

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 497 M.D. 2008

MONICA MOYER, *et al*

Petitioners,

v.

PEDRO CORTES, *et al*

Secretary of the Commonwealth

Respondents.

BRIEF OF AMICUS CURIAE ADVANCEMENT PROJECT

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October 28, 2008

I. INTRODUCTION

Amicus curiae, Advancement Project, submits this brief in Opposition to Petitioners' Motion for Special, Preliminary, and Permanent Injunction ("Petitioners' Motion"). Amicus provides this brief to show the Court that Petitioners' Motion has no purpose other than to suppress the vote, particularly in low income and minority communities. Petitioners' efforts here conform closely with the Republican Party's historical pattern of voter suppression against these communities, and they fail to plead sufficient, credible, or good faith allegations to justify the relief that they seek. Petitioners' overarching goal for this litigation is to obtain information about voters registered through ACORN, for the bad faith purpose of implementing voter suppression activities against those voters. For these reasons, Petitioners have not given sufficient justification for the Court to order the injunctive relief, nor the discovery, that they seek. Consequently, Petitioners' Motion should be denied.

II. INTEREST OF THE AMICUS

Advancement Project is a non-partisan, national civil rights and racial justice organization. Through its voter protection program, Advancement Project works with local leaders, election officials, organizations, and coalitions, to increase civic participation, improve election administration, and remove barriers to electoral participation in low-income and minority communities.

Advancement Project has also participated as counsel in a number of federal and state cases involving voting and elections issues. Advancement Project has extensively studied and litigated diverse election administration issues, including voter eligibility laws and practices, the database matching procedure provided by the Help America Vote Act of 2002 ("HAVA"),

provisional ballot administration, polling place resources, and Election Day administration. Advancement Project has also worked with election officials at the state and county level in numerous states relating to all of these issues.

Advancement Project serves as counsel for Petitioners in *Florida State Conference of the NAACP v. Browning*, (N.D. Fla. 2007), a case challenging a Florida statute that prohibits the registration of voter applicants whose voter data cannot be verified with a record in the social security administration or state driver's license database. Amicus submits this brief to provide additional context in opposition to Petitioners' Motion.

III. ARGUMENT

Under the guise of seeking to enforce voter registration laws, Petitioners seek to obtain information about voters registered through ACORN, so that they may use this information to intimidate these voters—a large portion of whom are people of color and people in low-income communities—and prevent or deter them from voting on Election Day. Petitioners also request that Secretary Cortés be ordered to provide county election officials with lists of ineligible voters, which Petitioners wrongfully presume to include all voters whose voter data could not be verified under HAVA matching procedures. Because Petitioners have not, and cannot, demonstrate a likelihood of success on the merits, the Court should dismiss their Motion.

In this brief, Amicus will show that Petitioners' Motion and Complaint are nothing more than a thinly-veiled effort to suppress the vote of voters of color. Specifically, Amicus will show that: (1) Petitioners' suggestion that unmatched voter applicants, who are disproportionately voters of color, are ineligible finds no support under state or federal law; (2) granting Petitioners' requests for information about voters who registered through ACORN and voters whose voter

data is unmatched pursuant to HAVA's matching procedures would lead to disenfranchisement of voters and undue burdens on Pennsylvanians' right to vote; and (3) Petitioners' lawsuit is one in a long series of tactics to suppress voters in minority communities.

A. Petitioners' Presumption that Unmatched Voter Applicants are Ineligible Lacks Legal and Factual Support.

Petitioners try to achieve their agenda of suppressing minority voters by arguing that voter applicants whose voter data cannot be verified in the Social Security Administration or state driver's license database pursuant to HAVA's matching procedures are illegitimate and ineligible to vote. This argument finds no support under state or federal law; non-matching does not render a voter applicant ineligible under HAVA. Rather, the matching function is intended to be a tool to assist the states in "storing and managing the official list of registered voters' and not as a restriction on voter eligibility." *Washington Ass'n of Churches v. Reed* 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006).

Two recent circuit court decisions affirmed that HAVA does not establish that matching is a voter eligibility requirement or, conversely, that a state's inability to match a voter applicant's personal information renders the applicant ineligible. The U.S. Circuit Court for the Sixth Circuit Court of Appeals, *en banc*, recently held that rather than "necessaril[ing] that a registered voter be removed from the rolls, [a]t most, the identification of a mismatch allows a county board to investigate whether the mismatch has a legitimate explanation" *See Ohio Rep. Party v. Brunner*, No. 08-4322, 2008 U.S. App. LEXIS 21573, at **15-16 (6th Cir. Oct. 14, 2008) (rev'd for failure to plead a private cause of action by *Brunner v. Party*, 2008 U.S. LEXIS 7762, 555 U.S. __ (Oct. 17, 2008)). Similarly, the Eleventh Circuit Court of Appeals

earlier this year held that “HAVA does not impose matching as a requirement of voter registration.” *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008) (also holding that HAVA did not preempt Florida from imposing such requirement by state statute). As further explained below, neither HAVA nor Pennsylvania Election Law requires a match in order for an applicant to be validly registered.¹ Furthermore, matching has high failure rates even among qualified voter applicants, and this occurs more frequently among voters of color.

1. **Neither HAVA Nor Pennsylvania Election Law Requires An Applicant’s Information to be Matched as a Precondition to Registration.**

“There is absolutely no language [in HAVA] that imposes an affirmative duty on any state official to enable a purge of voters by either scouring the database to locate mismatches or by providing a system that would allow a person to make such a search.” *Ohio Rep. Party*, 2008 U.S. App. LEXIS 21573, at *59 (Nelson Moore, J., Dissenting). Although HAVA directs states to attempt to “match” the number provided by a voter with records in other state databases, to ensure confidence that the numbers are accurately assigned, this “matching” provision was intended as an administrative safeguard for “storing and managing the official list of registered voters,” and not as a restriction on voter eligibility. *See id.* § 15483(a)(1)(A)(i).

¹ In making these claims, Petitioners reveal an utter lack of understanding about Pennsylvania’s Statewide Uniform Registry of Electors (“SURE”) system, Pennsylvania registration procedures, and applicable federal and state standards for determining eligibility. Petitioners also fail to understand that in Pennsylvania, information about ineligible voters is not controlled or hidden by the Secretary. Rather, it is the counties who perform the inputting of registration data and the checking of the voter’s eligibility, thus retaining access to information relating to whether an applicant is qualified to vote and is processed. Additionally, Petitioners fail to recognize the difference between “pending” and “rejected” applications; HAVA non-matches fall into the former, not the latter category.

Nor does Pennsylvania Law require database matching as a condition of voter registration eligibility. Pennsylvania's implementation of HAVA and the SURE system did not change the role and duty of county election officials in examining and determining voter eligibility. To the contrary, Pennsylvania law specifically requires that the SURE system "[p]reserve the power of the commissions to make determinations as to the qualifications of applicants." 25 Pa. C.S. § 1222. Under Pennsylvania law, in order to register to vote, an individual must be 18 years old or older on Election Day; a citizen of the United States for at least thirty (30) days; a resident of Pennsylvania for the thirty days prior to the election; and not be confined to a penal institution for the conviction of a felony.² 25 Pa.C.S § 1301; *Nixon v. Commonwealth*, 789 A.2d 376, 2001 Pa. Commw. LEXIS 882 (Pa. Commw. Ct. 2001), *affirmed by* 576 Pa. 385, 839 A.2d 277 (2003).

Notably, nowhere does Pennsylvania law require an application to be rejected because of a failure to achieve a match with a record in other databases. Although both HAVA and Pennsylvania law require county election officials to compare a voter applicant's identifying number with the PennDOT and Social Security Administration databases, Secretary Cortés has directed county officials that:

no provision of the HAVA data comparison requirement overrides the authority of the voter registration commission . . . to determine the validity of a voter registration application under the requirements of Pennsylvania law. Under HAVA and Pennsylvania law, the failure to achieve a match between a voter registration application and a record in the Commonwealth's driver's license database or the database of the Social Security Administration is not a reason to

² There are also many procedural requirements in place in order to confirm the eligibility of the applicant. *See, e.g.*, 25 Pa C.S. §1328; 4 Pa. Code 183.5. Furthermore, Pennsylvania's voter identification law acts as an additional safeguard against the casting of fraudulent votes. Under Pennsylvania law, all first time voters in an election district, not just newly registered, but also voters who move within the state or county, are required to present a form of valid ID before voting. 25 P.S. § 3050.

reject the application.

Pennsylvania Department of State Alert Re: Driver's License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA), dated Aug. 9, 2006 at 5. Thus, Petitioners' request that Secretary Cortés be ordered to provide county election officials with lists of purportedly ineligible voters, including voters whose information has not been matched with a record in the Social Security Administration or state driver's license database, should be denied. In any event, in actual practice, the county election officials already have this information, as it is they-- and not the Secretary-- who perform the inputting of voter data and conduct the checks against the databases. *See supra* p. 5 fn 1. Consequently, this request is both factually and legally unsupported.

Likewise, Petitioners' request that ACORN identify its voter applicants to election officials, and insinuation that such voters be subjected to additional, unspecified scrutiny as a condition of voter registration and voting, should be rejected out of hand. Petitioners, in effect, urge the Court to order the Department of State and county Boards of Election to take illegal action, by treating ACORN applicants different than similarly situated voter applicants, and requiring additional obstacles before these applicants can vote.

Where a voter registration applicant has satisfied the eligibility requirements under Pennsylvania law, it is unlawful, pursuant to the NVRA, 42 U.S.C. § 1973gg *et seq.*, and the Voting Rights Act, 42 U.S.C. § 1971 (a)(2)(B), for state or county election officials to refuse to register such applicants. If officials impose additional requirements on otherwise eligible voters, such actions would violate the NVRA, the Voting Rights Act, and the equal protection clauses of both the Pennsylvania and U.S. Constitution. In addition, such actions solely against ACORN

applicants would likely have a disparate effect on people of color. As such, Petitioners' request that ACORN identify its voter applicants to election officials should be rejected.

2. Matching Has High Failure Rates for Reasons Unrelated to a Voter's Identity, Particularly Among Minority Voters.

Petitioners' suggestion that a non-match of a voter's data indicates a fraudulent voter application is also wrong as an empirical matter. There is no relationship between a voter applicant's non-matching of his or her voter's data and whether the applicant is bona fide. Attempts to match voter data frequently fail, even for qualified voters. As Secretary Cortés has observed, non-matches may be caused by such administrative error as transposition of digits, use of a derivation of the applicant's given first name rather than full legal name, hyphens used in names on one database and not in the other, name changes adopted because of marriage or divorce. *See Pennsylvania Department of State Alert Re: Driver's License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA)*, dated Aug. 9, 2006, at 2-3 (cataloguing frequent errors that result in non-matches).

Unmatched voters are disproportionately voter applicants of color. In Florida, where matching is a statutory prerequisite to voter registration, between January 1, 2006 and December 2007, when the law was preliminarily enjoined, 65 percent of no-matches were African-American or Hispanic voter applicants, though they represented only 28 percent of all applicants during that time period. *Fla. State Conf. of the NAACP*, 522 F.3d at 1176 at n.4 (Barkett, J. Dissenting) ("For example, African-Americans make up 13% of the applicant pool, but 26% of the unmatched voter pool. Similarly, Hispanic-Americans comprise 15% of the applicant pool, but 39% of the unmatched voter pool. To show the sharp contrast . . . whites make up 66% of the applicant pool but only 17% of the unmatched voter pool."); Curtis Morgan, *Florida Counties Split Over Verification*, Miami Herald, Oct. 26, 2008. On September 8, 2008, the Secretary of

State reinstated the no-match law and during this time period, unmatched applicants were roughly 30 percent black, 30 percent Hispanic and about 20 percent white non-Hispanic. Curtis Morgan, *Florida Counties Split Over Verification*, Miami Herald, Oct. 26, 2008.

These disparities based on race and ethnicity may occur because members of minority communities are more likely than whites to have hyphenated or compound names, and therefore, the database entries are more likely to not match for minorities. *Fla. State Conf. of the NAACP*, 522 F.3d at 1176 at n.4 (Barkett, J. Dissenting).

B. The Granting Of Petitioners' Requests For Information About Unmatched Voters and Voters Who Registered Through ACORN Would Lead To Disenfranchisement Of Voters And Undue Burdens On Pennsylvanians' Right To Vote.

Petitioners seek to obtain through discovery or Court order information that would allow them to identify unmatched voters and voters who registered through ACORN, a goal that has only one possible purpose: to make baseless challenges to the eligibility of voters of color in advance of or on Election Day.

The Pennsylvania Election Code provides only two valid grounds for challenging a voter on Election Day: identity and continued residence in the election district. 25 P.S. § 3050 (d). Once a voter is challenged, s/he may only vote a regular ballot if s/he is able to produce another qualified voter who resides in the election district, to fill out an affidavit attesting to his or her identity and/or residence. *Id.* If the voter is unable to produce a witness right away, s/he must vote by provisional ballot or must leave and return again with a witness.³

³ Provisional ballots may also be rejected for technical reasons having nothing to do with a voter's eligibility. See 25 P.S. §3050; see also Advancement Project, *Provisional Voting: Fail-Safe Voting or Trapdoor to Disenfranchising Voters* (2008) at http://www.advancementproject.org/ourwork/power-and-democracy/voter-protection/view.php?content_vp_id=69.

Registration-based challenge complaints must be filed with the county election commissions. 25 P.S. §1329. An individual who is challenged must respond to the challenge with a written statement sworn or affirmed by the individual. The challenged individual must “produce such other evidence as may be required to satisfy the registrar or commissioner as to the individual's qualifications as a qualified elector.” *Id.* Thus, such challenges force voters to suffer an additional burden in order to vote.

The obvious effect of such challenges is not only to disenfranchise individual voters, but also to create a delay in the check-in and voting process. If the check-in process slows, a greater likelihood exists that other voters waiting in line will have to leave without voting or will suffer unduly long wait times. Whether the voter is forced to obtain a witness to vouch for her, or failing that, to vote provisionally, more time is needed for that voter to complete the voting process.

Meritless challenges filed on Election Day at the polls could exacerbate strains on election officials and poll workers as they endeavor to administer the elections with huge expected increases in voter turnout. Advancement Project obtained public records relating to the allocation, at the precinct level, of voting equipment and poll workers in Philadelphia, Montgomery, Berks and Allegheny counties and evaluated the data assuming certain levels of voter turnout. This data reveals that even under the most conservative estimate of voter turnout, some jurisdictions examined may not be able to accommodate all voters in a timely fashion, which will result in long lines and possible voter disenfranchisement. In addition, given Pennsylvania's requirement that the district Election Board create duplicate numbered lists of voters, the allocation of poll workers per polling place is not adequate to ensure efficient Election

Day operations. Finally, many precincts across the state exceed the statutory limit of 1,200 voters per precinct.⁴ Thus, challenges to voters, combined with insufficient polling place resources and surges in voter turnout in several populous counties, could create substantial delays in voting that could, in effect, disenfranchise voters.

As described below, historically the Republican Party has concentrated its efforts against voters and communities of color and/or low-income voters, who encompass a large portion of unmatched voter applicants and ACORN voter applicants. Such efforts to target intimidation against these voters violates the Voting Rights Act, which prohibits anyone from “attempting to intimidate” anyone from voting or attempting to vote in federal elections. 42 U.S.C. 1971(b); *see also* 42 U.S.C. § 1973i. This Court must condemn these illegal and immoral efforts and deny the petitioners’ motion.

B. Petitioners’ Requests are Part of a Long-Standing Historical Effort to Suppress the Vote, Particularly in Minority Communities.

As described above, Petitioners’ allegations in Pennsylvania are nothing more than an unlawful attempt to suppress the votes of low-income and minority communities. As they have done in the past, Petitioners are instigating these deceptive and intentionally repressive actions, to attempt to reduce the heightened voter enthusiasm and participation in Pennsylvania, and unprecedented number of new voter registrations, particularly among people of color.

These practices of suppressing minority voter turnout can be traced to the post-Reconstruction period of American history, when Democratic Party operatives in the former

⁴ Advancement Project recently released a report concerning polling place resources in Pennsylvania and other states entitled, “*The End of the Line: Preparing for a Surge in Voter Turnout in the November 2008 General Election.*” The report, including maps indicating distribution of polling place resources and expected voter turnout, may be found at <http://www.advancementproject.org/>.

Confederate states, threatened by the voting power of newly freed African Americans and motivated by a desire to maintain power, established laws to combat alleged voter fraud.

Lorraine C. Minnite, *The Politics of Voter Fraud* 3 (March 7, 2007), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf.

Many current state challenge laws have their roots in the post-Reconstruction Era, and are relics of the Jim Crow laws intended to deprive African Americans of their franchise.” Teresa James, *Caging Democracy; A 50-Year History of Partisan Challenges to Minority Voters*, *Project Vote* 7 (September 2007) at

www.projectvote.org/fileadmin/ProjectVote/Publications/Caging_Democracy_Report.pdf.

One voter suppression technique that has attracted attention in recent years is called “voter caging.” Voter caging is defined as “a practice of sending non-forwardable direct mail to registered voters and using the returned mail to compile lists of voters, called “caging lists,” for the purpose of challenging their eligibility to vote.” *Id.* at 3. Caging was adopted as a nationwide strategy by the Republican National Committee under “Operation Eagle Eye” in 1964. After waning use in the 1980s and 1990s, caging was reinstated as a nationwide tactic in 2004: “In 2004, political operatives targeted more than half a million voters in voter caging campaigns in nine states. At least 77,000 voters had their eligibility challenged between 2004 and 2006.” *Id.* at 4.

Pennsylvania has seen its share of these shameful voter suppression tactics by the Republican Party. For example, in 2004, the Pennsylvania Republican Party compiled a caging list of 10,000 returns from a GOP mailing welcoming newly registered Philadelphia voters to the political process. Subsequently, the GOP targeted these 10,000 voters on Election Day. The Republican Party only targeted Philadelphia, whose population includes approximately 58% people of color, but did not use these caging tactics in other parts of the state, which is 85%

white. The Republican speaker of the state House admitted the goal was to “keep down” the vote in Philadelphia. J. Gerald Hebert & Brian Dupre, *Vote Caging and the Attorney General* (July 23, 2007), at The Campaign Legal Center, http://www.clcblog.org/blog_item-152.html.

The Republican Party has used voter caging in Pennsylvania in conjunction with other voter suppression techniques, such as challenges and deceptive practices, in order to repress the minority vote. For example, according to a study by People for the American Way, “in Philadelphia during the 2003 elections, voters in African American areas were challenged by men with clipboards, driving some 300 sedans with magnetic signs that looked like law enforcement insignia.” Benjamin Dangl & Brendan Coyne, *Voter Suppression Becomes Biggest Election ‘Issue’*, THE NEW STANDARD (Oct. 31, 2004), at <http://newstandardnews.net/content/index.cfm/items/1174>. In addition, in 2004, 53 of the 63 precincts where the Republicans sent poll watchers on Election Day had predominantly African-American voters. James, *Caging Democracy* at 20.

Considering this history, and the lack of any other justification by the Republican Party, it is clear that the lawsuit before this Court is yet another attempt to suppress the vote of minority and low income individuals. This Court must reject these efforts and deny any credibility or support to these illegal and immoral efforts.

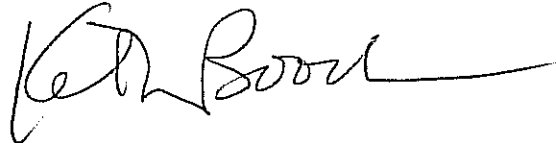
IV. **CONCLUSION**

As amply demonstrated above, Petitioners’ efforts have no valid purpose other than to suppress the vote in low-income and minority communities. Their efforts here conform closely with their historical pattern of voter suppression against these communities, and they fail to plead sufficient, credible, or good faith allegations to justify the relief that they seek. This Court must

not countenance the use of baseless lawsuit to assist Petitioners' unlawful purpose.

Consequently, this Court must reject Petitioners' requests and deny their Motion for injunctive relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kathryn Boockvar', with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I, Kathryn Boockvar, hereby certify that I caused the foregoing to be served upon counsel listed below via first class mail, postage prepaid:

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