

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	
	:	
PEDRO CORTÉS,	:	Docket No. 442 M.D. 2006
	:	
Respondent.	:	

[PROPOSED] ORDER GRANTING RESPONDENT'S APPLICATION FOR RELIEF TO AMEND ORDER

AND NOW this _____ day of _____, 2007, upon consideration of the Application for Relief to Amend the April 12, 2007 Order Overruling Preliminary Objections to Allow Interlocutory Appeal, filed by Respondent Pedro A. Cortés, Secretary of the Commonwealth ("Secretary"), it is HEREBY ORDERED that the Secretary's Application for Relief is GRANTED.

IT IS FURTHER ORDERED that the Order of April 12, 2007 overruling the Secretary's preliminary objections is amended to include the following:

"AND NOW, this 12th day of April, 2007, the preliminary objections filed by Pedro A. Cortés, Secretary of the Commonwealth, are hereby overruled. This Order involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this Order may materially advance the ultimate termination of the matter."

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, et al.,	:	
	:	
Petitioners,	:	
	:	
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	:	
PEDRO CORTÉS,	:	Docket No. 442 M.D. 2006
	:	
Respondent.	:	

**APPLICATION OF PEDRO A. CORTÉS, SECRETARY OF THE COMMONWEALTH,
FOR RELIEF TO AMEND THE APRIL 12, 2007 ORDER OVERRULING
PRELIMINARY OBJECTIONS TO ALLOW INTERLOCUTORY APPEAL**

Pursuant to Rules 123 and 1311(b) of the Pennsylvania Rules of Appellate Procedure, Respondent Pedro A. Cortés, Secretary of the Commonwealth (“Secretary”), through his undersigned counsel, moves this Court to amend its Order, dated April 12, 2007, which overruled the Secretary’s Preliminary Objections, to include a statement, pursuant to 42 Pa. C.S. § 702(b), allowing the Secretary to file a petition for permission to appeal in the Supreme Court of Pennsylvania. In support of his motion, the Secretary states as follows:

1. On or about August 15, 2006, the Petitioners in this action filed a Petition for Review (“Petition”) invoking this Court’s original jurisdiction. The Petition, attached as Exhibit A, is comprised of ten counts and challenges the Secretary’s discretionary decisions to

certify seven Direct Recording Electronic voting systems (“DREs”), as well as the Secretary’s decision not to re-examine four of those systems after receiving requests for re-examinations from some of the Petitioners.

2. On or about August 21, 2006, just six days after the Petition for Review was filed, the Secretary filed Preliminary Objections challenging all ten Counts on numerous grounds, both in the nature of demurrer and on jurisdictional and jurisprudential grounds. The Preliminary Objections, without attachments, are attached as Exhibit B.

3. This Honorable Court, with seven judges sitting *en banc*, held oral argument to consider the Secretary’s Preliminary Objections on November 15, 2006.

4. On April 12, 2007, a four-judge majority of this Court issued an order overruling the Secretary’s preliminary objections. The Order (“April 12 Order”) is attached as Exhibit C.

5. The Court’s Order was accompanied by an Opinion authored by the Honorable Rochelle S. Friedman and joined by Judges Smith-Ribner, Pellegrini and Simpson. The Opinion is attached as Exhibit D.

6. Judge Mary Hannah Leavitt, joined by now-President Judge Leadbetter and Judge Cohn-Jubelirer, authored a dissenting opinion. The three dissenting judges would have sustained the Secretary’s demurrer as to all but one Count.¹ The dissenting opinion (“Dissent”) is attached as Exhibit E.

¹ The sole issue on which all seven judges agreed is that Petitioners’ case may proceed as to Count VI, which seeks an order directing the Secretary to re-examine four of the challenged DREs.

7. The Secretary intends to seek immediate appellate review of the April 12, 2007 Order by filing, *inter alia*, a Petition for Permission to Appeal in the Pennsylvania Supreme Court.

8. As a jurisdictional prerequisite to filing a Petition for Permission to Appeal, the Commonwealth Court must make the following statement in its order:

This Order involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this Order may materially advance the ultimate termination of the matter.

See 42 Pa. C.S. § 702(b).²

9. Here, the April 12 Order involves substantial grounds for difference of opinion. Specifically, the Secretary respectfully submits that the April 12, 2007 Order involves the following six controlling questions of law as to which there is substantial ground for difference of opinion and that as to each, an immediate appeal may materially advance the ultimate termination of the matter.

FIRST QUESTION

Whether Counts I-V and VIII-X of the Petition, in which Petitioners seek to have this Court order the Secretary to decertify the challenged DREs, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.

10. There is substantial ground for difference of opinion as to whether the Petitioners' request to have this Court order the Secretary to decertify the challenged DREs

² The Secretary does not understand the April 12, 2007 Order to be either a final order from which the Secretary may file an immediate appeal as of right or an interlocutory order from which an appeal may be taken as of right. *See* Pa. R.A.P. 341 (describing final orders); Pa. R.A.P. 311 (describing categories of interlocutory orders from which an appeal may be taken as of right). *Cf.* Pa. R.A.P. 1316 (providing that if a party timely files a request for review of an order that was, in fact, immediately appealable, the appellate court shall treat the request for discretionary review as a notice of appeal).

improperly interferes with the Secretary's discretion. Three of seven judges agreed with the Secretary that the Petitioners did not state a cause of action in mandamus to compel decertification, because "[t]he Secretary's decision to approve, or to disapprove, electronic voting systems requires the exercise of discretion and, as such, cannot be compelled by a writ of mandamus." Dissent, at MHL-2.³ See also *Pennsylvania Dental Ass'n. v. Pennsylvania Ins. Dept.*, 512 Pa. 217, 227, 516 A.2d 647, 652 (1986) (a writ of mandamus "will only lie . . . where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy."). In contrast, the majority opinion reasons that "mandamus lies to compel proper action, i.e., de-certification of the DREs." Opinion at 7.

11. Although the dissent did not reach the related defenses of sovereign immunity and separation of powers, there is a substantial ground for disagreement as to whether it would be improper in light of those concepts for a court to order the Secretary to decertify machines as requested by Petitioners. See *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 59, 61-62 (Pa. Commw. Ct. 2006) (determining that request for an order mandating imposition of guidelines and policies by the State Police was properly dismissed on the basis of immunity), *allocatur denied*, 903 A.2d 539 (Pa. 2006).⁴ Further, the Petition fundamentally seeks to have this Court substitute its judgment for that of the Secretary with respect to the process of the

³ The dissent also noted that "[i]t is not for the courts, under any legal theory, to amend the General Assembly's lengthy, detailed list of standards by adding new ones," regardless of whether such implicit amendment is sought under a theory of mandamus, declaratory judgment, or equity. Dissent, at MHL-4 (footnote omitted) and MHL-4, n.3.

⁴ The majority construed the Petition as seeking mandamus relief and not relief in equity and, therefore, concluded that the doctrine of sovereign immunity does not apply. Opinion at 8. To the extent this may be, respectfully, incorrect, or that the Secretary is misconstruing the majority Opinion, the Secretary contends that he is immune from equitable relief requested in the Petition.

certification of voting systems and the results of that process, in violation of the doctrine of Separation of Powers.

12. This first question presents a controlling question of law. If the Secretary prevails on this question in an appeal of the April 12, 2007 Order, Counts I-V and VIII-X of the Petition for Review would be dismissed; therefore, an immediate appeal of this Court's April 12 Order may materially advance the ultimate termination of the case.

SECOND QUESTION

Whether Counts III and VII of the Petition, in which Petitioners seek to have this Court order the Secretary to establish uniform testing criteria for the certification of voting systems, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.

13. There is substantial ground for difference of opinion as to whether the Petitioners' request to have this Court order the Secretary to establish uniform testing criteria interferes with the Secretary's discretion. The three dissenting judges also agreed with the Secretary that a writ of mandamus could not compel the Secretary to adopt uniform testing criteria to be used in connection with the Secretary's process for certifying voting systems. Dissent, at MHL-2. In contrast, accepting as true the factual averments made in the Petition, the majority reasoned that the Petitioners have a clear right under the Election Code to uniform testing criteria because "[i]t would be impossible for the Secretary to file [his statutorily required report stating whether DREs are safe for use at elections and meet other requirements] if the Secretary did not establish uniform testing criteria that comply with the Election Code." Opinion at 7.

14. Though the dissent did not reach the related defenses of sovereign immunity and separation of powers, there is a substantial ground for disagreement as to whether

it is improper in light of those concepts to order the Secretary to decertify machines and create testing criteria as requested by Petitioners. *See Stackhouse*, 892 A.2d at 59, 61-62 (determining that request for an order mandating imposition of guidelines and policies by the State Police was properly dismissed on the basis of immunity).⁵

15. Further, as this Court has demonstrated when sitting in its appellate jurisdiction, the overruling of a preliminary objection based on immunity may form an appropriate basis for an interlocutory appeal by permission pursuant to 42 Pa. C.S. § 702(b). *See, e.g., Helsel v. Complete Care Services, L.P.*, 797 A.2d 1051, 1054 (Pa. Commw. Ct. 2002) (reviewing, on appeal by permission, the lower court’s overruling of demurrer on grounds of governmental immunity).

16. This second question presents a controlling question of law. If the Secretary prevails on this question in an appeal of the April 12, 2007 Order, Counts III and VII of the Petition for Review would be dismissed; therefore, an immediate appeal of this Court’s April 12 Order may materially advance the ultimate termination of the case.

THIRD QUESTION

Whether the approximately 56 counties that have procured the challenged DREs are indispensable parties as to Counts I, II, III, IV, V, VIII, IX and X of the Petition.

17. There is substantial ground for difference of opinion as to whether the counties are indispensable parties. Three of seven judges agreed with the Secretary that the counties are indispensable parties on the grounds that the counties that “made the decision to purchase one of the seven DRE voting systems approved by the Secretary . . . will be affected by

⁵ The majority construed the Petition as seeking mandamus relief and not relief in equity and, therefore, concluded that the doctrine of sovereign immunity does not apply. Opinion at 8. The Secretary contends that he is immune from equitable relief requested in the Petition.

the decision of this Court, should it decide to order the Secretary to decertify the seven DRE voting systems.” Dissent, at MHL-12. In contrast, the majority opined that “the fifty-six counties will not be prejudiced by a judgment in favor of Electors.” Opinion at 9.

18. Further, the overruling of a preliminary objection based on failure to join indispensable parties may form an appropriate basis for an interlocutory appeal by permission pursuant to 42 Pa. C.S. § 702(b). *See Pennsylvania Social Services Union v. Lynn*, 677 A.2d 371, 373 (Pa. Commw. Ct. 1996) (Commonwealth Court granting permission to appeal lower court’s denial of motion to dismiss where appellant had contended that Commonwealth was an indispensable party).

19. In addition, this third question presents a controlling question of law. As the dissenting opinion noted, the absence of the affected counties “leaves this Court without jurisdiction over Counts I, II, III, IV, V, VIII, IX, and X” of the Petition for Review. Dissent, at MHL-12. Moreover, determining whether the counties are indispensable to this action via an immediate appeal may materially advance the ultimate termination of this litigation and conserve judicial resources.

FOURTH QUESTION

Whether the Election Code requires that the DREs provide a voter verified independent record, as Petitioners contend throughout their Petition (see, e.g., Petition, Count I, ¶ 113 and Wherefore Clause (b), Count II, ¶ 115, Count IV, ¶ 119, and Count V, ¶¶ 123-24).

20. The Secretary contended in his argument in support of his Preliminary Objections that the Petitioners have improperly construed the pertinent provisions of the Pennsylvania Election Code as requiring a “voter verified independent record” and that it is not possible to subject him to a mandamus action based on Petitioners’ misunderstanding of the Election Code.

21. As evidenced in the Opinion, there is substantial ground for difference of opinion as to whether the Election Code requires a voter verified independent record. The majority focused on a requirement set forth in Section 1117-A of the Election Code, 25 P.S. § 3031.17, pertaining to methods of conducting statistical recounts (*see* Opinion at p. 16), a provision upon which Petitioners rely in Count IV of their Petition. However, the Secretary respectfully submits that there is nothing in that section or anywhere else in the Election Code that requires a statistical recount to be conducted on a “voter verified independent record.” Indeed, the three dissenting judges noted that a “physical paper receipt of the ballot cast so that each voter can check to see if the machine properly tallied her vote . . . is not anywhere stated in the list of seventeen standards set forth in Section 1107-A of the Election Code,” and that “the Secretary does not have the authority to disapprove an electronic voting system for the reason that the system does not provide a ‘voter verified independent record.’” Dissent, at MHL-4.

22. Further, the Secretary presented argument in his briefs that the definition of “electronic voting system” in the definitional section of the Election Code (that is, the section upon which Count I of the Petition for Review is based) cannot mean, when it speaks of a “permanent physical record of each vote cast,” what Petitioners contend it means – or, at least, it does not necessarily mean what Petitioners contend it means. As the dissenting judges noted, “What the legislature meant by ‘physical record’ is less than clear; it likely means a recording sufficient to permit a recount.” Dissent, at MHL-4. Similarly, though not addressed by either the majority or the dissent, the Secretary argued in his reply brief that the provisions of the Election Code upon which Count V is based, 25 P.S. §§ 3261, 3154, also do not speak of or require a “voter verified independent record,” in part because those sections either do not apply to the DREs at issue or do not apply in the manner implicitly suggested by the Petitioners. *See*

Reply Brief in Support of Preliminary Objections (“Reply Brief,” attached hereto as Exhibit F), at 16.

23. The fourth question presents a controlling question of law as to at least Counts I and V, if not also Counts II and IV. Were the Secretary to prevail on appeal respecting this question, at least two Counts of the Petition for Review would be dismissed and other Counts would be materially affected, thus materially advancing the ultimate termination of the case.

24. Because the Petitioners insist throughout the Petition that the DREs are due to be decertified for failure to provide a “voter verified independent record,” it would materially advance the litigation if an appeal were heard on that issue immediately.

FIFTH QUESTION

Whether the Pennsylvania constitutional claims set forth in Counts VIII-X are due to be dismissed because of jurisprudential considerations of standing and ripeness.

25. Counts VIII-X of the Petition assert claims pursuant to the Pennsylvania Constitution, Article I, §§ 5, and Article VII, § 6. As the Secretary has argued, these claims are largely based on speculative concerns about the challenged DREs and their potential to malfunction in alleged denial of these rights. There are substantial grounds for difference of opinion as to the ripeness of the Pennsylvania constitutional claims and as to whether Petitioners have standing, inasmuch as the Petition is concerned with abstract and remote hypothetical concerns with the performance of the DREs. *See* Brief in Support of Preliminary Objections (attached, without its attachments, as Exhibit G), at 40-43; Reply Brief, at 11.

26. The dissenting opinion notes that if Petitioners’ rights are “abridged in a particular county or at a particular polling place, this may be redressable in equity” in an action against the counties. Dissent, at MHL-11. The dissent cited *Taylor v. Onorato*, 428 F. Supp. 2d

384, 388 (W.D. Pa. 2006), a case in which the court heard claims parallel to the constitutional claims of Petitioners regarding DREs (though brought pursuant to the United States Constitution), and denied a request for a preliminary injunction. In *Taylor*, as in the instant case, the plaintiffs’ “claims [were] based on a potential series of events that may not happen as plaintiffs predict; indeed, may not happen at all. Principally, plaintiffs contend that one or more of the electronic machines may malfunction on election day causing delays and voter frustration or otherwise not give a correct tally.” *Taylor*, 428 F. Supp. 2d at 387. The *Taylor* court found, in pertinent part, that the plaintiffs were not likely to succeed on the merits of their constitutional claims:

“[I]t is of course possible that one or more of the electronic machines may malfunction on election day, just as the lever machines in the past have from time-to-time malfunctioned on election day. 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.”

Id. at 388 (and quoted in the Dissent, at MHL-12). These statements in *Taylor*, endorsed in the dissenting opinion, raise serious issues as to the ripeness of these claims and as to whether Petitioners have standing.

27. The majority opinion, however, asserted that the claims are ripe because the DREs have already been certified and provide (allegedly) “no way for Electors to know whether their votes will be recognized.” Opinion at 12. The majority also asserts that the Petitioners have standing because they allege a substantial, immediate, and direct interest in the certification of the challenged DREs, in that Petitioners are allegedly required to vote on unreliable or insecure DREs. Opinion at 11.

28. The fifth question presents a controlling issue of law as to Counts VIII-X because if the Petitioners’ claims are unripe or if they do not have standing, these claims would

be dismissed on appeal; and an immediate appeal as to the viability of these claims therefore may materially advance the ultimate termination of the litigation.

SIXTH QUESTION

Whether the Petitioners can require the Secretary to conduct a reexamination of a DRE in a particular manner not required by the Election Code, as is requested in Count VI.

29. There are substantial grounds for a difference of opinion as to whether the Secretary can be compelled, in the words of the Petitioners, to “re-examine voting systems *in accordance with the request made on him*” by various Petitioners. Petition at Count VI, Wherefore clause (a) (emphasis added).

30. The majority opinion, respectfully, erroneously states that the Petitioners “do not allege in their Petition that any Elector asked the Secretary to re-examine a DRE in a particular manner.” Opinion at p. 7. The Petitioners explicitly ask this Court to “[d]irect the Secretary to re-examine voting systems in accordance with the request made on him by Petitioners Brau, Reed, Fewlass and Bergquist,” Petition at Count VI, Wherefore Clause (a), and those re-examination requests, which were attached to the Petition, purport to require the Secretary to undertake particular actions not provided for by law, such as: (a) providing information about the “specific steps” taken in the certification process and conducting “independent testing that is free of manufacturer or government influence” (Petition, at Ex. A); (b) conducting the reexamination in a manner “modeled upon, and . . . at least as comprehensive and rigorous as, the Harri Hursti and RABA Technologies examination” (Petition, at Exs. C and E); and (c) subjecting the system at issue to “external ‘red team’ testing” (Petition, at Ex. G). None of these requested actions are provided for in the Election Code. Therefore, Petitioners do not have a clear right to such re-examinations, and the Secretary has no clear duty to undertake re-examinations in the manner requested by Petitioners. *See Pennsylvania Dental Ass’n.*, 512

Pa. at 227, 516 A.2d at 652 (a writ of mandamus “will only lie . . . where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy.”). The Secretary contends it is improper, pursuant to a mandamus action, to require the exercise of his discretion in a particular manner.

31. There are substantial grounds for disagreement as to whether the Commonwealth Court may compel a re-examination to be conducted *in a particular manner*. Although all seven judges agreed that Count VI might proceed, the dissent noted that “the content of the Secretary’s reexamination reports is beyond our review in a mandamus action.” Dissent, at MHL-10-11. In addition, while the re-examination issues presented in Count VI are somewhat ancillary to the core challenges of this litigation, consideration of this issue via an interlocutory appeal would advance the ultimate merits of this case and avoid undesirable and confusing piecemeal litigation. For example, even if Petitioners prevail on Count VI and obtain an order requiring the Secretary to reexamine four DREs, the content of such reexaminations will be unclear. Moreover, until Counts III and VII are resolved, it is unclear if the Secretary is required to adopt uniform testing criteria. Therefore, the Secretary respectfully submits that it is more efficient to have the interlocutory appeal as to Count VI heard presently and concurrently with the other issues cited, *supra*.

32. The sixth question presents a controlling question of law that, if decided in the Secretary’s favor, would result in dismissal of Count VI, thereby materially advancing the ultimate termination of the case.

33. In sum, the April 12, 2007 Order satisfies the criteria of 42 Pa.C.S. § 702(b) because it involves controlling questions of law on which the Secretary has identified substantial

grounds for a difference of opinion, and because it is an order from which immediate appeal may materially advance the ultimate termination of this matter.

WHEREFORE, Respondent Pedro A. Cortés, Secretary of the Commonwealth, respectfully requests this Honorable Court to amend its Order of April 12, 2007, to add the statement prescribed by Section 702(b) of the Judicial Code: *“This Order involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this Order may materially advance the ultimate termination of the matter.”*

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: April __, 2007

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