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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NATIONAL ELECTION DEFENSE COALITION, *et al.*, Petitioners, v. KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth, Respondent.	CIVIL ACTION No. 674 MD 2019

BRIEF OF RESPONDENT KATHY BOOCKVAR IN OPPOSITION TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 4

A. The Legislature Has Entrusted the Secretary With the Responsibility to Assess and Certify Voting Technology 4

1. The Statutory Framework 4

2. The Pennsylvania Supreme Court Recently Reaffirmed the Secretary's Broad Discretion, Including the Discretion to Certify Voting Systems With No Voter-Verifiable Paper Records at All 6

B. The Secretary's Certification of Voting Technology With Voter-Verifiable Paper Records, Including the ExpressVote XL......... 8

C. For More Than a Year, Petitioners Knew or Should Have Known About the Features of the ExpressVote XL They Complain About Today 11

D. During the Year After Certification, Petitioners Knew That Pennsylvania Counties Were Considering, Purchasing, and Deploying the ExpressVote XL, But Nonetheless Waited to Seek a Preliminary Injunction 15

III. ARGUMENT 19

A. Petitioners' Claims, Which Were Filed More Than a Year After the Secretary Certified the ExpressVote XL, Are Time-Barred 19

1. This Mandamus Action Is Untimely Under 42 Pa.C.S. § 5522(b)(1) 19

2. The Doctrine of Laches Bars Any Grant of Relief 20

B. Petitioners Have Failed to Make the Required "Very Strong Showing" of "A Clear Right to Relief" 26

1. Petitioners' Application Must Overcome an Extraordinarily High Burden 26

(a) The Elements Petitioner Must Show to Secure a Mandatory Preliminary Injunction 26

(b) The Court's Deference to the Secretary's Discretion....................28

(c) Petitioners Must Demonstrate Standing 29

2. To Hold That BMDs With Barcodes Violate Pennsylvania Law, as Petitioners Urge, Would Defy Both *Banfield* and Common Sense 30

3. Petitioners' Speculation About Theoretical Security Flaws Cannot Provide a Basis for Overriding the Secretary's Discretion 33

4. The Secretary Has Reasonably Determined That, Like Other Certified Voting Devices, the ExpressVote XL Ensures Voter Secrecy When Properly Used By Trained Poll Workers 35

5. Even if Petitioners Had Standing to Challenge the ExpressVote XL on Accessibility Grounds, Their Claim Would Fail on the Merits 38

(a) Petitioners Lack Standing to Pursue an Accessibility Claim....................38

(b) The Secretary Properly Exercised Her Discretion in Concluding That the ExpressVote XL Complies With Applicable Accessibility Requirements 39

6. Count VII Fails on the Merits Because Petitioners Cannot Demonstrate That The Secretary's Certification of the ExpressVote XL Constituted a Plain, Palpable, and Clear Abuse of Power That Actually Infringes on the Exercise of Their Voting Rights 41

C. Petitioners Fail to Satisfy Other Essential Prerequisites for a Mandatory Preliminary Injunction 44

1. Petitioners Have Failed to Show that "Irreparable Harm" Will Occur if the ExpressVote XL Is Not Decertified 44

(a) Petitioners' Assertions About Certain Features of the ExpressVote XL and Other BMDs Fail to Establish "Irreparable Harm" 45

(b) That the Secretary Is Currently Examining an Updated Version of the Suite of Products Containing the ExpressVote XL, Does Not Show Irreparable Harm 49

(c) Petitioners' Assertion of a Harm to "Voters' Trust" Is as Misplaced as It Is Cynical 50

2. Granting a Preliminary Injunction Would Cause Greater Injury Than Denying It, Harm Other Interested Parties, and Adversely Affect the Public Interest 52

(a) The Harms of a Preliminary Injunction – to the Commonwealth, to Non-Party Counties, and to the Public Interest – Would Be Severe 53

(b) Petitioners Have No Adequate Response to the Harm a Preliminary Injunction Would Cause 59

3. The Preliminary Injunction Sought by Petitioners Would Not Preserve the Status Quo 63

D. Petitioners Must Post a Substantial Bond to Obtain the Relief Sought 65

IV. CONCLUSION 68

TABLE OF CITATIONS

Page(s)

Cases

Americans for Fair Treatment, Inc. v. Phila. Fed'n of Teachers,
150 A.3d 528 (Pa. Commw. Ct. 2016) 29, 39

Applewhite v. Commonwealth,
No. 330 M.D. 2012, 2012 WL 5374328 (Pa. Commw. Ct. Nov. 1, 2012) 27

Armstead v. Zoning Bd. of Adjustment of City of Phila.,
115 A.3d 390 (Pa. Commw. Ct. 2015) 29

Banfield v. Aichele,
51 A.3d 300 (Pa. Commw. Ct. 2012) 7, 23, 31

Banfield v. Cortes,
110 A.3d 155 (Pa. 2015)..*passim*

City of Allentown v. Lehigh Cnty. Auth.,
--- A.3d ----, 2019 WL 5798685 (Pa. Super. Ct. Nov. 7, 2019)..................44, 46

City of Phila. v. Commonwealth,
837 A.2d 591 (Pa. Commw. Ct. 2003) 63, 64

Crookston v. Johnson,
841 F.3d 396 (6th Cir. 2016) 24, 58

DePaul v. Commonwealth,
969 A.2d 536 (Pa. 2009)..42

In re General Election 2014,
111 A.3d 785 (Pa. Commw. Ct. 2015) 29

Greene Cnty. Citizens United by Cumpston v. Greene Cnty. Solid Waste Auth.,
636 A.2d 1278 (Pa. Commw. Ct. 1994) 66, 67

Gueson v. Reed,
679 A.2d 284 (Pa. Commw. Ct. 1996) 65

Howard v. Commonwealth,
957 A.2d 332 (Pa. Commw. Ct. 2008) 29

Kauffman v. Osser,
271 A.2d 236 (Pa. 1970) 30

Koter v. Cosgrove,
844 A.2d 29 (Pa. Commw. Ct. 2004) 22, 24

Kuznik v. Westmoreland Cty. Bd. of Comm'rs,
902 A.2d 476 (Pa. 2006) 58

League of Women Voters v. Commonwealth,
178 A.3d 737 (Pa. 2018) 41, 42

Markham v. Wolf,
136 A.3d 134 (Pa. 2016) 29

Novak v. Commonwealth,
523 A.2d 318 (Pa. 1987) 44, 45, 53

Com. ex rel. Pa Att'y Gen. Corbett v. Griffin,
946 A.2d 668 (Pa. 2008) 20

Purcell v. Milton Hershey Sch. Alumni Ass'n,
884 A.2d 372 (Pa. Commw. Ct. 2005) 27

Reed v. Harrisburg City Council,
927 A.2d 698 (Pa. Commw Ct. 2007) .... *passim*

Schade v. Md. State Bd. of Elections,
930 A.2d 304 (Md. 2007) 58

Schneller v. Prothonotary of Montgomery Cnty.,
No. 1316 C.D. 2016, 2017 WL 3995911 (Pa. Commw. Ct.
Sept. 12, 2017) 19, 20

Sprague v. Casey,
550 A.2d 184 (Pa. 1988) 21

Stein v. Boockvar,
No. 16-6287 (E.D. Pa.) 14

Stein v. Cortes,
223 F. Supp. 3d 423 (E.D. Pa. 2016) 46

Stilp v. Commonwealth,
905 A.2d 918 (Pa. 2006) 43

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.,
828 A.2d 995 (Pa. 2003) 27

Taylor v. Onorato,
428 F. Supp. 2d 384 (W.D. Pa. 2006) 47

United States v. City of Phila.,
No. 06-4592, 2006 WL 3922115 (E.D. Pa. Nov. 7, 2006) 24, 58

Walter v. Stacy,
837 A.2d 1205 (Pa. Super. Ct. 2003) 66

Wheels Mech. Contracting & Supplier, Inc. v. W. Jefferson Hills Sch. Dist.,
156 A.3d 356 (Pa. Commw. Ct. 2017) 21, 25, 65

Woodward Twp. v. Zerbe,
6 A.3d 651 (Pa. Commw. Ct. 2010) 27

Statutes

25 P.S. § 2600 *et seq.* .... *passim*

25 P.S. § 2621(b) 4, 42

25 P.S. § 2642(c) 6, 53

25 P.S. § 3031.1 .... 6, 30

25 P.S. § 3031.5 5

25 P.S. § 3031.7 .... 5, 35, 40

25 P.S. § 3071 57

25 P.S. §§ 3150.11-.17 .... 57, 60

42 Pa.C.S. § 5522(b)(1) 2, 19, 20

52 U.S.C. § 20901 .... 5, 52

52 U.S.C. § 21081(a) 5

52 U.S.C. § 21081(a)(3)(B) 52

Other Authorities

Pa. Const. art. I, § 5 .... 6, 41, 42

Pa. Const. art. I, § 26 .... 41, 42

Pa. R. Civ. P. 1531(b) 2, 65

Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth of Pennsylvania ("Respondent" or the "Secretary"), submits this Memorandum of Law in Opposition to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction (the "Application").

I. INTRODUCTION

In their Application, Petitioners seek relief that will throw the election infrastructure of at least three Pennsylvania counties – including Pennsylvania's largest county, Philadelphia – into turmoil. Taking away these counties' voting machines will cause severe disruptions, delays, and voter disenfranchisement. If the Court grants the relief Petitioners seek before the 2020 primary or general elections, more than a million Pennsylvania voters will face obstacles to voting, such as long lines, moved or reconfigured polling places, hastily trained poll workers, new and untested technology, and unfamiliar voting machines. Given this chaos, many may choose not to vote at all, and the election results in these counties might not be available for weeks. All of this will happen in 2020, when the presidential election is expected to draw record-breaking turnout and county boards of elections will be consumed with implementing Pennsylvania's new election statute.

Petitioners could easily have avoided all this. For more than a year before they filed their Petition, some, if not all, of the Petitioners had been studying the

Election Systems & Software ExpressVote XL voting machine and criticizing the same defects that Petitioners allege here. And those same Petitioners were well aware that three counties were investing enormous amounts of time and money in evaluating, purchasing and introducing their voters to new voting technology. Inexplicably, they sat on their hands, waiting to file their Application until the point where a grant of relief will inflict devastating harm. They have presented no legitimate reason for this delay, and cannot do so. Therefore, the Court should deny Petitioners' Application on the grounds that the limitations period in 42 Pa.C.S. § 5522(b)(1), as well as the doctrine of laches, precludes a grant of relief. In the alternative, Respondent requests that, pursuant to Pa. R. Civ. P. 1531(b), the Court require Petitioners to post a bond to cover the damages that will be incurred in the event of an improper grant of a preliminary injunction. A grant of the Application would cause a voting administration emergency that will cost in the tens of millions of dollars; this bond should therefore be substantial.

If the Court reaches the merits of Petitioners' Application, it must deny it. Petitioners point to theoretical shortcomings with the security, confidentiality, and accessibility of the ExpressVote XL and argue that because of those shortcomings, the Secretary should not have certified the device. Petitioners have the law wrong: This Court cannot overrule the Secretary's certification decisions based solely on a device's theoretical (or even real) shortcomings. As the Pennsylvania Supreme

Court has held, "the mere possibility of error cannot bar the use of a voting system as the unfortunate reality is that the possibility of electoral fraud can never be *completely* eliminated, no matter which type of ballot is used." *Banfield v. Cortes*, 110 A.3d 155, 174 (Pa. 2015). Because the Legislature has delegated to the Secretary the "subjective determination" of whether a voting system is acceptable, that discretion can only be overruled with a showing that the Secretary's decision was "fraudulent, in bad faith, an abuse of discretion, or clearly arbitrary." *Id.* at 175. Petitioners do not attempt to make the required showing under *Banfield* (indeed, they do not even cite *Banfield* in their Application); therefore, they can show no right to relief.

Finally, Petitioners also fail to make out any of the other elements that they must show in order for this Court to grant a mandatory preliminary injunction. Petitioners cannot show that they will suffer any (let alone irreparable) harm if the ExpressVote XL remains in use; the Court cannot grant (and Petitioners unquestionably do not want) a return to the status quo; and, as discussed above, a grant of the relief Petitioners seek would cause incalculable damage to the Department, the counties, the public, and the integrity of the 2020 Pennsylvania elections.

II. FACTUAL BACKGROUND

A. The Legislature Has Entrusted the Secretary With the Responsibility to Assess and Certify Voting Technology

1. The Statutory Framework

As Pennsylvania's chief election officer, the Secretary leads the efforts of the Department of State (the "Department") to protect the integrity and security of the electoral process. She coordinates these efforts with many other stakeholders, including federal regulators, public interest groups, voting technology experts, and the election directors and personnel of the Commonwealth's 67 counties, to ensure that Pennsylvania's elections are free, fair, secure, and accessible to all eligible voters. (*See* Declaration of Respondent Kathy Boockvar in Support of Response to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction (Jan. 22, 2020) ("Boockvar Decl.") ¶¶ 2, 5-7.)

Among the duties delegated to the Secretary in the Pennsylvania Election Code, 25 P.S. § 2600 *et seq.* (the "Election Code"), is to "examine and re-examine voting machines, and to approve or disapprove them for use in this State, in accordance with [the Election Code]." 25 P.S. § 2621(b). Once an electronic voting system[1] has been certified by the United States Election Assistance

[1] A voting system is a suite of a vendor's voting devices and software, designed to be compatible. (*See, e.g.*, Ex. 16 to Declaration of Lesley M. Grossberg, Ex. H to Application ("Grossberg Decl.") at 4-8 (describing components of voting system that includes the ExpressVote XL).)

Commission ("EAC"), its vendor may present it to the Secretary for certification. *See* 25 P.S. § 3031.5(a). In order to determine whether the system qualifies for certification, the Secretary must navigate the complex requirements of two election statutes: the Election Code, which sets forth seventeen specific requirements, and the federal Help America Vote Act, 52 U.S.C. § 20901 ("HAVA"), which sets forth twelve requirements, as well as other state and federal statutes and policies. *See* 25 P.S. § 3031.7; 52 U.S.C. § 21081(a). Thus, in order to evaluate voting technology, the Secretary must engage in highly complex analysis of constantly developing technology and multiple legal requirements.

If the Secretary determines, in her discretion, that a system meets the standards set forth in the Election Code, the system is certified. *See* 25 P.S. § 3031.5(b) (The Secretary "shall examine the electronic voting system and shall make and file in his office his report … stating whether, *in his opinion*, the system so examined can be safely used by voters at elections … and meets all of the requirements [of the Election Code]." (emphasis added)). The Secretary may, and usually does, impose certifications or conditions on the use of the system. (*See* Boockvar Decl. ¶¶ 33, 44; *see, e.g.*, Grossberg Decl., Ex. 18 at 37-46 (listing 35 conditions on use of the ExpressVote XL and its accompanying technology).)

The Secretary's role is not to decide which voting system is "best" overall, but to ensure that each system used in the Commonwealth meets stringent baseline

standards. (Boockvar Decl. ¶ 46.) Each of Pennsylvania's 67 counties must determine which, of the systems that the Secretary has certified, best meets that county's needs, and each county independently purchases and implements that system. Although the Department provides advice and guidance, it is each county's board of elections' responsibility to store and maintain its voting machines, prepare them for elections, deploy them on election day, and manage the polling process. (*See* Boockvar Decl. ¶ 45.) 25 P.S. § 2642(c); *id.* § 3031.4(a); *id.* § 3031.8 (duties and responsibilities of county boards of elections).

2. The Pennsylvania Supreme Court Recently Reaffirmed the Secretary's Broad Discretion, Including the Discretion to Certify Voting Systems With No Voter-Verifiable Paper Records at All

In *Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015), the Pennsylvania Supreme Court addressed a challenge to the Secretary's certification of several direct-recording electronic voting systems ("DREs"). The DRE voting machines in use in Pennsylvania provided no contemporaneous paper record at all. Instead, the DREs recorded each vote electronically in their internal memory. *See id.* at 160. The *Banfield* Petitioners claimed, *inter alia*, that the DRE systems did not comply with the Election Code's requirement to "provide for a permanent physical record of each vote cast," 25 P.S. § 3031.1, that the DREs were subject to tampering, that the Secretary's testing standards were inadequate, and that the DREs' certification violated the Pennsylvania Constitution. *Id.* at 160-61.

This Court ruled in the Secretary's favor, *see Banfield v. Aichele*, 51 A.3d 300 (Pa. Commw. Ct. 2012), and the Pennsylvania Supreme Court affirmed. First, the Supreme Court held that, *inter alia*, the Election Code's "permanent physical record" provision did not require contemporaneous or voter-verifiable records of votes cast. *Banfield*, 110 A.3d at 167-68. Second, with respect to the DREs' alleged security issues, the Supreme Court noted the Secretary's broad discretion: "[O]ur courts will not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action." *Id.* at 174 (citations omitted). In the absence of allegations that the certification of the DREs was "fraudulent, in bad faith, an abuse of discretion or clearly arbitrary, [the Court] decline[d] to disturb [the Secretary's] administrative discretion in overseeing the implementation of the Election Code." *Id.* at 175. Third, it found that the petitioners had failed to show that the Secretary's actions were "arbitrary or fraudulently exercised or … based upon a mistaken view of the law," and therefore declined to invoke the "extraordinary remedy" of mandamus to compel the Secretary to adopt new testing standards. Finally, the Court affirmed the dismissal of the constitutional claim,

stating that "we see no reason to interfere with the Secretary's discretion … absent a showing that the decision was unreasonable or discriminatory."[2]

B. The Secretary's Certification of Voting Technology With Voter-Verifiable Paper Records, Including the ExpressVote XL

Under *Banfield*, DREs were held to comply with the Election Code. However, in recent years, the Department has been committed to phasing out DREs and replacing them with voting systems that provide voter-verifiable paper records. (Boockvar Decl. ¶¶ 10-12.) Voter-verifiable paper records enable accurate recounts and robust post-election audits, because they ensure that election officials have access to a physical record of each vote, confirmed by the voter who cast it. (*See id.* ¶ 11.) On April 12, 2018, the Department directed Pennsylvania's counties to purchase voting systems with voter-verifiable paper records no later than December 31, 2019. (*Id.* ¶ 15.)

At present, two kinds of voting technology fit the Department's requirements. (Boockvar Decl. ¶¶ 18-20.) The first uses optical or digital scans of hand-marked paper ballots. (*Id.* ¶ 20.) In these systems, a voter makes marks on a paper ballot. (*Id.*; Affidavit of Dean C. Baumert in Support of Respondent's

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[2] Respondent pointed out in the Application to Stay filed on January 15, 2020, that the Application and supporting brief do not cite *Banfield* a single time. Petitioners responded that "[c]learly, Petitioners as well as the Court are all fully aware of *Banfield*." Pet'rs Br. in Opp. to Application to Stay dated January 16, 2020, at 6. The point, however, is not whether Petitioners are or are not aware of *Banfield*; it is that Petitioners have not explained how, in light of *Banfield*, this Court can possibly grant the relief they seek.

Opposition to Petitioners' Application for Preliminary Injunction (Jan. 21, 2020) ("Baumert Aff.") ¶ 43.) In order to tabulate the votes, the scanners sense the location of the marks the voters have made, along with timing marks and/or other machine-generated markings on the paper ballot. (Boockvar Decl. ¶ 20; Baumert Aff. ¶ 43.) The second kind of system uses ballot marking devices ("BMDs"). (*Id.* ¶ 21.) BMD systems provide an interface to assist each voter in marking a paper document reflecting the voter's choices, which is then scanned by a tabulator. (*Id.*; Baumert Aff. ¶ 44.)

In 2018, the Department began certifying new voting systems that provided voter-verifiable paper records. (Boockvar Decl. ¶¶ 14, 18, 23.) For each system, the Department reviewed a vendor application that included testing reports, a list of all components of the system, and complete technical documentation for the system. (*Id.* ¶¶ 18, 36, 38.) The Department then conducted an examination that assessed the system's confidentiality, security, accuracy, safety, reliability, usability, accessibility, durability, resiliency, and auditability. (*Id.* ¶¶ 18, 36, 39.) Under updated Commonwealth security standards adopted in 2018, the certification processes included additional security testing, such as:

- Penetration testing, which evaluates the security of the voting system by seeking out and trying to exploit potential vulnerabilities that an attacker could exploit;

- Access control testing to confirm that the voting system can detect and prevent unauthorized access to the system and election data;
- Evaluation of voting system audit logging capabilities to confirm that the system logs will allow auditing, as well as investigation of any apparent fraudulent or malicious activity; and
- Tests that ensure every physical access point is well secured and system software and firmware is protected from tampering.

(*Id.* ¶¶ 18, 40.)

During 2018, the Department examined two suites of voting technology from Election Systems & Software ("ES&S"): The EVS 6000 system, which the Department declined to certify for reasons unrelated to this action, and the EVS 6021 system. (Boockvar Decl. ¶¶ 49-54; Baumert Aff. ¶¶ 16-17, 19.) Both systems included the ExpressVote XL. (Boockvar Decl. ¶¶ 49-51, 67.) The ExpressVote XL is what is known as an all-in-one BMD, which includes a touchscreen, a printer, and a scanner. The voter makes her selection of candidate(s) on the touchscreen and then presses "print." (Grossberg Decl., Ex. 18, at 5.) The machine then prints a paper record on which the voter's selections are recorded both as barcodes and as human-readable text. (Grossberg Decl., Ex. 18, at 5; Baumert Aff. ¶ 39.) The machine scans the barcodes and displays the paper record behind glass for the voter to review and verify. (Boockvar Decl. ¶ 62; Grossberg Decl., Ex. 18, at 42.) At that point, the voter has the option of using the

touchscreen to either "cast" or "spoil" her ballot. If she elects to cast her ballot, the machine tabulates the scanned selections, pulls the paper record into the machine and deposits it in a secure collection box. (Grossberg Decl., Ex. 18, at 5; Baumert Aff. ¶ 51.) If she spoils the ballot, it ejects from the machine and the voter defaces it and starts the process again. One of the certification conditions of the ExpressVote XL and various other voting system is the performance of post-election, manual audits of the paper records. (Boockvar Decl. ¶ 33.) Furthermore, the Department will require that any new audit procedure the Commonwealth adopts will require review of the human-readable plain text of the paper records. (Boockvar Decl. ¶¶ 33-35, 57, 59; Grossberg Decl., Ex. 18, at 38 (condition of certification requiring audits).)

The Department issued its certification of the EVS 6021 on November 30, 2018. (Boockvar Decl. ¶ 56.) The certification report included 48 pages of detailed discussion of the voting system, and another 49 pages of appendices. (*See* Grossberg Decl., Ex. 18.) During late 2018 and early 2019, the Department also certified several other systems that included BMDs. (Boockvar Decl. ¶¶ 61-69.)

C. For More Than a Year, Petitioners Knew or Should Have Known About the Features of the ExpressVote XL They Complain About Today

It was no secret that the Commonwealth was, in mid-2018, considering certifying the ExpressVote XL. The examination, which was open to the public,

commenced on June 25, 2018, and lasted for approximately four days. (Boockvar Decl. ¶ 49.) On September 21, 2018, the Secretary updated the list of voting systems under consideration, and noted that she was examining a new release of the EVS system, 6.0.2.1. (Boockvar Decl. ¶ 52.) When the Secretary certified the EVS 6.0.2.1 system, including the ExpressVote XL, on November 30, 2018, the certification report – like the reports for other certified voting systems – was published on the Department's website for all to see. (Boockvar Decl. ¶ 56; Grossberg Decl., Ex. 18.)[3]

Petitioners, who contend that their "core missions include … working to ensure that elections be conducted on systems that are secure, accessible, transparent, and auditable" (Petition ¶ 5), cannot claim that they did not know that the Department was certifying the ExpressVote XL or what the device's features were. Indeed, a representative of the two Organization Petitioners read the certification document carefully. On December 6, 2018, Kevin Skoglund, the President and Chief Technologist for Petitioner Citizens for Better Elections ("CBE"), who verified the Petition on CBE's behalf, and the Senior Technical

[3] *See* https://www.dos.pa.gov/VotingElections/Documents/Voting%20Systems/ESS%20EVS%206021/EVS%206021%20Secretary%27s%20Report%20Signed%20-%20Including%20Attachments.pdf.

Advisor to Petitioner National Election Defense Coalition ("NEDC"), sent an email to a Department representative stating,

> Congratulations on getting ES&S certified. I realize what a tremendous amount of work that was. And I know the pressure out there to get more vendor choices in front of the counties. Nice work.
>
> The certification report was really good too – much better than past reports. I especially appreciated the detailed review of accessibility.[4] It is great that accessibility testing was so thorough and even better that the results were made public.

(Boockvar Decl., Ex. 2.)

The features that Petitioners complain about in their Petition were publicly known and vigorously discussed even before certification. That the ExpressVote XL, like virtually all other BMDs, prints ballots with both barcodes and text, but scans only the barcodes, has long been known. And it is a feature that has long been in the crosshairs of those who prefer hand-marked paper ballots. For example, on July 8, 2018, Jennifer Cohn, a writer and former lawyer who publishes frequently and widely on election security issues, posted an article entitled: "States are flocking to buy the new 'universal use' touchscreen ballot marking devices, which have all the disadvantages of existing touchscreen voting machines, plus they print unverifiable BARCODES that are then counted as our votes!"

[4] As discussed below, *see infra* Section III.B.5.b, the accessibility review attached to the certification report is the sole basis for Petitioners' accessibility claim.

(Affidavit of Robert A. Wiygul in Support of Respondent's Opposition to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction (Jan. 22, 2020) ("Wiygul Aff."), Ex. 1.) The article described in detail the ES&S ExpressVote Universal Voting System, another component of the EVS 6.0.0.0/6.0.2.1 system that is, in effect, the XL's smaller cousin. (*Id.*)

In *Stein v. Boockvar*, No. 16-6287 (E.D. Pa.), Dr. Alex Halderman (who is on the Board of Advisors of NEDC, and whose declaration Petitioners rely upon here) reviewed documentation of the EVS 6021 and other voting systems under consideration. On October 9, 2018, Plaintiffs' counsel in the *Stein* case forwarded Dr. Halderman's evaluation to Respondent's counsel. Dr. Halderman's comments linked to a "Freedom to Tinker" blog post dated September 14, 2018, by Andrew Appel, who has submitted a declaration in support of the Application. (Declaration of Sue Ann Unger (Dec. 9, 2019) ("Unger Decl."), Ex. 4; Wiygul Aff., Ex. 3; *see* Pet'rs Application, Ex. A (Appel Decl.).) That post specifically criticizes the ExpressVote XL and urges jurisdictions not to purchase it. (Wiygul Aff., Ex. 3.) The post also links to a video demonstrating the ExpressVote Universal Voting System, clearly explaining and showing that the system prints and scans barcode records of each vote. (*Id.*, Ex. 3; *see* https://www.youtube.com/watch?v=yVEEHDttuxI&feature=youtu.be.) Notably, Dr. Halderman did *not* object that the ExpressVote XL (like other BMDs listed in

the report) printed and scanned barcodes, nor did he mention any of the other issues Petitioners raise here. (Unger Decl., Ex. 4.) Instead, he suggested that the Department *certify* the ES&S EVS Model 6.0.2.1 with certain restrictions designed to ensure that the voter would have the opportunity to verify each vote before casting it. (*Id.*) When the Department certified the ExpressVote XL, it adopted Dr. Halderman's guidance. (Boockvar Decl. ¶ 58; Grossberg Decl., Ex. 18, at 42.)

On October 16, 2018, Dr. Appel posted another "Freedom to Tinker" blog entry. This entry described an alleged "serious design flaw" with, among other machines, the "ExpressVote all-in-one," that could purportedly allow "the voting machine [to] print more votes on [the ballot]" after it had been reviewed and cast by the voter. (Wiygul Aff., Ex. 4.) Dr. Appel's complaint was that the machines were designed so that the "paper path" of the ballot took it underneath the print head again after it had been verified by the voter. (*Id.*) This is, of course, the same "paper path" issue Petitioners complain about in their Petition and Application (*see* Petition ¶¶ 79-112; Pet'rs Br. at 22-25) – filed *more than a year* after their expert identified the issue, and *more than a year* after the ExpressVote XL's certification.

D. During the Year After Certification, Petitioners Knew that Pennsylvania Counties Were Considering, Purchasing, and Deploying the ExpressVote XL, But Nonetheless Waited to Seek a Preliminary Injunction

During the year between certification and the date Petitioners filed their legal challenge, several Pennsylvania counties – including Philadelphia, the largest

county in the Commonwealth – considered the XL voting system and decided to purchase it. (Boockvar Decl. ¶¶ 86-88.) Philadelphia began the procurement process in February 2018. (Declaration of Monique Nesmith-Joyner (Dec. 12, 2019) ("Nesmith-Joyner Decl.") ¶ 7.) After a lengthy and complex procurement process, involving at least eight City departments, it selected the machines in February 2019. (Nesmith-Joyner Decl. ¶¶ 3-21; Declaration of Joseph Lynch (Dec. 11, 2019) ("12/11/19 Lynch Decl.") ¶ 7 & Ex. 1; Boockvar Decl. ¶ 87.) Additional processes were required to secure appropriate warehouse space for the new machines (12/11/19 Lynch Decl. ¶ 9) and put contractual arrangements in place for their deployment to polling places (Nesmith-Joyner Decl. ¶ 28). The machines – nearly 4,000 of them – were delivered over a four-month period beginning in April 2019. (12/11/19 Lynch Decl. ¶¶ 8, 10-11.) The intense process of training poll workers, educating voters, and rolling out the new voting systems lasted through October 2019, and Philadelphia deployed the machines for use in the November 5, 2019 election. (12/11/19 Lynch Decl. ¶¶ 7-22.) Cumberland County began its search for a new voting system in August 2018; its Board of Elections voted to select the ExpressVote XL in June 2019, and its Board of Commissioners approved the procurement in September 2019. (Declaration of Bethany Salzarulo (Dec. 11, 2019) ("Salzarulo Decl.") ¶¶ 3-8.)

Petitioners knew that all this was happening, and they were well aware that purchase and implementation of a new voting system is a massive undertaking that is not easily undone. On January 22, 2019, the Philadelphia Inquirer published an article by Petitioner Rich Garella, urging Philadelphia to choose "hand-marked ballots" rather than "a BMD." (Wiygul Aff., Ex. 5.) Mr. Garella pilloried the ExpressVote XL, an "all-BMD system," as "the worst choice," listing several of the issues now raised in the Application, including that the machine was "vulnerable to malware," that paper records were hard to verify, that chronological ballot storage weakened ballot security, and (citing the certification documents Petitioners rely on in their Application) that the system was not accessible. (*Id.*) Mr. Garella emphasized that Philadelphia's decision on a voting system was "less than a month away" and was a "consequential and costly decision." (*Id.*)

Mr. Skoglund, too, understood the time and effort that Philadelphia would have to invest in putting a new voting system in place. On February 27, 2019, he sent an email to Secretary Boockvar advocating against including Philadelphia in a pilot project in November 2019, because "Philadelphia [will] be rolling out a new voting system, new electronic pollbooks, and new [audits] …. They have a lot to learn and do in eight short months." (Boockvar Decl., Ex. 3.) Mr. Skoglund also understood that time was of the essence if the counties were to have their voting systems in place for the 2020 elections. On May 30, 2019, Mr. Skoglund wrote an

email to the Department about his concerns with the ExpressVote's paper path, warning: "This issue requires urgent attention. Philadelphia and Northampton Counties are purchasing the ExpressVote XL and other counties may consider hybrids soon." (Boockvar Decl., Ex. 4.) On June 27, he wrote, "Cumberland County selected the ExpressVote XL. This situation is getting worse …. When [another system] was decertified at the end of 2007, three PA counties had to scramble to be ready for the 2008 primaries and the Commonwealth gave them $4 million to help. Let's learn from that lesson." (*Id.*)

Despite their knowledge that the longer they waited, the more disruptive a decertification of the ExpressVote XL would be, Petitioners delayed for months before taking any formal action. On July 16, 2019 – more than seven months after certification – Petitioners NEDC and CBE asked the Secretary to reexamine the ExpressVote XL, raising essentially the same allegations regarding security, alleged susceptibility to tampering, privacy/secrecy, and accessibility that Petitioners raise in their Application. (Grossberg Decl., Ex. 6.) Even after the Secretary recertified the device on September 3, 2019, Petitioners waited more than three additional months, until December 12, 2019, before taking legal action. They then let yet another month elapse before filing the Application on January 10, 2020.

III. ARGUMENT

A. Petitioners' Claims, Which Were Filed More Than a Year After the Secretary Certified the ExpressVote XL, Are Time-Barred

Petitioners' claims for relief are plainly untimely. First, they are barred by the six-month statute of limitations for mandamus actions set forth in 42 Pa.C.S. § 5522(b)(1). Second, and independently, they are foreclosed by the doctrine of laches.

1. This Mandamus Action Is Untimely Under 42 Pa.C.S. § 5522(b)(1)

Although Petitioners never mention the term "mandamus," that is, in fact, the nature of this action. *See Banfield*, 110 A.3d at 164, 175 (petition seeking order requiring Secretary to decertify particular voting machines sought mandamus relief). Accordingly, Petitioners' claims are subject to the six-month limitations period set forth in 42 Pa.C.S. § 5522(b)(1). *See* 42 Pa.C.S. § 5522(b)(1) ("The following actions and proceedings must be commenced within six months: … An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter."); *Schneller v. Prothonotary of Montgomery Cnty.*, No. 1316 C.D. 2016, 2017 WL 3995911, at *4 (Pa. Commw. Ct. Sept. 12, 2017) ("[T]his Court has held that mandamus actions are typically subject to the six-month time limitation set forth in section 5522(b)(1) of the Judicial Code …." (citing *Twp. of Bensalem v. Moore*, 620 A.2d 76, 80 (Pa. Commw. Ct. 1993); *Fleming v.*

Rockwell, 500 A.2d 517, 519 (Pa. Commw. Ct. 1985))). As made clear by the facts set forth above, *see supra* Sections II.C-D, Petitioners could and should have brought this action as soon as the Secretary certified the ExpressVote XL on November 30, 2018; that is the government action Petitioners seek to undo. *See Schneller*, 2017 WL 3995911, at *6 ("A 'cause of action accrues when the injured party is first able to litigate the claim,' or, as our Supreme Court put it, 'as soon as the right to institute and maintain a suit arises.' (internal citations omitted)). Because Petitioners did not file suit until December 10, 2019 – more than a year after the Secretary's certification – their claims are time-barred. *See* 42 Pa.C.S. § 5522(b)(1).

2. The Doctrine of Laches Bars Any Grant of Relief

Petitioners could have initiated this action on November 30, 2018, the day the Secretary certified the ExpressVote XL. However, Petitioners waited over a year before they filed their Petition on December 12, 2019, and another month before they filed their Application. "Laches bars relief when the plaintiff's lack of due diligence in failing to timely institute an action results in prejudice to another." *Com. ex rel. Pa Att'y Gen. Corbett v. Griffin*, 946 A.2d 668, 676 (Pa. 2008). Petitioners offer no reasonable excuse or even explanation for their decision to sit on their hands, month after month, as one Pennsylvania county after another entered into contracts to purchase ExpressVote XLs, expended significant sums on

and received shipments of these machines, invested substantial time and manpower in training poll workers and voters in their use, and even used them in a general election. Given the large investment that several Pennsylvania counties have made in implementing the ExpressVote XL, and the impossibility of replacing the machines without wreaking havoc on upcoming elections, Petitioners' total lack of due diligence in pursuing this action has badly prejudiced Respondent, as well as several other parties, with respect to the requested relief.

Petitioners cannot argue that they were unaware of the facts underlying their Petition; as shown above, *see supra* Section II.C, various Petitioners, and their experts, knew the relevant features of the ExpressVote XL in 2018. Even if Petitioners could claim ignorance of the facts, "[t]he test for due diligence is not what a party knows, but what he might have known by the use of information within his reach." *Wheels Mech. Contracting & Supplier, Inc. v. W. Jefferson Hills Sch. Dist.*, 156 A.3d 356, 361 (Pa. Commw. Ct. 2017). "What the law requires of petitioner[s] is to discover those facts which were discoverable through the exercise of reasonable diligence." *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988). As discussed above, *see supra* Section II.C, there can be no question that Petitioners had within reach ample, detailed information about the features of the ExpressVote XL and the fact that the Commonwealth had certified it.

Petitioners also cannot argue that any of the events that took place after certification of the EVS 6021 system somehow restarted the laches clock. First, the date of the counties' decision to purchase the ExpressVote XL is not relevant; delay is measured not from the point at which government officials began making investments, but rather from the point when Petitioners could have first sought relief. *See Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004) ("[T]he triggering event for the challenge was not the government's implementation of the referendum, but was, instead, the point when the results of the election became clear.").

The recertification process of the ExpressVote XL that took place between mid-July and early September 2019 also provides no excuse for Petitioners' delay. Petitioners faced no exhaustion requirement; they could have initiated this action before, during, or after the reexamination process.

Petitioners argue in their Brief in Opposition to Respondent's Application to Stay ("Stay Resp.") that if they had filed before the November 2019 elections, Respondent would have had a legitimate objection that their claim was premature and that Petitioners lacked any cognizable injury. Stay Resp. at 4. But the November 2019 elections explain *none* of Petitioners' delay; nothing happened in November 2019 that created a substantive claim that had not existed before. The problems that occurred with ExpressVote XLs in Northampton County during the

November 2019 elections are irrelevant to Petitioners' claims. These problems involved human programming errors and imprecise factory configuration affecting the touchscreen and tabulation functionalities on these machines. (Baumert Aff. ¶¶ 66-73; Petition, Ex.s G, H. and I; Boockvar Decl. ¶ 79.) They had nothing to do with the security, accessibility, and confidentiality issues that Petitioners raise in their Application. (Baumert Aff. ¶ 65; Boockvar Decl. ¶¶ 81-82.)

The allegations that one voter believed a poll worker did not follow confidentiality procedures, *see* Application, Ex. C, another saw an unsealed access panel, *see* Application, Exs. D, E, and another believed ballot shuffling procedures were not followed, *see* Application, Ex. F, are similarly irrelevant. Even if counties or individual poll workers were not following prescribed procedures, that fact has no bearing on whether the ExpressVote XL was properly certified. *See Banfield*, 51 A.3d at 308 ("The dispositive question is whether the DREs certified by the Secretary [comply with the Election Code], not whether the machines are being used properly or whether the county boards of elections are properly performing their duties under the Code."). Finally, the fact that two voters claimed to have difficulty voting does not call certification into question. *See* Application, Exs. D, E.

Even Petitioners appear to admit that the November 2019 election does not justify their delay; in their Stay Response, their only explanation is that the election

added "context and specificity" to their claims. Stay Response at 4. Whatever "context and specificity" means, it does not mean information that creates a cause of action; more likely, here, it appears to mean irrelevant information that helped Petitioners' filing make more of a splash. Such information does not excuse Petitioners' egregious delay in filing.

There is thus no justification for Petitioners' delay of over a year from the date of certification of the ExpressVote XL before initiating this action, a delay which has caused substantial prejudice to Respondent and the multiple Pennsylvania counties that have selected and moved forward with introducing this machine for use in upcoming elections. Under similar circumstances, this Court has declined to grant equitable relief on the basis of laches. *See Koter*, 844 A.2d at 34 (holding that laches barred taxpayers' challenge of referendum result where they waited thirteen months following the election outcome before pursuing relief). The impact of Petitioners' delay is particularly egregious because this case involves an election. "The U.S. Supreme Court has long acknowledged that the timing in cases involving upcoming elections is a relevant consideration in determining the propriety of immediately effective relief." *United States v. City of Phila.*, No. 06-4592, 2006 WL 3922115, at *2 (E.D. Pa. Nov. 7, 2006) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Reynolds v. Sims*, 377 U.S. 533 (1964)). *See Crookston v. Johnson*, 841 F.3d 396, 397-97 (6th Cir. 2016) ("When an

election is 'imminent' and when there is 'inadequate time to resolve factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures.")

The doctrine of laches "is the practical application of the maxim that those who sleep on their rights must awaken to the consequence that they have disappeared." *Wheels Mech.*, 156 A.3d at 362 (quoting *Fulton v. Fulton*, 106 A.3d 127, 131 (Pa. Super. 2014)) (finding that laches barred grant of preliminary injunction because plaintiff failed to assert its claims for seven months during which it had ready access to the information on which its claims were based). Here, it is unnecessary to consider Petitioners' entitlement to relief on the merits, because they have forfeited any such entitlement as a result of their delay.[5]

[5] The Court should also deny the Application for the additional reason that Petitioners have failed to join necessary parties, the counties whose voting systems Petitioners seek to decertify. Because the Court has scheduled a separate hearing on this issue for January 23, 2020, Respondent does not discuss it here.

B. Petitioners Have Failed to Make the Required "Very Strong Showing" of "A Clear Right to Relief"

1. Petitioners' Application Must Overcome an Extraordinarily High Burden

(a) The Elements Petitioner Must Show to Secure a Mandatory Preliminary Injunction

Even if the Court does not deny Petitioners' Application as a consequence of their laches, Petitioners have a heavy burden to meet to obtain preliminary injunctive relief:

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

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

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003).

Moreover, because Petitioners seek a mandatory injunction overriding decisions made by the Secretary pursuant to the discretionary authority vested in her by the Election Code, and compelling the Secretary to decertify a voting machine she has twice examined and twice certified, this Court must apply even "greater scrutiny" to the injunction prerequisites than it would in the case of "a prohibitory injunction"; a mandatory preliminary injunction "is an extraordinary remedy that should be utilized only in the rarest cases." *Purcell v. Milton Hershey Sch. Alumni Ass'n*, 884 A.2d 372, 377 (Pa. Commw. Ct. 2005) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995 (Pa. 2003)); *accord Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Commw. Ct. 2010); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 5374328, at *2 (Pa. Commw. Ct. Nov. 1, 2012); Standard Pa. Prac. 2d § 83:9 (2008) ("[T]he court must exercise extreme care and act in *only the clearest of circumstances* when a mandatory preliminary injunction is requested." (emphasis added)). In fact, under *any* level of scrutiny, it is clear that Petitioners have failed to establish multiple "essential prerequisites" of a preliminary injunction, *see Reed v. Harrisburg City*

Council, 927 A.2d 698, 702-03 (Pa. Commw Ct. 2007), and that their application must therefore be denied.

(b) The Court's Deference to the Secretary's Discretion

The Pennsylvania legislature has delegated to the Secretary the determination of whether particular voting systems comply with the requirements of the Election Code. *See supra* Sections II.A.1-2. Pennsylvania courts "will ordinarily defer to an agency's interpretation of a regulation or a statute it is charged to enforce." *Banfield*, 110 A.3d at 174 (citing *Kuznik v. Westmoreland Cty. Bd. of Comm'rs*, 902 A.2d 476 (Pa. 2006)). Accordingly, Petitioners have the heavy burden of showing that the Secretary's decision to certify the ExpressVote XL was not only incorrect, but the product of "fraud, bad faith, abuse of discretion or clearly arbitrary action." *Id.* (quoting *Winslow–Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878, 881 (Pa. 2000)). Petitioners cannot do this. Their allegations show that the Secretary carefully considered all relevant aspects of the ExpressVote XL, assessed the device's capabilities in the context of a complex regulatory system, and arrived at a reasoned judgment. The mere fact that Petitioners disagree with the Secretary's conclusions does not mean that this Court may stand in the Secretary's shoes, second-guess her discretionary acts, and substitute Petitioners' judgments for the Secretary's.

(c) Petitioners Must Demonstrate Standing

"Standing is "a threshold requirement" for relief from this Court. *Howard v. Commonwealth*, 957 A.2d 332, 335 (Pa. Commw. Ct. 2008). To establish she has standing, a petitioner must demonstrate that she is "aggrieved" by the complained of conduct, that is, that she has "a substantial, direct, and immediate interest in the matter." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). A petitioner has a substantial interest only if "the concern in the outcome of the challenge [ ] surpass[es] 'the common interest of all citizens in procuring obedience to the law.'" *Id.* Organizations and individuals alike are held to this standard. *Armstead v. Zoning Bd. of Adjustment of City of Phila.*, 115 A.3d 390, 398-400 (Pa. Commw. Ct. 2015). An organization can establish standing on behalf of its members by demonstrating that one of its members is aggrieved, but "the fact that the challenged action implicates the organization's mission or purpose is not sufficient to establish standing." *Americans for Fair Treatment, Inc. v. Phila. Fed'n of Teachers*, 150 A.3d 528, 534 (Pa. Commw. Ct. 2016).

The "common interest of all qualified electors that the provisions of the Election Code be followed," along with a speculative assumption or conjecture that non-compliance with the Election Code will affect the outcome of an election, is an insufficient basis on which to establish "the requisite 'substantial, direct, and immediate' interest'" necessary to convey standing. *See In re General Election*

2014, 111 A.3d 785, 793 (Pa. Commw. Ct. 2015) (rejecting claim that objectors' status as registered electors with an interest in enforcement of the Election Code combined with objectors' having voted in the relevant election conveyed standing allowing them to challenge certain absentee ballots as non-compliant with Pennsylvania law); *see also Kauffman v. Osser*, 271 A.2d 236, 239-40 (Pa. 1970) (rejecting claim that appellants' status as registered electors and their intention to vote in person in a particular election conveyed standing allowing them to challenge a certain class of absentee ballots as violative of Pennsylvania law).

2. To Hold That BMDs With Barcodes Violate Pennsylvania Law, as Petitioners Urge, Would Defy Both *Banfield* and Common Sense

One of Petitioners' primary criticisms of the ExpressVote XL is that it prints records with barcodes, which voters cannot read, along with human-readable text. According to Petitioners, this feature means that the ExpressVote XL violates the provisions of the Election Code that require a "permanent physical record of votes cast," 25 P.S. § 3031.1, renders election results unauditable, and violates voters' constitutional rights:

> The ExpressVote XL indeed produces a piece of paper, which can be counted and recounted as many times as desired. However, this piece of paper is not guaranteed to be a permanent physical record of the voter's vote, but rather only a record of the machine's own output—that is, data from an unreadable barcode stored in the machine that the voter cannot verify to ensure it matches readable text of a voter's choices.

(Pet'rs Br. at 25-26.)

> There is no guarantee that the barcode read by scanners to count the votes actually matches the text summary provided elsewhere on the ballot, whether due to miscoding, firmware malfunction, hacking, or other error. Thus, a barcode-ballot-based election system cannot provide an auditable record.

(*Id.* at 26.)

> Forcing Plaintiffs to cast votes using BMD-generated barcode ballots, which are unreadable to the human eye, imposes an unconstitutional burden given the unverifiable nature of such a system and the persistent threats of hacking and vote manipulation in today's environment.

(*Id.* at 14.)

All of these arguments, however, are foreclosed by *Banfield*, which held that DREs – which produce no voter-verifiable paper record at all – comply with Pennsylvania law. *See Banfield*, 110 A.3d at 168; *see also Banfield*, 51 A.3d at 308 ("Not only does the Code not require that vote records be software independent, but such a construction would be absurd, completely incongruous to the amendments defining and authorizing the use of such devices …."). *Banfield* leaves no room for Petitioners to quibble with Respondent over the format of voting machines' voter-verifiable paper records, since such records are not required at all.

Moreover, although the Application, on its face, targets only the ExpressVote XL, Petitioners argue that "[f]orcing [voters] to cast votes using

BMD-generated barcode ballots, which are unreadable to the human eye, imposes an unconstitutional burden …. The Commonwealth … can offer no need – or reason – at all for using computer-generated, unreadable barcodes to tabulate votes." (Pet'rs Br. at 14.) Accordingly, a holding that BMDs that use barcodes violate the law would implicate not only the ExpressVote XL, but all of the BMDs used by *dozens* of Pennsylvania counties. (*See* Boockvar Decl. ¶¶ 61-69 (enumerating Pennsylvania counties using BMDs.))

Indeed, Petitioners' arguments, if accepted, would also disqualify systems employing hand-marked paper ballots read by an optical scanner, *i.e.*, the very systems Petitioners profess to prefer. (*See* Pet'rs Br. at 5, 14; Petition ¶ 245.) When a voting machine scans a hand-marked ballot (for41 example, a filled-in oval or drawn line next to a candidate's name) the machine is not reading the text. It is reading the marks. (Baumert Aff. ¶¶ 41-43; Boockvar Decl. ¶¶ 24-26, 28.) And the voter cannot verify how the marks are being read and registered by the machine. That depends on software – and voter-inscrutable coding marks, which are often printed on the margins of the ballots themselves – that tell the machine how to interpret a mark at a particular coordinate on the page. Functionally, this is no different than the barcodes printed on the ExpressVote XL ballot. (Baumert Aff. ¶¶ 41-45; Boockvar Decl. ¶¶ 24-26, 28.) In sum, Petitioners are urging the Court to hold that the Secretary should have adopted a standard for voter-verifiable

paper records that is so exacting that it would disqualify the alternative voting systems proposed by Petitioners (and virtually any voting system, other than humans manually counting every vote on every ballot in every election, which, as Petitioners' expert concedes, is not a practical method in United States elections (Application, Ex. A (Appel Decl.) ¶ 13)).

3. Petitioners' Speculation About Theoretical Security Flaws Cannot Provide a Basis for Overriding the Secretary's Discretion

Petitioners contend that Respondent should decertify the ExpressVote XL because three of its features – its paper path, the location of an access panel, and its "testing feature" – create "unacceptable" security vulnerabilities. (Pet'rs Br. at 22-33.) These features, and Petitioners' speculation about them, cannot justify a holding that the Express XL certification was "fraudulent, in bad faith, an abuse of discretion, or clearly arbitrary." *Banfield*, 110 A.3d at 175.

First, in order to present these ExpressVote XL features as "security flaws," Petitioners can only hypothesize about how, in theory, a bad actor could exploit these features to alter the results of an election. They do not, and cannot, contend that such hacking has ever taken place in an election or that it is anything more than a theoretical possibility. In fact, the ExpressVote XL has safety features that mean there is no realistic chance of these theoretical flaws being exploited. (*See* Baumert Aff. ¶¶ 28-37 (machine uses software with multi-layered security system);

id. ¶ 36 (ES&S conducts supply chain security reviews); *id.* ¶¶ 35, 37 (system is auditable at all times including during and post-elections); *id.* ¶¶ 50-61 (machine cannot be programmed to change paper record after voter reviews it, and in the nearly impossible scenario this occurred, the alteration would be easily detectable in an audit); *id.* ¶¶ 62-63 (access panel is locked and sealed and only very specific USB inputs with specified digital signatures are received by the machine); *id* ¶ 64 (normal voting operations blocked while "Test Deck" function is engaged and system clears test data upon exiting testing feature).) As the Pennsylvania Supreme Court held in *Banfield*, "the mere possibility of error cannot bar the use of a voting system." *Banfield*, 110 A.3d at 174.

Second, Respondent and the Department's security examiners have conducted a detailed and extensive security examination of the ExpressVote XL. First, the EAC examined and certified the device; then, the Department conducted three days of security testing of the EVS 6021 system, which included the ExpressVote XL. During this testing, the examiner conducted penetration analysis, finding, *inter alia*, that the devices' external ports and compartments were secure and lockable, that "USB ports do not allow any data or information to be transferred to the ExpressVote XL," and that "no maintenance, poll worker or administrative modes allow tampering with the tabulating element." (Grossberg Decl., Ex. 18, at 27-28.) When the Department received the Petition for

Reexamination of the ExpressVote XL, it conducted another round of security testing, re-reviewing the security of physical access points, confirming that attempts to modify the software on the machine would be rejected, and trying, unsuccessfully, to manipulate the printer head to modify a paper record after verification. (Grossberg Decl., Ex. 7.) Given this careful attention to security issues, the Court could not reasonably conclude that the Secretary acted in an arbitrary manner.

4. The Secretary Has Reasonably Determined That, Like Other Certified Voting Devices, the ExpressVote XL Ensures Voter Secrecy When Properly Used By Trained Poll Workers

Petitioners contend that the ExpressVote XL violates the statutory requirement that voting systems "[p]rovide[] for voting in absolute secrecy and prevent[] any person from seeing or knowing for whom any voter, except one who has received or is receiving assistance as prescribed by law, has voted or is voting." 25 P.S. § 3031.7(1). The Reexamination Petition raised the same concerns that Petitioners raise here: that the ExpressVote XL ballot container stores paper records in chronological order, that spoliation procedures might allow poll workers to see voters' spoiled ballots, and that voters might gain access to poll worker passcodes during the spoliation process. (Grossberg Decl., Ex. 16, at 2-3, 7-9.) Respondent addressed both issues in the reexamination and determined that

they could be addressed by imposing additional conditions on counties' use of the ExpressVote XL.

With respect to the paper record storage issue, the examiners determined that the device's hardware and documentation sufficiently protected against poll worker access to the paper records at the polling place. In order to guard against access to chronologically stored records at the county office, Respondent required, as an additional condition to certification, that county officials "implement proper poll closing and vote record transportation procedures to ensure that collection bins containing paper vote summary records are sealed and transported with proper chain of custody to the county office" and that paper records be "commingled before canvass and storage." (Grossberg Decl., Ex. 6, at 8-9, 11.)

With respect to the spoliation issue, the examiners determined that "appropriate voter and poll worker training and instructions on the screen can ensure vote record secrecy." (*Id.* at 10.) Respondent required, as a second additional condition to certification, that jurisdictions using the ExpressVote XL add voter and poll worker instructions on the touchscreen "detailing spoiling procedures and cues to protect voter privacy," and implement detailed poll worker training on spoliation procedures and the need for secrecy. (*Id.* at 11-12.) The examiners also pointed out that the poll worker only approaches the machine after the voter has decided to spoil her ballot; accordingly, the Secretary could

reasonably determine that, at that point, the voter is not in the process of voting and statutory restrictions on activity in the "voting booth" do not apply.

Finally, the examiners determined that "a compromise of all the characters of the supervisor password would be very difficult" and that "even if the password was known to an unauthorized person, they would not be able to access any functions related to voting or tabulation and any actions performed by the session user are recoverable." (*Id.* at 10-11.)

Accordingly, as with Petitioners' alleged security issues, the Secretary has looked into the alleged confidentiality issues in detail and determined, in her discretion, that they do not violate Pennsylvania law or policy. Petitioners cannot show that the Secretary's determination or interpretation of Pennsylvania law is arbitrary. Critically, they do not, and cannot, allege that the conditions imposed, if followed, are insufficient to protect secrecy. Instead, they point to isolated incidents in which individual election officials may not have correctly followed or described the prescribed procedures.

The fact that individual county employees and volunteers may have made mistakes is not relevant to certification. Moreover, human error is always possible, especially when using a brand new voting system, and Petitioners have presented no evidence that errors were widespread or systematic. No voting system now in existence can eliminate any possibility that voters' privacy can be compromised by

a poorly trained or ill-intentioned poll worker. Any system, including the hand-marked paper ballots that Petitioners prefer, may provide an opportunity for an inquisitive poll worker to peer over a voter's shoulder or glance at a ballot while feeding it through a scanner. The integrity of the voting system depends in part on having well-trained and conscientious poll workers; technology can and should make it easier for these people to properly do their jobs, but no technology is yet available that can replace them entirely.

5. Even if Petitioners Had Standing to Challenge the ExpressVote XL on Accessibility Grounds, Their Claim Would Fail on the Merits

(a) Petitioners Lack Standing to Pursue an Accessibility Claim

None of the Individual Petitioners has alleged that she has a disability or any other basis for claiming a substantial interest that exceeds that of the general public in ensuring the accessibility of the ExpressVote XL to those with disabilities. Likewise, neither of the Organization Petitioners has alleged a basis to claim a substantial interest in ensuring the accessibility of the ExpressVote XL, or that it has an individual member who has a disability or some other basis for claiming a substantial interest in this pursuit. Petitioners assert that "[a]ll of the named Petitioners have an interest in ensuring accessibility of voting machines since anyone could become disabled at any time." (Stay Resp. at 6.) This statement perfectly demonstrates the generic nature of Petitioners' interest in

pursuing the accessibility claim—an interest that is common to all electors—and exactly why Petitioners do not have a substantial interest as necessary to establish standing. Further, Petitioners' repeated assertion that they have organizational standing to bring this challenge is no more effective at establishing a substantial interest particular to them, as Petitioners refuse to recognize or account for the well-established rule that the mere fact that a claim "implicates the organization's mission or purpose is not sufficient to establish standing." *Americans for Fair Treatment*, 150 A.3d at 534.[6]

(b) The Secretary Properly Exercised Her Discretion in Concluding That the ExpressVote XL Complies With Applicable Accessibility Requirements

If the Court reaches the merits of Petitioners' accessibility claim, it should reject it. Petitioners cannot prove that the Secretary's interpretation of the Election Code's accessibility provisions was "fraudulent, in bad faith, an abuse of discretion or clearly arbitrary." *Banfield*, 110 A.3d at 175. To the contrary, the Secretary's determination that the ExpressVote XL "[p]ermits each voter to vote for any person and any office for whom and for which he is lawfully entitled to vote, whether or not the name of such person appears upon the ballot as a candidate for

[6] The fact that Petitioners attach a Declaration of a disabled voter, *see* Application, Ex. E, does not cure this lapse. Declarant Tamira Morales is not a Petitioner, the record is devoid of evidence that she is a member of one of the Organization Petitioners, and most importantly, Petitioners do not allege as much in their Petition.

nomination or election," 25 P.S. § 3031.7(5), was reasonable and based on a careful, in-depth evaluation of the relevant facts and issues.

The Secretary's examination of the ExpressVote XL included a comprehensive investigation and analysis of its accessibility. "[A] team of three examiners with accessibility, usability and election process experience" examined the device. (Grossberg Decl., Ex. 18, at 13.) The expert accessibility examiners also observed actual voters with disabilities run through test simulations and respond to questions about the experience. (*Id.*) Finally, "election officials and poll workers tested the accessibility features [of the ExpressVote XL] to evaluate how they would be activated during an election." (*Id.*) Despite some imperfections, the expert accessibility examiners and the voters who participated in testing concluded that the ExpressVote XL is "much more useable and accessible than the [prior] ADA voting systems used in Pennsylvania and allowed most voters to vote independently." (*Id*. at 32.)

Petitioners' accessibility claim is based solely on portions of the accessibility analysis conducted as part of the Secretary's own examination. (Petition ¶¶ 179-190.) The Secretary, well aware of this list of accessibility shortcomings, and likewise well aware of the ways in which the ExpressVote XL was found to be a major improvement over the accessibility of prior voting systems, chose to certify this system. This was a reasonable and well-considered

determination, and one that was well within the Secretary's discretion. Not every inaccessibility is prohibited by the election laws, and, as the Pennsylvania Supreme Court has acknowledged, no voting machine system is perfect. *Banfield*, 110 A.3d at 174.

6. Count VII Fails on the Merits Because Petitioners Cannot Demonstrate That The Secretary's Certification of the ExpressVote XL Constituted a Plain, Palpable, and Clear Abuse of Power That Actually Infringes on the Exercise of Their Voting Rights

Petitioners cannot establish entitlement to relief on their claims under Article I of the Pennsylvania Constitution (Count VII) because they cannot demonstrate that the Secretary's certification of the ExpressVote XL was a plain, palpable, and clear abuse of power that actually infringes on their voting rights. Much to the contrary, the Secretary was well within her statutorily designated authority when she certified the ExpressVote XL for use by the counties. There exists no constitutional basis to disturb her determination.

The Pennsylvania Constitution guarantees that "Elections shall be free and equal," Pa. Const. art. I, § 5, and that "the Commonwealth … shall [not] deny to any person the enjoyment of any civil right," Pa. Const. art. I, § 26. The Pennsylvania Constitution also "gives to the General Assembly the power to promulgate laws governing elections," and that power is necessarily quite broad. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 809 (Pa. 2018).

Indeed, "[a]lthough … the right to vote is fundamental and pervasive of other basic and civil political rights, the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner." *Banfield*, 110 A.3d at 176-77 (internal quotation and citations omitted). Only "in a case of plain, palpable and clear abuse of the power which actually infringes the rights of the electors" will an election regulation be invalidated as a violation of the guarantee to free and equal elections.[7] *League of Women Voters*, 178 A.3d at 809. The General Assembly delegated the specific authority to evaluate and certify voting machines for use by the counties to the Secretary in the Election Code. 25 P.S. § 2621(b). The Secretary's implementation of this authority will thus be upheld unless it constitutes a plain, palpable, and clear abuse of power resulting in an actual infringement of voters' rights.

Applicable to this analysis is the "judicial presumption that [the judiciary's] sister branches take seriously their constitutional oaths," that is, the presumption that the Secretary's actions in carrying out her duties as a member of the executive branch of the Commonwealth, including her duty to implement the Election Code,

[7] The more generic guarantee of Article I, Section 26 is likewise encapsulated in this deferential standard, and does not impose any additional, more restrictive limitations on the Commonwealth's authority to regulate elections than does Article I, Section 5. *DePaul v. Commonwealth*, 969 A.2d 536, 545 (Pa. 2009).

are consistent with the commands of the Pennsylvania constitution. *Stilp v. Commonwealth*, 905 A.2d 918, 938 (Pa. 2006). Even if Petitioners prove all of the allegations in their Petition, they cannot make the showing necessary to overcome this presumption. The Pennsylvania Supreme Court has endorsed the view that "all balloting systems are imperfect"; as such, even demonstrated imperfections with a particular system are not a sufficient basis for a court to find that the Commonwealth's allowing counties to use that system amounts to a constitutional violation of voters' rights. *Banfield*, 110 A.3d at 177. To the contrary, "state officials have the power to substantially regulate the election process as it is 'the job of democratically-elected representatives to weigh the pros and cons of various balloting systems,'" and 'so long as their choice is reasonable and neutral, it is free from judicial second-guessing.'" *Id.* (quoting *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)) (internal modification omitted).

The Secretary's certification of the ExpressVote XL was a reasonable, non-discriminatory, and neutral exercise of her duty under the Election Code. Consistent with the Pennsylvania Constitution, she weighed the pros and cons of this voting system, and reasonably concluded that it meets the requirements of Pennsylvania statutory and constitutional law. Even if Petitioners' allegations that the ExpressVote XL is imperfect in some ways are proven, they will not have

overcome the presumption that the Secretary's certification of this system was constitutional.

C. Petitioners Fail to Satisfy Other Essential Prerequisites for a Mandatory Preliminary Injunction

Not only have Petitioners completely failed to make a "very strong showing" of "a clear right to relief," *Big Bass Lake Community Ass'n*, 950 A.2d 1137, 1144-45 (Pa. Commw. Ct. 2008), but they also cannot establish any of the other "essential prerequisites" of a preliminary injunction, *Reed v. Harrisburg City Council*, 927 A.2d 698, 702-03 (Pa. Commw Ct. 2007).

1. Petitioners Have Failed to Show that "Irreparable Harm" Will Occur if the ExpressVote XL Is Not Decertified

"Actual proof of irreparable harm" is a "threshold evidentiary requirement to be met before a preliminary injunction may issue." *Reed*, 927 A.2d at 704. "In order to meet this burden, a plaintiff must present 'concrete evidence' demonstrating 'actual proof of irreparable harm.' The plaintiff's claimed 'irreparable harm' cannot be based solely on speculation and hypothesis." *City of Allentown v. Lehigh Cnty. Auth.*, --- A.3d ----, 2019 WL 5798685, at *6 (Pa. Super. Ct. Nov. 7, 2019) (quoting *Greenmoor, Inc. v. Burchick Constr. Co.*, 908 A.2d 310, 314 (Pa. Super. Ct. 2006)). Indeed, "[i]t is established … that 'speculative considerations … cannot form the basis for issuing [a preliminary injunction].'" *Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (quoting

Berkowitz v. Wilbar, 206 A.2d 280, 282 (Pa. 1965)) (second omission and alteration in *Novak*); *accord Reed*, 927 A.2d at 704 ("proof of injury" that is "speculative and conjectural" does not support an injunction (citing *Sameric Corp. of Market Street v. Goss*, 295 A.2d 277 (Pa. 1972))).

(a) Petitioners' Assertions About Certain Features of the ExpressVote XL and Other BMDs Fail to Establish "Irreparable Harm"

As detailed above, *see supra* Section III.B.3, the "injury" alleged by Petitioners here is entirely speculative, conjectural, and hypothetical. Petitioners do nothing more than identify bare theoretical possibilities that the machine could be hacked or malfunction. Strikingly, despite the fact that the ExpressVote XL has been used in numerous elections – in Pennsylvania and other jurisdictions (Baumert Aff. ¶ 11) – Petitioners provide absolutely no evidence that such scenarios have ever actually occurred or that there is any realistic prospect of their occurring in the face of the phalanx of security measures required by the Commonwealth. (*See* Boockvar Decl., ¶¶ 18, 39-43, 57-60; Baumert Aff. ¶¶ 16-24, 27, 46.) Indeed, the speculative nature of the harm claimed by Petitioners is apparent from the face of their Application. Recognizing that they must establish "irreparable harm," Petitioners can muster only that "[t]he Secretary's certification of the ExpressVote XL machine" has "ma[de] it *possible or probable* [and note that Petitioners offer ***no evidence whatsoever*** of any 'probability'] that a

significant number of votes will not be counted accurately." (Pet'rs Br. at 15-16.) In the words of a federal court examining similar allegations, Petitioners "have raised only spectral fears" and have "ma[de] out little more than the theoretical possibility a voting machine somewhere in the Commonwealth might be susceptible to tampering." *Stein v. Cortes*, 223 F. Supp. 3d 423, 441-42 (E.D. Pa. 2016) (denying preliminary injunction sought by plaintiffs challenging Pennsylvania's use of DRE machines). That is plainly insufficient to "demonstrat[e] 'actual proof of irreparable harm.'" *City of Allentown*, 2019 WL 5798685, at *6.

Once again, Petitioners ignore *Banfield*, which directly addresses – and rejects – precisely the type of "harm" argument Petitioners make here. As the Supreme Court explained:

> Appellants do not recognize that they are advocating that the DREs be held to an impossible standard of invulnerability. We agree with the Commonwealth Court's finding that the mere possibility of error cannot bar the use of a voting system as "the unfortunate reality is that the possibility of electoral fraud can never be *completely* eliminated, no matter which type of ballot is used." *Banfield III*, 442 M.S. 2006, at *8 (citing *Weber v. Shelley*, 347 F.3d 1101, 1106-07 (9th Cir. 2003) (emphasis in original). While Appellants claim traditional paper ballots and optical scan voting are preferable alternatives, they fail to acknowledge that such systems are also vulnerable to tampering as paper ballots can be easily destroyed or altered by an individual intending to manipulate the election result. Moreover, paper ballots may fail to accurately record voter intent as

> a result of mechanical or human error that leads to the invalidation of votes, in cases where ballots have not been completed in a correct and comprehensible manner, contain an overvote or undervote based on the number of permitted selections in an election, or contain marking that cannot be read by an optical scanner. As all voting systems are imperfect and not immune from tampering, the Election Code cannot be read to impose a requirement that cannot be achieved.

110 A.3d at 174; *see also Taylor v. Onorato*, 428 F. Supp. 2d 384, 378-88 (W.D. Pa. 2006) (denying request for preliminary injunction: "[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."). As already noted, voting systems using hand-marked ballots and optical scan machines – which appear clearly to be Petitioners' policy preference – also utilize human-inscrutable coding and software, and thus may also theoretically be hacked.[8]

[8] As Petitioners admit, "[a]ll computer-based vote-recording and vote-counting machines" – including the optical scan machines preferred by Petitioners – "can [theoretically] be 'hacked' to make them cheat." (Pet'rs Br. at 4.) That is why, in addition to the requirement that any voting system be "tested and certified as secure for reliable and accurate voting by independent federal laboratories and the Secretary's own examination" – in the case of the ExpressVote XL, two examinations – "the Election Code outlines additional administrative and procedural security protections to preclude individuals from tampering with the tabulating equipment of the electronic voting system." *Banfield*, 110 A.3d at 173.

Banfield also shows the error of Petitioners' attempt to establish "irreparable harm" by alleging that the ExpressVote XL might, in theory, fail to print a paper record of the vote that is actually voter-verifiable. Putting aside that Petitioners utterly fail to show that this has actually happened or realistically could happen in an actual election, or that any risk of error is meaningfully higher than the risk of error attending the use of other kinds of voting systems, *see Banfield*, 110 A.3d at 173-74, the controlling holding of *Banfield* is that *there is no legal requirement to utilize a voting system that generates a voter-verifiable paper voting record*. *Banfield*, 110 A.3d 155. Petitioners are nonetheless intent on overriding the discretion of the Secretary and county election officials and imposing Petitioners' preferred voting system (hand-marked ballots tabulated by optical scan machines) on every county in the Commonwealth. (*See, e.g.*, Pet'rs Br. at 14.) But there is no legal basis for this Court to use the extraordinary remedy of a mandatory preliminary injunction – let alone a mandatory preliminary injunction overriding the Secretary's duly exercised discretionary authority – to implement Petitioners' policy preference. *Banfield* makes clear that Petitioners have not established cognizable "irreparable harm."

The balance of Petitioners' allegations of harm rest on suggestions that county officials may fail to adhere to appropriate policies and practices in administering elections using the ExpressVote XL. *See supra* Sections III.A.2 and

III.B.4. But the risk that county officials might commit errors of administration is obviously not unique to the ExpressVote XL. Even if Petitioners had shown that such errors are very likely to occur (and they have not), the harm from such errors would manifestly fail to justify an injunction requiring the Secretary of the Commonwealth to decertify an entire voting system. Rather, the appropriate remedy, if any, would be directed at the county officials' administration practices. *See Reed*, 927 A.2d at 703 (quoting *Summit*, 828 A.2d at 1001) (party seeking preliminary injunction "must show that the injunction it seeks is reasonably suited to abate the offending activity").

(b) That the Secretary Is Currently Examining an Updated Version of the Suite of Products Containing the ExpressVote XL, Does Not Show Irreparable Harm

Particularly puzzling is Petitioners' attempt to predicate "irreparable harm" on the fact that the Secretary is currently examining the ES&S EVS 6.1.0.0, which, as Petitioners note, is an updated version of the "suite of products" that "includes [the] ExpressVote XL." (Pet'rs Br. at 17-18.) It is indeed true that the Secretary is a *third* time, with all of Petitioners' complaints about this machine set forth in detail in the public record. Left unexplained by Petitioners is how this fact could possibly cut *in favor of* rushing to override the Secretary's discretion and issuing an immediate judicial order requiring decertification. To the contrary, that fact provides another compelling reason for the Court to stay its hand, so that the

statutorily appointed executive agency may perform the statutorily prescribed evaluation.

(c) Petitioners' Assertion of a Harm to "Voters' Trust" Is as Misplaced as It Is Cynical

Without a hint of irony, Petitioners also claim that immediate decertification of the ExpressVote XL is necessary to avoid harm "to the trust that the entire electorate has in the machines and our voting system as a whole." (Pet'rs Br. at 18.) Petitioners appear to contend that this purported distrust arises from reports about certain issues that arose in Northampton County's last election. (*Id.* at 19.) Petitioners suggest that even if, as all evidence shows, those issues were the product of human error, have no connection with the alleged design issues Petitioners purport to identify in their Petition, and do not in any way establish that the Secretary abused her discretion in certifying the XL, this Court should *still* issue a mandatory preliminary injunction requiring immediate decertification – because of alleged "distrust."

That is a remarkable argument, for several reasons. First, putting aside the complete lack of evidence of any general voter "distrust,"[9] Petitioners fail to identify any legal support for the novel theory that this Court can compel

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[9] The anecdotal accounts by a few individual voters of their experiences, which Petitioners attach to their Application, are not competent evidence of general voter mistrust – or of anything else Petitioners have the burden of establishing in this preliminary injunction proceeding. *See supra* Sections III.A.2 and III.B.4.

Commonwealth agencies to reverse discretionary decisions based on alleged public *misperceptions* about the soundness of those decisions.

Second, Petitioners fail to explain why they – or this Court – are better positioned than county election officials to (a) gauge the status of public feeling about particular voting machines and (b) make whatever decisions they feel are appropriate in light of those sentiments. Legislators and executive officials are the organs of government tasked with responding to public opinion; courts must constrain themselves to applying the law.

Third, Petitioners' "distrust" argument is audacious. It is *Petitioners themselves* that seek, irresponsibly and heedless of the cost, to sow public distrust – in the ExpressVote XL, in BMDs generally, and in the decision-making of public officials, like the Secretary, charged with protecting the security and integrity of elections – as a means of advancing their policy goals. That is not mere conjecture; it is a concern well founded in Petitioners' Application itself. Petitioners' attack on the ExpressVote XL is transparently a stalking horse for their campaign to require all counties to use hand-marked paper ballots, regardless of the costs. (*See, e.g.*, Pet'rs Br. 14.) Make no mistake: If the Court grants Petitioners' Application, they (and fellow devotees of hand-marked ballots) will brandish the decision as proof that the Secretary's certification of any ballot-marking device is suspect, and that the 54 counties using BMDs with barcodes

(Boockvar Decl. ¶¶ 61-69) should be forced to switch to hand-marked paper ballots.[10] The Court should not allow itself to be made an instrument of Petitioners' agenda.

* * *

In sum, Petitioners have fallen well short of establishing "irreparable harm." For that reason alone, their Application must be denied.

2. Granting a Preliminary Injunction Would Cause Greater Injury Than Denying It, Harm Other Interested Parties, and Adversely Affect the Public Interest

It is well settled that a preliminary injunction "should in no event ever be issued unless the greater injury will be done by refusing it than in granting it." *Reed*, 927 A.2d at 704. Relatedly, a preliminary injunction must be denied if it will "substantially harm other interested parties in the proceedings" or "adversely affect the public interest." *Id.* at 702-03 (quoting *Summit*, 828 A.2d at 1001). This constellation of requirements provides an independent basis for denying Petitioners' Application.

[10] Petitioners' attack on BMDs notably ignores that hand-marked ballots *cannot* be used by persons with certain disabilities, which is why federal law *requires* a ballot-marking device, such as the ExpressVote XL, to be present in every polling place. HAVA, 52 U.S.C. § 21081(a)(3)(B). Alternatively, a DRE can meet this federal-law requirement, *see id.*, but it appears clear that Petitioners do not want to return to the use of DREs.

(a) The Harms of a Preliminary Injunction – to the Commonwealth, to Non-Party Counties, and to the Public Interest – Would Be Severe

As discussed above, *see supra* Sections III.B.2-6, the purported harms identified by Petitioners are speculative and hypothetical or simply not cognizable harms at all. Entry of the requested mandatory preliminary injunction, on the other hand, would impose undeniable, severe harms on the Commonwealth, the counties, and the citizenry of Pennsylvania.

First, an injunction would result with certainty in judicial micromanaging of the Secretary's discretion. *See Novak*, 523 A.2d at 320 (reversing Commonwealth Court's grant of preliminary injunction and explaining that "[t]he harms which the Commonwealth Court sought to prevent by issuance of the injunction … are speculative in nature, whereas the injunction's interference with management of the [Department of Revenue] is of a most certain form"). Strong, bedrock principles counsel against judicial interference in the discretionary acts of government officials.

Second, the non-party counties who have purchased the ExpressVote XL would also be substantially harmed. They would be denied their right to choose and utilize the certified voting systems of their choice. *See, e.g.*, 25 Pa. Stat § 2642(c) ("county boards of elections, within their respective counties, shall exercise … all powers granted to them by this act, … which shall include the

following: … to purchase, preserve, store and maintain primary and election equipment of all kinds, including … voting machines”). Moreover, they would be forced to choose new machines or voting systems they do not want.

Third, the paper-based optical scan voting systems that Petitioners would have this Court foist upon the non-party counties are just as susceptible – and in some ways are more susceptible – to intentional and unintentional acts causing votes to not be counted in accordance with voter intent. (Baumert Aff. 46-49; Boockvar Decl. ¶¶ 25-26, 28.)

Fourth, entry of a mandatory preliminary injunction would inflict monetary harm and costs on the counties and taxpayers and, most significantly, put the orderly administration of the 2020 elections at severe risk. A grant of the relief Petitioners request would mean that millions of tax dollars and months of effort by the Commonwealth and the counties had been spent fruitlessly (Nesmith-Joyner Decl. ¶¶ 6-21; 12/11/19 Lynch Decl. ¶¶ 7-22; Salzarulo Decl. ¶¶ 3-8; Boockvar Decl. ¶¶ 84-94) and would require government officials to devote significant additional time and attention to replacing the ExpressVote XL machines (Supplemental Declaration of Joseph Lynch (Jan. 22, 2020) (“Supp. Lynch Decl.”) ¶¶ 16-37; Nesmith-Joyner Decl. ¶¶ 22-30). Further, an injunction would prejudice the Commonwealth’s and the counties’ interest in carrying out orderly elections, force the counties to make intricate policy decisions in a short amount of time, and

distract government officials from other important work on behalf of citizens. (Supp. Lynch Decl. ¶¶ 4-42; Nesmith-Joyner Decl. ¶¶ 6-21; 12/11/19 Lynch Decl. ¶¶ 7-22, 31-32; Salzarulo Decl. ¶¶ 15-17; Boockvar Decl. ¶¶ 91-101.)

It is impossible to overstate this point: The relief Petitioners seek would almost certainly disrupt several pending elections. The Secretary does not make this point lightly or hyperbolically. The election officials of Philadelphia – the largest county in the Commonwealth by far, and one which successfully procured and utilized the ExpressVote XL in the November 2019 election – literally do not know how they would be able to transition to a different voting system by the November 2020 election without raising the substantial risk, at the very least, of severe disruptions, delays, and voter disenfranchisement. (Supp. Lynch Decl. ¶¶ 17, 19-21, 26, 35, 41-42; 12/11/19 Lynch Decl. ¶¶ 28-33.) The City's procurement of the ExpressVote XL took 16 months. (Nesmith-Joyner Decl. ¶ 5.) The City's Board of Elections selected the ExpressVote XL to replace the City's DRE machines on February 20, 2019, and the City needed effectively all of the time between then and the November 2019 election to acquire and implement the new voting systems, test and confirm their accuracy, reevaluate over 800 polling locations, train thousands of poll workers and interpreters, and perform over 800 demonstrations needed to educate voters about the new machines. (12/11/19 Lynch Decl. ¶¶ 7-27.) And all that was (1) for machines that are, in key respects,

similar in operation to the City's previous machines and thus familiar to its poll workers and voters (Supp. Lynch Decl. ¶ 28) and (2) in a non-presidential-election year in which "only" 300,000 voter were cast (12/11/19 Lynch Decl. ¶ 26).

If the Court grants Petitioners' requested preliminary injunction, Philadelphia would be faced with the prospect of selecting and implementing a new voting system in a presidential election year involving what is anticipated to be unprecedentedly high turnout and perhaps more than 700,000 votes cast. (Supp. Lynch Decl. ¶¶ 14, 21; 12/11/19 Lynch Decl. ¶ 28.) Considerably compounding the administrative burden, Philadelphia's Board of Elections also expects an enormous influx of voter registration applications, which will require the Board to assign additional Board personnel to assist in their processing. (Supp. Lynch Decl. ¶¶ 38-42; 12/11/19 Lynch Decl. ¶ 30.) If, as Petitioners urge, the new system includes optically scanned ballots, the Board would likely need to find larger polling places to provide privacy for voters filling out the ballots and space for ADA-compliant ballot-marking devices, in addition to either securing space for the scanners themselves or arranging for the transportation of ballots to a central scanning location. (Supp. Lynch Decl. ¶¶ 18-19, 21-26; 12/11/19 Lynch Decl. ¶ 31.) Both approaches would require a substantial effort to prepare for and carry out, including developing new procedures for scanning and retraining poll workers on these alternative systems. (Supp. Lynch Decl. ¶¶ 18-19, 21-26.) Moreover, the

scanning of the ballots themselves would likely take two to three weeks, thus delaying election results. (Supp. Lynch Decl. ¶ 21.) On top of all of this, because of the recent enactment of Act 77, the Board has already been required to commit substantial resources – in addition to those required in 2019 – to comply with the statute's requirements that counties provide mail-in ballots to all voters who request them, and extend the deadline for submission of voter registration applications from 30 days before the election to only 15 days beforehand. *See* 25 P.S. §§ 3071, 3150.11-.17. (Supp. Lynch Decl. ¶¶ 10-15.)

Put simply, for Philadelphia to administer the November 2020 Presidential Election with a different voting system would require massive additional resources that do not currently exist and that the Board of Elections does not know how it could possibly acquire. (Supp. Lynch Decl. ¶¶ 10-42.) And changing voting systems for the second time in as many years would, in itself, risk widespread confusion by voters and poll workers – particularly if, as Petitioners suggest, that switch is as radical as going from electronic machines (which Philadelphia has used, in one form or another, for nearly two decades) to hand-marked paper ballots. (Supp. Lynch Decl. ¶¶ 16-37, 41-42; Boockvar Decl. ¶¶ 102-103.) It goes without saying that Petitioners' notion that Philadelphia could transition to new voting systems in time for the *April 2020* primary election or a *February 2020* special election is nothing more than creative fiction.

Under Pennsylvania law, this testimony by election officials is entitled to "great deference" by the courts. *Kuznik*, 902 A.3d at 506-07. And what they testify to here is exactly the sort of threatened election disruption that routinely leads courts to deny preliminary injunction requests like Petitioners' Application. *See, e.g.*, *United States v. City of Phila.*, No. 06-4592, 2006 WL 3922115, at *2 (E.D. Pa. Nov. 7, 2006) ("The U.S. Supreme Court has long acknowledged that the timing in cases involving upcoming elections is a relevant consideration in determining the propriety of immediately effective relief." (citing cases)); *Crookston v. Johnson*, 841 F.3d 396, 397-98 (6th Cir. 2016) ("When an election is 'imminent' and when there is 'inadequate time to resolve factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures."); *Schade v. Md. State Bd. of Elections*, 930 A.2d 304, 327 (Md. 2007) ("[I]njunctive relief may be inappropriate in an elections case if the election is too close for the State, realistically, to be able to implement the necessary changes before the election…. [A]lthough the election process is one fraught with uncertainty[, i]t does not follow [] that a court should add a further element of wholly unanticipated uncertainty in the process at the eleventh hour…. [A] change in voting systems at the late date that this case involved, would have done more harm than good. There was no guarantee that the appellants' proposed remedy, *i.e.* the implementation of specific security measures and a paper ballot

option, would have resulted, in fact, in a 'secure' election. No system is infallible." (internal quotation marks omitted)).

(b) Petitioners Have No Adequate Response to the Harm a Preliminary Injunction Would Cause

Apparently recognizing the harm their proposed preliminary injunction would wreak, Petitioners advance several arguments for why the disruption would supposedly be less severe than it appears. But their responses are facile – and entirely insufficient.

First, Petitioners rely on testimony by the Secretary that, when the AVS Winvote system needed to be decertified in December 2007, the affected counties – Northampton, Lackawanna, and Wayne – were able to acquire and implement new voting equipment in time for the April 2008 presidential primary. (Pet'rs Br. at 44-46.) But as NEDC's Kevin Skoglund has admitted, that timeline was a "scramble" made possible only by an infusion of Commonwealth funds. (Boockvar Decl., Ex. 4; *see also* Boockvar Decl. ¶¶ 97-98.) Furthermore, and crucially, none of the counties affected by the AVS Winvote issue was Philadelphia. Philadelphia's election system and administration are without comparison in the Commonwealth – in size, diversity, and complexity. (*See id.* ¶¶ 99-105.) In sum, the timeline regarding the AVS Winvote decertification in no way shows that *any* of the counties currently using the ExpressVote XL could feasibly transition to a new system in time for the April 2020 election. (*See id.*)

Petitioners also suggest that "[i]n the April 2020 primary, paper ballots could be made available to voters alongside the ExpressVote XL, to provide all voters who wish to use a genuine voter-verifiable paper ballot the opportunity to do so." (Pet'rs Br. at 51.) Petitioners seem to be unaware that that option is already available to Pennsylvania voters *under current law*, namely, recently enacted Act 77, which, as noted above, affords every Pennsylvania voter the right to vote via mail-in paper ballot. *See* 25 P.S. §§ 3150.11-.17. To the extent Petitioners mean to suggest that counties utilizing the ExpressVote XL also use paper ballots *at the polling places* in the April 2020 election, the proposal is simply not feasible. The paper ballots would have to be tabulated on either a central optical scanner (as Petitioners seem to suggest, *see* Pet'rs Br. at 50) or precinct scanners. Tabulation on a central scanner would create a myriad of security and chain-of-custody issues, as ballots from each of Philadelphia's more-than-800 polling places would have to be transferred to the location of the central scanner. (Supp. Lynch Decl. ¶¶ 21-26.) And it would take a minimum of one week, but more likely two to three weeks, to complete the vote count. (Supp. Lynch Decl. ¶ 21.) If, on the other hand, precinct scanners were used, this would require exactly the sort of massive procurement and implementation of new equipment – with the attendant need to find storage space, test each machine, find polling spaces that could accommodate the scanners as well

as the ExpressVote XLs, train poll workers, and educate voters – that, as described above, is impossible on the timeline at issue. (Supp. Lynch Decl. ¶ 26.)

Petitioners also suggest, in a flippant, one-sentence throwaway argument, that the counties could "borrow[] or leas[e] an already certified system from another county or state." (Pet'rs Br. at 51.) Unsurprisingly, Petitioners provide no guidance as to how this proposal could actually work in practice. Other Pennsylvania counties would presumably need to use the machines Petitioners would have the affected counties lease and borrow for the April 2020 election. And machines from other states would be certified for use in *those* states; they would presumably need to be re-configured to comply with the requirements of the Pennsylvania Election Code. In any event, any such Voting Machine Lend Lease Program would require the affected counties to arrange for transportation of the machines, to find warehousing space for the machines, to test each machine upon delivery, to identify a sufficient number of polling places that could accommodate the new machines, and to train poll workers and educate voters on how the new machines work. (Supp. Lynch Decl. ¶¶ 16-37.) As previously discussed, any plan of accomplishing all of this before the April or November 2020 election is entirely unrealistic.

Finally, Petitioners seek to minimize the costs of their proposed preliminary injunction by pointing to the contract between Philadelphia and ES&S, the

manufacturer of the ExpressVote XL. (Pet'rs Br. at 46-47.) Based on this contract, Petitioners assert that "if the Court orders Defendants [sic] to decertify the ExpressVote XL, ES&S will bear the cost of providing Philadelphia with new, compliant voting systems." (*Id.* at 47.) Petitioners further contend that "[t]he same is likely true of Cumberland County or any other county, as this is surely a standard provision." (*Id.*)

This argument is flawed in numerous respects. First, Petitioners have failed to present any evidence that the other counties that have purchased the ExpressVote XL system have the same contractual provision as Philadelphia.

Second, the possibility that Philadelphia could recoup some funds, whether from ES&S or some other party, is irrelevant. Given the enormity of the financial obligation involved, any such party would almost certainly contest any demand by Philadelphia. Nor is it clear that Philadelphia could actually identify all of the relevant costs. As noted above, the expense of deploying a new voting system in a county as large as Philadelphia is massive and difficult to quantify. At the very least, there would be significant opportunity costs – in the personnel who are unavailable to work on other projects, if nothing else – that would be impossible to recover.

Third, cost is not the only or even the primary consideration. Even if all of the costs of all of the affected counties were fully reimbursed by ES&S, that would

not alter the fact that transitioning to a new voting system prior to the November 2020 presidential election is simply not feasible. *See supra* Sections II.D, III.A.2d, and III.C.2.(a). For that reason alone, the preliminary injunction sought by Petitioners must be denied.

3. The Preliminary Injunction Sought by Petitioners Would Not Preserve the Status Quo

Petitioners' Application must also be denied because the preliminary injunction they seek would not restore the status quo *ante*. *See Reed*, 927 A.2d at 703 (quoting *Summit*, 828 A.2d at 1001) (the party seeking a preliminary injunction "must show that [it] will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"). Indeed, owing to Petitioners' inexcusable delay in filing their Petition and the instant Application for preliminary injunctive relief, restoration of the parties to their previous status is impossible.

The status of this case is nothing like *City of Phila. v. Commonwealth*, 837 A.2d 591 (Pa. Commw. Ct. 2003), on which Petitioners rely for their assertion that they have complied with the "status quo" requirement of preliminary injunctive relief. At issue in that case was "Act 230," which was "characterized as a 'state takeover' of the Pennsylvania Convention Center." *Id.* at 592. That statute was signed into law on December 30, 2002. *Id.* The petitioners there filed suit on January 23, 2003, and a hearing on the motion for preliminary injunctive relief was

scheduled for February 10, 2003. *Id.* Given the petitioners' prompt action, the preliminary injunction in that case did serve to preserve the status quo.

In stark contrast, Petitioners here sat on their hands for more than a year after the Secretary certified the ExpressVote XL, while multiple counties investigated, procured, implemented, and then used the XL in the November 2019 elections. It was not until December 12, 2019, after all of those commitments were made, that Petitioners brought this action – and even then, they waited an entire additional month, until January 10, 2020, before applying for a preliminary injunction. Far from preserving the status quo, the preliminary injunction Petitioners seek would cause severe disruptions, sow unnecessary distrust, and impose needless and unrecoverable costs. *See supra* Sections II.D, III.A.2, III.C.2.(a).

Moreover, restoration of any "status quo *ante*" is impossible. Before Philadelphia (for example) adopted the ExpressVote XL, it was using DRE machines and had sufficient time, prior to the Secretary's deadline for transition to paper-record voting machines, to evaluate and implement a new voting system in a non-presidential-election year. (12/11/19 Lynch Decl. ¶¶ 4-25.) No preliminary injunction can restore that former status. Petitioners do not want counties to return to using DREs, and, in any event, the Secretary has directed all counties to transition away from them. (Boockvar Decl. ¶¶ 14-15.) Instead, if Petitioners'

preliminary injunction is granted, the affected counties will be left in the untenable position of scrambling to administer what is expected to be the largest-turnout presidential election in history – all because of Petitioners' dilatory conduct. In such circumstances, the case law is clear: Petitioners' application must be denied. *See Wheels Mech.*, 156 A.3d at 364 (reversing grant of preliminary injunction where, "at the time [plaintiff] filed suit, it was impossible to return the parties to the status quo"); *Gueson v. Reed*, 679 A.2d 284, 289 (Pa. Commw. Ct. 1996) (denying preliminary injunction where "it … would have been an impossibility for the preliminary injunction requested … to return the parties to the so-called status quo" and "impossible here to turn back the clock").

D. Petitioners Must Post a Substantial Bond to Obtain the Relief Sought

For a preliminary injunction to issue, the Pennsylvania Rules of Civil Procedure require the posting of a bond or cash by the Petitioners in an amount to be established by the Court:

> [A] preliminary or special injunction shall be granted only if … the plaintiff files a bond in an amount fixed and with security approved by the court … conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees.

Pa. R. Civ. P. 1531(b).

"The bond 'requirement is mandatory and an appellate court must invalidate a preliminary injunction if a bond is not filed by the plaintiff.'" *Walter v. Stacy*, 837 A.2d 1205, 1208 (Pa. Super. Ct. 2003) (quoting *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129, 1131 (Pa. Super. Ct. 1987)).

In setting the amount of the bond, the trial court should "require a bond which would cover damages that are reasonably foreseeable." *Greene Cnty. Citizens United by Cumpston v. Greene Cnty. Solid Waste Auth.*, 636 A.2d 1278, 1281 (Pa. Commw. Ct. 1994). In this case, Petitioners ask the Court to issue an Order that threatens to make a debacle of the upcoming elections. In order to avoid this fate, the counties will have to make massive additional investments in new voting systems; new elections infrastructure, such as warehousing and transportation; an advertising campaign to apprise the public that their voting systems are changing for the second time in two years; retraining of election personnel and voters; and personnel to manage this process and cope with the additional Election Day demands. The Department will also be required to make massive investments in additional personnel and training materials, as well as the extensive litigation that will certainly go along with such a seismic disruption to the voting system. Even if the injunction is withdrawn, it will be too late to undo the damage; given the timing of the 2020 elections, if the Department decertifies

the ExpressVote XL even temporarily, the counties and the Department must immediately find a way to move forward.

The possibility that ES&S might be contractually obligated to cover some of the damage is not relevant to the size of the bond required. Any payment from ES&S would almost certainly not cover all the consequences of an injunction; it would take time to recover; and if the Court found that a preliminary injunction was improvidently granted, then ES&S might contend that it was not liable at all.

Therefore, should the Court decide to issue the injunction – and it should not – the balance of equities dictates that it set the amount of security required at an amount sufficient to compensate all entities that the injunction will injure. *See Greene County Citizens United by Consumption*, 636 A.2d at 1281. While this amount cannot easily be calculated to the penny, the Court may arrive at a figure by looking to the tens of millions of dollars in expenditures required to purchase new voting systems and put them into place. Philadelphia, Northampton and Cumberland Counties' voting systems together cost more than $35 million; this number does not include the expense of implementing the systems, including transportation, training, warehousing, building infrastructure, moving or modifying polling places, advertising, and providing staff to implement the transition. The required bond will doubtless be large, but it must be commensurate with the amount of harm that a grant of the requested injunction would cause. Because

Petitioners, through their delay, made this harm a likelihood, they cannot be heard to complain about bearing the consequences should an injunction be improvidently granted.

IV. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court DENY Petitioners' Application for Special Relief in the Form of a Preliminary Injunction.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: January 22, 2020

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non–confidential information and documents.

Dated: January 22, 2020

/s/ Michele D. Hangley
Michele D. Hangley

CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I certify that the Brief of Respondent Kathy Boockvar in Opposition to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction contains 15,751 words as measured in accordance with Pennsylvania Rule of Appellate Procedure 2135. I further certify that Respondent has filed an Application seeking permission to file a brief exceeding the 14,000-word limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1).

Dated: January 22, 2020

/s/ Michele D. Hangley
Michele D. Hangley

CERTIFICATE OF SERVICE

I, Michele D. Hangley, hereby certify that on January 22, 2020, I caused a true and correct copy of the Brief of Respondent Kathy Boockvar in Opposition to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction to be served upon the persons and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

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