

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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.

**AMICUS BRIEF OF THE
PUBLIC INTEREST
LEGAL FOUNDATION
IN OPPOSITION TO
CLAIM I OF THE
PETITION FOR REVIEW**

No. 322 MD 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTEREST OF AMICUS CURIAE.....	1
II. INTRODUCTION	2
III. ARGUMENT.....	4
A. Federal Law Requires Public Disclosure of All Voter List Maintenance Records and Preempts Inconsistent State Laws	4
B. Commonwealth Law Demands Transparency in Voter Registration and Election Administration.....	6
C. Title 4, Section 183.14(c)(3) of the Pennsylvania Administrative Code Does Not Regulate Intergovernmental Data Sharing	8
D. The Pennsylvania Department of State Shares Voter Registration Data to Perform Election-Related Investigations.....	9
E. It Is Department of State Policy to Publicly Disclose Voter ID Numbers	13
F. Names, Addresses, Dates of Birth, and Voting Histories Are Public Information Under Commonwealth Law	13
IV. Conclusion	14
CERTIFICATE OF COMPLIANCE	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

Cases

<i>ACORN v. Edgar</i> , 880 F. Supp. 1215 (N.D. Ill. 1995)	5
<i>Arizona v. Inter Tribal Council of Arizona</i> , 570 U.S. 1 (2013).....	5
<i>Bowling v. Office of Open Records</i> , 990 A.2d 813 (Pa. Commw. Ct. 2010)	6 n.4
<i>Elizabeth Blackwell Health Ctr. for Women v. Knoll</i> , 61 F.3d 170 (3d Cir. 1995).....	5
<i>Foster v. Love</i> , 522 U.S. 67 (1997).....	5
<i>Holk v. Snapple Beverage Corp.</i> , 575 F.3d 329 (3d Cir. 2009).....	5
<i>Ill. Conservative Union v. Illinois</i> , 2021 U.S. Dist. LEXIS 102543 (N.D. Ill. June 1, 2021)	5
<i>Project Vote, Inc. v. Kemp</i> , 208 F. Supp. 3d 1320 (N.D. Ga. 2016).....	6 n.3
<i>Project Vote/Voting for Am., Inc. v. Long</i> , 752 F. Supp. 2d 697 (E.D. Va. 2010)	6, 6 n.3
<i>Project Vote/Voting for Am., Inc. v. Long</i> , 813 F.Supp.2d 738 (E.D. Va. 2011)	5
<i>Project Vote/Voting for Am., Inc. v. Long</i> , 682 F.3d 331 (4th Cir. 2012).....	4
<i>Pub. Interest Legal Found. v. Boockvar</i> , 431 F. Supp. 3d 553 (M.D. Pa. 2019).....	1, 4-5
<i>Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections</i> , 996 F.3d 257 (4th Cir. 2021).....	6 n.3
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	6

<i>True the Vote v. Hosemann</i> , 43 F. Supp. 3d 693 (S.D. Miss. 2014).....	6 n.3
---	-------

Constitutions, Statutes, Codes, and Rules

52 U.S.C. § 20507(i)(1).....	3-4
25 P.S. § 2648	7
25 P.S. § 3146.9	7
25 P.S. § 3150.17	7
25 Pa.C.S. § 1207(a)	7
25 Pa.C.S. § 1404.....	7
25 Pa.C.S. § 1404(a)	13
25 Pa.C.S. § 1405(b)	6
4 Pa. Code § 183.14	7, 13
4 Pa. Code § 183.14(c)(3)	3, 5, 8, 13
4 Pa. Code § 183.6	12 n.8
4 Pa. Code § 183.6(1).....	12 n.8
4 Pa. Code § 183.6(2).....	12 n.8
Pa.R.A.P. 531(a).....	1
Pa.R.A.P. 531(b)(1)(i).....	1

Other Authorities

https://www.pavoterservices.pa.gov/Pages/Purchase PAFULLVoterExport.aspx	7, 13 n.9
Performance Audit Report, Statewide Uniform Registry of Elections, Dec. 2019, https://www.paauditor.gov/Media/Default/Reports/Department%20of%20State_S URE%20Audit%20Report%2012-19-19.pdf	11 n.5, 14 n.11
FAQs, What Data Does ERIC Collect From Member States?, ERIC, https://ericstates.org/	12 n.7
Home, ERIC, https://ericstates.org/	11 n.6

ERIC Membership Agreement at 4(a), https://ericstates.org/wp-content/uploads/2020/02/ERIC_Bylaws_01-2020.pdf	12
--	----

The Public Interest Legal Foundation (“Foundation”) respectfully submits this brief as *amicus curiae* pursuant Pa.R.A.P. 531(b)(1)(i) (merits briefing).

I. INTEREST OF AMICUS CURIAE

The Foundation is a non-partisan, 501(c)(3) public-interest organization that is dedicated entirely to promoting the integrity of elections nationwide through research, education, remedial programs, and, where necessary, litigation. The Foundation’s mission includes protecting the fundamental right of citizens to vote and preserving the constitutional balance between the states and the federal government regarding election administration procedures. The Foundation pursues its mission, in part, by using state and federal open records laws (*e.g.*, the National Voter Registration Act of 1993) to study and analyze the voter list maintenance activities of state and local governments.

The Foundation has dedicated significant time and resources pursuing access to public records in the Commonwealth of Pennsylvania, and other jurisdictions throughout the United States. *See, e.g., Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553 (M.D. Pa. 2019). This matter involves access to records of the kind the Foundation often pursues and relies upon to carry out its mission. The Foundation is thus a non-party genuinely and significantly “interested in the questions involved” in this matter. Pa.R.A.P. 531(a).

The information and authorities presented in the Foundation’s brief will very likely not be presented by the existing parties. The Foundation’s brief will therefore aid the Court’s resolution of this matter.

Mindful of the Court’s limited judicial resources, the Foundation does not seek to intervene as a party or receive any oral argument time. Consideration of the Foundation’s brief will thus not prejudice any party or delay resolution of this matter.¹

II. INTRODUCTION

The Pennsylvania Senate Intergovernmental Operations Committee’s (“Committee”) subpoena duces tecum issued to the Pennsylvania Department of State (“DOS”) requests voter and election-related information, including, voting data for registered voters in the Commonwealth of Pennsylvania, much of which is already publicly available. Nevertheless, Petitioners sued to stop its release, mischaracterizing the information requested as “private.” Claim I of the Petition for Review (“Petition”) seeks an order declaring that paragraphs 4 through 13 of the subpoena are “unenforceable” because they “[v]iolate the informational privacy rights” of Pennsylvania’s registered voters. Petition ¶ 206; Prayer for Relief at (B)(1). Such an order would misstate and misconstrue both federal and state law.

¹ No person or entity other than the Foundation and its counsel paid for the preparation of this brief or authored any part of this brief.

This brief addresses Petitioners' repeated claim that the information sought by the subpoena is "private." *See, e.g.*, Petition at 3. Petitioners primarily rely on 4 Pa. Code § 183.14(c)(3), which limits which categories of data may not be made available for "public inspection." However, Respondents seek *private* data sharing between the Commonwealth's executive and legislative branches for the purpose of election-related research, which Section 183.14 does not address. Additionally, Petitioners wrongly claim that information regarding voters who hold certain jobs is automatically and wholly exempt from disclosure. In reality, the law provides certain individuals the ability to request to utilize an address other than their home addresses, for safety reasons. Regardless, much, if not all, of the data the Committee requests is already a matter of public record under federal and Commonwealth law. *E.g.*, 52 U.S.C. § 20507(i)(1). Furthermore, recent and historical DOS practice undermines Petitioners' privacy concerns in these circumstances. When convenient, DOS willingly shares so-called "constitutionally protected personal information," including driver's license and partial Social Security numbers, with outside departments, and even private persons and out-of-state entities.

The Committee's efforts to examine the integrity of registration and voting data should be encouraged, not squelched. Data sharing—both public and private—is vital to effective maintenance of official voter lists and the free and just

administration of elections. “State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. Without such transparency, public confidence in the essential workings of democracy will suffer.” *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 339 (4th Cir. 2012).

III. ARGUMENT

A. Federal Law Requires Public Disclosure of All Voter List Maintenance Records and Preempts Inconsistent State Laws.

It is federal policy that all state voter list maintenance records are public records. The National Voter Registration Act of 1993 (“NVRA”) contains an open-records provision, which provides,

Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]”

52 U.S.C. § 20507(i)(1) (emphasis added). The NVRA narrowly exempts only two specific records from its broad disclosure mandate: (1) “records relate[d] to a declination to register to vote” and, (2) records related “to the identity of a voter registration agency through which any particular voter is registered.” *Id.*

In recent litigation involving the Foundation, the United States District Court for the Middle District of Pennsylvania addressed the interplay between the NVRA and state-law restrictions on disclosure of government records. *Pub. Interest Legal*

Found. v. Boockvar, 431 F. Supp. 3d 553 (M.D. Pa. 2019). In that case, the Foundation sought, pursuant to the NVRA, various voter list maintenance records maintained by the Secretary of the Commonwealth. *Id.* at 555-57. The Secretary contended, in part, that Commonwealth law protected the requested records from disclosure. *Id.* at 561-62. The court disagreed.

Finally, we need not consider whether the requested records are protected by Pennsylvania's Right-to-Know Law because PILF sought its records under the NVRA. **To the extent Pennsylvania law conflicts with our interpretation of federal law, federal law controls.** *Foster v. Love*, 522 U.S. 67, 69, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 339 (3d Cir. 2009).

Id. at 564 (emphasis added).

The Middle District's interpretation accords with precedent of the Supreme Court of the United States, *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 15 (2013) (state laws must "give way" to NVRA under Elections Clause), and precedent of other lower federal courts, *ACORN v. Edgar*, 880 F. Supp. 1215, 1222 (N.D. Ill. 1995); *Project Vote/Voting for Am., Inc. v. Long*, 813 F.Supp.2d 738, 743 (E.D. Va. 2011); *Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS 102543, *16-20 (N.D. Ill. June 1, 2021) (holding that plaintiffs "plausibly alleged" a conflict between NVRA and Illinois law).

The NVRA, a federal law, thus supersedes any disclosure restriction, whether found in the Constitution of Pennsylvania, 4 Pa. Code § 183.14(c)(3), or another Commonwealth law. *Elizabeth Blackwell Health Ctr. for Women v. Knoll*,

61 F.3d 170, 178 (3d Cir. 1995) (“The Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law[.]”) (citing *Reynolds v. Sims*, 377 U.S. 533, 584 (1964)).²

While some courts have permitted limited redaction of voter list maintenance records, *e.g.*, *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 711 (E.D. Va. 2010) (allowing redaction of full Social Security numbers), such instances have concerned *public* disclosure,³ not the private, inter-governmental disclosure that is implicated here.

B. Commonwealth Law Demands Transparency in Voter Registration and Election Administration.

Although the Commonwealth maintains a robust and generally applicable Right to Know Law,⁴ the General Assembly singled out election-related records for specific and heightened transparency. For starters, despite the NVRA’s existence, the Commonwealth adopted its own public disclosure law that allows physical inspection of “all” voter list maintenance records. 25 Pa.C.S. § 1405(b). The

² Petitioners concede that Pennsylvania’s “[e]lections are governed by Pennsylvania’s Election Code and subject to federal law.” Petition ¶ 25.

³ See *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697 (E.D. Va. 2010); *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257 (4th Cir. 2021); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320 (N.D. Ga. 2016); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693 (S.D. Miss. 2014).

⁴ Pennsylvania’s Right to Know Law “is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010).

Commonwealth also allows any qualified elector to physically inspect the “records of each county board of elections.” 25 P.S. § 2648. Upon request, election officials must also disclose the names, addresses, and certain application and ballot activity of all absentee and mail-in voters. 25 P.S. § 3146.9; 25 P.S. § 3150.17. Election officials must also allow physical inspection of the following specific records: “(1) Records of a registration commission and district registers. (2) Street lists. (3) Official voter registration applications. (4) Petitions and appeals. (5) Witness lists. (6) Accounts and contracts. (7) Reports.” 25 Pa.C.S. § 1207(a). Furthermore, DOS offers the entire statewide registered voter list for public sale, which includes all of the following voter data:

voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential address, mailing address, polling place, date last voted, all districts in which the voter votes (i.e., congressional, legislative, school district, etc.), voter history, and date the voter’s record was last changed.

<https://www.pavoterservices.pa.gov/Pages/PurchasePAFULLVoterExport.aspx>

(last accessed Sept. 28, 2021) (screenshot below); *see also* 25 Pa.C.S. § 1404; 4 Pa. Code § 183.14.

PA Full Voter Export

As provided by 25 Pa C.S. Section 1404(b)(1) (relating to Public Information Lists), as well as the SURE Regulations at 4 Pa. Code Section 184.14(b) (relating to Public Information Lists), the Department of State will provide the Full Voter Export List to requestors.

This version of the Public Information List is a full export of all voters in the county and contains the following fields: voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential address, mailing address, polling place, date last voted, all districts in which the voter votes (i.e., congressional, legislative, school district, etc.), voter history, and date the voter's record was last changed.

The cost of the Full Voter Export list is 20.00. Upon successful payment an email will be sent to the provided email address.

This data is current as of 09/27/2021 and will be refreshed on 10/04/2021 at midnight.

The Pennsylvania General Assembly thus plainly intends that election records be transparent and does not consider voter list data to implicate any constitutional right to privacy.

C. Title 4, Section 183.14(c)(3) of the Pennsylvania Administrative Code Does Not Regulate Intergovernmental Data Sharing.

Title 4, Section 183.14(c)(3) of the Pennsylvania Administrative Code provides, “The following items may not be made available for public inspection or photocopying ... [t]he 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.” As the text reveals, this disclosure limitation applies to *public* inspection. *Id.* It thus does not regulate the subpoena, which seeks private disclosure of data between two branches of the Commonwealth’s government.

D. The Pennsylvania Department of State Shares Voter Registration Data to Perform Election-Related Investigations.

Despite invoking “privacy” as a reason to refuse to answer the subpoena, DOS has willingly and freely shared voter registration data of the very kind the subpoena requests within and outside the Commonwealth’s government.

According to sworn testimony given in Foundation litigation by the Commonwealth’s Deputy Secretary for Elections and Commissions, “[i]n or around 2017, the Department of State discovered that a software error at the Department of Transportation may have allowed non-citizens to inadvertently register to vote when applying for or renewing a driver’s license using the Motor Voter interface.” Doc. 64-1 ¶ 7, *Pub. Interest Legal Found. v. Boockvar*, No. 1:19-cv-622 (M.D. Pa., filed May 3, 2021) (attached as Exhibit A). In response, “the Department of State worked with representatives from the Department of Transportation to conduct a high-level comparison of the SURE database against the driver license database for the purpose of identifying the number of registrants in the PennDOT database with specific tags indicating the driver’s visitor, immigration or naturalization status, so-called ‘INS indicators.’” Exhibit A ¶ 12. To perform the comparison, DOS “provided PennDOT with voter registration records for the **entire Commonwealth**[.]” Doc. 66-1 at 176:2-4, *Pub. Interest Legal Found. v. Boockvar*, No. 1:19-cv-622 (M.D. Pa., filed May 3, 2021) (emphasis added) (excerpt below).

Atkinson Baker, Inc.
www.depo.com

1 mischaracterizes the testimony.

2 A. Well, again, we, we would have provided
3 PennDOT with voter registration records for the
4 entire Commonwealth, and then that would be used to
5 match against -- based on criteria, to determine if

The Deputy Secretary's testimony indicates that data that Petitioners claim is private—"driver's license" and "last four of SSN"—were shared with PennDOT.

23 Q. And when this process was occurring, did
24 the Department of State establish what data points
25 had to match for it to be considered a match?

Jonathan Marks
February 12, 2021

183
Exhibit A

Atkinson Baker, Inc.
www.depo.com

1 And I can give you an example.

2 A. Yeah. I mean, I mean the minimum to
3 consider a match would be, you know, first name,
4 last name, date of birth. If you had a driver's
5 license or the last four of SSN, that would be
6 preferable to establish a match. You know, if you
7 had a different middle name, that would not be a
8 match. I mean, they're pretty, you know, pretty
9 well-established criteria. And even that's not a
10 100 percent guarantee.

Later, DOS performed a second analysis using voter registration data and motor vehicle records to determine if non-citizens had registered to vote. This second analysis was allegedly done in consultation with an unidentified “expert,” who was not a DOS employee, but rather a “tenured Associate Professor of Political Science.”⁵

In addition to working with PennDOT to correct the issue, DOS management stated that steps were taken to investigate and address the concern that non-citizens were registered to vote. DOS management stated that they retained an expert, a tenured Associate Professor of Political Science, to conduct an analysis by comparing the Commonwealth’s voter registration data with other available Commonwealth databases. We requested information from DOS regarding what

Pennsylvania also routinely shares so-called “private voter information” with an outside entity as part of its membership in the Electronic Registration Information Center (“ERIC”). ERIC “is a non-profit organization with the sole mission of assisting states to improve the accuracy of America’s voter rolls and increase access to voter registration for all eligible citizens.”⁶ As a member of ERIC, DOS “submits at a minimum its voter registration and motor vehicle

⁵ Performance Audit Report at 162, Statewide Uniform Registry of Elections, Dec. 2019, *available at* https://www.paauditor.gov/Media/Default/Reports/Department%20of%20State_SURE%20Audit%20Report%2012-19-19.pdf (last accessed Sept. 28, 2021) (screenshot below).

⁶ Home, ERIC, <https://ericstates.org/>.

licensee data. The data includes names, addresses, date-of-birth, **last four digits of the social security number**.^{7,8}

What Data Does ERIC Collect From Member States? ^

Each member submits at a minimum its voter registration and motor vehicle licensee data. The data includes names, addresses, date-of-birth, last four digits of the social security number. Private data such as date of birth and the last four digits of the Social Security number are protected using a cryptographic one-way hash and then transmitted to ERIC. An explanation of how the

Because Petitioners complain about Respondents’ alleged intent to retain an “unknown third-party vendor” to perform investigative work, Petition ¶ 182, it should be noted that the Commonwealth has agreed, through written agreement, to conceal all information received from ERIC unless disclosure is required by court order. *See* ERIC Membership Agreement at 4(a), *available at* https://ericstates.org/wp-content/uploads/2020/02/ERIC_Bylaws_01-2020.pdf (last accessed Sept. 27, 2021). In other words, DOS farms out the fate of its registered voters to a far-away star chamber, where only those with the resources to pursue litigation stand a chance at entry.

⁷ FAQs, What Data Does ERIC Collect From Member States?, ERIC, <https://ericstates.org/> (emphasis added).

⁸ Petitioners wonder “why” the Committee must obtain the data the subpoena requests. Petition ¶ 203. The answer is simple: it is necessary to properly identify a particular registrant or voter. Election officials rarely rely on name and address alone to maintain voter registration records. For example, Pennsylvania election officials are required to identify and remove duplicated registration records. 4 Pa. Code § 183.6. If two or more records contain the same name, address, and date of birth, officials “shall use” the registrant’s unique identifier, Social Security number, and driver’s license number, if available, to confirm the match. 4 Pa. Code § 183.6(1)-(2).

These instances demonstrate that DOS will, when convenient, share voter registration and voting data with others, both inside and outside Pennsylvania state government, and reinforces the conclusion that neither the Constitution of Pennsylvania or 4 Pa. Code § 183.14(c)(3) restrict DOS's ability to engage in non-public disclosure of driver's license and Social Security numbers.

E. It Is Department of State Policy to Publicly Disclose Voter ID Numbers.

Although 4 Pa. Code § 183.14(c)(3) purports to make each registrant's "unique identifier" exempt from public disclosure, DOS makes "voter ID number[s]" available to the public as part of the Full Voter Export list that is available for purchase.⁹ DOS has provided voter ID numbers to the Foundation on multiple occasions when the Foundation has purchased the Full Voter Export. *See* Section II.B (screenshot).

F. Names, Addresses, Dates of Birth, and Voting Histories Are Public Information Under Commonwealth Law.

Petitioners concede that names, addresses, dates of birth, and voting histories of all registered voters is a matter of public record in the Commonwealth. Petition ¶ 174 (citing 25 Pa.C.S. § 1404(a); 4 Pa. Code § 183.14). In fact, for just twenty dollars, any member of the public can purchase the "Full Voter Export" list, which

⁹ <https://www.pavoterservices.pa.gov/Pages/PurchasePAFULLVoterExport.aspx> (last accessed Sept. 28, 2021).

contains that information (and more) for every registered voter in the Commonwealth.¹⁰ As noted above, the Foundation has purchased that information on several occasions.

IV. Conclusion

Petitioners imagine that compliance with the subpoena “threatens the fundamental right to vote” because “Pennsylvania citizens will rightly fear that the mere act of registering to vote could subject their personal information to disclosure.” Petition ¶ 17. If that were true, we would expect to see widespread evidence of it in Pennsylvania because DOS already sells every voter’s personal information on its website for twenty dollars. Yet we do not see it. Instead—as Petitioners tout—we see that “more than 6.9 million people voted in Pennsylvania in 2020,” a “record turnout” for the Commonwealth. Petition ¶ 44.

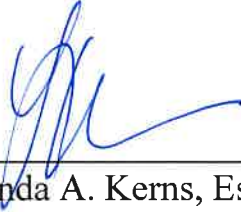
Authority, precedent, and practice in the Commonwealth side with transparency in election administration. The type of intergovernmental data sharing Respondents propose is both lawful and vital to the just execution of election contests and instilling voter confidence.¹¹ An order quashing the subpoena risks

¹⁰ *Id.*

¹¹ Petitioners’ reminder that “Pennsylvania law ... empower[s] the Auditor General to conduct audits for the Commonwealth,” Petition ¶ 84, might be of some comfort if DOS could be trusted to cooperate with those audits. As part of a 2019 audit of the Statewide Uniform Registry of Electors (SURE), the Auditor General audited DOS’s analysis relating to the registration of non-U.S. citizens. *See* Performance Audit Report at 161, Statewide Uniform Registry of Elections, Dec. 2019, *available at* https://www.paauditor.gov/Media/Default/Reports/Department%20of%20State_SURE%20Audit

contravening federal and state law. For these reasons, the Court should deny the relief sought in Claim I of the Petition.

Dated: September 30, 2021.

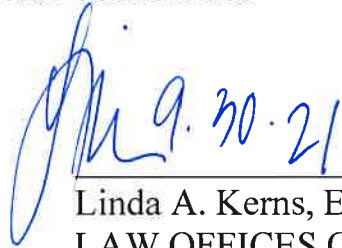


Linda A. Kerns, Esquire
LAW OFFICES OF LINDA A. KERNs, LLC
1420 Locust Street – Suite 200
Philadelphia, PA 19102
PA Atty ID 84495
Tel: (215) 731-1400
Fax: (215) 701-4154
linda@lindakernslaw.com
COUNSEL FOR *AMICUS CURIAE*
PUBLIC INTEREST LEGAL FOUNDATION

%20Report%2012-19-19.pdf (last accessed Sept. 28, 2021). The Auditor General “requested information from DOS regarding what Commonwealth databases were used for the analysis and the results of the analysis; however, DOS would not provide this information.” *Id.* at 162.

CERTIFICATE OF COMPLIANCE

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



Linda A. Kerns, Esquire
LAW OFFICES OF LINDA A. KERNS, LLC
1420 Locust Street – Suite 200
Philadelphia, PA 19102
PA Atty ID 84495
Tel: (215) 731-1400
Fax: (215) 701-4154
linda@lindakernslaw.com
COUNSEL FOR *AMICUS CURIAE*
PUBLIC INTEREST LEGAL FOUNDATION

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document using the Court's electronic filing system, which will serve notice on all parties.

 9.30.21

Linda A. Kerns, Esquire
LAW OFFICES OF LINDA A. KERNS, LLC
1420 Locust Street – Suite 200
Philadelphia, PA 19102
PA Atty ID 84495
Tel: (215) 731-1400
Fax: (215) 701-4154
linda@lindakernslaw.com
COUNSEL FOR *AMICUS CURIAE*
PUBLIC INTEREST LEGAL FOUNDATION

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**THE PUBLIC INTEREST LEGAL
FOUNDATION,**

Plaintiff,

V.

KATHY BOOCKVAR, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, JONATHAN M. MARKS, in his official capacity as Deputy Secretary for Elections and Commissions, and the BUREAU OF COMMISSIONS, ELECTIONS AND LEGISLATION,

Defendants.

NO. 1:19-CV-00622

JUDGE CONNER

ELECTRONICALLY FILED

DECLARATION OF JONATHAN M. MARKS

I, Jonathan M. Marks, hereby declare as follows:

1. I am the Deputy Secretary for Elections and Commissions for the Department of State of the Commonwealth of Pennsylvania. I make this Affidavit in support of Defendants' Motion for Summary Judgment in the above-captioned matter.

2. My duties as Deputy Secretary for Elections and Commissions include overseeing the Bureau of Election Security and Technology, the Bureau of Campaign finance and Civic Engagement and the Bureau of Elections and

Notaries. The Bureau of Election Security and Technology is responsible for the day-to-day activities of voter registration and election administration, including administration of the Statewide Uniform Registered Electors database (“SURE”).

3. Given my role and years of experience at the Department of State, I am personally knowledgeable about the matters referenced in this Declaration and the business records of the Department of State.

4. The National Voter Registration Act (“NVRA”) requires states to conduct general programs that make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of the death of the registrant or a change in the residence of the registrant. 52 U.S.C. § 20507(a)(4)(A).

5. In Pennsylvania, voter removal programs are codified in 25 Pa. C.S.A. § 1901. Section 1901(a)(2) directs that voter registrations may be canceled only upon the request of the elector, upon the death of the elector, upon confirmation that the elector has moved outside the county, or pursuant to a voter removal program designed to identify registered electors whose address may have changed. 25 Pa. C.S. § 1901(a)(1)-(4).

6. In Pennsylvania, voter registration is entrusted by statute to the counties and only counties are authorized to investigate a registrant’s eligibility to vote and to cancel voter registrations. 25 Pa. C.S.A. § 1203(a), (h), (i).

7. In or around 2017, the Department of State discovered that a software error at the Department of Transportation may have allowed non-citizens to inadvertently register to vote when applying for or renewing a driver's license using the Motor Voter interface.

8. The Department of State worked together with the Department of Transportation to make changes to the Motor Voter process to eliminate inadvertent registration by non-citizens. Among other things, the order of the Motor Voter screens was changed to more prominently display the citizenship question, the process was reconfigured to prevent non-citizens from being offered the voter registration process and the registration screens were translated into a dozen additional languages.

9. In late 2017, the Department of State undertook an analysis of voter data to better understand the scope of the Motor Voter problem. I described this effort in my testimony before the House State Government Committee on October 25, 2017.

10. The Department's initial analysis found 1,160 records in the SURE system that indicate a registrant apparently self-reported and cancelled his or her registration because he/she was not a U.S. citizen. County election officials maintain and process cancellation requests and therefore this data needed to be

further validated by county election officials to ensure the accuracy of any conclusions drawn from the records.

11. In late 2017, the Department of State requested that the counties provide copies of cancellation requests received from persons who requested cancelation of their registration because they were not U.S. citizens. The Department of State received copies of cancellation requests from Allegheny, Philadelphia and Dauphin Counties. Copies of the records were provided to PILF in discovery in this matter.

12. Also in 2017, the Department of State worked with representatives from the Department of Transportation to conduct a high-level comparison of the SURE database against the driver license database for the purpose of identifying the number of registrants in the PennDOT database with specific tags indicating the driver's visitor, immigration or naturalization status, so-called "INS indicators."

13. An INS indicator in a driver record does not signify or indicate that the driver is not a U.S. citizen. An INS indicator can also signify that a driver is a naturalized citizen and therefore eligible to vote. Further, INS indicators are point-in-time data that can and do change over time. For example, a visa holder may become a U.S. citizen and therefore become eligible to vote at a later point in time. Accordingly, the initial high-level comparison of the SURE database and driver

license database did not identify non-citizen registrants but rather identified a much larger group of persons who may potentially be non-citizens or may have been non-citizens at some point in time.

14. Further analysis was required to determine whether any of matched records was associated with a non-citizen registrant.

15. The then-Acting Secretary of the Commonwealth, Robert Torres, engaged the Office of Chief Counsel to provide legal advice concerning Motor Voter issues, including potential voting by non-citizens.

16. The Office of Chief Counsel retained outside counsel who in turn retained an expert to assist in providing legal advice based on review of data derived from the PennDOT driver license database and the SURE system.

17. The work performed by the consulting expert was at the request of counsel, was in anticipation of litigation from any number of sources arising from the PennDOT software glitch and was for the purpose of providing legal advice. The work was not publicly disclosed. The Department has consistently invoked the attorney client privilege and the work product doctrine over the analysis and over communications between counsel and the expert concerning the analysis.

18. Based on advice of counsel and expert work product, the Department of State communicated with registrants in 2018 concerning the Motor Voter software error.

19. The Department of State sent letters to 7,702 registrants on April 27, 2018 advising that the Motor Voter system may have allowed individuals to inadvertently apply to register to vote when obtaining or renewing a driver's license. The letter also advised registrants of the qualifications necessary to register to vote in Pennsylvania, *i.e.* must be a citizen of the United States, must have been a resident of Pennsylvania and the election district for at least 30 days and must be at least 18 years old. The letter further advised recipients to contact their county election office if they did not meet the requirements or were unsure if they meet the requirements. A copy of the letter is attached as Exhibit "A."

20. The Department of State sent a second letter on June 12, 2018 to 11,198 active and inactive (*i.e.* registrants who have not voted for five years and failed to respond to written notice) registrants reiterating the qualifications necessary to register to vote and asking the recipients to affirm their eligibility to vote or cancel their voter registrations. A copy of the letter is attached as Exhibit "B."

21. Another round of letters with a similar message was sent on June 29, 2018 to those recipients who did not respond to the June 12, 2018 letter. A copy of the letter is attached as Exhibit "C."

22. On July 26, 2018, the Department of State referred to the respective counties information concerning individuals whose letters were returned as

undeliverable and individuals who did not respond to the letters. County election officials were advised to handle the registrants according to normal processes employed to confirm eligibility and/or verify addresses.

23. The actions taken by the Department and the responses are summarized in the press statement and charts attached as Exhibit “D.”

24. In October 2017, I received a letter from PILF requesting four categories of records pursuant to the public disclosure provision the NVRA.

25. I responded by letter dated December 20, 2017 advising that the Department of State interpreted the public disclosure provision in the NVRA as applying only to programs for removal of registrants who have died or changed residence and that, if the NVRA were interpreted as applying to removal programs aimed at non-citizens, the Commonwealth had no such program at that time. A copy of my letter is attached as Exhibit “E.”

26. Following dismissal of the action docketed at No. 18-463, PILF resent the same request for records on March 20, 2019. I sent a letter dated April 9, 2019 in response to the renewed request with a similar response. A copy is attached as Exhibit “F.”

27. The first category of records sought by PILF are records relating to comparison of the SURE database with the PennDOT driver license database. This analysis and derivative lists of registrants generated as a result of this analysis

necessarily implicate confidential driver license information which the Commonwealth is prohibited from disclosing under federal Driver's Privacy Protection Act, 18 U.S.C. § 2721, and Pennsylvania state law, 75 Pa. C.S.A. § 6114(a).

28. In addition, disclosure of the names of the persons who received letters may suggest incorrectly that the recipients are non-citizens and may result in harassment or abuse directed at those individuals. It is important to reiterate that the persons who received letters were merely identified as persons whose voter registration eligibility required further review. They were not determined to be non-citizens. To the contrary, many of the persons who received letters are U.S. citizens. Nearly 2,000 of them affirmed their eligibility to vote.

29. The Department of State has provided PILF with copies of documents relating to communications with registrants that do not include or derive from protected driver license information, including copies of the letters, communications with county election officials, press communications and data showing the total number of letters sent and responses received.

30. Other than protected driver license information from PennDOT, the Department of State received no documents within the relevant period from the Department of Homeland Security or any other official government source identifying potential non-citizens on the voting rolls.

31. The second category of records sought by PILF are communications requesting cancellation of voter registration for any reason related to non-U.S. citizenship and any related list maintenance actions.

32. In Pennsylvania, voter registration is entrusted by statute to the counties and only counties are authorized to investigate a registrant's eligibility and cancel voter registrations. 25 Pa. C.S.A. § 1203(a), (h), (i). Accordingly, requests for voter cancellations are properly addressed to and processed by the counties.

33. In late 2017, after the Motor Voter programming error was discovered, the Department of State requested that county election officials provide records in their possession relating to registrants who requested that their voter registrations be canceled because they were not U.S. citizens. The Department of State received records from Allegheny, Dauphin and Philadelphia Counties. Although those documents were not sent to or maintained by the Department—they were sent to and maintained by the counties—those records were produced to PILF during discovery in this case.

34. While not directly responsive to the second request, the Department of State also produced in discovery a redacted list of 1,160 persons who requested to be removed from the voting roll because they claimed to be non-citizens. This list

was generated as part of the analysis referenced in my testimony before the State House Government Committee on October 25, 2017.

35. The Commonwealth does not have a list maintenance program to identify and remove non-citizens and therefore there are no records relating to such programs.

36. The third category of records sought by PILF are communications with jury selection officials relating to individuals who claimed to be non-U.S. citizens when attempting to avoid serving on jury duty and maintenance actions taken as a result.

37. As I explained in my deposition, the Department of State occasionally receives letters from jury officials identifying persons who were summoned for jury duty and who asked to be excused because they were not citizens.

38. When the Department receives such letters, they are forwarded to the respective county to take appropriate action. Again, counties, not the Department, are entrusted with responsibility for investigating voter eligibility.

39. The Department of State advised PILF as much in 2016 in a written response to PILF's similar request for communications with jury selection officials. The April 12, 2016 letter states in pertinent part: "[T]he Department receives non-citizen information on occasion from the U.S. district courts in

Pennsylvania. The Department forwards the information to the appropriate county voter registration commission.”

40. A search by Department of State personnel did not uncover any such letters from October 2015 (two years prior to PILF’s original NBRA request) to March 2019 (the date of PILF’s renewed request). There are no records to produce in response to the third category.

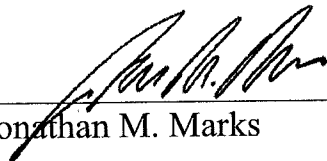
41. PILF’s final request for records relates to communications with prosecutors and law enforcement agencies concerning voting by non-citizens.

42. The Department of State has not communicated with federal or state prosecutors concerning any individual who was identified as a non-citizen or who sought to cancel his or her registration based on non-citizenship. Further, information received from county officials and other sources suggests that the software error allowed persons to register to vote inadvertently and without any intent to violate the law.

43. The Department has no records to produce in response to the fourth category.

44. The Commonwealth has no systematic program to identify and remove non-citizens from the voting rolls and therefore no list maintenance records to produce in response to PILF’s requests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Jonathan M. Marks

Date: May 3, 2021