

Respectfully submitted,

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: February 6, 2008

By: _____

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schedule an emergency motion for preliminary injunction . . . [b]ecause three counties need to replace, in a timely manner for the April 22 primary election, a voting system decertified by the Secretary last month,” (Pet’rs Mot. to Dissolve at 1) (emphasis from original omitted).³

Petitioners simultaneously filed their Motion for Preliminary Injunction, accompanied by a memorandum of law (“Petitioners’ Memorandum”). Petitioners state that they filed their Motion because “Wayne, Lackawanna and Northampton [Counties], must purchase new voting systems for use in the April 22, 2008 primary.” (Pet’rs Mem. at 2). Petitioners’ proposed order seeks the following relief:

[T]he [Secretary] shall suspend the acquisition, purchase, lease or otherwise, of the certified versions of the following six (6) DRE voting systems at issue in this litigation until the final disposition of this case on the merits:

1. AVC Edge II manufactured by Sequoia Voting Systems, Inc.;
2. AVC Advantage manufactured by Sequoia Voting Systems, Inc.;

(continued...)

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 counties 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.) 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) (“Petition for Permission to Appeal”). Petitioners filed an opposition brief to the Secretary’s Petition for Permission to Appeal on May 24, 2007. The Supreme Court has not ruled on the Secretary’s Petition for Permission to Appeal, which is docketed at No. 70 MM 2007. On May 11, 2007, this Court stayed these proceedings following the parties agreement that this action should be stayed pending the Secretary’s interlocutory appeal efforts.

³ The Honorable Barry F. Feudale granted Petitioners’ Motion to Dissolve by Order entered on February 1, 2008.

3. AccuVote TSX manufactured by Premier Election Systems (formerly Diebold Election Systems);
4. iVotronic manufactured by Election Systems and Software, Inc.;
5. eSlate, manufactured by Hart Intercivic, Inc.;
6. ELECTronic 1242 manufactured by Danaher Controls, Inc.

AND IT IS FURTHER ORDERED that the Secretary shall not use state funds to assist county boards of elections from acquiring, by purchase, lease or otherwise, such voting systems.

(Pet'rs Proposed Order at 1-2.) Unlike the Petition for Review, Petitioners' Motion does not seek to have this Court order the de-certification of any DREs. (*Id.*) In fact, Petitioners state expressly that they do not seek an injunction order that would preclude any county board of elections from using a voting system that it has been using. (Pet'rs Mem. ¶ 26) ("Petitioners do not seek to open this case at this time to prevent the use of any machines currently certified and already purchased, but merely seek to prevent the state from permitting counties to spend \$4 million of state money on purchasing new [DREs]")

II. ARGUMENT

The Court should summarily deny Petitioners' Motion because (1) it seeks relief that this Court simply may not issue under the law; and (2) it will immediately, directly and substantially impact at least three non-party counties that are indispensable parties to this Motion, if not this action. Accordingly, a hearing on Petitioners' Motion is a waste of the valuable resources of this Court and the Secretary.

Petitioners are clear on one thing: their Motion does not seek the same relief as the underlying Petition for Review. Petitioners state that "[t]hey do not, by this motion, seek to decertify and require replacement of all DREs currently in use in Pennsylvania." (Pet'rs Mem. at 6; see also Motion to Dissolve at ¶ 13 ("Petitioners do not seek to open this case at this time to prevent the use of any machines currently certified and already purchased")) Instead, they

only “seek a moratorium on county-wide new purchases of DREs,” (Pet’rs Mem. at 6), which they describe as “preventing the Secretary from allowing the electronic voting machines challenged in this case [to] be purchased by three counties seeking new machines because of the recent decertification by the Secretary of the DRE used by them.” (Pet’rs Mem. Supp. of Motion to Dissolve at 1.) In addition, Petitioners’ Motion seeks to enjoin the Secretary from using “state funds to assist county boards of elections from acquiring, by purchase, lease or otherwise, such voting systems.” (Pet’rs Proposed Order.)

A. Petitioners’ Motion Seeks an Improper Mandatory Injunction and/or Mandamus Relief that is Not Legally Cognizable

First, Petitioners improperly seek a mandatory injunction requiring the Secretary to take affirmative steps to preclude counties from purchasing DREs. It is axiomatic that this Court may not issue a mandatory injunction against the Secretary. See 1 Pa. C.S. § 2310 (sovereign immunity);⁴ Bonsavage v. Borough of Warrior Run, 676 A.2d 1330, 1331 (Pa. Commw. Ct. 1996) (“[B]ecause the [Plaintiffs] seek to compel the Commonwealth . . . to take affirmative action . . . , sovereign immunity will shield them from suit”); see also Stackhouse v. Pennsylvania State Police, 892 A.2d 54, 59, 61-62 (Pa. Commw. Ct.) (noting the rule and determining that request for an order mandating imposition of guidelines and policies by the State Police was properly dismissed on the basis of immunity), allocatur denied, 588 Pa. 760, 903 A.2d 539 (2006).

Second, to the extent Petitioners seek a preliminary injunction in the nature of mandamus relief, this Court could only order the Secretary to take nondiscretionary, ministerial actions that the Secretary is both duty-bound and empowered to take pursuant to Commonwealth

⁴ None of the limited, specified instances where the General Assembly has waived sovereign immunity apply here. See 42 Pa. C.S. §§ 8521, 8522.

law. See, e.g., Pennsylvania Dental Ass'n v. Pennsylvania Ins. Dept., 512 Pa. 217, 227, 516 A.2d 647, 652 (1987) (Mandamus “will only lie . . . where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy.”) Nothing in the Election Code empowers the Secretary to take the action Petitioners request this Court to mandate the Secretary to take: dictating to the counties which certified voting systems they may purchase.

Pursuant to the Election Code, the Secretary examines voting systems to determine if they meet the criteria set forth in the Code. See 25 P.S. § 2621(b) (listing among the “[p]owers and duties of the [S]ecretary of the [C]ommonwealth” the duty “[t]o examine and reexamine voting machines, and to approve or disapprove them for use in this State, in accordance with the provisions of this act”).⁵ The Secretary does not purchase any voting systems. Rather each of Pennsylvania’s sixty-seven counties chooses among the systems that the Secretary has determined, in his opinion, meet the requirements of the Code, and each county independently purchases the voting system that best meets the needs of that county. See 25 P.S. § 2642(c) (listing among “[p]owers and duties of county boards” the power and duty “[t]o purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines”); id. § 3031.4(a) (“[T]he county board of elections of that county shall purchase, lease, or otherwise procure for each election district of such county or municipality, the components of an electronic voting system of a kind approved .

⁵ If the Secretary determines, in his discretion, that a system meets the standards set forth by the General Assembly in the Election Code, the system is certified; if the Secretary determines that a system does not meet those criteria, it is not certified. See 25 P.S. § 3031.5(b) (“[T]he Secretary of the Commonwealth shall examine the electronic voting system and shall make and file in his office his report . . . stating whether, in his opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth. If his report states that the system can be so used and meets all such requirements, such system shall be deemed approved and may be adopted for use at elections, as herein provided.”)

. . . by the Secretary of the Commonwealth.”); *id.* § 3031.8 (“The county commissioners . . . of any county which adopts an electronic voting system shall, upon the purchase, lease or other procurement thereof, provide for payment therefor by the county.”)⁶

Accordingly, the Secretary’s Motion should be granted and Petitioners’ Motion should be summarily denied because it seeks legally impermissible relief.

⁶ Failing to find any support in the Election Code for their notion that “[t]he Secretary has the power to order that no new purchases of DREs at issue in this litigation shall be made during the pendency of the litigation,” (Pet’rs Mem. at 6), Petitioners infer that the Secretary has such a power because “[i]n August 2007, the Secretary suspended the certification of the AVS WINvote,” *id.* The circumstances underlying the Secretary’s revocation of the AVS WINvote are entirely inapposite, and nothing in the history of the AVS WINvote demonstrates that the Secretary has the power to prevent or direct the purchase of any certified voting system.

After successful use in the 2006 General Primary, the 2006 General Election and the 2007 Municipal Primary, the Secretary in August 2007 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 November 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 “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 the November 2007 Municipal Election.

AVS intended to fix the specific error in the next version of the software, version 2.0.4. However, under Pennsylvania law, 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. 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, *see* 25 P.S. § 3031.5(a) (requiring all voting systems to be approved by a “federally recognized independent testing authority”), the Secretary de-certified AVS WINvote 2.0.3 on December 28, 2007.

The history of the AVS WINvote’s certification revocation thus demonstrates only that the Secretary acted in accordance with his powers to certify machines (and revoke certifications), and not in the exercise of any purported power to bar purchases of certified voting systems or any other power not provided for in the Election Code.

B. Petitioners' Motion Should Be Summarily Denied for Failure to Join At Least Three Indispensable Parties: Northampton, Lackawanna and Wayne Counties

A party is indispensable when “his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” Polydyne, Inc. v. City of Philadelphia, 795 A.2d 495, 496 n.2 (Pa. Commw. Ct. 2002). The Supreme Court has defined the “indispensable party consideration” as involving at least the following: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” CRY, Inc. v. Mill Service, Inc., 536 Pa. 462, 468-69, 640 A.2d 372, 375 (1994). In addition, “[w]hether a court lacks jurisdiction due to the failure to join an indispensable party may be raised at any time or sua sponte.” Polydyne, 795 A.2d at 496 n.2.

At the time of the Court’s April 12 Order overruling the Secretary’s Preliminary Objections, the primary relief sought by the Petitioners impacting the Commonwealth’s counties was the court-ordered de-certification of DREs. (See, e.g., Petition for Review at 26 (demanding an order “[d]irect[ing] the Secretary to immediately de-certify the DRE systems”).) The Court, in a narrowly-divided, 4-3, en banc opinion, overruled the Secretary’s Preliminary Objection that the counties are indispensable parties to the Petition for Review (and its requested form of relief) in large part because the Secretary always “could de-certify a DRE at any time based solely on the statutory requirements for certification, and counties using certified DREs must be prepared

for that possibility.” (April 12 Majority Opinion at 10, reported at Banfield v. Cortés, 922 A.2d 36 (Pa. Commw. Ct. 2007).)⁷

Now, Petitioners’ Motion seeks relief different than the relief sought in the Petition for Review: Petitioners’ Motion does not seek an order de-certifying the DREs, but actually an order requiring the Secretary to deny to the counties their statutory right to acquire a certified system of their choice and an order preventing the Secretary from using “state funds to assist county boards of elections [in] acquiring [DREs], by purchase, lease or otherwise.” (Pet’rs Prop. Order at 2).) In short, these counties have a statutory right to chose among all certified voting systems, that right is essential to Petitioners’ Motion – if not this case – and justice cannot be afforded without those counties’ joinder, at least for the purposes of responding to this Motion. There can be no argument that the non-party counties, including at least Lackawanna, Northampton and Wayne Counties, “must be prepared for the possibility” (April 12 Majority Opinion at 10) that the Secretary would prevent those counties from exercising their statutory right to procure otherwise certified and available voting systems. See, e.g., Waksmunski v. Delginis, 391 Pa. Super. 37, 44-45, 570 A.2d 88, 92-93 (1990) (holding that township was an indispensable party to an action to declare a roadway public because it would be responsible for maintaining the road); Borough of Wilkinsburg v. Horner, 88 Pa. Commw. 594, 490 A.2d 964 (1985) (reversing order granting preliminary injunction where sanitation company that had entered into contract with borough was an indispensable party to taxpayer’s suit against borough to enjoin performance of contract that allegedly was in violation of borough’s code).

⁷ The dissent would have found these counties to be indispensable parties based on the relief sought in the Petition (April 12 Dissenting Opinion at 12-13 (“[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.”), and that (continued...))

In addition, even if the Court were to order all of the relief sought by Petitioners' Motion and issue an order compelling the Secretary to order Northampton and Lackawanna Counties not to purchase any DREs, there are serious questions as to whether Northampton and Lackawanna Counties would be under any legal obligation to follow such an edict by the Secretary. Where such doubt exists, a party should be joined to the action. See CRY, 536 Pa. at 470, 640 A.2d at 376 (finding the non-party Department of Environmental Resources (DER) to be an indispensable party where the DER indicated it might not comply with any order resulting from the litigation).

Having failed to join at least three indispensable party counties to this Motion or action, Petitioners' Motion should be summarily denied.⁸

(continued...)

issue remains pending before the Supreme Court as one of the questions presented in the Secretary's Petition for Permission to Appeal.

⁸ The April 12 Majority Opinion determining that the Commonwealth's counties are not indispensable is not law of the case. First, whether a court lacks jurisdiction for non-joinder of an indispensable party is an issue that may be raised at any stage of proceedings. Polydyne, 795 A.2d at 496 n.2. Second, Petitioners' Motion seeks different relief than the Petition for Review; and, accordingly, the counties' indispensability to the relief sought in this Motion has not yet been decided. Third, the April 12 Opinion concerned an entirely different procedural stage, and Petitioners now must overcome a far more difficult burden than they did to survive the Secretary's Preliminary Objections. See, e.g., Mellon Bank, N.A. v. National Union Ins. Co. of Pittsburgh, 768 A.2d 865, 870-71 (Pa. Super. Ct. 2001). Finally, for whatever its persuasive effect may be, the prior ruling is not conclusively binding as the doctrine "only applies to issues decided by appellate courts upon appeal. . . . This case is heard under [the Court's] original jurisdiction." Pennsylvania Ass'n of State Mental Hospital Physicians v. State Employees Retirement Bd., 31 Pa. Commw. 151, 156, 375 A.2d 863, 865 (1977).

III. CONCLUSION

For the foregoing reasons, the Secretary of the Commonwealth, Pedro A. Cortés, respectfully requests the Court grant the Secretary's Motion for Pre-hearing Summary Denial of Petitioners' Emergency Motion for Preliminary Injunction.

Respectfully submitted,

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Dated: February 6, 2008

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CERTIFICATE OF SERVICE

I, Alan C. Promer, hereby certify that on February 6, 2008, I caused true and correct copies of the foregoing Motion for Pre-hearing Summary Denial of Petitioners' Emergency Motion for Preliminary Injunction to be served by the method indicated below, on the following:


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