

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

National Election Defense Coalition,	:	
Citizens for Better Elections,	:	
Rich Garella, Rachel A. Murphy,	:	
Caroline Leopold, Stephen Strahs,	:	
Kathleen Blanford, Sharon Strauss,	:	
Anne C. Hanna, Raphael Y. Rubin,	:	
Robert F. Werner, Sandra	:	
O'Brien-Werner, Thomas P. Bruno, Jr.,	:	
Roger Dreisbach-Williams, and	:	
Jeff R. Faubert,	:	
Petitioners	:	
	:	
v.	:	No. 674 M.D. 2019
	:	
Al Schmidt, Secretary of the	:	
Commonwealth,	:	
	:	
Respondent	:	

AMENDED STIPULATION AND ORDER OF DISMISSAL

WHEREAS, Petitioners and Respondent have entered into a written settlement agreement to resolve this matter (the "Settlement Agreement"), a true and correct copy of which is attached hereto as **Exhibit A** (with redactions of personal email addresses of signatories from the signature confirmation pages);

NOW THEREFORE, Petitioners and Respondent hereby stipulate to, and respectfully request the Court to enter, the following Order:

ORDER

1. Petitioners' Amended Petition for Review Addressed to the Court's Original Jurisdiction is hereby **DISMISSED WITH PREJUDICE**.

2. Without affecting the finality of that judgment, the Court hereby
RETAINS JURISDICTION over this matter for the limited purpose of enforcing
the terms and conditions of the parties' Settlement Agreement and adjudicating any
disputes arising out of the Settlement Agreement.

Dated: August 17, 2023

BAKER & HOSTETLER LLP

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Philadelphia, PA 19103
Tel: (215) 982-2280

Counsel for Respondent

SO ORDERED:

August 24, 2023

RENÉE COHN JUBELIRER, President Judge

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NATIONAL ELECTION DEFENSE
COALITION, CITIZENS FOR BETTER
ELECTIONS, RICH GARELLA, RACHEL
A. MURPHY, CAROLINE LEOPOLD,
STEPHEN STRAHS, KATHLEEN
BLANFORD, SHARON STRAUSS, ANNE
C. HANNA, RAPHAEL Y. RUBIN,
ROBERT F. WERNER, SANDRA
O'BRIEN-WERNER, THOMAS P. BRUNO,
JR., ROGER DREISBACH-WILLIAMS, and
JEFF R. FAUBERT,

Petitioners,

v.

AL SCHMIDT, SECRETARY OF THE
COMMONWEALTH,

Respondent.

ORIGINAL JURISDICTION

Docket No.: 674 MD 2019

SETTLEMENT AGREEMENT AND RELEASE

I. INTRODUCTION

1. This settlement agreement and release (the "Agreement") is entered into as of the date of the last signatory ("Effective Date") between the petitioners, National Election Defense Coalition, Citizens for Better Elections, Rich Garella, Rachel A. Murphy, Caroline Leopold, Stephen Strahs, Kathleen Blandford (incorrectly identified as "Kathleen Blanford" in the caption and Amended Petition for Review), Sharon Strauss, Anne C. Hanna, Raphael Y. Rubin, Robert F. Werner, Sandra O'Brien-Werner, Thomas P. Bruno, Jr., Roger Dreisbach-

Williams, and Jeff R. Faubert (collectively, “Petitioners”); and respondent Al Schmidt, in his official capacity as Secretary of the Commonwealth (the “Secretary”; collectively with Petitioners, the “Parties,” and each a “Party”).¹

2. This Agreement is effective from the Effective Date until December 31, 2028 (“Expiration Date”).

II. EVALUATION AND CERTIFICATION OF ES&S 6.3.0.0

3. The Secretary certified Election Systems & Software’s EVS 6.3.0.0 Voting System (“ES&S 6.3.0.0”) for use in Pennsylvania elections on January 13, 2023. Election Systems & Software is referenced herein as “ES&S.”

4. Within 14 days after the Effective Date, the Secretary will direct each Pennsylvania county using the ES&S ExpressVote XL voting machine to upgrade the ES&S Voting System software to version 6.3.0.0 by March 1, 2024.

5. As part of, or within 10 days after issuing, the directive set forth in Paragraph 4 of this Agreement to counties using the ES&S ExpressVote XL voting machine, the Secretary will provide those counties with an express written notification of all applicable conditions of use for the ES&S 6.3.0.0 and request those counties to submit to the Department of State (the “Department”) a signed copy of a Voting System Implementation Attestation in the form attached hereto as Exhibit 1.

¹ Respondent Kathy Boockvar resigned the position of Secretary of the Commonwealth on February 5, 2021; Al Schmidt is currently serving as Secretary of the Commonwealth.

III. COLLECTION AND PUBLICATION OF INFORMATION REGARDING VOTING-SYSTEM MALFUNCTIONS

6. Beginning with the 2023 municipal election, the Secretary will direct each county in Pennsylvania to submit to the Department, within 60 days after each election, a report (the “Malfunction and Certification Report”) that includes the following: A list of all malfunctions, reported to the county by any source or otherwise believed by the county to have occurred, where an electronic voting system is alleged to have (i) prevented or delayed any voter from casting a vote or (ii) prevented or delayed the tabulation or reporting of results, or a declaration that the county has no such malfunctions to report. The Secretary will direct the counties to provide, to the extent known and in a common format, a description of each such malfunction, including source(s), time span, location (including precincts affected), nature of the issue, voting system component(s) affected, approximate number of voters or ballots affected, whether the malfunction was resolved, and any action(s) taken to resolve the malfunction.

7. The Department will post all Malfunction and Certification Reports received in connection with each election on the Department’s website within 105 days after the election. The Department may make only such redactions as are reasonably necessary to ensure that posting the Malfunction and Certification Reports will not compromise election security, disclose confidential or proprietary information, or mislead the public. Redactions shall be made in such a way as to

show that a redaction was made and the general reason for such redaction. The Department will maintain unredacted versions of all Malfunction and Certification Reports on permanent file. For purposes of this Agreement, including other paragraphs of this Agreement, (a) to “compromise election security” means to provide information that could assist any person in an illegal effort to alter election outcomes, compromise ballot anonymity, tamper or interfere with voting systems, or hamper election officials in performing their duties, and (b) “confidential” information means personally identifiable information relating to natural persons, or sensitive non-public information, including trade secrets, relating to corporate, partnership, joint venture, or governmental entities, and proprietary information.

8. At the same time it posts the Malfunction and Certification Reports for each election, the Department will also post on the same page of its website a list of any counties that were subject to the directive to submit a Malfunction and Certification Report but did not do so. For any Malfunction and Certification Report submitted late, the Department will post that report within 30 days after receipt.

IV. EXAMINATIONS OF ELECTRONIC VOTING SYSTEMS

A. Location

9. The Secretary’s examinations of electronic voting systems for potential certification have separate components focusing on the security,

functionality, and accessibility, respectively, of the systems. The functionality component of the examination shall be conducted in Pennsylvania, at a location of the Secretary's choosing in Harrisburg, Philadelphia, or Pittsburgh. However, nothing in this Agreement shall prevent the Department from conducting certain discrete portions of the functionality examinations via remote videoconference in circumstances where it is not possible or necessary for representatives of the Department to be present at the location of the equipment or software being examined.

B. Notice

10. Where feasible, the Department will provide public notice on its website of the functionality component of an electronic voting system examination at least 30 days before the examination occurs, including date, time, and any additional information the public and press would need in order to attend and observe.

C. Public Access and Video-Recording

11. A portion of the functionality component of an electronic-voting-system examination will include a public demonstration of the system. The public and press will be allowed to attend this portion of the examination. The Department may impose reasonable limitations on the number of attendees based on the capacity of the site at which the examination is conducted and

considerations of health, safety, and security. The public and press will be permitted, and the Department will make reasonable, good-faith efforts to enable them, to observe the demonstration, from a distance of 20 feet or less from the voting system.

12. The Department will make an audiovisual recording of the public demonstration portion of each electronic-voting-system examination. Within 30 days of the completion of the public demonstration portion of the examination, the Department will make the audiovisual recording publicly available on the Department's website or through a free file-sharing location.

13. If the Secretary certifies an electronic voting system for use in Pennsylvania, the Department will retain the audiovisual recording of the public demonstration for the entire period during which the voting system is certified and for two years after any revocation or withdrawal of its certification. If the Secretary decides not to certify the voting system for use in Pennsylvania, the Department will retain the audiovisual recording for a period of two years following the completion of the demonstration.

14. The public and the press will also be allowed to attend and observe in person the portions of the functionality component of any electronic-voting-system examination other than the public-demonstration portion, except that the Department may exclude the public and press from any portion of the examination

that involves discussion or disclosure of (a) confidential or proprietary information or (b) information that, in the Department's view, would jeopardize election security if disclosed.

15. To the extent that a portion of the functionality component of an electronic-voting-system examination is conducted via remote videoconference, as contemplated in Paragraph 9 above, upon request and to the extent feasible, Petitioners will be provided with remote access to the videoconference subject to the restrictions on access set forth in Paragraph 14 above.

V. COSTS AND FEES

16. Each Party shall bear his, her, or its own costs and fees, including attorneys' fees, incurred in connection with the above-captioned action.

VI. ENFORCEMENT

17. The Parties agree that this Agreement must be considered a private settlement agreement that does not require court approval and that the Parties are not seeking court approval.

18. In accordance with the Commonwealth Attorneys Act, the Parties agree that this Agreement is not a Consent Decree, is not intended to be a Consent Decree, may not be construed by any Party as a Consent Decree, nor shall any Party argue before any court of competent jurisdiction, federal or state, that this Agreement is a Consent Decree.

19. Should any court determine during the term of this Agreement that the Agreement is a Consent Decree, then the Agreement is voided and the Parties agree that a petition to reopen the case may be filed.

20. The parties agree to request that the Commonwealth Court enter an Order dismissing this case with prejudice but retaining jurisdiction solely to enforce the terms of this Agreement.

21. Prior to seeking specific performance of this Agreement from the Court, if Petitioners have a reasonable basis to believe that the Secretary is in non-compliance with a material term of this Agreement, Petitioners will notify the Secretary in writing of the specific compliance issue(s) (the “Notification”). This Notification shall identify with particularity the basis of the claim that the Secretary is not in compliance and the specific provisions of this Agreement that are implicated.

22. Within thirty (30) days of receipt of the Notification, the Secretary will provide a good-faith written response to Petitioners’ notification with a full factual explanation: (a) as to why the Secretary believes he or she is in compliance with the Agreement; or (b) of possible non-compliance and a detailed statement of the Secretary’s plans to ensure full compliance, including the timetable for compliance.

23. If the Secretary fails to provide a response within thirty (30) days of receipt of the Notification, or if Petitioners believe that the Secretary's response is insufficient, Petitioners may seek specific performance of this Agreement from the Court.

VII. NOTICE

24. All notices required under this Agreement will be sent via electronic mail and overnight mail or overnight carrier to the following people:

If to the Petitioners:

Ronald Fein
John Bonifaz
Free Speech For People
1320 Centre St. #405
Newton, MA 02459
rfein@freespeechforpeople.org
jbonifaz@freespeechforpeople.org

and also via electronic mail only to:

Kevin Skoglund
Citizens for Better Elections
info@citizensforbetterelections.org

and also to:

Ben Zion Ptashnik
Psephos – National Election Defense Coalition
c/o Victoria Collier Linden
4717 Valero Ct.
Laredo, TX 78046

If to the Secretary:

Department of State
c/o Chief Counsel
Office of Chief Counsel
306 North Office Building
401 North Street
Harrisburg, PA 17120-0500
kkotula@pa.gov

For purposes of this notice provision, Petitioners may amend their contact information, or the Secretary may amend his or her contact information, by providing notice to the other in accordance with this provision.

VIII. RELEASE AND DISCHARGE

25. In consideration of the terms and conditions called for herein, Petitioners release and completely discharge the Secretary and the Department of State, their respective predecessors, successors, agents, attorneys, servants, representatives, and employees, past and present, and their past, present and future agents, attorneys, servants, representatives, and employees and all other persons with whom any of the former have been, are now or may hereinafter be affiliated (collectively, the “Commonwealth Releasees”), of and from any and all past or present claims, demands, obligations, actions, causes of action, rights, damages, costs, expenses, and any claims for compensation or punitive or other damages of any type which relate to the subject matter of this civil action, including all claims for attorney’s fees which were or could have been set forth in this civil action, or

which Petitioners or their successors, attorneys, or assigns ever had or now has, for or by reason of any cause, matter, or any thing whatsoever arising out of any claims and/or allegations in this civil action existing up until the Effective Date. This release shall not prevent Petitioners from seeking court enforcement of or declaratory relief under this Agreement.

26. In consideration of the terms and conditions called for herein, the Secretary and the Department of State release and completely discharge the Petitioners, their respective predecessors, successors, agents, attorneys, servants, representatives, and employees, past and present, and their past, present and future agents, attorneys, servants, representatives, and employees and all other persons with whom any of the former have been, are now or may hereinafter be affiliated (collectively, the “Petitioner Releasees”), of and from any and all past or present claims, demands, obligations, actions, causes of action, rights, damages, costs, expenses, and any claims for compensation or punitive or other damages of any type which relate to the subject matter of this civil action, including all claims for attorney’s fees which were or could have been set forth in this civil action, or which the Secretary or the Department of State or their successors, attorneys, or assigns ever had or now has, for or by reason of any cause, matter, or any thing whatsoever arising out of any claims and/or allegations in this civil action existing up until the Effective Date.

27. All Parties acknowledge that they have had the opportunity to consult with counsel, and further acknowledge that they fully understand and agree to the terms of this Agreement.

IX. NO ADMISSION

28. It is understood and agreed that this settlement is a compromise of highly disputed claims, entered into to avoid further litigation. Nothing contained herein shall constitute or be construed to constitute an admission by any Party of the merits of claims or defenses which were, or which might have been, asserted by an opposing Party in the course of litigating the above-captioned action. Nor shall anything contained herein constitute or be construed to constitute a concession by any Party that it would not have prevailed on claims or defenses which were, or which might have been, asserted by it in the course of litigating the above-captioned action. The settlement has no precedential value and may not be cited or relied upon by any person in any proceeding for any purpose. It is not to be construed as an admission of liability on the part of any party being released hereunder, any such liability being expressly denied.

X. MISCELLANEOUS PROVISIONS

29. Petitioners represent and warrant that as of the Effective Date, besides themselves, no other person or entity has or had any interest in the claims referred

to in this Agreement, except as otherwise set forth herein; and that Petitioners have the sole right and exclusive authority to execute this Agreement.

30. This Agreement contains the entire agreement among the Parties with regard to the matters set forth herein and supersedes any and all prior agreements, proposed or otherwise, written or oral, among the Parties relating to all or part of the subject matter of this Agreement, and shall be binding upon and inure to the benefit of the successors and assigns of each Party from the Effective Date of this Agreement until the Expiration Date.

31. This Agreement shall be construed and interpreted according to the law of the Commonwealth of Pennsylvania.

32. If, subsequent to the Effective Date of this Agreement, any provision or term of this Agreement is held to be invalid, illegal, unenforceable or in conflict with the law in any jurisdiction, the validity and legality of the remaining provisions will not be affected or impaired thereby.

33. Any headings or subheadings used herein are for reference purposes only and do not affect the substantive provisions of the Agreement.

34. This Agreement may be executed in counterparts, and a facsimile or .pdf signature, or a signature via DocuSign accompanied by a Certificate of Completion, shall be deemed to be, and have the same force and effect as, an original signature.

Exhibit 1



Voting System Implementation Attestation

System Name: _____

County: _____

Date Installed/Upgraded: _____

The below hardware/software was installed and verified on the system implemented:

System Component	Software or Firmware Version	Hardware Version	Model	Comments
Electionware				(Please specify the implementation, single device (desktop/laptop), Client/server)
ES&S Event Log Service				
Removable Media Service				
ExpressVote HW 2.1				
DS200				
DS300				
DS450				
DS850				
DS950				

ExpressVote XL				
ExpressLink				
Toolbox				

Further to the key hardware/software components listed above, any of the COTS software installed on the voting system adheres to the EAC certificate of conformance for the EVS 6300 system. Any ancillary components sold under this contract, such as switches, ballot boxes, and charging carts, are EAC-certified components of the EVS 6300 electronic voting system. (Attach a list of all ancillary components sold under this contract.)

ES&S also has validated that the system components have been installed and hardened in accordance with the EAC-certified system hardening instructions, and that no software other than the voting system software has been installed on any of the components.

ES&S and the county confirm that the system implementation adheres to the conditions of certification identified in the Secretary of the Commonwealth's system certification report dated "1/13/23" (the "Report"), and that any deployment of the system for election activities will follow all conditions set forth in the Report.

Vendor Representative Signature: _____

Vendor Representative Name:_____ **Title:**_____

Telephone:_____ **Email:**_____

County Representative Signature: _____

County Representative Name:_____ **Title:**_____