NOTICE TO PLEAD TO ALL PARTIES
You are hereby notified to file a written response to the New Matter set forth in this Answer with New Matter pursuant to Pa. R.A.P. 1516(b) within thirty (30) days from service hereof.

Albert H. Masland
Attorney for Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft and John Dickinson, Petitioners, v. Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, and Pedro Cortés, Secretary of the Commonwealth of Pennsylvania, Respondents	:	Docket No. 451 M.D. 2008

ANSWER AND NEW MATTER OF RESPONDENTS HARHUT AND CORTÉS TO THE PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING A DECLARATORY JUDGMENT

AND NOW come Respondents Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, and Pedro A. Cortés, Secretary of the Commonwealth, through their undersigned counsel and pursuant to Pa. R.A.P. 1516(b), to answer the Petition for Review[1] in the nature of a complaint seeking declaratory judgment filed by Petitioners in the above-

[1] Petitioners commenced their action for declaratory judgment with a "Complaint." However, this Court by order entered September 18, 2008, indicated that "[t]he Complaint shall be regarded and acted upon as a petition for review addressed to this Court's original jurisdiction." Thus, Respondents will refer to the Complaint as a Petition for Review and to the parties as Petitioners and Respondents.

captioned matter, and to assert defenses thereto in the form of New Matter. In response to the averments made in the Petition for Review, Respondents answer as follows:

RESPONSE TO INTRODUCTION

To the extent the "Introduction" of Petition for Review requires a response, its statements regarding the Department of State's Memorandum (Memorandum) of September 8, 2008 (Petitioners' Exhibit 1) to the County Boards of Elections are conclusions of law to which no response is required.

1. The averments made in ¶ 1 of the Petition for Review state conclusions of law to which no response is required. To the extent that any averment is considered to be an averment of fact, it is DENIED. In contrast to the averment and conclusion of law in the first sentence of ¶ 1, Commissioner Harhut clearly stated in the third paragraph of the Memorandum that the Pennsylvania Election Code provides that the county boards of elections may make such reasonable rules as they deem appropriate for elections. Furthermore, the Petition for Review is factually incorrect and is internally inconsistent where it states in the second sentence that "passive electioneering" (as described in the Memorandum) has been disallowed in Pennsylvania for over a century. In fact, as the Petition for Review later recognizes in ¶¶ 34 through 37, all county boards of elections have not reached the same legal conclusion that Petitioners have.

2. ADMITTED in part and DENIED in part. Though the first sentence of ¶ 2 is factually accurate, it does not include significant portions of the Memorandum, as discussed in the paragraph above. The averments made in the last sentence of ¶ 2 of the Petition for Review state conclusions of law to which no response is required, nor does this sentence provide sufficient details to which Respondents may reply. By way of further answer, many county boards of elections have in fact been interpreting "electioneering" precisely in the manner suggested by the Memorandum.

3. DENIED. The Memorandum was not prompted by the ACLU letter of August 14, 2008. Rather, the issue first arose on Primary Election Day, April 22, 2008, when the Department of State (Department) received calls from both citizens and counties regarding voters wearing tee shirts in polling places. The Department responded essentially the same on April 22 as it did in the Memorandum of September 8, 2008, stating its opinion that voters appearing at the polls with tee shirts or buttons should be permitted to vote. However, the Department stressed that the determination is one to be made by the county boards of elections, citing to 25 P.S. §§ 2642(f) & (g). During the months following the primary, the Department expressed its view on this subject before several other audiences containing county commissioners, judges and solicitors, and received no contrary opinions until August 19, 2008. After these discussions, the Department learned of the letter received from the American Civil Liberties Union (ACLU). In contrast to Petitioners' incorrect assumptions, the Department issued the Memorandum to alert all counties, including those not engaged in the other discussions, about this issue so that they could discuss it with their solicitors and commissioners, and thereby consider it in advance of Election Day when the issue could arise. Although Petitioners quote 25 P.S. § 3060(c), they fail to point out that the General Assembly has not defined the term "electioneering."

4. The averments made in ¶ 4 of the Petition for Review state conclusions of law to which no response is required.

PARTIES

5. ADMITTED.

6. ADMITTED.

7. ADMITTED in part and DENIED in part. The Department's main office and the office of the Secretary are at Room 302 North Office Building, not Room 305 as alleged.

8. ADMITTED in part and DENIED in part. The office of the Secretary is at Room 302 North Office Building, not Room 305 as alleged.

9. ADMITTED in part and DENIED in part. The office of the Commissioner is at Room 210 North Office Building, not Room 305 as alleged.

VENUE

10. ADMITTED.

BACKGROUND

11. ADMITTED.

12. The averments made in ¶ 12 of the Petition for Review state conclusions of law to which no response is required.

13. ADMITTED.

14. The averments made in ¶ 14 of the Petition for Review state conclusions of law to which no response is required. To the extent that any statement is considered to be an averment of fact, it is DENIED. As noted in answer to ¶ 1, the Petition for Review is factually incorrect and is internally inconsistent where it states in the first sentence of ¶ 14: "Traditionally, election officials have prohibited voters from entering polling places while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office...." In fact, as the Petition for Review later recognizes in ¶¶ 34 through 37, all county boards of elections have not reached the legal conclusion favored by Petitioners. By way of further answer, to the extent that there is an inference that the Memorandum will endanger the health, safety and welfare of Pennsylvania citizens, it is specifically DENIED.

15. The averments made in ¶ 15 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Memorandum specifically

distinguishes between the apparel of voters as opposed to those serving in the polling place as election officials and watchers. Tee shirts or buttons worn by the latter would be improper within the polling places. Furthermore, 25 P.S. §§ 2677 and 2678 require the judge of elections and inspectors of election to take an oath to "impartially and faithfully perform [their] duty." However, it is specifically DENIED that any such action by a voter would constitute undue influence in the polling place.

16. The averments made in ¶ 16 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, many counties have conducted their elections in accordance with the Memorandum and have not adversely impacted the so-called "sanctuary" of the polling place. Petitioners' lofty prose belies the fact that they are making much ado about nothing. Finally, Petitioners' picture of the polling place as a bustling marketplace, with voters milling about, overlooks the guidelines found in the Election Code, at 25 P.S. § 3060(a), which provides that no more than ten voters at any one time may be "awaiting their turn to vote." The voters in line are clearly distinguishable from those administering the process of voting.

17. The averments made in ¶ 17 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, Respondents specifically DENY that a voter wearing a tee shirt or button in a polling place is engaged in any type of electioneering or solicitation of votes. Petitioners appear to be under the illusion that voters arrive at the polling place as non-partisans and do not decide to become partisan until presented with the implements of voting. The Election Code is under no such illusion and recognizes that people are partisans but should not attempt to influence others within the polling place. It is crucial that the election

officials maintain the appearance of neutrality, but a voter waiting in line need not appear to be a *tabla rasa*.

18. The averments made in ¶ 18 of the Petition for Review state conclusions of law to which no response is required.

19. The averments made in ¶ 19 of the Petition for Review state conclusions of law to which no response is required. Furthermore, in the case cited by Petitioners, *Western Psychiatric Institute v. PLRB*, 16 Pa. Commw. 204, 330 A.2d 257 (1974), this Court made no reference to the term "electioneering" as used in the Pennsylvania Election Code. In fact, the parties in that case – the union and the employer – entered into an agreement, which included "that the cut off date for electioneering shall be 12:01 midnight on the day of the election." *Id.*, 16 Pa. Commw. at 212. In spite of this agreement, there were numerous instances of soliciting votes both within and outside of the site of the election.

20. The averments made in ¶ 20 of the Petition for Review state conclusions of law to which no response is required. Furthermore, in the case cited by Petitioners, *Marlin v. District of Columbia Board of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001), there was a statute which specifically defined "political activity," unlike the Pennsylvania Election Code, which does not define the term "electioneering." In the absence of such clarity, to interpret this term in a manner that could result in turning away a duly registered voter from the polling place is a far greater harm than permitting the individual to vote.

21. ADMITTED.

22. ADMITTED in part and DENIED in part. The Memorandum referenced a letter dated August 14, 2008, from the American Civil Liberties Union of Pennsylvania sent to Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania ("the Letter"), and included a copy

of the Letter with the Memorandum. It is DENIED that the Memorandum incorporated the Letter.

23. The averments made in ¶ 23 of the Petition for Review state conclusions of law to which no response is required.

24. ADMITTED in part and DENIED in part. It is ADMITTED that the Letter requests that a written opinion be provided to the county board of elections. It is not only DENIED that the Letter requested the Department to advocate the opinion of the ACLU, but it is also DENIED that the Memorandum constitutes any advocacy on behalf of any organization. Rather, the Memorandum was designed to assist county boards of elections with their determination, with an overarching goal of ensuring that no eligible voter is prohibited from voting.

25. ADMITTED in part and DENIED in part. The first sentence of ¶ 25 of the Petition for Review is ADMITTED. The averments made in the last sentence of ¶ 25 of the Petition for Review state conclusions of law to which no response is required, nor does this sentence provide sufficient details to which Respondents may reply.

26. It is specifically DENIED that the Department "adopted the position" of the ACLU. As stated in ¶ 3 of the Answer, the issue first arose on Primary Election Day, April 22, 2008, when the Department received calls from both citizens and counties regarding citizens wearing tee shirts in polling places. The Department responded essentially the same on April 22 as it did in the Memorandum of September 8, 2008, stating its opinion but also stating that the determination is one to be made by the county boards of elections (citing to 25 P.S. §§ 2642(f) & (g)). The other averments made in ¶ 26 of the Petition for Review state conclusions of law to which no response is required.

27. The averments made in ¶ 27 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, as previously noted, many county boards of elections have traditionally interpreted the Election Code, at 25 P.S. § 3060, in a manner similar to the Memorandum without incident or anything approaching incendiary activity.

28. The averments made in ¶ 28 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, Petitioners' conclusions constitute clear hyperbole, which defies the ability to respond.

29. The averments made in ¶ 29 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, as previously noted, many county boards of elections have traditionally interpreted 25 P.S. § 3060 in a manner similar to the Memorandum without incident.

30. The averments made in ¶ 30 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, it is specifically DENIED that the Department is without authority to share its opinion with election officials. The symbiotic relationship between the Department and county elections officials requires the Secretary to reach out to county officials on numerous issues. The National Voter Registration Act (NVRA) at section 10, 42 U.S.C. § 1973gg-8, and the Help America Vote Act (HAVA) at section 702, 42 U.S.C. § 1973ff-1, provide for a chief election official to carry out the State responsibilities under the law. Furthermore, Title III of HAVA is entitled "Uniform and Nondiscriminatory Election Technology and Administration Requirements." Both the NVRA and HAVA also require that the responsibilities under each act are to be carried out in a uniform and nondiscriminatory manner. (42 U.S.C. § 1973gg-6(b)(1) and 42 U.S.C. § 15481.) *See also Bush*

v. Gore, 531 U.S. 98 (2000). Prior to these laws and this case, the Department's typical advice to counties was to consult with their solicitors. After these laws and this case, in keeping with the requirements of these laws and the Supreme Court's guidance, the Department has earnestly endeavored to provide the counties with its advice and opinions so that they can act uniformly and without discrimination. It is further DENIED that this Memorandum was issued *sua sponte*. To the contrary, the issue of electioneering was raised and discussed for over four months before the Memorandum was issued.

31. The averments made in ¶ 31 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Department regrets that it has been unable to control the press on numerous issues, and that situation is unlikely to change.

32. ADMITTED in part and DENIED in part. It is ADMITTED that Chet Harhut, Commissioner of the Department of State's Bureau of Commissions, Elections and Legislation, sent an e-mail to county elections officials ("the E-mail"), requesting county officials to discuss with their solicitors the Memorandum, the Letter, and the U.S. Supreme Court decision in *Burson v. Freeman*, 504 U.S. 191 (1992). In *Burson*, the Tennessee statute specifically delineated what could not be worn in a polling place, unlike the Election Code, which does not define the term "electioneering." The other averments made in ¶ 32 of the Petition for Review are DENIED.

33. The averments made in ¶ 33 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, it is clear from the Petition for Review that there is currently no uniformity in how the section of the Election Code at issue is interpreted and applied. It is difficult to see how providing guidance could create chaos and confusion.

34. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 34 of the Petition for Review acknowledge this fact, they are ADMITTED. Respondents are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in ¶ 34 of the Petition for Review, and therefore deny them.

35. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 35 of the Petition for Review acknowledge this fact, they are ADMITTED. Respondents are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in ¶ 35 of the Petition for Review, and therefore deny them.

36. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 36 of the Petition for Review acknowledge this fact, they are ADMITTED. Respondents are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in ¶ 36 of the Petition for Review, and therefore deny them.

37. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 37 of the Petition for Review acknowledge this fact, they are ADMITTED. To the extent that Allegheny County elections officials are enforcing the statute in accordance with the suggestions in the Memorandum,

Respondents submit that the county does in fact "enforce the statutory law," notwithstanding Petitioners' averments to the contrary.

38. The averments made in ¶ 38 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Memorandum was designed to assist the counties in their interpretation of the statute and not "to create further confusion."

39. The averments made in ¶ 39 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the opinions stated in the Memorandum were specifically designed to obviate the need for "fashion police," which would be required by Petitioners' interpretation.

40. The averments made in ¶ 40 of the Petition for Review state conclusions of law to which no response is required. By way of further response, many county boards of elections have traditionally followed the approach suggested in the Memorandum.

41. The averments made in ¶ 41 of the Petition for Review state conclusions of law to which no response is required.

42. The averments made in ¶ 42 of the Petition for Review state conclusions of law to which no response is required. By way of further response, 25 P.S. § 3060(a) provides that "[n]o elector shall be allowed to occupy a voting compartment or voting machine booth already occupied by another, except when giving assistance as permitted by this act," thus ensuring the secrecy of the vote. Petitioners' description of the eggshell-skull voter overlooks this important protection.

43. ADMITTED.

44. Respondents are without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶ 44 of the Petition for Review, and therefore deny them. By

way of further response, Petitioners seemingly attribute the same low opinion of the mentality of voters (see ¶ 42) to election officials. Respondents specifically DENY such characterization.

45. The averments made in ¶ 45 of the Petition for Review state conclusions of law to which no response is required. By way of further response, no specific facts are stated or documented in ¶ 45. Furthermore, Petitioners' conclusions constitute clear hyperbole, which defies the ability to respond.

46. The averments made in ¶ 46 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Memorandum was not an attempt to change the law. To the contrary, it was an attempt to assist county elections officials in interpreting this statute, which does not define "electioneering."

47. The averments made in ¶ 47 of the Petition for Review state conclusions of law to which no response is required.

RESPONSE TO COUNT ONE

48. Respondents incorporate by reference ¶¶ 1-47 of this Answer as if fully set forth herein.

49. DENIED. The Department issued the Memorandum expressing its opinion, but also stating that the determination is one to be made by the county boards of elections (citing to 25 P.S. §§ 2642(f) & (g)).

50. ADMITTED in part and DENIED in part. The Department did enclose a copy of the ACLU Letter with the Memorandum. It is DENIED that the Department adopted and disseminated a private entity's doctrine as if it was settled law in the Commonwealth. By way of further response, see the answer to ¶ 3, *supra*, which is incorporated herein by reference.

51. The averments made in ¶ 51 of the Petition for Review state conclusions of law to which no response is required.

52. The averments made in ¶ 52 of the Petition for Review state conclusions of law to which no response is required.

WHEREFORE, Respondents Pedro A. Cortés, Secretary of the Commonwealth, and Chet Harhut, Commissioner of the Bureau of Commissions, Elections and Legislation, respectfully request that this Honorable Court dismiss Petitioners' Petition for Review.

NEW MATTER

53. Respondents incorporate by reference ¶¶ 1-52 of their Answer as if fully set forth herein.

54. Petitioners seek declaratory and injunctive relief against the Secretary of the Commonwealth and Commissioner Harhut. However, Petitioners make specific allegations against Allegheny County in ¶¶ 34-38 of the Petition for Review, but they did not include Allegheny County or its board of elections as a party. Due to the allegations in the Petition for Review against Allegheny County, Allegheny County and/or its board of elections is an indispensable party to this action for declaratory judgment. Absent joinder of Allegheny County or its board of elections, this Court lacks jurisdiction to proceed under the Declaratory Judgments Act.

55. The relief sought by Petitioners would directly impact all 67 county boards of elections, which have primary responsibility for the conduct of elections in general and polling place activity in particular. *See* 25 P.S. §§ 2642(f) and (g). For this reason the Memorandum emphasizes that the regulation of activity within a polling place is the responsibility of the county boards of elections and their judges of elections, not the Secretary or the Department. Petitioners' failure to join any county board of elections or a class of counties means that

Petitioners have failed to join the only entities that have the power and duty to regulate polling places. The counties are necessary and indispensable parties to this case, and this Court lacks jurisdiction and power to consider this matter on its merits or to consider a proper statewide remedy.

56. Petitioners allege that the Memorandum will cause confusion at the polling places and that, "[t]raditionally, election officials have prohibited voters from entering polling places while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office." Petition for Review, ¶ 14. However, Petitioners also allege in ¶ 35 of the Petition for Review that the Allegheny County Board of Elections permits voters to wear a candidate's shirt, button or sticker into the voting booth. Therefore, the confusion over how to define "electioneering" preceded the Memorandum, and the Memorandum merely gave the Department's opinion on how "electioneering" may be interpreted, after several requests to do so, since it is not defined in the Election Code.

57. The Department's intention in issuing the Memorandum was to emphasize that no duly registered voter should be turned away from the polls and that county elections officials should train their district election officials on this subject so that they implement a policy uniformly and without discrimination throughout their county. Though Petitioners allege that there is harm in individuals wearing buttons or tee shirts to the polling places, Respondents maintain that there is greater harm in denying an individual the right to vote because that individual wore a certain tee shirt to the polling place.

58. The decision whether to allow individuals to wear a tee shirt or a button into the polling place has been, and remains, one for the county board of elections and the judges of elections in their respective precincts, in accordance with the Election Code at 25 P.S. §§ 2642(f)

& (g). Some counties, such as Allegheny County (as Petitioners have specifically pointed out), allow voters to wear a tee shirt or a button into the polling place. Thus far, the "rabblerousing" and "synchorize[ed] ...battalion[s] of like-minded individuals" showing up at the polls has not occurred. Therefore, the harm that Petitioners allege has not been experienced and is entirely unlikely to occur.

WHEREFORE, Respondents Pedro A. Cortés, Secretary of the Commonwealth, and Chet Harhut, Commissioner of the Department's Bureau of Commissions, Elections and Legislation, respectfully request that this Honorable Court dismiss Petitioners' Petition for Review

DATE: September 25, 2008

By: 

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Krafl and John Dickinson, Petitioners,	:	
v.	:	Docket No. 451 M.D. 2008
Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, and Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania Respondents	:	

VERIFICATION

Chet Harhut hereby states that he is one of the Respondents in the above-captioned matter; that he is authorized to take 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 25, 2008

Chet Harhut

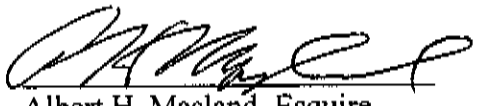
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft and John Dickinson, Petitioners,	:	
v.	:	Docket No. 451 M.D. 2008
Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, and Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania Respondents	:	

CERTIFICATE OF SERVICE

I, Albert H. Masland, attorney for Respondents in the above-referenced matter, hereby certify that I served via facsimile and regular mail, on September 25, 2008, the Answer and New Matter upon the following:

Linda A. Kerns, Esquire
Law Offices of Linda A. Kerns
1500 Market Street, 12th Floor, East Tower
Philadelphia, PA 19102



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Dated: September 25, 2008