3114

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, ***et al.,***	:	
	:	
Petitioners,	:	
	:	
v.	:	
	:	**Docket No. 442 M.D. 2006**
PEDRO CORTES,	:	
	:	
Respondent.	:	

PETITIONERS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO LIFT THE STAY AND ESTABLISH A SCHEDULE LEADING TO TRIAL

Petitioners file this reply brief in further support of their motion to lift the stay, and establish a schedule leading to trial. Petitioners' purpose is to ensure that this Court has before it an accurate picture of the prior history of this case, as well as where things currently stand.

That picture must be developed first by remarking on the Secretary's astonishing vision of his role under the Election Code – that he has complete discretion, irrespective of any limitations set forth in the law or the interests and rights of Pennsylvania's citizens, to certify voting machines. The Secretary believes his discretion supersedes the plain language of the Election Code (which, like Humpty Dumpty, the Secretary believes contains words that mean what he says they mean, "neither more nor less."[1]) and is, in his world-view, not subject to challenge in this Court. His arguments in this regard are, of

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[1] "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean neither more nor less." L. Carroll, Through the Looking Glass, 123-24 (1981 ed.).

course, excessive and were rejected by this Court when it overruled the Secretary's preliminary objections a year ago. They are worth lingering over for a moment, however, if only because they show, presumably unwittingly, what the Secretary is attempting to do here.

The Secretary, who is the government official charged with protecting the franchise of all citizens, does not have the discretion to certify voting machines which are unable to operate accurately, cannot be subjected to an independent audit, cannot be used for the sort of statistical sampling described in the Election Code and do not meet any rational definition of a safe and reliable system of computerized voting. The Secretary likewise does not have the "discretion" to say the challenged DRE machines have these qualities when they do not and or the "discretion" to interpret and apply the Election Code free of any judicial scrutiny.

The Secretary asserts that if the stay in this case were to be lifted, the litigation would quickly be resolved in his favor on the merits because of the DRE machines he certified have sterling qualities and because of his "just trust me" discretion. Nevertheless, he adamantly opposes holding a trial which would give him the public opportunity to establish the accuracy of his claims and which would allow him to assuage the widespread concern in this Commonwealth concerning the accuracy and safety of the DREs. The fact that he has fought tooth and nail to avoid a public airing of whether the machines he certified meet the requirements of our law stands plainly for the proposition that he knows what such a public airing will show - - that the flaws in the DREs are as great, if not greater, than those alleged in the Petition.

With the foregoing clarification, Petitioners reply below to the Secretary's remaining arguments, to the extent they were not already addressed in Petitioners' Motion.

A. The Decertification of the AVS WinVote System Is Evidence That Justifies Lifting the Stay

The debacle surrounding the Secretary's certification and subsequent decertification of the AVS WINVote system is the clearest proof that the Secretary's certification process failed to ensure that the DREs certified in Pennsylvania comply with the Election Code. Following the Secretary's certification of the AVS WIN Vote, and the purchase of that machine by three Pennsylvania counties, the manufacturer, AVS, installed uncertified software and firmware onto the Pennsylvania machines, including opening the machines and soldering items onto the motherboards of the equipment. The machines were thereafter used in the November 2006 General Election with the uncertified software and firmware. Afterwards, and faced with the foregoing, the Secretary requested a re-examination of the system with the unauthorized versions of software and firmware. Despite concerns raised at the re-examination demonstration of the WINVote by his own consultant, the Secretary certified the "new" version of the AVS WINVote, (the one already used in the 2006 election), for use in the spring 2007 election. However, because the Secretary knew that the WINVote did not properly tally cross-filed candidates, the Secretary instructed AVS to fix the cross-filing flaw and, while they were at it, to obtain federal certification.[2] AVS was not able to do either.

[2] The documents produced by the Secretary are ambiguous with respect to whether AVS *ever* obtained federal certification prior to the use of the WINVote in Pennsylvania. Federal certification is a prerequisite under the Election Code before the Secretary may certify a machine for use in the Commonwealth.

AVS started, but did not complete, the federal certification process. During that aborted process, it was learned that the AVS machines, as certified and then recertified by the Secretary for use in Pennsylvania elections, contained 1,946 source code anomalies in the software and 25 documentation anomalies. In addition, the hardware drawings submitted by AVS for assessment did not match the actual hardware provided to the testing organization. When it became clear in August 2007, that AVS could not obtain federal certification before the November election, the Secretary suspended certification and, ultimately, decertified the WINVote. Because AVS then dropped out of the federal certification process, it is unknown how many other anomalies would have been found had the federal certification agency been allowed to complete its job.

The development of this shocking evidence, standing alone, is a changed circumstance that justifies lifting the Court's May 1997 Stay. The fact that the WINVote was certified, with its thousands of source code and documentation anomalies and inability to register votes cast for cross-filed candidates, establishes beyond peradventure that the Secretary certified machines without a careful certification process and even when the machines do not meet the requirements of the Election Code. The remaining DREs were certified in the same inadequate manner and subjected to the same inadequate review as the WINVote. Moreover, they contain the same generic flaws in their inability to allow an audit independent of the same software which produced the original count or a statistical sample in accordance with the Election Code.

B. The Secretary's Reliance Upon The Same Reasons For Entering The Stay That He Raised In May 2007 Requires That This Court Lift The Stay.

The Secretary argues that the Court should not lift the stay because the reasons for entering it are as strong now as they were when the stay was entered. This, plain and simple, is an admission that the stay should be lifted, What the Secretary fails to mention is the fact that this Court looked at those reasons and **denied** the stay. The stay was only entered because the parties agreed to it not knowing that the Supreme Court would fail promptly to rule on the Secretary's request for allowance of appeal. In any event, this Court has already decided that this case does not justify any stay pending appeal and that none would exist, but for the parties' agreement. The Court should make the same decision now.

C. The Parties' Discovery Arrangement Does Not Bar This Motion To Lift The Stay, As This Court Has Already Determined

The Secretary argues that the parties' agreement to the entry of the stay pending appeal in exchange for his willingness to provide discovery prevents lifting the stay. He argues that, because he provided the discovery (although in point of fact, his production was far from complete), Petitioners are estopped from asking that the stay be lifted. Again, however, this question was previously resolved by the Court.

First, in its May 2007 Order, the Court stated specifically that the stay would be lifted for cause shown. It made that Order while aware of the parties' agreement and therefore plainly concluded that the discovery agreement did not bar lifting the stay where the circumstances merited it. Second, the Court lifted the stay in January 2008 to hear Petitioners' motion for emergency relief relating to the purchase by certain Pennsylvania counties of DRE machines to replace the decertified WINVote. Again, the

Court plainly did not consider the discovery agreement to impact the question of whether good cause was shown to lift the stay.

Third, and finally, and despite the Secretary's bluster, he cannot credibly argue he is prejudiced if the so-called discovery agreement is not enforced. All the Secretary did was provide discovery he was otherwise obligated under the Rules to provide (and did so in a sadly incomplete fashion). His compliance with his legal obligations can scarcely be deemed consideration sufficient to override the compelling need to lift the stay in light of the passage of time and the new evidence developed as a result of the AVS WINVote debacle.

D. The Court's February 2008 Hearing Was Limited To The Purchase Of DRE Machines In The Counties Replacing The WINVote And It Was Because Of The Determinations Made During That Hearing, Petitioners Decided To Have The Stay Lifted In Its Entirety.

Finally, and while the Secretary would like to pretend that this Court made determinations during the February 8 hearing that constitute 'law of the case' going forward, he is wrong. The earlier motion to lift the stay was filed as an emergency matter in order to address the fact that some of the counties replacing the AVS WINVote intended to purchase other DRE machines challenged in the Petition. The stay was lifted and the hearing was held. The results of that hearing, contrary to the Secretary's arguments, do not suggest that it would be either futile or wasteful for this Court to lift the stay and allow this case to proceed to trial. And, in making that argument, the Secretary omits the critical differences between the final hearing on the merits requested here and the nature of the emergency relief sought in February.

At the February hearing, the Court decided that it could not enter relief to bar the three counties from replacing the WINVote machines with the DRE machines that could be purchased by all other counties in Pennsylvania. It also concluded that, given the particular form of relief sought, it could not proceed without first causing the affected counties to be joined as parties.

Neither determination reflects in any way on the current motion to proceed with the case. To the contrary, the Court's ruling stands only for the proposition that a final determination is needed of whether the currently certified DREs meet the requirements of the Election Code. If such a determination is not sought, the Petitioners will be prejudiced again and again in a game of musical chairs as, inevitably, flaws are exposed in other DREs, forcing the Secretary to admit again that he erred in certifying those DREs just as he erred on the WINVote, causing county after county to choose among a reduced pool of certified DREs which, themselves, are later decertified.

Accordingly, the lack of any interim remedy is the very reason that the stay needs to be lifted and the case allowed to proceed to a full determination on the merits. If the Supreme Court believes a stay is useful while it considers the Secretary's requested appeal, it has the ability under the rules to do so. This Court need not guess, therefore, at whether the Supreme Court believes ought to happen pending its review of the Secretary's requested allowance of appeal.

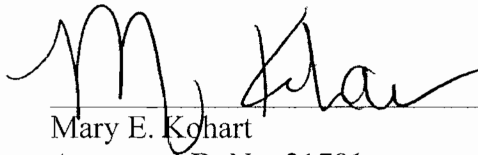
CONCLUSION

The Secretary surely recognizes that the individual counties expended significant sums of money based on his certifications and that they did so believing he had certified only machines that complied with the Election Code and did the things voting machines

in Pennsylvania are required to do. Human nature tells us, especially after the WINVote debacle, that the Secretary cannot and should not be relied upon to admit to his certification errors. It is telling that the WINVote decertification occurred only because the Secretary was confronted with the fact that the machines could not perform a core election function. If this flaw had not been exposed, it is likely that the WINVote, with all its anomalies, would still be certified in Pennsylvania today.

The stay must be lifted.

Respectfully submitted,



Dated: March 14, 2008

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CERTIFICATE OF SERVICE

I, Mary E. Kohart, hereby certify that the foregoing was served upon counsel listed below via Hand Delivery:

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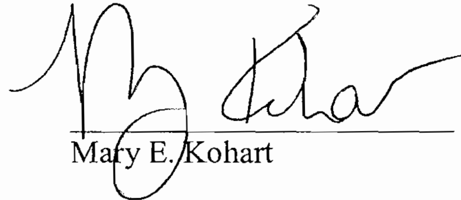

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