

10/23

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MONICA MOYER, *et al.*,

Petitioners,

v.

PEDRO A. CORTÉS, Secretary of the
Commonwealth of Pennsylvania, *et al.*,

Respondents

Docket No. 497 M.D. 2008

ANSWER OF RESPONDENT SECRETARY OF THE COMMONWEALTH PEDRO A. CORTÉS TO PETITIONERS' EMERGENCY APPLICATION FOR EXPEDITED DISCOVERY

AND NOW comes Respondent Pedro A. Cortés, Secretary of the Commonwealth, through his undersigned counsel and pursuant to Pa. R.A.P. 123(b), to respond to Petitioners' emergency application for expedited discovery ("Discovery Application") filed in the above-captioned matter.¹

¹ Because this matter is an action commenced in this Court's original jurisdiction against an official of the Commonwealth government, the matter is governed by Chapter 15 of the PA Rules of Appellate Procedure. Accordingly, this answer employs the nomenclature prescribed by Chapter 15 and other applicable appellate rules, not the labels used by Petitioners in their pleading and ancillary motions.

Alleging that ACORN and its affiliates are engaged in some kind of concerted effort to submit to Pennsylvania elections officials applications for voter registration that are “false and duplicative,” Petitioners now ask this Court, on an emergency basis, for permission to conduct expedited “discovery” to plumb the depths of ACORN’s operations and its internal records, including the names of individuals for whom the organization has submitted applications for voter registration. The Department of State will not speculate on what Petitioners intend to do with the mountain of material they seek, nor will it endeavor to defend any actions by ACORN or its employees – that is their fight, not the Department’s. Nevertheless, it is manifest that the only real mission of this “emergency” litigation is to gain access to ACORN’s records and operations.

However, to invoke this Court’s original jurisdiction to pursue “discovery” from ACORN in support of a single common law claim of “fraud and misrepresentation” (which they probably do not even have standing to pursue), Petitioners were constrained to include a Commonwealth party as a respondent. Thus, to assert jurisdiction in this Court, Petitioners have concocted a blatantly ridiculous claim that the Secretary of the Commonwealth has failed in his statutory duties to properly establish and maintain a statewide computerized voter registration system – the Statewide Uniform Registry of Electors (SURE).

Petitioners do not claim that the SURE system lacks in its design and operation the specific elements mandated by federal and state law. That is because there can be no reasonable dispute that the SURE system is designed to do what state and federal law requires it to do. Rather, the sole basis of Petitioners’ claim that the SURE system does not comply with the law is that the system periodically has been inoperable due to technical difficulties. In other words, Petitioners have invoked this Court’s original jurisdiction, on an emergency basis, to complain

that the SURE system has not at all times operated flawlessly and been available continuously for the use of county elections officials – *i.e.*, 24 hours per day, seven days per week. As a matter of law, Petitioners' claim against the Secretary is absurd on its face.

The SURE system includes all of the requirements mandated by federal and state law. It serves as the general register for every county in the Commonwealth. In the processing of voter registration applications, it enables county voter registration officials to identify duplicate voter registrations throughout the Commonwealth and to make changes to the register as necessary and proper. It compels registration officials to verify an applicant's registration information with the records maintained by the Pennsylvania Department of Transportation's driver's license database or the records of the Social Security Administration, as required by section 303(a)(5) of HAVA, 42 U.S.C. § 15483(a)(5). SURE also causes a voter registration card to be generated and mailed to every new registrant through nonforwardable mail as a check against illegitimate addresses. These features of SURE serve as important aids to county voter registration commissions and their staffs as they make thousands of determinations as to the qualifications of those who apply to register to vote.

When the SURE system periodically has become inoperable for short periods of time, due to technical difficulties caused primarily by heavy usage, voter registration officials do not continue to process voter registration applications without using the SURE system. Rather, elections officials wait until system operability has been restored to resume processing applications. Thus, short periods of SURE inoperability do not permit the approval of voter registration applications without being subject to the procedural checks established within the SURE system to maintain the integrity and accuracy of voter registration records. Rather, all applications are subject to the same rigorous process.

Petitioners speculatively claim that the periodic inoperability of the SURE system will prevent the timely processing of all voter registration applications in time for the November 4 General Election. That is demonstrably untrue. Many county voter registration commissions have completed processing their voter registration applications and printed their poll books. All county registration commissions are on target to complete the process well in time for the General Election. In short, as a matter of fact and law, there is no basis for Petitioners' complaints about the integrity and accuracy of the SURE system.

Petitioners also claim that the Secretary has failed to assure that elections officials in Philadelphia will comply with **their** statutory duty, **imposed upon those officials** by Pennsylvania and federal law, to require certain voters who are voting for the first time to present proper identification as part of the voting process. There is no basis for this claim as well – the Secretary has instructed all counties of this duty and the poll books themselves note the requirement for identification.

In any event, the statutes are clear in directing local elections officials in their duty to require certain first-time voters to present proper identification as part of the voting process, *see* 25 P.S. § 3050(a)-(a.2); 42 U.S.C. § 15483(b); the Department of State has provided continuous direction to county elections officials regarding their duties under the law; the SURE system has been programmed to identify for elections officials in the general register and in their poll books each voter who is required by law to present identification; and Philadelphia elections officials emphatically have stated that they are committed and prepared to comply with their statutory duties relating to voter identification.

Tellingly, Petitioners do not seek permission to obtain any discovery from the Secretary or any county elections office. Rather, the only discovery Petitioners are seeking on an expedited basis is from their true target in this litigation – ACORN. That requested discovery is not relevant to the ridiculous claims that Petitioners have made against the Secretary, nor is the discovery they seek likely to lead to any information relevant to their action against the Secretary. Petitioners seek no information relevant to their complaints about the SURE system or compliance with the voter identification requirements because they clearly have no valid legal claim against the Secretary for which any factual information might be relevant.

Because Petitioners have no legitimate, or even colorable, claim against the Secretary, it is likely that this Court will dismiss the Secretary as a respondent and either dismiss the suit altogether or transfer Petitioners' claim against ACORN to an appropriate court of common pleas. In any event, Petitioners can present no cause to order expedited discovery or to convene a preliminary injunction hearing involving the Secretary.

In response to the specific averments made in the Discovery Application, Secretary Cortés answers as follows:

1. ADMITTED.
2. Secretary Cortés is without knowledge or information sufficient to form a belief as to the truth of the statements in ¶ 2 of the Discovery Application, and therefore DENIES them. By way of further answer, none of the demanded depositions are of Secretary Cortés or any Commonwealth or county employee, highlighting the fact that Petitioners' true focus in this case is ACORN, and not Secretary Cortés or the SURE system. In exclusively focusing discovery on ACORN, Petitioners demonstrate that they have no interest in, or intention of proving, any wrongdoing by Secretary Cortés or the Department of State. Rather, it appears that Petitioners

have included Secretary Cortés as a respondent solely in a vain effort to invoke this Court's original jurisdiction and, perhaps, to undermine voters' confidence in the election process just 18 days before the election. Regarding the complaints about the activities of ACORN, it should be noted that in the exercise of their duties, several county elections officials have referred suspicious voter registration applications (which the county commissions have rejected) to their county district attorney or to federal prosecutors for investigation and possible criminal prosecution.


3. Paragraph 3 of the Discovery Application contains no averments to which a response is required and it is, therefore, DENIED. By way of further answer, none of the requested written discovery is directed towards Secretary Cortés, demonstrating that Petitioners have no intentions of proving their preposterous claims that Secretary Cortés has violated federal or state law. It bears emphasis that Secretary Cortés at all times – **during the three years that the SURE system has been fully operational** – would have been ready, willing and able to demonstrate to Petitioners the operations and characteristics of the SURE system, including the manner in which the SURE system assists county elections officials in administering the voter identification requirements for certain first-time voters. But Petitioners never asked for any demonstrations or explanations; they simply sued. Why? It is because Petitioners' lawsuit is not about the SURE system or compliance with the law by Secretary Cortés or county elections officials. It is, instead, about Petitioners' plan to use this Court's jurisdiction by fabricating arguments against the Secretary for the sole purpose of extracting information from ACORN.

4. Paragraph 4 of the Discovery Application contains no averments to which a response is required and, therefore, it is DENIED.

5. Any wrongdoing by Secretary Cortés is DENIED. The remaining statements in ¶ 5 of the Discovery Application contain no averments to which a response is required and, therefore, are DENIED.

WHEREFORE, Respondent Pedro A. Cortés, Secretary of the Commonwealth, respectfully request that this Honorable Court deny Petitioners' Application for Expedited Discovery.

DATE: October 23, 2008

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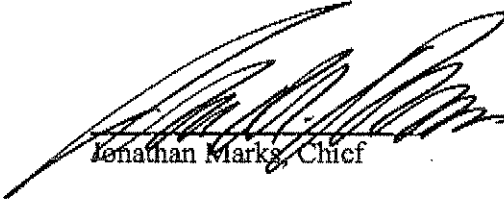
*Counsel for Respondent Pedro A. Cortés,
Secretary of the Commonwealth.*

VERIFICATION

The undersigned, Jonathan Marks, Chief of the Division of the Statewide Uniform Registry of Electors (SURE), verifies that the statements made in the foregoing Answer to Petitioners' Emergency Application for Expedited Discovery are true and correct to the best of his knowledge, information and belief.

The undersigned understands that statements therein are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

Date: October 23, 2008



Jonathan Marks, Chief

