

3/7/08

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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MARK BANFIELD, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	Docket No. 442 M.D. 2006
	:	
PEDRO CORTÉS,	:	
	:	
Respondent.	:	
	:	

**MEMORANDUM OF LAW OF RESPONDENT PEDRO A. CORTÉS,
 SECRETARY OF THE COMMONWEALTH, IN OPPOSITION TO PETITIONERS’
FEBRUARY 22, 2008 MOTION TO DISSOLVE STAY OF PROCEEDINGS**

Respondent Pedro A. Cortés, Secretary of the Commonwealth (hereinafter “Respondent” or “Secretary”), submits this Memorandum of Law in Opposition to Petitioners’ February 22, 2008 Motion to Dissolve Stay of Proceedings (“Motion”).

I. INTRODUCTION

It cannot be overstated that the interests of security, reliability and accuracy of all votes cast are paramount to all decisions made by the Secretary regarding all elections in the Commonwealth of Pennsylvania. By statute, the General Assembly has committed to the sound discretion of the Secretary the determination of whether electronic voting systems satisfy the various requirements of the Pennsylvania Election Code and the Constitution. Similarly, the General Assembly has committed to the discretion of each of the Commonwealth’s sixty-seven

counties the choice of what certified electronic voting systems to purchase and utilize for elections.¹

The instant action challenges the Secretary's exercise of the discretion committed to him by statute to examine and approve (or disapprove) of voting systems for use in the Commonwealth. At its core, this action seeks to have this Court prohibit the use of direct recording electronic voting systems ("DREs"), and in all practicality, mandate the use of paper-based optical scan systems. Central to this action are issues such as whether this Court has the power to enter mandamus relief requiring the Secretary to affirmatively de-certify all DREs and whether this Court lacks subject matter jurisdiction because the Commonwealth's counties, which will be impacted directly and adversely by Petitioners' requested relief, were not joined as parties to the Petition for Review. These fundamental issues are so contested that an en banc panel of this Court divided 4-3 in overruling the Secretary's Preliminary Objections. Indeed, on April 30, 2007, this Court found that these issues, among others, are "controlling issues of law for which there are substantial grounds for difference of opinion and interlocutory appeal of which may materially advance the ultimate termination of the case."

Against this backdrop, and with good cause shown, this Court entered a stay of all proceedings in this matter on May 11, 2007. The Court's Order followed an express agreement reached by the parties that all proceedings in the case were to be stayed through the Supreme Court's full disposition of the Secretary's interlocutory appeal efforts. The parties agreed that:

¹ Currently, approximately eleven electronic voting systems are certified by the Secretary for use in the Commonwealth, including six DREs and five optical scan systems. Approximately fifty-four counties have chosen to use DREs, i.e., the systems challenged in this litigation; approximately thirteen counties have chosen to use paper-based optical scan systems, i.e., the systems favored by Petitioners. Some counties have chosen to use a combination of DREs and optical scan systems.

[A]ll proceedings in the case in the Commonwealth Court are stayed pending the disposition of the Secretary's interlocutory appeal efforts before the Pennsylvania Supreme Court. This stay is effective immediately and lasts until the Supreme Court concludes its consideration of the Secretary's soon-to-be-filed Petition for Permission to Appeal, and, if that Petition is granted, through the Pennsylvania Supreme Court's disposition of the appeal.

May 4, 2007 letter agreement between Alan C. Promer, Esquire and Marian K. Schneider, Esquire ("May 4 Letter Agreement") (attached as Exhibit 1). The Secretary's Petition for Permission to Appeal remains pending before the Pennsylvania Supreme Court. Yet, despite that agreement and for the second time within one month, Petitioners ask this Court to dissolve the stay.

Lifting the stay is unwarranted and Petitioners' latest Motion to Dissolve the Stay should be denied for at least the following three reasons: First, the reasons justifying this Court's entry of a stay persist just as strongly today. Indeed, issues dispositive of this Court's subject matter jurisdiction and its power to afford the relief sought in the Petition for Review remain subject to the Secretary's interlocutory appeal efforts pending before the Supreme Court. It would be an unwarranted waste of this Court's and the Secretary's resources to lift the stay to proceed with costly discovery, motion practice and a trial on the merits while the Supreme Court, on interlocutory appeal by permission, may very well agree with the three dissenting judges that nearly the entirety of this case should not survive the pleadings stage.

Second, equity dictates that the stay remains in place as the Secretary will be prejudiced by the dissolution of the stay. The stay, as it stands, is exactly what the parties contemplated, and Petitioners' Motion contradicts the express terms of their agreement with the Secretary. Moreover, through that agreement, Petitioners already have obtained discovery. Having used the agreement to obtain discovery from the Secretary, Petitioners should not be heard now to wholly disregard its terms and purpose.

Third, Petitioners would not be prejudiced by the continuation of the stay. There has been no change in circumstances that warrants lifting the stay. Moreover, contrary to the implications of Petitioners' Motion, Petitioners have not been forced to sit idly as the world supposedly passes by during the Supreme Court's ongoing consideration of the Secretary's interlocutory appeal efforts. Less than one month prior to the instant Motion, the Court granted a very similar motion to dissolve by Petitioners and provided Petitioners an opportunity to seek preliminary injunctive relief. (The Court ultimately denied Petitioners Motion for Preliminary Injunction in full.) Petitioners simply are not disadvantaged by being held to their bargained-for agreement and the continuance of a sound and proper stay of this litigation, especially when they have obtained discovery and just recently were given an opportunity to seek interim relief.

As a final matter, it bears noting that Petitioners' Motion is predicated on unwarranted assumptions and wholly unsupported averments. Petitioners' Motion offers no basis for the conclusion that this action reasonably could fast-forward from the pleadings stage to the end of trial before July 2008. Nor does it offer any basis for the conclusion that the approximately fifty-four counties that have chosen to use DREs (and are not parties to this action) could overhaul their voting systems prior to the 2008 General Election. Petitioners' Motion should be denied.

II. RELEVANT FACTUAL BACKGROUND

A. This Court's Narrowly-divided Decision Overruling the Secretary's Preliminary Objections, and the Stay Pending the Secretary's Pending Interlocutory Appeal Efforts

This case originated as a “Petition for Review” (“Banfield Petition”) in this Court by twenty-five individuals (the “Petitioners”). The Banfield Petition currently challenges, in ten separate counts, the Secretary’s discretionary certification of six DREs. Six days after the Banfield Petition was filed in August of 2006, the Secretary filed preliminary objections raising several substantive grounds for dismissing the Banfield Petition, including that the suit improperly seeks to have this Court substitute its own judgment for decisions statutorily committed to the discretion of the Secretary.

Those Preliminary Objections were argued before an en banc panel of this Court in November 2006. On April 12, 2007, this Court, in a narrowly-divided 4-3 decision, overruled the Secretary’s Preliminary Objections (“April 12 Order”) (attached as Exhibit 2). See Banfield v. Cortés, 922 A.2d 36 (Pa. Commw. Ct. 2007).² The Court’s April 12 Order was accompanied by an Opinion authored by the Honorable Rochelle S. Friedman, which Judges Smith-Ribner, Pellegrini and Simpson joined (“April 12 Opinion”) (attached as Exhibit 3).

Judge Mary Hannah Leavitt, joined by now-President Judge Leadbetter and Judge Cohn-Jubelirer, authored a dissenting opinion (“April 12 Dissenting Opinion”) (attached as Exhibit 4). The three dissenting judges would have sustained the Secretary’s demurrer as to all but one count. They agreed with the Secretary’s position that requiring him, by court order, to decertify certain DRE voting systems inappropriately interferes with the Secretary’s discretion.

² The judges did agree unanimously that Count VI could survive, although the dissenting judges would have restricted the relief available even under that single count.

(April 12 Dissenting Opinion at 6 (“Because the application of the standards in the Election Code and the manner of examination require the exercise of the Secretary’s discretion, a writ of mandamus cannot issue.”).) The April 12 Dissenting Opinion also concluded that at least the counties currently using DREs (now approximately fifty-four of the Commonwealth’s sixty-seven counties) are indispensable parties to this action because of the direct, immediate and substantial impact that the decertification of DREs would have on their interests. (Id. at 12 (“[The County Boards of Elections] will be affected by the decision of this Court, should it decide to order the Secretary to decertify the seven DRE voting systems. Their absence leaves this Court without jurisdiction over Counts I, II, III, IV, V, VIII, IX, and X of the petition.”))

The Secretary immediately filed an application in this Court requesting that the April 12 Order be amended to include language, as required by 42 Pa. C.S. § 702(b), to allow the Secretary to file a petition for permission to appeal in the Supreme Court. The Secretary identified to this Court six questions presented by the April 12 Order that involve controlling issues of law for which there are substantial grounds for difference of opinion and interlocutory appeal of which may materially advance the ultimate termination of the case. Those issues include:

1. Whether Counts I-V and VIII-X of the Petition, in which Petitioners seek to have this Court order the Secretary to decertify the challenged DREs, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.
2. Whether Counts III and VII of the Petition, in which Petitioners seek to have this Court order the Secretary to establish uniform testing criteria for the certification of voting systems, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.

3. Whether the approximately 56 counties³ that have procured the challenged DREs are indispensable parties as to Counts I, II, III, IV, V, VIII, IX and X of the Petition.

(Secretary's Application for Relief to Amend the April 12 Order (footnote added) (attached as Exhibit 5 (without corresponding exhibits)).) Petitioners opposed the Secretary's Application, contending that this Court's April 12 Opinion and Order does not involve any such controlling issues of law. On April 30, 2007, this Court granted that requested relief and, in a per curiam order, so amended the April 12 Order ("April 30 Order") (attached as Exhibit 6).

The April 30 Order denied the Secretary's separate Application for Stay and Supersedeas of Proceedings pending the filing and disposition of the Secretary's Petition for Permission to Appeal. However, the parties then expressly agreed, subject to this Court's approval, to stay this action pending the Supreme Court's disposition of the Petition for Permission to Appeal on the condition that the Secretary provide agreed upon discovery materials. The parties agreed unambiguously that the proceedings should be stayed until the Pennsylvania Supreme Court fully disposes of the Secretary's interlocutory appeal:

Also under our agreement, all proceedings in the case in the Commonwealth Court are stayed pending the disposition of the Secretary's interlocutory appeal efforts before the Pennsylvania Supreme Court. This stay is effective immediately and lasts until the Supreme Court concludes its consideration of the Secretary's soon-to-be-filed Petition for Permission to Appeal, and, if that Petition is granted, through the Pennsylvania Supreme Court's disposition of the appeal.

(May 4 Letter Agreement at 2.) On May 8, 2007, in accordance with the parties' agreement, the Secretary filed an unopposed application to stay these proceedings and attached the May 4 Letter

³ The number of counties using DRE voting systems is currently 54 after the recent decisions of the county officials in Lackawanna County and Wayne County, whose DRE voting systems (the WINvote system manufactured by Advanced Voting Systems, Inc.) were decertified by the Secretary, decided to procure and use paper-based optical scan electronic voting systems.

Agreement.⁴ Upon consideration of the Secretary's unopposed application, this Court entered a stay of these proceedings on May 11, 2007 ("May 11 Order") (attached as Exhibit 7).

The parties' agreement and the May 11 Order obviated any need for the Secretary either to seek reconsideration of the portion of the Court's April 30 Order denying the Secretary's Application for a Stay or to petition the Supreme Court to issue a stay pursuant to 42 Pa. C.S. § 702(c). On May 10, 2007, the Secretary filed in the Pennsylvania Supreme Court a Petition for Permission to Appeal the Court's April 12 Order (as amended by the April 30 Order). The Petitioners filed an opposition memorandum to the appeal on May 24, 2007. The Secretary's Petition for Permission to Appeal, docket No. 70 MM 2007, remains pending before the Supreme Court.

B. Petitioners' January 2008 Motion to Dissolve the Stay and the Denial of Their Motion for Preliminary Injunction

On January 25, 2008, less than one month prior to the instant Motion, Petitioners filed a motion titled, "Motion to Dissolve Voluntary Stay of Proceedings and for an Expedited Hearing" ("January 2008 Motion to Dissolve"). Petitioners' January 2008 Motion to Dissolve argued that the Court should dissolve the agreed upon stay for the limited purpose of hearing Petitioners' motion for a preliminary injunction. Petitioners argued at that time that a limited dissolution of the stay was appropriate in light of the Secretary's de-certification of the WINvote system manufactured by Advanced Voting Systems ("AVS WINvote") (*id.* ¶ 8), recent reports from Ohio and California (*id.* ¶ 3) and the pending Spring Primary election (*id.* ¶ 15). They were clear, however, that "Petitioners do not seek to open this case at this time to prevent the use of

⁴ In accordance with the terms of the parties' May 4 Letter Agreement, the Secretary produced 3,744 pages of material on June 29, 2007. And, in keeping with notions of good faith, the Secretary produced an additional 410 pages of documents on January 17, 2008, including documents related to the decertification of one of the challenged DRE voting systems.

any machines currently certified and already purchased” (Id. ¶ 13.) This Court granted Petitioners’ January 2008 Motion to Dissolve and, thus, granted Petitioners an opportunity to seek interim relief. The Court subsequently denied in full Petitioners’ Motion for a Preliminary Injunction. (See Order, dated February 8, 2008.)

Now, less than one month later, Petitioners have filed yet another motion to dissolve the stay. This second Motion to Dissolve is based largely on the same reasons as their January 2008 Motion to Dissolve, including the Secretary’s de-certification of the AVS WINvote System and reports promulgated by the Secretaries of State of Ohio and California. (Motion ¶¶ 6, 7.) However, this time, unlike the January 2008 Motion to Dissolve, Petitioners do in fact seek to fully “open this case . . . to prevent the use of any [DRE] machines currently certified and already purchased.” (January 2008 Motion to Dissolve ¶ 13; see also Motion at 1.)

III. ARGUMENT

A. This Court Properly Entered the Stay and the Reasons Supporting Its Entry Persist Today.

Portraying the Court-ordered stay of this case as little more than a voluntary gift by the Petitioners that inured solely to the Secretary’s benefit, Petitioners’ Motion omits the fact that important grounds justified both the parties’ agreement and this Court’s May 11 Order. Those grounds still exist today.

Any further proceedings before this Court could be a waste of both the Court’s and the parties’ resources because the Supreme Court’s resolution of the Secretary’s interlocutory appeal efforts could result in dismissal of nearly this entire action. It is not disputed that (1) three judges of this Court would have dismissed most of this case at the pleadings stage (see generally April 12 Dissenting Opinion); and (2) this Court found that its April 12 Order involves controlling issues of law, for which there are substantial grounds for

difference of opinion, and as to which an interlocutory appeal may materially advance the ultimate termination of the case (see April 30 Order).

Ample authority supports the principle that a stay is appropriate when a lower court amends its Order pursuant to 42 Pa. C.S. § 702(b) to allow an interlocutory appeal. See Goldsborough v. Commw., Dept. of Educ., 137 Pa. Commw. 466, 586 A.2d 997 (1991) (explaining that the Supreme Court reversed the denial of a request for a stay pending disposition of a petition for allowance to appeal where the Department of Education had issued a 42 Pa. C.S. § 702(b) certification); see also 20 West's Pa. Prac., App. Prac. § 1313:1, n.3 (2007 ed.) (stating “[w]here the lower court or other government . . . agrees to amend its interlocutory order [to include the language required by section 702(b)] . . . it is unlikely that the lower court or other government unit would insist on proceeding forward with the case”). Moreover, this Court’s issuance of a stay was made against the backdrop of the Secretary agreeing to provide Petitioners with certain discovery, which the Secretary has in fact provided to Petitioners during the pendency of the stay.⁵

This Court had good cause to enter the stay, and that good cause persists today: the significant, controversial questions of law at issue in this case that the Court certified for interlocutory review remain unresolved. Proceeding with open discovery, motion practice and a trial prior to the Supreme Court’s disposition of the Secretary’s interlocutory appeal efforts could very well result in a waste of judicial resources. In addition, should Petitioners ultimately

⁵ It should not be lost that Petitioners’ receipt of approximately 4,000 pages of documents from the Secretary is more than they would have been entitled to had the Secretary prevailed on a petition to this Court for a reconsideration of its denial of his Application of a Stay or Supersedeas or to the Supreme Court pursuant to Pa. R.A.P. 1313 and 1702(b) for a stay ancillary to his Petition for Permission to Appeal, which avenues for obtaining a stay were not yet exhausted.

succeed on the merits – and they should not – at least fifty-four counties likely would be forced to spend millions upon millions of dollars and countless other resources to comply with a final order of this Court that very well could be rendered a nullity by the Supreme Court’s disposition of the Secretary’s pending interlocutory appeal efforts. Accordingly, this Court should deny Petitioners’ Motion.⁶

B. Equity Dictates that the Stay Continue.

1. *Dissolving the Stay Would Prejudice the Secretary and Contradicts the Express Terms of the Parties’ Bargained-for Agreement.*

Petitioners’ Motion should be denied because it improperly seeks to obviate the parties’ bargained-for agreement to the unfair detriment of the Secretary.

First, the Secretary and the public would be prejudiced if he is forced to engage in open discovery, motion practice and a trial prior to the Supreme Court’s disposition of the Secretary’s interlocutory appeal efforts. Win or lose after a trial on the merits, should the Supreme Court agree with the three dissenting judges, this case largely would be terminated at the pleadings stage. Clearly, both the Secretary and the public would be prejudiced if the Secretary and this Court were forced to throw substantial public resources upon a nullity.

Second, in accordance with the terms of the parties’ May 4 Letter Agreement, the Secretary produced discovery to Petitioners on June 29, 2007 and supplemented that discovery on January 17, 2008. Having reaped the benefits of the agreement, Petitioners should not be permitted now to wholly discard it and, among other things, force the Secretary to engage in

⁶ Petitioners’ Motion’s emphasis of the clause “until further order of the court” of the Court’s April 30 Order as supporting the dissolution of the stay is misplaced. Of course, with or without that phrase, this Court always retained the authority to dissolve any stay that it issued. That does not mean that this Court should dissolve the stay properly entered by its May 11th Order; nor does it mean that Petitioners’ Motion is any less a violation of the parties’ bargained-for agreement.

costly motion practice, open discovery and potentially litigate a complex trial involving judicial review of the Secretary's certifications of six DREs

Third, the implication of Petitioners' Motion that the "passage of time since May 2007" (Motion ¶ 7) was not contemplated by the parties' agreement is without merit. The parties agreed expressly that the proceedings should be stayed not only pending the Supreme Court's review of the Secretary's Petition for Permission to Appeal, but also that the stay would remain in full force and effect through the disposition of the appeal if permitted by the Supreme Court:

Also under our agreement, all proceedings in the case in the Commonwealth Court are stayed pending the disposition of the Secretary's interlocutory appeal efforts before the Pennsylvania Supreme Court. This stay is effective immediately and lasts until the Supreme Court concludes its consideration of the Secretary's soon-to-be-filed Petition for Permission to Appeal, and, if that Petition is granted, through the Pennsylvania Supreme Court's disposition of the appeal.

(May 4 Letter Agreement at 2.) That "time has passed" and the Secretary's interlocutory appeal efforts are still pending before the Supreme Court can hardly be considered a surprise or a new development justifying the dissolution of the stay.

2. *The Status Quo Has Not Changed Since the Court Entered the Stay and the Continuation of the Stay Does Not Prejudice Petitioners.*

Petitioners' Motion purports to describe a change in the landscape that supposedly makes the continuation of the agreed-upon stay prejudicial towards Petitioners. Petitioners' Motion is wrong.

First, contrary to the representations of Petitioners' Motion, the status quo has not changed since the Court's issuance of a stay, or at least has not changed to such a degree to justify the lifting of that stay for open discovery and a trial on the merits prior to disposition of the Secretary's interlocutory appeal efforts. Petitioners' Motion relies on two recent events: (1) the Secretary's decertification of the AVS WINvote in December 2007, a system whose

decertification was sought in the Petition for Review; and (2) the activity of other states in the fall of 2007 regarding electronic voting systems. (Motion ¶¶ 6-7.) Neither of these constitutes a change in the factual landscape relating to this case.

Regarding Petitioners' Motion's reliance on the Secretary's decertification of the AVS WINvote, it is the height of irony that Petitioners attack the Secretary for taking the action that they seek through this litigation, *i.e.*, the de-certification of a DRE. In revoking the certification of the AVS WINvote system, the Secretary exercised his statutorily-prescribed discretion to review and take corrective action to address issues relating to these systems (all without the need for judicial intervention). The parties, of course, did not agree that the stay would be dissolved if the Secretary decertified a system that the Petitioners wanted to decertify anyway. The fact that a system has been decertified simply is not a change in the status quo, let alone an unforeseen change justifying Petitioners' attempt to discard their bargained-for agreement with the Secretary through which they have already obtained discovery.⁷

⁷ The Secretary specifically disputes any implication in Petitioners' Motion that the de-certification of the WINvote system in any way demonstrates that the Secretary has failed to fervently follow and enforce the Election Code. In August 2007 – after the WINvote's successful use in the 2006 General Primary, the 2006 General Election and the 2007 Municipal Primary – the Secretary was compelled to suspend use of the WINvote due to an error in version 2.0.3 relating to so-called “cross-filed” candidates running in municipal elections, *i.e.*, November elections held in odd-numbered years. Specifically, WINvote version 2.0.3 included a software error that improperly permitted a voter in a municipal election to cast more than one vote for a single candidate, listed as the nominee of more than one political party, in elections for offices as to which a voter is permitted to vote for more than one candidate (*e.g.*, school board). This could be accomplished on the WINvote system by the voter selecting the name of one candidate twice – once where the candidate was listed as the nominee of one political party, and again where the candidate is shown as the nominee of another party for the same office. This software error could permit improper double voting only in Pennsylvania's municipal elections, *i.e.*, November elections held in odd-numbered years. The AVS WINvote was never used in an election in which the “cross-filing” issue could have arisen, as it was not certified until February 2006 and was suspended for use in advance of the November 2007 Municipal Election.

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Similarly, that other states, including California and Ohio, have conducted evaluations of DREs does not merit dissolution of the stay. Petitioners essentially contend – without credibility – that they did not foresee, at the time of the entry of the stay, that other non-party states would comment, favorably or unfavorably, on the same or similar voting systems as those used in Pennsylvania. Moreover, the summaries of the Ohio and California reports set forth in Petitioners’ Motion utterly fail to acknowledge that those very reports also disparage paper-based optical scan systems akin to the ones Petitioners want this Court to force approximately fifty-four non-party counties to purchase and deploy by the 2008 General Election.⁸ It is misleading to summarize those reports as merely critical of DRE voting systems

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AVS intended to fix the specific error in the next version of the software, version 2.0.4. However, the Secretary required that the new version of the WINvote could be used in Pennsylvania elections only after examination and approval by both a federally-recognized independent testing authority and the Secretary of the Commonwealth. See 25 P.S. § 3031.5(a). Had the new version been so approved, version 2.0.4 of the WINvote could have been installed on the AVS systems that the three counties had purchased in 2006. However, on November 28, 2007, the Director of Testing and Certification for the U.S. Election Assistance Commission (EAC) terminated the testing of WINvote version 2.0.4. Based on the inability of AVS to obtain federal approval for a version of its WINvote system that would correct a software error in the certified version, the Secretary de-certified AVS WINvote 2.0.3 on December 28, 2007.

⁸ For instance, Petitioners do not point out that Ohio’s Secretary of State examined not only DRE voting systems, but also some optical scan systems of the type that Petitioners would prefer be purchased by Pennsylvania counties. (See Motion ¶ 6.) Thus Ohio’s Secretary of State recommended following Ohio’s investigation to “Eliminate DREs *and Precinct-based Optical Scan Voting Machines* that tabulate votes at polling locations.” (See, e.g., Ohio Secretary of State’s Recommendations, Project Everest Report of Findings, at 77 (emphasis added), available at <http://www.sos.state.oh.us/sos/info/EVEREST/00-SecretarysEVERESTExecutiveReport.pdf>. While Ohio’s Secretary of State therefore recommends using centrally counted optical scan systems, the report on which that recommendation is based notes concerns with such systems. See, e.g., Project Everest Report of Findings, at 28 (noting that the ES&S M650 central count optical scan could be manipulated in order to cause “errors in the tabulation mechanism, which could be used to manipulate the vote count in the tabulation process”).

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in an effort to make it seem as if, since the entry of the stay, analyses have only increased the likelihood that their preferred voting system is best or most worthy of Pennsylvania certification. Petitioners' Motion's approach ignores the unremarkable and universal truth that every voting system is flawed in some respect, Taylor v. Onorato, 428 F. Supp. 2d 384, 387-88 (W.D. Pa. 2006) (observing that "[v]oting machine malfunction has been, and probably always will be, a potential problem in every election"), and that every kind of voting system is being subjected to scrutiny. Thus, the activities of other states, which are not binding on the Secretary of the Commonwealth, do not change the status quo in any meaningful way. (This, of course, is not to say that the Secretary does not take non-binding reports of other states seriously. He does. Nevertheless, these reports do not justify the dissolution of the stay.)

Second, even if the status quo has changed meaningfully since the entry of the stay – and it has not – Petitioners cannot credibly argue that they are being forced to watch the world pass by as the Supreme Court considers the Secretary's interlocutory appeal efforts. Not only have Petitioners received discovery during the stay, but less than one month ago, this Court granted Petitioners an opportunity to seek interim relief despite the stay. In their January 2008

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California withdrew certification for and then conditionally reapproved both DRE and optical scan systems. See August 3, 2007 Press Release of California Secretary of State, available at http://www.sos.ca.gov/executive/press_releases/2007/DB07_042.pdf (noting that "[e]ach of the systems that went through the top-to-bottom review has been legally decertified, and then each of them has been recertified with the addition of a number of conditions"). Indeed, California decided that the Hart InterCivic DRE system, a system used in Pennsylvania, was "required to comply with increased security and post-election auditing procedures." Id. Petitioners do not mention that this puts the Hart InterCivic DRE on equal footing with California's Diebold, Hart and Sequoia optical scan systems, which also were recertified and, like the Hart DRE, "will be required to adopt increased security and post-election auditing procedures." Id.

Motion to Dissolve, Petitioners actually relied upon these same developments to justify the limited dissolution of the stay for the purpose of hearing Petitioners' Motion for Preliminary Injunction. (Tellingly, Petitioners apparently did not believe that these developments merited a wholesale dissolution of the stay, as they unambiguously stated: "Petitioners do not seek to open this case at this time to prevent the use of any machines currently certified and already purchased" (*Id.* ¶ 13.)) The Court granted Petitioners' January 2008 Motion to Dissolve – over the Secretary's objections – and thus granted Petitioners an opportunity to seek interim relief. The Court subsequently denied, in full, Petitioners' Motion for Preliminary Injunction on February 8, 2008; but this was only after the Secretary spent considerable time, money and other resources defending against Petitioners' Motion for Preliminary Injunction. In sum, Petitioners are neither disadvantaged nor stymied by the continuation of the agreed-upon stay during the Supreme Court's consideration of the Secretary's interlocutory appeal efforts, particularly in light of the fact that Petitioners obtained relief from the stay just one month ago.

C. Petitioners' Motion is Based on Unwarranted Assumptions and Unsupported Averments

It bears noting that many of the averments of Petitioners' Motion are, at best, unsubstantiated and unverified, and at worst, plain wrong. By way of example only, Petitioners' Motion states "the fact that Pennsylvania citizens are now entering an important election year justifies providing Petitioners the relief they seek from the stay and allowing the case to proceed." (Motion ¶ 7.) The Secretary specifically disputes that the 2008 General Election is any more important than other elections. All elections are important. All elections demand the use of secure and reliable voting systems that are deployed and administered in the counties in a timely, deliberate and just manner. Moreover, that the 2008 General Election is a Presidential election means an increase in voter turnout and a corresponding increase in the administrative

demands on the non-party counties and the Commonwealth in the months and weeks leading up to that election. Dissolving the stay to litigate this case and hold a trial would only drain the resources of the Commonwealth (and likely the non-party counties as well) during a time when those resources already will be severely taxed. Thus, the magnitude of the 2008 General Election countenances against dissolution of the stay.

By way of another example, Petitioners' Motion seeks dissolution of the stay based on unwarranted assumptions that trial may be concluded before July 2008 and that "[t]he counties will have ample opportunity to arrange to use voting methods during the November 2008 election that do not involve the illegal DRE machines." (Motion ¶ 8.) Petitioners' Motion fails to demonstrate how the parties could reasonably, and without prejudice to the Secretary, fast-forward from the pleadings stage, through discovery, through dispositive motions and through the end of a complex trial regarding numerous certifications of six DRE systems and related software. Moreover, even if Petitioners succeeded on the merits of all of their claims and obtained all of the relief they seek in the Petition for Review before July 2008 (which they should not), the approximately fifty-four non-party counties currently using DREs – at the financial cost of millions upon millions of dollars – likely would have to thoroughly review other voting systems, order, purchase, receive and implement those systems, adequately train all relevant workers and properly inform voters how to operate those systems. All of this, and more, is set against the backdrop of an election for which increased voter turnout is expected, thus maximizing the chances for poll worker and voter confusion.

But, the feasibility of resolving trial before July 2008 and the feasibility of fifty-four counties completely overhauling their implemented voting systems by November 2008 really is beside the point. This Court prudently and wisely entered the stay. The same reasons

justifying the stay persist today, and Petitioners have demonstrated no reasons justifying the dissolution of the very stay to which they expressly agreed.

IV. CONCLUSION

For all of the foregoing reasons, the Secretary of the Commonwealth, Pedro A. Cortés, respectfully requests the Court to deny Petitioners' February 22, 2008 Motion to Dissolve Stay of Proceedings.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: March 7, 2008

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