

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS'
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

As set forth more fully in the accompanying Petition for Preliminary Injunction, Petitioners seek an injunction prohibiting Respondent, Pedro Cortés, Secretary of the Commonwealth from allowing future new purchases of any of the illegal, paperless Direct Record Electronic (DRE) voting systems at issue in this suit. In their Petition for Review, filed August 15, 2006, Petitioners allege that these DRE voting systems do not comply with the Pennsylvania Election Code, have serious security, reliability and accuracy flaws and that the Secretary’s certification process is inadequate to determine compliance with the Election Code. Further, Petitioners allege that the continued use of DREs violates the rights of Pennsylvania voters as protected by the Pennsylvania Constitution.

Events since the filing of the Petition for Review have confirmed Petitioners’ allegations. Recently, the Secretary was required to decertify the Advanced Voting Solutions (“AVS”) WINVote system because of several pre-existing violations of the Pennsylvania Election Code

which the Secretary's process had failed to identify. In addition, as discussed in the accompanying declarations of Douglas W. Jones, Ph.D. ("Jones Declaration") and Daniel P. Lopresti, Ph.D. ("Lopresti Declaration"), the states of California and Ohio subjected their DRE voting systems to rigorous and thorough testing by outside computer science and electronic voting experts. In both states, the testing teams found severe security, reliability and workmanship defects. As a result, California has already decertified its DREs and Ohio's Secretary of State has recommended that only paper ballots be used in the upcoming elections. Further, both experts have expressed their opinion that the DREs at issue do not provide a "permanent physical record of every ballot cast," as required by § 1101-A, 25 P.S. § 3031.1 and that the DREs are incapable of complying with § 1117-A, 25 P. S. § 3031.17 which mandates "a statistical recount of a random sample of ballots after each election using manual, mechanical or electronic devices of a type different than those used for the specific election."

The Secretary's certification blunders mean that three counties, Wayne, Lackawanna and Northampton, must purchase new voting systems for use in the April 22, 2008 primary. Recognizing its responsibility for this disastrous situation, the Secretary has agreed to reimburse the affected counties up to the original purchase price of the WINvote system. Petitioners seek to avoid a repeat of this situation by preventing the purchase of similarly flawed DRE systems that violate the Pennsylvania Election Code and which have not been properly tested to determine compliance. The Secretary should suspend his certification of these DRE voting systems and only permit the purchase of optical scanners which are used for electronically tabulating voter-marked paper ballots.

II. ARGUMENT

A. Standard for Preliminary Injunction

This court has authority to grant a preliminary injunction pursuant to Pa. R. Civ. P. 1351. A court may grant a preliminary injunction where the moving party establishes that (1) relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages; (2) that greater injury will occur from refusing the injunction than from granting it; (3) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and (4) that the plaintiffs right to relief is clear. *Roberts v. Sch. Dist. Of Scranton*, 462 Pa. 464, 469, 341 A.2d 475 (1975); *Lewis v. City of Harrisburg*, 158 Pa. Commw. 318, 631 A.2d 807(1993). “The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *In re Appeal of Little Britain Tp. From Decision of Zoning Hearing Bd. of Little Britain Tp., Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994) (holding that a preliminary injunction is a temporary remedy granted until that time when the dispute can be completely resolved).

As demonstrated below, Petitioners meet all of the requirements for the issuance of a preliminary injunction here.

B. Relief Is Necessary To Prevent Immediate And Irreparable Harm and Greater Harm will Result from the Denial of the Preliminary Injunction than from its Issuance.

The decertification of the AVS WINvote has resulted in the immediate need for three counties to purchase new voting systems. Under the Election Code, the Secretary is charged with the responsibility of examining and certifying electronic voting systems. The counties may only purchase voting systems that are certified. The purchase of any DRE systems

challenged in this suit will result in the expenditure of approximately \$4 million of taxpayer funds on flawed voting systems that have already been decertified for use in other states and may be decertified from use in Pennsylvania after a full hearing on the merits. If the Secretary continues to allow these counties to purchase one of the DRE systems at issue here, it is likely that the counties will have to discard yet a second electronic voting system after a trial on the merits in this case.

As set forth in the Lopresti and Jones declarations, the DREs at issue here do not comply with the Pennsylvania Election Code in several important respects. The certification and use of these systems which do not comply with the law constitutes irreparable harm. A violation of an express provision of a statute is per se irreparable harm for purposes of a preliminary injunction. *Crowe ex rel. Crowe v. School Dist. of Pittsburgh*, 805 A.2d 691, 694-5 (Pa.Cmwlth.2002).

Petitioners, especially those who reside in the affected counties, have no adequate remedy at law to redress the harm from using illegal voting systems and the harm from decreased confidence in elections. Greater injury will result from the denial of the preliminary injunction than from its issuance. Petitioners will be subjected to the unnecessary risk of the reliability and security of these machines, a risk which could be avoided if the Secretary were to suspend the certifications of these DREs. Since the three counties must acquire a new voting system in time for the April 22 election, there is no difference for the counties regarding timing or training if the counties were required to purchase a system not challenged by this lawsuit and which does not risk future decertification. Furthermore, the voters' interest in having their votes counted accurately and securely and having a record that can be used in a meaningful recount or audit is better protected by the issuance of this injunction than by its denial.

C. The Wrongs Are Manifest, and Plaintiffs Have a Reasonable Likelihood of Success on the Merits.

This Court has “jurisdiction to prevent the continuance of acts contrary to the law or prejudicial to the interest of individual rights.” *Straup v. Times Herald*, 423 A.2d 713, 718, 283 Pa. Super. 58 (1980).

Petitioners have established their clear right to relief as demonstrated by the Lopresti and Jones declarations. The Secretary has certified for use in Pennsylvania DRE voting systems that do not comply with specific requirements of the Pennsylvania Election Code. The very nature of the operation of DRE voting systems prevents them from producing a permanent physical record of every ballot cast and from counties conducting a statutorily mandated audit with a method independent of what was used to count the original vote. Moreover, the Pennsylvania Election Code requires that electronic voting systems be secure, prevent tampering, be capable of absolute accuracy and constructed in a neat and workmanlike manner. The analysis of four of the six DREs conducted in Ohio and California shows conclusively that these requirements have not been met and the lack of a contemporaneous record of the voters’ intent means that voters have no way of knowing whether these DREs have correctly recorded their votes. Finally, the Secretary’s certification process does not approximate those that are customary in the information technology industry for systems that require a high level of security, as amply demonstrated by the number of vulnerabilities that have surfaced in systems previously certified by the Secretary.

This Court ruled on April 12, 2007 that Petitioners’ allegation adequately alleged violations of the Pennsylvania Election Code and the Pennsylvania Constitution. This Court’s prior ruling and the certifications of Petitioners’ experts raise substantial legal issues and satisfy

the requirement of a clear right to relief. “A moving party need not prove an absolute right to relief in order to obtain a preliminary injunction; instead, if the other elements necessary for a preliminary injunction exist, and substantial legal questions are raised by the underlying legal claim, the party's right to relief is clear. *Pleasant Hills C. C. v. P. A. A.*, 782 A.2d 68 782 A.2d 68, 79-80 (Pa. Commw. 2001) (holding clear right to relief when party raised a substantial legal question as to whether two statutes were violated); *In Re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. 2002).

D. The Injunction is Reasonably Suited to Abate the Harm and Will Restore the Parties to the Status Quo.

Petitioners seek only limited relief by this motion. They do not, by this motion, seek to decertify and require replacement of all DREs currently in use in Pennsylvania. Rather, Petitioners seek to prevent wasteful future expenditures when these three counties, in addition to the remaining 53 counties, will be forced to replace their faulty DRE systems after this suit is fully litigated on the merits.

Petitioners seek a moratorium on county-wide new purchases of DREs. The Secretary has ample precedent for issuing orders that are less than complete decertification. In August of 2007, the Secretary suspended the certification of the AVS WINvote. Although the Secretary decreed that the WINvote could not be used in the General Election, if AVS had successfully obtained federal certification, the Secretary could have reinstated its certification. Similarly, the 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. In the unlikely event that the Secretary prevails in this case, he could simply lift the suspension.

Because the April primary election is imminent and the three affected counties must make a purchase now, the requested relief is appropriate because the counties do not have time to wait until the Supreme Court renders its decision and then this Court holds a hearing on the merits of the Petition for Review.

If this Court prohibits purchase of the challenged DREs, 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.

III. CONCLUSION

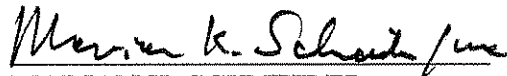
For all of the foregoing reasons, this Honorable Court should grant Petitioners' Emergency Motion for Preliminary Injunction and order a moratorium on new purchases of the DRE voting systems at issue in this suit.

Dated: January 25, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2008, I caused a true and correct copy of the foregoing
Petitioners' Emergency Motion for Preliminary Injunction and Memorandum of Law in Support of
Petitioners' Emergency Motion for Preliminary Injunction to be served on the following:

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Dated: January 25, 2008


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