Received 4/30/2020 6:16:35 PM Commonwealth Court of Pennsylvania

Filed 4/30/2020 6:16:00 PM Commonwealth Court of Pennsylvania
674 MD 2019

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200
(215) 568-0300 (facsimile)

TUCKER LAW GROUP

Joe H. Tucker (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth

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

RESPONDENT'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO PETITIONERS' AMENDED PETITION FOR REVIEW

TABLE OF CONTENTS

I. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND 3

II. STATEMENT OF JURISDICTION 8

III. STATEMENT OF THE QUESTIONS INVOLVED 8

IV. SUMMARY OF ARGUMENT 9

V. ARGUMENT 12

A. Counts I-V Should Be Dismissed As Legally Insufficient Because Petitioners Have Failed to Allege Facts That Would Make Out a Violation of the Election Code 12

1. Petitioners' Allegations That They Disagree With the Secretary's Assessments of the ExpressVote XL's Security and Privacy Features Do Not Suffice to State a Claim for Violation of the Code 12

2. Count V Also Fails to State a Claim Because the Amendments to the Election Code Have Mooted It 21

B. Petitioners Also Fail to Allege Facts to Sustain the Elements of Their Constitutional Claims 22

C. Petitioners Lack Standing to Pursue Their Election Code Claims 27

D. The Court Lacks Jurisdiction Because Petitioners Have Not Joined Necessary Parties 31

E. Counts I-VI Should Be Dismissed as Time-Barred Under the Six-Month Statute of Limitations for Actions Challenging the Official Decisions of Governmental Officers, Set Forth in 42 Pa. Cons. Stat. § 5522(b)(1) 34

1. Based on the Facts Admitted in the Amended Petition, This Action Was Plainly Untimely 34

2. Petitioners' Attempts to Avoid the Time Bar Are Meritless 36

(a) Petitioners Have Confused the Notice Requirement in 42 Pa. Cons. Stat. § 5522(a) with the Time Bar in § 5522(b) 37

(b) Given Petitioners' Admission That They Have Not Pled a Mandamus Claim, This Action Must Be Dismissed Under the Doctrine of Sovereign Immunity 38

(c) Petitioners' Disavowal of a Mandamus Claim Does Not Avoid § 5522(b)(1)'s Time Bar..............................40

(d) Petitioners Cannot Avoid the Time Bar by Asserting an Ongoing Injury or Lack of Knowledge.....................41

(e) The Filing of the Petition for Reexamination Does Not Render Petitioners' Claims Timely 43

(f) Petitioners' Argument Gets the Relevant Policy Considerations Exactly Backwards 46

VI. CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

Cases

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

Banfield v. Cortes,
922 A.2d 36 (Pa. Commw. Ct. 2007) .... *passim*

Bissey v. Commonwealth, Department of Transportation,
613 A.2d 37 (Pa. Commw. Ct. 1992) 38

Brimmeier v. Pennsylvania Turnpike Commission,
147 A.3d 954 (Pa. Commw. Ct. 2016) 19

Caffey v. W.C.A.B.,
185 A.3d 437 (Pa. Commw. Ct. 2018) 43

Ciamaichelo v. Independence Blue Cross,
928 A.2d 407 (Pa. Commw. Ct. 2007) 40

City of Philadelphia v. Commonwealth,
838 A.2d 566 (Pa. 2003) 32

Comcast Corp. v. National Ass'n of African American-Owned Media,
140 S. Ct. 1009 (2020) 19

Cordero v. FNU Ricknauer,
No. 13-2023, 2014 WL 4657104 (D.N.J. Sept. 17, 2014) 45

Dellape v. Murray,
651 A.2d 638 (Pa. Commw. Ct. 1994) 41

Finn v. Rendell,
990 A.2d 100 (Pa. Commw. Ct. 2010) 39

Fleming v. Rockwell,
500 A.2d 517 (Pa. Commw. Ct. 1985) 40, 41

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

Gonzalez v. Hasty,
651 F.3d 318 (2d Cir. 2011) 45

Green Party of Pennsylvania v. Department of State Bureau of Commissions,
168 A.3d 123 (Pa. 2017) 26

In re Guzzardi,
99 A.3d 381 (Pa. 2014) 26

Harrell v. Fleming,
285 F.3d 1292 (10th Cir. 2002) 48

HYK Construction Co. v. Smithfield Township,
8 A.3d 1009 (Pa. Commw. Ct. 2010) 32

Kauffman v. Osser,
271 A.2d 236 (Pa. 1970) 29, 30, 31

Kuznik v. Westmoreland County Board of Commissioners,
902 A.2d 476 (Pa. 2006) 14

Landis v. City of Philadelphia,
369 A.2d 246 (Pa. Super. Ct. 1976) 38

Laundry Owners Mutual Liability Insurance Ass'n v. Bureau of Workers' Compensation,
853 A.2d 1130 (Pa. Commw. Ct. 2004) 15

League of Women Voters v. Commonwealth,
178 A.3d 737 (Pa. 2018) 10, 23, 24, 25

Luckett v. Blaine,
850 A.2d 811 (Pa. Commw. Ct. 2004) 21

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

Miller v. Emelson,
520 A.2d 913 (Pa. Commw. Ct. 1987) 38

Montanez v. Secretary, Pennsylvania Department of Corrections,
773 F.3d 472 (3d Cir. 2014) 45

Nelson v. Geake,
No. 818 C.D. 2012, 2013 WL 3946544 (Pa. Commw. Ct. Jan. 14, 2013) 21

North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver,
827 A.2d 550 (Pa. Commw. Ct. 2003) 29

Commonwealth ex rel. Pappert v. TAP Pharmaceuticals Products, Inc.,
868 A.2d 624 (Pa. Commw. Ct. 2005) 17, 18

Pennsylvania Gamefowl Breeders Ass'n v. Commonwealth,
533 A.2d 838 (Pa. Commw. Ct. 1987) 29

Pilchesky v. Doherty,
941 A.2d 95 (Pa. Commw. Ct. 2008) 38

Police & Fire Retirement Sysstem of City of Detroit v. IndyMac MBS, Inc.,
721 F.3d 95 (2d Cir. 2013) 43

Reuben v. O'Brien,
445 A.2d 801 (Pa. Super. Ct. 1982) 34, 43

Romaine v. W.C.A.B.,
901 A.2d 477 (Pa. 2006) 43

Schmucker v. Naugle,
231 A.2d 121 (Pa. 1967) 47

Schneller v. Prothonotary of Montgomery County,
No. 1316 C.D. 2016, 2017 WL 3995911 (Pa. Commw. Ct. Sept. 12, 2017) 35, 40

Sharon Steel Corp. v. W.C.A.B.,
670 A.2d 1194 (Pa. Commw. Ct. 1996) 43

Snead v. Society for Prevention of Cruelty to Animals of Pennsylvania,
985 A.2d 909 (Pa. 2009) 47

Spahn v. Zoning Board of Adjustment,
977 A.2d 1132 (Pa. 2013) 29

Stackhouse v. Commonwealth,
892 A.2d 54 (Pa. Commw. Ct. 2006) 39

Stein v. Boockvar,
No. 2:16-cv-06287, slip op. (E.D. Pa. Apr. 29, 2020) 7, 8, 13, 32

Thomas v. City of Philadelphia,
861 A.2d 1023 (Pa. Commw. Ct. 2004) 37, 38

United States v. Dalm,
494 U.S. 596 (1990) 46

Vassia v. Dule,
35 Pa. D. & C.3d 335 (C.P. Luzerne Cnty. 1985) 38

Weber v. Shelley,
347 F.3d 1101 (9th Cir. 2003) 23, 25

Wolk v. Olson,
730 F. Supp. 2d 376 (E.D. Pa. 2010) 42

Working Families Party v. Commonwealth,
169 A.3d 1247 (Pa. Commw. Ct. 2017) 26

Zellie v. Commonwealth, Department of Corrections,
No. 97 M.D. 2011, 2012 WL 8666741 (Pa. Commw. Ct. Mar. 1,
2012) 41

Statutes

25 P.S. § 2601 *et seq.* .... passim

25 P.S. § 2621(b) 9, 14

25 P.S. § 3031.5 44

25 P.S. § 3031.7 9

25 P.S. § 3031.7(1) 16, 20

25 P.S. § 3031.7(11) 16, 20

25 P.S. § 3031.7(12) 20

25 P.S. § 3031.7(13) 16, 20

25 P.S. § 3031.9(a)(2) 22

25 P.S. § 3031.11(b) 16

1 Pa. C.S. § 2310 47

42 Pa. C.S. § 5502(a) 36

42 Pa. C.S. § 5522(a) 37, 38

42 Pa. C.S. § 5522(b) ....passim

52 U.S.C. § 21081..9, 14

Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West)..22

Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act. 2020-12 (S.B. 422) (West)..21, 22

Other Authorities

2 Standard Pennsylvania Practice 2d § 13:196..34

Pa.R.C.P. No. 1019(a)..17

Pennsylvania Constitution..*passim*

Pennsylvania Constitution Article I, § 5..24

Pennsylvania Constitution Article I, § 7 26

Pennsylvania Constitution Article I, § 20..26

In their Amended Petition, Petitioners allege that a voting machine in use in Pennsylvania, the ExpressVote XL, has certain theoretical vulnerabilities stemming from alleged flaws in its design and function. On the basis of these allegations, Petitioners ask the Court to reverse the Secretary of the Commonwealth's decision to certify this machine. But Petitioners' theoretical criticisms of the ExpressVote XL do not, as a matter of law, offer a legally sufficient basis for this Court to override the Secretary's decision. As the Pennsylvania Supreme Court has explained, the Secretary has broad discretion to determine whether voting machines comply with the extensive and complex requirements of state and federal law, and courts will not interfere with that discretion absent a strong justification for doing so. No voting system can be perfect, and the Secretary has not been charged with the impossible duty of neutralizing *all* voting machine risk and imperfection; rather, her duty is to weigh potential risks and imperfections and determine whether they present unacceptable levels of risk. Even if Petitioners could prove that the design and functionality of the ExpressVote XL are flawed in the ways they allege, that would not justify this Court's interference with the Secretary's certification decision.

Accordingly, the Court should dismiss all of Petitioners' claims as legally insufficient. Their Election Code claims should fall because Petitioners fail to allege facts that, if proven, would establish that the Secretary's certification of the

ExpressVote XL was an abuse of discretion, fraudulent, clearly arbitrary, or made in bad faith. Petitioners' claims under the Pennsylvania Constitution are similarly insufficient because Petitioners fail to allege facts that, if proven, would establish that the Secretary's certification of the ExpressVote XL was an unreasonable or discriminatory abuse of her power that resulted in a severe infringement upon the right to vote. Finally, recent amendments to the Pennsylvania Election Code eliminated the statutory provisions alleged in Count V of the Amended Petition; therefore, that Count has no basis in law.

The Amended Petition has other fatal flaws. First, Petitioners have not alleged an interest in ensuring compliance with the Election Code that is greater than the common interest that all electors have in this regard. Thus, Petitioners do not have standing to pursue their Election Code claims. Second, the Court lacks jurisdiction because Petitioners have failed to join indispensable parties Philadelphia, Northampton, and Cumberland Counties, all of which have purchased the ExpressVote XL and have a strong interest in being permitted to use this voting system in the upcoming 2020 elections. Finally, Petitioners' claims are time-barred. Petitioners allowed more than a year to elapse between the Secretary's certification of the ExpressVote XL and their filing of this lawsuit, and thus missed the applicable six-month statutory time bar by more than six months.

In light of the legal insufficiency of Petitioners' claims, Petitioners' lack of standing to pursue their Election Code claims, the absence of indispensable parties, and Petitioners' failure to comply with the applicable statute of limitations, the Court should dismiss the Amended Petition in its entirety.

I. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND[1]

Respondent, Secretary of the Commonwealth Kathy Boockvar ("Respondent" or the "Secretary") leads the Pennsylvania Department of State (the "Department"). She is charged with the general supervision and administration of Pennsylvania's election laws, including the duty "'to examine and re-examine voting machines, and to approve or disapprove them for use in this State, in accordance with the provisions of [the Pennsylvania Election Code].'" Am. Pet. ¶ 37 (quoting 25 P.S. § 2621) (modification in original). As the Pennsylvania Supreme Court has recently explained, the Secretary enjoys significant discretion in determining which voting machines to certify for use throughout Pennsylvania. *Banfield v. Cortes*, 110 A.3d 155, 177-78 (Pa. 2015).

The ExpressVote XL is "a polling place voting device" that is known as an "all-in-one" because it "combine[s] two tasks which are more often performed by two separate devices: marking a voter's choices on a piece of paper, and tabulating

---

[1] For purposes of her Preliminary Objections, Respondent assumes, but does not admit, the truth of the Amended Petition's well-pleaded factual allegations.

votes from a piece of paper." Am. Pet. ¶¶ 41-42. After the federal Election Assistance Commission ("EAC") certified this system on July 2, 2018, Am. Pet. ¶ 64, and following two multi-day examinations of this voting system, Am. Pet. ¶¶ 65-70, the Secretary issued a long, detailed report certifying the ExpressVote XL for use in Pennsylvania elections. Am. Pet. ¶ 71, Exh. C (report dated Nov. 30, 2018). More than seven months after the certification, on July 16, 2019, some of the Petitioners, along with other Pennsylvania electors, filed a petition requesting the Secretary to reexamine the ExpressVote XL. Am. Pet. ¶ 72. Following another multi-day examination, the Secretary issued another lengthy, detailed report explaining her decision to maintain certification of the machine. Am. Pet. ¶ 77, Exh. B (report dated Sept. 3, 2019). In the meantime, Philadelphia, Northampton, and Cumberland Counties purchased the ExpressVote XL. Philadelphia and Northampton Counties used this voting system during the general election on November 5, 2019, and all three of these counties intend to use this voting system as the primary voting machine during the upcoming 2020 elections. Am. Pet. ¶¶ 87, 92.

On December 12, 2019, more than a year after the Secretary certified the ExpressVote XL, Petitioners filed this action. Respondent filed Preliminary Objections, and Petitioners filed an Application for Special Relief in the Form of a Preliminary Injunction. On January 23, 2020 this Court held a hearing on the issue

of whether three counties that have purchased the ExpressVote XL were indispensable to the resolution of the Application. The Court ruled on January 24 that it could "proceed preliminarily for purposes of the Application without the … counties being joined as indispensable parties," and clarified that the ruling was "entered without prejudice to Respondent's Preliminary Objection raising the issue of whether [these] counties are indispensable parties to the litigation, which will be considered by the Court at a later date." Jan. 24 Order. That same day, prior to this Court's scheduled hearing on the merits of Petitioners' Application for a Preliminary Injunction, Petitioners withdrew their Application.

In their Praecipe to Withdraw Motion for Preliminary Injunction, Petitioners asserted that "it is of the utmost importance to Petitioners that the ExpressVote XL is decertified before the November 2020 general election," and indicated their intent to "seek relief in the form of a forthcoming motion for an accelerated briefing schedule and scheduling conference, setting a final pre-trial conference, or final resolution on the merits, in March 2020." Praecipe to Withdraw Motion for Preliminary Injunction with Consent from Both Parties at 2, 3. No such motion has been filed.

Petitioners filed an Amended Petition on February 4, 2020. In the Amended Petition, Petitioners allege that they are individuals who reside in and intend to vote in Pennsylvania counties that have purchased the ExpressVote XL, Am. Pet.

¶¶ 18-36 (the "Individual Petitioners") and non-profit organizations whose members include such individuals, Am. Pet. ¶¶ 14-17 (the "Organizational Petitioners"). They allege that certain design features of the ExpressVote XL make this voting system theoretically vulnerable to hacking and could theoretically lead to inaccuracies in recording and tabulating votes, Am. Pet. ¶¶ 93-148, compromise voter privacy and vote secrecy, Am. Pet. ¶¶ 157-202, and contradict technical ballot formatting requirements set forth in the Election Code, Am. Pet. ¶¶ 217-247. Petitioners allege that certification of the ExpressVote XL violated various provisions of the Election Code, Am. Pet. ¶¶ 277-290, and the Pennsylvania Constitution, Am. Pet. ¶¶ 284, 291-299. Petitioners claim that they or their members are directly harmed by these alleged violations because they are concerned that their votes will not be accurately recorded and counted in the upcoming 2020 elections. Am. Pet. ¶¶ 34-36. They do not, however, allege a basis on which to distinguish themselves from other electors in the Commonwealth in this regard. They ask this Court to declare that the ExpressVote XL violates both the statute and the Constitution and to enjoin the Secretary to decertify this voting machine, Am. Pet. at 54, and to grant this relief before the November 2020 presidential election, Am. Pet. ¶¶ 12, 34-36.

Respondent filed her Preliminary Objections on March 5, 2020. On March 27, Governor Wolf signed into law several amendments to the Election Code.

These amendments eliminated or altered all of the statutory language underlying Petitioners' claims, in Count V of the Amended Petition, that the ExpressVote XL violates technical ballot formatting requirements of the Code.

In February 2020, the Honorable Paul S. Diamond of the U.S. District Court for the Eastern District of Pennsylvania presided over a three-day evidentiary hearing in a related challenge to the Secretary's certification of the ExpressVote XL, captioned *Stein, et al. v. Boockvar, et al.*, No. 2:16-cv-06287. On April 29, 2020, Judge Diamond rejected the challenge and issued an opinion, attached to this Brief as Exhibit A. The opinion includes the following relevant findings:

- The ExpressVote XL "is reliable and easy to use." Ex. A at 14. "There is no credible evidence even suggesting that the EAC and Pennsylvania have certified machines that can be 'hacked.'" *Id.* at 41.

- Plaintiffs' theory that the ExpressVote XL's internal printer could alter ballots after a voter had verified them (the same theory that Petitioners present here, *see* Am. Pet. ¶¶ 93-127) is a speculative "fantasy" with "no basis" in fact. Ex. A at 25-27. Plaintiffs "could not credibly explain how Pennsylvania's XL machines, with all their safeguards and security features, could be subject to tampering or the introduction of malware." *Id.* at 36.

- Decertifying the ExpressVote XL before the November 2020 election (the same remedy that Petitioners seek here) would be "calamitous" because it "would effectively disenfranchise Philadelphia's one million registered voters" and would "destroy the City's ability to hold an election this year." *Id.* at 39, 40.

Judge Diamond concluded that "Dr. Stein has based her Motion on absolutely nothing … [her expert's] daft theories … will undoubtedly shake the belief of

some in their government because Stein has convinced them that voting integrity is at risk in Pennsylvania. That is certainly the most unfortunate consequence of Stein's pointless Motion." *Id.* at 41.

II. STATEMENT OF JURISDICTION

Respondent objects to the exercise of this Court's jurisdiction over this dispute because Petitioners have failed to join indispensable parties, as detailed *infra* Section V.D.

III. STATEMENT OF THE QUESTIONS INVOLVED

1. Where Petitioners fail to allege facts that, if true, would establish that the Secretary's certification of the ExpressVote XL was an abuse of her discretion, fraudulent, in bad faith, or clearly arbitrary, and where the statutory provisions underlying Count V of the Amended Petition are no longer in effect, should the Court dismiss claims that allege a violation of the Election Code for legal insufficiency?

Suggested Answer: Yes. *See infra* Section V.A.

2. Where Petitioners fail to allege facts that, if true, would establish that the Secretary's certification of the ExpressVote XL was unreasonable, discriminatory, and an abuse of her power that resulted in a severe infringement on the right to vote, should the Court dismiss claims that allege a violation of the Pennsylvania Constitution for legal insufficiency?

Suggested Answer: Yes. *See infra* Section V.B.

3. Where no petitioner has alleged an interest in the claims that the Secretary's certification of the ExpressVote XL violates the Election Code that is distinct from the generalized interest of all electors in ensuring compliance with the Election Code, should the Court dismiss these claims for lack of standing?

Suggested Answer: Yes. *See infra* Section V.C.

4. Should the Court dismiss the Amended Petition for failure to join indispensable parties where a grant of the relief sought would severely impair three Pennsylvania counties' ability to carry out the upcoming presidential election?

Suggested Answer: Yes. *See infra* Section V.D.

5. Should the Court dismiss the Amended Petition as time-barred by the six-month statute of limitations for actions brought against a governmental officer for anything done in the execution of her office, because Petitioners waited for more than a year after their claim accrued to file their petition?

Suggested Answer: Yes. *See infra* Section V.E.

IV. SUMMARY OF ARGUMENT

As "Pennsylvania's chief election official," *Banfield*, 110 A.3d at 174, the Secretary leads the Department's vital work to protect the integrity and security of Pennsylvania's elections. One of the Secretary's duties is the examination and certification of voting machines appropriate for use throughout the Commonwealth. The Secretary alone is charged with analyzing voting systems for compliance with federal and state statutory law, and approving or disapproving them for use by the counties. 25 P.S. § 2621(b).

The Secretary evaluates each proposed voting system under standards of security, reliability, confidentiality, accessibility, practicality, and other criteria, as set forth in the Election Code, 25 P.S. § 3031.7, and the Help America Vote Act ("HAVA"), 52 U.S.C. § 21081. 25 P.S. § 2621(b). As the Pennsylvania Supreme Court has recently recognized, "[a]ll voting systems are imperfect," and as such

voting systems are not "held to an impossible standard of invulnerability" under the Election Code. *Banfield v. Cortes*, 110 A.3d 155, 174 (Pa. 2015). Given this reality, it is the Secretary's job to weigh the relative advantages and disadvantages of each voting system and to select those for certification that, in the Secretary's opinion, satisfy the statutory criteria. She enjoys significant discretion in making these determinations, and the judiciary will not overrule them without a very strong justification to do so – evidence that the Secretary violated the Pennsylvania Election Code by abusing her discretion, or acting fraudulently, in bad faith, or clearly arbitrarily in certifying a particular voting machine, *Banfield*, 110 A.3d at 175, or that she violated the Pennsylvania Constitution by committing an unreasonable or discriminatory abuse of her power that resulted in severe infringement on the constitutional right to vote in certifying a particular voting machine, *id.* at 177-78; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 (Pa. 2018).

The Court should dismiss the Amended Petition because it fails to allege facts that, if true, would establish that the Secretary's certification of the ExpressVote XL violated either the Election Code or the Constitution. Petitioners complain about a grab bag of alleged flaws in the machine's security protections and speculate that these flaws could, under some largely unspecified theoretical conditions that have never been demonstrated, undermine the voting process. They

similarly complain about the machine's privacy protections, alleging that it is possible that, under some circumstances, poll workers or others involved in election administration could invade the privacy of voters who use the machines.

Petitioners do not allege that the Secretary overlooked these alleged flaws in the ExpressVote XL during the certification process; they allege that the Secretary made the wrong decision about them. Given the Secretary's broad discretion, Petitioners' quibbles with the Secretary's exercise of her judgment do not suffice to state a claim of either a statutory or Constitutional violation. In addition, Count V of the Amended Petition fails to state a claim because the technical ballot format requirements that Petitioners rely upon are no longer part of the Election Code.

The Court should also dismiss Petitioners' Election Code claims, Counts I through V, because Petitioners have merely alleged an interest in voting on systems that comply with the Election Code – the same interest that all electors share. This is not sufficient to allege the "substantial" interest necessary to establish standing to pursue claims that the Secretary's certification of the ExpressVote XL violated the Election Code.

Moreover, the Court lacks jurisdiction to adjudicate this dispute in the absence of three indispensable parties. Philadelphia, Northampton, and Cumberland Counties have purchased ExpressVote XL voting machines and intend to deploy them in the November 2020 election; they have a significant electoral

and financial interest in using those machines. This dispute cannot be resolved without impacting those interests, and justice cannot be done without these counties' participation in this action.

Finally, the Amended Petition must be dismissed as untimely. Petitioners delayed seeking relief beyond the statutory six-month time bar for actions brought against a governmental officer for anything done in the execution of her office.

V. ARGUMENT

A. Counts I-V Should Be Dismissed As Legally Insufficient Because Petitioners Have Failed to Allege Facts That Would Make Out a Violation of the Election Code[2]

1. Petitioners' Allegations That They Disagree With the Secretary's Assessments of the ExpressVote XL's Security and Privacy Features Do Not Suffice to State a Claim for Violation of the Code

The allegations in the Amended Petition consist of theoretical deficiencies in the ExpressVote XL that, even if true, would fall short of justifying judicial interference with the Secretary's decision to certify this machine. In support of their claims that the ExpressVote XL is insufficiently secure and not reliably accurate (Counts I-III), Petitioners criticize three discrete design features of this complex piece of machinery. Am. Pet. ¶¶ 93-148.[3] Petitioners fail to explain how

---

[2] As demonstrated below, *infra* Section V.B, the constitutional claim included in Count IV should also be dismissed, and Count IV should therefore be dismissed in its entirety.

[3] While Petitioners allege that issues occurred when the ExpressVote XL was used in the November 2019 elections in Northampton and Philadelphia Counties, they do not allege that any

two of the three design features they focus on (the "administrator access panel," Am. Pet. ¶¶ 128-137, and "'Test Deck' feature," Am. Pet. ¶¶ 138-148) could be exploited or malfunction to cause votes to be recorded inaccurately. They claim that a third allegedly flawed design feature ("insecure paper path") could result in the wrong votes being recorded, Am. Pet. ¶¶ 105-107, and thus undermine the efficacy of an audit, Am. Pet. ¶ 114, but base this assertion on theory, rather than any real-world occurrences or testing that would demonstrate that these alleged outcomes are actually possible. In fact, Petitioners do not allege that any of these three design features have ever been exploited by hackers or that the ExpressVote XL has ever malfunctioned in the ways Petitioners claim are possible, either in testing or in a live election.[4]

Similarly, in support of their claim that the ExpressVote XL fails to sufficiently provide for voter privacy and secrecy in the voting process (Count IV), Petitioners narrowly focus on two discrete aspects of the ExpressVote XL's overall functionality and allege that they could allow wrongdoers to undermine voter privacy – the fact that the ExpressVote XL stores ballots chronologically, Am. Pet.

---

of those alleged issues were connected to the alleged theoretical flaws that Petitioners identify throughout the Amended Petition. Am. Pet. ¶¶ 264-269.

[4] In the related federal court challenge to the Secretary's certification of the ExpressVote XL, the court found that the Plaintiffs' allegations that the ExpressVote XL was unreliable were "baseless and irrational." *Stein*, Ex. A at 1. The court noted that every alleged vulnerability, including the allegedly "insecure paper path," was speculative. *Id.* at 24-27.

¶¶ 158-59, 161-69, and the procedure used for ballot spoliation, Am. Pet. ¶¶ 179-192, 194. Petitioners do not allege that the claimed flaws have ever resulted in an invasion of any voter's privacy while voting, or the exposure of any elector's vote selection.

The Legislature has tasked the Secretary with the duty "[t]o examine and reexamine voting machines, and to approve or disapprove them for use" throughout the Commonwealth, in accordance with two comprehensive legislative schemes: the Pennsylvania Election Code, and the federal Help America Vote Act of 2002, 52 U.S.C. § 21081. *See* 25 P.S. § 2621(b). The Pennsylvania Supreme Court has made clear that the Secretary's "administrative discretion in overseeing the implementation of the Election Code is entitled to great deference," and will not be disturbed by the judiciary absent a showing that "the Secretary's certification of [a particular voting machine] was fraudulent, in bad faith, an abuse of discretion or clearly arbitrary." *Banfield*, 110 A.3d at 175. This is consistent with general principles of statutory interpretation – Pennsylvania courts typically strongly defer to an administrative agency tasked with implementing a legislative enactment. *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 502 (Pa. 2006). Moreover, where, as here, "the statutory scheme is complex" – together the Election Code and HAVA set forth over thirty specifications applicable to the Secretary's evaluation of voting devices – "the reviewing court must be even more

cautious in substituting its discretion for the expertise of an administrative agency." *Laundry Owners Mut. Liab. Ins. Ass'n v. Bureau of Workers' Comp.*, 853 A.2d 1130, 1136 (Pa. Commw. Ct. 2004).

Beyond the ordinary deference owed to the executive when it is charged with carrying out legislation, the complex and multifaceted rules that govern how the advantages and disadvantages of voting systems should be weighed by the Secretary do not lend themselves to easily discernable, objective lines for the court to draw, and thus militate even more strongly against judicial interference with the Secretary's decision-making in this arena. As the Pennsylvania Supreme Court has explained, "all voting systems are imperfect and not immune from tampering." *Banfield*, 110 A.3d at 174. The Election Code must accommodate this reality, and "the mere possibility of error cannot bar the use of a voting system." *Id.* Indeed, the Election Code does not "impose a requirement that cannot be achieved," that is, perfection, or require "an impossible standard of invulnerability." *Id.* The Secretary makes voting machine certification decisions against this backdrop. Because "the question of whether an electronic system has adequate security measures against tampering *necessarily results in a subjective determination*, the Legislature delegated th[e] discretionary decision" of whether to certify any particular voting system as sufficiently secure under the relevant statutory requirements to the Secretary. *Banfield*, 110 A.3d at 174 (emphasis added). In

other words, the Secretary is charged with making subjective determinations about which voting machines among the universe of imperfect systems are sufficiently secure to merit certification, and there exists no objectively correct set of tradeoffs for the judiciary to enforce.

Just as the Secretary has been entrusted, in her expertise, to weigh the security benefits and risks attendant to each voting system and to make the subjective decisions of whether each system is sufficiently secure to be certified, she must engage in similar analysis and make similarly subjective determinations with regard to the many other statutory requirements for voting machines. This includes accuracy/reliability requirements, set forth at 25 P.S. § 3031.7(11) and (13), and requirements for voter privacy protections, set forth at 25 P.S. § 3031.7(1) and 25 P.S. § 3031.11(b). And just as the Secretary's responsibility is *not* to identify and approve of only those voting machines that are completely impervious to security risks – as no voting system would meet this criteria – her responsibility is likewise *not* to identify only those voting machines that ensure absolute reliability or absolute voter privacy – as no voting machine can meet this standard, either. The Secretary's responsibility is to use her expertise and the resources of her office to analyze voting systems and to determine, in her discretion, which best meet the standards set forth in the dozens of applicable statutory requirements. Absent fraud, an abuse of her discretion, bad faith, or

clearly arbitrary decision-making, her decisions will not be interfered with by the judiciary. *Banfield*, 110 A.3d at 174-75.

In their Response to the Preliminary Objections, Petitioners make no effort to argue that their specific factual allegations, if true, would suffice to show that the Secretary's certification of the ExpressVote XL was an abuse of discretion, in bad faith, fraudulent, or clearly arbitrary. Instead, they argue that they are simply not required to assert such facts at the pleading stage. None of Petitioners' three arguments for this curious position has merit.

First, Petitioners argue, their boilerplate, rote incantation of the legal standard suffices to state a claim. *See* Pet'rs' Resp. at 11-12 ("Petitioners *did* plead … 'the Secretary's reexamination of the ExpressVote XL was conducted in bad faith.'" (citing Am. Pet. ¶¶ 250-54)). But without any factual allegations to support the bald assertions that the Secretary "abused her discretion and acted clearly arbitrarily" when she certified the ExpressVote XL, Am. Pet. ¶ 253, and that her reexamination of this voting system "was conducted in bad faith," Am. Pet. ¶ 254, Petitioners' Election Code claims necessarily fall short. The Pennsylvania Rules of Civil Procedure mandate that "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. No. 1019(a). This rule "requires a plaintiff to plead all the facts that he must prove in order to achieve recovery on the alleged cause of action." *Commonwealth ex rel.*

Pappert v. TAP Pharm. Prods., Inc., 868 A.2d 624, 635 (Pa. Commw. Ct. 2005). Petitioners' pleadings must "conform to the elements necessary to state a cause of action," and must be specific enough for Respondent and the Court to "discern from a factual perspective the precise nature of the conduct at issue." *Id.* at 635-36.

Second, Petitioners argue that their claims should survive because they are similar to those that survived preliminary objections in *Banfield v. Cortes*, which involved a dispute over whether the Secretary's certification of Direct Recording Electronic ("DRE") voting systems violated the Election Code. Pet'rs' Resp. at 9-11 (citing *Banfield v. Cortes*, 922 A.2d 36, 46-68 (Pa. Commw. Ct. 2007)). Petitioners assert that preliminary objections to the *Banfield* petitioners' claims were rejected with "no mention [ ] made of any necessity to plead fraud, bad faith, abuse of discretion, or clear arbitrariness." *Id.* at 10. Petitioners' argument misses the mark in two crucial ways. The first is that when this Court ruled on the preliminary objections in *Banfield*, it did not have the benefit of the Pennsylvania Supreme Court's later decision in that case, which established and clarified the applicable legal standards for evaluating whether the Secretary's certification of a particular voting machine constitutes an Election Code violation. *See Banfield*, 110 A.3d at 171-75. These legal standards guide what Petitioners must plead in *this* case. As the United States Supreme Court recently explained:

> Normally … the essential elements of a claim remain constant through the life of a lawsuit. What a plaintiff must do to satisfy those elements may increase as a case progresses from complaint to trial, but the legal elements themselves do not change. So, to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end.

Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S.Ct. 1009, 1014 (2020). Under Pennsylvania's more rigorous fact pleading regime, it is even more important that petitioners allege facts that align with the points that they will eventually have to prove. *Brimmeier v. Pa. Tpk. Comm'n*, 147 A.3d 954, 967 (Pa. Commw. Ct. 2016) (dismissing claims for failure to plead all elements with sufficient specificity).

Second, Petitioners fail to appreciate that their claims are parallel but not identical to the claims brought in *Banfield*: Whereas the gravamen of the *Banfield* petitioners' claims was that the certification of DREs contradicted a narrow and specific Election Code requirement, Petitioners here allege that the ExpressVote XL violates broad and inherently subjective Election Code mandates. Judicial deference is even more clearly justified in relation to Election Code challenges falling into the latter category.

In *Banfield*, this Court found that "[e]lectors' well-pled allegations raise questions of fact as to whether it is possible to comply with section 1117-A of the Election Code," which requires post-election recounts "using … devices of a type

different than those used for the specific election," "absent a voter verified independent record," in light of allegations that "the permanent physical record of each vote cast on a DRE is not independent of the data in the electronic storage system." *Banfield*, 922 A.2d at 47. In contrast to the highly specific Election Code requirement at issue in *Banfield*, Petitioners here invoke the Election Code's broadly worded security, accuracy, and privacy commands. Petitioners rely on Election Code requirements that voting machines "provide[] acceptable ballot security procedures," 25 P.S. § 3031.7(12) (Count I), "[w]hen properly operated, record[] correctly and compute[] and tabulate[] accurately every valid vote registered," 25 P.S. § 3031.7(13) (Count II), be "suitably designed and equipped to be capable of absolute accuracy," 25 P.S. § 3031.7(11) (Count III), and "[p]rovide for voting in absolute secrecy," 25 P.S. § 3031.7(1) (Count IV). Petitioners here do not allege a violation of any narrow and specific Election Code requirement, and their assertion that the Secretary's certification of the ExpressVote XL deviated from these more subjective Election Code mandates requires a greater factual basis than they have provided.

Petitioners' third justification for their failure to plead facts to support their allegations is that "[o]nce 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" their Amended Petition. Pet'rs' Resp at 11. But this is not how litigation works in Pennsylvania; Petitioners should not be allowed to conduct a discovery fishing expedition in the hope of finding a basis for stating a claim. *See Luckett v. Blaine*, 850 A.2d 811, 818 (Pa. Commw. Ct. 2004) (explaining that dismissal of claims is appropriate where a party cannot establish a *prima facie* case without discovery).

2. Count V Also Fails to State a Claim Because the Amendments to the Election Code Have Mooted It

Recent amendments to the Election Code, signed into law on March 27, 2020, moot the entirety of Count V, which consists of claims that the Secretary's certification of the ExpressVote XL violated several of the Election Code's ballot formatting requirements.[5] All of the language that Petitioners rely on for these claims has been eliminated or otherwise altered, such that the statutory basis that Petitioners allege for Count V no longer exists. *Compare* Am. Pet. ¶ 287 (alleging violation of Code Section 1109-A's requirement that certain ballots "be printed on card or paper stock of the color of the party of the voter …."), *with* Act of Mar. 27, 2020 (P.L. 41, No. 12), sec. 4, § 1109-A(e), 2020 Pa. Legis. Serv. Act. 2020-12 (S.B. 422) (West) (replacing language); *compare* Amended Petition ¶ 288 (alleging

[5] Respondent's Preliminary Objections did not make this argument, because the Legislature amended the statute after the Preliminary Objections were filed. However, where a preliminary objection has been filed requesting dismissal of a particular cause of action, the Court may grant the request on a different basis than was asserted in the preliminary objection. *See Nelson v. Geake*, No. 818 C.D. 2012, 2013 WL 3946544, at *4 n.4 (Pa. Commw. Ct. Jan. 14, 2013).

violation of Code Section 1004's requirement that certain ballots be "bound together in books of fifty"), *with* Act of Mar. 27, 2020 (P.L. 41, No. 12), sec. 3, § 1004 (deleting language); *compare* Amended Petition ¶ 289 (alleging violation of Code Section 1112-A's requirement that voter vote by "making a cross (x) or check (√) mark"), *with* Act of Mar. 27, 2020 (P.L. 41, No. 12), sec. 4, § 1112-A(b) (adding that voter may otherwise indicate a selection).[6]

B. Petitioners Also Fail to Allege Facts to Sustain the Elements of Their Constitutional Claims[7]

Petitioners' allegations, if true, would not establish that the Secretary's decision to certify the ExpressVote XL was unreasonable or discriminatory, and an abuse of her power that resulted in a severe infringement on the right to vote, as necessary to sustain their constitutional claims. As discussed, *supra* Section V.A.1, the Amended Petition merely alleges that certain design features and aspects of the functionality of the ExpressVote XL create theoretical security and performance vulnerabilities, and could theoretically undermine voter privacy. Petitioners dispense with the actual context of the Secretary's evaluation of voting

[6] Petitioners also allege that the ExpressVote XL violates a provision formerly in 25 P.S. § 3031.9(a)(2) that a ballot page "shall list … the names of … political parties with designating arrows." Am. Pet. § 290. This language was removed in a prior amendment to the Election Code. *See* Act of Oct. 31, 2019 (P.L. 552, No. 77), sec. 3, § 1109-A, 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West).

[7] While the second Preliminary Objection is directed to Count VI only, the constitutional claim asserted in Count IV should be dismissed for the same reasons.

systems and certification decisions, which requires her to review and consider the pros and cons of each machine as a whole.

Under the Pennsylvania Constitution, as under the Election Code, the Secretary may make reasonable, non-discriminatory decisions to certify certain voting systems for use throughout the Commonwealth that she deems sufficiently well-designed and high-performing, and to reject others that she deems are not. *Banfield*, 110 A.3d at 178. Constitutional protections of the right to vote are balanced against the need for the state to carefully regulate elections. While "the right to vote is fundamental and pervasive of other basic civil and 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." *Id. at* 176-77 (internal quotation and citations omitted; *see also Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) ("[S]tates are entitled to broad leeway in enacting reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner."). Only those election regulations that "severely restrict the right to vote," *Banfield*, 110 A.3d at 177, or that constitute a "plain, palpable and clear abuse of [ ] power which actually infringes on the rights of the electors," *League of Women Voters*, 178 A.3d at 766, 809 (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (Pa. 1869)), will be found to violate the Pennsylvania Constitution.

Petitioners' constitutional claims are subject to this deferential standard, which is designed to balance protection of the all-important right to vote with the need for comprehensive election regulations. Article I, Section 5 of the Pennsylvania Constitution establishes that "[e]lections shall be free and equal." Pa. Const. Art. I, § 5. The effect of this clause on the power of lawmakers has been consistently interpreted over nearly a century and a half as prohibiting only those enactments that result from "'a plain, palpable and clear abuse of the power [to promulgate laws governing elections]'" and that "'actually infringe[] the rights of the electors.'" *League of Women Voters*, 178 A.3d at 809 (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (Pa. 1869)) (observing that "our Court has not retreated from this interpretation of the Free and Equal Elections Clause" since it was first announced in 1869); *id*. at 809-810. Courts use slightly different language when addressing other constitutional guarantees in the context of election regulations – including Article I, Section 26 (which guarantees that "the Commonwealth … shall [not] deny to any person the enjoyment of any civil right") and Article VII, Section 4 (which requires that "secrecy in voting be preserved") – but the same substantive standard is consistently applied to all constitutional challenges to election regulations.

In *Banfield*, the Pennsylvania Supreme Court considered whether the Secretary's decision to certify DRE machines violated Article I, Section 5 or 26, or

Article VII, Section 6 (providing for uniformity of laws regulating elections throughout the state). The court's analysis turned on whether this decision "severely restricted" the "fundamental right to vote" and whether the decision was "unreasonable or discriminatory," and ultimately rejected the claims based on the lack of evidence to this effect. *Banfield*, 110 A.3d at 177-78. The court relied heavily on a Ninth Circuit opinion that recognized "that all balloting systems are imperfect," and that "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.'" *Banfield*, 110 A.3d at 177 (quoting *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)). "As the Election Code bestows upon the Secretary the responsibility to choose between several voting systems with varying advantages and disadvantages," the court explained, the Pennsylvania Constitution does not justify judicial interference with that discretion "absent a showing that the decision was unreasonable or discriminatory." *Banfield*, 110 A.3d at 178.

The substance of the standards in *Banfield* and *League of Women Voters* is the same: the judiciary should defer to reasonable, non-discriminatory exercises of the state's power to regulate elections absent a severe infringement upon the right to vote. Other case law confirms that Pennsylvania courts consistently apply this deferential standard to challenges to election regulations based on various state

constitutional protections. *See, e.g.*, *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1260-1264 (Pa. Commw. Ct. 2017) (holding that anti-fusion provisions of the Election Code, which prohibit two or more political organizations from nominating a single candidate, do not violate the rights of speech and association protected by Article I, Sections 7 and 20 of the Pennsylvania Constitution) ("Freedom of speech and association undeniably constitute fundamental rights. Nevertheless, our Supreme Court has recognized that in the context of election law, not all restrictions imposed by States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or choose among candidates." (internal quotation marks, citations, and alteration omitted)); *Green Party of Pa. v. Dep't of State Bureau of Comm'ns*, 168 A.3d 123, 130 (Pa. 2017) (rejecting Green Party's request for an exception to filing deadline for candidate to appear on special election ballot because "[t]he evidence [did] not show that the fifty-day deadline substantially burdened Appellants' rights); *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) ("[T]he judiciary should act with restraint, in the election arena, subordinate to express statutory directives.").

Petitioners argue that the "abuse of power" standard applies only to a legislative enactment and not to the executive action they challenge here, Pet'rs' Resp. at 12-14, but offer no authority in support of this proposition. As the

Secretary's authority to certify voting machines derives from the legislature's delegation of its power to make laws governing elections, she is likewise subject to this standard when exercising this authority. *See Banfield*, 110 A.3d at 177 (evaluating Secretary's certification of the ExpressVote XL based on whether it was unreasonable or discriminatory, and a severe restriction of the right to vote).

Petitioners must allege facts that, if true, would support a finding that the Secretary's decision to certify the ExpressVote XL was unreasonable or discriminatory, and an abuse of her power that severely restricted their right to vote. As with Petitioners' Election Code claims, *see supra* Section V.A.1, the Amended Petition's allegations that the ExpressVote XL is less than perfect – as the Election Code permits, *Banfield*, 110 A.3d at 177 – fall far short of this standard.

C. <u>Petitioners Lack Standing to Pursue Their Election Code Claims</u>

The Individual Petitioners are residents of two counties that use the ExpressVote XL, Northampton and Philadelphia. They allege that they are concerned about whether their votes will be accurately recorded and counted in future elections. *See* Am. Pet. ¶¶ 18-36. The Organizational Petitioners allege that they have standing because they have members who are residents of these two

counties.[8] *Id.* ¶¶ 15, 17. Critically, Petitioners do not allege that their alleged concerns about the voting process set the Individual Petitioners, the Organizational Petitioners' members, or any Philadelphia or Northampton County voter, apart from any other voter in Pennsylvania. The Amended Petition is simply devoid of allegations regarding what voting systems other jurisdictions in Pennsylvania use, whether those voting systems share the alleged imperfections and vulnerabilities of the ExpressVote XL, or whether these voting systems are more reliable, in Petitioners' view, than the ExpressVote XL.

Petitioners' only attempt to distinguish themselves from residents of other counties is speculation, at the end of the Amended Petition, that "other registered voters in Pennsylvania *may* vote in precincts or counties using voting systems … that do not suffer from the defects identified in this Petition." Am. Pet. ¶ 298 (emphasis added). Given the likelihood that Petitioners are aware of what voting technology other counties use, their failure to identify that technology, explain how it differs from that used in Philadelphia and Northampton Counties, or allege that their concern about whether their votes are recorded accurately differs from that of any other voter in Pennsylvania, is telling.

[8] The Organizational Petitioners also assert that their missions are to promote the integrity of the elections process. However, as discussed *infra* page 29, where an organization fails to establish standing on the basis of its membership, allegations that its mission relates to the challenge being pursued are insufficient.

To establish standing to sue, a party must demonstrate that it is "aggrieved," in other words, that it has "a substantial, direct, and immediate interest in the matter." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (internal citations and quotations omitted). An association may have standing on behalf of its members based on allegations that at least one of its members is aggrieved by the challenged action. *North-Central Pa. Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550, 554 (Pa. Commw. Ct. 2003); *see also Pa. Gamefowl Breeders Ass'n v. Commonwealth*, 533 A.2d 838, 840 (Pa. Commw. Ct. 1987). Allegations that an organization's "mission or purpose is implicated" are an insufficient stand-in. *Spahn v. Zoning Bd. of Adjustment*, 977 A.2d 1132, 1152 (Pa. 2013).

Here, because Petitioners have failed to set their alleged concerns apart from any other voters in Pennsylvania, they have failed to allege a "substantial" interest in this matter. "An interest is substantial if it surpasses the common interest of all citizens in obedience to the law." *Banfield v. Cortes*, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007). "[M]erely alleging the common interest of all qualified electors that the provisions of the Election Code be followed" along with "unsupported allegation[s]" that the claimed Election Code violation will affect the outcome of an election is an insufficient basis on which to establish "the requisite 'substantial, direct, and immediate' interest." *In re General Election 2014*, 111 A.3d 785, 793 (Pa. Commw. Ct. 2015); *see also Kauffman v. Osser*, 271 A.2d 236

(Pa. 1970) (rejecting electors' challenge of the Absentee Ballot Law as unconstitutional for lack of standing in the absence of any facts to suggest that anyone voting under this law would vote for a different candidate such that the challengers' votes would be diluted, because the interest they asserted was "not peculiar to them, [ ] not direct, and [ ] too remote and too speculative to afford" standing).

In their Response, Petitioners argue that they have made the same kinds of allegations that conferred standing on the petitioners in *Banfield. See* Pet'rs' Resp. at 15-18. But they have not. In *Banfield*, this Court found that the petitioners had a "substantial" interest because they had alleged that "*unlike all citizens*, they are required to vote using DREs that are not reliable or secure and that do not provide a means for vote verification or vote audit." *Banfield*, 922 A.2d at 44 (emphasis supplied). Petitioners argue in their Response that their Amended Petition contains "specific factual pleadings concerning the Individual [Petitioners'] immediate and substantial interest … as opposed to all Pennsylvania electors," Pet'rs' Resp. at 16, but do not point the Court to any such pleadings. Therefore, in contrast to *Banfield*, the Amended Petition does not allege that, "unlike all citizens," Petitioners must vote on voting machines that may not capture their votes and that may compromise their privacy when voting and the secrecy of their votes.

Petitioners' alleged interest in ensuring that the Secretary certifies voting systems that comply with the requirements of the Election Code and that will accurately record and count their votes is not "peculiar to them," *Kauffman*, 271 A.2d at 240, rather, it is an "interest common to that of all other qualified electors." *Id.* Because Petitioners have failed to allege facts that, if true, would establish a "substantial" interest in their Election Code claims, Counts I-V must be dismissed.

D. **The Court Lacks Jurisdiction Because Petitioners Have Not Joined Necessary Parties**

The Secretary is the Respondent in this litigation, but the entities that will suffer the most immediate and devastating consequences if the ExpressVote XL is decertified are the three Pennsylvania counties that have purchased the ExpressVote XL for use in their elections. Philadelphia County, Northampton County, and Cumberland County have each "spent millions of dollars buying [ExpressVote XL voting machines]," Am. Pet. ¶ 3, and "intend to use the ExpressVote XL as the primary voting machine for all elections in 2020," Am. Pet. ¶ 92. Indeed, many of Petitioners' complaints involve the ways that, they allege, county election boards and poll workers have deployed the ExpressVote XL, rather than the features of the machine itself. Am. Pet. ¶¶ 83, 147, 164-66, 174, 182-87, 195-97. Because Petitioners seek to thwart the three counties' plans to use the ExpressVote XL in the November 2020 election, *see* Am. Pet. ¶¶ 12, 34-36, each of the counties has a significant interest in, and important rights that depend on, the

outcome of this litigation.[9] Their absence thus strips this Court of jurisdiction over this dispute.

A party is indispensable to an action "when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 581 (Pa. 2003). Where an indispensable party has not been joined, this Court lacks jurisdiction to adjudicate the dispute. *Id.* The "basic inquiry" involved in determining whether a party is necessary to litigation is "whether justice can be done in the absence of him or her." *HYK Constr. Co. v. Smithfield Twp.*, 8 A.3d 1009, 1015 (Pa. Commw. Ct. 2010) (internal quotation and citation omitted). Courts consider whether an absent party has a right or interest related to the claim, what the nature of that right or interest is, whether it is essential to the merits of the issue, and "[whether] justice [can] be afforded without violating the due process rights of absent parties[.]" *Id.* (quoting *City of Philadelphia*, 838 A.2d at 581 n.11).

Philadelphia, Northampton, and Cumberland Counties each have a strong interest in using the ExpressVote XL in the upcoming elections because if they are

[9] In *Stein*, the court found that decertifying the ExpressVote XL before the November 2020 election would cause "grave and obvious" prejudice to the City of Philadelphia and its voters. Ex. A at 39; *see id.* (decertification would be "calamitous" because it "would effectively disenfranchise Philadelphia's one million registered voters"); *id.* at 40 (decertification would "destroy the City's ability to hold an election this year").

prevented from doing so, their carefully laid election plans will be thrown into chaos. Decertifying the ExpressVote XL less than six months before the November 2020 election would force these three counties to scramble to replace voting machines and retrain poll workers and the public in the use of the replacement machines, thereby threatening their important interest in ensuring the orderly administration of elections, and potentially even disenfranchising their voters. Each of these counties also has a strong financial interest in maintaining their ability to use the ExpressVote XL in upcoming elections, as a prohibition on this voting machine could require them to expend significant public funds to obtain appropriate replacement machines in just months. Moreover, because Petitioners allege that the counties' actions contribute significantly to the alleged problems with the ExpressVote XL, the counties are squarely in the middle of the dispute about whether the use of this voting system is legal. These three counties each have substantial interests that are inextricably intertwined with the issues presented by this dispute, and justice cannot be done in their absence.

Petitioners are wrong that "there is no distinction" between the position of the three counties in this case and that of the counties who used DREs in *Banfield*. *See* Pet'rs' Resp. at 24. The *Banfield* petitioners originally challenged the use of DREs in the November 2006 election. In its April 2007 rejection of the respondents' argument that the counties were indispensable, this Court highlighted

the crucial fact that "*because the November 2006 election has passed*, the fifty-six counties will not be prejudiced by a judgment in favor of Electors." *Banfield*, 922 A.2d at 44 (emphasis added). In contrast, here Petitioners challenge the use of the ExpressVote XL in the upcoming November 2020 election. Am. Pet. ¶¶ 12, 34-36. Philadelphia, Northampton, and Cumberland Counties will be substantially prejudiced if they are forced to replace their newly purchased voting machines. Accordingly, this Court lacks jurisdiction to adjudicate this dispute.

E. Counts I-VI Should Be Dismissed as Time-Barred Under the Six-Month Statute of Limitations for Actions Challenging the Official Decisions of Governmental Officers, Set Forth in 42 Pa. Cons. Stat. § 5522(b)(1)

1. Based on the Facts Admitted in the Amended Petition, This Action Was Plainly Untimely

"An action against any officer of any government unit for anything done in the execution of his office" "must be commenced within six months." 42 Pa. Cons. Stat. § 5522(b)(1).[10] Notably, this "limitation … is not a waivable statute of limitations requiring affirmative pleading. It is a limitation which qualifies a substantive right by a condition of the time within which an action can be maintained." *Reuben v. O'Brien*, 445 A.2d 801, 802 (Pa. Super. Ct. 1982); *see* 2 Standard Pennsylvania Practice 2d § 13:196.

[10] This provision carves out an exception for "action[s] subject to another limitation specified in this subchapter." 42 Pa. Cons. Stat. § 5522(b)(1). This action, however, is not subject to any other limitations period.

That this limitation bars Petitioners' lawsuit is apparent on the face of the Amended Petition. As announced by its first sentence, Petitioners' lawsuit, and each claim asserted therein, "is a challenge to the Secretary of the Commonwealth's certification of the ExpressVote XL electronic voting machine." Am. Pet. ¶ 1; *accord id.* ¶ 6 ("Plaintiffs challenge the Secretary's certification of the ExpressVote XL electronic voting machine for use in Pennsylvania elections."); *id.* ¶ 7 (alleging that "[t]he Secretary certified the [ExpressVote XL] machines even though they violate the Pennsylvania Election Code"). Congruent with this challenge is the relief Petitioners seek: they want "a declaration that the certification of the ExpressVote XL machine violates … the Pennsylvania Election Code and the Pennsylvania Constitution" and "an Order directing the Secretary to decertify the ExpressVote XL voting machine." *Id.* ¶¶ 10-11. Accordingly, there can be no doubt that this action was brought "against an[] officer of a[] government unit" – namely, the Secretary of the Commonwealth in her official capacity – "for [some]thing done in the execution of h[er] office" – namely, certification of the ExpressVote XL. *See* 42 Pa. Cons. Stat. § 5522(b)(1).

As the Amended Petition alleges, the Secretary certified the ExpressVote XL for use in Pennsylvania elections on November 30, 2018. Am. Pet. ¶ 71. Petitioners' claims accrued on that date. *See Schneller v. Prothonotary of Montgomery Cnty.*, No. 1316 C.D. 2016, 2017 WL 3995911, at *6 (Pa. Commw.

Ct. Sept. 12, 2017) ("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.'" (quoting *Simmons v. Cohen*, 534 A.2d 140, 148 (Pa. Commw. Ct. 1987), and *Dalrymple v. Brown*, 701 A.2d 164, 167 (Pa. 1997))); *see also* 42 Pa. Cons. Stat. § 5502(a) ("[T]he time within which a matter must be commenced under this chapter shall be computed … from the time the cause of action accrued."). Accordingly, Petitioners were required to bring this action by May 30, 2019. Yet Petitioners did not initiate their lawsuit until December 12, 2019, *more than a year after the Secretary's certification*. Because Petitioners indisputably failed to comply with – or even come close to complying with – the controlling six-month limitations period in 42 Pa. Cons. Stat. § 5522(b)(1), this action must be dismissed.

2. Petitioners' Attempts to Avoid the Time Bar Are Meritless

In an effort to avoid this inexorable conclusion, Petitioners throw up several disjointed arguments. *See* Pet'rs' Resp. at 24-27. Only one includes any citation to case law, and that case law – which addresses a statutory provision *other* than 42

Pa. Cons. Stat. § 5522(b)(1) – is completely inapposite. Petitioners' other cursory arguments are unsupported by any authority and without merit.

(a) Petitioners Have Confused the Notice Requirement in 42 Pa. Cons. Stat. § 5522(a) with the Time Bar in § 5522(b)

Petitioners' primary argument is that "Respondent is wrong about the nature of [42 Pa. Cons. Stat. § 5522(b)(1)]." Pet'rs' Resp. at 24 (quoting *Thomas v. City of Philadelphia*, 861 A.2d 1023 (Pa. Commw. Ct. 2004). Petitioners contend that § 5522(b)(1) is "not strictly a statute of limitations which bars the right to bring the action," but rather a "'notice of claim' statute" that "provides an affirmative defense to recovery." Pet'rs' Resp. at 24 (quoting *Thomas*, 861 A.2d at 1027) (emphasis omitted). Petitioners' reliance on *Thomas* is puzzling because that decision did *not* address § 5522(b), which sets forth the time by which certain actions "must be commenced," but rather § 5522(a), a separate provision – completely irrelevant here – stating that "any person who is about to commence any civil action … against a government unit *for damages* on account of any injury to his person or property" shall provide the government unit with notice of certain facts "[w]ithin six months from the date that any injury was sustained," 42 Pa. Cons. Stat. § 5522(a)(1) (emphasis added). *See Thomas*, 861 A.2d at 1027 & n.8 (citing to and discussing 42 Pa. Cons. Stat. § 5522(a)). Contrary to *Thomas*'s characterization of § 5522(a), on which Petitioners mistakenly rely, § 5522(b)

indisputably *is* "a statute of limitations which bars the right to bring the action." *See* 42 Pa. Cons. Stat. § 5522(b); *Miller v. Emelson*, 520 A.2d 913, 915-16 (Pa. Commw. Ct. 1987) (contrasting the notice provision of § 5522(a) with the limitations period of § 5522(b) and observing that although the former requirement is waivable, the latter is not); *Vassia v. Dule*, 35 Pa. D. & C.3d 335, 336-37 (C.P. Luzerne Cnty. 1985) (same); *see also Pilchesky v. Doherty*, 941 A.2d 95, 98 n.4 (Pa. Commw. Ct. 2008) (distinguishing § 5522(a) from § 5522(b) and noting that the latter provision "sets a six-month statute of limitations for the filing of claims against a government officer for conduct occurring in the execution of his office").[11]

(b) Given Petitioners' Admission That They Have Not Pled a Mandamus Claim, This Action Must Be Dismissed Under the Doctrine of Sovereign Immunity

Petitioners also dispute Respondent's characterization of this action as one sounding in mandamus; in a one-sentence argument that they fail to develop, Petitioners assert that they "have … not pleaded a cause of action for a writ of

[11] The only other case cited by Petitioners, *Landis v. City of Philadelphia*, 369 A.2d 246 (Pa. Super. Ct. 1976), further confirms that Petitioners have confused two different statutory provisions. As *Thomas* acknowledges, *Landis* was "interpreting the Act of [July 1,] 1937," 1937 Pa. Laws 2547, § 1, which was the predecessor to 42 Pa. Cons. Stat. § 5522(a). *Thomas*, 861 A.2d at 1027 n.8; *see Landis*, 369 A.2d at 748 & n.1; *Bissey v. Commw., Dep't of Transp.*, 613 A.2d 37, 40 (Pa. Commw. Ct. 1992) (explaining that the "Act of 1937" is a "predecessor statute" of § 5522(a)). The time-bar provision in § 5522(b)(1), on the other hand, has a very different statutory genealogy. *See* 42 Pa. Cons. Stat. Ann. § 5522 (West), Source Note (explaining that "Subsection (a) [of § 5522] is a generalization of act of July 1, 1937 (P.S. 2547), § 1," whereas "Subsection (b)(1) is a generalization of act of March 21, 1772 (1 Sm.L. 364), § 7").

mandamus." Pet'rs' Resp. at 25. Left unsaid is how this assertion could possibly help Petitioners.

As an initial matter, Petitioners' assertion is an admission that this lawsuit is barred by the doctrine of sovereign immunity. As noted, the Amended Petition seeks a mandatory injunction requiring the Secretary to decertify the ExpressVote XL and a declaratory judgment serving as a predicate for that injunction. *See* Am. Pet. ¶¶ 9-10. It is well settled that a Commonwealth officer such as the Secretary is immune from such claims. *See Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Commw. Ct. 2010).[12]

"The only exception to the rule barring mandatory injunctions against Commonwealth parties is that an action in mandamus will lie to compel a state officer or agency to perform a ministerial or mandatory statutory duty." *Id.* Indeed, this Court overruled the Secretary's preliminary objection asserting sovereign immunity in *Banfield* only because petitioners there had asserted a mandamus claim. *Banfield*, 922 A.2d at 43; *see id.* at 54 n.5 (Leavitt, J., dissenting) (noting that "[t]he majority dismisses this [sovereign immunity] argument by concluding that the only relief sought is a writ of mandamus").

---

[12] "[W]here a request for [declaratory relief] can have no effect nor serve any purpose other than as the legal predicate for … [an]other immunity-barred claim in the same action, the demand for declaratory relief ought to fall along with the claim it serves to support." *Stackhouse v. Commonwealth*, 892 A.2d 54, 62 (Pa. Commw. Ct. 2006).

Accordingly, because Petitioners have now clarified that they are *not* seeking a writ of mandamus, the Court should dismiss this lawsuit forthwith on the basis of sovereign immunity. *See Ciamaichelo v. Independence Blue Cross*, 928 A.2d 407, 413 (Pa. Commw. Ct. 2007) ("A party's statement in its brief is treated as a judicial admission ….").

(c) Petitioners' Disavowal of a Mandamus Claim Does Not Avoid § 5522(b)(1)'s Time Bar

In any event, the applicability of the time bar in 42 Pa. Cons. Stat. § 5522(b)(1) does not depend on the characterization of Petitioners' claims as seeking mandamus relief. To be sure, mandamus claims are subject to § 5522(b)'s six-month limitations period. *Schneller*, 2017 WL 3995911, at *4 (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)). But § 5522(b) is not *limited* to mandamus claims. As noted, by its plain terms, the statutory provision applies, with exceptions not pertinent here,[13] to any "action against any officer of any government unit for anything done in the execution of his office." 42 Pa. Cons. Stat. § 5522(b)(1). Because Petitioners do not – and cannot – dispute that this is such an action, their assertion that they are not seeking a writ of mandamus is irrelevant to the application of § 5522(b)(1).

[13] *See supra* note 10.

(d) Petitioners Cannot Avoid the Time Bar by Asserting an Ongoing Injury or Lack of Knowledge

Also unavailing is Petitioners' contention that they "are injured every time" an election utilizing the ExpressVote XL occurs. Pet'rs' Resp. at 25. Tellingly, and fatally, Petitioners cite no authority for the proposition that a party can avoid or toll the limitations period in 42 Pa. Cons. Stat. § 5522(b) by alleging that the complained-of official act has caused ongoing injury. And, in fact, the law is directly to the contrary. *See Zellie v. Commw., Dep't of Corr.*, No. 97 M.D. 2011, 2012 WL 8666741, at *3 (Pa. Commw. Ct. Mar. 1, 2012) ("The existence of a continuing violation does not toll the statute of limitations."); *Fleming v. Rockwell*, 500 A.2d 517, 519 (Pa. Commw. Ct. 1985) (holding that mandamus claim was barred by § 5522(b)(1)'s six-month limitations period and rejecting, as "totally without merit" and unsupported by any authority, plaintiffs' "argument as to the existence of a continuing violation that precludes the running of the statute of limitations": "it is well settled that a statute of limitations begins to run … when the plaintiff could have first maintained the action to a successful conclusion"); *see also Dellape v. Murray*, 651 A.2d 638, 640 (Pa. Commw. Ct. 1994) (affirming grant of summary judgment to defendant based on statute of limitations; "merely because the [plaintiffs'] harm is continuous in nature does not make their cause of action against [the defendant] a continuing tort"). In any event, as noted above, the Amended Petition makes clear that it is "challeng[ing] … the Secretary['s] …

certification of the ExpressVote XL" (Am. Pet. ¶ 1), which took place on November 30, 2018 (*id.* ¶ 71). The entire basis of the lawsuit is Petitioners' contention that this certification was unlawful. *Id.* ¶ 1. Accordingly, under well-settled Pennsylvania law, the date of certification is the date the six-month limitations period began to run. *See supra* Section V.E.1.

Nor can Petitioners avoid the time bar by asserting in a conclusory fashion that some of the issues they allege with the ExpressVote XL "could not have been known to Plaintiffs at the time the ExpressVote XL was initially certified for use." Pet'rs' Resp. at 25. First, Petitioners failed to allege any facts supporting this new assertion in their Amended Petition.

Second, as a threshold matter, Petitioners cite no authority whatsoever for the proposition that the limitations period in § 5522(b)(1) is subject to some sort of "discovery rule." In fact, applicable law is to the contrary. *See Wolk v. Olson*, 730 F. Supp. 2d 376, 378 (E.D. Pa. 2010) (rejecting plaintiff's argument that, under Pennsylvania law, the discovery rule "must be applied in all cases to determine when accrual occurs and the statute begins to run" and explaining that, under the Pennsylvania Supreme Court's decisions, the discovery rule applies only "to toll the running of the statute of limitations for latent injuries, or injuries of unknown etiology"). In particular, Petitioners ignore that § 5522(b)(1) "is not a waivable statute of limitations requiring affirmative pleading" but rather "a limitation which

qualifies a substantive right by a condition of the time within which an action can be maintained." *Reuben*, 445 A.2d at 802. Accordingly, equitable tolling is categorically unavailable. *See Romaine v. W.C.A.B.*, 901 A.2d 477, 485 (Pa. 2006) ("[a] nonwaivable defense is one in which the specific language of the statute operates to bar or destroy the claimant's right to bring an action as opposed to barring recovery, i.e. one that bars the right rather than merely the remedy"); *Sharon Steel Corp. v. W.C.A.B.*, 670 A.2d 1194, 1197-98 (Pa. Commw. Ct. 1996) (expirations period that not only limits remedy but extinguishes right is properly termed a statute of repose); *Caffey v. W.C.A.B.*, 185 A.3d 437, 446 (Pa. Commw. Ct. 2018) ("[T]he discovery rule … does not apply to a statute of repose."); *accord Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir. 2013).

(e) The Filing of the Petition for Reexamination Does Not Render Petitioners' Claims Timely

Finally, Petitioners point to the Petition for Reexamination they filed in July 2019 and contend that the six-month limitations period should be deemed tolled until September 3, 2019, the date the Secretary responded to the Petition for Reexamination by maintaining the ExpressVote XL's certification. Pet'rs' Resp. at 26-27. According to Petitioners, to do otherwise would "disincentivize the exhaustion of administrative remedies." *Id.* at 26.

Once again, Petitioners cite absolutely no authority in support of their argument. And, once again, they misapprehend the law. Even assuming that the provision in 25 P. S. § 3031.5 allowing any member of the public to request that the Secretary reexamine a voting machine should be construed as an "administrative remedy" that must be exhausted prior to filing suit (a proposition Petitioners entirely fail to support), this would not mean that the applicable limitations period would not begin to run until after an administrative remedy has been exhausted (whenever Petitioners get around to doing so). Such a rule would have the plainly perverse result of effectively nullifying the statute of limitations altogether – a petitioner could revive claims that had been stale for years, even decades, simply by filing a petition for reexamination and then filing suit within six months of the petition's resolution. For good reason, that is not the way time bars operate.

Here, even if one assumed that the limitations period should be tolled *during the period of time necessary to exhaust administrative remedies*, *i.e.*, the period between the filing of the initial administrative petition or grievance and the rendering of a final administrative decision, that rule would not help Petitioners. As the Amended Petition makes clear, they did not even *begin* the administrative process until they filed their Petition for Reexamination on July 16, 2019, more than *seven* months after the Secretary had certified the ExpressVote XL. Am. Pet.

¶ 72.[14] Put differently, the limitations period had expired before any hypothetical tolling could take effect. *See, e.g.*, *Montanez v. Sec'y Pa. Dep't of Corr.*, 773 F.3d 472, 482 n.5 (3d Cir. 2014) (even assuming two-year statute of limitations should be tolled while prisoner exhausted his administrative remedies, claim would still be time-barred because prisoner did not file his administrative grievance until more than two years after his claim accrued).[15]

Finally, contrary to Petitioners' suggestion, the fact that the Secretary's September 3, 2019 report maintaining the certification of the ExpressVote XL added some additional conditions that had to be fulfilled by "[j]urisdictions implementing the XL" (Am. Pet., Ex. B, at 11-12), did not somehow render Petitioners' claims timely. The additional conditions did not change any of the features or design aspects of the ExpressVote XL that are the basis for Petitioners' claims. Rather, the conditions simply imposed certain procedural requirements on

[14] Then, after the administrative process was concluded on September 3, 2019, when the Secretary announced her decision to maintain the certification of the ExpressVote XL (Am. Pet. ¶ 77 & Ex. B), Petitioners waited *another* three-and-one-half months before commencing this lawsuit.

[15] *Accord, e.g.*, *Gonzalez v. Hasty*, 651 F.3d 318, 324 (2d Cir. 2011) (although statute of limitations for prisoner's *Bivens* claim would be tolled while prisoner completed mandatory exhaustion process required by the Prison Litigation Reform Act, "the applicable three-year statute of limitations is tolled *only* during that exhaustion period *and not during the period in between the accrual of those claims and when [the prisoner] began the administrative remedy process*" (emphasis added)); *Cordero v. FNU Ricknauer*, No. 13-2023, 2014 WL 4657104, at *7 (D.N.J. Sept. 17, 2014) (where prisoner plaintiff's claim accrued on September 30, 2010, and he did not file his administrative remedy request until January 17, 2012, tolling of statute of limitations did not begin until January 17, 2012, and 474-day period between September 30, 2010, and January 17, 2012, eroded two-year limitations period).

the counties in response to certain concerns Petitioners had raised regarding ballot secrecy and security. *See id.* Petitioners do not suggest that these conditions rendered the ExpressVote XL's certification unlawful in some new way; they simply contend that the additional conditions are not sufficient to cure the allegedly preexisting security and secrecy flaws in the ExpressVote XL. A rule that such conditions could somehow re-start the six-month limitations clock (which, again, had expired before the Petition for Reexamination was even filed) would have the perverse incentive of discouraging the Secretary from imposing conditions in a good-faith attempt to address concerns raised in petitions for reexamination that were not filed until long after the limitations period had expired. That cannot be – and is not – the law.

(f) Petitioners' Argument Gets the Relevant Policy Considerations Exactly Backwards

Underlying Petitioners' opposition to the application of 42 Pa. Cons. Stat. § 5522(b)(1) is a misconceived policy argument. Holding their claims time-barred, Petitioners say, would mean that a decision by the Secretary to certify a voting machine could not be challenged "if the certification of th[e] machine happened more than six months prior." Pet'rs' Resp. 25. But that consequence is, of course, the intended effect of time bars like the one set forth in § 5522(b). *See generally United States v. Dalm*, 494 U.S. 596, 609 (1990) ("The very purpose of statutes of

limitations … is to bar the assertion of a … claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious.”).

Moreover, Petitioners completely ignore the important values served by time bars such as § 5522(b)(1). As the Pennsylvania Supreme Court has explained:

> The defense of the statute of limitations is not a technical defense but substantial and meritorious….. Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation.

Schmucker v. Naugle, 231 A.2d 121, 123 (Pa. 1967) (quoting *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922)).

Indeed, statutes of limitations must, if anything, be even more strictly applied where, as here, they limit claims against the government for official actions – claims that, unless they fall within a recognized exception to the doctrine of sovereign immunity, are completely barred. *See Snead v. Soc’y for Prevention of Cruelty to Animals of Pa.*, 985 A.2d 909, 913 (Pa. 2009) (recognizing that “[t]he Sovereign Immunity Act … insulate[s] the Commonwealth and its agencies from liability except in certain specified circumstances so that state governmental assets are not subject to depletion through multiple lawsuits” (internal quotation marks omitted)); *see also* 1 Pa. Cons. Stat. § 2310 (where sovereign immunity has been waived, “a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by

the provisions of Title 42 ….”); *cf. Harrell v. Fleming*, 285 F.3d 1292, 1293 (10th Cir. 2002) (where statute of limitations "qualifies the waiver of sovereign immunity," it "constitutes a limitation on subject matter jurisdiction").

These considerations weigh particularly heavily in the context of decisions to certify voting machines. As the Amended Petition notes, Pennsylvania allows the public to attend an examination of voting machines before they are certified. Am. Pet. ¶ 65. Delay in the assertion of challenges such as the one brought by Petitioners here has potentially staggering costs. Not only does the Commonwealth itself have an interest in repose, but, in reliance on the Secretary's certification, counties move forward, at great cost in both dollars and other resources (*e.g.*, the need to train poll workers and the public on particular machines), to purchase and implement the machines. Here, in the more than a year that elapsed between certification and the filing of this lawsuit, three Pennsylvania counties – including by far the largest, Philadelphia – purchased the ExpressVote XL, and two of those counties (Philadelphia and Northampton) used them in the November 2019 election. Am. Pet. ¶¶ 87, 90. Given these weighty interests in repose, a six-month limitations period for challenges to the Secretary's exercise of her statutorily delegated discretionary authority makes obvious policy sense.[16]

[16] In making their policy arguments, Petitioners treat challenges to voting-machine certification decisions as if they were challenges to the self-interested actions of a private defendant. But that is obviously not the case. As discussed above, *supra* Section V.A, these certification decisions

VI. CONCLUSION

For the foregoing reasons, Respondent's Preliminary Objections should be sustained, and the Amended Petition should be dismissed with prejudice.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: April 30, 2020

By: *\/s/ Michele D. Hangley*
Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200
(215) 568-0300 (facsimile)

TUCKER LAW GROUP
Joe H. Tucker (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth

---

are delegated by statute to the Secretary, a public official, who is granted discretionary authority to decide whether, "*in h[er] opinion*," a given voting machine complies with certain "necessarily … subjective" standards in the Election Code. *Banfield*, 110 A.3d at 174-75 (emphasis in original). Accordingly, courts will review the exercise of the Secretary's broad discretion, if at all, only "where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law." *Id.* at 175. It is eminently reasonable to require a voter to bring such judicial challenges, with all of the potential disruption, expense, and pernicious uncertainty they entail, within six months of the machine's certification.

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: April 30, 2020

/s/ Michele D. Hangley
Michele D. Hangley

CERTIFICATE OF SERVICE

I, Michele D. Hangley, hereby certify that on April 30, 2020, I caused a true and correct copy of the Brief of Respondent Kathy Boockvar in Support of Preliminary Objections to Petitioners' Amended Petition for Review to be served via PACFile, which satisfies the requirements of Pa.R.A.P. 121.

Dated: April 30, 2020

/s/ Michele D. Hangley
Michele D. Hangley