

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Mark Banfield et al.,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 442 M.D. 2006
	:	
Pedro Cortes,	:	
Secretary of the Commonwealth,	:	
	:	
Respondent	:	

**MOTION TO DISSOLVE VOLUNTARY STAY OF PROCEEDINGS  
AND FOR AN EXPEDITED HEARING**

Petitioners hereby request this Court dissolve the stay of proceedings “until further order of this Court” entered by this Court on May 11, 2007 pursuant to the voluntary agreement of the parties in order that it may hear on an expedited schedule an emergency motion for preliminary injunction. The emergency motion will seek to prevent *pendente lite* the Respondent Secretary from permitting the purchase of any of the six electronic voting systems whose certifications are challenged here until resolution of those challenges. Because three counties need to replace, in a timely manner for the April 22 primary election, a voting system decertified by the Secretary last month, an expedited hearing is critical. Without a preliminary injunction the Secretary will reimburse the three counties \$4 million to purchase machines which he has wrongly certified as available for use in Pennsylvania. Such action would compound the injury already caused to Petitioners. Petitioners state in support thereof:

1. This case is a petition for review to require the Secretary of State to decertify Direct

Electronic Recording voting systems previously certified by him as complying with Pennsylvania law. None of these machines have an independently auditable physical record. None have a paper record of the voter's intent.

2. On April 12, 2007 this Court dismissed the preliminary objections of Respondent. The Court found that challenges that the DREs do not have a permanent physical record, that they can not be audited in a manner different from the way they were originally tallied, that they are not safe nor reliable, and that the certifications were not properly conducted all stated appropriate claims. In addition,, the Court rejected waiting to review the certifications until challenges of election results on the ground that "Electors will suffer hardship because it will be impossible to determine the validity of the challenge by auditing the election results." Opinion at 12.

3. Since this Court's decision upholding Petitioners' right to a hearing, two states, California and Ohio, have conducted thorough evaluations of DREs, including four of the six machines whose certifications are challenged in this case, which concluded they present significant risks of reliability and safety.

4. Respondent applied for leave to allow an interlocutory appeal and an emergency application for "Stay and Supersedeas of Proceedings." On April 30, 2007 this Court amended its order of April 12, 2007 to permit an interlocutory appeal but denied Respondent's application for a stay or supersedeas. On May 12, 2007 Respondent filed a petition for review with the Pennsylvania Supreme Court.

5. Petitioners voluntarily agreed to the entry of a stay upon the application of Respondent conditioned upon production of certain agreed to discovery and the unopposed application was submitted to this Court. On May 11, 2007, the Court ordered "upon consideration of the

unopposed request for a stay, it is hereby ordered that a stay is granted until further order of this court.” The order is attached hereto as Exhibit A.

6. At that time petitioners consented to the stay, there were no additional purchases of DREs contemplated by any county board of elections known to the Petitioners.

7. After the 2006 General Election, the Secretary of State determined that one of the voting systems certified by him, manufactured by Advanced Voting Solutions (AVS), had installed and ran uncertified software on voting systems in use in Pennsylvania and installed repairs to the motherboard circuits of those systems. After examination of the new software, the Secretary determined a) the AVS voting system had never been properly federally certified and b) did not properly tally the votes of candidates who are cross filed. The Secretary required changes to the software to correct the cross-filing problem and required AVS to obtain federal certification. In August, the Secretary learned that federal certification of the AVS system would not be completed in time for the November 2007 General Election and prohibited its use in that election. This directive affected three counties – Lackawanna, Northampton, and Wayne. All three counties obtained temporary alternative machines for use in that election.

8. In December 2007 the Secretary officially decertified Advanced Voting Solutions’ WINVote DRE system. That action was taken without participation in any proceeding by the three counties or their boards of elections.

9. Upon information and belief, officials of the Department of State have agreed to pay for the cost of obtaining new voting systems to replace the wrongfully certified WINVote system. The total state funds committed is approximately \$4 million, divided \$2 million for Northampton, \$1.7 million for Lackawanna, and \$294,000 for Wayne.

10. The three counties held a meeting with vendors on January 15, 2008 to review the voting systems certified by the Secretary and available for purchase in time for the 2008 spring primary. They have announced their intention to promptly purchase new systems which may include the DREs at issue here.

11. If this Court prohibits purchase of the challenged DREs *pendente lite*, counties will still have available options approved by the Secretary and already in use in Pennsylvania. Those options include the use of paper ballots with either precinct based or centrally based optical scan equipment certified by the Secretary, now used in 13 counties in the Commonwealth.

12. Additional purchases of DREs will change the status quo, increasing by \$4 million the final cost incurred by the Secretary's wrongful certification and making more costly any remedy which Petitioners may be entitled to.

13. 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 machines which are the subject of this litigation and which, if petitioners prevail, will have to be sold for scrap. Moreover, Petitioners will be subjected to the unnecessary risk of the reliability and safety of these machines, a risk which could be avoided by the alternatives available.

14. Petitioners have no alternative remedy to preserve the status quo, or to protect their statutory and constitutional rights from further invasion and irreparable harm as set forth in the Complaint, or to protect their interests as taxpayers to avoid wasteful expenditures while this Court is waiting to determine whether the DREs were certified in accordance with law.

15. The harm to Petitioners from a stay of proceedings in this matter, without holding a


hearing on the motion for Preliminary Injunction, would exceed any cost to the Respondents or to the public from holding a timely hearing. The three counties will face the same timing problems of securing new equipment whether or not the six DREs are included in the options available. Because time is of the essence in preparing for the Spring Primary the parties can not wait for the determination by the Supreme Court of whether it will accept this matter for review.

16. An expedited hearing is necessary to protect the interests of Petitioners, of the public, and of this court so that timely and informed decisions can be made by the public entities involved, purchases inconsistent with eventual decisions of this court prevented, and wasteful expenditures avoided.

Wherefore Petitioners respectfully request this Court to proceed with setting an expedited hearing on the Petition for a Preliminary Injunction accompanying this motion.

Dated: January 25, 2008

Respectfully submitted,



MICHAEL CHURCHILL  
Attorney I.D. No. 4661  
Public Interest Law Center of Philadelphia  
125 S. 9<sup>th</sup> Street, Suite 700  
Philadelphia, PA 19107  
Tel. 215-627-7100  
Fax. 215-627-3183



MARIAN K. SCHNEIDER  
Attorney I.D. No. 50337  
Attorney-at-Law  
295 E. Swedesford Road, #348  
Tel. 610-644-1925  
Fax. 610-722-0581

MARY E. KOHART  
Attorney I.D. No. 37191  
DRINKER BIDDLE & REATH LLP  
One Logan Square  
18<sup>th</sup> & Cherry Streets  
Philadelphia, PA 19103  
Tel. 215-988-7740

*Attorneys for Banfield, et al.*

# **Exhibit A**

