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October 1, 2019

*Via Overnight Mail and Email*

Timothy E. Gates  
Department of State  
Office of Chief Counsel  
306 North Office Building  
401 North Street  
Harrisburg, PA 17120-0500  
[tgates@pa.gov](mailto:tgates@pa.gov)

*Re: Stein v. Cortes*, No. 16-CV-6287  
Second Notice of Non-Compliance with Settlement Agreement

Dear Mr. Gates:

Pursuant to Section 5, Paragraphs 13-14 of the Settlement Agreement, we write again to alert you that Defendants' certification of the ES&S ExpressVote XL ("ExpressVote") system violates the terms of the Settlement Agreement and must be rescinded.

First, as previously noted, under the Settlement Agreement, "[t]he Secretary will only certify new voting systems for use in Pennsylvania if . . . [t]hey produce a *voter-verifiable* record of each vote." Notwithstanding your September 12 letter, the ExpressVote system does not produce a "voter-verifiable record of each vote." The ExpressVote prints a summary card of the voter's selection, which includes text and an optical scan barcode. The voter can verify the text, but not the barcode. But the ExpressVote counts the *barcode*, not the text, as the voter's vote. Voters must be able to verify their own votes with their own eyes. That is the entire point of voter-verifiability. No voter can understand what a barcode means. No voter can know if the barcode accurately reflects his or her vote. Unless that fundamental problem is corrected, the ExpressVote may not, consistent with the Settlement Agreement, be used in the Commonwealth.

Second, the Settlement Agreement requires “paper ballots” for each voter. The summary card is not a paper ballot, in its presentation or in its method of production. It is also extremely difficult for any voter to read and understand this summary card before choosing to “cast.”

Third, the ExpressVote requires voters to insert their summary card into a machine that registers their selections, scans and prints, and is able to print onto the summary card after the voter chooses to “cast.” This allows the machine (whether through malfunction or hacking) to print a false vote onto the summary card *after* the voter attempted to verify their vote. This flaw prevents the ExpressVote from “supporting a robust pre-certification auditing process,” as required under the Settlement Agreement. An audit is only as good as the paper being audited. Without confidence that the summary card is accurate, we cannot have confidence in the audit of votes using the ExpressVote.

Finally, we are concerned about the lack of transparency of the ExpressVote recertification. Even if, as set forth in your letter, the reexamination “mostly” concerned security, the letter and spirit of the Settlement Agreement require Dr. Halderman to be able to “attend” these examinations, certainly as to non-security testing if not all the testing.<sup>1</sup>

So many systems comply with the Settlement Agreement, including the cheapest and best system: paper with OptiScan machines. But this ExpressVote is not one of them.

Plaintiffs, including Pennsylvania citizens, worked very hard to achieve this Settlement Agreement. They are entitled to full compliance. Unless the ExpressVote certification is promptly rescinded, we will seek court relief.

Sincerely,

/s

Ilann M. Maazel  
Alison Frick  
Doug Lieb

c. Sue Ann Unger, Esq.

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<sup>1</sup> Thank you for agreeing to make the Hart and Clear Ballot videos available to Dr. Halderman. We hope this can be achieved in an expeditious manner. Thank you also for your update concerning overall efforts to comply with the Settlement Agreement.