



4. Admitted.
5. Admitted.
6. Admitted in part, denied in part. Petitioners deny Respondent's characterization of the dissenting opinion, as it speaks for itself. Petitioner admits the remaining allegations in paragraph 6.
7. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the Secretary's allegations in paragraph 7.
8. Admitted.
9. Denied. As alleged above and in Petitioner's brief in opposition to the preliminary objections, attached hereto as Exhibit "A", there are no controlling questions of law in this case. Adoption of Respondent's arguments are tantamount to a ruling that the Respondent, not this Court interprets disputed provisions of the Election Code and that the electorate has no ability to question those interpretations of the Code before this Court. Specifically,

#### **FIRST QUESTION**

*There is no substantial difference of opinion regarding whether this Court may require the Secretary to comply with his non-discretionary legal duties under the Election Code by decertifying machines that do not meet Election Code standards.*

10. The Secretary has no discretionary power to refuse to decertify a voting machine that does not meet the requirements of the Election Code. And, even the language quoted by Respondent from the Dissenting Opinion implicitly recognizes this fact. That language – the “Secretary’s decision to approve, or to disapprove, electronic voting machines requires the exercise of discretion and, as such, cannot be compelled by writ of mandamus” – assumes that there is some issue over whether the machines comply with

the Election Code. The Petition alleges facts which, if proven, establish that the machines do not meet the Code's requirement. If the machines do not meet the Code's requirements, the Secretary has no discretion and mandamus may issue. See Meadville Area School District v. Dept. of Public Instruction, 398 Pa. 496, 500 (1960); Maute v. Frank, 441 Pa. Super. 401, 403 (Pa. Super. Ct. 1995)(a mandamus action is appropriate to compel official performance of a duty where there is a legal right in the plaintiff and a corresponding duty in the defendant.)

Moreover, Respondent intentionally obfuscates the fact that this is a case where the parties dispute both the extent and existence of the Secretary's duty and the meaning of the Election Code. Mandamus is appropriate here because, as the Supreme Court held more than forty years ago, a mandamus action will "compel performance by a public official of a legal duty even if the existence and/or scope of the duty must be found and defined in the mandamus action itself." Volunteer Fireman's Relief Assoc. v. Minehart, 415 Pa. 305, 311 (1964).

The Respondent's argument that he operates without any judicial review regarding his interpretation of the Election Code, no matter how arbitrary or idiosyncratic that interpretation might be, is simply wrong and not the subject of any meaningful difference of opinion. Although the Secretary has a duty to review electronic voting machines for certification under Pennsylvania law, he cannot discharge the discretionary components of that duty based upon a mistaken view of the law (such as the view that the machines do not have to create a record of the votes cast or that he can certify machines that do not count votes properly or can be readily tampered with) or in an arbitrary manner (such as using *ad hoc*, unwritten certification standards that differ from testing

date to testing date) or in a way that is not bounded by the provisions of the Election Code. The Petition contains allegation after allegation making plain that the Secretary has failed to decertify seven voting machines despite the fact that they do not meet the express requirements of the Election Code. His failure to decertify these seven machines is thus based on a mistaken view of the law and this Court has the power to remedy his failures through mandamus.

*There is likewise no substantial difference of opinion as to whether Petitioners state a claim because the doctrines of both sovereign immunity and the balance of powers actually require the Courts of this Commonwealth to determine whether the Secretary has failed in his mandatory legal duties.*

11. There is no substantial difference of opinion regarding whether this case should be dismissed because of sovereign immunity or to preserve the balance of power. In fact, the majority and dissenting judges of this Court did not even address these arguments by the Respondent, indicating they believed them to be frivolous on their face, which, indeed, they are.

First, to the extent the Petition seeks relief in the form of mandamus, the defense of sovereign immunity does not apply. See e.g., Maute v. Frank, 441 Pa. Super. 401, 403 (Pa. Super. 1995); Madden v. Jeffes, 85 Pa. Commw. 414 (1984).

Second, sovereign immunity does not prevent this Court from entering the declaratory relief sought directly or indirectly in each Count of the Petition. In fact, both the doctrines of sovereign immunity or 'balance of power', assuming they are implicated here, are properly considered following trial in this matter when the Court considers the form of relief that should be entered against the Secretary for his violations of the Election Code – i.e., whether injunctive, in the nature of mandamus or declaratory relief.

Third, it is the balance of powers that actually compel this Court to review the Secretary's conduct in this case. This Court has the power and obligation to review executive action intended to implement or supplement the Constitution or Statutes of the Commonwealth. See National Solid Wastes Management Assoc. v. Casey, 135 Pa. Commw. 134, 142-43 (Pa. Commw. 1990). This Court has the power to interpret the language of the laws passed by the legislature and decide whether those laws are properly implemented by the executive. This Court has the power to decide whether laws passed by the legislature, either on their face or as enforced by the Secretary, violate the constitutional rights of the Petitioners. In fact, **these are the very powers vested in this Court under the separation of powers doctrine**. For the Secretary to argue to the contrary plainly turns the doctrine on its head by taking unto the executive branch those powers vested in the judiciary.

12. As set forth above, none of the issues identified by Respondent present controlling questions of law. Certification of this Court's April 12 order for appeal would no more advance the ultimately termination of this case than would a like certification whenever this Court overrules a respondent's preliminary objections. This case should not advance on appeal until full development of the factual record and a hearing on the merits so that both this Court and any later appellate court can review the record in light of both what the Election Law says, what the Secretary has done or not done and whether any given certified DRE in fact operate in a way that complies with our Election Code. Any other result here, given that the allegations in the Petition must be deemed true, would mean that the electorate is required, without redress, to vote on machines that do not operate properly and cannot be audited following the elections such that each and

every citizen of the Commonwealth has, and will be, deprived of their right both to vote and to have that vote properly counted and weighed.

## SECOND QUESTION

*Upon Petitioners' proof that the allegations in the Petition are true, this Court may compel Respondent to establish uniform testing criteria; however, any appeal on this issue now would not advance the litigation because it need not be addressed until this Court is required to evaluate appropriate remedies, at which time the request for testing criteria may be rendered moot or this Court may decide that some alternative remedy is more appropriate.*

13. The Petition alleges that Secretary's has approved DREs under the Election Code using an *ad hoc*, idiosyncratic testing process that inevitably results in the approval of machines that do not comply with the Code. It further alleges that the certification process is "arbitrary, fraudulent, or based on a mistaken view of the law."

Lancaster County Tavern Owners Assoc. v. Commonwealth, 40 Pa. Commw. 201, 203 (1977). There is no substantial difference of opinion regarding whether, if the

Respondent's certification process is as alleged, mandamus may properly issue.

Consequently, an interlocutory appeal of this issue, would not materially advance the litigation because, until a factual record is established, there is no way to know whether this Court will agree that the Secretary's process is arbitrary and, if so, whether the form of relief requested will be found appropriate after trial. Accordingly, amendment of this Court's order to allow an interlocutory appeal would be simply tantamount to permitting an unfair and unnecessary delay in adjudication of Petitioners' claims.

14. Petitioners incorporate herein by reference their response to paragraph 11 as if fully set forth.

15. The Respondent's argument in paragraph 15 in no way justifies amending this Court's order to permit an interlocutory appeal in this case. Any time this Court makes a

legal ruling, an interlocutory appeal would arguably expedite the case. However, interlocutory appeals should be limited to the most extraordinary cases and not, as the Respondent suggests, whenever a legal ruling involved an adverse determination on whether a state official or entity may be sued at all.

Moreover, Helsel v. Complete Care Services, L.P., 797 A.2d 1051, 1054 (Pa Commw. Ct. 2002) is not applicable here. In Helsel, the lower court held that a private entity operating a county owned nursing home was not immune from suit alleging medical malpractice in the care of patients. The law was not settled on that issue; here, the law is settled that sovereign immunity is not a defense to a mandamus action *and* sovereign immunity does not apply to declaratory relief. In any event, a decision on this issue now before the court has determined the appropriate relief will not advance the ultimate resolution of the action.

16. For the reasons above, the Second Question raised does not present a controlling issue of law and should not form the basis of a decision to amend the Court's April 12 Order to allow an interlocutory appeal.

### THIRD QUESTION

*There is no substantial difference of opinion on whether the Counties are indispensable parties because the Petitioners seek no relief against the Counties.*

17. The Pennsylvania counties which have purchased DRE machines are not necessary parties because the Petitioners' seek no redress or relief against any one of the counties. "[A] party against whom no redress is sought need not be joined." Sprague v. Casey, 520 Pa. 38, 48 (1988). The fact that the counties have already purchased the machines and may suffer a financial consequence if they purchased them in reliance on the Secretary's certification is important but not legally material to the decree to be

entered in the case or the merits of the case. Pennsylvania's franchise is not for sale and does not depend on whether the counties will lose money because the Secretary failed to comply with the Election Code. See City of Philadelphia v. Commonwealth, 575 Pa. 542, 568 (2003) (stating "where the interest involved is indirect or incidental, joinder may not be required"); Allegheny County v. Dept. of Public Welfare, 376 A.2d 290 (1977) (finding that the Treasurer of the Commonwealth was not an indispensable party to a mandamus action requiring the Department of Public Welfare to reimburse a county for expenses). In fact, it is impossible to see how the addition of the Counties as parties to this case in any way impacts the question of whether the Respondent complied with the Election Code in his certification process!

In addition, in the event the Secretary should decide to de-certify a DRE (with or without Court involvement), the Election Code itself has no requirement that the Secretary include in the internal evaluations leading up to that decertification any county that purchased that DRE in reliance on his earlier certification of the machine. See § 1105-A©, 25 P.S. § 3031.5(c). There is no reason why this Court should be bound by a different rule.

18. The Respondent's argument in paragraph 18 in no way justifies amending this Court's order to permit an interlocutory appeal in this case. Any time this Court makes a legal ruling on an indispensable party, an interlocutory appeal would arguably expedite the case. However, interlocutory appeals should be limited to the most extraordinary cases and not, as the Respondent suggests here, to a case where the Court decided in compliance with existing Supreme Court law that third parties were not indispensable parties.

19. For the reasons above, the Third Question raised does not present a controlling issue of law and should not form the basis of a decision to amend the Court's April 12 Order to allow an interlocutory appeal.

#### FOURTH QUESTION

*This litigation would not be advanced by certifying for interlocutory appeal one, out of dozens, of examples why the DREs certified by Respondent do not meet the requirements of the Election Code.*

20. The issue of a "voter verified independent record" as raised in the Petition is simply one, out of dozens, of allegations addressing how Respondent failed to comply with the law. It is plain beyond peradventure that the ultimate resolution of this case would not be advanced by certification of this one issue for interlocutory appeal because, even if it was accepted for appeal and, indeed, even if the Supreme Court decided that such a record was not required by the Election Code, the remaining issues in the Petition would still need to be the subject of this Court's review after development of a factual record. Moreover, both the members of this Court who voted with the majority and with the dissent agreed that the Election Code likely required a physical record that would permit a recount. Dissent, attached as Exhibit E to Respondent's Application, at 4. A factual record must be developed to determine whether the certified DREs even permit the recount envisioned by the Code.

22. Petitioners incorporate herein by reference their response to paragraph 21.

23. For the reasons above, the Fourth Question raised does not present a controlling issue of law and should not form the basis of a decision to amend the Court's April 12 Order to allow an interlocutory appeal.

24. Moreover, this Court cannot ascertain whether the DREs meet the requirements of the Election Code based upon whether they permit the kinds of recounts envisioned in the Code without development of a factual record regarding what recounts are possible following an election using a particular DRE. Consequently, an immediate appeal of the question of whether the Code requires a voter verified independent record in order to permit recounts, or whether some other document is sufficient, would not materially advance the termination of this case.

#### FIFTH QUESTION

*The Petitioners have standing to raise their Constitutional Claims and those claims are ripe for adjudication; moreover, even if they lack standing and/or the claims are not ripe, an appellate determination of these issues would not advance the litigation because the case would still proceed on the remaining claims for relief.*

25. The Petitioners have standing because they have been aggrieved by Respondent's failure to comply with the Election Code. This failure means that, not only are Petitioners required to vote on DRE machines that do not meet the Code's requirements but they are faced with the prospect that their votes will not be properly counted or, because much of the remaining electorate in Pennsylvania is voting on similarly flawed machines, weighed. In re Adoption of J.E.F., C.J.U., N.G.F., 902 A.2d 402, 412 (Pa. 2006); Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 195 (1975); American Booksellers Assoc., Inc., v. Rendell, 332 Pa. Super. 537, 554 (Pa. Super. 1984). There is no controlling question of law or dispute over whether the voters of this Commonwealth have standing to raise constitutional claims arising out of the use of flawed voting machines that cause them to be disenfranchised.

26. Whether Petitioners' claims are ripe, and whether they have standing, is simply not answered by whether they may also be able to file a complaint in equity in the Court

of Common Pleas in the county where they vote. Among other things, such a complaint would not address whether the Petitioners' votes were being properly weighed in state wide elections.

27. Petitioners incorporate herein by reference their response to paragraph 26.

28. For the reasons above, the Fifth Question raised does not present a controlling issue of law and should not form the basis of a decision to amend the Court's April 12 Order to allow an interlocutory appeal.

### SIXTH QUESTION

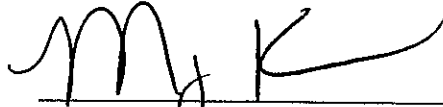
*Because Petitioners have not asked that this Court require the Secretary to conduct a re-examination of the DRE machines in manner not required by the Election Code, there is no need to seek interlocutory appeal on this question and thus no need to amend this Court's April 12 Order.*

29. Both the majority and dissenting opinions agreed that the Secretary has a non-discretionary obligation to re-examine voting systems when faced with a properly executed request under the Election Code. There is thus no basis to argue a "substantial difference of opinion" regarding this issue.

30. Respondent argues that he did not have to undertake his mandatory duty under the Code upon receipt of Petitioners' requests to re-examine because the requests were not limited on their face to a re-examination but instead, asked for more. As argued earlier, Respondent's argument can only be described as irresponsible. He believes that he can slither out of his mandatory obligations whenever a citizen makes the mistake of including in a recertification request something the Respondent alleges to be beyond his legal obligations. This argument is barely worth a response and on its face is not the subject of a substantial difference of opinion.

31-32. For the reasons above, the Sixth Question raised does not present a controlling issue of law and should not form the basis of a decision to amend the Court's April 12 Order to allow an interlocutory appeal.

April 27, 2007



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RECEIVED AND FILED  
COMMONWEALTH COURT  
OF PA (PHILA)

2006 OCT 19 A 11:25

MARK BANFIELD, *et al.*,

Petitioners,

v.

PEDRO CORTES,

Respondent.

DOCKET NO. 442 M.D. 2006

**PETITIONERS' OPPOSITION TO RESPONDENT'S APPLICATION FOR STAY OF  
DISCOVERY OR PROTECTIVE ORDER AND  
PETITIONERS' CROSS-MOTION TO COMPEL AND COMPEL PRODUCTION OF  
DOCUMENTS AND ANSWERS TO INTERROGATORIES**

Petitioners submit this opposition to the Application of Respondent, Pedro A. Cortes, Secretary of the Commonwealth (the "Respondent" or the "Secretary"), for a Stay of Discovery or Protective Order, and submits its cross-motion to compel responses to Respondents First Set of Interrogatories and First Requests for the Production of Documents. In support of that opposition and cross-motion, Petitioners state the following:

1. The Secretary has chosen to ignore the Pennsylvania Rules of Civil Procedure, has unilaterally decided what constitutes proper discovery, and is attempting to set his own discovery schedule. With his pending Application for Stay of Discovery or Protective Order (the "Secretary's Motion"), the Secretary seeks to have this Court ratify his decision to ignore the Petitioners' pending Discovery Requests. The Secretary's bases for ignoring the Discovery Requests and for pursuing the Secretary's Motion are without merit. Indeed, the Secretary's Motion is simply a recitation of boiler plate objections that lack any specific support. In reality,

both the facts and the law relating to this discovery dispute show that the Petitioners are entitled to full responses to the Discovery Requests immediately.

2. What is striking about the Secretary's position in this discovery dispute is his utter refusal to provide any responses other than a promise to produce a handful of documents, many of which are already publicly available. Rather than providing responses to the Discovery Requests as best as he can at this time, and objecting where he deems appropriate, the Secretary has instead refused to respond to the pending requests altogether. Such conduct is not acceptable.

3. Despite the Secretary's unsupported objections, the discovery sought by the Petitioners is extremely relevant and probative. *See* the Discovery Requests, attached as Exhibits "C" and "D" to the Secretary's Motion. Considering that this litigation centers on whether certain voting machines were properly evaluated and certified, information in the Secretary's possession that relates to the evaluation and certification process goes to the very heart of the case. Moreover, while the Discovery Requests are necessarily thorough, the Petitioners crafted the Discovery Requests to be as narrow and direct as possible, while still ensuring that Petitioners are able to obtain the information necessary to properly litigate this case. *See* the Discovery Requests, attached as Exhibits "C" and "D" to the Secretary's Motion.

4. A real necessity exists to move discovery forward in a timely manner. This case involves one of the most important services a government provides – conduct of an election – and the public is entitled to clarification, as promptly as possible, as to whether elections are being conducted in accordance with the law. Moreover, if the voting machines at issue in this case are found to be deficient, then additional time will be required to remedy this situation in

time for the next election. Clarification by a court will not be possible without a thorough record of what has or has not been done in certifying electronic machines and such a record must be developed through discovery. Any delay in discovery will have cumulative effects on the timing of the ultimate decision. Thus, the public interest is served by the Secretary providing the requested discovery as promptly as possible.

**The Secretary Cannot Show Good Cause to Support Entry of a Protective Order.**

5. The Secretary fails to meet the standard for the entry of a protective order. Discovery is "liberally permitted" under Pennsylvania law. *Obenski v. Brooks*, 7 Pa. D. & C. 253, 256 (Pa. Com. Pl. 1978). Discovery is presumed to be appropriate, and it is only in rare circumstance where discovery should be limited by the imposition of a protective order. *See Holowis v. Philadelphia Elec. Co.*, Pa. D. & C. 2d 260 (Pa. Com. Pl. 1965). Moreover, the party who seeks to limit discovery has the burden of establishing that the imposition of such limit is appropriate. *Mazzucca v. Methodist Hospital*, 47 Pa. D. & C. 3d 55 (Pa. Com. Pl. 1986). As pointed out in the Secretary's Motion, a protective order must not be entered unless good cause is shown for such an order. Pa. R. Civ. P. 4012. In order to show good cause, the party seeking protection must demonstrate that the discovery sought is unreasonable. *Id.* A showing of mere burden, oppression or expense is simply not enough to warrant a protective order. *Chrysler v. Zigray*, 7 Pa. D. & C. 4<sup>th</sup> 408 (Pa. Com. Pl. 1990).

6. The Secretary fails to make showing required for the entry of a protective order. First, the Secretary's claims that responding to the Petitioners' Discovery Requests would be unreasonably burdensome and expensive are nothing more than boilerplate objections, and his motion contains no specific information to support his objections. The Secretary has failed to support his motion with any accompanying affidavit – as one would expect in the context of a motion for a protective order – detailing the burdens and expense that would be incurred by

responding to the pending Discovery Requests. Without such supporting facts, the Secretary fails to meet his burden.

7. Rather than setting forth the specific reasons why the pending Discovery Requests impose unreasonable burdens, the Secretary simply highlights some of the types of discovery sought and essentially re-asserts his boilerplate objections. For example, the Secretary takes issue with the Petitioners' interrogatories seeking the identity of all persons present during any voting machine evaluation, and also objects to a number of document requests that seek all documents that relate to the purchase, evaluation, examination, and ultimate certification of the voting machines at issue in this case. The Secretary does not, however, explain why it is that he is unable to list all such persons that he can identify at this point, and provide whatever responsive documents he has in his possession now, and supplement later if necessary. Instead, the Secretary simply refuses to provide any response – not even written objections – and now seeks protection from having to respond at all. In so doing, the Secretary seems to be relying upon the misguided principle that if it would be difficult to locate and produce all information that possibly relates to a request, then the request is unduly burdensome and the Secretary should be relieved from providing any response whatsoever. Such an extreme position clearly goes against the spirit of the discovery rules.

8. Additionally, the Secretary claims that responding to Petitioners' so-called contention interrogatories are premature and also would require an unreasonable expenditure of resources. First, many of the interrogatories about which the Secretary complains do not constitute contention interrogatories. For example, Interrogatory No. 7 (although the word "contend" appears in the interrogatory) requests that the Secretary set forth the standards against which the various machines were measures in order to determine that each was safely and efficiently usable in the conduct of the elections. *See Exhibit "F" to the Secretary's Motion.* Surely, the Secretary can identify the standards he employed in testing these machines without having to first "determine all of the facts and theories regarding this litigation."

9. Second, to support his argument that he need not respond to these interrogatories now, the Secretary simply cites to federal cases, and concludes that such interrogatories are premature. The Secretary seems to ignore however, the simple fact that this matter is before the Commonwealth Court, and thus is governed by the Pennsylvania Rules of Civil Procedure, not the federal rules. Moreover, Pennsylvania courts have determined that contention interrogatories are appropriate, even in the early stages of litigation, and that a party served with such interrogatories must provide meaningful responses to the best of its ability. *See Frisby v. Zinner*, 49 Pa. D.&C. 3d 115 (Pa. Com. Pl. 1987). The Secretary's grounds for seeking protection from his obligation to respond to Petitioners' interrogatories are, therefore, without merit.

10. When asserting his objections to the Petitioners' requests for production of documents, the Secretary complains that these requests would force him to search "the most remote files" and have the documents reviewed by counsel prior to production. These objections are specious at best. First, one would expect that the Secretary keeps organized files, and that specific files were kept in connection with certification of voting machines. If this is the case, then retrieval of these documents certainly is not an unreasonable burden. The Secretary offers no information to refute this conclusion. But, even if organized files were not kept, the production of documents always requires that some time and effort be expended to locate relevant documents. Thus, requests for these documents cannot be deemed unreasonable simply because the Secretary may have to expend some staff time in locating responsive documents.<sup>1</sup>

11. Second, the Secretary's position that these document requests are unreasonable because production of responsive documents would require a review of the documents by the

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<sup>1</sup> Petitioners were willing to delay the responses to some of the Discovery Requests until after the election if the Secretary timely filed his objections and substantive responses to certain requests. *See Exhibit F of the Secretary's Motion*. This offer was made in the spirit of attempted compromise in light of the relatively light burdens imposed by the Discovery Requests. This compromise was rejected, and the Secretary, who has not served any objections or produced a single document, has instead sought a total exemption. *See Exhibit G of the Secretary's Motion*.

Secretary's counsel is particularly self-serving and creative. In litigation where documents are requested, a party normally will take the step of having counsel review the documents before their production. The need for a party to take such steps cannot possibly mean that the underlying requests are unduly burdensome. If this were the case, the discovery rules would have to be re-written. While the necessity of review of documents by outside counsel may be a burden, it is an acceptable burden, and a party should not be denied documents simply because the producing party may have to engage counsel to review those documents. What the Secretary characterizes here as unreasonable – the collection of responsive documents and review of those documents by outside counsel prior to production – is in fact a description of the normal document production process. Indeed, considering that this process is followed in producing documents in nearly every litigation, it is recognized that the burden and expense resulting for counsel's review of documents is a reasonable and acceptable burden to impose on a party. The Secretary's objections to the document requests are, therefore, without merit.

**A Stay of Discovery Pending Resolution of the Secretary's Preliminary Objections Is Not Appropriate in this Matter.**

12. The Secretary's reasons for seeking a stay of discovery are not compelling, and his application for a stay should, therefore, be denied. First, the Secretary asserts that discovery should be stayed simply because his Preliminary Objection are pending before the Court and that such a stay would not prejudice the Petitioners. The pendency of preliminary objections, however, does not serve as a *de facto* stay of discovery. *See Ciardi v. Janssen & Keenan, PC*, 2006 WL 1791603 (Pa. Com. Pl. June 27, 2006). More importantly, the Petitioners, voters across the Commonwealth, and even the Secretary will be prejudiced by a stay of discovery.

13. Petitioners, as well as voters throughout the Commonwealth, have a significant interest in adjudicating this case as quickly as possible, and such a quick resolution requires prompt responses to discovery. Unlike most other lawsuits that involve the recovery of damages

suffered in the past, this suit impacts upon the rights of Pennsylvania voters and the integrity of future elections. Each election held in the Commonwealth before the resolution of this suit will occur under a cloud of uncertainty. Thus, it is in the best interest of not only the Petitioners and voters throughout the Commonwealth, but also of the Secretary, to have the suit adjudicated as swiftly as possible. Swift adjudication requires that the record be developed fully, in as timely a manner as possible. Additionally, because expert witnesses will play such a prominent role in this matter, it is imperative that the parties have responses to discovery as soon as possible so that expert witnesses can be selected and those experts can review the materials necessary to generate their opinions. Thus, any delay on the timing of discovery in this matter has far-reaching consequences that will seriously prejudice the Petitioners.

14. In arguing for a stay of discovery, the Secretary also claims that his burden in responding to the Discovery Requests is "maximized" because of the approaching November elections. The Secretary, however, has not produced an affidavit setting forth the nature and extent of the burdens an election places upon him and his office, nor does he explain in the motion itself what tasks he and his staff must perform in connection with the upcoming election. Additionally, he does not explain what duties fall to the Secretary's office as opposed to falling to county election officials. Moreover, elections take place in the Commonwealth twice a year. Thus, there are few, if any, times on the calendar when the specter of an upcoming election cannot be invoked in an effort to avoid discovery responsibilities. Additionally, Petitioners sought to accommodate the Secretary by reducing the number of requests for which they require an immediate response, but the Secretary rejected this proposal. *See* Exhibits "F" and "G" to the Secretary's Motion.

**The Secretary Should Be Compelled to Provide Responses to the Pending Discovery Requests.**

15. Petitioners commenced this action on August 15, 2006 with the filing of the Petition for Review. On September 11, 2006 Petitioners served the Discovery Requests upon counsel for the Secretary. *See Exhibits "C" and "D" to the Secretary's Motion.* In accordance with Rule 4006(a)(2), the Secretary was required to serve a copy of the answers, and objections if any, within thirty (30) days of service of the interrogatories. Under Rule 4009.12(a)(1), the Secretary was also required to serve a response to the document requests within thirty (30) days. Those 30 days have passed, and Plaintiff has failed to respond or serve objections to either the interrogatories or the document requests.

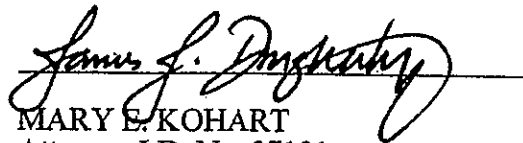
16. The same reasons that counsel against the entry of a protective order or stay of discovery also support the entry of an order compelling the Secretary to provide meaningful responses to the Discovery Requests in a timely manner. The Discovery Requests seek information that is relevant to the current litigation, and because it is essential that this matter be adjudicated quickly, the Petitioners have and will continue to be prejudiced as a result of the Secretary's refusal to provide any responses. Moreover, the Secretary has failed to establish any specific reasons that exempt him from providing responses to the Pending Discovery requests and has provided no compelling reasons why discovery should be stayed.

17. While both the Secretary and the Petitioners negotiated in good faith in an effort to resolve the Secretary's issues with the Discovery Requests, these negotiations broke down. Then, instead of providing written responses and objections to the Discovery Requests on the date they were due, the Secretary ignored his obligation to provide these responses – thus waiving his right to object – and filed his pending motion. Additionally, despite continued promises to provide certain documents responsive to the Discovery Requests, the Secretary has yet to produce these materials to the Petitioners. In so doing, the Secretary has failed to meet his

obligations to respond to the Discovery Requests and he should now be compelled to do so immediately.

WHEREFORE, Petitioners, respectfully request this Court deny the Secretary's Application for Stay of Discovery or Protective Order and grant Petitioners' Cross Motion to Compel Discovery and deem any and all of the Secretary's objections to Petitioners discovery requests to have been waived.

October 19, 2006



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**CERTIFICATE OF SERVICE**

I, James J. Dougherty, hereby certify that the foregoing was served upon counsel listed

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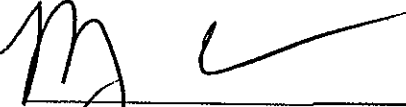
  
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**CERTIFICATE OF SERVICE**

I, Mary E. Kohart, hereby certify that the foregoing was served upon counsel listed below via Hand Delivery:

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Dated: April 27, 2007

  
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Mary E. Kohart