

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 08-cv-0232 1 -JLK

COMMON CAUSE OF COLORADO, on behalf of itself and its members; MI FAMILIA VOTA EDUCATION FUND; and SERVICE EMPLOYEES INTERNATIONAL UNION, on behalf of itself and its members,

Plaintiffs,

v.

BERNIE BUESCHER, in his official capacity as Secretary of State for the State of Colorado,

Defendant.

**UNOPPOSED MOTION TO REQUIRE DEFENDANT TO
DISCLOSE PROVISIONAL BALLOT INFORMATION**

Pursuant to Rules 26, 33, 34 and 37(a) of the Federal Rules of Civil Procedure, Plaintiffs Common Cause of Colorado, Mi Familia Vota Educational Fund, and Service Employees International Union, through their counsel, hereby move for an Order directing Defendant Bernie Buescher, in his official capacity as Secretary of State for the State of Colorado, to provide certain information responsive to Plaintiffs' Second Set of Interrogatories and Plaintiffs' Second Request for Production of Documents. In support of this motion, Plaintiffs state as follows:

1. Pursuant to Local Rule 7.1.A, counsel for Plaintiffs have conferred with counsel for the Secretary regarding this motion. Counsel for the Secretary have stated that they do not oppose the motion.

2. Plaintiffs' discovery requests in this matter include requests for documents and information related to certain provisional ballots cast in the 2008 primary and general federal elections. The Secretary objected to these requests on various grounds, including that the Help America Vote Act of 2002 ("HAVA") mandates that access to information about individual provisional ballots "shall be restricted to the individual who cast the ballot." 42 U.S.C. § 15482(a). On that basis, the Secretary declined to provide the results of provisional ballots without a court order permitting the Secretary to do so.

3. Although formal discovery in this matter has now closed, a limited and informal exchange of information continues. Counsel for the Secretary have represented that they would provide documents and information concerning certain provisional ballots, as described in Paragraphs 8 and 14, below, should the Court issue an order permitting the release of that information.

4. The specific requests at issue were made in Plaintiffs' Second Set of Interrogatories and Plaintiffs' Second Request for Production of Documents, and are reproduced below:

Interrogatory #21: Please list all individuals whose registration applications or registration records were cancelled or who were deemed "not registered" pursuant to the 20-day rule (meaning persons whose names (i) appear on the Statewide Supplemental List, (ii) appear on the Provisional Court Order List with the "Current_Status_Reason" of "Failed – 20-Day Period"; or (iii) whom are identified in response to Interrogatory 17) who sought to vote in either the August 2008 primary or the

November 2008 general election. In answering this Interrogatory, please note whether the individual was able to vote a regular ballot or provisional ballot; which county the voter voted in or attempted to vote in; if the voter cast a provisional ballot, whether the provisional ballot was counted or rejected by the County Clerk, and, if rejected, the grounds for the rejection; and whether the Secretary of State upheld or overturned the County Clerk's decision, and the grounds for the Secretary of State's decision.

Document Request #39: For all individuals whose registration was cancelled or who were deemed "not registered" pursuant to the 20-day rule and who cast a provisional ballot in 2008 during the August primary or November general election, please provide the information listed in subparts (a) through (c) of this Document Request. For purposes of this request, please include information pertaining to individuals who appear on the Statewide Supplemental List or the Provisional Court Order list, or who are identified by Defendant in responding to Plaintiffs Second Set of Interrogatories as not previously included in these two lists. Please also include information pertaining to individuals whose provisional ballots were either accepted or rejected on the county level.

- (a) Copies of all information in the SCORE system, including information reflecting the individuals' voting history;
- (b) Provisional ballot applications cast by these individuals in 2008;
- (c) Any and all communications related to provisional ballots cast in 2008 by such individuals.

5. The Secretary raised a general objection to Plaintiffs' second round of discovery requests that is applicable to both of these requests. The objection states as follows:

The Secretary objects to each and every Interrogatory to the extent that they seek the results of individual provisional ballots that are not included within the provisions of the Stipulated Preliminary Injunction and are not narrowed to their members or persons they registered. The Help America Vote Act of 2002 ("HAVA") mandates that such information be provided only to the affected voter. *See* 42 U.S.C. § 15482(a) ("access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.") Thus, the Secretary will not provide the results of provisional ballots that are not governed by the Stipulated Preliminary Injunction without a court order permitting the Secretary to do so.

Secretary of State's Response to Plaintiffs' Second Set of Interrogatories, p. 2; Secretary of State's Response to Plaintiffs' Second Requests for Production of Documents, p. 2.

6. The Secretary also specifically objected to Interrogatory #21 on the ground that "the Secretary is barred by HAVA from providing this information as this data is not covered by the Stipulated Preliminary Injunction; the Interrogatory would require the Secretary to disclose whether provisional ballots were accepted or rejected." *Id.*, p. 8.

7. Subject to these objections, the Secretary provided information regarding whether individuals cast provisional ballots in the 2008 general and primary elections, but did not disclose whether such ballots had been counted or provide documentation regarding the individual provisional ballots.

8. Counsel for the Secretary has stated that they do not oppose the present motion, provided that the scope of disclosure is limited to provisional ballots cast in the 2008 primary or general elections by persons whose were either (i) members of Plaintiff organizations or (ii) registered to vote in voter registration drives conducted under the auspices of Plaintiffs Mi Familia Vota Educational Fund and Service Employees International Union.

9. The Court previously ordered the disclosure of similar provisional ballot information in the Stipulated Preliminary Injunction entered on October 29, 2008. Pursuant to that order, counsel for the Secretary provided Plaintiffs with documents and information related to provisional ballots cast in the November 2008 general election by

various categories of voters, including individuals who were determined to have failed the 20-day rule between May 14, 2008 and November 4, 2008. In particular, the Stipulated Preliminary Injunction covered voters whose provisional ballots were rejected following review by county clerks and recorders and the Secretary.

10. The Court entered a Stipulated Protective Order on November 5, 2008 and a Second Stipulated Protective Order on May 22, 2009, both of which are designed to protect the confidentiality of personal information regarding voters and other individuals disclosed by the parties. By their terms, those orders would protect the confidentiality of personal information disclosed pursuant to the relief sought in the present motion.

11. Without waiving or limiting any rights or objections with respect to the discovery requests at issue, the parties have consulted in an effort to arrive at a mutually agreeable scope of information to be disclosed by the Secretary. These consultations are continuing, and will likely lead to the exchange of information on an informal basis despite the formal close of discovery on November 16, 2009.

12. Entry of an order requiring the Secretary to disclose whether certain provisional ballots were counted and produce documents relating to those ballots, as requested in this motion, would substantially facilitate the completion of the parties' ongoing informal exchange of information.

13. This motion does not constitute a waiver or limitation by Plaintiffs of their right to complete discovery under their Second Set of Interrogatories or Second Requests for Production of Documents. Plaintiffs also will not consider the Secretary's lack of opposition to this motion as a waiver of any of the Secretary's general or specific

objections to those discovery requests, except insofar as any relief granted by the court alters the Secretary's authority to disclose the information sought in this motion.

14. Based on the above facts, Plaintiffs respectfully request that the Court enter an Order directing the Secretary to provide information and documents concerning provisional ballots cast in the 2008 primary and general elections by members of Plaintiff organizations and individuals registered to vote in voter registration drives conducted under the auspices of Plaintiffs Mi Familia Vota Educational Fund and Service Employees International Union.

Dated: November 13, 2009

Respectfully submitted by:

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BERNIE BUESCHER, in his official capacity as Secretary of State for the State of Colorado,

Defendant.

ORDER

Kane, J.

This matter is before me on Plaintiffs Unopposed Motion to Require Defendant to Disclose Provisional Ballot Information. .

1. Plaintiffs' discovery requests in this matter include requests for documents and information related to certain provisional ballots cast in the 2008 primary and general federal elections.

2. The Secretary objected to these requests on various grounds, including that the Help America Vote Act of 2002 ("HAVA") mandates that access to information about individual provisional ballots "shall be restricted to the individual who cast the

ballot.” 42 U.S.C. § 15482(a). On that basis, the Secretary declined to provide the results of provisional ballots without a court order permitting him to do so.

3. The Court previously ordered the disclosure of similar information in the Stipulated Preliminary Injunction entered on October 29, 2008, which related in part to information regarding provisional ballots cast other than those at issue here.

4. Although formal discovery in this matter has now closed, a limited and informal exchange of information continues. Plaintiffs’ counsel has represented that entry of an order requiring the Secretary to disclose whether certain provisional ballots were counted and to provide documentation regarding such ballots would substantially facilitate the completion of this process.

5. The Secretary does not oppose Plaintiffs’ motion.

6. Based on the above facts, the Court hereby orders the Secretary to disclose information and documents responsive to Plaintiffs Second Set of Interrogatories and Second Set of Document Requests concerning provisional ballots cast in the 2008 primary and general elections cast by members of Plaintiff organizations and individuals registered to vote in voter registration drives conducted under the auspices of by Plaintiffs Mi Familia Vota Educational Fund and Service Employees International Union.

7. Any such disclosures are subject to the terms of the Stipulated Protective Order, entered on November 5, 2008, and the Second Stipulated Protective Order, entered on May 22, 2009.

Plaintiffs' motion is hereby GRANTED.

IT IS SO ORDERED this _____ day of _____, 2009.

JOHN L. KANE
UNITED STATES DISTRICT JUDGE