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PENNSYLVANIA STATE SUPREME COURT ALLOWS VOTING RIGHTS CASE TO PROCEED

State's Highest Court Denies Pennsylvania Secretary of State Permission to Appeal Lower Court Ruling in Voters' Favor

Case Challenging the Use of Electronic Voting Machines Now Moves Toward Trial

PHILADELPHIA, PA – Pennsylvania voters challenging the continued use of unverifiable electronic voting machines in their state won another major round on Tuesday when the Pennsylvania Supreme Court issued a ruling allowing their case to proceed toward trial. The state's highest court, in a one-sentence order, denied the Pennsylvania Secretary of State's petition seeking permission to appeal a lower court ruling decided in the voters' favor.

In April 2007, the Commonwealth Court of Pennsylvania had ruled that voters have a right under the Pennsylvania Constitution to reliable and secure voting systems and can challenge the use of electronic voting machines "that provide no way for Electors to know whether their votes will be recognized" through voter verification or independent audit. Following that ruling, Pennsylvania Secretary of State Pedro Cortés filed his petition before the Pennsylvania Supreme Court and further proceedings in the case, *Banfield v. Cortés*, had been suspended pending the outcome of the petition. The order issued on Tuesday gives a green light for the voters to pursue their claims.

"We now look forward to moving this case toward trial," says Mary Kohart, a partner at Drinker Biddle & Reath LLP, one of the lawyers representing the voters. "There is overwhelming evidence showing that electronic voting machines are unreliable and insecure for the counting and recording of votes. We are pleased that our clients will now have the opportunity to present this evidence to the court and to demonstrate why these machines should be decertified in Pennsylvania."

In their complaint, the voters allege that the electronic voting systems, otherwise known as Direct Recording Electronic voting systems or DREs, have failed during elections in Pennsylvania and in other states by losing votes; registering votes for one candidate when the voter was attempting to vote for another candidate; causing high "undervote" rates; failing to register votes when the ballot contained only one question; counting votes twice; failing to print "zero tapes" to demonstrate that no unlawful votes were stored on the machine prior to the election; printing "zero tapes" after votes had been cast; and reporting phantom votes and other irregularities. Fifty of Pennsylvania's 67 counties use electronic voting systems without a voter-marked paper ballot.

The growing concerns around DRE machines have led several states, including California, Florida, New Mexico, and Iowa, to shift to using optically-scanned paper ballots which voters may mark directly or through a ballot-marking device. Further, the State of Ohio is currently suing one of the major electronic voting machine manufacturers, Premier Election Solutions (formerly Diebold), alleging that the company sold the state a defective product. The lawsuit, which includes breach of contract and commercial fraud claims, seeks to recover tens of millions of taxpayer dollars spent in purchasing the company's DRE systems.

"Across the country, states are realizing that electronic voting systems cannot be trusted," says Michael Churchill, senior counsel with the Public Interest Law Center of Philadelphia and another lawyer for the voters in this case. "Like voters in other states, Pennsylvania voters have a right to a voting system which will properly count their votes.

The voters assert that the Pennsylvania Secretary of State's process of examining voting systems and approving them for use in Pennsylvania is inadequate because it fails to detect flaws. Last year, the states of California and Ohio subjected their electronic 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.

"The California Top to Bottom Review and the Ohio EVEREST report conclusively destroy the myth spread by voting system vendors that their systems have undergone thorough and painstaking testing," said Douglas W. Jones, Associate Professor of Computer Science at the University of Iowa and a nationally known expert in electronic voting systems. "The truth is that seriously defective voting systems have remained in the marketplace for more than a decade." Dr. Jones is serving as an expert witness in the case.

"The Secretary's certification process has failed to protect the voters of Pennsylvania," says Marian K. Schneider, a Chester County attorney and co-counsel for the voter-plaintiffs. "Court intervention is now necessary to ensure that the Secretary follows the mandate of the Pennsylvania Election Code and the Pennsylvania Constitution."

The state supreme court's order on Tuesday marks the second time in as many months that a court has ruled against the Pennsylvania Secretary of State in a case dealing with the state's electronic voting systems. On October 29, 2008, a federal judge issued an emergency order requiring Pennsylvania to provide emergency paper ballots to voters when 50% or more voting machines break down in any precinct in the Commonwealth. Secretary Cortés had previously required the distribution of emergency paper ballots only when 100% of voting machines malfunctioned in any precinct.

"All Pennsylvania citizens should enjoy the same confidence in the accuracy and reliability of voting in their county," says Mary Vollero, one of the voter-plaintiffs seeking to halt the use of unverifiable electronic voting systems and chair of Concerned Voters of Centre County. Last year, Vollero's group convinced the Centre County Board of Elections to switch from using DRE voting machines to precinct-based optical scan equipment.

"As this case moves into the trial phase, it will be watched by voting rights advocates across the country," says John Bonifaz, legal director of Voter Action, a national voting rights organization which has provided support for the case since its filing in 2006. "The voters in this case have the

potential of impacting not only the integrity of Pennsylvania's elections but also the integrity of elections nationwide."