

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

**[PROPOSED] ORDER DENYING PETITIONERS' MOTION TO DISSOLVE STAY OF
PROCEEDINGS AND FOR AN EXPEDITED HEARING**

AND NOW this _____ day of _____, 2008, upon consideration of all papers filed in connection with the Petitioners' January 25, 2008 Motion to Dissolve Voluntary Stay of Proceedings and for an Expedited Hearing ("Petitioners' Motion"), it is HEREBY ORDERED that Petitioners' Motion is DENIED.

It is further ORDERED that Petitioners' Emergency Motion For Preliminary Injunction is DENIED as moot.

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>MARK BANFIELD, et al.,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>PEDRO CORTÉS,</p> <p style="text-align: center;">Respondent.</p>	<p>: : : : : : : : : : :</p>	<p>Docket No. 442 M.D. 2006</p>
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**ANSWER OF RESPONDENT PEDRO A. CORTÉS, SECRETARY OF THE
COMMONWEALTH, TO MOTION TO DISSOLVE STAY OF PROCEEDINGS
AND FOR AN EXPEDITED HEARING**

AND NOW comes Respondent Pedro A. Cortés, Secretary of the Commonwealth, to answer the Motion to Dissolve Stay of Proceedings and for an Expedited Hearing (“Motion to Dissolve Stay”) filed by Petitioners in the above-captioned matter. Secretary Cortés opposes Petitioners’ motion because there is no reason for this Court to disturb the stay of proceedings that this Court entered on May 11, 2007. To the contrary, principles of equity, fairness and practicality counsel this Court to maintain the stay of proceedings in this matter until the Supreme Court of Pennsylvania has decided the Secretary’s pending Petition for Permission to Appeal this Court’s Order of April 12, 2007, overruling the Secretary’s Preliminary Objections.

Through their Motion to Dissolve Stay and accompanying Emergency Motion for Preliminary Injunction, Petitioners seek to interfere with the ongoing efforts of the Secretary and the county boards of elections – especially the non-party boards of elections serving

Northampton, Lackawanna and Wayne Counties – to prepare for and conduct elections for Federal, State and political party offices that are scheduled to be held in 2008, including the General Primary that will be conducted on April 22, 2008. In fact, Petitioners ask this Court to order the Secretary to stop the county boards of elections from procuring any voting system that Petitioners have challenged in this case despite the fact that the Secretary has *no* power under Pennsylvania law to order the county boards of elections to procure and use – or *not* to procure and use – any voting system that the Secretary has certified under Pennsylvania law. This Court should deny Petitioners’ motions.

In response to the specific averments made in the Motion to Dissolve Stay, Secretary Cortés answers as follows:

1. Denied. The first sentence of paragraph 1 refers to the contents of the Petition for Review, which speaks for itself. The remaining statements in paragraph 1 are denied as conclusions of law to which no response is required. By way of further response, Petitioners’ legal statements are mischaracterizations of Pennsylvania law, which requires neither an “independently auditable physical record” nor a “paper record of the voter’s intent.”

2. Admitted in part, denied in part. It is admitted only that on April 12, 2007, this Court overruled the Secretary’s Preliminary Objections in its Order (“April 12 Order”). The remaining averments are denied. Those averments that attempt to characterize the substance and effect of the Court’s Opinion and Order are denied. The Court’s Opinion and Order, which are reported at Banfield v. Cortés, 922 A.2d 36 (Pa. Commw. Ct. 2007), speak for themselves; Petitioners’ characterizations merely set forth their legal conclusions regarding the Order’s effect. Therefore, no response is required. By way of further response, the Court’s decision to overrule the Secretary’s Preliminary Objections was premised on the assumption that

the facts pleaded in the Petition for Review are true; this Court has made no findings of fact in this matter. By way of further response, on April 30, 2007, this Court granted the Secretary's Application to Amend the April 12 Order – over the objections of the Petitioners – stating, in the language of 42 Pa. C.S. § 702(b), that its Order overruling the Preliminary Objections “involves a controlling question of law as to which there is substantial ground for difference of opinion” and as to which “[a]n immediate appeal from [that] order may materially advance the ultimate termination of the matter.” April 30, 2007 Order (*per curiam*). On the same day, and in the same Order, this Court denied the Secretary's Application for a Stay and Supersedeas. However, on May 8, 2007, the Secretary filed an Unopposed Application for a Stay of Proceedings in the Commonwealth Court, requesting a stay of proceedings consistent with the parties' agreement, which is memorialized in a May 4, 2007 letter attached to the Unopposed Application for a Stay (A copy of the May 4, 2007 letter from Alan C. Promer, Esquire, one of the counsel for the Secretary, to Marian K. Schneider, Esquire, one of counsel for Petitioners, is attached to the Secretary's accompanying memorandum as Exhibit A (“May 4 Letter Agreement”).) On May 10, 2007, the Secretary filed with the Supreme Court of Pennsylvania a Petition for Permission to Appeal the April 12 Order, as amended by the April 30 Order. This Court granted the unopposed application for a stay of proceedings on May 11, 2007. The Petitioners filed an Opposition to the Petition for Permission to Appeal on May 24, 2007. The Secretary's Petition is still pending before the Supreme Court at Docket No. 70 MM 2007. The stay of proceedings entered by this Court obviated any need for the Secretary to seek a stay of proceedings or supersedeas from the Supreme Court under 42 Pa.C.S. § 702(c) and Pa. R.A.P. 1313, and therefore the Secretary would be unfairly prejudiced were this Court now to dissolve the stay on

which the Secretary and the county boards of elections have relied as they continuously meet their legal obligations to administer elections in the Commonwealth.

3. Admitted in part, denied in part. It is admitted only that California and Ohio conducted evaluations of certain versions of certain direct recording electronic voting systems (DREs). The remaining averments are denied. By way of further response, those states also conducted evaluations of, and expressed concerns regarding, non-DRE voting systems akin to the ones Petitioners, through their Emergency Motion for Preliminary Injunction, would force on the three Pennsylvania counties that must procure a new voting system in time for use in the April 22, 2008 General Primary. It is denied that four of the six DRE systems certified by the Secretary for use in Pennsylvania elections were examined in the other states, as version numbers of these systems may differ. By way of further response, neither Ohio nor California reviewed the AVC Advantage voting system manufactured by Sequoia Voting Systems, Inc. (“Sequoia”), and the ELECTronic 1242 voting system manufactured by Danaher Controls, Inc. On information and belief, Northampton County has already decided to procure Sequoia’s AVC Advantage voting system and has entered into a contract with Sequoia.

4. Admitted in part, denied in part. It is admitted, as set forth in paragraph 2, supra, that this Court, on April 30, 2007, granted the Secretary’s application to amend the Court’s April 12, 2007 Order, and denied the Secretary’s application for stay of proceedings. By way of further response, this Court, on May 11, 2007, granted the Secretary’s unopposed application for stay of proceedings – a stay that has been in effect continuously since that date. The remaining averments are denied. It is specifically denied that the Secretary filed a petition for review with the Pennsylvania Supreme Court on May 12, 2007. To the contrary, on May 10,

2007, the Secretary filed with the Supreme Court a Petition for Permission to Appeal, which remains pending at No. 70 MM 2007.

5. Denied as stated. By way of further response, the Secretary's May 8, 2007 Unopposed Application for Stay of Proceedings and this Court's May 11, 2007 Order speak for themselves. By way of further response, the Secretary produced –and has continued to produce – documents in accordance with the agreement of the parties memorialized in the May 4 Letter Agreement.

6. Denied. The Secretary is without information sufficient to admit or deny what Petitioners knew as of May 8, 2007. By way of further response, so long as the DRE voting systems that Petitioners challenge remained certified and legal for use in Pennsylvania elections, Petitioners should have known it was possible that counties would procure additional DRE voting systems to either supplement or replace those systems already purchased. In fact, in anticipation of the likely high voter turnout for the Presidential election in November, some counties are actively and predictably considering making additional procurements of voting machines to increase their capacity.

7. Admitted in part, denied in part. It specifically denied that the DRE voting system manufactured by Advanced Voting Solutions (“AVS”) – the WINvote system – had never been properly certified by Federally-certified testing laboratories. To the contrary, the WINvote system that was properly used in Pennsylvania elections in 2006 and May 2007 was examined and certified by the Secretary after it was examined and approved by a federally recognized independent testing authority, all as required by Pennsylvania law. It is an *updated* and different version of the software for the WINvote system – which was intended to ultimately replace the prior software version – that has not been certified by a Federally-sanctioned testing

laboratory and has not been approved by the Secretary for use in Pennsylvania. It is further specifically denied, to the extent that it is averred, that the AVS WINvote system was used in any election in which it was possible for an elector to cast more than one vote for a candidate who has been nominated by more than one political party (i.e., “the cross-filing problem”). The only type of election in which the WINvote’s “cross-filing problem” would have been relevant was a municipal election, i.e., a November election held in an odd-numbered year. The AVS WINvote system was not used in the November 2007 Municipal Election or any other such election. It is further specifically denied that the Secretary required AVS to obtain federal certification to the extent this averment is meant to imply that the Secretary imposed an obligation not already required by Pennsylvania law; to the contrary, the federal approval is required by state law. The remaining averments of paragraph 7 are admitted.

8. Admitted in part and denied in part. The first sentence of paragraph 8 is admitted. The second sentence of paragraph 8 is denied. By way of further response, the Department of State kept the counties apprised of the status of the AVS WINvote system from the fall of 2006 and throughout 2007, including the ongoing provision of information about the Department of State’s concerns and the possible outcomes. There was also public correspondence between the Secretary and AVS, as well as between the Federal Election Assistance Commission and AVS.

9. Admitted in part, denied in part. It is admitted that the Department of State has informed the three affected counties that it will partially compensate the three counties financially in their procurement of new voting systems to replace the now-decertified AVS WINvote system. It is denied that the Department of State has agreed to compensate the three counties for the entire cost of obtaining replacement systems. It is further admitted that the

amount of funds that the Secretary will use to compensate the three affected counties is approximately \$4 million, divided as follows: approximately \$2 million for Northampton County; approximately \$1.7 million for Lackawanna County; and approximately \$294,000 for Wayne County. It is denied that the AVS WINvote was “wrongfully” certified; to the contrary, following an examination of that system, the Secretary properly certified the WINvote voting system for use in Pennsylvania elections. When presented with the “cross-filing problem” in using the WINvote system in municipal elections – problem that AVS acknowledged did not meet the requirements of Pennsylvania law for the conduct of such elections – and after AVS did not make timely and proper modifications to the WINvote system to comply with Pennsylvania law, the Secretary decertified the WINvote system. It is also denied that the funds referenced in Petitioners’ motions are “state funds.” Rather, the funds that the Secretary plans to use to partially compensate the three counties for their costs in replacing their AVS WINvote system are Federal funds provided to the Commonwealth under the Help America Vote Act of 2002 (“HAVA”), 42 U.S.C § 15301 et seq. The remaining averments are denied.

10. Admitted in part, denied in part. It is admitted, on information and belief, that sometime in mid-January the three counties reviewed various certified voting systems. It is admitted, on information and belief, that Lackawanna County does intend promptly to procure a new voting system, which may or may not include DREs that are at issue in this case. On information and belief, Northampton County has decided to procure the AVC Advantage system manufactured by Sequoia, and it has entered into a contract with Sequoia. (A version of Sequoia’s AVC Advantage has been used in Montgomery County since 1996, and the Montgomery County Board of Elections plans to use that system again in 2008.) By way of further response, on information and belief, Northampton County made this decision despite

Petitioner Alan Brau's efforts to lobby Northampton County officials to procure an optical scanning system and his public comments to those officials regarding concerns that Petitioners have with the challenged DREs, including the AVC Advantage manufactured by Sequoia. On further information and belief, it is denied that Wayne County intends to purchase any DREs at issue in this case. The remaining averments are denied.

11. Admitted in part, denied in part. It is admitted that if this Court should prohibit counties from procuring any of the challenged DREs, the three most pervasively affected counties would still have other certified voting systems available to them for procurement, including precinct based or centrally counted optical scan ballot systems. It is further admitted that optical scan equipment is currently used in 13 Pennsylvania counties. By way of further response, the Secretary is aware that no voting system is perfect and, therefore, it is beneficial to the counties and the voting public that he has approved a variety of systems that meet the requirements of applicable Federal and Pennsylvania law, as some systems are better suited to some counties than others. For example, heavily populated counties tend to avoid the use of paper ballots, which are susceptible to manipulation and fraud, require the use of voluminous amounts of paper, and laboriously must be individually and collectively secured against loss, alteration and damage at all points in the election process. By Commonwealth statute, it is up to the counties to decide which certified voting system best suit their needs and the preferences of their voters. Indeed, prior to filing their motions, counsel for Petitioners informed counsel for the Secretary of his intention to file and stated his intention to contact the county solicitors for the three counties affected by the AVS decertification to apprise them of the imminent filing; the Secretary then independently advised the solicitors for those three counties of the Banfield case and of the threat of the preliminary injunction motion. Nevertheless, on

information and belief, Northampton County – a relatively populous county that includes the Cities of Bethlehem and Easton – decided to procure one of the challenged DRE systems. By way of further response, Lackawanna County is a populous county that includes the City of Scranton and that has approximately 163 voting precincts. The remaining averments of this paragraph are denied.

12. Denied. The averments of paragraph 12 constitute conclusions of law to which no response is required. By way of further response, it is denied that the replacement of one challenged DRE system with another is a change in the status quo. It is further denied that the reimbursement of the counties for their procurements is a change in the status quo. By way of further response, the counties could buy the systems regardless of the reimbursement if they so choose, which would constitute a cost to county taxpayers, and the county boards of elections would be able to use those voting systems unless and until the systems were decertified by the Secretary in accordance with Pennsylvania law. By way of further response, Petitioners very well could be increasing the costs of the procurement of voting systems through their request for emergency injunctive relief by insisting that counties procure the systems that Petitioners favor. For example, should Petitioners ultimately lose this case on the merits, and the DRE voting systems remain certified for use in Pennsylvania elections, those counties would be stuck with the less-favored systems and would need funds to procure the systems they preferred. By way of further response, the anticipated expenditure of HAVA funds is not a change in the status quo with respect to the underlying case, which does not challenge the propriety of the Secretary's expenditures as it concerns HAVA itself. By way of further response, the \$4 million at issue is a very small portion of the more than \$100 million in total funds made available to Pennsylvania pursuant to that statute.

13. Denied. The Secretary is not obligated to respond to Petitioners' description of the relief they would seek if the stay were dissolved. The Secretary denies as entirely speculative Petitioners' assertion that if they ultimately prevail the challenged systems procured by the counties would have to be "sold for scrap." The Secretary denies that Petitioners would be subjected to an unnecessary risk of the reliability and safety of the challenged DRE systems and notes, by way of further response, that all voting systems have imperfections, including the alternatives favored by Petitioners. Petitioners would substitute their assessment of risk for the judgment of the Secretary and the county officials who are responsible by law for making procurement decisions. By way of further response, no petitioner in this case resides in Wayne County, one of the three counties affected by the decertification of the AVS system; therefore, no petitioner would be directly affected by any decision made by officials in that county.

14. Denied. The averments of paragraph 14 constitute conclusions of law to which no response is required. By way of further response, there will be no material change in the status quo if the three affected counties were to procure DRE machines.

15. Denied. The averments of paragraph 15 constitute conclusions of law to which no response is required. By way of further response, at least the three counties referenced in this paragraph would be heavily affected by the relief requested by Petitioners, yet they are not parties to this case. By way of further response, the harm, if any, to Petitioners is narrow in terms of an alteration to the status quo; as noted, these three counties previously used challenged DREs and *may* procure different DREs that Petitioners challenge. The only other possible harm to Petitioners would be the generalized harm stemming from the spending of public funds on certified systems (that Petitioners state they do not seek to have immediately decertified for use


in Pennsylvania elections) that the counties have every right to procure. It is, therefore, denied that “time is of the essence”; rather, given that the Supreme Court soon may decide to consider and determine controlling questions of law as to which there is substantial ground for difference of opinion, it is not necessary to dissolve the stay or to hold an expedited hearing.

16. Denied. It is denied that the public entities involved – to wit, the counties – are making uninformed decisions. To the contrary, for example, on information and belief, Petitioner Alan Brau has voiced his concerns to appropriate Northampton County officials in public meetings held in January 2008 concerning the procurement of a replacement voting system for that county. As noted above, an expedited hearing is not necessary to protect the interests of Petitioners, as their interests have not materially changed since the time this case was first filed or since the time the stay of proceedings was entered by this Court. In fact, the Secretary has decertified one of the very machines that Petitioners have demanded be decertified; that hardly warrants the holding of an expedited hearing now to consider the merits of the certification of six other DRE voting systems.

WHEREFORE, Respondent Pedro A. Cortés, Secretary of the Commonwealth, respectfully requests this Court to deny Petitioners’ Motion to Dissolve Stay of Proceedings and for an Expedited Hearing.

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: January 30, 2008

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VERIFICATION

I, Harry A. VanSickle, Commissioner of the Bureau of Commissions, Elections and Legislation of the Pennsylvania Department of State, hereby verify that the facts and allegations previously not of record and set forth in the foregoing Answer Of Respondent Pedro A. Cortés, Secretary Of The Commonwealth, To Motion To Dissolve Stay Of Proceedings And For An Expedited Hearing are true and correct to the best of my personal knowledge, information and belief. I understand that the statements in the foregoing pleading are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: January 30, 2008



Harry A. VanSickle

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2008, I caused a true and correct copy of the foregoing Answer of Respondent Pedro A. Cortés, Secretary of the Commonwealth, to Motion to Dissolve Stay of Proceedings and for an Expedited Hearing to be served by the methods indicated below, on the following:

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