

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Senator Jay Costa, Senator Anthony H. Williams,  
Senator Vincent J. Hughes, Senator Steven J.  
Santarsiero, and Senate Democratic Caucus,  
Petitioners

v.

Senator Jacob Corman III, Senate Pro Tempore,  
Senator Cris Dush, and Senate Secretary-  
Parliamentarian Megan Martin,  
Respondents

Commonwealth of Pennsylvania, Pennsylvania  
Department of State, and Veronica  
Degraffenreid, Acting Secretary of the  
Commonwealth of Pennsylvania,  
Petitioners

v.

Senator Cris Dush, Senator Jake Corman, and the  
Pennsylvania State Senate Intergovernmental  
Operations Committee,  
Respondents

Arthur Haywood, Julie Haywood  
Petitioners

v.

Veronica Degraffenreid, Acting Secretary of  
State Commonwealth of Pennsylvania  
Respondents

**CASES CONSOLIDATED**

No. 310 MD 2021

No. 322 MD 2021

No. 323 MD 2021

**RESPONSE TO CROSS-APPLICATION FOR SUMMARY RELIEF AND  
REPLY IN SUPPORT OF COMMONWEALTH PETITIONERS'  
APPLICATION FOR SUMMARY RELIEF**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iv
INTRODUCTION .....	1
STATEMENT OF FACTS .....	3
I.    The Committee is not Conducting a Legitimate Investigation .....	3
A.    The Committee’s Investigation is Part of a Nationwide Effort to Cast Doubt on the 2020 Election.....	3
B.    The Committee’s Explanations Have Been Inconsistent and Implausible .....	6
C.    The Committee Has No Plan for Securing Pennsylvanians’ Private Information .....	10
II.   The Department Allows Limited, Secure Access to Voter Information When Needed to Perform Essential Duties .....	11
A.    Upgrading the SURE System.....	12
B.    Maintaining the SURE System .....	13
C.    Maintaining Voter Rolls.....	14
D.    Prior Litigation .....	17
ARGUMENT .....	20
I.    The Facts are not in Dispute .....	20
II.   The Subpoena Does Not Serve a Legitimate Legislative Purpose .....	21
A.    This Court has Authority to Consider the Committee’s Purpose .....	22
B.    The Subpoena’s Supposed Purpose is Pretextual .....	25
C.    The Requested Information is not Relevant to the Committee’s Stated Purpose .....	28
III.  The Subpoena Was Issued Without Authority .....	32
IV.  The Subpoena Violates Pennsylvanians’ Constitutional Right to Privacy .....	36

A.	Commonwealth Petitioners’ Application for Summary Relief is Ripe .....	37
B.	The Subpoena Violates Article I, Section I of the Pennsylvania Constitution.....	38
C.	The Subpoena Violates Article I, Section 8 of the Pennsylvania Constitution.....	54
V.	The Subpoena Interferes with Fair Elections and the Free Exercise of the Right to Vote .....	57
A.	The Subpoena Violates Article I, Section 5 of the Pennsylvania Constitution.....	57
B.	The Subpoena Violates the U.S. Constitution’s Protections of the Right to Vote.....	62
VI.	The Subpoena Demands Security Reports about SURE System Vulnerabilities Protected from Disclosure .....	64
VII.	The Subpoena Demands Privileged Information .....	66
	CONCLUSION .....	69

## TABLE OF AUTHORITIES

### Cases

<i>Allen v. Pennsylvania Bd. of Prob. &amp; Parole</i> , 207 A.3d 981 (Pa. Commw. Ct. 2019).....	20
<i>Annenberg v. Roberts</i> , 2 A.2d 612 (1938) .....	33, 56
<i>Applewhite v. Commonwealth</i> , No. 330 MD 2012, 2014 WL 184988 (Pa. Commw. Ct. 2014) .....	17, 18
<i>Ario v. Deloitte &amp; Touche LLP</i> , 934 A.2d 1290 (Pa. Commw. Ct. 2007) .....	66
<i>Banfield v. Cortes</i> , 110 A.3d 155 (Pa. 2015).....	60
<i>Bd. of Educ. of Westside Cmty. Sch. v. Mergens By &amp; Through Mergens</i> , 496 U.S. 226 (1990).....	24
<i>Blackwell v. City of Philadelphia</i> , 684 A.2d 1068 (Pa. 1996).....	34
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	62, 63
<i>Camiel v. Select Comm. on State Contract Practices of House of Representatives</i> , 324 A.2d 862 (Pa. Commw. Ct. 1974).....	22
<i>City of Harrisburg v. Prince</i> , 219 A.3d 602, (Pa. 2019) .....	40, 45
<i>Com. Ex rel. Carcaci v. Brandamore</i> , 327 A.2d 1 (Pa. 1974).....	22, 43
<i>Commonwealth ex rel. Fox v. Chace</i> , 168 A.2d 569 (Pa. 1961) .....	36
<i>Commonwealth v. Alexander</i> , 243 A.3d 177 (Pa. 2020) .....	54
<i>Commonwealth v. Baker</i> , 78 A.3d 1044 (Pa. 2013) .....	61
<i>Commonwealth v. DeJohn</i> , 403 A.2d 1283 (Pa. 1979) .....	55
<i>Commonwealth v. Duncan</i> , 817 A.2d 455 (Pa. 2003) .....	55
<i>Commonwealth v. Edmunds</i> , 586 A.2d 887 (Pa. 1991).....	54
<i>Commonwealth v. Melilli</i> , 555 A.2d 1254 (Pa. 1989) .....	56

<i>Commonwealth v. Nixon</i> , 761 A.2d 1151 (Pa. 2000) .....	49
<i>Commonwealth v. Rekasie</i> , 778 A.2d 624 (Pa. 2001) .....	55
<i>Commonwealth v. Vartan</i> , 733 A.2d 1258 (Pa. 1999).....	66, 67
<i>County of Santa Clara v. Superior Court</i> , 89 Cal. Rptr. 3d 374 (Ca. Ct. App. 2009).....	65
<i>Daly v. Hemphill</i> , 191 A.2d 835 (Pa. 1963) .....	61
<i>Denoncourt v. Com., State Ethics Comm’n</i> , 470 A.2d 945 (Pa. 1983) .....	49, 53
<i>Detroit Int’l Bridge Co. v. Fed. Highway Admin.</i> , 666 F. Supp. 2d 740 (E.D. Mich. 2009) .....	66
<i>Dittman v. UPMC</i> , 196 A.3d 1036 (Pa. 2018).....	50
<i>Easton Area School District v. Miller</i> , 232 A.3d 716 (Pa. 2020).....	40, 45
<i>Governor’s Off. of Admin. v. Campbell</i> , 202 A.3d 890 (Pa. Commw. Ct. 2019) .....	45
<i>Greidinger v. Davis</i> , 988 F.2d 1344 (4th Cir. 1993) .....	62, 63
<i>In re “B”</i> , 394 A.2d 419 (Pa. 1978) .....	44
<i>In re Fortieth Statewide Investigating Grand Jury</i> , 220 A.3d 558 (Pa. 2019) .....	42, 45, 51
<i>In re Grand Jury</i> , 821 F.2d 946 (3d Cir. 1987) .....	69
<i>In re June 1979 Allegheny Cty. Investigating Grand Jury</i> , 415 A.2d 73 (Pa. 1980).....	44, 51
<i>In re Sealed Case</i> , 121 F.3d 729 (D.C. Cir. 1997).....	67
<i>In re Semeraro</i> , 515 A.2d 880 (Pa. 1986).....	28
<i>In re Subpoena on Jud. Inquiry &amp; Rev. Bd.</i> , 517 A.2d 949 (Pa. 1986) .....	41
<i>In re Thirty-Third Statewide Investigating Grand Jury</i> , 86 A.3d 204 (Pa. 2014).....	68

<i>Karkalas v. Dep't of State, Bureau of Pro. &amp; Occupational Affs., State Bd. of Med.</i> , 71 A.3d 395 (Pa. Commw. Ct. 2013), .....	56
<i>KC Equities v. Dep't of Pub. Welfare</i> , 95 A.3d 918 (Pa. Commw. Ct. 2014) .....	66, 67
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972).....	62
<i>LaValle v. Off. of Gen. Couns. of Com.</i> , 769 A.2d 449 (Pa. 2001) .....	67
<i>League of Women Voters v. Commonwealth</i> , 177 A.3d 1010 (Pa. Commw. Ct. 2017).....	66
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018) ...	57, 58, 59, 60
<i>Lunderstadt v. Pa. House of Representatives Select Comm.</i> , 519 A.2d 408 (Pa. 1986).....	32, 33, 56, 61
<i>McGinley v. Scott</i> , 164 A.2d 424 (Pa. 1960) .....	33
<i>Moore v. Kobach</i> , 359 F. Supp. 3d 1029 (D. Kan. 2019).....	51
<i>Nw. Youth Servs., Inc. v. Com., Dep't of Pub. Welfare</i> , 1 A.3d 988 (Pa. Commw. Ct. 2010) .....	21
<i>Oughton v. Black</i> , 61 A. 346 (Pa. 1905) .....	59
<i>Pennsylvania Prot. &amp; Advoc., Inc. v. Dep't of Educ.</i> , 609 A.2d 909 (Pa. Commw. Ct. 1992) .....	21
<i>Pennsylvania State Educ. Ass'n v. Commonwealth Dep't of Cmty. &amp; Econ. Dev.</i> , 148 A.3d 142 (Pa. 2016) .....	passim
<i>Project Vote/Voting For Am., Inc. v. Long</i> , 752 F. Supp. 2d 697 (E.D. Va. 2010).....	62
<i>Pub. Int. Legal Found. v. Boockvar</i> , 431 F. Supp. 3d 553 (M.D. Pa. 2019) .....	43
<i>Pub. Int. Legal Found., Inc. v. N. Carolina State Bd. of Elections</i> , 996 F.3d 257 (4th Cir. 2021) .....	43

<i>Reese v. Pennsylvanians for Union Reform</i> , 173 A.3d 1143 (Pa. 2017) ...	40, 43, 45, 54
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	60
<i>Sharpless v. Mayor of Philadelphia</i> , 21 Pa. 147 (1853).....	61
<i>Stilp v. Commonwealth</i> , 905 A.2d 918 (2006).....	61
<i>Thornburgh v. Lewis</i> , 470 A.2d 952 (Pa. 1983) .....	28
<i>Times Pub. Co. v. Michel</i> , 633 A.2d 1233 (Pa. Commw. Ct. 1993).....	55
<i>Tombs v. Brick Twp. Mun. Utilities Auth.</i> , No. A-3837-05T5, 2006 WL 3511459 (N.J. Super. Ct. App. Div. Dec. 7, 2006) .....	65
<i>True the Vote v. Hosemann</i> , 43 F. Supp. 3d 693 (S.D. Miss 2014).....	62
<i>Trump v. Mazars USA, LLP</i> , 140 S. Ct. 2019 (2020).....	23, 24, 25, 66
<i>U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press</i> , 489 U.S. 749 (1989).....	50
<i>Watkins v. United States</i> , 354 U.S. 178 (1957).....	23, 63
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914) .....	59
<i>Yellin v. United States</i> , 374 U.S. 109 (1963) .....	33
<b>Constitutional Provisions</b>	
Pa. Const. art I, § 1.....	<i>passim</i>
Pa. Const. art I, § 5.....	<i>passim</i>
Pa. Const. art I, § 8.....	<i>passim</i>
Pa. Const. art. I, § 25.....	59
Pa. Const. art. VII.....	61
<b>Statutes and Legislation</b>	
1 Pa. Cons. Stat. § 1922 .....	61

18 U.S.C. § 6.....	43
2019 Pa. Legis. Serv. Act 2019-77 .....	28, 29
2020 Pa. Legis. Serv. Act 2020-12 .....	29
25 Pa. Cons. Stat. § 1108 .....	13, 47, 48
25 Pa. Cons. Stat. § 1201(3) .....	13, 47
25 Pa. Cons. Stat. § 1203(a).....	47
25 Pa. Cons. Stat. § 1203(h) .....	47
25 Pa. Cons. Stat. § 1203(i) .....	47
25 Pa. Cons. Stat. § 1203(k) .....	47
25 Pa. Cons. Stat. § 1207 .....	50
25 Pa. Cons. Stat. § 1222 .....	12, 47, 48
25 Pa. Cons. Stat. § 1222(f)(3) .....	13
25 Pa. Cons. Stat. § 1326 .....	29
25 Pa. Stat. § 2648 .....	50
25 Pa. Stat. § 3071 .....	29, 31
5 U.S.C. § 551 .....	43
52 U.S.C. § 20507 .....	43
6 U.S.C. § 673(a)(1).....	65
6 U.S.C. § 674.....	65
62 Pa. Cons. Stat. § 102 .....	38
62 Pa. Cons. Stat. § 103 .....	38
62 Pa. Cons. Stat. § 3101 .....	38
62 Pa. Cons. Stat. § 3102 .....	38



65 Pa. Stat. § 67.102 .....	41
71 Pa. Stat. § 182 .....	41
71 Pa. Stat. § 240 .....	27, 41
71 Pa. Stat. § 272 .....	41, 43, 67
71 Pa. Stat. § 512 .....	41
71 Pa. Stat. § 801 .....	43, 67

**Regulations**

1 Pa. Code § 1.4 .....	43
4 Pa. Code § 183.14(c)(4) .....	50
4 Pa. Code § 183.14(c)(5)(iii) .....	50
6 C.F.R. § 29.5 .....	65, 66
6 C.F.R. § 29.6(e)(1) .....	65

**Other Authorities**

<i>Mason’s Manual of Legislative Procedure</i> .....	36
Pa. R. Civ. P. 1035.1 .....	20
Pa. R. Civ. P. 1035.2 .....	20
Pa. R. Civ. P. 1035.3 .....	21
Pa. S. Rule 14 .....	34, 35
Pa. S. Rule 14(d)(3) .....	35
Pa.R.A.P. 1532 .....	20
Senate Resolution 3, Session of 2021 (January 5, 2021) .....	36

## INTRODUCTION

The Committee pretends that the genesis of this Subpoena is a September 9, 2021, hearing about election guidance. Like the many other justifications the Committee has given for the Subpoena, that is implausible. This Court should not heed the Committee's call for such willful blindness.

Senators Cris Dush and Jake Corman, like other Committee members, have been engaged in an unyielding effort to use baseless accusations to rattle the electorate's faith in democratic institutions. They, like other elected officials throughout the country, have done so under intense pressure from former President Trump, including pressure to perform the very "investigation" now underway. This undisputed context is directly relevant to identifying the Subpoena's actual purpose: to fuel mistrust of Pennsylvania's 2020 election results. Yet the Committee's response to Commonwealth Petitioners' application for summary relief is completely silent about this yearlong history.

Lacking a proper legislative purpose for their "investigation," Senators Dush and Corman have predictably been unable to tell a consistent or believable story about what they are trying to accomplish. The Committee's latest articulation—that it is conducting an investigation to consider legislative changes to either Act 77 of 2019 or Act 12 of 2020—is as doubtful as those that preceded it. The Committee's actions to date and the materials demanded in the Subpoena have

little to do with the changes brought about by Act 77 and Act 12. Thus, even taking this explanation at face value, the Subpoena has no rational relationship to what the Committee claims to be doing. In any event, the Committee does not have authority to investigate election matters.

The Subpoena also invades fundamental privacy rights because it seeks voters' personal information without adequate justification. Those privacy rights cannot be brushed aside merely because the party intending access voters' personal information is a government entity. Rather, privacy concerns are especially acute here because the Committee has demanded the personal information of every Pennsylvania voter and intends to hand it over to a third party, even though the Committee has not said who that will be, how they will be chosen, or what security protocols might be followed. While the Committee believes the Court should be indifferent to who will receive nine million Pennsylvanians' sensitive information and what they will do with it, there is no warrant to be so cavalier about the risks posed. Because those risks also will discourage participation in future elections, the Subpoena violates constitutional protections of the right to vote freely.

For these reasons, and others, Commonwealth Petitioners' application for summary relief should be granted, the Committee's cross-application for summary relief should be denied, and the Subpoena should be quashed.

## STATEMENT OF FACTS

### I. The Committee is not Conducting a Legitimate Investigation

#### A. The Committee's Investigation is Part of a Nationwide Effort to Cast Doubt on the 2020 Election

The Committee's "investigation" is not occurring in a vacuum. Pa. Br. at 7-19.<sup>1</sup> Whether called an "investigation" or an "audit," officials in several states have engaged in—or tried to initiate—conduct much like the Committee's. They have largely done so following overt pressure from former President Trump to "investigate" the 2020 election. The similarity of the resulting "investigations" in substance, timing, and responsiveness to former President Trump's disinformation campaign demonstrates that none is in fact reacting to any genuine localized concerns.

The connection between the Committee's "investigation" and the Arizona State Senate's "audit" of Maricopa County has been covered. Pa. Br. at 14-16. But the effort to use investigations to erode confidence in the 2020 elections is broader.

In Wisconsin, after former President Trump accused the Assembly Speaker of "working hard to cover up election corruption," the Speaker ordered an investigation of the 2020 presidential results. Shawn Johnson, *Following Warning By Trump, Vos Announces Former Justice Will Lead Assembly GOP Election*

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<sup>1</sup> "Pa. Br." refers to the memorandum in support of Commonwealth Petitioners' application for summary relief. "Comm. Br." refers to the Committee's brief in support of its cross-application for summary relief.

*Probe*, WPR (June 26, 2021) (Pa. Ex. N-1). That investigation is being led by someone who claimed in November 2020 that “our elected leaders...have allowed unelected bureaucrats...to steal our vote.” Patrick Marley, *Michael Gableman said bureaucrats ‘stole our votes’ before he was put in charge of reviewing 2020 election*, Milwaukee J. Sentinel (Aug. 9, 2021) (Pa. Ex. N-2). Individuals who aided the Maricopa County “audit”—including one who has falsely claimed Massachusetts destroyed over one million ballots in a primary race that he lost—are key players in the Wisconsin investigation. Jack Healy, et al., *Republican Review of Arizona Vote Fails to Show Stolen Election*, N.Y. Times (Sept. 24, 2021) (Pa. Ex. F-30); Elise Vielbeck, *Calls intensify to end Wisconsin’s election review amid blunders by ex-judge in charge*, Wash. Post (Oct. 14, 2021) (Pa. Ex. N-3).

In Texas, the Secretary of State announced several weeks ago a “Full Forensic Audit of 2020 General Election in Four Texas Counties.” *Texas Secretary of State’s Office Announces Full Forensic Audit of 2020 General Election in Four Texas Counties* (Sept. 23, 2021) (Pa. Ex. N-4). He did so hours after former President Trump published a letter saying “Texans want an election audit!” because they “have big questions about the November 2020 election,” and criticizing the state legislature for considering bills to audit elections that would not apply to the 2020 election. Ltr. from Pres. Trump to Gov. Abbott (Sept. 23, 2021) (Pa. Ex. N-5).

Throughout the country, including in Michigan, Oklahoma, Utah, and Virginia, elected officials are similarly pushing for “audits” of the 2020 election results. Samuel Robinson, *3 Michigan Republicans join national call for ‘forensic audit’ of 2020 election*, MLive (Oct. 6, 2021) (Pa. Ex. N-6); Carmen Forman, *Oklahoma elections official dismisses GOP lawmaker’s request for election audit*, The Oklahoman (July 14, 2021) (Pa. Ex. N-7); Katie McKellar, *Utah lawmaker fans flames, calls for audit of 2020 election*, Desert News (Oct. 20, 2021) (Pa. Ex. N-8); Brandon Jarvis, *Amanda Chase plans to introduce legislation limiting the new voting methods enacted by Democrats*, Virginia Scope (Nov. 3, 2021) (Pa. Ex. N-9).

Former President Trump continues to apply pressure to “audit” Pennsylvania’s 2020 Presidential election. Pa. Br. at 7-9, 16, 31. In a letter to The Wall Street Journal, he recently repeated his call for a “full forensic audit” of Pennsylvania’s 2020 election, justifying that demand with disinformation and conspiracy theories. *President Trump Responds on Pennsylvania’s 2020 Election*, Wall St. J. (Oct. 27, 2021) (Pa. Ex. N-10).<sup>2</sup>

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<sup>2</sup> The Wall Street Journal’s Editorial Board called the letter’s assertions “bananas,” and particularly noted that “[s]ome of Mr. Trump’s figures appear to come from amateur spelunking into voter data. Caveat emptor when this is done by motivated partisans unfamiliar with election systems.” Ed. Bd., *The Facts on Trump’s Fraud Letter*, Wall St. J. (Oct. 29, 2021) (Pa. Ex. N-11).

The Subpoena issued by the Committee is part of this push to discredit the legitimacy of the 2020 election. Paralleling what happened in other states, the Committee's investigation took its current shape after the former President politically threatened Senator Corman. *Statement by Donald J. Trump* (June 14, 2021) (Pa. Ex. F-54). And as elsewhere, individuals who have regularly lied about the 2020 election are leading the push to review the 2020 election. Pa. Br. at 9-14.

**B. The Committee's Explanations Have Been Inconsistent and Implausible**

Both the Committee's ambivalence for even minimal investigative diligence, and its difficulty coming up with a consistent explanation for what it is investigating, confirm this "investigation" is a sham.

The Committee's "investigation" has not even adhered to its own skeletal plan. The Committee previously launched a website for its "integrity investigation," which identified its first two steps as (1) "gathering evidence" by "inviting Pennsylvanians to share election fraud testimony" and "gathering information at public hearing," and then (2) issuing a subpoena for election materials. *PA Election Investigation - Restoring Faith in Our Elections* (Pa. Ex. N-12) (cleaned up). But the Committee issued the Subpoena without having gathered any information of fraud, at public hearings or otherwise. The Committee did not even wait until the deadline it set for the public submissions of evidence to issue the Subpoena. *Senator Dush Urges Public to Submit Sworn Testimony in Election*

*Investigation by October 1* (Sept. 23, 2021) (Pa. Ex. N-13). And the Committee has done nothing to advance its “investigation” since issuing the Subpoena.

The hearing held on September 9, 2021, which concerned the Department’s election guidance, was the Committee’s sole election-related hearing before voting on the Subpoena. The day after, Senator Corman released a statement asserting that the hearing necessitated a “vote on issuing subpoenas for information and testimony from the Department of State as well as the SURE system” and that the Committee “take other steps necessary to get access to ballots and other voting materials to begin a full forensic audit of the 2020 General Election.” *Corman Calls for Subpoenas in Election Investigation Next Week* (Sept. 10, 2021) (Pa. Ex. N-14). Nothing in the September 9 hearing plausibly justified the Committee’s rush to issue the Subpoena. There was no evidence presented at the hearing about any voting improprieties. Rather, the only witness testified that a company he authorized to “investigate” the 2020 general election did not identify any fraud. Tr. (Sept. 9, 2021) at 63:3-16, 66:9-13 (Pa. Ex. B).

Throughout, the Committee has struggled to settle on a consistent justification for its actions. The Committee’s only investigative hearing to date focused on the Department’s election guidance. Senator Dush stated on September 9 that the investigation was “regarding the Pennsylvania Department of State’s last minute guidance before the 2020 general election.” *Id.* at 2:9-11. The testimony



elicited from the lone witness mostly concerned the “numerous guidance and other directives from the Secretary of the Commonwealth.” *Id.* at 31:14-18. There was no discussion of voter registration rolls or the SURE system.

Other times, the Committee has stated it is investigating the impact of Act 77. Opening the September 15 committee meeting, Senator Dush said the Committee is investigating “the 2020 general election and 2021 primary election and how the election code is working after the sweeping changes of Act 77 of 2020.” Tr. (Sept. 15, 2021) at 4:14-16 (Pa. Ex. C).

Later, Senator Dush gave a different justification: the Committee needs to review the 2020 general election to verify the identity and eligibility of Pennsylvanians who voted. *Id.* at 17:6-8. So the investigation was “regarding the validity of people who have voted, whether or not they exist.” *Id.* at 17:16-17. Senator Dush reiterated this rationale in an opinion piece after this lawsuit was filed, saying the investigation would focus on voter rolls and uncovering voter fraud, including investigating “duplicate voters, dead voters, and/or illegal voters.” Cris Dush, *Your View by Republican leading Pennsylvania election audit: A meteor strike is more likely than a breach of your election info*, Morning Call (Oct. 13, 2021) (Pa. Ex. M-1). In press releases, he has similarly focused on supposedly “poorly kept” voter rolls and has urged the public to submit sworn testimony regarding “firsthand” accounts of nebulously defined “irregularities” or “election

improprieties.” *Dush Issues Statement on Inclusion of Personal Information in Subpoena*, The Courier Express (Sept. 17, 2021) (Pa. Ex. N-15); *Dush Urges Public to Submit Sworn Testimony* (Pa. Ex. N-13).

Also after this case was filed, Senator Dush issued a statement referencing a 2019 Auditor General report to say that “[t]he purpose of our review is to find the flaws in the [SURE] system and identify how to address them.” *Dush Responds to Attorney General’s Lawsuit, Arizona Audit Report* (Sept. 24, 2021) (Pa. Ex. F-52). Days later, Senator Dush reiterated that the Committee is “digging into the stuff that was brought out during Gene DePasquale’s investigation...when he was the Auditor General. And the stuff that was brought out during the two hearings that we had before.” Transcript of Interview with Sen. Cris Dush (Sept. 29, 2021) (Pa. Ex. F-53).

The Committee has described its effort as an “integrity investigation” into reports of election fraud; “a full forensic audit of the 2020 General Election”; a review of the implementation of Acts 77 and 12 to assess the need for further legislation; an investigation into “the validity of people who voted, whether or not they exist”; and a review of the SURE system focusing on issues identified in the 2019 Auditor General’s report. And, to date, the Committee has held only one investigative hearing, featuring testimony from one witness, who addressed yet

another topic. These inconsistent justifications confirm that the Committee is not actually performing the legitimate investigation it claims.

**C. The Committee Has No Plan for Securing Pennsylvanians' Private Information**

The Subpoena poses real dangers to the nine million Pennsylvanians whose personal data it demands. It does so because, among other things, the Committee has not identified any data security measures that either it or unknown third parties who receive the information will follow.

The Subpoena demands that personal information for every Pennsylvanian registered to vote be turned over to counsel for the Senate Republican Caucus, Subpoena (Pa. Ex. D), but the Committee has not identified any measures the Caucus will take to protect that information. At the September 15 meeting, Senator Corman, despite acknowledging the sensitivity of the information sought, simply asserted that “we will review sensitive information, and *then* we will secure that information.” Tr. (Sept. 15, 2021) at 55:2-4 (emphasis added). He also claimed that the Caucus would “make sure that that information is kept secure and there is no process that it gets leaked out in and used for other purposes.” *Id.* at 54:19-21. But the only detail provided was that voters’ personal information would “be held in the legal counsel’s office” until a vendor was chosen, “just like any other legal documents.” *Id.* at 24:10-20.

The Caucus plans to turn over much of whatever it receives to a third-party vendor. Senator Dush had not picked a vendor when the Committee approved the Subpoena, and could not say how the unidentified vendor would safeguard Pennsylvanians' personal information. *Id.* at 21:1-17; 23:13-24:21. After this litigation began, he casually dismissed concerns about the risks the Subpoena poses saying that “there is a better chance of a Pennsylvanian being struck by a meteor than having their personal information compromised by our election investigation.” Dush, *Meteor strike* (Pa. Ex. M-1).

Two months later, the Committee still has not supplied any details about the vendor it will hire, or the security protocols it and the vendor will follow. The Committee admits that it “has yet to identify what security measures it will require the vendor to adhere to,” Comm. Br. at 79, but still asserts that it will “adequately address any legitimate security or confidentiality concerns,” *id.* at 33 n.15. Conclusory assurances are not enough to protect the privacy and security of Pennsylvania voters.

## **II. The Department Allows Limited, Secure Access to Voter Information When Needed to Perform Essential Duties**

Much of the Committee's brief focuses on prior instances in which the Department has shared data with others. Consistent with its statutory obligations to administer the Statewide Uniform Registry of Electors (SURE) system and oversee Pennsylvania elections, the Department must periodically permit non-departmental

access to voter information for limited purposes and under controlled circumstances that ensure the privacy and security of personal voter information. No prior access to voter information resembles the circumstances here.

**A. Upgrading the SURE System**

The SURE system is Pennsylvania's centralized voter registration and election management system. 25 Pa. Cons. Stat. § 1222; Marks Decl. ¶¶ 4-21 (Pa. Ex. G); Pa. Br. at 23-27. Because of the SURE system's age and functional limitations, the Department is transitioning to a new SURE system, called SUREVote. Marks Suppl. Decl. ¶¶ 21-23 (Pa. Ex. O). After a competitive bidding process, the Department hired BPro, a software provider that offers voter registration solutions, to build SUREVote. *Id.* ¶¶ 24-25.

BPro has been building election systems for over a decade and provides statewide voter registration and election management systems in seven states. Comm. App'x 360a-362a. Building SUREVote necessarily involves accessing the contents of the SURE system. BPro acts as the Department's agent and is contractually required to keep confidential any identifying information or other data shared with it in the process of building and implementing the SUREVote system. Marks Suppl. Decl. ¶ 26. BPro must comply with all Commonwealth Information Technology Policies (ITPs) issued by the Governor's Office of Administration, including standards and policies concerning data privacy,

confidentiality, and security. *Id.* ¶¶ 9-18, 27. BPro must also conduct and complete initial and annual background checks on all employees or subcontractors who will have access to Commonwealth IT facilities, and must protect the confidentiality all data provided by, or collected, processed, or created on behalf of the Commonwealth. *Id.* ¶¶ 28-29. The contract strictly limits the use, copying, and disclosure of confidential information, and sets terms for the return of confidential information upon termination of the contract. *Id.* ¶ 29. Finally, the contract requires BPro to comply with “all applicable data protection, data security, data privacy and data breach notification laws,” with specific requirements elaborated. *Id.* ¶ 30.

#### **B. Maintaining the SURE System**

To fulfill its statutory obligations, 25 Pa. Cons. Stat. §§ 1108, 1201(3), 1222(f)(3), the Department contracts with an information technology company to support and maintain the current SURE system, Marks Suppl. Decl. ¶¶ 33-36. Maintaining the SURE system necessarily requires access to components that contain sensitive voter information. As with BPro, the contractor acts as an agent of the Department and can only access sensitive information in the SURE system as necessary to perform maintenance and support functions. *Id.* ¶ 33. The contractor must comply with all ITPs issued by the Governor’s Office of Administration and with all applicable state and federal data protection, data security, data privacy, and data breach notification laws. *Id.* ¶¶ 9-18, 34. To help

ensure that all confidential voter information accessed by the contractor remains under the Department's control, the Department requires the contractor to perform its work on Department-provided hardware, software, and networking systems; the contractor cannot store data from the SURE system outside of Department property. *Id.* ¶ 34. The Department requires the contractor's employees to undergo background checks prior to being permitted to access sensitive information in the SURE system. *Id.* The Department does not allow the contractor to copy, use, or disclose, in whole or in part, personal voter information except when essential for authorized activities and with Department consent. *Id.*

The Department contracted with Diverse Technologies Company from 2014 to 2015 to provide these maintenance and support services for the SURE system. *Id.* ¶ 35. The Department subsequently contracted with Acclaim Systems to provide these services. *Id.*

### **C. Maintaining Voter Rolls**

Pennsylvania is a member of the Electronic Registration Information Center (ERIC), an organization comprised of 30 states and the District of Columbia. ERIC's mission is to help members improve the accuracy of their voter rolls and register eligible citizens to vote. Written Testimony of Shane Hamlin, Executive Director, ERIC to the Pennsylvania House State Government Committee at 1 (March 4, 2021) (Pa. Ex. N-16); Marks Suppl. Decl. ¶¶ 37, 39. Using a strict set of

security protocols to ensure the privacy and security of voter information, the Department provides ERIC with voter registration records and state licensing and identification records. Hamlin Testimony at 1; Marks Suppl. Decl. ¶¶ 37-42. The Department does not send ERIC a plain-text version of Social Security numbers (SSNs), driver’s license numbers, or dates of birth. Hamlin Testimony at 3; Marks Suppl. Decl. ¶¶ 41-42. Instead, the Department applies a cryptographic one-way hash to these data *before* sending them to ERIC. Hamlin Testimony at 3; Marks Suppl. Decl. ¶ 42.<sup>3</sup> The hash application transforms SSNs, driver’s license numbers, and dates of birth into “what appears to be a string of random characters”—for example, “cd6357efdd966de8c0cb2f876cc89ec74ce35f0968e11743987084bd42fb8944”—“making the data significantly more difficult for a potential hacker to utilize.” ERIC, *Technology and Security Overview* at 2 (Apr. 1, 2021) (Pa. Ex. N-18); Ferrante Suppl. Decl. ¶¶ 36-38 (Pa. Ex. P). The hashed data sent to ERIC cannot be decoded or reversed. Hamlin Testimony at 3.

After converting the SSNs, driver’s license numbers, and dates of birth into a meaningless series of characters that cannot be used except by ERIC for

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<sup>3</sup> A hash application is akin to taking “a pig and a grinder and ma[king] a sausage”—if given “the grinder and the sausage, could you make a pig?” See *Pew’s David Becker Discusses the Electronic Registration Information Center* at 10:02-10:27 (Pa. Ex. N-17) (content in embedded video).



matching purposes, the Department then adds “layers of industry-standard security mechanisms...including multiple rounds and types of encryption” to upload the data to Pennsylvania’s folder on ERIC’s secure server. ERIC, *Technology and Security* at 2. Only one person at the Department is credentialed to access the ERIC server. Marks Suppl. Decl. ¶ 41. Upon receiving data from member states, ERIC runs the hashed driver’s license numbers, partial SSNs, and dates of birth through a second cryptographic one-way hash to further bolster privacy and security. ERIC, *Technology and Security* at 2.

To identify out-of-date and duplicate records, ERIC uses sophisticated data matching software to compare Pennsylvania’s records to other member states’ records and to the U.S. Social Security Administration Limited Access Death Master File. Hamlin Testimony at 1. ERIC produces five reports identifying potential: (1) voters who have moved within their state; (2) voters who have moved out of state; (3) deceased voters; (4) in-state duplicate registrations; and (5) eligible, but unregistered voters. *Id.* at 2-3. The Department uses multiple rounds of encryption to download from ERIC’s secure server the reports it receives. Marks Suppl. Decl. ¶ 43. The reports do not contain driver’s license numbers, SSNs, or dates of birth. *Id.* ERIC does not share voter information with any organization or entity besides its member states. ERIC, Bylaws Art. VI § 6 (Pa. Ex. N-19). No

member state can access another's records or reports. Hamlin Testimony at 4; ERIC, *Technology and Security* at 2.

ERIC's procedures and software "are routinely reexamined during internal risk assessments and security reviews, evaluated by [ERIC's] Privacy and Technology Advisory Board, and addressed in external auditing processes." ERIC, *Technology and Security* at 1. That board consists of experts in the field of data security and encryption. Hamlin Testimony at 3. In 2020, ERIC hired an independent U.S.-based cyber security firm to audit its information security and compliance posture. ERIC, *Technology and Security* at 2-3. The audit concluded that "ERIC has strong data security practices" and identified no critical issues. *Id.* In addition, to receive the Social Security Limited Access Death Master File, the U.S. National Technical Information Service requires ERIC to receive, every three years, a third-party attestation that ERIC can safeguard the information. *Id.* at 2.

#### **D. Prior Litigation**

In 2012, individuals and organizations sued the Commonwealth because, they argued, Pennsylvania's voter ID law would disenfranchise qualified voters who did not have a photo ID from the Pennsylvania Department of Transportation (PennDOT). *Applewhite v. Commonwealth*, No. 330 MD 2012, 2014 WL 184988, at \*17-\*18 (Pa. Commw. Ct. 2014).

Respondents initially conducted a database comparison between voter records from the SURE system and photo ID records from PennDOT to determine how many registered voters lacked a photo ID. *Id.* at \*4; Comm. App’x at 858a. When trial neared, however, respondents would not perform an updated analysis, so petitioners asked that their expert have access to the same data to do so. *Applewhite*, 2014 WL 184988 at \*4, \*34; Comm. App’x at 857a, 880a.

Respondents resisted turning over sensitive voter and driver records due to privacy and security concerns. Comm. App’x at 886a-887a; Tr. (Apr. 5, 2012) at 13:25-15:7, 17:6-23, 21:10-22:1, *Applewhite v. Commonwealth*, No. 330 MD 2012 (Pa. Ex. N-20). After a discovery conference in which the Court indicated it was inclined to grant petitioners’ expert access to the data under articulated security protections, Tr. (Apr. 5, 2012) at 10:18-23, 21:14-22:1, 26:6-8, 28:2-4, 29:1-3, 33:12-15, respondents agreed to provide driver’s license numbers under the litigation and court order exceptions to state and federal law otherwise restricting disclosure, *id.* at 27:18-22; Comm. App’x at 843a-847a; *contra* Comm. Br. at 60 n.21. Respondents continued to oppose production of partial SSNs. Comm. App’x at 848a-851a. This Court ultimately ordered the production of driver’s license numbers and partial SSNs “for use in this litigation only,” but only under “additional security measures,” including that the voter data would be stored on an encrypted physical drive separate from other data on the expert’s network and

accessed only by employees who required access. *Id.* at 929a (referring to measures at available 902a-903a).

This Court modified the existing Protective Order to impose additional restrictions. *Id.* at 931a-946a. Petitioners' expert had to comply with the Commonwealth's ITPs for encrypting data at rest (available at *id.* at 940a-942a) and in transit (available at *id.* at 944a-946a). *Id.* at 932a. Any persons accessing the data had to delete the records after litigation in compliance with the Commonwealth's ITP for data cleansing (available *id.* at 934a-938a). *Id.* at 931a.

The records were subject to additional robust security procedures. *See* Ltr. from Rachel Frankel to Timothy Keating (May 1, 2013) (Pa. Ex. N-21). Only petitioners' expert had physical and electronic access to the data. Comm. App'x at 866a; Ltr. from Frankel to Keating (May 1, 2013). Respondents sent the records directly to petitioners' expert, who stored the data on a physically secure server. Ltr. from Frankel to Keating (May 1, 2013); Email from Kathleen Kotula to Timothy Keating (May 6, 2013) (Pa. Ex. N-22). Only three individuals had physical access to the server room and only two had keys to unlock the server rack. Ltr. from Frankel to Keating (May 1, 2013). Only two individuals had physical and electronic access to the unprocessed data, and only three analysts had electronic access to derivative files used to prepare the expert report. *Id.* All individuals with

physical or electronic access to the data were U.S. citizens and employees of petitioners' expert. *Id.*

At the conclusion of litigation, respondents followed up with the petitioners to ensure that the data was deleted, consistent with Pennsylvania's data cleansing policies. Ltr. from Todd Hutchinson to David Gersch (May 30, 2014) (Pa. Ex. N-23); Email from Todd Hutchinson to Gregory Dunlap, et al. (July 28, 2014) (Pa. Ex. N-24).

## **ARGUMENT**

### **I. The Facts are not in Dispute**

For summary relief, “the record is the same as that for a summary judgment motion” and thus includes “the pleadings and other documents of record, such as exhibits.” *Allen v. Pennsylvania Bd. of Prob. & Parole*, 207 A.3d 981, 984 n.4 (Pa. Commw. Ct. 2019); *see also* Pa. R. Civ. P. 1035.1 (defining “record” for purposes of summary judgment). And because summary relief is available “[a]t any time after the filing of a petition for review,” Pa.R.A.P. 1532(b), the Court can resolve the applications on the existing record.

While the Committee states Commonwealth Petitioners are not entitled to summary relief because there are disputed facts, Comm. Br. at 33-34, it does not identify a single factual dispute *in the record*. Courts assess whether material facts are in dispute based on the evidentiary record. Pa. R. Civ. P. 1035.2 official note

(summary relief is based on the evidentiary record); Pa. R. Civ. P. 1035.3 (party opposing summary relief must identify factual disputes “arising from evidence in the record”); *Nw. Youth Servs., Inc. v. Com., Dep’t of Pub. Welfare*, 1 A.3d 988, 990 (Pa. Commw. Ct. 2010) (explaining that factual conclusions for summary relief are made based on the record); *Pennsylvania Prot. & Advoc., Inc. v. Dep’t of Educ.*, 609 A.2d 909, 911 (Pa. Commw. Ct. 1992) (denying summary relief based on contradictory affidavits). A litigant cannot defeat summary relief merely by declaring facts “disputed”; it must present actual evidence. If the Committee had evidence establishing any material factual dispute, it was obligated to present that evidence in its already-filed response. Pa. R. Civ. P. 1035.3(a), (b).

## **II. The Subpoena Does Not Serve a Legitimate Legislative Purpose**

The Committee’s “investigation” is part of a long-running effort to undermine public confidence in the results of the 2020 presidential election. That effort has encompassed former President Trump’s baseless claims that the Pennsylvania election was “rigged,” attempts by Committee members and others to overturn the will of the Pennsylvania electorate, and efforts in several states to “audit” the 2020 election results. Pa. Br. at 7-23, 27-33; *supra* at 3-7.

The Committee cannot and does not deny these facts. Instead, the Committee tries to paper over the actual purpose of its investigation with broad and

implausible justifications, then asks the Court to bury its head in the sand and take those various purposes as true, despite all the evidence to the contrary.

The Court is not so hobbled. The judicial branch has both the authority and the duty to consider the propriety of the Subpoena, including whether it furthers a proper legislative purpose. The evidence shows that it does not and the Committee's fig-leaf justification for the Subpoena is mere pretext.

**A. This Court has Authority to Consider the Committee's Purpose**

The Senate's investigative power is subject to important limits, including that any action be taken in furtherance of a proper legislative purpose. *Com. Ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 3 (Pa. 1974); *Camiel v. Select Comm. on State Contract Practices of House of Representatives*, 324 A.2d 862, 869 (Pa. Commw. Ct. 1974).

The Committee tries to escape the illegitimacy of its purpose here by insisting that once it claims that it has a proper legislative purpose, that claim may not be questioned. Comm. Br. at 81-83. No precedent supports that assertion of unreviewable power. In the very cases that the Committee insists establish its investigative autonomy, the U.S. Supreme Court performed the exact analysis the Committee maintains is forbidden: an evaluation of a legislative investigation's actual purpose.

In *Watkins v. United States*, an individual challenged a contempt conviction on the basis that documents he had refused to provide a House committee were not related to the committee’s investigation. 354 U.S. 178, 208 (1957). The Court recognized that an investigation that served a legitimate purpose could not be thwarted because of a legislator’s motives, *id.* at 200, but it did independently assess the actual purpose of the House committee’s investigation. The Court identified several sources relevant to that inquiry, including the committee’s “authorizing resolution, the remarks of the chairman or members of the committee, [and] the nature of the proceedings themselves,” *Watkins*, 354 U.S. at 209, and then conducted a robust inquiry into the committee’s legislative purpose before dismissing the indictment, *id.* at 209-16; *see also Barenblatt v. United States*, 360 U.S. 109, 130-33 (1959) (performing independent analysis of a House investigation’s legislative purpose based on the complete record of the relevant hearing). Critically, the Court did not acquiesce to committee members’ statements about their purpose.

In *Trump v. Mazars USA, LLP*, the U.S. Supreme Court explained that “courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose.” 140 S. Ct. 2019, 2036 (2020). “Detailed and substantial” evidence of legislative purpose is preferable to “vague” or “loosely worded” descriptions of legislative purpose. *Id.*



Moreover, the Court directed that a subpoena's purpose cannot be analyzed shorn of its context. *Id.* at 1034 (explaining that Court would “have to be blind” not to appreciate political significance of inter-branch subpoena).

More fundamentally, the Committee's insistence that legislators' “motives” cannot be questioned conflates distinct concepts. As *Watkins*, *Barenblatt*, and *Mazars* all make clear, the un-reviewability of individual legislators' “motives” is not an impediment to an independent assessment of the “purpose” of legislative action. The subjective motivation for an action is distinct from the objective purpose of that action. That distinction is familiar in other areas of law. For example, one element of analyzing possible violations of the Establishment Clause is the purpose of the challenged act. An act can have an objectively secular purpose—such as preventing discrimination against religious speech—even if certain legislators had subjective religious motivations—such as a belief that religious speech is valuable. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 249 (1990) (plurality). A legislator's religious motivation does not doom an act with a secular purpose because “what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.” *Id.* (emphasis in original)

Requiring that courts ignore when legislators contradict themselves by publicly stating one or more different purposes—as here—also would render

restrictions imposed on legislative investigations meaningless. For example, “Congress may not issue a subpoena for the purpose of law enforcement, because those powers are assigned under our Constitution to the Executive and the Judiciary.” *Mazars*, 140 S. Ct. at 2032. But that limitation is superficial if the inquiry ends as soon as a legislator proclaims a law enforcement subpoena advances some legislative purpose.

Accordingly, precedent directs that this Court must assess the Committee’s purpose based not only on its members’ statements, but on the context in which the Subpoena arises, the course of the investigation, and Committee members’ prior actions and statements.

**B. The Subpoena’s Supposed Purpose is Pretextual**

The evidence here establishes that the Committee’s rationales for the Subpoena are pretextual. The Subpoena’s actual purpose is illegitimate.

Committee members’ history of baselessly questioning the integrity of the 2020 election, Pa. Br. at 7-16, is strong evidence that the rationale the Committee now offers to this Court is pretextual. That evidence is confirmed by both the nationwide push by state officials to conduct similar “investigations,” *supra* at 3-7, and the public justifications for this “investigation,” Pa. Br. at 31-32. But those are only part of the evidence that discredits the Committee’s cover story.

The Committee has offered multiple, inconsistent rationales for the Subpoena before, during, and after the time it was issued. *Supra* at 7-10. These shifting justifications give reason to doubt all the varying explanations the Committee has given. Pa. Br. at 28-30 & n.2. The Committee does not acknowledge its inconsistencies, let alone try to explain them.

The Committee's theatrics around the Subpoena also betray its supposed purpose. Certain information responsive to the Subpoena is publicly available, either through the Department's website or through the Right-to-Know law (RTKL).<sup>4</sup> If the information that the Subpoena seeks was essential to the Committee's "legislative purpose," the Committee could have easily obtained much of it through less sensational alternatives. Once more, the Committee furnishes no explanation why it subpoenaed information it could have downloaded from the Department's website.

Nor does the Committee address, to the extent reviewing Acts 77 and 12 is its current justification, why it must duplicate work already performed by three properly constituted legislative bodies. Pa. Br. at 6-7; *see also* Joint State Government Commission, *Election Law in Pennsylvania* (June 2021) (Pa. Ex. N-

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<sup>4</sup> Notwithstanding the illegitimacy of the Subpoena, and without waiving any arguments, the Department has offered to produce certain materials that the Committee could have obtained through alternative, proper means. Ltr. from Michael Fischer to Matt Haverstick, et al. (Oct. 26, 2021) (Pa. Ex. N-26).

25). And it does not explain why those bodies could thoroughly review Acts 77 and 12 without personally identifying information but this Committee cannot.

The Committee tries to sidestep the illegitimacy of the Subpoena by identifying statutes it believes it could have used to obtain the same information. Comm. Br. at 28-30. But the Committee did not proceed under any statute it identifies. Issuing a Subpoena rather than proceeding under alternative options successfully elevated the Committee’s baseless conspiracy theories, sowing further doubt about election systems to dangerous effect. *Cf. Emerging Threats to Election Administration: Hearing Before the S. Comm. on Rules and Admin.*, 117th Cong. (Oct. 26, 2021) (statement of Al Schmidt, City Commissioner, Board of Elections, City of Philadelphia) (Pa. Ex. N-27) (noting that the “concerted effort before, during, and after the election to delegitimize the results of the election” being led by former President Trump resulted in “death threats” that “were intended to intimidate and coerce us into not counting every valid vote we received from legitimate voters and not certifying the election results”). This Court should not permit such abuse of process even if the Committee might have obtained certain information through quieter alternatives.

*Thornburgh v. Lewis* does not suggest an improper Subpoena is enforceable because certain information is available other under circumstances. That case concerned 71 Pa. Stat. § 240’s express requirement that the Governor “make

available” certain budgetary data. In *Thornburgh*, the Supreme Court ruled only that the statutory duty did not have an exception where requested information was accessible elsewhere. 470 A.2d 952, 957 (Pa. 1983). That interpretation of section 240’s specific requirement has no application to a legislative subpoena.

**C. The Requested Information is not Relevant to the Committee’s Stated Purpose**

Even if the Court were to take at face value the Committee’s most recent justification—that it is evaluating how Acts 77 and 12 work in practice—the Subpoena is still unenforceable because it seeks documents not reasonably relevant for that purpose. *In re Semeraro*, 515 A.2d 880, 882 (Pa. 1986) (identifying factors relevant to enforceability of a subpoena).

To evaluate whether the requested documents plausibly relate to examining Acts 77 and 12, it is important to understand what the acts did and did not do. Act 77 made numerous changes to the Pennsylvania Election Code, which is distinct from the Pennsylvania Voter Registration Act. *See* 2019 Pa. Legis. Serv. Act 2019-77. The primary changes were: prohibiting decertifying voting machines in 50% or more of counties without prior notification of the General Assembly, eliminating straight ticket voting, extending the deadline to submit absentee ballots, prohibiting the use of write-in stickers on paper ballots, changing the number of ballots that must be printed, authorizing up to \$90 million in bonds to replace voting systems, and creating a mail-in voting process. *Id.*

The General Assembly passed Act 12 to make additional changes to the Election Code, including establishing the Pennsylvania Election Law Advisory Board, modifying the rules for spoilage of ballots, changing the pre-canvassing and canvassing processes for mail-in ballots, and requiring formatting changes for ballots and envelopes. 2020 Pa. Legis. Serv. Act 2020-12.

Neither Act 77 nor Act 12 altered the qualifications or requirements to register to vote, nor did they alter any aspect of the SURE system. 2020 Pa. Legis. Serv. Act 2020-12; 2019 Pa. Legis. Serv. Act 2019-77. Between the two acts, the only changes to voter registration were to move the deadline to register from 30 days before an election to 15 days before an election, and to permit applicants to receive a same-day decision on their registration application. *Compare* 25 Pa. Stat. § 3071 *with* 25 Pa. Cons. Stat. § 1326 (repealed in 2019).

*1. Detailed Information about Every Pennsylvania Voter Is Not Relevant to an Evaluation of Acts 77 and 12*

For both the November 2020 General and the May 2021 Primary elections, the Committee has requested: “A complete list containing the name, date of birth, driver’s license number, last four digits of social security number, and address” of each individual who voted in person, by mail-in ballot, by absentee ballot, and by provisional ballot, and “a complete list of all changes to voter records” made in that time frame. Subpoena ¶¶ 6-14. No reason the Committee offers for the relevance of that demand holds water. Comm. Br. at 87.

First, the Committee does not explain how voters' personal information is relevant to determining "exactly how people voted in response to the options created by Act 77 and Act 12." *Id.* And there is no plausible connection.

Second, the Committee asserts that the subpoenaed documents will allow the Committee to discern problems encountered by individual voters. *Id.* But SSNs, driver's license numbers, addresses, and dates of birth will provide no qualitative details about potential problems while voting by mail.

Third, the Committee's assertion that the requested documents are relevant to "whether the new laws permitted (or are susceptible to) unlawful double voting due to known defects in the SURE system," *id.*, is just another way of saying that the Subpoena seeks information about the SURE system and not about Acts 77 and 12, which did not modify the SURE system. *See also id.* at 108 (arguing that Requests 2 and 16 seek "evidence that will provide detailed insight into the SURE system's operation"); Subpoena ¶¶ 14, 17 (seeking information about voter registration).

If the Committee genuinely believed voters' sensitive information is relevant to the operation of Acts 77 and 12, then it would have sought current information, not stale data concerning two of the first three elections conducted after the Acts became law. And if the Committee wanted to understand the impact of the Acts on voting methods, aggregated information that the Department has already published

would be sufficient. The Committee has not even attempted to explain why individualized voter data is necessary.

Similarly, the Committee requests personal information for every registered voter in the Commonwealth, voters’ “date of late voting activity,” and “all changes to voter records made between May 31, 2020, and May 31, 2021.” Subpoena ¶¶ 4-5, 14. There is no reasonable explanation—nor has the Committee given one—why this information would be helpful to understanding the Acts, nor any explanation for the requested time period.

The Acts established additional ways for registered voters to vote. The Acts did not change the manner or method of voter registration, or touch on the voter registration process except to revise certain deadlines and to permit same-day review of a registration application. 25 Pa. Stat. § 3071. As such, these requests are not reasonably relevant to understanding the Acts.

*2. The Committee’s Other Requests are not Related to the Subpoena’s Purported Purpose*

The Committee’s other requests are similarly divorced from the purported purpose of the Subpoena.

The Subpoena demands essentially all the Department’s communications with county election officials over the past year. Subpoena ¶¶ 1-3. These requests do not mention or even logically relate to any specific aspect of Acts 77 or 12. Their extreme overbreadth is strong evidence that their purpose is not, in fact, to



seek information regarding those Acts. Like the other Subpoena requests, they are nothing more than an impermissible “fishing expedition.” *See Lunderstadt v. Pa. House of Representatives Select Comm.*, 519 A.2d 408, 415 (Pa. 1986) (plurality).

The demand for certified election results from two of the first three elections that took place under Acts 77 and Act 12 also has no logical connection to the Committee’s stated purpose. Subpoena ¶ 15. Likewise, demanding audits or reports about the SURE system is disconnected from an investigation into Acts that made no changes to the SURE system. *Id.* ¶ 16. The same is true of the demand for reports from county voter registration commissions about voter registration and list maintenance activities, which has no relevance to an investigation into Acts that made no substantive changes to voter registration and list maintenance. *Id.* ¶ 17.

Relevance is an indispensable aspect of an enforceable subpoena. Here, the Subpoena is unenforceable because it does not bear a reasonable relevance to the claimed purpose of evaluating Acts 77 and 12.

### **III. The Subpoena Was Issued Without Authority**

Elections are outside the Intergovernmental Operations Committee’s assigned subject area. The Court cannot ignore the Committee’s attempt to exercise power it does not possess.

Whether the Committee has authority to issue the Subpoena is a question the Court must answer. Indeed, “the scope of judicial inquiry in legislative subpoena

enforcement actions...includes an examination of whether the inquiry is within the authority of the issuing party.” *Lunderstadt*, 519 A.2d at 411 (plurality) (cleaned up); *see also Annenberg v. Roberts*, 2 A.2d 612, 618 (Pa. 1938) (agreeing that congressionally created commission could issue subpoena only for “matters properly being inquired into by the commission”). Judicial review is necessary because “legislative investigations must be kept strictly within their proper bounds if the orderly and long-established processes of our coordinate branches of government are to be maintained.” *McGinley v. Scott*, 164 A.2d 424, 431 (Pa. 1960).

The Committee cannot evade judicial review just because the limits on its authority derive from Senate rules. Rather, “[i]t has been long settled, of course, that rules of Congress and its committees are judicially cognizable.” *Yellin v. United States*, 374 U.S. 109, 114 (1963). In *Yellin*, the U.S. Supreme Court reversed a witness’s contempt conviction because the witness had not been offered the chance to testify privately before being subpoenaed to testify publicly, in violation of committee rules. *Id.* at 114-15. Here, enforcing the Senate Rules is even more important because the underlying question is the Committee’s authority.

*Blackwell v. City of Philadelphia* is not to the contrary. There, in a two-Justice plurality, the Court decided that the political question doctrine barred review of whether an employment decision violated the Philadelphia City

Council’s internal rules because the employment decision was wholly tied to “day-to-day affairs.” 684 A.2d 1068, 1073 (Pa. 1996) (plurality). More importantly, those two Justices also said that application of the political question doctrine requires “an inquiry into the precise facts and posture...such [that] a determination cannot be made merely by semantic cataloguing.” *Id.* at 1071 (plurality). An improperly issued Subpoena is not simply mismanagement of the General Assembly’s day-to-day administrative affairs. It is the exercise of investigative power, enforceable by the possibility of contempt. Courts must ensure that power is exercised only by those that possess it.

The Senate Rules expressly contemplate that each standing committee has particular jurisdiction. While the Committee insists that it has all powers not expressly withheld from it, Comm. Br. at 91-92, that assertion of unlimited power is fundamentally at odds with the structure of the Senate Rules. Assignments of committee “jurisdiction” and “subject areas” reveal that each has discrete matters of responsibility. Pa. S. Rule 14(a)(1)-(2), (d)(1). The Committee’s view of unlimited, overlapping jurisdiction makes the standing committees redundant and sets the stage for oversight and legislative chaos.

Like committees’ jurisdiction, committees’ subpoena power does not exist “without any express limitation.” *Contra* Comm. Br. at 92. It is each committee’s duty “[t]o maintain a continuous review of the work of the Commonwealth

agencies concerned with [its] subject areas and the performance of the functions of government within each such subject area.” Pa. S. Rule 14(d)(1). Rule 14(d)(3) gives each committee subpoena power “[i]n order to carry out its duties.” This language unambiguously ties the subpoena power to each committee’s subject area-specific duties.

Past and current practice confirms that the Intergovernmental Operations Committee’s subject area jurisdiction does not reach elections. This history is particularly instructive as “the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions.” *Barenblatt*, 360 U.S. at 117. Legislative practices may illustrate “beyond doubt” what authority a committee has been given. *Id.* at 117-18.

The Committee does not deny that it was established to review proposals for regulatory reform and the restructuring of state government, or that election-related legislation, including all election-related bills from this legislative session, is routinely referred to the State Government Committee. Pa. Br. at 36-37. In fact, until it issued the Subpoena, the Committee had never voted on an election-related matter. *Id.* at 36-37. Acts 77 and 12, the two pieces of legislation the Committee is purportedly reviewing, both were referred to the State Government Committee. *See* Senate Bill 421 – Bill Information History (Regular Session 2019-2020) (detailing

history of Act 77) (Pa. Ex. N-28); Senate Bill 422 – Bill Information History (Regular Session 2019-2020) (detailing history of Act 12) (Pa. Ex. N-29).

Finally, *Mason's Manual of Legislative Procedure* does not insulate the Committee from judicial review. For one, a legislative manual cannot define the parameters of judicial review. Even if it could, *Mason's* does not provide the Committee the cover it seeks. While the Senate as a body may implicitly amend its rules by disregarding them, *Mason's Manual of Legislative Procedure* § 15 ¶ 4; *see also Commonwealth ex rel. Fox v. Chace*, 168 A.2d 569, 571 (Pa. 1961), in this case a committee has abrogated power not granted to it by the full body. The Senate Rules were approved by the full Senate, Senate Resolution 3, Session of 2021 (January 5, 2021), and may not be amended or ignored by the Committee.

#### **IV. The Subpoena Violates Pennsylvanians' Constitutional Right to Privacy**

The Committee demands the right to access and share the partial SSN, driver's license number, date of birth, and address for more than nine million Pennsylvanian voters. Individuals have a constitutional interest in controlling access to this sensitive personal information, and because that interest outweighs the Committee's purported interest in obtaining their personal information, the Subpoena violates Article I, Section 1's right to informational privacy. The demand for personal information likewise invades a reasonable expectation of privacy protected under Article I, Section 8, without a requisite showing of cause.

**A. Commonwealth Petitioners’ Application for Summary Relief is Ripe**

Although the Committee asks the Court to delay consideration of the constitutional issues because the Committee has not yet released the details of any agreement with a third-party vendor, Comm. Br. at 30-32, consideration of the constitutional issues need not, and cannot, wait just because the Committee has obscured who it will be working with, and under what terms. Commonwealth Petitioners’ application for summary relief is ripe now.

The Committee’s demand for unrestricted access to personal information violates Pennsylvanians’ privacy rights. *See* PFR ¶¶ 192-203, 205-206; Pa. Br. at 44-46, 48-49. The absence of adequate security measures sharpens the privacy concerns, and the significance of that failure will materialize as soon as the Department complies with the Subpoena. The Subpoena directs the Department to turn over personal information for Pennsylvania voters directly to the Republican Caucus’s general counsel. Pa. Ex. D. Yet the Caucus has no documented plan for how *it* will secure the sensitive information, including who will access it and for what purpose. *Supra* at 10-11. Senator Dush stated the Caucus plans to store the information “just like any other legal documents.” *Supra* at 10. But a database of more than nine million SSNs, driver’s license numbers, dates of birth, and addresses is not just “any other legal document”—it is uniquely attractive to attack and uniquely positioned to cause real harm to privacy and security. Pa. Br. at 40-

47; Ferrante Decl. ¶¶ 21-24 (Pa. Ex. H); Ferrante Suppl. Decl. ¶¶ 12-31; *infra* at 49-51. The Committee’s plan to provide voters’ personal information to a private party without any documented security protocols exacerbates the privacy concerns. *See* PFR ¶¶ 204; Pa. Br. at 46-47; Ferrante Suppl. Decl. ¶¶ 21-25; *infra* at 51-52.

Once Caucus counsel has received voters’ personal information, it can make that information available to the Committee’s yet-unidentified vendor immediately. Comm. Br. at 32 n.15. The Committee is not subject to Pennsylvania’s procurement law. 62 Pa. Cons. Stat. §§ 102, 103, 3101, 3102. Indeed, Senator Dush stated that the vendor will be chosen at his discretion. Tr. (Sept. 15, 2021) at 21:1-9. There is no mechanism for Commonwealth Petitioners, or anyone else for that matter, to ensure that the Committee, the Caucus, and its private third-party vendor establish and comply with robust security protocols as a condition of contracting. And it is unlikely that any entity other than the Republican Caucus and the vendor will be aware of that transfer, let alone have the opportunity to come back to the Court for an injunction.

As a result, whether the Subpoena violates fundamental constitutional rights is squarely before the Court.

**B. The Subpoena Violates Article I, Section I of the Pennsylvania Constitution**

Article I, Section 1 of the Pennsylvania Constitution provides each individual the right “to control access to, or the dissemination of, personal

information about himself or herself.” *Pennsylvania State Educ. Ass’n (PSEA) v. Commonwealth Dep’t of Cmty. & Econ. Dev.*, 148 A.3d 142, 150 (Pa. 2016). This right to informational privacy can only be infringed if the interest in disclosure outweighs individuals’ privacy interests. *Id.* at 158. The Committee concedes that the Subpoena implicates constitutionally protected personal information. But its attempt to avoid what necessarily follows misunderstands the right to informational privacy and distorts the competing interests at stake.

*1. Article I, Section 1’s Balancing Test Applies to any Disclosure of Personal Information*

Any time a party seeks access to an individual’s personal information, it must demonstrate that Section 1’s balancing test permits that access. None of the Committee’s reason for avoiding that constitutional review withstands scrutiny.

First, the Committee incorrectly asserts—without any citation to precedent—that the Subpoena is an intra-governmental disclosure of individuals’ personal information and therefore is outside Section 1’s scope. Comm. Br. at 60-62, 65-66. As a factual matter, however, the Committee plans to transfer voters’ personal information to a non-governmental vendor. Tr. (Sept. 15, 2021) at 20:6-25:13. Senator Dush was unwilling to exclude as possible third-party vendors the perpetrators of some of the most destructive lies about the 2020 election. *Id.* at 25:21-26:11.



Legally, the Committee’s position is antithetical to the nature of the constitutional right to informational privacy. Section 1 protects “the right of *the individual to control* access to, or the dissemination of, personal information about himself or herself.” *PSEA*, 148 A.3d at 150 (emphasis added); *accord Easton Area School District v. Miller*, 232 A.3d 716, 733 (Pa. 2020); *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017); *City of Harrisburg v. Prince*, 219 A.3d 602, 619 (Pa. 2019). For this reason, the Supreme Court has held that Section 1 applies to “*all* government disclosures of personal information, including those not mandated by the RTKL or another statute.” *Reese*, 173 A.3d at 1159.<sup>5</sup> Accordingly, a RTKL request issued to a school district could not be resolved without first addressing the “students’ and their parents’ interests in controlling access” to the content of the requested videos. *Easton*, 232 A.3d at 732-733; *accord Prince*, 219 A.3d at 619 (finding that in public record request for donor information, the donors must be notified of “their right to object to the disclosure of their names and addresses”).

With its Subpoena, the Committee aims to assert control over voters’ personal information. No different than fulfilling a public request for information, complying with the Subpoena will deprive these voters of the right to control who

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<sup>5</sup> That the right to informational privacy is most often implicated in the context of a RTKL request, *see* Comm. Br. 58 n.20, says nothing about the scope of the right.

accesses and uses their personal information. That loss of control must be justified by a “significant” and “compelling” interest, which the Committee cannot demonstrate. *Infra* at 52-53.

The notion that sensitive information can move freely within the government also is at odds with Supreme Court precedent. In *In re Subpoena on Judicial Inquiry & Review Board*, the Supreme Court refused to enforce a subpoena issued from a legislative commission to a judicial board because of constitutionally protected confidentiality interests. 517 A.2d 949, 956 (Pa. 1986) (citing Pa. Const. art. V, § 18). The Committee’s argument here is incompatible with this result. Not even the General Assembly subscribes to the notion that separate branches of the government are an undifferentiated whole for purpose of informational sharing. For example, the Administrative Code of 1929 has different rules for information sharing within the executive branch and for information sharing from the executive to the legislative branch. *Compare* 71 Pa. Stat. § 182 *with, e.g.,* 71 Pa. Stat. §§ 240, 272, 512. Laws defining how information will be shared within and between branches of government demonstrates that intra-government sharing is not per se permissible. In fact, the RTKL gives the public less access to the General Assembly’s records than it does to the records of executive branch agencies. *See* 65 Pa. Stat. § 67.102 (delineating the types of “legislative records” subject to public request without similarly limiting executive branch “records”).

This is not to say the particular circumstances of any contemplated disclosure are irrelevant to Section 1's balancing test. Limited sharing of personal information implicates a different privacy interest than unencumbered public access to personal information. Similarly, the recipients' ability to protect, or not, personal information can minimize or augment the privacy interest at stake. *In re Fortieth Statewide Investigating Grand Jury*, 220 A.3d 558, 570 (Pa. 2019) (citing *In re The June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d 73, 78 (1980)). But Section 1's balancing test must be applied all the same.

Federal statutes that authorize sharing of non-public information between branches of the federal government or between government agencies do not allow ignoring Section 1's restrictions. *Contra* Comm. Br. at 60-62. To the contrary, the myriad federal and state statutes that protect SSNs and driver's licenses numbers highlight the sensitivity of that information, which in turn strengthens the privacy interest under Section 1 and heightens what the Committee must show to overcome that interest. Pa. Br. at 41-44 & nn.3 & 4. But no federal statute could define the parameters of Pennsylvania's constitutional right to privacy or answers how Section 1's balancing test is resolved in any particular case. Even to the extent those federal statutes might be understood to suggest that intra-governmental

information sharing does not offend the federal right to privacy, Pennsylvania’s right to privacy is more protective. *PSEA*, 148 A.3d at 151.<sup>6</sup>

In addition, the Committee inaccurately claims that the Pennsylvania Constitution does not apply here because, it believes, the information is available under 71 Pa. Stat. §§ 272, 801. Comm. Br. at 53. But in *Reese*, the Supreme Court applied Section 1’s balancing test to a request for information under the Administrative Code in which § 272 appears. 173 A.3d at 1145-46. It did so because the “balancing test” is a “constitutional requirement” and “Pennsylvania courts are obliged to construe statutory enactments as consistent with the Pennsylvania Constitution.” *Id.* at 1159. Even if the Committee had demanded the personal information pursuant to the § 272 or § 801, and even if those statutes

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<sup>6</sup> No federal statute governs the access to voter information contemplated here. Title 18 U.S.C. § 2721(b)(1) permits sharing between “government agenc[ies],” but “agency” does not include the legislature. 18 U.S.C. § 6; *see also* 5 U.S.C. § 551(1)(A); 1 Pa. Code § 1.4. The National Voter Registration Act creates a federal basis for accessing some voter information, 52 U.S.C. § 20507(i), but the Committee issued a subpoena that must comply with the Pennsylvania Constitution. *Carcaci*, 327 A.2d at 4; *contra* PILF *Amicus* at 5. In this posture, the NVRA, as other state and federal statutes, is only evidence of the weight of the privacy interests that the court must balance against the articulated need for disclosure. What is more, the NVRA permits withholding information that the statute otherwise subjects to disclosure for reasons not identified in the NVRA. *Pub. Int. Legal Found., Inc. v. N. Carolina State Bd. of Elections*, 996 F.3d 257, 267-68 (4th Cir. 2021) (ruling that the NVRA allows redacting sensitive information to accommodate privacy interests); *Pub. Int. Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 562-63 (M.D. Pa. 2019) (holding that the Driver’s Privacy Protection Act prohibits disclosure of personal information otherwise available under the NVRA). Thus, the NVRA tolerates redacting SSNs before disclosure. *Project Vote/Voting For Am., Inc. v. Long*, 752 F. Supp. 2d 697, 712 (E.D. Va. 2010).

allowed access to that information, the Pennsylvania Constitution still requires an assessment of whether privacy rights outweigh the need for disclosure.

Finally, the Committee wrongly suggests that Commonwealth Petitioners are invoking the RTKL to quash the Subpoena. Comm. Br. at 58-59. But it is the constitutional right to informational privacy limits disclosure here—a right that applies against subpoenas. *See In re June 1979 Allegheny Cty. Investigating Grand Jury*, 415 A.2d 73 (Pa. 1980) (holding that Section 1 applied to a grand jury subpoena); *In re “B”*, 394 A.2d 419 (Pa. 1978) (holding that Section 1 barred enforcement of a subpoena for psychiatric records).

At bottom, Article 1 requires a demonstrated need for personal information that outweighs the competing privacy interest anytime an entity tries to exercise control over an individual’s personal information.

*2. Prior Disclosures of Personal Information Do Not Deprive Pennsylvania Voters of their Informational Privacy Rights*

Pennsylvania voters do not forfeit their informational privacy rights by virtue of exercising the fundamental right to vote. *See PSEA*, 148 A.3d at 158. Nor do Pennsylvania voters forfeit their informational privacy rights because the Department complies with its statutory and legal obligations to oversee and administer Pennsylvania’s election systems. *Contra* Comm. Br. at 54.

That personal information has been given to a government entity or otherwise shared with third parties, Comm. Br. at 16-25, 54-56, does not

extinguish Section 1’s protection. The right to informational privacy gives individuals *control* over their information. *PSEA*, 148 A.3d at 150. Information need not be absolutely secret to be protected under Section 1. Indeed, were prior disclosures fatal to constitutional protection, Section 1 could not apply at all in the context of requests for personal information previously disclosed to a government entity. Yet Pennsylvania courts regularly apply Section 1 in just that context. *E.g.*, *id.* at 157-58; *Reese*, 172 A.3d at 555-57; *Prince*, 219 A.3d at 618-19; *Easton*, 232 A.3d at 732-33; *Governor’s Off. of Admin. v. Campbell*, 202 A.3d 890, 894 (Pa. Commw. Ct. 2019).

Because the balancing in each case turns on whether the specific interest in further disclosure outweighs the individuals’ right to control their information, prior disclosures are legally irrelevant. *E.g.*, *Reese*, 173 A.3d at 1158 (requiring balancing test for records the General Assembly has expressly designated as “public”); *PSEA*, 148 A.3d at 157-58 (requiring balancing test for information “readily available to the public”). For example, the Supreme Court found that a person retained a constitutional privacy interest in medical treatment records, even though the records were provided first to the Pennsylvania Roman Catholic Diocese and then to a grand jury. *Fortieth Grand Jury*, 220 A.3d at 560-61, 570. The Committee therefore makes too much of prior instances in which the Department has allowed—or been ordered to allow—non-Department entities to

securely access voter information for limited purposes and under controlled circumstances.

What is more, no prior disclosure of information occurred in circumstances remotely similar to those here. Rather, the Committee's examples of prior disclosures demonstrate how the Department allows access to voters' personal information only for overseeing and administering Pennsylvania's elections, consistent with the purpose for which voters provide their personal information to counties and the Department. The cited examples also demonstrate that the Department takes great care to put in place all protections needed to preserve the privacy and security of voters' personal information.

County-level access to information in the SURE system about voters outside the county, Comm. Br. at 17, occurs only when a county commission is checking for duplicate records while processing a voter registration application or transferring a voter record. Marks Suppl. Decl. ¶¶ 4-5. County commissions use voter information only for election-related purposes, and only people with Department or county authorization can access sensitive voter information in the SURE system. Marks Decl. ¶¶ 5-7, 9, 23.

Likewise, the Department's 2014 contract with DTC to maintain the SURE system and 2020 contract with BPro to develop SUREVote, Comm. Br. at 18-20, 54-55, are consistent with the Department's obligations to "[d]evelop, establish,

implement and administer” the SURE system, 25 Pa. Cons. Stat. § 1201(3); *see also* 25 Pa. Cons. Stat. §§ 1108, 1222. Personal voter information can be accessed only consistent with Commonwealth protocols, only as needed to maintain the SURE system or build SUREVote, and only using Department hardware, software, and networks. *Supra* at 13-14.

The Department’s ERIC membership, Comm. Br. at 23-24, 55, also is consistent with its obligations to “administer” the SURE system, 25 Pa. Cons. Stat. § 1201(3), and to help county voter registration commissions conduct list maintenance, *id.* § 1203(a), (h), (i), (k); Marks Suppl. Decl. ¶¶ 37-43, 47-62. Additionally, the Department does not provide ERIC with plain-text driver’s license numbers, SSNs, or date of birth. *Supra* at 15. Instead, these sensitive data go through a one-way hash application before they leave Department control. *Supra* at 15-16. In light of the significant harm to personal privacy and financial security implicated by collecting this data in one place, ERIC complies with strict, state-of-the-art security protocols that are regularly verified by third-party audits. *Supra* at 16-17.

Next, the Pennsylvania Auditor General’s restricted access to voter information and the SURE system as part of an audit the Department requested, Comm. Br. at 24-25, was consistent with the Department’s obligations to “administer” the SURE system, 25 Pa. Cons. Stat. § 1201(3); *see also* 25 Pa. Cons.



Stat. §§ 1108, 1222. The Department implemented strict security and privacy protocols, including allowing officials from the Department of Auditor General to view voter information only at the Department, using Department hardware, and under Department supervision. Pa. Br. at 26-27; Marks Decl. ¶¶ 43-48.

Finally, the circumstances of this Court's 2013 order that a prior administration provide voter information to petitioners' expert in *Applewhite v. Commonwealth*, Comm. Br. at 20-22, 51, 56, highlight why the Subpoena here should be quashed. There, the parties implemented robust privacy and security protocols: the Court and the Department both knew who would access the information, how the data would be transferred, where it would be stored, and how it would be deleted. *Supra* at 19-20. Here, the Committee has refused to provide *any* details about who will access the voter records and what security and privacy protocols will exist. Tr. (Sept. 15, 2021) at 20:6-26:17, 39:10-40:11; Comm. Br. at 33 n.15, 57, 79, 115. There, voter information was necessary to determine how many voters lacked a valid photo ID issued by PennDOT, and the petitioners asked for the data only after the administration declined to conduct that analysis. *Supra* at 18-19. Here, the Committee has not articulated any reason, much less a compelling one, for obtaining all voters' personal information, nor has it explored whether the Department could conduct the relevant analysis itself. *Supra* at 25-32, *infra* at 53.

In sum, the Department’s proper use of voters’ personal information for election-related purposes does not strip nine million Pennsylvania voters of their right “to control access to, or the dissemination of, personal information” about themselves, *PSEA*, 148 A.3d at 150, nor is it relevant to whether the Committee has an interest in the information that outweighs voters’ privacy rights.

3. *Pennsylvania Voters’ Privacy Interests Outweigh any Purported Interest in Disclosure*

Section 1 permits disclosure of constitutionally protected personal information only when a “significant” and “compelling” interest outweighs an individual’s interest in controlling their information, *PSEA*, 148 A.3d at 157-58; *Commonwealth v. Nixon*, 761 A.2d 1151, 1156 (Pa. 2000), and even then only when there is “no alternate reasonable method of lesser intrusiveness to accomplish” that interest, *Denoncourt v. Com., State Ethics Comm’n*, 470 A.2d 945, 949 (Pa. 1983) (plurality). This balancing is fact-specific.

Here, the balance weighs heavily in favor of privacy. Pennsylvania voters have significant interests in keeping their SSN, driver’s license number, date of birth, and address private—especially when the Committee has adopted a “data first, security second” approach.

Unfettered access to the SSNs, driver’s license numbers, dates of birth, and addresses of every registered Pennsylvania voter constitutes a significant risk to individuals’ personal and financial security and to statewide and national election

security. Pa. Br. at 40-47; *see also* Ferrante Decl. ¶¶ 15-32, 51-55. Aggregating sensitive personally identifying information into a single database only magnifies the risk of abuse. *See Dittman v. UPMC*, 196 A.3d 1036, 1048 (Pa. 2018) (finding that failure to “adequate security measures” for collection of personal and financial information created risk of data breach). Indeed, there is a monumental difference between visiting each of 67 county commissions to inspect more than nine million voter registration applications, Comm. Br. at 51, and acquiring a single database with the personal information of more than nine million people, *see U.S. Dep’t of Just. v. Repts. Comm. For Freedom of Press*, 489 U.S. 749, 764 (1989) (recognizing significant privacy interests in “computerized summary located in a single clearinghouse of information”).<sup>7</sup> And each new disclosure or transfer of sensitive personal information increases the risk that the information will be compromised. *See* Ferrante Suppl. Decl. ¶¶ 27-31.

The privacy interests are even more pronounced here because the Committee’s “data first, security second” approach is irresponsible, dangerous, and contrary to all widely accepted data lifecycle management best practice. Ferrante

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<sup>7</sup> Of course, no one visiting a county commission could access SSN and driver’s license numbers. Marks Suppl. Decl. ¶ 6; 25 Pa. Cons. Stat. § 1207 (listing documents available under Voter Registration Act); 4 Pa. Code § 183.14(c)(4) (prohibiting a “registrant’s unique identifier, a registrant’s or applicant’s driver’s license number and the last four digits of a registrant’s or applicant’s Social Security number” from being “made available for public inspection or photocopying”); *id.* § 183.14(c)(5)(iii) (same). In addition, counties cannot provide public inspection of absentee and mail-in ballots. *See* 25 Pa. Stat. § 2648 (prohibiting county boards of elections from providing public inspection of ballots); *contra* Comm. Br. at 50-51.

Decl. ¶ 37; Ferrante Suppl. Decl. ¶¶ 12-31. The casual disregard of the real dangers faced by millions of Pennsylvania citizens—comparing the risk to a meteor strike—demonstrates an utter lack of knowledge about the risk of identity theft and about ongoing efforts by hostile actors to target our election systems. *See* Ferrante Suppl. Decl. ¶ 19; Ferrante Decl. ¶¶ 55-56. The absence of security measures cannot be brushed aside. *See Fortieth Grand Jury*, 220 A.3d at 570 (finding secrecy requirements key to whether disclosure would violate privacy rights); *Allegheny Cty. Grand Jury*, 415 A.2d at 78 (same).

Claiming that the Committee will “adequately address any legitimate security or confidentially concerns,” Comm. Br. at 32 n.15, is meaningless without specifics. Recently, one once-popular voter list maintenance program touted its “industry standard encryption technology and passwords,” but actually employed abysmal privacy and security practices that led to disclosure of private information and caused real-world harm. Jessica Huseman and Derek Willis, *The Voter Fraud Commission Wants Your Data — But Experts Say They Can’t Keep It Safe*, ProPublica (Oct. 23, 2017) (Pa. Ex. N-30); *Moore v. Kobach*, 359 F. Supp. 3d 1029, 1033-39 (D. Kan. 2019) (discussing Crosscheck’s security practices and disclosure of voters’ personal information). As the example of ERIC shows, data security requires a continuing focus on where and how the data is stored, how it is transmitted, and who can access the data and under what circumstances, coupled

with regular third-party audits and assessments to ensure compliance with on-paper data protocols. Hamlin Testimony at 3-4; ERIC, *Technology and Security* at 1-2. And any credible data security plan should not hide basic details about security practices and privacy protocols. *E.g.*, Hamlin Testimony at 4; ERIC, *Technology and Security*; Ltr. from Rachel Frankel to Timothy Keating (May 1, 2013).

Nothing in the record creates any dispute about the risks posed by the Committee's reckless demand for nine million sets of personal identifiers or the harm posed by identity theft and financial fraud. The Committee does not even acknowledge that identity theft and financial fraud are possible concerns. Instead, it points to other instances in which the Department has provided third parties with access to voter information, Comm. Br. at 54-56, neglecting to mention the controlled circumstances and significant security protections in each case, *supra* at 11-20.

Nor has the Committee met its burden to identify an interest—much less a significant and compelling interest—for why it requires unencumbered access to every registered voters' private, personal information. The Committee now claims it is “examin[ing] the application of Act 77 and Act 12 in the two most-recent elections and to examine whether the modification of election laws were needed in light thereof,” Comm. Br. at 82, but this assertion is pretext, *supra* at 25-28.

Even if the Committee were properly investigating the effectiveness of Acts 77 and 12, there is no plausible connection between the requested information and potential legislative action. *Supra* at 28-32. If an invasion of privacy “does not effect the state’s purpose, it is a gratuitous intrusion.” *Denoncourt*, 470 A.2d at 949. Moreover, the Committee has not shown there is “no alternate reasonable method of lesser intrusiveness” to accomplish those purported goals. *Id.* For example, the Committee maintains it needs personal information for nine million voters to determine “exactly how people voted in response to the options created by Act 77 and Act 12,” Comm. Br. at 87—but this information is already publicly available in the aggregate. The Committee also insists it needs personal voter information to determine “whether the new laws permitted (or are susceptible to) unlawful double voting due to known defects in the SURE system,” *id.*—but the Committee has not explored less intrusive options, such as asking the Department to report on how many duplicate entries actually exist in the SURE system and to investigate whether any persons unlawfully voted twice.<sup>8</sup>

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<sup>8</sup> Although the Auditor General claimed to have identified duplicate voter records, Comm. Br. at 25, the Department’s investigation revealed that thousands of records flagged as potential concerns “should not be flagged” and that the Auditor General had made “significant errors and/or omissions through its analysis,” Comm. App’x at 1131a-1133a. The Department also helps county voter registration commissions improve the accuracy of voter rolls. Marks Suppl. Decl. ¶¶ 44-62.

In short, the Committee’s “generic requests for irrelevant personal information” about more than nine million Pennsylvania voters, *PSEA*, 148 A.3d at 158, do not outweigh voters’ significant personal privacy and security interests.

**C. The Subpoena Violates Article I, Section 8 of the Pennsylvania Constitution**

The Subpoena also demands personal information protected by Article I, Section 8, without providing the requisite showing of cause or relevance.

Section 8 “is unshakably linked to a right of privacy in this Commonwealth.” *Commonwealth v. Edmunds*, 586 A.2d 887, 895-905 (Pa. 1991). To determine whether a subjective expectation of privacy is reasonable under Section 8, courts “consider our charter as a whole in terms of establishing a set of normative values that limits the government’s authority to search”—including the “privacy considerations” present in Article I, Section 1. *Commonwealth v. Alexander*, 243 A.3d 177, 206 (Pa. 2020).

The Committee disputes that Article 8 protects dates of birth. Comm. Br. at 64-65 & n.22. But the Supreme Court has found dates of birth protected by Section 1 and therefore to be information people expect to keep private. *Reese*, 173 A.3d at 1159 (approvingly citing Commonwealth Court decision as having already conducted the Article I, Section 1 balancing for dates of birth and noting that review “is not a statutory, but rather a constitutional requirement”).

Under Section 8, Pennsylvania voters' subjective expectations of privacy in their SSN, driver's license number, and date of birth are eminently reasonable. These pieces of information allow for the "retrieval of extensive amounts of personal data," *Times Pub. Co. v. Michel*, 633 A.2d 1233, 1237-38 (Pa. Commw. Ct. 1993) (cited approvingly in *PSEA*), and therefore reveal much about a person's "personal affairs, opinions, habits or associations," *Commonwealth v. Duncan*, 817 A.2d 455, 463 (Pa. 2003); *see generally* Pa. Br. at 40-47. Because of its sensitivity, this information is protected under many state and federal laws, Pa. Br. at 41-44 & nn.3 & 4, and Pennsylvania voters can reasonably expect it to remain protected and used only in connection with conducting Pennsylvania elections.

Providing SSNs, driver's license numbers, and dates of birth to county voter registration commissions to exercise the fundamental right to vote does not eliminate the reasonable expectation of privacy. *Contra* Comm. Br. at 64-67. Pennsylvania courts have "declined to embrace a constitutional analysis under Article I, Section 8 that relies primarily upon a principle of disclosure." *Commonwealth v. Rekasie*, 778 A.2d 624, 630-31 (Pa. 2001). As a result, "bank customers have a legitimate expectation of privacy in records pertaining to their affairs kept at the bank," *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979), and individuals have a reasonable expectation of privacy in telephone



numbers collected by a pen register, *Commonwealth v. Melilli*, 555 A.2d 1254, 1259 (Pa. 1989)—even though those records are in the hands of third parties.

Nor does it matter that the demand for personal information comes from a different branch of government. *Contra* Comm. Br. at 65-66. There is no exception to privacy rights when constitutionally protected information passes between different branches of government. *Supra* at 40-43. Moreover, Section 8 is a right that expressly applies against government invasions of privacy.

Because the Subpoena demands information protected by Section 8, the Committee must show “probable cause” that personal information for nine million Pennsylvania voters “contain[s] evidence of civil or criminal wrongdoing,” *Lunderstadt*, 519 A.2d at 415 (plurality), or at least how the information the Subpoena demands is “reasonably relevant” to an investigation within the authority of the legislature, *id.* at 417 (Zappala, J., concurring); *Annenberg*, 2 A.2d at 617. The Supreme Court has required this minimum showing of cause from legislative committees contemplating remedial legislation, *Lunderstandt*, 519 A.2d at 410, *Annenberg*, 2 A.2d at 212-13, just as the Committee claims to be doing here.

The Committee has not even attempted to make such a showing. Comm. Br. 62-67. As a result, it has forfeited any argument that it has such cause. *See Karkalas v. Dep’t of State, Bureau of Pro. & Occupational Affs., State Bd. of Med.*, 71 A.3d 395, 398 n.8 (Pa. Commw. Ct. 2013). Nor could the Committee establish

probable cause or that the information is reasonably relevant to a legitimate investigation. Pa. Br. at 49; *supra* at 25-32.

## **V. The Subpoena Interferes with Fair Elections and the Free Exercise of the Right to Vote**

The Subpoena violates fundamental protections of the right to vote in fair elections contained in both the Pennsylvania and U.S. Constitutions.

### **A. The Subpoena Violates Article I, Section 5 of the Pennsylvania Constitution**

Article 1, Section 5 commands that “Elections shall be free” and that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” The “touchstone” for interpreting this constitutional provision, as any other, is its “actual language.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). Section 5’s application is uncomplicated here: the Subpoena will discourage future participation in elections, thus impairing free elections and interfering with the free exercise of the right to suffrage. Pa. Br. at 53-56.<sup>9</sup>

The Committee’s suggestion, Comm. Br. at 68-72, that Section 5 applies only to statutes or regulations, and even then only to those that *govern* “the electoral process”—an undefined phrase that the Committee inexplicably believes excludes exercising the right to vote—abandons Section 5’s “actual language.” The

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<sup>9</sup> This issue is ripe. *Supra* at 37-38.

“plain and expansive sweep” of Section 5’s first clause guarantees that “*all* aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process[.]” *League of Women Voters*, 178 A.3d at 804 (emphasis added). Nothing in that clause categorically excludes subpoenas, or any particular subset of government acts, from constitutional scrutiny.

Likewise, Section 5’s second clause is unmistakably broad, commanding that “*no* power” may interfere with “the free exercise of the right of suffrage.” Pa. Const. art I, § 5. It, too, does not have language confining its applicability to only some exercises of power or to only procedural rules. Instead, Section 5’s second clause prohibits all forms of government acts that interfere with the right to vote freely.

The Committee argues that Section 5’s second clause responded to a past use of military power to commit election fraud, and thus is actually a remedy for “a specific harm.” Comm. Br. at 70. It is not clear, however, what specific harm the Committee is referencing. Moreover, that Section 5’s second clause addresses just the specific circumstances that precipitated it is belied by the text’s inclusion of “civil or military.”

Moreover, Section 5 is within the Constitution’s Declaration of Rights, which is an expression of “inviolable” rights. Pa. Const. art. I, § 25. It is therefore not just a restriction on what laws the General Assembly may pass. Instead, Section 5 describes “fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.” *League of Women Voters*, 178 A.3d at 803. The “inviolable” rights enumerated in the Constitution’s Declaration of Rights are not sacrosanct only as to some exercises of government power.

*League of Women Voters* also rejects the very limit the Committee tries to impose on Section 5. There, the Supreme Court explained Section 5 must be read to avoid “discouraging voters from participating in the electoral process.” 178 A.3d at 814. Section 5, then, regulates not only procedural rules that govern elections, but also conduct that affects voters in a certain manner.

Not even the cases that the Committee cites substantiate its narrow view of Section 5. *Oughton v. Black* is clear that Section 5 means “that by no intimidation, threat, improper influence, or coercion of *any kind* shall the right [to vote] be interfered with.” 61 A. 346, 347 (Pa. 1905) (cleaned up) (emphasis added). In *Winston v. Moore*, the Supreme Court merely described “[i]n a general way” when an election is free and equal. 91 A. 520, 523 (Pa. 1914). The Supreme Court did not exhaustively list Section 5’s applications, nor could it have.

Even assuming Section 5 regulates only the “electoral process,” its proscriptions apply to the Subpoena. The Subpoena is for election records and will affect voters’ willingness to participate in future elections. Voting is not only a part of the electoral process, but is its most essential aspect. Representative governments operate only if “each and every Pennsylvania voter has the same free and equal opportunity to select his or her representatives.” *League of Women Voters*, 178 A.3d at 814 (cleaned up); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (describing voting as “of the essence of a democratic society”).

The Committee’s alternative argument that Subpoena survives review under Section 5 is equally unavailing.

First, the Committee points to nothing in the record that creates a dispute about the Subpoena’s deterrent effect on voters. And that effect is not in service of any reasonable exercise of power, and it certainly is not “necessary to promote a compelling state interest and [] narrowly tailored to effectuate that state purpose.” *Banfield v. Cortes*, 110 A.3d 155, 176 n.15 (Pa. 2015) (describing standard of review for significant interferences with fundamental rights). As described, the Subpoena has no rational relationship to any legitimate purpose. *Supra* at 25-32.

Second, the Subpoena is not saved by the Committee’s observations that Article VII requires the General Assembly to pass election laws, and that the courts apply a deferential standard of review when assessing the constitutionality of

statutes. Comm. Br. at 73-74.<sup>10</sup> The Subpoena is, of course, not an election law.

And while the Committee maintains that the Court should be exceedingly deferential in its review of the Subpoena, it offers no support for that proposition.

Indeed, although it has long been the standard in Pennsylvania that “[a]n Act of Assembly will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution.” *Daly v. Hemphill*, 191 A.2d 835, 840 (Pa. 1963) (emphasis removed); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 164 (1853), that is not standard the Supreme Court applied in past constitutional challenges to a subpoena, *Lunderstadt*, 519 A.2d at 412-415 (plurality). What is more, legislation enjoys a presumption of constitutionality because courts assume the General Assembly intends to comply with the Constitution. *Stilp v. Commonwealth*, 905 A.2d 918, 938 (2006). Courts presume the General Assembly intends to follow the Constitution in part because the General Assembly itself has passed a statute announcing such an intention. *E.g.*, *Commonwealth v. Baker*, 78 A.3d 1044, 1050 (Pa. 2013) (citing 1 Pa. Cons. Stat. § 1922(3)). Yet the legislature itself has extended that presumption only to “the enactment of a statute.” 1 Pa. Cons. Stat. § 1922. No presumption exists for a subpoena.

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<sup>10</sup> The Committee’s maintains that Section 5 and Article VII must be read in harmony, Comm. Br. at 73, 77, but does not identify any section of Article VII implicated here.

The undisputed facts establish that the Subpoena will discourage participation in the electoral process, thus interfering with the right to vote freely and impairing free elections. It therefore violates Article I, Section 5.

**B. The Subpoena Violates the U.S. Constitution's Protections of the Right to Vote**

Like the Pennsylvania Constitution, the U.S. Constitution protects against acts that interfere with the right to vote. *Burson v. Freeman*, 504 U.S. 191, 196-208 (1992) (plurality). As multiple courts have held, and the record demonstrates, the unwanted sharing of voters' personal information has such an effect. *E.g.*, *Greidinger v. Davis*, 988 F.2d 1344, 1353-54 (4th Cir. 1993); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 739 (S.D. Miss 2014); *Project Vote/Voting For Am., Inc. v. Long*, 752 F. Supp. 2d 697, 712-13 (E.D. Va. 2010).

*Laird v. Tatum* confirms that conduct that merely chills the exercise of constitutional rights can violate the U.S. Constitution. 408 U.S. 1, 11 (1972). *Laird* also reiterated Article III's injury-in-fact requirement, 408 U.S. at 10-14, but that analysis has little bearing here. In *Laird*, there was no allegation that the Army surveillance program at issue had any connection to plaintiffs, or that there was any foreseeable possibility of such a connection. *Id.* at 8-10 & n.5. On those facts, the surveillance program's subjective chilling effect on the plaintiffs did not confer standing. *Id.* at 13-14. Here, the immediate effect of the Subpoena is on the very people whose information it demands.

What is more, while the burdensome effect of sharing voters' sensitive personal information may be at its peak when that information is shared publicly, as in *Greidinger*, that certainly does not mean that more limited—but still unwanted—sharing of personal information cannot also deter the exercise of the right to vote. *Contra* Comm. Br. at 79-80. Yet here, since the Committee has demanded sensitive personal information without first implementing any security protocols, *supra* at 10-11, there is little distance between the risks of sharing personal information with the Committee and the risks of sharing it publicly.

Finally, the Committee wrongly encourages the Court to ignore the U.S. Supreme Court's decision in *Burson v. Freeman*. There, the Court ruled that states can regulate political speech—which enjoys the First Amendment's "fullest and most urgent application," 504 U.S. at 196 (plurality)—if that speech might "drive the voter away," *id.* at 207. If otherwise protected individual speech is entitled to lesser protection when it might intimidate voters, then a legislative subpoena with the same effect certainly cannot be immune from judicial scrutiny. Indeed, the U.S. Supreme Court has been explicit that constitutional rights apply against legislative investigations. *Watkins*, 354 U.S. at 198.

As with the Pennsylvania Constitution, the Subpoena's unjustified burden on the right to vote violates the U.S. Constitution.



## **VI. The Subpoena Demands Security Reports about SURE System Vulnerabilities Protected from Disclosure**

Request 16 of the Subpoena amounts to a demand for reports that could provide a roadmap for how to attack Pennsylvania’s election systems. Marks Decl. at ¶¶ 37, 39 (explaining sensitivity of demanded reports); Marks Suppl. Decl. ¶ 68 (same). The U.S. Department of Homeland Security has designated these sensitive materials as protected critical infrastructure information (PCII). Those materials can be disclosed only to “protect[] critical infrastructure or protected systems” or to investigate and prosecute criminal acts in coordination with federal law enforcement, 6 C.F.R. § 29.8—circumstances that do not apply here.

The Committee maintains that reports it seeks are not protected because of how the Auditor General summarized a conversation about unspecified records with a DHS representative from several years ago. *See* Comm. Br. at 97-98. But the law, not the summary of an opinion of any DHS representative, controls.<sup>11</sup> Under the law, the Department has properly submitted certain reports covered by Paragraph 16 to DHS, not in lieu of compliance with any regulatory requirement and with the expectation that the reports would be protected from disclosure. PFR

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<sup>11</sup> To the extent the views of government officials are relevant to the scope of the law, the Committee neglects to mention that the Pennsylvania Interagency Election Security and Preparedness Workgroup—composed of the Pennsylvania Office of Homeland Security, Pennsylvania Emergency Management Agency, Pennsylvania State Police, Pennsylvania Department Military and Veterans Affairs, the Pennsylvania Inspector General, the Office of Information Technology, and Department—“fully concur[red]” in the Department’s decision to not disclose the reports requested by the Auditor General. Comm. App’x at 1125a.s

¶ 254; Marks Decl. ¶ 37; Marks Suppl. Decl. ¶ 69; 6 U.S.C. § 673(a)(1); 6 C.F.R. § 29.5. Each time the Department has submitted a report to the PCII program, DHS has subsequently informed the Department that it had validated the report as PCII. Marks Suppl. Decl. ¶ 69; *see* 6 C.F.R. § 29.6(e)(1).

Although the Committee argues, based on *County of Santa Clara v. Superior Court*, 89 Cal. Rptr. 3d 374 (Ca. Ct. App. 2009), that the PCII program regulates only information in the hands of a governmental recipient (which here would mean the federal government), *Santa Clara* is neither binding nor persuasive. The text of 6 C.F.R. § 29.8(d)(2) is clear, and does not include that limitation. The Superior Court of New Jersey, Appellate Division, has rightly reached the same conclusion in a case about whether PCII could be disclosed under state public records laws. *Tombs v. Brick Twp. Mun. Utilities Auth.*, No. A-3837-05T5, 2006 WL 3511459, at \*2-\*3 (N.J. Super. Ct. App. Div. Dec. 7, 2006) (finding information that state entity submitted to DHS under PCII program was exempt from disclosure).

Finally, the Committee's discussion about private rights of action, Comm. Br. at 101-02, is beside the point because Commonwealth Petitioners are not seeking to enforce any provision of the Critical Infrastructure Act. Therefore, the Act's bar on private rights of action does not apply. *See* 6 U.S.C. § 674. Instead, the Committee has subpoenaed critical infrastructure information about the Department and the SURE system that has been properly marked as PCII.

Consistent with the Act’s requirements, *e.g.*, 6 C.F.R. §§ 29.5(c), 29.8(d)(2), (f)(1)(i), Commonwealth Petitioners are resisting that attempt and asking the Court to quash the Subpoena. *Detroit Int’l Bridge Co. v. Fed. Highway Admin.*, 666 F. Supp. 2d 740, 747 (E.D. Mich. 2009), which did not involve any information designated as PCII and did not mention the Critical Infrastructure Act, is simply not relevant.

## **VII. The Subpoena Demands Privileged Information**

The deliberative process privilege allows “the free exchange of ideas and information within government agencies.” *League of Women Voters v. Commonwealth*, 177 A.3d 1010, 1017 (Pa. Commw. Ct. 2017). It therefore “benefits the public, and not the officials who assert the privilege.” *Commonwealth v. Vartan*, 733 A.2d 1258, 1264 (Pa. 1999) (plurality). Under the privilege, the government may “withhold documents containing ‘confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.’” *Id.* at 1263 (internal quotation omitted). Common law privileges, such as the deliberative process privilege, apply to congressional subpoenas. *Marzars*, 140 S. Ct. at 2032.

This Court has recognized the deliberative process privilege applies in Pennsylvania. *League of Women Voters*, 177 A.3d at 1017-18; *KC Equities v. Dep’t of Pub. Welfare*, 95 A.3d 918, 934 (Pa. Commw. Ct. 2014); *Ario v. Deloitte & Touche LLP*, 934 A.2d 1290, 1294 (Pa. Commw. Ct. 2007). The Supreme Court

has never said otherwise. In *Vartan*, a plurality of the Court ruled that the deliberative process privilege process could be invoked to prevent disclosure of internal deliberations. 733 A.2d at 1266.<sup>12</sup>

Neither 71 Pa. Stat. § 272 nor 71 Pa. Stat. § 801, which in any event are immaterial here, *supra* at 27-28, precludes the Department from asserting the privilege. The deliberative process privileges comes from common law, and applies even without statutory authority. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *see also KC Equities*, 95 A.3d at 934 (denying subpoenas issued to high-ranking officials in civil litigation to protect deliberative process privilege without statutory basis).<sup>13</sup> Nothing in § 272 or § 801 indicates that the legislature intended either to affirmatively abrogate the common law privilege. In fact, § 272’s reference to documents “*filed in the department*” suggests that it was not intended to reach materials reflecting the Department’s *internal* deliberations. *See LaValle v. Off. of Gen. Couns. of Com.*, 769 A.2d 449, 458 (Pa. 2001) (concluding that prior version of RTKL did not evince “intention to subject the internal, deliberative aspects of agency decision making to mandatory public scrutiny”).

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<sup>12</sup> Two justices concurred in the result without joining the plurality or writing separately, while three Justices did not participate. 733 A.2d at 1266.

<sup>13</sup> Decisions of this Court applying the privilege beyond the RTKL demonstrate that the fallacy of the Committee’s claim that the RTKL is “the only context in which deliberative process is recognized.” Comm. Br. at 106-07.

*In re Thirty-Third Statewide Investigating Grand Jury* does not aid the Committee’s view of § 272 or § 801. There, the Court would not allow a party to invoke attorney-client privilege to withhold certain materials from the Attorney General in a criminal investigation authorized by the Commonwealth Attorney’s Act. 86 A.3d 204, 218 (Pa. 2014). That decision rested on the “special circumstances of the case,” which “presented a unique context.” *Id.* at 218-19 (cleaned up). The Supreme Court rejected the privilege assertion only after analyzing the “unique role of government lawyers who advise public officials,” while repeatedly stressing the criminal nature of the investigation. *Id.* at 216–24; *see also id.* at 228 (Baer. J., concurring) (emphasizing “narrow scope of the holding” that was “limited to the facts presented”).

There is nothing here akin to the unique role of a government lawyer that makes this an unusual assertion of privilege. And the Committee is not engaged in a criminal investigation of possible wrongdoing, but rather in a scattershot exercise with an ill-defined purpose.

Commonwealth Petitioners have explained why the Subpoena demands protected information. Paragraph 16’s request for “all reports of audits and/or reviews of the SURE system” necessarily encompasses those portions of such reviews containing “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.” *In re Grand Jury*, 821 F.2d 946, 959 (3d

Cir. 1987). Such materials fall squarely within the protections of the privilege and are therefore exempt from disclosure. Moreover, the Committee has not shown “sufficient need for the material in the context of the facts.” Comm. Br. at 108 (quoting *Redland Soccer Club, Inc. v. Dep’t of the Army of the U.S.*, 55 F.3d 827, 854 (3d Cir. 1995)).<sup>14</sup> Even if the Committee’s latest proffered explanation is taken at face value, the Committee has not shown why the consideration of certain unspecified changes to the Election Code requires access to the Department’s internal deliberations. *Supra* at 28-32.

Finally, any suggestion that the Department “should not fear future disclosures,” Comm. Br. at 108-09, is blind to reality: the Subpoena is the latest step in an ongoing effort to cast doubt about the results of the 2020 election in Pennsylvania, so all residents of the Commonwealth have reason to fear if such sensitive information is turned over to the Committee without regard for the confidentiality of internal government deliberations.

## **CONCLUSION**

Commonwealth Petitioners’ Application for Summary Relief should be granted, the Committee’s Cross-Application for Summary Relief should be denied, and the Subpoena should be quashed.

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<sup>14</sup> The Committee also does not cite any decision of this Court stating that the privilege can be overcome. *See* Comm. Br. at 108-09 (relying on Third Circuit decision).

Dated: November 8, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 8, 2021

*/s/ Michael J. Fischer*

\_\_\_\_\_  
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**CERTIFICATE OF LENGTH**

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 16,038 words. I have relied on Word's word count function to determine the length of this brief.

Dated: November 8, 2021

*/s/ Michael J. Fischer*

\_\_\_\_\_  
Michael J. Fischer

# **EXHIBIT N**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Senator Jay Costa, Senator Anthony H.  
Williams, Senator Vincent J. Hughes, Senator  
Steven J. Santarsiero, and Senate Democratic  
Caucus,

Petitioners

v.

Senator Jacob Corman III, Senate Pro  
Tempore, Senator Cris Dush, and Senate  
Secretary-Parliamentarian Megan Martin,  
Respondents

Commonwealth of Pennsylvania,  
Pennsylvania Department of State, and  
Veronica Degraffenreid, Acting Secretary of  
the Commonwealth of Pennsylvania,

Petitioners

v.

Senator Cris Dush, Senator Jake Corman, and  
the Pennsylvania State Senate  
Intergovernmental Operations Committee,  
Respondents

Arthur Harwood, Julie Haywood

Petitioners

v.

Veronica Degraffenreid, Acting Secretary of  
State Commonwealth of Pennsylvania  
Respondents

**CASES  
CONSOLIDATED**

No. 310 MD 2021

No. 322 MD 2021

No. 323 MD 2021

**SUPPLEMENTAL DECLARATION OF JACOB BOYER**

I, Jacob Boyer, declare under the penalty of perjury as follows:

1. I am a Deputy Attorney General with the Pennsylvania Office of Attorney General, and a member in good standing of the bar of Pennsylvania. I have personal knowledge of the facts stated herein, and, if called upon, could and would testify competently to them.

2. I make this Supplemental Declaration in support of the Response to Cross-Application for Summary Relief and Reply in Support of Commonwealth Petitioners' Application for Summary Relief filed by Commonwealth of Pennsylvania, Pennsylvania Department of State and Veronica Degraffenreid, Acting Secretary of the Commonwealth.

3. Attached to this declaration as Exhibit N-1 is a true and correct copy of *Following Warning By Trump, Vos Announces Former Justice Will Lead Assembly GOP Election Probe* by Shawn Johnson published by Wisconsin Public Radio on June 26, 2021. The URL from which the exhibit was obtained (<https://www.wpr.org/following-warning-trump-vos-announces-former-justice-will-lead-assembly-gop-election-probe>) is current as of November 8, 2021.

4. Attached to this declaration as Exhibit N-2 is a true and correct copy of *Michael Gableman said bureaucrats 'stole our votes' before he was put in charge of reviewing 2020 election* by Patrick Marley published by the

Milwaukee Journal Sentinel on August 9, 2021. It was obtained through Westlaw's NewsRoom and the citation is 2021 WLNR 25851792.

5. Attached to this declaration as Exhibit N-3 is a true and correct copy of *Calls intensify to end Wisconsin's election review amid blunders by ex-judge in charge* by Elise Vielbeck published by the Washington Post on October 14, 2021. The URL from which the exhibit was obtained (<https://www.washingtonpost.com/politics/2021/10/14/wisconsin-election-review-gableman-errors/>) is current as of November 8, 2021.

6. Attached to this declaration as Exhibit N-4 is a true and correct copy of a press released titled *Texas Secretary of State's Office Announces Full Forensic Audit of 2020 General Election in Four Texas Counties* released by the Texas Secretary of State on September 23, 2021. The URL from which the exhibit was obtained (<https://www.sos.state.tx.us/about/newsreleases/2021/092321.shtml>) is current as of November 8, 2021.

7. Attached to this declaration as Exhibit N-5 is a true and correct copy of Letter to Texas Governor Greg Abbott released by former President Trump on September 23, 2021. The URL from which the exhibit was obtained (<https://twitter.com/realLizUSA/status/1441069474124386321>) is current as of November 8, 2021.

8. Attached to this declaration as Exhibit N-6 is a true and correct copy of *3 Michigan Republicans join national call for 'forensic audit' of 2020 election* by Samuel Robinson published by MLive on October 6, 2021. The URL from which the exhibit was obtained (<https://www.mlive.com/public-interest/2021/10/3-michigan-republicans-join-national-call-for-forensic-audit-of-2020-election.html>) is current as of November 8, 2021.

9. Attached to this declaration as Exhibit N-7 is a true and correct copy of *Oklahoma elections official dismisses GOP lawmaker's request for election audit* by Carmen Forman published by The Oklahoman on July 14, 2021. The URL from which the exhibit was obtained (<https://www.oklahoman.com/story/news/2021/07/14/oklahoma-gop-lawmaker-election-audit-request-dismissed/7958772002/>) is current as of November 8, 2021.

10. Attached to this declaration as Exhibit N-8 is a true and correct copy of *Utah lawmaker fans flames, calls for audit of 2020 election* by Katie McKellar published by the Desert News on October 20, 2021. The URL from which the exhibit was obtained (<https://www.deseret.com/utah/2021/10/20/22737041/utah-lawmaker-fans-flames-calls-for-audit-of-utahs-2020-election-but-will-it-catch-election-fraud>) is current as of November 8, 2021.

11. Attached to this declaration as Exhibit N-9 is a true and correct copy of *Amanda Chase plans to introduce legislation limiting the new voting methods enacted by Democrats* by Brandon Jarvis published by the Virginia Scope on November 3, 2021. The URL from which the exhibit was obtained (<https://www.viriniastope.com/amanda-chase-plans-to-introduce-legislation-limiting-the-new-voting-methods-enacted-by-democrats/>) is current as of November 8, 2021.

12. Attached to this declaration as Exhibit N-10 is a true and correct copy of *President Trump Responds on Pennsylvania's 2020 Election* by former President Trump published in The Wall Street Journal on October 27, 2021. The URL from which the exhibit was obtained ([https://www.wsj.com/articles/president-donald-trump-2020-election-fraud-pennsylvania-ballots-11635280347?mod=article\\_inline](https://www.wsj.com/articles/president-donald-trump-2020-election-fraud-pennsylvania-ballots-11635280347?mod=article_inline)) is current as of November 8, 2021.

13. Attached to this declaration as Exhibit N-11 is a true and correct copy of *The Facts on Trump's Fraud Letter*, an editorial published in the Wall Street Journal on October 29, 2021. The URL from which the exhibit was obtained (<https://www.wsj.com/articles/the-facts-on-donald->



[trumps-fraud-letter-2020-election-11635449578](#)) is current as of November 8, 2021.

14. Attached to this declaration as Exhibit N-12 is a true and correct copy of a website titled PA Election Investigation — Restoring Faith in Our Elections. The URL from which the exhibit was obtained (<https://paelectioninvestigation.com/>) is current as of November 8, 2021.

15. Attached to this declaration as Exhibit N-13 is a true and correct copy of a press released titled *Senator Dush Urges Public to Submit Sworn Testimony in Election Investigation by October 1* released on September 23, 2021. The URL from which the exhibit was obtained (<https://www.pasenategop.com/blog/senator-dush-urges-public-to-submit-sworn-testimony-in-election-investigation-by-october-1/>) is current as of November 8, 2021.

16. Attached to this declaration as Exhibit N-14 is a true and correct copy of a press released titled *Corman Calls for Subpoenas in Election Investigation Next Week* released on September 9, 2021. The URL from which the exhibit was obtained (<https://www.senatorcorman.com/2021/09/10/corman-calls-for-subpoenas-in-election-investigation-next-week/>) is current as of November 8, 2021.

17. Attached to this declaration as Exhibit N-15 is a true and correct copy of a statement titled *Dush Issues Statement on Inclusion of Personal Information in Subpoena* released on September 24, 2021. The URL from which the exhibit was obtained ([https://www.thecourierexpress.com/tri\\_county\\_sunday/dush-issues-statement-on-inclusion-of-personal-information-in-subpoena/article\\_a2ba51b0-405a-5284-80fc-69ecc0e4a972.html](https://www.thecourierexpress.com/tri_county_sunday/dush-issues-statement-on-inclusion-of-personal-information-in-subpoena/article_a2ba51b0-405a-5284-80fc-69ecc0e4a972.html)) is current as of November 8, 2021.

18. Attached to this declaration as Exhibit N-16 is a true and correct copy of written testimony submitted by Shane Hamlin, Executive Director, ERIC to the Pennsylvania House of Representatives State Government Committee on March 4, 2021. The URL from which the exhibit was obtained ([https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2021\\_0037\\_0004\\_TSTMNY.pdf](https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2021_0037_0004_TSTMNY.pdf)) is current as of November 8, 2021.

19. Attached to this declaration as Exhibit N-17 is a true and correct copy of a press released titled *Pew's David Becker Discusses the Electronic Registration Information Center*. The URL from which the exhibit was obtained (<https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2013/06/28/pews-david-becker-discusses-the>

[electronic-registration-information-center](#)) is current as of November 8, 2021.

20. Attached to this declaration as Exhibit N-18 is a true and correct copy of ERIC's Technology and Security Overview. The URL from which the exhibit was obtained ([https://ericstates.org/wpcontent/uploads/2021/04/ERIC\\_Tech\\_and\\_Security\\_Brief\\_v4.0.pdf](https://ericstates.org/wpcontent/uploads/2021/04/ERIC_Tech_and_Security_Brief_v4.0.pdf)) is current as of November 8, 2021.

21. Attached to this declaration as Exhibit N-19 is a true and correct copy of ERIC's Bylaws. The URL from which the exhibit was obtained ([https://ericstates.org/wpcontent/uploads/2020/02/ERIC\\_Bylaws\\_01-2020.pdf](https://ericstates.org/wpcontent/uploads/2020/02/ERIC_Bylaws_01-2020.pdf)) is current as of November 8, 2021.

22. Attached to this declaration as Exhibit N-20 is a true and correct copy of a transcript of proceedings from April 5, 2012 in *Applewhite v. Commonwealth*, No. 330 MD 2012.

23. Attached to this declaration as Exhibit N-21 is a true and correct copy of a letter sent from Rachel L. Frankel to Timothy P. Keating on May 2, 2013 regarding *Applewhite v. Commonwealth*, No. 330 MD 2012.

24. Attached to this declaration as Exhibit N-22 is a true and correct copy of an email sent from Kathleen Kotula to Timothy Keating on May 6, 2013 regarding *Applewhite v. Commonwealth*, No. 330 MD 2012.

25. Attached to this declaration as Exhibit N-23 is a true and correct copy of a letter sent from Todd Hutchinson to David Gersch on May 30, 2014 regarding *Applewhite v. Commonwealth*, No. 330 MD 2012.

26. Attached to this declaration as Exhibit N-24 is a true and correct copy of an email sent from Todd Hutchinson to Gregory Dunlap, et al. on July 28, 2014 regarding *Applewhite v. Commonwealth*, No. 330 MD 2012.

27. Attached to this declaration as Exhibit N-25 is a true and correct copy of a report titled *Election Law in Pennsylvania* issued by the Joint State Government Commission in June 2021. The URL from which the exhibit was obtained ([http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2021-06-23%20\(Act%2012\)%20ELAB%20web%206.23.2021.pdf](http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2021-06-23%20(Act%2012)%20ELAB%20web%206.23.2021.pdf)) is current as of November 8, 2021.

28. Attached to this declaration as Exhibit N-26 is a true and correct copy of a letter sent from Michael J. Fischer to Matt Haverstick, et al. on October 26, 2021 regarding *Commonwealth v. Dish*, 322 MD 2021.

29. Attached to this declaration as Exhibit N-27 is a true and correct copy of written testimony submitted by Al Schmidt, City Commissioner of Philadelphia, to the Committee on Rules and Administration of the United States Senate Emerging Threats to Election Administration on October 26, 2021. The URL from which the exhibit was obtained ([https://www.rules.senate.gov/imo/media/doc/Testimony\\_Schmidt.pdf](https://www.rules.senate.gov/imo/media/doc/Testimony_Schmidt.pdf)) is current as of November 8, 2021.

30. Attached to this declaration as Exhibit N-28 is a true and correct copy of Bill Information for Senate Bill 421, Regular Session 2019-2020. The URL from which the exhibit was obtained ([https://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2019&ind=0&body=S&type=B&bn=421](https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2019&ind=0&body=S&type=B&bn=421)) is current as of November 8, 2021.

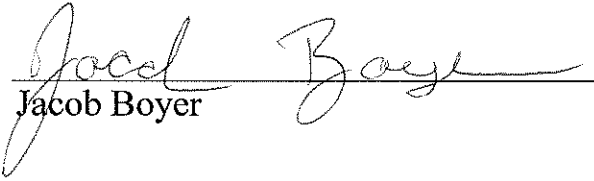
31. Attached to this declaration as Exhibit N-29 is a true and correct copy of Bill Information for Senate Bill 422, Regular Session 2019-2020. The URL from which the exhibit was obtained ([https://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2019&ind=0&body=S&type=B&bn=422](https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2019&ind=0&body=S&type=B&bn=422)) is current as of November 8, 2021.

32. Attached to this declaration as Exhibit N-30 is a true and correct copy of *The Voter Fraud Commission Wants Your Data — But*

*Experts Say They Can't Keep It Safe* by Jessica Huseman and Derek Willis published by ProPublica on October 23, 2017. The URL from which the exhibit was obtained (<https://www.propublica.org/article/crosscheck-the-voter-fraud-commission-wants-your-data-keep-it-safe>) is current as of November 8, 2021.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 8, 2021

  
Jacob Boyer

# Exhibit N-1



## Following Warning By Trump, Vos Announces Former Justice Will Lead Assembly GOP Election Probe

Former Wisconsin Supreme Court Justice Michael Gableman Will Oversee 3 Retired Officers Who Are Conducting The Investigation

By Shawn Johnson

**Updated:**

Saturday, June 26, 2021, 5:04pm

A day after being attacked by former President Donald Trump, Assembly Speaker Robin Vos told Wisconsin Republicans at their annual convention that former conservative state Supreme Court Justice Michael Gableman would oversee an investigation of the 2020 election.

Gableman, Vos said, would oversee three retired police officers who were hired by the Wisconsin Assembly. Vos said the group is "looking into the shenanigans" that happened in the 2020 election, which Trump has repeatedly falsely claimed he won.



"We wanted to make sure that you were the first people to know," Vos told GOP activists. "Because you are the ones who have done everything possible to make sure that our conservative candidates win for the Legislature, from the county clerk all the way up to the presidency."

Gableman served a single 10-year term on the Wisconsin Supreme Court before stepping down in 2018. While he promised that his work on the election probe would not be partisan, Gableman's Republican ties run deep, and GOP activists greeted him warmly Saturday.

"I'm glad to be here — glad to see so many friends," Gableman said. "When I fought evil every day at the state Supreme Court for 10 years, I fought for you."

Gableman, who attended a Nov. 7, 2020 rally supporting Trump [1], said he knew a lot of people at the convention were disappointed with how the presidential election was run.

"And you didn't just grumble about it and go back home and let it let bygones be bygones," Gableman said. "You recognize that this one is where we draw the line."

Democrats said the announcement of Gableman's hiring at the state GOP convention underscored the true partisan intent of Vos' investigation.

"Gableman says the big problem is people not trusting the election," tweeted [2] Wisconsin Democratic Party chair Ben Wikler. "Vos & Gableman are part of Operation Destroy Trust."

Before joining the court, Gableman was briefly Ashland County's district attorney and served six years as a Burnett County Circuit Court judge. He was appointed to the judgeship by former Republican Gov. Scott McCallum.

Gableman is a former chair of the Ashland County Republican Party and relied on GOP support to win his 2008 state Supreme Court race [3] against incumbent Justice Louis Butler. His election secured a 4-3 conservative majority on the court, which later went on to uphold major pillars of former Republican Gov. Scott Walker's agenda. Gableman himself wrote opinions that upheld Walker's Act 10 collective bargaining law [4] and shut down a semi-secret John Doe investigation [5] involving Walker's campaign.

Gableman ran a false attack ad against Butler during his 2008 campaign that prompted an investigation by the Wisconsin Judicial Commission. While staff at the agency alleged that Gableman ran the ad "with reckless disregard for the truth," Gableman's colleagues on the Supreme Court split 3-3 on whether to pursue the complaint, and it was dropped.

In addition to Gableman, the state Assembly under Vos' direction has already hired Mike Sandvick, a retired Milwaukee police detective with ties to the GOP, and Steve Page, who Vos has said previously worked for the city of Eau Claire. The Associated Press reported [6] that the investigators were being paid \$3,200 a month by taxpayers to investigate "potential irregularities and/or illegalities" in the 2020 presidential election. Vos has not named the third investigator and has not said what Gableman will be paid.

While Gableman said it had been "several days" since he was offered the position, the announcement of his hiring came the day after Vos, Senate Majority Leader Devin LeMahieu, R-Oostburg and Senate President Chris Kapenga, R-Delafield were criticized by name in a mass email from Trump.

"Wisconsin Republican leaders Robin Vos, Chris Kapenga, and Devin LeMahieu, are working hard to cover up election corruption, in Wisconsin," read the written statement from Trump issued Friday night. "They are actively trying to prevent a Forensic Audit of the election results."

Trump said Vos, Kapenga and LeMahieu needed to "step up and support the people who elected them" or they would be primaried and quickly run out of office.

Vos told [7] reporters [8] Saturday morning that Trump was "misinformed." GOP lawmakers have ordered the nonpartisan Legislative Audit Bureau to conduct an audit [9] of the 2020 election. On Saturday, several Wisconsin Republicans used the word "forensic" when describing the audit.

Kapenga released a public letter [10] to Trump where he effusively praised the former president but said Trump was mistaken.

"I feel I need to respond even though you will likely never hear of it, as the power of your pen to mine is like Thor's hammer to a Bobby pin," Kapenga wrote. "Nevertheless, I need to correct your false claim against me."

Kapenga said in his letter that he had "made specific requests on procedures and locations" as part of the election audit. Kapenga also noted that he was about to board a plane, where he would wear his Trump socks and a Trump face mask.

While it's been almost eight months since President Joe Biden won the 2020 presidential election, Trump has never stopped pushing the false claim that Biden lost.

In Wisconsin, where Biden defeated Trump by 20,682 votes, Trump and his allies lost repeated efforts to overturn the election in state and federal court. The former president's string of losses included a rebuke [11] by U.S. District Judge Brett Ludwig, himself a Trump nominee. The U.S. Supreme Court, where conservatives hold a 6-3 majority, also rejected GOP efforts [12] to overturn Wisconsin's election.

GOP lawmakers have passed a wide range of bills that would ban some of the types of voting Wisconsin residents used to cast their ballots in 2020. The bills, which are likely headed for veto by Democratic Gov. Tony Evers, would make it harder for people to declare themselves "indefinitely confined" and ban events like Madison's "Democracy in the Park."

Other GOP proposals would increase penalties for voter fraud, which is exceedingly rare in Wisconsin. According to the Wisconsin Elections Commission, local clerks in Wisconsin referred just 13 allegations of suspected fraud [13] in the November 2020 election to district attorneys. Nearly 3.3 million votes were cast in the state.

Despite his written warning to Wisconsin Republicans, Trump still appeared in a video message broadcast at the convention where he praised the state GOP. Trump, who has signaled he will run again in 2024, also promised a return to Wisconsin.

"I appreciate all of the incredible work you have done for me," Trump said. "We are going to be together a long time."

During a debate Saturday evening, a group of GOP activists advanced a resolution [14] calling for Vos' resignation, suggesting the Speaker should have fought the expanded use of absentee ballot drop boxes during the 2020 election. The motion was defeated on a voice vote.

## **Ron Johnson Attacks Democrats, Leaves Republicans Guessing About 2022**

When U.S. Sen. Ron Johnson first ran for office in 2010, he used that year's state GOP convention to effectively launch his campaign. Johnson alluded to his first run during his speech Saturday, but he made no such announcement.

"When I stepped up to the plate about 11 years ago ... I ran because I was panicked for our nation," Johnson said. "Now I've been serving for 11 years. I've seen the change. And I hate to admit it. I'm more panicked."

In 2016, Johnson pledged not to seek a third term [15] in office, but he has since distanced himself from that promise. Several Republicans said Saturday that they wanted Johnson to run, including Hitt.

"Make sure you give Sen. Johnson a warm welcome," Hitt told the crowd ahead of Johnson's speech. "Let's give him a warm welcome and coax this decision."

Johnson sent mixed messages during his remarks, saying the state GOP's mission should be to unify the nation while at the same time suggesting Democratic leaders don't love the United States.

"The left talk about fundamentally transforming this nation," Johnson said. "Do you even like, much less love, something you want to fundamentally transform?"

"What are the fundamental differences between them and us?" Johnson continued. "For some reason, their leaders are not real satisfied with what America represents."

Johnson said he had seen a change in the public during his tenure, moving away from "Wisconsin nice" to more aggressive, personal confrontations. He referenced Milwaukee's recent Juneteenth Day celebration, where Johnson — who had opposed making Juneteenth an additional paid federal holiday — was booed [16]. Johnson blamed a "small group of just incredibly nasty and profane people."

Democratic Party of Wisconsin Senate Communications Advisor Philip Shulman said in a statement that Johnson had focused his speech on a self-serving agenda.

"Ron Johnson once again showed Wisconsinites that he's only concerned with fulfilling his personal ambitions, not doing what is in their best interests," Shulman said.

Several Democrats have lined up to run against Johnson, including Outagamie County Executive Tom Nelson, Milwaukee Bucks executive Alex Lasry, Wisconsin Treasurer Sarah Godlewski, Milwaukee state Sen. Chris Larson and Wausau doctor Gillian Battino.

Whether or not Johnson runs, Wisconsin's Senate race is expected to be among the most competitive in the nation. Other Republicans said to be considering the race should Johnson bow out include U.S. Rep. Mike Gallagher and Kevin Nicholson, who ran for U.S. Senate in 2018.

While Saturday's convention, which was broadcast by Wisconsin Eye [17], provided a window into what's motivating the GOP base in 2021, next year's convention could be more consequential. Republicans use their even year conventions to nominate candidates for contested statewide office, and could have multiple candidates running for governor, if not Senate.

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**Source URL:** <https://www.wpr.org/following-warning-trump-vos-announces-former-justice-will-lead-assembly-gop-election-probe>

### Links

- [1] <https://www.tmj4.com/news/local-news/hundreds-gather-to-support-president-trump-at-serb-hall>
- [2] <https://twitter.com/benwikler/status/1408808520066207747>
- [3] <https://www.wpr.org/contentious-supreme-court-race-stage-was-set-decade-ago>
- [4] <https://www.wpr.org/supreme-court-upholds-act-10-ending-legal-battle-against-collective-bargaining-law>
- [5] <https://www.wpr.org/state-supreme-court-ruling-blocks-john-doe-probe>
- [6] <https://apnews.com/article/wi-state-wire-wisconsin-election-2020-government-and-politics-f783a78b7475917c4de1f8574d5783e2>
- [7] <https://twitter.com/MollyBeck/status/1408794153497075716>
- [8] <https://twitter.com/rvetterkind/status/1408793903713636355>
- [9] <https://www.wpr.org/republican-lawmakers-order-audit-wisconsins-election-system>
- [10] [https://wpr-public.s3.amazonaws.com/wprorg/senator\\_kapenga\\_-\\_letter\\_to\\_president\\_trump.pdf](https://wpr-public.s3.amazonaws.com/wprorg/senator_kapenga_-_letter_to_president_trump.pdf)
- [11] <https://www.wpr.org/federal-judge-denies-trump-lawsuit-wisconsin>
- [12] <https://www.wpr.org/us-supreme-court-denies-texas-lawsuit-seeking-block-election-results-wisconsin>
- [13] <https://www.wpr.org/elections-commission-report-13-instances-possible-voter-fraud-referred-prosecutors->

november-election

[14] <https://twitter.com/MollyBeck/status/1408917578005848069>

[15] <https://www.wpr.org/insurrection-election-ron-johnson-courts-controversy-he-weighs-third-term>

[16] <https://www.jsonline.com/story/news/2021/06/19/crowd-boos-sen-ron-johnson-milwaukeees-juneteenth-day-celebration/7758466002/>

[17] <https://wiseye.org/?p=25175>

# Exhibit N-2

## NewsRoom

8/9/21 Milwaukee J. & Sentinel (Pg. Unavail. Online)  
2021 WLNR 25851792

Milwaukee Journal Sentinel (WI)  
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August 9, 2021

Section: News

Michael Gableman said bureaucrats 'stole our votes' before he was put in charge of reviewing 2020 election

Patrick Marley

MADISON - The lawyer overseeing a Republican review of the presidential election is portraying himself as a neutral arbiter who hasn't reached any conclusions, but last year he told a group of Donald Trump's supporters that the election had been stolen.

"Our elected leaders - your elected leaders - have allowed unelected bureaucrats at the Wisconsin Elections Commission to steal our vote," former state Supreme Court Justice Michael Gableman told the crowd at Serb Hall in Milwaukee in November.

Assembly Speaker Robin Vos of Rochester hired Gableman at taxpayer expense this summer to review the election that Trump narrowly lost even though recounts and a slew of court rulings showed Joe Biden had won.

The pairing is not an obvious one. Gableman in November blamed Republican leaders like Vos for setting the stage for what he considers a poorly run election, arguing they should have cracked down on the agency that oversees Wisconsin's voting systems.

"The people who bear the real responsibility for all of this is the legislative leadership," Gableman said in November. "They created the Wisconsin Elections Commission, they pay for it, they write the checks - well, the people pay for it, but the Legislature writes the check to support all these people (at the commission)."

Gableman made the comment on a podcast hosted by Kevin Nicholson, the former Marine who lost the 2018 Republican primary for U.S. Senate and is planning a bid for Senate or governor next year. Gableman sits on the board of the No Better Friend Corp., the political group Nicholson heads.

Also on the podcast, Gableman said he thought Republican lawmakers were unwilling to take on the Elections Commission because they feared media criticism, according to a Milwaukee Journal Sentinel review of comments Gableman made shortly after the election.

Recently, Gableman has tried to downplay his past comments.

In a recent interview broadcast on WISN-TV, Gableman falsely claimed he hadn't said the election was stolen.

Gableman did not respond to questions from the Milwaukee Journal Sentinel. A spokeswoman for Vos also did not answer questions.

During the WISN interview, Gableman was asked whether he had prejudged his review of the election by saying at the November rally, "I don't think anyone here can think of anything more systematically unjust than a stolen election."

He responded: "I didn't say it was a stolen election. I stand by every word you just (said). I cannot - and I defy you to - think of anything more unjust than a corrupt or unlawful election in a democracy. Whether that occurred here is very much a question to be examined."

Asked if that meant he was saying that he hadn't told the crowd the election was stolen, Gableman said, "I try to be very careful about my words."

But he didn't address how his claim squared with his other comment at the rally that the bureaucrats had been allowed to "steal our vote."

"I think that's a profoundly unfortunate, false and inflammatory comment," said Ann Jacobs, the Democrat who serves as chairwoman of the commission. "The Elections Commission has been absolutely diligent in fulfilling our statutory duties with regards to elections."

Assembly Democratic Leader Gordon Hintz, D-Oshkosh, said Gableman wasn't credible because he had cheered on the pro-Trump crowd in November.

"He showed up at the circus. He showed up at a clown show. I mean, he's part of the circus," Hintz said. "He's doing damage by his participation in this. There is no credibility."

The status of Gableman's investigation is unclear. Vos hired law enforcement officers to assist Gableman, but they quit. Vos recently said he has given Gableman more authority and will allow him to hire more help.

The developments come as state Rep. Janel Brandtjen, the Menomonee Falls Republican who leads the Assembly Committee, is seeking to seize ballots and voting equipment in Brown and Milwaukee counties. She issued subpoenas for that material on Friday, but they appear to be invalid because they were not signed by Vos and Assembly Chief Clerk Ted Blazel.

Gableman criticizes a leader who is now his boss

Gableman is now working closely with Vos, but nine months ago he had harsh words for legislative leaders like Vos.

In his November podcast appearance, Gableman criticized the Elections Commission for guidance it gave clerks that he considers inaccurate. That's when he said "the ones who bear the real responsibility for all of this is the legislative leadership."

Republicans aren't doing more about how the commission operates because they can't handle public criticism, he said.

"I think legislators, especially Republican legislators, are afraid that if they do take steps to see that the election laws are followed, that they will be criticized by, among others, most of the editors and most of the reporters at the Milwaukee Journal Sentinel and other media outlets for so-called voter suppression when in fact they are just trying to enforce the law," Gableman said.

The commission consists of six members - three Republicans and three Democrats.

Gableman claimed that when the commissioners deadlock on an issue, the staff's recommendation prevails. That is not true. The staff can't take action without the directive of a majority of the commission.

Gableman blasted the commission for its decision not to quickly purge thousands of voters from the rolls in 2019 after notifying them that it believed they might have moved.

He argued the commission was "in clear violation of the statutes" even though an appeals court decision was in place at the time saying the commission had acted appropriately.

Five months after Gableman claimed the commission was wrong, the state Supreme Court ruled 5-2 in its favor.

Also during his podcast interview, Gableman said he had trouble believing 85% of voters in some wards in Milwaukee had voted for Biden - even though lopsided numbers for Democrats are common in the state's largest city.

"I simply don't believe those numbers are legitimate based on what I've seen and the conversations I've had. I just think that President Trump has a lot more support than that," Gableman said.

Results from past elections show Biden's numbers in Milwaukee were typical.

For instance, in 2016 - when Trump won the state - Democrat Hillary Clinton received 85% or more of the votes in many Milwaukee wards. Similarly, Trump that year racked up close to 85% of the vote in heavily Republican rural areas such as Alto, Leola, McKinley and Herman.

Bill Glabuer and Hope Karnopp of the Journal Sentinel staff contributed to this report.

Contact Patrick Marley at [patrick.marley@jrn.com](mailto:patrick.marley@jrn.com). Follow him on Twitter at [@patrickdmarley](https://twitter.com/patrickdmarley).

Facebook Twitter Email

--- **Index References** ---

Company: WISCONSIN MUNICIPALITIES PRIVATE SCHOOL FINANCE COMMISSION; Supreme Court Registry; WIN TV-PRODUCTIONS BV; THE SENATE (DESG); JOURNAL SENTINEL INC.; FACEBOOK, INC.; MILWAUKEE COMMUNITY JOURNAL INC.; UNITED STATES SENATE; MARINE PRODUCTS CORPORATION; TWITTER, INC.

News Subject: (Campaigns & Elections (1CA25); Global Politics (1GL73); Government (1GO80); Legislation (1LE97); Political Parties (1PO73); Public Affairs (1PU31); World Elections (1WO93))

Region: (Americas (1AM92); North America (1NO39); U.S. Midwest Region (1MI19); USA (1US73); Wisconsin (1WI54))

Language: EN

Other Indexing: (Republican; No Better Friend Corp.; Elections Commission; Democrat; Assembly Committee; Republicans; Democrats; Wisconsin Elections Commission; Supreme Court; WISN-TV; Senate; Journal Sentinel; Facebook; Milwaukee Journal Sentinel; U.S. Senate; Marine; Twitter) (Michael Gableman; Donald Trump; Robin Vos; Joe Biden; Kevin Nicholson; Ann Jacobs; Assembly Democratic Leader; Gordon Hintz; Janel Brandtjen; Assembly Chief Clerk; Ted Blazel; Hillary Clinton; Bill Glabuer; Hope Karnopp; Patrick Marley; [@patrickdmarley](https://twitter.com/patrickdmarley))

Word Count: 1094



# Exhibit N-3

# Calls intensify to end Wisconsin's election review amid blunders by ex-judge in charge

By [Elise Viebeck](#)

October 14, 2021 at 6:00 a.m. EDT



The glaring errors became clear soon after a former Wisconsin judge [issued subpoenas earlier this month](#) in a Republican review of the state's 2020 presidential election. Some of the requests referred to the wrong city. At least one was sent to an official who doesn't oversee elections. A Latin phrase included in the demands for records and testimony was misspelled.

Michael Gableman, the former judge leading the review, admitted days later that he does not have “a comprehensive understanding or even any understanding of how elections work.” He then backed off some of his subpoena demands before reversing course again, telling a local radio host that officials would still be required to testify.

The latest round of reversals and blunders is intensifying calls to end the probe, one of several recent efforts around the country to revisit Joe Biden's win in states where former president Donald Trump and his supporters have leveled baseless accusations of voter fraud.

Attorney General Josh Kaul (D) this week called the subpoenas unlawful and “dramatically overbroad,” and he urged Republicans to “shut this fake investigation down.” Voting rights advocates, election policy experts and some state and local officials, meanwhile, accuse Gableman of incompetence and say his review — which could cost taxpayers \$680,000 or more — will decrease public trust in Wisconsin elections.

“It's terrible for democracy in the state,” Madison Mayor Satya Rhodes-Conway (D) said in an interview. “It's corrosive. It undermines confidence in our elections, and it's deeply insulting to our municipal clerks and poll workers. ... The thing that should give everybody some confidence is the fact that our elections are not being run by people like attorney Gableman.”

While some critics have mocked the constant stream of missteps, Gableman's approach comes with a real cost to democracy, experts said.

“I do think it's harmful,” Barry C. Burden, director of the Elections Research Center at the University of Wisconsin at Madison, said of the review. “It's obviously amateurish and uncoordinated and irresponsible and open-ended and partisan. The people who are leading the effort have already decided they think the election was fraudulent, or they're distrustful of the outcome. It's a violation of all the standards you'd use in a usual election audit or review the state might do.”

Gableman, a former state Republican Party official, suggested in November that the election [might have been stolen](#), even as multiple court rulings and local recounts went on to affirm Trump's loss in Wisconsin by just under 21,000 votes. His office did not respond to a request for comment Tuesday. In a [video posted over the weekend](#), he doubled down on claims that election laws were “not properly followed” by state and local officials but did not provide further

detail. He has said the goal of his review is not to overturn Biden's win in the state.

As the first anniversary of the 2020 election approaches, a number of similar ballot reviews are still underway or have just recently ended.

A Republican-commissioned probe in Arizona confirmed the accuracy of Biden's win in Maricopa County after a costly and drawn-out process widely criticized by election experts as sloppy and biased. State officials in Texas have launched a review of the election results in four of the state's largest counties. Republican lawmakers in Pennsylvania approved subpoenas last month for a wide variety of data and personal information on voters, triggering a lawsuit from Democratic Attorney General Josh Shapiro. And in Michigan this week, conservative activists rallied at Trump's behest to demand an investigation into Biden's victory there.

"If we don't solve the Presidential Election Fraud of 2020," Trump said in a statement Wednesday urging further reviews of his debunked claims, "Republicans will not be voting in '22 or '24. It is the single most important things for Republicans to do."

Gableman's review is one of several ongoing probes of the 2020 election in Wisconsin. Chosen by Assembly Speaker Robin Vos (R) over the summer, he previously traveled to Arizona to learn about its review and attended a conference held by Mike Lindell, the MyPillow chief executive and Trump supporter who has claimed without evidence that China hacked the election.

The review had problems from the start. Two initial employees quit. Gableman's team used an unsecure private email account under another name to send instructions to county clerks about preserving evidence, leading some messages to be marked as "junk" or flagged as risky. The former judge also drew criticism after suggesting in a video posted to YouTube that the burden was on election officials to prove the election was not tainted by fraud.

Gableman is consulting with Shiva Ayyadurai, who has accused Massachusetts election officials of committing fraud in the U.S. Senate primary he lost last year, and Andrew Kloster, a former Trump White House attorney who has also claimed the presidential election was stolen.

Problems with the review intensified Oct. 1 as Gableman began to issue subpoenas for in-person testimony and "all documents" pertaining to the November 2020 vote from mayors and other officials in Wisconsin's five largest counties, as well as some state officials. The letters were rife with errors, including misspelling the name of at least one official.

Gableman requested that the officials come to Brookfield, Wis., to testify at rented office space. The following week, he admitted his ignorance about how elections are run.

"No one can call elections laws common sense," he told the Milwaukee Journal Sentinel. "Once you understand them, it may be common sense, but it's not intuitive. And so most people, myself included, do not have a comprehensive understanding or even any understanding of how elections work."

Gableman then backed off the subpoenas he had just issued, saying officials did not need to appear in person for interviews and could provide copies of records they had already made available under Wisconsin's open records law. But on Friday, Gableman offered more contradictory statements when he said he was still seeking in-person testimony from officials.

Local officials expressed frustration with the mixed messages and lack of clarity.

"Our attorneys have been back and forth with their team trying to understand what they want, because their request was so incredibly broad," Rhodes-Conway said. "Every time we communicate with them, it seems to change."

Matthew Weil, director of the Bipartisan Policy Center's Elections Project, said Gableman and his team seem to lack the expertise needed to properly interpret and contextualize the documents they gather.

"It doesn't seem like they have any rules or know what they're doing," he said. "I don't think they're going to do anything to improve confidence in the process."

At a news conference this week, Kaul criticized Gableman's plan to interview officials privately. He said the review is "not a serious investigation" and "suffers from glaring flaws that destroy any credibility that its results could have."

"It is continuing to fan the flames of the 'big lie' and it is falsely undermining confidence in our elections," he said.

Asked for comment, a spokeswoman for Vos pointed to a statement the speaker issued earlier in the week in which he said Gableman's subpoenas were "issued correctly" based on a memo prepared by the nonpartisan Legislative Council.

Yet not all Wisconsin Republicans think they go far enough. State Rep. Janel Brandtjen, the chair of the Assembly's Campaigns and Elections Committee, who is running her own review of the vote, called on Gableman to take a more aggressive approach.

"A cyber forensic audit, including the recounting of physical ballots and an audit of the machines, would finally rebuild trust in Wisconsin elections," Brandtjen said in a statement.

Gableman's rhetoric has become increasingly harsh as his review receives more media scrutiny.

In an interview Friday with conservative radio host Dan O'Donnell, Gableman compared the Journal Sentinel's reporting to the work of Nazi Germany's minister of propaganda, saying the paper's coverage "would make Joseph Goebbels blush." The comment prompted a call for Gableman's removal by state Rep. Lisa Subeck (D), who is Jewish and called the comparison "clearly antisemitic."

After O'Donnell suggested a comparison with Pravda, the official newspaper of the Communist Party of the Soviet Union, would be more appropriate, Gableman said he retracted his reference to Goebbels.

Both Burden and Rhodes-Conway called the review "doomed" in terms of its credibility.

"I think the only thing he can do that would be helpful is to admit that this was a wrongheaded exercise, that he was the wrong person to do this, that he went in with beliefs about the election not being trustworthy, that he violated all of the standards of normal election reviews," Burden said. "I don't see how it's salvaged other than to simply scrap it and admit it was the wrong way to go."

Weil said he hoped that partisan reviews in Arizona, Wisconsin and other states would increase support for legitimate election audits run with transparency by experts.

"There are absolutely avenues to strengthen election laws and procedures, and we should be doing that, but promising some sort of cyber-forensic audit that has no goals, being led by people who don't understand elections, isn't the way to get there," he said.



# Exhibit N-4



Texas Secretary of State  
John B. Scott

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## Texas Secretary of State's Office Announces Full Forensic Audit of 2020 General Election in Four Texas Counties

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September 23, 2021

Contact: [Sam Taylor](#)

512-463-6116

**AUSTIN** - Under existing Texas laws, the Secretary of State has the authority to conduct a full and comprehensive forensic audit of any election and has already begun the process in Texas' two largest Democrat counties and two largest Republican counties—Dallas, Harris, Tarrant, and Collin—for the 2020 election. We anticipate the Legislature will provide funds for this purpose.

[Read additional information \(PDF\)](#) about Texas' full forensic election audit.

###

# Exhibit N-5





- September 23, 2021 -

## Letter to Texas Governor Greg Abbott

Dear Governor Abbott,

Despite my big win in Texas, I hear Texans want an election audit! You know your fellow Texans have big questions about the November 2020 Election. Bills to audit elections in your great state's House and Senate were considered during Texas' Second Special Session. Instead, the legislature passed a watered-down amendment that doesn't even apply to the 2020 Presidential Election. This short amendment doesn't answer the questions Texans have about the last election. Texans demand a real audit to completely address their concerns.

We need HB 16, which was just filed in the Third Special Session. This legislation specifically addresses the 2020 Presidential Election, and enables audits for future elections. The bill creates a process for candidates and party chairs to initiate an audit, and uses the same language as SB 97, which already passed the Texas State Senate, but did not have enough time to make it through the House during the Second Special Session.

Texas needs you to act now. Your Third Special Session is the perfect, and maybe last, opportunity to pass this audit bill. Time is running out. Paper ballots in your state are only kept for 22 months after the election. Your citizens don't trust the election system, and they want your leadership on this issue, which is the number one thing they care about. It is their most important issue—one that will affect 2022 and 2024.

Governor Abbott, we need a "Forensic Audit of the 2020 Election" added to the call. We're quickly running out of time and it must be done this week. Texans know voting fraud occurred in some of their counties. Let's get to the bottom of the 2020 Presidential Election Scam!

Donald J. Trump

# Exhibit N-6

# 3 Michigan Republicans join national call for 'forensic audit' of 2020 election

By [Samuel J. Robinson | srobinson@mlive.com](mailto:srobinson@mlive.com)



Steve Carra is pictured in a July 15, 2019 file photo. Joel Bissell | MLive.com

LANSING, MI — Dozens of lawmakers from multiple states, including three Republicans from Michigan, signed a letter to “the American people” calling for a 50-state audit of the November 2020 general election.

92 state Republicans joined Arizona state Sen. Wendy Rogers, who released the letter in [a post](#) to social media Monday.

Michigan House Reps. Steve Carra, R-Three Rivers, Daire Rendon R-Lake City and Matt Maddock, R-Milford, are listed on the letter.

The letter calls for states to decertify electors where elections were certified inaccurately, and suggests the US House of Representatives “convene and vote per the US Constitution by means of one vote per state to decide the rightful winner of the election.”

Maddock and Rendon could not be immediately reached for comment, but Carra offered some insight into why he added his name to the Arizona

lawmaker's letter.

"The American people should expect their elected officials to continue fighting for fair, honest and transparent elections," Carra said Monday in a text message.

"Simply passing dozens of election integrity bills without seeing what worked and what didn't work from the last election is insulting to the people of my community," Carra said, adding that Michigan "needs a full forensic audit," a procedure he's called for since July.

**Read more:** [Michigan lawmaker introduces bill calling for 'forensic audit' of 2020 election](#)

For months, Carra has rejected the [audits already completed by the Michigan Secretary of State](#), which concluded that no fraud or foul play occurred during the 2020 election following its post-election audit in March. Carra has insisted the department's review of the election didn't go far enough.

"The Secretary of State conducted 250 baby recounts from select precincts. Those weren't audits," Carra said.

For Carra, a full forensic audit "looks beyond the ballots," he said.

"A full forensic audit looks beyond the ballots; it reviews the qualified voter file, the poll books, the chain of custody and is a thorough and rigorous investigation of the election," Carra said.

Despite months of insistence from Trump-allied Republicans that fraud influenced the result of the 2020 election, there has been no factual evidence presented thus far to back up their claims.

Secretary of State Jocelyn Benson has pushed back against calls for a forensic audit that gained momentum among conservative activists after the review style took form in Arizona.

"A forensic audit is not a thing," Benson said in a Twitter post in June.

Investigation efforts in Arizona, which found that voter fraud did not propel Biden to victory, came to a conclusion last week, but are now popping up in other Republican-controlled state Legislatures.

In Texas, the Secretary of State's office recently announced it would conduct a "full and comprehensive forensic audit" of the 2020 election in some heavily populated counties.

Under Carra's House Bill 5091, a bipartisan audit board would be tasked with contracting an outside group to conduct the investigation of the 2020 general election. The audit would be required to begin no later than 45 days after the bill takes effect, and the corporation would have 90 days to complete the audit. The bipartisan audit board would then have two weeks to complete and submit a final report.

The bill proposes a body that would consist of seven members: the state auditor general or the auditor general's designee; one each appointed by the Republican and Democratic leaders of the House and Senate; and one election challenger who served during the 2020 general election from each of the two major political parties.

Carra's bill asks auditors to take a look at 10% of precincts from across Michigan's counties and 20% from "each city with at least 500,000 residents," a designation that only the city of Detroit would qualify for.

Included in Carra's proposal are solutions to issues that often circulate among election conspiracists.

Under his bill, auditors would be asked to check to make sure whether electronic poll books were "connected to a network," as well as to analyze electronic voting systems to determine whether ballots were cast by humans or machines.

"We need to look into qualified voter files, see if there's any anomalies. We need to look into what machines may or may not have been connected to the internet, we need to look into this system, which I would contend is very ripe for fraud," Carra said in June.

Gov. Gretchen Whitmer this week vetoed an election bill package, which received some support from House Democrats, that would have made it illegal for third parties to access the Qualified Voter File and banned electronic poll books from being connected to the internet.

**Related:** [Whitmer vetoes election bills she says perpetuated 'Big Lie'](#)

"This legislation addresses a non-existent problem because poll books currently are not connected to the internet on election day and until the results have been tabulated for that precinct," a statement from the governor's office said.

"Together, HB 4837 and 4838 perpetuate the Big Lie by suggesting there is a defect in our election system which, in fact, does not exist," the statement said.

### **ALSO ON MLIVE:**

[In rare move, Judge sanctions 9 pro-Trump lawyers for 'frivolous' election fraud lawsuit in Michigan](#)

[Presence at US Capitol ahead of riot not likely to affect prospective Michigan GOP co-chair's candidacy](#)

# Exhibit N-7

## NEWS

# Oklahoma elections official dismisses GOP lawmaker's request for election audit

**[Carmen Forman](#)** Oklahoman

Published 7:09 a.m. CT July 14, 2021 | Updated 7:30 a.m. CT July 14, 2021

Oklahoma's chief elections official on Tuesday brushed off a request from a GOP state lawmaker seeking an election audit of some of the state's 2020 general election results.

Election Board Secretary Paul Ziriaux suggested an independent audit of Oklahoma's election results is not allowed under state law.

He also reiterated his faith in the accuracy of Oklahoma's elections, saying the state's voting devices are among the most precise and secure in the world.

Citing debunked claims of election fraud in other states, Rep. Sean Roberts, R-Hominy, asked for a forensic and independent audit of the 2020 general election results in Oklahoma County and two additional counties, chosen at random.

"In my judgment the time and expense of a post-election audit is not justified for an election that was conducted more than eight months ago," Ziriaux wrote in a letter to Roberts.

Although Ziriaux did not explicitly deny Roberts' request, he said the timing and manner of the audit requested are inconsistent with state law on post-election audits, which is defined as "a manual or electronic examination of a limited number of ballots" by certain elections officials.

**More:** Oklahoma Gov. Kevin Stitt's forum on McGirt ruling turns contentious in Tulsa

In other words, state law doesn't appear to allow an outside group to audit Oklahoma ballots, which is what is happening in Arizona where a Republican legislative leader hired a private firm to conduct an audit of the 2020 election results from the state's largest county.



Oklahoma law gives the state election board secretary the authority to direct a county election board secretary to conduct a post-election audit. The method, timing and procedures of the audit would be decided by the state election board secretary.

"There were clear signs of election fraud in various other states around the country such as Arizona, Georgia, and Pennsylvania," Roberts said in a news release. "Elections are the bedrock of our constitutional republic and the recent fraud across the country has led to voter confidence dropping drastically, we must prove our state elections are secure."

## **President Donald Trump and election fraud accusations**

Former President Donald Trump won all 77 counties in Oklahoma in the 2020 general election, a repeat of his presidential election performance from four years earlier.

Mimicking rhetoric from the former president, Trump loyalists have made accusations about widespread election fraud in the 2020 election that resulted in Democrat Joe Biden's victory. Yet, Trump supporters have presented no concrete evidence of extensive voter fraud that could have swung the election results in favor of Biden.

**Related:** New laws alter Oklahoma's initiative petition process after narrow passage of SQ 802

In his letter, Zirix noted no state or federal candidates on the ballot for the 2020 general election requested a recount of the results.

"There is no controversy surrounding the 2020 General Election in Oklahoma," he wrote. "Because of the strong protections our state has in place for the security and integrity of elections, there is no credible suspicion or evidence of pervasive fraud here."

Although some GOP lawmakers in Oklahoma have expressed doubts about presidential election results in various battleground states, they have largely expressed confidence in elections in the Sooner State.

**Related:** As some GOP states seek to limit ballot access, Oklahoma expands early voting

In May, House Majority Floor Leader Jon Echols, R-Oklahoma City, praised the integrity and security of the state's elections system.

"Oklahoma elections are safe and secure," Echols said.

In keeping with legislation passed by Oklahoma's GOP-led Legislature in 2019, the State Election Board also is testing audit techniques in order to implement a system of random post-election audits starting in 2022, Ziriak said.

Roberts said he is considering introducing legislation for the 2022 legislative session that would create a "more comprehensive audit process" in Oklahoma. Next year will be Roberts' final year in the state legislature before he is termed out of office.

Roberts made headlines last year when he threatened to undo tax breaks for the Oklahoma City Thunder if players knelt during the national anthem amid a national reckoning on race.

# Exhibit N-8

UTAH POLITICS

# Utah lawmaker fans flames, calls for audit of 2020 election. Will it catch fire or go up in smoke?

Gov. Spencer Cox 'frustrated' over misinformation in legislative hearing

By Katie McKellar | @KatieMcKellar1 | Oct 20, 2021, 8:08pm MDT



Kevin Unsinn, from Moab, holds a sign in support of a forensic vote audit during an election rally at the Capitol in Salt Lake City on Wednesday, Oct. 20, 2021. | Shafkat Anowar, Deseret News | [Purchase Photo](#)

A crowd of about 200 people rallied on Utah's Capitol Hill and packed an overflowing committee hearing on Wednesday to support a Republican lawmaker who's calling for an Arizona-style election audit in the state.

Even though President Donald Trump handily won Utah in 2020, that doesn't deter Rep. Steve Christiansen, R-West Jordan, who told the cheering crowd he's seeking a widespread, "forensic" audit in Utah because the issue of "election integrity" goes "much, much deeper than Donald J. Trump."

"It goes all the way to the Constitution of the United States of America for me," he said.

Gov. Spencer Cox and Lt. Gov. Deidre Henderson, both Republicans, were left "frustrated by the misinformation" that was presented at the hearing, according to a joint statement issued by the governor's office.

"We recognize some voters have legitimate questions about our elections and we invite all citizens to be involved in our local elections to see the process first-hand. But make no mistake: There is absolutely no evidence of election fraud in Utah," the statement said in part.

Christiansen on Tuesday appeared as a guest on a podcast hosted by Steve Bannon, former chief strategist to Trump, to draw attention to his efforts, hyping Wednesday's gathering as a "massive rally" fueled by "hundreds and thousands of people across this state that care deeply about their right to a free and fair election."

"They've all been invited to come and we're anticipating a fantastic turnout," Christiansen told Bannon. "The purpose of the rally is to push for an audit, as needs to be done in all 50 states, and also to push for election reform."

That "election reform" Christiansen is pushing entails doing away with voting by mail — a voting method that's existed in Utah for almost a decade — and voting machines.



Protesters hold U.S flags during a rally calling for a forensic vote audit at the Capitol in Salt Lake City on Wednesday, Oct. 20, 2021. | Shafkat Anowar, Deseret News | [Purchase Photo](#)

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Wednesday, the rally on the steps of the Utah Capitol began as crowd of about several dozen and grew to over 100 before they lined up outside the House Building to pack the Judiciary Interim Committee hearing, which included an agenda item titled “election integrity” on its schedule to hear Christiansen and his supporter’s demands — even though that committee does not have the power to call for an election audit.

In total, Utah Highway Patrol troopers tallied about 200 in-person attendees to the committee hearing, contrary to Christiansen’s comment during the committee hearing that about 400 to 600 turned out. During the rally on the Capitol’s steps, Christiansen said he’d hoped for a “thousand” attendees.

The calls for a “full forensic audit” of Utah’s elections, no more voting by mail and no more voting machines come after Christiansen in June went to Maricopa County, Arizona, to observe the audit that took place there.

That audit of 2.1 million votes, financed largely by \$6.7 million in donations from far-right groups and Trump defenders, affirmed President Joe Biden’s victory in that county, finding 99 additional votes for Biden and 261 fewer votes for Trump.

Supporters of Arizona’s controversial audit inaccurately claim it showed evidence of voter fraud and found so-called “lost votes” affected Arizona’s election outcome. Those claims have been debunked.

Christiansen continues to call for an election audit in Utah even though he has presented no evidence of widespread election fraud or issues in Utah’s election results. Acknowledging he has no proof, Christiansen argues there’s no harm in conducting a widespread audit to confirm the state’s elections are, indeed, free and fair.

“Bottom line, if we do an audit and it’s clean, then I’ve done my job,” he said. “If we do an audit and it identifies opportunities for improvement, I’ve done my job.”



State Rep. Steve Christiansen, R-West Jordan, speaks during a rally calling for a forensic vote audit at the Capitol in Salt Lake City on Wednesday, Oct. 20, 2021. | Shafkat Anowar, Deseret News | [Purchase Photo](#)

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Though the Judiciary committee allowed Christiansen the time to present his call for an audit, it didn’t act on his request.

Christiansen submitted an audit request in December 2020 to the Legislative Audit Committee, which hasn’t granted his request. He urged his crowd of supporters “to

reach out to every member of that committee and let them know you want an audit and you're willing to pay for it.”

“What we're hearing now is they're warming up to the idea that an audit may be necessary, but they don't want to pay any more than what is already in the budget,” Christiansen said.

## **Utah's top election official 'frustrated' by misinformation**

Cox and Henderson took issue with some of the questions raised about Utah elections in the hearing.

“Namely, that voting machines can be hacked, that there are more ballots than voters, that algorithms control voter registration, and other spurious claims made without evidence. All of these assertions are absolute falsehoods and run counter to Utah law and the foundation of our constitutional republic,” Cox and Henderson said.

“Utah has long been a model to the nation when it comes to voting and voter security. County clerks and local election offices execute their duties with accuracy and integrity. Utah follows the law.”

Utah's county clerks and state election officials have lauded the state's election system as a “model” for the country. Earlier this year, the Utah Legislature passed and Cox signed a resolution recognizing Utah county clerks for running a widely successful election without any significant problems.

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“There have been a lot of concerning accusations and inaccuracies just in general that we've heard ... since the past election,” Henderson said during the committee hearing.

Henderson said she fears the “talk that has been circulating is serving to undermine — deliberately undermine — voter confidence, and it concerns me greatly because it



becomes a threat to our democracy, becomes a threat to our constitutional republic, and a threat to our freedom.”

“We believe in a peaceful transfer of power in the United States of America. We value the fact that every citizen has a right to have their voice heard ... and that the process by which they do that is free and fair elections. This is what we live by here in the state,” Henderson said.

“In the U.S., sometimes we win elections, and sometimes we lose elections. And that’s OK, because there’s always another election,” she said

While Henderson spoke, some of Christiansen’s supporters grumbled and scoffed under their breath.

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**Trump's claims of voter fraud 'dangerous' and erode confidence, Lt. Gov. Cox says**

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## **Where are claims of fraud coming from?**

The 2020 election divided an already polarized U.S., and was undermined by Trump’s claims that the election was stolen from him — claims that lacked evidence and faltered in dozens of court cases.

Now, almost a year later, those claims live on. Even in Utah, county clerks are still facing misinformation that throw the election’s results into question, especially on social media, said Weber County Clerk/Auditor Ricky Hatch.

Clerks have tried to combat that misinformation by educating Utahns about all the safeguards currently in place to ensure elections are safe, free and fair, but oftentimes “there are louder voices,” Hatch said.

“On social media, posts that are inflammatory, outlandish, inciting, scary and quite often incomplete tend to get more interest than calm, measured posts of controlled safeguards, things that aren’t quite as exciting,” Hatch said.

Every year, Utah’s elections are audited at the state and local level in a certification process called a canvass. Before the certification of an election — in a public meeting

— clerk staff conduct an audit of a random sample of all ballots cast. During the audit, they manually review and compare the audited ballots to the system-tabulated record to ensure the accuracy of the equipment.

The audit results are public records that are reported to the Board of Canvassers and the lieutenant governor, who oversees elections in the state.

Henderson, while calling Utah a “model for other states to emulate,” said the state has also made “methodical and deliberate improvements to its election law.”

“Some of these improvements do include universal vote by mail, voter ballot tracking, same-day voter registration,” Henderson said. “But each of these improvements also come with multiple safeguards to ensure the integrity of the process, such as public audits, signature verification, chain of custody requirements ... address validation, not connecting any of our election equipment to the internet, secure drop boxes ... and a process for candidates and citizens to challenge the results of an election.”

Henderson added Utah conducted 462 individual races last year, and “to my knowledge there has not been a single challenge to any of those results.”

“That being said, we are also continually learning and improving and looking for ways that we can do better, and there are ways we can do better,” Henderson said.

Henderson said she’s working with county clerks and Rep. Jon Hawkins, R-Pleasant Grove, to propose legislation to add “additional safeguards,” including audits of voter registration rolls, in-person “spot checks” of post-election audits without notice, and improvements to controls governing ballot processing.

Hatch said Utah’s election system continues to serve as a model for other states.

“At the same time, we fully recognize that voter confidence across the country is suffering. And even with our exemplary system, Utah is no exception,” Hatch said. “Utahns hear what appears to be horror stories in other states or see complex statistical analyses that supposedly prove a stolen election.

“Now whether these stories or analyses are true or not, it’s no surprise that some voters worry about the security and integrity of elections in our own state,” Hatch

added. “Utah’s election officials know that we’re not perfect, nor is our election system perfect. No election system is. And this is why we’ve constantly worked to improve ourselves and the elections that we administer.”

Hatch went on to describe in detail how Utah’s current elections are already audited and re-audited, and all the safeguards already in place to ensure election security.

Hatch urged Utahns to come see for themselves how clerks conduct elections.

“Come see how we’re addressing the risks,” he said. “We think you’ll be comforted by the current safeguards and processes.”

# Exhibit N-9

POLITICS TOP STORIES

## **Amanda Chase plans to introduce legislation limiting the new voting methods enacted by Democrats**

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### Virginia Political Newsletter

Giving you the inside scoop on Virginia politics.

substack

by [Brandon Jarvis](#)

State Senator Amanda Chase R-Chesterfield said Wednesday that she is drafting legislation to limit mail-in voting and require a photo ID now that Virginia will have a Republican governor. She also plans to push for a forensic audit of Virginia’s 2020 election results after spending [recent months](#) traveling the country participating in election audit protests like the one she organized outside of the Virginia State Capitol in [August](#).

“While I’m thankful freedom won this election cycle, I’m still fully committed to election integrity,” Chase [tweeted](#) Wednesday, the day after the Republican statewide ticket [swept the Democrats](#). “Tomorrow, I begin drafting legislation to put the guardrails back on our elections including photo ID to vote. Mail in ballots increase the risk of issues.”

The state Senator has made election integrity a priority, even though there has been no evidence to prove any voter fraud in Virginia during the 2020 election. In an interview with Virginia Scope, Chase explained why she wants to limit mail-in absentee voting, something that was significantly expanded under Democratic rule in 2020.

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“I think there should be minimal exceptions,” Chase said. “One of the things that I have learned is that you can increase and decrease certain risk factors.” She believes that mail-in voting provides more opportunities for something to go wrong in the voting process. After multiple elections in Virginia, election officials have reported no significant problems with mail-in voting.

She noted that Governor-elect Glenn Youngkin was able to afford [poll watchers](#) and lawyers to monitor the process, but she says she wants to change the code to protect the candidates who cannot afford those same accommodations. “We gotta make sure that we secure elections for candidates,” Chase said.

Virginia law does [not require a photo ID to vote](#) as long as you sign a form confirming your identity. An analysis from [Virginia Mercury](#) earlier this year showed that a very minuscule percentage of voters did not show their photo ID to vote.

While Youngkin has steered clear of election integrity talks and acknowledged that Joe Biden was the 2020 winner, he did speak at a [rally](#) over the summer advocating for requiring a photo ID to vote in Virginia. “I’ll ask everyone to show up to vote with a photo ID,” he also said during a gubernatorial debate.

Chase says she will be soon drafting legislation to help the governor-elect make that happen.

“Photo ID is a bill I introduced last session but it was passed by for the year,” Chase continued Wednesday. “I just think it is a good best practice. You have to have a valid photo ID just to live in society here in Virginia and America. I really don’t think that is that heavy of a lift.”

While she made the public statement Wednesday, Chase says she has not talked to Youngkin about it. “I understand what its like to run for governor.”

She told Virginia Scope that she and Youngkin agreed to sit down after the election and talk about her findings from traveling the country looking for election fraud.

Chase plans to continue that effort in Virginia now that Republicans have much more power within the state government. “Now that we will have a Republican Governor, I look forward to seriously pursuing a full forensic **audit** of the 2020 Pres Election,” Chase [tweeted](#) Wednesday. “We were able to learn from 2020 and put extra safeguards in place for 2021. Still much work to do to make sure there’s never a repeat of 2020.”

Virginia election officials reported no problems with the 2020 elections. The results in 2021 were not questioned by Chase or other Republicans this year, however, as they won across the board.

When asked if she wants a forensic **audit** of the 2021 election results, Chase responded by citing the Virginia Code that already [requires](#) an **audit** of Virginia’s voting machines.

Governor-elect Youngkin did not provide comment for this article.

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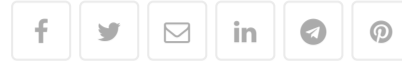
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# VA Scope

Independent News





# Exhibit N-10

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OPINION | LETTERS

## *President Trump Responds on Pennsylvania's 2020 Election*

Donald Trump writes a letter to the editor.

Oct. 27, 2021 2:15 pm ET



Observers watch a poll worker tabulate ballots at the Allegheny County Election Warehouse in Pittsburgh, Nov. 6.

PHOTO: JOHN ALTDORFER/REUTERS

In your editorial "[The Election for Pennsylvania's High Court](#)" (Oct. 25), you state the fact that a court wrongly said mail-in ballots could be counted after Election Day. "This didn't matter," you add, "because Mr. Biden won the state by 80,555, but the country is lucky the election wasn't closer. If the election had hung on a few thousand Pennsylvanians, the next President might have been picked by the U.S. Supreme Court."

Well actually, the election was rigged, which you, unfortunately, still haven't figured out. Here are just a few examples of how determinative the voter fraud in Pennsylvania was:

- 71,893 mail-in ballots were returned after Nov. 3, 2020, at 8 p.m., according to Audit the Vote PA. None of these should have been counted according to the U.S. Constitution and the state Legislature, which didn't approve this change.
- 10,515 mail-in votes from people who do not exist on the Pennsylvania voter rolls at all.
- 120,000 excess voters are not yet accounted for by the Pennsylvania Department of State—far more votes than voters!
- From 2016 to 2020, during my term as president, Republicans out-registered Democrats 21 to 1. This translated to a 659,145-vote lead at 12:38 a.m. on election night, with "Trump" up a full 15 points.
- Hundreds of thousands of votes were unlawfully counted in secret, in defiance of a court order, while Republican poll watchers were thrown out of buildings where voting took place.

- 39,771 people who registered to vote after the Oct. 19, 2020, deadline, still voted in the 2020 election—simply not allowed.

Highly respected Audit the Vote PA found numerous data integrity problems the Pennsylvania Statewide Uniform Registry of Electors (SURE) system, including:

- 305,874 voters were removed from the rolls after the election on Nov. 3rd.
- 51,792 voters with inactive voter registrations at the end of October 2020 nevertheless voted.
- 57,000 duplicate registrations.
- 55,823 voters who were backfilled into the SURE system.
- 58,261 first-time voters 70 years and older.
- 39,911 people who were added to voter rolls while under 17 years of age.
- 17,000 mail-in ballots sent to addresses outside of Pennsylvania.
- Another analysis of Montgomery County, Pa., found 98% of the eligible voting population in the county was already registered to vote—not possible.
- A canvass of Montgomery County has identified 78,000 phantom voters, with roughly 30% of respondents unaware that there are people registered and voting from their address.
- One nursing home in Lancaster County had 690 registrations and an extremely high turnout rate of 85% in 2020, while nursing homes were closed due to Covid. One of these residents said she had not voted in the past 3 years, but had a mail-in ballot cast in her name.
- 25,000 ballots were requested from nursing homes at the exact same time.
- Numerous reports and sworn affidavits attested to poll watcher intimidation and harassment, many by brute force.
- Attorney General Bill Barr ordered U.S. Attorney Bill McSwain to stand down and not investigate election irregularities.
- Mark Zuckerberg of Facebook poured over \$17 million to interfere in the Pennsylvania election, including \$5.5 million on “ballot processing equipment” in Philadelphia and \$552,000 for drop boxes where the voting pattern was not possible.

And so much more! This is why Democrats and the Fake News Media do not want a full forensic audit in Pennsylvania. In reality, 80,555 ballots are nothing when there is this much corruption or voter irregularities.

**Donald J. Trump**

*Palm Beach, Fla.*

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# Exhibit N-11

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<https://www.wsj.com/articles/the-facts-on-donald-trumps-fraud-letter-2020-election-11635449578>

OPINION | REVIEW & OUTLOOK

# The Facts on Trump's Fraud Letter

His 2020 monomania is news, and it reflects on his fitness for 2024.

By [The Editorial Board](#)

Updated Oct. 28, 2021 6:15 pm ET



Former U.S. President Donald Trump speaks during a rally at the Iowa States Fairgrounds in Des Moines on Oct. 9.

PHOTO: RACHEL MUMMEY/REUTERS

The progressive parsons of the press are aflutter that we published [a letter to the editor](#) Thursday from former President Trump, objecting to [our editorial](#) pointing out that he lost Pennsylvania last year by 80,555 votes. We trust our readers to make up their own minds about his statement. And we think it's news when an ex-President who may run in 2024 wrote what he did, even if (or perhaps especially if) his claims are bananas.

OPINION: POTOMAC WATCH



**The House Holds Steve Bannon in Contempt**



00:00

1x



SUBSCRIBE

Mr. Trump's letter is his familiar barrage, with 20 bullet points about alleged irregularities that he says prove "the election was rigged." It's difficult to respond to everything, and the asymmetry is part of the former President's strategy. He tosses off enough unsourced numbers in 30 seconds to keep a fact-checker busy for 30 days. When one claim is refuted, Mr. Trump is back with two more.

To highlight a few, he objects to the way the Pennsylvania Supreme Court rewrote the deadline for mail ballots. [We do too.](#) But he insinuates that the presidential results include thousands of tardy votes, and "none of these should have been counted." They weren't, per [a directive](#) by Justice Samuel Alito. "Those ballots were segregated as the court ordered," says a spokeswoman for the Pennsylvania Department of State. "They are not included in the vote totals."

Mr. Trump says that “25,000 ballots were requested from nursing homes at the exact same time.” His citation for this—no kidding—is a Nov. 9 cable-TV hit by Sen. Lindsey Graham. Mr. Trump is alleging 25,000 fake votes in Pennsylvania, based on a stray remark by someone from South Carolina. Breaking news: A politician on TV repeated a rumor. We emailed to follow up, and Mr. Graham’s office tells us this was “an allegation, one of many others,” but it now “can be laid to rest.”

Some of Mr. Trump’s figures appear to come from amateur spelunking into voter data. Caveat emptor when this is done by motivated partisans unfamiliar with election systems. The “audit” team in Arizona asserted that Maricopa County received 74,000 more mail votes than were sent out. This was debunked as a misunderstanding of the files.

Mr. Trump says Attorney General Bill Barr “ordered U.S. Attorney Bill McSwain to stand down and not investigate” the election. Mr. McSwain claims as much. Yet Mr. Barr, who’s no liberal patsy, has said it’s “false,” and Mr. McSwain is running for Governor. Mr. Barr said Mr. McSwain “told me that he had to do this because he was under pressure from Trump.” We believe Mr. Barr.

This is how it goes for election truthers. First the allegation was ballots marked with Sharpies, then voting machines tied to Venezuela, then more votes than voters. Now Mr. Trump apparently thinks his own Attorney General did an inside job. Electoral fraud does happen: A Pennsylvania man received five years of probation this spring after voting for Mr. Trump on behalf of his dead mother. The price of liberty, as they say, is vigilance. But the evidence doesn’t show anything real that could dent Pennsylvania’s 80,555-vote margin.

Even if it did, Mr. Trump would be two states short of victory. Georgia’s ballots were counted three times and a signature check done. The Arizona audit was a dud. A Michigan inquiry led by a GOP lawmaker ended up keelhauling “willful ignorance” and grifters who use misinformation “to raise money or publicity.” Mr. Trump’s lawyers who made baseless claims have been sued for defamation—twice. They’ve been sanctioned by a federal judge. Does Mr. Trump imagine a conspiracy so deep that practically everybody is in on it?

Mr. Trump is making these claims elsewhere, so we hardly did him a special favor by letting him respond to our editorial. We offer the same courtesy to others we criticize, even when they make allegations we think are false.

As for the media clerics, their attempts to censor Mr. Trump have done nothing to diminish his popularity. Our advice would be to examine their own standards after they fell so easily for false Russian collusion claims. They’d have more credibility in refuting Mr. Trump’s.

*Appeared in the October 29, 2021, print edition.*

# Exhibit N-12



# PA Election Investigation — Restoring Faith in Our Elections



*In order to identify and address election irregularities and strengthen our voting laws, the Senate Intergovernmental Operations Committee is conducting a thorough investigation into the 2020 General Election and the 2021 Primary Election.*

*Our work will build upon previous reviews by the Senate Special Committee on Election Integrity and Reform and the House State Government Committee. However, our approach will be focused on digging much deeper into the problems and irregularities that have been reported in the system and working to rectify those issues.*

**Senator Cris Dush**

## A Responsible, Thoughtful and Transparent Investigation

The investigation will include public hearings, eyewitness testimony from Pennsylvanians, a deep-dive review into our voting system, and recommendations for legislative improvements. The goal is to create a fair, transparent process everyone can believe in.

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## Sign Up for Updates

Subscribe to stay connected with Senator Dush's "Inside the Election Investigation" e-newsletter.

**First Name:**

**Last Name:**

**Email Address:**

**Zip Code**

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# Pennsylvania Election Integrity Investigation

## 1. Gathering Evidence

 Invite Pennsylvanians to share election fraud testimony.  
Gather information at public hearings.

## 2. Election Integrity Investigation

 Request/subpoena & inspect election materials.

## 3. Report & Legislative Action

 Report findings & legislative recommendations to General Assembly.

## Subpoenas Issued



The Senate Intergovernmental Operations Committee met on September 15, 2021, to approve a subpoena for data, communications and other materials from the Pennsylvania Department of State.

[Read the full language of the subpoena here.](#)

This information will be critical to the committee's review of our elections, providing a clearer picture of potential problems with the state's voter registration system and any

other voting irregularities.

## Submit Your Testimony Now



Gathering firsthand testimony from Pennsylvanians is an important part of the investigation. If you witnessed or were personally and directly affected by election improprieties, please consider sharing your stories here.

Please note testimony is only being accepted if you are willing to sign a sworn affidavit and potentially testify at a future hearing.

[Submit your testimony here.](#)

## A Crisis of Confidence in PA Voting Systems

Public opinion polls have revealed a troubling crisis of confidence in our election system.

# Restoring Faith in PA Elections



# 55%

of voters **support** Election Audits

\* Rasmussen Reports 6/2021

**1/3** of voters are not confident that the election reflected the voting sympathies of PA

**68%**  
Republican  
Support

**18%**  
Independent  
Support

**44%**  
Democrat  
Support

\* Muhlenberg College 1/2021

**59%** of PA voters believed election laws **need revision**

**75%**  
Republican  
Support

**52%**  
Independent  
Support

**46%**  
Democrat  
Support

\* Franklin & Marshall 6/2021



Without a thorough investigation of our elections, these problems will continue to fester and discourage participation in the democratic process.


## Frequently Asked Questions

Why are lawmakers trying to get my Social Security number and Driver License number?



That information is necessary to help identify any duplicate registrations, fake registrations, and any votes resulting from those ineligible registrations. Having that information allows us to complete a thorough investigation to ensure every vote cast in every election comes from a living, legal, registered voter.

The General Assembly having this information is no different than any other branch of government having this information. Lawmakers frequently have access to this type of information to help constituents manage problems with the Unemployment Compensation system and other concerns, and no problems have been reported.

What security measures will be in place to protect my personal information? 

Every measure is being taken to ensure voter data does not fall into the wrong hands. The information will be stored securely and only made available for the purposes of the investigation. In addition, any third-party vendor personnel will be required to sign a non-disclosure agreement to protect this information under penalty of law.

Hasn't the state already conducted two audits? 

The two audits mandated by the state were completed, but were limited in size and scope. These reviews are routine and not designed to address broader concerns about election security and integrity. Our investigation and audit are intended to go much further.

How will the investigation be funded? 

The investigation will be funded through Senate accounts. As such, every effort will be made to minimize costs while still providing a thorough examination of our elections.

Who will conduct the audit? 

Conversations are ongoing with different vendors to determine the size and scope of the investigation. We are working to identify a vendor who can complete the work

with proper measures in place to ensure the integrity and security of the process.

Will you do the same type of audit as Arizona? ⊖

Although we have learned valuable lessons from Arizona, the process will differ in many ways. As soon as a vendor is identified, we will work with them to determine best practices and allow the investigation to follow wherever the evidence leads.

## Committee Videos & Hearings

### Public Hearing — September 15, 2021



### Public Hearing — September 9, 2021

# Exhibit N-13



« **Senator Martin’s Hearing on COVID in**

**Schools Reveals Ongoing Frustration**

**with State Agencies**

**Local Elections Officials, Stakeholders**

**Testify on Bipartisan Election Reform**

**Bill »**

## **Senator Dush Urges Public to Submit Sworn Testimony in Election Investigation by October 1**

Posted on Sep 23, 2021

HARRISBURG – Senate Intergovernmental Operations Committee Chairman Senator Cris Dush (R-Jefferson) is urging Pennsylvanians to submit sworn testimony by October 1 regarding problems they have personally experienced with the state’s election system.

Voters should submit information only if they experienced irregularities or other election improprieties firsthand. State residents can share their stories and contact information at

**<https://intergovernmental.pasenategop.com/electioninvestigation/>**.

The information will help lawmakers develop potential improvements to state law to bolster election security. The October 1 date matches the deadline for the Department of State to respond to subpoenas issued by the committee last week.

Dush noted that testimony is only being accepted from Pennsylvania residents, and the infractions must have been witnessed in person or affected the state resident personally. In addition, members of the public should submit testimony on the webpage only if they are comfortable signing an affidavit and potentially testifying under oath at a Senate committee hearing under penalty of perjury.

More information about the election investigation is available at [www.paelectioninvestigation.com](http://www.paelectioninvestigation.com).

CONTACT: [Jason Thompson](#)



# Exhibit N-14

« Republican Leaders Request More

Detailed COVID-19 Data from Wolf

Administration

Senate President Pro Tempore

Corman Responds to Governor Wolf's

Recall Request, False Accusations »

## **Corman Calls for Subpoenas in Election Investigation Next Week**

Posted on Sep 10, 2021

HARRISBURG – Senate President Pro Tempore Jake Corman (R-Bellefonte) issued the following statement today regarding the beginning of the investigation into our election system and the refusal of the Department of State to participate:

“As predicted, the Department of State failed to appear yesterday to provide answers to the lingering questions about their role in creating doubts about the fairness of the 2020 General Election. The dereliction of duty by Wolf Administration officials continues a troubling pattern of refusing to take accountability for weaponizing an agency that is supposed to be non-partisan.

“Yesterday's hearing was an important first step in the process of investigating every aspect of our election system, but it will not be the last. Pennsylvanians deserve answers about the Wolf Administration's mishandling of our election. I am calling on the Senate Intergovernmental Operations Committee to meet on Monday, September 13 to vote on issuing subpoenas for information and testimony from the Department of State as well as the SURE system, and to take other steps necessary to get access to ballots and other voting materials to begin a full forensic audit of the 2020 General Election.

“Senator Dush’s office will have my full cooperation in achieving these goals.”

CONTACT: [Jason Thompson](#)



# Exhibit N-15

[https://www.thecourierexpress.com/tri\\_county\\_sunday/dush-issues-statement-on-inclusion-of-personal-information-in-subpoena/article\\_a2ba51b0-405a-5284-80fc-69ecc0e4a972.html](https://www.thecourierexpress.com/tri_county_sunday/dush-issues-statement-on-inclusion-of-personal-information-in-subpoena/article_a2ba51b0-405a-5284-80fc-69ecc0e4a972.html)

## Dush issues statement on inclusion of personal information in subpoena

Sep 17, 2021



DUSH

HARRISBURG – Senate Intergovernmental Operations Committee Chairman Senator Cris Dush, R-Brookville, issued the following statement Friday regarding the inclusion of personal identifying information in subpoenas issued to the Pennsylvania Department of State this week:

“I have been receiving numerous inquiries regarding the personal identifying information requested in the subpoenas that the Intergovernmental Operations Committee issued to the Department of State on Wednesday. Most of this information is available for \$20 at your local county board of elections offices.

“I understand why folks are hesitant or concerned in light of the way this issue has been sensationalized by the media. However, the reason for requesting the last four digits of a voter’s Social Security number or their driver License is because it is the best way to determine the accuracy of voter rolls and make sure there are not duplicate, doctored or deceased voters on these rolls. This is the exact reason why the Department of State has the information in the first place.

“Committee staff and I remain committed to using this information only to conduct a thorough investigation and to create legislation to fix the problems we identify. It is the 21st century, and given the technology used in today’s world, poorly kept voter rolls should be a thing of the past.”



# Exhibit N-16

ERIC, Inc  
Electronic Registration Information Center  
1201 Connecticut Ave NW, Suite 600  
Washington DC 20036  
[www.ericstates.org](http://www.ericstates.org)



March 4, 2021

The Honorable Rep. Seth M. Grove, Chair  
The Honorable Rep. Margo L. Davidson, Democratic Chair  
House State Government Committee, Pennsylvania House of Representatives

Dear Representative Grove and Representative Davidson:

Thank you for the invitation to participate in your hearing on voter registration. This written testimony will provide an overview of the Electronic Registration Information Center (ERIC).

### **Introduction**

ERIC is a nonpartisan, non-profit membership organization funded by participating state members. It's managed by a Board of Directors comprised of a representative from each member state – either its chief election official or their designee. Our mission is to help state and local election officials improve the accuracy of their voter rolls, register eligible citizens, reduce costs, and improve efficiencies in the voting process. ERIC works to achieve its mission by routinely comparing official data from a variety of sources and then providing its findings to members via specialized reports. ERIC was founded by seven states in 2012. Pennsylvania joined ERIC in 2016. Today, 30 states and the District of Columbia are members.

### **Required Data Uploads**

Members must provide a complete set of voter registration records and all records from the state driver's licensing agency relevant to voter registration. States must upload these data sets at least once every 60 days. These data are foundational to the various reports ERIC provides its members.

### **Data Matching**

ERIC uses a powerful, sophisticated data matching program to compare multiple data sets in a secure environment. However, no data matching tool is perfect, and the quality and applicability of source data can present challenges. While members have confidence in the reports, ERIC strives for continuous improvement in its data matching processes.

In addition to state voter registration and state driver's licensing/ID data, ERIC uses the Limited Access Death Master File (DMF) from the Social Security Administration. Comparisons of all these data sets are used to provide members with four core list maintenance reports and a report of potentially eligible but unregistered individuals. These reports are discussed below.

Separately, upon request, ERIC provides a National Change of Address report using official NCOA data from the United State Postal Service. Finally, ERIC also offers a Voter Participation Report that identifies cases of possible illegal voting. This report is voluntary and is available only after a federal General Election.

### **Acting on Reports Provided by ERIC**

Prior to each federal General Election, members must initiate contact with eligible but unregistered individuals identified by ERIC, educating them on the most efficient means to register to vote. This is typically done via a postcard mailing that clearly states the voter eligibility requirements, registration deadlines, and instructions for how to register.

Members must also initiate contact with voters whose registration information is identified by ERIC as inaccurate or outdated in order to correct the inaccuracy or obtain information sufficient to inactivate or update the voter’s record. Members must request list maintenance reports at least once every 425 days, but are strongly encouraged to use these reports much more frequently. All voter registration list maintenance activity using information provided by ERIC must be conducted in compliance with the National Voter Registration Act (NVRA) and/or applicable state law.

### **Report Types and ERIC Statistics**

Since it was founded in 2012, ERIC has identified over 16.8 million out-of-date voter records and over 55 million potentially eligible individuals not registered to vote.

Table 1 includes each list maintenance report and the total number of records identified by report type since ERIC started offering these reports in 2013. The Report Type column includes a short explanation of how individuals are identified for that report. The In-state Updates report provides a list of voters who’ve moved within the state, but have not updated their voter registration to their new address. The Cross-state Movers report identifies voters who’ve moved from one ERIC member state to another. Deceased voters are identified in a separate report, as are duplicate registrations.<sup>1</sup>

Table 2 provides the number of potentially eligible but unregistered individuals identified by ERIC.

**Table 1 – ERIC List Maintenance Report Statistics as of 12/31/2020**

<b>Report Type</b>	<b>2013 – 2020</b>
In-state Updates (More recent activity in DMV record)	10,744,985
Cross-state Movers (More recent registration/license in other state)	5,136,817
Deceased (Appears on national Death Master File)	390,484
In-state duplicates (Duplicate voter records)	525,994
<b>Totals</b>	<b>16,798,280</b>

---

<sup>1</sup> The Pennsylvania Department of State is currently prohibited from using the ERIC death report due to statutory limitations on which data may be used to remove deceased voters.

**Table 2 – Potentially Eligible but Unregistered Report Statistics as of 12/31/2020**

<b>Report Type</b>	<b>2012 – 2020</b>
Potentially Eligible but Unregistered Report (In DMV file, but not registered)	55,273,415

## **Information Security and Privacy Protections**

ERIC’s information security approach aligns with national and international information security management standards. ERIC seeks to continuously improve the management and technical monitoring of data provided by its members. ERIC also performs annual reviews of its risk profile and security management policies, operations and procedures. Board Members are provided periodic information security updates and reviews, consistent with standard corporate transparency guidelines for governance and oversight of member data. The Board approves updates to ERIC’s information security management plan and policies. This intense focus on protecting members’ data is reflected in ERIC’s governance documents, structure, and technical processes.

### Protecting Data and Privacy: Governance

The ERIC Membership Agreement specifies ERIC reports are to be used only for voter registration purposes and must be kept confidential. Driver’s licensing data is protected against release under the federal Driver’s Privacy Protection Act. Since all ERIC reports inherently include driver’s licensing data, a court order is required prior to release of ERIC data. Members and ERIC must immediately disclose to the membership any unauthorized data release.

The ERIC Board of Directors is advised by a Privacy and Technology Advisory Board comprised of leading experts in the field of data security and encryption. This advisory board reviews security protections and helps provide advice as to information security improvements.

### Technical Processes

Providing states with “actionable” data requires using data from multiple sources, including driver’s licensing/state ID data, the last four digits of Social Security numbers, and full dates of birth. To protect this highly sensitive information, ERIC and its members use a secure software program that applies a one-way cryptographic hash to these data. The one-way hashing program converts each of these data points to a series of characters that are meaningless beyond the matching process. Hashing the data is different from encrypting it. Encrypted data can be unencrypted with a key. Data that has been hashed is not intended to be decrypted; there is no key.

All ERIC members use the same hashing program, resulting in comparable hashed data. For example, the hashed value of a March 9, 1954 date of birth will be the same from each state. States run their data through the hashing program prior to uploading it to ERIC. Social Security numbers, dates of birth, and driver’s license/ID numbers should never leave a member state’s control in clear text. These data points are not included in the reports ERIC provides to states.

Members upload their data to a secure server (sFTP). All data, including the hashed elements, are encrypted prior to upload. The server must be accessed from a computer with a unique computer

address (IP address) with preapproval. Members cannot see other members' data on the secure server.

The ERIC Systems Engineer accesses the uploaded data on the secure server within an environment employing industry standard security protections, including multi-factor authentication. The data is again processed through the hashing application and prepared for the data matching program. This means the most sensitive data are hashed twice. After the data matching process is complete, the various reports are prepared for the members.

To be clear, ERIC does not directly interface with any state voter registration system. ERIC is not connected to state voter registration systems and is not a national database of voters.

The ERIC system – the servers that hold member data and the data matching software – is hosted in a secure facility in the mid-west, offsite from any ERIC employee. This professionally managed facility houses data from other clients with highly regulated and sensitive data, including financial institutions and health care companies. ERIC data lives on separate servers and is never commingled with other client data. The hosting company undergoes regular industry standard security audits and employs virtual and physical security that meets or exceeds national and international standards.

### Third-Party Assessments

Under federal data security rules, entities that subscribe to the Limited DMF must submit a written third-party conformity attestation, from an independent auditor, stating the organization has "information security systems, facilities, and procedures in place to protect the security of the Limited Access DMF." ERIC successfully passed a third-party assessment and completed the certification in 2017 and 2020.

In 2020, ERIC contracted with an independent cybersecurity firm to conduct an external assessment and review of its information security practices/systems/policies and its compliance with accepted information security standards. ERIC passed this assessment without material findings.

### **Summary**

I hope the information provided here is helpful and relevant to your discussions on maintaining accurate voter rolls and the tools available to help Pennsylvania perform high quality list maintenance activities. In closing, here are a few points to highlight:

- ERIC administers a sophisticated and secure data matching service that helps states keep their voter lists accurate, even as citizens move or die.
- ERIC protects the confidentiality of sensitive data using standards-based risk assessment and risk management practices. Privacy protections and information security lie at the core of ERIC's operating principles.
- ERIC has successfully identified almost 17 million out-of-date voter records since 2013.
- ERIC has helped states register millions of eligible citizens.
- ERIC assists states in reducing the possibility of improper or double voting by helping states clean up out-of-date records in a proactive and routine manner throughout the year, while encouraging eligible people to get registered.

For more information, including a short explanatory video on ERIC, please visit [www.ericstates.org](http://www.ericstates.org). I would be happy to answer any questions the committee may have about ERIC. I can be reached by email at [Shane.Hamlin@ericstates.org](mailto:Shane.Hamlin@ericstates.org) and by phone at (202) 695-3464.

Sincerely,

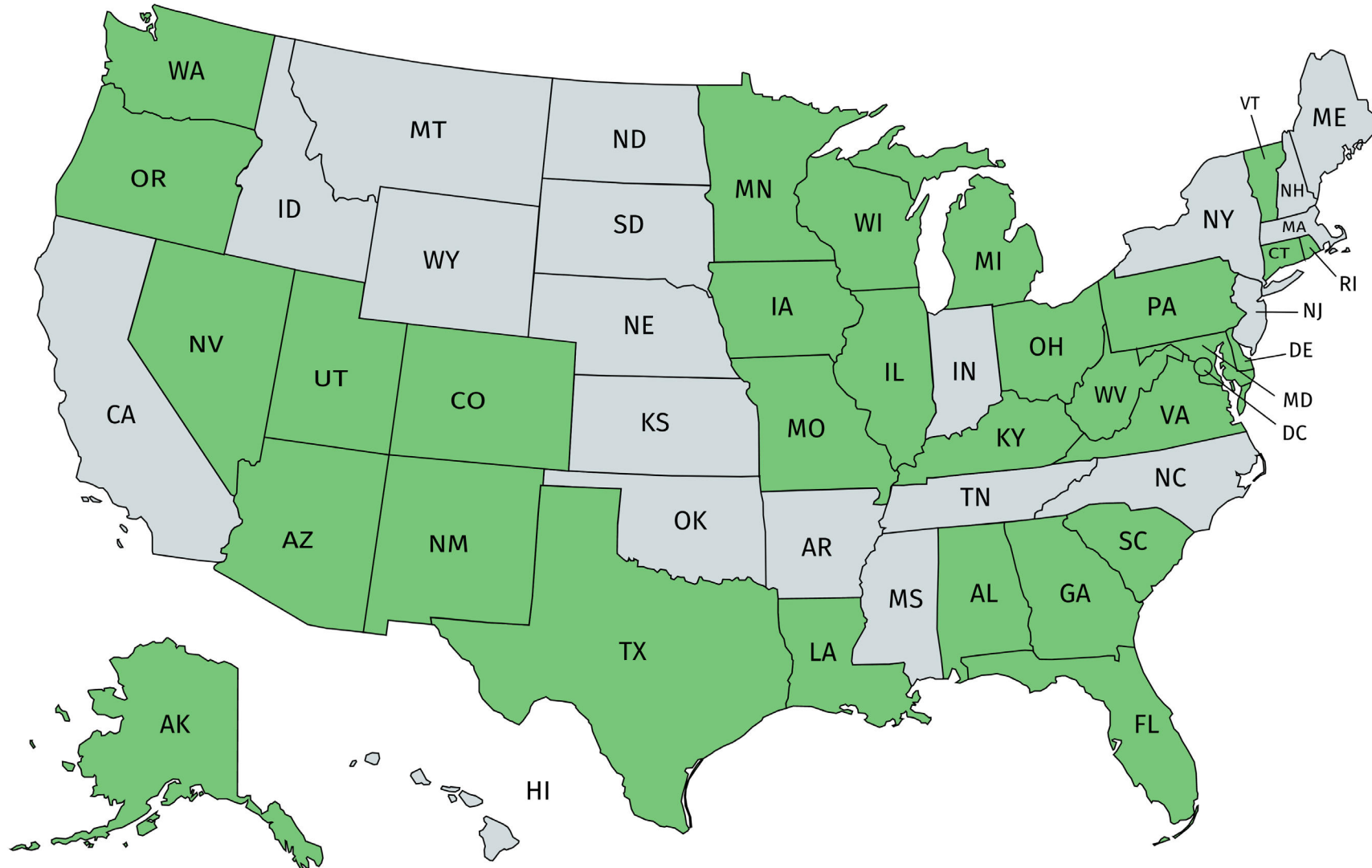
s/h

Shane Hamlin  
Executive Director  
Electronic Registration Information Center, Inc.

Enclosures:

1. Map of ERIC membership as of 12/31/2020
2. Reports available to ERIC Members

# ERIC Members account for about 63 percent of the U.S. Citizen Voting Age Population\*



\*<https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html>

# ERIC Reports

- Eligible but Unregistered

Outreach



- In-state Movers
- Cross-state Movers
- Deceased
- In-state Duplicates

List Maintenance



- NCOA
- Voter Participation

Optional Reports





# Exhibit N-17

# Pew's David Becker Discusses the Electronic Registration Information Center

PRESS RELEASES AND STATEMENTS

June 28, 2013

Projects: [Election Initiatives](#)

Hear Election Initiatives Director David Becker and IBM Fellow and Chief Scientist Jeff Jonas discuss the Electronic Registration Information Center (ERIC) and upgrading voter registration in the United States.

Watch and learn how ERIC's data center is the only secure, sophisticated tool of its kind capable of fully bringing voter registration systems into the 21st century.

The video below is the full-length presentation. Viewing the video full-screen will allow you to view the following chapters:

0:13 - Let's Make Elections Run More Like Jiffy Lube

1:37 - Voter Lists are Inaccurate

3:28 - Voter Registration is Inefficient

4:33 - A Tale of Two Voters: Registration Varies in the States

5:40 - How do we Fix Voter Registration?

7:20 - The Technology Behind a Better Election System

11:10 - ERIC: The Future of Voter Registration is Here

## The Future of Voter Registration is Here | Pew



You can also view the [video](#) on YouTube.

### RELATED

Projects [Election Initiatives](#)

# Exhibit N-18

## ERIC: Technology and Security Overview

The Electronic Registration Information Center (ERIC) is a non-profit membership organization whose mission is to help state and local election officials improve the accuracy of their voter rolls, register more eligible citizens to vote, reduce costs, and improve the voting process. Formed in 2012, ERIC provides sophisticated data matching services to members in order to improve their ability to identify inaccurate and out-of-date voter registration records, as well as likely eligible, but unregistered residents. Members can then contact voters, in compliance with federal and state regulations, to encourage individuals to register or update their existing registration. ERIC is governed and funded by its members.

### Privacy and Technology Advisory Board

ERIC is dedicated to the security and protection of the data in its care. The ERIC Board of Directors appointed a Privacy and Technology Advisory Board, comprised of experts in the field of data security and encryption, to review security protections and provide advice. This board reviews ERIC's technical and governance systems and makes recommendations related to security practices. As of March 2020, the Advisory Board members are:

- Jeff Jonas, Senzing Founder and CEO, <https://senzing.com/jeff-jonas-bio/>.
- Glenn Newkirk, President of InfoSENTRY Services, Inc., <http://www.infosentry.com/>
- Rebecca Wright, Professor of Computer Science at Rutgers University and Director of the Center for Discrete Mathematics and Theoretical Computer Science (DIMACS), <http://www.cs.rutgers.edu/~rebecca.wright>

### Information Security Management Approach

Information security management, corporate transparency, and oversight are core principles for ERIC. In support of these principles, ERIC employs risk management and information security management techniques that align with industry guidelines published by national and international information security management organizations. ERIC practices include, but are not limited to:

1. Building a culture of continuous review and improvement
2. Using standards-based risk assessment and risk management practices
3. Performing routine internal and external audits of risk profiles and security management policies, operations, and procedures
4. Providing governing board members with scheduled security updates and reviews, consistent with standard corporate transparency guidelines for governance and oversight
5. Requiring members to follow stringent information security commitments via ERIC's by-laws and membership agreement
6. Requiring that its data center vendor provide documentation of an annual security assessment by an independent third party to ensure that their security aligns with industry-accepted standards.

### ERIC Operations

As a practical matter, ERIC does not publicly discuss specific security measures. All procedures and software are routinely reexamined during internal risk assessments and security reviews, evaluated by the Privacy and Technology Advisory Board, and addressed in external auditing processes.

Participating as a member in ERIC involves three routine actions: preparing and protecting voter registration and license/identification data, securely transmitting data to ERIC, and securely accessing reports. ERIC employs a full-time Systems Engineer and Technical Liaison to guide members through these processes.



Members provide their voter registration records and license/identification records (other official state data sources may be accepted but are not required). Fields related to name, address, driver's license or state ID number, last four digits of social security number, date of birth, and activity date are required, if present. Members also submit information on current record status, phone number, and email address when available.

ERIC distributes to each participating jurisdiction an application that applies a cryptographic one-way hash to sensitive data elements before the jurisdiction submits the data to ERIC. The hashed elements are driver's license or state ID number, any part of the social security number, and date of birth. The hashing application converts the information into what appears to be a string of random characters, making the data significantly more difficult for a potential hacker to utilize. ERIC only accepts voter and driver's license data files that have been hashed using this application. This ensures these sensitive data are protected at the source, in the member's environment, prior to submission to the ERIC data center. A cryptographic hash is not meant to be decrypted so ERIC does not receive this information in clear text and does not restore it to the original values. To further strengthen the security around these data, all records are run through a second hashing process using different parameters once inside the ERIC environment. ERIC uses a hashing module provided by IBM, in conjunction with Senzing ([www.senzing.com](http://www.senzing.com)), which implements an HMAC-SHA2-256 one-way hashing algorithm with a 1024-bit secret key. The secret key is housed in a PKCS#11 interfaced secure store that leverages AES-128 encryption.<sup>i</sup> The distribution of the hashing application to the ERIC members is a closely monitored and structured process.

Once the data file is hashed, ERIC members employ layers of industry-standard security mechanisms to transmit the data to the ERIC data center, including multiple rounds and types of encryption. There are also specific procedures directed at communication of member credentials.

At the ERIC data center, the provided data is processed through a sophisticated matching engine produced by IBM and Senzing. The engine compares common identifying data elements and additional tools such as a name variation database, fuzzy date matching, and record linkage. Record linkage is a matching methodology that compares multiple data sources at the same time. For instance, the mailing address on a DMV record might provide the missing link that confirms a match between two voter records that otherwise wouldn't have enough information on their own to be sure. ERIC produces reports for each member by analyzing the results of the matching to identify voter records from that member that may be outdated or inaccurate or people who are not currently registered to vote. Once the reports are generated they are available for secure download. Members cannot access the reports of other members.

### Assessment and Review

The Center for Democracy and Technology (CDT) reviewed plans for ERIC in 2011 and determined that ERIC would improve the quality of voter registration data while protecting, and even improving, the privacy and security of information shared across state lines for registration purposes. (The CDT and ERIC are not affiliated.)

ERIC subscribes to the Social Security Limited Access Death Master File in order to provide information on possibly deceased voters to its members. The National Technical Information Service requires subscribers to attain a third-party attestation that its systems, facilities, and procedures adequately safeguard this information. This process must be conducted every three years. It is similar to an audit and includes an extensive review and examination of all information security policies, practices, systems, facilities, and procedures relative to the handling of Social Security data. ERIC successfully received this attestation in 2017 and 2020.

In 2020, ERIC contracted with an independent U.S.-based cyber security firm to conduct a comprehensive assessment of its information security and compliance posture. The external evaluation included the following:

- Cyber security risk assessment using ISO 27001 and 27002 security controls



- 
- Code review of the cryptographic hashing tool used by members and ERIC to secure sensitive data
  - Office and network scan and penetration testing.
  - Email security assessment
  - Phishing/Social Engineering campaign
  - Data handling practices relative to member data

The cyber security firm concluded “ERIC has strong data security practices” and identified “no critical findings.”

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<sup>1</sup> For more information on the hashing mechanism and secure store, visit <https://senzing.zendesk.com/hc/en-us/articles/360000970834-Selective-Feature-Hashing>. A free Zendesk account may be required for access.

# Exhibit N-19



Last updated on March 28, 2014; May 21, 2015; October 28, 2015; December 16, 2016; November 30, 2018; February 3, 2020

**ELECTRONIC REGISTRATION INFORMATION CENTER, INC.**

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**BYLAWS**

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## TABLE OF CONTENTS

	<b>Page</b>
ARTICLE I OFFICES .....	1
Section 1. Location .....	1
ARTICLE II MEMBERS.....	1
Section 1. Members .....	1
Section 2. Admission of Members.....	1
Section 3. Membership Agreement.....	1
Section 4. Membership Fee.....	1
Section 5. Dues .....	2
Section 6. Term of Membership; Good Standing .....	2
Section 7. Resignation .....	2
Section 8. Removal .....	2
Section 9. Meetings of Members.....	3
Section 10. Notice.....	3
Section 11. Waivers of Notice .....	3
Section 12. Quorum, Vote, Proxy .....	3
Section 13. Written Consent of Members.....	4
ARTICLE III BOARD OF DIRECTORS .....	4
Section 1. Power of Board and Qualification of Directors .....	4
Section 2. Appointment of Directors .....	4
Section 3. Non-Voting Seats on Board of Directors.....	4
Section 4. Resignation .....	4
Section 5. Removal of Directors.....	4
Section 6. Vacancies.....	4
Section 7. Meetings of the Board.....	5
Section 8. Notice.....	5
Section 9. Quorum and Voting .....	5
Section 10. Written Consent of Directors; Meetings by Conference Telephone.....	5
Section 11. Compensation of Directors .....	6
ARTICLE IV COMMITTEES.....	6

**TABLE OF CONTENTS**  
(continued)

		<b>Page</b>
	Section 1. Committees of the Board .....	6
	Section 2. Committee Rules.....	6
	Section 3. Service of Committees.....	6
	Section 4. Records .....	6
	Section 5. Advisory Board.....	6
	Section 6. Executive Committee.....	7
	Section 7. Finance Committee.....	7
ARTICLE V	OFFICERS, AGENTS AND EMPLOYEES .....	8
	Section 1. General Provisions .....	8
	Section 2. Term of Office, Vacancies and Removal.....	8
	Section 3. Powers and Duties of Officers .....	8
	Section 4. Executive Director .....	9
	Section 5. Agents and Employees.....	9
	Section 6. Compensation of Officers, Agents and Employees .....	9
ARTICLE V	MISCELLANEOUS .....	10
	Section 1. Fiscal Year .....	10
	Section 2. Corporate Seal.....	10
	Section 3. Checks, Notes, Contracts .....	10
	Section 4. Books and Records .....	10
	Section 5. Amendments to Certificate, Bylaws and Membership Agreement .....	10
	Section 6. Privacy.....	10
	Section 7. Indemnification and Insurance.....	10

## **ELECTRONIC REGISTRATION INFORMATION CENTER, INC.**

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### **BYLAWS**

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#### **ARTICLE I**

##### **Offices**

**Section 1. Location.** The principal office of Electronic Registration Information Center, Inc. (the “Corporation”) shall be located within or without the State of Delaware, at such place as the Board of Directors shall from time to time designate. The Corporation may also maintain additional offices at such other places as the Board of Directors may from time to time designate. The Corporation shall have and maintain within the State of Delaware a registered office at such place as may be designated by the Board of Directors.

#### **ARTICLE II**

##### **Members**

**Section 1. Members.** The members of the Corporation shall consist solely of state, territorial governmental units, or the District of Columbia. Each member shall be represented by the chief election official or a chief election official’s designee to act on the member’s behalf for all purposes related to the Corporation, including service on the Board of Directors or as an Officer (the “Member Representative”). A chief election official may designate a new or replacement Member Representative at any time for any reason, at their discretion, upon written or electronic notice to the ERIC Executive Director who shall, in turn, notify the Membership.

**Section 2. Admission of Members.** Any jurisdiction seeking membership shall apply to the Executive Director of ERIC. The Executive Director shall provide written notice to the Membership of ERIC’s intent to admit a new jurisdiction, and members shall have five (5) business days to submit objections to the Executive Director in writing. If there are no objections, the new jurisdiction shall be automatically admitted to Membership effective upon execution of the Membership Agreement and payment of the Membership Fee as required by Article II, Section 4 of these Bylaws. If one or more members object to the admission of the new jurisdiction, then the jurisdiction shall be admitted to Membership upon a majority vote of the entire Board of Directors, effective upon execution of the Membership Agreement and payment of the Membership Fee.

**Section 3. Membership Agreement.** Each member shall sign a Membership Agreement that sets forth the terms and conditions of membership in the Corporation, which is attached as Exhibit A to these Bylaws.

**Section 4. Membership Fee.** Upon admission and execution of the Membership Agreement, each member shall pay a one-time Membership Fee of \$25,000 to the Corporation.

With respect to individual members, the schedule for payment of the Membership Fee may be modified by the Board of Directors.

**Section 5. Dues.** Each member shall pay annual Membership Dues. Each year, the Membership shall approve the annual dues (the “Dues Schedule”), which shall form the basis of the Corporation’s budget to be set annually by the Board of Directors. The Dues Schedule may be amended, modified, or substituted by a vote of the Membership, however, the schedule for payment of dues by individual members may be modified by the Board of Directors. The Executive Director shall set the schedule for payment of Membership Dues in accordance with section 1 of the Membership Agreement. Any member of the Corporation who is delinquent in the payment of Membership Dues shall be notified of the delinquency and suspended from certain privileges of membership as provided for in the Membership Agreement. If dues are ninety (90) days delinquent, the delinquent member shall forfeit all rights and privileges of membership and be automatically removed from Membership. No dues will be refunded after payment, absent an overpayment or other payment error.

**Section 6. Term of Membership; Good Standing.** Members shall remain members provided they remain in good standing with the Corporation. Each member shall remain in good standing by complying with all of the terms and conditions of the Membership Agreement and paying annual dues on a timely basis, as described in Section 5 of this Article. A member that is out of compliance with the requirements for good standing may be subject to removal, including automatic removal, as set forth in Section 8 of this Article.

**Section 7. Resignation.** A member may resign by mailing or delivering written notice to the Secretary of the Corporation and ERIC’s Executive Director, who shall, in turn, notify the Membership. A member must provide a minimum of 91 days notice before their resignation is effective, provided however, that any notice of resignation that would otherwise become effective during the 91 days preceding a federal general election will not be effective until the first business day following the federal general election. Any paid Membership Dues will not be refunded, and a member shall be responsible and liable for any dues assessed prior to notice being received. However, if a member who has resigned reapplies for membership in the same fiscal year, dues previously paid will be credited to their Membership Dues for that fiscal year. If the sole reason for member’s resignation is a material breach by ERIC of the Membership Agreement, member may not issue a notice of resignation in accordance with this section unless a) it has provided written notice to ERIC of the alleged breach; and b) within thirty (30) days (or such other time specified in the Membership Agreement) of receiving such notice from member, ERIC is unable to cure the breach or determines the breach cannot be cured.

**Section 8. Removal.**

**(a) Automatic Removal:** A member shall be automatically removed from Membership for failure to comply with the “automatic removal” provisions as set forth herein or in the Membership Agreement. Such automatic removal shall be effective upon written notice by the Chair of the Board of Directors and/or ERIC’s Executive Director to the non-compliant member.

**(b) Other Grounds for Removal:** Any member may be removed at any time, with or without cause, by a three-fourths vote of the entire Board of Directors. The Board of Directors may vote to remove a member solely for a breach of the provisions of the Membership Agreement (with the exception of those provisions that trigger automatic removal) only if the breach cannot be cured or, if curable, is not cured by the member within thirty (30) days (or such other time as may be specified in the Membership Agreement) of receiving notice of the breach from the Corporation.

**(c) Dues Upon Removal:** Any paid dues will not be refunded following removal.

**(d) Readmission to Membership:** After termination of membership pursuant to this Section, the member may reapply for membership at any time, without penalty, subject to remedying the cause for termination. Any dues assessed to the member upon reapplication shall be credited the amount of dues paid previously for the same fiscal year.

**Section 9. Meetings of the Members.** An annual meeting of the members shall be held each year at such time and place as shall be fixed by the Board of Directors for the appointment of directors, as necessary, and the transaction of other business as may properly come before the members.

Regular or special meetings of the members may be held at such times as may be fixed by the Board of Directors. The annual meeting of the members shall be open to the public, except as provided by law.

Meetings of the members may be held at such places within or without the State of Delaware as may be fixed by the Board of Directors for annual and regular meetings and in the notice of meeting for special meetings. The Board of Directors may authorize that meetings of the members may be held by means of remote communication in accordance with Section 211(a)(2) of the General Corporation Law of the State of Delaware, and other applicable laws. Minutes of any meeting of the Membership shall be published following the meeting.

**Section 10. Notice.** Annual and special meetings of the members shall be held upon at least ten (10) days' notice by first-class mail, personal delivery, or by telephone, facsimile, electronic transmission or other similar means of communication to the members, and publication by appropriate means. The notice shall be given by or at the direction of the Chair or the Secretary, who shall call a meeting on the request of two or more directors, or a majority of the entire Membership. In the case of a meeting at which amendments to the Certificate of Incorporation, bylaws or Membership Agreement will be submitted to the members, the notice of such meeting shall set forth the proposed amendment or a summary of the changes to be effected thereby.

**Section 11. Waivers of Notice.** Whenever any notice is required to be given to a member, a waiver thereof in writing, signed by the person or persons entitled to such notice, or by electronic transmission, whether before or after the time stated therein, shall be equivalent to the giving of such notice. Such waiver need not specify the purpose or purposes of the meeting.

**Section 12. Quorum, Vote, Proxy.** A majority of the members of the Corporation, as represented by their respective Member Representatives, shall constitute a quorum at a meeting of members, and the affirmative vote of a majority of such members present at the meeting and

entitled to vote on the subject matter shall be the act of the members, except as otherwise provided herein. As permitted by Delaware law, a member entitled to vote on matters reserved to the Membership may do so by identifying a proxy for the Member Representative, who shall be a part of the Member Representative's staff or department. The Member Representative shall provide written notice to ERIC's Executive Director of the proxy within a reasonable period of time in advance of the meeting of the members.

**Section 13. Written Consent of Members.** Any action required or permitted to be taken at a meeting of the members may be taken without a meeting if the members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting of the members consent in writing or by electronic transmission to the adoption of a resolution authorizing such action. Each resolution so adopted and the writings or electronic transmissions evidencing such consent by the members shall be filed with the minutes of the proceedings of the members.

### **ARTICLE III**

#### **Board of Directors**

**Section 1. Power of Board and Qualification of Directors.** The business and affairs of the Corporation shall be managed by or under the direction of its Board of Directors.

**Section 2. Appointment of Directors.** All members of the Corporation have a right to appoint their Member Representative to serve as a director on the Board of Directors. Upon admission to Membership under Article II, Section 2 or in the event of a vacancy, member shall inform ERIC's Executive Director in writing whether it wishes to have its Member Representative serve or continue to serve on the Board of Directors. Declining to have a Member Representative serve on the Board of Directors shall have no effect on the Member's other rights under these Bylaws, and such member shall have the right to appoint or reinstate their Member Representative to the Board of Directors at any time by providing written notice to ERIC's Executive Director who shall, in turn, notify the Board of Directors.

**Section 3. Non-Voting Seats on Board of Directors.** The Board of Directors may include up to two non-voting members of the Board for individuals who are experts in voting and elections but not governmental employees. Such non-voting directors shall serve two-year, renewable terms.

**Section 4. Resignation.** Any director may resign from office at any time by delivering a resignation in writing to the Corporation. Such resignation shall take effect at the time specified therein, and unless otherwise specified, acceptance of such resignation shall not be necessary to make it effective.

**Section 5. Removal of Directors.** Any director may be removed from office at any time, with or without cause, by a vote of three-fourths of the entire Board of Directors.

**Section 6. Vacancies.** If a Member Representative position on the Board of Directors becomes vacant for any reason including resignation or removal, the chief election official shall appoint a replacement in accordance with Article II, section 1 and shall notify the Executive

Director in writing whether it wishes to have its replacement Member Representative serve as a director on the Board of Directors.

**Section 7. Meetings of the Board.** An annual meeting of the Board of Directors shall be held each year at such time and place as shall be fixed by the Board of Directors, for the election of officers and for the transaction of such other business as may properly come before the meeting.

Regular meetings of the Board of Directors shall be held at such times as may be fixed by the Board of Directors. Special meetings of the Board of Directors may be held at any time whenever called by the Chair of the Board, any two directors, or ERIC's Executive Director. Any Member Representative who is not a director may attend any meeting of the Board of Directors.

Meetings of the Board of Directors may be held at such places within or without the State of Delaware as may be fixed by the Board of Directors for annual and regular meetings and in the notice of meeting for special meetings. Minutes of any meeting of the Board of Directors shall be published following the meeting.

**Section 8. Notice.** Annual and special meetings of the Board of Directors shall be held upon at least five (5) days' written notice by first-class mail or twenty-four (24) hours' notice given personally or by telephone, facsimile, electronic transmission or other similar means of communication to all members.

Any such notice shall be addressed or delivered to each member at such member's address as it is upon the records of the Corporation or as may have been given to the Corporation by the member for purposes of notice.

**Section 9. Quorum and Voting.** Unless a greater proportion is required by law, the Certificate of Incorporation or these Bylaws, a majority of the entire Board of Directors shall constitute a quorum for the transaction of business or of any specified item of business and, except as otherwise provided by law, the Certificate of Incorporation or these Bylaws, the vote of a majority of the directors present at a meeting at the time of the vote, if a quorum is present at such time, shall be the act of the Board of Directors. Directors are not permitted to give a proxy to someone to act on his or her behalf with respect to actions of the Board of Directors.

**Section 10. Written Consent of Directors; Meetings by Conference Telephone.** Any action required or permitted to be taken by the Board of Directors or any committee thereof may be taken without a meeting if all members of the Board of Directors or such committee consent in writing or by electronic transmission to the adoption of a resolution authorizing such action. Each resolution so adopted and the writings or electronic transmissions evidencing such consent by members of the Board of Directors or such committee shall be filed with the minutes of the proceedings of the Board of Directors or such committee.

Any one or more members of the Board of Directors or of any committee thereof may participate in a meeting of such Board or committee by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time. Participation by such means shall constitute presence in person at a meeting.



**Section 11. Compensation of Directors.** Directors shall receive neither compensation nor reimbursement of expenses for their services as such.

## **ARTICLE IV**

### **Committees**

**Section 1. Committees of the Board.** The Board of Directors, by resolution adopted by a majority of the entire Board, may designate from among its members an Executive Committee and other standing committees, each consisting of two or more directors, and each of which, to the extent provided in the resolution and to the fullest extent of the law, shall have and may exercise all the powers and authority of the Board. No committee may a) take any action expressly reserved under these Bylaws and Membership Agreement to the members for approval; b) amend the certificate of incorporation, these Bylaws, or the Membership Agreement; c) approve or remove members; d) elect or remove officers; e) remove directors; f) elect or remove non-voting members of the Board of Directors; g) elect members of committees; h) hire or discharge an executive director; i) adopt an agreement of merger or consolidation; j) recommend to the Membership the sale, lease or exchange of all or substantially all of the Corporation's property and assets; or k) recommend to the Membership a dissolution of the Corporation or a revocation of a dissolution of the Corporation. The Board of Directors shall have the power at any time to designate a member of such committee as its chair, fill vacancies, change the membership or discharge a committee.

**Section 2. Committee Rules.** Unless the Board of Directors otherwise provides, each committee designated by the Board may make, alter and repeal rules for the conduct of its business, except with respect to quorum. In the absence of a contrary provision established by the Board of Directors, a majority of the entire authorized number of members of each committee shall constitute a quorum for the transaction of business, the vote of a majority of the members present at a meeting at the time of such vote if a quorum is then present shall be the act of such committee, and each committee shall otherwise conduct its business in the same manner as the Board of Directors conducts its business under Article III of these Bylaws.

**Section 3. Service of Committees.** Each committee of the Board of Directors shall serve at the pleasure of the Board. The designation of any such committee and the delegation thereto of authority shall not alone relieve any director of his or her duty under law to the Corporation.

**Section 4. Records.** Minutes shall be kept of each meeting of each committee. Copies of the minutes of each such meeting shall be filed with the corporate records and supplied to each member of the Board of Directors.

**Section 5. Advisory Board.** The Board of Directors shall create a Privacy and Technology Advisory Board, and may create such other advisory boards and appoint to them such persons as it deems appropriate. Persons serving in such advisory capacity shall not exercise any of the powers granted to the Board of Directors in these Bylaws.

## **Section 6. Executive Committee.**

**(a) *Ex Officio* Membership:** The Executive Committee shall consist of the Chair, Vice Chair, Immediate Past Chair, Treasurer, and Secretary of the Board of Directors, and the Executive Director shall serve as a non-voting member of the Executive Committee (collectively the “*ex officio* members”). Vacancies in the *ex officio* membership of the Executive Committee shall be addressed in accordance with Article V.

**(b) Elected Membership:** In addition to the *ex officio* members, until the Membership reaches thirty-four, the Executive Committee shall include two voting members of the Board of Directors elected by the Board of Directors. When the Membership reaches thirty-five, the number of voting members of the Board of Directors serving on the Executive Committee shall increase to four, with the election of the additional members occurring within a reasonable time following the admission of the thirty-fifth member. Such committee members shall serve in this capacity for terms of one year, not to exceed two consecutive one-year terms. In the event of a vacancy among the elected membership of the Executive Committee, in accordance with subsection d below, the Executive Committee shall take reasonable steps to propose a replacement to fill the unexpired term of his or her predecessor.

**(c) Chair of Executive Committee:** The Chair of the Board of Directors shall be the Chair of the Executive Committee.

**(d) Role and Powers of Executive Committee:** Except as set forth in Article IV, Section 1 above, or as otherwise proscribed by the Board of Directors, the Executive Committee shall have the authority to exercise all powers of the Board of Directors between meetings of the Board. In addition, the Executive Committee’s responsibilities shall include preparing and proposing to the Board of Directors a slate of candidates for officer positions and elected members of the Executive and Finance Committees, including in the event of a vacancy, and the Executive Director; and, in consultation with the Finance Committee, reviewing the compensation and performance of the Executive Director. The Executive Committee shall hold regular meetings at such times as it shall determine and special meetings as requested by the Chair, the Executive Director, or any two of its members. Actions of the Executive Committee shall be reported to the Board of Directors.

## **Section 7. Finance Committee.**

**(a) *Ex Officio* Membership:** The Finance Committee shall consist of the Treasurer and Secretary of the Board of Directors, and the Executive Director shall serve as a non-voting member of the Finance Committee (collectively, the “*ex officio* members”). Vacancies in the *ex officio* membership of the Finance Committee shall be addressed in accordance with Article V.

**(b) Elected Membership:** The Finance Committee shall include one voting member of the Board of Directors elected by the Board. This committee member shall serve in this capacity for terms of one year, not to exceed two consecutive one-year terms. In the event the voting member position on the Finance Committee becomes vacant, in accordance with subsection d below, the Executive Committee shall take reasonable steps to propose a replacement to fill the unexpired term of his or her predecessor.

**(c) Chair of Finance Committee:** The Treasurer shall be the Chair of the Finance Committee.

**(d) Role and Powers of Finance Committee:** Except as set forth in Article IV, Section 1 above, or as otherwise proscribed by the Board, the Finance Committee shall have the authority to exercise all powers of the Board of Directors between meetings of the Board. The Finance Committee will assist the Board of Directors with its financial oversight responsibilities including reviewing and recommending approval of the annual operating budget; reviewing periodic financial reports; and overseeing the management of financial assets and audits. The Finance Committee shall hold regular meetings at such times as it shall determine and special meetings as requested by any of its members. Actions of the Finance Committee shall be reported to the Board of Directors.

## ARTICLE V

### **Officers, Agents and Employees**

**Section 1. General Provisions.** The officers of the Corporation shall be a Chair, a Vice Chair, the Immediate Past Chair, a Secretary, a Treasurer and may include such other officers as may be deemed necessary.

**Section 2. Term of Office, Vacancies and Removal.** The officers shall be elected by the Board of Directors from among its membership at the annual meeting of the Board. The Board of Directors may appoint other officers, who shall have such authority and perform such duties as may be prescribed by the Board. Each officer shall hold office for a term of one year, until the next annual meeting of the Board of Directors after his or her appointment and until his or her successor has been appointed and qualified. Any two or more offices may be held by the same person, except the offices of Chair and Secretary. If an office becomes vacant for any reason, the Board of Directors may fill such vacancy. Any officer so appointed or elected shall serve only until such time as the unexpired term of his or her predecessor shall have expired unless re-elected by the Board of Directors. Any officer may be removed by a vote of the majority of the entire Board of Directors with or without cause. Such removal without cause shall be without prejudice to such person's contract rights, if any, but the appointment of any person as an officer of the Corporation shall not of itself create contract rights.

### **Section 3. Powers and Duties of Officers.**

**(a) Chair.** The Chair shall preside at all meetings of the Board of Directors. The Chair shall perform all duties customary to that office and shall supervise and control all of the affairs of the Corporation in accordance with the policies and directives approved by the Board of Directors.

**(b) Vice Chair:** The Vice Chair shall serve as advisor to the Chair and shall substitute for the Chair in his or her absence or inability to serve.

**(c) Immediate Past Chair:** The Immediate Past Chair shall serve as advisor to the Chair, the Executive Director and the Board of Directors.

**(d) Secretary.** The Secretary shall be responsible for the keeping of an accurate record of the proceedings of all meetings of the Board of Directors, shall give or cause to be given all notices in accordance with these Bylaws or as required by law, and, in general, shall perform all duties customary to the office of Secretary. The Secretary shall oversee the custody of the corporate seal of the Corporation, if any; and shall have authority to affix or cause to be affixed the same to any instrument requiring it; and, when so affixed, it may be attested by his or her signature. The Board of Directors may give general authority to any officer to affix the seal of the Corporation, if any, and to attest the affixing by his or her signature.

**(e) Treasurer.** The Treasurer shall be chair of the Finance Committee. The treasurer shall oversee the custody of, and be responsible for, all funds and securities of the Corporation; shall keep or cause to be kept complete and accurate accounts of receipts and disbursements of the Corporation; and shall deposit or cause to be deposited all monies and other valuable property of the Corporation in the name and to the credit of the Corporation in such banks or depositories as the Board of Directors may designate. Whenever required by the Board of Directors, and at the annual membership meeting, the Treasurer shall render a statement of accounts. The Treasurer shall at all reasonable times exhibit or cause to be exhibited the books and accounts to any officer or director of the Corporation, and shall perform or cause to be performed all duties incident to the office of Treasurer, subject to the supervision of the Board of Directors, and such other duties as shall from time to time be assigned by the Board. The Treasurer shall, if required by the Board of Directors, give such bond or security for the faithful performance of his or her duties as the Board may require.

**Section 4. Executive Director.** The Board of Directors shall hire an Executive Director who shall serve as the chief executive officer of the Corporation. The Executive Director shall have day-to-day responsibility for the management of the staff and programs of the Corporation, including carrying out the Corporation's goals and Board-approved policies. The Executive Director shall serve as an ex-officio, non-voting member of the Board of Directors; report on the progress of the Corporation's activities, publish by appropriate means all data received from the Members pursuant to the Membership Agreement, provide notice to members regarding any changes in their standing with regard to the Corporation, answer questions of Board members and carry out the duties described in the job description. The Board of Directors may designate other duties as necessary. The Executive Director shall report to the Chair of the Corporation.

**Section 5. Agents and Employees.** The Board of Directors may hire or appoint agents and employees who shall have such authority and perform such duties as may be prescribed by the Board. The Board of Directors may remove any agent or employee at any time with or without cause. The foregoing powers may be delegated to the Executive Director. Removal without cause shall be without prejudice to such person's contract rights, if any, and the appointment of such person shall not itself create contract rights.

**Section 6. Compensation of Officers, Agents and Employees.** Salaries or other compensation of officers, agents and employees may be fixed from time to time by the Board of Directors, or this power may be delegated to the Executive Director; provided, however that such salaries and compensation shall not be excessive in amount and shall be for services which are reasonable and necessary for performance of the Corporation's purposes.

## **ARTICLE VI**

### **Miscellaneous**

**Section 1. Fiscal Year.** The fiscal year of the Corporation shall be determined by resolution of the Board of Directors.

**Section 2. Corporate Seal.** The seal of the Corporation shall be circular in form and contain the name of the Corporation, the words “Corporate Seal” and “Delaware” and the year the Corporation was formed in the center. The Corporation may use the seal by causing it or a facsimile to be affixed or impressed or reproduced in any manner.

**Section 3. Checks, Notes, Contracts.** The Board of Directors shall determine who shall be authorized from time to time on the Corporation’s behalf to sign checks, notes, drafts, acceptances, bills of exchange and other orders or obligations for the payment of money; to enter into contracts; or to execute and deliver other documents and instruments.

**Section 4. Books and Records.** The Corporation shall keep at its principal office (1) correct and complete books and records of accounts, (2) minutes of the proceedings of its Board of Directors and any committee of the Corporation, and (3) a current list or record containing the names and addresses of all members, directors and officers of the Corporation. Any of the books, records and minutes of the Corporation may be in written form or in any other form capable of being converted into written form within a reasonable time.

**Section 5. Amendments to Certificate, Bylaws and Membership Agreement.** The Certificate of Incorporation may be amended in whole or in part by the members. These Bylaws may be amended or repealed, in whole or in part, by a two-thirds vote of the entire Membership. The Membership Agreement may be amended, in whole or in part, by a four-fifths vote of the entire Membership.

**Section 6. Privacy.** The protection of individual’s privacy being of significant importance to the Corporation, the Corporation shall take all reasonable and prudent actions to prevent and/or contest the disclosure of any personal or individual data held within the Corporation’s control to anyone other than the members.

**Section 7. Indemnification and Insurance.** The Corporation may, to the fullest extent permitted by law, indemnify any present or former director, officer, employee or agent or any person who may have served at its request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, whether for profit or not for profit, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement, actually and reasonably incurred by him or her in connection with any threatened, pending or completed action, suit or proceeding whether civil, criminal, administrative, or investigative, to which he or she may be or is made a party by reason of being or having been such director, officer, employee or agent if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. However, there shall be no indemnification in respect of any claim, issue or matter as to which he

or she shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

The Corporation shall have the power to purchase and maintain insurance to indemnify the Corporation and its directors and officers to the full extent such indemnification is permitted by law.

The Corporation may pay expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such officer or director to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the Corporation under this Article. Such expenses (including attorneys' fees) incurred by other employees and agents may be paid upon such terms and conditions, if any, as the Board of Directors deems appropriate.

In no case, however, shall the Corporation indemnify, reimburse, or insure any person for any taxes imposed on such individual under chapter 42 of the Internal Revenue Code of 1986, as now in effect or as may hereafter be amended ("the Code"). Further, if at any time the Corporation is deemed to be a private foundation within the meaning of § 509 of the Code then, during such time, no payment shall be made under this Article if such payment would constitute an act of self-dealing or a taxable expenditure, as defined in § 4941(d) or § 4945(d), respectively, of the Code.

If any part of this Article shall be found in any action, suit, or proceeding to be invalid or ineffective, the validity and the effectiveness of the remaining parts shall not be affected.

**OFFICER’S CERTIFICATE**

I, \_\_\_\_\_, \_\_\_\_\_ of the Electronic Registration Information Center, formed and existing under the laws of the State of Delaware, do hereby certify that the foregoing is a true and complete copy of the Bylaws of this not-for-profit corporation as submitted and read to, and adopted by, the Board of Directors on \_\_\_\_\_, 20\_\_.

IN WITNESS THEREOF, I have hereunder ascribed my name and affixed the Seal of the Corporation on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[Corporate Seal]

## EXHIBIT A

### ELECTRONIC REGISTRATION INFORMATION CENTER, INC.

#### MEMBERSHIP AGREEMENT

This membership agreement (this “Agreement”) is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_ 20\_\_ (the “Effective Date”), by and between Electronic Registration Information Center, Inc., a Delaware nonstock corporation (“ERIC”) and \_\_\_\_\_ (the “Member”).

**WHEREAS**, ERIC was formed for charitable and educational purposes to engage in meaningful, evidence-based reform of the election system in the United States; and

**WHEREAS**, ERIC seeks to lessen the burdens of government by facilitating the collaboration of states and local government units to conduct research, develop technology, and perform other charitable and educational activities designed to reduce the costs and increase the accuracies and efficiencies associated with their use of voter registration systems; and

**WHEREAS**, ERIC seeks the direct involvement of states and local government units in furthering its charitable and educational purposes by such states and local government units becoming members of ERIC and furnishing voter registration and other data to help ERIC understand the needs of states and local government units with respect to their use of voter registration systems, and assist state and local government units in making their voter registration lists and processes more accurate, more complete, and fully compliant with federal, state and local laws; and

**WHEREAS**, in consideration for the Member’s performance as described below, ERIC will provide the service to the Members of sharing and processing data that relates to the maintenance of their voter registration lists and provide regular (at least on a monthly basis) reports to the Member.

**NOW THEREFORE**, in consideration of the foregoing, the terms and conditions hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Annual Dues. The Member shall pay annual dues to ERIC as determined by the ERIC Membership, pursuant to Article II, Section 5 of ERIC’s Bylaws. The Executive Directors shall invoice Members for dues and set a reasonable payment deadline. If the Member fails to pay dues by the payment deadline, ERIC shall not deliver, nor shall the Member receive, any services or data from ERIC until such payment is received. Any Member that fails to pay dues within ninety (90) days of a payment deadline shall be *automatically removed* as a Member in accordance with ERIC’s Bylaws (the “Bylaws”).
2. Voter Files and Motor Vehicle Records. The Member shall transmit to ERIC the following data related to its voter files and motor vehicle records (collectively, the “Member Data”).
  - a. A reasonable time after admission, the Corporation and the Member will agree upon a ‘Certification Date’ that obligates the Member to the following two sections



## EXHIBIT A

herein. The Member shall be notified in writing by the Corporation of the Certification Date.

- b. Within sixty (60) days of the Certification Date, and at least every sixty (60) days thereafter, the Member shall transmit: (1) all inactive and active voter files (excluding those records that are confidential or protected from disclosure by law), including those fields identified in Exhibit B, and (2) all licensing or identification records contained in the motor vehicles database (excluding those fields unrelated to voter eligibility, such as fields related to an individual's driving record), including those fields identified in Exhibit B. Under no circumstances shall the Member transmit an individual's record where the record contains documentation or other information indicating that the individual is a non-citizen of the United States. Should Member believe it has an alternative source of data that is equivalent to or better than the motor vehicle database ("Alternative Data Source"), Member may apply in writing to the Executive Director of ERIC to substitute the Alternative Data Source for motor vehicle data. Such written application shall explain the basis for Member's assertion that the Alternative Data Source is equivalent or better and why using it will effectively serve the goals of ERIC. If, in the Executive Director's assessment, the request is reasonable, the Executive Director shall submit the Member's request to the ERIC Board of Directors ("ERIC Board" or "Board") for approval. If membership in ERIC is contingent upon a jurisdiction's ability to use an Alternative Data Source, the jurisdiction may seek approval of a data substitution request in advance of joining ERIC.
  - c. If the Member fails to transmit the required Member Data as described above, ERIC shall not deliver, nor shall the Member receive, any Data or services from ERIC until ERIC receives the required Member Data from the Member. Should Member fail to transmit Member Data in any sixty (60) day period as provided in sub-section b, Member shall, upon written notice from ERIC, have a thirty (30) day grace period in which to provide such Member Data. Should this grace period expire without a transmission to ERIC of Member Data from the Member, the Member shall be *automatically removed* from membership in accordance with the Bylaws. Member may submit a written appeal to the Executive Director of ERIC for a reasonable extension of the grace period deadline if Member is unable to meet that deadline because of a technical issue or a problem accessing or receiving the Member Data. Whether or not to grant the extension or to proceed to automatic removal shall be in the sole discretion of ERIC's Executive Director.
3. State Agency Records. The Member shall use its best efforts to transmit, on a regular basis, data relating to individuals that exists in the records of other agencies within its jurisdiction that perform any voter registration functions, including, but not limited to, those required to perform voter registration pursuant to the National Voter Registration Act, 43 U.S.C. 1973gg-5 ("Additional Member Data"). Notwithstanding this section, a state's failure to transmit Additional Member Data under this section shall not affect the Member's compliance with this Section or its standing as a member of ERIC.

## EXHIBIT A

### 4. Privacy; Use of Data.

- a. **Use and Protection of Data:** The Member and ERIC shall use their best efforts to prevent the unauthorized use or transmission of any private or protected Member Data; Additional Member Data; and data included in reports provided by ERIC (“ERIC Data”) (Member Data, Additional Member Data and ERIC Data shall be collectively referred to as “Data”) in its possession. The Member represents and warrants that all uses and transmissions of Data originating from the Member to ERIC and/or ERIC’s agents, contractors or subcontractors comply fully with applicable state, federal and local laws, rules and regulations. The Member shall not use or transmit any ERIC Data for any purpose other than the administration of elections under state or federal law. Should a Member receive a request to disclose ERIC Data and determines that it is legally obligated, in whole or in part, to comply with such request, it shall not make the disclosure without first obtaining a court order compelling it to do so, a copy of which shall be provided to ERIC.
- b. **Unauthorized Use or Disclosure of Data--Member:** Should there be an unauthorized or impermissible use, disclosure or transmission of Data, regardless of whether it is accidental or intentional (for example, Member intentionally sells, distributes, publishes or uses any ERIC Data for any purpose other than election administration, including any commercial purpose) or the responsibility of a third party (collectively, “Unauthorized Disclosure”), Member shall, within ninety (90) days of ERIC receiving notice of the Unauthorized Disclosure a) explain in writing to ERIC that such Unauthorized Disclosure has been cured and how it was cured or, if the breach is not curable, provides a written explanation to ERIC of what steps it has taken to mitigate the risks to ERIC and its Members resulting from such breach; and b) provide a written explanation of what processes it has implemented to prevent such Unauthorized Disclosure in the future. Upon written application, the Executive Director of ERIC, in consultation with the Board Chair, may extend the deadline for Member to comply with this section. At its first meeting following the Member’s compliance with sub-sections a and b above, the Board will consider the information submitted by the Member and vote on Member’s continued membership. Should Member fail to provide any information in response to sub-sections a and/or b above, Member shall be *automatically removed*. To the extent permitted under each Member’s state law, the Member agrees to indemnify, defend and hold harmless ERIC against any claims related to the Unauthorized Disclosure.
- c. **Notice to ERIC:** Each Member shall report to the Executive Director of ERIC as soon as is practicable if a Member is required by law to sell, distribute, publish, disclose or use any ERIC Data for any purpose other than election administration. Each Member shall report to the Executive Director of ERIC immediately upon learning of any Unauthorized Disclosure.
- d. **Unauthorized Disclosure of Data-ERIC:** Should there be an unauthorized disclosure of motor vehicle data by ERIC, whether accidental or intentional or the

## EXHIBIT A

responsibility of a third party (“ERIC Unauthorized Disclosure”), ERIC shall immediately give notice to Members. Understanding that ERIC’s primary source of funds are fees and dues paid by Members, and subject to consultation and approval by the Board, ERIC agrees to indemnify, defend and hold harmless state motor vehicle agencies against any claims related to an ERIC Unauthorized Disclosure of Data.

This provision 4 shall not be construed to limit any Member’s sovereign immunity, rights, claims or defenses which arise as a matter of law or pursuant to any other provision of this Agreement.

5. State Voter Registration Systems. To foster ERIC’s goal of improving the accuracy of state voter registration data, Members are strongly encouraged to establish a regular schedule for requesting ERIC Data with a minimum of one request every calendar year. When a Member Representative requests ERIC Data, upon receipt of such ERIC Data, the Member shall take the following actions in connection with the improvement of its state voter registration systems. (If Member rescinds in writing its request for ERIC Data within seven (7) business days of making its original request, the following requirements will not apply.) If a Member fails to make at least one request for ERIC Data for 425 days, ERIC will automatically provide ERIC Data within seven (7) business days of the 425th day, thereby triggering the following requirements.
  - a. When the Member receives ERIC Data regarding eligible or possibly eligible citizens who are not registered to vote, the Member shall, at a minimum, initiate contact with each and every eligible or possibly eligible citizen and inform them how to register to vote. Each Member shall have until October 1 or fifteen (15) days before the close of registration, whichever is earlier, of the next Federal General Election year to initiate contact with at least 95% of the eligible or potentially eligible citizens on whom data was provided and address validation was performed, as described above. Members shall not be required to initiate contact with eligible or possibly eligible voters more than once at the same address, nor shall Members be required to contact any individual who has affirmatively confirmed their desire not to be contacted for purposes of voter registration or is otherwise ineligible to vote in the Member’s jurisdiction. Should a Member need a brief extension in order to comply with the requirements of this section 5(a), Member may submit a written request to ERIC’s Executive Director setting forth the reasons for the extension request and providing a specific date when the required mailing will be sent. Members shall make every effort to submit extension requests at least two weeks before the deadline. Whether or not to grant an extension request or to proceed to automatic removal is in the sole discretion of ERIC’s Executive Director, and the timeliness of the request shall be a factor in the Executive Director’s determination. Members are entitled to request only one extension per Federal General Election cycle. No later than December 1 (or, if December 1 falls on a weekend, the next business day) following the Federal General Election, the Member Representative shall provide a written certification

## EXHIBIT A

to the Executive Director of ERIC that Member has or has not complied with the provisions of this section. Members that have not complied with this section, or do not provide the written certification, shall be *automatically removed* from membership. If a Member adopts legislation or policies that have the potential to accomplish the objectives of this section by alternative means, Member may apply to ERIC for an exemption from the requirements of this section of the Membership Agreement by sending a written request to the Executive Director of ERIC and the Chair of the Board. Such written application shall explain the basis for Member's assertion that the alternative means will effectively achieve the objectives of this section. If the Executive Director of ERIC and the Chair of the Board believe the request is reasonable, it shall be presented to the Board for a vote and, if granted, a determination on the timing of implementation of the exemption.

- b. When the Member receives credible ERIC Data (meaning the state has validated the data) indicating that information in an existing voter's record is deemed to be inaccurate or out-of-date, the Member shall, at a minimum, initiate contact with that voter in order to correct the inaccuracy or obtain information sufficient to inactivate or update the voter's record. Each Member has ninety (90) days after the data was sent to initiate contact with at least 95% of the voters on whom data indicating a record was inaccurate or out-of-date, as described above, was provided.

Within ten (10) business days of the ninetieth day, the Member Representative shall provide a written certification to the Executive Director of ERIC that Member has complied or not complied with this section and, if out of compliance, the extent of such non-compliance. If Member is out of compliance, Member shall have a 30-day grace period, which begins on the 91<sup>st</sup> day, within which to complete the required contacts. Within ten (10) business days following the expiration of the grace period, the Member Representative shall provide a written certification to the Executive Director of ERIC that Member has complied or not complied with this section. If Member is still out of compliance, or fails to provide the certification, Member shall be *automatically removed*.

- c. The Member shall use its best efforts to provide for a mechanism by which any eligible voter whose registration appears to have been erroneously processed or unprocessed shall be offered the opportunity to cast a ballot that will be counted, unless the voter is otherwise ineligible.
- d. The Member shall use its best efforts to provide for a mechanism by which an eligible voter may register to vote over the internet without need to complete and/or deliver a paper voter registration form.
- e. The Member shall use its best efforts to provide for a mechanism by which voter registration transactions performed at state agencies is more fully automated and reduces or eliminates paper transactions.

## EXHIBIT A

6. Voter Participation Data. ERIC recognizes that the appearance of improper voting, allegations of improper voting, and actual improper voting undermines public confidence in the electoral process and election outcomes. ERIC can be a tool to identify potentially improper votes, and refer them to Members for further investigation consistent with each state's laws. For the purposes of this Agreement, "improper votes" means votes cast by an individual who may have voted more than once in the Member jurisdiction at the same election, voted in more than one Member jurisdiction at the same election, or voted on behalf of a deceased voter within the Member jurisdiction.

Upon the written request of a Member Representative, ERIC shall provide the Member with data identifying voters who appear to have cast improper votes in a preceding election. Members shall not be required to request these data. Use or acceptance of these data shall not be a condition of membership.

To receive these data, Members shall submit a written request to the Executive Director at least 90 calendar days before the applicable election. In the written request, the Member must: (1) specify the election for which it requests data identifying voters who appear to have cast improper votes, (2) affirm that it will submit to ERIC voting history data for the applicable election in a manner consistent with how voter files and motor vehicle records are submitted to ERIC, (3) affirm that it will accept the requested data from ERIC, (4) affirm that it will complete a reasonable internal investigation of any possible improper votes before publicly releasing information about the data, and (5) affirm that it can protect the confidentiality of the individual-level data, either by state law or administrative rule, until the internal investigation is complete and the findings are turned over to law enforcement.

7. Single Point of Transfer. The Member shall designate and maintain a single point of transfer of data and a single data source/point of data per data feed.
8. Performance Data. Within 30 days of the date of execution of this agreement, and every one hundred eighty (180) days thereafter, the Member shall report to ERIC data relating to performance under this Agreement, as described in Exhibit C.
9. State Specific Requirements. From time to time, legislation or implementing regulations enabling states to become members of ERIC will contain state-specific membership requirements not applicable to all Members. Such state-specific requirements are set forth in Exhibit D.
10. Publicity. The Member shall not make or permit any person connected with it to make any announcement or statement purporting to be on behalf of ERIC, or use any logo, trademark, service mark, or business or trading name of ERIC or any other Member of ERIC without the prior written approval of ERIC or the affected Member, as applicable. Furthermore ERIC shall not make or permit any person connected with it to make any announcement or statement purporting to be on behalf of any Member, or use any logo, trademark, service

## EXHIBIT A

mark, or business or trading name of any Member of ERIC without the prior written approval of the affected Member.

11. Waiver. No waiver by any party for any breach by the other of any of the provisions of this Agreement shall be deemed a waiver of any preceding or succeeding breach of the same or any other provisions hereof. No such waiver shall be effective unless in writing and then only to the extent expressly set forth in writing.
12. Severability. The provisions of this Agreement are separate and severable, and the invalidity of any of them shall not affect or impair the validity or enforcement of the remaining provisions.
13. Assignment. ERIC may not sell, assign, or otherwise transfer any of its rights or interests or delegate any of its duties or obligations in this Agreement, without a majority vote of the entire Membership. The Member may not sell, assign, or otherwise transfer any of its rights or interests or delegate any of its duties or obligations in this Agreement, without the prior written consent of ERIC. Any sale, assignment, or transfer in violation of this Section is void and without effect.
14. No Partner or Agency. This Agreement does not constitute or create a partnership or joint venture with any Member or among the Members; appoint any Member as an agent for ERIC or any other Member, or appoint ERIC as an agent for any Member; or create any fiduciary obligations among the Members, except as may be expressly set forth in this Agreement.
15. Amendments. Amendments or modifications of this Agreement shall be effective immediately upon approval of such changes by the entire Membership in accordance with Article VI, Section 5 of the Bylaws.
16. Communications; Notices. All communications and notices that are required to be given by ERIC or a Member pursuant to this Agreement must be in writing and sent to the recipient either by electronic mail, personal delivery, overnight commercial courier service, or facsimile. Members may request a preferred method of delivery and the Corporation will make all reasonable efforts to oblige such requests. Communications and notices must be sent using the Notice Details set forth on the signature page of this Agreement, unless these details are changed by delivery of a written notice to ERIC, if the change related to a Member, or the Member, if the change relates to ERIC. The Executive Director of ERIC shall maintain or cause to be maintained a roster of Members that contains a compilation of Notice Details for each Member, and which shall be distributed periodically to the Members.
17. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which when fully executed shall be an original, and all of said counterparts taken together shall be deemed to constitute one and the same agreement.

## EXHIBIT A

18. Complete Agreement. This Agreement is the parties' final and binding expression of their agreement and the complete and exclusive statement of its terms. This Agreement cancels, supersedes and revokes all prior negotiations, representations and agreements between the parties, whether oral or written, relating to the subject matter of this Agreement.
19. Headings and Subsections. Section headings are provided for reference and do not constitute part of this Agreement.
20. Definitions. As used herein, the term "state" includes the fifty (50) states, the District of Columbia, and the territories of the United States.

**EXHIBIT A**

**ELECTRONIC REGISTRATION INFORMATION CENTER, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Notice Details:

With a copy to:

Name:	Name:
Title:	Title:
Address:	Address:
Phone:	Phone:
Fax:	Fax:

**[MEMBER]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Notice Details:

With a copy to:

Name:	Name:
Title:	Title:
Address:	Address:
Phone:	Phone:
Fax:	Fax:



## **EXHIBIT B**

### **ELECTRONIC REGISTRATION INFORMATION CENTER, INC.**

#### **Voter Registration and motor vehicles data fields to be submitted to ERIC by each participating jurisdiction, if collected by the Member State**

1. All name fields
2. All address fields
3. Driver's license or state ID number
4. Last four digits of Social Security number
5. Date of birth
6. Activity dates as defined by the Board of Directors
7. Current record status
8. Affirmative documentation of citizenship
9. The title/type of affirmative documentation of citizenship presented
10. Phone number
11. E-mail address or other electronic contact method

## EXHIBIT C

### ELECTRONIC REGISTRATION INFORMATION CENTER, INC.

#### Performance data to be submitted to ERIC by each participating jurisdiction

Each jurisdiction will have two types of performance data submission:

- A. Prior to receiving the first ERIC reports, the jurisdiction will submit a set of baseline data for a representative period of time to use for comparisons.
- B. After receiving the first ERIC reports, the jurisdiction will begin submitting data for the activity within the specified time period.

#### Performance Data Points

1. Number of voter registration applications new to the Member's jurisdiction submitted by the voter on a paper form
2. Number of new voter registration applications new to the Member's jurisdiction submitted by the voter electronically
3. Number of updates to a voter's existing voter registration submitted by the voter on a paper form
4. Number of updates to a voter's existing voter registration submitted by the voter electronically
5. Number of records reported from ERIC on In-state Movers report who updated through the jurisdiction's online voter registration system (if available)
6. Election statistics, totals for any federal elections within the period of:
  - a. Number of new voters to the Member's jurisdiction who registered and voted on the same day, where applicable
  - b. Number of updates to a voter's existing registration submitted on the same day on which they voted, where applicable
  - c. Total number of provisional ballots cast
  - d. Total number of provisional ballots counted
  - e. Total number of provisional ballots uncounted, by reason (if available)

*Note: for context, ERIC will use voter turnout data from the United States Elections Project ([www.electproject.org](http://www.electproject.org))*
7. Number of individuals for whom contact was initiated and invited to register as a result of reports received from ERIC within the period
8. Number of individuals for whom contact was initiated and invited to correct their registration as a result of reports received from ERIC within the period

## **Exhibit D**

### **ELECTRONIC REGISTRATION INFORMATION CENTER, INC.**

#### **State-Specific Requirements**

##### **Illinois:**

In addition to the voter files and motor vehicle records Members must provide to ERIC under section 2 of the Membership Agreement, Illinois, in accordance with state law, is required to transmit to ERIC identification records contained in the Department of Human Services, the Department of Healthcare and Family Services, the Department of Aging, and the Department of Employment Security databases (excluding those fields unrelated to voter eligibility, such as income or health information).

# Exhibit N-20

# Transcript of Proceedings

**Date: April 05, 2012**

**Case: APPLEWHITE, et al. vs. COMMONWEALTH OF PA, et al.**



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1 IN THE COMMONWEALTH COURT OF PENNSYLVANIA

2 - - -

3 VIVIETTE APPLEWHITE; WILOLA :  
SHINHOLSTER LEE; GROVER FREELAND; :  
4 GLORIA CUTTINO; NADINE MARSH; DOROTHY :  
BARKSDALE; BEA BOOKLER; JOYCE BLOCK; :  
5 HENRIETTA KAY DICKERSON; DEVRA MIREL :  
("ASHER") SCHOR; THE LEAGUE OF WOMEN :  
6 VOTERS OF PENNSYLVANIA; NATIONAL :  
ASSOCIATION FOR THE ADVANCEMENT OF :  
7 COLORED PEOPLE, PENNSYLVANIA STATE :  
CONFERENCE; HOMELESS ADVOCACY PROJECT, :  
8 :

**CERTIFIED  
TRANSCRIPT**

9 Petitioners, : C.A. No.

10 vs. : 330 M.D. 2012

11 THE COMMONWEALTH OF PENNSYLVANIA; :  
THOMAS W. CORBETT, in his capacity as :  
12 Governor; CAROLE AICHELE, in her :  
capacity as Secretary of the :  
Commonwealth, :  
:

13 Respondents. :  
:

14  
15 \*\* TELEPHONIC CONFERENCE \*\*

16  
17 Reporter's Transcript of Proceedings before

18 THE HONORABLE ROBERT SIMPSON

19 Harrisburg, Pennsylvania

20 Friday, April 5, 2012

21  
22  
23  
24 REPORTED BY:

25 Gail L. Inghram Verbano, CSR, RDR, CRR



1 A P P E A R A N C E S

2 On behalf of Petitioners:

3

4 ARNOLD & PORTER, LLP:  
Michael a. Rubin, Esquire  
5 Dana Peterson, Esquire  
6 Dorian Hurley, Esquire  
Rachel Frankel, Esquire

7 ADVANCEMENT PROJECT:  
8 Marian K. Schneider, Esquire

9 ACLU OF PENNSYLVANIA:  
10 Witold Walczak, Esquire

11

12

13

14

15 On behalf of Respondents:  
PENNSYLVANIA OFFICE OF ATTORNEY GENERAL  
16 Timothy Paul Keating Esquire  
Kelly Neary, Esquire

17 PENNSYLVANIA OFFICE OF GENERAL COUNSEL:  
18 Gregory E. Dunlap, Esquire

19 PENNSYLVANIA DEPARTMENT OF STATE:  
Caroline Bailey, Esquire

20 PENNSYLVANIA DEPARTMENT OF TRANSPORTATION:  
21 Donald Smith, Esquire  
William Cressler, Esquire

22

23 ALSO PRESENT:

24 Leonard Cupingood  
25 Brian Niederberger

1 Friday, April 5, 2012; 11:00 a.m.

2 - -

3 THE COURT: This is Judge Simpson.

4 MR. KEATING: Tim Keating from the  
5 Attorney General's office for the Respondents. We  
6 have other attorneys here on the call from the  
7 Department of State and department of -- PennDOT,  
8 because they have been instrumental in the last week  
9 or two in trying to resolve all these discovery  
10 things. So I've asked them to be along on the call  
11 with us to flesh out any questions the Court may have  
12 or to fill in any things that I might be missing.

13 THE COURT: Let's have a roll call here,  
14 just so that I know with whom I'm speaking. Who do  
15 we have for the Respondents in addition to  
16 Mr. Keating?

17 MR. CRESSLER: Bill Cressler, Chief  
18 Counsel at PennDOT.

19 MR. KEATING: Caroline Bailey with the  
20 Department of State, she's on the line.

21 MS. BAILEY: Yes, Caroline Bailey,  
22 Assistant Counsel, Department of State.

23 MR. DUNLAP: Your Honor, this is Greg  
24 Dunlap from the Office of General Counsel.

25 MR. SMITH: Your Honor, Don Smith with



1 the Department of Transportation as well.

2 THE COURT: Good morning, Mr. Dunlap.

3 MR. DUNLAP: Good morning, Your Honor.

4 MR. KEATING: And Your Honor, we have  
5 another here from the Office of Attorney General,  
6 Kelly Neary. She's just here to be another set of  
7 ears to help me out.

8 THE COURT: So we have the Bench for the  
9 Respondents. Who do we have for the Petitioners?

10 MR. RUBIN: You have Mike Rubin from  
11 Arnold & Porter, along with Dorian Hurley and Rachel  
12 and Frankel from Arnold & Porter. Marian Schneider  
13 and Vic Walczak are also on.

14 We also have invited to join Leonard  
15 Cupingood and Brian Niederberger, who are our  
16 database experts, as this may get into a technical  
17 issue that they could offer some insight in, and we  
18 wanted to have them available for the Court.

19 THE COURT: Okay. I feel sorry for the  
20 poor court reporter trying to keep this straight.  
21 You're probably going to need to identify yourself  
22 each time you speak so we can have a semi-useable  
23 record for this.

24 Since this seems to be something that's  
25 concerning the Petitioners, let me ask somebody for

1 the Petitioners to start off.

2 MR. RUBIN: Thank you, Your Honor. This  
3 is Mike Rubin again.

4 This is a discovery issue, broadly. The  
5 big issue is the lack of responses to the discovery  
6 that's outstanding. The one that is most critical is  
7 the database discovery, which is, I think, the  
8 primary purpose of the call today.

9 On the other discovery, it's been  
10 outstanding for more than two months and it's just a  
11 matter of setting a date certain by which the  
12 Attorney General's office needs to respond, which I  
13 think is all that's needed from Petitioners to set  
14 the right priorities at the Attorney General's office  
15 and just getting it moving. And we haven't heard any  
16 objection to the substance of those. It's just a  
17 timeliness issue.

18 But on the database requests, to put it  
19 into context, the Court is, I'm sure, already well  
20 aware, the issue goes -- the discovery goes to the  
21 central issue in this case, which is how many people  
22 lack ID that would allow them to vote if this law  
23 were enforced.

24 As the Court knows, the Commonwealth did  
25 matching between the SURE database and the PennDOT

1 database last summer, found over a million people  
2 lacked ID that would be acceptable for voting, but  
3 then discounted those conclusions because the  
4 matching criteria were not very robust. And the  
5 Court expressed in its initial Opinion concerns about  
6 the lack of robust data on how many people were  
7 lacking ID.

8           The Secretary of the Commonwealth, before  
9 the last election, said publicly that after the  
10 election there would be some new efforts to do a more  
11 robust matching. We now know from Mr. Cawley that  
12 there's no intention to actually do that going  
13 forward, for whatever reason.

14           So the Petitioners very much do not want  
15 to try this case in July without being able to give  
16 the Court the type of data the Court wants; which  
17 means we need to obtain the PennDOT database and the  
18 SURE database and the fields in those databases that  
19 will allow us -- not me but our experts -- to do the  
20 robust type of matching that is needed to give the  
21 Court a real concrete number of how many people lack  
22 the ID.

23           The central issue, I think, here is  
24 Social Security numbers. From our perspective, that  
25 is critical to this effort. That is something that

1 was not provided to our experts by the Commonwealth  
2 last summer. So our effort to do matching last  
3 summer was not what we thought was robust enough to  
4 even present to the court.

5 Having a unique identifier obviously  
6 allows the issue of duplicate names or similar names  
7 or changed names or name differences and lets us do a  
8 very robust matching.

9 So we asked for the Social Security  
10 numbers. We served that discovery in February --  
11 well, we flagged this issue in the December  
12 conference that we would need this data.

13 After we found out from Mr. Cawley there  
14 was no intention to improve the databases or do a  
15 better match by the Commonwealth, we served our  
16 discovery for the database on February 8th, which is  
17 about two months ago.

18 We've made multiple efforts to engage the  
19 Respondents and their counsel on when will we get the  
20 database, what any concerns they had were. We gave  
21 them two weeks ago a more narrow list of fields that  
22 we wanted.

23 It wasn't until the last two days that we  
24 learned that PennDOT and Department of State were  
25 simply refusing to produce the database because of

1 the Social Security number issues.

2           There are multiple different ways to  
3 randomize the Social Security numbers, including with  
4 the last four digits. And that's what we're now down  
5 to, because the Department of State database doesn't  
6 even have full Social Security numbers. It just has  
7 the last four digits, which are not a unique  
8 identifier, as the affidavit lays out that we  
9 submitted to you last night. That combined with  
10 other information -- primarily date of birth -- does  
11 get a far more robust match than we would without the  
12 Social Security numbers at all or the last four  
13 digits.

14           We don't think that there's even an issue  
15 of trying to mask those numbers anymore. And by that  
16 what I mean is taking the last four digits, or the  
17 6722, and, in both databases, changing them in some  
18 way that only the Commonwealth would know how it was  
19 done.

20           So that set of 6722, in both database it  
21 would be 1278. So it's not the person's real Social  
22 Security number or even last four digits but would  
23 still provide a unique identifier in the database to  
24 assist in the matching.

25           We don't think that's necessary, given

1 the Confidentiality Order in place in this case and  
2 our willingness to even supplement that Order to  
3 satisfy any concerns that the Commonwealth has. But  
4 we have proposed sort of alternative means to  
5 randomize even those last four digits.

6 PennDOT says that that's something that  
7 would take them, I think the estimate was two months  
8 to do, which obviously -- and they're not even  
9 willing to do it, even in two months. But that's  
10 obviously not consistent with a July trial, which is  
11 very concerning to us. And as far as we can tell  
12 from discussions yesterday, nothing has been done in  
13 the last two months to even start the process.

14 So what we're asking for is for the Court  
15 to order the Department of State and PennDOT to  
16 produce the databases; to produce the last four  
17 digits, subject to the Confidentiality Order; and to  
18 do it by a date certain. That's April 17th.

19 We understand that the two-month estimate  
20 was based upon the need to randomize the last four  
21 digits. But just an extract from the database would  
22 take a week plus a couple extra days. So I think  
23 April 17th is workable. And I think Court Orders  
24 have ways to motivate parties to move expeditiously.

25 On the other discovery, I think it's

1 simply a matter of have it completed and served.  
2 we're asking for a date certain of April 12th for  
3 that discovery.

4 THE COURT: Did you mention that you  
5 submitted an affidavit to me?

6 MR. RUBIN: Yes. In our letter that we  
7 sent last night, we -- attached to that was the  
8 discovery along with a Declaration -- I'm sorry, a  
9 Declaration of Dr. Cupingood, who is on the phone  
10 with us, basically explaining why we need the Social  
11 Security numbers; why at the very last we need the  
12 last four digits; talking about encryption methods  
13 and discussing that -- sort of the alternative  
14 encryption methods that have been imposed and even  
15 why we don't need to encrypt this information at all  
16 but ways that it can be done. It can be done in a  
17 day or two.

18 But also goes through the physical -- the  
19 security that it would be held under by our  
20 consultants. The lawyers would never have access to  
21 it. It would be limited to a small group of people  
22 at our consultant who have robust security, and  
23 that's laid out in the Declaration as well.

24 THE COURT: I haven't seen the  
25 Declaration, so I'm at somewhat of a disadvantage.

1                   Let me add, I'm not aware of entering  
2 into a Confidentiality Order. Is there a  
3 Confidentiality Agreement?

4                   MR. KEATING: Your Honor, this is Tim  
5 Keating from the Attorney General's office.

6                   There's a Confidentiality Agreement that  
7 has been entered into. In discussions with PennDOT,  
8 they believe that it's not sufficiently fleshed out  
9 to meet their high concerns about security; but we  
10 don't believe that adding additional confidentiality  
11 paragraphs in that would stop us from going forward  
12 with discovery.

13                   MR. RUBIN: And Your Honor, on your  
14 question of whether it's just an agreement or a Court  
15 Order, my understanding was -- or at least my belief  
16 was that it had been so ordered by the Court, but  
17 we're checking right now. It may be that it is  
18 simply an agreement.

19                   MR. CRESSLER: Bill Cressler from  
20 PennDOT. The Court entered an Order on June 11,  
21 2012, adopting a stipulated protective order.

22                   THE COURT: Okay. Thank you. So it  
23 didn't originate here. I was just adopting something  
24 else. Did I sign it?

25                   MR. CRESSLER: Yes.



1 THE COURT: Okay. There you go. That  
2 short-term memory stuff. I'm just getting a little  
3 too old, I guess.

4 Well, I've heard one side of this. Who  
5 will fill me in on the Respondent's position?

6 MR. KEATING: Your Honor, this is Tim  
7 Keating from the Attorney General's office.

8 Let me start with the outstanding  
9 discovery other than database encryption that we were  
10 talking about, the Social Security numbers. We do  
11 have some other discovery outstanding that we were  
12 working on. We think we can provide most of that in  
13 a fairly short order.

14 Relative to the Social Security numbers  
15 and the cross-match between PennDOT and the  
16 Department of State, I know -- I think counsel said  
17 something, nothing has been done in the last two  
18 months to start this process.

19 I'm not sure that's the right way to  
20 phrase it.

21 The way it happened was they indicated  
22 they needed the nine-digit Social Security number  
23 from PennDOT and Department of State. And PennDOT  
24 had very serious security concerns over releasing the  
25 nine-digit Social Security numbers.

1           So we were trying to find a way that we  
2 could come to an agreement concerning that. And that  
3 is when this whole IT encryption logarithm came up,  
4 that they could somehow do some sort of program that  
5 they could encrypt some other number to it and match  
6 them.

7           We have been involved in several  
8 conference calls about how to do that. And all of a  
9 sudden we find out the Department of State doesn't  
10 keep the nine-digit Social Security numbers, just the  
11 last four Social Security numbers.

12           PennDOT has indicated that if they were  
13 to go through the encryption method -- I believe, and  
14 I'm sure they can correct me if I'm wrong -- that  
15 would take a couple months to do. So what we're  
16 trying to find out is an easier way to do that, and  
17 we certainly are trying to do that in a way that will  
18 not put off the hearing scheduled in July.

19           MR. CRESSLER: Bill Cressler from  
20 PennDOT. Okay for me to speak?

21           MR. KEATING: Sure, go ahead.

22           MR. CRESSLER: Okay, Your Honor?

23           THE COURT: Yes.

24           MR. CRESSLER: Thank you.

25           PennDOT has been very zealous through the

1 years of protecting the privacy rights of the drivers  
2 who give this information to them for driving  
3 purposes, and it does get used for other purposes.  
4 But it's a -- PennDOT views this as a fundamental  
5 mission of it, to protect its information that's  
6 given to it by the citizens, the drivers.

7           And of course the concern is that the  
8 information gets out there, fraud and identity theft,  
9 even with the last four digits of the Social Security  
10 numbers, there's ways to -- whenever you have the  
11 date of birth and the name and the address, there's  
12 ways that, if this information would get released  
13 accidentally somehow, that that's the risk that we have  
14 here; and is it necessary to invade the privacy of  
15 all of the citizens in view of this -- of the  
16 litigation?

17           There is law which I can get into and  
18 give you the citations and what-have-you. But -- you  
19 know, the vehicle code and there's a federal law, the  
20 Driver Privacy Protection Act, that generally  
21 protects Social Security numbers. And even state law  
22 protects that not only in the vehicle code but also  
23 in the Right to Know, which specifically prohibits  
24 Social Security numbers.

25           I think anyone understands that Social

1 Security numbers are something that should very well  
2 be protected under the federal driver -- the DPPA  
3 it's called -- it's highly restricted information.

4 Names and addresses are personal  
5 information that are restricted, but Social Security  
6 numbers go up to that next level, and they are highly  
7 restrictive.

8 And, like I said, I can get into the  
9 legal citations, but there are limited exceptions to  
10 disclosure. And one of those exceptions is -- under  
11 federal law it's called a litigation exception.  
12 Under state law, it's by Court Order.

13 So that's where we're at, is we're  
14 protecting the privacy of the citizens. That can be  
15 overcome, if, in the balance, the Court believe that  
16 that's the appropriate thing to do in this litigation  
17 because of its litigation exception under a Court  
18 Order.

19 That entails a -- you still have to --  
20 even under the litigation exception there has to be a  
21 permitted use, so it can't be like a farfetched use.  
22 It has to be relevant to the litigation to the extent  
23 that it's worth for the fact finder to overcome the  
24 privacy rights that are involved in it. There are  
25 Commonwealth Court cases under the DPPA that do

1 reflect that. The general policy, both federal and  
2 state, is to be interpreted to protect those privacy  
3 rights, and you have to do a waive type of situation.

4 As a practical matter, what --

5 THE COURT: Let me ask you to pause for  
6 just a moment.

7 Do I need to make a fact-finding --  
8 express fact-finding in order to enter a discovery  
9 order?

10 MR. CRESSLER: I believe you have to do a  
11 weighing process, whether that can -- whether you can  
12 do that just because of your knowledge already of  
13 this litigation or whether you feel you need to have  
14 some fact-finding. I would believe a decision could  
15 be made based on the information that's given to you  
16 and the law and your knowledge of this litigation so  
17 that we don't -- we don't want to unnecessarily split  
18 up the process.

19 THE COURT: Got it. Thank you. Are you  
20 completed with your comments?

21 MR. CRESSLER: Just one thing I'd like to  
22 say. I can go down through the citations to support  
23 what I just said, if you would like that.

24 But for PennDOT to produce the nine --  
25 there were -- we didn't know this until very

1 recently. There's 11 specific fields from our data  
2 that is being requested by the Petitioners. If we  
3 have to supply all 11, that can be done within a  
4 month. Two weeks would be pushing it for our  
5 resources. We could do that within a month.

6 There are two items on the list that we  
7 have concerns about, and like I said, the Social  
8 Security numbers. The other one is the driver's  
9 license number.

10 There's absolutely no need -- again,  
11 that's an individual identifier of a particular  
12 person. There's no need to disclose that number,  
13 because there's nothing over in the Department of  
14 State -- you know, they don't have the driver's  
15 license numbers of people so there's nothing to match  
16 it with.

17 So it's -- the name and address and birth  
18 date and stuff like that make some sense to match the  
19 two systems. But driver's license numbering, there's  
20 absolutely no -- again, that's personal information.  
21 It's not highly restrictive but it's personal  
22 information, and there's absolutely no reason that  
23 that needs to be disclosed.

24 MR. RUBIN: Your Honor, on that last  
25 point, may I ask a clarifying question? This is Mike

1 Rubin again.

2 THE COURT: Go ahead.

3 MR. RUBIN: On the driver's license  
4 number -- I guess this is a question for the Court  
5 and also for Department of State. In the fields that  
6 we were provided by the Department of State for their  
7 entire database, there's a line item that  
8 specifically says "driver's license number."

9 And from the testimony that we heard last  
10 fall, the matching that was done between the SURE  
11 database and PennDOT was to populate the SURE  
12 database with driver's license numbers specifically  
13 to comply with the -- to allow the Department of  
14 State election officials to comply with the voter ID  
15 law in that, for absentee ballot individuals, to  
16 prove that they are who they are, one of the  
17 requirements is to do -- to write -- to provide their  
18 driver's license number, which then the poll worker  
19 who is processing the absentee ballot would then  
20 compare to the SURE database. And they wanted all  
21 those numbers in the SURE database.

22 So our understanding is, from work that  
23 was done last summer, that data is, in fact, in the  
24 SURE database. And our understanding is that's  
25 critical, because when those two match, we will be

1 able to knock out, if the numbers are correct from  
2 what we heard last summer, 94 percent of the record  
3 entries. And then we're focusing on the 6 percent  
4 where the Commonwealth didn't have a match last time,  
5 and we're trying to do an appropriate match.

6 MR. CRESSLER: This is Bill Cressler  
7 again. And, Don, I'm going to let you follow up on  
8 this if you have anything to add.

9 But if the driver's license numbers are  
10 in the SURE database, it's because they were given to  
11 them by PennDOT, which means that there were -- there  
12 would be other matching elements. The name and the  
13 date of birth would have matched, because that's how  
14 it would have gotten there.

15 MR. SMITH: I believe that's correct.  
16 This is Don Smith. Yes.

17 MR. RUBIN: Right. But having those two  
18 numbers is going to be the first point on which our  
19 experts will then be able to carve out a huge  
20 universe of people they don't need to then try to  
21 match, which is why it's critical for us to get the  
22 driver's license numbers. Otherwise, what we think  
23 could be a month or two project could be longer than  
24 than.

25 MR. KEATING: Your Honor, this is Timothy



1 Keating from the Office of Attorney General. And I  
2 really don't have the in-depth knowledge that some of  
3 these other individuals do.

4 But I think what PennDOT is saying is the  
5 only -- the license number the Department of State  
6 got, they got from PennDOT. So trying to match them  
7 up, it's like matching up from what you already have.

8 The other concern I have, I got a call  
9 from Department of State late yesterday, around  
10 6 o'clock. And they said, Tim, in reviewing the  
11 database with SURE and the requests, we think that it  
12 might be a little bit more in-depth than we thought,  
13 and we're not sure how much of a monkey wrench that  
14 throws in in our original analysis.

15 Again, this stuff is so complex, I'm not  
16 sure exactly how to address it to the Court.

17 THE COURT: Is there somebody from the  
18 Department of State that wants to be heard?

19 MR. KEATING: The two main individuals  
20 from the Department of State are not able to be on  
21 today's call. They had personal matters that they  
22 could not change.

23 THE COURT: Is there anybody else on  
24 behalf of the Respondents who issues to be heard now?

25 MR. CRESSLER: This is Bill Cressler. I

1 wasn't quite finished with the driver's license  
2 question.

3 I'd just like to wrap up by saying that  
4 last year, whenever they did the match, all that was  
5 negotiated was the name, address and date of birth.  
6 That was thought to be sufficient. That's what  
7 PennDOT would ultimately think would be sufficient,  
8 but I understand there may be argument why that was  
9 not sufficient.

10 Basically what we're arguing here is  
11 PennDOT doesn't want to be in a position where  
12 they're undermining the public interest that's given  
13 to it with these numbers.

14 And the final thing is that the -- I  
15 thought that, from reading the letter and the  
16 Declaration from Petitioners yesterday, that they  
17 were in agreement that if all this information was  
18 ordered to be disclosed, that we would add to the  
19 Protective Order two elements: 1, that it would be  
20 kept in a secure environment and set forth in the  
21 Declaration of the doctor; and 2, that certain  
22 Commonwealth procedures on their -- it's called an  
23 ITB -- on cleansing the information whenever the case  
24 is over so that it's gone from all the computers,  
25 that that would be incorporated in the Protective

1 Order.

2 Thank you, Your Honor.

3 THE COURT: Okay.

4 MR. RUBIN: Your Honor, unless someone  
5 from the Respondents has more to say, if I may have a  
6 brief moment to respond?

7 THE COURT: Mr. Rubin?

8 MR. RUBIN: Yes.

9 THE COURT: Please proceed.

10 MR. RUBIN: I'll go in reverse order.

11 On the -- Mr. Cressler is correct that we  
12 are happy to amend the Stipulated  
13 Agreement/Protective Order to add language -- we  
14 haven't provided the specific language that's wanted,  
15 but I'm sure we can work that piece out.

16 In terms of the privacy interests and the  
17 Right to Know law, I'd refer the Court to United  
18 States versus Philadelphia Housing Authority. The  
19 citation is 2011 Westlaw 382, 765, and it's the  
20 Eastern District of Pennsylvania court case.

21 That case involved a subpoena for the  
22 first five digits of Social Security numbers, which  
23 is more sensitive because people that know this tell  
24 me that the first five digits actually provides  
25 information about place of birth and date of birth.

1 The last four digits don't.

2 But the first five digits were requested.

3 The arguments about Pennsylvania law and public  
4 policy including the Right to Know law and  
5 limitations -- and the Social Security Number Privacy  
6 Act were considered by that Court and found not to  
7 apply, largely because of what Mr. Cressler  
8 acknowledged, that there are exceptions under the  
9 various laws, specifically for litigation or  
10 administrative proceedings, which is what that case  
11 was about.

12 As long as there is a -- the issues are  
13 relevant, which I think they clearly are here for the  
14 reasons the Court heard last summer, that the Court  
15 reflected in its own Order an opinion that matching  
16 these databases robustly and reliably is a critical  
17 question to come up with not only how many don't have  
18 ID but also give guidance to the Commonwealth to get  
19 those people IDs.

20 So I don't think there's much -- if I'm  
21 hearing correctly, I think what's required here is a  
22 Court Order that would allow PennDOT to comply with  
23 its -- the statute that limit its ability to  
24 voluntarily disclose the information.

25 So I think a Court Order would get around

1 those concerns.

2 We certainly will retain that information  
3 in a secure environment described in the affidavit  
4 and, at the end of this litigation, properly cleanse  
5 the data.

6 In terms of the driver's license numbers,  
7 I just -- the key issue is, yes, that we don't want  
8 to have our database experts spend months reinventing  
9 the wheel of matching based upon name, address,  
10 Social Security number, date of birth, when that work  
11 has already been done, and we can exclude 84 percent  
12 of the entries. It makes no sense to not take  
13 advantage of what the Commonwealth did last summer,  
14 which is what having the driver's license numbers  
15 from both databases would allow us to do.

16 But the last piece of this is, getting  
17 the database in a month I think really pushes our  
18 ability to do the matching and the work that we need  
19 to do and really call into question the July trial  
20 date, which is a significant problem for -- that we  
21 discussed last week -- earlier this week as well,  
22 both the Court and for the parties.

23 MR. KEATING: Your Honor, for the  
24 Respondents, Timothy Keating from the Attorney  
25 General's office.

1 I think another issue sort of raised  
2 here, too, is, assuming all this information is  
3 provided and analyzed and whatnot, we now have, I  
4 think, eight sets of production of documents and four  
5 sets of interrogatories.

6 Are we then going to be subject to more  
7 discovery requests? What's the ending point for the  
8 discovery, especially since we're looking at the July  
9 hearing date?

10 I would just like to bring that out to  
11 the Court's attention, because I will say that  
12 Petitioners have been very accommodating in keeping  
13 discussions open and working out these discovery  
14 issues. But as a practical matter, we're also trying  
15 to make sure that we go forward in July as scheduled.

16 Thank you.

17 MR. RUBIN: Your Honor, briefly on that  
18 point, obviously we're not waiving our right for  
19 further discovery. We don't have a pile of  
20 additional discovery sitting here waiting to serve.  
21 I don't even have any in my mind at this moment.  
22 We've asked for what we want, but obviously there may  
23 be some discrete issues that we'd work with the  
24 Commonwealth on.

25 Obviously, there will be depositions once

1 we finish getting interrogatory responses. I don't  
2 think that's what Mr. Keating was concerned about.

3 THE COURT: Okay. Let me just ask you to  
4 pause for a moment.

5 Mr. Keating, what's -- I can move this  
6 trial if it needs to be moved. Bottom line is, we  
7 need to get the discovery done properly; otherwise,  
8 the trial is a mess.

9 So now that I've heard this problem, I am  
10 less wedded to the trial date than I was when we  
11 spoke earlier this week. I think that's one way to  
12 relieve everybody's concern. So I'm signaling  
13 flexibility on the trial date.

14 Mr. Keating, what's the time frame for  
15 all this other discovery, the nondatabase discovery?  
16 What's a reasonable time frame for you to provide  
17 your responses?

18 MR. KEATING: Your Honor, I think two  
19 weeks is -- and where we're at with that is this: We  
20 have a third set of interrogatories outstanding which  
21 largely track the fifth set of Requests for  
22 Production of Documents, which we provided. And we  
23 drafted up a lot of responses to that set. I think  
24 there's 43-some interrogatories.

25 We also have a sixth request for

1 production of documents, which we have not responded  
2 to. But that sixth request really just says, Give us  
3 all the documents you have relative to the third set  
4 of interrogatories that you have not already given  
5 us, which is also tied into the fifth set of Requests  
6 for Production of Documents.

7 So the other outstanding discovery  
8 request or interrogatory Request for Production of  
9 Documents is not that, should I say, strenuous; and I  
10 think within two weeks we can get all that cleared  
11 away and move forward with that.

12 MR. CRESSLER: May it please the Court,  
13 Bill Cressler from PennDOT. You're talking about  
14 moving the date. Are you talking about moving it  
15 just to like a week or two or --

16 THE COURT: Well, let me see how the  
17 problem develops here.

18 MR. CRESSLER: I agree with that. If  
19 there is a Court Order entered requiring PennDOT to  
20 disclose the last four digits and the driver license  
21 number, if that's your decision, PennDOT will get  
22 right on doing it. And if they can do it sooner than  
23 a month, it will be done sooner than a month. And  
24 maybe that's the way to approach this, is not impact  
25 the trial date but see how things develop within the



1 next two or three weeks based on what you do today.

2 THE COURT: Well, I'm inclined to -- I'm  
3 inclined to allow this discovery under the strictures  
4 that have been described to me.

5 Part of my problem is that I haven't read  
6 anything that was submitted by Petitioners.

7 Everybody else seems to have read it, but I haven't  
8 seen it yet.

9 Respondents, do you wish to submit  
10 anything to me before I make a final decision?

11 MR. KEATING: When would you need that  
12 by, Your Honor?

13 THE COURT: Well, if you want me to make  
14 a decision before I go, I'm probably going to need it  
15 today or tomorrow.

16 MR. CRESSLER: It's something I could get  
17 out relatively quickly. It's just the citations, so  
18 that then your clerk would know where to go to --

19 THE COURT: Actually, I'm not as  
20 concerned about the citations. It seems to me that  
21 there's enough complication here that I want to be  
22 careful with this process. And I may not make a  
23 decision before I leave. I want to make sure both  
24 sides have been given full opportunity to submit this  
25 to me.

1           As I'm speaking to you now, I'm leaning  
2 towards granting the Petitioner's requested  
3 discovery, but I don't want to do that until  
4 everybody has had a full and fair opportunity to talk  
5 about this.

6           MR. CRESSLER: From PennDOT's point of  
7 view, the only thing that I would want to add --  
8 because you've heard my oral presentation, the  
9 written would just be the same -- is the citations,  
10 just a list of citations.

11           MR. KEATING: Your Honor, I think part of  
12 the difficulty is, you indicated you had not seen the  
13 letter that was submitted by Petitioners, which  
14 was -- and we only saw that yesterday afternoon.

15           I would -- in order to present something  
16 to the Court, which would have to be essentially  
17 today, I have to go back, talk to individuals from  
18 the Department of State, get their input, PennDOT's  
19 input. I'm not exactly sure how to answer the  
20 question.

21           THE COURT: Let's do it this way. I'm  
22 not going to make a decision before I go away. You  
23 can have some time to submit something to me. I'm  
24 not going to look at it until late in April, but I  
25 want you to have an opportunity to respond.

1           It seems to me that the information  
2 that's being requested here is something that our  
3 court has already ruled on under the Right to Know  
4 law. I think we may have denied access under the  
5 Right to Know law. This is somewhat different.

6           But because I think it's kind of going  
7 against the main current in our court right now, I  
8 want to give this sufficient consideration.  
9 Ultimately I may grant it, but I want to give it  
10 proper thought.

11           What I would ask you to do, however, is,  
12 Petitioners, would you submit a Proposed Order to me  
13 regarding the other discovery. It sounds like two  
14 weeks to respond is something that the Respondents  
15 can live with. So something along those lines would  
16 make sense so the rest of this can proceed.

17           MR. RUBIN: We will certainly do that,  
18 and we will get that to you today, Your Honor.

19           THE COURT: You can email that to my  
20 secretary or fax it to us. Do you need our fax  
21 number?

22           MR. RUBIN: We have that, Your Honor.

23           THE COURT: Okay. I will think about the  
24 rest of it and look at whatever has been submitted to  
25 me.

1 MR. WALCZAK: Your Honor, Vic Walczak.

2 If I could just make one quick point.

3 THE COURT: Certainly.

4 MR. WALCZAK: I would submit that there  
5 is a qualitative difference between the standard that  
6 would apply under the Right to Know law, which means  
7 that it's truly public and anybody can get access to  
8 it; and not allowing access to the databases we're  
9 seeking as a matter of public record makes sense,  
10 because you've got Social Security numbers, birth  
11 dates and other sensitive kinds of information in  
12 there.

13 But what we're talking about here is in  
14 discovery, which would be protected through various  
15 confidentiality agreements or orders.

16 And so I would suggest that the standard  
17 that the Commonwealth Court applied in a Right to  
18 Know case is materially different and really not  
19 applicable when you're looking at production of  
20 crucial information in discovery, which is surrounded  
21 by all sorts of confidentiality protections.

22 THE COURT: I think that's a very logical  
23 presentation, but I'm -- I have to tell you that the  
24 general current in my court right now is to be very,  
25 very, very careful with this type of information

1 being released.

2 So it goes against a lot of the sort of  
3 internal discussions that we've had when we've  
4 considered the Right to Know law. I want to weigh it  
5 carefully, in other words. I don't want to make this  
6 decision on the run. You may well prevail on this,  
7 but I just want to be careful about it.

8 MR. RUBIN: Your Honor, one issue I just  
9 want to raise -- this is purely a logistical issue,  
10 based upon what you said earlier this week. If the  
11 trial date is moved, it's not going to be moved a  
12 week; it will be moved six months to a year. And if  
13 that is the case, the database, by the time the trial  
14 starts, will become stale again.

15 So if it turns out that the trial is  
16 going to be moved, I think the Order we would be  
17 looking for would be that PennDOT and the Department  
18 of State produce the then-current databases three  
19 months or four months before whatever the new trial  
20 date would be.

21 So that we're not producing it in a month  
22 pursuant to Court Order now, which is not soon enough  
23 for the trial to happen. The trial gets moved for a  
24 year, and then we're back asking them to do the whole  
25 work again. I don't think that's in anyone's

1 interests. It's not in the Petitioner's interest.  
2 Certainly not in PennDOT or the Department of State  
3 or the taxpayers of Pennsylvania's interest either.  
4 That's a wrinkle that I wanted to flag for the Court.

5 THE COURT: Good point. Good point.  
6 Thank you.

7 MR. CRESSLER: May it please the Court,  
8 Bill Cressler from PennDOT again.

9 I am going to suggest -- if I could get a  
10 preliminary read, Your Honor, on the driver's license  
11 numbers, did you have any thoughts on that one?

12 THE COURT: I lean towards granting both  
13 the Social Security numbers encrypted, or whatever  
14 shorter amount of Social Security number information  
15 is available; and also the driver's license numbers.

16 MR. CRESSLER: The encrypting will take  
17 longer. So it's -- you know -- but I think what I'm  
18 going to suggest to my client is that they would  
19 proceed with putting the database together so that  
20 whatever your decision might be, we would be -- that  
21 PennDOT would be prepared to produce it in quick  
22 order if your decision was to produce it, and that  
23 may alleviate some of the trial concern.

24 You're going to be back in two weeks;  
25 correct?

1 THE COURT: I'll be back the 23rd or  
2 24th. First day back in the office.

3 It's just too important an issue for me  
4 to decide without giving it sufficient thought. And  
5 I also want to give the Attorney General's office an  
6 opportunity to submit any written argument they want  
7 to submit to supplement what I heard today.

8 I'm giving you all a preliminary read.  
9 You can go back and talk to your people and see if  
10 there's anything else that you want to submit to me.

11 MR. RUBIN: And, Your Honor, for  
12 Petitioners, obviously we didn't find out that there  
13 was an impasse until late in the day yesterday. We  
14 put together our Letter of Submission very quickly so  
15 that Your Honor could have it before his vacation,  
16 because I know Courts always like to hear discovery  
17 disputes right before they go on vacation.

18 But if we could have an opportunity in  
19 sort of a more reasonable pace as well to submit the  
20 supplemental paper if needed, again, focusing on this  
21 Right to Know issue probably -- our paper is devoid  
22 of the case law, although I did give you the citation  
23 we found after we submitted our letter -- that would  
24 be very much appreciated.

25 THE COURT: Well, let me put it this way,

1 then.

2 So both sides, if you want to submit  
3 something else to me in writing, would you please do  
4 so within the next 10 days. I won't look at it until  
5 later in April but I want to give you a deadline so  
6 that it's set and you both know what you're talking  
7 about.

8 MR. KEATING: For the Respondents, Your  
9 Honor -- Tim Keating with the Attorney General's  
10 office -- we find that reasonable.

11 MR. RUBIN: As do we, Your Honor. We  
12 appreciate it.

13 THE COURT: Thank you. Every now and  
14 then I get something right.

15 MR. KEATING: You don't want any reading  
16 material to take with you to the Galapagos Islands?

17 THE COURT: Oh, dear.

18 Anyway, so the Petitioners are going to  
19 send me a Proposed Order for the other nondatabase  
20 discovery sometime today, and I will sign it.

21 MR. RUBIN: Thank you, Your Honor.

22 THE COURT: And both sides have an  
23 opportunity to submit supplemental written argument  
24 to me within the next 10 days. And I will resolve  
25 the database issue when I come back, and ultimately,



1 if it impacts the trial date, I'll deal with that, or  
2 the trial judge will deal with that.

3 But I understand the need to balance all  
4 these interests and to do that carefully. So I will  
5 go ahead with that. That's our game plan.

6 Do we all understand what's going to  
7 happen?

8 MR. KEATING: Very good.

9 THE COURT: Is there anybody else who  
10 wishes to be heard?

11 MS. SCHNEIDER: Your Honor, this is  
12 Marian Schneider for the Petitioners. I just wanted  
13 to make a brief point about the case that was heard  
14 in Commonwealth Court under the Right to Know law,  
15 that I don't think it's applicable in this case. In  
16 fact, the Commonwealth Court did not analyze the DPPA  
17 and said that it was not appropriate to analyze those  
18 exceptions in the context of Right to Know.

19 So I don't think that that case is  
20 applicable to the situation you have before you,  
21 which is the seeking of the same databases in  
22 connection with ongoing litigation for which there  
23 are more than one exceptions that could possibly be  
24 applicable.

25 And I think that the Petitioners will

1 like to address these points in their supplemental  
2 submission to Your Honor.

3 THE COURT: Okay. I think it's a very  
4 persuasive argument. I just don't want to make the  
5 decision on the run.

6 MS. SCHNEIDER: Thank you, Your Honor.

7 THE COURT: Anyone else want to say  
8 something?

9 MR. WALCZAK: Yes, Your Honor. Vic  
10 Walczak. Have a wonderful trip. Sounds great.

11 THE COURT: It's going to be good to get  
12 out of town. I'm looking forward to it.

13 Thank you all for your useful arguments,  
14 and we'll follow this game plan and move through this  
15 issue.

16 MR. RUBIN: Thank you very much, Your  
17 Honor.

18 THE COURT: Have a good day. Bye-bye.  
19 (Proceedings concluded: 11:47 a.m.)

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1 CERTIFICATE OF SHORTHAND REPORTER

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I, Gail Inghram Verbano, Registered  
Diplomate Reporter, Certified Realtime Reporter,  
Certified Shorthand Reporter (CA), and Notary Public,  
the officer before whom the foregoing proceedings  
were taken, do hereby certify that the foregoing  
transcript is a true and correct record of the  
proceedings; that said proceedings were taken by me  
stenographically and thereafter reduced to  
typewriting under my supervision; and that I am  
neither counsel for, related to, nor employed by any  
of the parties to this case and have no interest,  
financial or otherwise, in its outcome.



Gail Inghram Verbano, RDR, CRR, CSR  
CA-CSR No. 8635

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**1**

---

**1** 21:19  
**10** 35:4,24  
**11** 11:20 17:1,3  
**11:47** 37:19  
**1278** 8:21  
**12th** 10:2  
**17th** 9:18,23

---

**2**

---

**2** 21:21  
**2011** 22:19  
**2012** 11:21  
**23rd** 34:1  
**24th** 34:2

---

**3**

---

**382** 22:19

---

**4**

---

**43-some** 26:24

---

**6**

---

**6** 19:3 20:10  
**6722** 8:17,20

---

**7**

---

**765** 22:19

---

**8**

---

**84** 24:11  
**8th** 7:16

---

**9**

---

**94** 19:2

---

**A**

---

**a.m.** 37:19  
**ability** 23:23 24:18  
**absentee** 18:15,19  
**absolutely** 17:10,20,22  
**acceptable** 6:2  
**access** 10:20 30:4 31:7,8  
**accidentally** 14:13  
**accommodating** 25:12  
**acknowledged** 23:8  
**Act** 14:20 23:6  
**add** 11:1 19:8 21:18 22:13 29:7  
**adding** 11:10  
**additional** 11:10 25:20  
**address** 14:11 17:17 20:16 21:5 24:9 37:1  
**addresses** 15:4  
**administrative** 23:10  
**adopting** 11:21,23  
**advantage** 24:13  
**affidavit** 8:8 10:5 24:3  
**afternoon** 29:14  
**agree** 27:18  
**agreement** 11:3,6,14,18 13:2 21:17  
**Agreement/protective** 22:13  
**agreements** 31:15  
**ahead** 13:21 18:2 36:5  
**alleviate** 33:23  
**allowing** 31:8  
**alternative** 9:4 10:13  
**amend** 22:12

**amount** 33:14  
**analysis** 20:14  
**analyze** 36:16,17  
**analyzed** 25:3  
**anymore** 8:15  
**anyone's** 32:25  
**applicable** 31:19 36:15,20,24  
**applied** 31:17  
**apply** 23:7 31:6  
**appreciated** 34:24  
**approach** 27:24  
**April** 9:18,23 10:2 29:24 35:5  
**arguing** 21:10  
**argument** 21:8 34:6 35:23 37:4  
**arguments** 23:3 37:13  
**Arnold** 4:11,12  
**assist** 8:24  
**assuming** 25:2  
**attached** 10:7  
**attention** 25:11  
**Attorney** 4:5 5:12,14 11:5 12:7 20:1 24:24 34:5 35:9  
**Authority** 22:18  
**aware** 5:20 11:1

---

**B**

---

**back** 29:17 33:24 34:1,2,9 35:25  
**balance** 15:15 36:3  
**ballot** 18:15,19  
**based** 9:20 16:15 24:9 28:1 32:10  
**basically** 21:10  
**behalf** 20:24  
**belief** 11:15  
**Bench** 4:8  
**big** 5:5

## Index: Bill..Declaration

**Bill** 13:19 19:6 20:25 27:13 33:8

**birth** 8:10 14:11 17:17 19:13 21:5  
22:25 31:10

**bit** 20:12

**Bottom** 26:6

**Brian** 4:15

**briefly** 25:17

**bring** 25:10

**broadly** 5:4

**Bye-bye** 37:18

---

### C

---

**call** 20:8,21 24:19

**called** 15:3,11 21:22

**calls** 13:8

**careful** 28:22 31:25 32:7

**carefully** 32:5 36:4

**carve** 19:19

**case** 5:21 6:15 9:1 21:23 22:20,21  
23:10 31:18 32:13 34:22 36:13,15,19

**cases** 15:25

**Cawley** 6:11 7:13

**central** 5:21 6:23

**change** 20:22

**changed** 7:7

**changing** 8:17

**checking** 11:17

**citation** 22:19 34:22

**citations** 14:18 15:9 16:22 28:17,20  
29:9,10

**citizens** 14:6,15 15:14

**clarifying** 17:25

**cleanse** 24:4

**cleansing** 21:23

**cleared** 27:10

**clerk** 28:18

**client** 33:18

**code** 14:19,22

**combined** 8:9

**comments** 16:20

**Commonwealth** 5:24 6:8 7:1,15  
8:18 9:3 15:25 19:4 21:22 23:18  
24:13 25:24 31:17 36:14,16

**compare** 18:20

**completed** 10:1 16:20

**complex** 20:15

**complication** 28:21

**comply** 18:13,14 23:22

**computers** 21:24

**concern** 14:7 20:8 26:12 33:23

**concerned** 26:2 28:20

**concerns** 6:5 7:20 9:3 11:9 12:24  
17:7 24:1

**concluded** 37:19

**conclusions** 6:3

**concrete** 6:21

**conference** 7:12 13:8

**confidentiality** 9:1,17 11:2,3,6,10  
31:15,21

**connection** 36:22

**consideration** 30:8

**considered** 23:6 32:4

**consistent** 9:10

**consultant** 10:22

**consultants** 10:20

**context** 5:19 36:18

**correct** 13:14 19:1,15 22:11 33:25

**correctly** 23:21

**counsel** 7:19 12:16

**couple** 9:22 13:15

**court** 4:2,8,18,19,20 5:19,24 6:5,16,  
21 7:4 9:14,23 10:4,24 11:14,16,20,  
22 12:1 13:23 15:12,15,17,25 16:5,19  
18:2,4 20:16,17,23 22:3,7,9,17,20

23:6,14,22,25 24:22 26:3 27:12,16,19  
28:2,13,19 29:16,21 30:3,7,19,23  
31:3,17,22,24 32:22 33:4,5,7,12 34:1,  
25 35:13,17,22 36:9,14,16 37:3,7,11,  
18

**Court's** 25:11

**Courts** 34:16

**Cressler** 11:19,25 13:19,22,24 16:10,  
21 19:6 20:25 22:11 23:7 27:12,13,18  
28:16 29:6 33:7,8,16

**criteria** 6:4

**critical** 5:6 18:25 19:21 23:16

**cross-match** 12:15

**crucial** 31:20

**Cupingood** 4:15 10:9

**current** 30:7 31:24

---

### D

---

**data** 6:6,16 7:12 17:1 18:23 24:5

**database** 4:16 5:7,18,25 6:1,17,18  
7:16,20,25 8:5,20,23 9:21 12:9 18:7,  
11,12,20,21,24 19:10 20:11 24:8,17  
32:13 33:19 35:25

**databases** 6:18 7:14 8:17 23:16  
24:15 31:8 32:18 36:21

**date** 5:11 8:10 9:18 10:2 14:11 17:18  
19:13 21:5 22:25 24:10,20 25:9  
26:10,13 27:14,25 32:11,20 36:1

**dates** 31:11

**day** 10:17 34:2,13 37:18

**days** 7:23 9:22 35:4,24

**deadline** 35:5

**deal** 36:1,2

**dear** 35:17

**December** 7:11

**decide** 34:4

**decision** 16:14 27:21 28:10,14,23  
29:22 32:6 33:20,22 37:5

**Declaration** 10:8,9,23,25 21:16,21

**denied** 30:4  
**Department** 4:1 7:24 8:5 9:15 12:16,  
 23 13:9 17:13 18:5,6,13 20:5,9,18,20  
 29:18 32:17 33:2  
**depositions** 25:25  
**develop** 27:25  
**develops** 27:17  
**devoid** 34:21  
**difference** 31:5  
**differences** 7:7  
**difficulty** 29:12  
**digits** 8:4,7,13,16,22 9:5,17,21 10:12  
 14:9 22:22,24 23:1,2 27:20  
**disadvantage** 10:25  
**disclose** 17:12 23:24 27:20  
**disclosed** 17:23 21:18  
**disclosure** 15:10  
**discounted** 6:3  
**discovery** 5:4,5,7,9,20 7:10,16 9:25  
 10:3,8 11:12 12:9,11 16:8 25:7,8,13,  
 19,20 26:7,15 27:7 29:3 30:13 31:14,  
 20 34:16 35:20  
**discrete** 25:23  
**discussed** 24:21  
**discussing** 10:13  
**discussions** 9:12 11:7 25:13 32:3  
**disputes** 34:17  
**District** 22:20  
**doctor** 21:21  
**documents** 25:4 26:22 27:1,3,6,9  
**Don** 19:7,16  
**Dorian** 4:11  
**DPPA** 15:2,25 36:16  
**drafted** 26:23  
**driver** 14:20 15:2 27:20  
**driver's** 17:8,14,19 18:3,8,12,18  
 19:9,22 21:1 24:6,14 33:10,15

**drivers** 14:1,6  
**driving** 14:2  
**Dunlap** 4:2,3  
**duplicate** 7:6

---

**E**

---

**earlier** 24:21 26:11 32:10  
**ears** 4:7  
**easier** 13:16  
**Eastern** 22:20  
**effort** 6:25 7:2  
**efforts** 6:10 7:18  
**election** 6:9,10 18:14  
**elements** 19:12 21:19  
**email** 30:19  
**encrypt** 10:15 13:5  
**encrypted** 33:13  
**encrypting** 33:16  
**encryption** 10:12,14 12:9 13:3,13  
**end** 24:4  
**ending** 25:7  
**enforced** 5:23  
**engage** 7:18  
**entails** 15:19  
**enter** 16:8  
**entered** 11:7,20 27:19  
**entering** 11:1  
**entire** 18:7  
**entries** 19:3 24:12  
**environment** 21:20 24:3  
**essentially** 29:16  
**estimate** 9:7,19  
**everybody's** 26:12  
**exception** 15:11,17,20  
**exceptions** 15:9,10 23:8 36:18,23

**exclude** 24:11  
**expeditiously** 9:24  
**experts** 4:16 6:19 7:1 19:19 24:8  
**explaining** 10:10  
**express** 16:8  
**expressed** 6:5  
**extent** 15:22  
**extra** 9:22  
**extract** 9:21

---

**F**

---

**fact** 18:23 36:16  
**fact-finding** 16:7,8,14  
**fair** 29:4  
**fairly** 12:13  
**fall** 18:10  
**farfetched** 15:21  
**fax** 30:20  
**February** 7:10,16  
**federal** 14:19 15:2,11 16:1  
**feel** 4:19 16:13  
**fields** 6:18 7:21 17:1 18:5  
**fill** 12:5  
**final** 21:14 28:10  
**find** 13:1,9,16 34:12 35:10  
**finder** 15:23  
**finish** 26:1  
**finished** 21:1  
**flag** 33:4  
**flagged** 7:11  
**fleshed** 11:8  
**flexibility** 26:13  
**focusing** 19:3 34:20  
**follow** 19:7 37:14  
**forward** 6:13 11:11 25:15 27:11

37:12  
**found** 6:1 7:13 23:6 34:23  
**frame** 26:14,16  
**Frankel** 4:12  
**fraud** 14:8  
**full** 8:6 28:24 29:4  
**fundamental** 14:4

---

**G**

---

**Galapagos** 35:16  
**game** 36:5 37:14  
**gave** 7:20  
**general** 4:5 20:1 31:24  
**General's** 5:12,14 11:5 12:7 24:25  
 34:5 35:9  
**generally** 14:20  
**get all** 27:10  
**give** 6:15,20 14:2, 23:18 27:2 30:8,9  
 34:5,22 35:5  
**giving** 34:4,8  
**good** 4:2,3 33:5 36:8 37:11,18  
**grant** 30:9  
**granting** 29:2 33:12  
**great** 37:10  
**group** 10:21  
**guess** 12:3 18:4  
**guidance** 23:18

---

**H**

---

**happen** 32:23 36:7  
**happened** 12:21  
**happy** 22:12  
**hear** 34:16  
**heard** 5:15 12:4 18:9 19:2 20:18,24  
 23:14 26:9 29:8 34:7 36:10,13  
**hearing** 13:18 23:21 25:9

**held** 10:19  
**high** 11:9  
**highly** 15:3,6 17:21  
**Honor** 4:3,4 5:2 11:4,13 12:6 13:22  
 17:24 19:25 22:2,4 24:23 25:17 26:18  
 28:12 29:11 30:18,22 31:1 32:8 33:10  
 34:11,15 35:9,11,21 36:11 37:2,6,9,  
 17  
**Housing** 22:18  
**huge** 19:19  
**Hurley** 4:11

---

**I**

---

**ID** 5:22 6:2,7,22 18:14 23:18  
**identifier** 7:5 8:8,23 17:11  
**identify** 4:21  
**identity** 14:8  
**IDS** 23:19  
**impact** 27:24  
**impacts** 36:1  
**impasse** 34:13  
**important** 34:3  
**imposed** 10:14  
**improve** 7:14  
**in-depth** 20:2,12  
**inclined** 28:2,3  
**including** 8:3 23:4  
**incorporated** 21:25  
**individual** 17:11  
**individuals** 18:15 20:3,19 29:17  
**information** 8:10 10:15 14:2,5,8,12  
 15:3,5 16:15 17:20,22 21:17,23 22:25  
 23:24 25:2 30:1 31:11,20,25 33:14  
**initial** 6:5  
**input** 29:18,19  
**insight** 4:17  
**intention** 6:12 7:14

**interest** 21:12 33:1,3  
**interests** 22:16 33:1 36:4  
**internal** 32:3  
**interpreted** 16:2  
**interrogatories** 25:5 26:20,24 27:4  
**interrogatory** 26:1 27:8  
**invade** 14:14  
**invited** 4:14  
**involved** 13:7 15:24 22:21  
**Islands** 35:16  
**issue** 4:17 5:4,5,17,20,21 6:23 7:6,11  
 8:14 24:7 25:1 32:8,9 34:3,21 35:25  
 37:15  
**issues** 8:1 20:24 23:12 25:14,23  
**ITB** 21:23  
**item** 18:7  
**items** 17:6

---

**J**

---

**join** 4:14  
**judge** 36:2  
**July** 6:15 9:10 13:18 24:19 25:8,15  
**June** 11:20

---

**K**

---

**Keating** 11:4,5 12:6,7 13:21 19:25  
 20:1,19 24:23,24 26:2,5,14,18 29:11  
 35:8,9,15 36:8  
**keeping** 25:12  
**Kelly** 4:6  
**key** 24:7  
**kind** 30:6  
**kinds** 31:11  
**knock** 19:1  
**knowledge** 16:12,16 20:2

---

**L**

---

**lack** 5:5,22 6:6,21  
**lacked** 6:2  
**lacking** 6:7  
**laid** 10:23  
**language** 22:13,14  
**largely** 23:7 26:21  
**late** 20:9 29:24 34:13  
**law** 5:22 14:17,19,21 15:11,12 16:16  
 18:15 22:17 23:3, 30:4,5 31:6 32:4  
 34:22 36:14  
**laws** 23:9  
**lawyers** 10:20  
**lays** 8:8  
**lean** 33:12  
**leaning** 29:1  
**learned** 7:24  
**leave** 28:23  
**legal** 15:9  
**Leonard** 4:14  
**lets** 7:7  
**letter** 10:6 21:15 29:13 34:14,23  
**level** 15:6  
**license** 17:9,15,19 18:3,8,12,18 19:9,  
 22 20:5 21:1 24:6,14 27:20 33:10,15  
**limit** 23:23  
**limitations** 23:5  
**limited** 10:21 15:9  
**lines** 30:15  
**list** 7:21 17:6 29:10  
**litigation** 14:16 15:11,16,17,20,22  
 16:13,16 23:9 24:4 36:22  
**live** 30:15  
**logarithm** 13:3  
**logical** 31:22

**logistical** 32:9  
**long** 23:12  
**longer** 19:23 33:17  
**lot** 26:23 32:2

---

**M**

---

**made** 7:18 16:15  
**main** 20:19 30:7  
**make** 16:7 17:18 25:15 28:10,13,22,  
 23 29:22 30:16 31:2 32:5 36:13 37:4  
**makes** 24:12 31:9  
**Marian** 36:12  
**mask** 8:15  
**match** 7:15 8:11 13:5 17:15,18 18:25  
 19:4,5,21 20:6 21:4  
**matched** 19:13  
**matching** 5:25 6:4,11,20 7:2,8 8:24  
 18:10 19:12 20:7 23:15 24:9,18  
**material** 35:16  
**materially** 31:18  
**matter** 5:11 10:1 16:4 25:14 31:9  
**matters** 20:21  
**means** 6:17 9:4 19:11 31:6  
**meet** 11:9  
**memory** 12:2  
**mention** 10:4  
**mess** 26:8  
**method** 13:13  
**methods** 10:12,14  
**Mike** 4:10 5:3 17:25  
**million** 6:1  
**mind** 25:21  
**mission** 14:5  
**moment** 22:6 25:21 26:4  
**monkey** 20:13  
**month** 17:4,5 19:23 24:17 27:23

32:21  
**months** 5:10 7:17 9:7,9,13 12:18  
 13:15 24:8 32:12,19  
**morning** 4:2,3  
**motivate** 9:24  
**move** 9:24 26:5 27:11 37:14  
**moved** 26:6 32:11,12,16,23  
**moving** 5:15 27:14  
**multiple** 7:18 8:2

---

**N**

---

**names** 7:6,7 15:4  
**narrow** 7:21  
**Neary** 4:6  
**needed** 5:13 6:20 12:22 34:20  
**negotiated** 21:5  
**Niederberger** 4:15  
**night** 8:9 10:7  
**nine-digit** 12:22,25 13:10  
**nondatabase** 26:15 35:19  
**number** 6:21 8:1, 12:22 13:5 17:9,12  
 18:4,8,18 23:5 24:10 30:21 33:14  
**numbering** 17:19  
**numbers** 6:24 7:10 8:3,6,12,15 10:11  
 12:10,14,25 13:10,11 14:10,21,24  
 15:1,6 17:8,15 18:12,21 19:1,9,18,22  
 21:13 22:22 24:6,14 31:10 33:11,13,  
 15

---

**O**

---

**objection** 5:16  
**obtain** 6:17  
**offer** 4:17  
**office** 4:5 5:12,14 11:5 12:7 20:1  
 24:25 34:2,5 35:10  
**officials** 18:14  
**ongoing** 36:22



**open** 25:13  
**opinion** 6:5 23:15  
**opportunity** 28:24 29:4,25 34:6,18 35:23  
**oral** 29:8  
**order** 9:1,2,15,17 11:2,15,20,21 12:13 15:12,18 16:8,9 21:19 22:1,10,13 23:15,22,25 27:19 29:15 30:12 32:16, 33:22 35:19  
**ordered** 11:16 21:18  
**orders** 9:23 31:15  
**original** 20:14  
**originate** 11:23  
**outstanding** 5:6,10 12:8,11 26:20 27:7  
**overcome** 15:15,23

---

**P**

---

**pace** 34:19  
**paper** 34:20,21  
**paragraphs** 11:11  
**part** 28:5 29:11  
**parties** 9:24 24:22  
**pause** 16:5 26:4  
**Penndot** 5:25 6:17 7:24 9:6,15 11:7, 20 12:15,23 13:12,20,25 14:4 16:24 19:11 20:4,6 21:7,11 23:22 27:13,19, 21 32:17 33:2,8,21  
**Penndot's** 29:6,18  
**Pennsylvania** 22:20 23:3  
**Pennsylvania's** 33:3  
**people** 5:21 6:1,6, 10:21 17:15 19:20 22:23 23:19 34:9  
**percent** 19:2,3 24:11  
**permitted** 15:21  
**person** 17:12  
**person's** 8:21  
**personal** 15:4 17:20, 20:21  
**perspective** 6:24  
**persuasive** 37:4  
**Petitioner's** 29:2 33:1  
**Petitioners** 4:9,25 5:1,13 6:14 17:2 21:16 25:12 28:6 29:13 34:12 35:18 36:12,25  
**Philadelphia** 22:18  
**phone** 10:9  
**phrase** 12:20  
**physical** 10:18  
**piece** 22:15 24:16  
**pile** 25:19  
**place** 9:1 22:25  
**plan** 36:5 37:14  
**point** 17:25 19:18 25:7,18 29:6 31:2 33:5 36:13  
**points** 37:1  
**policy** 16:1 23:4  
**poll** 18:18  
**poor** 4:20  
**populate** 18:11  
**Porter** 4:11,12  
**position** 12:5 21:11  
**possibly** 36:23  
**practical** 16:4 25:14  
**preliminary** 33:10 34:8  
**prepared** 33:21  
**present** 7:4 29:15  
**presentation** 29:8 31:23  
**prevail** 32:6  
**primarily** 8:10  
**primary** 5:8  
**priorities** 5:14  
**privacy** 14:1,14,20 15:14,24 16:2 22:16 23:5  
**problem** 24:20 26:9 27:17 28:5  
**procedures** 21:22  
**proceed** 22:9 30:16 33:19  
**proceedings** 23:10 37:19  
**process** 9:13 12:18 16:11,18 28:22  
**processing** 18:19  
**produce** 7:25 9:16 16:24 32:18 33:21,22  
**producing** 32:21  
**production** 25:4 26:22 27:1,6,8 31:19  
**program** 13:4  
**prohibits** 14:23  
**project** 19:23  
**proper** 30:10  
**properly** 24:4 26:7  
**proposed** 9:4 30:12 35:19  
**protect** 14:5 16:2  
**protected** 15:2 31:14  
**protecting** 14:1 15:14  
**Protection** 14:20  
**protections** 31:21  
**protective** 11:21 21:19,25  
**protects** 14:21,22  
**prove** 18:16  
**provide** 8:23 12:12 18:17 26:16  
**provided** 7:1 18:6 22:14 25:3 26:22  
**public** 21:12 23:3 31:7,9  
**publicly** 6:9  
**purely** 32:9  
**purpose** 5:8  
**purposes** 14:3  
**pursuant** 32:22  
**pushes** 24:17  
**pushing** 17:4  
**put** 13:18 34:14,25  
**putting** 33:19

## Index: qualitative..specific

---

### Q

---

**qualitative** 31:5  
**question** 11:14 17:25 18:4 21:2  
23:17 24:19 29:20  
**quick** 31:2 33:21  
**quickly** 28:17 34:14

---

### R

---

**Rachel** 4:11  
**raise** 32:9  
**raised** 25:1  
**randomize** 8:3 9:5,20  
**read** 28:5,7 33:10 34:8  
**reading** 35:15  
**real** 8:21  
**reason** 6:13 17:22  
**reasonable** 26:16 34:19 35:10  
**reasons** 23:14  
**recently** 17:1  
**record** 4:23 19:2 31:9  
**refer** 22:17  
**reflect** 16:1  
**reflected** 23:15  
**refusing** 7:25  
**reinventing** 24:8  
**relative** 12:14 27:3  
**released** 14:12 32:1  
**releasing** 12:24  
**relevant** 15:22 23:13  
**reliably** 23:16  
**relieve** 26:12  
**reporter** 4:20  
**request** 26:25 27:2,8  
**requested** 30:2

**requests** 5:18 20:11 25:7 26:21 27:5  
**required** 23:21  
**requirements** 18:17  
**requiring** 27:19  
**resolve** 35:24  
**resources** 17:5  
**respond** 5:12 22:6 29:25 30:14  
**responded** 27:1  
**Respondent's** 12:5  
**Respondents** 4:9 7:19 20:24 22:5  
24:24 28:9 30:14 35:8  
**responses** 5:5 26:1,17,23  
**rest** 30:16,24  
**restricted** 15:3,5  
**restrictive** 15:7 17:21  
**retain** 24:2  
**reverse** 22:10  
**reviewing** 20:10  
**rights** 14:1 15:24 16:3  
**risk** 14:13  
**robust** 6:4,6,11,20 7:3,8 8:11 10:22  
**robustly** 23:16  
**Rubin** 4:10 5:2,3 10:6 11:13 17:24  
18:1,3 19:17 22:4,7,8,10 30:17,22  
32:8 35:11,21 37:16  
**ruled** 30:3  
**run** 32:6 37:5

---

### S

---

**satisfy** 9:3  
**scheduled** 13:18 25:15  
**Schneider** 4:12 36:11,12 37:6  
**secretary** 6:8 30:20  
**secure** 21:20 24:3  
**security** 6:24 7:9 8:1,3,6,12,22  
10:11,19,22 11:9 12:10,14,22,24,25  
13:10,11 14:9,21,24 15:1,5 17:8

22:22 23:5 31:10 33:13,14  
**seeking** 31:9 36:21  
**semi-useable** 4:22  
**send** 35:19  
**sense** 17:18 24:12 30:16 31:9  
**sensitive** 22:23 31:11  
**serve** 25:20  
**served** 7:10,15 10:1  
**set** 4:6 5:13 26:20,21,23 27:3,5 35:6  
**sets** 25:4,5  
**setting** 5:11  
**short** 12:13  
**short-term** 12:2  
**shorter** 33:14  
**side** 12:4  
**sides** 28:24 35:2,22  
**sign** 11:24 35:20  
**signaling** 26:12  
**significant** 24:20  
**similar** 7:6  
**simply** 7:25 10:1 11:18  
**sitting** 25:20  
**situation** 16:3 36:20  
**sixth** 26:25 27:2  
**small** 10:21  
**Smith** 19:15,16  
**Social** 6:24 7:9 8:1,3,6,12,21 12:10,  
14,22,25 13:10,11 14:9,21,24,25 15:5  
17:7 22:22 23:5 31:10 33:13,14  
**sooner** 27:22,23  
**sort** 9:4 10:13 13:4 25:1 32:2 34:19  
**sorts** 31:21  
**sounds** 30:13 37:10  
**speak** 4:22 13:20  
**speaking** 29:1  
**specific** 17:1 22:14

Index: specifically..week

**specifically** 14:23 18:8,12 23:9

**spend** 24:8

**split** 16:17

**spoke** 26:11

**stale** 32:14

**standard** 31:5,16

**start** 5:1 9:13 12:8,18

**starts** 32:14

**state** 7:24 8:5 9:15 12:16,23 13:9  
14:21 15:12 16:2 17:14 18:5,6,14  
20:5,9,18,20 32:18 33:2

**States** 22:18

**statute** 23:23

**stipulated** 11:21 22:12

**stop** 11:11

**straight** 4:20

**strenuous** 27:9

**strictures** 28:3

**stuff** 12:2 17:18 20:15

**subject** 9:17 25:6

**submission** 34:14 37:2

**submit** 28:9,24 29:23 30:12 31:4  
34:6,7,10,19 35:2,23

**submitted** 8:9 10:5 28:6 29:13 30:24  
34:23

**subpoena** 22:21

**substance** 5:16

**sudden** 13:9

**sufficient** 21:6,7,9 30:8 34:4

**sufficiently** 11:8

**suggest** 31:16 33:9,18

**summer** 6:1 7:2,3 18:23 19:2 23:14  
24:13

**supplement** 9:2 34:7

**supplemental** 34:20 35:23 37:1

**supply** 17:3

**support** 16:22

**surrounded** 31:20

**systems** 17:19

---

**T**

---

**taking** 8:16

**talk** 29:4,17 34:9

**talking** 10:12 12:10 27:13,14 31:13  
35:6

**taxpayers** 33:3

**technical** 4:16

**terms** 22:16 24:6

**testimony** 18:9

**theft** 14:8

**then-current** 32:18

**thing** 15:16 16:21 21:14 29:7

**things** 27:25

**thought** 7:3 20:12 21:6,15 30:10 34:4

**thoughts** 33:11

**throws** 20:14

**tied** 27:5

**Tim** 11:4 12:6 20:10 35:9

**time** 4:22 19:4 26:14,16 29:23 32:13

**timeliness** 5:17

**Timothy** 19:25 24:24

**today** 5:8 28:1,15 29:17 30:18 34:7  
35:20

**today's** 20:21

**tomorrow** 28:15

**town** 37:12

**track** 26:21

**Transportation** 4:1

**trial** 9:10 24:19 26:6,8,10,13 27:25  
32:11,13,15,19, 33:23 36:1,2

**trip** 37:10

**turns** 32:15

**two-month** 9:19

**type** 6:16,20 16:3 31:25

---

**U**

---

**ultimately** 21:7 30:9 35:25

**undermining** 21:12

**understand** 9:19 21:8 36:3,6

**understanding** 11:15 18:22,24

**understands** 14:25

**unique** 7:5 8:7,23

**United** 22:17

**universe** 19:20

**unnecessarily** 16:17

---

**V**

---

**vacation** 34:15,17

**vehicle** 14:19,22

**versus** 22:18

**Vic** 4:13 31:1 37:9

**view** 14:15 29:7

**views** 14:4

**voluntarily** 23:24

**vote** 5:22

**voter** 18:14

**voting** 6:2

---

**W**

---

**waiting** 25:20

**waive** 16:3

**waiving** 25:18

**Walczak** 4:13 31:1,4 37:9,10

**wanted** 4:18 7:22 18:20 22:14 33:4  
36:12

**ways** 8:2 9:24 10:16 14:10,12

**wedded** 26:10

**week** 9:22 24:21 26:11 27:15 32:10,

12

**weeks** 7:21 17:4 26:19 27:10 28:1  
30:14 33:24

**weigh** 32:4

**weighing** 16:11

**Westlaw** 22:19

**what-have-you** 14:18

**whatnot** 25:3

**wheel** 24:9

**willingness** 9:2

**wishes** 36:10

**wonderful** 37:10

**words** 32:5

**work** 18:22 22:15 24:10,18 25:23  
32:25

**workable** 9:23

**worker** 18:18

**working** 12:12 25:13

**worth** 15:23

**wrap** 21:3

**wrench** 20:13

**wrinkle** 33:4

**write** 18:17

**writing** 35:3

**written** 29:9 34:6 35:23

**wrong** 13:14

---

**Y**

---

**year** 21:4 32:12,24

**years** 14:1

**yesterday** 9:12 20:9 21:16 29:14  
34:13

---

**Z**

---

**zealous** 13:25

# Exhibit N-21

May 1, 2013

**VIA ELECTRONIC MAIL**

Timothy P. Keating  
Litigation Section  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Re: *Applewhite et al. v. Commonwealth et al.*, No. 330 M.D. 2012

Dear Counsel:

On May 1, 2013, you provided us with some modified proposed revisions to the Stipulated Protective Order entered as an order by the Court on June 11, 2012. In Sections 2E through 2I, you requested information about the location of the servers upon which the data will be stored at BLDS, the physical security measures BLDS will take to protect the servers, how access to the data will be granted and tracked, the names of the employees who will have access to the servers and data, and assurances that those with access to the servers and data will have passed national fingerprint background checks and be citizens of the United States.

In a follow-up call on May 1, 2013, we raised the impracticality of including such information in the Stipulated Protective Order lest BLDS, *inter alia*, move offices or hire new employees during the remainder of the litigation. Moreover, we noted that in its discovery order of April 29, 2013, the Court deemed sufficient the existing security measures outlined in Paragraphs 10 and 11 of the Declaration of Leonard A. Cupingood, Ph.D. dated April 4, 2013. For these reasons, we are unable to agree to Sections 2E through 2I of the modified proposed revisions to the Stipulated Protective Order.

Notwithstanding the foregoing, to help address the concerns of the Department of Transportation (“DOT”) and Department of State (“DOS”), we are providing you herein with the information you requested:

- The servers upon which the data will be stored are located at the offices of BLDS at 1608 Walnut Street, 12th Floor, Philadelphia PA 19102.
- The building at 1608 Walnut Street is protected by security guard access. Access to the 12th floor after normal business hours is restricted by key card. Access to the BLDS suite on the 12th floor is restricted by key pad authorization. The server room inside the BLDS suite is locked by key.

Timothy P. Keating  
May 1, 2013  
Page 2

Only three members of the BLDS staff have keys to allow physical access to the server room. Within the server room, the server rack is locked by key. Only two members of the BLDS staff have keys to unlock the server rack.

- Database access will be restricted through username/password credentials specific to the database administrator. Database access rights will be modified or revoked at a table-specific level as needed. Access to analysis files (data derived from the databases) will be restricted via membership to a security group. Membership in the security group will be revoked as needed.
- Two employees, Casey Barrett and Bryan Niederberger, will have physical and electronic access to the unprocessed data. These employees will be responsible for the initial processing of the data to create derivative files used by the analysts at BLDS. The three analysts who will be working on the derivative files are Leonard Cupingood, Bernard Siskin, and Martin Shanin.
- All employees named above are US Citizens. The three analysts previously have passed background checks by the FBI and/or CIA prior to performing work for those agencies.

The security measures detailed above are current as of today's date. In the event that any of the above security measures are expected to change materially, we agree to so inform you.

Finally, on our May 1, 2013, call, we raised the issue of how to actually transfer the databases. One way is for DOT and DOS to place the data on their servers and have BLDS download the data; the second way is for DOT and DOS to upload the data to BLDS's servers. We request that you speak with the appropriate individuals at DOT and DOS to arrange the transfer. We are happy to use the method of transfer that DOT and DOS prefer but need to know in advance which method will be used so BLDS can create any necessary accounts.

Sincerely,



Rachel L. Frankel

Cc: Kevin P. Schmidt, Esq.

# Exhibit N-22



**From:** [Kotula, Kathleen](#)  
**To:** [Keating, Timothy P.](#)  
**Cc:** [Cressler, William](#); [Turner, Steven V](#)  
**Subject:** Notice  
**Attachments:** [NOTICE - CONFIDENTIAL INFORMATION.PDF](#)

---

Tim –

Attached is the Notice that was uploaded to FTP site along with the DOT and DOS data. [REDACTED]

**Kathleen M. Kotula** | Deputy Chief Counsel  
PA Department of State | Office of Chief Counsel  
301 North Office Building | Harrisburg, PA 17120  
Phone: 717.783.0736 | Fax: 717.214.9899  
[www.dos.state.pa.us](http://www.dos.state.pa.us)

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION  
ATTORNEY WORK PRODUCT

*The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any use of this information other than by the intended recipient is prohibited. If you receive this message in error, please send a reply e-mail to the sender and delete the material from any and all computers. Unintended transmissions shall not constitute waiver of the attorney-client or any other privilege.*

## **NOTICE**

All data on this site is being supplied by the Department of Transportation and the Department of State pursuant to the Discovery Order issued by Judge Robert Simpson on April 29, 2013. All data on this site is CONFIDENTIAL information that is subject to the Stipulated Protective Order.

# Exhibit N-23

Law Offices

One Logan Square, Ste. 2000  
Philadelphia, PA  
19103-6996

215-988-2700 phone  
215-988-2757 fax  
www.drinkerbiddle.com

CALIFORNIA  
DELAWARE  
ILLINOIS  
NEW JERSEY  
NEW YORK  
PENNSYLVANIA  
WASHINGTON DC  
WISCONSIN

May 30, 2014

**VIA ELECTRONIC MAIL**

David P. Gersch  
Michael A. Rubin  
Arnold & Porter LLP  
555 Twelfth Street, NW  
Washington, DC 20004-1206

**Re: *Wilola Shinholster Lee, et al. v. Thomas W. Corbett, et al.*  
No. 330 MD 2012 (Pa. Cmwltth.)**

Dear David and Mike:

As you are no doubt aware, the respondents have decided not to appeal Judge McGinley's determinations in this matter. Accordingly, please satisfy the provisions of the Protective Orders that require the petitioners to destroy all copies of confidential records, and all data of Commonwealth agencies and citizens, no later than July 7, 2014. This includes, but is not limited to, the PennDOT database provided for Dr. Siskin's review and the comprehensive SURE database. We appreciate your courtesy in certifying compliance with these provisions and in ensuring that all Qualified Persons who received confidential information from or as a result of their association with the petitioners have timely complied with the Protective Orders and likewise certify compliance. For your convenience, we have enclosed a proposed form to certify compliance. Kindly have all Qualified Persons complete the certification and return it to the address identified therein.

In particular, pursuant to the Stipulated Protective Order, the petitioners agreed that:

Within sixty (60) days after the termination of this litigation (including any appeals), each document and each other tangible thing that contains or reveals Confidential Information and any copies, abstracts, summaries, notes, or other records regarding the contents of any Confidential Information shall be returned to the attorney of record for the producing party or non-party witness, or the Confidential Information shall be destroyed. The party or attorney returning or destroying confidential records shall not retain a copy of the confidential records.

Stipulated Protective Order ¶ 19 (June 7, 2012), attached as Exhibit 1. In May 2013, the court modified the Protective Order to include the following additional paragraph:

David P. Gersch  
Michael A. Rubin  
May 30, 2014  
Page 2

Within sixty (60) days after the termination of this litigation (including any appeals) all “Qualified Persons” as defined in the Protective Order shall comply fully with the Commonwealth of Pennsylvania’s Data Cleansing Policy Information Technology Bulletin (ITB-SYM009) incorporated herein and attached hereto as Exhibit A. Although ITB-SYM009 and additional ITBs referenced hereafter in this Order state that they specifically apply to Commonwealth agencies and to equipment that is owned or leased by Commonwealth agencies or used by contractors on behalf of the Commonwealth, the parties understand and agree that all citizen and agency data and all “Confidential Information” as defined in the Protective Order, supplied during this litigation shall be securely erased from all devices/media/equipment regardless of ownership in accordance with the policies, methods, and proper disposal outlined in ITB-SYM009.

Modified Protective Order ¶ 1 (May 6, 2013), attached as Exhibit 2. ITB-SYM009 has been updated and replaced by ITB-SEC015, a copy of which is attached for your convenience as Exhibit 3. The pertinent substantive difference is a revision to change references from Blackberry devices to all mobile devices.

Finally, Mike, when you, Dana Peterson, and I met during the July 2013 trial to discuss the respondents’ assertion of privilege to the petitioners’ proposed trial exhibits, you represented that the petitioners would return or purge all privileged documents. To that end and for your reference, I am also attaching (as Exhibit 4) a copy of the privilege log we sent on July 10, 2013, the privilege log attached to our related motion *in limine*, and Judge McGinley’s July 19, 2013 order resolving the privilege claimed as to two documents. Kindly include your certification as to all remaining privileged documents within the scope of your certification of compliance with the Protective Orders.

David P. Gersch  
Michael A. Rubin  
May 30, 2014  
Page 3

Please let me know if you have any questions regarding this request. I look forward to receiving your confirmation that the petitioners and all associated Qualified Persons have timely complied with the Protective Orders and certification that all confidential information and privileged documents have been destroyed.

Very truly yours,



Todd N. Hutchison

TNH  
Attachments

cc: Timothy P. Keating (via electronic mail, with attachments)  
Witold J. Walczak (via electronic mail, with attachments)  
Jennifer R. Clarke (via electronic mail, with attachments)  
Marian K. Schneider (via electronic mail, with attachments)



---

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## Electronic Media Destruction Verification

### END USER INFORMATION

Full Name: (PLEASE PRINT)

---

Company:

---

Title/Position:

---

Office Location:

---

---

Phone: \_\_\_\_\_ Email Address: \_\_\_\_\_

### MEDIA INFORMATION

Description of Data and Records that was destroyed:

---

Media Type	Make	Model	Serial



## DESTRUCTION AGREEMENT

As the end user, by signing below, I affirm that

- The equipment denoted above (or denoted on attachment included with this form) is/are property of our company.
- I understand that PennDOT has requested the confidential data and records be destroyed rather than returned to PennDOT.
- All confidential data and records associated with Commonwealth Court of Pennsylvania Docket No. 330 M.D. 2012 has been destroyed.
- I have not retained a copy of any confidential data or records associated with Commonwealth Court of Pennsylvania Docket No. 330 M.D. 2012.

End User Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Comments:

---



---



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---

Return completed form to:

Pennsylvania Department of Transportation  
400 North Street  
8<sup>th</sup> Floor  
Harrisburg, PA 17120  
Attn: Phil Tomassini, CIO



# **EXHIBIT 1**

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA

VIVIETTE APPLEWHITE, *et al.*,  
Petitioners,

v.

COMMONWEALTH OF  
PENNSYLVANIA, *et al.*,  
Respondents.

Docket No. 330 M.D. 2012

RECEIVED

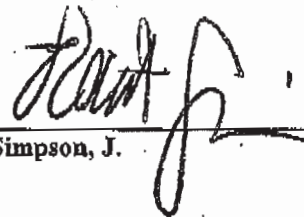
JUN 11 2012

Office of Attorney General  
Litigation Section

AND NOW, this 11<sup>th</sup> of June, 2012, upon consideration of the Stipulated Protective Order, it is hereby ORDERED that the foregoing Stipulated Protective Order is entered as an Order of this Court.

IT IS SO ORDERED.

BY THE COURT:



Robert Simpson, J.

Certified from the Record

JUN 11 2012

And Order Exit

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA

VIVIETTE APPLEWHITE, *et al.*,  
Petitioners,

v.

COMMONWEALTH OF  
PENNSYLVANIA, *et al.*,  
Respondents.

Docket No. 330 M.D. 2012

STIPULATED PROTECTIVE ORDER

This Stipulated Protective Order (“Protective Order”) is entered by the Court in the above-captioned action for the purposes of establishing the terms and conditions set forth herein, as agreed upon by the parties.

WHEREAS, the parties in this action and their counsel believe that there is good cause within the meaning of Pa. R.C.P. No. 4012 to keep confidential certain written responses to discovery, documents produced, and responses during depositions; and

WHEREAS, the parties in this action and certain non-party witnesses, who may become bound by this Protective Order, may from time to time be required to produce documents or provide testimony pursuant to requests made by the parties herein; and

WHEREAS, some of these documents or testimony may contain confidential information within the scope of this Protective Order; and

WHEREAS, with regard to certain records in the possession, custody and control of the Department of Transportation (“Department”) – a Commonwealth agency that is not a party to the above-captioned action but that possesses and maintains certain records and information that are relevant, or are claimed to be relevant, to the matter – the Department takes the position that

the production or disclosure of driver or other personal records is prohibited by section 6114(a)(1) of the Vehicle Code, 75 Pa.C.S. § 6114(a)(1), and section 2721(a) of the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(a); and

WHEREAS, the Commonwealth agrees that aggregate data derived from Department computer bases is not confidential and shall not be designated as such under this Stipulated Protective Order and whereas Petitioners' counsel have no current intention to disclose the name or other identifying information about individual drivers; and

WHEREAS, each party and his, her or its counsel believes that it would serve the interests of the parties, certain non-party witnesses, and the public to conduct discovery in this case under a protective order consistent with Pa. R.C.P. No. 4012; and

WHEREAS, each party and/or non-party witness (including the Department) may desire to preserve the protected status of any such material and/or information, but at the same time be able to make such information available for use in the litigation.

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND ORDERED THAT:**

(1) This Protective Order shall apply to all confidential and proprietary information and documents produced or disclosed by the parties in this action or any non-party that produces or discloses such information and documents, whether pursuant to a discovery request, subpoena, or other court order or process, including information and documents disclosed:

- (a) through the discovery process;
- (b) in any pleading, documents, affidavit, brief, application or motion, transcript, or other writing; or
- (c) in testimony given in a deposition.

This Protective Order shall not apply to any proceedings in open Court, but nothing in this Order shall prevent a party from seeking confidential treatment for any Confidential Information introduced or discussed in open Court.

### **DEFINITIONS**

(2) The term “Confidential Information” shall mean any document, information, data, or other tangible thing, or oral testimony that contains or reveals information believed to be subject to protection under Pa. R.C.P. No. 4012 because it is confidential and sensitive information in which a party or non-party has a privacy and property interest or that is required by state or federal law to be confidential. The term “document” shall have the broadest meaning possible under the Pennsylvania Rules of Civil Procedure. Each party shall act in good faith in designating information as “Confidential Information.”

(3) The “producing party” shall mean any party and/or non-party who either produces or testifies as to confidential and/or proprietary information or who asserts a confidentiality interest in information produced or testimony given by another in this action.

(4) The term “Qualified Person” shall mean:

(a) Parties to this action and non-party agencies, officials or employees of the Commonwealth of Pennsylvania;

(b) The Court and its official personnel;

(c) Court officials involved in this action, including, but not limited to, court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court;

(d) Counsel for parties to this action, including all partners, associates, secretaries, paralegal assistants, and employees of such counsel;

(e) Persons employed or consulted by counsel for litigation management purposes, including but not limited to, third-party photocopy or imaging services contractors;

(f) Any independent expert or consultant who is retained for the purpose of assisting counsel in this action;

(g) Deponents, pursuant to paragraph 9 hereinafter;

(h) Fact witnesses to investigate the case or prepare the case for any proceeding including trial of this case; and

(i) Any other person who is designated as a "Qualified Person" by order of the Court or by written agreement of the parties.

**USE OF CONFIDENTIAL INFORMATION**

(5) Confidential Information shall be used solely for the purpose of preparing for and conducting the above-captioned action.

**DISCLOSURE OF CONFIDENTIAL INFORMATION**

(6) Confidential Information shall not be made available to anyone other than a Qualified Person or the party who produced such Confidential Information, except as otherwise provided in this Protective Order.

(7) Nothing in this Protective Order shall prevent disclosure of Confidential Information if the designating party consents, in writing, to such disclosure or if the Court, after notice to all parties, orders such disclosure.

(8) In the event that a party desires to disclose Confidential Information to any person not enumerated in paragraph 4 above, such party shall provide at least seven (7) business days advance notice in writing to all other parties. Should any party, or should any non-party witness that provided Confidential Information to the parties pursuant to this Stipulated Protective Order, object in writing to the disclosure of such Confidential Information to that person, the party seeking disclosure may seek an order from the Court. Until the Court resolves the application, no such disclosure shall be made.

(9) A deponent may during a deposition be shown, and examined about, Confidential Information. Deponents shall not retain or copy confidential documents or portions of the transcript of their depositions that contain Confidential Information. Any deposition transcript page which is deemed by a party to disclose Confidential Information is to be identified and marked as "CONFIDENTIAL" within seven (7) days after receipt of the deposition transcript. Prior to the termination of said seven (7) day period, the entire deposition transcript shall be deemed to be confidential. Deposition transcripts containing testimony with Confidential Information shall be marked on the front page: "THIS DEPOSITION TRANSCRIPT CONTAINS CONFIDENTIAL INFORMATION THAT IS SUBJECT TO A PROTECTIVE ORDER."

(10) Each person to whom information designated as confidential is revealed, disclosed or made available for inspection (except for the persons identified in Paragraphs 4(a)-(d) above) shall, prior to having access to such information, sign the Nondisclosure Agreement in the form annexed hereto marked as Exhibit "A." Counsel shall retain the Nondisclosure Agreement, and shall produce it upon written request of the parties or by order of the Court.

**IDENTIFICATION OF CONFIDENTIAL INFORMATION**

(11) Any document or other tangible thing that a producing party or non-party witness believes contains or reveals Confidential Information shall be labeled "CONFIDENTIAL" by the party or non-party witness seeking confidential treatment. For a paper document, such marking shall appear on each page seeking confidential treatment. Any document or other tangible thing so labeled and the information it contains or reveals shall be treated in accordance with the provisions of this Protective Order.

### **INADVERTENT PRODUCTION**

(12) The inadvertent failure by a producing party or non-party witness to designate specific documents or materials as containing Confidential Information shall not be deemed a waiver in whole or in part of a claim of confidentiality as to such documents or materials. Upon notice to the receiving party of such failure to designate, the receiving party shall cooperate to restore the confidentiality of the inadvertently disclosed information. Inadvertent production of documents or information subject to the attorney-client privilege, work product immunity, or any other privilege or immunity shall not constitute a waiver of such privileges.

### **CHALLENGES TO CONFIDENTIAL INFORMATION DESIGNATION**

(13) A party shall not be obligated to challenge the propriety of a Confidential Information designation at the time made, and a failure to do so shall not preclude a subsequent challenge thereto. Once a party challenges the propriety of a Confidential Information designation, the producing party shall have seven days to move the Court for an Order protecting that information. In that event, the information at issue shall remain Confidential Information under this Order until such time as the Court rules.

### **FILING OF CONFIDENTIAL INFORMATION**



(14) The Clerk of the Court is directed to maintain under seal any pleading, motion, brief, memorandum, exhibit, affidavit, declaration, transcript, response to a discovery request, or other paper filed with the Court that has been designated, in whole or in part, as containing or revealing Confidential Information.

(15) In the event that a party wishes to use any Confidential Information in any pleading, motion, brief, memorandum, exhibit, affidavit, declaration, transcript, response to a discovery request, or other paper filed with the Court, such paper shall be enclosed in a sealed envelope or other appropriate container. The sealed envelope or other appropriate container shall:

- (a) show the caption of this action;
- (b) identify its content; and
- (c) include the following legend:

**CONFIDENTIAL INFORMATION – FILED UNDER SEAL**

This envelope is sealed pursuant to court order and contains confidential information. This envelope was filed by [name of the party] and may not be opened, nor may its contents be displayed or revealed, except by the court order or by written stipulation of the parties.

(16) Any Party submitting any pleading, motion, brief, memorandum, exhibit, affidavit, declaration, transcript, response to a discovery request, or other paper filed with the Court, containing any Confidential Information shall also submit a public version of the document with only the Confidential Information redacted.

**MISCELLANEOUS**

(16) Nothing in this Protective Order shall be construed to affect the admissibility of any document, material, or information at any trial or hearing.

(17) Nothing in this Protective Order shall prejudice the right of any party to seek at any time an order modifying this Protective Order.

(18) In the event that a new party is added, substituted, or brought in, this Protective Order shall be binding on and inure to the benefit of the new party, subject to the right of the new party to seek relief from or modification of this Protective Order.

(19) Within sixty (60) days after the termination of this litigation (including any appeals), each document and each other tangible thing that contains or reveals Confidential Information and any copies, abstracts, summaries, notes, or other records regarding the contents of any Confidential Information shall be returned to the attorney of record for the producing party or non-party witness, or the Confidential Information shall be destroyed. The party or attorney returning or destroying the confidential records shall not retain a copy of the confidential records.

(20) Within sixty (60) days after the termination of this litigation (including any appeals), any Confidential Information that was filed under seal with the Clerk of the Court shall be returned to the attorney of record for the filing party.

(21) The provisions of this Protective Order shall survive and remain in full force and effect after the termination of this litigation (including any appeals).

**SO STIPULATED AND AGREED:**

DATE: 6.7.2012

By: Patrick S. Cawley  
Patrick S. Cawley  
PA 85575  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
Attorney for Respondents

DATE: 6.7.2012

By: DL Gersch

David P. Gersch  
Arnold & Porter LLP  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
Attorney for Petitioners

# **EXHIBIT 2**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

VIVIETTE APPLEWHITE, <i>et al.</i> ,	:	
Petitioners,	:	
v.	:	Docket No. 330 MD 2012
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA, THOMAS CORBETT,	:	
Governor, and CAROL AICHELE,	:	
Secretary of the Commonwealth,	:	
Respondents.	:	

AND NOW, this 6th of May, 2013, the Stipulated Protective Order entered as an Order of this Court on June 11, 2012, remains in full effect, but is modified as follows:

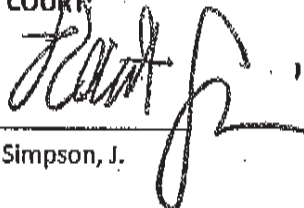
- 1) A new paragraph (22) is added to read: Within sixty (60) days after the termination of this litigation (including any appeals) all "Qualified Persons" as defined in the Protective Order shall comply fully with the Commonwealth of Pennsylvania's Data Cleansing Policy Information Technology Bulletin (ITB-SYM009) incorporated herein and attached hereto as Exhibit A. Although ITB-SYM009 and additional ITBs referenced hereafter in this Order state that they specifically apply to Commonwealth agencies and to equipment that is owned or leased by Commonwealth agencies or used by contractors on behalf of the Commonwealth, the parties understand and agree that all citizen and agency data and all "Confidential Information" as defined in the Protective Order, supplied during this litigation shall be securely erased from all devices/media/equipment regardless of ownership in accordance with the policies, methods, and proper disposal outlined in ITB-SYM009.
- 2) A new paragraph (23) is added to read: Any and all "Confidential Information" released from the Department of Transportation or Department of State databases (data) will be released only to, and maintained in, a secure environment as follows:
  - A) BLDS will be responsible for securing the data. The data will be stored on the internal BLDS network, which consists of a mixed environment of Windows Server 2008 R2 and Linux (Ubuntu) servers with Windows 7 workstations. All workstations within the network will require valid domain credentials for access; with the credentials having industry standard password complexity and expiration requirements. Remote access to the BLDS network will be restricted to encrypted VPN connections and all data will remain local to the BLDS network because all data processing being done will be performed using virtual sessions. The data will be stored on an at-rest encrypted physical drive, separate from other data in the BLDS network. The access rights to this network share will be limited to employees who require access. Data will be housed in a MySQL database and access will be limited to

specific database administrators. Upon completion of the matter, the dedicated drive will be securely deleted using the Department of Defense clearing and sanitizing standard DOD 5220.22-M 1 recognized and defined in the Commonwealth's ITB-SYM009.

- B) There will be full compliance by all qualified persons with the Commonwealth's Encryption Standards for Data at Rest Information Technology Bulletin (ITB-SEC020) incorporated herein and attached hereto as Exhibit B. The ITB addresses full disk encryption, file encryption and data element encryption.
  - C) There will be full compliance by all qualified persons with the Commonwealth's Encryption Standards for Data in Transit Information Technology Bulletin (ITB-SEC031) incorporated herein and attached hereto as Exhibit C.
  - D) Derivatives made from data that are "Confidential Information" will be subject to the terms of the Protective Order (including this paragraph 23) to the same extent as the original data, except that aggregate data derived from the data are not considered confidential (as agreed in the original Protective Order).
  - E) Back-ups of the data that are "Confidential Information" will be subject to the terms of the Protective Order (including this paragraph 23) to the same extent as the original data, except that aggregate data derived from the back-ups of the data are not considered confidential (as agreed in the original Protective Order).
- 3) The parties understand that "Confidential Information" as used above is subject to the provisions of the Stipulated Protective Order allowing a party to challenge whether citizen and agency data provided are "Confidential Information."

IT IS SO ORDERED.

BY THE COURT:



Robert Simpson, J.

Certified from the Record

MAY 06 2013

And Order Exit

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**VIVIETTE APPLEWHITE, *et al.***           :  
  **Petitioners,**                               :

**No. 330 M.D. 2012**

**v.**

**The COMMONWEALTH OF**                               :  
**PENNSYLVANIA; THOMAS**                       :  
**CORBETT, Governor; and**                     :  
**and CAROL AICHELE,**                           :  
**Secretary of the Commonwealth,**         :  
  **Respondents.**                               :

**Exhibit A**

**Information Technology Bulletin  
 Commonwealth of Pennsylvania  
 Governor's Office of Administration/Office for Information Technology**

<b>ITB Number:</b>	<b>ITB-SYM009</b>
<b>ITB Title:</b>	<b>Commonwealth of Pennsylvania Data Cleansing Policy</b>
<b>Issued by:</b>	<b>Deputy Secretary for Information Technology</b>
<b>Date Issued:</b> November 20, 2009	<b>Date Revised:</b> December 20, 2010
<b>Domain:</b>	<b>Systems Management</b>
<b>Discipline:</b>	<b>Configuration Management</b>
<b>Technology Area:</b>	<b>Disposal</b>
<b>Revision History Date:</b>	<b>Description:</b>
<b>12/20/2010</b>	<b>ITB Refresh</b>

**Abstract:**

The purpose of this Information Technology Bulletin (ITB) is to provide information pertaining to the sanitization and/or destruction of leased or state-owned computer system hard drives, removable media and hand-held devices.

**General:**

This ITB applies to all departments, boards, commissions and councils under the Governor's jurisdiction. Agencies not under the Governor's jurisdiction are strongly encouraged to follow this policy.

**Policy:**

This policy was developed in collaboration with Agency Chief Information Officers and IT Managers, the Office of Administration and the Department of General Services. This policy applies to all agencies under the governor's jurisdiction. It will take effect immediately, and applies to equipment that is:

- Owned or leased by agencies
- Used by contractors on behalf of the Commonwealth

Citizen and agency data are to be securely erased from state-owned and leased devices/media in accordance with policies outlined in this IT Bulletin. Peripheral storage devices including but not limited to floppy diskettes, CD and DVD discs along with external storage devices such as USB drives, are not to be used by end users for storing Commonwealth data. An exception may be made for specific tasks only if the user is directed to do so by his or her agency's IT staff or administrator. In such cases the external storage media used are to follow the same guidelines as hard drives for purging data or are to be physically destroyed once retired or decommissioned. This also includes archive media such as tape backup. Please refer to the "NIST Guidelines for Media Sanitization" (Draft SP 800-88) document for acceptable destruction procedures.

In addition, wireless handheld devices such as a BlackBerry™ are to have the capability to perform an erase procedure remotely from a server so that data confidentiality can be maintained even in the event where a user's device is lost or stolen.



## **I. Proper Disposal of Retired State-Owned Computers**

**1. Degauss, Wipe, or Destroy the Hard Drives.** All data residing on a physical hard drive is to be destroyed in accordance with the "NIST Guidelines for Media Sanitization" (Draft SP 800-88) or be securely erased by using either an NSA or DoD rated degausser, or by performing a DoD 5220.22-M wipe where data is overwritten using a one pass approach. If an agency is leasing Dell computers then it is suggested that the agency take advantage of the prepaid disk wipe service offered by Dell.

**2. Recycle Non-Functional Computers.** Wiped or degaussed hard drives that no longer contain Commonwealth data and chain of custody is not an issue. Hard drives already removed from the PCs can be destroyed or recycled by the agency, or packaged and sent to the DGS Recycling Office. Please note that if wiping has been performed, then the hard drives do not have to be removed; they can simply be left in the computer when shipped to DGS Recycling.

**3. Surplus Functional Computers.** The DGS Bureau of Supplies and Surplus Operations can facilitate reutilization or sales of functional computers with or without hard drives. The value returned to the Commonwealth is greatest, of course, with functional, cleared, overwritten, or wiped hard drives. Consult the agency's Property Control Officer (PCO) to make online surplus system entries; to fill out an identification tag for the users' computers; and to arrange for transportation to DGS. User entries to the online system and physical identification tag are to indicate the type of hard drive, if any, and method used to remove data (i.e., ATA HD-Secure Erase, IDE HD - DoD 5220.22-M single wipe, no HD, etc).

**4. Package/Palletize the Computer Equipment.** Agencies are to package the equipment for shipment. Please make arrangements for collection with the DGS Recycling Office by contacting them at (717) 772-2300. Shipments to DGS Bureau of Supplies and Surplus are to also be suitably packaged and labeled. Contact them at (717) 787-6159 ext 3224 to facilitate.

**5. Store in a Secure Location.** The equipment is to be stored in a secure location pending collection.

## **II. Proper Return of State-Leased Computers**

**Note:** The Department of General Services has issued the following state-wide Contract 4400002819 that includes information regarding disk wiping services provided by Dell: If the agency leases Dell equipment, it is suggested that the agency utilize this prepaid service. No value will be returned to the Commonwealth if this service is used for Commonwealth-owned computers.

**1. Degauss or Wipe the Hard Drive.** All data residing on a physical hard drive is to be securely erased using an NSA or DoD rated degausser or by performing a DoD 5220.22-M 1 wipe where data is overwritten using a one pass approach. ***If an agency is leasing Dell computers, then it is currently required that the agency take advantage of the prepaid disk wipe service offered by Dell when returning leased Dell computers.***

**2. Return the leased Computer.** Once the drives have been securely erased, they can be reinserted back into the PC or laptop to be returned with the computer to the vendor/contractor. It is the vendor/contractor's responsibility to reinstall the OS and applications back onto his/her computer.

**Note:** Be advised that if using the wiping method to securely erase data, then the status log is to be checked each time the process is completed to ensure that the entire disk wiping procedure finished successfully without any errors. Disk wiping is a time-consuming and labor-intensive process that demands high levels of quality control review by IT staff. The agency is fully responsible and liable for taking the necessary measures to ensure that data is securely erased.

### **III. Computers Owned by Contractors and Used on Behalf of the Commonwealth**

Contractor owned computers that are used to perform work for the Commonwealth are to be treated as confidential. Once a contractor has completed his/her engagement, all computer equipment utilized for the engagement is to be securely erased in accordance with the steps below. This can be done by the contractor, a Commonwealth employee or a third party, however, successful completion of this process is to be verified by a Commonwealth employee.

**1. Wipe the Hard Drive.** All data residing on a physical hard drive is to be wiped by performing a DoD 5220.22-M 1 where data is overwritten using the one pass approach. **Do not use a degausser for this scenario.** Hard drives that are degaussed are not readily usable as they would require a low-level factory format in order to be reused.

**2. Re-Image Hard Drive.** It is the responsibility of the contractor to re-image or manually reinstall the OS and software applications. The contractor is to be made aware of this policy before he begins an engagement with the Commonwealth.

### **IV. Reassignment of State-Owned PCs Between Employees of the Commonwealth**

**1. Wipe the Hard Drive.** All data residing on a physical hard drive is to be wiped by performing a DoD 5220.22-M 1 wipe where data is overwritten using a one pass approach. If an agency is leasing Dell computers then it is suggested that the agency take advantage of the prepaid disk wipe and image services offered by Dell. **Do not use a degausser for this scenario.** Hard drives that are degaussed are not readily usable as they would require a low-level factory format in order to be reused if they have not been damaged.

**2. Re-Image Hard Drive.** Once the hard drive has been wiped, use a backup image such as a Norton Ghost Image to reinstall the OS and software applications. It is necessary to wipe prior to re-imaging a computer because imaging does not overwrite the files and data contained in unused areas of a hard drive.

**Note:** Special cases may exist that do not warrant a DoD disk wipe upon reassignment of a computer between users of Commonwealth owned PCs. In such cases, a Commonwealth department manager has the discretion to determine and request that the wipe procedure not be utilized. By allowing special-case discretion to management, the Commonwealth will be able to promote business efficiency and

prevent unnecessary work from being done, while at the same time, not compromising its ability to maintain the confidentiality of its sensitive and private data.

#### **V. Failed Hard Drives and Devices**

Whether the equipment or device is state-owned, contractor-owned or leased, all hard drives or media that fall due to a physical malfunction are to be destroyed. If a contractor has a "Statement of Destroyed Materials" or similar policy/program, the agency will not be required to pay for the replacement of the destroyed hard drive. This policy recognizes that a drive contains confidential, sensitive data and cannot be returned. The contractor will credit the Commonwealth as if the drive had been returned.

#### **VI. Multifunction Fax/Print/Scanner Devices**

Many multifunction devices now have a presence on the Commonwealth MAN and can contain storage media such as a hard drive. These devices are therefore subject to the same data cleansing policies as outlined above.

#### **VII. DGS Equipment Handling**

Equipment delivered to, or collected by, DGS will be taken to a central storage location. At that point, equipment will be held until it is forwarded to the recycler, claimed by and shipped to another agency, or sold. Agencies may deliver non-functional equipment to the recycler by their own means via agency trucks or contracted movers, after they have conformed to the removal or secure erase procedures as outlined above and remanded to DGS the Media Disposal Log mentioned above.

#### **Definitions of Terms:**

Degaussing - Is a procedure that reduces the magnetic flux to virtual zero by applying a reverse magnetizing field.

Disk Wipe - Is a procedure that uses a single character to overwrite all addressable locations on a hard drive.

DoD 5220.22-M 1 Wipe - DoD clearing standards, as identified in DoD 5220.22-M 1, require one pass where the entire hard drive is overwritten one time using any single character.

DoD - U.S. Department of Defense.

DoD Rated Degausser - DoD Type degaussers that meet or exceed DoD Type I or Type II media sanitization standards.

DoD Type I Degausser - Equipment rated to degauss magnetic media having a maximum coercivity of 350 Oersteds.

DoD Type II Degausser - Type II Degaussers. Equipment rated to degauss magnetic media having a maximum coercivity of 750 oersteds.

Hard Drive - or "hard disk" is a rigid metal disk coated with a magnetic material on which data for a computer can be stored.

NSA Rated Degausser - A degausser that conforms to NSA/CSS Specification L1-MTC-4A standards for secure erasure.

#### **Related Documentation:**

Dell Contract 4400002819 Includes disk wiping services performed by Dell  
"NIST Guidelines for Media Sanitization" (Draft SP 800-88)

**Refresh Schedule:**

All standards identified in this ITB are subject to periodic review and possible revision, or upon request by the Enterprise Architecture Standards Committee (EASC).

**Exemption from This Policy:**

In the event an agency chooses to seek an exemption, for reasons such as the need to comply with requirements for a federally mandated system, a request for waiver may be submitted via the Community of Practice Procurement and Architectural Review (COPPAR) process. Requests are to be entered into the COPPAR Tool located at [WWW.COPPAR.STATE.PA.US](http://WWW.COPPAR.STATE.PA.US). Agency CIO approval is required. Contact your agency [CoP Planner](#) for further details or assistance.

**Questions:**

Questions regarding this policy are to be directed to [ra-oalth@state.pa.us](mailto:ra-oalth@state.pa.us).



**Information Technology Bulletin  
Commonwealth of Pennsylvania  
Governor's Office of Administration/Office for Information Technology**

<b>Number:</b>	<b>ITB-SEC020</b>		
<b>Title:</b>	<b>Encryption Standards for Data at Rest</b>		
<b>Issued by:</b>	<b>Deputy Secretary for Information Technology</b>		
<b>Date Issued:</b>	<b>August 17, 2007</b>	<b>Date Revised:</b>	<b>January 21, 2011</b>
<b>Domain:</b>	<b>Security</b>		
<b>Discipline:</b>	<b>Encryption for Data at Rest</b>		
<b>Technology Area:</b>	<b>Encryption for Data at Rest</b>		
<b>Revision History Date:</b>	<b>Description:</b>		
<b>10/16/2008</b>	<b>Updated to meet newly identified needs for encryption of data at rest.</b>		
<b>9/17/2009</b>	<b>Tape media update</b>		
<b>1/21/2011</b>	<b>Updated to provide requirements and guidance on encrypting data at rest without specificity to disks and removable media.</b>		

**Abstract:**

The purpose of this Information Technology Bulletin (ITB) is to improve the confidentiality and integrity of data at rest by requiring the use of encryption.

"Data at rest" refers to all data in storage, regardless of the storage device, that is not in motion. This excludes information traversing a network or temporarily residing in non-volatile computer memory. Data at rest primarily resides in files on a file system. However, data at rest is not limited to file data. Databases, for example, are often backed by data files, and their contents can be thought of as rows and columns of data elements instead of as individual files. Agencies should consider all aspects of storage when designing an encryption solution.

Criteria to be taken into account when encrypting data at rest include:

- Data Classification – Refer to *SEC019 Policy and Procedures for Protecting Commonwealth Electronic Data*, to determine the classification of sensitive, protected, and exempt data.
- Statutory or regulatory mandates including, but not limited to, the Health Insurance Portability and Accountability Act (HIPAA), Sarbanes-Oxley Act of 2002, the Gramm-Leach-Bliley Act (GLBA), and any other law or regulation involving data security at rest.

Data encryption supports data privacy and integrity by providing a method to convert electronic information into a format that is readable only by authorized individuals. This policy establishes the use of the following types of encryption for electronic information:

- **Full Disk Encryption:** Full disk encryption is a computer security technique that encrypts data stored on a mass storage or removable device, and automatically decrypts the information when an authorized user requests it. Full disk encryption is often used to signify that everything on a disk or removable device, including the operating system and other executables, is encrypted. Full disk encryption includes hardware encryption, such as configuring a tape drive to encrypt all backup data before write.

- **File Encryption:** File encryption is a technique that encrypts files on a file system, without encrypting the file system itself or the entire disk. A file encrypting application may include functionality to: archive multiple files into a single file before or after encrypting; produce self-decrypting files; or automatically encrypt files or folders based on policies or locations. File encryption is often used to protect files being sent through email or written to removable media.
- **Data Element Encryption:** Data element encryption is a technique that encrypts individual data elements instead of encrypting an entire file or database. Common examples of data element encryption include column level database encryption and encryption of a Social Security Number (SSN) before writing it to a file. Data element encryption is used to selectively apply encryption, and may be used to reduce encryption/decryption overhead, to protect different elements with different keys, or to simplify adding encryption to applications.

### **General:**

This ITB applies to all departments, boards, commissions and councils under the Governor's jurisdiction. Agencies not under the Governor's jurisdiction are strongly encouraged to follow this policy to ensure they implement data encryption that facilitates enterprise-wide interoperability and standardization. The requirements in this document outline the minimum adequate steps to provide an acceptable level of encryption.

### **Policy:**

Agencies must protect stored sensitive, protected, or exempt data at rest through the use of encryption. Additionally, agencies must ensure that any non-commonwealth entity or agency business partner/contractor which stores or has access to such data also protects stored sensitive, protected, or exempt data at rest through the use of encryption. Agencies are to adhere to the Advanced Encryption Standard (AES) for symmetric encryption. For asymmetric encryption, agencies are to follow ITB-SEC013, Identity Protection and Access Management (IPAM) Architectural Standard - Identity Management Services, and ITB-SEC014, IPAM Architectural Standard - Identity Management Technology Standards.

### **Full Disk Encryption:**

Full disk encryption conforming to AES specifications is to be used on laptop computers, other mobile computing devices, and electronic devices for which physical security controls are limited due to the mobile nature of the devices. In cases where these devices will not store any sensitive, protected, or exempt data, exceptions may be granted. Agencies are to comply with product standards as described in STD-SEC020A Encryption Product Standards for Data at Rest for these devices.

Full disk encryption is also to be used on computers or computing devices storing sensitive, protected, or exempt data located in areas not equipped with public access restrictions and physical security controls such as locked doors etc. (reference ITB) Agencies are to comply with product standards as described in STD-SEC020A Encryption Product Standards for Data at Rest for these devices as well.

In order to ensure the highest levels of security and overall effectiveness of disk encryption, devices using full disk encryption are not to be placed in suspend mode when unattended, and are to be shut down completely when not in use or when unattended.

Full disk encryption is to be used for archiving or backing up sensitive, protected, or exempt data to tape or optical media. Software or hardware mechanisms can be used provided they conform to AES specifications. If no conforming mechanisms are available, file encryption techniques may be used to encrypt the data at the file level before it is written to tape or optical media.

**File Encryption:**

File encryption is to be used when files containing sensitive, protected, or exempt data are transferred on physical media, through email, or across networks, without other forms of encryption or protection.

**Data Element Encryption:**

Data element encryption is to be used when sensitive, protected, or exempt data elements are stored. Physical security of a data storage device is not a substitute for data element encryption, as it does not prevent accessing data through exploited application vulnerabilities. Likewise, data element encryption should be designed such that exploited access does not provide unencrypted access to sensitive, protected, or exempt data.

**General:**

Agencies are to heed statutory and regulatory requirements and necessary certifications when selecting encryption products. Most certifications maintain lists of validated products; for Federal Information Processing Standards (FIPS) certifications refer to National Institute of Standards and Technology (NIST) Computer Security Division. Implementations of AES must conform to the test vectors published by NIST.

Agencies are required to follow existing ITB's regarding storing sensitive, classified, or other non-public information, (as referenced in ITB-SEC19).

Where encryption keys are protected by or derived from passwords, agencies are to use passwords in accordance with ITB-SEC007 *Minimum Standards for User IDs and Passwords*. This includes credentials used to access devices using Full Disk Encryption.

Agencies are to conduct an audit of these policies in accordance with ITB-SEC023 *Security Assessment and Testing Policy*.

**Refresh Schedule:**

All standards identified in this ITB are subject to periodic review and possible revision, or upon request by the Enterprise Architecture Standards Committee (EASC).

**Exemption from This Policy:**

In the event an agency chooses to seek an exemption, for reasons such as the need to comply with requirements for a federally mandated system, a request for waiver may be submitted via the Community of Practice Procurement and Architectural Review (COPPAR) process. Requests are to be entered into the COPPAR Tool located at [WWW.COPPAR.STATE.PA.US](http://WWW.COPPAR.STATE.PA.US). Agency CIO approval is required. Contact your agency CoP Planner for further details or assistance.

**Questions:**

Questions regarding this policy are to be directed to [ra-qaib@state.pa.us](mailto:ra-qaib@state.pa.us).

**Policy Supplements:**

STD-SEC020A - Encryption Product Standards for Data at Rest

**References:**

- ITB-SEC007: Minimum Standards for User IDs and Passwords
- ITB-SEC019: Policy and Procedures for Protecting Commonwealth Electronic Data
- ITB-SEC019A: Data Classification Quick Reference Guide
- ITB-SEC023: Security Assessment and Testing Policy



**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**VIVIETTE APPLEWHITE, *et al.*,** :  
**Petitioners,** :

**No. 330 M.D. 2012**

**v.** :

**The COMMONWEALTH OF** :  
**PENNSYLVANIA; THOMAS** :  
**CORBETT, Governor; and** :  
**and CAROL AICHELE,** :  
**Secretary of the Commonwealth,** :  
**Respondents.** :

**Exhibit C**

**Information Technology Bulletin  
Commonwealth of Pennsylvania  
Governor's Office of Administration/Office for Information Technology**

<b>ITB Number:</b>	<b>ITB SEC031</b>
<b>ITB Title:</b>	Encryption Standards for Data in Transit
<b>Issued by:</b>	Deputy Secretary for Information Technology
<b>Date Issued:</b> August 17, 2007	<b>Date Revised:</b> September 17, 2009
<b>Domain:</b>	Security
<b>Discipline:</b>	Encryption
<b>Technology Area:</b>	Encryption Protocols
<b>Revision History Date:</b>	<b>Description:</b>
09/17/2009	Rewrote policy section and added transmission mechanism table

**Abstract:**

The purpose of this Information Technology Bulletin (ITB) is to improve the confidentiality and integrity of data in transit by prescribing the use of encryption.

The Commonwealth of Pennsylvania is a trusted steward of information. Many solutions and technologies have been put in place to improve connectivity and sharing between Commonwealth entities with external business partners and citizens.

Data in transit is any type of information that is transmitted between systems, applications, or locations. Encryption of data in transit is a critical mechanism to protect that data. Unauthorized disclosure or alteration of data in transit could cause perceivable damage. Criteria to be taken into account when encrypting data in transit include:

- Data sensitivity - Refer to SEC019, *Policy and Procedures for Protecting Commonwealth Electronic Data*, to determine the classification of sensitive, protected or exempt data.
- Mandates of law including, but not limited to, the Health Insurance Portability and Accountability Act (HIPAA), Sarbanes-Oxley Act of 2002, the Gramm-Leach-Bliley Act (GLBA) and any other law or regulation that involves data security in transit.

**General:**

This ITB applies to all departments, boards, commissions and councils under the governor's jurisdiction. Agencies not under the governor's jurisdiction are strongly encouraged to follow this policy to ensure they implement data encryption that facilitates enterprise-wide interoperability and standardization. The requirements in this document are the minimum adequate to provide an acceptable level of encryption.

**Policy:**

Agencies are to protect the transmission of sensitive, protected, or exempt data as determined by SEC019. Agencies are to adhere to the Advanced Encryption Standard (AES) for symmetric encryption. For asymmetric encryption, agencies are to follow ITB-SEC013, *Identity Protection and Access Management (IPAM) Architectural Standard - Identity Management Services*, and ITB-SEC014, *IPAM Architectural Standard - Identity Management Technology Standards*.

Internet Protocol Security (IPSec) gateway to gateway implementations utilizing triple data encryption standard (3DES) is to be migrated to IPSec/AES to take advantage of increased security; new IPSec implementations are not to use 3DES.

Any application protocols (e.g., HTTP, file transfer protocol [ftp], secure copy [SCP]) tunneled in an encryption mechanism or combination of encryption mechanisms utilizing approved symmetric or asymmetric encryption algorithms are considered to be secure.

Agencies are strongly recommended to utilize 256-bit key sizes, and hashing algorithms that utilize 160-bit (or greater) digest lengths. Agencies are encouraged to use larger key/digest sizes where performance and client constraints allow.

Encryption products used to protect sensitive information are to conform to the NIST Cryptographic Module Validation Program listing <http://csrc.nist.gov/cryptval/>.

Encryption Mechanism/Examples	Meets NIST 3DES
HTTPS in export mode (40-bit keys)	No, does not meet key size requirements, and does not utilize AES.
HTTPS (TLS 1.0, AES 128, 192, or 256)	Yes
Secure Shell (SSH)-1	No, SSH-1 does not utilize AES encryption.
SSH-2 (DES, 3DES, or Blowfish)	No, these algorithms are not AES.
SSH-2 (AES)	Yes
SCP/SFTP over SSH-2	Yes
HTTP over SSH-2	Yes
VPN Clients (TLS 1.0, passwords or PKI certificates)	Yes
IPSec (3DES for encryption)	No, IPSec/3DES setups are to be migrated to IPSec/AES.
IPSec (AES-CBC for encryption)	Yes
Layer 2 Forwarding (L2F) or Point-to-Point Tunneling Protocol (PPTP)	No, L2F and PPTP do not offer encryption.
HTTPS (TLS 1.0, AES 128, 192, or 256) over L2F or PPTP	Yes, L2F/PPTP is transporting encrypted traffic.

**Refresh Schedule:**

All standards identified in this ITB are subject to periodic review and possible revision, or upon request by the Enterprise Architecture Standards Committee.

**Exemption from This Policy:**

In the event an agency chooses to seek an exemption, for reasons such as the need to comply with requirements for a federally mandated system, a request for waiver may be submitted via the Community of Practice Procurement and Architectural Review (COPPAR) process. Requests are to be entered into the COPPAR Tool located at [WWW.COPPAR.STATE.PA.US](http://WWW.COPPAR.STATE.PA.US). Agency CIO approval is required. Contact your agency CoP Planner for further details or assistance.

**Questions:**

Questions regarding this policy are to be directed to [ra-oaitb@state.pa.us](mailto:ra-oaitb@state.pa.us).

**References:**

ITB-SEC013: Identity Protection and Access Management (IPAM) Architectural Standard - Identity Management Services

ITB-SEC014: IPAM Architectural Standard – Identity Management Technology Standards

ITB-SEC019: Policy and Procedures for Protecting Commonwealth Electronic Data

# **EXHIBIT 3**

## Information Technology Bulletin

### *Data Cleansing*

<b>ITB Number</b> ITB-SEC015	<b>Effective Date</b> May 1, 2013
<b>Category</b> Recommended Policy	<b>Supersedes</b> ITB-SYM009
<b>Contact</b> <a href="mailto:ra-oaitb@pa.gov">ra-oaitb@pa.gov</a>	<b>Scheduled Review</b> May, 2014

**This ITB establishes policy, responsibilities, and procedures for the sanitization and/or destruction of leased or state-owned computer system drives, removable media and hand-held devices.**

### 1. Purpose

To establish policy, responsibilities, and procedures for the sanitization and/or destruction of leased or state-owned computer system drives, removable media and hand-held devices.

### 2. Scope

This ITB applies to all departments, boards, commissions and councils under the Governor's jurisdiction. Agencies not under the Governor's jurisdiction are strongly encouraged to follow this ITB.

### 3. Definitions

**Degaussing:** a procedure that reduces the magnetic flux to virtual zero by applying a reverse magnetizing field.

**Disk Wipe:** a procedure that uses a single character to overwrite all addressable locations on a hard drive.

**DoD 5220.22-M:** DoD clearing standards, as identified in DoD 5220.22-M, requires three passes where the entire hard drive is overwritten.

**DoD:** U.S. Department of Defense.

**DoD Rated Degausser:** DoD Type degaussers that meet or exceed DoD Type I or Type II media sanitization standards.

**DoD Type I Degausser:** equipment rated to degauss magnetic media having a maximum coercivity of 350 oersteds.

**DoD Type II Degausser - Type II Degaussers:** equipment rated to degauss magnetic media having a maximum coercivity of 750 oersteds.

**Hard Drive:** or "hard disk" is a rigid metal disk coated with a magnetic material on which data for a computer can be stored.

**NSA Rated Degausser:** a degausser that conforms to NSA/CSS Specification L1-MTC-4A standards for secure erasure.

#### 4. Objective

Provide required actions for agencies to follow for data cleansing.

#### 5. Policy

This policy was developed in collaboration with Agency Chief Information Officers and IT Managers, the Office of Administration and the Department of General Services. This policy applies to all agencies under the governor's jurisdiction. It will take effect immediately, and applies to equipment that is:

- Owned or leased by agencies
- Used by contractors on behalf of the Commonwealth

Citizen and agency data are to be securely erased and storage media physically removed from state-owned and leased devices in accordance with policies outlined in this IT Bulletin.

Peripheral storage devices including but not limited to floppy diskettes, CD and DVD discs along with external storage devices such as USB drives, are not to be used by end users for storing Commonwealth data. An exception may be made for specific tasks only if the user is directed to do so by his or her agency's IT staff or administrator. In such cases the external storage media used are to follow the same guidelines as hard drives for purging data or be physically removed and destroyed once retired or decommissioned. This also includes archive media such as tape backup. Please refer to the "[NIST Guidelines for Media Sanitization](#)" (Draft SP 800-88) document for acceptable destruction procedures.

In addition, wireless handheld devices are to have the capability to perform an erase procedure remotely from a server so that data confidentiality can be maintained even in the event where a user's device is lost or stolen.

## **I. Proper Disposal of Retired State-Owned Computers**

**1. Degauss, Wipe, or Destroy the Hard Drives.** All data residing on a physical hard drive is to be destroyed in accordance with the "NIST Guidelines for Media Sanitization" (Draft SP 800-88) or be securely erased by using either an NSA or DoD rated degausser, or by performing a DoD 5220.22-M wipe where data is overwritten using a three pass approach. If an agency is leasing Dell computers then it is suggested that the agency take advantage of the prepaid disk wipe service offered by Dell.

**2. Recycle Non-Functional Computers.** Wiped or degaussed hard drives that no longer contain Commonwealth data and chain of custody are not an issue. Hard drives already removed from the PCs can be destroyed or recycled by the agency, or packaged and sent to the DGS Recycling Office

**3. Surplus Functional Computers.** The DGS Bureau of Supplies and Surplus Operations can facilitate reutilization or sales of functional computers without hard drives. Consult the agency's Property Control Officer (PCO) to make online surplus system entries; to fill out an identification tag for the users' computers; and to arrange for transportation to DGS. User entries to the online system and physical identification tag are to indicate the type of hard drive, if any, and method used to remove data (i.e., ATA HD-Secure Erase, IDE HD - DoD 5220.22-M triple wipe, no HD, etc).

**4. Package/Palletize the Computer Equipment.** Agencies are to package the equipment for shipment. Wiped hard drives should be packaged separately. Please make arrangements for collection or delivery with the DGS Bureau of Supplies and Surplus at (717) 787-6159 Shipments to DGS Bureau of Supplies and Surplus are to also be suitably packaged and labeled

**5. Store in a Secure Location.** The equipment is to be stored in a secure location pending delivery or collection

## **II. Proper Return of State-Leased Computers**

**Note:** The Department of General Services (DGS) has issued the following state-wide Contract 4400002819 that includes information regarding disk wiping services provided by Dell: If the agency leases Dell equipment, it is suggested that the agency utilize this prepaid service. No value will be returned to the Commonwealth if this service is used for Commonwealth-owned computers.



**1. Degauss or Wipe the Hard Drive.** All data residing on a physical hard drive is to be securely erased using an NSA or DoD rated degausser or by performing a DoD 5220.22-M wipe where data is overwritten using a three pass approach. ***If an agency is leasing Dell computers, then it is currently required that the agency take advantage of the prepaid disk wipe service offered by Dell when returning leased Dell computers.***

**2. Return the leased Computer.** Once the drives have been securely erased, they can be reinserted back into the PC or laptop to be returned with the computer to the vendor/contractor as dictated by the leasing agreement.

**Note:** Be advised that if using the wiping method to securely erase data, then the status log is to be checked each time the process is completed to ensure that the entire disk wiping procedure finished successfully without any errors. Disk wiping is a time-consuming and labor-intensive process that demands high levels of quality control review by IT staff. The agency is fully responsible and liable for taking the necessary measures to ensure that data is securely erased.

### **III. Computers Owned by Contractors and Used on Behalf of the Commonwealth**

Contractor owned computers that are used to perform work for the Commonwealth are to be treated as confidential. Once a contractor has completed his/her engagement, all computer equipment utilized for the engagement is to be securely erased in accordance with the steps below. This can be done by the contractor, a Commonwealth employee or a third party, however, successful completion of this process is to be verified by a Commonwealth employee.

**1. Wipe the Hard Drive.** All data residing on a physical hard drive is to be wiped by performing a DOD 5220.22-M where data is overwritten using the three pass approach. ***Do not use a degausser for this scenario.*** Hard drives that are degaussed are not readily usable as they would require a low-level factory format in order to be reused.

**2. Re-image Hard Drive.** It is the responsibility of the contractor to re-image or manually reinstall the OS and software applications. The contractor is to be made aware of this policy before he begins an engagement with the Commonwealth.

### **IV. Reassignment of State-Owned PCs Between Employees of the Commonwealth**

**1. Wipe the Hard Drive.** All data residing on a physical hard drive is to be wiped by performing a DOD 5220.22-M wipe where data is overwritten using a

three pass approach. If an agency is leasing Dell computers then it is suggested that the agency take advantage of the prepaid disk wipe and image services offered by Dell. ***Do not use a degausser for this scenario.*** Hard drives that are degaussed are not readily usable as they would require a low-level factory format in order to be reused if they have not been damaged.

**2. Re-image Hard Drive.** Once the hard drive has been wiped, use a backup image such as a Norton Ghost image to reinstall the OS and software applications. It is necessary to wipe prior to re-imaging a computer because imaging does not overwrite the files and data contained in unused areas of a hard drive.

**Note:** Special cases may exist that do not warrant a DoD disk wipe upon reassignment of a computer between users of Commonwealth owned PCs. In such cases, a Commonwealth department manager has the discretion to determine and request that the wipe procedure not be utilized. By allowing special-case discretion to management, the Commonwealth will be able to promote business efficiency and prevent unnecessary work from being done, while at the same time, not compromising its ability to maintain the confidentiality of its sensitive and private data.

## **V. Failed Hard Drives and Devices**

Whether the equipment or device is state-owned, contractor-owned or leased, all hard drives or media that fail due to a physical malfunction are to be destroyed. If a contractor has a "Statement of Destroyed Materials" or similar policy/program, the agency will not be required to pay for the replacement of the destroyed hard drive. This policy recognizes that a drive contains confidential, sensitive data and cannot be returned. The contractor will credit the Commonwealth as if the drive had been returned.

## **VI. Multifunction Fax/Print/Scanner Devices**

Many multifunction devices now have a presence on the Commonwealth MAN and can contain storage media such as a hard drive. These devices are therefore subject to the same data cleansing policies as outlined above.

## **VII. DGS Equipment Handling**

Equipment delivered to, or collected by, DGS will be taken to a central storage location. At that point, equipment will be held until it is forwarded to the recycler, claimed by and shipped to another agency, or sold. Agencies may deliver non-functional equipment to the recycler by their own means via agency trucks or contracted movers, after they have conformed to the removal and/or

secure erase procedures as outlined above and remanded to DGS the Media Disposal Log mentioned above.

## 6. Responsibilities

Agencies are required to perform the actions outlined in this policy.

## 7. Related ITBs/Other References

## 8. Authority

- Executive Order 2011-05, Enterprise Information Technology Governance

## 9. Publication Version Control

It is the user's responsibility to ensure they have the latest version of this publication. Questions regarding this publication are to be directed to [ra-oaitb@pa.gov](mailto:ra-oaitb@pa.gov). Notifications will be issued from the subscription list on the [OA-ITB Alert Collaboration Site](#) for new versions.

Version	Date	Purpose of Revision
Original		Base Document
Revision	5/1/13	Includes all mobile devices, , rescinds ITB-SYM009.

# **EXHIBIT 4**

Applewhite, et al. v. Commonwealth, et al. -  
Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

Bates Begin	Bates End	Action	Date	From	To	CC	BCC	Document Type	Subject/Title	Privilege Reason(s)	Privilege Description	Privilege Narrative
PA-00084169	PA-00084171	Redact	3/14/2012	Phillip Bricknell	Kurt Myers, Scott Shen	Donald Smith, Terrance Edwards, Janet Dolan		Email	RE: Voter Affirmation	Attorney-client communication	Counsel providing legal analysis	Bricknell email providing legal analysis
PA-00085305	PA-00085309	Redact	5/31/2012	Sandra Ykema	Kari Kissinger, Robert Brackbill	Kimberly Rankin		Email	RE: Voter ID at Riddle Village	Attorney-client communication	Counsel providing legal opinion	Ykema email providing legal analysis and suggesting strategy
PA-00085305	PA-00085309	Redact	5/31/2012	Kari Kissinger	Sandra Ykema, Robert Brackbill	Kimberly Rankin		Email	RE: Voter ID at Riddle Village	Attorney-client communication	Client requesting legal advice	Kissinger email to Ykema requesting strategy and legal advice
PA-00090032	PA-00090034	Redact	8/16/2012	Shauna Clemmer	Megan Sweeney			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Counsel email to client requesting information to inform legal analysis and opinion	Clemmer email to Sweeney requesting information to inform legal analysis and opinion
PA-00090032	PA-00090034	Redact	8/16/2012	Puja Khare	Matthew McLees	Shauna Clemmer, Alison Taylor		Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Client email providing information and seeking counsel's legal advice, mental impressions	Khare email to McLees and Clemmer providing information and seeking counsel's mental impressions and legal analysis and opinion
PA-00090032	PA-00090034	Redact	8/16/2012	Puja Khare	Melia Belonus, Alison Taylor			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Client requesting counsel's legal opinion, mental impressions	Khare email to Taylor requesting Taylor's mental impressions and/or legal opinion
PA-00090032	PA-00090034	Redact	8/16/2012	Alison Taylor	Puja Khare			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Counsel providing legal opinion, mental impression	Taylor email in response to Khare request, providing mental impressions and/or legal opinion
PA-00091139	PA-00091140	Redact	9/10/2012	Kurt Myers	William Cressler, Donald Smith, Janet Dolan	Tracy Root		Email	FW: PennDOT Voter ID	Attorney-client communication; attorney work product	Client email seeking counsel's legal advice, mental impressions	Myers email to Cressler and Smith requesting legal analysis and mental impressions of letter received from party to litigation
PA-00091139	PA-00091140	Redact	9/10/2012	William Cressler	Andrew Cline			Email	Advancement Project demand (Marian Schneider)	Attorney work product	Internal discussion among counsel regarding client request	Email between counsel regarding client request for impressions and legal analysis regarding request received from party to litigation
PA-00091139	PA-00091140	Redact	9/10/2012	Andrew Cline	Jarad Handelman, Gregory Dunlap, Kevin Schmidt			Email	FW: Advancement Project demand (Marian Schneider)	Attorney work product	Internal discussion among counsel regarding client request	Email among counsel regarding client request for impressions and legal analysis regarding request received from party to litigation
PA-00091139	PA-00091140	Redact	9/10/2012	Gregory Dunlap	Steven Turner			Email	FW: Advancement Project demand (Marian Schneider)	Attorney work product	Internal discussion among counsel regarding client request	Email between counsel regarding client request for impressions and legal analysis regarding request received from party to litigation
PA-00091139	PA-00091140	Redact	9/11/2012	Steven Turner	Kathleen Kotula, Shauna Clemmer, Caroline Bailey			Email	FW: Advancement Project demand (Marian Schneider)	Attorney work product	Internal discussion among counsel regarding client request	Email among counsel regarding client request for impressions and legal analysis regarding request received from party to litigation
PA-00091144	PA-00091145	Redact	9/18/2012	Gregory Dunlap	James Schultz, Andrew Cline, Jarad Handelman, Kevin Schmidt, Steven Turner, Kathleen Kotula, Shauna Clemmer			Email	Applewhite	Attorney work product	Internal discussion among counsel regarding pending litigation	Email among counsel regarding status of pending litigation
PA-00091144	PA-00091145	Redact	9/18/2012	Alfred Putnam	Gregory Dunlap			Email	FW: 71 MAP 2012 (Order & 2 dissenting statements)	Attorney work product	Discussion between counsel regarding pending litigation	Email between counsel regarding status of pending litigation

*Applewhite, et al. v. Commonwealth, et al. -*  
 Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00091190	PA-00091191	Redact	8/9/2012	Karen Cummings	Shannon Royer, Ronald Ruman, Nicholas Winkler, Megan Sweeney, Kathleen Kotula, Shauna Clemmer, Ian Harlow, Jonathan Marks	Steven Turner, Heidi Barry		Email	FW: RTKL Request: Judicial Watch, Inc. No. 2012-307	Attorney-client communication	Email from counsel requesting material from client to inform legal analysis, opinion	Cummings email to client requesting information from client to inform legal analysis and opinion
PA-00092182	PA-00092183	Withhold	7/16/2012	Kathleen Kotula	Shannon Royer, David Burgess, Rebecca Oyler, Megan Sweeney, Jonathan Marks, Timothy Ruppert	Steven Turner, Shauna Clemmer, Caroline Bailey		Email	DOS ID Meeting	Attorney-client communication	Email from counsel attaching document reflecting attorney-work product and establishing agenda for client meeting	Kotula email to client providing document reflecting attorney work product and advising client of issues to discuss at upcoming meeting
PA-00092184	PA-00092184	Withhold	7/16/2012	Kathleen Kotula	Shannon Royer, David Burgess, Rebecca Oyler, Megan Sweeney, Jonathan Marks, Timothy Ruppert	Steven Turner, Shauna Clemmer, Caroline Bailey		Word document	DOS ID Meeting	Attorney work product	Document reflecting attorney work product and attached to communication with client	Document reflecting attorney work product as noted in Kotula email to client
PA-00092186	PA-00092186	Withhold	6/21/2012	Shauna Clemmer	Kurt Myers, Janet Dolan, Scott Shenk, Donald Smith	Shannon Royer, David Burgess, Jonathan Marks, Rebecca Oyler, Ian Harlow, Megan Sweeney, Kathleen Kotula		Email	DOS ID Mock Up	Attorney-client communication	Email from counsel attaching document reflecting attorney work product and reflecting communications among counsel and clients	Clemmer email to client providing document reflecting attorney work product and communications among counsel and clients
PA-00092187	PA-00092187	Withhold	6/22/2012	Shauna Clemmer	Kurt Myers, Janet Dolan, Scott Shenk, Donald Smith	Shannon Royer, David Burgess, Jonathan Marks, Rebecca Oyler, Ian Harlow, Megan Sweeney, Kathleen Kotula		PDF	DOS ID Mock Up	Attorney work product	Document reflecting attorney work product and attached to communication with client	Document reflecting attorney work product as noted in Clemmer email to client
PA-00092188	PA-00092190	Withhold	7/20/2012	Shauna Clemmer	Jonathan Marks, Rebecca Oyler	Kathleen Kotula		Email	DOS ID Name Change and Exceptions	Attorney-client communication; attorney work product	Email from counsel to client reflecting counsel discussions with client and requesting information from client	Clemmer email to client reflecting attorney work product, memorializing communication with client, and seeking information from client to inform attorney mental impressions
PA-00092371	PA-00092372	Redact	8/8/2012	Megan Sweeney	Shauna Clemmer, Jonathan Marks			Email	DOS ID FAQ	Attorney-client communication	Email from client to counsel requesting mental impressions and legal opinion and analysis	Sweeney email to Clemmer seeking Clemmer mental impressions and legal opinion and advice
PA-00092371	PA-00092372	Redact	8/8/2012	Shauna Clemmer	Jonathan Marks, Megan Sweeney			Email	RE: DOS ID FAQ	Attorney-client communication; attorney work product	Email from counsel to client providing legal advice and opinion and mental impressions	Clemmer email in response to Sweeney request providing mental impressions and legal opinion and analysis

*Applewhite, et al. v. Commonwealth, et al.* -  
 Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00092373	PA-00092374	Withhold	8/8/2012	Shauna Clemmer				Word document	DOS ID FAQ	Attorney work product	Document reflecting attorney work product and attached to communication with client	Document reflecting attorney work product as noted in Clemmer email to client
PA-00092375	PA-00092377	Withhold	7/23/2012	Shauna Clemmer	Jonathan Marks, Rebecca Oylar	Kathleen Kotula		Email	RE: DOS ID Name Change and Exceptions	Attorney-client communication; attorney work product	Email from counsel to client reflecting counsel discussions with client and requesting information from client	Clemmer email to client reflecting attorney work product and memorializing communication with client
PA-00092401	PA-00092401	Withhold	7/11/2012	Judith Holjes	Shauna Ckemmer, Kathleen Kotula	Jonathan Marks		Email	DRAFT...Question from County-Shared Response No. 11	Attorney-client communication	Email to counsel requesting mental impressions and legal advice and opinion	Holjes email to Clemmer and Kotula seeking mental impressions and legal analysis and opinion
PA-00092401	PA-00092401	Withhold	7/11/2012	Kathleen Kotula	Judith Holjes, Shauna Clemmer	Jonathan Marks		Email	RE: DRAFT...Question from County-Shared Response No. 11	Attorney-client communication	Email from counsel to client providing legal advice and opinion and mental impressions	Kotula email in response to Holjes request providing mental impressions and legal opinion and analysis
PA-00092469	PA-00092469	Redact	8/16/2012	Kathleen Kotula	Jonathan Marks, Shannon Royer, Nicholas Winkler	Megan Sweeney, Rebecca Oylar, Shauna Clemmer, Judith Holjes, Jessica Mathis, Suzanne Seitz		Email	RE: Poll Worker Guide	Attorney-client communication	Email from counsel to client providing legal advice and opinion and mental impressions	Kotula email providing mental impressions and legal opinion and analysis
PA-00092511	PA-00092512	Withhold	8/2/2012	Several senders	Several recipients	Kathleen Kotula		Emails	Provisional Ballot Affirmation	Attorney-client communication; attorney work product	Email from counsel to client providing attorney work product for client review and comment; and from client to counsel providing comments on attorney work product and requesting mental impressions and legal opinion and analysis	Emails among counsel and clients discussing attorney work product and communicating mental impressions and legal analysis
PA-00092513	PA-00092514	Withhold	8/2/2012	Shauna Clemmer				Word document	Affirmation that Voter is Indigent and Voted Provisionally on Election Day	Attorney work product	Document reflecting attorney work product and attached to communication with client	Document reflecting attorney work product as noted in Clemmer email to client
PA-00092515	PA-00092515	Withhold	8/2/2012	Shauna Clemmer				Word document	Affirmation that Voter is Indigent and Voted Provisionally on Election Day	Attorney work product	Document reflecting attorney work product and attached to communication with client	Document reflecting attorney work product as noted in Clemmer email to client
PA-00092519	PA-00092520	Redact	8/8/2012	Judith Holjes	Shauna Clemmer	Jonathan Marks, Ian Harlow, Jessica Mathis, Suzanne Seitz		Email	Question from Phila. County	Attorney-client communication	Email to counsel requesting mental impressions and legal analysis and opinion	Holjes email to Clemmer seeking mental impressions and legal analysis and opinion
PA-00092519	PA-00092520	Redact	8/8/2012	Shauna Clemmer	Jonathan Marks, Judith Holjes	Ian Harlow, Jessica Mathis, Suzanne Seitz		Email	RE: Question from Phila. County	Attorney-client communication	Email from counsel providing mental impressions and legal analysis and opinion	Clemmer email to Holjes et al. providing mental impressions and legal analysis and opinion
PA-00093138	PA-00093138	Withhold	8/1/2012	Patrick Cawley	Jonathan Marks, Kathleen Kotula, Shauna Clemmer	William Cressler, Donald Smith		Email	DOS ID Card Request Form	Attorney-client communication	Email from counsel to client requesting information	Cawley email to client and other counsel requesting information
PA-00093139	PA-00093140	Withhold	8/1/2012	William Cressler	Kathleen Kotula	Steven Turner, Shauna Clemmer		Emails	DOS ID Card Request Form	Attorney-client communications; attorney work product	Series of emails regarding counsel request for information and discussion of legal strategy	Cressler, Kotula emails regarding counsel's request for information and internal discussion of legal strategy

*Applewhite, et al. v. Commonwealth, et al. -*  
 Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00093208	PA-00093209	Withhold	8/1/2012	Kathleen Kotula	William Cressler	Steven Turner, Shauna Clemmer		Emails	RE: DOS ID Card Request Form	Attorney-client communications; attorney work product	Series of emails regarding counsel request for information and discussion of legal strategy	Cressler, Kotula emails regarding counsel's request for information and internal discussion of legal strategy
PA-00094233	PA-00094234	Withhold	9/19/2012	Karen Cummings	Rodney Akers	Dana Wellner, Julie Snader, Karen Weiss		Emails	FW: Request for Approval 2012.doc	Attorney-client communications; attorney work product	Series of emails regarding retention of outside counsel	Cummings email to other counsel regarding retention of outside counsel for ongoing litigation
PA-00094235	PA-00094238	Withhold	9/13/2012	Steven Turner	Andrew Cline, Rodney Akers	Dana Wellner		Word document	Request for Approval 2012	Attorney-client communications; attorney work product	Request for approval of retention of outside counsel	Request for approval to retain outside counsel for ongoing litigation
PA-00095190	PA-00095191	Withhold	7/16/2012	Kathleen Kotula	Shannon Royer, David Burgess, Rebecca Oyler, Megan Sweeney, Jonathan Marks, Timothy Ruppert	Steven Turner, Shauna Clemmer, Caroline Bailey		Email	DOS ID Meeting	Attorney-client communication	Email from counsel attaching document reflecting attorney work product and establishing agenda for client meeting	Kotula email to client providing document reflecting attorney work product and advising client of issues to discuss at upcoming meeting
PA-00095192	PA-00095192	Withhold	7/16/2012	Kathleen Kotula	Shannon Royer, David Burgess, Rebecca Oyler, Megan Sweeney, Jonathan Marks, Timothy Ruppert	Steven Turner, Shauna Clemmer, Caroline Bailey		Word document	DOS ID Meeting	Attorney work product	Document reflecting attorney work product and attached to communication with client	Document reflecting attorney work product as noted in Kotula email to client
PA-00095312	PA-00095313	Redact	7/16/2012	Kathleen Kotula	Shannon Royer, David Burgess, Rebecca Oyler, Megan Sweeney, Jonathan Marks, Timothy Ruppert	Steven Turner, Shauna Clemmer, Caroline Bailey		Email	DOS ID Meeting	Attorney-client communication	Email from counsel attaching document reflecting attorney work product and establishing agenda for client meeting	Kotula email to client providing document reflecting attorney work product and advising client of issues to discuss at upcoming meeting
PA-00095314	PA-00095314	Withhold	7/16/2012	Kathleen Kotula	Shannon Royer, David Burgess, Rebecca Oyler, Megan Sweeney, Jonathan Marks, Timothy Ruppert	Steven Turner, Shauna Clemmer, Caroline Bailey		Word document	DOS ID Meeting	Attorney work product	Document reflecting attorney work product and attached to communication with client	Document reflecting attorney work product as noted in Kotula email to client
PA-00095391	PA-00095392	Withhold	9/19/2012	Steven Turner	Many recipients			Email	FW: Email for Executive Office, Policy Office, Legislative Office, Chief Counsel Office, Press Office, and BFO	Attorney-client communication; attorney work product	Email from counsel to client regarding pending litigation	Turner email to several client employees regarding pending litigation
PA-00095999	PA-00095999	Redact	8/16/2012	Kathleen Kotula	Jonathan Marks, Shannon Royer, Nicholas Winkler	Megan Sweeney, Rebecca Oyler, Shauna Clemmer, Judith Holjes, Jessica Mathis, Suzanne Seitz		Email	RE: Poll Worker Guide	Attorney-client communication	Email from counsel to client providing legal advice and opinion and mental impressions	Kotula email providing mental impressions and legal opinion and analysis
PA-00096657	PA-00096662	Redact	8/20/2012	Megan Sweeney	Shannon Royer			Memorandum	Voter ID Report: August 13, 2012 through August 17, 2012	Attorney-client communication; attorney work product	Memorandum passing along legal advice and opinion received from counsel	Sweeney memorandum to Royer informing Royer of advice and opinion received from counsel; redact first sentence of first bullet point, first sentence of third bullet point on page 3



*Applewhite, et al. v. Commonwealth, et al. -*  
 Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00096937	PA-00096942	Redact	8/6/2012	Megan Sweeney	Shannon Royer			Memorandum	Voter ID Report: July 30, 2012 through August 3, 2012	Attorney-client communication; attorney work product	Memorandum passing along legal advice and opinion received from counsel	Sweeney memorandum to Royer informing Royer of advice and opinion received from counsel; redact first sentence of first bullet point, first sentence of second bullet point on page 3
PA-00097515	PA-00097516	Withhold	8/1/2012	Kathleen Kotula	William Cressler	Steven Turner, Shauna Clemmer		Emails	RE: DOS ID Card Request Form	Attorney-client communications; attorney work product	Series of emails regarding counsel request for information and discussion of legal strategy	Cressler, Kotula emails regarding counsel's request for information and internal discussion of legal strategy
PA-00098324	PA-00098338	Withhold	8/14/2012	Many senders	Many recipients			Emails	FW: Edits to Agreement	Attorney-client communications; attorney work product	Series of emails discussing legal strategy for pending litigation	Various counsel emails discussing strategy for pending litigation
PA-00098339	PA-00098341	Withhold	8/14/2012	Many senders	Many recipients			Word document	Stipulation & Order	Attorney work product	Draft document incorporating counsel's work product	Draft document attached to preceding email incorporating counsel's work product in pending litigation
PA-00098342	PA-00098362	Withhold	8/14/2012	Many senders	Many recipients			Word document	Settlement Agreement	Attorney work product	Draft document incorporating counsel's work product	Draft document attached to preceding email incorporating counsel's work product in pending litigation
PA-00098363	PA-00098382	Withhold	8/14/2012	Many senders	Many recipients			Word document	Settlement Agreement	Attorney work product	Draft document incorporating counsel's work product	Draft document attached to preceding email incorporating counsel's work product in pending litigation
PA-00098383	PA-00098384	Withhold	9/19/2012	Steven Turner	Many recipients			Email	FW: Email for Executive Office, Policy Office, Legislative Office, Chief Counsel Office, Press Office, and BFO	Attorney-client communication; attorney work product	Email from counsel to client regarding pending litigation	Turner email to several client employees regarding pending litigation
PA-00100488	PA-00100488	Withhold	7/13/2012	Karen Cummings	Nicholas Winkler, Ronald Ruman	Christopher Wolf, Heidi Barry, Steven Turner		Email	Community Outreach and PR Proposals	Attorney-client communication, attorney work product	Email from counsel to client regarding attorney work product revealing mental impressions	Cummings email to client and other counsel providing mental impressions and legal opinion and analysis
PA-00100488	PA-00100488	Withhold	7/27/2012	Christopher Wolf	Ronald Ruman			Email	FW: Community Outreach and PR Proposals	Attorney-client communication, attorney work product	Email forwarding counsel's mental impressions and work product	Email forwarding preceding email reflecting counsel's mental impressions and legal opinion and analysis
PA-00100498	PA-00100498	Redact	9/11/2012	Christopher Wolf	Karen Cummings, Julie Snader			Email	FW: RFQ	Attorney-client communication	Email forwarding information to counsel for preparing for contract negotiations	Client email to Cummings forwarding information necessary for counsel to participate in contract negotiations
PA-00100565	PA-00100566	Redact	7/30/2012	Christopher Wolf	Karen Cummings			Email	FW: RFQ 2012-4 - 2012 GENERAL ELECTION VOTER EDUCATION MEDICA CAMPAIGN - CREATIVE ADVERTISING - Non-Award Letter	Attorney-client communication	Email to counsel requesting legal advice and opinion	Wolf email to Cummings requesting legal advice and opinion

Applewhite, et al. v. Commonwealth, et al. -  
Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00100565	PA-00100566	Redact	7/30/2012	Karen Cummings	Christopher Wolf			Email	RE: RFQ 2012-4 - 2012 GENERAL ELECTION VOTER EDUCATION MEDICA CAMPAIGN - CREATIVE ADVERTISING - Non-Award Letter	Attorney-client communication	Email from counsel providing legal advice and opinion	Cummings response to Wolf request providing legal advice and opinion
PA-00101934	PA-00101938	Redact	7/16/2012	Stephen Aichele	Carol Aichele			Email	FW: News clips - July 16	Attorney-client communication	Email from counsel to client regarding mental impressions and legal analysis and opinions	Aichele email to Aichele providing information, mental impressions, and legal analysis and opinions
PA-00101971	PA-00101972	Withhold	8/15/2012	Heidi Barry	Many recipients	Gregory Dunlap, Robert Ayers, Patrick Striggle, Meredith Klinger, Timothy Ruppert		Email	Litigation Hold - Applewhite	Attorney-client communication; attorney work product	Email from counsel to client providing legal advice and opinion and mental impressions	Email to several client employees providing legal advice and opinion and mental impressions
PA-00105899	PA-00105901	Redact	8/16/2012	Shauna Clemmer	Megan Sweeney			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Counsel email to client requesting information to inform legal analysis and opinion	Clemmer email to Sweeney requesting information to inform legal analysis and opinion
PA-00105899	PA-00105901	Redact	8/16/2012	Puja Khare	Matthew McLees	Shauna Clemmer, Alison Taylor		Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Client email providing information and seeking counsel's legal advice, mental impressions	Khare email to McLees and Clemmer providing information and seeking counsel's mental impressions and legal analysis and opinion
PA-00105899	PA-00105901	Redact	8/16/2012	Puja Khare	Melia Belonus, Alison Taylor			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Client requesting attorneys' legal opinion, mental impressions	Khare email to Taylor requesting Taylor's mental impressions and/or legal opinion
PA-00105899	PA-00105901	Redact	8/16/2012	Alison Taylor	Puja Khare			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Attorney providing legal opinion, mental impression	Taylor email in response to Khare request, providing mental impressions and/or legal opinion
PA-00106037	PA-00106039	Redact	8/24/2012	Kathleen Kotula	Megan Sweeney			Emails	RE: Voter ID Awareness	Attorney-client communication	Series of emails between counsel and client seeking and providing mental impressions and legal analysis and opinion	Series of 3 emails from Sweeney to Kotula, and from Kotula to Sweeney, requesting and providing counsel's mental impressions and legal analysis and opinion
PA-00108289	PA-00108291	Redact	8/16/2012	Shauna Clemmer	Megan Sweeney			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Counsel email to client requesting information to inform legal analysis and opinion	Clemmer email to Sweeney requesting information to inform legal analysis and opinion
PA-00108289	PA-00108291	Redact	8/16/2012	Puja Khare	Matthew McLees	Shauna Clemmer, Alison Taylor		Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Client email providing information and seeking counsel's legal advice, mental impressions	Khare email to McLees and Clemmer providing information and seeking counsel's mental impressions and legal analysis and opinion
PA-00108289	PA-00108291	Redact	8/16/2012	Puja Khare	Melia Belonus, Alison Taylor			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Client requesting attorneys' legal opinion, mental impressions	Khare email to Taylor requesting Taylor's mental impressions and/or legal opinion
PA-00108289	PA-00108291	Redact	8/16/2012	Alison Taylor	Puja Khare			Email	FW: Voice mail: 53 sec. (MID=333475)	Attorney-client communication	Attorney providing legal opinion, mental impression	Taylor email in response to Khare request, providing mental impressions and/or legal opinion

*Applewhite, et al. v. Commonwealth, et al.* -  
 Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00111491	PA-00111505	Withhold	8/14/2012	Many senders	Many recipients			Emails	FW: Edits to Agreement	Attorney-client communications; attorney work product	Series of emails discussing legal strategy for pending litigation	Various counsel emails discussing strategy for pending litigation
PA-00111506	PA-00111508	Withhold	8/14/2012	Many senders	Many recipients			Word document	Stipulation & Order	Attorney work product	Draft document incorporating counsel's work product	Draft document attached to preceding email incorporating counsel's work product in pending litigation
PA-00111509	PA-00111529	Withhold	8/14/2012	Many senders	Many recipients			Word document	Settlement Agreement	Attorney work product	Draft document incorporating counsel's work product	Draft document attached to preceding email incorporating counsel's work product in pending litigation
PA-00111530	PA-00111549	Withhold	8/14/2012	Many senders	Many recipients			Word document	Settlement Agreement	Attorney work product	Draft document incorporating counsel's work product	Draft document attached to preceding email incorporating counsel's work product in pending litigation
PA-00111550	PA-00111551	Withhold	9/19/2012	Steven Turner	Many recipients			Email	FW: Email for Executive Office, Policy Office, Legislative Office, Chief Counsel Office, Press Office, and BFO	Attorney-client communication; attorney work product	Email from counsel to client regarding pending litigation	Turner email to several client employees regarding pending litigation
PA-00111649	PA-00111655	Redact	9/5/12-9/11/12	Several senders	Several recipients			Emails	FW: Response to Mayor Nutter letter	Attorney-client communication; attorney work product	Emails among counsel and clients regarding attorney work product	Emails among counsel and clients discussing attorney work product and communicating mental impressions and legal analysis
PA-00111656	PA-00111659	Withhold	9/12/2012	Several senders	Several recipients			Word document	Draft letter to Mayor Nutter, 9.12.2012	Attorney work product	Attachment to emails among counsel and clients reflecting attorney work product	Attachment to preceding email reflecting attorney work product
PA-00112929	PA-00112930	Redact	9/24/2012	Kathleen Kotula	Tait Harbaugh	Nicholas Winkler, Shauna Clemmer, Caroline Bailey		Email	Doc	Attorney-client communication; attorney work product	Email from client to counsel providing mental impressions and legal analysis and opinion	Kotula email to client and other counsel reflecting proposed strategy and providing mental impressions and legal analysis and opinion
PA-00112929	PA-00112930	Redact	9/24/2012	Kathleen Kotula	Jonathan Marks			Email	FW: Doc	Attorney-client communication; attorney work product	Email from client to counsel providing mental impressions and legal analysis and opinion	Kotula email to client and other counsel reflecting proposed strategy and providing mental impressions and legal analysis and opinion
PA-00119532	PA-00119534	Redact	9/24/2012	Kathleen Kotula	Tait Harbaugh	Nicholas Winkler, Shauna Clemmer, Caroline Bailey		Email	Doc	Attorney-client communication; attorney work product	Email from client to counsel providing mental impressions and legal analysis and opinion	Kotula email to client and other counsel reflecting proposed strategy and providing mental impressions and legal analysis and opinion
PA-00119532	PA-00119534	Redact	9/24/2012	Kathleen Kotula	Jonathan Marks			Email	FW: Doc	Attorney-client communication; attorney work product	Email from client to counsel providing mental impressions and legal analysis and opinion	Kotula email to client and other counsel reflecting proposed strategy and providing mental impressions and legal analysis and opinion
PA-00120561	PA-00120561	Redact	10/5/2012	Judy Keefer	Matthew Whittaker	Chris Miller		Email	Phone Call	Personal identifiers	Document contains personal information about PennDOT customer	Redact customer's personal information

*Applewhite, et al. v. Commonwealth, et al.* -  
 Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00122633	PA-00122634	Withhold	9/21/2012	Several senders	Several recipients				Emails	VotesPA	Attorney-client communication; attorney work product	Emails among counsel and clients regarding attorney work product, ongoing litigation, and strategy	Kotula email and client responses regarding attorney work product, ongoing litigation, and strategy
PA-00122635	PA-00122635	Withhold	9/21/2012	Several senders	Several recipients				Emails	VotesPA	Attorney-client communication; attorney work product	Emails among counsel and clients regarding attorney work product, ongoing litigation, and strategy	Kotula email and client responses regarding attorney work product, ongoing litigation, and strategy
PA-00122636	PA-00122637	Withhold	9/21/2012	Several senders	Several recipients				Emails	VotesPA	Attorney-client communication; attorney work product	Emails among counsel and clients regarding attorney work product, ongoing litigation, and strategy	Kotula email and client responses regarding attorney work product, ongoing litigation, and strategy
PA-00127966	PA-00127966	Withhold	1/24/2013	Kathleen Kotula	Toni Goril	David Burgess, Jonathan Marks, Ian Harlow, Caroline Bailey, Heidi Barry			Email	SURE Help Desk - DOS ID Process	Attorney-client communication; attorney work product	Email from counsel to client regarding pending litigation	Kotula email to several client employees regarding pending litigation
PA-00128379	PA-00128379	Withhold	4/9/2013	Kathleen Kotula	Jonathan Marks, Ian Harlow, Jessica Mathis	Kathleen Kotula, Caoline Bailey, Heidi Barry			Email	Voter ID Discovery - BCEL's To Do List	Attorney-client communication; attorney work product	Email from counsel to client regarding pending litigation	Kotula email to several client employees regarding pending litigation
PA-00128379	PA-00128379	Withhold	4/9/2013	Ian Harlow	Kathleen Kotula, Jonathan Marks, Jessica Mathis	Caroline Bailey, Heidi Barry			Email	RE: Voter ID Discovery - BCEL's To Do List	Attorney-client communication; attorney work product	Email from client to counsel regarding pending litigation	Harlow email to Kotula regarding pending litigation
PA-00128557	PA-00128559	Withhold	4/9/13-4/10/13	Several senders	Several recipients				Emails	RE: Voter ID Discovery - BCEL's To Do List	Attorney-client communication; attorney work product	Emails among counsel and clients regarding pending litigation	Email among counsel and clients in response to Kotula email regarding pending litigation
PA-00129374	PA-00129374	Redact	4/15/2013	Rebecca Oyler	Kathleen Kotula				Email	FW:	Attorney-client communication; attorney work product	Email from client to counsel regarding pending litigation	Oyler email to Kotula regarding pending litigation
PA-00129377	PA-00129378	Redact	9/14/2012	Megan Sweeney	Shannon Royer, Steven Turner, Kathleen Kotula, Shauna Clemmer, Rebecca Oyler				Email	Lackawanna County	Attorney-client communication	Email from client to counsel requesting mental impressions and legal opinion and analysis	Sweeney email to Turner et al. seeking counsel's mental impressions and legal opinion and analysis
PA-00129377	PA-00129378	Redact	9/14/2012	Kathleen Kotula	Megan Sweeney, Shannon Royer, Steven Turner, Shauna Clemmer, Rebecca Oyler	Caroline Bailey			Email	RE: Lackawanna County	Attorney-client communication	Email from counsel to client providing mental impressions and legal opinion and analysis	Kotula email to Sweeney et al. providing counsel's mental impressions and legal analysis and opinion
PA-00129377	PA-00129378	Redact	9/21/2012	Megan Sweeney	Ronald Ruman				Email	FW: Lackawanna County	Attorney-client communication	Email between client employees passing on counsel's mental impressions and legal analysis and opinion	Sweeney email to Ruman passing along Kotula email providing counsel's mental impressions and legal analysis and opinion
PA-00129381	PA-00129381	Redact	4/15/2013	Rebecca Oyler	Kathleen Kotula				Email	FW: Research	Attorney-client communication; attorney work product	Email from client to counsel regarding pending litigation	Oyler email to Kotula regarding pending litigation
PA-00129387	PA-00129389	Redact	4/15/2013	Rebecca Oyler	Kathleen Kotula				Email	FW: Voter ID Locations	Attorney-client communication; attorney work product	Email from client to counsel regarding pending litigation	Oyler email to Kotula regarding pending litigation
PA-00129392	PA-00129392	Redact	4/15/2013	Rebecca Oyler	Kathleen Kotula				Email	FW:	Attorney-client communication; attorney work product	Email from client to counsel regarding pending litigation	Oyler email to Kotula regarding pending litigation

*Applewhite, et al. v. Commonwealth, et al.* -  
 Respondents' Privilege Log in Response to 7.04.2013 Petitioners' Request

PA-00129399	PA-00129399	Redact	4/15/2013	Rebecca Oyler	Kathleen Kotula			Email	FW: research	Attorney-client communication; attorney work product	Email from client to counsel regarding pending litigation	Oyler email to Kotula regarding pending litigation
PA-00129405	PA-00129407	Redact	4/15/2013	Rebecca Oyler	Kathleen Kotula			Email	FW: Voter ID Locations	Attorney-client communication; attorney work product	Email from client to counsel regarding pending litigation	Oyler email to Kotula regarding pending litigation

### Respondents' Privilege Log for Petitioners' Designated Trial Exhibits

Exhibit No.	Action	Date	To	From	CC	BCC	Document Type	Subject/Title	Privilege Reason(s)	Privilege Description	Privilege Narrative
1062	Withhold	April 17, 2012	Shannon Royer, Rebecca Oyler, Megan Sweeney, <b>Kathleen Kotula, Shauna Clemmer</b>	Jonathan Marks	<b>Steven V. Turner</b> , Ian Harlow		Email	Voter ID reply to Stephanie Singer	Attorney-Client Communication	Client communication to attorney seeking counsel's mental impression and opinion	Marks email to counsel (Kotula, Clemmer, and Turner) seeking counsel's mental impressions and opinions on proposed response to Philadelphia City Commissioner
1132	Redact	May 16, 2011					Memo	Legislative Bill Analysis	Attorney-Client Communication	Discloses attorney mental impressions and opinions	Memo on pending legislative bill reflects counsel's legal analysis, except for Section 1 which reflects agency's recommended position
1140	Redact	March 22, 2012	Rebecca Oyler, Shannon Royer, <b>Shauna Clemmer</b> , Jonathan Marks, Ian Harlow, Megan Sweeney, Ronald Ruman, Nicholas Winkler, Lindsey Hock, Jessica Mathis	<b>Kathleen Kotula</b>	Patrick Geho, Mitchell Weglos		Email	RE: Voter ID	Attorney-Client Communication	Attorney communication to client and client's employees offering counsel's mental impression, legal analysis, and opinion	Kotula email in response to email from client's employee; Kotula provides mental impression, analysis, and opinion in response to issues raised by third party and directed to client

Exhibit No.	Action	Date	To	From	CC	BCC	Document Type	Subject/Title	Privilege Reason(s)	Privilege Description	Privilege Narrative
1157	Redact	April 18, 2012	Shannon Royer, Jonathan Marks, <b>Kathleen Kotula, Shauna Clemmer</b>	Ronald Ruman			Email	FW: News conference	Attorney-Client Communication	Client communication to attorney seeking counsel's mental impression and opinion	Ruman email to counsel (Kotula and Clemmer) seeking counsel's advice and opinion
1164	Redact	April 18, 2012	Shannon Royer, <b>Kathleen Kotula</b>	Kurt Myers	Rebecca Oyler, Cindy Cashman, Patrick Geho, Paul Gnazzo, Janet Dolan, <b>Donald Smith,</b> Joseph Murzyn		Email	FW: Another Voter ID question	Attorney-Client Communication	Communication to counsel requesting counsel to take action	Myers email to counsel (Kotula and Smith) requesting counsel to provide legal services
1164	Redact	April 18, 2012	Rebecca Oyler, Patrick Geho, <b>Donald Smith,</b> Janet Dolan	Cindy Cashman	Joseph Murzyn, Paul Gnazzo, Kurt Myers		Email	FW: Another Voter ID question	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Cashman email to counsel (Smith) seeking counsel's advice and opinion
1217	Redact	April 18, 2012	<b>Shauna Clemmer, Kathleen Kotula,</b> Shannon Royer	Rebecca Oyler	Patrick Sweeney, Patrick Geho		Email	FW: Another Voter ID question	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Oyler email to counsel (Kotula and Clemmer) seeking advice on course of action
1217	Redact	April 18, 2012	Rebecca Oyler, Patrick Geho, <b>Donald Smith,</b> Janet Dolan	Cindy Cashman	Joseph Murzyn, Paul Gnazzo, Kurt Myers		Email	FW: Another Voter ID question	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Cashman email to counsel (Smith) seeking counsel's advice and opinion

Exhibit No.	Action	Date	To	From	CC	BCC	Document Type	Subject/Title	Privilege Reason(s)	Privilege Description	Privilege Narrative
1221	Withhold	May 1, 2012	Shannon Royer, David Burgess, Toni Goril, Rebecca Oyler, <b>Kathleen Kotula, Shauna Clemmer, Jonathan Marks</b>	Megan Sweeney			Email	Voter ID Provisional Ballot Question	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Marks email to counsel (Kotula and Clemmer) seeking counsel's mental impressions and opinions on proposed response to external inquiry
1227	Withhold	March 19, 2012	Shannon Royer, Ronald Ruman	<b>Kathleen Kotula</b>	Nicholas Winkler, Rebecca Oyler, <b>Shauna Clemmer, Steven Turner, Jonathan Marks</b>		Email	Name Changes	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion, and attorney response	Royer email to counsel (Kotula) seeking mental impressions, analysis, and opinion, and Kotula email in response including additional counsel (Turner and Clemmer)
1331	Withhold	August 28, 2012	Jonathan Marks, <b>Kathleen Kotula, Shauna Clemmer</b>	Rebecca Oyler			Email	New DOS ID Verification Grid	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Oyler email to counsel (Kotula and Clemmer) seeking mental impressions, analysis, and opinion
1332	Redact	September 7, 2012	<b>Shauna Clemmer</b>	Ian Harlow			Email	FW: PA-Born Voters and the new DOS ID	Attorney-Client Communication	Communication to counsel for counsel's information	Harlow email to counsel (Clemmer) providing information to counsel regarding ongoing matter



Exhibit No.	Action	Date	To	From	CC	BCC	Document Type	Subject/Title	Privilege Reason(s)	Privilege Description	Privilege Narrative
1343	Redact	July 30, 2012	<b>Kathleen Kotula</b>	<b>Megan Sweeney</b>			Email	RE: Homeless Voter ID Question	Attorney-Client Communication	Communication to counsel seeking counsel's mental impressions and opinion	Sweeney email to counsel (Kotula) seeking mental impressions, analysis, and opinion
1343	Redact	July 30, 2012	Megan Sweeney	<b>Kathleen Kotula</b>	Jonathan Marks		Email	RE: Homeless Voter ID Question	Attorney-Client Communication	Communication from counsel providing counsel's mental impressions and opinion	Email from counsel (Kotula) providing mental impressions, analysis, and opinion
1343	Redact	July 30, 2012	<b>Kathleen Kotula</b> , Megan Sweeney	Jonathan Marks			Email	RE: Homeless Voter ID Question	Attorney-Client Communication	Communication forwarding counsel's advice	Marks email communicating and relying on advice from counsel (Kotula)
1351	Redact	August 14, 2012	Shannon Royer, <b>Kathleen Kotula</b> , <b>Sauna Clemmer</b>	Jonathan Marks	<b>Caroline Bailey</b>		Email	FW: Voter ID	Attorney-client Communication	Communication to counsel seeking counsel's mental impressions and opinion	Marks email to counsel (Kotula, Clemmer, and Bailey) offering client's impressions and seeking counsel's mental impressions, analysis, and opinion
1351	Redact	August 16, 2012	Jonathan Marks, Shannon Royer, <b>Sauna Clemmer</b>	<b>Kathleen Kotula</b>	<b>Caroline Bailey</b>		Email	RE: Voter ID	Attorney-client Communication	Counsel response to request for mental impression, analysis, and opinion	Email from counsel (Kotula) providing mental impressions, analysis, or opinion

Exhibit No.	Action	Date	To	From	CC	BCC	Document Type	Subject/Title	Privilege Reason(s)	Privilege Description	Privilege Narrative
1363	Redact	August 23, 2012	Shannon Royer, Jonathan Marks, Megan Sweeney, Ian Harlow, Toni Goril, Courtney Wolpert, <b>Shauna Clemmer, Kathleen Kotula</b> , Randy Trutt	David Burgess			Email	DOS ID Card Verification Types	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Burgess email to counsel (Kotula and Clemmer) seeking mental impressions, analysis, and opinion
1363	Redact	August 23, 2012	Rebecca Oyler	<b>Kathleen Kotula</b>			Email	FW: DOS ID Card Verification Types	Attorney-Client Communication	Counsel response to request for mental impression, analysis, and opinion	Email from counsel (Kotula) to Oyler communicating information
1363	Redact	August 27, 2012	Jonathan Marks, <b>Kathleen Kotula</b>	Rebecca Oyler			Email	RE: DOS ID Card Verification Types	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Oyler email to counsel (Kotula) seeking mental, impressions, analysis, and opinion
1363	Redact	August 23, 2012	Rebecca Oyler, Jonathan Marks	<b>Kathleen Kotula</b>	<b>Shauna Clemmer</b>		Email	RE: DOS ID Card Verification Types	Attorney-Client Communication	Counsel response to request for mental impression, analysis, and opinion	Email from counsel (Kotula) to Oyler communicating mental impressions, analysis, and opinions

Exhibit No.	Action	Date	To	From	CC	BCC	Document Type	Subject/Title	Privilege Reason(s)	Privilege Description	Privilege Narrative
1495	Withhold	July 10, 2012	Kurt Myers	<b>William Cressler</b>	<b>Patrick Cawley, Donald Smith</b>		Email	HB 1318 – Election Code Bill	Attorney-client Communication	Communication to counsel for counsel's information and forwarding to client and additional counsel	Email to counsel (Cressler) forwarding prior emails for counsel's information, and email from counsel (Cressler) to client and additional counsel acknowledging discussion
1600	Withhold	March 23, 2012	Shannon Royer, Ronald Ruman, Nicholas Winkler	<b>Karen Cummings</b>	Julie Snader, <b>Steven Turner</b>		Email	Cost Estimates	Attorney-Client Communication	Counsel communication disclosing status of contract negotiations	Email from counsel (Cummings) disclosing status of contract negotiations
1675	Redact	November 23, 2011	Shannon Royer, <b>Kathleen Kotula</b> , Rebecca Oyler, Jonathan Marks	Patrick Geho			Email	Fw: Voter ID	Attorney-Client Communication	Communication to counsel requesting counsel's mental impression and opinion	Geho email to counsel (Kotula) requesting counsel's mental impression, analysis, and opinion
1677	Redact	December 14, 2011		Patrick Geho, Rebecca O'Pyler, <b>Steve Turner, Shauna Clemmer, Patty Dillon</b>			Memo	Legislative Bill Analysis	Attorney-Client Communication	Discloses attorney mental impressions and opinions	Memo on pending legislative bill reflects counsel's (Turner and Clemmer) legal analysis, except for Section 1 which reflects agency's recommended position

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Viviette Applewhite; Wilola Shinholster	:	
Lee; Gloria Cuttino; Nadine Marsh;	:	
Bea Bookler; Joyce Block; Devra	:	
Mirel ("Asher") Schor; the League	:	
of Women Voters of Pennsylvania;	:	
National Association for the	:	
Advancement of Colored People,	:	
Pennsylvania State Conference;	:	
Homeless Advocacy Project,	:	
Petitioners	:	
:		
v.	:	330 M.D. 2012
:		
The Commonwealth of Pennsylvania;	:	
Thomas W. Corbett, in his capacity	:	
as Governor; Carole Aichele, in her	:	
capacity as Secretary of the	:	
Commonwealth,	:	
Respondents	:	

**ORDER**

**AND NOW**, this 19<sup>th</sup> day of July, 2013, upon consideration of Respondents' Motion in *Limine* to exclude evidence of or derived from inadvertently produced attorney-client privileged materials, and Petitioners' response thereto, and,

**WHEREAS**, Petitioners represented that as to the majority of the exhibits identified within Respondents' privilege log as attorney-client privileged materials, the Petitioners do not intend to introduce said exhibits at trial with the exception of Exhibit Nos. 1132 and 1677; and,

**WHEREAS**, this Court heard argument regarding the alleged privileged nature of Exhibit Nos. 1132 and 1677, and the alleged waiver of the

attorney-client privilege, and conducted an *in camera* review of these documents to assess their content; and,

**WHEREAS**, Petitioners' counsel alerted Respondents' counsel to inadequacies in their privilege screen during the course of discovery in 2012,

**FURTHER**, as to Exhibit 1132:

**WHEREAS**, the content of Exhibit 1132 is materially and substantively the same as an exhibit that is already part of the evidentiary record in this case, having been previously, and without objection, moved into evidence at the trial on the preliminary injunction in this case; and,

**WHEREAS**, counsel relied upon and used this exhibit during deposition, without objection, in preparation for this trial, the Court enters the following order as to Exhibit 1132:

To the extent Exhibit 1132 contains any privileged material, such privilege has been waived. **THEREFORE**, Respondents' motion in *limine* as to Exhibit 1132 is hereby **DENIED** and Petitioners may use this exhibit at trial.

**FURTHER**, as to Exhibit 1677:

**WHEREAS**, Respondents' counsel disclosed Exhibit 1677 in June 2012, and neglected to raise any privilege as to its contents until the eve of trial in July 2013; and,

**WHEREAS**, Respondents acknowledge the content of Exhibit 1677 was prepared by lawyers and non-lawyers, and the face of the document so states; and,

**WHEREAS**, having reviewed the document *in camera*, the content of Exhibit 1677 does not constitute attorney mental impressions or communications with the possible exception of the section entitled "Legal Issues"; and,

**WHEREAS**, Pennsylvania Department of State witnesses have testified regarding the content of this exhibit during deposition, and which testimony is not privileged; and,

**WHEREAS**, Petitioners did not identify this document as a potential trial exhibit prior to submitting its pre-trial memorandum;

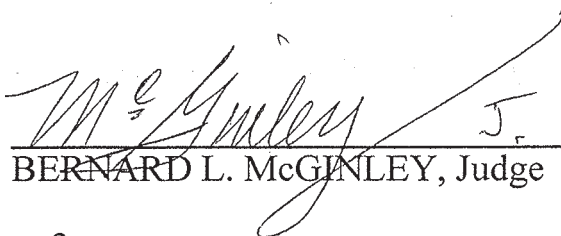
**THEREFORE**, Respondents' motion in *limine* as to Exhibit 1677 is hereby **GRANTED IN PART** and **DENIED IN PART**. Respondents' motion is **GRANTED** as to the section of the document entitled "Legal Issues," and **DENIED** as to the remainder. Petitioners may use an appropriately redacted version of this exhibit at trial.

**AND FURTHER**, in the event Petitioners intend to introduce at trial any other exhibits designated on their Proposed Trial Exhibit List, they shall first request permission of this Court so another *in camera* hearing may be conducted if necessary.

Certified from the Record

JUL 19 2013

And Order Exit

  
BERNARD L. MCGINLEY, Judge

# Exhibit N-24

**From:** [Hutchison, Todd N.](#)  
**To:** [Dunlap, Gregory \(GC\)](#); [Schmidt, Kevin](#); [Kotula, Kathleen](#); [Keating, Timothy P.](#); [Concannon, Sean M \(GC\)](#)  
**Cc:** [Putnam, Alfred W.](#); [Hickok, Alicia](#)  
**Subject:** FW: Protective order  
**Date:** Monday, July 28, 2014 1:28:06 PM

---

All:

FYI – petitioners have certified that they have complied with the stipulated protective order regarding the destruction of confidential information. I plan to respond in kind by 3:00, so please let me know if there is any reason that I should not or cannot.

Thanks, Todd.

---

**From:** Rubin, Michael A. [mailto:[Michael.Rubin@APORTER.COM](mailto:Michael.Rubin@APORTER.COM)]  
**Sent:** Monday, July 28, 2014 10:43 AM  
**To:** Hutchison, Todd N.  
**Subject:** Protective order

Todd

I hope you are well and enjoying the summer somewhere other than Harrisburg. Pursuant to the protective order, I wanted to confirm that Plaintiffs are now in compliance with their obligations under the Protective Order concerning Confidential Information as well as defendants' requests concerning what you describe as inadvertently produced privileged documents. In particular, Dr. Siskin's office has followed the procedures ordered by the Court concerning the secure and permanent destruction of the confidential DMV and DOS data files.

Please confirm that the Defendants have likewise destroyed the Confidential Information (i.e., ID information) produced on behalf of individuals.

Best regards,

Mike

---

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\*\*\*\*\*

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\*\*\*\*\*

# Exhibit N-25

# JOINT STATE GOVERNMENT COMMISSION

General Assembly of the Commonwealth of Pennsylvania

## ELECTION LAW IN PENNSYLVANIA

*Report of the Election Law Advisory Board  
for the Fiscal Year 2020-2021*

June 2021



*Serving the General Assembly of the  
Commonwealth of Pennsylvania Since 1937*

**REPORT**

*Election Law in Pennsylvania*

<b>Project Manager:</b>	Yvonne Llewellyn Hursh, Counsel
<b>Project Staff:</b>	Glenn J. Pasewicz, Executive Director Stephen J. Kramer, Staff Attorney Grant Rosul, Staff Attorney Wendy L. Baker, Office Manager/Executive Assistant
The report is also available at <a href="http://jsg.legis.state.pa.us">http://jsg.legis.state.pa.us</a>	

## JOINT STATE GOVERNMENT COMMISSION

Room 108 Finance Building  
613 North Street  
Harrisburg, PA 17120

**Telephone:** 717-787-4397  
**Fax:** 717-783-9380  
**E-mail:** [jntst02@legis.state.pa.us](mailto:jntst02@legis.state.pa.us)  
**Website:** <http://jsg.legis.state.pa.us>

The Joint State Government Commission was created in 1937 as the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania.<sup>1</sup>

A fourteen-member Executive Committee comprised of the leadership of both the House of Representatives and the Senate oversees the Commission. The seven Executive Committee members from the House of Representatives are the Speaker, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. The seven Executive Committee members from the Senate are the President Pro Tempore, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. By statute, the Executive Committee selects a chairman of the Commission from among the members of the General Assembly. Historically, the Executive Committee has also selected a Vice-Chair or Treasurer, or both, for the Commission.

The studies conducted by the Commission are authorized by statute or by a simple or joint resolution. In general, the Commission has the power to conduct investigations, study issues, and gather information as directed by the General Assembly. The Commission provides in-depth research on a variety of topics, crafts recommendations to improve public policy and statutory law, and works closely with legislators and their staff.

A Commission study may involve the appointment of a legislative task force, composed of a specified number of legislators from the House of Representatives or the Senate, or both, as set forth in the enabling statute or resolution. In addition to following the progress of a particular study, the principal role of a task force is to determine whether to authorize the publication of any report resulting from the study and the introduction of any proposed legislation contained in the report. However, task force authorization does not necessarily reflect endorsement of all the findings and recommendations contained in a report.

Some studies involve an appointed advisory committee of professionals or interested parties from across the Commonwealth with expertise in a particular topic; others are managed exclusively by Commission staff with the informal involvement of representatives of those entities that can provide insight and information regarding the particular topic. When a study involves an advisory committee, the Commission seeks consensus among the members.<sup>2</sup> Although an advisory committee member may represent a particular department, agency, association, or group, such representation does not necessarily reflect the endorsement of the department, agency, association, or group of all the findings and recommendations contained in a study report.

---

<sup>1</sup> Act of July 1, 1937 (P.L.2460, No.459); 46 P.S. §§ 65–69.

<sup>2</sup> Consensus does not necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation. At a minimum, it reflects the views of a substantial majority of the advisory committee, gained after lengthy review and discussion.

Over the years, nearly one thousand individuals from across the Commonwealth have served as members of the Commission's numerous advisory committees or have assisted the Commission with its studies. Members of advisory committees bring a wide range of knowledge and experience to deliberations involving a particular study. Individuals from countless backgrounds have contributed to the work of the Commission, such as attorneys, judges, professors and other educators, state and local officials, physicians and other health care professionals, business and community leaders, service providers, administrators and other professionals, law enforcement personnel, and concerned citizens. In addition, members of advisory committees donate their time to serve the public good; they are not compensated for their service as members. Consequently, the Commonwealth receives the financial benefit of such volunteerism, along with their shared expertise in developing statutory language and public policy recommendations to improve the law in Pennsylvania.

The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly. Certain studies have specific timelines for the publication of a report, as in the case of a discrete or timely topic; other studies, given their complex or considerable nature, are ongoing and involve the publication of periodic reports. Completion of a study, or a particular aspect of an ongoing study, generally results in the publication of a report setting forth background material, policy recommendations, and proposed legislation. However, the release of a report by the Commission does not necessarily reflect the endorsement by the members of the Executive Committee, or the Chair or Vice-Chair of the Commission, of all the findings, recommendations, or conclusions contained in the report. A report containing proposed legislation may also contain official comments, which may be used to construe or apply its provisions.<sup>3</sup>

Since its inception, the Commission has published over 400 reports on a sweeping range of topics, including administrative law and procedure; agriculture; athletics and sports; banks and banking; commerce and trade; the commercial code; crimes and offenses; decedents, estates, and fiduciaries; detectives and private police; domestic relations; education; elections; eminent domain; environmental resources; escheats; fish; forests, waters, and state parks; game; health and safety; historical sites and museums; insolvency and assignments; insurance; the judiciary and judicial procedure; labor; law and justice; the legislature; liquor; mechanics' liens; mental health; military affairs; mines and mining; municipalities; prisons and parole; procurement; state-licensed professions and occupations; public utilities; public welfare; real and personal property; state government; taxation and fiscal affairs; transportation; vehicles; and workers' compensation.

Following the completion of a report, subsequent action on the part of the Commission may be required, and, as necessary, the Commission will draft legislation and statutory amendments, update research, track legislation through the legislative process, attend hearings, and answer questions from legislators, legislative staff, interest groups, and constituents.

---

<sup>3</sup> 1 Pa.C.S. § 1939.

# ELECTION LAW ADVISORY BOARD

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*General Assembly of the Commonwealth of Pennsylvania*

**JOINT STATE GOVERNMENT COMMISSION**

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June 23, 2021

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Counsel

To the Members of the General Assembly of Pennsylvania:

We are pleased to release Election Law in Pennsylvania, the first annual report of the Election Law Advisory Board established by Act 12 of 2020. This report represents the past year's work of the Advisory Board, which was created to study the election law and identify statutory language to repeal or modify, to collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues, to study the development of election technology, and to evaluate and make recommendations on improving and implementing best practices to ensure the integrity and efficiency of the electoral process in this Commonwealth.

This first report focuses on what many members believe to be of the highest priority, which is proposed amendments to address mail-in ballot processing, otherwise known in Pennsylvania as "pre-canvassing". The consensus of ELAB members is that advance mail-in ballot processing could resolve many of the problems that contributed to concerns about the validity of votes in Pennsylvania.

While the recommendations in this report are the consensus of the members of the Advisory Board, it should not be assumed by the reader that agreement was unanimous. Some provisions were the subject of much debate and concerns are noted in context.

The full report is available at <http://jsg.legis.state.pa.us>.

Respectfully submitted,

Glenn J. Pasewicz  
Executive Director



# TABLE OF CONTENTS

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<b>INTRODUCTION</b> .....	1
<b>BALLOT PROCESSING: PROPOSED AMENDMENTS</b> .....	5
What is Pre-Canvassing? .....	5
Pre-Canvassing and Canvassing in Pennsylvania .....	6
Ballot Processing in Other States .....	9
Proposed Amendments .....	19
<b>IMPACT OF EXECUTIVE AND JUDICIAL DECISIONS ON PENNSYLVANIA ELECTION LAW</b> .....	27
<b>ON-GOING PENNSYLVANIA LEGISLATIVE PROPOSALS</b> .....	31
House State Government Committee Public Hearings .....	31
Proposed Legislation in Pennsylvania .....	31
Absentee Ballots .....	31
Candidates and Campaigns .....	31
Conduct of Elections .....	32
Early Voting .....	33
Election Audits .....	33
Election Day Voter Access .....	33
Judicial Matters .....	33
Mail-Ballots .....	34
Nomination Petitions .....	36
Pollwatchers .....	36
Poll Worker Recruitment and Retention .....	36
Primaries .....	37
Voter Registration .....	37
Voting Machines.....	38
Voting Rights of Previously Incarcerated .....	38
2020 Election Concerns .....	38
<b>ACTIVITIES IN OTHER JURISDICTIONS</b> .....	39
United States Congress .....	39
Procedural History .....	39
Significant Provisions .....	39
Expanding Voter Registration .....	39
Protection of Information .....	41
Voter Identification .....	41
Use of Electronic Addresses for Purposes other than Official Use .....	41
Congressional Redistricting .....	41
Campaign Finance .....	42
Ethics for the Three Branches of Government .....	42
Other States .....	43

<b>APPENDIX A:</b>	
Statutory Authority for Election Law Advisory Board .....	51
<b>APPENDIX B:</b>	
2020 Pennsylvania Election Law Litigation .....	53

# INTRODUCTION

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## The Constitution of the Commonwealth of Pennsylvania

### Article I, § 5. Elections.

*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.*

The fundamental precept underlying Pennsylvania's election laws is the Constitutional guarantee of free and equal elections. Pennsylvania's laws intended to protect that constitutional right can be found in the act of June 3, 1937 (P.L. 1333, No.320), known as the Pennsylvania Election Code (Election Code) and Title 25 of the Pennsylvania Consolidated Statutes, added by the act of January 31, 2002 (P.L. 18, No. 3) (Title 25). Read together, these two statutes form Pennsylvania's election law.<sup>4</sup> Additionally, Article VII of the Pennsylvania Constitution provides further details relating to voting rights and procedures.

In 2019, revisions were made to the Election Code, most significant of which for this study are the elimination of straight ticket voting, the addition of mail-in voting, and the replacement of, and funding for, voting machines.<sup>5</sup> These amendments were specifically intended to create a fairer, more free and equal election process. New voting machines allow for the use of paper ballots so a voter can see his or her completed ballot and verify its accuracy before casting their votes. Elimination of straight ticket voting focused voters' attention on the candidate, rather than the candidate's party. Each office and its candidates must be considered separately, which allows Independents and third-party candidates a greater ability to compete against the two major parties, prevents weaker candidates from being elected simply because of their party affiliation, and encourages voters review the entire ballot, which may increase voting on ballot initiatives, constitutional amendments and referenda. Mail-in balloting similarly achieves the goals of a more deliberative voting process, as the voter using a mail-in ballot has ample time to research candidates, review the entire ballot, and vote from a more informed stance. Additionally, persons with transportation issues, including the elderly and persons with physical disabilities, and persons whose hours of employment and family responsibilities

---

<sup>4</sup> Pennsylvania does not have a complete formal statutory code. Laws are found in two places – the Pamphlet Laws and the Consolidated Statutes. A commercial vendor, Purdon's, has created a compilation with titles identified by topics which can aid the legal practitioner in locating specific laws, but they do not carry the weight of legal citations. If challenged in court and there is a conflict between Purdon's and the Pamphlet Law or Consolidated Statutes, the Pamphlet Laws or Consolidated Statutes will triumph. In 1972, Pennsylvania began a consolidation process in the which the Pamphlet Laws, which address single topics only and are organized chronologically, are reorganized and codified by topic in the Consolidated Statutes. The process is on-going and more Pamphlet Laws are consolidated each year, and many new enactments are added directly to the Consolidated Statutes at the time of enactment.

<sup>5</sup> Act of October 31, 2019 (P.L. 552, No. 77), amending the Election Code (Act 77).

prevent them from reaching their polling place in the allotted hours for voting can vote from home on a schedule that is convenient to them.<sup>6</sup>

Amendments in 2020 were enacted to provide for temporary emergency general primary election procedures in response to the COVID-19 pandemic, additional revisions to the mail-in voting provisions, and creation of the Election Law Advisory Board (ELAB),<sup>7</sup> a permanent body within the Joint State Government Commission and directed to:

- Study the election law and identify statutory language to repeal, modify or update.
- Collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues.
- Study the development of new election technology and voting machines.
- Evaluate and make recommendations on:
  - improving the electoral process in this Commonwealth by amending the election law or through regulations promulgated by the Department of State; and
  - implementing best practices identified to ensure the integrity and efficiency of the electoral process in this Commonwealth.

By the end of each fiscal year, extensive and detailed findings are to be published on the Joint State Government Commission's publicly accessible Internet website and made available in electronic format to the Office of the Governor and members of the General Assembly.<sup>8</sup>

Membership of on the board consists of House and Senate leadership and the Secretary of the Commonwealth or their designees, and 18 individuals appointed by the Governor and confirmed by the Senate, one from each Congressional district in Pennsylvania. The gubernatorial appointees are to include members who represent the following groups: those advocating for individuals with disabilities, those advocating for voting rights, and those representing county commissioners or county election officials. No more than half of the appointees may be registered with the same political party.<sup>9</sup>

---

<sup>6</sup> Floor debate on Senate Bill 421 (2019), which became Act 77: *see* Senate Legislative Journal June 25, 2019, pp. 721-722; House Legislative Journal October 28, 2019, pp. 1689-1713; House Legislative Journal October 29, 2019, pp. 1738-1741; and Senate Legislative Journal, October 29, 2019, pp. 999-1003.

<sup>7</sup> Act of March 27, 2020 (P.L. 41, No. 12), amending the 1937 Election Code (Act 12).

<sup>8</sup> § 1302-E(c) of Act 12.

<sup>9</sup> § 1302-E(b) of Act 12.

The gubernatorial appointees were confirmed by the Senate on September 9, 2020. The board held a web-based organizational meeting on January 28, 2021 and additional web-based meetings were held on April 8, 2021 and June 10, 2021.

Commission staff established the ELAB website in June 2020 at <http://jsg.legis.state.pa.us/act12.cfm>, and posted summaries of potential topic areas of the election law that may be suitable for repeal, modification, or update. Additionally, a summary of election law pending legislation at that time was also provided. At the close of the 2019-2020 General Assembly, these proposals died. Many have been reintroduced for the 2021-2022 General Assembly and are detailed later in this report.

Subsequent to the summer of 2020, the presidential election in November 2020 triggered a number of challenges to the 2019 and 2020 amendments, in particular relating to the interpretation and implementation of the provisions governing mail-in ballots. The COVID-19 pandemic and the public health restrictions developed to attempt to contain the spread of the virus, together with individuals' reluctance to gather publicly and risk exposure to a novel disease whose potency and lethality were evolving and being revealed incrementally, resulted in a demand for mail-in voting that was unanticipated by the drafters of the amendments and the county officials charged with implementing them. Additionally, the primary election of 2020 was the first election held using the new electronic voting systems required under the Commonwealth's settlement in a recount lawsuit stemming from the 2016 presidential election. Concerns over the age and vulnerability to hacking as well as an inability to produce paper ballots for recount and audit purposes contributed to this settlement decision.<sup>10</sup> Problems within the United States Postal Service exacerbated an already challenging surge in mail-in voting. This confluence of major changes and unanticipated delays imposed strains on the election system in Pennsylvania and identified possible shortcomings in the mail-in ballot amendments.

During the ELAB meetings and via information submitted to the Commission by interested parties, many of the problems associated with mail-in ballots were identified as the result of the law asking county election officials to run an in-person election and a mail-in election simultaneously. This produced delays in vote counts, further fueling concerns that errors and fraud were possible. The ELAB will be taking a deliberate approach to the elections laws to address and prioritize areas of the law where review, repeal and updates are needed, and given the fallout from the November 2020 election, this first report focuses on what the members believe to be of the highest priority, which is proposed amendments to address mail-in ballot processing, otherwise known in Pennsylvania as "pre-canvassing." It is the belief of many of the ELAB members that many of the problems that contributed to concerns about the validity of Pennsylvania's votes would be resolved if advanced mail-in ballot processing is permitted.

---

<sup>10</sup> Jill Stein et al., v Pedro A. Cortes, Secretary of the Commonwealth et al., No. 16-CV-6287, E.D. Pa., (November 28, 2018).

While the recommendations in this report are the consensus of the members of the ELAB, it should not be assumed by the reader that agreement was unanimous. Some provisions were the subject of much debate and concerns are noted in context.

Potential areas of future study and recommendations include other aspects of mail-in voting, such as ballot verification, ballot curing, application deadlines, use of satellite offices and drop boxes, mailing lists for ballot requests, the effect of missing or illegible postmarks, treatment of naked ballots, and ballot challenges; voter registration, including verification and purging of rolls; polling places; early voting; poll worker recruitment and retention; and training for all election officials.



## **BALLOT PROCESSING: PROPOSED AMENDMENTS**

---

This proposal is based on the assumption that mail-in voting in some form will continue to occur in Pennsylvania. Numerous legislative proposals are before the General Assembly that would revise or modify the statutory language governing these ballots, but only a few voices have called for the outright repeal of these provisions. Mail-in voting was very popular with Pennsylvania voters during the 2020 Presidential Election. Mail-in votes that were accepted and counted for President ranged from 370,361 in Philadelphia, the largest county by population in the Commonwealth, to 715 in Cameron County, the smallest county by population. The 10 smallest counties by population ranged from 715 to 5,074 accepted and counted mail-in votes, with an average of 1,367 mail-in votes for the three presidential candidates on the ballot.<sup>11</sup> This is not an insignificant amount of votes to process on election day, when some of these smaller county boards of elections have only a handful of employees who must be available to assist the judges of elections conducting the in-person voting in all of the county's precincts while also processing thousands of mail-in votes. The amendments proposed in this chapter are designed to address mail-in ballot processing in a manner that is secure, permits voters to fully exercise their right to vote without artificial impediments, and allows election officials to run elections using careful and deliberate procedures. Finally, the amendments would allow election results to be known within hours, rather than days, of the conclusion of in-person voting on election day.

Many issues surround mail-in ballot processing, and this chapter will attempt to address them individually and identify which provisions of the following proposed amendments relate to that issue.

### ***What is Pre-Canvassing?***

Pre-election day ballot processing occurs in a number of states. The term "pre-canvassing" appears to be unique to Pennsylvania law, can easily be confused with "canvassing," and does not have an intuitive meaning. One of the recommendations contained in the proposed amendments is to do away with this terminology and replace it with "processing," a more self-descriptive term and the term used almost universally in other states.

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<sup>11</sup> Pennsylvania Department of State, Reporting Center, Pennsylvania Elections - Report Center (pa.gov).

Pennsylvania’s Election Code defines the term “canvass” to “mean the gathering of ballots after the final pre-canvass meeting and the counting, computing, and tallying of the votes reflected on the ballots.”<sup>12</sup> Likewise, it defines the term “pre-canvass” to mean the following:

*[T]he inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the **counting, computing, and tallying of the votes reflected on the ballots.***<sup>13</sup> *[Emphasis added]*

Neither term includes the recording or publishing of the votes reflected on the ballots.<sup>14</sup> Not publishing the votes is consistent with Pennsylvania’s legitimate concern with maintaining the secrecy of the ballot and not revealing vote counts in a manner that may influence voters who have not yet voted in person before the close of the polls on election day. But it is not clear how one counts, computes, and tallies without creating some sort of record. This confusion can be remedied by creating a definition of ballot processing that specifies the processing activities to be allowed, such as opening envelopes, removing ballots, and other activities.

### ***Pre-Canvassing and Canvassing in Pennsylvania***

Pennsylvania’s Election Code requires that each county board of elections “meet no earlier than seven o’clock A.M. on election day to pre-canvass all ballots received prior to the [pre-canvass] meeting.”<sup>15</sup> Moreover, the law requires that the county board provide at least 48 hours’ notice of the pre-canvass meeting by publicly posting a notice of said meeting on its publicly accessible Internet website.<sup>16</sup>

One authorized representative of each candidate in an election and one representative from each political party must be permitted to remain in the room in which the absentee ballots and mail-in ballots are being pre-canvassed. However, the law prohibits any person who is observing, attending or participating in a pre-canvass meeting to disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.<sup>17</sup>

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<sup>12</sup> Act of June 3, 1937 (P.L.1333, No.320), § 120(a.1); 25 P.S. § 2602(a.1).

<sup>13</sup> *Ibid*; 25 P.S. § 2602(a)(1) and (q.1).

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid*. § 1308(g)(1.1); 25 P.S. § 3146.8(g)(1.1).

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid*.

After the pre-canvassing of ballots, county boards of elections are required to meet “no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting.”<sup>18</sup> This meeting continues until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The board is prohibited from recording or publishing any votes reflected on the ballots prior to the close of the polls. The entire canvass process then continues through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot).<sup>19</sup>

Like the pre-canvass meetings, the canvass meetings require no less than 48-hour notice by publicly posting a notice on the county board of elections’ publicly accessible website. One authorized representative of each candidate in an election and one representative from each political party must be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.<sup>20</sup> In addition, the Election Code requires that when the board meets to pre-canvass or canvass absentee ballots and mail-in ballots, it must:

[E]xamine the declaration on the envelope of each ballot not set aside ... and shall compare the information thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.<sup>21</sup>

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<sup>18</sup> *Ibid.* § 1308(g)(2); 25 P.S. § 3146.8(g)(2).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*; 25 P.S. § 3146.8(g)(3).

All absentee ballots not challenged and all mail-in ballots not challenged and that have been verified must be counted and included with the returns of the applicable election district as follows:

- The county board must open the envelope of every unchallenged absentee elector and mail-in elector without destroying the declaration executed thereon.
- If any of the envelopes on which are printed or labeled “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, said envelopes and the ballots contained therein must be set aside and declared void.
- The county board must open the envelopes, remove the ballots and count, compute and tally the votes.
- Following the close of the polls, the county board must record and publish the votes reflected on the ballots.<sup>22</sup>

Alternatively, received ballots with challenged applications and ballots must be “placed unopened in a secure, safe and sealed container in the custody of the county board.” They will remain in such custody until the board fixes a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. A hearing can be held no later than seven days after the deadline for all challenges to be filed. During the hearing, the county board must hear said challenges and, in hearing the testimony, is not legally bound by the Pennsylvania Rules of Evidence. “The testimony presented must be stenographically recorded and made part of the record of the hearing.”<sup>23</sup>

County board decisions upholding or dismissing any challenge are reviewed by the court of common pleas of the county upon the filing of a petition by any person aggrieved by a board decision. The appeal must be filed within two days after the decision. Pending final determination, the county board must suspend any action in canvassing and computing all challenged ballots received. When computation of the returns of the county is completed, the votes cast upon the challenged official absentee ballots that are finally determined to be valid are added to the other votes cast within the county.<sup>24</sup>

If the proof of identification for absentee ballots or mail-in ballots is received and verified prior to the sixth calendar day following the election, then the county board of elections is legally required to canvass the absentee ballots and mail-in ballots. “If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-

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<sup>22</sup> *Ibid*; 25 P.S. § 3146.8(g)(4)(i)-(iv).

<sup>23</sup> *Ibid*. § 1308(g)(5); 25 P.S. § 3146.8(g)(5).

<sup>24</sup> *Ibid*. § 1308(g)(6), (7); 25 P.S. § 3146.8(g)(6)-(7).

in ballot shall not be counted.”<sup>25</sup> A qualified absentee elector is not required to provide proof of identification so long as the elector is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act or by an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act.<sup>26</sup>

### ***Ballot Processing in Other States***

Intuitively, the states with the largest populations would be the states mostly likely to benefit from pre-election day ballot processing, simply to accommodate the larger number of votes likely to be received in any election. With resident populations ranging from 10 million to nearly 40 million,<sup>27</sup> these states present a variety of positions on ballot processing. Some states allow for no excuse vote by mail, while others have absentee balloting that provides for a range of restrictive to broad excuses to vote via absentee ballot. All states allow mail in voting under federal law for active duty military personnel and persons serving overseas.

#### California<sup>28</sup>

As a general rule, vote by mail ballots may begin to be processed during the 29-day period running up to the election. This general rule applies only to verifying each voter’s signatures on the ballot return envelope and updating voter history.

Counties that have the “necessary computer capability” may open the envelopes, remove the ballots, duplicate any damaged ballots, prepare ballots to be machine read, or machine read them, including write-in votes so that they can be tallied by the machine beginning on the 15<sup>th</sup> day before the election. Under this process, the ballots are completely processed as received, including entered into the tabulators. Jurisdictions with computer capacity cannot engage in these activities before 5pm of the day before the election. Under either process, counts or tabulations may not be accessed or released prior to the close of the polls on election day.

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<sup>25</sup> *Ibid.* § 1308(h)(2), (3); 25 P.S. § 3146.8(h)(2)-(3).

<sup>26</sup> *Ibid.* § 1308(i); 25 P.S. § 3146.8(i).

<sup>27</sup> United States Department of Commerce, U.S. Census Bureau, 2020 Census Apportionment Results, April 26, 2021, Table 2. Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census

<sup>28</sup> Cal.. Elec. Code §15101.

## Texas<sup>29</sup>

Texas allows early voting by mail, but generally does not allow any pre-election day processing or counting of votes. The one exception to this rule is for an election in a county with a population of 100,000 or more, in which case counting of early voting ballots may begin on the 4<sup>th</sup> day before the election. This exception applies to 41 of Texas' 254 counties.<sup>30</sup> This, however, is the status of the law on May 31, 2021. As of this writing, the Texas legislature is engaged in a vociferous battle over election law changes. If the results of this battle are available before this report goes to press, staff will attempt to update this paragraph with any changes that are enacted.

## Florida<sup>31</sup>

On May 6, 2021, the Governor of Florida signed substantial amendments to Florida's mail-in voting law, including provisions that affect processing of mail-in ballots. Previously, processing of mail-in ballots could begin at 7:00 am on the 22<sup>nd</sup> day before the election. This authority has been eliminated. Processing now can only occur after the public testing of automatic tabulating equipment. Testing must occur 10 days prior to the start of early voting. In a federal election, early voting begins on the 10<sup>th</sup> day before the election. Local election officials have the discretion to offer early voting on the 15<sup>th</sup>, 14<sup>th</sup>, 12<sup>th</sup>, 11<sup>th</sup> or 2<sup>nd</sup> day before a state or federal election as well. In a federal election such as a presidential election, the earliest processing of vote by mail ballots can occur is 20 days before the election, but could vary in other elections. Processing includes all canvassing activities, which includes entering the ballots into electronic tabulation machines. No results may be released prior to the close of the polls on election day, and to do so will result in 3<sup>rd</sup> degree felony charges.

## New York<sup>32</sup>

While New York State allows early voting, it does not allow any pre-election day processing of ballots. Generally, the ballots are not to be canvassed or examined until after the close of the polls on election day, and no unofficial tabulations of election results may be printed or viewed in any manner until after the close of polls on election day. An exception exists that allows early voting tabulation to begin one hour before the close of the polls on election day, but only if the local board of elections adopts procedures to prevent the public release of election results prior to the close of polls on election day and the procedures are consistent with the regulations of the state board of elections. The

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<sup>29</sup> Tex. Elec. Code §§ 85.001, 87.0241.

<sup>30</sup> World Population Review, Population of Counties in Texas (2021) (worldpopulationreview.com).

<sup>31</sup> Fl. Stat. §§ 101.68, 101.657, and 101.5612(2) as amended by Statutes Chapter 2021-11.

<sup>32</sup> N.Y. Elec. Law § 8-600.

procedures must be filed with the state board of elections at least thirty days before they are scheduled to be effective.

### Illinois<sup>33</sup>

Illinois allows mail-in voting, and allows the processing of vote by mail ballots to be completed upon receipt by the election authority at its central ballot counting location. The results of the processing may not be counted until after 7pm on election day.

### Ohio<sup>34</sup>

Ohio has no excuse absentee voting. These ballots may be processed upon receipt. Processing includes:

- Examining the identification envelope statement of voter to verify that the ballot is eligible to be counted;
- Opening the envelope if the ballot is eligible to be counted;
- Determining the validity of the ballot;
- Preparing and sorting the ballot for scanning by automatic tabulating equipment;
- Scanning the ballot by automatic tabulating equipment if the equipment used by the board of elections permits a ballot to be scanned without tabulating or counting the votes on the ballot scanned.
- Disclosure of the count prior to the closing of polling places is prohibited.

### Georgia<sup>35</sup>

In March 2021, Georgia amended its election law to allow pre-election day processing of its no excuse absentee ballots. Previously, ballots could not be processed until election day. Under the new provisions, ballots that have been verified and accepted may be processed beginning at 8:00 a.m. on the third Monday prior election day. The election superintendent is authorized to open the outer envelope, open the inner ballot

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<sup>33</sup> Il. Cons. Stat. § 5/19-8.

<sup>34</sup> Ohio Rev. Code § 3509.

<sup>35</sup> Ga. Code § 21-2-386, as amended by Act 9 of 2021, effective March 25, 2021.

envelope and scan the absentee ballot using one or more ballot scanners. The process must be witnessed, and no one may tally, tabulate, estimate, or attempt to tally, tabulate, or estimate or cause the ballot scanner or any other equipment to produce and tally or tabulate the ballots prior to the close of the polls on election day.

#### North Carolina<sup>36</sup>

North Carolina has no excuse absentee voting. Beginning with the fifth Tuesday before the election, the county board of elections holds a weekly meeting at which it approves absentee ballot applications at and which it can begin processing completed ballots that have been received. This includes removing those ballots from their envelopes and having them read by an optical scanning machine, without printing the totals on the scanner. The actual tally of the votes is required to occur on election day.

#### Michigan<sup>37</sup>

Michigan allows for limited circumstance absentee ballots, which cannot be processed until election day. For the November general election of 2020, a law was passed to allow pre-processing of those ballots on the day before election day. While several pieces of legislation were introduced in the Michigan Legislature in the Spring of 2021, as of June 1, 2021, none of them have been enacted.

*Other states that allow substantial pre-election day ballot processing are outlined below.*

#### Arizona<sup>38</sup>

Signature verification of early ballots is to occur upon receipt of the ballot and ballot affidavit. After the ballot is verified, the ballots may be transferred to the early election board of the municipality for tallying of the ballots which may begin immediately after delivery. The release of information regarding early voting tallies before one hour after the closing of the polls or all precincts have reported, whichever occurs first, is a class 6 felony.<sup>39</sup>

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<sup>36</sup> N.C.Gen.Stat. §§ 163-230.1 and 163.234.

<sup>37</sup> Mich. Com. Laws § 168.765.

<sup>38</sup> Ariz. Rev. Stat. §§ 16-550 and 16-551, as amended by Ch. 318, signed by the Governor May 5, 2021.

<sup>39</sup> Ariz. Rev. Stat. §§ 16-550 to 16-552.



## Colorado<sup>40</sup>

Colorado permits the opening, preparation, and counting of mail ballots at designated mail counting places beginning 15 days prior to the election. The election official in charge of the mail ballot counting place shall take all precautions necessary to ensure the secrecy of the counting procedures, and no information concerning the count shall be released by the election officials or watchers until after 7 p.m. on election day.

## Delaware<sup>41</sup>

Beginning on the Friday before election day, absent ballots may be opened and examined to determine if the ballot has been properly completed, if the elector's intent can be determined, tally write-in votes or those that must be hand counted, and if it is determined that a ballot cannot be read by the tabulating equipment, duplicate the ballot if the voter's intent can be determined. They are then sealed in carrier envelopes and delivered to the relevant election district. The results cannot be extracted or reported before the polls close in election day.

## Indiana<sup>42</sup>

In amendments adopted in 2021, effective July 1, 2021, Indiana provided for early processing of absentee ballots. A county board of election may scan voted absentee ballot cards using an optical ballot scanner no earlier than 7 calendar days before the election, but the ballots may not be tabulated before election day. An exception to this rule applies to counties that use an electronic poll book or are a vote center county, if the county board of elections unanimously adopts a resolution to allow early processing of ballots. 47 of Indiana's 92 counties were designated as vote center counties in 2021.<sup>43</sup> In those counties, absentee ballots may be partially processed. Under these provisions, beginning with the third day prior to the election and continuing daily up until noon of the day before the election, the county boards may open the outer envelopes and verify if the ballot is properly endorsed and verified but may not unfold and examine the ballot. Tabulation may not occur until election day.

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<sup>40</sup> Col. Rev. Stat. §§ 1-7.5-107.5, 1-7.5-202 and 1-7.5-203.

<sup>41</sup> 15 Del. Code §§ 5508, 5509, and 5510A.

<sup>42</sup> Ind. Code §§ 3-11.5-4-5, 3-11.5-4-6, 3-11.5-4-11 and 3-11.5-4-11.5, as amended by Public Law 108, signed by the Governor April 23, 2021.

<sup>43</sup> Indiana Department of State, accessed May 28, 2021, SOS: Voter Information: Vote Centers.

## Iowa<sup>44</sup>

Outside envelopes may be opened and affidavits verified and counting may begin the day before election day. Counting shall begin on the day before election day if, in the preceding general election, absentee ballot counts were not completed by 10pm election day. The results of tabulations are not to be released until all counts are completed on election day.

## Montana<sup>45</sup>

In Montana, signatures may be verified upon receipt and the outer envelope opened; The inner envelope may be opened three days prior to election and the ballot secured in a ballot box. Automatic tabulation using a vote-counting machine may begin day before election day, but manual tabulation may not begin until election day.

## Nebraska<sup>46</sup>

In Nebraska, verification of signature and affidavit occur upon receipt. On the second Friday before the election, verified ballots shall be opened, unfolded, flattened for purposes of using the optical scanner, and placed in a sealed container for counting. Counting boards may begin counting early ballots no earlier than twenty-four hours prior to the opening of the polls on the day of the election. No results can be released until after the polls close on election day.

## Nevada<sup>47</sup>

By new legislation enacted in June 2021, Nevada adopted permanent mail-in ballot voting. Each active registered voter in the county is to receive a mail ballot for every election. An appointed mail ballot central counting board may begin counting the received mail ballots 15 days before the day of the election. The board must complete the count of all mail ballots on or before the seventh day following the election. The counting procedure must be public. Results of the count are to be kept secret and not revealed until the end of election day.

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<sup>44</sup> Iowa Code §53.23, as amended by Acts Chapter 12, signed by the Governor March 8, 2021.

<sup>45</sup> Mont. Code Ann. § 13-13-341(7)(a).

<sup>46</sup> Neb. Rev. Stat. §32-1027(7) and (8).

<sup>47</sup> Nev. Assembly Bill 321, signed by the Governor June 2, 2021 as Chapter 248.

## New Mexico<sup>48</sup>

Upon receipt, ballots are verified and voting lists updated in New Mexico. In election in which less than 10,000 mailed ballots were sent to the voters of a county, election judges may, beginning five days before the election, open the official mailing envelope, and insert the ballot into an electronic voting machine to be registered and retained until votes are counted after the close of polls on election day. In counties where 10,000 or more ballot were mailed, this process can begin two weeks before the election.

## North Dakota<sup>49</sup>

Beginning three days before election day, the outer envelopes may be verified and voter lists updated. A different person may open the ballot, unfold it, and place in secured ballot boxes. Votes may not be tallied or tabulation reports generated until after close of polls on election day.

## Oklahoma<sup>50</sup>

In Oklahoma, outer envelopes may be opened and signatures/affidavits verified beginning at 10 a.m. on the Thursday preceding the election. Generally, the inner envelopes are opened and fed into a voting device for counting on election, with no results to be printed, or made known to any person nor announced earlier than 7:00 p.m. on the day of the election. Upon written approval by the Secretary of the State Board of Election, the process for opening and scanning the inner envelopes can begin earlier than election, subject to the same security and information release restrictions imposed on ballots opened on election day.

## Oregon<sup>51</sup>

Oregon allows ballots to be opened and scanned into a vote tallying system beginning on the seventh day before the election. Totals may not be recorded until after 8 p.m. on election day.

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<sup>48</sup> N. M. Stat. § 1-6-14.

<sup>49</sup> N.D. Cent. Code §§ 18.1-07-12 and 18.1-07-12.1, as amended by Senate Bill 2142, signed by the Governor April 12, 2021. This amended extended the processing time from the day before the election until starting three days before the election.

<sup>50</sup> Okla. Stat. §§ 26-14-123 and 25-14-125.

<sup>51</sup> Or. Rev. Stat. §§ 254.478 and 260.705.

## Rhode Island<sup>52</sup>

Rhode Island allows outer envelopes to be opened upon receipt. Ballots may be processed and certified beginning 14 days before the election. Ballots are then sorted by city and town, after which the inner envelopes may be opened and the ballots tabulated through the use of a central count optical-scan unit. Final counts may not occur until after 8p.m. on election day.

## Vermont<sup>53</sup>

No more than 30 days prior to the election, the outer envelopes of mail-in and absentee ballots may be opened and verified. If a town will be using a vote tabulator for the registering and counting of votes in the upcoming election, they ballots may be opened, processed and scanned the day before the election. Final counts will then be made on election day.

## Virginia<sup>54</sup>

Upon receipt, signatures on outer envelopes are to be verified and voting lists updated. The general registrar may open sealed ballots and insert them in optical scan counting equipment any time prior to the seventh day immediately preceding the election. This becomes a mandatory duty beginning on the seventh day immediately preceding the election. No ballot count totals shall be initiated. If the affirmation has been completed as required, the general registrar may open the sealed ballot envelope and insert the ballot in optical scan counting equipment or other secure ballot container without initiating any ballot count totals. If a general registrar does not choose to do so, the sealed ballot envelope shall be deposited into a secure container provided for such purpose, in which it shall remain until the general registrar initiates the process of opening the sealed ballot envelopes deposited into the secure container and inserting such ballots into optical scan counting equipment without initiating any ballot count totals. Such process shall be at the general registrar's discretion at any time prior to the seventh day immediately preceding the election but shall be mandatory beginning on the seventh day immediately preceding the election. Absentee ballots that need to be counted by hand can begin to be counted at noon on election day. No totals shall be generated before the close of the polls on election day.

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<sup>52</sup> R.I. Gen. Laws §§ 17-20-26 and 17-22-1.

<sup>53</sup> 17 Vt. Stat. §§ 2546 and 2546a.

<sup>54</sup> Va. Code. §§ 24.2-709.1 through 24.2-712, as amended by Acts of Assembly Chap 0471, signed by the Governor March 31, 2021.

Washington<sup>55</sup>

Verification of ballots may begin upon receipt and after they have been verified, they may begin opening and preparing the ballots for tabulation, although actually counting may not occur until 8 p.m. on election day.

<b>Ballot Processing in Other States Current Law as of June 21, 2021</b>			
<b>State</b>	<b>Pre-Election Day Ballot Preparation Allowed</b>	<b>Amount of Time before Election Day</b>	<b>Activities Authorized</b>
Alabama <sup>56</sup>	No	--	Note receipt on absentee list only
Alaska <sup>57</sup>	Partially	7 days	Verification of voter's certificate; secrecy envelope not opened or vote counted until 8pm election day
Arkansas <sup>58</sup>	Partially	Tuesday before	Opening outer envelope, processing and canvassing of ballot paperwork of outer envelope only; secrecy envelope not opened or vote counted until 8am election day
Connecticut <sup>59</sup>	Partially	7 days	Sort into voting districts and verify qualified voter only; all envelopes opened and ballots counted at the time on election day designated by registrar of voters
Hawaii <sup>60</sup>	Yes	Upon receipt	After verification of outer envelope, may be opened and counted
Idaho <sup>61</sup>	Partially	Upon receipt	Verification of affidavit on outer envelope only
Kansas <sup>62</sup>	Partially	Unspecified date	Some advance ballots by mail may be processed but not counted before election day

<sup>55</sup> Rev. Code Wash. § 29A.40.010 et seq.

<sup>56</sup> Ala. Code § 17-11-10. Prior to 2021, absentee ballots could not be opened until noon on election day. Act #2021-364 moved that time up to 7 am on election day. Signed by the Governor May 6, 2021.

<sup>57</sup> Alaska Stat. §§ 15.20.201 and 15.20.203.

<sup>58</sup> Ark. Code § 7-5-416, as amended by Act 736-2021, approved by the Governor April 15, 2021.

<sup>59</sup> Ct. Gen. Stat. §§ 9-140(c) and 9-150a.

<sup>60</sup> Hawaii Rev. Stat. §§ 15-9 and 15-10. The statute appears to allow all aspects of vote processing and counting to occur upon receipt, but the language is not elaborative on details.

<sup>61</sup> Idaho Code §§ 1005, 10007 and 1008.

<sup>62</sup> In Kansas, the county election officer appoints a special election board to count advance ballots. In the eight counties that use paper ballots, the board meets on election day to begin the count. In the remaining 97 counties which use voting machines, optical scanners, electronic or electronic/mechanical voting systems, the boards convene on election day or at any time before election day as the county election officer deems necessary. These boards may conduct the original canvass of advance voting ballots when the board convenes, but shall not complete final tabulation prior to election day. Kan. Stat. §§ 25-1133 and 25-1134.

<b>Ballot Processing in Other States Current Law as of June 21, 2021</b>			
<b>State</b>	<b>Pre-Election Day Ballot Preparation Allowed</b>	<b>Amount of Time before Election Day</b>	<b>Activities Authorized</b>
Kentucky <sup>63</sup>	No	--	--
Louisiana <sup>64</sup>	Partially	In parishes that receive more than 1,000 absentee ballots, the day before	Activities on the day before are limited to preparation and verification of outer envelopes; no tabulation or counting may occur until election day
Maine <sup>65</sup>	Partially	7 <sup>th</sup> day immediately preceding	Verification authorized; ballots may not be counted, voter intent may not be determined and election results may not be obtained or released until after the polls have closed on election day
Maryland <sup>66</sup>	No	--	Date and time stamp receipt only
Massachusetts <sup>67</sup>	Partially	Upon receipt	May verify signature/affidavit on outer envelope, open outer envelope; inner envelope not to be opened or processed before Election Day
Minnesota <sup>68</sup>	No	--	Date stamped upon receipt only
Mississippi <sup>69</sup>	No	--	--
Missouri <sup>70</sup>	No	--	--
New Hampshire <sup>71</sup>	No	--	All processing and counting starts on election day after the polls open
New Jersey <sup>72</sup>	Partially	At least weekly three weeks prior to election day	Outer envelopes to be removed, signatures verified and voters with rejected ballots are to be sent a “cure letter” within 24 hours; inner envelopes opened and ballots counted on election day

<sup>63</sup> Ky. Rev. Stat. §§ 117.087.

<sup>64</sup> La. Rev. Stat. §§ 1313 and 1313.1.

<sup>65</sup> Maine Rev. Stat. §§ 759, and 760-B as amended by 2021 Public Law Ch. 11, approved by the Governor March 17, 2021.

<sup>66</sup> MD Code Elect. Law, § 302 and Code of Maryland Regulations (COMAR) §33.11.04.01 et seq.

<sup>67</sup> Mass. Gen. Laws 54 §§ 94 and 95.

<sup>68</sup> Minn. Stat. §§ 203B.08(subd.3), 203B.081, and 204C.20.

<sup>69</sup> Miss. Code § 23-15-639.

<sup>70</sup> Mo. Stat. § 115.299.

<sup>71</sup> N.H. Rev. Stat. §§ 659:47 to 659:61.

<sup>72</sup> N. J. Stat. §§ 63-17 to 63.22. New Jersey adopted early voting by P.L.2021, ch. 40, signed by the Governor March 30, 2021, but this addition did not change the vote counting timeline. These ballots are not to be counted until after the close of the polls on election day. N.J. Stat. § 19:15A-4.

<b>Ballot Processing in Other States Current Law as of June 21, 2021</b>			
<b>State</b>	<b>Pre-Election Day Ballot Preparation Allowed</b>	<b>Amount of Time before Election Day</b>	<b>Activities Authorized</b>
South Carolina <sup>73</sup>	No	--	All certification and counting occurs after 9 am on election day.
South Dakota <sup>74</sup>	Partially	Upon receipt	Outer envelopes may be opened and time stamped; all other processing and counting to occur after the close of polls on election day; exception if the total number of absentee ballots justifies starting earlier on election day
Tennessee <sup>75</sup>	No	--	All activities begin on election day; no counts released until after polls close
Utah <sup>76</sup>	Partially	Upon receipt	Signatures may be verified, eligibility checked and outer envelopes opened; all counting begins the day after election day
West Virginia <sup>77</sup>	No	--	All processing and counting occurs on election day
Wisconsin <sup>78</sup>	No	--	Time stamped only; all processing occurs on election day
Wyoming <sup>79</sup>	No	--	All processing occurs on election day

Source: National Conference of State Legislatures Elections and Campaigns databases; review of each state's election law by Commission staff.

### ***Proposed Amendments***

Revisions to the mail-in ballot processing to procedures need to answer two questions: how much time in advance of the opening of the polls on election day should be granted to begin processing, and what activities are authorized as part of the processing

<sup>73</sup> S.C. Code § 7-15-420. Amendments to allow processing to begin the day before the election were added as a Covid-19 pandemic response and lapse on December 31, 2021, reverting back to the language requiring all certification and counting to occur on election day. 2020 Act 133, signed by the Governor May 13, 2020.

<sup>74</sup> S.D. Cod. Laws §§ 12-19-10, 12-19-43 and 12-19-46. The earlier start provisions on § 12-19-43 were added by Senate Bill 184 (2021), signed by the Governor March 18, 2021.

<sup>75</sup> Tenn. Code §§ 2-6-202 and 2-6-303.

<sup>76</sup> Utah Code §§ 20A-3a-401 and 20A-3a-402.

<sup>77</sup> W. Va. Code §§ 3-3-8 and 3-3-11.

<sup>78</sup> Wisc. Stat. §§ 6.84 to 6.89; 7.52.

<sup>79</sup> Wy. Stat. §§ 22-9-101 to 22-9-125.

procedure. An additional issue is protecting the privacy of the ballots and maintaining a secure chain of custody.

Almost every state allows for an initial inspection and verification of the voter's affidavit on the outer envelope and updating and correcting lists of voters. A large subset of those states allow for a visual inspection of the inner envelopes to ensure that they are unmarked and undamaged, and then the inner envelopes are set aside. A dozen states do not allow any type of mail-in ballot preparation in advance of election day. Of the nine largest states by population reviewed above (Pennsylvania is ranked 5<sup>th</sup> overall), six of those states at least in some instances allow mail-in or absentee ballots to be verified, opened, and prepared for scanning. These six states also allow for ballots to be scanned into ballot scanners or other electronic tabulation devices. The only step not taken is to cause the scanner or tabulation machines to generate a total number of votes (in layman's terms, the only step that remains for election day is to "hit the button"). Another 16 of the remaining smaller states allow some time period before election day for ballots to be prepared and scanned, with only a machine-generated total left to be done on election day after the polls close. In other words, 22 states allow all but the final tabulation to occur some period of time before election day; 12 states prohibit any pre-processing, and the remaining 16 states (excluding Pennsylvania) allow pre-processing to some degree.

Some members of the Advisory Board have stated that processing needs to include scanning in order to be fully effective. Others have opined that Pennsylvania's newly installed (2019-2020) voting systems, found in all 67 counties, have the capacity to scan large volumes of votes and could accommodate the physical scanning of all mail-in ballots on election day. Pennsylvania's counties have security procedures in place to safeguard unopened mail-in ballots from the time they are received until election day by requiring them to be kept in sealed or locked containers, and these procedures may well be adequate to provide appropriate security for processed and scanned ballots. These amendments, however, also seek to strengthen safeguards and protect the chain of custody of opened ballots.

As to how much time should be allotted for ballot processing, states range from Georgia's 21 days to the day before election day. Possible models could be Georgia, California's 15-day period, or Florida's newly revised maximum 20-day period. Colorado, Nebraska, Nevada, and Rhode Island allow ballot preparation and, in some instances, ballot counting, to occur 14 to 15 days prior to the elections. The County Commissioners Association of Pennsylvania has advocated for additional ballot preparation time, but has not specified a particular time period.<sup>80</sup> During Advisory Board meetings, the time frames of 14 and 21 days have been suggested.

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<sup>80</sup> CCAP Election Reform Preliminary Report, January 2021, CCAPElectionsReformReportJanuary2021.pdf (pacounties.org).



AN ACT

Amending the act of June 3, 1937 (P.L.1333, No.320), entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," in preliminary provisions and voting by qualified absentee electors, further providing for processing of official canvassing of official absentee ballots and mail-in ballots.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 102 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, amended March 27, 2020 (P.L.41, No.12), is amended to read:

Section 102. Definitions.--

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(a.1) The word "canvass" shall mean the gathering of ballots [after the final pre-canvass meeting] and the counting, computing and tallying of the votes reflected on the ballots.

\* \* \*

(q.1) The word "process" shall mean the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the

envelopes and [the counting, computing and tallying of the votes reflected on the ballots] the preparation of those ballots for scanning, including unfolding, straightening and duplicating if the ballot is damaged in some way that prevents it from being scanned but where the voter's intent is still clear. It shall also include scanning the ballot into a voting machine or other automatic tabulating device, if the equipment used by the county board of elections permits a ballot to be scanned without tabulating or counting the votes on the ballot scanned. The term does not include the recording or publishing of the votes reflected on the ballots.

Section 2. Section 1308 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, amended March 27, 2020 (P.L.41, No.12), is amended to read:

Section 1308. [Canvassing] Processing of Official Absentee Ballots and Mail-in Ballots.

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be [canvassed] processed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be [canvassed] processed in accordance with subsection (g). A mail-in ballot shall be [canvassed] processed in accordance with subsection (g).

\* \* \*

(d) Whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act has died prior to

the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected by the [canvassers] board of elections but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election.

\* \* \*

(g) (1)

(i) An absentee ballot cast by any qualified absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(ii) [An] Subject to the provisions of paragraph (1.1) an absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section [1302(a.3)] 1302.1(a.3) or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

(1.1) The county board of elections [shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting.] may begin processing official absentee and mail-in ballots no earlier than seven o'clock A.M. on the 14th day immediately preceding the election, during the hours of seven o'clock A.M. to seven o'clock P.M. each day, including holidays and weekends, if the number of absentee and mail-in ballots sent by the county to registered voters indicates that

extra time will be needed to ensure that all such ballots can be processed, counted and tallied prior to eleven o'clock P.M. on the day of the election. A county board of elections shall provide at least forty-eight hours' notice of [a pre-canvass meeting] the first day that pre-election day ballot processing will begin by publicly posting a notice [of a pre-canvass meeting] of the dates and times processing will occur on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are [pre-canvassed] processed. No person observing, attending or participating in [a pre-canvass meeting] any ballot processing activities may disclose the results of any portion of any [pre-canvass meeting] ballot processing prior to the close of the polls on election day. A person who makes an unauthorized disclosure under this paragraph shall be guilty of a misdemeanor of the first degree.

(2) The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not [included in the pre-canvass meeting] processed under paragraph (1.1). The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide at least forty-eight hours' notice of a canvass

meeting by publicly posting a notice on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.

(3) When the county board meets to [pre-canvass] process or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be [pre-canvassed] processed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words "Official Election Ballot" contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii)

(A) In the case of absentee and mail-in ballots processed during the time allotted in paragraph (1.1), after the ballots have been processed, they shall be locked and sealed in tamper-proof containers and secured in a locked secure location at the county board of elections physical location and otherwise retained subject to the provisions of this act regarding retention and safekeeping of canvassed ballots in general.

(B) In the case of absentee and mail-in ballots not processed under paragraph (1.1), the [The] county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

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## IMPACT OF EXECUTIVE AND JUDICIAL DECISIONS ON PENNSYLVANIA ELECTION LAW

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Fundamental to democratic government is the concept of separation of powers and the notion of three separate but equal branches of government. At its most basic level, laws are enacted by the legislature, which also appropriates the funds necessary to operate the government, the executive branch implements and administers the law enacted by the legislature, and the judiciary interprets the Constitution and laws when controversies are brought before it. The presidential election of 2020 tested the limits of this separation and balance of powers at times; and in the minds of some, individual branches overstepped their bounds. Determinations by the Department of State and rulings by the Pennsylvania Supreme Court created temporary responses to questions raised and effectively filled in what were perceived to be gaps in primarily the mail-in ballot provisions of the law.<sup>81</sup>

The cases examined in Appendix B interpreted and modified Pennsylvania's mail-in law in the following ways:

- Act 77 was interpreted to permit counties to use drop boxes or other mobile or temporary collection sites. If this practice is not desired, the statute would need to be amended to explicitly prohibit their use and specify what constitutes an acceptable return of a mail-in ballot. Section 1306-D of the Election Code governs voting by mail-in electors. The provision states that “the elector shall send same [envelope] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”<sup>82</sup> The Pennsylvania Supreme Court in *Pennsylvania Democratic Party v Boockvar*<sup>83</sup> found that this provision was subject to multiple reasonable interpretations. Accordingly, the court determined that hand delivered mail-in ballots could be accepted at locations other than county board of election office addresses, finding that the legislative intent of Act 77 was to provide voters with options to vote outside of traditional polling places.
- The deadline for receipt of completed mail-in ballots was statutorily established as no later than 8:00 pm on the day of the primary or election.<sup>84</sup> This remains the state of the law in Pennsylvania in June 2021. This rule was temporarily lifted by the Pennsylvania Supreme Court for the November 2020 General Election in *Pennsylvania Democratic Party v. Boockvar*. The court granted this relief to reduce voter disenfranchisement through factors beyond their control.

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<sup>82</sup> § 1306-D(a) of the Election Code, as added by Act 77.

<sup>83</sup> *Pennsylvania Democratic Party v. Boockvar*, 238 A. 3d. 345, 361 (Pa. 2020).

<sup>84</sup> § 1306-D(c) of the 1937 Election Code, as added by Act 77.

In finding the COVID-19 pandemic and its fallout on voters seeking to exercise their franchise the equivalent of a natural disaster, conflated by the combination of U.S. Postal Service delivery standards and the timelines set forth in the Election Code for receipt and return of a mail-in ballot, the Pennsylvania Supreme Court granted temporary and extraordinary equitable relief in the form of an injunction that permitted tabulation of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day, and received by 5:00 p.m. on the Friday following the election.<sup>85</sup>

- The Pennsylvania Supreme Court in *Pennsylvania Democratic Party v. Boockvar* also held that ballots received between Election Day and the military ballot deadline that lacked a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, were presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrated that it was mailed after Election Day. The Court specifically stated that “[W]e refuse, however, to disenfranchise voters for the lack or illegibility of a postmark resulting from the USPS processing system, which is undeniably outside the control of the individual voter.”<sup>86</sup> While not issuing a ruling (the case was dismissed on jurisdictional grounds), the United States Court of Appeals for the Third Circuit commented that it believed that the Pennsylvania Supreme Court’s order to presume that mail-in ballots without postmarks are valid violates the Equal Protection Clause because it creates an unequal treatment of votes.<sup>87</sup> It would be prudent to amend the Election Code to provide specific guidance on how ballots with illegal or missing postmarks should be treated. This issue was not unique to the November 2020 general election and is likely to result in further litigation in the future if not addressed.
- Pennsylvania’s requirement that pollwatchers be residents of the county in which they serve was found to not violate the United States or Pennsylvania Constitutions.<sup>88</sup>
- The ability to “cure” imperfect ballots was challenged on the basis that some counties allowed it and others did not, thus violating the equal protection rights of voters. The Pennsylvania Supreme Court sitting in the Middle District stated: “It is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots.”<sup>89</sup> As Pennsylvania’s statute neither allows nor prohibits ballot curing, a legislative declaration would probably be useful. Several states have specific statutes to deal with opportunities to cure mail-in ballots.

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<sup>85</sup> *Id.* at 371.

<sup>86</sup> *Id.* at 371, n.26.

<sup>87</sup> *Boguet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d. 336, 354 (3d Cir. 2020).

<sup>88</sup> *Pennsylvania Democratic Party*, 238 A.3d. at 385.

<sup>89</sup> *Donald J. Trump for President, Inc., et al. v. Secretary Commonwealth of Pennsylvania*, 830 F. Appx. 377 (3d Cir 2020) (Trump II).



## *Pennsylvania Supreme Court Jurisdiction*

There has been some confusion among some observers as to how the Pennsylvania Supreme Court has been able to assume jurisdiction over some of these cases. In normal circumstances, a plaintiff or petitioner brings a case to a court of original jurisdiction. In Pennsylvania, that is usually a county court of common pleas or in matters involving government agencies, the Commonwealth Court. Decisions are made at those levels, and appeals can be sought through the Superior Court and then the Supreme Court. Act 77 of 2019 provided that the Pennsylvania Supreme Court had exclusive jurisdiction over constitutional challenges to its provisions regarding straight ticket voting and mail-in ballots, in any challenge brought before it during the 180 days following the effective date of Act 77. As Act 77 was effective upon enactment on October 31, 2019, constitutional challenges under this exclusive jurisdiction had to be commenced prior to the end of April 2020. Most of the litigation involving mail-in balloting occurred after the 180-day deadline had passed. Additionally, several constitutional challenges were brought in federal court, outside of the Pennsylvania Supreme Court's jurisdiction. To the extent litigation was brought after April 2020, the cases were usually filed in courts of common pleas and the Commonwealth Court. However, the Pennsylvania Supreme Court has what is known as extraordinary jurisdiction, or “King’s Bench” jurisdiction, which allows it to reach down to a lower court and remove a case from that court’s docket and immediately consider it, without going through the appeal process. This authority is limited to extraordinary circumstances, such as cases in which the importance of an issue to public well-being or the expediency with which action must be taken in the interest of justice requires superseding normal judicial or appellate procedures. Pennsylvania’s Supreme Court has explicitly had this authority since 1722.<sup>90</sup>

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<sup>90</sup> 42 Pa.C.S. §§ 502 and 726; Pa. R.A.P. 3309.



## ON-GOING PENNSYLVANIA LEGISLATIVE PROPOSALS

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### *House State Government Committee Public Hearings*

Between January 21 and April 15, 2021, the House State Government Committee conducted a series of 10 public hearings to gather information about Pennsylvania's election laws. On May 10, 2021, committee chair Representative Seth Grove released the committee's findings, "A Comprehensive Review of Pennsylvania's Election Laws: How Pennsylvania Can Guarantee Rights and Integrity in Our Election System."<sup>91</sup> The report addressed such issues as the Department of State's election guidance, the SURE system and other election information technology, audits, voter registration, voting machines, mail-in and absentee ballots, county election board operations and satellite offices, election integrity and accessibility policy, election laws and procedures in other states, and testimony from stakeholders and members of the House of Representatives.

### *Proposed Legislation in Pennsylvania*

Proposed legislation before the Pennsylvania General Assembly during the 2021-2022 legislative session addresses a variety of topics. Legislation introduced through June 21, 2021 has been listed below by topic. Seventy-four bills have been introduced, but as of June 21, 2021, all but two of the bills remain in the committees to which they were originally referred.

#### *Absentee Ballots*

Senate Bill 93, Printer's No. 164, allows electors who have requested permanent absentee voter status an option to revoke that status electronically.

#### *Candidates and Campaigns*

Senate Bill 140, Printer's No. 117, requires candidates' reports and statements to be filed electronically, and requires the Department of State to maintain a searchable computer database and electronic reporting system to include contributions and expenditures by candidates and political committees. Also provides for disposition of unused campaign funds.

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<sup>91</sup> [https://www.legis.state.pa.us/WU01/LI/TR/Reports/2021\\_0002R.pdf](https://www.legis.state.pa.us/WU01/LI/TR/Reports/2021_0002R.pdf).

House Bill 174, Printer's No. 141 prohibits public employees from using sick time to engage in campaign activities.

House Bill 851, Printer's No. 835 requires background checks for candidates for school district offices.

House Bill 852, Printer's No. 836 requires financial reporting of expected large political or campaign donations by nonprofit organizations by the organization and disclosure of receipts from candidates and campaigns.

House Bill 905, Printer's No. 892 calls for the mandatory disclosure of federal income tax returns of candidates for President of the United States and Governor of Pennsylvania.

### *Conduct of Elections*

House Bill 28, Printer's No. 1658 provides for immunity from liability for individuals who report election misconduct. Establishes a \$5,000 reward for information regarding election fraud leading to the arrest and conviction of an offender.

House Bill 29, Printer's No. 1659 provides for standardized requirements for all paper ballots.

Senate Bill 59, Printer's No. 36 allows for ranked-choice voting at November municipal elections.

Senate Bill 404, Printer's No. 395, creates the Voter's Bill of Rights regarding such matters as being in line to vote at the time the polls close, where voting is allowed if the person has moved to another polling district, voting via special needs ballot, taking children under the age of 18 into the voting area, voting without intimidation or force, and choosing to vote in-person even though a mail-in ballot had been requested.

Senate Bill 422, Printer's No. 422 requires voter ID to vote.

Senate Bill 735, Printer's No. 899 proposes a constitutional amendment to require voter identification at the polls. The bill received second consideration in the Senate and was re-referred to the Senate Appropriations Committee on June 16, 2021.

House Bill 737, Printer's No. 722 prohibits possession of a firearm at a polling place (exception for law enforcement).

House Bill 853, Printer's No. 837 requires voter ID to vote.

House Bill 1300, Printer's No. 1760 is a comprehensive election reform bill. For purposes of this report, the bill requires county boards of elections to meet on the first Friday and Saturday before election day to pre-canvas and may meet any other day during the five days leading up to election day. Additionally, the bill adds further responsibilities to the

Election Law Advisory Board. The bill received first consideration in the House of Representatives and was re-committed to the House Rules Committee on June 15, 2021.

### *Early Voting*

House Bill 316, Printer's No. 290 requires counties to provide early voting beginning 15 days prior to the date of the primary or election. Standards established for uniform days, times, hours of operation, and early voting sites. Counties may track votes by precinct but may not tabulate votes until close of polls on election day.

House Bill 366, Printer's No. 338 is similar to HB 316 above, except that the early voting period begins 30 days prior to the date of the primary or election, and requires a minimum number of polling places be available in the county, based on local population. The bill also extends the start of pre-canvassing to 14 days before the election.

### *Election Audits*

House Bill 1197, Printer's No. 1258, provides for Department of State audits with 90 days of each election. Within 180 days of all general elections, DOS is to compare voting records with neighboring states to ensure no discrepancies or irregularities, such as a voter voting in both Pennsylvania and another state.

House Bill 1476, Printer's No. 1593 provides for voting system performance audits of each county election results.

House Bill 1477, Printer's No. 1594 provides for county voting system audits.

### *Election Day Voter Access*

House Bill 18, Printer's No. 11 declares the first Tuesday after the first Monday in November, known as Election Day, as a legal holiday in Pennsylvania.

Senate Bill 309, Printer' No. 319 requires employers to give employees up to two hours absence from work in order to vote in-person.

House Bill 892, Printer's No. 883 requires employees to give employees up to two hours leave without loss of pay, leave or other benefits in order to vote in-person. The leave is limited to the beginning or end of the employee's shift.

### *Judicial Matters*

Senate Bill 22, Printer's No. 6 provides that when a Governor files a vacancy in the office of judge or magisterial district judge. Upon the creation of a vacancy, the Office of General

Counsel is to provide an application period of 30 days. Redacted applications are to be posted on the office's website and a 30-day public comment period must occur.

House Bill 263, Printer's No. 234 proposes a constitutional amendment to change the way number of justices and the manner of electing those justices for the Supreme and Superior Courts of Pennsylvania.

### *Mail-Ballots*

House Bill 25, Printer's No. 13 repeals mail-in ballot provisions.

House Bill 30, Printer's No. 1660 authorizes guardians, persons with power of attorney, and next of kin of qualified electors to apply for a mail-in ballot on their behalf. Creates a thumbprint identification system for those who cannot sign or mark their applications. Requires each county board to establish an election management system to track all mail-in ballots sent to electors.

House Bill 31, Printer's No. 1661 limits the locations of drop boxes and drop off locations, requires video surveillance of the site, and requires the ability to time, date and location stamp the ballots when dropped off.

Senate Bill 128, Printer's No. 100 changes Pennsylvania's voting method to all mail-in and absentee voting.

House Bill 195, Printer's No. 1189 repeals mail-in ballot provisions.

Senate Bill 322, Printer's No. 330 amends the mail-in ballot pre-canvassing provisions. It requires a judge of elections to deliver all completed absentee and mail-in ballots to the county board of elections by 2 A.M. It authorizes the chairs of the county political parties (or a designee) to remain in the room where pre-canvassing occurs. Persons allowed to watch the pre-canvassing are to be permitted to have a clear line of sight to view and hear the proceedings at a distance of six feet or less, but that does not impede the ability of the person canvassing the ballots from carrying out his or her duties.

House Bill 366, Printer's No. 338 extends the start of pre-canvassing to 14 days before the election. The bill also allows for early voting. See above.

Senate Bill 515, Printer's No. 506 repeals the permanent mail-in voter list and states that only the Department of State or the county board of election of the qualified elector's residence may send an application for a mail-in ballot to the elector.

Senate Bill 599, Printer's No. 673 extends the pre-canvassing period to 21 days before election day.

House Bill 808, Printer's No. 792 allows ballots postmarked by on or before election day and received by 8 P.M. on the 6<sup>th</sup> day following the election may be counted.

House Bill 895, Printer's No. 886 repeals the mail-in ballot application process and instead provides for automatic mailing of mail-in ballots to each qualified registered elector 60 days before the election.

House Bill 982, Printer's No. 994 extends the pre-canvassing period as follows:

- 1<sup>st</sup>, 2<sup>nd</sup>, and 2<sup>nd</sup> Class A counties begin may begin pre-canvassing 14 days prior to election day;
- 3<sup>rd</sup> Class counties may begin pre-canvassing 7 days prior to election day; and
- 4<sup>th</sup> through 8<sup>th</sup> Class counties may begin pre-canvassing 3 days prior to election day

House Bill 1266, Printer's No. 1346 provides that absentee and mail-in ballots received within three days after the election that are postmarked on or before election day shall be counted.

House Bill 1270, Printer's No. 1350 prohibits private organizations or individuals from sending an application for an absentee or mail-in ballot to an elector by mail or electronic means. The bill requires all qualified registered electors to be placed on a permanent mail-in ballot list. Electors may opt out of this list upon request.

House Bill 1498, Printer's No. 1636 repeals the ability of a person who received a mail-in ballot turning in the ballot for destruction and voting in-person on election day. The bill authorizes electors to present their completed mail-in ballots to the judge of elections at their polling place on election day.

House Bill 1499, Printer's No. 1637 specifically authorizes signature verification of absentee and mail-in ballots and grants the authority to reject ballots if the signatures are found not to match.

House Bill 1501, Printer's No. 1638 requires each mail-in ballot to include a unique scannable identification code.

House Bill 1502, Printer's No. 1639 provides that absentee and mail-in ballots (except military ballots) received after 8 P.M. on election day are void. Provides that no declared disaster emergency, executive order or court order may waive that deadline.

House Bill 1618, Printer's No. 1794 requires county boards of elections to meet at least once before election day to pre-canvass all ballots received prior to the meeting. This can occur at any point during the seven-day period prior to election day, including the day before election day. This authorization is contingent upon the board completing a pre-canvass of all ballots received prior to the Friday before election day. Pre-canvassing activities authorized are those currently present in the law.

House Bill 1619, Printer's No. 1795 extends the current pre-canvassing period to no earlier than 21 days prior to election day.

House Bill 1620, Printer's No. 1796 provides for a "notice to cure" if an absentee or mail-in ballot is received on which the signature cannot be verified to prove identity.

Senate Bill 784, Printer's No. 922 changes the application date for absentee ballots and allows additional time for prec canvassing.

### *Nomination Petitions*

Senate Bill 56, Printer's No. 33 extends the provisions regarding the counting and treatment of irregular ballots to general elections (the provisions formerly applied only to primary elections). This includes a provision that irregular ballots are not to be counted unless the total number of ballots equals or exceeds the number of signatures required to file a nomination petition.

House Bill 367, Printer's No. 339 sets the minimum number of signatures need for candidates at primaries at 10 in cities of the 3<sup>rd</sup> Class.

House Bill 894, Printer's No. 990 extends the provisions regarding the counting and treatment of irregular ballots to general elections (the provisions formerly applied only to primary elections). This includes a provision that irregular ballots are not to be counted unless the total number of ballots equals or exceeds the number of signatures required to file a nomination petition. The bill also provides for open primaries.

House Bill 1425, Printer's No. 1532 waives nomination petition and affidavit requirements for incumbents seeking renomination for the same office or persons who were defeated in the immediately preceding election cycle for the same office. This waiver is inapplicable for offices that are the subject of redistricting in the first election cycle following the redistricting.

### *Pollwatchers*

Senate Bill 573, Printer's No. 612 increases the number of authorized pollwatchers, removes the requirement that pollwatchers be residents of the county within which they serve and replaces it with a requirement that they be residents of the Commonwealth, and authorizes watchers to be within the enclosed space where ballot counting occurs, but they may not interfere with the counting.

### *Poll Worker Recruitment and Retention*

House Bill 1638, Printer's No. 1813 provides an exemption from state income tax for compensation received by poll workers for the election-related duties.



### *Primaries*

Senate Bill 346, Printer's No. 369 allows an "unenrolled elector" (independent or unaffiliated) to vote at a primary by declaring which political party the elector wishes to vote in for that primary election.

Senate Bill 428 moves the date of the primary in presidential election years to the third Tuesday of March.

Senate Bill 690, Printer's No. 816 allows an "unenrolled elector" (independent or unaffiliated) to vote at a primary by declaring which political party the elector wishes to vote in for that primary election.

House Bill 894, Printer's No. 990 allows unaffiliated qualified voters to vote at a primary by declaring which political party the elector wishes to vote in for that primary election. The party designation remains until the elector changes it. See above.

House Bill 1614, Printer's No. 1788 amends the number of official election ballots to be provided at primary and general elections.

### *Voter Registration*

House Bill 24, Printer's No. 12 creates the Voter Registration Database Audit Act. The bill calls for an audit of the voter registration database and at the conclusion purging of the records of all deceased and inactive electors.

Senate Bill 30, Printer's No. 12 Senate Bill 30, Printer's No. 12 proposes a constitutional amendment to lower the voting age in Pennsylvania to 16.

Senate Bill 141, Printer's No. 118 provides for automatic voter registration upon application for a driver's license, and upon application for employment with a state agency or an application for program benefits through a state agency.

House Bill 143, Printer's No. 109 requires monthly cross-referencing of the State's database of registered voters with death record information from local registrars. The bill also provides for registration updates for person who move residence.

Senate Bill 198, Printer's No. 171, creates the Election Day Registration Act.

House Bill 205 provides for automatic registration of qualified electors. Personal information is to be collected from PennDOT, the Department of Human Services, and the Department of Military and Veterans Affairs. Electors so registered are to receive notice of the registration, the opportunity to decline, and the ability to enroll/designate a political party.

House Bill 215, Printer's No. 181 allows for same day voter registration.

House Bill 462, Printer's no. 423 provides for cancellation of a deceased persons registration. Within two days of receipt of a death certificate by a local registrar or the State Registrar of Vital Statistics, notice is to be given to local election officials.

Senate Bill 510, Printer's No. 536, allows youth between the ages of 16 and 18 to pre-register to vote.

House Bill 1053, Printer's No. 1087 authorizes same day voter registration.

House Bill 1334, Printer's No. 1432 creates the Secure and Fair Elections Act. The bill requires all persons seeking to register to vote to provide proof of U.S. citizenship. Persons registered to vote on the effective date of the act will be deemed to have provided satisfactory proof and will not be required to submit evidence of U.S. citizenship.

### *Voting Machines*

House Bill 1663, Printer's No. 1858 requires voting machines used in Pennsylvania to be manufactured in the United States and sold by a vendor with a primary place of business in the United States.

### *Voting Rights of Previously Incarcerated*

House Bill 1336, Printer's No. 1439 provides that the Department of State to notify inmates of the requirements of eligibility to vote after release from confinement in a penal institution in the Commonwealth.

House Bill 1337, Printer's No. 1434 provides that the Department of State shall maintain a database on its publicly accessible website to all persons to search for information about the voting habits and activities of previously incarcerated individuals.

### *2020 Election Concerns*

Senate Bill 71, Printer's No. 53 requires the Department of State to provide a report on how complaints about the 2020 Election were handled.

Senate Bill 528, Printer's No. 602, the 2020 General Election Review and Audit Act requires the Auditor General to perform an audit of the 2020 presidential election.

## ACTIVITIES IN OTHER JURISDICTIONS

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### *United States Congress*

This subchapter provides a cursory review of proposed federal legislation known as HR1, also commonly referred to as the “For the People Act of 2021.” It is worth noting that this piece of legislation has been a polarizing subject of discussion throughout national politics, especially with respect to its proposed amendments to federal election law.

#### *Procedural History*

HR1 is currently pending before the 117<sup>th</sup> United States Congress. The bill was initially introduced before the U.S. House of Representatives on January 4, 2021, where 222 Democrats ultimately signed on as co-sponsors. No Republicans co-sponsored the bill. On March 2, 2021, HR1 was brought up for debate before the House. On March 3, 2021, the House voted 220-210 to adopt HR1, with all but one present Democratic Representative (Rep. Bennie Thompson, Miss.) voting in favor and no support from any Republican Representatives. The bill was received in the U.S. Senate on March 11, 2021, and as of May 25, 2021, the bill has yet to be taken up in the Senate and remains pending.<sup>92</sup>

The bill addresses several areas of the election process including election integrity and security, campaign finance, voter access, and ethics for the three branches of the federal government. In addition, the bill would federalize the election process by implementing nationwide mandates for the states to carry out in their election processes. For instance, the bill would require all states to universally implement early voting, automatic voter registration, no-fault absentee balloting for voters, and other requirements.

#### *Significant Provisions*

Below is a list highlighting some of the more significant provisions within the bill that will have a direct impact on state laws for federal elections.

##### Expanding Voter Registration

The bill mandates that the chief State election official of each State operate a system of automatic registration for the registration of eligible individuals to vote for elections for Federal office in the State. According to the bill, “automatic registration” is essentially a

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<sup>92</sup> Congress.Gov, “H.R. 1 – For the People Act of 2021,” <https://www.congress.gov/bill/117th-congress/house-bill/1/all-actions?overview=closed#tabs>, last accessed on May 25, 2021.

system that registers an individual to vote in elections for Federal office in a State, if eligible, by electronically transferring the information necessary for registration so that, unless the individual declines to be registered, the individual will be registered to vote.<sup>93</sup>

Specifically, the official must ensure that the individual is registered to vote in elections for Federal office in the State if the individual is eligible, not later than 15 days after a contributing agency has transmitted information. This official is also required to send written notice to the individual, in addition to other means of notice established within the bill, of the individual's voter registration status, not later than 120 days after a contributing agency has transmitted such information.<sup>94</sup> The bill further provides that a state may not refuse to treat an individual as an eligible individual on the grounds that said individual is less than 18 years of age at the time a contributing state agency receives information with respect to the individual, so long as the individual is at least 16 years of age at such time.<sup>95</sup> Agencies administering the automatic registration system mandated by the bill must ensure that an eligible individual is given the opportunity to decline the opportunity to register to vote.<sup>96</sup>

In addition, the bill requires each state to ensure the availability of internet for online registration on the official public websites of the appropriate State and local election officials. The websites must also include online assistance to applicants in applying to register to vote, a streamlined completion and submission registration application form prescribed by the Election Assistance Commission, and online receipts of completed voter registration applications.<sup>97</sup>

Each State would be required under the bill to permit same day registration for any eligible individual. In other words, an eligible individual must be permitted on the day of a Federal election and on any day when voting, including early voting, to register to vote in a Federal election and to cast a vote in such election.<sup>98</sup>

Under the bill, each state would be mandated to permit individuals to vote in an election for Federal office during an early voting period prior to the date of the election, in the same manner as voting is allowed on such date. The early voting period required would consist of a period of consecutive days (including weekends) beginning on the 15th day before the date of the election (or, at the option of the State, on a day prior to the 15th day before the date of the election) and would end on the date of the election. Each polling place permitting early voting must allow such voting for no less than 10 hours on each day; have uniform hours each day for voting; and allow such voting to be held for some period of time prior to 9:00 a.m (local time) and some period of time after 5:00 p.m. (local time).<sup>99</sup>

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<sup>93</sup> H.R. 1, 117th Cong., § 1012(a)(1)-(2) (2021).

<sup>94</sup> *Ibid.* § (b)(1)-(2).

<sup>95</sup> *Ibid.* § 1012(d).

<sup>96</sup> *Ibid.* § 1013(b)(2).

<sup>97</sup> *Ibid.* § 6A(a)(1)-(4).

<sup>98</sup> *Ibid.* § 304(a)(1)(A)-(B).

<sup>99</sup> *Ibid.* § 306(a)(1)-(2), (b)(1)-(3).

The bill also requires certain parameters for location of polling places, such as proximity to public transportation and college campuses.<sup>100</sup>

Voting by mail must be an option available to all eligible voters in every state under the requirements of the bill. No state may impose any additional requirements or conditions on the eligibility of an individual to cast a vote by absentee ballot by mail.<sup>101</sup>

#### Protection of Information

The bill prohibits contributing state agencies from collecting, retaining, transmitting, or publicly disclosing an individual's decision to decline voter registration, an individual's decision not to affirm his or her citizenship, or any information that a contributing agency transmits pursuant to pre-existing voter registration information.<sup>102</sup> Each state must establish appropriate technological security measures to prevent to the greatest extent practicable any unauthorized access to information provided by individuals using the online services for voter registration.<sup>103</sup>

#### Voter Identification

The bill appears to relax state voter ID laws by requiring states to allow those who do not have an ID to present a statement "signed by the individual under penalty of perjury, attesting to the individual's identity and attesting that the individual is eligible to vote in the election." This requirement would only be applicable for federal elections.<sup>104</sup>

#### Use of Electronic Addresses for Purposes other than Official Use

H.R. 1 would also require that a chief State election official ensure that any electronic mail address provided by an applicant is used only for purposes of carrying out official duties of election officials and is not transmitted by any State or local election official (or any agent of such an official, including a contractor) to any person who does not require the address to carry out such official duties and who is not under the direct supervision and control of a State or local election official.<sup>105</sup>

#### Congressional Redistricting

The bill establishes terms and conditions States must follow in carrying out congressional redistricting after an apportionment of Members of the House of Representatives. Specifically, the bill requires that congressional redistricting be conducted in accordance with a redistricting plan established by an independent redistricting commission established by a state pursuant to specific terms in the bill.<sup>106</sup>

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<sup>100</sup> *Ibid.* § 306(c)(1), (3).

<sup>101</sup> *Ibid.* § 307(a)(1).

<sup>102</sup> *Ibid.* § 1015(d)(1)-(4).

<sup>103</sup> *Ibid.* § 6A(f).

<sup>104</sup> *Ibid.* § 1903(a).

<sup>105</sup> *Ibid.* § 1003(c).

<sup>106</sup> *Ibid.* § 2401(a)(1).

Under the plan, the following criteria must be followed:

- Districts must comply with the U.S. Constitution.
- Districts must comply with the Voting Rights Act of 1965 (52 U.S.C. 10301 et seq.), and all applicable Federal laws.
- Districts must be drawn, to the extent that the totality of the circumstances warrant, to ensure the practical ability of a group protected under the Voting Rights Act of 1965 (52 U.S.C. 10301 et seq.) to participate in the political process is not diluted or diminished.
- Districts must respect communities of interest, neighborhoods, and political subdivisions to the extent practicable. A “community of interest” is defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, cultural, geographic or historic identities. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, municipalities, tribal lands and reservations, or school districts, but shall not include common relationships with political parties or political candidates.<sup>107</sup>

### Campaign Finance

The bill also addresses the issue of campaign finance by expanding the prohibition on campaign spending by foreign nationals. In addition, the bill requires additional disclosure of campaign-related fundraising and spending, along with additional disclaimers regarding certain political advertising, and establishing an alternative campaign funding system for certain federal offices.<sup>108</sup> Any covered organization that makes campaign-related disbursements aggregating more than \$10,000 in an election reporting cycle must, not later than 24 hours after each disclosure date, file a statement with the Commission disclosing its campaign-related disbursements.<sup>109</sup>

### Ethics for the Three Branches of Government

The bill addresses ethics requirements for all three branches of government. For instance, the bill provides that the Judicial Conference issue a code of conduct applicable to each justice and judge of the United States. The code of conduct may include provisions that are applicable only to certain categories of judges or justices.<sup>110</sup> The bill also prohibits Members of the House from serving on the board of a for-profit entity and establishing additional conflict-of-interest and ethics provisions for federal employees and the White House.<sup>111</sup> With respect to conflicts of interest and Covered Executive Branch employees,

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<sup>107</sup> *Ibid.* § 2401(a)(1)-(4).

<sup>108</sup> *Ibid.* § 4105.

<sup>109</sup> *Ibid.* § 342(a)(1).

<sup>110</sup> *Ibid.* § 7001(a).

<sup>111</sup> *Ibid.* Title VIII.

the bill prohibits such employees from participating “personally and substantially in a particular matter in which the covered employee knows or reasonably should have known that a former employer or former client of the covered employee has a financial interest.”<sup>112</sup>

### *Other States*

State election laws are being amended at a rapid pace, and new enactments reach the evening news with startling frequency. This subchapter will attempt to address the newest developments in other states that may be of interest to Pennsylvania as it deliberates potential changes to its election laws beyond mail-in ballot processing.

Through June 21, 2021, other states have adopted numerous statutes and amendments affecting election law. This short summary highlights those changes that are not addressed elsewhere in this report.<sup>113</sup>

#### Arizona

- Comparison of death records with the statewide voter registration database
- Security procedures for voting machines and electronic polling devices
- Prohibits the use of private monies to prepare, administer or conduct an election
- Specifies that absentee ballots cannot reveal voter’s political affiliation
- Revisions to election ballots, dates, deadlines, election boards, nomination petitions, and polling locations

#### Arkansas

- Voter ID for provisions ballots
- Requires all voting machines to operate without a connection to the internet or an external network
- Limits on absentee ballot collection

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<sup>112</sup> *Ibid.* § 602.

<sup>113</sup> Information culled from the National Conference of State Legislatures, “2021 Election Enactments,” May 24, 2021, <https://www.ncsl.org/research/elections-and-campaigns/2021-election-enactments.aspx>.

- Prohibits election officials from distributing unsolicited absentee ballot applications
- Balloting Integrity Act – complaint process
- Restricts electioneering within 100 feet of primary exterior entrance to a polling place
- Requires county board to certify to State that it has a secure electronic connection to prevent unauthorized access to electronic pollbooks, voter registration database, voting equipment, and materials

#### Hawaii

- Changes to procedures for proclamations of voter service centers and drop boxes, including days, location, and hours of operation

#### Idaho

- Training and guidance on verification of signatures of electors and petition signers

#### Illinois

- Amends drop box provisions, allows curbside voting, and allow ballots returned without postage to be accepted
- Provision of voter registration information to citizens when released from incarceration and allows Department of Corrections to participate in automatic voter registration program
- Requires cybersecurity measures by local election authorities
- Mandates that information regarding voter registration to be provided to high school students
- State Board of Elections to provide local authorities with guidance 90 days before each election
- Makes November 8, 2022 a state holiday
- Provides for permanent mail-in voting lists



## Indiana

- Removal from voter registration of persons incarcerated in another state
- Early absentee ballot voting in satellite offices
- Prohibits use of private funds for preparing, administering or conducting elections, including registering voters

## Iowa

- Reduces early voting period from 29 days to 19 days
- Requires absentee ballots to be received by the close of the polls on election day
- Requirements of nomination petitions
- Proof of ID for provisional ballots
- Absentee ballot application and ballot tracing on state website to be available by February 26, 2024
- Prohibiting ballot harvesting

## Kentucky

- Establishes three days of early voting
- Allows vote center polling places
- Creates an online absentee ballot request portal
- Allows voters to cure signatures on absentee ballots
- Provides for curing of ballots
- Establishes an online absentee ballot tracking service

## Louisiana

- Requires annual training for members of parish board of elections

- Requires persons conducting exit polls to register with the State
- Registrars of voting to complete orientation and training
- Provides for voter registration rights of persons with felony convictions if the person has not been incarcerated for the past five years and had not been convicted of an election offense

#### Maryland

- Increases the number of voting centers in some counties
- Allows for permanent absentee ballot status and list
- Establishes provisions governing locations of drop boxes
- Requires absentee ballot applications be sent to every eligible voter before the primary election in 2022 and 2024
- Provides for information and voter registration applications for individuals released from correctional facilities
- Requires Baltimore City central booking facility to provide a designated drop box for eligible voters who are incarcerated in the facility to submit voter registration and absentee ballot applications, and absentee ballots
- Expands hours at early voting centers

#### Montana

- Eliminates same day voter registration. Deadline is now noon of the day before the election.
- Prohibits any pecuniary benefit to a person in exchange for distributing, ordering, requesting, collecting, or delivering ballots
- Requires Secretary of State to adopt rules governing election security and requires election security assessments to be made every year, beginning January 1, 2023
- Requires accessible voting locations for disabled voters during elections conducted primarily by mail

- Pollwatchers are allowed to be at each drop box during the days and times they are open for mail ballot elections
- Revises identification requirements for voter registration and voting
- Requires voter list maintenance to occur annually
- Allows election officials to reduce hours of operation at polling places where less than 400 voters are expected
- Allows counties to test vote tabulation machines before automatic tabulation begins

#### Nevada

- Governs voting by electronic transmission system by voter with a disability – registration, application for absentee ballot, and casting an absentee ballot
- Establishes mail in ballot procedures for all elections. Each active registered voter to receive a mail ballot for every election

#### New Jersey

- Allows county boards of election to determine drop box locations in certain circumstances
- Requires nine days of early voting for November elections; three days for non-presidential primary elections and five days for presidential primary elections

#### New York

- Adds the State University of New York (SUNY) as a designated voter registration agency for automatic voter registration<sup>114</sup>
- Restores voting rights of formerly incarcerated persons who were convicted of a felony

#### North Dakota

- Prohibits the use of private monies for election operations or administration

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<sup>114</sup> SUNY is comprised of 64 campuses; by comparison, Penn State has 24 campuses.

## Oklahoma

- Modified the days when registered voters can apply in-person for absentee ballot
- Requires county election board to keep record of voter's preferred method of voting
- Authorizes the state to participate in multistate voter list maintenance organizations such as the Electronic Registration Information Center (ERIC)
- Authorizes purchase of equipment and software to implement electronic poll books

## North Dakota

- Persons conducting public counting of the votes received at the polls are not to leave the site until the count is complete

## Oregon

- Prohibits communication of false statements regarding voting procedures, places, dates and deadlines, etc. within 30 days of a primary or 60 days of a general elections
- Prohibits moving voters to inactive status due to not voting or updating voter registration for a period of time. Counties to notify persons of current inactive status and how to reactivate registration

## Tennessee

- Counties with permanently established convenient voting centers to provide a report within 90 days of each election to include an evaluation of the centers, issues, and suggestions for improvement
- Prohibits the use of private monies for election operations or administration

## Texas

- Requires early voting clerks to post early voting turnouts in a timely manner
- Creates felony offenses for knowingly and intentionally counting invalid votes

- Provides for persons allowed to be present at the polling place through the election day process
- Sets deadlines for local register of deaths to report to the registrar of the decedent's county of residence and the Secretary of State
- Provides for the development of an online tracking tool to all tracing of location and status of mail-in applications and ballots
- Requires voting system vendors to disclose ownership interests of persons and entities owning five percent or more of the vendor
- Provides for a standardized training program and materials for county election officers
- Provides for the withholding of certain state and federal funds from registrars who fail to timely perform duties requiring the approval, change or cancellation of a voter's registration
- Provides for risk-limiting audits after August 31, 2016, with a pilot effort to take place with the November 8, 2022 election
- Prohibits establishing false residence for purpose of influencing an election
- Requires that voting system equipment be manufactured, stored and held in the United States and sold by a company whose headquarters and parent headquarters are in the United States, beginning September 1, 2021.

## Utah

- Requires removal of deceased voters from the voter rolls
- Creates an online system for voters to track their mailed ballots and receive notice of status
- Ranked-choice voting pilot program
- Requires election officials to report an estimate of the total number of ballots in the official's custody that remain to be counted beginning on the day after the election and ending on the day before the canvass date
- Effective date of change in voter designation or political party affiliation

## Vermont

- Requires the Secretary of State to mail every active voter a postage-paid ballot for each general election

## Virginia

- If online voter registration system fails before close of registration period, Governor has authority to order the system to be open after the closing date for a commensurate time
- Requires establishment of ballot drop boxes, allows for cure of signature statements in some circumstances
- Permits early absentee in-person voting
- Permits persons 16 years of age or older to pre-register to vote
- No person convicted of a felony may vote before completion of his/her sentence, at which time voting rights are automatically restored
- Prohibits voting by incapacitated persons
- Requires the establishment of a drop off location for the return of marked absentee ballots at the general registrar's office and each voter satellite office, as well as at each polling place on election day
- Requires the state to create a tool to allow voters with a visual impairment or print disability to electronically receive and mark absentee ballots

## Washington

- Exempts election operation plans, security risk assessments and other election security records for public records disclosure law
- Restores voting rights of citizens on parole
- Misrepresentation of an unofficial ballot collection site or device as an official ballot drop box is a gross misdemeanor

## Wyoming

- Requires voter ID to vote in person

***Statutory Authority  
for Election Law Advisory Board***

PENNSYLVANIA ELECTION CODE - OMNIBUS AMENDMENTS  
Act of Mar. 27, 2020, P.L. 41, No. 12 Cl. 25  
Session of 2020  
No. 2020-12

**ARTICLE XIII-E  
PENNSYLVANIA ELECTION LAW ADVISORY BOARD**

Section 1301-E. Definitions.

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The Pennsylvania Election Law Advisory Board established under section 1302-E(a).

Section 1302-E. Pennsylvania Election Law Advisory Board.

(a) Establishment.--The Pennsylvania Election Law Advisory Board is established within the Joint State Government Commission.

(b) Members.--The board shall be comprised of the following members:

- (1) The Secretary of the Commonwealth or a designee.
- (2) The President pro tempore of the Senate or a designee.
- (3) The Minority Leader of the Senate or a designee.
- (4) The Speaker of the House of Representatives or a designee.
- (5) The Minority Leader of the House of Representatives or a designee.
- (6) One member from each congressional district, of whom no more than half may be registered with the same political party, appointed by the Governor and confirmed by the Senate and which shall include members who:

- (i) represent groups advocating for individuals with disabilities;<sup>22</sup>
- (ii) represent groups advocating for voting rights; and
- (iii) represent county commissioners or county election officials.

(c) Duties.--The board shall have the following duties:

- (1) Study this act and identify statutory language to repeal, modify or update.

- (2) Collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues.
- (3) Study the development of new election technology and voting machines.
- (4) Evaluate and make recommendations on:
  - (i) improving the electoral process in this Commonwealth by amending this act or through regulations promulgated by the Department of State; and
  - (ii) implementing best practices identified to ensure the integrity and efficiency of the electoral process in this Commonwealth.
- (5) By the end of each fiscal year, publish extensive and detailed findings on the Joint State Government Commission's publicly accessible Internet website and make them available in electronic format to the Office of the Governor and members of the General Assembly.
- (d) Quorum.--A majority of appointed members shall constitute a quorum for the purpose of conducting business.
- (e) Chairperson and vice chairperson.--The members shall select a member to be chairperson and another member to be vice chairperson.
- (f) Transparency and ethics.--The board shall be subject to the following laws:
  - (1) The act of July 19, 1957 (P.L.1017, No.451), known as the State Adverse Interest Act.
  - (2) The act of October 4, 1978 (P.L.883, No.170), referred to as the Public Official and Employee Ethics Law.
  - (3) The act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law.
  - (4) 65 Pa.C.S. Ch. 7 (relating to open meetings).
- (g) Information gathering.--The board may conduct hearings and otherwise gather relevant information and analysis that it considers appropriate and necessary to fulfill its duties.
- (h) Reimbursement.--Members of the board shall be reimbursed for reasonable expenses.



### *2020 Pennsylvania Election Law Litigation*

*Pennsylvania Democratic Party v. Boockvar*<sup>115</sup>

#### Posture of the Case

Initially, the Pennsylvania Democratic Party and several Democratic candidates for office filed a petition for an injunction and declaratory relief in the Commonwealth Court. The Pennsylvania Supreme Court, under its authority to exercise extraordinary jurisdiction over an issue of immediate public importance, assumed jurisdiction in this matter.

#### Issue before Pennsylvania Supreme Court:

In this case, the petitioners sought:

- A declaratory judgment to confirm that Act 77 permits county boards of elections to provide “mobile or temporary collection sites, and/or drop-boxes for the collection of mail-in ballots”;
- An injunction to lift the deadline in the Election Code statewide to allow any ballot postmarked by 8:00 p.m. on Election Night to be counted if it is received by the Boards” by 5:00 p.m. on Tuesday, November 10, which is the deadline for ballots to be received under the Federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA);
- An injunction requiring the county boards of elections to contact electors who make minor errors on their mail-in ballots and provide them the opportunity to cure the ballot defect until the UOCAVA deadline;
- A declaration that there is no statutory authority to set aside an absentee or mail-in ballot solely for failure to place it into the official ballot or “secrecy” envelope — effectively asking the court to permit the counting of “naked” ballots;
- A declaration that the Election Code’s poll watcher residency requirement does not violate the United States Constitution’s First and Fourteenth Amendments, its Equal Protection Clause, or the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

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<sup>115</sup> *Pennsylvania Democratic Party*, 238 A. 3d. at 361

Before the Supreme Court resolved these issues on their merits, a request to intervene was filed by Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, as well as Joseph B. Scarnati II, President Pro Tempore and Jake Corman, Majority Leader of the Pennsylvania Senate, in opposition to the petition.

The Supreme Court granted relief to the Petitioners' First, Second, and Fifth claims. Important to this litigation, to provide the relief the Petitioners sought in their Second claim, the Court fashioned its own rule which required ballots received up to three days after the election must be included so long as they are postmarked within that three-day period. If a mail-in ballot is not postmarked but received within that three-day window, it shall be presumed that the ballot was mailed within the allotted timeframe.

It denied relief as to the Third and Fourth claims, regarding ballot curing and secrecy envelopes respectively, holding that the Election Code does not permit ballot curing and that the Election Code explicitly requires that a mail-in ballot be placed inside the secrecy envelope to be considered valid.

#### Post-Ruling Procedure

On September 24, an application for a stay of its ruling was denied by the Pennsylvania Supreme Court. On September 28, stays were filed with the United States Supreme Court by the Pennsylvania Republican Party and Joseph Scarnati, respectively. On October 19, these applications for a stay of the Pennsylvania Supreme Court's ruling were denied by an equally divided United States Supreme Court.

On October 4, a petition for a writ of certiorari was filed by the Republican Party of Pennsylvania. The issue on appeal before the United States Supreme Court is whether the decision by the Pennsylvania Supreme Court requiring the state to count mail-in ballots received up to three days after Election Day, so long as they are not clearly postmarked after Election Day, violates federal election law and the Constitution.

On October 28, a motion to expedite consideration of the petition for a writ of certiorari was denied. Justice Alito, joined by Justices Thomas and Gorsuch, issued a statement disagreeing with this denial, and indicating that they consider this matter important and expressing a belief that its resolution should be expedited.

On November 6, the Republican Party of Pennsylvania filed an Emergency Application for an Injunction with the United States Supreme Court. The same day, Justice Alito ordered that all county boards of election in the Commonwealth segregate all mail-in ballots received after 8:00 PM on Election Day, to keep them in secure, safe, and sealed container separate from other voted ballots, and that all such ballots be counted separately.

However, there has been no action taken by the U.S. Supreme Court since that date. As of this date, the Court has not accepted, nor denied, the petition for a writ of certiorari in this case.

Posture

On September 28, following the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar* permitting mail-in ballots to be counted if they are received three days after the election, the Pennsylvania Republican Party petitioned the United States Supreme Court for an Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari. On October 19, the application to stay the Pennsylvania Supreme Court’s ruling was denied. This is the same application and denial as in *Pennsylvania Democratic Party* and *Scarnati*.

On October 23, the Pennsylvania Republican Party filed a petition for a Writ of Certiorari. The same day a motion to expedite consideration of the petition for a Writ of Certiorari was filed. On October 28, the motion to expedite was denied, with Justice Alito issuing a statement in which Justices Thomas and Gorsuch joined. This is the same motion to expedite, denial of motion to expedite, and statement of Justice Alito issued in *Pennsylvania Democratic Party* and *Scarnati*.

The questions presented to the United States Supreme Court in *Pennsylvania Republican Party* are:

- “Whether the Pennsylvania Supreme Court majority violated the United States Constitution by usurping the Pennsylvania General Assembly’s plenary authority to “direct [the] Manner” for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and its broad power to prescribe “[t]he Times, Places, and Manner” for congressional elections, id. art. I, § 4, cl. 1”; and
- Whether the majority’s extension and presumption conflict are preempted by federal statutes that establish a uniform nationwide federal Election Day. See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1.

The questions presented in this petition are identical to the ones presented in the petition of *Scarnati*. The petitions for writ of certiorari were denied on February 22, 2021.

*Scarnati v. Pennsylvania Democratic Party*

Posture

In *Pennsylvania Democratic Party v. Boockvar*, Joseph Scarnati filed a motion to intervene as President Pro Tempore of the Pennsylvania Senate. After the decision in that case, Joseph Scarnati and Jake Corman (Scarnati’s successor as President Pro Tempore)

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<sup>116</sup> This case and the Scarnati case that follows were combined into *Republican Party of Pennsylvania v. Degraffenred*, 592 U.S. \_\_\_ (2021).

filed one emergency stay and the Republican Party filed another emergency stay, as well as seeking an emergency stay under the heading of the *Pennsylvania Democratic Party*.

This case arises from Scarnati’s Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, filed on September 28. On October 19, the stay was denied by the Court, and Justices Thomas, Alito, Gorsuch and Kavanaugh would have granted it, indicating a 4-4 split (as Justice Barrett did not take the bench until October 27).

A petition for writ of certiorari in *Scarnati* was filed on October 23, along with a motion to expedite consideration of the Petition for a Writ of Certiorari. That motion was denied on October 28. This is the same motion in *Pennsylvania Democratic Party* but it appears to apply to *Scarnati*, *Republican Party of Pennsylvania*, and *Democratic Party of Pennsylvania*.

The questions presented to the United States Supreme Court in *Scarnati* are:

- “Whether the Pennsylvania Supreme Court majority violated the United States Constitution by usurping the Pennsylvania General Assembly’s plenary authority to “direct [the] Manner” for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and its broad power to prescribe “[t]he Times, Places, and Manner” for congressional elections, id. art. I, § 4, cl. 1”; and
- Whether the majority’s extension and presumption conflict with and are preempted by federal statutes that establish a uniform nationwide federal Election Day. See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1.

It is noted in the petition for *Scarnati* that “the questions presented in this Petition are identical to those presented by the Republican Party of Pennsylvania in its Petition for a Writ of Certiorari in *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020).

*Donald J. Trump for President, Inc. v. Boockvar*<sup>117</sup>

President Donald Trump’s campaign filed a complaint in the Federal District Court for the Western District of Pennsylvania alleging federal and state constitutional violations stemming from the Commonwealth’s implementation of mail-in voting. Between the time the campaign filed the lawsuit and the time the judge had occasion to rule on it the Pennsylvania Supreme Court decided several of the issues before the District Court, narrowing the scope of the instant litigation.

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<sup>117</sup> *Donald J. Trump for President, Inc. v. Boockvar*, 403 F. Supp. 3d 331 (W.D. Pa. 2020) (Trump I).

The three issues decided in this case were:

- “whether the use of so-called “drop boxes” for mail-in ballots is unconstitutional, given the lack of guidance or mandates that those drop boxes have security guards to man them”;
- “whether the Secretary’s guidance as to mail-in ballots—specifically, her guidance that county election boards should not reject mail-in ballots where the voter’s signature does not match the one on file—is unconstitutional”; and
- “whether Pennsylvania’s restriction that poll watchers be residents in the county for which they are assigned, as applied to the facts of this case, is unconstitutional.”

The Court entered a judgment for the defendant on all three issues. The Court concluded that the campaign lacked standing to bring the challenge, as they “have not presented a concrete injury to warrant federal-court review.” The Court further opined that even if the Court were to agree that the campaign had standing, their claims would fail on the merits because they “essentially ask this Court to second-guess the judgment of the Pennsylvania General Assembly and election officials, who are experts in creating and implementing an election plan,” explaining that “the job of an unelected federal judge isn’t to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials.” (internal citation omitted).

*Disability Rights Pennsylvania et al. v. Boockvar*<sup>118</sup>

On May 8, the Disability Rights Pennsylvania filed a complaint requesting declaratory and injunctive relief to expand the deadline for submitting mail-in votes in light of the Coronavirus pandemic. On May 15, the Pennsylvania Supreme Court entered an order *sua sponte* dismissing plaintiff’s complaint.

*Bognet v. Boockvar*<sup>119</sup>

On October 22, the plaintiffs, a candidate for federal office and private citizens, filed a complaint against Secretary Boockvar and all 67 county boards of election in federal District Court, claiming that the Pennsylvania Supreme Court decision in *Pennsylvania Democratic Party v. Boockvar* usurped the authority of the General Assembly to establish the “Time, Place and Manner” of federal elections in the federal Constitution’s Electors and Elections Clause by extending the receipt deadline for mail-in ballots to three days after Election Day.

On the same day, the plaintiffs filed a Motion for an Immediate Temporary Restraining Order and a Preliminary Injunction and an Expedited Hearing. On October 28, the Court denied the plaintiff’s motion.

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<sup>118</sup> No. 83 MM 2020 (Pa. Supreme Court).

<sup>119</sup> *Bognet*, 980 F.3d. 336.

The Court ruled that plaintiff Bognet’s “alleged injury [as a result of the Pennsylvania Supreme Court decision] is too speculative to confer standing.” The Court reasoned that for Bognet to have suffered harm, “more votes which otherwise would not have been counted must be cast in favor of Bognet’s opponent than in his favor.” The Court also found that the two private citizen plaintiffs lacked standing. Their theory of vote dilution was not a concrete and particularized injury-in-fact necessary to confer Article III standing.

However, the Court found that the Pennsylvania Supreme Court’s order to presume that mail-in ballots without postmarks are valid violates the Equal Protection Clause because it creates an unequal treatment of votes. Although the District Court found that the plaintiff had established a likelihood of success on the merits of their claim, ordinarily entitling them to a preliminary injunction, the Court cited *Republican National Committee v. Democratic National Committee*<sup>120</sup> for the principle that “lower federal courts should ordinarily not alter the election rules on the eve of an election.” On that basis, the Court denied the plaintiffs their requested relief.

The plaintiffs filed a notice of appeal on October 29. On October 30, the plaintiffs filed an Emergency Motion for an Expedited Briefing Schedule. The same day the Third Circuit denied the plaintiff appellants’ Emergency Motion. After a full briefing by both parties, the court issued an opinion affirming the District Court’s denial of Plaintiff’s Emergency Motion for Preliminary Injunction.

The Third Circuit affirmed the District Court, finding that the plaintiffs lacked standing under the Elections and Electors Clause. After some analysis of the Elections and Electors Clause, the Third Circuit concluded that only a state legislature would have standing to bring a claim under that clause, stating that “Plaintiffs’ Elections Clause claims thus ‘belong, if they belong to anyone, only to the Pennsylvania General Assembly,’” quoting *Corman v. Torres*.<sup>121</sup>

Further, the Third Circuit held that “vote dilution” by counting unlawfully cast ballots is not a concrete harm sufficient to confer standing on the plaintiffs, finding that “violation of state election laws by state officials or other unidentified third parties is not always amenable to a federal constitutional claim.” If vote dilution of lawfully cast ballots by unlawfully cast ones were a true equal protection problem, “then it would transform every violation of state election law ... into a potential federal equal-protection claim requiring scrutiny of the government’s ‘interest’ in failing to do more to stop the illegal activity.”<sup>122</sup>

Even if such a claim were enough to confer standing, the Third Circuit explained that the Equal Protection Clause’s concern regarding vote dilution was founded in circumstances where votes were weighed differently, not where, as in this instance, a state actor allegedly violates state law by counting votes it should not have counted. Here, “no

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<sup>120</sup> *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020).

<sup>121</sup> *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018).

<sup>122</sup> *Trump I* at 391.

Pennsylvania voter’s vote will count for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness.”

In summation, the Third Circuit emphasized that it was not deciding whether the Deadline Extension or the Presumption of Timeliness were proper exercises of the Commonwealth’s lawmaking authority. It was deciding only the question of standing to enjoin the counting of ballots on the grounds that doing so “dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause.”

*Donald J. Trump for President, Inc., et al. v. Boockvar*<sup>123</sup>

In this case, President Trump’s campaign sought to set aside ballots cast in the 2020 presidential election and enjoin the certification of the election based on the November 2<sup>nd</sup> guidance sent by Secretary Boockvar to the counties that the Pennsylvania Supreme Court decision in *Pennsylvania Democratic Party v. Boockvar* neither required nor prohibited ballot curing. Some counties chose to implement a “notice-and-cure” policy, such as Philadelphia, while others did not. In addition to the campaign, plaintiffs in the case included two voters whose votes were discarded because of a defect and whose counties (Lancaster and Fayette) did not give them the opportunity to cure their ballots.

Plaintiffs filed this claim on November 9, raising seven counts — two equal-protection claims, two due-process claims, and three claims under the Electors and Elections Clauses. On November 15, Plaintiffs filed their First Amended Complaint, withdrawing five of their claims and leaving only two claims for each the individual plaintiffs and the campaign — one equal protection claim and one Electors and Elections Clause claim under the federal Constitution each.

After the campaign filed this claim, the United States Court of Appeals for the Third Circuit in *Bognet v. Secretary Commonwealth of Pennsylvania*<sup>124</sup> determined that only the General Assembly would have standing to bring an Electors and Elections Clause claim in federal court. Relying on this case, the District Court dismissed this count on standing grounds as it applied to both the individual plaintiffs and the campaign.

The thrust of the remaining Equal Protection claim of the campaign is that “it is unconstitutional for Pennsylvania to give counties discretion to adopt a notice-and-cure policy,” on the basis that such a policy violates the Equal Protection Clause. However, even on the Equal Protection Clause claim, the District Court found that neither the campaign nor the individual plaintiffs who were not afforded the opportunity to cure their ballots had standing to challenge the November 2<sup>nd</sup> order.<sup>125</sup>

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<sup>123</sup> *Donald J. Trump for President, Inc. v. Secretary Commonwealth of Pennsylvania*, 830 F. Appx. 377 (3d Cir. 2020) (Trump II).

<sup>124</sup> *Bognet*, 980 F.3d. 336.

<sup>125</sup> *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020).

While the District Court found that the two individual plaintiffs had established injury in fact, they “fail[ed] to establish that it was Defendants who caused these injuries and that their purported injury of vote-denial is adequately redressed by invalidating the votes of others.” The Court further reasoned that even if the Secretary of State and other counties “unconstitutionally allowed other voters to cure their ballots that alone cannot confer standing on Plaintiffs who seek to challenge the denial of their votes.”

The District Court further found that because the Defendants’ conduct imposed no burden on the individual plaintiffs’ rights, any claim brought pursuant to the Equal Protection Clause would be reviewed under the rational basis test. Reviewing the individual plaintiffs’ claims under this test, the Court held that their claims “fail because it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots.”

The District Court explained that, even if it were to find that the individual plaintiffs’ Equal Protection rights were violated, it could not impose the remedy they seek — an injunction of the electoral certification. This is because “rather than requesting that their votes be counted, they seek to discredit scores of other votes” by asking the Court to issue such an injunction. The remedy sought is not proportional to the alleged violation of the individual plaintiff’s rights.

Further, “the Trump Campaign’s theory also fails because neither competitive nor associational standing applies, and it does not assert another cognizable theory of standing.” The Court also cited the recently decided *Bognet* in a footnote to clarify that that decision also foreclosed standing on the “theory that Pennsylvania’s purportedly unconstitutional failure to uniformly prohibit the notice-and-cure procedure constitutes vote-dilution[.]”

The District Court also noted that the campaign’s Brief in Opposition to the Motions to Dismiss only spent one paragraph discussing how several counties’ refusal to permit Republican poll watcher or canvass observers violated the campaign’s Equal Protection rights. The District Court stated that there is no Equal Protection issue presented because the campaign “makes no mention of disparity in treatment of observers based on which campaign they represented.” Because there is no allegation that Republican poll watchers or observers were treated differently than Democratic ones, there can be no cognizable Equal Protection claim.

On appeal to the Third Circuit, the Court upheld the dismissal of the Plaintiffs’ case on standing grounds. The Court emphasized that the number of ballots challenged — effectively all of the cured ballots “is far smaller than the roughly 81,000-vote margin of victory” for Biden. Further, the Court also held that the District Court did not abuse its discretion in not letting the Campaign amend its complaint a second time.



*In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*<sup>126</sup>  
and *In Re: 2,349 Ballots in the 2020 General Election*<sup>127</sup>

In this case, consolidating the appeals of six separate cases, the Pennsylvania Supreme Court decided that the Election Code does not require a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged.

The outcome of the case hinged on whether such information is specifically required by the Election Code or whether the instruction to include the name, address, and date is merely "directory." The court concluded that, based on the unambiguous text of the Election Code as well as the principle that election laws ordinarily will be construed liberally in favor of the right to vote, such information is directory and the failure to include it does not disqualify a ballot.

*Kelly v. Pennsylvania*<sup>128</sup>

On November 21, State Representative Mike Kelly and several other plaintiffs filed a complaint for declaratory and injunctive relief against the Secretary of State of the Commonwealth, the Pennsylvania General Assembly, and Governor Wolf in the Commonwealth Court. The plaintiffs sought a declaration that the universal mail-in ballot provisions of Act 77 are unconstitutional and an injunction prohibiting the certification of the 2020 election in Pennsylvania or requiring any such certification to be rescinded.

The thrust of Rep. Kelly's legal argument is that the scheme of Act 77 to allow any elector to vote by mail violates the limitation on absentee voting prescribed in the Pennsylvania Constitution, specifically Article VII, §14. Because Act 77 had the effect of amending the Pennsylvania Constitution, but did not go through the procedural requirements for such an amendment, it should have no legal effect. Effectively, Rep. Kelly asserted that the law was void *ab initio*.

The defendants countered that Act 77 prohibits any challenge to itself if it is filed 180 days after the law's passage and that the plaintiff waited too long to challenge the law under its own terms. The defendants further argued Article VII, §4 of the Pennsylvania Constitution permits the General Assembly to make any law it wishes regarding how elections are conducted, and that Article VII §14 is irrelevant to Act 77.

On November 22, the petitioners filed a Motion for Emergency/Special Prohibitory Injunction. The petitioners hoped to enjoin the defendants from taking official action to certify or otherwise finalize the results of the 2020 General Election. On November 24, before the Court could rule on the Motion for Emergency Injunction, the Secretary of State

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<sup>126</sup> Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020.

<sup>127</sup> 29 WAP 2020 (Consolidated Cases).

<sup>128</sup> *Kelly v. Pennsylvania*, 2020 W.L. 7224280 (Not Reported) (Pa. Commw. Ct. 2020), vacated 240 A.3d 1255 (Pa. 2020).

of the Commonwealth certified the election results, but only for the offices of President and Vice President.

The petitioners questioned whether the respondents “might have short-circuited the certification process to purportedly avert this Courts’ determination on the merits by declaring victories in the presidential and vice-presidential elections, while leaving certification of the elections for the other offices for another time.”

Given the exigencies and time constraints, the Court felt it was necessary to preliminarily enjoin, on an emergency and temporary basis, executive branch defendants from undertaking any other actions with respect to the certification of the results of the presidential and vice-presidential elections. Further, the Court found that the plaintiffs “appear to have established a likelihood to succeed on the merits because Petitioners have asserted the Constitution does not provide a mechanism for the legislature to allow for expansion of absentee voting without a constitutional amendment.”

On November 25, the Governor and Secretary Boockvar filed an Application for Extraordinary Jurisdiction with the Pennsylvania Supreme Court, seeking to have the preliminary injunction invalidated. On November 28, the Pennsylvania Supreme Court, in a *per curiam* opinion, vacated the Commonwealth Court’s order to preliminarily enjoin the Commonwealth from taking any further action regarding the certification of the results of the 2020 General Election, and dismissed with prejudice the Petition for Review filed by Rep. Kelly and the other petitioners.

The Pennsylvania Supreme Court opined that the petitioners’ “challenge violates the doctrine of laches given their complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77’s enactment.” The Pennsylvania Supreme Court emphasized that it was relying upon the common law doctrine of laches, and not the 180-day time bar on challenges to Act 77 that is found in the text of the act.

On the same day, Rep. Kelly and the other plaintiffs filed an Emergency Application for Stay of the Pennsylvania Supreme Court’s November 28 order. On December 3, the Pennsylvania Supreme Court denied the plaintiffs’ Emergency Application for a Stay. On the same day, Rep. Kelly and the other plaintiffs filed an Emergency Application for Writ of Injunction with the United States Supreme Court. Also on December 3, Justice Alito requested responses from respondents by December 8. On December 8, the respondents filed their opposition to the Emergency Application. On February 22, 2021, SCOTUS denied the Petition for a Writ of Certiorari.<sup>129</sup>

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<sup>129</sup> *Id.*, cert. denied. 141 S.Ct. 1449 (2021).

*Donald J. Trump for President, Inc. v. Boockvar*<sup>130</sup>

On November 4, President Trump’s campaign filed a Petitioner for Review in the Commonwealth Court seeking declaratory and injunctive relief against Secretary Boockvar and each of the 67 county boards of election. The campaign in this action challenged the Secretary’s November 1 guidance to counties that voters may wait until November 12 — six days after the additional three days given by the Pennsylvania Supreme Court for voters to mail-in ballots — to provide missing proof of identification.

The campaign pointed to Election Code § 1308(h), which requires that if a voter’s identification is not received for verification “by the sixth day following the election” such ballots shall not be counted. The campaign sought declaratory relief that Secretary Boockvar’s November 1 guidance on this issue was in contravention to the statutory requirement, and a “preliminary, special, and/or permanent” injunction directing the county boards of elections to adhere to the cited provision of the Election Code.

On November 12, the Court granted the campaign the requested declaratory and injunctive relief, finding that Secretary Boockvar “lacked statutory authority to issue the November 1, 2020, guidance to Respondents County Boards of Elections insofar as that guidance purported to change the deadline in Section 1308(h) of the Pennsylvania Election Code.” The Court also enjoined the counties and the Secretary from counting ballots which have been segregated pursuant to the Court’s November 5 order in *Donald J. Trump for President v. Montgomery County Board of Elections*, discussed below.

*Donald J. Trump for President, Inc. v. Montgomery County Board of Elections*<sup>131</sup>

On November 5, President Trump’s campaign filed a Petition for Review of Decision by the Montgomery County Board of Elections. The petition was a statutory appeal to the Common Pleas Court from the county Board of Elections’ decision denying the campaign’s objection to the counting of statutorily prohibited absentee and mail-in ballots cast in Montgomery County, Pennsylvania. The campaign objected to the counting of 600 ballots on which the electors did not fill out their address immediately below their signature line. The campaign asserted that electors are required to provide this information pursuant to Election Code §§ 1308(a) and 1306-D(a).

On November 13, the Common Pleas Court issued a memorandum and order denying the campaign’s petition. The court pointed to language from Election Code § 1308(g)(3), which gives the county board of elections discretion to determine if the declaration is sufficient. Further, the Common Pleas Court held that a ballot should not be invalidated simply because an elector failed to write their address on the outer envelope. The Common Pleas Court disagreed with the campaign’s interpretation of the two sections it relied upon, pointing to other language in the Election Code that did require the address of a witness when an elector was unable to sign due to illness or physical disability. Had

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<sup>130</sup> *Donald J. Trump for President, Inc. v. Boockvar*, 602 MD 2020 (Commw. Ct.) (Trump III).

<sup>131</sup> *Donald J. Trump for President, Inc. v. Montgomery County Board of Elections*, No. 2020-18680 (Mont. Co. Common Pleas 2020).

the General Assembly intended to require an elector's address to be printed on the outer envelope, the Common Pleas Court reasoned, it would have more explicitly stated that requirement.

Further, the instructions provided by the county board of elections did not inform voters that they should write their address on the outer envelope or risk having their ballot rejected. The instructions only informed the electors that they must sign and date their ballot. Regarding the campaign's requested relief, the Common Pleas Court cited *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A. 2d 303, 308-309 (Pa. 1974) for the proposition that invalidating a ballot "where the voter has complied with all instructions communicated to him and in the absence of any evidence of improper influence having been exerted, invalidation would necessarily amount to an unreasonable encroachment upon the franchise...."

The campaign filed a notice of appeal on November 16, but withdrew its notice of appeal on November 18.

*Barnette et al. v. Lawrence et al.*<sup>132</sup>

On November 3, Kathy Barnette, a candidate for federal political office, along with several voters, filed a complaint for declaratory and injunctive relief against Kenneth Lawrence in his capacity as a member of the Montgomery County Board of Elections, as well as two other board members.

The candidate and voters alleged that the Montgomery County Board of Elections was pre-canvassing mail-in ballots prior to the 7:00 AM November 3 time and date for canvassing, and permitting mail-in electors in that county whose ballots were illegally pre-canvassed to change their ballot if the ballot was deficient in some way. The candidate and voters sought an injunction prohibiting the Montgomery County Board of Elections from pre-canvassing ballots and contacting voters to change their ballots if those ballots are deficient, as well as a declaratory judgment that the Montgomery County Board of Elections' actions violate the Election Code.

On November 3, the plaintiff candidate and voters filed a Motion for a Temporary Restraining Order of the same conduct. On November 5, the plaintiffs and the voters withdrew their Motion for a Temporary Restraining Order, as the pendency of another hearing in the Commonwealth Court would make the TRO requested "ineffective in addressing the matters covered in their Motion." On November 6, the Court denied the initial Motion for Temporary Restraining Order in light of the plaintiff's motion to withdraw the motion for a TRO.

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<sup>132</sup> *Barnette et al. v. Lawrence et al.*, 2:20-cv-05477-PBT (E.D. Pa. 2020).

On November 12, the plaintiffs moved to withdraw their complaint without prejudice.

*Donald J. Trump for President, Inc. v. Philadelphia County Board of Elections*<sup>133</sup>

On November 5, President Trump’s campaign filed a Motion for Emergency Injunction against the Philadelphia County Board of Elections, asking the court to order the defendant to cease counting ballots until Republican canvass observers are given meaningful access to the sites where ballots are being counted.

After this motion was filed, the parties came to an agreement, and the Court dismissed the Motion for Emergency Injunction without prejudice.

*Hamm v. Boockvar*<sup>134</sup>

On November 3, Plaintiffs Hamm, a candidate for the Pennsylvania General Assembly, Kelly, a candidate for federal Congressional office, and other individual voters filed a complaint in the Commonwealth Court seeking declaratory and injunctive relief from Secretary Boockvar’s November 3 guidance to the county boards of election that they should “provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected....”

Plaintiffs claim this guidance permitting county boards of elections to give electors an opportunity to cure defects in their ballots contradicts the Election Code, specifically § 1308 and the Pennsylvania Supreme Court decision in *In re November 3, 2020 General Election*.<sup>135</sup>

On November 6, the Commonwealth court granted the Plaintiff’s requested relief, and further ordered that “all provisional ballots cast on election day where the elector’s absentee ballot or mail-in ballot was timely received by the county boards of election be segregated and secured from other provisional ballots pending compliance with procedures set forth in Section 1210 of the Election Code ....”

*In re: Allegheny County Provisional Ballots*<sup>136</sup>

On November 16, petitioner Nicole Zicarelli, a candidate for the Pennsylvania Senate, filed a Petition of Review from the Allegheny County Board of Elections seeking to set aside approximately 300 provisional ballots. The petitioner alleges that these ballots were only signed on one line but the Election Code requires signatures on two separate lines. The Board responded that if the ballots were incorrectly signed by the electors on

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<sup>133</sup> *Donald J. Trump for President, Inc. v. Philadelphia County Board of Elections*, No. 2:20-cv-05533-PD (E.D. Pa.2020).

<sup>134</sup> *Hamm v. Boockvar*, 600 M.D. 2020 (Commw. Ct. 2020).

<sup>135</sup> *Supra*, note 126.

<sup>136</sup> *In re: Allegheny County Provisional Ballots*, 1161 C.D. 2020 (Commw. Ct.), Petition for Allowance of Appeal Denied, 338 WAL 2020 (Pa. 2020).

mistaken or wrong advice of the Board, the electors should not be penalized by having their votes cancelled.

In a November 18 opinion, the Allegheny County Court of Common Pleas ruled in favor of the Allegheny County Board of Elections, finding that where no fraud is alleged the Board should favor the right to vote, and that where a voter relies on incorrect information from the Board the voter should not be penalized.

On appeal, the Commonwealth Court reversed the Allegheny County Court of Common Pleas, holding in a November 20 opinion that according to the plain language of the relevant statute — Election Code § 1210(a.4)(5(ii)(A) and (F) — the provisional ballots cannot be counted.

On November 23, the Pennsylvania Supreme Court denied the Allegheny County Board of Election’s Petition for Allowance of Appeal.

*In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*<sup>137</sup>

On November 8, President Trump’s campaign filed a Petition for Review of the decision of the Bucks County Board of Elections denying the campaign’s objection to counting statutorily prohibited absentee and mail-in ballots. The campaign challenges ballots counted by the Bucks County Board of Elections that had no date or a partial date only; had no printed name or address; had a partial address; and had a mismatched address. These challenged ballots total 2,175. The campaign also challenges 69 mail-in ballots accepted as votes where the secrecy envelope was not sealed and 7 which had extraneous markings on them.

On November 19, the Court denied the Petition for Review. The Court began its analysis by noting that previous case law on the issue has militated in favor of enfranchising voters, not disenfranchising them, notwithstanding the canon that all provisions of the Election Code should be strictly enforced. “In an attempt to balance these two overriding principles, the Pennsylvania Supreme Court has ruled that certain provision of the Election Code are mandatory, and some are directory.” Ballots should not be disqualified if they fail to follow directory provisions of the law.

The campaign pointed to the use of the word “shall” throughout the Election Code, and particularly in the sections of the code requiring a date, printed name, and address. Regarding the ballots with a partial date handwritten on the outer envelope, the Court held that those ballots should not be invalidated as the parties stipulated that such ballots were received by Election Day.

Regarding the ballots with no date on the envelope, the Court found that the Election Code was clear in its mandate of requiring a date along with a signature on the outer envelope. However, the Court noted that the board co-mingled ballots from undated

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<sup>137</sup> *In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 1191 C.D. 2020 (Commw. Ct.); Petition for Allowance of Appeal denied, 676 MAL 2020 (Pa. Supreme Court).

outer envelopes with all other ballots, so it is impossible to tell which ballots came from which envelopes. Because of the co-mingling of the improper ballots with the bulk of properly-cast ones, the Court stated it would be unfair to disenfranchise these voters as a result of the Board's decision. The Court noted that although there was no case law on the issue of co-mingling improper ballots with proper ones, the act of co-mingling was done in the presence of both Republican and Democratic representatives, who could have objected at that time. Thus, the Court implied that because the complaining party could have stopped the Board from co-mingling the improper ballots, they have essentially waived the issue.

Turning to the ballots with no handwritten name or address, a partial written address, or a mismatched address on the outer envelope, the Court found that the “[f]ailure of the elector to complete this information is not an error of law...there is no requirement that filling out the declaration needs to include handwriting the elector's name and address.” These are minor irregularities which should not be a basis to invalidate ballots.

Finally, addressing the ballots enclosed but not sealed in their secrecy envelopes, the Court found that there is no evidence that the electors failed to securely seal the ballot in the privacy envelope as required by the election code. Because there is insufficient evidence to determine whether the provision of the statute mandating sealing the ballot in the secrecy envelope was violated by the elector — as opposed to simply having the seal fail — the Court found that it would be an injustice to disenfranchise these voters, and declined to overrule the Board regarding their decision to count these ballots as well.

On November 23, the campaign filed an Application for Expedited Treatment and Summary Relief with the Commonwealth Court, asking that it grant summary adjudication on an expedited basis. On November 25, the Commonwealth Court affirmed the decision of the Bucks County Court of Common Pleas as it pertained to the electors' failure to write their names, addresses, and the dates of signatures on their ballots' outer envelope. The Commonwealth Court's ruling cited the recently decided case *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, holding that the Election Code “does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.”

As to the ballots which were placed in the secrecy envelopes but not sealed, the Commonwealth Court stated that the “legislature did not merely require the envelopes to be sealed, but specified that it be ‘securely’ sealed.” However, the Commonwealth Court noted that the instructions provided by the board of elections did not specify that the envelope needed to be securely sealed and that if it was not the ballot may not be counted. Given this, and the fact that it cannot be conclusively established that the voters failed to seal their ballots, the Court held that its ruling regarding the sealing of secrecy envelopes is to be applied prospectively only, and the 69 ballots which were unsealed in their secrecy envelopes will not be invalidated.

On December 4, the campaign filed an Emergency Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On December 8, the Emergency Petition for Allowance of Appeal was denied.

*Metcalfe v. Wolf*<sup>138</sup>

On December 4, State Representative Daryl Metcalfe and several other Republican state house members filed a Request for an Emergency Temporary Restraining Order and Injunctive Relief and Compliant for Writ of Mandamus against Gov. Wolf, Secretary Boockvar, and the Democratic State Electors of the Electoral College.

The complaint was premised on the assertion that the Governor and Secretary of State failed to implement the recommendations in the 2019 Auditor General’s report regarding deficiencies in the SURE system. Additionally, the complaint alleged that Secretary Boockvar had been allowing “select organizations with close ties to the Democratic Party ... direct[] access to the Commonwealth’s SURE System.” In support of this allegation, the complaint quotes Secretary Boockvar stating that she gave Rock the Vote, a Democratic NGO, access to the SURE system.

Additionally, the complaint includes an affidavit from a USPS mail carrier who transported completed Pennsylvania ballots from New York to Pennsylvania. It was estimated by the affiant that there were close to 200,000 such ballots shipped in one batch. The assertion was that these are falsified, fictitious, and illegal ballots.

Further, the complaint challenges some counties’ use of a notice-and-cure procedure for defective ballots, quoting portions of the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar* as support for the contention that the notice-and-cure policies pursued by some counties was illegal.

Other allegations of irregularities animated this complaint. For instance, Deputy Secretary for Elections Marks announced that those who voted by mail-in or absentee and whose ballots had been rejected as defective may go in person to a polling place and recast their vote as a provisional ballot. It is alleged by Rep. Metcalfe that not only did this policy contradict Election Code §§ 1308 and 1210, it was timed to coincide with a Democratic Party campaign to tell voters who had voted by absentee or mail-in ballot to go in-person to their polling place and cast an additional provisional ballot. It was further alleged that this policy presumed the fact that the absentee and mail-in ballot would have to have been pre-canvassed before Election Day in order for the county Boards of Election to determine which absentee and mail-in ballots were defective or deficient prior to Election Day — another violation of the Election Code.

Based on these irregularities and others covered in separate lawsuits detailed in this memorandum, the petitioners sought a Writ of Mandamus from the Court “directing Defendant Wolf to withdraw the certification of the 2020 presidential election,” as well as

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<sup>138</sup> *Metcalfe v. Wolf*, 636 MD 2020 (Commw. Ct.).



temporary and permanent injunctive relief preventing the Democratic electors from casting votes in the Electoral College.

On December 9, the Court denied the petitioners' sought-after Writ of Mandamus and Temporary and Permanent Injunctions. The Court found that the petitioners "are unable to demonstrate a clear right to relief or likelihood of prevailing on the merits because their underlying action, although styled as a complaint seeking a writ of mandamus, is really an improper and untimely election contest." In support of its ruling, the Court cited Pennsylvania Supreme Court precedent holding that the proper remedies for violations of the Election Code are to be found in the Election Code itself.

*In re: Canvassing Observation*<sup>139</sup>

On November 3, President Trump's campaign filed an appeal from the Philadelphia Board of Elections decision denying his petition to conduct a closer inspection of the ballot canvassing process at the Philadelphia Convention Center. The campaign claimed the way its canvass observers were treated by the Philadelphia Board of Elections violated its statutory right under § 1308(b) to observe the canvassing of ballots.

The Common Pleas Court held otherwise, finding that the statute relied on by the campaign merely requires that the boards of elections allow the campaign's observers to "be present" at the canvassing operation — it does not require that the canvassers permit the observers to see ballots being counted, ballots being removed from their outer envelopes, and similar actions of the canvassers. The Court stated "the watchers' purpose is not to audit the individual ballots, and 'meaningful observation' or 'meaningful access' is not a legally recognized reason for a watcher getting close enough to do so."

On November 4, the campaign appealed to the Commonwealth Court. On November 5, the Commonwealth Court issued an opinion reversing the Philadelphia Common Pleas Court. In so deciding, the Court pointed to language in Election Code § 1308(g)(1.1) that permitted campaigns to have attorneys, representatives, or watchers present "in the room" where ballots are being canvassed.

This, the Court held, implied a right in the campaign to be more than just "present." "To find otherwise would completely undercut the intent of the Election Code by reducing candidates' representatives to tourists incapable of carrying out the observations allowed by the Election Code for the purposes of reporting to the candidate they represent." The Court then found that the Philadelphia Board of Elections violated the Trump campaign's right to have observers present, discussing in some detail how his campaign's observers were kept away from the canvassing tables. The Court then pointed out that the Philadelphia Board of Elections presented no evidence to contradict the campaign's observer's testimony.

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<sup>139</sup> *In re: Canvassing Observation*, 241 A.3d 339 (Pa. 2020).

On November 5, the Philadelphia Board of Elections filed an Emergency Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On November 9, the Pennsylvania Supreme Court granted the Emergency Petition, on the following three legal questions:

- Whether, as a matter of statutory construction pursuant to Pennsylvania law, the Commonwealth Court erred in reversing the trial court, which concluded that Petitioner City of Philadelphia Board of Elections’ regulations regarding observer and representative access complied with applicable Election Code requirements.
- Whether the issue raised in Petitioner’s petition for allowance of appeal is moot.
- If the issue raised in Petitioner’s petition for allowance of appeal is moot, does there remain a substantial question that is capable of repetition yet likely to evade review, and, thus, fall within an exception to the mootness doctrine.

On November 17, the Pennsylvania Supreme Court issued its opinion, reversing the Commonwealth Court and reinstating the ruling of the Philadelphia Common Pleas Court.

As an initial matter, the Pennsylvania Supreme Court noted that after the favorable ruling from the Commonwealth Court, the campaign then filed for an injunction in the federal District Court for the Eastern District of Pennsylvania, alleging that the Philadelphia Board of Elections was not complying with the Commonwealth Court’s ruling. Recognizing that there was a pending appeal to the Pennsylvania Supreme Court, the federal District Court urged the parties to work out an agreement amongst themselves.

As to the first of three legal questions the court granted the petition on, mootness, the Court held that the case was not moot because, even at that late date, ballots were still being canvassed and the campaign wanted maximal access to the process.

Addressing the merits of the case, the Court restated the Philadelphia Board of Elections’ position — that it is entitled to craft rules for the canvassing process, and that is rule corralling the campaign observers into a segregated area was necessary to protect its workers from physical assault and coronavirus. On the other hand, “[t]he Campaign argues that, under the Board’s interpretation, merely being in the far end of a room like the Convention Center, which is as large as a football field, would be sufficient to comport with these requirements.”

In its analysis, the Pennsylvania Supreme Court agreed with the statutory interpretation forwarded by the Philadelphia Common Pleas Court, explaining:

[T]hese provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they “remain in

the room.” The General Assembly, had it so desired, could have easily established such parameters; however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so.

Because the General Assembly did not include any language regarding distance of observation, the Philadelphia Board of Elections was within its statutory authority to craft the canvassing observation rules that it did. There was “no basis for the Commonwealth Court to have invalidated these rules.” Justices Mundy and Saylor filed a dissenting opinion.

*Texas v. Pennsylvania et al*<sup>140</sup>

On December 7, the State of Texas filed a Motion for Leave to File Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Wisconsin, and Michigan in the United States Supreme Court. The complaint alleged that these states’ election irregularities cumulatively acted to deprive Texas’s and the other complaining states’ residents the right to a free and fair election. The State of Texas also filed a Motion to Expedite and a Motion for a Preliminary Injunction and Temporary Restraining Order.

The irregularities complained of in the Motion for Leave to File Bill of Complaint included:

- Non-legislative actors’ purported amendments to States’ duly enacted election laws, in violation of the Electors Clause’s vesting State legislatures with plenary authority regarding the appointment of presidential electors;
- Intrastate differences in the treatment of voters, with more favorable [treatment] allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States; and
- The appearance of voting irregularities in the Defendant States that would be consistent with the unconstitutional relaxation of ballot-integrity protections in those States’ election laws.

Texas asserted that all of these flaws in state election laws “violate one or more of the federal requirements for elections” and “cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.” Missouri and 16 other states backed Texas by filing an *Amicus Curae* brief with the United States Supreme Court.

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<sup>140</sup> *Texas v. Pennsylvania*, 592 U.S. 155 (2020) (denying Motion for Leave to File a Bill of Complaint).

On December 14, the United States Supreme Court refused to hear the case. The Court stated that “The State of Texas’s motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot.”

Justice Alito, with whom Justice Thomas joined, would have accepted Texas’s Bill of Complaint, as those Justices believe that the United States Supreme Court, as the court of original jurisdiction as to matters between the States, cannot reject such cases. However, even those two Justices would not have granted Texas the sought-after relief. Justice Alito stated “[i]n my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue.”

# Exhibit N-26



COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO  
ATTORNEY GENERAL

1600 ARCH STREET  
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October 26, 2021

*By Email*

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Pittsburgh, PA 15222

Re: *Commonwealth v. Dush*, No. 322 MD 2021 (Pa. Commw. Ct.)

Dear Counsel:

I am writing on behalf of the Acting Secretary of the Commonwealth to follow up on our October 6, 2021, discussion about the Subpoena issued by the Senate Committee on Intergovernmental Operations on September 15, 2021.

As explained in the petition for review and application for summary relief filed in the above matter, the Subpoena is not justified by a legitimate legislative purpose. Rather, it seeks to further a false narrative about the 2020 election in Pennsylvania and undermine confidence in the Commonwealth's electoral process. It is regrettable that, nearly a full year after the 2020 election and after the results in Pennsylvania have been shown to be accurate through numerous court decisions, two audits, and multiple prior legislative investigations, the Committee continues to give fuel to these false narratives.

As we have previously discussed—and as members of the Committee surely are aware—certain of the materials demanded are publicly available without a subpoena. Some could be obtained through a request under the Pennsylvania Right to Know Law (RTKL), and others are available on the Department’s website. Therefore, in an attempt to narrow the issues before the Court, the Department is willing to voluntarily provide certain items to the Committee, provided that the Committee will agree to not seek to enforce the subpoena with respect to those items and that the Committee and all other parties to the litigation expressly agree that such production is voluntary and does not waive any argument as to the illegitimacy of the Subpoena or the requests therein, including those arguments set forth in the petition for review and application for summary relief, and that the Subpoena is therefore moot with respect to the items produced. Furthermore, consistent with the arguments put forward in Petitioners’ pleading in *Commonwealth v. Dush*, the Department will not provide the Committee with protected critical infrastructure information, nor will it produce materials that are protected from disclosure by the RTKL, the deliberative process privilege, or any other applicable privilege.

If all parties agrees to the above conditions, the Department agrees to provide the following materials to the Committee:

**Request 1** (“Any and all communications (emails, letters, notes of calls and/or meetings, or otherwise) from the Department of State to any County Election Director or member of a County’s Elections Board between May 1, 2020 and May 31, 2021.”)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 1.

**Request 2** (“A copy of each and every version of all directives, guidance(s), policies, or procedures in effect at any time between August 1, 2020 and June 30, 2021 relating to elections, election systems, mail-in ballot applications, ballots, voting, compliance with state or federal election laws, polling places, and/or poll watchers.”)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 2.

**Request 3** (“All training materials used to train County election workers, poll workers, poll watchers, Judges of Election, inspectors, clerks, and all persons who staffed voting offices between August 1, 2020 and May 31, 2021.”)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 3.

**Request 15** (“A copy of the certified results for each and every race and/or ballot question on the 2020 General or 2021 Primary elections.”)

Subject to the above conditions, the Department will voluntarily provide the Committee with the certified results for those races and/or ballot questions from the 2020 General and 2021 Primary Elections that are in its possession. Please be aware that the Department is not responsible for certifying the results of “each and every race and/or ballot question” from those elections, and will only provide certified results for the races and/or ballot questions for which it is responsible for certifying the results.

**Request 16** (“A copy of all reports of audits and/or reviews of the SURE system conducted by or for the Department of State between 2018 and the present, including, but not limited to, any audits conducted under 25 Pa.C.S. 1803(a).”)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 16. Please be aware that the non-public version of the 2019 report of the Auditor General on the SURE System contains protected critical infrastructure information and will not be provided.

**Request 17:** (“A copy of the annual reports submitted to the Department in 2021 pursuant to 4 Pa. Code 183.17.”)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 17.

Please respond in writing as to whether your clients consent to the above proposal.

Requests 4 through 13 seek detailed personal information, including driver’s license numbers and partial Social Security numbers, for all Pennsylvanians who registered to vote and who exercised their right to vote in either the 2020 General Election or the 2021 Primary Election. Request 14 seeks “all changes to voter records,” which would necessarily entail producing similar personal information about voters in the Commonwealth, including driver’s license numbers and partial Social Security numbers. As explained in the Petitioners’ pleadings in *Commonwealth v. Dush*, this personal information is protected by the privacy rights contained in the Pennsylvania Constitution, and producing it would discourage participation in future elections. Moreover, the Committee has not shown any legitimate basis or compelling interest for demanding confidential information of millions of Pennsylvania voters, nor has it demonstrated that it has the capacity to ensure that such confidential information is adequately protected. Indeed, the Committee has not yet publicly identified the vendor or vendors with whom it apparently intends to share this information, much less informed the Department or the public what, exactly, the vendor will do with any information it receives. As a result, the Department will not be producing the requested materials.



During our previous conversation, counsel for the Committee stated that the Committee is unwilling to narrow the Subpoena in any way. It is unclear why the Committee continues to demand much of the information identified in the Subpoena, and in particular the personal information and other records on the Commonwealth's nine million registered voters, particularly in light of the justifications offered in the Committee's brief in support of its cross-application for summary relief. Should the Committee's position change, we remain willing to engage in additional discussions regarding the Subpoena in the hope of further narrowing the issues before the Court.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael J. Fischer", with a long horizontal flourish extending to the right.

Michael J. Fischer  
Chief Counsel and Executive Deputy Attorney General  
Pennsylvania Office of Attorney General

# Exhibit N-27



**Testimony of Al Schmidt  
City Commissioner of Philadelphia**

**The Committee on Rules and Administration of the United States Senate  
Emerging Threats to Election Administration  
Tuesday, October 26, 2021**

Good afternoon Chairwoman Klobuchar, Ranking Member Blunt, and honorable members of the Committee on Rules and Administration. Thank you for inviting me to testify today on this very important topic.

I'm Philadelphia City Commissioner Al Schmidt. In Philadelphia, the City Commissioners are three independently-elected officials responsible for oversight of elections and voter registration. I was first elected to this position in 2011, reelected in 2015, reelected in 2019, and have overseen more than two dozen elections in my nearly ten years of service. I am a Republican.

Following the 2020 election, many states raced to pass laws purporting to address alleged flaws in how the Presidential election was administered, but neither they, nor the Federal Government, have addressed two of the biggest problems arising from that election that are real and directly threaten our Republic: the risk of election subversion and the threats against election administrators. According to the Brennan Center for Justice and the Bipartisan Policy Center, nearly one in five election officials listed threats to their lives as a job-related concern.<sup>1</sup> Violent threats against election officials, which began during the 2020 election, continue to this day. They rise in frequency and intensity each time elected officials and bad-faith political actors spread disinformation about the 2020 election. This creates a vicious cycle in which elected officials lie to their constituents, deceived constituents believe the lies being shared by those elected officials and demand something be done to fix something that never happened to begin with, and then elected officials use those demands as an excuse to do something. The problem is that "something" typically makes voting less accessible and fuels violent threats to election officials.

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<sup>1</sup> [https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials\\_v7.pdf](https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials_v7.pdf)

In addition to threats of physical violence, election officials have also been subjected to frivolous lawsuits intended to harass or financially ruin them. Most election officials are not as fortunate as I am to have a small army of city solicitors prepared to defend them from these efforts. While bipartisan organizations like the Election Official Legal Defense Network (EOLDN) have formed to protect these election officials, that shouldn't even be necessary. They are public official in public service counting votes – in a democracy. That shouldn't be criminal or even controversial. It should be encouraged, not discouraged.

This is a nationwide problem that demands a national response. As detailed by the Elections Group, across many states “[t]he election’s legitimacy was questioned, and its mechanisms and personnel became targets for escalating physical confrontation.”<sup>2</sup> In Philadelphia, the largest county in one of the most important swing states in America, there was a concerted effort before, during, and after the election to delegitimize the results coming from our city. The avalanche of meritless litigation and propaganda seeking to disenfranchise eligible voters in Philadelphia led to threats against me, my colleagues, and our staff. The death threats toward myself and my Deputy Commissioner became more specific in nature after we were publicly mentioned by former President Trump and his campaign. There is no doubt in my mind that the threats we received as a result of this attention were intended to intimidate and coerce us into not counting every valid vote we received from legitimate voters and not certifying the election results. These threats were explicit, violent, and in the case of my Deputy Commissioner, anti-Semitic. After the President tweeted about me, my wife and I received threats that named our children, included my home address and images of my home, and threatened to put their “heads on spikes.” What was once a fairly obscure administrative job is now one where lunatics are threatening to murder your children.

It will take a concerted and bipartisan effort to turn us back from the point of no return for the legitimacy of our system of government. In the meantime, there are several efforts the federal government can take right now to help protect election administrators and our democratic institutions.

1. Better Funding: In addition to the general need for better funding of elections in the United States, funding should specifically be appropriated to provide grants to secure election offices and operations;
2. Prioritize Prosecution: There has been a noticeable lack of prosecution of individuals who threatened election officials following the 2020 election.<sup>3</sup> The Department of

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<sup>2</sup> <https://electionsgroup.com/assets/Running%20Elections%20Without%20Fear.pdf>

<sup>3</sup> <https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement>

Justice should support state and local partners and assist them in identifying and prosecuting threats against election officials; and

3. Mitigate Disinformation: Congress should revise the Electoral Count Act removing any ambiguities about how electors are certified and electoral votes are counted. This change will remove one of the motivations for the losing candidate to continue a disinformation campaign beyond the safe harbor deadline.

Chairwoman Klobuchar, Ranking Member Blunt, and honorable members of the Committee on Rules and Administration, thank you for the opportunity to testify today. I know working across party lines to find common ground on any topic is challenging, let alone on election reform, but for the sake of our Republic I hope you can work together to protect election administrators and our democratic institutions. Because as Benjamin Franklin said, it's a Republic "if you can keep it."

# Exhibit N-28

## Bill Information - History

### Senate Bill 421; Regular Session 2019-2020

**Sponsors:** [BOSCOLA](#), [BROWNE](#), [MENSCH](#), [BARTOLOTTA](#), [KILLION](#), [LAUGHLIN](#), [SCAVELLO](#), [STEFANO](#) and [PHILLIPS-HILL](#)

**Printer's No.(PN):** [1330\\*](#) , [1328](#), [1292](#), [1015](#), [481](#)

**Short Title:** An Act amending the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, in preliminary provisions, further providing for definitions; in the Secretary of the Commonwealth, providing for requirements for disapproval or decertification of voting apparatuses and for census outreach; in district election officers, further providing for compensation of district election officers; in election districts and polling places, further providing for restrictions on alteration; in nomination of candidates, further providing for petition may consist of several sheets and affidavit of circulator, for manner of signing nomination petitions and time of circulating and for nominations by political bodies; in ballots, further providing for form of official primary ballot, for form of official election ballot, for number of ballots to be printed and specimen ballots and for forms of ballots on file and open to public inspection and ballots and diagrams to be furnished to candidates and parties; in voting machines, further providing for requirements of voting machines and for form of ballot labels on voting machines; in electronic voting systems, further providing for requirements of electronic voting systems, for forms, for election day procedures and the process of voting and for post election procedures; providing for voting apparatus bonds; in preparation for and conduct of primaries and elections, further providing for manner of applying to vote and persons entitled to vote and voter's certificates and entries to be made in district register and numbered lists of voters and challenges, for method of marking ballots and depositing same in districts in which ballots are used, for instructions of voters and manner of voting in districts in which voting machines are used, for count and return of votes in districts in which ballots are used, for what ballots shall be counted, manner of counting and defective ballots and for canvass and return of votes in districts in which voting machines are used and providing for deadline for receipt of valid voter registration application, for appeals and for appeals to court of common pleas; in voting by qualified absentee electors, further providing for applications for official absentee ballots, for date of application for absentee ballot, for approval of application for absentee ballot, for absentee electors files and lists, for official absentee voters ballots, for delivering or mailing ballots, for voting by absentee electors, for canvassing of official absentee ballots and for public records; providing for voting by qualified mail-in electors; in returns of primaries and elections, further providing for manner of computing irregular ballots; providing for dissemination of information and for jurisdiction; removing references to the Traffic Court of Philadelphia; and making related repeals.

**Actions:**

- [PN 0481](#) Referred to STATE GOVERNMENT, March 25, 2019
- [PN 1015](#) Reported as amended, [June 18, 2019](#)
  - First consideration, June 18, 2019
  - Second consideration, June 19, 2019
  - Re-referred to APPROPRIATIONS, June 19, 2019
  - Re-reported as committed, [June 24, 2019](#)
  - Third consideration and final passage, June 25, 2019 ([30-20](#))
  - (Remarks see Senate Journal Page [721-722](#)), June 25, 2019
  - In the House
  - Referred to STATE GOVERNMENT, June 26, 2019
- [PN 1292](#) Reported as amended, [Oct. 22, 2019](#)
  - First consideration, Oct. 22, 2019

Laid on the table, Oct. 22, 2019

Removed from table, Oct. 28, 2019

[PN 1328](#) Second consideration, with amendments, [Oct. 28, 2019](#)

Re-referred to APPROPRIATIONS, Oct. 28, 2019

[PN 1330](#) Amended in House Committee on APPROPRIATIONS, [Oct. 28, 2019](#)

(Remarks see House Journal Page [1689-1713](#)), Oct. 28, 2019

Re-reported as amended, [Oct. 29, 2019](#)

Third consideration and final passage, Oct. 29, 2019 ([138-61](#))

(Remarks see House Journal Page [1738-1741](#)), Oct. 29, 2019

In the Senate

Referred to RULES AND EXECUTIVE NOMINATIONS, Oct. 29, 2019

Re-reported on concurrence, as committed, [Oct. 29, 2019](#)

Senate concurred in House amendments, Oct. 29, 2019 ([35-14](#))

(Remarks see Senate Journal Page [999-1003](#)), Oct. 29, 2019

Signed in Senate, Oct. 29, 2019

Signed in House, Oct. 30, 2019

Presented to the Governor, Oct. 30, 2019

Approved by the Governor, Oct. 31, 2019

Act No. [77](#)

\* denotes current Printer's Number

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# Exhibit N-29

# Bill Information - History

## Senate Bill 422; Regular Session 2019-2020

**Sponsors:** [VOGEL](#), [FOLMER](#), [COSTA](#), [BAKER](#), [YAW](#), [K. WARD](#), [BROWNE](#) and [MENSCH](#)

**Printer's No.(PN):** [1608\\*](#) , [1600](#), [399](#)

**Short Title:** An Act amending the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, in preliminary provisions, further providing for definitions; in county boards of elections, further providing for powers and duties of county boards; in ballots, further providing for forms of ballots, printing ballots, numbers; in electronic voting systems, further providing for forms, for election day procedures and the process of voting and for post election procedures; in preparation for and conduct of primaries and elections, further providing for manner of applying to vote, persons entitled to vote, voter's certificates, entries to be made in district register, numbered lists of voters, challenges and for deadline for receipt of valid voter registration application; in voting by qualified absentee electors, further providing for applications for official absentee ballots, for approval of application for absentee ballot, for absentee and mail-in electors files and lists, for official absentee voters ballots, for envelopes for official absentee ballots, for delivering or mailing ballots, for voting by absentee electors, for canvassing of official absentee ballots and mail-in ballots and for public records and repealing provisions relating to violation of provisions relating to absentee voting; in voting by qualified mail-in electors, further providing for qualified mail-in electors, for applications for official mail-in ballots, for approval of application for mail-in ballot, for official mail-in elector ballots, for envelopes for official mail-in ballots, for voting by mail-in electors and for public records and repealing provisions relating to violation of provisions relating to mail-in voting; providing for Pennsylvania Election Law Advisory Board; in penalties, further providing for violations of provisions relating to absentee electors ballots; providing for emergency provisions for 2020 general primary election; and making a related repeal.

**Actions:**

- [PN 0399](#) Referred to STATE GOVERNMENT, March 12, 2019
- Reported as committed, [June 18, 2019](#)
- First consideration, June 18, 2019
- Second consideration, June 19, 2019
- Re-referred to APPROPRIATIONS, June 19, 2019
- Re-reported as committed, [June 24, 2019](#)
- Third consideration and final passage, June 25, 2019 ([28-22](#))
- (Remarks see Senate Journal Page [722](#)), June 25, 2019
- In the House
- Referred to STATE GOVERNMENT, June 26, 2019
- Reported as committed, [March 23, 2020](#)
- First consideration, March 23, 2020
- Laid on the table, March 23, 2020
- Removed from table, March 23, 2020
- [PN 1600](#) Second consideration, with amendments, [March 24, 2020](#)
- Re-referred to APPROPRIATIONS, March 24, 2020
- (Remarks see House Journal Page [267-286](#)), March 24, 2020
- Re-reported as committed, [March 25, 2020](#)
- [PN 1608](#) Third consideration, with amendments, [March 25, 2020](#)

Final passage, March 25, 2020 ([198-0](#)).

(Remarks see House Journal Page [297-300](#)), March 25, 2020

In the Senate

Referred to RULES AND EXECUTIVE NOMINATIONS, March 25, 2020

Re-reported on concurrence, as committed, [March 25, 2020](#)

Senate concurred in House amendments, March 25, 2020 ([50-0](#)).

(Remarks see Senate Journal Page [187](#)), March 25, 2020

Signed in Senate, March 25, 2020

Signed in House, March 25, 2020

Presented to the Governor, March 25, 2020

Approved by the Governor, March 27, 2020

Act No. [12](#)

\* denotes current Printer's Number

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# Exhibit N-30

## The Voter Fraud Commission Wants Your Data — But Experts Say They Can't Keep It Safe

Newly revealed records show sloppy practices that could put millions of people's information at risk.

by Jessica Huseman and Derek Willis, Oct. 23, 2017, 1:47 p.m. EDT



Voters cast ballots at St. Thomas More Church in Cleveland, Ohio, on Nov. 8, 2016. (Luke Sharrett/Bloomberg via Getty Images)

The voter-fraud-checking program championed by the head of the Presidential Advisory Commission on Election Integrity suffers from data security flaws that could imperil the safety of millions of peoples' records, according to experts.

Indivisible Chicago, a progressive advocacy group in Illinois, filed a public-records request with Illinois and Florida for information on the Interstate Voter Registration Crosscheck Program. Crosscheck was created and run by the Kansas secretary of state's office and is often cited by Kris Kobach, Kansas' secretary of state, as a way to identify voters casting ballots in more than one state. Indivisible Chicago then posted emails and other documents it received, including messages exchanged between elections officials in Illinois and Florida and Crosscheck.

The emails and records revealed numerous security weaknesses. Crosscheck's files are hosted on an insecure server, according to its own information. Usernames and passwords were regularly shared by email, making them vulnerable to snooping. And passwords were overly simplistic and only irregularly changed.

"It blows my mind — this is complete operational security incompetence," said Joe Hall, the chief technologist for the Center for Democracy & Technology, an organization that promotes internet freedom. "You should consider all of that stuff in the hands of people who are clever enough to intercept someone's email."

The Kansas secretary of state's office did not respond to emailed questions about Crosscheck's security.

Crosscheck was conceived in 2005 as a way to, as the name implies, let states compare their voting rolls to prevent people from registering in multiple states. Kansas operates the program at no cost to the states that participate. Crosscheck assures them — about 30 states use the program as of now — that it employs "industry standard encryption technology and passwords."

Hall disputes that. "It's a complete lie," he said.

Kobach co-chairs President Donald Trump's voter fraud commission, which has been under heavy scrutiny over whether it will be able to secure the vast voting data it has requested, including names, addresses and dates of birth for virtually every voter in the country. When Kobach requested this data in June, the commission was scorched with criticism and lawsuits in both federal and state courts over privacy concerns. Kobach sent a second letter to states in late July promising data would "be kept confidential and secure throughout the duration of the commission's existence."

Experts say the documents released by Indivisible Chicago undercut Kobach's claims that he understands how to protect voter data. "This raises serious concerns about the security of citizens' data not only in Crosscheck, but with the voter fraud commission run by the same people," said David Becker, the executive director of the Center for Election Innovation & Research. "They tell the voters, the states and the courts 'trust us' with personal data, but they refuse to answer basic questions about how they plan to secure or use that data."

Concern over the commission's ability to keep data secure given the new information about Crosscheck's methods is "absolutely justified," said Kenneth White, director of the Open Crypto Audit Project, and a security researcher and consultant.

Crosscheck's data is stored on an FTP server run by the Arkansas Office of the Secretary of State. FTP servers are unencrypted, leaving passwords and downloads readable by electronic spies. It is standard across the industry to instead use SFTP (short for "SSH File Transfer Protocol"), which protects data from prying eyes, according to Hall. He compared FTP servers to a postcard and SFTP servers to a letter sealed in an envelope and locked in a vault.

Employees of the Arkansas secretary of state's office send login credentials to election officials in states participating in Crosscheck and restrict access to either the public IP address or a range of addresses used by election officials in those states. That's an important step to ensure users can only access the system through one of the approved IP addresses, according to White — but he said well-resourced attackers would be able to get around this protection.

And because Crosscheck routinely emailed full credentials, hackers may not even need to work particularly hard to do so. They could simply "spoof" — essentially, mimic — the email address of a state authority and send an email to Crosscheck's administrators adding a different IP address, said Shawn Davis, the director of forensics at Edelson PC, a Chicago-area law firm specializing in cyber security. The firm has begun working with Indivisible Chicago, and Davis will testify before an upcoming joint session of the Illinois House and Senate to discuss Crosscheck's vulnerabilities.

"Hackers do take these steps," said Davis. "They are pretty patient — if they want to get the data they'll do these things."

Illinois has been a member of Crosscheck since 2011, but emails released by Indivisible Chicago show that no Illinois official inquired about data security issues until this July, when Indivisible Chicago raised questions. In response, Vipin Nischal, an analyst at the Arkansas secretary of state's office, confirmed the use of an FTP server but claimed "no unauthorized or anonymous access" had been found. Bryan Caskey, Kansas's director of elections, said officials at the Kansas secretary of state's office, which performs the matching work, also have access to the data.

Arkansas employees sent emails to Crosscheck members containing the FTP address, the username and the password in the same email, which is considered bad security practice. Operating procedures included in the records request show that this practice was standard — Crosscheck instructed all three things to be sent in a single email every January before the matches were done. Hall called this "completely, unbelievably irresponsible."

The Illinois State Board of Elections, which fulfilled one of the records requests from Illinois, redacted the FTP address but did not redact usernames and passwords. Passwords were emailed to all states in the

same manner, leaving them vulnerable to similar exposure through public-records requests in other states.

The passwords are simplistic, and emails from Crosscheck’s operators show they were rarely changed. “Due to the heavy work load on our IT Director, we will not be able to update the passwords for this data pull,” an Arkansas employee said in an email to Crosscheck participants in 2011. “If there is a specific state that really needs/wants their password changed, please let me know and I will see what I can do for you.” Emails from Arkansas employees to the Illinois State Board of Elections in 2016 and 2017 also contained the same credentials.

“[Secretaries of state] took an oath to the people of their states to protect the state constitution, and part of that is the safekeeping of the citizens information,” said White. “They are abdicating that responsibility by putting their data in this sort of system.”

**Filed under:** Trump Administration, Politics



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# **EXHIBIT O**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Senator Jay Costa, Senator Anthony H. Williams,  
Senator Vincent J. Hughes, Senator Steven J.  
Santarsiero, and Senate Democratic Caucus,  
Petitioners

v.

Senator Jacob Corman III, Senate Pro Tempore,  
Senator Cris Dush, and Senate Secretary-  
Parliamentarian Megan Martin,  
Respondents

Commonwealth of Pennsylvania, Pennsylvania  
Department of State, and Veronica  
Degraffenreid, Acting Secretary of the  
Commonwealth of Pennsylvania,  
Petitioners

v.

Senator Cris Dush, Senator Jake Corman, and the  
Pennsylvania State Senate Intergovernmental  
Operations Committee,  
Respondents

Arthur Harwood, Julie Haywood  
Petitioners.

v.

Veronica Degraffenreid, Acting Secretary of  
State Commonwealth of Pennsylvania  
Respondents

**CASES CONSOLIDATED**

No. 310 MD 2021

No. 322 MD 2021

No. 323 MD 2021

**SUPPLEMENTAL DECLARATION OF JONATHAN M. MARKS**

I, Jonathan M. Marks, declare and affirm under the penalties of 18 Pa. Cons. Stat. § 4904 that:

1. I am the Deputy Secretary for Elections and Commissions at the Pennsylvania Department of State (the Department). I submitted a Declaration in support of Petitioners' application for summary relief on October 13, 2021. I

submit this Supplemental Declaration in support of Petitioners' opposition to Respondents' cross-application for summary relief.

2. Given my role and years of experience at the Department, I am personally knowledgeable about the matters referenced in this Supplemental Declaration and the business records of the Department of State. If called as a witness, I could and would testify competently to the matters set forth below.

**I. The Department allows county voter registration commissions to access parts of the SURE system only to the extent necessary to carry out their lawful duties.**

3. As explained in my initial Declaration, the SURE system is a suite of databases, portals, and applications, protected by layers of security and designed to securely hold the personal information of millions of Pennsylvania voters. The Department is statutorily charged with maintaining the SURE system, and it provides access to county voter registration commissions so that they may process voter registration applications, maintain voter registration records, and perform election-related tasks assigned to them by state law. Pa. Ex. G. Parts I-III. While I used the word "county" throughout my Declaration as shorthand, the more precise term is county voter registration commission. *See, e.g.*, 25 Pa. Cons. Stat. §§ 1102 (defining commission); 1203 (establishing commissions to oversee voter registration).

4. By providing limited access to parts of the SURE system to each county voter registration commission, the Department enables commissions to perform their statutorily assigned duties. When a commission is processing a voter registration application, *see* 25 Pa. Cons. Stat. §§ 1321-1329, the commission must, among other things, verify that the voter is eligible and not already registered, 25 Pa. Cons. Stat. § 1328(a)(2). As part of the registration approval process, the SURE system helps county voter registration commissions verify whether an applicant is eligible. The SURE system also allows the commission to perform a duplicate check, as outlined in Department regulations. *See* 4 Pa. Code § 183.6.

5. County voter registration commissions have access to the SURE system only so far as is necessary to carry out their statutory obligations. A commission can only access the voter registration records for voters *in that county*. The commission cannot access or change voter records for voters in other counties, and it does not have access to the voter registration applications in other counties. The only time a commission can see (in read-only mode) voter data from voters in another county is when the commission is processing a voter registration application and searching for potential duplicate records or when the commission is transferring a voter's record after the voter moves between counties.

6. Although county voter registration commissions must allow public inspection of certain information, *e.g.*, 25 Pa. Cons. Stat. § 1207(a), the Department has made clear that commissions cannot allow public inspection of driver's license and Social Security numbers and must redact them from public inspection, *see* 4 Pa. Code § 183.14(c)(3).

7. To ensure efficient administration of and accurate information in the SURE system, the Department has created a uniform process for each county voter registration commission to use when entering information into the SURE system. The Department provides commissions with information they can use to identify and remove duplicate records, and it works with them to regularly and systematically update information in the system. The Department provides county voter registration commissions with training and documentation on the SURE system, which the Department calls "job aids." It has established a help desk for commissions to utilize.

## **II. The Department maintains and improves the SURE System.**

### **A. The Department complies with Commonwealth IT policies and best practices to protect confidential voter information and the SURE system.**

8. In recognition of the paramount importance of protecting the security of confidential voter information, the Department uses a layered set of protections for the SURE system. These layered protections for the SURE system include:

24/7 continuous network monitoring, multiple firewalls, encryption of data in transit and at rest, password protection, multi-factor authentication, and continuity of operations (COOP) planning, among other controls to protect its systems.

9. In addition, the Department's operation, maintenance and oversight of the SURE system fully comports with information technology policies (ITPs) issued by the Office of Information Technology (OIT) within the Pennsylvania Office of Administration. As explained below, those ITPs are extensive and detailed. They concern, among other things, the protection of Commonwealth data, as well as software, hardware, and other informational technology resources.

10. OIT is the Commonwealth's lead agency on information technology for executive agencies. Among other responsibilities, OIT "establishes and implements policies, standards, and guidelines regarding planning, management, acquisition, and security of IT assets in all commonwealth agencies under the Governor's jurisdiction."<sup>1</sup> OIT also "provides direct oversight for large, enterprise-wide initiatives, such as IT consolidation, commonwealth shared services, and cyber security, as well as enterprise IT technology support."<sup>2</sup>

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<sup>1</sup> Office of Admin, *About IT*, <https://www.oa.pa.gov/Programs/Information%20Technology/Pages/AboutIT.aspx#.Va1cSPIVhBc>.

<sup>2</sup> *Id.*

11. OIT has issued a broad range of ITPs, including policies for information security and for protecting confidential data and personally identifying information (PII).

12. One such ITP, titled Policy and Procedures for Protecting Commonwealth Electronic Data (ITP-SEC019),<sup>3</sup> establishes policies and procedures for the identification of, and safe transmittal, transport, storage, and overall protection of Commonwealth electronic data. Among other things, the ITP establishes protocols for the use of a “C” designation, which indicates that all or part of the record requires “special treatment and/or heightened protections.”

13. Another such ITP, titled Encryption Standards (ITP-SEC031),<sup>4</sup> establishes standards for the encryption of Commonwealth data while in transit and at rest.

14. Another such ITP, titled Data Cleansing Policy (ITP-SEC015),<sup>5</sup> establishes policy, responsibilities, and procedures for the sanitization and or destruction of Commonwealth data.

15. Another such ITP, titled Enterprise Data Loss Prevention (DLP) Compliance Standards (ITP-SEC032),<sup>6</sup> sets standards to protect sensitive data from

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<sup>3</sup> [https://www.oa.pa.gov/Policies/Documents/itp\\_sec019.pdf](https://www.oa.pa.gov/Policies/Documents/itp_sec019.pdf)

<sup>4</sup> [https://www.oa.pa.gov/Policies/Documents/itp\\_sec031.pdf](https://www.oa.pa.gov/Policies/Documents/itp_sec031.pdf)

<sup>5</sup> [https://www.oa.pa.gov/Policies/Documents/itp\\_sec015.pdf](https://www.oa.pa.gov/Policies/Documents/itp_sec015.pdf).

<sup>6</sup> [https://www.oa.pa.gov/Policies/Documents/itp\\_sec032.pdf](https://www.oa.pa.gov/Policies/Documents/itp_sec032.pdf).

data breach and provides solutions designed to detect and act upon unauthorized use and transmission of confidential information.

16. One of the most relevant ITPs is entitled Proper Use and Disclosure of Personally Identifiable Information (PII) (ITP-SEC025).<sup>7</sup> This policy sets guidelines to assist agencies in determining procedures for the handling of PII. PII includes, among other things, a person's name, place and date of birth, driver's license number, and Social Security number. The policy states that OIT "is committed to protecting the privacy of PII of its employees, contractors, constituents, and other individuals associated with the Commonwealth. All agencies shall take appropriate measures, implement necessary technology, and/or establish operating procedures to ensure data privacy is maintained." To that end, "[a]gencies must limit the generation, collection, storage, use, and disclosure of PII to that which is necessary for business purposes only and must further limit generation, collection, storage, use and disclosure of PII to the minimum extent necessary for the accomplishment of those business purposes." Agencies must provide for encryption when transferring such information. In addition, "[a]ll agency entities maintaining files utilizing PII for any purpose shall ensure that access or use of such information is properly controlled, encrypted, and restricted

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<sup>7</sup> [https://www.oa.pa.gov/Policies/Documents/itp\\_sec025.pdf](https://www.oa.pa.gov/Policies/Documents/itp_sec025.pdf).



to prevent unauthorized use or disclosure and that the retention period is minimized based upon business requirements.”

17. These are among the myriad of OIT information technology policies that govern the Department’s activities, as they do with other Commonwealth agencies.

18. Many ITPs, including all of the ITPs listed above, also apply to third parties who contract with the Department to provide services for the SURE system.<sup>8</sup>

19. In addition to ITPs, the Department in 2019 established a Policy on Election System Security Measures, known as a traffic light protocol. The traffic light protocol establishes how the Department must mark, handle, store, and protect election infrastructure information, which includes information about voter registration database and associated IT systems and about IT infrastructure and systems used to manage elections. The traffic light protocol requires all election infrastructure information to be marked with one of four colors (red, amber, green, or white), which corresponds with how freely the information can be shared. Information marked red cannot be disclosed to any parties outside of a specific

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<sup>8</sup> Office of Admin, *IT Policies*, <https://www.oa.pa.gov/Policies/Pages/itp.aspx> (“Third-party vendors, licensors, contractors, or suppliers shall meet the policy requirements of the Commonwealth’s Information Technology Policies (ITPs) that are applicable to the products and services provided to the Commonwealth.”).

exchange or meeting; information marked amber can only be shared with members of the participants' organization or with other who need to know; information marked green can be shared with peers and partner organizations within the relevant sector or community, but not publicly; and information marked white can be freely distributed.

20. The Department scrupulously adheres to ITPs and its security policies to protect confidential data such as PII, and it employs encryption consistent with the Commonwealth's policy for encryption of data in transit and at rest, among other layers of protection, to prevent unauthorized uses or disclosures. Through adherence with Commonwealth ITPs, the Department ensures that Pennsylvanian voters' information in the SURE system is only used for limited lawful purposes and remains protected by layers of security.

**B. The Department is planning to transition to a new and secure SURE system known as SUREVote.**

21. The SURE system is now over fifteen years old and, while fully secure, has limitations in terms of data input, use, and reporting. Technological advances as well as security needs warrant an upgrade of the SURE system.

22. Consistent with its statutory obligation to develop and administer the SURE system, 25 Pa. Cons. Stat. § 1201(3), the Department since 2018 has been taking steps to transition to a new SURE system, which the Department calls SUREVote. That system will go live after the November 2022 election, and the

Department is already working on SUREVote infrastructure and a suite of services. The Department is testing to enable adoption beginning next year.

23. The new SUREVote system will securely hold confidential voter information for millions of Pennsylvanians. It will have layered security protections, including 24/7 continuous network monitoring, firewalls, encryption, password protection, multi-factor authentication, and continuity of operations (COOP) planning, among other controls. As such, SUREVote will enhance the tools available to county voter registration commissions, while preserving the Department's ability to keep voter information secure from a variety of bad actors who have reportedly attempted to hack state voter registration systems. It will also expand the options available to the Department for password maintenance and multi-factor authentication.

**C. The Department's contract with BPro to create and maintain SUREvote zealously protects the security of confidential voter information.**

24. To build SUREVote, the Department has contracted with a vendor called BPro, Inc., a software provider that offers voter registration software solutions that are protected by multiple layers of security.

25. The Department selected BPro after a lengthy and thorough competitive procurement process. The Department worked with federal, state, and county partners for more than a year to finalize and post a Request for Proposal

(RFP) and then evaluate submitted proposals using a panel of security experts and county election personnel. The Department, in coordination with the Department of General Services, determined that BPro's proposal was the most advantageous to the Commonwealth, and a final contract was executed on December 28, 2020.

26. The Department's contract with BPro requires the contractor to maintain the confidentiality of PII and other data shared with it in the process of building and implementing the SUREVote system.

27. Specifically, the contract with BPro provides that the contractor must comply with all ITPs and policies issued by OIT. The contractor must ensure that all services and supplies procured under the contract comply with the applicable standards and policies, including those concerning data privacy and security. The contract also references the full list of ITPs issued by the OIT. *See supra* ¶ 18 & n.8.

28. The contract also requires BPro to conduct and complete background checks on all employees or subcontractors who will have access to Commonwealth IT facilities. The contract prescribes the procedure for the background checks and requires them to be completed prior to initial access as well as annually for the duration of the contract.

29. The contract requires BPro to "protect the confidentiality of the Commonwealth's confidential information" and further states that "all Data

provided by, or collected, processed or created on behalf of the Commonwealth is Confidential Information unless otherwise indicated in writing.” The contract bars BPro from copying, in whole or in part, using, or disclosing confidential information except when essential for authorized activities. It also provides terms for the return of confidential information upon termination of the contract.

30. Finally, the contract requires BPro to comply with “all applicable data protection, data security, data privacy and data breach notification laws,” with specific requirements elaborated. For example, any unauthorized use, loss, or destruction of data or confidential information must be reported by the contractor within two hours of learning of any such incident, and the contractor must take immediate reasonable steps to mitigate the harm or loss.

31. While these are among the most important provisions of the contract with BPro for purposes of protecting confidential information, the contract also contains other provisions, such as the contractor’s agreement to comply with all relevant federal and state laws regarding the protection of data, as well as agency-specific requirements relating to sensitive or confidential information.

32. By referencing the entire catalog of Commonwealth OIT ITPs, providing for the handling of confidential information, requiring background checks, and treating all SURE data as confidential, the Department’s contract

ensures to the fullest extent possible that BPro will safely maintain the confidential information of Pennsylvania voters as it develops the new SUREVote system.

**D. The Department's maintenance contracts zealously protect the security of confidential voter information.**

33. Consistent with its statutory obligations, 25 Pa. Cons. Stat.

§§ 1201(3); 1222(f)(3), the Department contracts with an information technology company to support and maintain the current SURE system. The contractor acts as an agent of the Department. The contractor can only access sensitive information in the SURE system as necessary to perform maintenance and support functions. The Department ensures that its maintenance and support contractor adheres to Commonwealth ITPs and takes all appropriate steps to maintain the security of personal voter information.

34. When the Department contracts for maintenance and support of the SURE system, the contractor must comply with all ITPs issued by the Governor's Office of Administration and with all applicable state and federal data protection, data security, data privacy, and data breach notification laws. To help ensure that all confidential voter information accessed by the contractor remains under the Department's control, the Department requires the contractor to perform its work on Department-provided hardware, software, and networking systems; the contractor cannot store data from the SURE system outside of Department property. The Department requires the contractor's employees to undergo

background checks prior to being permitted to access sensitive information in the SURE system. The Department does not allow the contractor to copy, use, or disclose, in whole or in part, personal voter information except when essential for authorized activities and with Department consent.

35. In 2014, the Department engaged a firm named Diverse Technologies Company (DTC) to provide help desk support and maintenance of the SURE system. The Department terminated its contract with DTC in 2015. The Department has subsequently contracted with Acclaim Systems to provide maintenance and development services for the SURE system.

36. The Department takes seriously its obligations to maintain the security and confidentiality of voter information in the SURE system, and its contracts with vendors reflect its commitments to data security and privacy.

**III. The Department works with other state election officials to improve the accuracy of Pennsylvania voter rolls without compromising data security or confidentiality.**

37. To improve the accuracy of Pennsylvania's voter rolls, Pennsylvania is a member of the Electronic Registration Information Center (ERIC), a non-profit organization funded, governed, and managed by its members, which are 30 States and the District of Columbia. As explained below, the security of confidential voter information in the SURE system is never put at risk or compromised because of the Department's involvement with ERIC. Indeed, all transfers of information

between ERIC and Pennsylvania are subject to multiple layers of security protection, including limited credentialing, encryption, and the use of a hash application to mask Social Security numbers, driver's license numbers, and dates of birth.

38. ERIC's Board of Directors consists of a representative from each member State. I serve as the ERIC Board Member for the Commonwealth of Pennsylvania.

39. ERIC's sole mission is to assist its member States in improving their voter rolls and registering eligible citizens to vote.

40. Each member State, including Pennsylvania, must agree to a number of policy guidelines and technical protocols to maximize the accuracy of voter lists while maintaining the privacy and security of voter data.

41. Pursuant to these guidelines and protocols, the Department provides ERIC with voter registration records from the SURE system and state licensing and identification records from the Pennsylvania Department of Transportation (PennDOT). The Department uploads this data to Pennsylvania's folder on ERIC's secure server using multiple rounds of encryption. Access to the ERIC server is limited and it is only provided to persons with credentials. Only two officials in the Department have credentials to ERIC data and only one official in the Department is credentialed to access Pennsylvania's folder on the ERIC server. The



Department cannot access data uploaded by any other member State, and no other member State can access Pennsylvania's data.

42. Before the Department uploads driver's license numbers, Social Security numbers, or dates of birth, the Department runs these through a one-way cryptographic hash application that turns this sensitive data into a seemingly random string of letters and numbers. Only one official in the Department has access to the ERIC hashing application.

43. ERIC provides the Department with reports of Pennsylvania voter records that may be duplicates or out of date. The reports do not contain Social Security numbers, driver's license numbers, or dates of birth. Downloading data from the ERIC server employs the same security protocols and encryption as uploading data. Only one credentialed official in the Department is able to download these reports from ERIC's secure server. The Department can only access reports for Pennsylvania and no other member State can access Pennsylvania reports.

**IV. The Department works with county voter registration commissions to improve the accuracy of voter records in the SURE system.**

44. As I discussed in my initial Declaration, the Department asked the Department of Auditor General (DAG) to audit the SURE system. *See Pa. Ex. G ¶¶ 40-53.* The Auditor General released his report and recommendations in December 2019.

45. The Auditor General's report noted potentially inaccurate records in the SURE system, including potentially duplicate voter registrations and deceased voters and some obviously incorrect years of birth.

46. In response, the Department has worked with county voter registration commissions to continue to improve the accuracy of Pennsylvania's voter rolls.

**A. List maintenance improves the accuracy of Pennsylvania voter rolls.**

47. Pennsylvania law does not authorize the Department to perform voter registration list maintenance or to verify the accuracy or completeness of voter registration information. Only county voter registration commissions are authorized to investigate a registrant's eligibility to vote and to cancel or alter voter registrations. 25 Pa. Cons. Stat. § 1203(a), (h), (i), (k).

48. In Pennsylvania, voter removal programs are codified in 25 Pa. Cons. Stat. §§ 1501-05, 1901. Section 1901(a)(2) directs that voter registrations may be canceled only upon the request of the voter, upon the death of the voter, upon confirmation that the voter has moved outside the county, or pursuant to a voter removal program designed to identify registered voters whose address may have changed. 25 Pa. Cons Stat. § 1901(a)(1)-(4).

49. Voter registration list maintenance also is regulated by two federal laws, the National Voter Registration Act (NVRA), 52 U.S.C. § 20501 *et seq.*, and

the Help America Vote Act, 52 U.S.C. § 20901 *et seq.* See also § 25 Pa. Cons. Stat. § 1513.

50. Although the Department cannot itself remove or update voter records, the Department assists county voter registration commissions in list maintenance by providing job aids and reminders about statutory deadlines and best practices.

**i. Removing voters who have moved.**

51. Each year, county voter registration commissions review their lists to determine whether voters may have moved using data from the National Change of Address (NCOA) program. The NCOA is a commercial dataset sold by the U.S. Postal Service of permanent change-of-address records (names and addresses) for individuals, families, or businesses who have filed a change-of-address with the Postal Service

52. The Department facilitates the NCOA list maintenance process by obtaining the data through ERIC and then providing that information to county voter registration commissions. The Department also obtains further data generated by ERIC to attempt to identify voters who may have moved in state or out-of-state. It conveys that information to the commissions.

53. In June 2020 and 2021, the Department distributed three data sets provided by ERIC regarding possible residence changes by voters that county voter

registration commissions can use to update their lists. The three data sets were: National Change of Address, In State Moves, and Out of State Moves.

54. County voter registration commissions are required by the NVRA to follow a specific procedure before altering the registration status of a voter who has been identified as potentially having moved. In only two circumstances can a commission remove a voter from the rolls on the grounds that she has changed residence. First, if a voter confirms in writing that she has moved, the rolls may be updated. Second, the commission can mail a notice to the voter asking her to return a postage prepaid and pre-addressed card confirming her residence. If the voter affirmatively indicates that her residence has not changed, no further action is taken. If the voter confirms she has moved, her record is updated appropriately. If the voter does not reply or the notice is returned as undeliverable, she is placed on inactive status, but can return to active status upon confirming her address. Inactive status does not prevent a voter from legally voting. If the voter does not return to active status or vote in the two federal general elections following the mailing of the notice, her name can then be removed from the rolls. 52 U.S.C. § 20507(d)-(f).

55. In 2020 and 2021, the Department provided county voter registration commissions a “job aid,” or a step-by-step manual, for them to use to generate the various types of correspondence to mail to voters who may have moved. The job

aid also provided a step-by-step guide for managing and updating residence information in SURE Voter Registration (SURE VR).

**ii. Removing voters who have died.**

56. Ordinarily, a commission can only remove a deceased voter if it has received a report from the Pennsylvania Department of Health or if it identifies the voter as deceased using published newspaper obituaries, letters testamentary, or letters of administration issued by the office of the registrar of wills. 25 Pa. Cons. Stat. § 1505(a)-(b).

57. The Department receives death records from the Department of Health twice monthly and transmits that data to the commissions every few weeks. The Department has also encouraged commissions to perform list maintenance to remove deceased voters using approved statutory sources.

58. Earlier this year, the Department entered into a stipulated agreement allowing the Department to provide county voter registration commissions with a report from ERIC identifying deceased voters drawn from Limited Access Death Master File from the Social Security Administration.

**iii. Removing duplicate and inactive voter registration records.**

59. In 2020 and 2021, the Department distributed a data set from ERIC that identified potential duplicate registrations. This data set can help county voter registration commissions identify potential duplicate registrations and then take

steps to investigate them. The Department produced a job aid to assist commissions in using the data.

60. Each year county voter registration commissions are required by law to send a notice to voters who have not had any activity on their record or have not voted in the last five years. 25 Pa. Cons Stat. § 1901(b)(3). This is known as the “Five Year Notice.” Voters sent such notices are deemed inactive. An inactive voter who does not respond to the notice stays on the rolls in that status until two consecutive federal general elections have passed without further activity, at which point her registration will be cancelled by the commission. If the voter responds to the “Five Year Notice” confirming she wishes to remain registered then she is returned to active status. If she responds saying she wishes to have her registration cancelled, then her inactive status is converted to cancelled without waiting for the passage of two consecutive federal general elections.

\* \* \*

61. The Department regularly communicates with county voter registration commissions to encourage their timely compliance with these obligations. In 2021, the Department sent the commissions ten separate reminders of the deadline for their yearly list maintenance activities.

62. The Department prepares an annual report for the General Assembly on the administration of voter registration in the Commonwealth. 25 Pa. Cons.

Stat. § 1406(b). The report for 2020 was provided to the General Assembly in June 2021 and provides detailed information about various list maintenance efforts undertaken by the county voter registration commissions.

**B. Dates of birth**

63. Prior to the creation of the SURE system, each county voter registration commission maintained its own system for voter registration. Those systems were not uniform and often lacked certain categories of information, including full birth dates, years of birth, or registration dates. This is because some commissions used to only record whether a voter had reached legal age, not the voter's date of birth.

64. When the Department implemented the SURE System, the Department migrated voter registration information into SURE VR as it had been maintained by the county voter registration commissions in their voter registration systems. If the commission had not previously collected full birthdates, the Department and commission used "dummy birthdates" as placeholders to indicate that more detailed information was unavailable. The dummy birthdates in these "legacy" voter records account for many of the obviously incorrect years of birth that DAG auditors noted.

65. The Department had informed the Auditor General of its use of dummy birthdays for legacy voter records.

66. Once Pennsylvania implements SUREVote, *see supra* Part II.B, the Department will work with county voter registration commissions to fill in missing data in legacy voting records.

67. In addition, the Department places “dummy birthdates” for some voters whose information is confidential, including voters in the state’s Address Confidentiality Program. *See* Pa. Ex. G ¶ 31. This helps the Department and county voter registration commissions readily identify that these individuals’ information must be kept confidential.

**V. The Subpoena demands critical infrastructure information protected from disclosure.**

68. As I explained in my Declaration, Paragraph 16 demands certain reports that identify potential risks and vulnerabilities in the SURE system and the Department’s IT infrastructure and would create a roadmap for how to attack the SURE system. Pa. Ex. G ¶¶ 33-39. It is vital to the security of the Commonwealth and Pennsylvania’s election systems that these records remain protected and for use only to protect critical infrastructure systems.

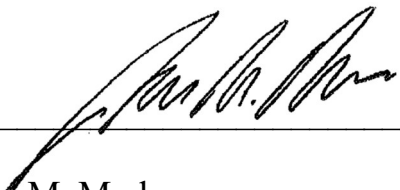
69. Paragraph 16 demands copies of certain reports that the Department has properly submitted for protection under the PCII Program. As required by federal law, each time the Department submits a report to the PCII program, the Department affirms that it is voluntarily submitting the report to the Federal government in expectation of protection from disclosure as provided by the Critical



Infrastructure Act of 2002. *See* 6 C.F.R. § 29.5(a)(3)(i). Each time the Department has submitted a report for protection, Homeland Security has subsequently informed the Department that it has verified the report is PCII. *See* 6 C.F.R. § 29.6(e)(1).

I declare that the facts set for in this Declaration are true and correct. I understand that this Declaration is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa. Cons. Stat. § 4904.

Executed on this 8th day of November, 2021



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Jonathan M. Marks  
Deputy Secretary for Elections and Commissions  
Pennsylvania Department of State

# **EXHIBIT P**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Senator Jay Costa, Senator Anthony H. Williams,  
Senator Vincent J. Hughes, Senator Steven J.  
Santarsiero, and Senate Democratic Caucus,  
Petitioners

v.

Senator Jacob Corman III, Senate Pro Tempore,  
Senator Cris Dush, and Senate Secretary-  
Parliamentarian Megan Martin,  
Respondents

Commonwealth of Pennsylvania, Pennsylvania  
Department of State, and Veronica  
Degraffenreid, Acting Secretary of the  
Commonwealth of Pennsylvania,  
Petitioners

v.

Senator Cris Dush, Senator Jake Corman, and the  
Pennsylvania State Senate Intergovernmental  
Operations Committee,  
Respondents

Arthur Harwood, Julie Haywood  
Petitioners.

v.

Veronica Degraffenreid, Acting Secretary of  
State Commonwealth of Pennsylvania  
Respondents

**CASES CONSOLIDATED**

No. 310 MD 2021

No. 322 MD 2021

No. 323 MD 2021

**SUPPLEMENTAL EXPERT DECLARATION OF**  
**ANTHONY J. FERRANTE**

I, Anthony J. Ferrante, declare and affirm under the penalties of 18 Pa. Cons. Stat. § 4904 as follows:

1. I am a Senior Managing Director and the Global Head of Cybersecurity at FTI Consulting, Inc. (“FTI”). I have been retained by the Pennsylvania Department of State and asked to provide my professional opinion as to the potential security and privacy risks surrounding the subpoena issued by the Pennsylvania State Senate’s Intergovernmental Operations Committee (“SIOC”).

2. I submitted a Declaration in support of Petitioners’ application for summary relief on October 13, 2021 (Pa. Ex. H). I submit this Supplemental Declaration in support of Petitioners’ opposition to Respondents’ Cross Application for summary relief.

3. If called as a witness, I could and would testify competently to the matters set forth in my initial Declaration and to the matters set forth below.

**SUPPLEMENTAL MATERIALS REVIEWED**

4. In addition to materials I reviewed in my initial Declaration, I have also reviewed the Respondents’ Cross Application for Summary Relief (“Cross Application”), including materials referenced therein. I have also reviewed the

Technology and Security Overview prepared by the Electronic Registration Information Center (“ERIC”).<sup>1</sup>

### **STATEMENT OF FACTS**

5. It is my understanding that on September 15, 2021, Senator Cris Dush, Chair of the SIOC, issued a subpoena to Veronica Degraffenreid, Acting Secretary of the Pennsylvania Department of State (“DOS”).

6. Within the subpoena, the SIOC ordered the delivery of personally identifiable information (“PII”) on millions of Pennsylvania voters. Specifically, paragraphs 4 through 14 ordered access to and disclosure of names, addresses, dates of birth, driver’s license numbers, and last four digits of Social Security Numbers (“SSN”).

7. It is also my understanding that within the subpoena, the SIOC ordered the delivery of Protected Critical Infrastructure Information (“PCII”). Specifically, paragraph 16 ordered a copy of all reports of audits and/or reviews of the Statewide Uniform Registry of Electors (“SURE”) system conducted by or for the DOS between 2018 and the present.

8. In response to the subpoena, the DOS and Secretary Degraffenreid filed a petition, requesting that the subpoena be quashed and enjoined by the Court.

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<sup>1</sup> ERIC, *Technology and Security Overview* (Apr. 1, 2021), [https://ericstates.org/wp-content/uploads/2021/04/ERIC\\_Tech\\_and\\_Security\\_Brief\\_v4.0.pdf](https://ericstates.org/wp-content/uploads/2021/04/ERIC_Tech_and_Security_Brief_v4.0.pdf).

9. In response to the petition filed by the DOS and Secretary Degraffenreid, Respondents submitted a Cross Application, arguing that the SIOC is entitled to receive the information requested in the subpoena.

### **SUMMARY OF SUPPLEMENTAL OPINIONS**

10. Based on my review of the SIOC's motions and supporting materials, I hereby reincorporate and reassert the opinions in my initial Declaration.

11. It is my opinion that Respondents have not demonstrated that the SIOC is prepared to receive, handle, or transfer the information demanded in the subpoena. There has been no demonstrated consideration for the necessary safeguards, processes, or procedures required to ensure that the information requested will remain secure at all times throughout the data lifecycle.

### **DETAILED SUPPLEMENTAL OPINIONS**

12. Within my initial Declaration, I noted that it was apparent to me that the SIOC was demanding information from the DOS without demonstrating it had the ability to ensure it would remain secure at all times throughout the data lifecycle.<sup>2</sup>

13. Senator Jake Corman's statement in the September 15 hearing best encapsulates the SIOC's overall approach: "we will gather sensitive information,

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<sup>2</sup> Pa. Ex. H ¶¶ 12-13.

we will review sensitive information, and then we will secure that information.”<sup>3</sup>

Notably, the gathering of the information is prioritized over the security of the information.

14. Based on Respondents’ Cross Application, it is clear to me that the SIOC’s approach has not changed. As stated by Respondents, the issue is “not whether there will be sufficient security measures to protect any information that could be disclosed to a third-party in the future, **but whether the Acting Secretary must comply with a lawfully issued Subpoena and produce the information to the Senate in the first place.**”<sup>4</sup> The security of the data demanded is decidedly secondary to its acquisition. In other words, give us the data now and we will figure out the rest later.

15. Thus far, only general statements regarding the security of the information have been offered.

16. In the September 15 hearing, Senator Dush stated that the information would be “held in a secure location” and that the SIOC would “take proper care of it.”

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<sup>3</sup> Pa. Ex. C 55:2-5.

<sup>4</sup> Comm. Br. at 31-32 (emphasis added).

17. In their Cross Application, Respondents claimed that in negotiating any contract with a third-party vendor, the SIOC will “adequately address any legitimate security or confidentiality concerns.”<sup>5</sup>

18. On the PA Election Investigation website, the SIOC assert that “[t]he information will be stored securely and only made available for the purposes of the investigation.”<sup>6</sup>

19. Senator Dush’s confidence in the SIOC’s ability to protect this information is reflected in an article he authored which states that “there is a better chance of a Pennsylvanian being struck by a meteor than having their personal information compromised by our election investigation.”<sup>7</sup> Although Senator Dush likely intended for this statement to engender reassurance, its hyperbolic nature actually reinforces the SIOC’s cavalier approach to security. Contrary to Senator Dush’s assertion, there has been only one confirmed case in history of a person being hit by a meteorite.<sup>8</sup> Conversely, according to the Identity Theft Research

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<sup>5</sup> Comm. Br. at 32-33 n.15.

<sup>6</sup> *PA Election Investigation — Restoring Faith in Our Elections*, <https://paelectioninvestigation.com/> (last visited November 8, 2021).

<sup>7</sup> Cris Dush, *Your View by Republican leading Pennsylvania election audit: A meteor strike is more likely than a breach of your election info*, *The Morning Call* (October 13, 2021), <https://www.mcall.com/opinion/mc-opi-election-investigation-pa-dush-20211013-qg6cy22ggzhc7pljsx2rkk7u3q-story.html>.

<sup>8</sup> Justin Nobel, *The True Story of History’s Only Known Meteorite Victim*, *National Geographic* (February 20, 2013), <https://www.nationalgeographic.com/science/article/130220-russia-meteorite-ann-hodges-science-space-hit>.



Center, as of September 30, 2021, there had been 1,291 data breaches in the United States alone, with approximately 281 million people impacted.<sup>9</sup> In 2020, there were 1,108 data breaches in the United States with approximately 310 million people impacted.<sup>10</sup> It should be noted that these are only reflective of publicly reported breaches and thus should be viewed as minimums; many more could remain unaccounted for.<sup>11</sup>

20. In the same article, Senator Dush continues the SIOC’s pattern of only offering vague and general statements on security, such as “insisting on contract language with potential vendors to ensure information security” and “making information security a key consideration as we decide which vendor to select.”

21. As a third-party vendor has yet to be selected, Respondents state that any claims by Petitioners on what might happen if the unidentified vendor obtains access to the information requested are unripe and thus have no merit.<sup>12</sup> It is my understanding that the vendor will be chosen by Senator Dush, who has been

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<sup>9</sup> Alex Achten, *Identity Theft Resource Center to Share Latest Data Breach Analysis With U.S. Senate Commerce Committee; Number of Data Breaches in 2021 Surpasses All of 2020*, Identity Theft Resource Center (October 6, 2021), <https://www.idtheftcenter.org/identity-theft-resource-center-to-share-latest-data-breach-analysis-with-u-s-senate-commerce-committee-number-of-data-breaches-in-2021-surpasses-all-of-2020/>.

<sup>10</sup> *Id.*

<sup>11</sup> For the last 15 years, the ITRC has tracked publicly-reported data breaches in an effort to make businesses and consumers aware of the latest information. Identity Theft Resource Center, 2020 in Review Data Breach Report, (January 28, 2021), 3.

<sup>12</sup> Comm. Br. at 32.

unwilling to disclose any vendors under consideration. However, the SIOC still demands the delivery of the data now. This places the DOS in an impossible position, where the only tangible thing that can be currently evaluated are the SIOC's general statements.

22. Put another way, imagine a scenario in which you are approached by an unknown individual demanding access to your bank and investment accounts so they could manage your money. When asked what their qualifications are and how they will use the money, they only tell you that you will find out once you give them access. Understandably, you would be skeptical and would not blindly hand over your account credentials.

23. Imagine another scenario in which an unknown individual demands that you lend them your car for a road trip. This individual refuses to share any of the details of the road trip or who will be driving the car but assures you that your car will be "in a secure location" and that they will "take proper care of it." Again, you would be skeptical and would not unquestioningly hand over your car.

24. Respondents also state that the SIOC has yet to identify what security measures it will require the vendor to adhere to.<sup>13</sup> Perhaps unknowingly, Respondents essentially admit in this statement that they are not prepared to

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<sup>13</sup> Comm. Br. at 79.

receive, handle, or transfer the information demanded in the subpoena. However, they still demand the delivery of the data now.

25. The SIOC claims that “any third-party vendor personnel will be required to sign a non-disclosure agreement to protect this information under penalty of law.”<sup>14</sup> However, a non-disclosure agreement (“NDA”) does nothing to establish security protocols or prevent or remedy a data breach. An NDA will only bind the vendor to not disclose the information. Hackers are not bound by NDAs.

26. In line with the SIOC’s approach, Respondents argue that the DOS must deliver the information to the SIOC now, and that other details such as the vendor and associated security requirements will be determined after this data transfer has taken place. This argument contravenes all widely accepted data lifecycle management best practices as the lack of planning inherent in this approach creates multiple opportunities for a data breach.

27. At its most basic level, a data breach is defined as the unauthorized access to sensitive or private data by an unauthorized party. A data breach can occur through the exploitation of technical vulnerabilities or through the manipulation of human emotions, actions and/or judgements. The latter falls into an attack category widely referred to as “social engineering.” The most common

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<sup>14</sup> *PA Election Investigation — Restoring Faith in Our Elections*, <https://paelectioninvestigation.com/> (last visited November 8, 2021).

and successful form of social engineering is “phishing,” an event in which an attacker will send an action-inducing email to their victim in order to gain fraudulent access to their account, information, or system. Due to the increasing sophistication of phishing emails, they can often appear as legitimate communications from parties known to the recipient, such as coworkers, friends, or third-party partners. An untrained employee may not realize that they are engaging with a phishing email and may inadvertently divulge sensitive information to an attacker, thinking they are communicating with a trusted individual.

28. Social engineering can also manifest itself physically. For example, an attacker may impersonate a third-party vendor claiming that their presence was requested to perform maintenance on certain systems. If granted access to these systems, it is entirely possible that this individual would be able to exfiltrate sensitive data or install malware.

29. In thwarting social engineering attacks, it is crucial to define upfront who has and who does not have authorized access to systems or data and ensure that individuals who handle sensitive data are properly trained on how to identify social engineering. In addition, therefore, to the technological defenses that would be required to adequately safeguard the data demanded by SIOC, *see infra* ¶¶ 30-31, there would also be an equally pressing need to demonstrate the training of

staff who would be handling it; neither of which have been competently demonstrated by the SIOC during proceedings thus far.

30. The SIOC's promise to establish security requirements after it has acquired the data implies that the data will not be protected in transit and that it is not aware of the potential vulnerabilities associated with data in this state. Depending on the mechanism used, there are a number of different ways for data to be compromised in transit. If utilizing physical transfer mechanisms such as paper or USB drives, the data could easily be misplaced, diverted, or lost without proper security protocols in place and end up on the wrong hands. If data is transferred electronically without utilizing encryption-in-transit, it could be intercepted and read in plain text, (through what is known as a "man in the middle" attack). Even if encryption-in-transit is implemented, the data may be stored unencrypted at-rest on an intermediary server before it reaches its final destination if end-to-end encryption is not utilized; in short, this means that the data would be stored unencrypted at-rest in multiple locations, creating additional avenues and opportunities for attack.

31. In addition to the data privacy and data security risks that would be incurred during the transmission process, there are also multiple scenarios in which the data demanded by the SIOC could be compromised once in their possession.

Although by no means exhaustive, the following are real possibilities for exploitation that could occur in an unregulated environment:

- a. It is quite common for data to be stored in shared drives within corporate and office environments. These shared drives' permissions may not be regularly reviewed and adjusted based on the industry best practice deployment of the principle of least privilege. If this was the case, it is entirely possible that an unauthorized individual would be able to access the highly sensitive data the SIOC is demanding. The danger in this scenario is further increased if anyone with access to the shared drive falls victim to a phishing scam, and has their credentials revealed to an attacker in the process. In this scenario, an attacker would be able to freely access the shared drive without too much difficulty.
- b. In the majority of organizations, endpoint (i.e. devices such as laptops or desktops) updates are the responsibility of the end user. Updates are critical to the remediation of vulnerabilities identified by the software provider, fixing irregularities in code or software flaws that render that endpoint vulnerable. Attackers are known to actively look for these vulnerabilities in order to exploit them and gain unauthorized access to the information and credentials these endpoints store. In a scenario in which an end user has not updated their endpoint, it is entirely possible

that an attacker could exploit a known vulnerability and access data that they should not have access to. For this reason, transferring sensitive PII data to an organization that has not explained or demonstrated the safeguards or processes around data privacy poses a grave risk to the data itself and the individuals to which it pertains.

- c. Data stored on physical devices within office buildings is also potentially insecure. If left unattended and in view, external hard drives and USBs are vulnerable to theft, loss, and damage. In addition, therefore, to the technological defenses outlined above, this emphasizes the need for the explicit demonstration of strict policies governing the use and storage of media of this kind. These types of policies have not yet been evidenced or mentioned by the SIOC in their arguments for the possession of the dataset in question.
- d. Insider threats are another risk that must be considered when discussing data security and data privacy. Data housed within an organization may be vulnerable to the actions of malicious insiders, disgruntled workers, employees being manipulated by a third-party, or a vendor with elevated access privileges. In order to combat these threats, it would be expected that any organization intending to handle sensitive data of the kind in question would be able to evidence processes, technologies and

procedures intended to ensure appropriate levels of Data Loss Prevention (DLP) – none of which has been seen within SIOC’s statements around data protection thus far.

32. Based on my experience, if the DOS were a client of mine, I would strongly recommend that it does not transfer any information until a robust due diligence analysis is performed to ensure that whomever they are sending the sensitive information to has implemented robust data security measures to receive, protect, and properly dispose of the data in question. At present, this includes the SIOC and the unidentified vendor.

33. A due diligence analysis of this kind should consist of a thorough independent assessment to ensure that the SIOC’s and vendor’s security controls are verified and validated. It could involve a combination of questionnaires, interviews, documentation review, and on-site visits. Such an assessment could cost tens of thousands of dollars and take months to complete; potentially more depending on the size of the organization and the intricacy of the assessment requirements.

34. Respondents argue that because the information requested in the Subpoena has been released before by the DOS to the Electronic Registration Information Center (“ERIC”), the DOS should also release the information in this



case. However, these two scenarios are not comparable as it appears that ERIC never actually receives the sensitive information demanded by the SIOC.

35. Based on a review of ERIC's Technology and Security Overview, member states never provide ERIC with any sensitive PII (i.e., driver's licenses, SSNs, and dates of birth), in plain text. Instead, ERIC requires that each member state mask (or obfuscate) this data using a cryptographic one-way hash before transferring it to ERIC. ERIC does not restore hashed data to the original values. Once the data is received, ERIC runs the hashed elements through a second hashing process, adding another layer of obfuscation.

36. ERIC implements an HMAC-SHA-256 one-way hashing algorithm with a 1024-bit secret key. The secret key is stored using AES-128 encryption. HMAC adds another layer of security in that it mixes the secret key with the input data, hashes the result with the hash function, mixes that hash value with the secret key again, and then applies the hash function a second time. The output hash is 256 bits, or 32 characters, in length.<sup>15</sup>

37. Hashing is the process of using an algorithm to transform plain-text data into a unique fixed-sized output, usually a combination of numbers and letters. For example, using standard SHA-256 hashing alone (one of the strongest

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<sup>15</sup> *HMACSHA256*, Microsoft, <https://docs.microsoft.com/en-us/dotnet/api/system.security.cryptography.hmacsha256?view=net-5.0> (last visited November 8, 2021).

cryptographic hash functions in existence), the hash for “dog” would be “cd6357efdd966de8c0cb2f876cc89ec74ce35f0968e11743987084bd42fb8944”.

38. Hashing a hash adds another layer of obfuscation. For example, using SHA-256, the hash for “dog”, “cd6357efdd966de8c0cb2f876cc89ec74ce35f0968e11743987084bd42fb8944”, would become “111a7bef999bf758e6884ffaebd484b674cba2642be69dc7b4fe5d4387e85713”.


39. In other words, ERIC has implemented a complex and thorough security process to obfuscate sensitive PII and thus never actually receives sensitive data elements. Conversely, the SIOC is asking for all of this sensitive voter information in plain text.

40. Additionally, in 2020 ERIC underwent a comprehensive third-party assessment of its information security and compliance posture, which included among other things, a cybersecurity risk assessment using ISO 27001 and 27002 controls (industry standard framework), a review of its hashing mechanisms, and a penetration test. This demonstrates to me that ERIC has undergone rigorous review of its security practices.

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I declare under penalty of perjury under the laws that the foregoing is true and correct.

Executed on November 8, 2021



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Anthony J. Ferrante