

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft & John Dickinson

Petitioners

v.

Chet Harhut, Individually and in his capacity as Commissioner, Bureau of Commissions, Elections and Legislation, Pennsylvania Department of State; Pennsylvania Department of State; Pedro A. Cortes, Individually and in capacity as Secretary of the Commonwealth of Pennsylvania

Respondents

NO. 451 MD 2008

2008 SEP 26 P 3:15

RECEIVED AND FILED COMMONWEALTH COURT OF PA (PILLA)

ORDER

AND NOW, this ___ day of _____, 2008, upon consideration of American Civil Liberties Union of Pennsylvania's Petition to Intervene, it is hereby ORDERED that the petition is GRANTED, and that American Civil Liberties Union of Pennsylvania is permitted to intervene in this action as a Respondent in this action and shall have all the rights and liabilities of a party to this action. The prothonotary of the court is hereby ORDERED to add American Civil Liberties Union of Pennsylvania to the caption in this matter and file the Answer and New Matter that American Civil Liberties Union of Pennsylvania attached to its Petition to Intervene.

By the Court:

J.

PEPPER HAMILTON LLP

By: Stephen G. Harvey (I.D. No. 58233)
Seth R. Oltman (I.D. No. 93395)
William M. Taylor (I.D. No. 203503)

3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

*Attorneys for Petitioner and Proposed
Respondent-Intervenor American Civil
Liberties Union of Pennsylvania*

ACLU OF PENNSYLVANIA

By: Witold J. Walczak (I.D. No. 62976)
Sara J. Rose (I.D. No. 204936)

313 Atwood Street
Pittsburgh, PA 15213
(412) 681-7864
vwalczak@aclupgh.org

RECEIVED AND FILED
COMMONWEALTH COURT
OF PA (PHILA)
2008 SEP 26 P 3:16

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft & John Dickinson,

Petitioners,

v.

**Chet Harhut, Individually and in his
capacity as Commissioner, Bureau of
Commissions, Elections and Legislation,
Pennsylvania Department of State;
Pennsylvania Department of State;
Pedro A. Cortes, Individually and in
capacity as Secretary of the
Commonwealth of Pennsylvania.**

Respondents.

NO. 451 MD 2008

**AMERICAN CIVIL LIBERTIES UNION
OF PENNSYLVANIA'S PETITION TO INTERVENE**

Petitioner and Proposed Respondent-Intervenor, American Civil Liberties Union of Pennsylvania ("ACLU-PA"), hereby files this Petition to Intervene in accordance with Pa.R.A.P. 1531(b) and Pa.R.C.P. 2326 through 2330 and in support hereof states as follows:

1. Petitioners Richard Kraft and John Dickinson filed a Complaint that this Court denominated a Petition for Review addressed to the Court's original jurisdiction ("Petition for Review") in its order of September 18, 2008.

2. The Petition for Review seeks a declaratory judgment: (1) requiring Chet Harhut, Commissioner of the Bureau of Commissions, Elections and Legislation and Pedro A. Cortes, Secretary of the Pennsylvania Department of State, to rescind a memorandum issued by the Commissioner on September 8, 2008, which opines that "passive electioneering," specifically, the wearing by voters in polling places on election day of "tee shirts, clothing, or buttons with a candidate's or political party's name, picture, or emblem," is not prohibited by Section 1220(c) of the Pennsylvania Election Code, 25 P.S. § 3060(c); (2) prohibiting the Pennsylvania Department of State from disseminating opinions regarding the Pennsylvania Election Code that Petitioners contend are "unauthorized and legally erroneous"; and (3) requiring County Board of Elections to notify all Judges of Election and district election board members that they must enforce Section 3060(c) to mean "no 'soft electioneering in polling places.'"

3. ACLU-PA seeks to intervene in this action because the relief Petitioners seek would, if granted, impose a *de facto* dress code for voters that would define what they may wear and infringe voters' right to freedoms of speech and expression, which are guaranteed by the Pennsylvania and U.S. Constitutions. Such a dress code would present a new and unnecessary condition for voters, one that will engender confusion about what political messages are and are not permitted, which will thereby result in some voters having to relinquish their freedom of speech in order to exercise their right to vote. Furthermore, Petitioners are requesting that this Court establish a new rule of law that is inconsistent with the longstanding practice

followed in many Pennsylvania counties, including the two most populous, namely, Allegheny and Philadelphia Counties. These counties have for many years permitted voters to enter polling places on election day wearing tee shirts, clothing, or buttons with candidate's or political party's names, pictures, or emblems, and this practice has not interfered with anyone's ability to vote. If Petitioners' requested relief is granted, ACLU-PA will be forced to expend additional resources to ensure voters are not denied the right to vote on election day, and its members will be forced to relinquish one right, the freedom of speech, in order to exercise another one, the right to vote.

4. American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 600,000 members. ACLU-PA, one of the national ACLU's statewide affiliates, has about 19,000 members. For more than eighty-five years ACLU has sought to advance the principles of liberty and equality embodied in the Constitution of the Commonwealth of Pennsylvania and of the United States and, in particular, the freedom of speech. ACLU also defends the right to vote, with an active litigation program administered by the organization's Voting Rights Project. In support of these principles, ACLU has appeared before the U.S. Supreme Court, other federal courts and Pennsylvania's state courts in numerous free-speech and voting-rights cases, both as direct counsel and as *amicus curiae*. The important free-speech and voting-rights issues raised in this case are of substantial concern to the ACLU and its members.

5. According to the Petition for Review, Petitioner Richard Kraft is a Pennsylvania resident residing in Bethel Park, Pennsylvania, where he serves as a Judge of Elections in Pennsylvania. Petitioner John Dickinson is a Pennsylvania resident residing in Pittsburgh, Allegheny County, Pennsylvania, where he serves as a Minority Inspector of Elections. Petition for Review ¶¶ 5-6.

6. Respondent Chet Harhut is the Deputy Commissioner, Bureau of Commissions, Elections and Legislation. Respondent Pennsylvania Department of State is a Pennsylvania government entity. Respondent Pedro Cortes is the Secretary of the Commonwealth. The Department of State and the Secretary have offices located at 302 North Office Building, Harrisburg, Pennsylvania, 17120, while the Commissioner has an office at 210 North Office Building, Harrisburg, Pennsylvania, 17120. Answer and New Matter of Respondents Harhut and Cortes to the Petition for Review in the Nature of a Complaint Seeking a Declaratory Judgment ¶¶ 7-9.

7. On August 14, 2008, ACLU-PA and the League of Women Voters of Pennsylvania sent a letter (the "Letter") to Respondent Pedro Cortes requesting that he clarify that the definition of "electioneer," as that term is used in 25 Pa. C.S.A. § 3060(c), "does not apply to and/or prohibit voters from casting ballots while wearing partisan T-shirts, stickers, and buttons." A copy of the Letter is attached as Exhibit 2 to the Petition for Review.

8. The Letter also stated: "And because [25 Pa. C.S.A. § 3060(c)] implicates First Amendment free-speech rights, we urge you to adopt a narrow definition of the term 'electioneer' that would explicitly allow voters to wear candidate t-shirts, buttons, stickers, and similar items into the polling place to cast their votes." *Id.*

9. As noted in the Letter, ACLU-PA had received complaints from citizens in Mt. Lebanon, Pa., and in Ardmore, Pa., who were prohibited from voting in the primary elections held on April 22, 2008, on the grounds they were wearing t-shirts endorsing candidates for office. ACLU-PA received similar complaints regarding recent elections in Lancaster and York Counties. The Letter further noted that the website for the Centre County Board of

Elections informs voters: “When going to the polls to vote, do not wear any campaign material that is exposed (hat, shirt, button, etc). You will be asked to remove it.” That information still appears on the website for the Centre County Board of Elections. *See* <http://www.co.centre.pa.us/elections/elect.asp> (last visited September 24, 2008).

10. On September 8, 2008, Respondent Harhut issued a memorandum regarding “Passive Electioneering” (the “Memorandum”). The Memorandum was addressed to County Boards of Elections and advised that if passive electioneering – the wearing of tee shirts, clothing or buttons with a candidate’s or political party’s name, picture, or emblem – “remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute ‘electioneering’ as that term is used in [25 Pa. C.S.A. § 3060(c)].” A copy of the Memorandum is attached as Exhibit 1 to the Petition for Review.

11. The Memorandum also alerted the County Boards of Elections that “on August 19, 2008, the Secretary of the Commonwealth received the enclosed letter from the [ACLU-PA] and the League of Women Voters of Pennsylvania asking us to provide an opinion clarifying this issue. The authors of the letter believe that this issue ‘implicates First Amendment free-speech rights’ and urges us to adopt a narrow definition of the term ‘electioneer.’ The letter also lists examples where the ACLU and the League have received complaints regarding this subject.”

12. The Commissioner further noted in the Memorandum that the Department of State has the authority to issue binding directives to the County Boards of Elections “on only one subject: ‘the implementation of electronic voting procedures or the operation of electronic

voting systems.’ 25 P.S. § 3031.5(a). This issue relating to apparel in the polling place would not fall within the scope of electronic voting procedures or the operation of electronic voting systems. As such, the various suggestions and recommendations that we make to the counties regarding this and other issues, must be reviewed and considered by the county boards of election in conjunction with their solicitors. Therefore, we ask that those of you receiving this memo confer with your solicitor and commissions regarding this issue[.]”

13. On September 17, 2008, Petitioners filed the Petition for Review in this matter.

14. In the Petition for Review, Petitioners placed ACLU-PA in the center of the “passive electioneering” controversy by alleging, *inter alia*, that the Memorandum incorporated the Letter; the definition of electioneering put forth by ACLU-PA violated the Pennsylvania Election Code; the Pennsylvania Department of State incorporated ACLU-PA’s position; and ACLU-PA’s position on electioneering had risen to the level of law. Petition for Review ¶¶ 22, 23, 26, 31, 50.

15. Petitioners also alleged that the Memorandum created the risk of legal challenges from ACLU-PA to various county Boards of Elections that turned away voters who were engaged in “passive electioneering.” *Id.* ¶ 41.

16. Chapter 15 of the Pennsylvania Rules of Appellate Procedure provides “a person not named as a respondent in an original jurisdiction petition for review . . . may seek leave to intervene,” Pa.R.A.P. 1531(b), and refers to the Pennsylvania Rules of Civil Procedure for the applicable pleading standards, Pa.R.A.P. 1517. In turn, Pa.R.C.P. 2327(4) provides that during the pendency of an action a person not a party may intervene if “the determination of such

action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.”

17. The right to vote, identified in Article I, § 5 of the Pennsylvania Constitution and several provisions of the U.S. Constitution, and the freedoms of speech and expression are legally enforceable interests under the Pennsylvania and U.S. Constitutions. *See* U.S. CONST. amend. I (protecting freedom of speech); *see, e.g., id.* amend. XIV, XV (protecting, with other provisions of the U.S. Constitution, the right to vote); PA. CONST. art. I, § 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); *id.* art. I, § 7 (providing for freedom of expression).

18. An organization has standing when it establishes it has or will itself suffer an injury, *Warth v. Seldin*, 422 U.S. 490, 511 (1975), or “establish[es] that at least one of its members has or will suffer a direct, immediate or substantial injury as a consequence of the challenged action,” *Building Industry Association of Lancaster County v. Manheim Township*, 710 A.2d 141, 144 (Pa. Commw. Ct. 1998).

19. ACLU-PA will itself suffer injury if Petitioners are awarded the relief they seek because ACLU-PA devotes significant staff and other resources to ensuring that no duly registered voters are denied the right to vote. If county election officials and boards do deny the vote to voters who are engaged in “passive electioneering,” as Petitioners request, ACLU-PA will have to expend its resources addressing the complaints of the citizens improperly denied the vote. *See Pennsylvania Protection and Advocacy, Inc. v. Houston*, 136 F. Supp.2d 353, 361-62 (E.D. Pa. 2001) (finding advocacy group alleged a sufficient injury where state agency’s action

may have caused the group to devote more resources to advocacy than it would have absent the agency action).

20. Also, one or more members of ACLU-PA intend to wear tee shirts or other clothing or buttons with the names, pictures, or emblems of the candidates or political parties when casting their votes on November 4, 2008. These ACLU-PA members will suffer a direct, immediate, and substantial injury if Petitioners are granted the declaratory relief they seek because it will infringe these members' right to vote and right to freedoms of speech and expression provided under the Pennsylvania and U.S. Constitutions.

21. ACLU-PA seeks to intervene in this matter as a Respondent, and if permitted to intervene in this matter, would file an Answer and New Matter (attached hereto as Exhibit 1) demonstrating that Petitioners are not entitled to the declaratory relief they seek and that ACLU-PA is entitled to judgment in its favor.

22. The relief Petitioners seek is inconsistent with the practice in this Commonwealth and with the provisions of the Pennsylvania and U.S. Constitutions guaranteeing citizens the right to vote and the right to freedoms of speech and expression. If granted, the relief Petitioners seek would tend to disenfranchise voters, impede access to the vote, chill political discourse, and suppress the freedoms of speech and expression.

23. ACLU-PA's proposed Answer and New Matter is not in subordination to and in recognition of the propriety of the action.

24. The interests of ACLU-PA and its members in the outcome of the litigation are not otherwise adequately represented in this action.

25. ACLU-PA has not delayed in filing this petition to intervene as the case was only filed on September 17, 2008 and the Respondents were not required to respond to the Petition to Review until September 25, 2008, and the intervention will not unduly delay, embarrass, or prejudice the adjudication of the rights of the parties.

WHEREFORE, Petitioner and Proposed Intervenor-Respondent, American Civil Liberties Union of Pennsylvania, respectfully requests that it be granted leave to intervene in this action as a Respondent in substantially the form of order attached hereto.

Respectfully submitted,



Stephen G. Harvey (ID No. 68233)
Seth R. Oltman (I.D. No. 93395)
William M. Taylor (I.D. No. 203503)
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Witold J. Walczak (I.D. No. 62976)
Sara J. Rose (I.D. No. 204936)
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
(412) 681-7864

*Attorneys for Petitioner and Proposed Intervenor-
Respondent, American Civil Liberties Union of
Pennsylvania*

Dated: September 26, 2008

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft & John Dickinson :

Petitioners :

v. :

Chet Harhut, Individually and in his
capacity as Commissioner, Bureau of
Commissions, Elections and Legislation,
Pennsylvania Department of State;
Pennsylvania Department of State;
Pedro A. Cortes, Individually and in
capacity as Secretary of the
Commonwealth of Pennsylvania

NO. 451 MD 2008

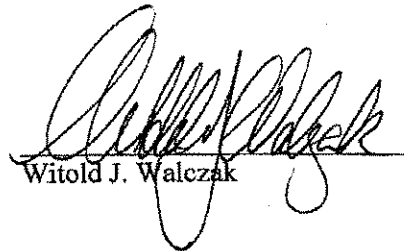
Respondents :

VERIFICATION

Witold J. Walczak hereby states that he is Legal Director for Petitioner and Proposed Respondent-Intervenor American Civil Liberties Union of Pennsylvania in the above-captioned action, that he is authorized to make this verification, and that the facts set forth in the foregoing Petition to Intervene are true and correct to the best of his knowledge, information, and belief.

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

Date: September 26, 2008


Witold J. Walczak

1

and, :

**American Civil Liberties Union of
Pennsylvania,**

Respondent-Intervenor.

**ANSWER AND NEW MATTER OF RESPONDENT-INTERVENOR AMERICAN CIVIL
LIBERTIES UNION OF PENNSYLVANIA TO PETITION FOR REVIEW**

Respondent-Intervenor American Civil Liberties Union of Pennsylvania (“ACLU-PA”), by its undersigned counsel, hereby submits the following Answer and New Matter to the plaintiffs’ Complaint, denominated a Petition for Review addressed to the Court’s original jurisdiction (the “Petition”) under the Court’s Order of September 18, 2008, and states as follows:

1. Admitted in part and denied in part. It is admitted that the Commissioner of the Commonwealth’s Bureau of Commissions, Elections and Legislation (the “Commissioner”) on or about September 8, 2008, issued a memorandum (the “Memorandum”) to all Pennsylvania County Boards of Elections and that a copy of the Memorandum is attached to the Petition as Exhibit 1. The Memorandum is a document in writing that speaks for itself and any characterization of it is denied. The remainder of paragraph 1 of the Petition consists of conclusions of law and not any averments to which a response is required and it is therefore denied. To the extent any response is required, the remainder of paragraph 1 of the Petition is denied. It is specifically denied that permitting voters to enter polling places on November 4, 2008, while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office is prohibited by Pennsylvania law and has been disallowed for over a century. On the contrary, it has been the longstanding practice in many Pennsylvania counties,

including the two most populous, Allegheny and Philadelphia, to permit voters wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office to vote.

2. Admitted in part and denied in part. It is admitted that the Commissioner on or about September 8, 2008, issued the Memorandum to all Pennsylvania County Boards of Election and that a copy of the Memorandum is attached to the Petition as Exhibit 1. The Memorandum is a document in writing that speaks for itself and any characterization of it is denied. The last sentence of paragraph 2 of the Petition is denied. It is specifically denied that the position taken by the Commissioner is internally self-conflicting, would be impossible to enforce, or is open to innumerable interpretations. On the contrary, this position has been followed for years by many Pennsylvania counties, including Allegheny and Philadelphia, and they have not experienced the problems claimed by Petitioners in paragraph 2 and other paragraphs of the Petition.

3. Admitted in part and denied in part. It is admitted that the ACLU-PA, along with the League of Women Voters of Pennsylvania, sent to the Commissioner the letter attached to the Petition as Exhibit 2. It is denied as stated that such letter “prompted” the Memorandum. By way of further answer, Respondent-Intervenor adopts the averments set forth in paragraph 3 of the Answer and New Matter of Respondents Harhut and Cortes to the Petition for Review in the Nature of a Complaint Seeking a Declaratory Judgment (“Answer of Harhut and Cortes”). The second sentence of paragraph 3 of the Petition consists of a conclusion of law and not any averment to which a response is required and it is therefore denied.

4. Paragraph 4 of the Petition contains no averments to which a response is required and it is therefore denied.

5. After reasonable investigation Respondent-Intervenor is without knowledge or information sufficient to form a belief as to the averment of paragraph 5 of the Petition and it is therefore denied.

6. After reasonable investigation Respondent-Intervenor is without knowledge or information sufficient to form a belief as to the averment of paragraph 6 of the Petition and it is therefore denied.

7. Respondent-Intervenor adopts the averments set forth in paragraph 7 of the Answer of Harhut and Cortes.

8. Respondent-Intervenor adopts the averments set forth in paragraph 8 of the Answer of Harhut and Cortes.

9. Respondent-Intervenor adopts the averments set forth in paragraph 9 of the Answer of Harhut and Cortes.

10. Paragraph 10 of the petition consists of a conclusion of law and not any averments to which a response is required.

11. Admitted.

12. Admitted in part and denied in part. It is admitted that the citizens of Pennsylvania have an interest in secure and peaceful elections in which they may exercise their right to vote and that Petitioners accurately quote from the Constitution of the Commonwealth of Pennsylvania. The remainder of the first sentence of paragraph 12 of the Petition is denied as stated, as Respondent-Intervenor is without knowledge as to the meaning of the phrase “system conducted with uniformity across the Commonwealth.” The second sentence of paragraph 12 of the Petition contains no averments that require a response and it is therefore denied. By way of

further answer, it is admitted that the words quoted by Petitioners are taken from Article VII, section 6, of the Constitution of the Commonwealth of Pennsylvania.

13. Admitted in part and denied in part. Paragraph 13 of the Petition contains conclusions of law and not any averments to which a response is required and it is therefore denied. By way of further answer, it is admitted that Petitioners have accurately quoted from the Pennsylvania Election Code.

14. Denied. It is specifically denied that it has been the law or tradition in this Commonwealth that election officials have prohibited voters from entering the polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office. On the contrary, it has been the practice in many Pennsylvania counties to permit voters wearing such t-shirts, stickers, buttons, or other paraphernalia in the polling place to vote. To the extent that any election officials in Pennsylvania have prohibited voters from entering polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office such officials have not acted in accordance with the Pennsylvania Election Code and their actions have violated the voters' free speech, expression, and voting rights secured to them under the Pennsylvania and U.S. Constitutions. Further, any such actions of elections officials have been unnecessary to protect any citizen's health, safety, and welfare or to ensure the public's confidence in the electoral process.

15. Denied. Paragraph 15 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent any response is required, there is no sound reason why election officials should prohibit voters from entering polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office and the

main effect of such a prohibition would be to disenfranchise voters and violate their free speech and expression rights.

16. Denied. Paragraph 16 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent any response is required, it is specifically denied that prohibiting voters from entering the polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office is necessary to ensure that each voter may exercise her or his right to vote without danger of intimidation or confusion or that voters at polling places are indistinguishable from election officials stationed within. To the extent that prohibiting voters from entering polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office would establish a bright line rule, such rule would have the effect of disenfranchising voters and violating their free speech and expression rights. If any bright line rule is needed, the rule should be that election officials must not act as fashion police charged with prohibiting voters from entering the polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office, as empowering such fashion police would have the effect of disenfranchising voters and violating their free speech and expression rights.

17. Denied. Paragraph 17 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied.

18. Denied. Paragraph 18 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied. To the extent an answer is required, it is specifically denied that a narrow reading of the term “electioneering” would allow anomalies that could rise to the level of a partisan free-for-all in polling places.

19. Denied. Paragraph 19 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied.

20. Denied. Paragraph 20 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied.

21. Admitted.

22. Denied. It is specifically denied that the Memorandum “incorporated” a letter to Pedro A. Cortes, the Secretary of the Commonwealth of Pennsylvania, from the ACLU-PA dated August 14, 2008. On the contrary, the Memorandum referred to and enclosed a copy of a letter to Pedro A. Cortes from the ACLU-PA and the League of Women Voters of Pennsylvania dated August 14, 2008 (the “Letter”).

23. Denied. The Letter is a document in writing that speaks for itself and any characterization of it is denied. The remainder of paragraph 23 of the Petition consists of conclusions of law and not any averments to which a response is required and it is therefore denied.

24. Denied. The Letter referred to in paragraph 24 of the Petition is a document in writing that speaks for itself and any characterization of it is denied.

25. Denied as stated. It is admitted that American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization comprised of two organizational entities and that ACLU-PA is one of the American Civil Liberties Union’s statewide affiliates.

26. Admitted in part and denied in part. It is admitted that the Commonwealth of Pennsylvania’s position in this matter, as set forth by the Commissioner in the Memorandum, is consistent and in accordance with the position of the ACLU-PA and the League of Women

Voters of Pennsylvania, as set forth in the Letter. The remainder of paragraph 26 of the Petition consists of conclusions of law to which no response is required and it is therefore denied.

27. Denied. Paragraph 27 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent any response is required, it is specifically denied that prohibiting voters from entering polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office is needed to preserve the peace or to prevent voter intimidation or contentiousness or would in any way lead to “a tinder box of rabbleroxing.” On the contrary, the main effect of prohibiting voters from entering the polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office would be to disenfranchise voters and violate their free speech and expression rights.

28. Denied. Paragraph 28 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent any response is required, Respondent-Intervenor states that under the Pennsylvania Election Code and the Pennsylvania and United States Constitutions political groups may lawfully encourage their supporters to express their support by wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office during election season, including on election day and while voting.

29. Denied. Paragraph 29 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent any response is required, it is specifically denied that continuing to permit voters to enter polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office “implicitly authorizes champions of one party or another to stand outside and outfit passer-by.” On the contrary,

Pennsylvania law prohibits candidates or their supporters from giving voters things of value at the polling place. 25 PA. CONS. STAT. § 3051 (2008).

30. Denied. Paragraph 30 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied.

31. Admitted in part and denied in part. The first two sentences of paragraph 31 of the Petition are admitted. The third sentence of paragraph 31 of the Petition is denied. The Letter reflects what has been practice in at least the largest counties in Pennsylvania for many years and thus the Letter has not “risen to the level of the law” either in reality or in the eyes of the press, the general public, or county election officials.

32. Admitted in part and denied in part. It is admitted that the Commissioner sent out to county election officials the email attached to the Petition as Exhibit 4 (the “Email”). The Email is a document in writing that speaks for itself and any characterization of it is denied. It is specifically denied that the Commissioner recognized “the threat to the electoral process caused by the misleading and inaccurate Memorandum,” or that county election officials have been “bandied about in a virtual echo chamber of uncertainty,” whatever that means.

33. Denied. Paragraph 33 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent any response is required, it is specifically denied that permitting voters to enter polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office has or will lead to “chaos, confusion and non-uniformity in our Pennsylvania polling places” or that it is needed to protect citizens’ health, safety, and welfare or to ensure the public’s confidence in the electoral process. On the contrary, the largest counties in Pennsylvania have for many years permitted voters to enter the polling places while wearing t-shirts, stickers, buttons, and other paraphernalia endorsing

specific candidates for office without incident. By way of further answer, the main effect of such a prohibition would be to disenfranchise voters and violate their rights of free speech and expression.

34. Denied. It is specifically denied that Allegheny County faces a plethora of partisan election problems; that election judges at many polling places in Allegheny County or in other counties have attempted to prohibit voters from entering polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office; that in the past partisans have set up shop directly outside of polling places, distributing buttons and badges, creating a virtual parade of voters, ornamented with the images of candidates of their choice; that such voters have proceeded into polling places as walking billboards for the candidate of their choice encouraged by those stationed outside to continue the electioneering within the voting area; and that there has been any “gauntlet of electioneering” that “can often be aggressive and overbearing.” The remainder of paragraph 34 of the Petition consists of conclusions of law and not any averments to which a response is required and it is therefore denied. To the extent that a response is required, there is no sound reason why election officials should prohibit voters from entering the polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office. The main effect of such a prohibition would be to disenfranchise voters and violate their free speech and expression rights.

35. Admitted in part and denied in part. It is specifically denied that complaints were made to the Allegheny County Board of Elections about voters entering the polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office. It is admitted that the Allegheny County Board of Elections permits voters to enter the polling

places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office.

36. Admitted in part and denied in part. It is specifically denied that voters in Allegheny County are expressly forbidden to enter polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office. On the contrary, the Allegheny County Board of Elections permits voters to enter polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office. It is admitted that voters in Allegheny County in the past have openly worn t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office while voting.

37. Denied. It is specifically denied that there is any statutory ban on voters wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office, that the Allegheny County Board of Elections has applied the law in a non-uniform manner, that it has neither defined nor clarified the meaning of electioneering, and that it has not indicated that it will enforce the statutory law. On the contrary, the Allegheny County Board of Elections has consistently taken the position that voters are permitted to enter polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office.

38. Denied. It is specifically denied that the Memorandum and any press reports about it will create any confusion. On the contrary, the Memorandum clarifies the public's understanding of the Commissioner's view that under the Pennsylvania Election Code voters may wear t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office while voting.

39. Denied. It is specifically denied that the Memorandum will cause any confusion or that it will force members of election boards to become "fashion police." On the contrary, it is

Petitioner's position, if adopted into law, that would force members of election boards to become "fashion police." It is further denied that as a result of the Memorandum disputes will arise within polling places, the electoral process will be disrupted, the integrity of the process will be compromised, the health and safety of voters will be affected, or the courts will be inundated on election day with a plethora of suits and claims. On the contrary, the electoral process will be disrupted and the free speech and voting rights of voters would be violated if the position advanced by Petitioners is adopted into law.

40. Denied. It is specifically denied that disruptions at the polling place will occur and that any voters' right will be denied if various Boards of Election do not adopt a resolution stating that voters will be prohibited from voting if they wear t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office. On the contrary, adopting the Petitioners' position that election officials should be required to prohibit voters from voting if they wear t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office would lead to disruption in the electoral process, disenfranchisement of voters, and denial of voters' rights of free speech and expression.

41. Admitted in part and denied in part. Paragraph 41 of the Petition contains legal conclusions to which no response is required and it is therefore denied. To the extent a response is required, it is specifically denied that the Pennsylvania Election Code imposes a ban on voters entering the polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office. It is admitted that County Boards of Election that violate the rights of voters by prohibiting them from voting if they wear t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office may face lawsuits or other challenges from voters or others concerned with voters' rights.

42. Denied. Paragraph 42 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent any response is required, it is specifically denied that permitting voters to enter polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office, as has long been the practice in the largest Pennsylvania counties, would interfere with or violate the rights of other voters.

43. Admitted.

44. Denied. Paragraph 44 of the Petition contains no averments to which any response is required and it is therefore denied. To the extent a response is required, denied as stated. Election workers may not be familiar with the law and it may be possible under some circumstances to sway some election workers from the proper exercise of their lawful duties, but they are required to follow the law and the directives of their County Boards of Election.

45. Denied. Paragraph 45 of the Petition contains no averments to which any response is required and it is therefore denied.

46. Denied. Paragraph 46 of the Petition contains no averments to which any response is required and it is therefore denied.

47. Denied. It is specifically denied that the Commissioner must rescind the Memorandum to prevent harm. On the contrary, rescinding the Memorandum would cause harm, as it would have the effect of causing election officials to think that they must prohibit voters from entering polling places while wearing t-shirts, stickers, buttons, or other paraphernalia endorsing specific candidates for office, which would violate the Pennsylvania Election Code and have the effect of disenfranchising voters and violating their rights of free speech and expression.

48. Respondent-Intervenor incorporates by reference its answers to Paragraphs 1 through 47 of the Petition.

49. Denied. Paragraph 49 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied.

50. Denied. Paragraph 50 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied. To the extent a response is required, Respondent-Intervenor adopts the averments set forth in paragraph 50 of the Answer of Harhut and Cortes.

51. Denied. Paragraph 51 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied.

52. Denied. Paragraph 52 of the Petition contains legal conclusions and not any averments to which a response is required and it is therefore denied.

WHEREFORE, the ACLU-PA respectfully requests that this Court dismiss the Petition for Review.

NEW MATTER

1. Respondent-Intervenor ACLU-PA is a nonprofit, nonpartisan, membership organization with about 19,000 members. ACLU-PA is one of the national ACLU's statewide affiliates. For more than eighty-five years the ACLU has sought to advance the principles of liberty and equality embodied in the Constitution of the Commonwealth of Pennsylvania and of the United States and, in particular, the freedom of speech. ACLU also defends the right to vote, with an active litigation program administered by the organization's Voting Rights Project. In support of these principles, ACLU has appeared before the United States Supreme Court, other federal courts and Pennsylvania's state courts in numerous free-speech and voting-rights cases,

both as direct counsel and as *amicus curiae*. The important free-speech, free-expression, and voting-rights issues raised in this case are of substantial concern to ACLU-PA and its members.

2. On August 14, 2008, ACLU-PA and the League of Women Voters of Pennsylvania sent a letter (the “Letter”) to Respondent Pedro Cortes requesting that he clarify that the definition of “electioneer,” as used in 25 Pa. C.S.A. § 3060(c), “does not apply to and/or prohibit voters from casting ballots while wearing partisan T-shirts, stickers, and buttons.” A copy of the Letter is attached as Exhibit 2 to the Petition for Review.

3. The Letter also stated: “And because [25 Pa. C.S.A. § 3060(c)] implicates First Amendment free-speech rights, we urge you to adopt a narrow definition of the term ‘electioneer’ that would explicitly allow voters to wear candidate t-shirts, buttons, stickers, and similar items into the polling place to cast their votes.” *Id.*

4. As noted in the Letter, ACLU-PA had received complaints from citizens in Mt. Lebanon (Allegheny County) and Ardmore (Montgomery County), who were prohibited from voting in the primary elections held on April 22, 2008, on the grounds they were wearing t-shirts endorsing candidates for office. ACLU-PA received similar complaints regarding recent elections in Lancaster and York Counties. The Letter further noted that the website for the Centre County Board of Elections informs voters: “When going to the polls to vote, do not wear any campaign material that is exposed (hat, shirt, button, etc). You will be asked to remove it.” That information still appears on the website for the Centre County Board of Elections. *See* <http://www.co.centre.pa.us/elections/elect.asp> (last visited September 24, 2008).

5. On September 8, 2008, Respondent Harhut issued a memorandum regarding “Passive Electioneering” (the “Memorandum”). The Memorandum was addressed to County

Boards of Elections and advised that if passive electioneering – the wearing of tee shirts, clothing or buttons with a candidate’s or political party’s name, picture, or emblem – “remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute ‘electioneering’ as that term is used in [25 Pa. C.S.A. § 3060(c)].” A copy of the Memorandum is attached as Exhibit 1 to the Petition for Review.

6. The Memorandum also alerted the County Boards of Elections that “on August 19, 2008, the Secretary of the Commonwealth received the enclosed letter from the [ACLU] of Pennsylvania and the League of Women Voters of Pennsylvania asking us to provide an opinion clarifying this issue. The authors of the letter believe that this issue ‘implicates First Amendment free-speech rights’ and urges us to adopt a narrow definition of the term ‘electioneer.’ The letter also lists examples where the ACLU and the League have received complaints regarding this subject.”

7. The Commissioner further noted in the Memorandum that the Department of State has the authority to issue binding directives to the County Boards of Elections “on only one subject: ‘the implementation of electronic voting procedures or the operation of electronic voting systems.’ 25 P.S. § 3031.5(a). This issue relating to apparel in the polling place would not fall within the scope of electronic voting procedures or the operation of electronic voting systems. As such, the various suggestions and recommendations that we make to the counties regarding this and other issues, must be reviewed and considered by the county boards of election in conjunction with their solicitors. Therefore, we ask that those of you receiving this memo confer with your solicitor and commissions regarding this issue[.]”

8. In our system of government we tolerate expression of political views different from and opposed to our own because we believe that our representative democracy, with voting and free speech and expression rights for all, is the best system of government ever devised. We also tolerate it because the law says we must. The Constitutions of both the Commonwealth of Pennsylvania and the United States of America protect the right of free speech, and the speech historically accorded the most protection relates to political campaigns.

9. The Petitioners ask this Court to adopt the view that our right to freely express our political views ends on election day as we dress to go to the polling place. Unlike every other day of the year, when we are free to wear our Obama or McCain tee shirts as we see fit, this day is different, they contend. This day we must put aside our political tee shirts and buttons and if we have political tattoos we must cover them, Petitioners urge, for we may offend the other voters and disrupt the voting process by doing nothing more than passively and silently conveying political messages on our clothing and persons.

10. The position advanced by Petitioners conflicts with the longstanding practice in many Pennsylvania counties, including the two largest counties of Allegheny and Philadelphia. These counties have for many years permitted voters to enter polling places wearing clothing and signs that display political messages. This has not been extended to election officials, as voters have the right to expect utmost neutrality from those who conduct the voting process. Nor has it been extended to permit voters to engage in active campaigning in the polling place by making speeches, wearing sandwich boards, soliciting votes, or otherwise actively seeking to communicate political views or engaging in disruptive conduct in the polling place.

11. The position adopted by the Commissioner in the Memorandum is consistent with the longstanding practice in Allegheny, Philadelphia and many other Pennsylvania counties. The Commissioner's memorandum was based on the Department's own good-faith assessment of what is required under the Pennsylvania Election Code and not because he desired to adopt or promote the views of ACLU-PA. It so happens that the views of ACLU-PA are in accordance with the views of the Commissioner and the Pennsylvania Election Code.

12. Respondent-Intervenor opposes the position urged by the Petitioners for several reasons.

13. First, the Petitioners' position is not required but is instead in conflict with the Pennsylvania Election Code and the plain language of the word "electioneering" as used in Section 1220(c) of the Pennsylvania Election Code, 25 P.S. 3060(c).

14. Second, the Petitioners' position, if adopted into law, would upset and overturn the longstanding practice in many Pennsylvania Counties, including the two largest counties of Allegheny and Philadelphia. This would result in a significant disruption of the electoral process on November 4, 2008.

15. Third, the Petitioners' position is entirely unnecessary to protect the integrity of the voting process or the rights of other voters, as evidenced by the longstanding practice in Allegheny and Philadelphia Counties.

16. Fourth, the Commissioner adopted a position and communicated it to the local Boards of Elections as a persuasive but non-binding expression of the Commissioner's view on Pennsylvania law and good electoral process. He left final decisions about whether to permit

voters to convey political messages on their clothing and persons in polling places to local Boards of Elections, in consultation with their solicitors. Petitioners seek to turn this around and obtain relief from this Court that would force a binding statewide rule even though the local Boards of Elections are not parties to this action. Further, Petitioners lack standing to seek the requested relief because they have no injury in fact resulting from the Commissioner's action as any harm they might suffer would result from the actions of the Allegheny County Board of Elections. Moreover, the Commissioner's Memorandum is in the nature of an advisory opinion and the Petitioners essentially seek an advisory opinion about the validity of an advisory opinion.

17. Fifth, the Petitioners' position, if adopted into law, would infringe the free speech and expression rights of voters. It would require voters to give up their free speech and expression rights in order to vote. It would also place election officials at polling places in the untenable position of serving as "fashion police" charged with deciding whether words and images displayed on voters' clothing and persons endorse political candidates and parties. The position advanced by Petitioners is thus impermissibly vague as it vests too much discretion into the hands of election officials without fair notice to voters as to what words and images are permissible or not.

18. Finally, the Petitioners' position, if adopted into law, would disenfranchise voters by forcing them to relinquish their free speech and expression rights in order to vote. Voters who choose not to relinquish their free speech and expression rights would not be permitted to vote. And in any event, Petitioners' position would create an unnecessary obstacle to voting that would have the necessary effect of disenfranchising some voters.

WHEREFORE, ACLU-PA respectfully requests that this Court dismiss the
Petition for Review.

Respectfully submitted,



Stephen G. Harvey (ID No. 58233)
Seth R. Oltman (I.D. No. 93395)
William M. Taylor (I.D. No. 203503)
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Witold J. Walczak (I.D. No. 62976)
Sara J. Rose (I.D. No. 204936)
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
(412) 681-7864

*Attorneys for Petitioner and Proposed Intervenor-
Respondent American Civil Liberties Union of
Pennsylvania*

Dated: September 26, 2008

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft & John Dickinson

Petitioners

v.

Chet Harhut, Individually and in his
capacity as Commissioner, Bureau of
Commissions, Elections and Legislation,
Pennsylvania Department of State;
Pennsylvania Department of State;
Pedro A. Cortes, Individually and in
capacity as Secretary of the
Commonwealth of Pennsylvania

Respondents

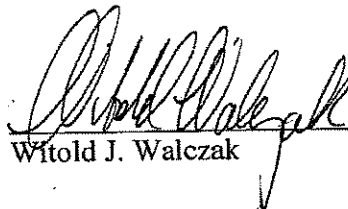
NO. 451 MD 2008

VERIFICATION

Witold J. Walczak hereby states that he is Legal Director for Petitioner and Proposed Respondent-Intervenor American Civil Liberties Union of Pennsylvania in the above-captioned action, that he is authorized to make this verification, and that the facts set forth in the foregoing Answer and New Matter are true and correct to the best of his knowledge, information, and belief.

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

Date: September 26, 2008


Witold J. Walczak

CERTIFICATE OF SERVICE

I, William M. Taylor, do hereby certify that I caused to be served on September 26, 2008, true and correct copies of Respondent-Intervenor American Civil Liberties Union of Pennsylvania's Petition to Intervene and Answer and New Matter upon the following:

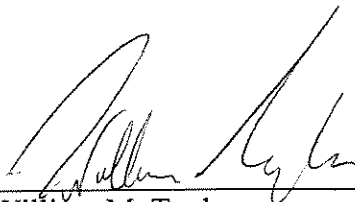
Via Hand Delivery:

Linda A. Kerns, Esquire
Law Offices of Linda A. Kerns
1500 Market Street, 12th Floor, East Tower
Philadelphia, PA 19102
Attorney for Plaintiffs Richard Kraft and John Dickinson

Via Overnight Mail:

Albert H. Masland, Esquire
Louis Lawrence Boyle, Esquire
Pennsylvania Department of State
Office of Chief Counsel
301 North Office Building
Harrisburg, PA 17120
Attorneys for Respondents Pedro A. Cortes,
Secretary of the Commonwealth, and Chet Harhut,
Commissioner of the Bureau of Commissions,
Elections and Legislation

Date: September 26, 2008



William M. Taylor