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Petitioners,

v.

KATHY BOOCKVAR, SECRETARY
OF THE COMMONWEALTH,

Respondent.

COMMONWEALTH
COURT OF
PENNSYLVANIA

ORIGINAL JURISDICTION

Docket No.: 674 MD 2019

**PLAINTIFFS' RESPONSE TO RESPONDENT'S PRELIMINARY
OBJECTIONS AND BRIEF IN SUPPORT THEREOF**

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Plaintiffs, by and through their counsel, hereby file their Response to Respondent's Preliminary Objections and brief in support, as follows:

I. INTRODUCTION

Plaintiffs responded to Respondent's initial Preliminary Objections by amending their Petition for Review to address any perceived infirmities and narrow the scope of the claims. Despite having done that, and Respondent clearly being on notice of the legal standards governing Plaintiffs' claims, namely, those set forth in *Banfield v. Cortes*, 922 A.2d 36, 46-48 (Pa. Commw. 2007) (*en banc*), Respondent has nonetheless re-asserted preliminary objections that clearly have no basis with respect to the current status of this case. Accordingly, they should be overruled in their entirety.

II. PLAINTIFFS' FACTUAL STATEMENT

Plaintiffs are voting rights organizations (the "Organizational Plaintiffs") and individual electors who are residents of counties that have procured the ExpressVote XL voting machine for use in elections (the "Individual Plaintiffs" and collectively with the Organizational Plaintiffs, the "Plaintiffs"). The Plaintiffs, by their Amended Petition for Review, challenge the Secretary of the Commonwealth's certification of the ExpressVote XL voting machine for use in Pennsylvania elections. The ExpressVote XL uses ballots that do not conform to the requirements of the Pennsylvania Election Code, violates the right of voters to

vote in free and equal elections in which votes are counted fairly and accurately, violates voters' right to vote in absolute secrecy, and poses real and immediate risks of undetectable hacking or tampering. By their Amended Petition for Review, Plaintiffs seek an order from this Court directing the Secretary to decertify the ExpressVote XL in order to protect Plaintiffs' individual voting rights, and the integrity of the electoral process.

III. PLAINTIFFS' RESPONSES TO RESPONDENT'S PRELIMINARY OBJECTIONS

Plaintiffs now respond to each of the allegations in Respondent's Preliminary Objections, pursuant to Pennsylvania Rule of Civil Procedure 1029:

1. Admitted.
2. Admitted that the Pennsylvania Election Code tasks the Secretary with responsibility for certifying and decertifying voting systems for use in Pennsylvania. Admitted that the Secretary must also take into account the requirements of the federal Help America Vote Act. Plaintiffs state that those statutes speak for themselves and therefore Plaintiffs deny the remaining characterizations of paragraph 2.
3. Denied insofar as Respondent's selective quotations from *Banfield v. Cortes*, 110 A.3d 155, 174 (2015) are misleading and lack context. Admitted that the Secretary is charged with examining, re-examining, certifying, and decertifying

voting systems in Pennsylvania. The remaining allegations and characterizations of paragraph 3 are denied.

4. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

5. The averments in this paragraph purport to summarize facts alleged in the Amended Petition. Plaintiffs refer to the Amended Petition for its full and complete contents and deny anything inconsistent therewith.

6. Admitted that Respondent and not Plaintiffs is charged with making decisions regarding the certification of voting systems. The remaining allegations and characterizations of paragraph 6 are denied.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

11. Admitted.

12. Admitted.

13. Admitted.

14. Plaintiffs deny Respondent's characterization of events in this paragraph. Admitted that on January 24, 2020, two business days and four

calendar days before the scheduled hearing, Petitioners withdrew their Application for a Preliminary Injunction, with the full knowledge and consent of Respondent, and that Plaintiffs' counsel and Respondent's counsel jointly called the Court to inform it of the change. The remaining allegations of this paragraph are denied.

15. Admitted.

16. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

17. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

18. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

19. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

26. Denied.

27. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

28. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

29. Denied.

30. Denied.

31. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

32. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

33. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

34. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

35. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

36. The averments in this paragraph purport to summarize facts alleged in the Amended Petition. Plaintiffs refer to the Amended Petition for its full and complete contents and deny anything inconsistent therewith.

37. The averments in this paragraph purport to summarize facts alleged in the Amended Petition. Plaintiffs refer to the Amended Petition for its full and complete contents and deny anything inconsistent therewith.

38. The averments in this paragraph purport to summarize facts alleged in the Amended Petition. Plaintiffs refer to the Amended Petition for its full and complete contents and deny anything inconsistent therewith.

39. The averments in this paragraph purport to summarize facts alleged in the Amended Petition. Plaintiffs refer to the Amended Petition for its full and complete contents and deny anything inconsistent therewith.

40. The averments in this paragraph purport to summarize facts alleged in the Amended Petition. Plaintiffs refer to the Amended Petition for its full and complete contents and deny anything inconsistent therewith.

41. Denied.

42. Denied.

43. Denied.

44. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

45. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

46. Denied.

47. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

48. The averments in this paragraph purport to summarize facts alleged in the Amended Petition. Plaintiffs refer to the Amended Petition for its full and complete contents and deny anything inconsistent therewith.

49. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

50. Denied.

51. Denied.

52. Denied.

IV. JURISDICTION

The Court has original jurisdiction over this action pursuant to 42 P.S. § 761(a).

V. STANDARD OF REVIEW

It is well established that in ruling on preliminary objections, all well-pleaded, material and relevant facts will be considered as true, together with such reasonable inferences as may be drawn from such facts. *Santiago v. Pennsylvania National Mutual Casualty Insurance Co.*, 613 A.2d 1235, 1238 (Pa. 1992). “The test on preliminary objections is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief.” *Bower v. Bower*, 611 A.2d 181 (Pa. 1992) (citing *Firing v. Kephart*, 359 A.2d 833, 835 (1976)). “Where a doubt exists as to whether a preliminary objection should be sustained, this doubt should be resolved in favor of overruling it.” *Powell v. Drumheller*, 653 A.2d 619, 621 (Pa. 1995) (internal citations omitted).

“Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings and no testimony or other

evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.” *Ward v. Moses Taylor Hosp.*, 2010 WL 4357308 (Pa. Com. Pl. Apr. 23, 2010). “All material facts set forth in the pleading and all inferences reasonably deducible therefrom, must be admitted as true.” *Id.* The impetus of the Court’s “inquiry is to determine the legal sufficiency of the complaint and to determine whether the pleading would permit recovery if ultimately proven.” *Id.* “Since sustaining a preliminary objection in the nature of a demurrer will result in a denial of a claim or a dismissal of a suit, a demurrer should only be granted where the case is clear and free from doubt.” *Id.* (internal citations omitted.)

VI. ARGUMENT

A. Response to First Preliminary Objection: Counts I-V Should Be Not Dismissed for Legal Insufficiency/Failure to State a Claim for Which Relief May Be Granted Because Petitioners Have Alleged Facts That, if True, Would Support Their Allegations That Respondent’s Certification of the ExpressVote XL Was Fraudulent, in Bad Faith, an Abuse of Discretion, or Clearly Arbitrary (Pa. R. C. P. 1028(a)(4))

In her first Preliminary Objection, Respondent argues that Petitioners must allege facts showing that Respondent’s certification was “fraudulent, in bad faith, an abuse of discretion or clearly arbitrary” in order to challenge it successfully. (Resp. Prelim. Obj. ¶¶ 16-24). This objection should be overruled for two reasons: that is not the legal standard at the pleading stage, and in any event, Petitioners *did* plead it.

First, Respondent misinterprets the law on this point. In this Court’s 2007 en banc opinion in *Banfield v. Cortes*, 922 A.2d 36, 46-68 (Pa. Commw. 2007), it rejected a similar preliminary objection, where respondent there tried to argue that it was insufficient for Plaintiffs simply to allege that the certification decision was not consistent with the Election Code. The Court disagreed, stating that “Electors’ well-pled allegations raise questions of fact as to whether it is possible to comply with section 1117–A of the Election Code absent a voter verified independent record.” *Id.* at 47. With that interpretation, no mention was made of any necessity to plead fraud, bad faith, abuse of discretion, or clear arbitrariness. Similarly, Petitioners in this case have raised well-pled allegations concerning the ExpressVote XL’s inability to conform to the Pennsylvania Election Code, which is enough to survive dismissal.

Respondent’s misplaced reliance on the phrase, “plead fraud, bad faith, abuse of discretion, or clear arbitrariness” comes from her incorrect interpretation of the Pennsylvania Supreme Court’s subsequent 2015 decision in *Banfield v. Cortes*, where the Supreme Court stated that

[W]hen the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation.... Thus, our courts will not disturb administrative discretion in interpreting legislation within an agency’s own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action.

Banfield v. Cortes, 110 A.3d 155, 174 (Pa. 2015) (internal citation omitted.) This is a common principle of administrative law, but was not at all meant to be used in reference to the pleading stage of a case. In *Banfield*, the Court only noted the standard of deference *after* plaintiffs had had the opportunity to take discovery and present evidence, and in the course of affirming the Commonwealth Court’s holding that plaintiffs had not actually proven their case. Moreover, the above quoted language in *Banfield* was also taken from another case in which the parties had finished discovery, had appealed a summary judgment decision to the Commonwealth Court, and then had finally appealed that to the Supreme Court. *See Winslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878 (Pa. 2000).¹

Second, Petitioners *did* plead in their Amended Petition that “on information and belief, the Secretary’s reexamination of the ExpressVote XL was conducted in bad faith.” (Amended Pet. at ¶¶ 250-54). Petitioners believe that once they take discovery into the circumstances of Respondent’s certification and reexamination actions—circumstances which are currently known only to Respondent, the Department of State, and its consultants—they will further be able to substantiate the pleading. Given that the 2015 *Banfield* case had already passed the discovery

¹Additionally, Respondent asserts this objection to Counts I-V, but Count IV includes a constitutional claim. (Amended Pet. at ¶¶ 9, 284.) Respondent asserts no authority for applying this standard to a constitutional claim.

stage, it is obvious that the Supreme Court was not purporting to provide a heightened pleading standard that would necessitate detailed substantiation of bad faith at the complaint stage. Thus, the Supreme Court’s 2015 *Banfield* opinion should not affect the outcome of the preliminary objections in this case, as they should still be governed by this Court’s 2007 *Banfield* opinion.

Because Respondent has not carried her burden on this objection, this Court should overrule the objection.

B. Response to Second Preliminary Objection: Count VI Should Not Be Dismissed for Legal Insufficiency/Failure to State a Claim for Which Relief May Be Granted Under Article I, Sections 5 and 26 of the Pennsylvania Constitution Because Petitioners Have Alleged a Plain, Palpable and Clear Abuse of Power That Actually Infringes on the Exercise of Their Voting Rights (Pa. R. C. P. 1028(a)(4))

Similar to her first Preliminary Objection, Respondent once again misinterprets the law on this point. Respondent argues that “in order to state a claim that action by the Commonwealth should be invalidated under Article I, Section 26 of the Pennsylvania Constitution...and Article I, Section 5 of the Pennsylvania Constitution...petitioner must allege that the action constitutes a “plain, palpable and clear abuse of the power which actually infringes on the rights of the electors.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 n.33, 808-09 (2018); Resp. Prelim. Obj. ¶ 26.

First of all, Petitioners did allege that “[b]y certifying the ExpressVote XL while being aware that the machine violated the Election Code in the many ways

already detailed in the Petition, the Secretary committed a plain, palpable, and clear abuse of power that infringes on the voting rights of the Individual Plaintiffs and of the Organizational Plaintiffs' individual members.” (Amended Pet. ¶ 255). Thus, should the standard apply, Petitioners have pled it. Petitioners, however, also contend that this standard is not necessarily applicable to the asserted claims.

Respondent's use of the phrase “plain, palpable, and clear abuse of power”, which is a quote from *League of Women Voters*, is not applicable here. *League of Women Voters* dealt with the question of when a court may invalidate a legislative enactment relating to elections; it did not purport to establish a new pleading standard for a case like this, where a party is alleging that the executive branch is violating a voter's rights under the state constitution.²

In *League of Women Voters* a group of plaintiffs brought an action against the state arguing that the Pennsylvania Congressional Redistricting Act of 2011 was an unconstitutional partisan gerrymander which infringed upon their constitutional rights. *League of Women Voters*, 178 A.3d at 741. The Supreme Court of Pennsylvania stated: “Pennsylvania's congressional districts are drawn

²In *League of Women Voters*, the Secretary of the Commonwealth filed an Answer and New Matter in response to the Petition for Review rather than preliminary objections, and this Court dismissed the other Respondents' preliminary objections with the exception of a challenge to the standing of the organizational entity to assert a gerrymandering claim. No. 261 M.D. 2017, Order Filed Nov. 13, 2017. This Court overruled all remaining preliminary objections, “based on the presence of disputed issues of fact and the exigency of the matter.” *Id.*

by the state legislature as a regular statute, subject to veto by the Governor. While this process is dictated by federal law, it is delegated to the states.” *Id.* at 742-43. In order to ensure that elections across the state were equal, the legislature would be given deference as well as discretion to enact laws to this end; as a result of that deference, legislative action could only be reviewed in “a case of plain, palpable, and clear abuse of the power which actually infringes on the rights of the electors.” *Id.* at 793. When it came to the 2011 map, however, Plaintiffs argued that the method by which the map had been drawn was done in such a way that it violated their constitutional rights and therefore the legislative action should be reviewed.

In the case at present, no legislative action is being reviewed. Instead, Plaintiffs set forth a clear constitutional injury by the *executive* branch—that by certifying the ExpressVote XL the Secretary has violated their constitutional rights by failing to provide voters with voting machines that ensure that “their votes [are] honestly counted.” *Banfield*, 922 A.2d at 48. Similar to this Court’s 2007 *Banfield* decision, where the Respondent brought forth a similar objection that was overruled, this Court should overrule this argument since a constitutional injury has been pled and Plaintiffs do not need to meet the heightened pleading standard found in *League of Women Voters*.

Because Plaintiffs have pled an injury under Article I, Sections 5 and 26 of the Pennsylvania Constitution, this Court's 2007 *Banfield* opinion control and Respondent's second preliminary objection should be overruled.

C. Response to Third Preliminary Objection: Petitioners Have Standing With Respect to the Violations of the Election Code Alleged in Counts I-V and Have Alleged Substantial, Direct, and Immediate Harm (Pa. R. C. P. 1028(a)(5))

Respondent objects that neither the Individual Plaintiffs nor the Organizational Plaintiffs have standing with respect to the violations of the Pennsylvania Election Code alleged in the Amended Petition for Review. This preliminary objection should be overruled with respect to both groups.

1. The Individual Plaintiffs Have Standing.

Regarding the Individual Plaintiffs, this Court's en banc opinion in *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. 2007) definitively established that individual electors have standing to challenge the Secretary's actions with respect to the testing, examination, and certification of voting systems, by asserting that they are required to use voting machines that are not reliable or secure and that they have no way of knowing whether the machines will accurately recognize and tabulate their votes in the next election. 922 A.2d at 44. The *Banfield* court found that individual electors have a "substantial" interest in challenging the certification of voting machines "by asserting that, unlike all citizens, they are required to vote using [machines] that are not reliable or secure and that do not provide a means for

vote verification or vote audit.” *Id.* Similarly, here the Individual Plaintiffs have specifically alleged that each of them resides in a county that uses the ExpressVote XL voting machine (Amended Petition at ¶¶ 3-4, 18-31), and that each of them cast a ballot in the November 5, 2019 general election and wants to cast ballots in future elections (Amended Petition at ¶ 35). Respondent’s attempt to claim that the Individual Plaintiffs have no particular interest “beyond that of all other electors” (Resp. Prelim. Obj. ¶ 42) disregards the specific factual pleadings concerning the Individual Plaintiffs’ immediate and substantial interest in challenging the continued certification of voting machines that they individually as residents of Philadelphia and Northampton Counties, as opposed to all Pennsylvania electors, are being forced to use, and the particular threat that these machines pose to their own individual voting rights.

Like the *Banfield* individual elector plaintiffs, the Individual Plaintiffs here “have alleged a direct interest” in the certification of the ExpressVote XL by asserting that, because of the specific identified deficiencies of the ExpressVote XL, they are “uncertain whether the outcome of the election in their jurisdiction will be accurately tabulated and reported.” (Amended Petition at ¶ 36.) *See Banfield*, 922 A.2d at 44 (“Electors alleged a direct interest by asserting that” because DREs are not reliable or secure, electors have “no way of knowing” whether the DREs will recognize their votes in an election.”). *Banfield* further

held that once the substantial and direct interest prongs are met, the “immediate” prong for standing is met where electors allege that they “each want to cast a ballot” in future elections, and “each wants their future votes ... to be properly counted and weighted.” *Id.* The fact that the electors had “no way of knowing” whether the voting machine recognizes, records, and counts their own votes “gives Electors a direct and immediate interest in the outcome” of the challenge to the certification of a voting machine. *Id.* at 44 n.7. The Individual Plaintiffs thus clearly have standing.

2. The Organizational Plaintiffs Have Standing.

An organization or association may have standing to bring suit under two circumstances: first, where the organization has standing in its own right to seek judicial relief from injury to itself; and second, on behalf of its members, where the members themselves have standing to bring the claims. *See Pa. Prison Soc. v. Cortes*, 508 F.3d 156, 162-63 (3d Cir. 2007); *see also Americans for Fair Treatment, Inc. v. Phila. Fed. of Teachers*, 150 A.3d 528 (2016) (“An association has standing to bring an action on behalf of its members where at least one of its members is suffering an immediate or threatened injury as a result of the challenged action.”) To have standing on the latter basis, the plaintiff organization “must allege sufficient facts to show that at least one of its members has a

substantial, direct and immediate interest.” *Americans for Fair Treatment*, 150 A.3d at 533.

The Organizational Plaintiffs have standing because they each have individual members who have standing to bring the claims asserted in the Amended Petition for the same reasons as the Individual Plaintiffs. As alleged in the Amended Petition, the National Election Defense Coalition has “at least one member who is a resident of Philadelphia County and has voted in the November 2019 election where the ExpressVote XL was first used and plans to continue to vote in Pennsylvania elections where the ExpressVote XL will be used.” (Amended Petition at ¶ 15.) Similarly, Citizens for Better Elections has “at least one member in each of Philadelphia and Northampton Counties who are residents of such county, who voted in the November 2019 election where the ExpressVote XL was first used, and who plan to continue to vote in Pennsylvania elections where the ExpressVote XL will be used.” (Amended Petition at ¶ 17.) Thus, the Organizational Plaintiffs have each alleged that they have members who have standing—specifically, electors in Philadelphia and Northampton Counties who have a direct, substantial, and immediate interest in challenging the certification of the ExpressVote XL. Respondent’s preliminary objection based on standing should be overruled.

D. Response to Fourth Preliminary Objection: Counts I-VI Should not be Dismissed for Nonjoinder of a Necessary Party Because the Counties are not Indispensable to the Resolution of This Action (Pa. R. C. P. 1028(a)(1))

Respondent objects that Petitioners failed to join three necessary parties — Philadelphia County, Northampton County, and Cumberland County (collectively, the “Counties”) — and, therefore, the Court lacks jurisdiction to adjudicate the dispute. But, as with the standing issue, Respondent fails to cite, much less distinguish, the Court’s binding, en banc decision in *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. 2007).³ *Banfield* mandates overruling Respondent’s Fourth Preliminary Objection. Furthermore, the reasoning of the majority in *Banfield* correctly distinguishes the authorities relied upon by Respondent.

In *Banfield*, the petitioners alleged multiple violations of the Pennsylvania Election Code and Pennsylvania Constitution with respect to certain Direct Recording Electronic voting systems (“DREs”). *Id.* at 41-42. The Banfield petitioners sought a “judgment declaring that the Secretary has violated the Election Code and the Pennsylvania Constitution” as well as an order directing the Secretary to decertify the DREs, establish testing criteria, and re-examine the DREs. *Id.* The Secretary objected, arguing that the petitioners had failed “to join

³Respondent knows that *Banfield* is central here. Following the Court’s January 15, 2020, Memorandum and Order (citing *Banfield*), the Court heard argument from the parties that largely focused on the applicability of *Banfield*.

indispensable parties, i.e., the fifty-six counties planning to use one or more of the challenged DREs” in the upcoming election. *Id.* at 43.

The Court overruled the Secretary’s objection in *Banfield*, concluding that the *Banfield* petitioners (“Electors”) were not indispensable:

Here, Electors do not seek redress from the fifty-six counties, and, because the November 2006 election has passed, the fifty-six counties will not be prejudiced by a judgment in favor of Electors. Even absent a request, the Secretary could de-certify a DRE at any time based solely on the statutory requirements for certification, and counties using certified DREs must be prepared for that possibility.

922 A.2d at 44. *Banfield* is on all fours with this case.⁴

As in *Banfield*, Petitioners here are alleging violation of the Pennsylvania Election Code and Constitution with respect to a voting machine. As in *Banfield*, Petitioners seek an order from this Court directing the Secretary to decertify that machine. And, as in *Banfield*, any non-party counties using that machine will bear the consequences of that decertification. The *Banfield* court determined that the counties would “not be prejudiced” because “the November 2006 election” had passed, but here, Respondent cites no authority relating the timing of the relief sought to the indispensability of parties. Nor could the timing of any one election

⁴In its January 15, 2020 Memorandum and Order, this Court pointed out that the *Banfield* petitioners were not seeking a preliminary injunction at the time of the 2006 *en banc* decision. This potential distinction is now moot because Petitioners withdrew their motion for a preliminary injunction. *See* January 24, 2020 Praecipe to Withdraw.

be dispositive to the jurisdictional question of joining necessary parties; after all, there will always be another election.

Respondent relies upon the Supreme Court's decision in *City of Philadelphia v. Com.*, 838 A.2d 566 (Pa. 2003), but *Banfield* both cited that decision and applied its principles correctly in holding that the absent counties were not indispensable. Many if not all cases involving decrees will affect third parties, sometimes profoundly. But indispensability depends on the rights at stake, because "the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of him or her." *City of Philadelphia*, 838 A.2d at 581 (quoting *CRY, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 375 (Pa. 1994)). Thus, key questions include the existence and "nature" of the absent parties' rights, and whether those rights are "essential to the merits of the issue." *Id.* at 581-82 (quoting *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981)). The focus must be on the rights at stake, rather than the nature or magnitude of the relief sought, as a guard against the temptation to include any party who may be affected. *City of Philadelphia*, 838 A.2d at 582; *see generally Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975) (defining an indispensable party as "one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights").

Here, the Counties are not necessary parties because their rights and interests are largely irrelevant to the merits of the case. The Counties do not certify or decertify voting machines — that is the Secretary’s responsibility. The Counties are not even parties to that process. Rather, the Counties select a machine from the menu of options approved by the Secretary, and must stand ready to react — as happens from time to time — when machines are removed from that menu for any reason. *See Banfield*, 922 A.2d at 44. Thus, although the Counties may be affected by the outcome of this case, they have no rights to be vindicated in the decertification process. This is not at all like the situation in a land use case like *HYK Const. Co., Inc. v. Smithfield Tp.*, 8 A.3d 1009, 1015 (Pa. Commw. Ct. 2010) (cited by Respondent), where the absent party had the opportunity to be — and actually was — granted party status in the underlying process. *Id.* at 1013, 1016 (“[T]he neighbors, having been granted party status at the conditional use hearing, participated in the proceedings and have an interest in not having those proceedings declared void.”). The Counties have no right to participate in the Secretary’s process, and thus the interests of justice are not advanced by involving them now. Similarly, the Counties are not prejudiced, because they lack a right that could be subject to prejudice.

The Respondent is well aware that counties are not party to, and have no voice in, voting machine certification or decertification. On February 18, 2020,

she testified in the Eastern District Court of Pennsylvania that it would be unacceptable for counties to object or request a delay if a system required immediate decertification. *See Stein v. Cortes*, No. 16-CV-6287 (E.D. Pa. Feb. 18, 2020), evidentiary hearing transcript at 37-38, attached hereto as Exhibit A.⁵

One indicator that an absent party may have rights of sufficient connection to the dispute that justice requires the presence of the party is when that party may have interests divergent from the named party. *See Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495 (Pa. Commw. 2002) (observing “[w]hile the governmental entity awarding a bid may ordinarily be expected to wish to avoid having its contract upset, it is far from certain that in the crucible of litigation it will always zealously defend the interests of the prevailing bidder”). Respondent has given no indication that the Counties have any unique or divergent perspective on this dispute, and there is no apparent reason why they would. To the contrary,

⁵As an example, in 2007, the WinVote voting system was suspended and then eventually decertified, and the three affected counties were required to adapt to the Secretary’s orders and obtain new equipment for holding an election on short notice. *See id.* at 38-39. Furthermore, all 67 counties recently upgraded their voting systems because the Respondent stated her intention to decertify the previous systems, over the strong objections of several counties. *See, e.g., Jonathan Lai, 2020 election votes are at stake as a Pennsylvania county plays a game of chicken with Gov. Tom Wolf*, Phila. Inquirer, Nov. 14, 2019, available at <http://bit.ly/39V205t>; *Mark Scolforo, Dauphin County caves, last county to buy new paper-trail voting machines*, Morning Call, Dec. 31, 2019, available at <http://bit.ly/2ISjWBG>.

given that the Counties do not have unique rights here, their contributions to the merits issues can be expected to be duplicative and burdensome.⁶

Respondent provides no distinction from this Court's *en banc* decision in *Banfield* because there is no distinction. *Banfield's* holding, and underlying reasoning, show that the Counties are not necessary parties, and therefore, Respondent's Fourth Preliminary Objection should be overruled.

E. Response to Fifth Preliminary Objection: Plaintiffs' Claims are Not Time-Barred by a Six-Month Statute of Limitations Because the Amended Petition for Review Does Not Assert a Claim for Mandamus and Petitioners' Claims Accrued Upon the Secretary's Issuance of the Reexamination Report on September 3, 2019

Respondent asserts that Plaintiffs' claims should be dismissed under the statute of limitations for mandamus actions against government officers, 42 P.S. § 5522(b)(1). This objection should be rejected for two reasons.

First, Respondent is wrong about the nature of the statute. This "notice of claim" statute is "**not strictly a statute of limitations** which bars the right to bring the action, but rather provides an affirmative defense to recovery." *Thomas v. City of Phila.*, 861 A.2d 1023, 1027 (Pa. Commw. Ct. 2004), citing *Landis v. City of*

⁶In fact, it appears that the Secretary does not anticipate any participation by Counties. See Zack Hoopes, *Cumberland County Introduces New Voting Machines to Public*, The Sentinel (Mar. 3, 2020) (available at https://www.buckslocalnews.com/news/state/cumberland-county-introduces-new-voting-machines-to-public/article_fa04d5ab-e468-55ad-961f-d1e50f5182ec.html) ("The Department of State has told the county that it doesn't anticipate involving counties any further in the ongoing litigation, Eichelberger said, leaving the county in a wait-and-see mode.").

Phila., 369 A.2d 746, 749 (Pa. Super. 1976) (emphasis added). Plaintiffs have also not pleaded a cause of action for a writ of mandamus.

Respondent's preliminary objection, if sustained, would create a dangerous and unintended rule that a voting machine's use in the Commonwealth could never be challenged by voters if the certification of that machine happened more than six months prior. Plaintiffs are injured every time they are forced to vote using a machine that is insecure, inaccurate, and violates the Election Code's and Pennsylvania Constitution's requirements. This ongoing injury recurs with every election: most recently the November 5, 2019 general election, and it will occur again during the April 28, 2020 primary election. Indeed, many of the injuries alleged by Plaintiffs – including but not limited to the ballot card's second exposure to the print head after the voter has approved the ballot, the ballot form violations, the violations of ballot secrecy, and the inaccuracy of the machines (*see generally* Amended Petition at 93, 97-98, 197, 219-245, 264-269) – could not have been known to Plaintiffs at the time the ExpressVote XL was initially certified for use.

Furthermore, assuming *arguendo* that Plaintiffs' claims accrued as of the date that Respondent took some action concerning certification of the ExpressVote XL (a point that Plaintiffs do not concede, for the reasons stated above), the relevant date would be September 3, 2019 – the date the Secretary issued the

Report Concerning the Reexamination Results of Election Systems and Software ExpressVote XL (“Reexamination Report”). (Amended Petition at ¶ 77.) The Reexamination Report contained several “additional conditions for certification” that jurisdictions using the machine “must” implement. (Amended Petition at ¶ 83.) To the extent that any of Plaintiffs claims can be considered to have accrued as the result of a certification determination by Respondent, the accrual date is September 3, 2019. Petitioners’ Petition for Review, filed on December 19, 2019, is well within the six-month limitations period that Respondent seeks to impose. To hold Petitioners to the original certification date would disincentivize the exhaustion of administrative remedies and render superfluous the ongoing obligation of the Secretary of the Commonwealth to re-examine and approve electronic voting machines for use in the Commonwealth as set forth in 25 P.S. § 3031.5, subsections (b) (“Upon receipt of a request for examination or reexamination of an electronic voting system ...the Secretary of the Commonwealth shall examine the electronic voting system and shall make and file in [her] office [her] report...stating, whether in [her] opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth...”) and subsection (c) (“[I]f, upon the reexamination of any such system previously approved, it shall appear that the system so reexamined can no longer be used safely by voters at elections

as provided in this act or does not meet the requirements hereinafter set forth, the approval of that system shall forthwith be revoked by the Secretary of the Commonwealth, and the system shall not thereafter be used or purchased for use in this Commonwealth”).

To adopt Respondent’s position would essentially immunize outdated voting machines from ever being challenged by individual voters in court. This Court should decline to impose such a rule.

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to overrule all of Respondent’s preliminary objections.

Respectfully submitted,

BAKER & HOSTETLER LLP

Dated: March 17, 2020

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CERTIFICATION

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.

Date: March 17, 2020

/s/ Lesley M. Grossberg
Lesley M. Grossberg (Pa. 208608)

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, ET AL : CIVIL CASE NUMBER
PLAINTIFFS :
VERSUS : 16-6287
PEDRO A. CORTES, ET AL, :
DEFENDANTS :

FEBRUARY 18, 2020
COURTROOM 14A
PHILADELPHIA, PA 19106

BEFORE THE HONORABLE PAUL S. DIAMOND, J.

EVIDENTIARY HEARING - DAY 1

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22

23

24

25

1 (CLERK OPENS COURT.)

2 THE COURT: PLEASE BE SEATED, EVERYBODY.

3 GOOD MORNING.

4 ALL COUNSEL: GOOD MORNING, YOUR HONOR.

5 THE COURT: OKAY. MR. MAAZEL, I BELIEVE

6 YOU ARE UP.

7 MR. MAAZEL: GOOD MORNING, YOUR HONOR.

8 DO YOU WANT APPEARANCES FROM THE PARTIES OR --

9 THE COURT: NO, NO. I THINK WE HAVE THAT

10 ALL DOWN, BUT IF YOU WOULD LIKE TO.

11 MR. MAAZEL: NO, I JUST WANTED TO CHECK,

12 YOUR HONOR.

13 WE JUST, AS A COUPLE OF HOUSEKEEPING

14 MATTERS, WE HAVE THE PLAINTIFFS/DEFENDANTS JOINT EXHIBIT

15 BINDERS UP THERE FOR THE COURT, AS WELL AS FOR THE

16 WITNESSES, WHOEVER THE WITNESSES ARE.

17 THE COURT: OKAY. GREAT.

18 MR. MAAZEL: AND I BELIEVE WE HAVE

19 AGREEMENT AMONG THE PARTIES THAT ALL OF THE EXHIBITS IN

20 THOSE BINDERS, WITH THE EXCEPTION OF PX 1016, ARE

21 AUTHENTIC. WE DON'T HAVE AGREEMENT ON THE ADMISSIBILITY

22 BUT WE DO ON THE AUTHENTICITY OF THE DOCUMENTS, RIGHT?

23 MR. WIYGUL: YES.

24 MR. MAAZEL: YOUR HONOR, TO START OUR

25 PRESENTATION, WE WANTED TO SIMPLY MOVE A NUMBER OF

1 MR. MAAZEL: RIGHT. SO, YOUR HONOR, THIS
2 IS -- AND PERHAPS WE SHOULD RESERVE THIS FOR WHEN WE GET
3 TO THE WITNESS.

4 THE COURT: THAT'S FINE.

5 MR. MAAZEL: MAYBE THAT MAKES MORE SENSE.
6 1012.

7 MR. WIYGUL: NO OBJECTION.

8 MR. MAAZEL: 1013.

9 MR. WIYGUL: NO OBJECTION.

10 MR. MAAZEL: AND THAT'S IT FOR NOW, YOUR
11 HONOR.

12 (JOINT EXHIBITS 1, 7, 10, 11, 19, 23-30,
13 30, 34, 38, 40-52, 57, 60 ADMITTED INTO EVIDENCE.)

14 (PLAINTIFFS' EXHIBITS PX 1001, 1002,
15 1006, 1010, 1012, 1013 ADMITTED INTO EVIDENCE.)

16 THE COURT: OKAY.

17 MR. MAAZEL: YOUR HONOR, WOULD YOU LIKE
18 ME TO QUESTION FROM HERE OR --

19 THE COURT: WHEREVER. YOU CAN REMAIN
20 SEATED, IT'S OKAY. WHEREVER YOU'RE MOST COMFORTABLE.

21 MR. ARONCHICK?

22 MR. ARONCHICK: JUST IN THE NATURE OF
23 HOUSEKEEPING.

24 THE COURT: YES.

25 MR. ARONCHICK: WE BROUGHT AN ELECTION

1 MACHINE HERE. WE INTEND TO USE IT WHEN THE ES&S WITNESS
2 IS ON THE STAND, WHICH WILL BE LATER, BUT WE JUST WANTED
3 TO LET YOU KNOW IT WAS HERE.

4 THE COURT: I ASSUMED THAT'S WHAT IT WAS.
5 OKAY.

6 MR. MAAZEL: WE CALL AS OUR FIRST WITNESS
7 SECRETARY KATHY BOOCKVAR, YOUR HONOR.

8 THE COURT: VERY WELL.

9 (WITNESS SWORN.)

10 THE CLERK: PLEASE STATE AND SPELL YOUR
11 NAME FOR THE RECORD.

12 THE WITNESS: SURE. IT'S KATHY BOOCKVAR,
13 K-A-T-H-Y, B-O-O-C-K-V, LIKE IN VICTORY, A-R.

14 THE COURT: GOOD MORNING.

15 THE WITNESS: GOOD MORNING, YOUR HONOR.

16 DIRECT EXAMINATION

17 BY MR. MAAZEL:

18 Q. GOOD MORNING, SECRETARY BOOCKVAR.

19 A. GOOD MORNING.

20 Q. NICE TO SEE YOU AGAIN.

21 A. YOU AS WELL.

22 Q. YOU WERE APPOINTED THE ACTING SECRETARY OF THE
23 COMMONWEALTH ON JANUARY 5, 2019, IS THAT CORRECT?

24 A. THAT'S CORRECT.

25 Q. AND YOU WERE APPOINTED SECRETARY OF THE

1 COMMONWEALTH ON NOVEMBER 19, 2019, CORRECT?

2 A. I WAS CONFIRMED, CORRECT.

3 Q. AND THAT'S YOUR CURRENT POSITION?

4 A. CORRECT.

5 Q. AT THE TIME OF THE SETTLEMENT AGREEMENT, WHEN
6 THE SETTLEMENT AGREEMENT WAS SIGNED, YOU WERE A SENIOR
7 ADVISOR TO GOVERNOR WOLF, IS THAT CORRECT?

8 A. THAT'S CORRECT.

9 Q. SO YOU WERE NOT PART OF THE DEPARTMENT AT THAT
10 TIME?

11 A. I WAS IN THE DEPARTMENT OF STATE, THAT'S WHERE I
12 WORKED, SO I WAS PART -- I'VE WORKED AS A PART OF THE
13 TEAM AT DEPARTMENT OF STATE. BUT MY BOSS WAS THE
14 GOVERNOR.

15 Q. AND YOU ATTENDED THE SETTLEMENT CONFERENCE WITH
16 JUDGE RICE IN THAT CAPACITY, CORRECT?

17 A. I DID.

18 Q. NOW, AS ACTING SECRETARY OR SECRETARY, DO YOU
19 SIGN ALL OF THE CERTIFICATIONS FOR VOTING SYSTEMS?

20 A. I DO.

21 Q. AND DO YOU HAVE TO PERSONALLY APPROVE THOSE
22 VOTING SYSTEMS?

23 A. I DO.

24 Q. OKAY. AS YOU KNOW, WE HAD A SETTLEMENT IN THIS
25 LITIGATION, CORRECT?

1 A. CORRECT.

2 Q. AND HAVE YOU HAD A CHANCE TO REVIEW THAT
3 SETTLEMENT AGREEMENT?

4 A. I HAVE.

5 Q. COULD YOU TURN TO JOINT EXHIBIT 30, WHICH IS IN
6 EVIDENCE?

7 THE COURT: I'M SORRY, WHAT IS THAT?

8 MR. MAAZEL: 30.

9 THE COURT: JOINT EXHIBIT?

10 MR. MAAZEL: 30, YOUR HONOR.

11 THE COURT: 30. OKAY.

12 BY MR. MAAZEL:

13 Q. SECRETARY BOOCKVAR, IS THIS THE SETTLEMENT
14 AGREEMENT IN THIS CASE?

15 A. YES.

16 Q. AND THIS WAS SIGNED BY ALL PARTIES, CORRECT?

17 A. YES.

18 Q. AND IS IT FAIR TO SAY THAT THIS SETTLEMENT
19 AGREEMENT WAS THE RESULT OF A CAREFUL NEGOTIATION AND
20 DRAFTING PROCESS AMONG THE PARTIES?

21 A. YES.

22 Q. THIS IS OBVIOUSLY AN IMPORTANT AGREEMENT, YES?

23 A. YES.

24 Q. IT AFFECTS THE ENTIRE COMMONWEALTH?

25 A. YES.

1 Q. AND IT'S AN AGREEMENT THAT THE DEFENDANTS LOOKED
2 AT VERY CAREFULLY BEFORE SIGNING AND APPROVING, CORRECT?

3 A. YES.

4 Q. AND AM I CORRECT THAT AMONG THE PEOPLE WHO HAD
5 TO APPROVE THE SETTLEMENT AGREEMENT ON THE DEFENSE SIDE
6 WERE THE ATTORNEY GENERAL'S OFFICE?

7 A. CORRECT.

8 Q. AND MR. GATES, WHO WAS THE CHIEF COUNSEL FOR THE
9 DEPARTMENT OF STATE?

10 A. CORRECT.

11 Q. AND SECRETARY CORTES, THE THEN SECRETARY OF THE
12 COMMONWEALTH?

13 A. HE IS ACTUALLY NOT A SIGNATORY TO THIS.

14 Q. BUT HE WAS A DEFENDANT AND COUNSEL SIGNED ON HIS
15 BEHALF, CORRECT?

16 A. CORRECT.

17 Q. AND SO DID HE HAVE TO APPROVE THIS AGREEMENT, TO
18 YOUR KNOWLEDGE?

19 A. TO MY KNOWLEDGE.

20 Q. AND DID THE GOVERNOR ALSO HAVE TO APPROVE THIS
21 AGREEMENT?

22 A. I CERTAINLY WAS INVOLVED ON THE GOVERNOR'S
23 BEHALF TO APPROVE THE AGREEMENT.

24 Q. AND SO DID YOU PERSONALLY REVIEW THIS AGREEMENT
25 CAREFULLY BEFORE IT WAS SIGNED AND APPROVED?

1 A. I DID.

2 Q. IF WE COULD LOOK AT PARAGRAPH 2 OF THE
3 AGREEMENT. DO YOU HAVE THAT IN FRONT OF YOU?

4 A. I DO.

5 Q. AND ON THE HEADING OF THIS IS: VOTER-VERIFIABLE
6 PAPER BALLOTS FOR EVERY VOTER, CORRECT?

7 A. CORRECT.

8 Q. AND IT SETS FORTH A NUMBER OF REQUIREMENTS UNDER
9 THE SETTLEMENT AGREEMENT, CORRECT?

10 A. CORRECT.

11 Q. AND SO PARAGRAPH 2 READS: THE SECRETARY WILL
12 ONLY CERTIFY NEW VOTING SYSTEMS FOR USE IN PENNSYLVANIA
13 IF THEY MEET THESE CRITERIA, RIGHT?

14 A. CORRECT.

15 Q. AND THE FIRST CRITERION IS THAT THE BALLOT ON
16 WHICH EACH VOTE IS RECORDED IS PAPER, CORRECT?

17 A. YEP.

18 Q. AND THE SECOND CRITERION IS THAT THEY PRODUCE A
19 VOTER-VERIFIABLE RECORD OF EACH VOTE, YES?

20 A. YES.

21 Q. AND A THIRD IS THAT THEY ARE CAPABLE OF
22 SUPPORTING THE ROBUST PRECERTIFICATION AUDITING PROCESS,
23 CORRECT?

24 A. CORRECT.

25 Q. AND THOSE ARE THREE -- WELL, WITHDRAWN.

1 THERE IS AN "AND" THERE BETWEEN 2B AND
2 2C, RIGHT?

3 A. YES.

4 Q. SO THESE ARE THREE SEPARATE REQUIREMENTS,
5 CORRECT? A, B AND C?

6 A. YES. THEY'RE INTERRELATED SEPARATE
7 REQUIREMENTS.

8 Q. BUT A AND B AND C ARE EACH SEPARATE REQUIREMENTS
9 THAT THE DEFENDANTS MUST MEET, CORRECT?

10 A. YEP.

11 Q. AND ALTHOUGH THEY MAY BE INTERRELATED, THEY ARE
12 DIFFERENT REQUIREMENTS, CORRECT?

13 A. THEY EACH ADD A DIFFERENT PART TO THE PROCESS.
14 AND, YOU KNOW, THEY WERE A CONTINUATION OF THE PATH THAT
15 WE WERE ALREADY ON.

16 Q. OKAY. WELL, WE'LL GET TO THAT IN A MINUTE.

17 BUT, FOR EXAMPLE, YOU CAN HAVE A
18 VOTER-VERIFIABLE RECORD OF A VOTE THAT IS NOT A PAPER
19 BALLOT, CORRECT?

20 A. PRESUMABLY.

21 Q. BUT THE SETTLEMENT AGREEMENT REQUIRES BOTH PAPER
22 BALLOT AND A VOTER-VERIFIABLE RECORD OF THE VOTE,
23 CORRECT? A AND B, CORRECT?

24 MR. ARONCHICK: OBJECTION.

25 THE COURT: SUSTAINED. I CAN READ.

1 MR. MAAZEL: OKAY.

2 BY MR. MAAZEL:

3 Q. NOW, ONE OF THE CERTIFICATIONS THAT YOU APPROVED
4 AS ACTING SECRETARY WAS SOMETHING CALLED THE CLEARBALLOT
5 CLEARVOTE 1.5.

6 MR. ARONCHICK: OBJECTION.

7 MR. MAAZEL: WHICH IS --

8 THE COURT: THIS IS WHAT YOU OBJECTED TO
9 PREVIOUSLY?

10 MR. ARONCHICK: YES.

11 MR. MAAZEL: NO, THIS IS NOT. HE DIDN'T
12 OBJECT, YOUR HONOR.

13 THE COURT: WELL, LET ME -- I AM NOT SURE
14 WHERE YOU ARE GOING WITH THIS, BUT I WILL LET YOU START.

15 MR. MAAZEL: OKAY.

16 BY MR. MAAZEL:

17 Q. COULD YOU PLEASE TURN TO PLAINTIFF'S
18 EXHIBIT 1002?

19 A. THAT IS TAB 2?

20 Q. YES.

21 AND THIS IS A REPORT OF THE SECRETARY
22 DATED MARCH 22, 2019 THAT YOU SIGNED, CORRECT?

23 A. CORRECT.

24 Q. AND WHEN YOU ANALYZED THESE REPORTS, YOU USED
25 CERTAIN TERMINOLOGY BASED ON THE TYPE OF VOTING SYSTEM

1 YOU ARE REVIEWING, CORRECT?

2 A. YES.

3 Q. SO DIFFERENT BALLOT-MARKING DEVICES CREATE
4 DIFFERENT TYPES OF PAPER, IS THAT FAIR?

5 A. SURE.

6 Q. AND SOME BALLOT-MARKING DEVICES PRODUCE A PIECE
7 OF PAPER THAT SHOWS CONTEST OPTIONS.

8 A. YOU ARE SAYING SOME?

9 Q. GENERALLY.

10 A. HAVE ALL THE DIFFERENT CHOICES, YES.

11 Q. YES.

12 OTHER BALLOT-MARKING DEVICES LIKE THIS XL
13 SYSTEM AT ISSUE IN THIS MOTION DO SOMETHING A LITTLE
14 DIFFERENT, RIGHT? THEY DON'T SHOW CONTEST OPTIONS?

15 A. THEY SHOW THE SELECTIONS THAT THE VOTER HAS
16 MADE.

17 Q. SO THEY'RE DIFFERENT TYPES OF PAPER THE
18 DIFFERENT BALLOT-MARKING DEVICES PRODUCE, RIGHT?

19 A. CORRECT.

20 Q. AND THEN IN YOUR CERTIFICATION REPORTS,
21 DEPENDING ON THE TYPE OF PAPER THAT IS PRODUCED, YOU
22 USED DIFFERENT TERMINOLOGY TO DESCRIBE WHAT THAT PAPER
23 IS, RIGHT?

24 A. WELL, SOMETIMES -- OFTENTIMES IT'S WHAT THE
25 MANUFACTURER REFERS TO IT AS. SO YOU OFTEN SEE

1 DIFFERENT TERMINOLOGY USED FOR WHAT MAY ACTUALLY LOOK
2 VERY SIMILAR.

3 Q. SO I WANT TO FOCUS ON THIS CLEARBALLOT, WHICH
4 YOUR OFFICE APPROVED, WHICH IS EXHIBIT 2, YES?

5 A. YES.

6 MR. MAAZEL: AND I WOULD LIKE TO MOVE
7 THIS INTO EVIDENCE, YOUR HONOR, TO SHOW THE TERMINOLOGY
8 THAT WAS USED FOR A DIFFERENT BALLOT-MARKING DEVICE,
9 WHICH IS AN ADMISSION AS TO WHAT THE DEFENDANTS --

10 THE COURT: I KNOW WHAT YOUR OBJECTION
11 IS, MR. ARONCHICK, AND I THINK IT GOES MORE TO WEIGHT
12 THAN ADMISSIBILITY. I WILL CONSIDER IT FOR WHATEVER IT
13 IS WORTH.

14 MR. MAAZEL: OKAY.

15 BY MR. MAAZEL:

16 Q. SO THIS IS AN OFFICIAL CERTIFICATION, IS THAT
17 RIGHT?

18 A. IT IS.

19 Q. AND THIS WAS PREPARED CAREFULLY BY THE
20 SECRETARY, I ASSUME?

21 A. IT WAS PREPARED BY SOMEBODY OTHER THAN THE
22 SECRETARY, BUT I DID REVIEW IT.

23 Q. YES. AND THIS IS AN ACCURATE DOCUMENT, TO YOUR
24 KNOWLEDGE?

25 A. IT IS.

1 Q. AND IT'S AN OFFICIAL DOCUMENT?

2 A. IT IS.

3 Q. NOW, THIS -- IF WE CAN TURN TO PAGE 6 OF THE
4 EXHIBIT, THE END OF THE FIRST PARAGRAPH. DO YOU SEE
5 THAT THE DEPARTMENT REFERRED TO THE PIECE OF PAPER
6 PRODUCED BY THIS MACHINE AS, QUOTE, A MARKED PAPER
7 BALLOT?

8 A. I DO. WE USE THAT TERMINOLOGY A LOT.

9 Q. WELL, I AM JUST ASKING ABOUT THIS DOCUMENT.

10 AND SO IT SAYS THAT THE OUTPUT IS A
11 MARKED PAPER BALLOT, CORRECT?

12 A. IT DOES.

13 Q. AND IN THE NEXT PARAGRAPH, YOU WROTE, QUOTE:
14 THE CLEARCAST TABULATOR IS A PRECINCT COUNT BALLOT
15 SCANNING SOLUTION THAT PROCESSES HAND-MARKED PAPER
16 BALLOTS, YES?

17 A. YES.

18 Q. AND ON PAGE 21 --

19 A. IT ALSO SAYS IN BALLOTS PRINTED BY CLEARACCESS.

20 THE COURT: I'M SORRY?

21 THE WITNESS: SORRY. HE READ ONE PART OF
22 THE SENTENCE, SO I JUST WANTED TO MAKE SURE THE WHOLE
23 SENTENCE WAS MENTIONED.

24 THE COURT: WHICH SENTENCE?

25 THE WITNESS: HE SAID IT MENTIONS

1 PROCESSES HAND-MARKED PAPER BALLOTS. SO I JUST WAS
2 CONTINUING THE REST OF THE SENTENCE. AND BALLOTS
3 PRINTED BY CLEARACCESS ACCESSIBLE BALLOT-MARKING DEVICE.

4 THE COURT: OKAY.

5 BY MR. MAAZEL:

6 Q. AND THEN AT PAGE 21, IN THE TOP PARAGRAPH, YOUR
7 OFFICE WROTE, QUOTE: THE TYPICAL VOTING EXPERIENCE
8 INVOLVES THE VOTER MAKING SELECTIONS ON CLEARACCESS TO
9 MARK THEIR BALLOT, PRINTING THEIR BALLOT, USING AN OKI
10 1432 PRINTER, AND THEN SCANNING THEIR PRINTED BALLOT ON
11 CLEARCAST TO CAST THE BALLOT, CORRECT?

12 A. CORRECT.

13 Q. AND THIS IS A DEVICE WHERE YOU MAKE YOUR
14 SELECTIONS ON A SCREEN AND THEN IT PRINTS A BALLOT,
15 RIGHT?

16 A. CORRECT.

17 Q. AND THAT'S WHAT YOU CALLED IT?

18 A. YEAH. AGAIN, WE CALLED IT THAT ALL THE TIME.

19 Q. OKAY.

20 A. IN LOTS OF DIFFERENT MACHINES IN EVERY PRESS
21 RELEASE WE EVER PUT OUT AND EVERY TESTIMONY WE EVER
22 GAVE.

23 Q. AND I THINK I WILL SPARE US EVERY REFERENCE TO
24 BALLOT OR PRINTED BALLOT, BUT THERE ARE MANY REFERENCES
25 TO BALLOTS OR PRINTED BALLOTS IN THIS DOCUMENT, CORRECT?

1 MR. ARONCHICK: OBJECTION.

2 THE COURT: IS THAT CORRECT?

3 THE WITNESS: I MEAN, I'D HAVE TO GO
4 THROUGH THE ENTIRE DOCUMENT, BUT SO FAR --

5 THE COURT: IT'S ALL RIGHT. YOU DON'T
6 HAVE TO GUESS. MOVE ALONG.

7 BY MR. MAAZEL:

8 Q. I'LL JUST GIVE YOU ONE MORE EXAMPLE. ON PAGE
9 23, IN THE MIDDLE PARAGRAPH, IT SAYS: ALL VOTERS USE
10 CLEARACCESS TO MARK THEIR BALLOT AND PRINT THEIR BALLOT
11 USING THE OKI 1432 PRINTER, RIGHT?

12 A. YES.

13 Q. NOW, IF WE COULD LOOK AT WHAT IS NOW IN
14 EVIDENCE, I BELIEVE, THAT IS JOINT EXHIBIT 52. AND IN
15 CONNECTION TO THAT, SECRETARY, IF YOU COULD ALSO LOOK AT
16 NUMBER 99 OF THE STIPULATION, WHICH I BELIEVE YOU HAVE
17 THE STIPULATIONS IN FRONT OF YOU. SHOULD BE IN THE
18 POCKET OF THE JOINT EXHIBITS BINDER. THIS WILL JUST
19 HELP ORIENT YOU TO THIS EXHIBIT.

20 A. I'M SORRY, WHICH BINDER AM I IN?

21 Q. IF YOU LOOK AT THE JOINT EXHIBITS BINDER, THERE
22 SHOULD BE A POCKET THAT HAS THE STIPULATIONS. DO YOU
23 SEE THAT?

24 A. YES.

25 THE COURT: DOES THIS SAY MARKED AS

1 EXHIBIT JX 52 AS AN EXAMPLE OF THE PAPER DOCUMENT USED
2 WITH THE CLEARBALLOT VOTING SYSTEM?

3 MR. MAAZEL: YES, YOUR HONOR.

4 THE COURT: OKAY.

5 BY MR. MAAZEL:

6 Q. AND SO WHAT I AM GETTING AT IS, JOINT EXHIBIT 52
7 IS AN EXAMPLE OF THE BALLOT PRODUCED BY THE CLEARBALLOT
8 DEVICE, RIGHT?

9 A. IT APPEARS TO BE SO, YES.

10 Q. AND THIS DOCUMENT CONTAINS CHOICES, CONTEST
11 OPTIONS, RIGHT?

12 A. YES.

13 Q. AND THAT IS ACTUALLY PRINTED OUT BY THE
14 CLEARBALLOT-MARKING DEVICE, YES?

15 A. YES.

16 Q. OKAY. IF YOU COULD NOW TURN TO PLAINTIFF'S
17 EXHIBIT 1006.

18 A. WHAT TAB?

19 Q. TAB 6 OF THE PLAINTIFF'S BINDER. AND THIS IS A
20 SEPARATE SYSTEM THAT YOU, AS ACTING SECRETARY, APPROVED
21 ON JUNE 13, 2019?

22 A. YES.

23 Q. AND IT INCLUDES AN APPROVAL FOR SOMETHING CALLED
24 THE VERITY TOUCH WRITER, A HART SYSTEM?

25 A. OKAY.

1 Q. IS THAT RIGHT?

2 A. I MEAN, IT'S A LARGER SYSTEM, IT'S THE VERITY
3 VOTING 2.3.4.

4 Q. OKAY. WHICH IS A HART SYSTEM?

5 A. YES.

6 Q. WHICH IS A DIFFERENT MANUFACTURER FROM ES&S, FOR
7 EXAMPLE?

8 A. CORRECT.

9 Q. AND THE SUITE OF PRODUCTS DESCRIBED IN THIS
10 CERTIFICATION INCLUDES THE HART VERITY TOUCH WRITER,
11 RIGHT?

12 A. YES.

13 Q. AND THAT'S ANOTHER BALLOT-MARKING DEVICE?

14 A. YES.

15 Q. THAT'S ANOTHER DEVICE WHERE A MACHINE -- YOU
16 MAKE SELECTIONS ON A MACHINE AND IT PRINTS OUT A
17 DOCUMENT, RIGHT?

18 A. YES.

19 Q. AND ON PAGE 6 OF THIS CERTIFICATION, IN THE END
20 OF THE SECOND FULL PARAGRAPH, IT SAYS, QUOTE, THE
21 PRINTED BALLOT WITH VOTER SELECTION IS SCANNED BY THE
22 VERITY SCAN USING THE SAME ALGORITHM USED FOR TABULATING
23 HAND-MARKED PAPER BALLOTS.

24 DO YOU SEE THAT SENTENCE?

25 A. I DO.

1 MR. ARONCHICK: YOUR HONOR, SAME
2 OBJECTION.

3 THE COURT: SAME RULING. I'LL TAKE IT
4 FOR WHAT IT'S WORTH.

5 BY MR. MAAZEL:

6 Q. AND SO HERE AGAIN YOU ARE REFERRING TO THE
7 DOCUMENT PRODUCED BY THE BALLOT-MARKING DEVICE AS,
8 QUOTE, A PRINTED BALLOT, YES?

9 A. YES. AGAIN, CONSISTENT WITH WHAT WE DID
10 REGULARLY.

11 Q. AND IF WE LOOK AT JOINT EXHIBIT 60.

12 MR. MAAZEL: AND IF YOU NEED TO LOOK AT
13 THE STIPULATION, THIS WOULD BE 107, YOUR HONOR.

14 THE COURT: AND IT'S STIPULATED THAT THIS
15 IS THE --

16 MR. MAAZEL: THE HART.

17 THE COURT: -- THE HART EXAMPLE OF A
18 BALLOT?

19 MR. MAAZEL: YES.

20 BY MR. MAAZEL:

21 Q. AND SO, SECRETARY, THIS IS THE DOCUMENT, JOINT
22 EXHIBIT 60, THAT IS THE BALLOT PRODUCED BY THIS HART
23 VERITY BALLOT-MARKING DEVICE, YES?

24 A. OKAY. YES.

25 Q. AND THIS, AGAIN, CONTAINS CONTEST OPTIONS?

1 A. YES.

2 Q. IT LOOKS LIKE A TRADITIONAL PAPER BALLOT USED BY
3 PEOPLE WHEN THEY DON'T USE A BALLOT-MARKING DEVICE AT
4 ALL, YES?

5 MR. ARONCHICK: OBJECTION.

6 THE COURT: SUSTAINED.

7 BY MR. MAAZEL:

8 Q. NOW, YOU ALSO HAVE A RECERTIFICATION REPORT FOR
9 THE ES&S EXPRESSVOTE XL THAT IS THE ISSUE OF THIS
10 MOTION, RIGHT?

11 MR. ARONCHICK: OBJECTION.

12 THE COURT: IF SHE KNOWS. DO YOU KNOW?

13 THE WITNESS: I MEAN, MY UNDERSTANDING IS
14 THAT THIS CASE IS NOT SPECIFICALLY RELATED TO THE
15 RECERTIFICATION. THAT THIS IS RELATED TO THE SETTLEMENT
16 AGREEMENT.

17 THE COURT: WHY DON'T YOU ASK A DIFFERENT
18 QUESTION.

19 MR. MAAZEL: SURE.

20 BY MR. MAAZEL:

21 Q. IF YOU COULD TURN TO JOINT EXHIBIT 45, WHICH IS,
22 I BELIEVE, IN EVIDENCE. IS THIS A CERTIFICATION OR A
23 RECERTIFICATION FOR THE EXPRESSVOTE XL?

24 A. IT IS.

25 Q. AND DID YOU SIGN THIS AS ACTING SECRETARY OF THE

1 COMMONWEALTH ON SEPTEMBER 3RD, 2019?

2 A. I DID.

3 Q. AND THIS IS AN OFFICIAL DOCUMENT?

4 A. IT IS.

5 Q. AND IT IS A TRUTHFUL AND ACCURATE DOCUMENT?

6 A. IT IS.

7 Q. AND THIS WAS THE DOCUMENT THAT ALLOWED COUNTIES
8 SUCH AS PHILADELPHIA TO USE THE XL SYSTEM, CORRECT?

9 MR. ARONCHICK: OBJECTION.

10 THE COURT: IF SHE KNOWS.

11 THE WITNESS: NO. THEY WERE ALREADY
12 USING THE SYSTEM.

13 BY MR. MAAZEL:

14 Q. WELL --

15 A. OR THEY HAD ALREADY SELECTED THE SYSTEM. SORRY.

16 Q. IN THIS REPORT, YOU HAD DECERTIFIED THE XL
17 SYSTEM, THEN NO COUNTY COULD USE IT, IS THAT RIGHT?

18 A. NO. WE HAD NEVER DECERTIFIED THE SYSTEM.

19 Q. I UNDERSTAND. BUT IF, IN THIS REPORT, THE
20 SECRETARY DID DECERTIFY THE SYSTEM, THEN PHILADELPHIA
21 AND OTHER COUNTIES COULD NOT USE IT, CORRECT?

22 A. THAT'S CORRECT. IF WE HAD DECERTIFIED, THAT
23 WOULD BE CORRECT.

24 Q. AND SO IF WE TURN TO PAGE 3 OF YOUR
25 CERTIFICATION, RECERTIFICATION, THERE'S A PARAGRAPH

1 CALLED EXPRESSVOTE XL?

2 A. YES.

3 Q. AND IN THE FIFTH LINE -- I'M SORRY, THE FOURTH
4 LINE, YOU WROTE, QUOTE, THE INTEGRATED THERMAL PRINTER
5 PRINTS THE VOTER'S CHOICES ON A VOTER-VERIFIABLE PAPER
6 VOTE SUMMARY RECORD AND THE SYSTEM SCANS AND SAVES AN
7 IMAGE OF THE PRINTED VOTE SUMMARY RECORD.

8 THAT'S WHAT YOU WROTE?

9 A. I DIDN'T WRITE IT, BUT, YES.

10 Q. THAT'S WHAT YOU SIGNED?

11 A. CORRECT.

12 Q. THAT'S WHAT YOUR OFFICE APPROVED?

13 A. CORRECT.

14 Q. AND SO IN THIS CASE YOU REFERRED TO THE PIECE OF
15 PAPER THAT COMES THROUGH THE XL AS A, QUOTE, PAPER VOTE
16 SUMMARY OF RECORD, YES?

17 A. YES. AND, AGAIN, AS I MENTIONED --

18 Q. THAT'S A YES OR NO QUESTION.

19 A. -- EARLIER, IT'S BECAUSE THAT'S WHAT ES&S CALLS
20 IT IN THEIR SYSTEM.

21 THE COURT: SHE CAN EXPLAIN HER ANSWER
22 AFTER SHE ANSWERS YES OR NO, WHICH IS WHAT SHE DID.

23 MR. MAAZEL: I UNDERSTAND, YOUR HONOR.

24 BY MR. MAAZEL:

25 Q. AND IN THE NEXT LINE, YOU REFERRED -- OR YOUR

1 OFFICE, AGAIN, REFERRED TO THE DOCUMENT AS A VOTE
2 SUMMARY RECORD, YES?

3 A. I'M SORRY. IN THE FOLLOWING LINE, IS THAT WHAT
4 YOU SAID?

5 Q. YES.

6 A. YES.

7 Q. AND ON PAGE 7, IN THE SIXTH LINE FROM THE TOP, I
8 BELIEVE, YOUR OFFICE WROTE, QUOTE, THE XL PRINTS THE
9 VOTER'S CHOICES ON A PAPER VOTE SUMMARY RECORD USING A
10 THERMAL PRINTER, YES?

11 A. AGAIN, YES. THE SAME LANGUAGE THAT THE ES&S
12 SYSTEM DESCRIBES IT AS.

13 Q. BUT THIS DOCUMENT WAS CREATED BY YOUR OFFICE,
14 NOT BY ES&S, YES?

15 A. YES.

16 Q. AND YOUR OFFICE DESCRIBED THIS PIECE OF PAPER AS
17 A VOTE SUMMARY RECORD ABOUT 23 TIMES IN THIS DOCUMENT,
18 IS THAT RIGHT?

19 MR. ARONCHICK: OBJECTION.

20 THE WITNESS: I HAVEN'T COUNTED.

21 THE COURT: WOULD IT BE FAIR TO SAY YOU
22 REFER TO IT SEVERAL TIMES?

23 THE WITNESS: YES.

24 THE COURT: IN THAT WAY?

25 THE WITNESS: YES, THANK YOU.

1 BY MR. MAAZEL:

2 Q. AND NOT ONCE IN THIS ENTIRE DOCUMENT DOES YOUR
3 OFFICE EVER CALL THIS PIECE OF PAPER A PAPER BALLOT,
4 ISN'T THAT RIGHT?

5 A. I'D HAVE TO REVIEW THE ENTIRE DOCUMENT.

6 Q. OKAY.

7 A. HOWEVER, WHEN WE PUT OUT OUR PRESS RELEASE ABOUT
8 PHILADELPHIA SELECTING THIS SYSTEM, WE REFER TO IT AS A
9 VOTER-VERIFIABLE PAPER BALLOT.

10 MR. MAAZEL: I JUST OBJECT TO THAT AS
11 NONRESPONSIVE.

12 THE COURT: OVERRULED.

13 BY MR. MAAZEL:

14 Q. THE XL PRODUCES A PIECE OF PAPER THAT, UNLIKE
15 THE HART AND UNLIKE THE CLEARBALLOT THAT WE LOOKED AT A
16 MINUTE AGO, DOES NOT SHOW CONTEST OPTIONS, AM I RIGHT?

17 A. CORRECT. THE PAPER BALLOT OF MANY OF OUR
18 SYSTEMS DOES NOT SHOW THE CONTEST OPTIONS.

19 Q. I AM JUST REFERRING TO THE XL SPECIFICALLY DOES
20 NOT SHOW CONTEST OPTIONS?

21 A. CORRECT. LIKE I SAID, LIKE MANY OTHER SYSTEMS.

22 Q. AND, NOW, YOU HAVE TESTIFIED THAT YOU CALLED
23 THIS PIECE OF PAPER A VOTE SUMMARY RECORD BECAUSE THAT'S
24 WHAT ES&S CALLS THEM?

25 A. I BELIEVE ES&S CALLS IT SOMETHING LIKE VOTE

1 SUMMARY RECORD.

2 Q. ARE YOU REQUIRED IN YOUR OFFICIAL CERTIFICATION
3 TO USE THE TERMINOLOGY OF THE MANUFACTURER?

4 A. REQUIRED, NO. I MEAN, STATUTORILY IT'S NOT THAT
5 EXPLICIT.

6 Q. YOU CAN USE THE LANGUAGE THAT YOU BELIEVE IS
7 APPROPRIATE IN YOUR OWN OFFICIAL DOCUMENT, RIGHT?

8 A. WELL, I TRUST OUR VOTING SYSTEMS ANALYST TO USE
9 THE LANGUAGE THAT SHE THINKS IS CONSISTENT WITH THE
10 SYSTEM.

11 Q. OKAY. WHO WAS YOUR VOTING SYSTEMS ANALYST?

12 A. WHO IS IT? SHE IS A STAFF PERSON.

13 Q. WHO WAS YOUR VOTING SYSTEMS ANALYST FOR THIS
14 RECERTIFICATION OF THE XL?

15 A. THE SAME PERSON THAT HAS BEEN THE VOTING SYSTEM
16 ANALYST FOR THE LAST -- FOR ALL THESE SYSTEMS. HER NAME
17 IS SINDHU.

18 Q. SINDHU?

19 A. SINDHU RAMACHANDRAN.

20 Q. AND YOU TRUST MS. RAMACHANDRAN'S WORK?

21 A. I DO.

22 Q. AND YOU APPROVE OF IT?

23 A. I DO.

24 Q. AND SO WHEN SHE CALLED IT A VOTE SUMMARY RECORD,
25 YOU APPROVED THAT AND YOU HAD NO QUALMS ABOUT DOING SO,

1 CORRECT?

2 A. AGAIN, WHAT MATTERED WAS THE THINGS THAT WERE
3 REQUIRED FOR CERTIFICATION AND THAT WE REQUIRED UNDER
4 OUR DIRECTIVES. SO IT WAS A VOTER-VERIFIABLE PAPER
5 BALLOT VOTING SYSTEM THAT MET SECURITY STANDARDS AND
6 ACCESSIBILITY TESTING. SO YES.

7 Q. OKAY. ARE YOU FAMILIAR WITH THE NATIONAL
8 INSTITUTE OF STANDARDS AND TECHNOLOGY?

9 A. YES.

10 Q. WERE YOU FAMILIAR WITH THAT BACK WHEN THE
11 SETTLEMENT AGREEMENT WAS SIGNED?

12 A. FAMILIAR WITH IT AS AN ORGANIZATION, SURE.

13 Q. AND IT'S A FEDERAL AGENCY?

14 A. IT'S -- IS IT AN AGENCY? WHAT IS THE DEFINITION
15 OF AGENCY?

16 Q. WELL, WHAT DO YOU UNDERSTAND THE NATIONAL
17 INSTITUTE OF STANDARDS AND TECHNOLOGY TO BE?

18 A. TO BE HONEST WITH YOU, I AM NOT REALLY SURE WHAT
19 THE SCOPE OF WHAT THEY DO IS. I KNOW THAT THEY ARE
20 INVOLVED IN TECHNOLOGY IN SOME REGARDS. BUT HONESTLY, I
21 DON'T KNOW.

22 Q. WHAT DID YOU UNDERSTAND THAT -- AND IT'S ALSO
23 REFERRED TO AS NIST, YES?

24 A. YES.

25 Q. DID YOU UNDERSTAND THAT NIST DEVELOPS GUIDELINES

1 AND BEST PRACTICES FOR ELECTION SECURITY?

2 A. AGAIN, I AM NOT FAMILIAR WITH WHAT THEIR EXACT
3 SCOPE IS, NO.

4 Q. WELL, DID YOU KNOW THAT THEY WERE A FEDERAL
5 AGENCY THAT CERTIFIED VOTING SYSTEMS FOR THE FEDERAL
6 GOVERNMENT?

7 A. WELL, THE EAC DOES CERTIFICATION OF VOTING
8 SYSTEMS FOR THE FEDERAL GOVERNMENT, SO I'M NOT AWARE OF
9 NIST DOING THEIR OWN CERTIFICATIONS, BUT --

10 THE COURT: THE EAC?

11 THE WITNESS: SO THE FEDERAL ELECTION
12 ASSISTANCE COMMISSION IS THE FEDERAL AGENCY -- SORRY,
13 YOUR HONOR -- THAT DOES THE ACTUAL CERTIFICATIONS OF
14 VOTING SYSTEMS. SO PENNSYLVANIA LAW REQUIRES BOTH
15 FEDERAL EAC CERTIFICATION AS WELL AS PENNSYLVANIA
16 CERTIFICATION.

17 BY MR. MAAZEL:

18 Q. AND ARE YOU AWARE THAT NIST ADVISES THE EAC IN
19 THEIR WORK?

20 A. I WAS NOT AWARE OF THAT.

21 Q. OKAY. WERE YOU FAMILIAR WITH THE NIST ELECTION
22 GLOSSARY DEFINING TERMS?

23 MR. ARONCHICK: OBJECTION.

24 THE COURT: IF SHE WAS FAMILIAR WITH IT?

25 MR. MAAZEL: THAT'S MY QUESTION.

1 THE WITNESS: AT THE TIME OF THE
2 SETTLEMENT AGREEMENT, NO.

3 BY MR. MAAZEL:

4 Q. WHEN DID YOU BECOME FAMILIAR WITH THAT?

5 A. WITHIN THE LAST COUPLE OF WEEKS.

6 Q. DOES PENNSYLVANIA USE ABSENTEE BALLOTS?

7 A. WE DO.

8 Q. AND THOSE ARE FOR PEOPLE WHO CANNOT MAKE IT TO
9 THE POLLS FOR VARIOUS REASONS?

10 A. SO ABSENTEE, YES. WE DID JUST PASS ACT 77 IN
11 THE FALL, WHICH ALSO ALLOWS MAIL-IN VOTING FOR PEOPLE
12 WHO DON'T -- WITHOUT AN EXCUSE.

13 Q. AND THOSE ARE PAPER BALLOTS?

14 A. THEY ARE.

15 Q. AND THOSE CONTAIN CONTEST OPTIONS?

16 A. THEY DO.

17 Q. IF WE CAN SHOW YOU JOINT EXHIBIT 57.

18 MR. MAAZEL: WHICH, YOUR HONOR, CONNECTS
19 TO STIPULATION 104.

20 BY MR. MAAZEL:

21 Q. JOINT EXHIBIT 57, SECRETARY, IS THE VOTE SUMMARY
22 CARD GENERATED BY THE XL, CORRECT?

23 A. CORRECT.

24 Q. AND IS THAT THE TYPE OF DOCUMENT YOU WOULD EVER
25 SEND TO AN ABSENTEE VOTER?

1 A. I DON'T SEND BALLOTS TO ABSENTEE VOTERS, BUT
2 THIS DOES NOT LOOK LIKE ABSENTEE BALLOTS.

3 Q. OKAY. I MEAN, PLAINLY, A PIECE OF PAPER LIKE
4 THIS, AN ABSENTEE VOTER CANNOT VOTE ON IT, RIGHT?

5 A. WELL, IT'S A DIFFERENT THING. THERE'S --

6 Q. LET ME ASK A DIFFERENT QUESTION.

7 DO YOU USE PROVISIONAL BALLOTS IN
8 PENNSYLVANIA?

9 A. WE DO.

10 Q. AND, JUST BRIEFLY, WHAT IS A PROVISIONAL BALLOT?

11 A. A PROVISIONAL BALLOT IS FOR CIRCUMSTANCES WHERE
12 THE, FOR EXAMPLE, IF A VOTER GOES INTO A POLLING PLACE
13 AND THEIR NAME IS NOT IN THE DISTRICT REGISTER AND THEY
14 CANNOT IDENTIFY, FOR EXAMPLE, THE RIGHT PRECINCT WHERE
15 THEY SHOULD GO TO, THEY HAVE THE OPPORTUNITY TO VOTE ON
16 A PROVISIONAL BALLOT, WHICH MAY OR MAY NOT BE COUNTED
17 LATER, DEPENDING ON WHETHER THEY WERE DETERMINED
18 ELIGIBLE OR NOT.

19 Q. AND IS A PROVISIONAL BALLOT A PAPER BALLOT?

20 A. IT IS.

21 Q. AND IT CONTAINS CONTEST OPTIONS?

22 A. IT DOES.

23 Q. NOW, WE DISCUSSED AT THE BEGINNING OF YOUR
24 TESTIMONY THAT ONE OF THE REQUIREMENTS, IN ADDITION TO
25 THE PAPER BALLOT REQUIREMENT, IS VOTER VERIFIABILITY OF

1 THE VOTE. DO YOU REMEMBER THAT?

2 A. I'M SORRY, CAN YOU ASK THAT QUESTION AGAIN?

3 Q. LET'S LOOK AGAIN AT JOINT EXHIBIT 30. AND SO
4 PARAGRAPH 2A REQUIRES THAT ANY VOTING SYSTEM PRODUCE A,
5 QUOTE, VOTER-VERIFIABLE RECORD OF EACH VOTE, YES?

6 A. THAT'S 2B.

7 Q. I'M SORRY, 2B?

8 A. YES.

9 Q. AND VOTER-VERIFIABLE MEANS VERIFIABLE BY THE
10 VOTER, YES?

11 A. CORRECT.

12 Q. IT DOES NOT MEAN VERIFIABLE BY SOME AUDITOR IF
13 EVER, IT MEANS VERIFIABLE BY THE ACTUAL VOTER, YES?

14 A. CORRECT.

15 Q. AND WHAT THE VOTER IS SUPPOSED TO VERIFY UNDER
16 THE SETTLEMENT AGREEMENT IS THEIR VOTE, YES?

17 A. CORRECT. OR AT LEAST THEIR SOON-TO-BE-VOTE.
18 TECHNICALLY IT'S NOT A VOTE UNTIL THEY CAST IT.

19 Q. THE XL -- THE VOTE SUMMARY RECORDS THAT THE XL
20 PRODUCES CONTAINS BARCODES, YES?

21 A. IT DOES.

22 Q. AND IT ALSO CONTAINS WORDS?

23 A. YES.

24 Q. AND IF WE COULD JUST LOOK AGAIN AT JOINT
25 EXHIBIT 57. THE BARCODES ARE AT THE TOP AND THE WORDS

1 ARE BELOW, YES?

2 A. CORRECT.

3 Q. AND THE WORDS ARE SUPPOSED TO BE THE SELECTION
4 THAT THE VOTER MADE. IN THIS CASE, REPRESENTATIVE
5 KIMBERLY JONES AND JAMES COLLINS, YES, AND OTHERS.

6 A. THOSE ARE THE TWO AT THE TOP, YES.

7 Q. BUT AM I CORRECT THAT THE XL ACTUALLY TABULATES
8 AND COUNTS AS THE VOTE THE BARCODES?

9 A. SIMILAR TO EVERY VOTING SYSTEM CERTIFIED IN
10 PENNSYLVANIA, WHICH ALL USE, EXCEPT FOR ONE
11 CONFIGURATION OF ONE SYSTEM, THEY ALL USE EITHER
12 BARCODES, QR CODES OR TIMING MARKS OR SENSORS, YES.

13 Q. SECRETARY, DOES THE XL COUNT THE BARCODES OR THE
14 WORDS AS THE VOTE?

15 A. I JUST ANSWERED, YES.

16 MR. ARONCHICK: OBJECTION.

17 BY MR. MAAZEL:

18 Q. BARCODES?

19 A. YES. CONSISTENT WITH WHAT EVERY SINGLE VOTING
20 SYSTEM EXCEPT FOR ONE CONFIGURATION OF ONE SYSTEM DOES.

21 Q. AND CAN A VOTER READ A BARCODE?

22 A. NOT WITHOUT A BARCODE READER.

23 Q. OKAY. DO YOU PROVIDE BARCODE READERS TO VOTERS
24 WHEN THEY COME TO THE POLLS?

25 A. WE DON'T. WE ALSO DON'T PROVIDE QR CODE READERS

1 OR TIME MARK READERS OR SENSOR READERS.

2 Q. CAN A VOTER UNDERSTAND A BARCODE?

3 A. SIMILAR TO QR CODE OR TIMING MARKS OR SENSORS,
4 NO.

5 Q. CAN THE VOTER VERIFY THAT THE BARCODE REFLECTS
6 THAT VOTER'S VOTE?

7 A. WITHOUT A READER, NO.

8 Q. NOW, SOMETIMES YOUR DEPARTMENT HAS TO DECERTIFY
9 A VOTING SYSTEM, YES?

10 A. YES.

11 Q. AND WHAT ARE THE VARIOUS REASONS THAT YOUR
12 DEPARTMENT WOULD HAVE TO DECERTIFY A VOTING SYSTEM?

13 A. WELL, IF IT WAS DETERMINED, FOR EXAMPLE, IN
14 ANOTHER STATE TO BE THAT IT'S NOT MEETING ONE OF -- SO
15 IF IT'S NOT CAPABLE OF ACCURACY, IF IT'S DECERTIFIED BY
16 THE FEDERAL EAC, I MEAN, IT COULD BE A HOST OF REASONS
17 THAT IT NO LONGER CAN BE SAFELY USED BY THE VOTERS OF
18 PENNSYLVANIA.

19 Q. SOMETIMES DECERTIFICATION MUST HAPPEN VERY
20 QUICKLY, YES?

21 A. INFREQUENTLY, THANK GOODNESS, BUT YES.

22 Q. AND WOULD YOU AGREE THAT, IN THOSE SITUATIONS,
23 THAT IT'S IMPORTANT FOR COUNTIES TO BE RESILIENT AND
24 FLEXIBLE IN THEIR RESPONSE TO YOUR DECERTIFICATION
25 ORDER?

1 A. IT'S ALWAYS IMPORTANT.

2 Q. WOULD IT BE ACCEPTABLE FOR A COUNTY TO SAY TO
3 YOUR OFFICE, IF YOU DECERTIFY A SYSTEM, WE NEED 18 TO
4 24 MONTHS TO GET A NEW SYSTEM IN PLACE? IS THAT
5 ACCEPTABLE?

6 A. NOT IF IT WAS SOMETHING THAT REQUIRED IMMEDIATE
7 DECERTIFICATION.

8 Q. IN FACT, THERE HAVE BEEN EXAMPLES IN
9 PENNSYLVANIA WHERE YOUR DEPARTMENT DECERTIFIED SYSTEMS,
10 YES?

11 A. CORRECT.

12 Q. FOR EXAMPLE, IN DECEMBER 2007, THERE WAS A
13 SYSTEM THAT YOU DECERTIFIED THAT WAS USED IN
14 NORTHAMPTON, LACKAWANNA AND WAYNE COUNTIES, YES?

15 A. YES. AND WE HAD HAD NOTICE BACK IN AUGUST, AND
16 THE COUNTIES HAD NOTICE BACK IN AUGUST OF THAT YEAR THAT
17 THIS WAS LIKELY COMING.

18 Q. THE DECISION TO DECERTIFY THAT SYSTEM OCCURRED
19 IN DECEMBER 2007, YES?

20 A. IT DID, BUT I THINK IT WAS TEMPORARILY SUSPENDED
21 EARLIER.

22 Q. AND THOSE THREE COUNTIES WERE ABLE, IN TIME FOR
23 A PRESIDENTIAL PRIMARY IN APRIL OF 2008, TO ACQUIRE NEW
24 EQUIPMENT AND TRAIN THEMSELVES AND THEIR POLL WORKERS IN
25 TIME FOR A PRESIDENTIAL PRIMARY, CORRECT?

1 A. YES. OF COURSE, THE LARGEST OF THOSE THREE
2 COUNTIES WAS MAYBE 200-AND-SOME-ODD THOUSAND VOTERS.

3 Q. WE WILL GET TO THE SIZE OF THE COUNTIES IN A
4 MOMENT.

5 BUT IT IS A FACT THAT BETWEEN
6 DECEMBER 2007, WHEN YOUR OFFICE MADE THE DECISION, AND
7 APRIL OF 2008, THAT THOSE THREE COUNTIES ALL DECERTIFIED
8 ONE SYSTEM AND TOOK A NEW SYSTEM AND TRAINED THEIR POLL
9 WORKERS AND DID A PRESIDENTIAL PRIMARY. THAT IS A FACT,
10 YES?

11 A. YES.

12 Q. FOUR MONTHS, YES?

13 A. NO. AGAIN, I THINK IT'S AUGUST WAS WHEN WE
14 TEMPORARILY SUSPENDED USE OF THE SYSTEM. SO THEY HAD
15 ABOUT EIGHT MONTHS.

16 Q. THOSE THREE COUNTIES COLLECTIVELY CONTAIN ABOUT
17 40 PERCENT OF THE POPULATION OF PHILADELPHIA, YES?

18 A. I'M SORRY?

19 Q. THOSE THREE COUNTIES, NORTHAMPTON, LACKAWANNA
20 AND WAYNE, COLLECTIVELY ARE ABOUT 40 PERCENT OF THE
21 POPULATION OF PHILADELPHIA, YES?

22 A. I'M NOT -- I DON'T WANT TO CONFIRM THAT WITHOUT
23 DOING THE MATH.

24 Q. THERE WAS ANOTHER EXPERIENCE WHERE THE VERY SAME
25 SYSTEM, VOTING SYSTEM WAS DECERTIFIED IN VIRGINIA, YES?

1 MR. ARONCHICK: OBJECTION.

2 THE COURT: WHICH VERY SAME VOTING
3 SYSTEM?

4 MR. MAAZEL: THE SAME -- I'M SORRY. THE
5 SAME SYSTEM THAT WAS DECERTIFIED IN NORTHAMPTON,
6 LACKAWANNA AND WAYNE.

7 THE COURT: AND YOU ARE SAYING THE SAME
8 THING HAPPENED IN VIRGINIA?

9 MR. MAAZEL: I MEAN, THAT'S --

10 THE COURT: THAT'S YOUR QUESTION?

11 MR. MAAZEL: THAT'S MY QUESTION.

12 THE COURT: GIVE ME AN IDEA OF WHEN.

13 MR. MAAZEL: OKAY.

14 BY MR. MAAZEL:

15 Q. SECRETARY BOOCKVAR, WHICH PROGRAM ARE WE TALKING
16 ABOUT THAT WAS DECERTIFIED IN NORTHAMPTON, LACKAWANNA
17 AND WAYNE?

18 A. IS THAT THE WINVOTE?

19 Q. I'M ASKING YOU.

20 A. I -- YOU KNOW, YES, I BELIEVE IT WAS THE
21 WINVOTE.

22 Q. AND WAS THAT SAME SYSTEM, THE WINVOTE,
23 DECERTIFIED IN VIRGINIA IN THE SAME TIME PERIOD?

24 A. SO I AM NOT SURE OF THE EXACT TIME PERIOD. AND
25 I WAS NOT IN VIRGINIA AND I WAS NOT EVEN IN THE

1 DEPARTMENT OF STATE. BUT TO MY KNOWLEDGE, I BELIEVE
2 THAT IT HAD HAPPENED IN VIRGINIA PREVIOUSLY.

3 Q. OKAY. AND YOU ACTUALLY GAVE TESTIMONY IN A 2019
4 SENATE STATE GOVERNMENT HEARING ABOUT VIRGINIA, DIDN'T
5 YOU?

6 A. I THINK I SAID THAT IT HAD ALSO BEEN DECERTIFIED
7 IN WRITTEN TESTIMONY.

8 Q. YES. AND THAT SYSTEM WAS DECERTIFIED IN
9 VIRGINIA TWO MONTHS BEFORE AN ELECTION, CORRECT?

10 A. TO MY KNOWLEDGE, YES.

11 Q. THAT WAS YOUR TESTIMONY TO THE SENATE, YES?

12 A. CORRECT.

13 Q. SO WITHIN TWO MONTHS, VIRGINIA MANAGED TO
14 DECERTIFY THAT WIN SYSTEM AND GET A NEW SYSTEM UP AND
15 RUNNING IN TIME FOR THE ELECTION, CORRECT?

16 A. SO, AGAIN, I DON'T WANT TO -- THEY MAY HAVE ALSO
17 HAD A PERIOD WHERE THEY TEMPORARILY SUSPENDED, BUT I
18 THINK TECHNICALLY FROM THE TIME THAT THEY DECERTIFIED
19 IT, YES. AND AGAIN, IT WAS DECERTIFIED BY THE EAC AND
20 THERE WERE SEVERE PROBLEMS. SO THIS IS NOT SOMETHING
21 THAT WE RECOMMEND. BUT IN EMERGENCIES, YES, THERE HAVE
22 BEEN CIRCUMSTANCES LIKE THAT WHERE THEY HAVE HAD TO DO
23 IT.

24 Q. YOU SIGNED A DECLARATION IN THIS CASE, YES?

25 A. YES.