

Kathleen Kotula, Esq.
Executive Deputy Chief Counsel
Pennsylvania Department of State
306 North Office Building
401 North Street
Harrisburg, PA 17120

August 22, 2019

RE: Petition to re-examine ExpressVote XL

Dear Ms. Kotula,

On behalf of the petitioners who requested re-examination of the ExpressVote XL under 25 P.S. § 3031.5, I am writing to follow up on our telephone communications beginning August 14, 2019 and concluding August 21, 2019. While we appreciate that the Department plans to expeditiously re-examine the ExpressVote XL as requested in our July 16, 2019 petition, we have serious concerns about the process as we understand it from you.

Our understanding is that, to this point, every single examination and re-examination conducted in Pennsylvania since at least 2005 has been conducted in public, with very limited breaks for discussions of proprietary information. This precedent of transparency was set with the Secretary's process in addressing the very first petition to re-examine a previously certified system, the 2005 petition to re-examine the Unilect Patriot.¹ According to the report prepared for the Secretary on this re-examination, "[a] limited number of members of the public and the press were permitted to attend the reexamination, as was a representative of the requesting electors."² The voting system was decertified in May 2005.

Since then, to the best of our knowledge, every single examination and re-examination—including the 2012 re-examinations spurred by the litigation in

¹ See Michael Ian Shamos, *UniLect Corporation Patriot Voting System: An Evaluation Prepared for the Secretary of the Commonwealth of Pennsylvania* (Apr. 2005), <http://bit.ly/2L42POb>, at 2.

² *Id.* at 6.

*Banfield v. Cortes*³—has been open to members of the public. Petition signer Mary Beth Kuznik has personally attended over 20 examinations since 2005.

Apart from your office's own past practice and the requirements of the Sunshine Act,⁴ conducting the re-examination in secret would violate your office's recent agreement settling a federal constitutional lawsuit against the Secretary's office in *Stein v. Cortes*.⁵ Paragraph 4 of that settlement agreement provides:

To ensure that new voting systems meet the criteria set forth [in the settlement], and to work collaboratively to further the parties' shared goal of promoting reliable and secure voting in Pennsylvania, a designee of Plaintiffs will be invited to observe the certification process. To that end:

a. The Secretary shall ensure that the Plaintiffs are made aware of all currently scheduled, and future scheduled, Commonwealth on-site certification testing for Voting Systems;

b. Plaintiffs will appoint a person to attend any and/or all on-site certification testing undertaken by or on behalf of the Secretary, and the representative may provide written or oral comments to the Secretary concerning the certification of any Voting Systems at breaks during the on-site certification testing or within a reasonable period after completion of the on-site testing

As your office has neither notified the *Stein* plaintiffs' counsel nor their designated representative (Professor J. Alex Halderman) of the time and place of the re-examination, nor invited them to observe the process and provide comments, your office appears to be proceeding in violation of the *Stein* settlement.

Please advise us on your view as to whether the re-examination is subject to the Sunshine Act; your office's plans with regard to public access to the re-examination; and your office's plan for compliance with the *Stein* settlement.

³ *Banfield v. Aichele*, 51 A.3d 300, 314 (Commw. Ct. Penn. 2012), *aff'd sub nom. Banfield v. Cortes*, 110 A.3d 155 (2015).

⁴ 65 P.S. §§ 701 *et seq.*

⁵ *Stein v. Cortes*, No. 16-cv-06287, ECF No. 108 (E.D. Pa. Nov. 28, 2018), *available at* <http://bit.ly/SteinSettlement>.

We hope that your office will conduct the re-examination in a manner that will avoid the need for litigation regarding the procedures.

Sincerely,

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