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Via Email (mhurlbur@pahouse.net)

Hon. Babette Josephs, Chair
Committee on State Government
Pennsylvania House of Representatives
300 Main Capitol Building
PO Box 202182
Harrisburg, PA 17120-2182

RE: Public hearing on General Election Preparedness, September 25, 2008

Dear Representative Josephs:

Please accept this letter as written testimony for the above public hearing and include it in the record of the hearing. I am submitting this testimony on behalf of VoterAction, a non-partisan, national non-profit organization that seeks to ensure election integrity in the United States through legal advocacy, research, and public education. I am a cooperating attorney with VoterAction and also serve as co-counsel for petitioners in *Banfield v. Cortes*, No. 442 MD 2006 (CmwltH Ct). In *Banfield*, petitioners, 25 voters in Pennsylvania, allege that the paperless electronic voting machines used in 52 counties in Pennsylvania violate the Pennsylvania Election Code and the Pennsylvania Constitution. Petitioners seek to have the court declare such voting systems illegal.

The use of paperless electronic voting systems, or DREs, has become more prevalent since the enactment of the Help America Vote Act in 2002. Since the widespread introduction of these systems, critics have repeatedly raised concerns over their reliability, accuracy, auditability and inability to allow a meaningful recount. Perhaps the most widely known problem with DRE voting systems occurred in 2006 in Florida's 13th Congressional District in which iVotronic touchscreen DRE voting systems lost 18,000 votes. iVotronics are currently in use in 24 counties in Pennsylvania. 51 Pennsylvania counties use DRE electronic voting systems as their method of voting. 16 counties use paper ballots which are optically scanned as their primary voting system.

DRE voting systems have a history of unreliability. As recently as the April 2008 Primary Election in Pennsylvania, DRE voting systems failed at the polling places, resulting in long lines and disenfranchising voters who could not wait for the lengthy period of time until the voting systems were restored. During the April 22, 2008 Primary, election protection volunteers staffed and monitored calls to two national hotlines, 866 MYVOTE1 and 866 OURVOTE. Both these hotlines received calls from Pennsylvania voters regarding machine failures on Primary Day. These hotlines, and an additional line monitored by the League of Women Voters, reported a significant percentage of calls regarding machine problems. Voters reported inoperable electronic voting machines at 50 different polling

places in Pennsylvania. In at least 30 polling places, all of the DREs were inoperable. Calls regarding inoperable voting systems occurred disproportionately in precincts with minority or low income voters, including in Philadelphia, Delaware, Allegheny and Montgomery counties. These numbers reflect only those polling places in which a voter called a hotline. The actual number of precincts with DRE voting system malfunctions is likely much higher.

When electronic voting systems are not working, long lines occur at the polling place because voters are unable to vote. Several voters reported that they were unable to vote, or to return to the polling place later in the day. Other voters reported waiting times of more than one hour before being able to vote or being offered a provisional ballot. Further, voters observed other voters leaving the polling place when electronic voting machines were not available and it is unknown whether those voters ever returned. Eyewitness reports estimated the number of voters who left without voting in some precincts as close to 100 voters.

Emergency paper ballots, although clearly contemplated by the Election Code, (*see* 25 P.S. § 3031.20(b)) were, in many cases, not distributed to voters to provide them with an opportunity to vote despite the failure of the DRE voting systems. Moreover, some voters reported that the pollworkers required them to follow the procedures for provisional voting which is not correct. Clearly, no uniform standard or procedure is currently in place in Pennsylvania to ensure that all voters have the opportunity to cast a ballot when the unreliable DRE voting systems have failed at the polling place.

On September 3, 2008, the Secretary of the Commonwealth, Pedro Cortes, issued a directive to the counties regarding election preparation and voting procedures. Secretary Cortes directed the counties to provide emergency paper ballots to voters in polling places when **all** electronic voting systems are inoperable. Specifically, the directive provides

Inoperable electronic voting systems - repairs, substitutes and emergency back-up paper ballots. In the event that an electronic voting system or any of its components should become inoperable during the election, the county board of elections is required, "as promptly as possible," to make necessary repairs or to use substitute machines. 25 P.S. 5 3031.20(@). However, if all electronic voting machines in a precinct are inoperable, "paper ballots, either printed or written and of any suitable form," for registering votes (described herein as "emergency back-up paper ballots") shall be distributed immediately to eligible voters pursuant to section 1120-A(b) of the Election Code. Emergency back-up paper ballots shall be used thereafter until the county board of elections is able to make the necessary repairs to the machine(s) or is able to place into operation a suitable substitute machine(s).

This directive fails to take into account the delays that result when less than all electronic voting systems are inoperable and fails to protect voters who cannot wait an hour or two hours to vote because of machine malfunction. Although the discretion exists for boards to distribute emergency paper ballots if less than all voting systems are not working, the directive is silent on this point. Moreover, the directive does not specify how many emergency ballots should be on hand at the precinct. Apparently, in other documents, the Secretary has recommended that each polling place have enough emergency paper ballots to equal 20% of the number of registered voters in the precinct.

The Secretary also attempted to clarify the procedures for providing emergency paper ballots but failed to require that counties provide paper ballots specifically designed for that purpose. The effect of the

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Directive seems to be a very confusing set of guidelines to the counties regarding procedures for the use of emergency paper ballots.

While VoterAction applauds the Secretary's attempt to clarify the Election Code for the counties, the September 3, 2008 directive falls short in its goal. By requiring that every DRE machine be inoperable before emergency paper ballots are used, the Secretary fails to protect the right to vote of those persons who are unable to wait in a long line before casting their vote.

The requirement to provide emergency paper ballots should be tied to the waiting time that voters experience because of machine failures. The Election Code contemplates that each voter shall spend no more than 3 minutes in line. 25 P.S. § 3057. We believe that the September 3 Directive should be revised to require distribution of emergency paper ballots whenever *any* DRE machine is not working *and* the line of voters waiting to vote is more than 10 voters per operable machine. Further, we believe that the directive should require counties to print ballots specifically designed to be used as emergency paper ballots. In this digital day and age, counties can simply use the form for the absentee ballot and replace the title "absentee ballot" with "emergency paper ballot." Such a procedure would avoid the problems associated with pollworkers scrambling to find suitable ballots to distribute to voters and worrying over whether provisional balloting procedures need to be followed for every voter regardless of eligibility to vote.

The requirement for emergency paper ballots should be codified in the Election Code. Thus, 25 P.S. § 3031.20(b) should be amended to incorporate the standard stated above regarding tying the wait time caused by machine failures to the necessity of distributing emergency paper ballots. Indeed, it would be advisable to create a state standard that no voter would have to wait more than a half hour after being checked in whether or not it is because of machine failure or insufficient machines by a new provision requiring emergency paper ballots be distributed whenever there is a line waiting to vote in excess of ten voters per available machine.

This November's election will be historic in many ways but turnout will be unusually high given the number of new registrations and intense interest in the Presidential election. Counties should be in compliance with the Secretary's rules regarding the number of voting machines per precinct and the number of privacy booths in counties using paper ballots. Strict adherence to those requirements will, to some extent, alleviate long lines at the polls. However, where long lines are caused by machine failures, every Pennsylvania voter should be given an opportunity to cast her ballot and not be forced to leave the polls without voting.

Respectfully submitted,

/sent via email/
Marian K. Schneider