Received 07/07/2014 Supreme Court Middle District

Filed 07/07/2014 Supreme Court Middle District
83 MAP 2013

IN THE SUPREME COURT OF PENNSYLVANIA

No. 83 MAP 2013

MARK BANFIELD, *et al.*,

Appellants,

v.

CAROL AICHELE,
Secretary of the Commonwealth,

Appellee.

Appeal from the Order of Commonwealth Court,
entered on October 15, 2013, in No. 442 M.D. 2006

Appellee's

BRIEF IN OPPOSITION TO *AMICUS CURIAE* THE RUTGERS SCHOOL OF LAW CONSTITUTIONAL RIGHTS CLINIC

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Dated: July 7, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

I. INTRODUCTION

This Court is required to consider whether the certification and use of certain direct-recording electronic ("DRE") voting systems comply with Pennsylvania law. More than seven years ago, then-Secretary of the Commonwealth Pedro A. Cortés (appointed by and serving during the administration of Governor Ed Rendell) concluded that DREs are safe, reliable, and accurate, and determined that such systems could be employed in any county that elected to use them. See 25 P.S. § 3031.4(a) (stating that, if a majority of electors in a county vote in favor of using an electronic voting system, "the county board of elections of that county shall purchase, lease, or otherwise procure for each election district of such county or municipality, the components of an electronic voting system of a kind approved . . . by the Secretary"). (R.1042a-1054a; R.1063a-1068a; R.1091a-1110a; R.1135a-1142a; R.1175a-1184a; R.1195a-1206a; R.1543a-1550a; R.2733a-2742a.) More recently, the current Secretary of the Commonwealth, Carol Aichele (who serves by appointment of Governor Tom Corbett) affirmed those findings and determinations. (R.2617a-2706a.) In two separate opinions (dated August 29, 2012, and October 1, 2013), Commonwealth Court agreed with both Secretaries of the Commonwealth, holding that the particular DREs certified and used in

Pennsylvania are capable of meeting, and do in fact satisfy, the requirements of the Pennsylvania Election Code and the Pennsylvania Constitution.

More than nine years ago, before Pennsylvania examined or certified for use any of the DRE systems at issue in this case, the Constitutional Rights Clinic of Rutgers Law School-Newark (the "Clinic") filed a complaint on behalf of various plaintiffs in the state trial court of New Jersey. See Gusciora v. Corzine, No. MER–L–2691–04, 2010 WL 444173, at *1 (N.J. Super. Ct. Law Div. Feb. 1, 2010) ("Gusciora I") (see R.2787a-2890a), aff'd sub nom., Gusciora v. Christie, 2013 WL 5015499 (N.J. Super. Ct. App. Div. Sept. 16, 2013) ("Gusciora II"), certification denied, 87 A.3d 773 (N.J. Feb. 21, 2014). The complaint challenged New Jersey's use of other DRE systems. Specifically, the Clinic alleged that, because those older DREs contained "bugs" and "vulnerabilities" and lacked a "voter verified paper audit trail," the systems violated the New Jersey Constitution and several provisions of New Jersey's election statutes. Gusciora I, at *2.

In 2009, the New Jersey Superior Court conducted a 25-day trial that focused almost entirely on whether New Jersey's version of the Sequoia AVC Advantage (the "Advantage") complied with state law. Id. at *1; see

also Gusciora II, at *2. In an exhaustive opinion spanning more than 100 pages, the trial court held that it did, rejecting the Clinic's constitutional and statutory arguments. See Gusciora I. The Appellate Division recently affirmed this opinion. See Gusciora II, at *11 ("In sum, plaintiffs have failed to demonstrate that the use of paperless DREs violate the New Jersey Constitution."); id. at *13 (holding that "statutes are not violated because DREs do not produce a 'paper record for each vote cast'" and "plaintiffs' other claims of statutory violations [are] unavailing").

Unsatisfied with these opinions in New Jersey, the Clinic, under the guise of amicus curiae, now seeks to have its evidence and arguments reconsidered by this Court. The Clinic, however, has failed to explain why points pertaining to New Jersey practice and law that failed to persuade New Jersey's trial and appellate courts should be any more successful in the courts of the Commonwealth tasked with applying Pennsylvania law. Accordingly, the Clinic has not presented any reason or rationale to reverse the holdings of the Commonwealth Court that the certification of DREs by the Secretary of the Commonwealth and the use of such voting systems in Pennsylvania comply with Pennsylvania law.

II. ARGUMENT

The Clinic relies on irrelevant evidence that cannot even be considered by this Court and asserts unavailing legal arguments that cannot reverse the opinions of the Commonwealth Court.

A. The *Amicus Curiae* brief improperly relies on evidence that is not part of the certified record.

"It is well settled that '[a]n appellate court may consider only the facts which have been duly certified in the record on appeal.'" Commonwealth v. Rios, 684 A.2d 1025, 1035-36 (Pa. 1996) (citing Pa. R. App. P. 1921, Note). See also Commonwealth v. Bracalielly, 658 A.2d 755, 763 (Pa. 1995) ("Matters outside the record cannot be considered."). The Clinic's Amicus Brief, however, relies entirely on "expert" reports of persons who have not been designated as experts in this case and isolated events in a neighboring state – materials and information that are not part of the certified record in this appeal. The Clinic should not be allowed to admit – or argue from – new evidence that was not considered by Commonwealth Court and was not deemed by the parties necessary to present.

First, in its prosecution of the Gusciora matter, the Clinic engaged Dr. Andrew Appel as an expert. On August 29, 2008, almost six years ago, Dr. Appel issued his report "evaluating the security and accuracy of the …

Advantage DRE voting computer" used in New Jersey. The Amicus Brief contains forty-six footnote citations to Dr. Appel's Gusciora report. The Clinic depends on Dr. Appel's opinions to support every argument it makes regarding the problems that (it speculates) might be part of the Advantage voting system used in Pennsylvania.

But Dr. Appel is not an expert in this case. In fact, by stipulation of the parties and order of the Commonwealth Court, Dr. Appel was expressly denied the right to serve in an expert or consultant capacity in this matter, absent permission from Commonwealth Court. Ex. C ¶ 9 (Protective Order) ("The Petitioners shall not retain Andrew W. Appel as an Examining Expert without first notifying counsel for the Vendors and the Court and without first obtaining permission of the Court …."); Ex. D ¶ 28 (Confidentiality Agreement and Stipulated Second Protective Order, Governing Materials Other Than Source Code and Voting Machines) ("No material designated as Protected Discovery Items shall be provided to Andrew W. Appel without first notifying counsel for the Vendors and the Court and without first obtaining permission of the Court …."). Additionally, Dr. Appel has not offered any expert opinions or submitted any expert reports regarding Pennsylvania's use of DREs.

More to the point, the Clinic wrongly suggests that "[p]arts, but not all, of Prof. Appel's Expert Report … are part of the record of this case." Amicus Brief at 14 n.4. In fact, no part of the Dr. Appel's 2008 Gusciora report has been designated by the parties for the record. See generally Ex. E (Table of Contents of Reproduced Record). Nor was any part of the report attached as an exhibit to the parties' summary judgment and summary relief briefing before the Commonwealth Court.

Second, the Amicus Brief relies on portions of an "Expert Report" of Dr. Roger Glenn Johnston.[1] Amicus Brief at 29 n.41. The Clinic offers the report to illustrate that a "malicious party" can attack an Advantage machine by removing panels and altering the hardware underneath. Id. at 29. Dr. Johnston, like Dr. Appel, is not an expert in this case. Moreover, contrary to the Clinic's representation, neither Appellants nor the Secretary designated any part of Dr. Johnson's reports (neither the "full unredacted expert report" that was filed in Gusciora nor the public excerpts to which the Clinic provides a link) as part of the reproduced record.

[1] Like Dr. Appel, the Clinic asked Dr. Johnston to prepare an expert report in the Gusciora matter. The "report" cited in the Amicus Brief is not actually the full expert report submitted by Dr. Johnston as part of that litigation. Rather, the document on which the Clinic now relies is a redacted and altered version of Dr. Johnston's report, one that Dr. Johnson himself later elected to "make available to the public."

Lastly, the Clinic contends that the results of the 2011 primary election in Cumberland County, New Jersey, show that using the Advantage voting system "runs the risk of errors, bugs or hacks." Amicus Brief at 13. In support of this claim, the Clinic relies on certifications filed and testimony, questions, and opinions set forth in an excerpted transcript of another New Jersey case, Zirkle v. Henry, No. CUM-L-000567-11 (N.J. Super Ct., filed on June 20, 2011). See Amicus Brief Exs. A, B. At no point in the litigation of the case before this Court, however, has any party relied on, or any court cited, the events or opinions from the Zirkle matter. Most simply, none of these materials referenced in the Amicus Brief is part of the record of this appeal.

The Amicus Brief raises arguments that rely entirely on "expert reports" of Dr. Appel and Dr. Johnston and on certain documents produced in the Zirkle case. These materials are not part of the record on appeal and cannot be considered by the Court.

B. The *Amicus* Brief relies on evidence that cannot help this Court answer the questions presented by this appeal.

The Clinic purports to bring to the Court's attention new facts – namely, (a) the performance of the Advantage in two New Jersey primary

elections; (b) expert opinions prepared long ago in separate, unrelated litigation; and (c) additional claims of "vulnerabilities" that might be associated with a different version of the Advantage voting system than that used in Pennsylvania. None of these facts or supporting materials are relevant to the essential issue before this Court, i.e., whether, in certifying the Specified Voting Systems, the Secretary of the Commonwealth properly exercised her discretion within the bounds of the Pennsylvania Election Code and Pennsylvania Constitution.

First, the Amicus Brief details the results of the 2008 presidential primary election in New Jersey and the 2011 Democratic primary election in one county in New Jersey. Regarding the 2008 election, the Amicus Brief reports that poll workers' execution of the "option switch bug" allowed voters to vote in the wrong party primary. Amicus Brief at 13-20. With respect to the 2011 election, the Amicus Brief states that votes cast for one slate of candidates were wrongly attributed to another slate of candidates. Id. at 7-13.

Neither of these two New Jersey elections have anything to do with the compliance of the Advantage voting system (or other DREs) with Pennsylvania law. Crucially, the version of the Advantage system used in

both the 2008 and 2011 New Jersey elections (Version 9.00H) is not the version that was examined and certified by the Secretary for used in Pennsylvania (Version 10). (R.1135a-1142a; R.2693a-2706a.)

Although the Clinic does not address them, the differences between the two versions are material. Among other things, Pennsylvania's Version 10 has been tested against (and deemed compliant with) the 2002 federal Voting System Standards (R.2702a). New Jersey's Version 9.00H has not. See Gusciora I, at *66 (noting testimony of Paul David Terwilliger, witness for the state, that "[w]hile Version 9.00H is not certified to the 2002 standards…. Sequoia certified [Version 10] according to the 2002 standards in 2005"). Additionally, Version 10 contains hundreds of changes to the source code of Version 9.00H, the effect of which on issues like the "option switch bug" the Clinic and its experts do not even recognize, much less explain.[2]

Just as importantly, New Jersey experienced problems in 2008 and 2011 not because of an inherent deficiency in the Advantage system's

[2] Testimony in the Gusciora trial from Edwin B. Smith, then an employee of Sequoia, but qualified by the trial court as an expert, indicates that the "option switch has been fixed in the [Version 10] by changing the firmware code to initialize a variable that was not initialized in Version 9.00H." Gusciora I, at *46.

design or a fundamental flaw in its performance. Rather, the 2008 and 2011 elections produced erroneous results because the human beings monitoring and setting up the voting machines committed errors. The Clinic, its experts, and the New Jersey courts that have considered the issues all acknowledge as much.

With regard to the "option switch bug," for example, Dr. Appel reported that the problem manifested in 2008 was the result of a programming mistake and a misapplied button by poll workers.[3] See Appel Report §§ 56.15 - 56.18. The "switched votes" in 2011 were also caused by mistakes by local election officials who wrongly switched the names of the candidates in the programming computer and then conducted "inattentive or otherwise non-thorough" pre-election testing. Gusciora II, at *3, *17. As both this Court and the court below fully understands, mistakes by election officials have the potential to lead to incorrect results, no matter

[3] Before the trial court in Gusciora, Dr. Appel further explained that, if the ballot definition is programmed correctly, the "bug … will not immediately cause an effect." Gusciora I, at *32; see id. at *36 (admitting on cross-examination that "the option switch bug was a result of poll worker error when the machine was used in a manner inconsistent with the operator's manual"); id. at *86 n.82 (finding of court that "option switch problem occurred when a board worker pressed an inappropriate sequence of buttons on the option switch panel"). Dr. Appel also stated that, ultimately, the "malicious use of the option switch bug" would not be a "very effective way of trying to cheat in elections." Id. at *31.

what machine or system is used to record votes. See Brief for Appellant, Ex. A 17-18 & n.31 (En Banc Opinion of Commonwealth Court, dated August 29, 2012).

Second, as noted above, the Amicus Brief relies on the Gusciora reports of Drs. Appel and Johnston. Even if these reports were part of the record of this case and could be considered, they offer no grounds for reversing either of the two opinions below that the Secretary's certification of the Advantage system in Pennsylvania does not violate Pennsylvania law. In preparing their reports, Drs. Appel and Johnston examined Version 5 and Version 9.00H of the Advantage and New Jersey's particular use of the machines. See Gusciora I, at *21, *69-*70; Johnston Report ¶¶ 145, 147. While both Appel and Johnston offered some speculative suppositions regarding how Version 10 might perform, these opinions were not based on any review of the actual software, firmware, or hardware of the pertinent system.

The "security vulnerability" purportedly discovered by Dr. Johnston illustrates the irrelevance of the Gusciora expert reports. Dr. Johnston suggests that vote manipulation can occur by removing the Advantage's front panel and altering the subpanels underneath. Amicus Brief at 29.

Dr. Johnston performed this particular attack on Version 5 of the Advantage system, and he admits that he does "not know if the … attack [would] work on the latest version of the AVC Advantage voting machine." Johnston Report ¶ 147.

Even if Dr. Johnson's attack could, in theory, be performed on Pennsylvania's Advantage system, there is no explanation as to how it could be performed during an actual election. The Amicus Brief, for example, does not even try to address how such an obvious physical attack could realistically take place "during the progress of voting" in Pennsylvania. 25 P.S. § 3031.7(16)(iii). Nor does the Clinic (or Dr. Johnston) address the fact that the Pennsylvania Election Code requires, and local election officials practice, security procedures that are designed to preclude this type access-dependent tampering. (See R.3028a (Shamos Dep.) 253:9 – 254:9 ("The scenario just gets more and more implausible as you think about it.").)

More importantly, there is nothing in the Amicus Brief or the underlying reports for Drs. Appel or Johnston that addresses the issues before this Court, i.e., the particular requirements and standards of the Pennsylvania Election Code. The Amicus Brief does not even mention,

much less analyze, Pennsylvania's definition of electronic voting systems as able to "provide for a permanent physical record of each vote case." 25 P.S. § 3031.1. It does not cite Appel or Johnston to dispute Commonwealth Court's conclusion that Version 10 (and the other certified DREs) allow for a "statistical recount," id. at § 3031.17, and "preclude … tampering with the tabulating element." Id. at § 3031.7(16)(iii).

In short, the opinions developed more than five years ago in New Jersey litigation concerning an older DRE system used in New Jersey elections do not help this Court determine whether the voting systems at issue in this appeal comply with Pennsylvania law.

Lastly, the Clinic would have this Court consider a number of "other bugs" or "vulnerabilities" that Dr. Appel's report associated with the (New Jersey) Advantage system. These alleged flaws, however, cannot be used to challenge Commonwealth Court's opinions that the Pennsylvania DREs satisfy the demands of the Election Code and Pennsylvania Constitution.

The "bugs" identified by Dr. Appel in his 2008 examination of Version 9.00H are unrelated to Pennsylvania's use of DREs generally or the Version 10 specifically. The existence of a "buffer overrun" in the 9.00H source code, for example, tells this Court nothing about Version 10's code

(which, by definition, is different than the earlier version of the Advantage). Additionally, the Amicus Brief explains that the "buffer overrun" causes the Advantage machine to shut down, but it does not explain how a machine malfunctioning in this way might cause an actual loss of votes. Importantly, Pennsylvania maintains practices and procedures that account for the possibility that election machines may fail to work. (For example, election officials can reset the machine, replace the machine, or use emergency ballots. (R.1465a.)) Nowhere in the Amicus Brief does the Clinic address whether, given these policies, the "buffer overrun" is a real problem in Pennsylvania.

The Amicus Brief also reiterates the Clinic's claims that a "fraudulent Z80 processor" or an infected "daughterboard" can steal votes. Amicus Brief at 23-25. These arguments are especially specious. They were thoroughly considered – and found unpersuasive – during the Gusciora trial. Dr. Appel testified, for example, that it may be theoretically possible to create a fake central processor and insert it into an Advantage machine. He then admitted under oath, however, that "(1) neither he [n]or any member of his team ever designed and installed a fraudulent vote-stealing Z80 processor chip; (2) there is no scientific literature regarding creating

Z80 processor chips for voting machines; and (3) neither [he] nor anyone else has ever created a fraudulent Z80 processor chip that has gone undetected." Gusciora I, at *25; see id. at *36. Thus, absent evidence that this attack has actually been attempted (and the Amicus Brief certainly does not proffer any such evidence), it remains entirely fantastical.

With regard to potential manipulations of the Advantage's daughterboard, Dr. Appel admitted that he "did not design or implement a vote-stealing program that would work on the daughterboard." Id. at *36. He also testified that "the daughterboard cannot cause the motherboard to change votes cast the normal way through the voter panel." Id. at *34. It is for these reasons that the Gusciora court found that the "viral mode theorized by [Appel] through the use of the daughterboard is fictional."[4] Id. at *87.

The Amicus Brief also identifies WinEDS, the ballot-creation and vote-tabulating software used in both New Jersey and Pennsylvania, as

[4] Relying on the speculations of Dr. Appel, the Clinic suggests a daughterboard-firmware attack is more possible on Version 10 than on Version 9.00H. Amicus Brief at 24-25. There is no reason to think this claim is actually true. The Amicus Brief does not cite a successful effort to effect such an attack even within the virtually unrestricted laboratory environment where computer scientists like Dr. Appel work. The Amicus Brief certainly does not (because it cannot) identify a single instance of such an attack happening during the highly regulated and restricted process of voting in an election.

another "vector of attack for a potential hacker." Amicus Brief at 31. The Amicus Brief notes that the potential for wrongdoing is especially high if the "computer running [WinEDS] is connected to the Internet," allegedly a "common practice" in New Jersey. Id.

This example perfectly encapsulates the irrelevance of the Amicus Brief. Whatever the practice in New Jersey might have been in 2008, it is "standard practice in Pennsylvania … to require voting machines and election management systems to be operated in a standalone, non-networked configuration." (R.2736a (Examination Results of Sequoia's Advantage Electronic Voting System, November 3, 2006).) That is, Pennsylvania DREs are not connected to the Internet. (R.821a (Shamos Report ¶ 314) ("No certified voting system is connected to the Internet ….").) Again, because the Amicus Brief does not address the requirements and protections of Pennsylvania law, it does not assist the Court in the instant appeal.

The New Jersey trial and appellate courts have determined that none of the "other bugs" violate the New Jersey election code or the New Jersey Constitution. The Amicus Brief offers no reason grounded in fact or Pennsylvania law why the courts of this Commonwealth could find

otherwise. In the end, these alleged flaws still have not been shown to be possible outside of the lab.[5] More to the point, the Amicus Brief does not even suggest, much less show, that the bugs have been used to change or destroy a single vote of any Pennsylvania elector.

Ultimately, each error, bug, or hack cited in the Amicus Brief – like the "vulnerabilities" relied on by Appellants – is merely a hypothetical possibility. As fully discussed in the Secretary's primary brief, see Appellee's Br. Part III.C, the fact that a particular voting system may be manipulated in ways that might run the risk of altering votes cannot state a violation of law for the most basic reason that all voting systems suffer from this "flaw."[6] See Weber v. Shelley, 347 F.3d 1101, 1106-07 (9th Cir. 2003)

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[5] The court-ordered examination of Version 9.00H was conducted by Dr. Appel and a six-member team of computer scientists and voting machine experts. Gusciora I, at *21. The vulnerabilities they discovered and attacks they imagined did not come easily. "The team spent nearly seven days a week during the month of July 2008 examining the AVC, working between six to ten hours a day." Id. Obviously, one seeking to interfere with real-world elections, monitored by real election workers, would not have the same kind of unfettered access and virtually unlimited time to develop and implement any of the attacks concocted in the lab by a bevy of computer scientists.

[6] It is also important to remember that, while Dr. Appel and his team made extensive efforts to find "flaws" with the Advantage voting system, they did not conduct a similar examination of the optical-scan systems favored by Appellants. Thus, when Appel – and the Clinic relying on his expert opinion – claims that the paper-based systems do not possess the same "flaws" as DREs, the simplest explanation for that conclusion is that Appel did not look for them. (Cf. R.741a (Shamos Report ¶ 42) ("Petitioners have not performed any testing or analysis of any optical scan systems."); R.758a-759a (Shamos Report ¶ 100) ("[Petitioners] have not performed a reliability, accuracy or

("[T]he possibility of electoral fraud can never be completely eliminated, no matter which type of ballot is used") (citing Hennings v. Grafton, 523 F.2d 861, 864 (7th Cir. 1975)); Taylor v. Onorato, 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006) ("No election system is perfect and no machine built by man is infallible. Voting machine malfunction has been, and probably always will be, a potential problem in every election."); Gusciora I, at *87 & n.90 (stating no standard could plausibly "impose a requirement of absolute security or complete protection against tampering, which would be impossible to achieve"); Banfield v. Aichele, No. 442 M.D. 2006, Slip Op. at 8 (Pa. Commw. Ct. Oct. 1, 2013) (attached as Ex. C to Brief of Appellants) ("If the mere possibility of such error were considered sufficient to bar the use of a voting system[,] then we would be left with none."); Andrade v. NAACP, 345 S.W.3d 1, 14 (Tex. 2011) ("DREs are not perfect. No voting system is ….").

C. The *Amicus* Brief asserts futile legal arguments.

As a final argument, the Amicus Brief asserts that Commonwealth Court "erred in citing to Weber … and Wexler v. Anderson, 452 F.3d 1226

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security analysis of optical scan systems, have not compared those systems to the Specified Voting Systems and thus are in no position to assert or prove that such systems are superior to DREs.").)

(11th Cir. 2006)." Amicus Brief at 33. This argument is facially without merit.

First, the parties in a case, not amici curiae, have the responsibility and the authority to frame the questions presented in the case and to identify the purported errors of Commonwealth Court giving rise to those questions. Thus, the Clinic cannot alter the issues on appeal by listing new or additional mistakes that it would like this Court to consider. Commonwealth v. Allshouse, 36 A.3d 163, 179 n.18 (Pa. 2012) ("Amicus cannot raise issues in an appeal which have not been preserved or raised by the parties themselves."); 4 Am. Jur. 2d Amicus § 7 (2005) ("[A]n amicus must accept the case before the court with the issues made by the parties. Accordingly, an amicus curiae ordinarily cannot inject new issues into a case which have not been presented by the parties.") (footnotes omitted), cited in Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals, 919 A.2d 206, 221 n. 8 (Pa. 2007). In this case, Appellants have not argued that Commonwealth Court's reference to Wexler or Weber was erroneous, and the Court should not allow the Clinic to insert this issue into this appeal.

Second, the Clinic's argument that Wexler and Weber have been "overruled by subsequent legislation" is simply wrong. Amicus Brief at 36. The legislatures of California and Florida, of course, were free to amend the states' election codes to require things like voter-verifiable paper records. Appellants (and, for that matter, the Clinic) are free to pursue just such a result from the Pennsylvania General Assembly. Such legislative amendments, however, do not alter the fact (as found in Wexler, Weber, and other cases that the Clinic does not cite) that electronic voting systems without the specific types of paper records that Appellants and the Clinic demand do not impose "severe restrictions" on the right to vote and do not violate equal protection requirements.[7] Tex. Democratic Party v. Williams, No. A–07–CA–115–SS, slip op. at 11 (W.D. Tex. Aug. 16, 2007) (R.1797a-1810a.), aff'd, 285 Fed. App'x 194, 195 (5th Cir. 2008); Favorito v. Handel, 684 S.E.2d 257, 261-62 (Ga. 2009); Schade v. Md. State Bd. of Elections, 930 A.2d 304, 327-28 (Md. 2007).

[7] The Clinic raised this argument before the New Jersey appellate court. It was summarily rejected. See Gusciora II, at *11 ("Plaintiffs' retort to Wexler and Weber is that those cases 'have been overruled by legislative action.' If anything, that assertion validates our respect for the exercise of judicial restraint, which, in the absence of a constitutional violation, is well-founded.").

Third, Amicus Curiae fails to distinguish the facts in Wexler and Weber from those giving rise to this litigation. The Clinic, for example, claims that the federal court in Weber refused to order decertification because of "issues of federalism." Amicus Brief at 34. The Clinic suggests that this case is different in that it concerns state practices under state law in state courts, where "[t]here are no doubts whatsoever" about the courts' authority to issue relief. As the Clinic recognizes, however, "federal constitutional rights were at issue in Weber." Id. Properly applying the very same principles of federalism, there can be "no doubts" that the Weber court was entirely free to determine that the use of DREs was illegal. Thus, the deference it exercised was not because it was afraid of encroaching on state prerogatives. Rather, the Weber court simply recognized that the regulation of elections requires an exercise of discretion better left to the elected officials of the legislature. This is exactly the type of deference demanded in this case and exercised by Commonwealth Court.

The Clinic seeks to distinguish Wexler by asserting that the case concerned two different voting systems with two different recount procedures. Amicus Brief at 35. "In contrast," the Clinic asserts, "Petitioners here are not pitting one type of voting system endorsed by

state statute against another." Id. But that, of course, is exactly what Petitioners are doing. Petitioners' constitutional claims are based on a belief that the optical-scan systems are more compliant with the Election Code than DREs, notwithstanding the fact that both types of systems have been subjected to the same certification procedures and have been found by the Secretary to be safe, reliable, and accurate. Thus, rather than distinguishing Wexler, the Amicus Brief serves only to show that the case is on point.

III. CONCLUSION

For the reasons set forth above, the Amicus Curiae Brief of the Rutgers School of Law Constitutional Rights Clinic in Support of Appellants does not provide any factual or legal bases to reverse the either the January 29, 2013 Order of Commonwealth Court (dismissing Counts I, IV, V, and VI of the Petition for Review) or the October 1, 2013 Order of Commonwealth Court (granting the Secretary's Application for Summary Relief and ordering entry of judgment in favor of the Secretary on Counts II, III, VII, VIII, IX, and X). Accordingly, the Secretary respectfully requests that the Court affirm those Orders.

Respectfully submitted,

Dated: July 7, 2014

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