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EXAMINING IRREGULARITIES IN THE 2020 ELECTION

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

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EXAMINING IRREGULARITIES IN THE 2020 ELECTION

WEDNESDAY, DECEMBER 16, 2020

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:01 a.m., in room SD–342, Dirksen Senate Office Building, and via Webex, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Portman, Paul, Lankford, Scott, Hawley, Peters, Carper, Hassan, Sinema, and Rosen.

OPENING STATEMENT OF CHAIRMAN JOHNSON[1]

Chairman JOHNSON. Good morning. This hearing is called to order. I want to welcome and thank the witnesses for your time and your testimony.

Let me start the hearing by saying this hearing should not be controversial. It really should not be. This is something I think we all should want to restore the confidence in our election system.

A week ago, when I gave notice of this hearing, there were more standing issues and court cases than there are today. But even though courts have handed down decisions and the Electoral College has awarded Joe Biden 306 electoral votes, a large percentage of the American public does not believe the November election results are legitimate. This is not a sustainable state of affairs in our democratic republic.

There are many reasons for this high level of skepticism. It starts with today's climate of hyper-partisanship, which is only exacerbated by the persistent efforts to delegitimize the results of the 2016 election. The corrupt investigation and media coverage of the Russian collusion hoax reduced faith in our institutions, and the ongoing suppression and censorship of the conservative perspective by biased media and social media adds fuel to the flames.

Senator Grassley's and my investigation and report on the conflicts of interest and foreign financial entanglements of the Biden family is just one example of how media suppression can and does affect the outcome of an election. It is both amazing and galling that all of a sudden post-election this has become a news story and a scandal worthy of investigation.

With less than a month left in my chairmanship of this Committee, the examination of irregularities in the 2020 election will

[1] The prepared statement of Senator Johnson appears in the Appendix on page 67.

obviously be my last investigation and last hearing as Chairman. But oversight into election security should continue into the next Congress because we must restore confidence in the integrity of our voting system.

As I said at the start, this effort should be bipartisan. In my statement announcing this hearing, I stated its goal was to "resolve suspicions with full transparency and public awareness." What is wrong with that? That is what good oversight can accomplish.

Unfortunately, Senators Schumer and Peters ignored my statement and instead chose to politically attack me and this hearing. As I commented in last Thursday's hearing on early treatment of Coronavirus Disease (COVID–19), close-mindedness is a root cause of many problems we face.

Just a quick aside about that hearing held 7 days ago. It was attacked, unfortunately boycotted by Democrat Members of this Committee except for a rather politically charged opening statement by Senator Peters. Two of those witnesses, two of those doctors who had the courage to treat COVID patients, I think one of them told the Committee they are Democrats, and they were very disappointed by that boycotting by Democrats, that close-mindedness, that politically charged opening statement. But to prove the worthiness and the value of that hearing, Dr. Kory, one of those Democrats, a person who showed immense courage in treating successfully COVID patients, his 10-minute opening statement has received more than 4.4 million views in just the last 7 or 8 days. Obviously, Americans need that information. They have the right to know about early treatment, and they have the right to try early treatment.

My last pitch before I return to this hearing, if you or somebody you know gets COVID, seek a doctor. Again, you need doctor participation in this, but find a doctor who will at least consider and talk to you about early treatment.

On with this hearing. In preparation for this hearing, I asked my staff to find out as much as they could about basic election mechanics, controls, and data flow. Much of the suspicion comes from a lack of understanding how everything works and how much variety there is in the way each precinct, county, and State conducts their elections. Even though decentralization makes it more difficult to understand the full process, it also dramatically enhances the security of our national elections.

In addition to the witnesses testifying today, we spoke to State and local officials as well as suppliers of election machinery, equipment, and data. I believe the alleged irregularities can be organized into three basic categories: one, lax enforcement or violations of election laws and controls; two, allegations of fraudulent votes and ballot stuffing; and, three, corruption of voting machines and software that might be programmed to add or switch votes.

In the time we had, it was impossible to fully identify and examine every allegation. But many of these irregularities raise legitimate concerns, and they do need to be taken seriously.

Here is a brief summary of what we did learn, and a lot of this should provide the American public comfort in the integrity of our election system.

First, multiple controls do exist to help ensure election integrity. Voter registration rules and election logs for both in-person and absentee vote balloting are used to verify eligible voters and help prevent fraudulent voting. But it is not a perfect system, as we will hear in testimony today.

We have increased the percentage of votes using paper ballots from 82 percent in 2016 to 95 percent in 2020, and a lot of that had to do with the efforts of Cybersecurity and Infrastructure Security Agency (CISA) and Chris Krebs, recognizing that was a vulnerability in our system, not having that audit trail. So this is a significant improvement in providing a backup audit trail, but only if full or statistically valid recounts occur. Optical scanners, ballot marking machines, and tabulators should not be connected to the Internet during voting. But we found some do have the capability of being connected, and there are allegations that some were.

Once voting ends, those machines print out a paper report and also transmit voting data in digital form in two separate data streams, from precinct to the county level and then the State level.

The first data stream—this is the official stream—is sent to the official State election management systems, and the second, unofficial stream is to the unofficial media reporting system through companies like Edison Research and the Associated Press (AP). There is no uniform method of transmission. It is not fully automated, and thousands of human beings are involved in the process, so human error does occur. But that is what paper backups and post-election canvassing is designed to catch.

Today we will hear testimony on how election laws in some cases were not enforced and how fraudulent voting did occur, as it always does. The question that follows is whether the level of fraud would alter the outcome of the election. This year, in dozens of court cases through the certification process in each State and by the Electoral College votes, the conclusion has collectively been reached that it would not. However, lax enforcement, denying effective bipartisan observation of the complete election process, and failure to be fully transparent or conduct reasonable audits has led to heightened suspicion.

The most difficult allegations to assess involve vulnerabilities in voting machines and the software used. In order to effectively determine the extent to which voting machines were subject to nefarious intrusion or other vulnerabilities, computer science experts must be given the opportunity to examine these allegations. This is a complex issue that has been under congressional scrutiny for years.

Since 2018, I am aware of three oversight letters requesting information from the main suppliers of voting machines. This oversight is focused on Election Systems & Software LLC, Dominion Voting Systems Inc., and Hart InterCivic, Inc. Today we have a witness from the Election Assistance Commission (EAC), which certifies voting machines, to describe what has been done and what more can be done to address any vulnerabilities.

On March 7, 2018, it was reported that Senator Klobuchar and Senator Shaheen asked, "major vendors of U.S. voting equipment whether they had allowed Russian entities to scrutinize their software, saying the practice could allow Moscow to hack into Amer-

ican election infrastructure." Then last year, on March 26, 2019, Senators Klobuchar, Warner, Reed, and Ranking Member Peters wrote, "The integrity of our elections remains under serious threat. Our Nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020 elections as they did the 2016 and 2018 elections. . . . a combination of older legacy machines and newer systems, vulnerabilities in each present a problem for the security of our democracy and they must be addressed."

On December 6, 2019, Senators Warren, Klobuchar, Wyden, and Congressman Pocan wrote, "We are particularly concerned that secretive and 'trouble-plagued companies,' owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, 'have long skimped on security in favor of convenience,' leaving voting systems across the country 'prone to security problems.'"

Again, this is a quote from that letter: "Moreover, even when State and local officials work on replacing antiquated machines, many continue to 'run on old software that will soon be outdated and more vulnerable to hackers.'"

The letter continues: "In 2018 alone, 'voters in South Carolina [were] reporting machines that switched their votes after they had inputted them.' Scanners were rejecting paper ballots in Missouri, and busted machines were causing long lines in Indiana. "In addition," these Senators write, "researchers recently uncovered previously undisclosed vulnerabilities in 'nearly three dozen backend election systems in 10 States.' Just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania State judicial election in 2019, the county's Republican Chairwoman said, 'nothing went right on Election Day. Everything went wrong. That is a problem.' These problems threaten the integrity of our elections."

Now, again, those were three letters from Democrat Members of Congress. Now, maybe I missed it, but I do not recall the media or anyone else accusing these eight congressional Democrats of indulging in "quackery and conspiracy theories" or their letters of being a "ridiculous charade," as Senator Schumer did when he used those exact same words attacking me and this hearing on the Senate floor.

The fact that our last two Presidential elections have not been accepted as legitimate by large percentages of the American public is a serious problem that threatens our republic. I do not say that lightly. This hearing is part of what should be ongoing congressional oversight that is meant to transparently address that serious problem.

Before I turn it over to Senator Peters, I do want to remark this is my last hearing as Chairman. I want to express the fact that I think it has been an honor and privilege to serve. I think our track record—even though a couple of the last hearings and some of these investigations have grown to be a little rancorous, I regret that. I think we really have an excellent track record of achievement, over 100 bills passed and signed into law in this Committee, 200 others passed by the Committee maybe not signed into law, but they can act as a foundation for future legislation.

Again, I just want to thank everybody for working together, and staff. It really has been an honor and privilege. Looking ahead, I want to acknowledge that Senator Carper had a very kind phone call to me just an hour ago. We will probably be working in some capacity as Chairman and Ranking Member in the Permanent Subcommittee on Investigations (PSI), and I look forward to trying to find those areas of agreement of things we can look into together to give the American people the information they need to know as it relates to government and other issues. So, Senator Carper, thanks for calling.

With that, I will turn it over to Senator Peters.

OPENING STATEMENT OF SENATOR PETERS[1]

Senator PETERS. Thank you, Mr. Chairman, and thanks to our witnesses for being here today.

Mr. Chairman, if we have learned anything over the past 2 years, it is that we cannot take our democracy for granted. Our institutions and our democratic norms have been under assault, and when elected leaders fail to stand up to protect them, we just see how quickly things can erode.

For generations, Americans have been a shining example for budding democracies around the world. We have shown the world that strong governments and free societies can thrive when political power is entrusted to the people. We have demonstrated that the will of the people is above any one individual, and when voters choose their new leaders, power can be transferred peacefully.

The President and many of his supporters are unfortunately continuing their efforts to undermine the will of the people, disenfranchise voters, and sow the seeds of mistrust and discontent to further their partisan desire for power. Whether intended or not, this hearing gives a platform to conspiracy theories and lies, and it is a destructive exercise that has no place in the U.S. Senate.

Joe Biden won the election more than 5 weeks ago with 306 electoral votes and received the most popular votes for a Presidential candidate in American history. All 50 States and the District of Columbia have certified those results. The Electoral College met Monday, and all affirmed that Joe Biden will be the President on January 20, 2021.

It is a result that the majority of the American people recognize along with the leaders of more than 150 countries around the world. Yet, even after all of that, significant numbers of Republican elected officials have been slow to publicly acknowledge that Joe Biden will be the next President of the United States.

I appreciate that yesterday several of my Republican colleagues made their first public comments acknowledging this fact, and I appreciate that even the Chairman's rhetoric around this election has evolved over the last 24 hours.

But let me be clear. Deciding to move forward with this hearing is still dangerous. Elected leaders who are chosen by the voters to help uphold our institutions and democratic values spent weeks either turning a blind eye or parroting provocative rhetoric and false claims about this election. By not speaking out earlier, even though

[1] The prepared statement of Senator Peters appear in the Appendix on page 71.

they knew it was wrong, that there was no evidence to support these claims and that this inflammatory rhetoric is harmful to our democracy, many elected officials gave the President and his supporters license to spread damaging lies about the election.

We have known for weeks that there was no widespread voter fraud, a fact that President Trump's own Department of Justice (DOJ) has confirmed. There was no election interference, and the election was not rigged. In fact, independent election security officials in the Department of Homeland Security (DHS) have called this election "the most secure in American history." We are going to hear directly from the former Director of CISA who will testify today about that fact.

In the face of intimidation from the President and his supporters, including threats of violence and even death, election officials in States across the country certified their results as accurate. More than 50 post-election lawsuits file by the Trump campaign have been dismissed or withdrawn, including by the United States Supreme Court, because there is simply no evidence to support these claims in a court of law. Despite the title of today's hearing, there were no widespread election irregularities that affected the final outcome. These claims are false, and giving them more oxygen is a grave threat to the future of our democracy.

Now, I understand the Chairman's desire to ensure our elections run smoothly, and I agree that we need to restore faith and trust in our election process. But I am concerned that today's hearing will do more harm than good by confusing a few anecdotes about human error with the insidious claims the President has aired.

Mistakes do happen in elections, but there is a difference between a clerk making an error that gets caught and corrected during routine audits and calling the entire election fraudulent or stolen when there is no evidence just because you do not like the outcome.

Amplifying these obviously false narratives about fraud or irregularities corrodes public trust. It threatens national security, and it weakens our democracy and our standing around the world. Every time the President or his followers make these false claims, they destabilize our relationships with our allies and allow authoritarian adversaries to undercut American democratic leadership around the globe.

Democracy and a free society are not guaranteed. We have seen democracies around the world crumble because of similar words and actions. When executives abuse their power, when political leaders work to stifle the free press, and when they delegitimize the principle of one person, one vote, it puts our country on a dangerous path toward authoritarianism.

I have faith that our democracy is strong and that it can withstand these attacks, but we need all of our leaders to speak up and condemn this harmful rhetoric. Preserving our democracy takes hard work, and I am deeply troubled that we are at the edge of a crisis point.

Now is the time for American patriots who love this country to say, "Enough is enough." Now is the time for patriots to put our Nation's founding ideals first during a time when American democracy needs the strongest defense that we can give.

Mr. Chairman, to date the Trump campaign has filed about 60 legal challenges to the election in 8 States across this country. I ask that this document highlighting those cases and their failed attempts be entered into the record without objection.[1]

Chairman JOHNSON. Without objection.

Senator PETERS. I would also like to include in the record a nonexhaustive list of incidents of violence[2] aimed at election officials as well as a statement from our Nation's top law enforcement associations condemning the threats of violence, harassment, and intimidation leveled at election official across the country since election day.[3] I move without objection.

Chairman JOHNSON. Without objection.

Senator PETERS. I also will ask that op-eds from our Nation's foremost voices on election integrity, democratic institutions, and national security, including Madeleine Albright, Michael Chertoff, Ben Ginsberg, and Steven Brill, be entered into the record, without objection.[4]

Chairman JOHNSON. Without objection, because I am not afraid of information, but go ahead.

Senator PETERS. That is great.

Last, I would like to enter into the record a statement from Freedom House President Michael Abramowitz.[5] Freedom House is a nonprofit, nonpartisan organization dedicated to the expansion of freedom and democracy across the world. Without objection, Mr. Chairman.

Chairman JOHNSON. Without objection.

Senator PETERS. Thank you, Mr. Chairman.

Chairman JOHNSON. Again, I do not see anything dangerous about evaluating information, about doing legitimate congressional oversight. Nothing dangerous about that whatsoever. As I said in my last hearing, close-mindedness is a real problem for a lot of the issues we face today.

I should have entered into the record the Reuters article from March 7, 2018, describing the letter from Senators Klobuchar and Shaheen.[6]

I will also enter into the record the March 27, 2019, press release and letter from Senators Klobuchar, Warner, Reed, and Peters, which let me just read a segment from that letter again.[7] This is Senator Peters joining in writing this letter. "The integrity of our elections remains under serious threat. Our Nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020 elections as they did the 2016 and 2018 elections. . . . a combination of older legacy machines and newer systems, vulnerabilities in each present a problem for the security of our democracy and they must be addressed"—until, I guess, right

[1] The document referenced by Senator Peters appears in the Appendix on page 145.
[2] The document referenced by Senator Peters appears in the Appendix on page 290.
[3] The statement referenced by Senator Peters appears in the Appendix on page 288.
[4] The statement referenced by Senator Peters appears in the Appendix on page 272.
[5] The statement referenced by Senator Peters appears in the Appendix on page 286.
[6] The article referenced by Senator Johnson appears in the Appendix on page 126.
[7] The letter referenced by Senator Johnson appears in the Appendix on page 120.

now let us move on, let us not worry about this, because if we look at this, it is dangerous to our democracy.

Also the December 6, 2019, letters written by Senators Warren, Klobuchar, Wyden, and Congressman Pocan to those equipment manufacturers.[1]

I would also like to enter the responses from Dominion and Hart to the March 27th letter, but the Ranking Member's staff had an objection. Do you object to that, the responses? OK. So we will enter those in the record.[2]

Finally, there is a really interesting article recently written by Matt Taibbi who, again, I do not know his political affiliation, seems to be a pretty straight-up reporter, the things I read of him. But if I were to guess—and no offense, Mr. Taibbi. I think he might be a little bit left of center. But the title is, "The YouTube Ban Is Un-American, Wrong, and Will Backfire. Silicon Valley could not have designed a better way to further radicalize Trump voters." The reason I want to enter this article into the record,[3] I really hope people will read it because it really speaks to an awful lot that I covered in my opening statement of why we are in this unsustainable state of affairs in this country where, after 2016, 4 years of resistance, refusing to recognize the legitimacy of that election, and here we are again. This is not sustainable.

But, anyway, again, I want to welcome the witnesses. It is the tradition of this Committee to swear in witnesses, so those via Webex, if you will raise your right hand. You here in person, please rise and raise your right hand. Do you solemnly swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. STARR. I do.

Mr. PALMER. I do.

Mr. TROUPIS. I do.

Mr. RYAN. I do.

Mr. BINNALL. I do.

Mr. KREBS. I do.

Our first witness is coming via Webex, Judge Ken Starr. Judge Starr served as a judge on the D.C. Circuit Court of Appeals from 1983 to 1989. Mr. Starr has argued 36 cases before the Supreme Court, including 25 cases during his service as Solicitor General of the United States from 1989 to 1993. From 1994 to 1999, he was appointed to serve as Independent Counsel for five investigations. Mr. Starr has had a distinguished career in academia and continues to write articles and serve as a guest commentator on a variety of media programs. Judge Starr.

TESTIMONY OF THE HONORABLE KENNETH W. STARR,[4] TESTIFYING IN HIS PERSONAL CAPACITY

Mr. STARR. Thank you, Mr. Chairman and Ranking Member Peters and Members of the Committee. It is an honor to be with you, even remotely.

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[1] The letter referenced by Senator Johnson appears in the Appendix on page 105.

[2] The responses from Dominion and Hart referenced by Senator Johnson appears in the Appendix on page 126.

[3] The article referenced by Senator Johnson appears in the Appendix on page 128.

[4] The prepared statement of Mr. Starr appears in the Appendix on page 74.

Over a century ago, the Supreme Court of the United States wrote this: "the right to vote is . . . a fundamental political right . . . preservative of all rights." Over our 231 years as a constitutional democracy, the story of our American experiment is in no small part a story of expansion and inclusion. And that policy has been undergirded by a desire to achieve human dignity and equality of all persons.

In the wake of the Civil War, very briefly, our constitutional history in terms of amendments governing voting: The 15th Amendment served as the capstone of the three post-Civil War Amendments, which, taken together, abolished slavery; guaranteed due process and equal protection to all persons; and then expanding the right to participate to all persons.

With the franchise expanding came 100 years ago the inclusion of women in 1920 as a Federal constitutional right, the 19th Amendment; the elimination of financial impediments to vote (the 24th Amendment in 1964); and finally, in the wake of the Vietnam War, the expansion of the vote in Federal elections to include 18-year-olds (the 26th Amendment in 1971). Of course, along the way, Congress acted to foster the values of the 15th Amendment through passage of the Voting Rights Act of 1965 with its extensions over time.

Now, underlying this story of ever-expanding voting rights was an assumption, that is, one of integrity in the process. Recall the scene in the wonderful movie "Selma," as the would-be voter, portrayed by Oprah Winfrey, was unconscionably stymied in her effort simply to register to vote. Dishonesty caused disenfranchisement and enormous moral outrage.

The flip side of racially motivated disenfranchisement is the bedrock concept of treat everyone fairly and be honest in the process. And this bears repeating. Honesty in the electoral process is fundamental to the social bonds that unite us as a free people, echoing the Chairman's opening statement.

Not surprisingly, the Supreme Court of the United States has severely warned about the dangers and the corrosive effects of dishonesty. Here is what a unanimous Supreme Court wrote in 2006: "Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy." The Court went on to say: "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our form of government."

How do we achieve honesty and integrity in elections? It is a challenge for the reason the Chairman suggested: decentralization. We have national elections, but we do not have a nationalized election with one set of rules. Indeed, both Article I and Article II point out the approach of our decentralized government, and that is, we look to the States but specifically State legislatures—both Article I, Section 4 of the Constitution and Article II, Section 1, Clause 2.

And so as in much of life, the guardrails of integrity are needed, and time and again, courts have warned—in the strongest terms—that assuring honesty and integrity is a compellingly important governmental interest. Justice Sandra Day O'Connor, now retired, who herself had been elected to State office in Arizona, specifically warned that judicial intervention may be required in order to protect the integrity of the election process.

As we will be exploring in this hearing, the Presidential election of 2020, with its unprecedented feature of the use of mail-in ballots, has given rise to a number of questions that deserve to be answered.

Instead of pointing to examples such as in Pennsylvania where there was a clear violation of the law and then the statement of Justice Samuel Alito, since my time has now expired, I want to close just by a reminder that in history there was, in fact, a campaign, an illicit campaign, to deprive Abraham Lincoln of the Presidency, and that was through the use of mail-in ballots.

I think in the spirit of the Carter-Baker Commission, it is wise for us, since the warning that they had with respect to mail-in ballots, to pause and reflect on how we can, in fact, better assure that bedrock factor and feature of integrity in the election process.

I thank the Chairman and I thank the Committee. I look forward to your questions.

Chairman JOHNSON. Thank you, Judge Starr.

Our next witness is Commissioner Donald Palmer. Commissioner Palmer was confirmed to the Election Assistance Commission in January 2019. Mr. Palmer is the former Secretary of the Virginia State Board of Elections and served as Virginia's chief election official from 2011 to 2014. He also served as an intelligence officer and a judge advocate general. Commissioner Palmer.

TESTIMONY OF THE HONORABLE DONALD PALMER,[1] COMMISSIONER, U.S. ELECTION ASSISTANCE COMMISSION

Mr. PALMER. Good morning, Chairman Johnson and Members of the Committee, and Ranking Member. I am thankful for the opportunity to testify before you this morning on the 2020 general election and the efforts of the Election Assistance Commission to secure the Nation's voting systems. Election officials, the Commissioners, and the staff of the EAC have a duty to ensure the accuracy and integrity of the voting systems used throughout the Nation. Our mission is to support the chief election officials, the directors of elections, and administrators in all localities across the country.

As the only Federal agency completely dedicated to election administration, the EAC is charged with facilitating secure, lawful, and accessible elections. Under the Help America Vote Act (HAVA), the EAC is focused on assisting State and local election officials. We are a bipartisan agency that recognizes the authority of States to conduct Federal elections, and that is a cornerstone of our representative democracy.

The 2020 general election has underscored the vital importance of comprehensive oversight of voting technology and the companies who manufacture these systems. That oversight is an overlapping process of voluntary Federal standards, State certification or approval, and local logic and accuracy testing prior to each election.

We work to bolster confidence in democracy by adopting voluntary voting system guidelines periodically. We test voting systems, we accredit test laboratories, and serve as a national clearinghouse of information on election administration.

[1] The prepared statement of Mr. Palmer appears in the Appendix on page 78.

Let me be clear. The EAC has confidence in the voting systems we certify and in the State and local election administrators who ran the election; first and foremost, that is due to the process the voting system manufacturers must undergo to receive Federal certification.

Before voting machines and election management systems are used in elections, the systems undergo rigorous hardware and software testing by laboratories accredited by the EAC and the National Institute of Standards and Technology (NIST). There are currently two accredited voting system laboratories: Pro Verification and Validation (Pro V&V) and SLI.

Currently, the EAC's quality monitoring program includes auditing voting system test laboratories and manufacturing facilities, conducting field reviews of EAC-certified voting systems, and gathering information on voting system anomalies on EAC-certified voting systems. I strongly support additional auditing, additional field reviews, and resolutions of any anomalies discovered.

To apply for EAC certification of a voting system, a company must first apply to register with the agency as a registered manufacturer. Registration requires manufacturers to provide details on their ownership structure, names of officers and members of the board of directors and any individual or organization with a controlling interest in the company.

Additionally, a list of all manufacturing or assembly facilities used by the manufacturer and the name and contact information of the person at each facility responsible for quality management must be provided.

There are currently eight active manufacturers registered with the EAC's testing program. Please note, it is not a requirement to be an EAC-registered manufacturer to develop and sell voting systems to election jurisdictions in the United States. It is a voluntary program. Joining the program requires that manufacturers voluntarily agree to the program's requirements as outlined in the program manual.

Requirements include complying with all EAC inquiries and investigations into the usage and status of fielded EAC-certified voting systems. Under our quality monitoring program, these investigations may arise due to technical failures experienced in the field by election administrators, misrepresentations made in regard to the certification status of a voting system, and any deviations in quality in regard to those systems submitted to testing versus what is actually fielded.

The EAC staffed an election day war room to gather information on issues reported by the media and election officials. Five of the eight manufacturers participated in those calls. Additionally, the program is following up with election officials and voting system manufacturers to obtain any information on claims of irregularities reported in the media during the general election. This effort is ongoing.

Jurisdictions across the United States also perform a series of logic and accuracy tests prior to operating those voting machines in polling places. We supports those efforts through technical assistance and best practices and our grant monies. Election officials

conduct post-election audits to verify the completeness and accuracy of the tabulated votes.

I am going to conclude with stating that we recognize the need to do more than ever to strengthen confidence in the integrity of our elections. HAVA set forth an ambitious agenda for the EAC, one rooted in protecting the foundation of our democracy. Despite the challenges in recent years, the EAC has faithfully fulfilled its obligations and even expanded the support it provides to election administrators and to voters. We look forward to working with Congress in a bipartisan manner as we continue our efforts to help America vote.

I am happy to answer any questions following this testimony. Thank you.

Chairman JOHNSON. Thank you, Commissioner Palmer.

Our next witness is here in person, James Troupis. Mr. Troupis serves as the lead attorney for the Trump campaign in Wisconsin. From 2015 to 2016, Mr. Troupis served as the circuit court judge in Dane County, Wisconsin. He is currently a partner at the Troupis Law Office. Mr. Troupis.

TESTIMONY OF JAMES R. TROUPIS, ATTORNEY, TROUPIS LAW FIRM

Mr. TROUPIS. I am honored to be here, Senator. Thank you for the invitation.

I have submitted written testimony, which I would ask be in the record,[1] and I am going to provide additional remarks at this point.

Chairman JOHNSON. By the way, without objection, everybody's submitted testimony is automatically entered into the record. So go ahead.

Mr. TROUPIS. Thank you. Absentee voting in Wisconsin is treated quite differently, I believe, than other parts of the country. Let me read for you what the legislature found. It is in our statute. It says that the legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse, to prevent overzealous solicitation of absent electors who may prefer not to participate in an election, to prevent undue influence on an absent elector to vote for or against a candidate.

As a consequence, our laws are strictly construed, and even more so, let me read again from the law. Results which do not comply with those regulations "may not be included in the certified result of any election." So it is very straightforward that the State of Wisconsin has taken a very different view of in-person voting with all the protections and absentee voting that has been repeatedly, including in the Carter Commission report, thought to be a source of significant potential for fraud.

In Wisconsin, we just completed a recount. We had more than 2,500 volunteers, or probably more than 1,000 volunteers for the Biden campaign as well. Uniquely, we are able to examine actual envelopes that contain the ballots that are submitted by absentee voters. This allowed us to identify by person, by address, by ward—it is not conspiracy. The real names are in the record. Here is what we found. We found that there were incomplete and altered certifi-

[1] The prepared statement of Mr. Troupis appears in the Appendix on page 81.

cates. These are the certificates on the front of the envelopes that have to be exactly done correctly under our law. If not, those results may not be counted. How many of those? More than 3,000 of those identified by person were nonetheless counted, even though they are clearly invalid under the law.

A second category: initials of clerks are placed on all of those envelopes. Why? Because the clerk identifies it having been properly received and identification is provided. That is the check in advance of the election. What did we find? More than 2,000 of those ballots in Dane and Milwaukee County had no initials at all, but, nonetheless, they got counted.

We also have special laws in Wisconsin with regard to voting in advance. We do not allow advance voting. We allow in-person and other voting as absentee. So anything before election day is under our absentee rules. What did the city of Madison do? They created a system where people could arrive at a park, hand in their ballots in envelopes, 5 weeks before the election. They also created boxes, no controls at all, just boxes on corners, that you could throw the ballot in. No attempt at all, and our statutes explicitly say there are only two ways to submit an absentee ballot: in person or delivery to the clerk's office. That is it. Nothing else is allowed. And yet the city of Madison, we had 17,271 ballots in this category that we identify. There are tens of thousands more because they commingled the ballots afterwards so we could not identify each one that may have been improperly cast.

Then we have an interesting category called "indefinitely confined." These are people which the statute—I will read from the statute—"by age, physical illness, or infirmity or are disabled indefinitely." Among those claiming this status—so they do not have to provide any identification. Among those claiming this status is one of the electors for Joe Biden, who said, "I cannot get to the polls." We have poll workers who claimed it. We have people who went to protests, people who had weddings, people who had vacations. All claimed this status: "I cannot get to the polls," so they were able to vote without identification. There were 28,395 people we explicitly identified.

Finally, there are other categories in which as much as 170,000 other ballots were submitted without any application. In fact, they considered the certification envelope the application though a separate application is required by law.

Three million people properly voted in the State of Wisconsin. More than 200,000 identified during this recount did not. But those votes got counted, and our statute says they should not have been. That, in our view, is a taint on our election in Wisconsin.

Thank you.

Chairman JOHNSON. Thank you, Mr. Troupis. I believe Joe Biden won our State by about 20,000 votes?

Mr. TROUPIS. Correct.

Chairman JOHNSON. You are talking about over 200,000 that were outside of our law that probably, if the law would have been followed, should not have been counted.

Mr. TROUPIS. Correct.

Chairman JOHNSON. Should not have been accepted and should not have been put in the ballot pool. Of course, the remedy is not

particularly pleasing, which is one of the reasons the decision went its way. I will come back to you.

Our next witness is via Webex, Representative Francis Ryan. Representative Ryan has served in the Pennsylvania House of Representatives since 2016. Mr. Ryan is a certified public accountant (CPA) and, prior to his election, ran a practice that focused on corporate restructurings and management. Mr. Ryan is a retired Marine Reserve Colonel who served as the Central Command special operations officer in Operation Enduring Freedom. Representative Ryan.

TESTIMONY OF THE HONORABLE FRANCIS X. RYAN,[1] STATE REPRESENTATIVE, COMMONWEALTH OF PENNSYLVANIA

Mr. RYAN. Thank you so much for the chance to be with you today.

The mail in-ballots system for the general election in 2020 in Pennsylvania was so fraught with inconsistencies and irregularities that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is almost impossible to rely upon.

The evidence of these violations of the Pennsylvania election laws as enacted, the election security safeguards, and the process flaws include things such as:

Actions by the Pennsylvania Supreme Court which undermined the controls inherent in Act 77 of 2019. The controls which were undermined included: on September 17, 2020, the Supreme Court unilaterally extended the deadline for mail-in ballots to be received to 3 days after the election; they mandated that the ballots mailed without a postmark would be presumed to be received, and allowed the use of drop boxes for collection votes.

Then, on October 23, 2020, upon a petition from the Secretary of the Commonwealth, ruled that mail-in ballots need not authenticate signatures for the mail-in ballots, thereby treating in-person and mail-in voters dissimilarly and eliminating a critical safeguard against potential election fraud. This is one of my main reasons for believing that it is difficult to believe that the mail-in voting process can be relied upon.

Then there were also actions and, candidly, inactions by the Secretary of State which undermined the consistency and controls of the election process.

On November 2, the night before the November 3 election and prior to the prescribed time for pre-canvassing mail-in ballots, the office of the Secretary of the Commonwealth encouraged certain counties to notify party and candidate representatives of mail-in voters whose ballots contained defects.

In certain counties, watchers were not allowed to meaningfully observe the pre-canvassing and canvassing activities related to the absentee and the mail-in ballot process.

Those were at what I would call the strategic level. At the operational level, there were a significant number of issues that resulted from those issues.

The Pennsylvania election system is the Statewide Uniform Registry of Electors (SURE) system, and some of the issues that took

[1] The prepared statement of Mr. Ryan appears in the Appendix on page 86.

place actually called into question the consistency. For example, in the case of an over-vote in the case of Philadelphia County, on November 4th at 11:30, the Department of State posted updated mail-in vote counts for Philadelphia County, showing 508,112 ballots despite the fact that only 432,873 ballots were, in fact, issued to voters. This data was later corrected, but the question becomes: Who had the authorization to change and correct that information, and who had access to the system? Any type of system control would ask for that.

Additionally, on a data file on November 4, 2020, the Commonwealth of Pennsylvania's Open Data record site reported 3.1 million mail-in ballots sent out. In a prior discussion that was had the day before the election, it was indicated that there were 2.7 million that were sent out, and efforts to attempt to reconcile those numbers have not yet been successful and still need to be resolved.

Recently, a newly available data voter set from data.pa.gov, which had been offline for weeks, indicated that the last update had been done on November 16, 2020. The download of November 16, 2020, shows 75,505 more ballots returned on November 16 than the comparable download on November 15th. So that basically means an additional 75,505 ballots were added to the data set, again, without any explanation, or without the ability to have a hearing to determine that, it becomes almost impossible to track in the system of internal controls.

Additionally, there were mail date irregularities that were identified in the 3.1 million ballots relative to the dates that the ballots were finalized, ballots mailed late and ballots mailed inconsistent with enacted legislation. That was 154,584 ballots.

Voter date of birth irregularities, meaning voters over 100 years of age: 1,573 ballots.

These apparent discrepancies can only be evaluated by reviewing the transaction logs and to determine the access, the authority for the entry, the verification of the data entered as well as the authentication. Anytime you have this type of system of internal controls, as a CPA you would want to ensure that the system of internal controls is reasonably designed to deter wrongdoing.

Before and after the election of November 3, 2020, the efforts by the State Government Committee and other members of the Pennsylvania Legislature to obtain oversight information and relevant data to confirm or deny claims of improprieties were stymied. Even an effort to have a hearing on November 20, 2020, with Dominion Systems was canceled after Dominion Systems indicated they were concerned about litigation concerns.

Candidly, without knowing the answers to these questions and due to the magnitude of the potential discrepancies and closeness of the election, the results of the 2020 Presidential election in Pennsylvania would just be completely difficult, if not impossible, to determine with conclusiveness.

Mr. Chairman and Ranking Member, thank you so much for your time, and I look forward to your questions.

Chairman JOHNSON. Thank you, Representative Ryan.

Our next witness is Jesse Binnall—did I get that right?

Mr. BINNALL. You did.

Chairman JOHNSON. Wow. Mr. Binnall is an attorney for the Trump campaign and is lead counsel for the campaign in Nevada. He is currently a partner at the law firm of Harvey & Binnall. Mr. Binnall.

TESTIMONY OF JESSE BINNALL,[1] PARTNER, HARVEY & BINNALL, PLLC

Mr. BINNALL. Thank you, Mr. Chairman, Ranking Member Peters, and Members of the Committee.

This year, thousands upon thousands of Nevada voters had their voices canceled out by election fraud and invalid ballots. Here is how it happened.

On August 3, 2020, after a rushed special session, Nevada legislators made drastic changes to the State's election law by adopting a bill known as Assembly Bill No. 4 (AB 4). The vulnerabilities of this statute were obvious: It provided for universal mail voting without sufficient safeguards to authenticate voters or ensure the fundamental requirement that only one ballot was sent to each legally qualified voter. This was aggravated by election officials' failure to clean known deficiencies in their voter rolls. Because of AB 4, the number of mail ballots rocketed from about 70,000 in 2016 to over 690,000 this year.

The election was inevitably riddled with fraud, and our hotline never stopped ringing. While the media and Democrats accused us of making it all up, our team began chasing down every lead. Our evidence came both from data scientists and from brave whistleblowers.

Here is what we found. Over 42,000 people voted more than once. Our experts were able to make this determination by reviewing the list of actual voters and comparing it to other voters with the same name, address, and date of birth. This method was also able to catch people using different variations of their first name, such as William and Bill, and individuals who were registered both under a married name and a maiden name.

At least 1,500 dead people are recorded as voting, as shown by comparing the list of mail voters with the Social Security death records.

More than 19,000 people voted even though they did not live in Nevada. This does not include military voters or students. These voters were identified by comparing the lists of voters with the U.S. Postal Service's (USPS) National Change of Address database, among other sources.

About 8,000 people voted from nonexistent addresses. Here we cross-referenced voters with the Coding Accuracy Support System which allowed our experts to identify undeliverable addresses.

Over 15,000 votes were cast from commercial or vacant addresses. Our experts found these voters by analyzing official U.S. Postal Service records that flag nonresidential addresses and addresses vacant for more than 90 days.

Incredibly, almost 4,000 noncitizens also voted, as determined by comparing official Department of Motor Vehicles (DMV) records of noncitizens to the list of actual voters in the 2020 election.

[1] The prepared statement of Mr. Binnal appears in the Appendix on page 88.

The list goes on. All in all, our experts identified 130,000 unique instances of voter fraud in Nevada. But the actual number is almost certainly higher. Our data scientists made these calculations not by estimations or statistical sampling, but by analyzing and comparing the list of actual voters with other lists, most of which are publicly available. To put it simply, they explained their methods so others could check their work. Our evidence has never been refuted, only ignored.

Two Clark County technical employees came forward, completely independent of each other, and explained that they discovered that the number of votes recorded by voting machines and stored on Universal Serial Bus (USB) drives would change between the time the polls were closed at night and when they were reopened the next morning. In other words, votes were literally appearing and disappearing in the dead of night. When we attempted to verify the integrity of these voting machines, we were allowed only a useless visual inspection of the outside of a USB drive. We were denied a forensic examination.

Finally, our investigation also uncovered a campaign to illegally incentivize votes from marginalized populations, by requiring people to prove they voted to receive raffle tickets for gift cards, televisions, and more.

Our determined team verified these irregularities without any of the tools of law enforcement, such as grand jury subpoenas or the Federal Bureau of Investigation (FBI) agents. Instead, we had less than a month to use critical thinking and elbow grease to compile our evidence. We tried to obtain testimony or documents from Clark County officials, but they obstructed and stonewalled. When we filed suit, State officials and even courts delayed proceedings for days, but then offered us merely hours to brief and argue our cases.

And wrapping up, Mr. Chairman, these findings are disturbing, alarming, and unacceptable in a free society. Our free and fair election tradition is a precious treasure that we are charged with protecting. Government by the consent of the governed is hard to win and easy to lose. Every single time a fraudulent or illegal vote is cast, the vote of an honest citizen is canceled out.

Thank you.

Chairman JOHNSON. Thank you, Mr. Binnall.

Our final witness is also here in person, Christopher Krebs. He has testified before this Committee a number of times. Mr. Krebs served as the first Director of the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency. Mr. Krebs also served in various roles at the Department, responsible for a range of cybersecurity, critical information, and national resilience issues. Prior to coming to DHS, he directed U.S. cybersecurity policy for Microsoft. Mr. Krebs also served in the Bush Administration advising DHS leadership on domestic and international risk management as well as on public-private partnership initiatives.

Mr. Krebs, welcome back.

TESTIMONY OF THE HONORABLE CHRISTOPHER C. KREBS,[1] FORMER DIRECTOR (2018–20) CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. KREBS. Chairman Johnson, Ranking Member Peters, and Members of the Committee, as you know, I previously served as the Director of the Cybersecurity and Infrastructure Security Agency. This was the job of a lifetime for me and a tremendous opportunity to serve the Nation.

When I sat before this Committee in 2018 for my confirmation hearing, I could not have imagined how challenging and rewarding this job would be. That is why it is such an honor to appear before this Committee today to testify about the extraordinary efforts of the election security community to protect the 2020 election, a difficult task complicated by the ongoing global pandemic.

Before I get into the substance of my remarks, I am grateful to this Committee and your leadership and your guidance over the last several years, first in shepherding what is probably the best of the 100 bills that came through the Committee, your efforts for the CISA authorizing statute, and your support of CISA's efforts securing our elections.

The Nation should also thank the many Federal, State, and local government election partners for the crucial work that has been done that would give our citizens the confidence that their vote was counted as cast. We should also be taking a victory lap celebrating a job well done.

Consider where we started. When I rejoined the Department of Homeland Security in 2017, America had just endured a broad attack on democracy owing to the now-well-documented interference campaign by the Russian Federation. Whatever their other motivations, this campaign sought to undermine confidence in our democratic institutions.

Building on the universal agreement across the national security community that we cannot allow that to happen again, the CISA team started with what needed to be improved based on the 2016 elections.

First, we needed to improve our relationships with our State and local election officials, the individuals that actually run our elections.

Second, we needed to improve the security and resilience of election systems, particularly by phasing out voting machines without paper ballots.

Third, Federal agencies needed to move faster, work better together, with each other, and our State and local counterparts and be more proactive in order to detect and prevent attacks on our democracy.

Over the course of the last few years, we met these challenges. We improved CISA's relationships with key partners through constant engagement and building an election security community of practice. This improvement is perhaps best represented by an election-specific information-sharing and analysis center made up of all 50 States and thousands of jurisdictions.

[1] The prepared statement of Mr. Krebs appear in the Appendix on page 90.

We improved the security of systems, scanning for vulnerabilities in election systems, providing intelligence briefings, and rapidly alerting to emerging threats, and deploying security sensors, among other measures. While we were principally focused on stopping actual hacks, we also had to content with perception hacks, a form of disinformation which we countered with our rumor control website.

We contributed to the cross-agency effort to protect the 2020 election by surging coordination and collaboration with our partners across the national security space.

In conclusion, because of these and other efforts, on November 12, 2020, government and industry representatives from the election security community issued a joint statement reflecting a consensus perspective that the 2020 election was the most secure in U.S. history. That statement reflects the confidence these officials gained based on years of work poured into improving the security and resilience of our elections. It was based on the strong operational relationships developed across the election security community. It was based on the tremendous partnership between CISA under the thoughtful guidance of this Committee, the FBI, the Election Assistance Commitment, the Department of Defense (DOD), and the intelligence community (IC). It was based on an intimate understanding of how our elections work here in the United States. It was based on the increase in paper ballots and audits across the Nation. And probably most importantly, it was based on the professionals, the heroes that conduct elections in this country.

While elections are sometimes messy, this was a secure election. Of that I have no doubt.

Chairman Johnson, Ranking Member Peters, and Members of this Committee, thank you again for the opportunity to be here today, for your leadership, and for your support of CISA. I look forward to answering your questions and sharing more about our efforts to protect 2020.

Chairman JOHNSON. Thank you, Mr. Krebs, for your past service. By the way, I think under both the Obama Administration and the Trump administration, while I have been Chairman, I think DHS, now in the form of CISA, has done a very good job. As you talked about, from 82 to 95 percent paper ballots, that is improving our election integrity. I appreciate all your efforts and really all the men and women who work within DHS and CISA to do that.

Mr. Troupis, the decision by the Wisconsin Supreme Court obviously went against you, maybe not totally against you. I did read the rather scathing dissent from the chief judge. Can you describe exactly, in summary fashion, what the Wisconsin Supreme Court decision was based on your lawsuit talking about all the areas that you have a concern with?

Mr. TROUPIS. Certainly. The Wisconsin Supreme Court was urged by the Biden campaign not to address any substantive issues, and that is exactly what happened. The Biden campaign argued to the court that we are not going to talk about any of the substantive things; we are not even going to dispute the things I just brought up to you; but instead you just should not hear them because a State agency, the Wisconsin Election Commission, had authorized some of these activities. Candidly, as Chief Justice

Roggensack and other dissenters held, one, the claims are substantive, they are substantial, and they needed to be addressed.

Second, the Wisconsin Election Commission is a bureaucratic organization, explicitly that the same court just 4 months ago has no meaning. It is not law. It is some advice given and that the statute should control. We were disappointed not so much in the decision but in the fact that the decision itself is premised not on an analysis of the law nor an analysis of the claims. It is an idea that we should not have a transparent system that you are not going to address these things, and that is what they argued.

So it is disappointing, especially in Wisconsin. Senator Johnson, as you know, we have a long history in Wisconsin, unlike other States, I know unlike other States, of high transparency. Our recounts were conducted with utmost integrity by both Milwaukee and Dane County, with thousands of volunteers able to look at those items, and it is really a sad day, frankly, when the opposition does not argue we are wrong; it argues we should not be heard. That is a strange thing in a State that is so transparent as ours.

Chairman JOHNSON. Just real quick, I know former Director Krebs talked about the men and women who run these elections. I had about at least a half-hour phone conversation with the county clerk of my town of Oshkosh voting precinct who gave me all kinds of good information. I will tell you, if every county clerk ran their elections like Jeanette Merten does, we would have a completely secure election. I think that is true of the vast majority of elections in different precincts.

Mr. Binnall, Mr. Troupis is talking about the law that he was arguing before the Wisconsin Supreme Court was basically ignored. You had a similar statement, that it was not that the information that you just presented to the Committee—it was never rebutted; it was simply ignored. Can you talk about that?

Mr. BINNALL. Yes, Mr. Chairman. It was extremely disappointing that rather than address our issues and the data that we presented head on, they simply tried to use technicalities and limiting our evidence, limiting the amount of witnesses we could bring forward, saying that we could not introduce any live testimony but only 15 depositions—we could only use 15 depositions to show 130,000 instances of voter fraud. And then when it went to the Supreme Court of Nevada, they gave us 2 hours to brief the issues before immediately coming down with a decision. Our record was over 8,000 pages long. We were never fully considered by those courts. They never took a good, hard list at hard evidence.

Chairman JOHNSON. Mr. Krebs, you have testified here on this specific issue, the potential for foreign interference to have an impact on our elections. We have had private conversations. I have always categorized the ability for foreigners to interfere with an election in kind of three buckets: one is changing the vote tallies on the machines; second is hacking into voter registration files, which could cause all kinds of problems, but quite honestly, probably would be detected on election day when there is chaos; and then, third, what I think is a more serious problem, the one more difficult to detect, is basically the use of social media.

You quoted the CISA group that declared this the most secure election in our history?

Mr. KREBS. Yes, sir, that was the joint Government Coordinating Council (GCC) and Sector Coordinating Councils' (SCC) statement.

Chairman JOHNSON. OK. One of the reasons I have always stated based on our discussions of your testimony, to my knowledge it is almost impossible to change the vote tally by hacking into these computers was based on the fact that these things are not connected and most of them do not even have the capability of being connected to the Internet. Based on all these allegations people are talking to, it sounds like some of these machines or certainly the tabulators can and are connected to the Internet.

So can you just kind of explain to me, the whole voting machine tabulation, Internet connections, is just a huge confusing mess. Can you speak to that?

Mr. KREBS. I think it is important to step back and actually look at how votes are cast in the country, particularly with paper ballots, and that, regardless of any Internet connections, regardless of any foreign hacking, as long as you have the paper receipt——

Chairman JOHNSON. But let me stop you there. I acknowledge that, yes, the paper backup is the control—if it is used. That was going to be my next question. So set aside the control of the machine process. What is capable—again, I kind of want to know on what basis, what aspects of this is the most secure? Because when you listen to Mr. Troupis and Mr. Binnall, there was fraud in this election. I do not have any doubt about that. There was fraud. We just do not know the extent, and we do not know what the remedy would be when identified. OK?

Again, just speak to the computer aspect of this, the connection to the Internet, the possibility if these machines are connected to the Internet, or if in the certification process—because I think, Mr. Palmer, in our discussions, you were talking a little bit about the fact that people attempted to change the controls or the program in these computers inside that certification process.

But, Mr. Krebs, just talk to the computer aspect of this because, again, it is the most difficult, confusing aspect of these allegations.

Mr. KREBS. Yes, there are a number of different systems and machines and computers involved in the entirety of the election process, from registration through ballot design, through ballot printing, to actual voting and into the tabulation and post-election process. Throughout, particularly where a vote is cast on election day, those machines tend to and should not be connected to the Internet, certainly as a best practice.

Chairman JOHNSON. But some have the capability, don't they?

Mr. KREBS. Some may have modems that are typically disabled, but in certain States, I believe in Wisconsin some are temporarily activated to transmit some counts. But, again, when you have paper and you can conduct a post-election audit——

Chairman JOHNSON. Again, if they are——

Mr. KREBS. Important security control that——

Chairman JOHNSON. Oh, absolutely.

Mr. KREBS. Technology in elections are used to facilitate access and increase accuracy of the process, but election officials are very careful that technology is not a single point of failure and that there are security controls before, during, and after the process.

Chairman JOHNSON. Again, finish this aspect of the computer thing. My time has already expired, but we will come back to how many audits, the statistical sampling, that type of thing, to use those paper backups to the electronic voting. But, you know, finish this——

Mr. KREBS. Right. As you move out from election day, there will be tabulators that may have Internet connections to transmit the vote from the precinct to the county level, to the State, again security controls in place. As long as you have the paper—you cannot hack paper—you can run that process.

Chairman JOHNSON. But those tabulators are connected on election day because that is how they transmit the data to the counties and also into the unofficial——

Mr. KREBS. In some cases, yes, sir.

Chairman JOHNSON. Yes, OK. I will follow up. Senator Peters.

Senator PETERS. Thank you, Mr. Chairman.

I have questions for Mr. Krebs, but before I get to that, I just want to be clear. We have heard a number of statements made by other witnesses. We have heard those statements before. We are continuing to hear those statements. I would just say to anybody who is watching this hearing, look at the 60 court cases that have been brought before the judiciary in this country and how the arguments—or I should say the statements. They are not really arguments. They are statements that have been made. They have all been rejected by courts of law, including in Wisconsin, which was a Republican judge that rejected the arguments made by this administration. So just take a look at all this that we are putting into the record.[1]

Mr. Krebs, CISA has the primary responsibility for working with State and local election officials and the private sector to secure our election infrastructure. It is important for folks to realize where you sat and what were your responsibilities. In essence, you were tasked with coordinating with thousands of your partners across the country to ensure the integrity of the 2020 election. That was your job. By all accounts, you were very successful at that.

President Trump's own Department of Justice concluded, and I am going to quote the Department of Justice in the Trump administration, "We have not seen fraud on a scale that could have effected a different outcome in the election."

The Election Infrastructure Government Coordinating Council, Executive Committee on the Election Infrastructure Sector Coordinating Council comprising of Federal, State, and local government officials and numerous private sector organizations from all around the country jointly called this "the most secure in American history."

You also echoed this statement, and when you echoed that statement, you were fired by President Trump. He did not want to hear that, clearly.

So my question to you: Do you stand by that statement? Have you seen anything in the weeks since November 4th that would lead you to change your mind? And have you identified any credible claim of widespread election irregularities?

[1] The documents referenced by Ranking Member Peters appear in the Appendix on page 145.

Mr. KREBS. I stand by the claim. I said it in my opening statement. It is my written testimony. I have yet to see anything from a security perspective that would change my opinion on that. Fraud is a different matter. It is a criminal matter. But, again, bolstered by the Attorney General's (AG) statement from last week or recently, again, nothing to change my opinion of that matter.

Senator PETERS. So yet despite more than 5 weeks now that the President has lost and numerous public officials have continued to pressure State and local elected officials to push what is a demonstrably false narrative that election irregularities should somehow make him a winner of this race, you have willingly—in fact, these folks are willingly fanning the flames of discontent, and they are in the process of weakening institutions that are essential for our representative democracy.

My question to you is: What is the danger, in your estimation, to the democratic process to challenge the legitimacy of an election and deny its results in the absence of any credible evidence?

Mr. KREBS. I think generally from a timing perspective, particularly with the seating of the Electoral College and 306 electoral votes for President-elect Biden, I think we are past the point where we need to be having conversations about the outcome of this election. I think that continued assaults on democracy and the outcome of this election only serve to undermine confidence in the process is ultimately, as you both have said, ultimately corrosive to the institutions that support elections, and going forward it will be that much harder.

The trick about elections is that, you are not so much trying to convince the winner they won; it is the loser that they lost. You need willing participants on both sides, and I think we have to get back to that point. Otherwise, we are going to have a very difficult time going forward maintaining confidence in this American experiment.

Senator PETERS. During the 2016 election, we saw foreign disinformation campaigns trying to sow doubt about the integrity of our election. We have seen that before, very clearly, in 2016, and certainly all in the intelligence community in this country back that up. In fact, CISA's rumor control page was actually created within your agency—you mentioned it in your testimony—to address foreign disinformation having an impact on the election. Yet rather than creating fake news, it seems as if Russia has simply used State-controlled news outlets to basically push President Trump's own statements and lies about a rigged election.

Our adversaries do not have to be technologically advanced. Our adversaries do not have to be creative to sow that doubt. All they have to do is air the words of American elected officials on their State-owned news networks.

As Clint Watts said—he is a former FBI agent and a disinformation expert. As he put it, which I think is very strong, he said, "Nothing that Russia, Iran, or China could say is anywhere near as wild as what the President is saying."

My question is: How are our foreign adversaries taking advantage of false claims of broad election fraud by the President and his supporters or hearings like we hearing here, we are hearing these

statements again, that are broadly claiming systemic irregularities where none exist? How damaging is that?

Mr. KREBS. So talking about rumor control very briefly, I think that that was an innovation in government that we created on the fly to address some emerging threats. The point, though, that I would like to highlight with rumor control is that it was intended to identify and debunk issues as they were emerging, and we saw domestic disinformation campaigns of a cybersecurity nature that were emerging in the days and weeks following the election. I will specifically talk about the "Hammer and Scorecard" claims, that there was a CIA super computer and program that were flipping votes throughout the country, in Georgia specifically.

But, again, Chairman Johnson, I am going to keep coming back to it. That is why it is so important to have a paper trail. That is why it is so important to have paper ballots, so even if there was foreign interference of a malicious algorithm nature, you can always go back to the receipts. You can check your math. Georgia did that three times, and the outcomes were consistent over and over and over again.

Senator PETERS. Thank you, Mr. Chairman.

Chairman JOHNSON. Which, by the way, is precisely why I brought that up in my opening statement. That should provide comfort that we have that paper backup. But I just have to talk about Russian disinformation, because the people peddling it are not on my side of the aisle. Senior Democrat leaders, including Ranking Member Peters, were involved in a process of creating a false intelligence product that was supposedly classified, they leaked to the media, that accused Senator Grassley, the President Pro Tem of the Senate, and myself of accepting and disseminating Russian disinformation from Andrii Derkach. I had never heard of the person until they brought it up. Senator Peters introduced that false information, Russian disinformation, into our investigation record. Fifty people associated with the intelligence community after our Hunter Biden investigation and the revelations of the Hunter Biden computer said, oh, this is Russian disinformation. Now we find out it is a real investigation by the Justice Department.

So it is just galling, and I just have to point out that the purveyors of Russian disinformation, Hillary Clinton's campaign, the Democratic National Committee (DNC), the Steele dossier, Ranking Member Peters accusing Senator Grassley and I of disseminating Russian disinformation, that is where the disinformation is coming. That is where the false information, the lies, the false allegations. I cannot sit by here and listen to this and say that this is not disinformation in this hearing today. This is getting information we have to take a look at to restore confidence in our election integrity. We are not going to be able to just move on without bringing up these irregularities, examining them, and providing an explanation and see where there really are problems so we can correct it moving forward. Senator Paul.

Senator PETERS. Mr. Chairman, I have to respond to that. You are saying I am putting out information——

Chairman JOHNSON. Try.

Senator PETERS. One, I had nothing to do with this report——

Chairman JOHNSON. You lied repeatedly——

Senator PETERS. I did not——

Chairman JOHNSON. You lied repeatedly in the press that I was spreading Russian disinformation, and that was an outright lie, and I told you to stop lying, and you continued to do it.

Senator PETERS. Mr. Chairman, this is not about airing your grievances. I do not know what rabbit hole you are running down——

Chairman JOHNSON. You talked about Russian disinformation.

Senator PETERS. You are rushing down rabbit holes.

Chairman JOHNSON. Senator Paul.

Senator PETERS. This is simply not what we are dealing with.

Chairman JOHNSON. Senator Paul.

Senator PETERS. No, Mr. Chairman, you cannot make false allegations and then drop it there. That is why this Committee——

Chairman JOHNSON. Senator Paul.

Senator PETERS [continuing]. Needs to return back to——

This is terrible what you are doing to this Committee, and all the great work that you talked about——

Chairman JOHNSON. It is what you have done to this Committee——

Senator PETERS. It is not the case——

Chairman JOHNSON [continuing]. Falsely accusing the Chairman of spreading disinformation. Nothing could have been further from the truth, and you are spouting it again, which is why I had——

Senator PETERS. Oh, come on, Mr. Chairman. This is outrageous.

OPENING STATEMENT OF SENATOR PAUL

Senator PAUL. Judge Starr, it has been alleged that 60 courts have refused to hear these cases; therefore, there was no fraud in the election. I guess another way of looking at this is that the court cases have been refused for procedural and technical reasons. When you see the 60 court cases rejected, do you think that is a conclusion by our court system that there is no fraud? Or do you think that the court cases were primarily rejected for procedural reasons?

Mr. STARR. Right, Senator Paul, it is my understanding that the vast majority of these cases were rejected for rightly stated procedural reasons as opposed to a merits-based or substantive-based evaluations. Of course, we saw that very recently and I think most dramatically by the Supreme Court's unanimous rejection of the bill of complaint filed by the Texas Attorney General, my home State here. The entirety of the decision was based upon the legal concept of standing. You just do not, Texas, have standing to object to what happened in Wisconsin or Pennsylvania or whatever. And that is a reasonable ruling. There are those who would quarrel with it in that we are a United States of America, and if something bad happens in one State that ends up having an effect on another State, we have such respect for our States as sovereign entities within our union that the argument is, I think, quite reasonable, and I think others think it is quite reasonable, that at least the matter should have been heard under the original jurisdiction. I think that is a key example.

Senator PAUL. Yes, and I think it is important, though, that we look at this and understand what courts are saying and not saying. The courts have not said there was not fraud. The courts just simply did not rule on or hear from the fraud.

I do think there is an important issue here, though. The fraud is one aspect of this, and I think courts have historically been reticent to get involved in elections and to look at fraud, but moving forward, we have to change the rules or reevaluate our State rules in order that this does not happen again. We cannot just sit by and say, we are going to let it happen again.

There is another important aspect to this, though, that is a legal aspect that I think does need to be heard by the courts, and I do not know if it can be heard beyond the election, but I think it should. This is the question of whether or not people who are nonlegislators can change the election law. This happened in many States. Probably two dozen States decided to accept ballots after the election. Two dozen States decided they could mail out applications or mail out ballots, all without the will of the legislature.

Do you think there is any hope for any of this being heard, Judge Starr? Outside of the concept of changing the election, is there any possibility any court is going to ever hear this and say that it was wrong that Secretaries of State changed the law in the middle of this pandemic without the approval of the legislature? Or do you think there is no hope because it is mixed up in electoral politics? Judge Starr.

Mr. STARR. I think there is a possibility because this issue may return in light of the use, this unprecedented use of mail-in ballots, and the concern that is a bipartisan concern, again, the Carter-Baker Commission, that we need to look at these issues. I think there is a doctrine, Senator Paul, to essentially say this issue may recur again. It should not be washed out as being moot because there is a very important principle here, as I said in my opening statement and in my written statement. The Constitution is very clear that it is the prerogative of State legislatures to determine what these rules and laws are. And that was, I must say, flagrantly violated in Pennsylvania and perhaps elsewhere as well.

Senator PAUL. Yes, I think the legal question there is a very easy one to decide. I think even as a physician I can figure out that the Secretary of State cannot create law. I do think, though, that many of us who wanted this to be heard by the Supreme Court and are disappointed actually also might be disappointed by the precedent of Bush v. Gore in the sense that I think Bush v. Gore's precedent is shutting down elections that have been certified. They were not going to continue to count the hanging chads. The Secretary of State had certified it. I actually think that the Bush v. Gore precedent actually argues against the Supreme Court overturning certified elections. Do you have an opinion on that?

Mr. STARR. I do not have an opinion on that specifically. I think that Bush v. Gore stands for this basic proposition: You cannot have changes in election laws after the fact. You must, in fact, be faithful to what the State legislature has done. That is also what Justice Alito said in his opinion, I think essentially condemning but certainly identifying as a huge issue what had happened in Penn-

sylvania. I think all in all, Bush v. Gore is just a reiteration of our constitutional structure.

Senator PAUL. Thank you.

Mr. Chairman, as we go on with this, I think it is important that we not stop here. A lot of the laws that have to be confirmed and I think reaffirmed are State laws, so it is not in our purview. But the State laws are set, and then we have Federal elections. So what we have heard about what happened in Wisconsin and what happened in Nevada I think is absolutely true, and we have to prevent it from happening again.

I think State legislatures will need to reaffirm that election law can only be changed by a State legislature. I think there is a lot of work to be done. While we will not dictate it to the States, I think we should have hearings going into the next year, hearing from State legislatures and what they are going to do to make sure election law is upheld, not changed by people who are not legislators. We do have an interest in that. I do not want it to be Federal laws. Many on the other side of the aisle would just as soon Federalize it and mail everybody a ballot and we will have this universal corruption throughout the land. But what I think we need to do is keep it at the State level, but we cannot just say it did not happen. We cannot just say, oh, 4,000 people voted in Nevada that were noncitizens and we are just going to ignore it, we are going to sweep it under the rug, the courts have decided the facts? The courts have not decided the facts. The courts never looked at the facts. The courts do not like elections, and they stayed out of it by finding an excuse, standing or otherwise, to stay out of it. But the fraud happened. The election in many ways was stolen, and the only way it will be fixed is by in the future reinforcing the laws.

And then a last comment I would say on what Mr. Krebs—and he can speak for himself, but I think his job was keeping the foreigners out of the election, and it was the most secure election based on security of the Internet and technology. But he never has voiced an opinion—he is welcome to today—on whether or not dead people voted. I do not think he examined that. Did he examine noncitizens voting? So to say it was the safest election, sure, I agree with your statement if you are referring to foreign intervention. But if you are saying it is the safest election based on no dead people voted, no noncitizens voted, no people broke the absentee rules, I think that is false. I think that is what has upset a lot of people on our side, is that they are taking your statement to mean, oh, well, there was no problem in the election. I do not think you examined any of the problems that we have heard here, so, really, you are just referring to something differently, the way I look at it.

Thank you, Mr. Chairman.

Senator LANKFORD. [Presiding.] Senator Carper.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman. To our witnesses, those that are here and those that are afar, we welcome you.

I just want to say to Chris Krebs on behalf of many of us on both sides of the aisle, thank you for your leadership and for a job well done. Thank you for your courage to speak truth to power.

Mr. Chairman and colleagues, President Lincoln once said these words. He said, "If given the truth, people can be depended upon to meet any national crisis. The great point is to bring them the real facts." Those were his words. That is what we in the Navy call "the straight skinny." With all due respect, the American people have had the facts with respect to the outcome of this election for some time now. The truth, the straight skinny, if you will, is staring us in the face. It may not be what President Trump and his supporters wanted, but Joe Biden and Kamala Harris received more votes than any ticket in American history. That is a success for our democracy. It is something we ought to be celebrating. A success made possible in the middle of an unprecedented pandemic, thanks to ordinary citizens who volunteered as poll workers across the country. Many of them risked their own health to oversee a fair count while hundreds of thousands of postal workers worked tirelessly to deliver absentee ballots.

The U.S. Cybersecurity and Infrastructure Security Agency, ably led by Chris Krebs, has called this election the "most secure in American history." He has called it that again here today. Throughout this country, courts have flat-out rejected claims of election irregularities. Conservative Trump-appointed judges in State after State have dismissed the Trump campaign's claims, calling them "baseless" and worse. Let me just cite a couple of examples.

In response to the legal challenge from the Trump campaign in Pennsylvania, a Federal judge, appointed by President Trump and a long-time member of the conservative Federalist Society, wrote that, "Charges of unfairness are serious, but calling an election 'unfair' does not make it so. Charges require specific allegations and then proof."

He went on to say, "We have neither here."

One of the most strongly worded opinions came from a Wisconsin State justice who served as president of a chapter of Federalist Society and as chief legal counsel to former Republican Governor Scott Walker. Here is what he said: "Something far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case." He wrote that in declining to hear a case asking the court to overturn the election results.

He went on to say this: "At stake is faith in our of free and fair elections, a feature central to the enduring strength of our constitutional republic."

To that, I think we should all just say, "Amen."

We learned this week that the arguments from the Trump legal team thus far have been defeated 59 times out of 61 in State and Federal courts. Fifty-nine times, including 9-zip by the Supreme Court, the U.S. Supreme Court, just last week.

I am wearing my mask here for my alma mater, undergraduate alma mater of Ohio State where I was a Navy Reserve Officers Training Corps (ROTC) midshipman. But if the football coach at Ohio State were to go 2–59 over a period of 4 years, he would be fired. That is what the voters of this country have done with our President, like it or not.

Those 61 cases, at least 59 of them were not close calls. In suit after suit across red and blue States, in opinions written by liberal

and ultra-conservative judges, the Trump campaign's largely contrived allegations have been rejected. Four years after Donald Trump lost the popular vote by 3 million votes, Joe Biden and Kamala Harris won it by a whopping 7 million votes, and they received 306 votes in the Electoral College just earlier this week, a margin described 4 years ago by Candidate Trump as a "landslide."

What if the outcome is not as definitive 4 years from now or 8 years from now? What if? And with different judges on the bench, different candidates, and a lot less integrity and courage from State and local officials, a defeated party might somehow be able to steal an election, as is alleged here falsely. Think about that. It somehow might be able to steal an election. Friends, that ought to scare the hell out of all of us.

Meanwhile, many of the President's supporters across the country continue to spread misinformation and false allegations about the Presidential election. The truth of the matter is in a lot of States, many of the voters who voted for Joe Biden for President turned around on their ballots and they voted on down-ballot races, to our chagrin as Democrats, they voted Republicans. They voted for Republicans in congressional races, in State legislative races, and more. You know what we call that in Delaware? We call it "ticket splitting." It is as old as our democracy. It is not a conspiracy. It is plain and simple ticket splitting. We have done it before, and we are going to do it again.

Let me go on to say that what we say in this Committee and in this body matters, and if we continue to push what the courts have over time overwhelmingly called "baseless" claims of fraud, we not only risk permanent damage to our democracy; we also become complicit in threats and attacks against election officials and ordinary citizens. In Georgia, nonpartisan election technicians have faced death threats simply for doing their jobs. Georgia's Secretary of State and his family have received death threats.

Mr. Krebs, our witness here today, a Trump appointee, has been bombarded with threats ever since an attorney for President Trump's campaign said on national TV—what did he say? He said, "Krebs should be taken out at dawn and shot."

And just this week, "credible threats of violence" closed the Michigan State Capitol, and electors in Pennsylvania needed law enforcement escorts when they went to cast their votes.

This is not the America that our Founding Fathers dreamed of. This is shameful. Enough already. We have work to do to get America back on track, starting right here, right here in this Congress, in this House.

All of us, Democrats and Republicans here in this body, need to do our jobs, and that is just the beginning. There are over 250 million Americans who need to be vaccinated. There are millions of businesses that need a helping hand. Tens of millions of students who need to be back in school getting an education, hundreds of thousands of hospital and nursing home workers who just need a break. But it is going to be hard to move forward as a country with dispatch or as a Congress until we accept the clear results of this election and turn the page.

In 1787, colleagues, delegates from 13 colonies convened in Philadelphia to debate the future of our country. They disagreed on a

lot of things, but they all agreed on this: They did not want a king. Responding to arguments for the Trump legal team in Wisconsin, a member of the State Supreme Court there echoed sentiments recently when she said to them, "You want us to overturn this election so that your king can stay in power? That is un-American." And you know what? She was right. It is un-American.

Mr. Chairman and colleagues—the Chairman is not sitting here; he is out voting. But when Chairman Johnson became the leader of this Committee in 2015, he pledged to run this Committee, and I quote, "with a spirit of bipartisan team work, respect, integrity, and professionalism." That has been the hallmark of this Committee for years, for decades, and those words were reassuring to me. I know they were to our colleagues on this Committee, the staffs that we lead, and a few years later, when the Chairman and I worked together to introduce and enact the bipartisan Presidential Transition Improvement Act, he said, and I quote, "The peaceful transition of power from one administration to the next is the hallmark of our democracy."

Those are words we hope and expect to hear from our leaders, words that appeal to our better angels, words that unite us, not divide us.

Sadly, I fear that today's hearing may not be truly reflective of those words. I hope I am wrong. But if I am not, today's hearing could prove deeply disappointing to me and to the 330 million people that we serve across this Nation. Let us not disappoint them.

As we continue with this hearing today, I would just say to our Chairman, you asked our witnesses to stand and take an oath to tell the truth. It is only fair for all of us to hold ourselves to the same standard. If our Nation's leaders do not embrace the truth in our daily discourse, then we no longer have a democracy that will endure. Calling an election "unfair" does not make it so, and spreading misinformation in this Committee or any committee does not just stay inside these four walls.

I will conclude with this: I began my statement today with the words of Abraham Lincoln. I want to conclude it with the words attributed to Thomas Jefferson. Here is what he said: "If the people know the truth, they will not make a mistake."

"If the people know the truth, they will not make a mistake."

So let us tell them the truth. Let us tell them the truth today, tomorrow, and for generations to come. The truth will keep us free. The truth will keep us free. It always has, and it always will.

Thank you.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Thank you. The Chairman ran down to vote quickly, and we are in the middle of a vote series, and so we are going to maintain the hearing and continue to be able to move through this hearing process, though there are two votes, and so you will see us switching back and forth while he is running to vote. I am going to sit in for a moment for the Chairman, and I am going to recognize myself for the next round of questions. I happen to be next in line, so I am not actually pulling time here. But I want to be able to recognize myself and be able to do that. When

he returns, we will switch out, and I will run to vote. And then we will run back and forth.

In December 2016, there was a poll that was done on if the American people believed that the Russians interfered and changed our election. At that time, 32 percent of the people believed that the Russians had influenced the outcome of the election in December 2016.

Based on that belief and what was going on, there was launched a whole series of hearings. Certainly the Russians were trying to interfere in our elections, but we spent millions and millions of dollars investigating it, going through it, ramping up entities like CISA and others to be able to go engage, to be able to make sure we could protect our next election. Senator Klobuchar and I worked for years on election security legislation and worked to be able to get that implemented. We did six different public hearings on Russian interference, just on that one topic, to make sure that we were paying attention to it when it all started with 32 percent of Americans in December 2016 believing the Russians had interfered in our election.

A few days ago, another poll asked the question: Do you believe there was election and voter fraud in the Presidential election between Joe Biden and Donald Trump? This December, 46 percent of the voters in America have said yes; 45 percent saying no. Interestingly enough, Trump voters say there was fraud, 80 percent; Biden voters also said, 16 percent, that they believed that there was voter fraud.

The reason I bring that up is we watched what happened in 2016 and what the American people thought and saw, and so we engaged with hearings, we looked at the issues, and determine do things need to change. Much of the work that has gone on in the last several years to be able to get paper ballots into States happened because this Congress engaged on an issue where we saw an obvious problem. And so we distributed Federal dollars, assistance, and a constant drumbeat to say these States have to fix the areas where they do not have paper ballots, and we have the potential for problems. That was the question. Is there a potential for a problem? The answer was yes, there is a potential, and we ought to fix that.

Now, amazingly, after this election, all kinds of issues have come up and said there are potentials for problems, and everyone seems to be saying, "Move on." The only reason I can think that that would be different was because the election outcome seemed to be different. One side is now saying, "Let us just move on and ignore this."

In my State, on election night, like 27 other States in the country, by that evening we were counting votes and all absentee ballots had been received. There was much less opportunity for accusations of fraud because all of our ballots were in. Amazingly enough, a week after the election was completed this November, Oklahomans were listening to other States that were saying things like, "We do not know how many more ballots there are left to count." We had been done for a week. We and 27 other States had been completed for a week. That gives opportunities for fraud and questions and problems. That is a reasonable question to ask.

It is reasonable to be able to ask if people can drift around and gather ballots from other people and do ballot harvesting—and in some States that is legal—does that provide an opportunity for fraud? I think the obvious answer is yes. The obvious answer is if you mail a ballot to everyone in the State, even if they did not ask for it, does it provide an opportunity for fraud, especially when the State did not first purge or verify those addresses and they sent thousands of ballots to people that no longer lived there?

I have talked to Nevada residents that received multiple ballots at their home for people that no longer live there. That is a problem. We should at least admit that is a problem. For some reason, the other side was very focused on we have to fix the potential for a problem for 2016, but in 2020 when there is a potential for a problem and things that have been shown, everyone seems to say, "Move along. Let us not discuss this."

There is a system called the Electronic Registration Information Center (ERIC) system that is in place that 30 States cooperate with. It helps them verify if people have moved and they are registered in two different States or if they have moved into your State and are registered somewhere else. It helps them determine if they are voting in two different States.

Only 30 States use that. Other States are not. Even of the 30 States that use it, not all of them are actually using it. They literally are on the system, but they are not actually purging their rolls when they know there are people that have moved out of their States and have been informed of that.

Just this last year, in the ERIC system they identified 91,000 people that are registered voters that are dead. Ninety-one thousand that that one system had recognized.

There are problems in the system, and in this conversation that I have had with so many people and I have said, "Is it a problem that people are voting in two States? Is it a problem that people are voting if they are dead?" And this is what I hear over and over again. This has been going on for years. "So why don't we fix it?" should be the next statement. Instead, the statement seems to be, "Well, let us just move along."

Mr. Binnall, 42,000 people in Nevada voted more than once, according to your work in this. Forty-two thousand people. Fifteen hundred people voted in Nevada that were dead; 19,000 people voted though they did not live in Nevada, and they were not a college student. Eight thousand people voted from a nonexistent address; 15,000 people voted though they were registered to a commercial address or a vacant address; and 4,000 people voted in Nevada that are noncitizens.

My question to you is: In my State, when someone votes twice—and we do have that occasionally, about 50 times a year that that actually occurs in our State—we prosecute individuals that vote twice. Of this 130,000 instances that you have identified from the 2020 election in Nevada, do you know of any prosecutions currently going on in Nevada for any voter fraud?

Mr. BINNALL. Not yet, Senator, and that is extremely important. These laws have to be enforced. We, of course—I represent the Trump campaign and the campaign's electors. I do not represent the government. We cannot bring prosecutions. But if we are going

to enforce voter integrity laws, they must be enforced, and we are confident that, although it often takes a long time to put together a fraud case, although it takes prosecutors months, sometimes even years, to go through subpoenas and warrants and using the FBI to go investigate these things, once a good, hard look at these cases is examined, an honest look, if we do that, there should be charges brought, because the Ranking Member brought up in his remarks that when you lose the principle of one person, one vote, the end result is authoritarianism. That is exactly what we are saying here today.

Senator LANKFORD. Right, and that is—Mr. Chairman, could I ask for one additional moment?

Judge Starr, you have raised twice this issue about Pennsylvania and that the laws of Pennsylvania were changed. In Oklahoma, we did State Bill 210 and State Bill 1779 because we saw with the pandemic there were going to be problems. So our legislature came into session, made a change to be able to adjust for how we were going to do early ballots and early voting, because we knew that was the law that needed to be followed. Was that done in Pennsylvania? And does it matter who sets the law and the rules for elections?

Mr. STARR. No, it was not done, unfortunately, in Pennsylvania. The Governor sought to change the law. The General Assembly in Pennsylvania had met, reviewed, and made various and sundry changes and reforms. And then the Pennsylvania Supreme Court, building on what the Governor had done, made additional changes, and those in my judgment were complete violations of the United States Constitution and flagged as such preliminarily by Justice Samuel Alito. So the Oklahoma Legislature did it the right way.

Senator LANKFORD. Judge Starr, thank you very much. Senator Hassan.

OPENING STATEMENT OF SENATOR HASSAN

Senator HASSAN. Thank you very much. I just want to test that folks can hear me.

Senator LANKFORD. They can.

Senator HASSAN. OK. Thank you very much, Mr. Chair, and our Ranking Member. I want to also thank all our witnesses for being here today. I would like to specifically acknowledge former CISA Director Chris Krebs. Director Krebs, I want to thank you for your work in standing up the agency as CISA's first Director and in securing our elections.

I am deeply troubled by your abrupt and unjustified dismissal, which has made our country less safe. Now more than ever, the challenges of this pandemic and our Nation's increased reliance on online services requires the experience and steady leadership that you have displayed. Even so, I want to express my deep thanks to you and to the men and women at CISA for the work that you have done and will continue to do to help make our country and our communities safer.

Now, I have three questions for you, Director Krebs. Let us start with this one. As the CISA Director, you attempted to tackle disinformation campaigns via the rumor control effort by CISA. That is the name you all gave it. Rumor control is a resource fea-

tured on CISA's website to debunk common misinformation and disinformation narratives.

First, in your time as CISA Director, were you ever asked by any administration official to refrain from debunking disinformation or misinformation?

Mr. KREBS. Yes, ma'am, thank you for the question. I was never directly approached on any rumor control changes or alterations. I understand my staff was. I told them that if anyone had any problems with what was on rumor control, I was the Senate-confirmed leader of the agency; ultimately I approved content, and they would need to come talk to me about that. I never got that phone call or visit.

Senator HASSAN. But you are saying that staff did report to you that there was outreach from officials asking them to make changes?

Mr. KREBS. Yes, ma'am.

Senator HASSAN. Were you ever asked to take down an entry that debunked a conspiracy theory?

Mr. KREBS. Not directly, no, ma'am.

Senator HASSAN. Was your staff?

Mr. KREBS. They were asked about some of the content, and, again, I reiterated and reinforced that I owned that content, and if anybody had an issue with it, they needed to come talk to me.

Senator HASSAN. Was it ever implied that your job was at stake if you did not ease up on debunking disinformation?

Mr. KREBS. I certainly never interpreted any statements or anything along those lines, no, ma'am.

Senator HASSAN. I would like to explore with you further, perhaps after this panel, some of what you just said in terms of your staff, but I want to move on to a couple of other things just in the interest of time.

Director Krebs, given your experience with tackling disinformation, I want to talk about the post-election disinformation campaign that has been waged. The President and many others have tweeted outlandish claims of massive voter fraud and truly wild conspiracy theories. However, the President's lawyers will not or do not usually bring these same claims when they go into court. When they do, the judges, often conservative or Republican-appointed judges, have dismissed them.

Director Krebs, given your experience with disinformation campaigns, why do you think there is such a gulf between rhetoric and reality? What is the goal of this disinformation campaign?

Mr. KREBS. I think generally the disinformation now, currently particularly domestically, is being used to create confusion and drive a certain narrative. But our point with rumor control at CISA was about identifying, initially foreign activities, but it became more of a domestic or even uncertain origin, and it was things, again, like "Hammer and Scorecard," some of these claims of malicious algorithms, and they were pretty straightforward to debunk in the early days, but they continue to this day.

There is confusion being sown about how election machines are used, how they fit into the process. Even now, in Michigan right now, with Antrim County, there was a forensics audit done on some of the machines there, and there was a group that released

a report. It is a 22-page report. I looked at it, and others have looked at it, and to me, it implies that those systems are compromised and not dependable and you cannot trust the votes and any other of the machines across the State.

I was a little concerned about that, and I looked at the report, and it claims that there was a 60-percent error rate in the machines, the election management systems. So, again, I dug into that, and it makes the claim that then, 68 percent of the votes cast are, therefore, not dependable. I have seen those claims being repeated on social media by the campaign, by the President.

I wanted to understand what that was all about. I looked at it, and, in fact, it was not that there were 68 percent of the votes that were errors. It was that the election management system's logs had recorded 68 percent of the logs themselves had some sort of alert rate. That is being used to spin that that machine is not trustworthy. But the problem is the report itself does not actually specify any of those errors except for one, and it is on page 20, and it says, "There is no permission to bracket zero bracket, and that is being claimed to mean that somebody tried to get into the machine and wipe the records.

I looked at that, and I said, OK, I do not know if it actually says that, and something jumped out at me, having worked at Microsoft, that these are Windows-based machines. The election management system is a Windows-based machine, and the election management system is coded with a programming language called "C#." "There is no permission to bracket zero bracket" is a place holder for a parameter, so it may be that it is just not good coding, but that certainly does not mean that somebody tried to get in there and zero. They misinterpreted the language in what they saw in their forensic audit. And that is just one example. And Commissioner Palmer, I am sure can talk to us about whether there is a HAVA 90-day safe harbor rule or which of the Voluntary Voting System Guidelines (VVSGs) is applicable to those machines and whether that machine—so I am seeing these reports that are factually inaccurate continue to be promoted. That is what rumor control is all about. That is what I am continuing to do today based on my experience and understanding and how these systems work. We have to stop this. It is undermining confidence in democracy.

Senator HASSAN. I thank you so much for that statement.

Mr. Chair, I will note that a couple of other people have gone a little bit over their time, and I have one more question for Mr. Krebs, and with your indulgence I would like to ask it.

Chairman JOHNSON. [Presiding.] Sure.

Senator HASSAN. Director Krebs, I thank you for that response. I think it is a very important example of the kind of disinformation and spinning that is happening that, frankly, puts confidence at risk and puts some of our people at risk.

You have noted in the past that we have a very diffuse election system that is administered at the local level. At individual polling locations, there are often numerous nonpartisan officials involved in administering a community's voting process. That diffusion of responsibility also makes it extremely unlikely that there would be a single point of failure or fraud that could sway an election.

Director Krebs, you have worked with the numerous election officials across State and local governments. Can you speak to how the diffuse nature of our election systems affects the security of our elections? And just also, in the interest of time, I want you to comment to, sadly, some of these nonpartisan officials at the local level have been subjected to harassment and even death threats. So can you speak to the impact of these threats? And do you think the President and his allies have done enough to condemn the threats of violence?

Mr. KREBS. I am not aware of much in terms of condemning the threats of violence, having been a recipient of some of them. I think it is, again, an affront to democracy that the citizens of the United States of America that are responsible for executing this sacred democratic institution of elections are being threatened on a daily basis. I mean, you name it, whether it is emails, whether it is phone calls, whether it is people showing up at your house. This is not an America I recognize, and it has to stop. We need everyone across the leadership ranks to stand up.

I would appreciate more support from my own party, the Republican Party, to call this stuff out and end it. We have to move on. We have a President-elect in President-elect Biden. We have to move on. These officials that are Republicans—look at Georgia: Brad Raffensperger, Gabriel Sterling, Geoff Duncan. These are Republicans that are putting country over party. They are being subjected to just horrific threats as a result. This is not America.

Senator HASSAN. Thank you, Mr. Krebs. Thank you, Mr. Chair, for your indulgence. Mr. Krebs, thank you for your patriotism.

Chairman JOHNSON. Thanks, Senator Hassan.

Senator Scott went to vote, so is Senator Rosen available?

OPENING STATEMENT OF SENATOR ROSEN

Senator ROSEN. Yes, I am here. Thank you, Mr. Chairman. Good morning to all the witnesses here today.

I want to start out by saying, as Members of Congress, we take an oath to support and defend the Constitution against all enemies, foreign and domestic. We have a responsibility to our constituents and our Nation to defend our democratic process.

With that being said, Mr. Krebs, we thank you for your service to our Nation and for upholding your oath to defend the Constitution from foreign and domestic threats. Your efforts to protect the integrity of our democratic process help ensure that the 2020 election was the most secure in American history, as certified by the Department of Homeland Security.

I would also publicly like to thank Nevada's election workers who, despite Mr. Binnall's comments in the media and here today, worked long hours to ensure that Nevada's elections were free, fair, and secure. Both our Republican Secretary of State and our Democratic Attorney General have stated there is no evidence of widespread voter fraud that occurred in Nevada, and our highest court has said the same, and I will not give this false narrative about my State any more attention than it has already, unfortunately, received.

However, we do know that foreign adversaries like Russia have peddled false narratives. On September 3, the Department of

Homeland Security warned that Russia has been spreading disinformation about the integrity of U.S. elections since March. This evidence is alarming. According to Alethea Group, ahead of the election Russian media sources like RT and Sputnik were already pushing the narrative that the United States would not conduct free and fair elections. Last month, the Election Integrity Partnership found that social media accounts tied to Russian Internet Agency amplified claims of election fraud leading up to the 2020 election.

Mr. Krebs, to reiterate, were there any election systems successfully hacked by foreign adversaries in the 2020 election?

Mr. KREBS. Ma'am, having been out of the job now for 5 weeks or so, based on what I understood when I left, I am not aware of any voting machine involved in the casting or counting of votes in this election or the certification process that was accessed by a foreign adversary.

Senator ROSEN. Thank you. I want to just emphasize the difference between election interference and influence. So we know our election infrastructure was secure from interference. I want to turn to the issue of foreign influence campaigns. In your view, did adversaries succeed in amplifying the false perception our election process was fraudulent? Can you explain how domestic actors amplified foreign disinformation campaigns and how that undermines confidence in our democratic process?

Mr. KREBS. I think what we saw—I believe it was October 22—we did see some Iranian efforts. I have talked about this before where there were some emails that popped up on that day claiming to be purportedly from at least the Proud Boys that were talking about—sent specifically to Democratic voters that said, "You need to change your registration and vote for President Trump. If you do not, we will find you and take care of business," I guess.

The issue there is that ballot secrecy is the law in all 50 States, and so we identified that issue, we isolated it, and then put up a rumor control debunker. In the meantime, in the ensuing 27 hours, we were able to determine that that was, in fact, an Iranian operation, and I think what was one of the true success stories of the Protect 2020 effort and defending democracy this time around was the fact that rather than, 4 months, in 27 hours we went from detection to sharing that information with the American people.

There is one element that does not get a lot of play, though. Prior to making that assessment, following up on my commitment to our partners in the State and local election community, we held a call with the Election Commissions and said, look, this is what we are seeing, you need to know this, and then we went to the public.

Senator ROSEN. Mr. Krebs, I just have about 2½ minutes left, so I would like to yield the rest of my time to you, because you did take an oath to uphold the Constitution when you were sworn in as Director of CISA, and so I want you to address anything that you feel we have not already asked today and give you an opportunity to speak in the last 2½ minutes, please.

Mr. KREBS. Thank you for that courtesy. Look, I could not be more proud of my team at CISA for the work they did, not just protecting the 2020 election, but in getting through the last 9 months of all the stresses that COVID placed on the workforce and coming

to work each day, whether they are sitting at home, out in the field, or the limited folks that came into the office. So that is point one.

Point two is I firmly believe that this Protect 2020 effort, working with our partners in the Federal Government, whether it was in the intelligence community or the Department of Defense, was the single best representation of a unified government effort. Everybody got it. There were no turf wars. There was no parochialism. Everybody was on the same page. So we were defending democracy.

The last thing I will say is that the real heroes here at the State and local election workers out there across the country, the hundreds of thousands of election workers that risked their lives—and that is not a joke, right? There is a global pandemic. There is COVID spreading across the country. They went to work so that you and I could go vote and cast our decisions here contribute to this process. They had to deal with incredibly adversity. And then at the end of it, risking their lives, they get death threats for doing their jobs, for standing up and speaking truth to power, putting country over party.

That has to end. We are going to have to move past this somehow. I have said before that democracy, yes, we survived this, I think. It was strong enough to survive. But democracy in general is fragile. It requires commitment, follow-through on both sides. If a party fails to participate in the process and instead undermines the process, we risk losing that democracy. We have to come back together as a country.

Senator ROSEN. Again, I thank you for being here. I thank you and your teams, your teams around the country, for keeping us safe and working so hard in this past election.

Thank you.

Chairman JOHNSON. Thank you, Senator Rosen.

Senator Scott is not back yet. Senator Portman, are you on Webex?

[No response.]

Senator Hawley, are you on Webex?

[No response.]

I will try Senator Sinema.

[No response.]

Then, I will pick up the slack.

Mr. Binnall, I want to explore a little bit further in terms of what access you did not have to the information you requested to verify this. Again, I value the paper backups. I value the controls. But they are only as good as they are actually used, and they only provide confidence to the extent that it is a transparent process. So just speak a little bit to what you had access to, what you did not have access to, what you were denied, and then go ahead.

Mr. BINNALL. Thank you, Mr. Chairman. The very sad fact is that we were denied access to almost anything meaningful that would allow us to verify——

Chairman JOHNSON. Can you be specific?

Mr. BINNALL. Absolutely, Senator. Let us talk about the paper backups on the electronic machines. We were denied any access to those except for from one machine in the entire State of Nevada.

We were denied that access—I wish I could have quoted Mr. Krebs when we were fighting our discovery fights in Nevada, saying how important it was to get access to these. We could not see any paper backups, and on top of that, the printers on the machine were malfunctioning at such a high rate, we doubt that the paper backups were actually giving us anything of use anyhow. So these paper backups that are supposed to provide such transparency, we could not use them, we could not see them. They provided us zero transparency at all, except on one machine in the entire State of Nevada.

Another example is the fact that we were denied any meaningful discovery in the case in order to go and examine the full extent of the voter fraud. For instance, even when we were able to subpoena the records that led us to discover those 4,000 noncitizens who voted, we could not put that into evidence because we did not get them until the end of the discovery period, and then the court said, well, at that point it is too late. Our discovery period was essentially 3 days. We were denied any meaningful opportunity to even use in our case the information that we got, and the court did not even consider those things, unfortunately.

We were denied—we tried to be able to understand the code of these machines, to be able to find out, for instance, as the Chairman pointed out, whether machines were hooked up to the Internet, whether any of that happened, be able to do a forensic review. We brought forensic experts all the way to Nevada, people that could have discovered this information, people that could have told us what happened with these machines, and we were not allowed near them. We were not allowed any forensic audit of it, nothing that could have given us any transparency, because transparency is not political. That is what we have talked about here. That is what we were denied in Nevada, is any attempt to actually find out what happened.

Here is the troubling thing. One of the reasons that they said that we could not get transparency on those machines was because they are proprietary, the information, the coding was proprietary. But we are talking about the counting of votes for the Office of the President of the United States, and they are not going to let us see the code for how they actually coded the votes? You have to pick one. It is either open-sources and we exactly know the way that these machines are counting the votes, or you have to go back to a verifiable system to make sure that the results that are being reported are the results that we get from actual voters, because that is where democracy breaks down. That is really the fear that we have of losing democracy, is when it is not the people's votes that are being counted but fraud that is being counted. We cannot just pretend that the emperor has any clothes if he does not. We cannot pretend that we have a clean election when there is evidence to the contrary. The way that we get that is through transparency, and we were denied that in Nevada at every single turn.

We had a clerk, a register of voters, who literally dodged our subpoenas. We had the holiday weekend over Thanksgiving in order to serve subpoenas. They locked the doors of the offices. He locked himself in his house. He refused to accept a subpoena. That same register of voters, we have a whistleblower that says he was wear-

ing a Biden-Harris pin to inspect voter sites. This is not something where we are trying to attack officials. We are trying to say that we have to make sure that it is nonpartisan, that we have to make sure that there is transparency, and you cannot deny transparency at every turn, Mr. Chairman.

Chairman JOHNSON. Mr. Krebs, real quick, mindful that, again, all this testimony is under oath, so what you heard from Mr. Binnall is testimony under oath, does that trouble you? In your assessment, this was the most secure election. Again, I am all for paper backups. I am all for those controls. If used, it works. We have a system of advocacy in terms of a legal system. You advocate for one side. It is a combative system, but both sides have to have information. Does that trouble you in terms of lack of transparency that Mr. Binnall is testifying to under oath?

Mr. KREBS. I think a couple things here. One is that in Commissioner Palmer's opening statement he talked about the certification process, the voluntary voting systems guides, the certifications that happen at the State level, the logic and accuracy testing of these machines, the parallel testing that happens the day of or during the election process, the sampling and forensic audits. We saw Georgia do that with a number of their machines to ensure that the hashes match what they expected.

I do think that, yes, we need to make sure that, working with these vendors, we have the appropriate insight and transparency into the process, certainly. I think we need to have a conversation on what the appropriate auditing process looks like. I have seen some auditing that is not necessarily up to snuff, so we need to explore that a little bit more fully. But, again, if we are talking about paper backups, but we are also talking about paper ballots——

Chairman JOHNSON. But, again, only if he just said they did not have access to the ballots.

Mr. KREBS. I am not—that is——

Chairman JOHNSON. Again, all I am asking, does that trouble you that there was not that kind of transparency? Or are you challenging his testimony?

Mr. KREBS. Oh, of course not. I do not have——

Chairman JOHNSON. OK. So, again, this system is—we only have confidence in it if it is completely transparent and somebody who is challenging results has access to the information, the paper ballot backup, can have their forensic experts take a look at the computer systems. That was not afforded. I am just asking: Does that concern you?

Mr. KREBS. I think that there are multiple controls in place throughout the system. If there is a legal mechanism at the back end that allows for independent third-party auditing——

Chairman JOHNSON. But that is the problem. The legal system did not allow for the transparency. OK. You can talk about all these controls up front, but then in the end, where there are affidavits signed and people are making charges, when you cannot obtain the evidence to actually try it in court and your evidence is denied in court, do you understand how that frustrates people? Again, that is the problem. That is why there are suspicions, because this was not in so many cases that we have heard about a transparent process.

With that, I will turn to Senator Scott.

OPENING STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you, Chairman Johnson. I want to thank Chairman Johnson for taking all the heat for hosting a hearing like this. I think it is the right thing to do, to make people feel comfortable that their elections are free and fair, and if this one was not, that the next one will be.

Two years ago, I got elected. I won election night by 54,000 votes, and Chuck Schumer sent a lawyer down and basically said, "I do not care what the votes are. We are going to win through the courts." We went through an unbelievable number of lawsuits. We had, I think, something like 1,000 lawyers working with us. We went through two recounts. He did not care what the votes were. Chuck Schumer's goal was to win, and his lawyer's goal was just to win through the courts, and it did not matter what the votes were. He did not let me come to orientation, and so when I watch this stuff now, I do not remember one Democrat in this entire country say, "That is not right. You should not be doing it that way." They were all in on this, and nobody complained.

We have to figure out how to do this where people feel comfortable. I can tell you, I live in Naples, Florida. Every time I go out, people come up to me and they are frustrated with the unfairness of the system.

Now, of course, these are people that wanted Trump to win. They think that he lost unfairly. But they are mad. They are mad because they read and they hear about what happened in Wisconsin; they hear about what happened in other States. Then they are sort of furious that they think the whole system is rigged.

So one thing I did is in September I put out a bill called "the Voter Act." We do absentee ballots, and it actually works in Florida. You have to be a registered voter. Your signatures have to match. You have to get your vote in, ask where you vote early. You have to get your vote in on time. It is your problem if you do not. It is not somebody else's. You do not get to vote after the fact. Your vote does not get to come in after the fact and somebody count it, although 2 years ago the Democrat lawyers tried to do that. And in Florida we do it on time. We did it this time.

So it seems to me that if we want people to feel comfortable in this country that these elections are fair, you have to show your ID. You cannot be doing same-day registration because how can you tell if somebody is legal, illegal? How would you know? Do they live in that State? How would you know? You have to let people be able to watch ballots being opened. We had two election supervisors that were removed because of what they did in my election. They were clear. They completely violated the law, and they found and tried to count 95,000 ballots after election night—not in my favor. Of course, in the Democrat's favor.

Judge Starr, what do you think about the need to have local elections—because I think what Mr. Krebs said is right. One of the reasons why we have good systems here is we do not have a national system. We have a local system. But should we have national standards? Should you have to have ID? Should your signatures have to match? You cannot get registered on the same day

that you vote. All these things that we have, like we do in Florida, where you have to get your ballots early and all these things and you know how many—and, by the way, you are supposed to announce how many ballots you have that night. You should know, right? They did not in mine, and that is how they kept finding it.

Judge Starr, what do think about this idea that we have to have some national standards but still have local elections?

Mr. STARR. I think national standards need to be seriously considered in light of these recurring issues. We all have anecdotes. One of my friends, an academic leader in the Commonwealth of Virginia where I used to live—here is an anecdote. One of his students, a registered voter in Vermont, but she is studying in Virginia, and she receives, appropriately, an absentee ballot from Vermont. But she receives four unsolicited ballots from the Commonwealth of Virginia where she happens to not be registered to vote, but she receives these, and everyone is hearing these anecdotes. They are saying, well, aren't there control mechanisms in place? The issue with decentralization is you will continue to have these varieties and vagaries unless and until there is some enormous reforms in State government or Congress using its powers under Article I in this particular instance, says we need to step in and have regulations to ensure integrity. The signature requirement is one of the bases.

I like to say, Senator Scott, you have to show ID if you want to check into a hotel or get through Transportation Security Administration (TSA) security, so do we not want to have those kinds of safeguards just to ensure, yes, this is going to be an honest election, which I think is what we are all asking for.

Senator SCOTT. Mr. Binnall, if we had done some of these things and they had been enforced in your State, would people feel comfortable that there was a fair election?

Mr. BINNALL. Senator Scott, I think it would absolutely go miles to make sure that people were confident in the results of the election if we put in simple methods to make sure that the people who vote are who they suppose to be, that one person only gets one vote, that the way that the ballots are counted leads to an accurate total. These things should not be partisan. These things should be exactly what we do to protect our republic and make it so that people know that the results are accurate because, otherwise, you end up where we are today.

Mr. TROUPIS. Senator, one of the fascinating things about Wisconsin is, as I said, we have a long history of real transparency in our process, in our recount process, in all of our processes. So it is particularly odd here—and several of the justices on our court this last week called what the Democrats had done in the majority of the court, in the Supreme Court, as absurd and bizarre, and the reason they referred to it that way is they said the issue here is what confidence do people have in the election process. If that is what we hear—and I have heard that—I have been hearing that all day here, confidence in the election process. Why, when everything is teed up—I mean, I am a former judge. My co-counsel is a former president of the State bar. We had teed up everything. We absolutely knew the names, addresses, wards. You have exact records. What the Biden campaign did not want the court to do is

to actually address the substantive question. That is the holding of the court: We will not address the substantive question.

The chief justice, I mean, there was great frustration in the chief justice when she said four members of this court throw the cloak of laches over numerous problems that will be repeated again and again until this court has the courage to correct them. Candidly, it was all Democrat talking points. I mean, the same thing, I heard something about Justice Karofsky's comment. It was just a talking point. I guess the frustration you hear from those of us who are serious lawyers, who have taken this seriously, is that when we pose these matters to courts, we expect them to address them. When they do not, it undermines the integrity of our system. That is what is going on here. The frustration that you hear even in good Democrat circles is if the courts do not address these, who is going to? Are they not the ultimate arbiters?

There is no dispute that the election would have turned out differently in Wisconsin if, according to our allegations and according to our proofs, the court accepted those, that the election result would be different. But instead of addressing the substantive claims, the Biden campaign argues do not talk about them, do not address them. That is why I thanked Senator Johnson when he first called and asked if I would talk, because if you do not inquire here in the Senate—and as Ken Starr said a minute ago, if you do not do this inquiry, there really is not going to be any analysis, and there is not going to be an opportunity to get the very integrity that we all want.

As I said, as a former judge—and this is a serious matter to me, and no one suggested at any point in the process that the allegations in Wisconsin are anything but serious and substantive and documented. And yet a court takes the Biden line and says, "We are just not going to talk about it." That is just wrong, and that is the reason, one of the reasons people do not trust this outcome.

Senator SCOTT. In Florida, we have a lot of people that moved from South America, and so a lot of them have said to me, "How is this different than what Maduro is doing?" Right? I mean, and part of it is, people do not have enough information, but it is so simplistic when you hear about people that are dead that vote, people that do not live in the State that vote, and you hear all these things, and there is no recourse.

We have to figure this out. We have to be able to prevent this from—I do not know if anything will happen with this election, but clearly we cannot let this go on for the next election.

Thank you, Chairman.

Chairman JOHNSON. Thank you, Senator Scott, and I completely agree. You have to have the information. This is not a dangerous hearing. This is an incredibly important and crucial hearing. Thank you for participating in it.

Senator Portman, are you available by Webex?

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. I am, Mr. Chairman. Thank you. I have been moving around the Capitol as we have had to vote, but I was at the hearing earlier, and I appreciate the witnesses and all the information we have received.

As I look at this issue and even watch some of the back-and-forth today between our colleagues, it seems to me that pulling this out of politics a little bit and having a bipartisan group that is more independent look at the issue is a good idea, in part because most of us do not believe that this ought to be something that the Federal Government usurps from the States. In fact, we believe that the Constitution got it right and that, generally speaking, it is better to have the States handle this. But there are obviously many disparities between how the States do it.

So there was discussion earlier, I think it was, of the Carter-Baker Commission. I would ask you, Mr. Starr, is it time for us to establish a commission—I have been involved in some of these commissions. I have been a commissioner and co-chaired some that have worked, some that have not worked. But often they can be quite effective at sort of taking the partisan poison out of an issue and addressing it in a very straightforward way. If you had a distinguished Democrat and a distinguished Republican and commissioners who were dedicated to increasing the confidence in our elections, do you think now is the time for us to establish such a commission that could report with plenty of time before the next midterm election and help to give the States a sense of direction and perhaps even a template of best practices?

Mr. STARR. The short answer is yes. In light of the acrimony and the division with respect to the 2000 election, bringing together Jimmy Carter and former Secretary of State Baker was, I think, very efficacious. They made thoughtful recommendations. But they bring attention and shed light on what the issues are. And so, yes, I think taking it out of what is clearly continuing to be a highly bitter and acrimonious discussion and to say to the American people we are going to take a look at this and we are going to try to, in fact, improve in the great spirit of reform, we want honest elections. Abraham Lincoln, the subject of the fraudulent mail-in campaign. Let us not lose sight, even though I am thankful that foreign interference and so forth—and I very much admire Mr. Krebs and all that. But we are really talking about down in the boiler room, so to speak, of American elections, and that is where I think these reforms and safeguards need to be put in place.

Senator PORTMAN. Thank you for that, and I am looking forward to working with one of my Democratic colleagues to try to promote this idea. We have had some discussions of it already, and I think again today what we have heard is indicative of the degree of intensity on this issue and the need for free and fair elections. I think everybody agrees with secure elections, absolutely, and you mentioned, Mr. Krebs—Chris, thank you for your service at CISA. I agree with what was said earlier about the fact that during your time there you were instrumental in building up our defenses on the cybersecurity side. Particularly thank you for working with Ohio Secretary of State Frank LaRose so well. Frank LaRose and you I think were able to provide some examples for other States, as I understand it. You can speak to that. But we have in every county in Ohio the so-called Albert intrusion detection monitoring hardware, which is designed to detect suspicious cyber activity. Can you kind of brief me on the benefits of using this kind of detection and monitoring hardware and how it worked?

Mr. KREBS. Yes, sir. First off, I want to thank you for—actually just the State of Ohio, for some reason in my senior staff in my front office, two of my top three advisers happened to be from Ohio, so you are doing something right there.

The Albert systems are intrusion——

Senator PORTMAN. I am going to put on my mask, after you said that, since Carper had his Ohio mask on earlier. [Laughter.]

Mr. KREBS. So the Albert systems are intrusion detection systems that effectively sit on the networks and on the wire that capture traffic, that we can work with our intelligence community partners and develop what is known as "signatures," looking for known malicious activity or known interaction with suspicious Internet Protocol (IP) addresses, just looking for bad interaction, and it gives us a good insight into what sort of behaviors may be happening on those networks, and they are actually pretty key after the 2016 election. Once we were able to get a sense of what was happening in Illinois, we could load up some of those signatures and then go do forensics.

It is a passive system. It is a forensic system. Where we need to go, though, is building on the trust we have developed through the Albert censors and through the Information Sharing and Analysis Center (ISAC) and through the Coordinating Councils to start deploying more advanced technologies. I am specifically talking about some of the endpoint detection and response capabilities that will actually sit on a computer in a State and local office and be more of a real-time monitoring and mitigation capability. That is how we continue moving forward. We need the same capability in the Federal Government. We are not there yet, but we have to continue advancing, and I think Congress needs—I will stop there.

Senator PORTMAN. Chris, yes, and again, as you know, you and I have talked about this. I appreciate what you did for elections. I also am very concerned that our Federal Government is not up to the task generally, and that is another topic for another hearing, perhaps one where you will be back to testify. But look at what has happened just recently. In the last week, we found out that a very sophisticated group of hackers got into the computers of some our most sensitive agencies, and so we obviously have a lot of work to do. I am not suggesting that CISA was at fault there, but on the other hand, I think we have not yet given even CISA the adequate resources and authority to be able to handle all these issues, not just the election issues, but obviously we have a huge problem right now with cyber attacks. We do not know all the details yet, and I will not ask you to get into stuff you do not know about. But it was a massive cyber attack on Federal agencies that undercut our national security. We know that.

By the way, Senator Paul earlier talked about the fact that there has been some lack of understanding between what you testified to and what you stated as to the election being secure from cyber attacks and this notion that there were not instances of irregularity and fraud in this election, which, of course, there have been in every election in the history of our country, and there were in this election, and we have heard about some of those today.

Is Senator Paul correct? I guess I would slightly amend what he said. He said that your focus was just on foreign adversaries. My

sense is your focus was not just on foreign adversaries, although you feel fairly confident that that did not happen this time, and obviously based on what happened in 2016 with the Russians, this is good news, but also with regard to domestic cyber attacks. Is that what your report was about? Is he accurate in saying that?

Mr. KREBS. Yes, sir, so when you come into a Federal office, you pledge the oath to uphold and defend the Constitution from threats, foreign and domestic, and that is what we did. The focus of the statement, the joint statement, was security. It was secure. I think terms have been conflated here, alleging that we were speaking to the fraud aspect. We absolutely were not. We were talking about security, hacking, manipulation of these machines. That was the thrust of the statement.

Senator PORTMAN. I think that is very important to point out, and I think a number of people were confused about that, including, perhaps, some folks in the administration. Post-election, there has been a lot of talk about signature matching, and I will end with this, Mr. Chairman. I know we are getting over time here. But in Ohio, what we do is—and we have been doing this for 15 years quite successfully—we send out an application for an absentee ballot. It is no-fault absentee. That is how I vote. But you have to send in an application, including a signature. Those signatures are checked. Then the signature on the actual ballot, once you receive the ballot and you send that in, you have another signature, that is checked. Of course, the two are compared.

They also in Ohio have access to other signatures if there is some confusion as to whether it might be the right person or not. Could you, Mr. Krebs or others, perhaps comment on that system? Is that a good way to ensure that you have the protection that we all want to have that the person who requested the ballot is an eligible voter and that the return ballot was completed by that same person?

Mr. KREBS. Not an expert on the system. Seems reasonable to me.

Senator PORTMAN. Anybody else want to comment on that?

Mr. RYAN. Sir, this is Representative Frank Ryan. I would tell you that that is a good system, and that would alleviate a significant number of the concerns that I had in the election. Based on some of the comments that were made by many of the Senators and the testifiers, I would indicate that we saw a major problem with the dot-com bubble in 2001, which led to the Sarbanes-Oxley bill, much of which is the basis of my testimony today. In 2008 and 2009, we had the crisis that happened in the banking industry with the no-documentation loans, and we saw how that worked and then led to the Dodd-Frank bill. I would hope that would happen in the 2000 elections and in the Abraham Lincoln election and these most recent ones in 2016 and 2020. There would be similar legislation that could help us restore the confidence that people have that there is some degree of uniform perspective about the requirements that each of the States need to be able to comply with. What Ohio is doing would have alleviated a major amount of the concerns I had when we had a Supreme Court that decided to legislate from the bench.

Mr. STARR. Mr. Chairman, if I may say just a word, and that is, I think what, Senator Portman, you have identified is a best practice, and it certainly qualifies as one of the things that perhaps a commission, if one if founded, could say we have canvassed the entire 50 States, and here are the best practices. The recommendations could be based on experience as opposed to simply theoretical constructs. Let us just see what has worked in the various States with reputations for honesty and integrity.

Senator PORTMAN. Yes, that would be the objective. Thank you, Mr. Starr. And thank you, Mr. Chairman, for your indulgence.

OPENING STATEMENT OF SENATOR HAWLEY

Senator HAWLEY. [Presiding.] Thank you very much, Senator Portman.

Now, on behalf of the Chairman, I am going to recognize myself, so thanks to the witnesses for being here. I just want to say how important it is that we are having today's hearing, and let me just give you an example why.

Yesterday I was talking with some of the constituents back at home, a group of about 30 people. Every single one of them, every one of them, told me that they felt they had been disenfranchised, that their votes did not matter, that the election had been rigged. These are normal, reasonable people. These are not crazy people. These are reasonable people and who, by the way, have been involved in politics, they have won, they have lost, they have seen it all. These are normal folks living normal lives who firmly believe that they have been disenfranchised. And to listen to the mainstream press and quite a few voices in this building tell them after 4 years of non-stop Russia hoax, it was hoax, it was based on—the whole Russian nonsense was based on, we now know, lies from a Russian spy. The Steele dossier was based on a Russian spy. After 4 years of that, being told that the last election was fake and that Donald Trump was not really elected, and that Russia intervened, after 4 years of that, now these same people are told, "You just sit down and shut up. If you have any concerns about election integrity, you are nut case. You should shut up."

I will tell you what. Seventy-four million Americans are not going to shut up, and telling them that their views do not matter and that their concerns do not matter and they should just be quiet is not a recipe for success in this country. It is not a recipe for the unity that I hear now the other side is suddenly so interested in after years of trying to delegitimize President Donald Trump.

Suffice it to say I am not too keen on lectures about how Missourians and others who voted for President Trump and now have some concerns about fraud, about integrity, about compliance with the law should just be quiet and that they are somehow not patriotic if they raise these questions. It is absolutely unbelievable.

Let me talk about the First Amendment. Judge Starr, I want to begin with you because I know that you have spent much of your life as a litigator defending the First Amendment. Have you ever seen anything like we saw in the closing days of the election when you had the biggest corporations in the history of this country, the most powerful corporations in the world—Facebook, Twitter—working with the Democrat campaign to suppress legitimate reporting

on Hunter Biden, who we now know is under Federal investigation for criminal wire fraud, tax evasion, other things? Have you ever seen anything in your career like that, Judge Starr, where we have these giant corporate conglomerates censoring and suppressing news directly bearing on an election weeks beforehand and doing it apparently in conjunction with one of the major political parties? Have you ever seen anything like that?

Mr. STARR. No. I think we live in a new age, and we need to go back to great lessons from constitutional law, as you well know, Senator Hawley, and Justice William Brennan, an icon of the Warren Court, saying that our democracy is based upon robust and uninhibited debate, and Justice Oliver Wendell Holmes saying let us test things in the marketplace of ideas. You cannot test ideas and theories unless you allow the marketplace of information, communication, to flourish.

Senator HAWLEY. Well said. I agree with that 100 percent. It is an extraordinary thing not to be able to get—I have had Jack Dorsey and Mark Zuckerberg under oath. We have asked them, "Did you coordinate with the Democrat campaign?" How was it that within minutes of this story breaking, both of those major corporate giants decided that they would suppress this story and exactly what the Biden campaign wanted them to do? They will not answer questions. I have asked the Federal Election Commission (FEC) to determine whether or not this was an illegal campaign contribution on the part of these corporate entities, and I just cannot fathom why anybody who cares about free speech in this country would be fine with these mega corporations controlling what people can and cannot say and trying to intervene in a Presidential election.

Let me ask you, Judge Starr, about something else. Let us talk a little bit about mail-in balloting. In your written testimony, you discuss the findings of the Carter-Baker Commission, and you have mentioned that again here today. That Commission commented on the use of mail-in ballots after the 2000 election. Can you tell us a little bit about that Commission's finding on mail-in ballots as you recall it and talk about some of the warnings that that Commission put into place?

Mr. STARR. Yes. The Commission was referring to absentee ballots, but, of course, in light of what has happened in this Presidential election, we are now talking about the unprecedented use of mail-in ballots. Their concern and their warning, former President Carter and Secretary of State Baker, is that this is a mechanism or a platform for fraud and abuse. Be careful about it. Have safeguards in place. I think that is at the bottom of what some of these concerns are.

How did dead people vote, accepting that allegation from Nevada? It is because of inadequate safeguards. The dead person did not walk into the voting booth and vote. Someone voted for him or her. We have to have those safeguards in place, and that is what the Commission was saying and issuing that fervent warning, that it may get worse in a deeply divided country.

Senator HAWLEY. Twenty-six States, as I understand it, when it comes to mail-in voting, Judge, 26 States now in this country allow third-party ballot harvesting of mail-in votes. That is where you

can pay a third party to go distribute the ballots, and you cannot do this in my home State of Missouri because we have controls similar to those in Ohio that Senator Portman was talking about. But in other States, 26 States, you can pay a third party to go distribute the ballots. You can pay a third party to pick up the ballots. There is no chain of custody there. There is no verification. This seems to me an invitation to fraud and abuse.

I have introduced legislation to end third-party ballot harvesting nationwide, to make it illegal nationwide. Would you agree, Judge Starr, that looking at something like third-party ballot harvesting is a common-sense approach? By the way, some House Democrats even have endorsed this approach. Would you agree with me that that is a common-sense place to start when we think about preventing fraud and addressing it in our elections?

Mr. STARR. Yes, because the opportunity for fraud and abuse is so rife and omnipresent with that kind of, if I may now call it, "worst practice." So many States have best practices. We heard from Senator Portman about Ohio. Other States have the safeguards in place. Let us put safeguards in place, but one of them is let us eliminate practices that are so prone to fraud and abuse.

Senator HAWLEY. I think that is just the very beginning of what we should do. We should also make sure that poll watchers from both parties can be present at all times, that there are eyes on ballots, cameras on ballots at all times, that there are significant verification requirements that are mandatory, that there is mandatory reporting requirements about where we are in the count, where the States are, so the States just cannot go dark for days at a time. All of this stuff ought to be common sense. There is no reason we should just shrug our shoulders and say, "Fraud happens all the time. No big deal."

It is a very big deal, and for millions and millions of Americans in this election, it is a very big deal indeed.

Thank you, Mr. Chairman.

Chairman JOHNSON. [Presiding.] Thank you, Senator Hawley, for your questions and for standing in.

Based on one question and the answer from Judge Starr, I just want to read from my opening statement from the last hearing: "In his 'Reflections on Progress, Peaceful Coexistence, and Intellectual Freedom,' Russian dissident Andrei D. Sakharov wrote, 'The second basic thesis is that intellectual freedom is essential to human society—freedom to obtain and distribute information, freedom for open-minded and unfearing debate and freedom from pressure by officialdom and prejudices. Such a trinity of freedom of thought is the only guarantee against an infection of people by mass myths, which, in the hands of treacherous hypocrites and demagogues, can be transformed into bloody dictatorship. Freedom of thought is the only guarantee of the feasibility of a scientific democratic approach to politics, economics and culture.'"

I would like to think that this hearing is a demonstration of that freedom to obtain and distribute information to the public. There is nothing dangerous about that. It is essential to our freedom. It is essential to our country, to our democratic republic, and it is essential if we are going to restore confidence in this election system we have. We have to do this. We cannot ignore the problem. The

first step in solving any problem is admitting you have one and then dealing with it honestly, gathering the information. This hearing, as my hearings have been, has been a problem-solving process, first gathering the information. That is what we are trying to do here today. Senator Sinema.

OPENING STATEMENT OF SENATOR SINEMA

Senator SINEMA. Thank you so much, Mr. Chairman.

The 2020 Arizona election was a successful election, not for any one party or individual but for our democracy, and it is a demonstration of the will of Arizona voters. A record 80 percent of registered voters participated. Arizonans are independent. They vote for State and Federal representatives they trust to be honest, who they believe will fight for and uphold Arizona values.

This record turnout number is also a testament to the work of Arizona election officials who not ensured our system worked and our laws were upheld, but did so while ensuring that people could safely participate in the election during the pandemic as voters and volunteers.

Arizona has had some sort of absentee voting by mail for over 100 years. In 1992, the Arizona Legislature and Governor in bipartisan fashion made it easier for Arizonans to vote by mail by no longer requiring a reason to participate. Our vote-by-mail system has a number of safeguards to ensure safe elections. Ballots are mailed out 28 days prior to the election, and each ballot has a tracking mechanism. We use tamper-resistant envelopes, and ballot drop boxes have specific security requirements. Election staff are trained to authenticate signatures, and a voter is contacted if the signature cannot be verified. Arizona also has severe criminal penalties for ballot tampering or for throwing out someone's ballot.

In 2018, when I was elected to the U.S. Senate, nearly 80 percent of Arizona voters voted early, most of them by mail. In 2020, that increased to 88 percent. That is 2.9 million votes moving through the postal system in Arizona. Arizona's postal workers put in long hours, many working 65 hours a week for weeks on end to ensure that ballots got to voters and were returned by State deadlines so they could be counted. Even though many postal facilities in Arizona are short-staffed right now, these essential workers did not shy away from the challenge or the need to protect our democracy.

Arizonans know it takes time to count our votes and determine election winners. When I was elected to the Senate, I was declared the winner in 6 days, but it took 12 days to finish counting the votes. Now, that is not an indication of fraud. It shows that election officials are following the law and counting all the votes. That is how elections have worked in Arizona since our State adopted widespread mail-in voting, and it is how things worked in Arizona again in 2020. Our elections this year produced bipartisan results where members of both parties won elections.

Arizona's statewide elected officials from both parties have also confirmed that our election was fair, just, and without fraud. Katie Hobbs, Arizona's Democratic Secretary of State, on December 9 said this about our election: "This election is one for the record books, for a number of reasons. Participation was at a historic high, as was interest in the inner workings of this civic process,

which is the kind of scrutiny that pushes the process to be better. I have full confidence in this election. That confidence has been affirmed by the courts."

On November 20, Clint Hickman, the chairman of the Maricopa County Board of Supervisors, a Republican, said: "No matter how you voted, this election was administered with integrity, transparency, and, most importantly, in accordance with Arizona State laws."

On December 4, the Republican Speaker of the Arizona State House, Rusty Bowers, rejected calls for the State legislature to change the result of Arizona's election. Here is his quote: "As a conservative Republican, I do not like the results of the Presidential election. I voted for President Trump and worked hard to reelect him. But I cannot and will not entertain a suggestion that we violate current law to change the outcome of a certified election. I and my fellow legislators swore an oath to support the U.S. Constitution and the Constitution and laws of the State of Arizona. It would violate that oath, the basic principles of republican government and the rule of law if we attempted to nullify the people's vote based on unsupported theories of fraud."

Challenges contesting the Arizona election were brought to the courts and dismissed, including a unanimous ruling by the Arizona Supreme Court confirming a lower court ruling upholding the results of the election challenge. This is how our system works. If there are concerns of fraud or abuse, the courts consider the evidence and make a ruling.

Now, I have a few questions for Mr. Krebs. During your work at the Cybersecurity and Infrastructure Security Agency, did you find any evidence that disputes the statements I shared from elected officials regarding the integrity and fairness of the 2020 election in Arizona?

Mr. KREBS. No, ma'am.

Senator SINEMA. More broadly, what evidence can you offer to support the idea that the election across the country, not just in Arizona, was fair and secure?

Mr. KREBS. Again, it is those layered security controls that are in place before, during, and after an election. The thing that I always like to point back to is that increase of paper ballots across the country and the ability to then conduct post-election audits. In Arizona, I believe it was a 2 percent audit. In Georgia, they did a risk-limiting audit that then triggered a full hand tally. The outcomes were consistent. A 5-percent audit in Wisconsin, a 2 percent audit in Pennsylvania. Those are the sorts of things that give you confidence in the process when you can go and recount the ballots over and over and over.

Senator SINEMA. What lessons should we learn from the 2020 election as we plan for future elections?

Mr. KREBS. We need to invest in democracy. First and foremost, we need to fully eradicate those machines that do not have paper ballots, so those direct recording electronic machines, there is only one State that is statewide, and that is Louisiana, but they are throughout Texas, Indiana, Tennessee, and a couple other States, including New Jersey. We need to get those out of the system, so

Congress needs to fully invest in a risk-based approach to eradicate those.

We need also to continue investing in post-election audit capabilities for the State. That takes a little bit more time. Then a steady stream of funding and grants on a regular basis, not every 10 years or every 4 years but, on a regular, dependable basis, to support elections. Along the same lines, we need to fully fund and support the Election Assistance Commission. They are a critical tool to helping the administration of elections.

Last—and this is my pet project here—we need to reinvest in civics education in K through 12 throughout the country. We have to continue educating our children on what it means to be an American and the democracy that we are enjoying here.

Senator SINEMA. Thank you. My last question: Early in this election cycle, sites on the FBI highlighted a potential threat that foreign elements could pose to the U.S. election system through disinformation campaigns. Looking back, did the United States do enough to prepare for this threat from both foreign and domestic actors?

Mr. KREBS. Ma'am, we had the distinct advantage this time around of having about 3½ to 4 years to prepare for this election, and that is in comparison to the prior administration. They only had about 4 months. We had 4 years. I know my team, we took every moment of the day to think through any number of scenarios. I have talked about it often that I was paranoid, that we were looking for every angle that we possibly could. I think that ultimately benefited us from a preparation perspective when it came around and that we had a full range of scenarios we had worked through, that we improved security at the State level. But ultimately it came down to those perception hacks. It came down to disinformation. I think rumor control was an incredibly valuable tool that we need to think about from a governmentwide perspective how rumor control—I have said rumor control as a service. How can we use rumor control to help ensure—well, rather, counter disinformation on the vaccine for COVID as it rolls out. Those are the sorts of things we need to be thinking about.

Senator SINEMA. Thank you.

Mr. Chairman, I overextended my time. I yield back and thank you for your indulgence.

Chairman JOHNSON. Thank you, Senator Sinema, for participating.

I do want to just warn Mr. Palmer and Mr. Ryan, first of all, I apologize for not having maybe any questions directed your way. I will at the tail end of this have another quick round of questions here. Senator Peters has some. I will ask you a couple questions. Then what I will tell all the witnesses is a final summary—I actually got this technique from Senator Carper. We will give you each an opportunity to make kind of a final statement, things that either you were not asked that you wanted to be asked about or something that you just think needs to be said during this hearing. We will do that, but I will first turn it over to Senator Peters for some extra questions.

Senator PETERS. Thank you, Mr. Chairman.

A question for Mr. Krebs. As you know, you and I have spoken about the rise of domestic extremist violence in the country and how we need to be conscious of that rise. In August, FBI and the Department of Homeland Security memos reportedly warned of threats by domestic extremists to election-related targets in the run-up to the 2020 election. Unfortunately, and sadly, these warnings seemed to have been well warranted.

Since President Trump's false claims of widespread voter fraud, local election officials across the Nation have faced harassment. Some have faced death threats against themselves and their families. In Michigan, our Secretary of State had protesters surround her home while she was decorating it with her young child to get ready for Christmas. According to local law enforcement, many of those folks were armed. They were repeating some of the President's false allegations of widespread fraud in an intimidating way.

After speaking out defending the integrity of the 2020 election, it is my understanding that you and your family also faced threats. In fact, it required us to make some arrangements for your security to be here today to testify in person.

On December 1 of this year, a top Republican election official, Gabriel Sterling, in the Georgia Secretary of State's office, held a news conference urging President Trump and Republican lawmakers to stop attacking Georgia's election system with baseless claims of voter fraud. In that news conference, Mr. Sterling said President Trump was, and I am quoting Mr. Sterling here, "inspiring people to commit potential acts of violence," and that, a new quote, "someone is going to get hurt, someone is going to get shot, someone is going to get killed."

Now, we saw a similar dangerous trend earlier this year when election officials questioned COVID public health safety protocols and also fueled extremists, including in my home State, extremists that targeted the Governor of the State of Michigan.

So my question for you, Mr. Krebs, particularly given the fact that you have faced some of this: Do you believe Mr. Sterling's statements are overstated or that, unfortunately, real-world violence stemming from dangerous claims can indeed be a realistic concern that we should be conscious of?

Mr. KREBS. Absolutely. He himself received a number of threats, and he has continued to receive threats, as I understand it. Secretary Raffensperger down there has. I have continued to receive threats. It is not just the heads, the principal level people, the directors of the offices. He was having information technology (IT) contractors that were receiving death threats.

We are seeing stoking of fires that is completely unnecessary with claims that are, I am not even talking about some of the court cases. I am talking about, in my case and in many of our cases, it is these fanciful claims of dead dictators and computer algorithms. We are debunking them because they are nonsense, and we have said that from the beginning. But they have taken root, and, some people just do not want to hear how these systems actually work and what is actually capable across these systems. Most importantly, those—I am going to say it again. I am going say it again, the paper ballots, it is those measures—the root of trust in the process that can dispense with these claims; even if these algo-

rithms were there, they did not work. But they are probably not there.

So we have to move past this, and these cases of threats, they need to be prosecuted. People need to be held accountable for the claims they are making.

Senator PETERS. And just the last question, and we spoke about this earlier. If you look at the fact that we were able to conduct this election in a fair way, during the middle of a pandemic, which is an extraordinary time to try to conduct fair elections and do it as efficiently as possible, and the fact that you have thousands of election officials and volunteers that are working—I think of the men and women who went to the polling places, the process voting, did it with concerns about their health, people who went to vote, for their health, or folks who chose to vote absentee in order to minimize the risk to their families, to the health of their families. This is really, in my mind, a time to celebrate a very successful election that was done fairly, and it was done in the midst of an extraordinary time that we are living in, and it is the result of folks in CISA, your folks, others with Homeland Security, folks with the FBI, and others.

Would you just comment on that as to how we should look at what we just went through? That does not mean that we should not be looking at ways to improve the system, to make sure that we minimize clerical errors, to make sure that if there are isolated incidents of fraud, that they are dealt with and they are caught. But we should be also celebrating what just was pulled off in this country, which is an example of how a democratic system can work efficiently, fairly, and even do it under extraordinary pressure.

Mr. KREBS. I absolutely agree with the earlier conversation about the need for a national conversation about how to improve trust in the elections. I think things I have even recommended about eliminating the direct-recording electronic voting machine (DRE) and having more audits available after the election, and that is going to require, again, that policy conversation. It is going to require investing in democracy. But we do need to recognize the fact that this was a historic election. We had 100 million voters by November 3. That shows that people wanted to get out there and vote. They wanted to participate in this process. All along we have hundreds of thousands of election workers out there that, as you have pointed out, as I said in my opening statement, that risked their lives in a global pandemic to make sure that we could all get out there and vote.

We need to support them. I have significant concerns that the targeted violence against these election workers is going to have a chilling effect on turnout of election workers in the future. If there are no election workers, it is really hard to do an election. We need to think about that and how to counter that going forward.

Senator PETERS. Thank you.

Chairman JOHNSON. Thank you, Senator Peters.

This was a number of times we have talked about threat and violence against election workers, which obviously nobody on this Committee condones at all. At all. I certainly hope there is not an inference in all this discussion that this hearing is going to spawn some of that. Anybody listening to this hearing, do not engage in

that. OK? I wish Senator Paul were actually here to talk about his scrape with threats and violence in the political realm. We are in a terrible position in this country where you have this level of threat across the political spectrum. Nobody should condone it, certainly not this Committee. But that is what I think this hearing is about, is to provide the information, talk honestly about it, take a look at allegations. If they can be explained, take them off the table. There is plenty, as we were doing our preparation for this hearing, that we were able to take off the table. But that is what this is about. This is about information, obtaining it, the freedom to obtain it and disseminate it, information.

With that, I will turn it over to Senator Carper.

Senator CARPER. Thanks, Mr. Chairman. Again, our thanks to our witnesses. You have been patient and been here for a long time, those of you that are here personally and those that are connected from afar.

I mentioned earlier I went to Ohio State. Unfortunately, nobody in my family had ever graduated from college. I won this Navy ROTC scholarship. I got to go to college, and the first one in my family, I think, to graduate from college.

When I got to Ohio State, I found out there was a little town just north of Columbus called "Delaware," and so my 4 years at Ohio State, I am thinking of Delaware. I am thinking, it is a little town just north of Columbus. Then I found out later on it is a State. When I finished up my active duty at the end of the Vietnam War and moved from California to Delaware to get an Master of Business Administration (MBA), I learned on December 7, 1787, Delaware became the first colony to ratify the Constitution. Then 12 others followed suit, and we ended up with a country that prevails to this day.

I am little bit of a student of history. I know we all are. But one of the things I learned about the Framers, the Constitutional Convention up in Philadelphia, just north of where my wife and I live—our family lives just north of Wilmington—is they disagreed on a bunch of stuff. Probably the hardest thing for them to agree on, as it turns out, was should there be a judiciary, Article II I think it is, but should there be a judiciary, and if so, who is going to pick the judges? And they argued and argued for days, weeks, trying to figure it out. And somebody came up with the idea and they finally said it should not just be the Senate, it should not just be the House. It ought to be the President to appoint with the advice and consent of the Senate.

And so they voted on it, and they voted it down. Whenever they would run into an impasse up in Philadelphia, they would bring in faith leaders to come in and pray for wisdom for our Framers. They did that again, and they debate some more for days, and finally somebody said, why don't we just go back to the earlier idea and vote on it again? And they did, and they adopted the clause that says the President shall nominate with the advice and consent of the Senate, those who will serve lifetime terms, rather extraordinary, our judges.

Is it a perfect solution? No. We have been wrestling for, what, 200-and-some years figuring out what is the advice and consent of

the Senate. What does that really mean? Just in recent months, we have been wrestling again with that.

But it is an imperfect solution to a very real challenge, and that is that we are going to have disagreements and we are going to have disputes that need to be resolved. This is before—I was talking about football earlier. In baseball, they call balls and strikes. But the Framers, they did not have baseball to talk about, but they knew they needed somebody to call balls and strikes and to have a system that most people say, well, that is fair and reasonable.

We have needed judges, Federal judges and others, to be able to call balls and strikes in all this litigation, 61 instances around the country. Sixty-one. And they have done that, and some people like the results, and other people do not.

I have two points to make in closing before I have to go to another meeting. But one of those is at some point in time we have to say enough is enough, it is time to turn the page, and let us get about our Nation's work. Here this week, we were just voting on the floor, and people are talking about negotiations going on with this COVID package, addressing climate change in ways that create jobs, all kinds of stuff that is in play. Literally right now, it is an exciting time to be in the Senate, and I am encouraged by that.

The other thing I would say, in the Navy, I was a naval flight officer (NFO), P–3 aircraft, mission commander for a long time, active and reserve. In naval aviation, especially in the P–3 community, you have a job in the airplane, and the crew, and you have a job on the ground. For a while, my job was—I was described as an air intelligence officer when we were in Southeast Asia. I had huge respect for intelligence agents, and we got a bunch of them, really good ones. One of our friends, one of our former colleagues, was the former Senator from Indiana, and he ended up as Director of National Intelligence (DNI), and a good friend of, I think, all of us. Dan, I talked to him when he stepped down as head of DNI, and I asked him, I said, "Just talk to me as a friend and off the record." I guess I am going on the record. But I said, "Are you convinced that the Russians were involved in trying to put their fingers on the scales of the Presidential elections in 2016?" He said, "Without a doubt. Without a doubt they were." I said, "Well, there are like 17 or so intelligence agencies. Do some of them feel that way?" He said, "All of us do. It is unanimous. Everybody feels that the Russians were interfering in our election in 2016, and they wanted to change the outcome." And he said, "They were not trying to help Hillary Clinton. They were trying to help Donald Trump."

I am not asserting that they were doing that at his request or—but, wait a minute, maybe they were, come to think of it. But there is no question they were involved, and with a purpose, a single purpose, the Russians, and we caught them red-handed. We have been dwelling on that for 4 years now. We need to get over it. I respect enormously the work of our intelligence agencies. I think we all do. But we need to put that in our rearview mirror. If we are ever going to put this pandemic in the rearview mirror, we have to figure out how to provide vaccinations timely, promptly, correctly to about 250 million Americans. If we do not vaccinate kids under the age of 7, there are 250 million Americans we have to get vaccinated not once but twice, in the right sequence, good

recordkeeping. We have to convince about 30 percent of the people in this country that it is safe to do this. We have to set an example for that. We have a lot of work to do. If we do that, we will be on our way coming out of this recession and on our way to better days ahead for our country and for the people who really are counting on us. I would ask us to keep our eye on the ball.

Let me close, Mr. Chairman, if I could. We only have three counties in Delaware. The southernmost county is called Sussex County, and there is a town in Sussex County called Seaford, which is famous for being the first nylon plant in the world. It was built in Seaford, Delaware, and they had like 4,000 people working there from World War II up until about 10 years ago. There was a church close to the plant there. It is a Methodist church, and the minister that used to be there was an old guy, Reverend Reynolds. His son was a Republican State representative and a football coach and a great guy. When I got elected Governor, he said to me—he wanted to come and sit and talk to me and visit with me and share some thoughts, and I said, "Sure." Everybody has known in our lives—I am sure the Chairman and Ranking Member, people we have known in our lives, they are just wise. They just have a lot of wisdom, and every now and then they share it with us.

He came to meet with me, and he said these words—we were having a lovely conversation. We used to have lunch together. And he said to me, "Just remember this, Tom. The main thing is to keep the main thing the main thing." That is what he said. "The main thing is to keep the main thing the main thing."

I sat there and I thought, "What in the world are you talking about?" It took me a while to figure it out, but I finally did. I would just say the main thing here is to keep the main thing the main thing, and that is, we have this gift, the Constitution, that is not perfect but it actually puts us on a course for a more perfect union. A more perfect union. Hopefully we are going to learn from this what we did well in this election and what we did not. And years from now, people will look back and say, "Well, they kept their eye on the ball. They kept their eye on the main thing." If we do that, our history will look well on our efforts.

Thank you, Mr. Chairman. Thank you to our Ranking Member, Senator Peters. To our witnesses, again, thank you all.

Chairman JOHNSON. Thank you, Senator Carper, and, again, I appreciate your outreach this morning.

I would say the main thing of this hearing is the fact that we need to have confidence in the integrity of our election, and we have to recognize the reality that right now—and, quite honestly, for the last 4 years—that has not existed. In 2016, illegitimate result, resistant, you remember the famous Tweet by Mark Zaid. I cannot remember it off the top of my head but something like the coup has begun, impeachment will follow. That is what we have been living with for 4 years. Different election, different result, different side. The reality is people have concerns. I am just saying these are legitimate concerns.

You mentioned the courts. I have acknowledged the process has worked its way to a conclusion. I have something like 59 court cases. Now, many of them, as Mr. Troupis talked about, some were not decided on the facts. They were just decided and dismissed

based on standing, which, again, that is our process. That is a legitimate decision by a court. But it is not very satisfying for people who have some facts that they want to be considered by a court, or, Mr. Binnall, the same thing in Nevada.

So to deny the reality that we have a very serious problem, that is not the main thing. The main thing is we have to acknowledge that problem, and we have to work together to fix it, to restore the confidence.

Let me just see if I can wake up Mr. Ryan and Mr. Palmer and make sure they are there. I will ask a question of each of you, and then I will give all of you the opportunity to kind of make a relatively brief—this is actually a long hearing for us. I know the Judiciary Committee sometimes goes on long, but this is a long hearing for our Committee, and I really do appreciate the involvement of as many members who took this thing seriously.

But, Mr. Ryan, are you there?

Mr. RYAN. I am. Thank you, Senator.

Chairman JOHNSON. Sorry about that. I hope you had lunch or something in the interim. Representative Ryan, in our conversations, you were talking about, as Mr. Binnall talked about, your inability to get access to certain things that I would hope Director Krebs would agree should be transparent and that those of you having questions about or even challenging results should have access to in order to mount an effective challenge. Can you talk a little bit about that?

Mr. RYAN. Actually, Senator, as a former chair of an audit committee of publicly traded companies and currently the chair of the audit committee of the Public School Employee Retirement System, the control environment is a critical component of it. Mr. Krebs is referring to, as an example, the security systems, and I do not dispute his comments on that at all. I applaud the great work that has been done at CISA. But until the entire control environment—that is, the tone at the top—has been properly evaluated and documented to where you can have a Six Sigma LEAN systems approach that allows you to be able to have this transparent, auditable result, it violates one of the basic principles of any systems of internal controls.

One of the things that we tried to deal with with the Sarbanes-Oxley bill that I think was done effectively was this concept of control deficiencies, significant deficiencies, and material weaknesses. The absence of the ability to provide a timely audit of that information is problematic.

I would like to just make this comment. I spent a lifetime as a reserve officer, and I was also on active duty, either in Operation Uphold Democracy in Haiti, Operation Iraqi Freedom. I helped supervise some of the election results in Iraq in 2005 after I was called out of retirement. I would pray that all those sacrifices made by the millions upon millions of people who served in our military to support and defend the Constitution of the United States against enemies foreign and domestic would be upheld as well on our shores so that we can ensure the same type of election integrity that we are asking for with transparent, fair, and accurate results to be assured within the United States.

We know 44 of the States apparently went off without a hitch, so we have six States that we are dealing with. That is a pretty good track record, but, unfortunately, when you consider the fact that four of the States were razor-thin margin close, the results of the election could have been in question. I concur, Senator, that most of the results have already been looked at from a challenge from a legal perspective, so it is probably a moot point for the current election, but I pray that the Senate will take up this battle standard and say we need to really reaffirm to make sure that the people have the faith and confidence in our election systems.

I try to live by a triangle of faith, that faith is to believe, to believe is to have faith, and to have faith is to have trust. Whenever that trust triangle is broken, we will have difficulties and discord will follow. I pray to God that every person listening to this testimony hears your words and says let us have a peaceful resolution of all of these concerns that we have so we can get on with business as usual.

Chairman JOHNSON. Thank you, Representative Ryan, and thank you for your service. We will come back to you for your closing comment.

Mr. Palmer, in our discussion prior to this hearing—and, again, I appreciate your service and your membership in the Commission—you talked about some things that troubled you with this election. Can you just kind of review those with the Committee?

Mr. PALMER. A few of the things that I was concerned about, I think that raise the emotions from the political campaigns, some of it was the treatment of poll watchers. I believe transparency is a very important thing, and one of the concerns I had was that people need to be treated with respect. I understand as an election administrator that often we are doing our job, and we do not believe anybody needs to be watching the process. But some of the reports, it gets back to sort of this the way we treat each other in this country, and if a poll watcher is observing the process, they have a right to be there to observe the process; they need to be respectful of the election official. There were some significant reports that that process was, interfered with, and people were treated very poorly. It is not the first time. I worked at the Department of Justice in the Civil Rights Division, and one of the things that I saw often was based on party or race, citizens treat each other poorly, and even in the context of elections.

I think that we need to make a commitment of respect toward each other and to each political campaign. I think that that was the major issue. I think that hearing a lot of the reports about the inaccuracy of the voter rolls, I have been talking about this for a long time. It is because there is just not the focus or the resources provided at the State or local level, in my opinion, to maintain the accuracy of the voter rolls. I think that a lot can be done in a nonpartisan way, in a very smart way, with technology. Election officials do not often have the latest technology, and so upgrades to voter registration systems and to resources of data can help them clean and make sure their rolls are as accurate as could be. Frankly, I just think that this becomes somewhat of a partisan issue and, therefore, any attempt to maintain the accuracy of the rolls can be seen as a negative. This is what happens, that if you have highly

inaccurate rolls, then there is a perception of fraud. Sometimes there is actual fraud. We actually see that. It may not change an election except in a close race. But our job as administrators is to make sure that there is no fraud and mitigate and minimize any irregularities. That is the goal. Only with technology and resources and a commitment to doing it will we see those instances decrease. I believe technology and resources are some bipartisan ways to decrease that, sir.

Chairman JOHNSON. If you could also, because your Commission does act to certify some of these voting machines—not all of them, but in some States you do. Can you just quickly go through kind of what that certification process is? I think that was one of the issues you did see, somebody trying to get back into those machines inside that certification process.

Mr. PALMER. We have a certification process for voting systems. One of the vulnerabilities that we have—and I believe CISA would agree—is that the nonvoting systems that are tied to the Internet, they perform important functions like voter registration, electronic poll books. There are no standards or testing, and that is one of the things that we are trying to do at the EAC with adequate funding we could do. But it is a big gap in our defenses, and it is one that we may not have been burned this time, but it is a vulnerability, and we need to take care of it.

Chairman JOHNSON. OK. Thank you.

Now we will move to closing statements here, and we will go in reverse order. Again, former Director Krebs, I appreciate your service to the country. I appreciate what you accomplished. As you know, I have acknowledged that repeatedly. I think the fact that we have gone from 82 to 95 percent paper backup, that is all great stuff. I certainly appreciate you coming here and testifying today. I will let you make any closing comments. Go ahead.

Mr. KREBS. Thank you, Chairman Johnson. I am going to keep this short because I think this is a historic hearing for me. This may be the longest hearing that I have had in this chamber, so I will try to wrap this one up quickly.

First is thank you to you for your ongoing and constant support of CISA. You were key in getting us across the finish line in the Senate and ultimately in November 2018. So thank you for your leadership there, supporting other key initiatives for the agency, including the administrative subpoena bill. So thank you for that.

Just a quick comment to the team at CISA, if they are watching. It was honor to lead. Thank you for that opportunity to lead you. You have a great future ahead of you, keep at it.

And then, last, thank you to the other witnesses for showing up today and thank you for what they do. But, again, thank you for your leadership here and good luck.

Chairman JOHNSON. Although maybe based on their attention, you might encourage them to stay a little bit longer, but I will do that. Mr. Binnall.

Mr. BINNALL. Thank you, Mr. Chairman. We cannot ignore voter fraud away. We cannot just wish it away. Unfortunately, that is what the media these past weeks has been trying to do in the most biased reporting I think I have ever seen, where even in headlines they try to claim that the evidence I have seen with my own eyes

is somehow not there. We cannot wish it away. It is just simply right now a gaslighting attempt on America. This is real. This happened. We have to address it.

We cannot intimidate the problem away. Rightfully, much testimony today has talked about why it is so important that government officials, election officials, not be intimidated. But myself, the lawyers on my team, volunteers, whistleblowers, there are a number of people who have stood up for this fraud that have faced similar death threats, similar intimidation, similar harassment. I do not pay it a lot of attention because no one is ever going to intimidate me away from pursuing the truth, pursuing the law, representing my client. But we need to make sure that other groups that are out there that are encouraging the intimidation of lawyers, even, from threatening to go after their bar cards on one side, going after their clients or going after their safety or their lives, that cannot stand either.

We cannot stonewall it away. I talked briefly about some stonewalling attempts. One other that we ran across in Nevada is that we had Postal Service employees that we knew of that were directly told to deliver ballots to undeliverable addresses. That is what resulted in ballots being littered all across apartment mail rooms and trash cans everywhere, and they were told in many instances to deliver ballots to undeliverable addresses. The United States Postal Service, they obstructed our ability to get that evidence in our case. We lost one of our 15 depositions because the United States Postal Service actually obstructed that.

It raises the question with all this stonewalling that we encountered: What do you have to hide? I think we know in this case what there is to hide.

I said in my opening statement that government by consent of the governed is hard to win and easy to lose. That is why it is so important that we take this so incredibly seriously.

Senator Hawley told a very important story about his constituents, and I ask all Senators to think about their constituents, to think about how you are supposed to tell your constituents to turn out to vote if they do not know that it is their vote that is going to matter, that they do not know if their vote is going to be canceled out by the fraud of somebody else, their vote is going to be diluted by these irregularities.

We cannot pretend that this problem did not happen. It did. This is the United States of America. We do not run from that. We fix it. We have to use every arrow in our quiver to fix it because it did happen, and it is now on all of us to make sure that we fix it.

I really appreciate the Committee's time and the Chairman's time. Thank you.

Chairman JOHNSON. Thank you, Mr. Binnall. Representative Ryan.

Mr. RYAN. Senator, thank you very much for your courage in having this hearing.

If I could just conclude with these comments, our Nation is at a crossroads. No matter what happens with any of the work that is being done relative to looking at this, since probably about the year 2000 and apparently even going back as far as 1787, although I was not there for that particular meeting, shortly thereafter but

not that one, the consent of the governed will determine whether or not they believe in the results of any election. It has gotten significantly worse. It is one of the reasons I ran for office. I was elected in 2016, obviously later in my life.

We have to examine the processes from start to finish. CISA has done a phenomenal job in so many different respects, and under the concerns relative to COVID–19, I actually recommend using the CISA standards. For all the poll watchers, all the poll workers, the directors of election, God bless them for the great work they have done.

By the same token, there is a point in time now where we as a Nation have to sit back and say we have to solve these problems. We have to take a look at the entire process from start to finish and the ability of people to interfere with those election results, the ability of the person to be able to change the system of controls that we can no longer rely on.

I have heard so many comments today, and I go back to what I heard in 2007 and 2008 when I was a practicing CPA keeping companies out of bankruptcy, and Meredith Whitney was bringing up the concerns she had about the strength and stability of the banking industry, and she was vilified. Michael Lewis, when he wrote "The Big Short," was vilified. The assumption was that no-documentation loans were not dangerous, ignore that concern that both of them had, nothing to be concerned about.

Shortly thereafter, there was as triggering event, and the housing bubble burst, and the United States was thrust into one of the worst issues that we have had to deal with financially in a long time. Many States are still recovering.

I would tell you we are at that seminal moment today relative to the sanctity of our elections that have probably been building since 1787, but now is the time for all of us to sit back and say we need to not vilify one another—and, Senator, I applaud you for your willingness to get to an open, transparent process here. But we need to sit down and do these types of hearings. As much as the Band-aid being pulled off may be painful, we need to expose these concerns so that the 150 million people who voted can once again feel with confidence that the election process works and their vote mattered.

Senator, thank you for your time and for the great work of your entire staff.

Chairman JOHNSON. Thank you, Representative Ryan, for your testimony and your service to this country. Mr. Troupis.

Mr. TROUPIS. Senator, thank you very much. I want to say right off the bat that I am honored to represent the President. I was honored to get the call. But I am not naive. One of the reasons I was called is because virtually every major law firm in this country and in this city refused to represent the President, not because of the lack of merit of his claims—we have certainly demonstrated there is merit—but because of the cancel culture, because of the environment that has been created by the left that has intimidated lawyers so they cannot be here. They are not here from the giant law firms precisely because they were ordered by their management committees and others that you cannot take those cases. The reason you cannot take those cases is because our clients or the Demo-

crat Party or the incoming administration will remember that, and they will hold it against you. That is a sad state of affairs.

As a former judge, I was so incensed by that that I took the representation. That was the ultimate reason I took that representation. I have heard a lot today about what went on afterwards as if these latest threats are coming from the right. Remember why and how this started after the election. We need to have faith in our court system. We have to acknowledge that the court system has been deeply intimidated by the left, just as the lawyers have been intimidated, and that is a sad, sad state of affairs. I so much appreciate, Senator, that you are holding these hearings because, otherwise, as we are finding out all over the country, these items just disappear.

No. 2, I wanted to say, as I have said throughout my testimony, that one of the reasons people are doubting the election is because the other side here, the Biden campaign's primary defense is do not hear the evidence, do not let them litigate, do not have a court rule on the substance.

Let us be honest. That is what is going on. That is why the public does not trust this outcome. It is not about the President. It is about what the other side is doing to intimidate and force people not to listen, not to take the evidence.

I have heard lots of fancy words here today, but if you give transparency, if you let the issues come out—and I have represented Republicans, and I have represented Democrats, and at the end of the day, lawyers do their job when it is open and we are able to present the evidence. I so appreciate the fact that you, a nonlawyer, is taking on this task here.

But, finally—and I have to say this—we had 4,000 people volunteer from everywhere in the country to come to Wisconsin to participate in the process. We had over 2,500 volunteers over a 10-day period take their own time, their own money, come from all over the country, and they came and they attended the recount and they participated. I said to the recount on the floor, the Democrats and the Republicans, I said, "If you are losing your faith in the greatness of this republic, look at this recount. Look at the number of people from the Trump campaign and from the Biden campaign that would give of their time and effort to be here," in that case in Madison, Wisconsin. It was humbling, truly humbling, for me and everyone on our legal team and everyone who was there.

We have a great system, and people want to participate. Let us make it transparent. Again, I cannot thank those volunteers enough. They are the ones who make this democracy work.

Chairman JOHNSON. Thank you, Mr. Troupis. I noticed Mr. Binnall shaking his head when you were talking about the fact that lawyers from large law firms were more than discouraged, they were actually prevented from representing the President, which is kind of a sad state of affairs.

I will also say storefronts in big cities did not board up their windows in anticipation of a Vice President Biden victory. Commissioner Palmer.

Mr. PALMER. Thank you for the opportunity to testify today. I will make a few comments.

The EAC is looking at holding a series of hearing and issue a report on some nonpartisan recommendations. There are going to be a lot of policy disputes around the country in State legislatures, and, that could be debated back and forth about what the best policies in certain areas. But we as the election administration community want to do better. We understand that oftentimes there are flaws in the way we administer elections. It happens in every election. We could always do better.

The way we respond in the election administration community, just like the military, is more education and more training and more resources when available, and that is really the recipe, I believe, moving forward, if you want to improve the performance of election officials and their election workers within an office and our poll workers, it will take a commitment of time, resources, and training to do so. The EAC is prepared to do that free to localities with appropriate funding.

I think that is really my solution, thinking back to my military days, whenever there was an issue, more education and more funding, more training.

Chairman JOHNSON. Thank you, Commissioner Palmer.

Judge Starr, you were our lead-off hitter. Now you are batting cleanup here, so thank you for hanging in there. Do you have some closing comments?

Mr. STARR. I think the bottom of the order, Mr. Chairman, but thank you. Thank you for your leadership and a real sense today's hearing has been a tribute to the Constitution. I loved Senator Carper's comments about December 7, 1787, and the idea to form a more perfect union, and this hearing has been in that spirit.

I am also reminded of one of President Lyndon Johnson's favorite quotes from the Prophet Isaiah: "Come let us reason together." I think this has been a time of reasoning together and listening in the great traditions of the U.S. Senate.

Let me close with words that I heard with my own ears from United States Senator Alan Simpson, now the tender age of 89 in retirement, when he was addressing in his valedictory at the Kennedy Institute of Politics which he headed for 2 years. He told the audience—and it was in very hushed tones. Whatever your politics were, Alan Simpson was a great man and recognized to be that. He closed with these words: "In politics, if you do not have integrity, you do not have anything." What this hearing has tried to do is how can we, in fact, promote not just confidence in government, but how can we, in fact, promote the integrity and honesty which is at the bedrock of the kind of government in whom we can trust.

So thank you for the honor of appearing before the Committee.

Chairman JOHNSON. Thank you, Judge Starr, for your participation and for your service to this country.

I do want to make a comment. We spoke to—and we appreciated the fact—Dominion Systems, Edison Research, AP, a number of people we spoke to prior to this hearing. Now, they did not all participate, but we will leave the record open, and I encourage everybody who spoke, and people that we did not, if you want to input information into this record, you have a couple weeks to do it, and I encourage it. Our staff will look at that, and we will vet it. We will call you; we will ask questions. This hearing is not dangerous.

What would be dangerous is not discussing this openly and frankly, with transparency.

This is a problem that we have to acknowledge and recognize and solve together. We are only going to do that with information. I am soliciting information. This is only part of the process. There was oversight before this hearing. There needs to be oversight after this in the next Congress, and hopefully I can work with Senator Carper, who I think we all recognize has done a pretty good job of outreach here and some pretty bipartisan words here. I am hoping that is how we can move forward, because I truly think as Americans we share the same goal. We all want a safe, prosperous, secure country, State, community. That is what we want. We want to be able to raise our children in safety and freedom. The way it works in this country is through participation in the democratic process.

I think everybody in this panel wants to make sure that we have good participation. We encourage citizens to participate. We also want every legitimate vote to count. But what we should be every bit in favor of making sure that every vote is legitimate. That is what this is all about. If we can put the controls in place and actually act on them—it is great having paper ballots, but you have to have access to look at it to give yourself confidence in the current election and moving forward that, OK, this all worked out.

Wisconsin's recount, totally honest. Our count was almost 100 percent accurate. Other issues, but, again, I think in Wisconsin we got a pretty good level of confidence that we run our elections right. I will just give another shout-out to Jeanette Merten, the county clerk in the town of Oshkosh. I am sure the vast majority are just like Jeanette. We are in really good hands.

To conclude, this is my last hearing. It has been an honor and privilege to chair this Committee.

The hearing is adjourned.

[Whereupon, at 1:39 p.m., the Committee was adjourned.]

APPENDIX

Opening Statement of Chairman Ron Johnson:

"Examining Irregularities in the 2020 Election," December 16, 2020

As submitted for the record:

A week ago, when I gave notice of this hearing, there were more outstanding issues and court cases than today. But even though courts have handed down decisions and the Electoral College has awarded Joe Biden 306 electoral votes, a large percentage of the American public does not believe the November election results are legitimate. This is not a sustainable state of affairs in our democratic republic.

There are many reasons for this high level of skepticism. It starts with today's climate of hyper partisanship, which was only exacerbated by the persistent efforts to delegitimize the results of the 2016 election. The corrupt investigation and media coverage of the Russian collusion hoax reduced faith in our institutions. And the ongoing suppression and censorship of conservative perspectives by biased news media and social media adds fuel to the flames.

Senator Grassley's and my investigation and report on the conflicts of interest and foreign financial entanglements of the Biden family is just one example of how media suppression can, and does, affect the outcome of an election. It is both amazing, and galling, that all of a sudden — post-election — this has become a news story and a scandal worthy of investigation.

With less than a month left in my chairmanship of this committee, the examination of irregularities in the 2020 election will obviously be my last investigation and last hearing as chairman. But oversight into election security should continue into the next Congress because we must restore confidence in the integrity of our voting system.

This effort should be bipartisan. In my statement announcing this hearing, I stated its goal was to "resolve suspicions with full transparency and public awareness." That is what good oversight can accomplish. Unfortunately, Senators Schumer and Peters ignored my statement and instead chose to politically attack me and this hearing. As I commented in last Tuesday's hearing on early treatment of COVID, closed-mindedness is a root cause of many problems we face.

As a quick aside, in preparation for this hearing, I asked my staff to find out as much as they could about basic election mechanics, controls and data flow. Much of the suspicion comes from

a lack of understanding how everything works and from how much variety there is in the way each precinct, county and state conducts its elections. Even though decentralization makes it more difficult to understand the full process, it also dramatically enhances the security of our national elections.

In addition to the witnesses testifying today, we spoke to state and local election officials, as well as suppliers of election equipment and data.

I believe the alleged irregularities can be organized into three basic categories: 1) lax enforcement or violations of election laws and controls, 2) fraudulent votes and ballot stuffing, and 3) corruption of voting machines and software that might be programmed to add or switch votes. In the time we had, it was impossible to fully identify and examine every allegation. But many of these irregularities raise legitimate concerns, and they do need to be taken seriously. Here is a brief summary of what we did learn.

First, multiple controls do exist to help ensure election integrity. Voter registration rolls and election logs for both in-person and absentee balloting are used to verify eligible voters and to help prevent fraudulent voting. But it is not a perfect system, as we will hear in testimony. We have increased the percentage of votes using paper ballots from 82% in 2016 to 95% in 2020. This is a significant improvement in providing a backup audit trail, but only if full or statistically valid recounts occur.

Optical scanners, ballot marking machines, and tabulators should not be connected to the internet during voting, but some have the capability of being connected and there are allegations that some were. Once voting ends, those machines print out a paper report and also transmit voting data in digital form into two separate data streams from precinct to the county level and then to the state level. The first data stream is sent to the official state election management system and the second to the unofficial media reporting system through companies such as Edison Research and the Associated Press. There is no uniform method of transmission, it is not fully automated, and thousands of human beings are involved in the process. Human error does occur, but that is what the paper backups and post-election canvassing is designed to catch.

Today, we will hear testimony on how election laws in some cases were not enforced and how fraudulent voting did occur, as it always does. The question that follows is whether the level of fraud would alter the outcome of the election. This year, in dozens of court cases, through the certification process in each state, and by the Electoral College vote, the conclusion has collectively been reached that it would not. However, lax enforcement, denying effective

bipartisan observation of the complete election process, and failing to be fully transparent or conduct reasonable audits has led to heightened suspicion.

The most difficult allegations to assess involve vulnerabilities in voting machines and the software used. In order to effectively determine the extent to which voting machines were subject to nefarious intrusion or other vulnerabilities, computer science experts must be given the opportunity to examine these allegations. This is a complex issue that has been under congressional scrutiny for several years. Since 2018, I am aware of three oversight letters requesting information from the main suppliers of voting machines. This oversight focused on Election Systems & Software LLC, Dominion Voting Systems Inc., and Hart InterCivic Inc. Today, we have a witness from the Election Assistance Commission, which certifies voting machines, to describe what has been done, and what more can be done, to address any vulnerabilities.

On March 7, 2018, it was reported that Senators Klobuchar and Shaheen "asked major vendors of U.S. voting equipment whether they have allowed Russian entities to scrutinize their software, saying the practice could allow Moscow to hack into American elections infrastructure."

Last year, on March 26, 2019, Senators Klobuchar, Warner and Reed and Ranking Member Peters wrote: "The integrity of our elections remains under serious threat. Our nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020 elections as they did the 2016 and 2018 elections." With companies offering "a combination of older legacy machines and newer systems, vulnerabilities in each present a problem for the security of our democracy and they must be addressed."

And then on December 6, 2019, Senators Warren, Klobuchar and Wyden and Representative Pocan wrote:

"We are particularly concerned that secretive and 'trouble-plagued companies,' owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, 'have long skimped on security in favor of convenience,' leaving voting systems across the country 'prone to security problems.'"

"Moreover, even when state and local officials work on replacing antiquated machines, many continue to 'run on old software that will soon be outdated and more vulnerable to hackers.'

"In 2018 alone 'voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana.' In addition, researchers recently uncovered previously undisclosed vulnerabilities in 'nearly three dozen backend election systems in 10 states.' And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, '[n]othing went right on Election Day. Everything went wrong. That's a problem.' These problems threaten the integrity of our elections."

Maybe I missed it, but I don't recall the media or anyone else accusing these eight congressional Democrats of indulging in "quackery and conspiracy theories" or their letters of being a "ridiculous charade," as Senator Schumer did when he used those exact words attacking me and this hearing from the Senate floor.

The fact that our last two presidential elections have not been accepted as legitimate by large percentages of the America public is a serious problem that threatens our republic. This hearing is part of what should be ongoing congressional oversight that is meant to transparently address that problem.

U.S. Senate Homeland Security and Governmental Affairs Committee
Examining Irregularities in the 2020 Election
December 16, 2020
Opening Statement of Ranking Member Gary C. Peters

Mr. Chairman,

If we have learned anything over the past few years, it's that we cannot take our democracy for granted. Our institutions and democratic norms have been under assault, and when elected leaders fail to stand up and protect them, we see just how quickly they can erode.

For generations, America has been a shining example for budding democracies around the world. We have shown the world that strong governments and free societies can thrive when political power is entrusted to the people.

We have demonstrated that the will of the people is above any individual, and that when voters choose their new leaders, power can be transferred peacefully.

That's why I am frankly shocked that this committee is holding this irresponsible hearing today.

The President and many of his supporters are continuing their efforts to undermine the will of the people, disenfranchise voters, and sow the seeds of mistrust and discontent to further their partisan desire for power.

Whether intended to or not, this hearing gives a platform to conspiracy theories and lies, and it's a destructive exercise that has no place in the U.S. Senate.

Joe Biden won the election more than five weeks ago with 306 electoral votes and received the most popular votes for a presidential candidate in American history.

All 50 states and the District of Columbia have certified those results. The Electoral College met Monday and all affirmed that Joe Biden will be the President on January 20, 2021.

It's a result that the majority of the American people recognize, along with the leaders of more than 150 countries around the world.

Yet even after all of that, significant numbers of Republican elected officials have been slow to publicly acknowledge that Joe Biden will be the next president of the United States.

I appreciate that yesterday several of my Republican colleagues made their first public comments acknowledging this fact. And I appreciate that even the Chairman's rhetoric around this election has evolved over the past 24 hours.

But let me be clear, deciding to move forward with this hearing today is still dangerous.

Elected leaders who were chosen by the voters to help uphold our institutions and democratic values spent weeks either turning a blind eye, or parroting provocative rhetoric and false claims about the election.

By not speaking out earlier, even though they knew it was wrong, that there was no evidence to support these claims, and that this inflammatory rhetoric is harmful to our democracy, many elected officials gave the President and his supporters license to spread damaging lies about the election.

We have known for weeks that there was no widespread voter fraud, a fact that President Trump's own Department of Justice confirmed.

There was no election interference and the election wasn't rigged. In fact, independent election security officials, and the Department of Homeland Security, have called this election "the most secure in American history." We will hear directly from the former director of CISA who will testify today that this is a fact.

In the face of intimidation from the President and his supporters, including threats of violence and even death, election officials in states across the country certified their results as accurate.

More than 50 post-election lawsuits filed by the Trump campaign have been dismissed or withdrawn, including by the U.S. Supreme Court, because there is simply no evidence to support these claims in a court of law.

And despite the title of today's hearing, there were no widespread election "irregularities" that affected the final outcome. These claims are false. And giving them more oxygen is a grave threat to the future of our democracy.

I understand the Chairman's desire to ensure our elections run smoothly, and I agree that we need to restore faith and trust in our election process.

But I am concerned today's hearing will do more harm than good by confusing a few anecdotes about human error with the insidious claims the President has aired.

Mistakes do happen in elections. But there is a difference between a clerk making an error that gets caught and corrected during routine audits, and calling the entire election fraudulent or stolen when there's no evidence, all because you didn't like the outcome.

Amplifying these obviously false narratives about fraud or irregularities, corrodes public trust, threatens our national security, and weakens our democracy and our standing around the world. Every time the President or his followers make these false claims, they destabilize our relationships with our allies, and allow our authoritarian adversaries to undercut America's democratic leadership around the globe.

Democracy, and a free society, are not guaranteed. We have seen democracies around the world crumble because of similar words and actions.

When executives abuse their power, when political leaders work to stifle the free press, and when they delegitimize the principle of one person, one vote, it puts our country on a dangerous path toward authoritarianism.

I have faith that our democracy is strong and that it can withstand these attacks. But we need all of our leaders to speak up and condemn this harmful rhetoric.

Preserving our democracy takes hard work, and I am deeply troubled that we are edging closer and closer to a crisis point.

Now is the time for American patriots who love this country to say, enough is enough.

Now is the time for patriots to put our nation's founding ideals first, during a time when American democracy needs the strongest defense we can give.

Senate Committee on Homeland Security and Governmental Affairs
Testimony of Judge Ken Starr
December 16, 2020

Chairman Johnson, Ranking Member Peters, and Members of the Committee:

"We the People…"

These are the elegant words that introduced the world to America's Constitution. Launched in Philadelphia in the late 18th Century was a bold experiment in government of and by and for the people. At the time, in the most democratic founding document in human history, the Constitution of the United States looked ahead to ever-expanding participation in the fundamental act of the American experiment. – the right of "We the People" to vote. As the Supreme Court has aptly put it, "the right to vote is…a fundamental political right…preservative of all rights."

As our nation's experiment in participatory democracy continued, America's Founding document provided the vehicle for ever-greater inclusion. Under the authority of Article V, the post-Civil War Congress proposed a far-reaching expansion of the franchise to welcome those who had previously suffered through the unspeakable scourge of slavery. The 15th Amendment served as the capstone of the trio of post -Civil War Amendments, abolishing slavery; guarantying equal protection and due process to all persons; and finally, conferring the right to participate in our constitutional democracy on the newly-freed slaves.

With the franchise expanding came – one hundred years ago -- the inclusion of women-- in 1920 -- by virtue of the 19th Amendment; the elimination of financial impediments to vote (the 24th Amendment in 1964); and finally, in the wake of the Vietnam War, the expansion of the vote in federal elections to welcome 18 year-olds (the 26th Amendment in 1971). Along the way,

Congress acted to foster the values of the 15th Amendment through passage of the Voting Rights Act of 1965 and its various extensions over time.

From the beginning, the structure of federal elections, including the election of the President, was a matter primarily entrusted to the States, and specifically to state legislatures. It was not to Governors or other state administrative officials, but to the Legislatures, that the Constitution looked, including the manner of choosing Electors who would convene to determine the next occupant of the White House.

Thus, both Article I and Article II of the Constitution single out state legislatures as the authoritative source of power in framing the architecture of voting. In particular, Article II, section 1, cl. 2, provides: "Each State shall appoint, in such Manner as the Legislatures thereof may direct, a Number of Electors…." That authority, the Supreme Court reminded us in Bush v. Gore, is "plenary" in nature. What the legislature says, goes. As we saw dramatically in the Bush v. Gore litigation, States – and their subdivisions – are where the action is.

Underlying America's story of ever-expanding voting rights was an assumption – one of integrity in the electoral process. Recall the scene in the Academy Award winning film, Selma, as the would-be voter, portrayed by Oprah Winfrey, was unconscionably stymied in her effort to register to vote. Dishonesty caused disenfranchisement – and moral outrage.

As in much of life, guardrails are needed in the election process. Or in the words of the United States Supreme Court, "procedures and safeguards are necessary" to enforce this fundamental right, including – again in the words of the Supreme Court – "prevention of fraud and corrupt practices."

The idea of removing artificial barriers to citizen participation was thus undergirded by the assumption of honest and honorable elections. Under the Constitution, how can the American public be assured of honesty and integrity in the election process? Once again, it is up to the States through their legislatures to erect appropriate checks and balances to keep the voting process – and the counting of the votes -- honest.

Among these guardrails of integrity is the simple idea of proof of voter eligibility. Or, on Election Day, the familiar scene of poll watchers, which Michigan calls "challengers." As the U.S. Supreme Court has succinctly put it, "confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy." The Court went on to say: "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."

Time and again, courts have warned – and in the strongest terms-- that assuring honesty and integrity in elections is a compellingly important government interest. Indeed, Justice Sandra Day O'Connor – who herself had been elected to state office in Arizona – specifically warned that judicial intervention may be required in order to protect the integrity of the election process.

The presidential election of 2020 – with its unusual and indeed unprecedented features – provides an important occasion for lawmakers to pause and to ponder safeguards of honesty. By way of example, one Pennsylvania judge concluded that state law required poll watchers to be present (within six feet) in order to meaningfully to observe the ballot-counting process. In Philadelphia, election officials had indisputably violated this pro-integrity measure. This is a clear and undisputed instance where a crucial safeguard – ensuring the integrity of the ballot-counting process – was thrown by the wayside.

Likewise, the Pennsylvania General Assembly's duly enacted law governing the timing for receipt of mail-in ballots across the Commonwealth was entirely ignored. The Supreme Court, through Justice Samuel Alito, issued a strong condemnation of the Pennsylvania Supreme Court's actions in extending the deadline contrary to state law.

Other witnesses will describe additional factual scenarios that merit careful consideration as we seek to foster confidence in the integrity of the process. These examples all raise troubling questions, especially in the context of the unprecedented use of mail-in ballots during last month's election. After all, it was the Jimmy Carter-James Baker commission, formed in the wake of the 2000 election, that issued a warning about the use of mail-in ballots. That method of voting, they warned, provides fertile ground for a harvest of fraud and abuse. In the spirit of President Carter and Secretary Baker, it is not only useful, but it is important to reflect on the election just past and, with an open mind, soberly assess whether the appropriate safeguards were effectively in place and whether improvements are now called for.

As the Governor of my home State, Greg Abbott, aptly stated one week after the election: "Regardless of party affiliation, or no party affiliation, all Americans must have confidence in the accuracy and transparency of our elections. That can be achieved and must be done…."

Thank you, Mr. Chairman. I look forward to the Committee's questions.

U.S. Senate Committee on Homeland Security and Governmental Affairs
Examining Irregularities in the 2020 Election

Donald Palmer, Vice Chairman
United States Election Assistance Commission (EAC)
December 16, 2020

Good morning Chairman Johnson and members of the committee. I'm thankful for the opportunity to testify before you this morning on the 2020 general election and the efforts of the United States Election Assistance Commission (EAC) to secure the nation's voting systems. Election officials, the Commissioners, and staff at the EAC have a duty to ensure the accuracy and integrity of the voting systems used throughout our nation. Our mission is to support the chief election officials, directors of elections, and administrators in all localities across the country.

As the only federal agency completely dedicated to election administration, the EAC is charged with facilitating secure, accurate, lawful, and accessible elections. As prescribed by the Commission's enabling legislation, the Help America Vote Act of 2002 (HAVA), the EAC is focused on assisting state and local election officials across the United States. We are a bipartisan agency that recognizes that the authority of states to conduct federal elections is a cornerstone of our representative democracy.

The 2020 general election has underscored the vital importance of comprehensive oversight of voting technology and the companies who manufacture these systems – that oversight is an overlapping process of voluntary federal standards, state certification or approval, and local logic and accuracy testing prior to each election.

We work to bolster confidence in democracy by adopting voluntary voting system guidelines, testing voting systems, accrediting test laboratories, and serving as a national clearinghouse of information on election administration. The EAC aspires to do more. Adequate funding is necessary to safeguard the integrity of our nation's elections and instill public confidence in election outcomes.

Let me be clear, the EAC has confidence in the voting systems we certify and in the state and local election administrators who ran the 2020 election; first and foremost, due to the process voting system manufacturers must undergo to receive federal certification.

Before voting machines and election management systems are used in elections, the systems undergo rigorous hardware and software testing by laboratories accredited by the EAC and the National Institute of Standards and Technology (NIST). There are currently two accredited voting system test laboratories: Pro V&V and SLI.

The testing encompasses security, accuracy, functionality, accessibility, usability, and privacy based on requirements in the EAC's voluntary standards. The full testing cycle, from test plan creation to final determination of a system's suitability for federal certification, is managed by

the EAC's Testing and Certification program, and closely monitored for adherence to all applicable standards.

Currently, the EAC's quality monitoring program includes auditing voting system test laboratories and manufacturing facilities, conducting field reviews of EAC-certified voting systems, and gathering information on voting system anomalies on EAC-certified voting systems. I strongly support additional auditing, field reviews, and resolutions of any anomalies discovered.

To apply for EAC certification of a voting system, a company must first apply to register with the agency as a registered manufacturer. Registration requires manufacturers to provide details on their ownership structure, names of officers and/or members of the board of directors and any individual or organization with a controlling interest in the company.

Additionally, a list of all manufacturing and/or assembly facilities used by the manufacturer and the name and contact information of a person at each facility responsible for quality management must be provided.

Finally, a set of technical and management contacts must be provided with the application. Technical and program staff working in the Testing and Certification program office review the application for correctness and sufficiency before a decision is reached regarding a company's application to the program. When any information on the application for registration changes, manufacturers are required to submit an updated application within 30 days.

There are currently eight active manufacturers registered with the EAC's Testing and Certification program. Please note, it is not a requirement to be an EAC registered manufacturer to develop and sell voting systems to election jurisdictions in the United States. Joining the program requires that manufacturers voluntarily agree to the program's requirements as outlined in the EAC's Testing and Certification program manual.

Requirements include complying with EAC inquiries and investigations into the usage and status of fielded EAC-certified voting systems. Under our quality monitoring program, these investigations may arise due to technical failures experienced in the field by election administrators, misrepresentations made in regard to the certification status of a voting system, and deviations in quality in regard to systems submitted to testing versus what is actually being fielded.

In 2020, the EAC Testing and Certification program conducted investigations into voting systems deployed in various jurisdictions. The investigations sought information about the alleged use of uncertified firmware, factual inaccuracies in marketing materials, and improper installation of firmware in certified systems.

The EAC staffed an Election Day war room to gather information from registered manufacturers on issues reported by media or election officials. Five of the eight manufacturers participated in these calls (Dominion, ES&S, Hart InterCivic, MicroVote, and Smartmatic). Additionally, the program is following up with election officials and voting system manufacturers to obtain

information on claims of irregularities reported in the media during the general election. This effort is ongoing.

Jurisdictions across the United States perform a series of tests, including logic and accuracy testing, prior to operating voting machines in polling places. The EAC supports these efforts through technical assistance, grant initiatives, and best practices. Election officials conduct post-election audits to verify the completeness and accuracy of tabulated votes. These audits also help ensure voting equipment is functioning properly. The EAC provides resources and direct assistance to jurisdictions looking to improve their auditing capabilities. We aim to expand our current efforts to provide a comprehensive election audit program. In the future, the EAC would like to formalize its election audit program that would assist election administrators with conducting pre-election and post-election audits, compliance audits (e.g., ADA and security), and developing best-practice guides and white papers.

As we work to support election officials and voters, the EAC recognizes the need to do more than ever to strengthen confidence in the integrity of our elections. Through its clearinghouse mission, the EAC seeks to combat misinformation and disinformation by providing a centralized, trusted source of election administration resources for election officials and voters alike. The EAC seeks to improve voter-facing information on our website and engage in extensive campaigns to combat disinformation.

While we have increased protection of our voting systems, we are very concerned with the vulnerability of other election systems that have access to the internet. We also seek to bolster these election defenses for states through the review and testing of non-voting election systems including voter registration systems, electronic poll books, and election night reporting. The EAC has already undertaken a pilot in partnership with the Center for Internet Security (CIS) to develop an evaluation program for this technology. Continuation of the program will improve risk mitigation of vulnerabilities, usability, and accessibility assessments for all types of non-voting election technology. The program would emphasize disclosure of information to states and localities to better inform their acquisition decisions.

HAVA set forth an ambitious agenda for the EAC, one rooted in protecting the very foundation of our nation's democracy. Despite very real challenges in recent years, the EAC has faithfully fulfilled its obligations and even expanded the support it provides to election administrators and voters. We look forward to working with Congress as we continue our efforts to help America vote. I am happy to answer any questions you may have following today's testimony.

Testimony

James R. Troupis

Senator Johnson and members of the Committee, thank you for this opportunity to present testimony regarding the November 3, 2020 election in Wisconsin. Wisconsin has specific laws related both to elections and to recounts that have been tested both in Court and in the legislative process.

To begin, it is important to understand that Wisconsin treats absentee voting as a "privilege," not a right. Our Legislature explicitly wrote in the law that because absentee voting occurs without the normal election-day protections, it is far more likely to result in, in the statutes words: "fraud or abuse"; "overzealous solicitation of absent electors who may prefer not to participate in an election"; and "undue influence on an absent elector to vote for or against a candidate." The Wisconsin statutes are explicit that the enforcement of them: "shall be . . . mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election."

In Wisconsin, absentee balloting must be witnessed, and the certification on the outside of the envelope containing the ballot provides a place where the

witness must sign, and provide his or her address. That envelope is an official, certified document and as the statute states, "*If a certificate is missing the address of a witness, the ballot may not be counted.*" This provision is mandatory. Despite that explicit directive, the clerks in Dane and Milwaukee Counties actually *altered* these legally binding documents after they arrived in their offices. Addresses were added. As the recent court case explained, even the clerks themselves thought alteration of documents was inappropriate. We identified more than 3,000 such ballot envelopes after the election, during the recount.

Perhaps even more telling was the discovery, after the election, many ballot envelopes had no initials from the municipal clerks. Initials are added to the envelopes containing the ballot by the clerk receiving the envelope as a verification that proper identification has been provided—that the absentee ballot was indeed cast by the person named. If there are no initials, the ballot can not, by law, be counted. More than 2,000 ballots had no initials and thus there was no way even to know if they were properly received and identification was presented.

It is important to recognize that, unlike other States, Wisconsin does not allow advance voting. Instead, any vote cast prior to November 3 was an absentee vote, subject to the mandatory, strict regulation of the statutes. But rather than

follow the statute, the City of Madison conducted advance voting that it labeled "Democracy in the Park" on September 26 and October 3 at 206 separate locations in Madison. Ballots were received, witnesses were provided to certify ballot envelopes, and signage advertised the locations as if it were election day. In Wisconsin the law expressly prohibits any clerk from having more than one additional clerk's office. But, in this Fall's election, Madison created 206. Then, in a rather obvious attempt to avoid later scrutiny, the City took those ballots and mixed them in with all the other absentee ballots so that it would be nearly impossible to identify all the illegal votes cast. Still, even without the names, there is no dispute that 17,271 ballots were received through these improper and illegal events.

Given the pandemic, municipal clerks laudably incorporated safety protocols into election day voting, including plexiglass barriers, social distancing, enforcement of mask mandates and the like. However, in the handling of absentee voting they went far beyond the law. For absentee voters in Dane and Milwaukee Counties the County clerks told voters they could vote without Identification (an obvious requirement for all voters) so long as they claimed to be indefinitely confined under a statute meant for those residing in nursing homes, assisted living facilities and homebound disabled persons. Our Supreme Court

held just this week that the advice given was directly contrary to the statute. 28,395 persons claimed that status in the weeks after the clerks posted their notices. By law, the clerks are required to take action to remove those persons for whom they have "reliable information that [the] . . . elector no longer qualifies for the service." No action was taken, and those individuals, without any identification whatsoever, were allowed to cast ballots. A simple search disclosed individuals who went to protests, attended weddings, went to work, and even acted as a Biden Elector, who was able to get to the Capitol this past week, but claimed four weeks earlier that she was unable to make it to the polls.

The list of the abuses of Wisconsin's absentee voting laws is long. Clerks preprinting their initials on ballot certifications, clerks certifying unknown persons, envelopes witnessed by unauthorized poll workers, certifications submitted that failed to indicate in-person voters, 386 sealed envelopes opened by clerks after the election in Milwaukee County and others in Dane County, and of course nearly 170,000 ballots cast without a separate application. The Wisconsin statutes presume that those votes cast in a manner contrary to that required by statute, were fraudulent or the result of undue influence, and the law mandates explicitly that they not be counted.

All in all, more than 3 million of Wisconsin's citizens cast their votes legally and without taint. Many other votes were not legally cast. As the Chief Justice of Wisconsin's Supreme Court explained several days ago, "Every single voter in this State is harmed when a vote is cast in contravention of the statutes." The 3 million legal voters who cast their ballots ought not have had their votes diluted and cancelled out by votes which, by law, were not to be counted.

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Testimony of Frank Ryan
December 16, 2020

The mail in-ballots system for the general election of 2020 in Pennsylvania was so fraught with inconsistencies and irregularities that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon.

The evidence violations of PA election laws as enacted, election security safeguards, and process flaws include:

1. Actions from the PA Supreme Court which undermined the controls inherent in Act 77 of 2019. The controls which were undermined include:
    a. On September 17, 2020, unilaterally extended the deadline for mail-in ballots to be received to three days after the election, mandated that ballots mailed without a postmark would be presumed to be received, and allowed the use of drop boxes for collection votes.
    b. On October 23, 2020, upon a petition from the Secretary of the Commonwealth, ruled that mail-in ballots need not authenticate signatures for mail-in ballots thereby treating in-person and mail-in voters dissimilarly and eliminating a critical safeguard against potential election crime
2. Actions and inactions by the Secretary of State which undermined the consistency and controls of the election process during the weeks preceding the General Election of November 3, 2020. These include:
    a. On November 2, 2020, the night before the November 3, 2020 election and prior to the prescribed time for pre-canvassing mail-in ballots, the office of the Secretary of the Commonwealth encouraged certain counties to notify party and candidate representatives of mail-in voters whose ballots contained defects;
    b. In certain counties in the Commonwealth, watchers were not allowed to meaningfully observe the pre-canvassing and canvassing activities relating to absentee and mail-in ballots. Although some guidance was provided by the Secretary, the counties did not uniformly adopt practices allowing for meaningful observation (which practices were later endorsed by the Pennsylvania Supreme Court). .

In addition to the concerns of the actions of the Secretary of State and the legislative overreach by the Pennsylvania Supreme Court, the inaccuracies of the actual results reflected in the election system (SURE system) call into question the consistency of the application of voting laws throughout the Commonwealth. Certain inconsistencies stand out to include:

At the county level the pattern of inconsistencies is easily seen. For instance, Over-vote in Philadelphia County -- On November 4th at 11:30am, the DOS posted updated mail in vote counts for Philadelphia County. The number of ballots reported to have been counted was an impossible 508,112 ballots despite the fact that only 432,873 ballots had been issued to voters in that county. Later that day, the ballots counted number was reduced but this begs the question, who had the authority to add and subtract votes on the ballot counts reported to the Department

of State? Even if this was simply a data entry error, the lack of internal controls over such reporting necessitates a review of the numbers, the process and system access.

Additionally, in a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained.

Furthermore, a newly available voter dataset available on data.pa.gov which had been offline for weeks indicated that it was last updated on 11/16/2020. The download of 11/16 shows 75,505 more ballots returned on 11/16 than the download from 11/15. Therefore, from 11/15 to 11/16, 75,505 ballots were added to the dataset with no explanation.

Mail Date irregularities to include ballots mailed before the ballot was finalized, ballots mailed late and ballots mailed inconsistent with enacted legislation relative to mail in ballots: 154,584 ballots

Voter Date of Birth irregularities: (voters over age 100): 1573 ballots

These apparent discrepancies can only be evaluated by reviewing all transaction logs into the SURE system to determine the access, authority for the entry, the verification of the data entered as well as the authentication of the security certificates of the sites from which the data had been entered.

Before and after the election of November 3, 2020, the efforts by the State Government Committee and other members of the PA Legislature to obtain oversight information and relevant data to confirm or deny claims of improprieties were stymied. For instance, a hearing sought by Dominion Voting Systems with the State Government Committee of the PA House, which was scheduled for November 20, 2020, was cancelled by Dominion at the last-minute citing litigation concerns. Right to know requests were similarly not responded to except by delay from the Executive Branch until well into January 2021.

Without knowing the answer to these questions and due to the magnitude of the discrepancies and the closeness of the election, the results of the 2020 presidential election in Pennsylvania cannot be conclusively determined.

Senate Homeland Security and Governmental Affairs Committee

Witness Statement of Jesse Binnall
December 16, 2020

Thank you Mr. Chairman, Ranking Member Peters, and member of the committee.

This year, thousands upon thousands of Nevada voters had their voices cancelled out by election fraud and invalid ballots. Here's how it happened.

On August 3, 2020, after a rushed special session, Nevada legislators made drastic changes to the state's election law by adopting a bill known as AB 4. The vulnerabilities of this statute were obvious: it provided for universal mail voting without sufficient safeguards to authenticate voters or ensure the fundamental requirement that only one ballot was sent to each legally qualified voter. This was aggravated by election officials' failure to clean known deficiencies in their voter rolls. Because of AB 4, the number of mail ballots rocketed from about 70,000 in 2016 to over 690,000 this year.

The election was inevitably riddled with fraud and our hotline never stopped ringing. While the media and the democrats accused us of making it all up, our team began chasing down every lead. Our evidence came both from data scientists and brave whistleblowers.

Here is what we found:

- Over 42,000 people voted more than once. Our experts were able to make this determination by reviewing the list of actual voters and comparing it to other voters with the same name, address, and date of birth. This method was also able to catch people using different first name variations, such as William and Bill, and individuals who were registered both under a married name and a maiden name.

- At least 1,500 dead people are recorded as voting, as shown by comparing the list of mail voters with the social security death records.

- More than 19,000 people voted even though they did not live in Nevada; to be clear, this does not include military voters or students. These voters were identified by comparing the lists of voters with the U.S. Postal Service's National Change of Address database, among other sources.

- About 8,000 people voted from non-existent addresses. Here we cross-referenced voters with the Coding Accuracy Support System which allowed our experts to identify undeliverable addresses.

- Over 15,000 votes were cast from commercial or vacant addresses. Our experts found these voters by analyzing official U.S. Postal Service records that flag non-residential addresses and addresses vacant for more than 90 days.

- Incredibly, almost 4,000 non-citizens also voted, as determined by comparing official DMV records of non-citizens to the list of voters in the 2020 election.

The list goes on. All in all, our experts identified over 130,000 unique instances of voter fraud in Nevada. But the actual number is almost certainly higher. Our data scientists made these calculations not by estimations or statistical sampling, but by analyzing and comparing the list of actual voters with other lists, most of which are publicly available. To put it simply, they explained their methods so that others could check their work. Our evidence has never been refuted, only ignored.

Two Clark County technical employees came forward, completely independent of each other, and explained that they discovered that the number of votes recoded by voting machines and stored on USB drives would change between the time the polls were closed at night until they were reopened the next morning. In other words, votes were literally appearing and disappearing in the dead of night. When we attempted to verify the integrity of these voting machines, we were allowed only a useless visual inspection of the outside of a USB drive. We were denied a forensic examination.

Finally, our investigation also uncovered a campaign to illegally incentive votes from marginalized populations, by requiring people to prove they voted to receive raffle tickets for gift cards, televisions, and more.

Our determined team verified these irregularities without any of the tools of law enforcement, such as grand jury subpoenas or FBI agents. Instead, we had less than a month to use critical thinking and elbow grease to compile our evidence. When we tried to obtain testimony or documents from Clark County officials they obstructed and stonewalled, literally dodging subpoenas and refusing to release documents. Even the U.S. Postal Service obstructed our discovery efforts. When we filed suit, state officials and even courts delayed proceedings for days, but then offered us merely hours to brief and argue our cases.

Mr. Chairman, these findings are disturbing, alarming and unacceptable in a free society. Our free and fair election tradition is a precious treasure that we are charged with protecting. Government by the consent of the governed is hard to win and easy to lose. Every single time a fraudulent or illegal vote is cast, the vote of an honest citizen is canceled out. Thank you.

Testimony of

Chris Krebs

Before the

Committee on Homeland Security and Governmental Affairs

U.S. Senate

On

Examining Irregularities in the 2020 Election

December 16, 2020

Washington, DC

Introduction

Chairman Johnson, Ranking Member Peters, Members of the Committee, my name is Chris Krebs, and it is my pleasure to appear before you today to discuss "Examining Election Irregularities in the 2020 Election." As you know, I previously served as the first Director of the Cybersecurity and Infrastructure Security Agency (CISA), leading CISA and its predecessor organization, the National Protection and Programs Directorate, from August 2017 until last month. After a hearing in this Committee, I was confirmed by the Senate in June of 2018. Over the last several years, I have had the pleasure of working with many of you as members of the primary oversight Committee for CISA. I have testified in front of this Committee many times, most recently in February of this year. Many of those hearings were focused on the efforts underway to protect the nation's election infrastructure. I enjoyed a positive working relationship with the many Republican and Democratic members of the Senate and House of Representatives, consistent with the bipartisan—if not non-partisan—approach to election security that CISA took.

It is a pleasure to appear before this Committee today to testify about the extraordinary efforts of elected officials and public servants in federal, state, and local governments, as well our private-sector partners, to secure the 2020 election. On November 12, 2020, I approved CISA's publication of a joint statement from the election security community, reflecting that community's consensus that the 2020 election the most secure in U.S. history. I have attached that document to this testimony. I stand by the statement, as the work we did toward that goal should be a point of great pride for all of you, the CISA oversight committee, as well as the nation. That effort could not have succeeded without the extraordinary leadership and thoughtful vision of this Committee, for which the nation should be grateful and proud. Chairman Johnson and Ranking Member Peters, the CISA team, supported by your oversight efforts, performed admirably and achieved the election security goals we set for ourselves.

The Initial Challenge

When I re-joined the Department of Homeland Security in 2017, America had just endured compromises to our election systems, owing to the now well documented interference campaign by the Russian Federation. Whatever their other motivations, these Russian campaigns sought to create chaos and division among Americans, implant disinformation, sow the seeds of distrust in democratic institutions, and, in this way, degrade America's standing abroad, which the Russians hoped would enhance their own ability to enforce their will against weaker nations. Put another way, the Russians hoped to plant a cancer that would erode American values and cohesion from the inside, leaving them free to exert their will on the global stage.

The national security community understood the stakes. To safeguard America and the world from these perils, election security dominated my time and attention at DHS. My first priority was to work with Congress to create a standalone cybersecurity agency under DHS to focus on securing American businesses and institutions. We achieved that objective on November 16, 2018, when the President signed into law the Cybersecurity and Infrastructure Security Agency Act of 2018, which created CISA. I once again would like to thank this Committee and the stewardship of Chairman Johnson for guiding that legislation through the Senate.

As CISA's Director, election security was my top priority. Initially, at that time, the immediate goal was securing the 2018 midterm election, with the 2020 election on the horizon. I also indicated

that priority in our "restart plan" after the 2018-2019 government shutdown, which listed election security as one of five agency priorities. We further memorialized that priority list in CISA's 2019 Strategic Intent document.[1]

Election Security Roles and Responsibilities

Our initial defensive strategy centered on the modus operandi of the three-pronged Russian campaign of 2016, which was plainly described in the unclassified Intelligence Community Assessment released in January 2017. The Russians attacked the systems supporting elections, the political candidates, and, through sophisticated disinformation campaigns, the minds of Americans, and these efforts by the Russians continue to this day. Across the nation's security agencies, there was universal and unanimous acknowledgement that we could not let it happen again.

My team at CISA had lead responsibility for working with state and local election officials to secure our election infrastructure (the machines, equipment, and systems supporting elections) from hacking. State election officials—consistent with the duties assigned by their own state legislatures, operating under Article I, Section 4 of the Constitution of the United States of America—are responsible for conducting and overseeing elections. Our job at CISA was to ensure state and local election professionals had access to technology, programs, risk-management policies and protocols, and other information necessary to create resilient elections, enhance physical voting security, identify systemic cyber weaknesses, react to suspected infiltration, and to identify and combat disinformation.

Many of CISA's activities were coordinated through the Election Security Initiative (ESI), which was led by Matthew Masterson and Geoffrey Hale. These activities were carried out by numerous CISA employees scattered across the country, who worked with an array of state and local election officials on a daily basis. They built meaningful relationships, improved election security, shared critical information, provided support through exercises and training, and, if needed, supported incident response efforts. One of the keys to success for CISA in securing the election was a customer-centric model that depended on "boots on the ground," meaning locally embedded CISA security advisors who maintained a consistent presence and regular engagement with our state and local partners.

Our most important federal partner in this effort was the Election Assistance Commission (EAC). As an independent commission, EAC has bipartisan leadership, with Republicans recommending to the President two nominees to serve as Commissioners and Democrats recommending another two. CISA enjoyed a positive and productive working relationship with EAC, though EAC suffers from a lack of sufficient funding to conduct the full range of supporting activities with which they are statutorily tasked. Most critical is updating the Voluntary Voting Systems Guide 2.0.

To understand CISA's role in election security, it is important to distinguish between two different kinds of risks that elections face: (a) physical and cybersecurity of elections, on the one hand, and (b) election-related fraud, on the other. While CISA led efforts to secure election systems, it had no role—and never claimed to have a role—in investigating or mitigating election-related

[1] Cybersecurity and Infrastructure Security Agency, Strategic Intent, Aug. 2019, https://www.cisa.gov/sites/default/files/publications/cisa_strategic_intent_s508c.pdf.

fraud. Federal, state, and local law enforcement authorities, including the FBI, rather, are responsible for combating fraud.

However, one area where election security and fraud may intersect—and both CISA and law enforcement can play important roles—is foreign interference campaigns that attempt to deceive voters through disinformation, such as Russia's disinformation efforts in connection with the 2016 election. On that front, CISA did play an important role, partnering with the FBI, the Intelligence Community, and social media companies. Disinformation campaigns are one of the hardest problems we still face. We worked hard to find ways to tackle the problem, including through dissemination of the CISA Disinformation Tool Kit, which was intended to empower state and local officials to serve as "trusted voices" for election information, enabling them to combat pernicious disinformation campaigns.

Election Security Improvements

As we considered our election infrastructure mission in the summer of 2017, several lessons from the 2016 election were clear. First, we did not have sufficient working relationships with our state and local election officials. Second, certain election-related systems, particularly the voting machines without paper ballots, did not give us the confidence we sought. Third, federal agencies needed to move faster, work better together, and be more proactive to detect and prevent attacks on our democracy. With these lessons in mind, we set to work. At that time, although 2020 was certainly on our minds, the 2018 midterm elections were just about a year away.

A key priority was improving our relationships with state partners. While the relationship-building process was long and often contentious, we built trust through consistent engagement with the community. Our goals were to understand their concerns and provide support and expertise where they most needed it. One important way we did this was through enduring partnerships, in the form of Government Coordinating Councils and Sector Coordinating Councils (the "Councils"), that drew representatives from across the election-security community, including federal, state, and local government representatives, as well as the private sector. The Councils empowered members to gather to discuss emerging issues, develop guidance, and chart joint plans to mitigate risk. We saw that the Councils became a critical tool to pursue coordinated action to secure elections.

Thus, building relationships with our partners was a crucial task, but systems enhancement was another necessary goal that we pursued simultaneously. A key milestone in our efforts to spot and stop attacks came in 2018 with the establishment of the Elections Infrastructure Information Sharing and Analysis Center (EI-ISAC). Information sharing and analysis centers, or ISACs, exist in many different sectors of the economy, with the Financial Services ISAC being the most well-known and longest running. An ISAC is exactly what its name implies—an organization that collects relevant information and shares it with people and systems that can deploy defensive measures. For instance, ISACs may share information about malware, spyware, ransomware, adware, and phishing emails—all of which can compromise a system or device or steal critical information to assist in hacking. We are incredibly proud that, by the time of the 2018 midterm elections, all 50 states and thousands of jurisdictions had elected to join the EI-ISAC we created. The value that the EI-ISAC provided in widely broadcasting threat information to necessary parties was immeasurable.

Meanwhile, CISA worked hand-in-hand with our state and local partners to understand the security posture of the various systems and networks used to support elections across the nation.

We found the nationwide election community not just willing, but eager to engage with us and committed to the security of their elections. Although the community had the will, it lacked the resources to replace aging or out-of-date systems and hardware. Furthermore, trained cybersecurity personnel across the country were in short supply, which was a frequent challenge for most locales.

Based on these issues, we assisted many locales through election security assessments. What we saw was disconcerting but not surprising. We regularly found systems with clear security deficiencies, such as a lack of multifactor authentication, outdated software, and misconfigured systems. These shortcomings were so common that we could reliably predict them *before* we even conducted our assessments. To help state and local election officials remediate these problems, we drafted and issued a "best practices" primer prior to the 2018 election.[2]

While the primer helped guide security investments, states and localities also needed help with enhanced intrusion detection, which was another key deficiency we found in existing systems. To address this issue, we helped enroll every state in the ALBERT program, which is an intrusion-detection system (IDS). ALBERT collects and examines state-level network data for interactions with malware or known malicious internet infrastructure, sending alerts when it detects potential intrusions. ALBERT alerts were then shared with the EI-ISAC, which enabled other participants to identify similar intrusions. We are proud that, by the time of the 2020 election, all 50 states were covered by ALBERT sensors.

The widespread participation by state and local officials in CISA's efforts, including with respect to the Councils, the EI-ISAC, and the ALBERT program, is a clear indicator that we succeeded in gaining the trust of our partners in election security, which critical for CISA's mission success.

As CISA worked with state and local officials on election security efforts, we focused on areas of particular concern—such as those identified in our Election Infrastructure Cyber Risk Assessment.[3] It was clear to us that two characteristics of systems presented the most risk: centralization and connectivity. Attacking systems that centralize services for an entire state allow for broad disruption. For example, an attack on a statewide voter registration database could possibly disrupt the ability to confirm voter eligibility on the day of an election, leading to longer voting wait times across the state. Similarly, if a system must be connected to the internet to operate, that presents clear risks that could have serious ramifications. For example, attacking the systems used for election night reporting could disrupt such reporting and ultimately undermine confidence in the results of the election. Based on these and other insights we gained from the risk assessment, we worked with election officials to strengthen the security of their systems.

Additionally, we worked with election officials to consider resilience measures in the event of a successful attack. For example, in the event of a hacked or ransomed database, a critical resilience measure is the existence of backup copies, both digital and physical. Or, in the event

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[2] Election Infrastructure Subsector Government Coordinating Council, DHS Election Infrastructure Security Funding Considerations, June 13, 2018, https://www.dhs.gov/sites/default/files/publications/Election%20Infrastructure%20Security%20Funding%20Considerations%20Final_0.pdf.

[3] Cybersecurity and Infrastructure Security Agency, Election Infrastructure Cyber Risk Assessment, June 28, 2020, https://www.cisa.gov/sites/default/files/publications/cisa-election-infrastructure-cyber-risk-assessment_508.pdf.

of an attack on a system used for election night reporting, resilience measures may include having the ability to educate the American people that quickly reported database results are not official and that the actual ballots (including paper ballots) and counting processes are unaffected.

In addition to these and many other efforts, we also worked closely with the FBI to identify and investigate potential cybersecurity incidents. The relationship with the FBI evolved positively over time, especially with FBI leadership and supervisory agents. Cooperation between CISA and FBI field offices varied by locale, principally based on relationships between CISA personnel and local FBI personnel. Going forward, it is critical for CISA to designate and embed field personnel in each FBI field office to enhance this cooperation. CISA is currently piloting that concept in a southeastern U.S. field office.

Election Risks

Enhancements to voting systems was a necessary task, but those enhancements alone could not ensure the security of the 2020 election. Based on our experiences in 2016 and 2018, and our learning and experience more generally, we had to predict every possible attack we could face in 2020 in advance. Working within CISA, and alongside our Intelligence Community partners and the Councils, we thought through every possible scenario in which Russia, Iran, China, or non-state cybercriminals could attempt to disrupt the election. We examined and planned for not only "pure" cybersecurity scenarios (hacks, disruptions, compromises of infrastructure, and the like), but also so-called "perception hacks." Perception hacks are nonexistent, small, or inconsequential intrusions unto themselves, but they are exaggerated by the malicious actors responsible for them in a manner such that they may undermine the public's confidence in the election or even lead to unnecessary and disruptive defensive measures (such as taking a system offline).

As we devised potential scenarios, we shared our thinking with our state and local partners, and collaboratively developed defensive strategies to prevent or respond to possible attacks. These scenarios informed trainings and exercises, including the Elections Cyber Tabletop Exercise Package we released, which allowed any of the thousands of jurisdictions across the country to develop, plan, and conduct exercises to prepare for potential cyberattacks.[4] In a real sense, these were "war games" to help create muscle memory and facilitate more efficient and effective responses to actual "game time" intrusions. This approach addressed one of CISA's main challenges of scaling our activities to engage as much of the election community as possible.

One scenario that required our attention was the possibility – even if unlikely – of a direct hack of voting machines. To be clear, based on my experience and understanding, no adversary has yet developed the ability to manipulate a single vote cast in a U.S. election. Furthermore, even if such a hack were conducted, it would be incredibly difficult to carry out such an operation on a scale that could change the outcome of a national election.

Even with malicious vote changing an unlikely scenario, we knew that paper ballots were critically important to provide an audit trail. Prior to the 2020 election, there were multiple states that had statewide or significant use of machines without paper ballots, including Delaware, New Jersey, Pennsylvania, South Carolina, Georgia, Louisiana, Texas, Tennessee, and Indiana. Wisely,

[4] Cybersecurity and Infrastructure Security Agency, Elections Cyber Tabletop Exercise Package – Situation Manual, Jan. 2020, https://www.cisa.gov/sites/default/files/publications/Elections-Cyber-Tabletop-Exercise-Package-20200128-508.pdf.

Congress provided grant funding in 2018, 2019, and 2020 to states so that they could retire the paperless machines and roll out auditable paper-based systems.

The results were impressive. The congressional grants led to the retirement of many paperless machines across the country. Between 2016 and 2020, votes cast with a paper audit trail increased from approximately 80% to somewhere between 92% and 95%. This enhanced nationwide paper trail is critical for confidence in voting results, as it allows for post-election audits to confirm the outcome of the race and identify any anomalies.

Protecting the 2020 Election

Throughout this election year, CISA carefully monitored for threats to the security of the election. Meanwhile, we provided details about what we were seeing—and what we were doing—in briefings with congressional staff (including staff of this Committee), political campaigns, and state and local election officials. I personally led many briefings for both chambers of Congress during the run-up to the election. Many of you participated, and I hope you found them valuable. This was a continuation of our commitment to perform our duties in a non-partisan and transparent manner.

As we entered the fall of 2020 and the election grew closer, CISA became aware of election-related adversary activity, including by Russia. In two cases, the Russians gained access to election-related systems, and they succeeded in extracting information about voters from one of those systems—although the data was publicly available from other sources. This intrusion was detected, information was shared with the appropriate local authorities, the means of unauthorized access was eliminated, and further steps were taken to investigate, mitigate, and confirm system security moving forward.[5] In no case did the Russians access any voting machines, tabulators, or equipment related to vote casting, counting, or certification.

Around this same time, as a part of CISA's defensive strategy to counter disinformation, we created the "Rumor Control" website.[6] The idea was simple. CISA would use the website to share information with American voters in a straightforward, digestible manner. By doing so, we hoped to get ahead of misinformation and provide clear information to help American voters understand the facts. In a sense, we were looking to inoculate the public from misleading claims before those misleading claims took root. The Rumor Control website was in part an outgrowth of the Public Service Announcements that CISA and the FBI had jointly released earlier in the year, starting in late September.[7]

The Rumor Control website had an early test. Just as we got it up and running, email messages allegedly from the Proud Boys—the far-right political organization—started showing up in voters' inboxes across the country. The emails appeared to target Democratic voters, threatening potential consequences if they did not cast votes in the election for President Trump. Of course, ballot secrecy is the law in all fifty states, meaning that there would be no feasible way to carry out the threats in these emails. To educate voters about ballot secrecy and ensure they

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[5] Alert (AA20-296A) Russian State-Sponsored Advanced Persistent Threat Actor Compromises U.S. Government Targets, https://us-cert.cisa.gov/ncas/alerts/aa20-296a

[6] Cybersecurity and Infrastructure Security Agency, Rumor Control, https://www.cisa.gov/rumorcontrol.

[7] *See, e.g.*, Federal Bureau of Investigation and Cybersecurity and Infrastructure Security Agency, Public Service Announcement – False Claims of Hacked Voter Information Likely Intended to Cast Doubt on Legitimacy of U.S. Elections, Sept. 28, 2020,

understood that they could safely cast votes for the candidate of their choice, we worked quickly to post a Rumor Control entry about the subject on the website.

The very next day, another round of malicious emails were sent to voters. This time, the emails included a link to an alleged Proud Boys video that purported to show someone hacking a voter registration database and accessing Federal Write-in Absentee Ballots (FWAB)—which are typically used by military and overseas voters who requested but did not yet receive their absentee ballots. We got to work on two Rumor Control entries—one on email spoofing, to help voters understand that the Proud Boys did not actually send the emails in question, and another on FWAB, to help voters understand the security measured in place that relate to such ballots.

Meanwhile, we worked with federal government and private sector partners to determine who sent the emails. In just a little more than one full day after the threatening emails first appeared, the Director of National Intelligence, John Ratcliffe, announced publicly that Iran was behind them.

This is just one example of the myriad ways that CISA endeavored to monitor disinformation and educate voters about the facts. Another concern we had, which was based on our knowledge of the ways adversaries like Iran and Russia operate, related to the potential risk of an attack on an election night reporting system, which election officials use to provide unofficial results on election day (while the official processes to count votes are still happening). If successful, such an attack could have a significant psychological impact on American voters and undermine their confidence in the election and its results. We imagined accompanying claims or speculation that the vote count itself had been hacked. In fact, we saw just such a thing with domestic claims of voter data "irregularities" and "ballot dumps" in the dark of night. Aware of the risk of these sorts of claims, we tried to educate voters about the difference between unofficial election night counts and the official results, which are subject to separate systems and processes. For example, on my official Twitter account, I compared it to a baseball game: "It's like seeing the score on @SportsCenter, when the official scorer is keeping the box score. Simple as that."[8] Moreover, the paper records of around 150,000,000 votes could always be audited or recounted to confirm the outcome, just as Georgia did three times.

As election day came and went, we continued to monitor networks across the country and work with our partners, who reported any suspicious activity to us. As I said in a press briefing, election day was "just another Tuesday on the internet"—meaning that our usual scanning and probing was happening. As it was, we did not see evidence of any attacks or malicious disruptions.

Our operations center at our headquarters building was staffed by representatives from our federal, state, and local government partners, as well as private sector vendors. We also had virtual situational rooms up and running in advance of Election Day and for a few days afterwards. The idea was to have seamless real-time information sharing as operational issues occurred. This was useful when a handful of election officials experienced early morning technology challenges. The vendors were there to explain what was going on, and the state and local representatives had the ability to confirm and explain backup measures that would be used.

In one case, we did get a report of someone trying to exploit a known vulnerability, which we then passed to other federal partners for their subsequent action. In some corners, this action represented the realization of long sought after "information sharing" practices, where defenders

[8] Christopher C. Krebs (@CISAKrebs), Twitter (Nov. 16, 2020, 4:50 PM), https://twitter.com/CISAKrebs/status/1328455387910168576.

detect activity and pass it to the federal government for further action. It is my sincere hope that this sort of sharing becomes the norm rather than the exception, something that can only happen when there is meaningful, trusted cooperation between state and local partners, as well as the private sector, and the federal government, with CISA serving as the hub of activity.

Unfortunately, as we moved on from election day, we began to see wild and baseless domestic claims of hackers and malicious algorithms that flipped the vote in states across the country, singling out election equipment vendors for allegedly having ties to deceased foreign dictators. None of these claims matched up with what we knew about the facts.

The allegations being thrown around about manipulation of the equipment used in the election are baseless. These claims are not only inaccurate and "technically incoherent," according to 59 election security experts,[9] but they are also dangerous and only serve to confuse, scare, and ultimately undermine confidence in the election. All authorities and elected officials in positions of power or influence have a duty to reinforce to the American people that these claims are false.

To address these claims, we once again took to Rumor Control, highlighting the various security controls and checks in place that would prevent such manipulations. More importantly, even in the event of a successful compromise of a system, the counting process would be trustworthy and accurate because of the evidence-based nature of the system—that is, paper ballots or records could be audited or recounted.

CISA and our election partners continued to publish truthful information about the election, culminating on November 12, 2020, with the publication of the Joint Statement from Elections Infrastructure Government Coordinating Council and the Election Infrastructure Sector Coordinating Council Executive Committees.[10] That statement explained: "There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised." Despite some claims, this statement does not address voter fraud, which is not within this group's ambit. Instead, the statement focuses on manipulation or hacking of the machines supporting elections. Furthermore, to ensure the facts are clear, this was not a CISA statement, but rather a joint statement from the election security community, reflecting the consensus of that community, that CISA published. I did not write or edit the statement, but I did have an opportunity to review it prior to release, and I authorized CISA's publication of it. Furthermore, I amplified the statement via my official Twitter account, @CISAKrebs, writing: "Election Infrastructure Subsector – SCC/GCC Joint Statement on the 2020 Election. TLDR; America, we have confidence in the security of your vote, you should, too."[11]

I had confidence in the security of the election, which is why I authorized CISA to publish the statement. That confidence was based on the years of work poured into improving the security and resilience of our elections. It was based on the relationships developed over the years with

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[9] Tony Adams, et al., Scientists say no credible evidence of computer fraud in the 2020 election outcome, but policymakers must work with experts to improve confidence, Nov. 16, 2020, https://www.mattblaze.org/papers/election2020.pdf.

[10] Joint Statement from Elections Infrastructure Government Coordinating Counsel and the Election Infrastructure Sector Coordinating Executive Committees, Nov. 12, 2020, https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election.

[11] Christopher C. Krebs (@CISAKrebs), Twitter (Nov. 12, 2020, 7:34 PM), https://twitter.com/CISAKrebs/status/1327047087024984064.

election officials to improve reporting channels and share concerns and areas for opportunity. It was based on the tremendous interagency partnership between CISA, the FBI, the EAC, the Department of Defense, and the Intelligence Community. It was based on the increase in voter verifiable paper audit trails across the country. And it was based on the professionals that conduct elections regularly.

Do systems have vulnerabilities? Yes. But vulnerabilities do not automatically translate into hacked systems and votes changed. Appropriate resilience measures built into election systems mean that with reliable paper and meaningful post-election canvassing and auditing that can repeatedly confirm outcomes, voters can still have confidence in the process.

Protecting Elections Going Forward

The entire nationwide election infrastructure community worked diligently and effectively to make the 2020 election safe and secure. This achievement should be a great point of pride for the tireless efforts of so many thousands of elected officials and public servants. I was honored to work alongside them. This Committee deserves to be remembered for its exceptional leadership and vision to make that goal a reality. Although my time as a public servant has—at least for now—come to a pause, I hope the Committee will allow me to make a number of recommendations based on my experience serving as CISA Director:

- Congress should continue to invest in and support CISA's regionalization efforts, including the establishment of Cybersecurity Statewide Coordinators in every state focused on election security and state government cybersecurity.
- Congress should increase funding for and support of the EAC.
- Congress's inclusion of continuous threat hunting authorities for CISA in the 2021 National Defense Authorization Act (NDAA) will enable broader use of EDR in the federal civilian agencies. Congress should ensure that CISA is appropriately funded to scale up this program.
- Going forward, it is critical for CISA to designate and embed field personnel in each FBI field office to enhance this cooperation. CISA is currently piloting that concept in a southeastern U.S. field office. I encourage Congress to support and fund expansion of that program.
- Congress should continue to authorize and appropriate for election-security improvements across the country, first focusing on elimination of paperless machines. Second, Congress should further authorize and appropriate election-security grants on an annual basis to provide election officials consistent and dependable funding by which they can make appropriate infrastructure and personnel investments.
- I hope DHS leadership and Congress will support strengthening the relationship between CISA and FBI, including developing a leadership exchange program that would provide broader understanding of the respective capabilities and advantages of the two agencies.
- Congress should continue to support CISA's central role in defensive cybersecurity efforts for the government and ensure that the necessary resources and information and liability protection measures are strengthened.
- Current wild and baseless domestic claims of hackers and malicious algorithms flipping the vote in states across the country due to ties to deceased foreign dictators serve only to confuse, scare, and ultimately undermine confidence in the election. All authorities and elected officials in positions of power or influence have a duty to reinforce to the American people that these claims are false.

Thank you not only for this opportunity testify before the Committee today on this critical issue, but also for, by confirming me, giving me the opportunity to lead CISA. It has been the honor of a lifetime.

I look forward to answering any questions you might have.

RON JOHNSON, WISCONSIN, CHAIRMAN

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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

December 22, 2020

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Mr. Chairman,

In our Wednesday, December 16th Committee hearing you made baseless accusations on the record, including calling me a liar for my efforts to hold you accountable for your extreme partisan actions that have undermined our Committee's bipartisan traditions and our fundamental mission to help protect our homeland security. Had you made your false accusations on the Senate floor, it would have been in violation of Senate Rule XIX. Your outburst was beneath the dignity of the Senate, the Committee, and simple civil discourse. In fact, it was the culmination of the Committee's descent, under your chairmanship, into a hotbed of dangerous, hyper-partisan, anti-democratic, and demonstrably false conspiracies that have no place in the United States Senate. Tragically, those falsehoods have extended beyond your efforts to influence the 2020 presidential election to your amplification of unsound medical information that has the potential to exacerbate the COVID-19 pandemic and your amplification of conspiracy theories that question the very validity of the election's outcome.

To be clear, in pursuing my responsibilities as Ranking Member and as a steward of our Committee's bipartisan reputation, I have never lied. To the contrary, every specific allegation you named in your public accusation was false or misleading. To set the record straight:

First, you claimed that I was involved in the creation of a "false intelligence product." The accusation itself is false. Specifically, you said, "Senior Democrat leaders, including Ranking Member Peters, you know, were involved in a process of creating a false intelligence product that was supposedly classified. They leaked to the media that accused Senator Grassley, the president pro tem of the Senate and myself, of accepting and disseminating Russian disinformation from Andrii Derkach."[1]

You are referring to the July 13, 2020, letter with a classified annex from Democratic leaders to the FBI requesting a defensive briefing on foreign election interference efforts.[2] As I stated during last week's hearing, I was not involved in the creation of the letter, classified addendum, or subsequent press reports. Your characterization of the classified addendum as a "false intelligence product" is also

[1] Senate Committee on Homeland Security and Governmental Affairs, *Hearing on Examining Irregularities in the 2020 Election* (Dec. 16, 2020).
[2] Letter from Speaker Nancy Pelosi, Senator Chuck Schumer, Representative Adam Schiff, and Senator Mark Warner, to Director Christopher Wray, Federal Bureau of Investigation (July 13, 2020) https://intelligence.house.gov/uploadedfiles/20200713_big_4_letter_to_fbi_director_wray_-_defensive_briefing_signed.pdf.

inaccurate. Despite your protestations, I requested defensive briefings that would have given us clear answers about how your allegations related to a foreign attack on our election. Unfortunately, while the Federal Bureau of Investigation's Foreign Influence Task Force was willing to brief our Committee, the Central Intelligence Agency declined. Politico reported that you are "considered 'toxic' by some members of the intelligence community."[3]

Second, you also falsely claimed I "lied repeatedly in the press" that you were "spreading Russian disinformation."[4] To be precise, I have said that you have "advanced," and "amplified," a Russian attack on our election, which is unequivocally true. Your investigation was the successful culmination of a Russian attack on our election. As then-Special Envoy and Coordinator for International Energy Affairs Amos Hochstein testified in this very same investigation:

> Q: Do you remain concerned that Vice President Biden is a target of a Russian disinformation effort?
>
> A: Yes.
>
> Q: Why?
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> A: Because I can see it on a regular basis. I think this investigation is probably the successfu outcome of that effort.[5]

Then-Ambassador to Ukraine (later President Trump's appointed Ambassador to Greece) Geoffrey Pyat also testified that the conspiracy theory that Hunter Biden's position at Burisma undermined anti-corruption efforts in Ukraine was in fact rooted in a Russian disinformation effort:

> Q: And the argument that Hunter Biden's position on the board of Burisma corrupted U.S. anti-corruption efforts in Ukraine, do you include that as part of the Russian disinformation narrative?
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> A: Yes, of course. And it's of a pattern with lots of other Russian disinformation. … This is a toolkit which Russia is using across Europe to undermine security and advance their perceived interests.[6]
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> ….

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[3] Politico, *CIA steers clear of Senate Republican probe into Bidens* (August 5, 2020) https://www.politico.com/news/2020/08/05/cia-biden-senate-probe-391479

[4] Senate Committee on Homeland Security and Governmental Affairs, *Hearing on Examining Irregularities in the 2020 Election* (Dec. 16, 2020).

[5] Senate Committee on Homeland Security and Governmental Affairs and Senate Committee on Finance Interview of Amos Hochstein (Sept. 17, 2020) p.74.

[6] Senate Committee on Homeland Security and Governmental Affairs and Senate Committee on Finance Interview of Geoffrey R. Pyatt (Sept. 17, 2020) p.115.

Q: Is the narrative that Vice President Biden's actions in the Ukraine were corrupt, is that a false narrative?

A: Yes, it is. And I think you only need to look at what Secretary Pompeo said about Derkach, what Treasury said about Derkach, and their contemporaneous release of privileged telephone conversations between the Vice President and President Poroshenko by Derkach to understand what's referred to there.[7]

You seem to think that because you have never spoken with Mr. Derkach, that you cannot be held accountable for amplifying his lies. This reflects a fundamental misunderstanding of how disinformation works, and the role you have played in aiding it. A key source for your investigation is Ukrainian national Andrii Telizhenko, who traffics in the same conspiracy theories as Mr. Derkach and is cited 42 times in your letters. You initially sought to authorize a subpoena from the Committee to interview Mr. Telizhenko, but retreated following bipartisan concerns over Mr. Telizhenko's credibility and associations.

Both Mr. Derkach and Mr. Telizhenko released leaked records of alleged phone calls between former Vice President Biden and former Ukrainian President Poroshenko one day before you forced this Committee to meet in person during a devastating pandemic to vote to obtain records related to Mr. Telizhenko.[8] Mr. Telizhenko translated Mr. Derkach's claims from Russian to English to make his disinformation accessible to an American audience.[9] In October 2020, the State Department reportedly revoked Mr. Telizhenko's visa.[10]

On September 10, 2020, the U.S. Treasury Department identified Mr. Derkach as an "active Russian agent" and sanctioned him for "false and unsubstantiated narratives concerning U.S. officials" in the 2020 election, "spurring corruption investigations in both Ukraine and the United States designed to culminate prior to election day."[11] Two weeks later, you released an investigative report entitled "Hunter Biden, Burisma, and Corruption."

I have never accused you of having directly accepted material or Russian disinformation from Andrii Derkach, as you have consistently denied. However, direct contact with Mr. Derkach is not necessary to repeat his disinformation. I have only made statements that are indisputably true—your "claims that

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[7] *Id.* at pp.117-118.
[8] Washington Post, *Ukrainian lawmaker releases leaked phone calls of Biden and Poroshenko* (May 19, 2020) https://www.washingtonpost.com/national-security/ukrainian-lawmaker-releases-leaked-phone-calls-of-biden-and-poroshenko/2020/05/19/cc1e6030-9a26-11ea-b60c-3be060a4f8e1_story.html; Свободный, Interview of Andrii Telizhenko (May 19, 2020) (in Russian and Ukrainian).
[9] Daily Beast, *Rudy Giuliani and His Ukraine Ally Sprint Away from Their 'Russian Agent' Pal* (Sept. 11, 2020) https://www.thedailybeast.com/rudy-and-his-ukraine-ally-sprint-away-from-their-russian-agent-pal.
[10] CNN, *U.S. revokes visa of Giuliani's Ukrainian ally who spread conspiracy theories about the Bidens* (Oct. 5, 2020) https://www.cnn.com/2020/10/05/politics/telizhenko-visa-revoked/index.html.
[11] United States Department of the Treasury, *Treasury Sanctions Russia-Linked Election Interference Actors* (Sept.10, 2020) https://home.treasury.gov/news/press-releases/sm1118.

mirror the claims" of Mr. Derkach, relied on "suspect sources" who have "extensive ties" to Mr. Derkach, and "amplified a known Russian attack on our election."[12]

Finally, in our December 16th hearing, you again repeated the false claim that the minority was the only party who introduced Russian disinformation into the record – a transparent attempt to deflect from the clear record of your statements and actions that have repeatedly amplified conspiracy theories rooted in Russian disinformation. Minority staff identified the document you are referring to as disinformation, as the transcript reflects, "by introducing this into the record we are in no way endorsing it but rather trying to expose it."[13] This document was entered into the record, identified as disinformation at the time, and presented to an expert witness to discuss it in the context of the broader Russian disinformation efforts that have been confirmed by President Trump's own National Counterintelligence and Security Center Director.[14] This exhibit was entered into the record in order to expose Russian disinformation, educate the public about this complex attack on our election, and with the goal of preventing the Committee from spreading that disinformation further. Unfortunately that effort failed. You have been credulously repeating Russian disinformation for more than a year now, debasing the Committee responsible for oversight of election security by advancing a foreign attack on our democracy.

You still have a chance to drop your partisan probe, abandon this destructive behavior and return to the Committee's bipartisan traditions. I urge you to retract your words, cease your political investigations and apologize for the harm you have done to the reputation of our Committee and the United States Senate over the past year.

Sincerely,

Gary C. Peters
Ranking Member

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[12] Senate Committee on Homeland Security and Governmental Affairs Minority, *Peters, Wyden Respond to Republican Effort to Amplify Russian Disinformation & Manufacture Dirt on Vice President Biden* (Sept. 23, 2020) https://www.hsgac.senate.gov/media/minority-media/peters-wyden-respond-to-republican-effort-to-amplify-russian-disinformation-and-manufacture-dirt-on-vice-president-biden; Senate Committee on Homeland Security and Governmental Affairs and Senate Committee on Finance Minority, *Election Interference: Majority Investigation Amplifies Russian Attack on 2020 Election* (Sept. 23, 2020) https://www.hsgac.senate.gov/imo/media/doc/200923_FullReport_PetersHSGACWydenFinance.pdf.

[13] Senate Committee on Homeland Security and Governmental Affairs and Senate Committee on Finance Interview of George Kent (July 24, 2020) p.150.

[14] Office of the Director of National Intelligence, *Statement By NCSC Director William Evanina: Election Threat Update For The American Public* (Aug. 7, 2020) https://www.dni.gov/index.php/newsroom/press-releases/item/2139-statement-by-ncsc-director-william-evanina-election-threat-update-for-the-american-public

Congress of the United States
Washington, DC 20510

December 6, 2019

Sami Mnaymneh
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
1450 Brickell Avenue 31st Floor
Miami, FL 33131

Tony Tamer
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
1450 Brickell Avenue 31st Floor
Miami, FL 33131

Dear Messrs. Mnaymneh and Tamer:

We are writing to request information regarding H.I.G. Capital's (H.I.G.) investment in Hart InterCivic Inc. (Hart InterCivic) one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio

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[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.
[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.
[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early 2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—Election Systems & Software, Dominion Voting Systems, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.
[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[6] Id.
[7] Id.
[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

H.I.G. reportedly owns or has had investments in Hart InterCivic, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does H.I.G. have a stake in or own? Please provide the name of and a brief description of the services each company provides.

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[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.
[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.
[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5c070c31f3c497fa9e6875f426ccde1.
[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.
[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.
[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.
[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

a. Which election technology companies, including all affiliates or related entities, has H.I.G. had a stake in or owned in the past twenty years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company H.I.G. had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

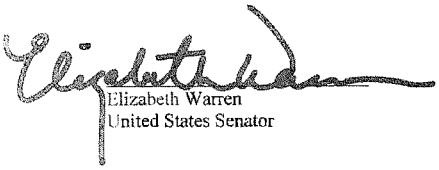
5. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

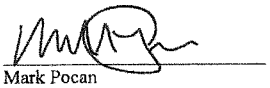
Sincerely,



Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator



Mark Pocan
Member of Congress

Congress of the United States
Washington, DC 20510

December 6, 2019

Michael McCarthy
Chairman
McCarthy Group, LLC
1601 Dodge Street, Suite 3800
Omaha, NE 68102

Dear Mr. McCarthy:

We are writing to request information regarding McCarthy Group, LLC's (McCarthy Group) investment in Election Systems & Software (ES&S), one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early

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[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—ES&S, Dominion Voting Systems, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.
[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[6] Id.
[7] Id.
[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.
[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.

elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

McCarthy Group reportedly owns or has had investments in ES&S, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does McCarthy Group have a stake in or own? Please provide the name of and a brief description of the services each company provides.

    a. Which election technology companies, including all affiliates or related entities, has McCarthy Group had a stake in or owned in the past twenty

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[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.

[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.

[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.

[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.

[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.

[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company McCarthy Group had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

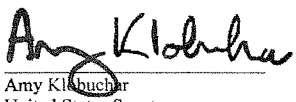
7. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the

past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator



Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Congress of the United States

Washington, DC 20510

December 6, 2019

Stephen D. Owens
Managing Director
Staple Street Capital Group, LLC
1290 Avenue of the Americas, 10th Floor
New York, New York 10104

Hootan Yaghoobzadeh
Managing Director
Staple Street Capital Group, LLC
1290 Avenue of the Americas, 10th Floor
New York, New York 10104

Dear Messrs. Owens and Yaghoobzadeh:

We are writing to request information regarding Staple Street Capital Group, LLC's (Staple Street) investment in Dominion Voting System (Dominion) one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio

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[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early 2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—Election Systems & Software, Dominion, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.
[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[6] Id.
[7] Id.
[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

Staple Street reportedly owns or has had investments in Dominion, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does Staple Street have a stake in or own? Please provide the name of and a brief description of the services each company provides.

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[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.
[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.
[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.
[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.
[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.
[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.
[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

a. Which election technology companies, including all affiliates or related entities, has Staple Street had a stake in or owned in the past twenty years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company Staple Street had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Amy Klobuchar
U.S. Senator for Minnesota

Ranking Members Klobuchar, Warner, Reed, and Peters Press Election Equipment Manufacturers on Security

March 27, 2019

Intelligence Agencies have confirmed that our election systems are a target for foreign adversaries, yet election vendors continue to sell equipment with known vulnerabilities

The Ranking Members of the Senate Rules, Intelligence, Armed Services, and Homeland Security Committees are requesting information about the security of voting systems

WASHINGTON – U.S. Senator Amy Klobuchar (D-MN), Ranking Member of the Senate Rules Committee with oversight jurisdiction over federal elections, sent a letter to the country's three largest election system vendors with questions to help inform the best way to move forward to strengthen the security of our voting machines. In the U.S., the three largest election equipment vendors—Election Systems & Software, LLC; Dominion Voting Systems, Inc.; and Hart InterCivic, Inc.—provide the voting machines and software used by ninety-two percent of the eligible voting population. However, voting and cybersecurity experts have begun to call attention to the lack of competition in the election vendor marketplace and the need for scrutiny by regulators as these vendors continue to produce poor technology, like machines that lack paper ballots or auditability.

Klobuchar was joined on the letter by Senator Mark Warner (D-VA), Vice Chairman of the Senate Intelligence Committee, Senator Jack Reed (D-RI), Ranking Member of the Senate Armed Services Committee, and Senator Gary Peters (D-MI), Ranking Member of the Senate Homeland Security Committee.

"The integrity of our elections remains under serious threat. Our nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020 elections as they did the

2016 and 2018 elections," the senators wrote. **"The integrity of our elections is directly tied to the machines we vote on – the products that you make. Despite shouldering such a massive responsibility, there has been a lack of meaningful innovation in the election vendor industry and our democracy is paying the price."**

The full text of the letter is below:

March 26, 2019

Mr. Phillip Braithwaite

President and Chief Executive Officer

Hart InterCivic, Inc.

Mr. Tom Burt

President and Chief Executive Officer

Election Systems & Software, LLC

Mr. John Poulos

President and Chief Executive Officer

Dominion Voting Systems

Dear Mr. Braithwaite, Mr. Burt, and Mr. Poulos:

We write to request information about the security of the voting systems your companies manufacture and service.

The integrity of our elections remains under serious threat. Our nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020 elections as they did the 2016 and 2018 elections. Following the attack on our election systems in 2016, the Department of Homeland Security (DHS) designated election infrastructure as critical infrastructure in order to protect our democracy from future attacks and we have taken important steps to prioritize election security. We appreciate the work that your companies have done in helping to set up the Sector Coordinating Council (SCC) for the Election Infrastructure Subsector.

Despite the progress that has been made, election security experts and federal and state government officials continue to warn that more must be done to fortify our election systems. Of particular concern is the fact that many of the machines that Americans use to vote have not been meaningfully updated in nearly two decades. Although each of your companies has a combination of older legacy machines and newer systems, vulnerabilities in each present a problem for the security of our democracy and they must be addressed.

On February 15, the Election Assistance Commission's (EAC) Commissioners unanimously voted to publish the proposed Voluntary Voting System Guidelines 2.0 (VVSG) Principles and Guidelines in the Federal Register for a 90 day public comment period. As you know, this begins the long-awaited process of updating the Principles and Guidelines that inform testing and certification associated with functionality, accessibility, accuracy, auditability, and security. The VVSG have not been comprehensively updated since 2005 – before the iPhone was invented – and unfortunately, experts predict that updated guidelines will not be completed in time to have an impact on the 2020 elections. While the timeline for completing VVSG 2.0 is frustrating, these guidelines are voluntary and they establish a baseline – not a ceiling – for voting equipment. Furthermore, VVSG 1.1 has been available for testing since 2015.

In other words, the fact that VVSG 2.0 remains a work in progress is not an excuse for the fact that our voting equipment has not kept pace both with technological innovation and mounting cyber threats. There is a consensus among cybersecurity experts regarding the fact that voter-verifiable paper ballots and the ability to conduct a reliable audit are basic necessities for a reliable voting system. Despite this, each of your companies continues to produce some machines without paper ballots. The fact that you continue to manufacture and sell outdated products is a sign that the marketplace for election equipment is broken. These issues combined with the technical vulnerabilities facing our election machines explain

why the Department of Defense's Defense Advanced Research Projects Agency (DARPA) is reportedly working to develop an open source voting machine that would be secure and allow people to ensure their votes were tallied correctly.

As the three largest election equipment vendors, your companies provide voting machines and software used by 92 percent of the eligible voting population in the U.S. This market concentration is one factor among many that could be contributing to the lack of innovation in election equipment. The integrity of our elections is directly tied to the machines we vote on – the products that you make. Despite shouldering such a massive responsibility, there has been a lack of meaningful innovation in the election vendor industry and our democracy is paying the price.

In order to help improve our understanding of your businesses and the integrity of our election systems, we respectfully request answers to the following questions by April 9, 2019:

1. What specific steps are you taking to strengthen election security ahead of 2020? How can Congress and the federal government support these actions?
2. What additional information is necessary regarding VVSG 2.0 in order for your companies to begin developing systems that comply with the new guidelines?
3. Do you anticipate producing systems that will be tested for compliance with VVSG 1.1? Why or why not?
4. What steps, if any, are you taking to enhance the security of your oldest legacy systems in the field, many of which have not been meaningfully updated (if at all) in over a decade?
5. How do EAC certification requirements and the certification process affect your ability to create new election systems and to regularly update your election systems?
6. Do you support federal efforts to require the use of hand-marked paper ballots for most voters in federal elections? Why or why not?
7. How are you working to ensure that your voting systems are compatible with the EAC's ballot design guidelines (i.e. "*Effective Designs for the Administration of Federal Elections*")?
8. Experts have raised significant concerns about the risks of ballot marking machines that store voter choice information in non-transparent forms that cannot be reviewed by voters (i.e. such as barcodes or QR codes), noting that errors in the printed vote record

could potentially evade detection by voters. Do you currently sell any machines whose paper records do not permit voters to review the same information that the voting system uses for tabulation? If so, do you believe this practice is secure enough to be used in the 2020 election cycle?

9. Do you make voting systems with Cast Vote Records (CVRs) that can be reliably connected to specific unique ballots, while also maintaining voter privacy? If not, why not? Does your company make voting systems that allow for a machine-readable data export of these CVRs in a format that is presentation-agnostic (such as JSON) and can be reliably parsed without substantial technical effort? If not, why not?

10. Would you support federal legislation requiring expanded use of routine post-election audits, such as risk-limiting audits, in federal elections? Why or why not?

11. What portion of your revenue is invested into research and development to produce better and more cost effective voting equipment?

12. Congress is currently working on legislation to establish information sharing procedures for vendors regarding security threats. How does your company currently define a reportable cyber-incident and what protocols are in place to report incidents to government officials?

13. What steps are you taking to improve supply chain security? To the extent your machines operate using custom, non-commodity hardware, what measures are you taking to ensure that the supply chains for your custom hardware components are monitored and secure?

14. Do you employ a full-time cybersecurity expert whose role is fully dedicated to improving the security of your systems? If so, how long have they been on staff, and what title and authority do they have within your company? Do you conduct background checks on potential employees who would be involved in building and servicing election systems?

15. Does your company operate, or plan to operate, a vulnerability disclosure program that authorizes good-faith security research and testing of your systems, and provides a clear reporting mechanism when vulnerabilities are discovered? If not, what makes it difficult for your company to do so, and how can Congress and the federal government help make it less difficult?

16. How will DARPA's work impact how your company develops and manufactures voting machines?

We look forward to your answers to these questions, and thank you for your efforts to work with us and with state election officials around the country to improve the security of our nation's elections.

Sincerely,

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Amy Klobuchar
U.S. Senator for Minnesota

Senators ask vote machine vendors about Russian access to source code

Reuters

March 7, 2018

Dustin Volz

Two Democratic senators on Wednesday asked major vendors of U.S. voting equipment whether they have allowed Russian entities to scrutinize their software, saying the practice could allow Moscow to hack into American elections infrastructure.

The letter from Senators Amy Klobuchar and Jeanne Shaheen followed a series of Reuters reports saying that several major global technology providers have allowed Russian authorities to hunt for vulnerabilities in software deeply embedded across the U.S. government.

The senators requested that the three largest election equipment vendors - Election Systems & Software, Dominion Voting Systems and Hart Intercivic - answer whether they have shared source code, or inner workings, or other sensitive data about their technology with any Russian entity.

They also asked whether any software on those companies' products had been shared with Russia and for the vendors to explain what steps they have taken to improve the security of those products against cyber threats to the election.

The vendors could not immediately be reached for comment. It was not immediately clear whether any of the vendors had made sales in Russia, where votes are submitted via written ballots and usually counted by hand.

"According to voting machine testing and certification from the Election Assistance Commission, most voting machines contain software from firms which were alleged to have shared their source code with Russian entities," the senators wrote. "We are deeply

concerned that such reviews may have presented an opportunity for Russian intelligence agents looking to attack or hack the United States' elections infrastructure."

U.S. voters in November will go to the polls in midterm elections, which American intelligence officials have warned could be targeted by Russia or others seeking to disrupt the process.

There is intense scrutiny of the security of U.S. election systems after a 2016 presidential race in which Russia interfered, according to American intelligence agencies, to try to help Donald Trump win with presidency. Trump in the past has been publicly skeptical about Russian election meddling, and Russia has denied the allegations.

Twenty-one states experienced probing of their systems by Russian hackers during the 2016 election, according to U.S. officials.

Though a small number of networks were compromised, voting machines were not directly affected and there remains no evidence any vote was altered, according to U.S. officials and security experts.

TK News by Matt Taibbi

The YouTube Ban Is Un-American, Wrong, and Will Backfire

Silicon Valley couldn't have designed a better way to further radicalize Trump voters

Matt Taibbi Dec 11 554 1,293

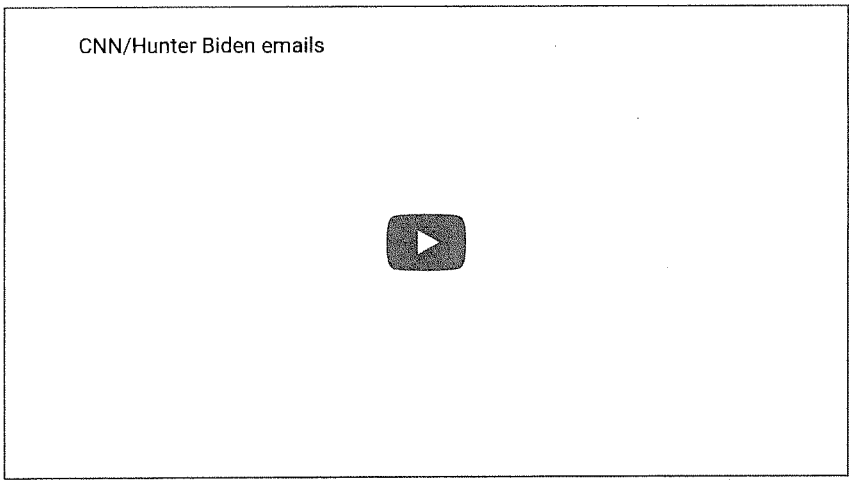
Start with the headline: *Supporting the 2020 U.S. Election.* YouTube in its company blog can't even say, "Banning Election Conspiracy Theories." They have to employ the Orwellian language of politicians — Healthy Forests, Clear Skies, "Supported" Elections — because Google and YouTube are now political actors, who can't speak plainly any more than a drunk can walk in a straight line.

The company wrote Wednesday:

> Yesterday was the safe-harbor deadline for the U.S. Presidential election and enough states have certified their election results to determine a President-elect. Given that, we will start removing any piece of content uploaded today (or anytime after) that misleads people by alleging that widespread fraud or errors changed the outcome of the 2020 U.S. Presidential election... For example, we will remove videos claiming that a Presidential candidate won the election due to widespread software glitches or counting errors.

This announcement came down at roughly the same time Hunter Biden was announcing that his "tax affairs" were under investigation by the U.S. Attorney in Delaware. Part of that investigation concerned whether or not he had violated tax and money laundering laws in, as CNN put it, "foreign countries, principally China." Information suggestive of money-laundering and tax issues in China and other countries was in the cache of emails reported in the *New York Post* story blocked by Twitter and Facebook.

That news was denounced as Russian disinformation by virtually everyone in "reputable" media, who often dismissed the story with an aristocratic snort, *a la* Christiane Amanpour:

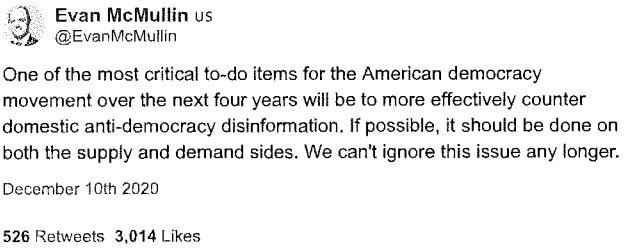


That tale was not Russian disinformation, however, and Biden's announcement this week strongly suggests Twitter and Facebook suppressed a real story of legitimate public interest just before a presidential election.

How important was that Hunter Biden story? That's debatable, but the fact that tech companies blocked it, and professional journalists gleefully lied about it, has a direct bearing on YouTube's decision now to bar Trumpist freakouts over the election results.

If you want a population of people to stop thinking an election was stolen from them, it's hard to think of a worse method than ordering a news blackout after it's just been demonstrated that the last major blackout was a fraud. Close your eyes and imagine what would have happened if Facebook and Google had banned 9/11 Truth on the advice of intelligence officials in the Bush years, and it will start to make sense that Trump voters in Guy Fawkes masks are now roaming the continent like buffalo.

The YouTube decision also came on the same day that former CIA officer Evan McMullin tweeted this:



McMullin was the Never-Trump conservative who ran for president in 2016 and received glowing coverage from *The Washington Post* and other outlets as the man who "stands a fair chance of stealing the red state of Utah from GOP nominee Donald Trump." The same outlet that blasted Jill Stein's "fairy tale candidacy" had Josh Rogin write a slobbering blowjob profile of McMullin just before the 2016 election, hailing his "steady personality, honesty, and work ethic" and gushing at the possibility that he might become the first third-party candidate to win a state since 1968. "That," Rogin noted without irony, "might be his most successful covert operation."

Intelligence officers like McMullin have spent much of the last four years conditioning the public to accept the idea that aggressive steps need to be taken to stop "foreign disinformation" or "foreign interference," in the media landscape most of all. A move to stop "domestic anti-democracy disinformation" on "both the supply and demand sides" (*wtf!?*) is a serious escalation of that idea.

Signs pointed to this moment coming. This past August, the office of the Director of National Intelligence released an assessment that foreign countries were seeking to spread "disinformation" in the run-up to the election. In October, Virginia Democrat (and former CIA official) Abigail Spanberger piggybacked on that report and introduced a bill designed to cut down on "foreign disinformation."

The law among other things would require that political ads or content produced by foreign governments be marked by disclaimers, and that companies should remove any such content appearing without disclaimers. It would also expand language in the Foreign Agents Registration Act (FARA) requiring that any content intended to influence U.S. citizens politically be reported to the Department of Justice.

Stipulate that this is all above board, that there's nothing odd about the Department of Justice monitoring political ads, or registering content creators, or permanent bureaucrats in intelligence agencies publishing their takes on which presidential candidate is preferred by conniving foreign adversary nations. The United States has survived a long time without such procedures, but sure: an argument can be made that any country has an interest in alerting its citizens to foreign messaging.

Where it gets weird is when the effort to stamp out "foreign interference" is transferred to the domestic media landscape. Intelligence agencies, think tanks, and mainstream news agencies have been preparing us for this concept for years as well. This dates back to the infamous 2016 *Washington Post* story hyping PropOrNot, a shadowy organization that identified a long list of homegrown American news sites like *Consortium, TruthDig, Naked Capitalism,* and *Antiwar.Com* as vehicles for "Russian propaganda."

Connecticut Senator Richard Blumenthal two years ago insisted the Russians in attempting to disrupt our lives "will use American voices. No longer the broken English, no longer the payment in rubles. They will become ever more astute in their attacks." Think-tanks began hyping ideas about "domestic-origin disinformation" and foreign countries "co-opting authentic American voices."

As time passed in the Trump years, we started reading on a regular basis that Russian propaganda efforts would be harder to detect, because they would be routed through people appearing on the outside, like Nexus 6 replicants, to be ordinary human Americans. In late February earlier this year, at the peak of the preposterous campaign to depict Bernie Sanders as a favorite of the Kremlin, David Sanger of the *New York Times* warned that Russians were

purposefully sending messages through "everyday Americans" because "it is much harder to ban the words of real Americans."

When *The Bulwark*, basically the reanimated corpse of Bill Kristol's *Weekly Standard*, wrote some weeks back about Donald Trump holding a "maskless anti-democracy disinformation rally straight out of Vladimir Putin's dreams," that language wasn't accidental. This was part of a P.R. campaign, years in the making, preparing us for the idea that domestic voices can be just as dangerous as foreign ones, and similarly need to be stamped out.

The YouTube announcement is the latest salvo in the fight against "domestic anti-democracy information," and the first of many problems with it is its hypocrisy. Do I personally believe the 2020 election was stolen from Donald Trump? No. However, I also didn't believe the election was stolen from Hillary Clinton in 2016, when the Internet was bursting at the seams with conspiracy theories nearly identical to the ones now being propagated by Trump fans:

Daniel Nazer
@danielnazer

It's stunning how perfectly the Palmer Report's coverage in 2016 matches today's MAGA conspiracies. But Democratic state AGs were not stupid enough to submit it to the Supreme Court.

Donald Trump's impossibly strong support in Wisconsin counties that used electronic voting

[illegible] | 3:29 pm EST November 28, 2016

[illegible]

Researchers find alarming Wisconsin pattern, even when adjusted for demographics

Rigged election: two Wisconsin voting blocks had more ballots cast than registered voters

Bill Palmer | 6:48 pm EST November 29, 2016

Palmer Report

Things keep looking worse in Wisconsin

Math "error" in Wisconsin county hints at how state may have been rigged for Donald Trump

Bill Palmer | 1:09 pm EST November 24, 2016

Palmer Report

Three Wisconsin precincts already caught padding Trump's vote total

Read More

Wisconsin recount observer says Waukesha County is double-counting Donald Trump votes

[illegible] | 5:09 pm EST December 4, 2016

[illegible]

Accusations of recount fraud in key Wisconsin county

December 9th 2020

88 Retweets **362** Likes

Unrestrained speculation about the illegitimacy of the 2016 election had a major impact on the public. Surveys showed 50 percent of Clinton voters by December of 2016 believed the Russians actually hacked vote tallies in states, something no official agency ever alleged even at the peak of the Russiagate madness. Two years later, one in three Americans believed a foreign power would change vote tallies in the 2018 midterm elections.

These beliefs were turbo-charged by countless "reputable" news reports and statements by politicians that were either factually incorrect or misleading, from the notion that there was "more than circumstantial" evidence of collusion to false alarms about Russians hacking everything from Vermont's energy grid to C-SPAN.

What makes the current situation particularly grotesque is that the DNI warning about this summer stated plainly that a major goal of foreign disruptors was to "undermine the public's confidence in the Democratic process" by "calling into question the validity of the election results."

Our own domestic intelligence agencies have been doing exactly that for years now. On nearly a daily basis in the leadup to this past Election Day, they were issuing warnings in the corporate press that you might have reason to mistrust the coming results:

foreignpolicy.com › 2020/09/25 › real-hacking-threat-f...

In Some Ways, Russia Has Already Hacked the 2020 Election ...

Sep 25, 2020 — 7 statement, "foreign states **will** continue to use covert and overt influence measures in their **attempts** to sway U.S. voters' preferences and ...

www.nbcnews.com › politics › five-ways-russians-coul...

5 ways the Russians could wreak havoc on the 2020 election

Nov 30, 2020 — It's not likely, but here **are** five ways experts say **the Russians** (or Iranians ... sign that Russian hackers have **tried** to infiltrate the **election** infrastructure the ... U.S. officials: Iran and Russia hacked voter data to influence **election**.

www.nytimes.com › U.S. › Politics

Russia Poses Greater Election Threat Than Iran, Many U.S. ...

Oct 22, 2020 — The discovery of the **hacks** came as American intelligence agencies, ... "It's reasonable to assume any **attempt** at the **election** systems **could** be ...

www.cnn.com › 2016/12/26 › 2016-presidential-campaig...

2016 Election Hacking Fast Facts - CNN

Oct 29, 2020 — Read CNN's Fast Facts about **hacking** during the 2016 presidential campaign. ... that at least one computer has been compromised by **Russian** hackers. ... masked as an alert from Google that another user had **tried** to access his account. It contains a link to a page where Podesta can change his password.

www.npr.org › 2020/10/22 › ongoing-russian-cyberattac...

Ongoing Russian Cyberattacks Are Targeting U.S. Election ...

Oct 22, 2020 — Russian Hackers Break Into 2 County Systems, Stoking **Election** Security Fears ... The focus of the effort, from the notable **Russian hacking** group ... Government officials **do** not usually announce the location of **hacks**, but The ...

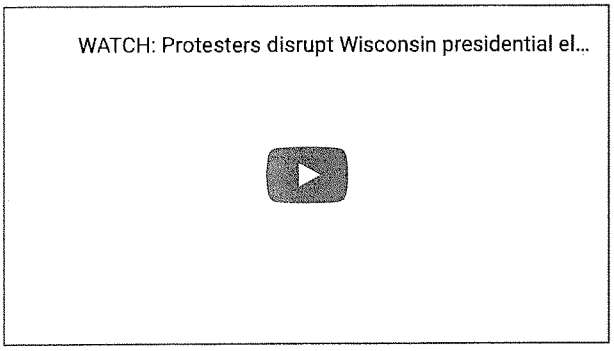
Amazing how those stories vanished after Election Day! If you opened any of those pre-vote reports, you'd find law enforcement and intelligence officials warning that everything from state and local governments to "aviation networks" was under attack.

In fact, go back across the last four years and you'll find a consistent feature of warnings about foreign or domestic "disinformation": the stern scare quote from a bona fide All-Star ex-spook

or State official, from Clint Watts to Victoria Nuland to Frank Figliuzzi to John Brennan to McMullan's former boss and buddy, ex-CIA chief Michael Hayden. A great many of these figures are now paid contributors to major corporate news organizations.

What do we think the storylines would be right now if Trump had won? What would those aforementioned figures be saying on channels like MSNBC and CNN, about what would they be speculating? Does anyone for a moment imagine that YouTube, Twitter, or Facebook would block efforts from those people to raise doubts about that hypothetical election result?

We know the answer to that question, because all of those actors spent the last four years questioning the legitimacy of Trump's election without any repercussions. *The Atlantic,* quoting the likes of Hayden, ran a piece weeks after Trump's election arguing that it was the duty of members of the Electoral College to defy voters and elect Hillary Clinton on national security grounds. Mass protests were held to disrupt the Electoral College vote in late December 2016, and YouTube cheerfully broadcast videos from those events. When Electoral vote tallies were finally read out in congress, ironically by Joe Biden, House members from at least six states balked, with people like Barbara Lee objecting on the grounds of "overwhelming evidence of Russian interference in our election."



In sum, it's okay to stoke public paranoia, encourage voters to protest legal election results, spread conspiracy theories about stolen elections, refuse to endorse legal election tallies, and

even to file lawsuits challenging the validity of presidential results, so long as all of this activity is sanctified by officials in the right party, or by intelligence vets, or by friendlies at CNN, NBC, the *New York Times,* etc.

If, however, the theories are coming from Donald Trump or some other disreputable species of un-credentialed American, then it's time for companies like YouTube to move in and wipe out 8000+ videos and nudge people to channels like CBS and NBC, as well as to the home page of the federal Cybersecurity and Infrastructure Security Agency. This is a process YouTube calls "connecting people to authoritative information."

Cutting down the public's ability to flip out removes one of the only real checks on the most dangerous kind of fake news, the official lie. Imagine if these mechanisms had been in place in the past. Would we disallow published claims that the Missile Gap was a fake? Tbat the Gulf of Tonkin incident was staged? How about Watergate, a wild theory about cheating in a presidential election that was universally disbelieved by "reputable" news agencies, until it wasn't? It's not hard to imagine a future where authorities would ask tech platforms to quell "conspiracy theories" about everything from poisoned water systems to war crimes.

There's no such thing as a technocratic approach to truth. There are official truths, but those are political rather than scientific determinations, and therefore almost always wrong on some level. The people who created the American free press understood this, even knowing the tendency of newspapers to be idiotic and full of lies. They weighed that against the larger potential evil of a despotic government that relies upon what Thomas Jefferson called a "standing army of newswriters" ready to print whatever ministers want, "without any regard for truth."

We allow freedom of religion not because we want people believing in silly religions, but because it's the only defense against someone establishing one officially mandated silly religion. With the press, we put up with gossip and errors and lies not because we think those things are socially beneficial, but because we don't want an aristocratic political establishment having a monopoly on those abuses. By allowing some conspiracy theories but not others, that's exactly the system we're building.

Most of blue-state America is looking aghast at news stories about 17 states joining in a lawsuit to challenge the election results. Conventional wisdom says that half the country has been taken over by a dangerous conspiracist movement that must be tamed by any means necessary. Acts like the YouTube ban not only don't accomplish this, they'll almost certainly

further radicalize this population. This is especially true in light of the ongoing implication that Trump's followers are either actual or unwitting confederates of foreign enemies.

That insult is bad enough when it's leveled in words only, but when it's backed up by concrete actions to change a group's status, like reducing an ability to air grievances, now you're removing some of the last incentives to behave like citizens. Do you want 70 million Trump voters in the streets with guns and go-bags? Tell them you consider them the same as foreign enemies, and start treating them accordingly. This is a stupid, dangerous, wrong policy, guaranteed to make things worse.

554 1,293

← Previous Next →

Write a comment...

Leroy Kolacinski Dec 11

Matt, while I agree with you in theory, I need to know what we can do to stem the tide of misinformation that is going out. Psychological research has shown that, in this case, "good speech" does not drive out bad speech. Once a lie is consumed and internalized, presenting evidence against it only strengthens the subject's belief in the falsehood.

The mistake is that social media companies are not stopping these lies from propagating early enough. Once the lie has taken hold, then the idea of censorship is not only odious, as you point out, but also worthless in terms of combating it. In fact, it strengthens the believer's adherence to the lie.

The question is, as I said, what CAN be done?

1 Reply

240 replies by Matt Taibbi and others

David Ross Dec 11

Most Trump voters aren't "radicalized", Matt, nor are we in danger of becoming so. You may have noticed that it wasn't Trump voters who raged through the streets of our cities this summer, burning, looting and killing. We ARE mighty pissed off, though. Who wouldn't be, with the media, Big Tech, the entire Democrat party and half the GOP working together to drag Biden over the finish line. The YouTube fiasco is merely the icing on a very rotten cake. Fuck Google, Facebook and Twitter, their woke-but-morally-bankrupt CEOs, and their obvious progressive biases. I don't know what the answer is, but an old-fashioned pillory might not be a bad place to start.

94 Reply

208 replies

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December 16, 2020

Senator Ron Johnson
U.S. Senate Committee on Homeland Security and Governmental Affairs

Re: Associated Press Elections Processes

Dear Senator Johnson,

For more than 170 years, The Associated Press has tabulated the vote in U.S. elections and delivered the results to its members and customers. It is something that we have done through the Civil War, the pony express, periods of unrest, and world wars. The decentralized U.S. elections system makes the work AP does to tabulate votes and call races a critical function of the American democracy.

In every U.S. election since 1848, AP has collected and communicated election returns in all counties, parishes, cities and towns across the country, covering races down to the legislative level in each state. We do this because the American public does not want to wait until mid-December to know who won an election. In the 2020 U.S. elections, AP tabulated the vote in 7,000 contests, doing the work so that the public knows as soon as possible who wins not only the White House, but control of Congress and each state legislature.

This all is no small effort. It involves thousands of AP staff and freelancers working together to collect and tabulate the vote. Only then do we distribute the results to our customers, and only then does the public read the results online or in the newspaper or see them on the air. As you may know, thousands of broadcasters, newspapers, digital outlets around the world rely on our results and we are trusted to deliver the results of elections quickly, accurately and without fear or favor.

Given the extraordinary interest in this past November's election, we did extensive work to be as transparent as we could with the public about AP's elections processes. In the months before Election Day, we explained what AP's essential role is in U.S. elections and how the elections processes work at AP. We developed a landing page on our corporate website outlining AP's role in elections (which you can see here: https://www.ap.org/media-center/understanding-the-election); we published a series of elections-related Q&As, including how we tabulate the vote (you can see that here: https://blog.ap.org/behind-the-news/understanding-the-election-how-ap-counts-the-

vote); we regularly made AP news leaders available for interviews with news organizations to explain in depth our role in the process; and we produced explanatory journalism around each race call in the presidential election, all in an effort demystify a complex process. We have been deliberately public and transparent about this process, which we set forth in detail below.

How AP tabulates the vote

Aggregating and compiling the vote count data

From well before dawn on Election Day and continuing until the count is complete, thousands of people are engaged on AP's behalf to gather the vote count data and report the election results. This is an area of AP expertise built up over decades of accurately collecting, aggregating and delivering information on how Americans voted.

Our elections team is staffed with experienced election workers and our field operation is supervised by seasoned veterans. Most of our freelancers in the field have been with AP for multiple elections and have worked at least a primary election leading up to the general election in the same year. We also conduct regular training sessions each week for vote entry personnel and field operations. We also tap into our 50-state footprint of local journalists in the U.S., who have firsthand knowledge of their territories and trusted relationships with county clerks and other local officials.

On election night, shortly before the polls close, over 4,000 AP freelancers report to county election centers across the country. When the first polls close, the freelancers phone in the raw vote as it is reported by the counties. They place their calls to AP election centers around the country, which because of the pandemic, were virtual in 2020. In 2020, more than 800 vote entry clerks in AP's election centers answered those calls and walked each freelancer through a check list as they enter the number of precincts reporting and the candidates' votes into our election system. Since many states and counties display their election night results on websites, teams at the election centers also monitor those sites and enter results into the same system. This system tabulates the results and disseminates the data in a variety of formats to our member news organizations and customers.

It is fundamentally important to understand that AP collects data on how Americans voted from multiple sources – the data is not derived from a single source in any state. We take in city, county and state feeds from the secretaries of state, county or city, we monitor official websites and we have a network of over 4,000 experienced freelancers who call in results. We use all these different sources to make sure that we are delivering the most up-to-date and accurate election returns available to customers and to our own newsroom. We work very hard to assure that our tabulated results are accurate by having our election experts compare those multiple sources within the states and use the most up to date.

Entering the vote count data into AP's systems, and verifications

AP has dozens of checks and balances ensuring the integrity of the aggregation of the vote count collected from the various sources in each state. The reported vote counts themselves are subject to an intense series of checks and reviews for accuracy. As reported votes are entered into the AP system, they must pass through computer programs that set off alerts in cases of discrepancies or apparent inconsistencies with previous voting history or other data. Any discrepancy is reviewed by an experienced AP elections employee, and then evaluated to ensure the numbers are accurate and the process can continue. If a town clerk provides AP with vote count numbers that show a significant disparity from expected patterns, a popup box appears on AP's system that summons a supervisor to intervene before the process can continue.

AP elections staff are well-trained and are encouraged to ask a series of questions to ensure accuracy as they collect the numbers of recorded votes from local elections clerks, including asking if there are problems in their county. Additionally, if the data entered looks inconsistent or statistically unlikely -- for example, if there are more votes entered than voters registered in a given county -- AP's quality control software checks will interrupt the entry of the collected data with popups, requiring confirmation of the numbers.

Process for changes and updates

To be clear, AP does not adjust or make changes to the numbers submitted by local town clerks. AP will point out any inaccuracy or anomaly we see to local election officials and ask them if they would like to review their numbers. AP only enters the vote totals from the election officials after they have responded to our inquiry. Every reported vote recorded in AP's system comes directly from a town, or parish election staff member or is scraped directly from the town, parish or state's website.

Because AP uses multiple sources to collect the vote in each state, there are sometimes brief fluctuations in precincts reporting and the reporting on actual vote totals when switching from one source to another. These fluctuations are sometimes referred to as "vote drops". Our quality control teams review the data at the time of a source switch, and we fix any inaccuracies immediately and alert our customers about the situation in keeping with our commitment to transparency. In most cases, the adjustments are from when a county changes the data sent to AP. This can happen, for example, if an early report from an election official includes an incomplete status, or if a first report from an election official inaccurately assigns statewide returns to an individual county. To be sure, this isn't a sign of something nefarious; rather, it's a real-time indication that our process to ensure the accuracy of the reported and recorded votes is working. "Vote drops" are not new to the 2020 elections. They have occurred in our vote tabulation operation every year and are no more than a hitch in the process.

While we work hard to collect and record the votes cast in each locality as quickly as we can, we are first and foremost focused on accuracy. The speed at which AP can tabulate the vote is wholly dependent on the speed with which vote data is released by each county or parish.

Delivering the information to members and customers

We begin providing results as soon as they come in on Election Day. This may be as early as the statutory poll close time in a state. Because the U.S. election system is decentralized, each state has its own laws, processes and procedures. That effectively means we are managing 50 different elections on election night with respect to the presidential election. For example, each state handles mail-in voting differently and has different rules about when it can begin processing and counting absentee ballots. Poll close times vary from state to state. Some states have multiple poll close times depending on time zones.

Our vote tabulation results are delivered to our customers and members, who in turn take AP's vote tabulation feed and use it in their print, digital or broadcast offerings. We distribute vote totals via an Application Programming Interface (API) available in various data formats and in pre-packaged digital features, including maps and tables. Vote tabulation results are updated throughout the evening and the days following Election Day, as the remaining votes are counted and the numbers reported out to the AP.

In addition to tabulating the vote on and after election night, AP also ultimately gathers the certified results from the states and makes them available to customers. We load those results into our feeds on a state-by-state basis and they are marked with separate certified flag. As is the case in every election, we make clear to our customers that the results we provide on election night and in the days and weeks after are unofficial; the certified results represent the final, official results from the states. Once the final state certifies its election results, we update our maps and tables accordingly.

In our ongoing efforts to be as transparent as possible, we have had much of this information available to the public via AP's website. You can access it here: http://apne.ws/ShslLCt

We hope this answers the questions you had about the vote tabulation process at The Associated Press. We take pride in this work and are pleased to have the opportunity to share this information with you and the Committee through this letter. Please do not hesitate to reach out if we can help answer any further questions on this topic.

Most sincerely,

Karen Kaiser
Senior Vice President
General Counsel
The Associated Press

Brian Scanlon
Director of Elections
The Associated Press

Post-Election Litigation in Battleground States

Updated December 14, 2020

Abstract: This document briefly summarizes the approximately 60 Election Day and post-Election Day lawsuits filed in the battleground states, primarily by the Trump For President campaign and various GOP groups. It also links to the legal complaints and court orders where possible.

Authors: Zahavah Levine and Jacob Kovacs-Goodman

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Arizona

- **Burk v. Ducey, No. CV202001869 (Ariz. Super. Ct., Pinal Cnty.)**
  - **Open Case**
  - **Filed 12/07/20: Complaint**. Plaintiff, an Arizona voter, alleges that there was a scheme that resulted in the counting of hundreds of thousands of fictitious ballots in Arizona and that Dominion software covered up this scheme. Plaintiff seeks an audit and an injunction against transmitting Arizona's results to the electoral college.

- **Bowyer v. Ducey, No. 2:20-cv-02321-DJH (D. Ariz.)**
  - **Open Case**
  - **12/09/2020: Order/Ruling.** The court held that plaintiffs are not candidates and allege no concrete harm, so lack standing. The court also held that plaintiffs fail to state a claim, they delayed too long in bringing the claim, their claims are moot, Colorado River abstention is warranted in this case, and that the Eleventh Amendment bars plaintiffs' request to mandate decertification. The court held that plaintiffs did not provide any evidence for their claims and dismissed the suit.
  - **Filed 12/02/20: Complaint**. Plaintiffs, Arizona voters and one candidate for Republican Arizona presidential elector, bring suit against Arizona state officials, including the governor and secretary of state. Plaintiffs allege that poll watchers failed to adequately verify signatures on ballots, that Maricopa County ballot dispute referees were partisan, that Dominion backups had no chain of custody, and that the Dominion machines themselves suffered from errors during state evaluations. Plaintiffs claim that defendants' actions violate the Elections and Electors Clauses, and seek de-certification of Arizona results or, in the alternative, that Arizona certify its results for Trump.

- **Stevenson v. Ducey, No. CV2020-096490 (Ariz. Super. Ct., Maricopa Cnty.)**
  - **Closed Case**
  - **12/07/2020: Voluntary Dismissal.**
  - **Filed 12/04/20: Complaint**. Plaintiffs, members of the Arizona Election Integrity Association, allege that a grant from the Center for Tech and Civic Life helped fund the election, that the absentee ballot error rate was impermissibly high, and that state officials did not enforce residency requirements and permitted double voting. Based on

these purported violations of the Election Code and the state constitution, plaintiffs seek an injunction against the certification of the election results.

- **Ward v. Jackson, No. CV2020-015285 (Ariz. Super. Ct., Maricopa Cnty.)**
  - **Closed Case**
  - **12/11/2020: Petition for Cert.**
  - **12/08/2020: Order/Ruling.** The Arizona Supreme Court, sitting en banc, held that plaintiffs had not provided any evidence to suggest that the hand count audit, required by the Election Code prior to the final canvass, was insufficient to discover fraud. The court concluded that the superior court was correct in its determination that the hand count audit was adequate and that there was no evidence of misconduct.
  - **12/04/2020: Appeal to the Arizona Supreme Court.**
  - **12/04/2020: Order/Ruling.** The court held that the evidence did not demonstrate fraud or misconduct, since the court's ordered audit and the forensic examiners found a small number of duplicate ballots and a low error rate, without any impact on the outcome. The court denied relief and confirmed the election certification.
  - **Filed 11/30/20: Complaint**. Plaintiff, an Arizona voter, alleges that poll workers were not fit to verify absentee signatures and that observers were not present for the replication of damaged ballots, in violation of state law. The lawsuit requests an audit and requests the election results be annulled.

- **Arizona Republican Party v. Fontes, No. CV2020-014553 (Ariz. Super. Ct., Maricopa Cnty.)**
  - **Closed Case**
  - **Issue: Criteria for sample size of quality control recount.**
  - **11/18/2020: Order/Ruling.** Dismissed, order to follow.
  - **Filed 11/12/2020: Complaint.** Arizona must hand-count a random sampling of ballots as quality control once a preliminary result has been made public. Plaintiffs, the Republican party, contend that, according to state law, a sampling from 2% of precincts is required which, in Maricopa County, is 15 precincts. Defendant, the Maricopa County Recorder, follows the Secretary of State manual which, due to Maricopa County's Vote Center model, would sample 2% of vote centers (4 centers). Plaintiffs seek a hand count by "precincts" as opposed to "polling places."

- **Aguilera v. Fontes, No. CV2020-014562 (Ariz. Super. Ct., Maricopa Cnty.)**
  - **Closed Case**
  - **Issue:**
  - **11/30/2020: Dismissed.** The court held that the plaintiffs fail to allege a sufficient harm to achieve standing. The court also held that there were no violations of the Election Code and the relief requested was not appropriate. The court dismissed the case with prejudice.
  - **Filed 11/12/2020: Complaint.** Plaintiffs, two Arizona voters, allege that the electronic system did not count one of their votes, and that the other's ballot was rejected by the tabulator and subject to off-site human adjudication. Plaintiffs seek the ability to cast a ballot that will be counted and an opening of the offsite adjudication process to the public.

- **DJT for President v. Hobbs, No. _____ (Ariz. Super. Ct., Maricopa Cnty.)**
  - **Closed Case**
  - **Issue: Request to halt the canvass until review of over-voted in-person ballots that were allegedly improperly disqualified**
  - **11/16/2020: Dismissed.** Case dismissed as moot. Ballot totals at issue would not impact election outcome.
  - **Filed 11/7/2020**: **Complaint**. Donald. J Trump for President brings suit against Secretary of State Hobbs and Maricopa County Recorder Fontes alleging that qualified voters who cast their ballots in person on election day had their ballots improperly disqualified as an "overvote" without additional adjudication or review. Alleges violations of multiple clauses of the AZ constitution including equal protection and equal access to elections, as well as various election related statutes including ARS 16-611. Complaint includes declaration from six voters. Plaintiffs seek an injunction prohibiting canvassing until these over votes are permitted to be reviewed and adjudicated.

- **Aguilera v. Fontes, No. CV2020-014083 (Ariz. Super. Ct., Maricopa Cnty.)**
  - **Closed Case**
  - **Issue: Request that in-person ballots filled with sharpie markers be allowed to be cured.**
  - **11/07/2020: Dismissed.** Plaintiffs voluntarily dismiss suit without prejudice.

- **Filed 11/04/2020: Complaint.** Petitioner, Maricopa County voter, voted in person on Election Day, November 3, 2020 and claims that Maricopa County failed to properly process and count her vote because of the sharpie she was provided at the polling location. Her claims arise out of the state constitution's Art II Sections 13, 21 - Arizona's "equal privileges" clause, and failure to ensure maximum correctness, impartiality, and uniformity of election procedures under A.R.S. sections 16-449(B), 16-452(A). Plaintiff requests that all in-person ballots filled with sharpie pens be allowed to be cured.

District of Columbia

- **Michigan Welfare Rights Organization v. Trump, No. 1:20-cv-03388 (D.C. Cir.)**
  - **Open Case**
  - **Issue: Voter disenfranchisement in violation of the Voting Rights Act**
  - **11/20/2020: Complaint.** Plaintiffs, Detroit voters and a state chapter of a union that advocates for low-income people, allege that defendant, the Trump campaign, in its pressure on state and local officials to not certify election results, is attempting to disenfranchise Black voters in violation of the Voting Rights Act.

Georgia

- **Trump v. Raffensperger, No. __**
  - **Open Case**
  - **Filed 12/04/20: Complaint**. Petitioners, Donald Trump and a Georgia voter, request a new presidential election on the basis of alleged violations of the Georgia Election Code and state constitution. Petitioners allege that respondents, county elections officials, allowed unqualified people to vote, sent unsolicited absentee ballots to voters, entered into a consent decree that allocated more personnel to conduct signature verification, and that the number of absentee ballots was higher than in previous elections.

- **Boland v. Raffensperger, No. __**
  - **Open Case**
  - **Filed 11/30/20: Complaint**. Plaintiff, a Georgia voter, alleges that people who did not reside in Georgia voted in the election and that there was a low ballot rejection rate

based on signature mismatch. Plaintiff alleges both issues arise from the Secretary of State's failure to follow the Election Code. As remedy, plaintiff seeks the decertification of election results.

- **Pearson v. Kemp, No. 1:20-cv-04809-TCB (N.D. Ga.)**
  - **Open Case**
  - **12/08/2020: Notice of appeal.**
  - **12/07/2020: Order/Ruling.** In a minute order on the record, Judge Batten ruled that: "The relief that the plaintiffs seek this court cannot grant - they ask the court to order the secretary of state to decertify the election results as if such a mechanism even exists, and I find that it does not."
  - **12/04/2020: Appeal and Dismissal.** The Eleventh Circuit dismissed the appeal for lack of jurisdiction and allowed the proceedings to continue in the district court. The panel found that, instead of waiting for an imminent appealable order, appellants appeal the district court's emergency temporary restraining order.
  - **11/29/2020: Order/Ruling.** The court instituted a ten-day temporary restraining order preventing defendants from altering or destroying Dominion machine data.
  - **Filed 11/25/20: Complaint**. Plaintiffs, Georgia voters, allege that election software and hardware from Dominion Voting Systems, which was purportedly developed by Venezuelans to manipulate votes in favor of Hugo Chavez, led to a fraudulent ballot-stuffing campaign in Forsyth, Spalding, Cherokee, Hall, and Barrow Counties. Plaintiffs allege that the state's use of Dominion violated the Election Code and the Fourteenth Amendment by processing "defective" ballots and seek as remedy an injunction against transmitting Georgia's certified results.

- **Wood v. Raffensperger, No. 2020CV342959 (Ga. Super. Ct., Fulton Cnty.))**
  - **Open Case**
  - **11/25/2020: Complaint.** Plaintiff, President of the Georgia Voters Alliance, contends that Georgia officials violated the Election Code and state constitution by accepting a grant from the Center for Tech and Civic Life to help fund the election, by following a consent decree that provided for more scrutiny of absentee ballot signatures and disqualification, and by counting purportedly illegal votes. Plaintiff requests that the court prevent the governor from certifying Georgia's results and instead mandate that any result determined by the Georgia state assembly be the lawful result.

- **Lin Wood v. Raffensperger, No. 1:20-cv-04651-SDG (N.D. Ga.)**
  - **Open Case**
  - **11/20/2020: Order/Ruling.** The district court considered whether defendants violated the state constitution by (1) executing and enforcing the pre-election settlement agreement to the extent that it required different procedures from the Georgia Election Code, and (2) not permitting designated monitors to have certain viewing privileges of the Audit. The court held that Lin Wood lacked standing to bring these claims. The court also held plaintiff had not demonstrated a likelihood of success on the merits. The court denied the request for a temporary restraining order.
  - **11/19/2020: Order/Ruling.** Denied, order to follow.
  - **Filed 11/13/20: Complaint**. Plaintiff, a Georgia voter, alleges that defendant, the Secretary of State, violated the Elections Clause by entering into the litigation settlement in Georgia Democratic Party v. Raffensperger in March. Plaintiff alleges that the Secretary of State changed the manner of handling absentee ballots to a form inconsistent with state law. On a variation of this argument, plaintiffs further alleges that the "disparate" treatment of absentee ballots by county boards as compared to the process laid out by the Georgia legislature is an equal protection violation. Plaintiff seeks an injunction against certifying the general election results in Georgia.

- **Rebecca Brooks v. Thomas Mahoney III, 4:20-cv-00281-RSB-CLR (S.D. Ga.)**
  - **Closed Case**
  - **Issue: Request to exclude the votes of counties with alleged voting irregularities from the state's overall vote count.**
  - **11/16/2020: Dismissed.** Plaintiffs voluntarily dismiss suit.
  - **Filed 11/11/20: Complaint**. Plaintiffs, Georgia voters, file suit against defendants, members of County Boards of Elections, the Secretary of State, and the Governor. Plaintiffs allege that, during the election: voters were recorded as having voted absentee, even though they voted in person and did not register absentee; voter registration exceeded 100%; and non citizens voted. Plaintiffs seek to exclude counties with any irregularities from the state's overall vote total, on the grounds that such counties' inclusion dilutes plaintiffs' votes.

- **In re: Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV20-00982 (Ga. Super. Civil)**
  - **Closed Case**
  - **Issue: Request to sequester ballots received post-election day**
  - **11/05/2020: Order/Ruling.** The court held that there was no evidence that the ballots in question were returned after 7:00p.m. on Election Day or that Chatham County Board of Elections had violated any law.
    - **Press Report: "**A pair of Republican election watchers who had raised concerns on Wednesday about the process testified in the video-conferenced hearing. They both testified about concerns about the process they observed involving a stack of 53 ballots, but offered no evidence that the ballots had come in after the deadline. After listening to testimony for more than a hour, including a details outlining the procedures the Chatham County registrar's office uses to receive and track absentee ballots, Judge James F. Bass swiftly threw out the case. 'I'm denying the request and dismissing the petition,' he said."
  - **Filed 11/04/2020: Complaint.** Petitioners, the Georgia Republican Party and Donald J. Trump for President, Inc., petition the Court to order the Chatham County Board of Elections to follow specific ballot custody procedures, namely, to store all absentee ballots received after 7:00 P.M. on Election Day, as allegedly required by Ga. Code Ann. sec. 21-2-386(a)(1)(F), and to provide an accounting of all such ballots to Petitioners. Petitioners claim this action is necessary to avoid the inadvertent count of these ballots, which Petitioners claim would be contrary to Georgia law.

Michigan

- **King v. Whitmer, No. 2:20-cv-13134-LVP-RSW (E.D. Mich.)**
  - **Open Case**
  - **Issue: Request to de-certify results.**
  - **12/11/2020: Petition for Cert.**
  - **12/07/2020: Order/Ruling.** The court held that: the suit is barred by the Eleventh Amendment, the case is now moot, the doctrine of laches applies - in that plaintiffs waited too long to bring their claims, abstention doctrine applies since parallel state

proceedings are ongoing, and that plaintiffs failed to establish an injury sufficient to meet standing requirements.

- **11/25/2020: Complaint.** Plaintiffs, Michigan voters, allege that Republican poll observers were denied the opportunity to meaningfully observe, election workers forged and altered ballots, and that defective ballots were still counted. Plaintiffs claim these purported executive branch violations of the Election Code violate both the elections and Electors Clauses and that, as remedy, the court should either de-certify Michigan's results or certify them for Trump.

- **Leaf v. Whitmer, No. 1:20-CV-1169 (E.D. Mich.)**
  - **Closed Case**
  - **Issue: Request to preserve data.**
  - **12/07/2020: Order/Ruling.** The court held that plaintiffs failed to meet the requirements for the relief sought on the basis of an improper submission. The court found that there was nothing amounting to a complaint based on specific causes of action, that the application was not verified, and that the notice certification requirement was not met.
  - **12/06/2020: Complaint.** Plaintiff, the Barry County Sheriff, seeks injunctive relief against the Michigan Board of Elections from initiating the deletion of election records.

- **Johnson v. Benson, No. 162286 (Mich. Sup. Ct.)**
  - **Closed Case**
  - **Issue: Request to de-certify results.**
  - **12/09/2020: Order/Ruling.** The Michigan Supreme Court denied relief. Justice Clement, concurring, first analyzed the complaint, finding that the only recognized cause of action is plaintiffs' Count Four, which asks for 'Mandamus and Quo Warranto,' the combination of which, since it is incongruous with the relief sought, "makes it unclear what petitioners are asking this Court to do." The court went on to find that plaintiffs' claimed statutory authority for jurisdiction was lacking. Finally, the court held that the injunction request was barred by mootness.
  - **11/26/2020: Complaint.** Petitioners, members of Black Voices for Trump, allege that respondent state officials failed to allow meaningful poll observation, instructed election workers to count invalid ballots, and permitted grant funding from Mark Zuckerberg. Petitioners further allege that election workers forged ballots and duplicated ballots without oversight. Petitioners allege that the above and the subsequent concealment of the above violate the Election Code and seek an investigation and an injunction against final certification.

- **Johnson v. Benson, No. 1:20-cv-01098 (W.D. Mich.)**
  - **Closed Case**
  - **Issue: Request for injunction against certifying election results based on Secretary of State's voter registration practices.**
  - **11/18/2020: Voluntary dismissal.**
  - **Filed 11/16/20: Complaint.** Plaintiffs, Michigan voters and TCF Center poll challengers, allege that defendant, the Secretary of State, enabled fraud on Election Day. Specifically, plaintiffs claim that the Secretary of State's purportedly illegal plan to mail voters absentee applications caused many invalid occurrences at the TCF Center, culminating in democratic party inspectors filling out "thousands" of ballots in violation of state law. Plaintiffs seek, on equal protection and due process grounds, an injunction against final certification until an audit is conducted.
  - Motion by the DNC to Intervene Filed 11/18/20

- **Donald J. Trump for President Inc. v. Benson, No. 1:20-cv-01083 (W.D. Mich.)**
  - **Closed Case**
  - **Issue: Request for injunction against certifying election results based on challenger access and ballot dates.**
  - **11/19/20: Voluntary dismissal.**
  - **Filed 11/11/20: Complaint.** Plaintiff, the Trump campaign, alleges that Wayne County and the Secretary of State violated the Michigan Election Code by purportedly not permitting challengers to observe the conduct of the election and the processing of ballots and pre-dating ballots that were not eligible to be counted.
  - Dropped on 11/19/20

- **Bally v. Whitmer, No. 1:20-cv-1088 (W.D. Mich)**
  - **Closed Case**
  - **Issue: Request to exclude the votes of counties with alleged voting irregularities from the state's overall vote count.**
  - **11/16/2020: Dismissed.** Plaintiffs voluntarily dismiss suit.
  - **Filed 11/11/20: Complaint.** Plaintiffs, registered voters, file suit against the Secretary of State and Boards of Canvassers. Plaintiffs allege that a certified poll watcher was excluded from canvassing and cites the complaints from *Costantino* and *Trump v. Benson* with claims of anomalous election practices, such as that officials counted ineligible ballots and that deceased individuals cast votes. Plaintiffs further cite websites

to allege that programming errors, multiple ballot mailing, and voter registration exceeding 100% violate plaintiff's fundamental right to vote by diluting their votes. The plaintiffs seek to exclude the presidential vote count from these counties in the state's overall total.

- **Costantino v. Detroit, No. [_____] (Mich. Cir. Ct., Wayne County)**
  - **Closed Case**
  - **Issue: Request for injunction against certifying election results based on various types of alleged misconduct**
  - **11/23/2020: Order/Ruling.** The Michigan Supreme Court, in considering plaintiffs' request to enjoin the Wayne County Board of Canvassers election certification, ruled that the case is now moot, since the Board has already certified the election results.
  - **11/16/2020: Order/Ruling.** Application for reversal and application for appeal both denied.
  - **11/13/2020: Order/Ruling.** The court found that the affidavits supplied by plaintiffs, purporting fraud, were "rife" with generalization, speculation, hearsay, and a lack of evidentiary basis. The court held that the evidence supports no credible finding of fraud at the TCF Center. Furthermore, the injunctive relief plaintiffs ask for, against certification of Wayne County results, would amount to judicial activism in light of the other remedies available. The court denied the injunction.
  - **Filed 11/09/20 Complaint.** Plaintiffs, Wayne County voters, allege several instances of election misconduct. Plaintiffs allege that the city of Detroit processed and counted ballots from voters whose names did not appear in the Qualified Voter File; instructed election workers to not verify signatures on absentee ballots, to backdate absentee ballots, and to process such ballots regardless of their validity; and, "on a daily basis leading up to the election, coached voters to vote for Joe Biden and the Democrat party." Plaintiffs seek an audit, an order to stop the count, an injunction against certifying election results, an order voiding the November 3, 2020 election results and an order that a new election to be held.
  - Supreme Court Appeal Denied 11/23/20

- **Stoddard v. City Election Commission, No. 20-014604-CZ (Mich. Cir. Ct., Wayne County)**
  - **Closed Case**

- **Issue: Request to halt the vote count in Detroit until observers from both parties are present.**
- **11/06/2020: Order/Ruling**. Motion for injunctive relief denied for failure to state a cause of action and because plaintiffs' allegation is "mere speculation." Further, alternative remedies, such as a recount, exist.
- **Filed 11/04/2020: Complaint.** Plaintiffs, a Michigan poll observer and a nonprofit organization, allege that absentee vote count centers in Detroit do not have one inspector from each political party present, in violation of state law. Plaintiffs seek to halt the counting of absentee ballots until observers from both parties are present.

- **Donald J. Trump for President v. Benson, No. 20-000225-MZ (Mich. Ct. Claims)**
  - **Closed Case**
  - **Issue: Request to halt the ballot count until inspectors are allowed at the absentee ballot boards and until challengers can review video surveillance footage of ballot dropboxes**
  - **11/05/2020: Order/Ruling**. The judge dismissed the case stating that, "At this point, the essence of the count is completed, and the relief is completely unavailable."
  - **Filed 11/04/2020: Complaint**. Plaintiff, Donald Trump's reelection campaign, alleges issues with Michigan's Absent Voter Count Boards. Plaintiff asserts, based on state laws, that Michigan has violated election inspector and ballot challenger requirements in counting absentee votes. The campaign asks the court to halt Michigan's ballot count until the Secretary of State allows its inspectors to be present at the absentee ballot boards and until its challengers can review video surveillance footage of ballot dropboxes.

- **Polasek-Savage v. Benson, No. 20-000217-MM (Mich. Ct. Claims)**
  - **Closed Case**
  - **Issue: Request to have more than one challenger present at the absent voter counting board**
  - **11/03/20: Order**. Court denied the request for declaratory judgment, finding that the defendants (the Secretary of State and Oakland County) did not have the power to grant the relief requested.
  - **Filed 11/02/20:** [Complaint] Plaintiffs challenged the rule in Oakland County that organizations approved to appoint election challengers will be permitted to have only one challenger present at each combined absent voter counting board. The issue

concerns the number of election challengers that can be present at a combined absent voter counting board established under MCL 168.764d(1)(a).

Minnesota

- **Kistner v. Simon, No. A20-1486 (Minn. Sup. Ct.)**
  - **Closed Case**
  - **Issue: Request to block Minnesota certification**
  - **12/04/2020: Order/Ruling.** The Minnesota Supreme Court dismissed the case. It held that the doctrine of laches applied to petitioners' claims against the Secretary of State - that they had adequate time, starting from Sept. 18, to bring suit prior to the election but failed to do so. With respect to observer access to post-election review, the court held that Minnesota law requires that such charges be served against county election officials, the court asked petitioners to do so, and petitioners did not.
  - **11/24/20: Complaint.** Petitioners, candidates for Minnesota state congress, seek an immediate temporary restraining order from the Minnesota Supreme Court enjoining the State Canvassing Board from certifying Minnesota's election results. Petitioners allege that the Secretary of State impermissibly removed barriers (suspended the witness requirement) to absentee voting, in violation of separation of powers, and did not provide adequate poll observer access, violating due process.

Nevada

- **Rodimer v. Gloria, No. A-20-825067-P**
  - **Open Case**
  - **Issue: Request to block the use of Agilis in signature verification**
  - **Filed 11/18/2020: Complaint.** Plaintiff, a Candidate for Senate District 6, contends that the Registrar of Voters for Clark County found discrepancies in ballot tracking, used the purportedly unreliable Agilis system, and should have moved certain voters to the inactive list and not sent them ballots. Plaintiff seeks a new election.

- **Becker v. Cannizzaro, No. A-20-825130-W**
  - **Closed Case**
  - **Issue: Request to block the use of Agilis in signature verification**
  - **11/20/20: Voluntary dismissal.**

- **Filed 11/19/2020: Complaint.** Plaintiff, a candidate for state Congressional District 3, seeks relief against the Clark County Registrar of Voters. Plaintiff alleges that defendant's use of the Agilis system to verify signatures, when state law requires verification be conducted by a human, warrants that all votes verified by the system be invalidated and a new election be held.

- **Marchant v. Gloria, No. A-20-824884-W**
  - **Closed Case**
  - **Issue: Request to block the use of Agilis in signature verification**
  - **11/23/2020: Order/Ruling.** The court held that it lacked jurisdiction to hear the writ, which was in fact a claim for an election contest. Yet Nevada's election contest statute excludes the federal legislative election at issue in the petition. The court went on to hold that, even if the claim were able to proceed, it would fail on the merits. The plaintiffs invoke a statute that relates to ballot loss or destruction, neither of which has been demonstrated. The court dismissed the case.
  - **Filed 11/16/2020: Complaint.** Petitioner, a Nevada Fourth Congressional District Representative, seeks injunctive relief against Clark County's use of the Agilis system to verify signatures. Petitioner alleges that state law requires that signature verification be conducted by a human.

- **Law v. Whitmer, No. __**
  - **Closed Case**
  - **Issue: Request to certify the Nevada election for Donald Trump**
  - **12/04/2020: Order/Ruling.** The court turned to the doctrine of issue preclusion, since the issues raised are identical to those already litigated before and decided by this same court in Kraus v. Cegavske and plaintiffs here are in privity with the Kraus parties. Nevertheless, the court went on to rule on the merits that there was no proof of machine malfunctions, improper votes, election board malfeasance, or vote manipulation. The court dismissed the case with prejudice.
  - **Filed 11/17/2020: Complaint.** Plaintiffs, presidential electors for Donald Trump for the state of Nevada, allege widespread electronic voting systems malfunctions both due to the Agilis machine and generally across the country. Plaintiffs also allege that voting drives in Nevada to encourage Native Americans to vote depicted Biden-Harris

promotional material and that any such resulting votes should be invalidated. Plaintiffs allege that the Agilis machine, which was used to verify signatures in Clark County but not other Nevada counties, resulted in an equal protection violation. Plaintiffs seek, as relief, that Donald Trump be certified the winner of Nevada.

- **Becker v. Gloria, No. A-20-824878-W**
  - **Closed Case**
  - **Issue: Request to block the use of Agilis in signature verification**
  - **11/24/2020:** Denied without prejudice.
  - **Filed 11/16/2020: Complaint.** Petitioner, a candidate for senate district 6, seeks relief against the use of the Agilis system in signature verification. Petitioner alleges that, since the AI is flawed and state law requires human review, a new election should be held.

- **Stokke v. Cegavske, No. 2:20-cv-02046 (D. Nev.)**
  - **Closed Case**
  - **Issue: Request to (i) allow greater access to observers, and (ii) cease use of automated system to count ballots**
  - **11/06/2020: Order/Ruling**. Judge Andrew Gordon denied plaintiffs' request for an injunction to prevent Nevada's largest county from using its signature-matching technology. The court also denied the plaintiffs' request to mandate that Clark county permit observers to be closer to the ballot-counting process.
  - **Filed 11/05/2020: Complaint.** Plaintiffs, two individuals and two Nevada congressional campaigns, seek injunctive relief directing defendants to (a) cease their use of the Agilis system to count ballots and (b) allow greater access to ballot counting observers. Plaintiffs claim that the Agilis system, which purportedly misidentified Plaintiff Stokke as having already voted by mail, is not able to properly verify signatures. Additionally, Plaintiffs allege that, while Clark County officials allowed Plaintiff Prudhome to observe the ballot count, he was not allowed to stand in a position that would allow him to meaningfully observe.
  - **Filed 11/05/2020: Motion for Expedited Hearing and Briefing on Emergency Motion for TRO and PI**.

- **Kraus v. Cegavske, No. 82018 (Nev. Sup. Ct.)**

- **Closed Case**
- **Issue: Request that election officials stop duplicating ballots and using AI to authenticate ballot signatures unless observers are granted access to process.**
- **11/10/2020: Order Dismissing Case.** Court granted appellants' motion to dismiss the case. State agreed to allow more observers, in accordance with a settlement agreement.
- **11/05/2020: Emergency Motion for Extension of Briefing Schedule**. Appellants file an emergency motion for a 7-day extension of time to file their docketing statement, opening brief, and appendix pending settlement.
- **11/03/2020: Emergency Motion for Stay and to Expedite Appeal** Kraus, Donald J. Trump for President, and the Nevada Republican party seek a stay of a lower court order allowing duplication of mail ballots without observation and the use of artificial intelligence to expedite appeals. Appellants filed an emergency motion seeking immediate relief under NRAP 8, pending appeal, prohibiting the Clark County Registrar from continuing to duplicate mail ballots unless observers are granted an opportunity to meaningfully observe the process and from using artificial intelligence to authenticate ballot signatures. Appellants also seek to expedite this appeal.
- **11/03/2020: Order/Ruling**. In an order signed by all seven members, the Nevada Supreme Court granted the request to expedite the appeal but denied the motion for an emergency stay to stop the county from processing ballots.
    - The court granted the motion as to the request to expedite the appeal because the matter involves the election process currently underway.
    - The court denied appellants' request to enjoin the registrar from duplicating ballots and using artificial intelligence to authenticate ballots. Appellants have not demonstrated a sufficient likelihood of success to merit a stay or injunction. The court cited the district court's conclusion that appellants' allegations lacked evidentiary support, and noted that "appellant's request for relief to this court is not supported by affidavit or record materials supporting many of the factual statements made therein....It is unclear from the motion how appellants are being prevented from observing the process or that the use of the Agilis machine is prohibited under AB 4....Appellants motion, on its face, does not identify any mandatory statutory duty that respondents appear to have ignored. Further, appellants fail to address the district court's conclusion that they lack standing to pursue this relief. Thus, appellants have

not shown that the NRAP 8(c) factors militate in favor of a stay or injunction, and the request for immediate relief is denied."

- **Kraus v. Cegavske, No. 20 OC 00142 1B (Nev. Dist. Ct., Carson City)**
  - **10/29/2020: Order/Ruling**. The court held that plaintiffs lacked standing, since they proved neither a direct nor indirect injury. Nevertheless, the court went on to find that no proof of an equal protection violation was presented nor was there any statutory basis for the level of poll observation plaintiffs were seeking.
  - **Filed 10/23/2020: Complaint**. The plaintiffs, Nevada Republican Party and Trump's re-election campaign, seek a temporary restraining order, ordering Clark County to immediately halt the county's ballot processing and counting. They argue the county's signature verification process for mail-in ballots is lacking and that observers are not provided with ample opportunities to view or challenge the work of election workers. They are asking the judge to force election officials to allow "meaningful observation" of the verification of mail-in ballots, including allowing watchers to have access to all parts of the verification process and be close enough to verify data, including being able to see individual voter signatures.

- **Donald J. Trump for President v. Gloria, No. A-20-824153-C (Nev. Dist. Ct.)**
  - **Closed Case**
  - **Issue: Request to extend in-person voting hours.**
  - **11/03/20: Order/Ruling**. Select polling places in Clark County, Nevada to stay open an extra hour, to 8:00 p.m.
  - **Filed 11/03/2020: Complaint**. Plaintiffs, Donald J. Trump for President and Nevada Republican Party, seek injunctive relief from Clark County to keep open poll locations affected by voting machine malfunctions until 8:00 p.m.

New York

- **Tenney v. Oswego County Board of Elections, No. EFC-2020-1376 (N.Y. Supr. Ct.)**
  - **Open Case**
  - **Issue: Request to secure ballots.**
  - **12/08/2020: Order/Ruling.** The court held that the Election Boards' canvassing

errors in failing to catalogue and adjudicate ballot challenges, when the candidates might be separated by only 12 votes, necessitates a partial recount. The court ordered that the Boards of elections account for all votes and canvassing errors.

- **Filed 11/04/2020: Complaint**. Petitioner, the Republican candidate for a Congressional district, seeks to sequester and secure the ballots cast, a mandated review of the Board of Election's ballot verification procedures, and to be certified the winner.

Pennsylvania

- **Kelly v. Pennsylvania, No. 620 MD 2020**
  - **Closed Case**
  - **Issue: Request not to certify election results.**
  - **12/08/2020: Order/Ruling.** The Supreme Court, with no dissents, declined to grant the injunctive relief, requested by Rep. Kelly, to prevent Pennsylvania from certifying its election results.
  - **12/03/2020: Emergency application for injunction submitted to Justice Alito.**
  - **11/28/2020: Order/Ruling.** In a per curiam decision, the Pennsylvania Supreme Court vacated the Commonwealth Court's preliminary injunction and dismissed the case with prejudice. The court held that a dismissal was warranted "based upon Petitioners' failure to file their facial constitutional challenge in a timely manner," since the Campaign filed the suit more than a year after the enactment of Act 77, after a general election in which millions of voters had cast mail-in votes.
  - **11/25/2020: Appeal.**
  - **11/25/2020: Order/Ruling.** The court, without elaboration, held that the Commonwealth of Pennsylvania is enjoined from certifying any remaining election results.
  - **Filed 11/21/2020: Complaint**. Plaintiffs, Republican representatives to state congress, seek to declare Act 77, a Pennsylvania statute from 2019 that contains a no-excuse mail-in voting provision, unconstitutional. Plaintiffs request an injunction against certifying the state's election results.

- **Metcalfe v. Wolf, No. 636 MD 2020 (Penn. Commonw. Ct.)**
  - **Closed Case**
  - **Issue: Request to uncertify results.**
  - **12/09/2020: Order/Ruling.** The court held that plaintiffs cannot be entitled to

relief, because what they present as a complaint is "really an improper and untimely election contest." The Election Code specifies how to commence election contests, and the court held that this complaint was neither in the proper venue or within the correct timeframe.

- **Filed 12/04/2020: Complaint**. Plaintiffs, Pennsylvania voters, filed suit against the governor, the secretary of state, and Pennsylvania's democratic presidential electors. Plaintiffs allege that local democratic officials and the Pennsylvania Supreme Court violated numerous portions of the Election Code related to ballot signatures, secrecy envelopes, and poll observers. Plaintiffs seek a Writ of Mandamus directing the governor to withdraw the certification of the 2020 presidential election.

- **Ziccarelli v. Westmoreland County Board of Elections, No. 4152**
  - **Closed Case**
  - **Issue: Request to count ballots that were challenged.**
  - **11/23/2020: Order/Ruling.**
  - **Filed 11/18/2020: Complaint**. Plaintiff, a candidate for Pennsylvania state senate, appeals the Westmoreland County Board of Elections decision to uphold challenges to 9 ballots received without secrecy envelopes and to uphold challenges to 250 ballots where the voter used a provisional ballot and was improperly instructed to sign the poll book.

- **Ziccarelli v. Allegheny County Board of Elections, No. GD-20-11654/No. 1161 CD 2020 (Penn. Commonw. Ct.) and No. GD-20-011793/No. 1162 CD 2020 (Penn. Commonw. Ct.)**
  - **Closed Cases**
  - **Issue: Request to exclude ballots with various defects from the vote count.**
  - **11/23/2020. Appeal denied.**
  - **11/19/2020: Order/Ruling.** The court of appeals held that the plain language of the statute requires both signatures. The court reversed the lower court's decision, holding that the 270 ballots will not be counted.
  - **11/18/2020: Order/Ruling.** The court ruled that the approximately 300 provisional ballots should be counted. Voters were meant to have signed twice, but should not be penalized because they were given and relied on incorrect information from the election administration.

- **Filed 11/16/2020:** Complaint. Plaintiff, a candidate for Pennsylvania state senate, appeals the decision of the Allegheny County Board of Elections to accept 270 provisional ballots that had a requisite signature but not an affidavit signature.
- **11/23/2020:** Order/Ruling. The Supreme Court held 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. The court affirmed the lower courts' decisions to count the ballots, on the basis that the Code's directives in question are not mandatory and Pennsylvania jurisprudence has long held that courts must construe the law to save, not void, ballots.
- **11/19/2020:** Order/Ruling. The court of appeals held that the Election Code requires that voters date the declaration. The lower court is reversed, and the 2,349 ballots will not be counted.
- **11/18/2020:** Order/Ruling. The court held that the ballots at issue are sufficient even without a voter supplied date. The ballots were processed in the Statewide Uniform Registry of Electors ("SURE") system and timestamped when they were timely delivered to the Board on or before November 3, 2020. They were signed and otherwise properly completed by a qualified elector.
- **Filed 11/12/2020:** Complaint. Plaintiff, a candidate for Pennsylvania state senate, appeals the decision of the Allegheny County Board of Elections to accept 2,349 mail-in ballots containing an undated voter verification.

- **Donald J. Trump for President Inc. v. Bucks County Bd. of Elections, No. (Penn. Ct. Common Pleas, Bucks Cnty.)**
  - **Closed Case**
  - **Issue: Request to exclude ballots with various defects from the vote count.**
  - **12/08/2020:** Order/Ruling. The Pennsylvania Supreme Court denied the application for appeal.
  - **11/25/2020:** Order/Ruling. The court first described how Appellant has since withdrawn some of the challenges in the complaint and, of the remaining challenges, all but 69 ballots were resolved by a recent decision of the Supreme Court. These remaining 69 ballots were received with secrecy envelopes that were "unsealed." The court held that, since it cannot be established that the electors did not seal the secrecy envelopes; the parties stipulated that the instructions on the outer envelope stated only

that the ballot should be placed in the secrecy envelope and did not specify that the envelope needed to be securely sealed or the consequences of failing to strictly adhere to that requirement; and there are no allegations of any fraud, impropriety, misconduct, or undue influence, that anyone voted who was not eligible to vote, or that the secrecy of the ballots cast was jeopardized, the 69 ballots would count. The court held prospectively that ballots must be securely sealed.

- **11/24/2020: Order/Ruling.** The Supreme Court denied the applications to Exercise Extraordinary Jurisdiction.
- **11/19/2020: Order/Ruling.** The court held that the Pennsylvania Supreme Court has made it clear that voters should not be disenfranchised based on advisory portions of the Election Code. Even following a "strict" interpretation of the Code, the address, date. or secrecy envelope errors are not mandated by statute. Dismissed.
- **Filed 11/09/2020: Complaint**. Petitioners, the Trump campaign and RNC, seek review of the Bucks County Board of Elections' counting of absentee ballots. Petitioners allege that defendant accepted ballots with date or address defects, or with unsealed secrecy sleeves, as valid votes. Petitioners seek a reversal of the election board's decision.

- **Donald J. Trump for Pres., Inc. v. Boockvar, No. 4:20-cv-02078 (M.D. Pa.)**
  - **Closed Case**
  - **Issue: Omnibus lawsuit requesting an injunction against certifying the election results, alleging mail-in ballot fraud, insufficient poll observer access, and violations of the Elections, Elector, Equal Protection and Due Process clauses of the US Constitution.**
  - **11/27/2020: Order/Ruling.** The Third Circuit denied the requested injunction and affirmed the district court's denial of leave to amend. Judge Bibas, writing for the panel, held that appellants, the Trump Campaign, tried to "repackage" state-law claims about ballot corrections and poll observer access as unconstitutional discrimination. Yet the Campaign never alleges that anyone treated the Trump campaign or Trump votes worse than it treated the Biden campaign or Biden votes. An injunction to undo Pennsylvania's certification is not warranted, since "the number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory" and "it never claims fraud or that any votes were cast by illegal voters." The circuit held that the district court had not abused its discretion in denying leave to amend the complaint a

second time, since the Campaign's delay was undue and an amendment would have been futile.

- **11/23/2020: Appeal.** Appellants seek review of the district court for alleged abuse of discretion in denying their Motion to Amend and in denying the requested injunction as moot.
- **11/21/2020: Order/Ruling.** Plaintiffs contended an equal protection violation, in that Pennsylvania's lack of a uniform prohibition against notice-and-cure is unconstitutional. The court held that plaintiffs lack standing to make this claim but, nevertheless went on to hold that, even if they were to have standing, they failed to even make an equal protection claim. The court dismissed the case, characterizing it as "strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence."
- **Filed 11/09/2020: Complaint.** Plaintiff, the Trump campaign, alleges that defendants, the Pennsylvania Secretary of State and county boards of election, violated the Elections Clause, did not allow for sufficient poll observation of absentee ballot counting, and "did not undertake any meaningful effort to prevent the casting of illegal or unreliable absentee or mail-in ballots." Plaintiff alleges that the purported lack of uniform statewide standards for curing mistakes violates voters' equal protection and due process rights. As remedy, plaintiffs seek an injunction that prohibits Pennsylvania from certifying the election results state-wide or, in the alternative, one that prohibits Pennsylvania from including in its certification the tabulation of absentee and mail-in ballots for which Plaintiffs' watchers were allegedly prevented from observing and those which some counties allegedly improperly permitted to be cured.

- **In re: Pre-Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election, No.: [_____]**
  - **Closed Case**
  - **Issue: Request to enjoin election workers from providing observers the identity of ballots with defects during pre-canvass**
  - **11/03/2020: Order/Ruling.**
  - **11/03/2020: Petition.** Petitioner asks the court to reverse a decision of the Bucks County Board of Elections denying Petitioner's objection to the disclosure of the identification of voters who's ballots were defective (e.g. naked ballots) during the pre-canvass review for the Nov. 3, 2020 general election prior to the close of the polls.

Petitioner contends that the disclosure of such information to authorized observers in the pre-canvass meeting is in turn being disclosed to persons outside of the pre-canvass meeting in violation of Election Code, 25 P.S. Sec. 3146.8(g)(1.1) which provides that "No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls." Petitioner also contends that absentee ballots cast in violation of mandatory requirements are void and cannot be counted.

- **Pirkle v. Wolf, No. 4:20-cv-02088-MWB (M.D. Penn.)**
  - **Closed Case**
  - **Issue: Request to exclude from the state-vote tabulation the votes from multiple counties, due to alleged illegal practices.**
  - **11/16/2020: Dismissed.** Plaintiffs voluntarily dismiss suit.
  - **Filed 11/10/2020: Complaint**. Plaintiffs, Pennsylvania voters, cite the complaint in *Trump v. Boockvar* and promised forthcoming data-backed analysis to allege that several counties violated voters' Fourteenth Amendment rights by counting "illegal votes." As remedy, plaintiffs seek to exclude all votes from those counties, including Philadelphia county, in the tabulation of the state's final vote count.

- **Bognet v. Boockvar, No 20-3214 (3rd Cir.)**
  - **Closed Case**
  - **11/13/20 Order.** In a lawsuit filed before the election but relevant to much of the post-election litigation, the U.S. Circuit Court of Appeals for the Third Circuit upheld the district court's rejection of a constitutional challenge to Pennsylvania's post-Election Day ballot receipt deadline on the grounds that the plaintiffs lacked standing. The court held "when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that the source of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause. Further, and independent of our holding on standing, we hold that the District Court did not err in denying Plaintiffs' motion for injunctive relief out of concern for the settled expectations of voters and election officials. We will affirm the

District Court's denial of Plaintiffs' emergency motion for a TRO or preliminary injunction."

- The Court did not decide "whether the Deadline Extension or the Presumption of Timeliness are proper exercises of the Commonwealth of Pennsylvania's lawmaking authority, delegated by the U.S. Constitution, to regulate federal elections. Nor [did it] evaluate the policy wisdom of those two features of the Pennsylvania Supreme Court's ruling."
- **Bognet v. Boockvar, No. 3:20-cv-00215 (W.D. Pa.)**
  - **10/28/2020: Order/Ruling**. The district court denied the motion for injunction holding that the candidate plaintiff lacked standing because his claims were too speculative and not redressable, and the voter plaintiffs lacked standing on their Equal Protection voter dilution claim because they alleged only a generalized grievance. And although the voter plaintiffs had standing on their Equal Protection arbitrary-and-disparate treatment claim, and were likely to succeed on the merits (that the ballot deadline extension violates Equal Protection), the Purcell principle mandates that no injunction be awarded since there is less than two weeks before the election, and injunctive relief would result in significant voter confusion.
  - **10/22/2020: Complaint**. Plaintiffs, residents of Pennsylvania and some candidates for office there, bring suit against the Pennsylvania Secretary of State and every Pennsylvania county Board of Elections alleging violations of the Elections Clause and Presidential Electors Clause as well as the Equal Protection Clause for counting ballots received after election day but postmarked by election day in accordance with a recent Pennsylvania Supreme Court decision. Plaintiffs seek declaratory and injunctive relief in the form of preventing ballots received after the original Election Day receipt deadline set by statute from being counted and a declaration that the Pennsylvania Supreme Court's decision in Pennsylvania Democratic Party v. Boockvar was contrary to the United States Constitution.

- **In Re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election, Nos. 20110894-20110898 (Penn. Ct. Common Pleas, Philadelphia Cnty.) / Nos. J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F2020 (Penn Sup. Ct.)**
  - **Closed Case**
  - **Issue: request to reserve county election board's refusal to throw out ballots based on various ballot completion omissions**
  - **11/23/2020: Supreme Court Order/Ruling.** The Supreme Court held 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. The court affirmed the lower courts' decisions to count the ballots, on the basis that the Code's directives in question are not mandatory and Pennsylvania jurisprudence has long held that courts must construe the law to save, not void, ballots.
  - **11/13/2020: Orders/Rulings 1, 2, 3, 4, 5.** For each petition, the court reached the same holding: that petitioner is not alleging fraud but conducting an eligibility challenge. The Election Code does not require that the outer envelope have a date, the elector's printed name, and address. In fact, the preprinted ballots already contain the elector's name and address. The Philadelphia County Board of Elections decision to count the ballots is affirmed.
  - **Filed 11/10/2020: 1, 2, 3, 4, 5.** Five petitions from the Trump campaign to overturn the five following Philadelphia County Board of Elections decisions: to count 1,211 ballots where the voter affixed their signature to the Declaration Envelope, but no other information was provided, preventing signature verification; to count 1,259 ballots where the voters did not date their signature but all other information was complete; to count 553 ballots where all the information was complete except for the voter's printed name; to count 860 ballots missing a street address; and to count 4,466 ballots where the voters signed and dated but did not print their name and street address.

- **Boockvar v. Republican Party of Pennsylvania, No. 20A84 (S. Ct)**
  - **Closed Case**

- **Issue: Request for order to sequester post-Election-Day ballots and exclude them from the vote count**
- **11/06/2020: Order/Ruling**. Justice Alito ordered that all absentee ballots received after 8:00 P.M. on November 3 be segregated and that, if such ballots are counted, that their tally be counted separately. The Court did not order Pennsylvania to exclude such ballots from its vote count.
- **11/06/2020 Emergency Application for Injunction Pending Certiorari Review.** The Republican Party of Pennsylvania petitioned the Supreme Court to order election boards to separate ballots received after Election Day through November 6, 2020 and to refrain from counting them while the Republicans' legal challenge to those ballots remains pending. The challengers acknowledged that Secretary of State Boockvar directed county election boards to segregate later-arriving ballots, but contended that the guidance is insufficient to preserve the challengers' potential right to a targeted remedy of tossing those ballots later because (i) the election boards are not required to follow the directions from the Secretary of State, (ii) the Secretary of State may change her mind, and (iii) it "is currently unclear whether all 67 county boards of elections" in the state are following instructions to segregate mail-in ballots that arrive after Election Day and they have been unable to confirm whether they are. Petitioners requested the court to instruct election boards "to log, to segregate, and otherwise to take no further action" on mail-in ballots received after Election Day, suggesting that the order might also prohibit the state from counting the ballots.

- **Donald J. Trump for Pres., Inc. v. Philadelphia Cnty. Bd. of Elections, No. 2:20-cv-05533-PD (E.D. Pa.)**
  - **Closed Case**
  - **Issue: Requesting broader observer access.**
  - **11/05/2020: Order/Ruling.** Request for injunction denied without prejudice.
  - **Filed 11/05/2020: Complaint**. Plaintiff Donald J. Trump for President seeks an injunction halting the count of ballots in Philadelphia County unless Republican observers are permitted to monitor the count. The complaint alleges that the Board of Elections is ignoring an unspecified Order that purportedly requires Republican observers to be present. Plaintiff seeks an Emergency Injunction barring the Defendant County Board of Elections from continuing to count any ballots so long as Republican observers are not present as required by state law.

- **Donald J. Trump for President Inc. v. Montgomery County Bd. of Elections (In re Canvass of Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election), No. 2020-18680 (Penn. Ct. Common Pleas)**
  - **Closed Case**
  - **Issue: Appeal of decision by the election board to count 600 absentee ballots missing some information on outer envelope**
  - **11/13/2020: Order/Ruling.** The court agreed with the Montgomery County Board of Elections's interpretation of the Election Code. The law does not require that voters provide their addresses on the declaration envelope. The 592 ballots will be counted.
  - **Filed 11/05/20: Petition.** Petitioners, Donald J. Trump for President, the RNC, Heidelbaugh for Attorney General, Garrity for PA, and Republican state house candidate Daniel Wissert, request that the Court reverse the purported decision by the Montgomery Court Board of Elections to deny Petitioners' objections to counting absentee ballots that fail to include all of the required information (i.e. signature, address, and/or date of execution) on the outer declaration envelope. Petitioners objected to 600 such ballots and claim the board's decision is in violation of 25 P.S. sections 3146.6(a) and 3150.16(a).

- **Donald J. Trump for President, Inc. v. Kathy Boockvar, et al., No. 602 MD 2020 (Pa. Comm. Ct.)**
  - **Closed Case**
  - **Issue: Request to discard absentee ballots cured between Nov 9-12 with proof of ID**
  - **11/12/2020: Order/Ruling.** The court held that the Secretary of State did not have authority to extend the proof of ID period by three days (from November 9 to November 12), and granted an injunction requiring that ballots in connection with which the voter's ID was verified after November 9 be excluded from the vote count.
  - **Filed 11/04/20 Petitioner's Application**. Petitioners, the Trump campaign and RNC, seek injunctive relief to prohibit the Respondents, the Pennsylvania Secretary of State, from allowing absentee and mail-in voters to cure their ballots by providing proof of ID after November 9. Petitioners claim the state's plan to accept such ID

through Nov 12 violates the Pennsylvania Election Code. Petitioners also seek injunctive relief to prohibit the Respondents from counting any absentee and mail-in ballots of voters whose proof of identification was not received and verified by November 9, 2020.

- **In re: Canvassing Observation, No. 30 EAP 2020 (Penn. Sup. Ct.)**
  - **Closed Case**
  - **Issue: Request for broader right to observe the canvassing**
  - **11/13/2020:** Order/Ruling. The Supreme Court found that the procedures for poll observing that the Philadelphia Board of Elections had implemented were reasonable under law. The court held that the legislature held proximity parameters to the discretion of county boards of elections. The court concluded that, based on the plaintiffs' witness's own testimony, he had sufficient access to observe under the Election Code.
  - **11/05/20**. Philadelphia county appeals the state appellate court's reversal of the trial judge's ruling that Philadelphia was complying with canvassing observer requirements.
  - **In Re: Canvassing Observation, No. 1094 CD 2020 (Penn. Commonw. Ct.)**
  - **11/04/20:** Appellant Brief. The Trump campaign appealed the trial court (court of common pleas) ruling that Philadelphia county was complying with poll observer requirements.
  - **11/05/2020:** Order/Ruling. The appeals court reversed the court of claims, and held that all candidates, watchers, or candidate representatives be permitted to be present for canvassing processes pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8, and to observe within 6 feet.
  - **In Re: Canvassing Observation, No. 7003 (Penn. Ct. Common Pleas, Philadelphia Cnty.)**
  - Petitioners, the Trump campaign, allege that poll observers do not have sufficient proximity to canvassing.
  - **11/03/2020:** Order/Ruling. The presiding election day judge, based on the witness's testimony, held that Philadelphia was complying with canvassing observer requirements as set forth in Pennsylvania law, and denied the oral motion of Petitioners for closer observation of the canvassing of ballots.

- **Barnette v. Lawrence, No. 2:20-cv-05477-PBT (E.D. Pa.)**
  - **Closed Case**
  - **Issue: Request to discard and sequester defective ballots that were cured, request to stop allowing voters to cure defects**
  - **11/06/2020 Order:** The Court denied the motion for the TRO. The court will not order the county to toss ballots that initially contained errors that were later cured.
  - **Filed 11/03/2020: Complaint**. Plaintiff, a Republican congressional candidate, seeks injunctive relief from Montgomery County, PA. He alleges the County illegally pre-canvassed mail-in ballots and contacted some voters who's mail ballots had defects (such as a missing signature) to give them a chance to correct the problem. Plaintiff, whose district includes Montgomery County, argues that since not all Pennsylvania counties are doing this, under Bush v. Gore, it is a federal equal protection violation for some voters to be notified about curing their ballots and others not. He asks the court to order the Montgomery County election officials to stop the practice of reaching out to voters and not count the ballots that have been cured. Plaintiff also alleges that the County is restricting the ability of "Canvass Watchers" to monitor the process.

- **Hamm v. Boockvar, No. 600 MD 2020 (Pa. Comm. Ct.)**
  - **Closed Case**
  - **Issue: Request to stop allowing ballots with errors to be cured by the submission of provisional ballots**
  - **11/06/20 Order.** The court granted in part and denied in part the Petitioner's request. The court ordered that all provisional ballots cast on Election Day (in cases where the voter's absentee or mail-in ballot was timely received) be segregated and secured from other provisional ballots pending the legal determination of whether such provisional ballots are valid and may be counted. The court ordered the Secretary of State to distribute the order to county election boards statewide.
  - **Filed 11/03/20: Petitioner's Application**. Petitioners Hamm (a candidate for the Pennsylvania State House of Representatives) and Mike Kelly (a Republican Candidate for US Congress), and others, seek injunctive relief (i) blocking Secretary of State Boockvar from permitting absentee and mail-in ballots that were submitted with errors to be "cured" by the submission of provisional ballots, and (ii) prohibiting the state from disclosing identifying information about voters who have submitted ballots rejected for non-compliance with the Pennsylvania Election Code (so that party and

candidate representatives cannot reach out to help them cure). Petitioners contend that Secretary Boockvar's guidance allowing election officials to provide such information to parties and candidate representatives violates Pennsylvania law (25 P.S. Sec. 3146.8) and the Pennsylvania Supreme Court's decision in In re November 3, 2020 Gen. Election (Pa. Oct. 23, 2020) because it allows voters an opportunity to cure ballot defects.

- **In re: Motion for Injunctive Relief of Northampton County Republican Committee, No.: C-48-CV-2020-6915**
  - **Closed Case**
  - **Issue: Request to enjoin election workers from providing observers the identity of ballots with defects during pre-canvass**
  - Northampton County Republican Committee made an oral motion to enjoin the Northampton County Board of Elections from disclosing the identity of voters of cancelled ballots during pre-canvassing.
  - **11/03/2020 Order/Ruling**. The court denied the oral motion of the Northampton County Republican Committee to enjoin the Northampton Board of Elections from disclosing the identity of cancelled ballots during pre-canvassing.

Texas

- **Texas v. Pennsylvania et al., No. 22O155 (Supr. Ct.)**
  - **Closed Case**
  - **Issue: Decertification.**
  - **12/11/2020: Order/Ruling.** In a brief statement, the Supreme Court denied for lack of standing Texas's motion to file its complaint. Plaintiff failed to demonstrate "a judicially cognizable interest in the manner in which another State conducts its elections." Justices Alito and Thomas dissented, stating they would permit the filing, yet refraining from commenting on the merits.
  - **12/08/2020: Complaint.** The State of Texas filed a motion, on the basis of 28 U.S.C. § 1251(a) and the Supreme Court's Rule 17, to submit a bill of complaint against the states of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania challenging their administration of the 2020 presidential election. The complaint alleges three unconstitutional practices: 1) defendant states' executive and judicial

branches amended Election Codes, in violation of the Electors Clause; 2) disparate, more favorable treatment of democratic voters; and 3) relaxing absentee ballot regulations, such as signature verification standards. Plaintiff cites Anderson for the proposition that Texas votes are diluted by the alleged maladministration in defendant states, and seeks injunctive relief.

Wisconsin

- **Trump v. Biden, No. 2020CV007092 (Wis. Super. Ct., Milwaukee Cnty.)**
  - **Closed Case**
  - **Issue: Contesting Recount.**
  - **12/14/2020: Order/Ruling.** The Wisconsin Supreme Court held that the Campaign is not entitled to the relief it seeks. It held that the challenge to the indefinitely confined voter ballots is meritless on its face, and the other three categories of ballots challenged fail under the doctrine of laches.
  - **12/11/2020: Appellant Brief.** Appellants focus their objections on four different categories of ballots—each applying only to voters in Dane and Milwaukee Counties. First, they seek to strike all ballots cast by voters who claimed indefinitely confined status since March 25, 2020. Second, they argue that a form used for in-person absentee voting is not a "written application" and therefore all in-person absentee ballots should be struck. Third, they maintain that municipal officials improperly added witness information on absentee ballot certifications, and that these ballots are therefore invalid. Finally, they assert that all ballots collected at "Democracy in the Park," two City of Madison events in late September and early October, were illegally cast.
  - **12/11/2020: Order/Ruling.** The court affirmed the final recount determinations of the Dane County Board of Canvassers and Milwaukee County Elections Commission.
  - **12/03/2020: Complaint.** Pursuant to state law, President Trump and Vice-President Pence file an appeal and post a surety in cash to contest the Wisconsin recount.

- **Trump v. Wisconsin Election Commissions, No. 2:20-cv-01785 (E.D. Wis.)**
  - **Open Case**
  - **Issue: Request that Wisconsin legislature decide results.**
  - **12/12/2020: Order/Ruling.** The court found, as a threshold matter, that it had jurisdiction to resolve plaintiff's claims (plaintiff meets standing requirements and

claim is barred neither by mootness nor the Eleventh Amendment). The court then held on the merits that the plaintiff failed to prove that the WEC violated his rights under the Electors Clause. The court found that the record showed Wisconsin's Presidential Electors were "determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution." With respect to plaintiff's three complaints about the WEC's guidance on indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses are not challenges to the "Manner" of Wisconsin's appointment of Presidential Electors, but rather disagreements over election administration. Defendant WEC in fact conducted the election in the manner directed by the state legislature, in accordance with the Electors Clause.

- **12/02/2020: Complaint.** Plaintiff, Donald Trump, alleges that defendants, local government officials in Wisconsin, undermined the election. Specifically, plaintiff alleges that defendants ignored limits on the availability of mail-in balloting, created ballot dropboxes, did not provide adequate access to poll observers, "eliminated state laws requiring that voters provide information on the mail-in ballot envelope," and permitted election workers to alter ballots. Plaintiff claims that the alleged conduct violates both the Elections and Electors Clauses. As remedy, plaintiff requests that the result of the Wisconsin election be remanded to the Wisconsin state legislature.

- **Trump v. Evers, No. 2020AP1971-OA (Wis. Sup. Ct.)**
  - **Closed Case**
  - **Issue: Request to de-certify results.**
  - **12/03/2020: Order/Ruling.** Petition for leave to commence an original action is denied. Judge Hagedorn, concurring, specifies that Wisconsin law requires that challenges to election results be brought to the circuit court.
  - **12/01/2020: Complaint.** Petitioners, President Trump and Vice President Pence, seek to void Wisconsin's election certification. Petitioners ask the court to reject early in-person absentee votes in Milwaukee and Dane counties, where the ballot envelope contains a voter certification and application. Petitioners also allege violations of the election code with respect to "indefinitely confined" voters having different ID requirements, election workers allegedly filling in missing voter information, and pre-Election Day "Democracy in the Park" initiatives.

- **Feehan v. Wisconsin Elections Commission, No. 2:20-cv-1771 (E.D. Wis.)**
  - **Closed Case**
  - **Issue: Request to de-certify results.**
  - **12/09/2020: Order/Ruling.** The court held that it lacked the jurisdiction to grant the relief the remaining plaintiff seeks : "federal judges do not appoint the president in this country." Primarily, the court held that the plaintiff lacked Article III standing to sue in federal court over a state election claim. But the court went on to dismiss the claims on the additional basis of mootness.
  - **12/01/2020: Complaint.** Plaintiff, a Republican presidential elector for the state of Wisconsin, alleges that the Wisconsin Elections Commission violated the Election Code. Plaintiff alleges that defendant used the Dominion voting system; directed clerks not to remove individuals from the list of those who registered as confined to home; permitted ballot certificates without addresses; and, on October 19, directed clerks to fill in missing ballot information. Plaintiff asserts that defendant's actions violate the Elections and Electors Clauses, and that the election results must either be de-certified or certified for Trump.

- **Mueller v. Jacobs, No. 2020AP1958-OA (Wis. Sup. Ct.)**
  - **Closed Case**
  - **12/03/2020: Order/Ruling.** Petition for leave to commence an original action is denied.
  - **11/27/2020: Complaint.** Petitioner, a Wisconsin voter, requests that the Wisconsin Supreme Court take original jurisdiction over the case, in which petitioner alleges that Wisconsin's ballot dropboxes and all ballots placed in such dropboxes were illegal. Petitioner alleges that the Wisconsin Election Commission improperly made law by advising counties to establish such dropboxes.

- **Wisconsin Voters Alliance vs. Wisconsin Election Commissions**
  - **Closed Case**
  - **Issue: Request to block certification of results.**
  - **12/04/2020: Order/Ruling.** The Wisconsin Supreme Court held that issues of material fact prevent the court from addressing the legal issues presented. Justice Hagedorn, in his concurrence, explains that the petition "falls far short of the kind of

compelling evidence and legal support we would undoubtedly need to countenance the court-ordered disenfranchisement of every Wisconsin voter."

- **11/23/2020: Complaint.** Petitioners, Wisconsin voters, allege that the Mark Zuckerberg-funded Center for Technology and Civic Life, which granted money to municipalities to conduct elections, circumvented absentee ballot laws and caused illegal votes to be cast, without which Trump would have won Wisconsin.

- **Langenhorst v. Pecore, No. 1:20-cv-01701 (E.D. Wis.)**
  - **Closed Case**
  - **Issue: Request to exclude the votes of counties with alleged voting irregularities from the state's overall vote count.**
  - **11/16/2020: Dismissed.** Plaintiffs voluntarily dismiss suit.
  - **11/12/20: Complaint.** Plaintiffs, Wisconsin voters, state that Wisconsin had many absentee ballots this year, and such ballots are purportedly conclusively linked to fraud. Plaintiffs further allege that three deceased individuals voted and that voters who had received absentee ballots voted in person, after election officials tore up their unvoted absentee ballots. Plaintiffs claim that these alleged practices violate plaintiffs' fundamental right to vote by diluting their votes, and seek to exclude the presidential vote count from these counties from the state's overall total.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DONALD J. TRUMP,

Plaintiff,

v.

Case No. 20-cv-1785-BHL

The WISCONSIN ELECTIONS COMMISSION, ET AL.,

Defendants.

DECISION AND ORDER

This is an *extraordinary* case. Plaintiff Donald J. Trump is the current president of the United States, having narrowly won the state of Wisconsin's electoral votes four years ago, through a legislatively mandated popular vote, with a margin of just over 22,700 votes. In this lawsuit, he seeks to set aside the results of the November 3, 2020 popular vote in Wisconsin, an election in which the recently certified results show he was defeated by a similarly narrow margin of just over 20,600 votes. Hoping to secure federal court help in undoing his defeat, plaintiff asserts that the defendants, a group of some 20 Wisconsin officials, violated his rights under the "Electors Clause" in Article II, Section 1 of the Constitution.[1] Plaintiff seizes upon three pieces of election guidance promulgated by the Wisconsin Elections Commission (WEC)—a creation of the Wisconsin Legislature that is specifically authorized to issue guidance on the state election statutes—and argues that the guidance, along with election officials' conduct in reliance on that guidance, deviated so significantly from the requirements of Wisconsin's election statutes that the election was itself a "failure."

Plaintiff's requests for relief are even more *extraordinary*. He seeks declarations that defendants violated his Constitutional rights and that the violations "likely" tainted more than

[1] Plaintiff's complaint also refers to the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. At the December 9, 2020 final pre-hearing conference, plaintiff disclaimed reliance on any First Amendment or Due Process claims. While counsel purported to reserve the Equal Protection claim, the complaint offers no clue of a coherent Equal Protection theory and plaintiff offered neither evidence nor argument to support such a claim at trial. It is therefore abandoned. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (undeveloped arguments and arguments unsupported by pertinent authority are waived).

50,000 ballots. Based on this declaratory relief, his complaint seeks a "remand" of the case to the Wisconsin Legislature to consider and remedy the alleged violations. Plaintiff's ask has since continued to evolve. In his briefing, he says he wants "injunctive relief" requiring the Governor "to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature." In argument, counsel made plain that plaintiff wants the Court to declare the election a failure, with the results discarded, and the door thus opened for the Wisconsin Legislature to appoint Presidential Electors in some fashion other than by following the certified voting results.

Defendants want plaintiff's claims thrown out, arguing his complaint fails to state a claim and raising several knotty issues of federal jurisdiction. With the Electoral College meeting just days away, the Court declined to address the issues in piecemeal fashion and instead provided plaintiff with an expedited hearing on the merits of his claims. On the morning of the hearing, the parties reached agreement on a stipulated set of facts and then presented arguments to the Court. Given the significance of the case, the Court promised, and has endeavored, to provide a prompt decision. Having reviewed the caselaw and plaintiff's allegations, the Court concludes it has jurisdiction to resolve plaintiff's claims, at least to the extent they rest on federal law, specifically the Electors Clause. And, on the merits of plaintiff's claims, the Court now further concludes that plaintiff has not proved that defendants violated his rights under the Electors Clause. To the contrary, the record shows Wisconsin's Presidential Electors are being determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution. Plaintiff's complaint is therefore dismissed with prejudice.[2]

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

1. THE PARTIES

Plaintiff Donald J. Trump is the current, properly elected, President of the United States. In 2016, after a statewide recount, plaintiff won Wisconsin's Presidential Electors by 22,748 votes. *Certificate of Ascertainment for President, Vice President and Presidential Electors General Election – November 8, 2016*, seal affixed by Governor Scott Walker, National Archives,

[2] This decision constitutes the Court's findings of fact and conclusions of law under Federal Rule of Civil Procedure 52.

https://www.archives.gov/electoral-college/2016. Plaintiff went on to win the 2016 Electoral College with 304 electoral votes. 2016 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2016. He was a candidate for reelection to a second term as President in the November 3, 2020 election.

Defendant Wisconsin Elections Commission is a creation of the Wisconsin Legislature. *See* 2015 Wis. Act 118 §4, Wis. Stat. §5.05. It is a bi-partisan, six-person commission that has "responsibility for the administration" of the state election laws in Chapters 5 to 10 and 12 of the Wisconsin Statutes.[3] Wis. Stat. §15.61. Any action by the commission requires the affirmative vote of at least two-thirds of its members. Wis. Stat. §5.05(1e). Defendants Ann S. Jacobs, Mark L. Thomsen, Marge Bostelmann, Dean Knudson, and Robert F. Spindell, Jr. are five of the six members of the commission.[4]

Defendant Scott McDonnell is sued in his official capacity as the Dane County Clerk. As the county clerk, McDonnell has a host of election-related responsibilities, including providing ballots and elections supplies to the municipalities, preparing ballots, educating voters, and training election officials. *See* Wis. Stat. §7.10. Additionally, McDonnell serves on the county board of canvassers, which is responsible for examining election returns and certifying the results to the WEC. Wis. Stat. §7.60.

Defendants Maribeth Witzel-Behl, Tara Coolidge, Matt Krauter, and Kris Teske are sued in their official capacities as the City Clerks of Madison, Racine, Kenosha, and Green Bay. As city clerks, they supervise both voter registration and elections. Wis. Stat. §7.15. They provide training for voters and election officials and equip the polling places. *Id.* Additionally, they are part of each respective city's board of canvassers. Wis. Stat. §7.53.

Because of their substantial populations, Milwaukee County and the City of Milwaukee have additional "election boards." Milwaukee County has a county board of election commissioners and the City of Milwaukee has a municipal board of election commissioners. Wis. Stat. §7.20(1). These boards have the same powers and duties assigned to the municipal and county clerks in other parts of the state. Wis. Stat. §7.21. Defendant George L. Christiansen is sued in his official capacity as the Milwaukee County Clerk. As the county clerk,

[3] Chapter 11 of the Wisconsin Statutes contains the state's campaign finance laws, which are outside of the WEC's authority.

[4] For reasons not explained, plaintiff did not name Commissioner Julie M. Glancey as a defendant.

he serves as the executive director of the county board of election commissioners, *id.*, but he is not on the county board of canvassers. *See* Wis. Stat. §7.60. Jim Owczarski is sued in his official capacity as the Milwaukee City Clerk. Like Defendant Christiansen, Owczarski maintains some election-related responsibilities, but he is not on the city's board of canvassers. Wis. Stat. §7.53.

Julietta Henry is sued in her official capacity as Milwaukee County Elections Director. The record in unclear on Henry's duties as Elections Director. Claire Woodall-Vogg is sued in her official capacity as the Executive Director of the City of Milwaukee Election Commission. She has the same powers and duties assigned to city clerks throughout the rest of the state. *See* Wis. Stat. §7.21.

Defendants Tom Barrett, Satya Rhodes-Conway, Cory Mason, John Antaramian, and Eric Genrich are sued in their official capacities as the Mayors of Milwaukee, Madison, Racine, Kenosha, and Green Bay. Plaintiff contends that these five mayors unlawfully promoted the expansion of mail-in voting in their cities by adopting practices that were banned by the Wisconsin Legislature. Under Wisconsin's election statutes, mayors play no formal role in presidential elections.

Defendants Tony Evers and Douglas La Follette are sued in their official capacities as the Governor and Secretary of State of Wisconsin. As governor, in accordance with Wis. Stat. §7.70, Defendant Evers signed the certificate of ascertainment prepared by the WEC, affixed the state seal, and forwarded the certificate to the U.S. administrator of general services. Wis. Stat. §7.70(5)(b). Defendant La Follette also signed the certificate of ascertainment.

2. WISCONSIN'S MANNER OF CHOOSING PRESIDENTIAL ELECTORS

Article II, Section 1, Clause 2 of the United States Constitution (the "Electors Clause") states, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…" U.S. CONST. art. II, §1, cl. 2. Pursuant to this federal Constitutional command, the Wisconsin Legislature has directed that Wisconsin choose its Presidential Electors through a general election. *See* Wis. Stat. §8.25. Specifically, the Wisconsin Legislature has directed:

> (1) Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.

Wis. Stat. §8.25(1). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States … presidential electors." Wis. Stat. §5.02(5).

The Wisconsin Legislature has also established laws detailing the particulars of election administration; these details are set forth in Chapters 5 to 12 of the Wisconsin Statutes. For the last five years, responsibility for the administration of Wisconsin elections has rested with the WEC. The Wisconsin Legislature created the WEC in 2015 specifically to "have the responsibility for the administration of … laws relating to elections and election campaigns." 2015 Wis. Act 118 §4; Wis. Stat. §5.05. To carry out these duties, the legislature has delegated significant authority to the WEC. The Wisconsin Legislature directed the WEC to appoint an administrator to "serve as the chief election officer" of the state. Wis. Stat. §5.05(3d), (3g). The Wisconsin Legislature has authorized the WEC to conduct investigations, issue subpoenas, and sue for injunctive relief. Wis. Stat. §5.05(b), (d). The legislature also directed the WEC to receive reports of "possible voting fraud and voting rights violations," Wis. Stat. §5.05(13), and to "investigate violations of laws administered by the commission and … prosecute alleged civil violations of those laws." Wis. Stat. §5.05(2m)(a).

The Wisconsin Legislature has also assigned powers and duties under the state election laws to municipal and county clerks, municipal and county boards of canvassers, and in Milwaukee, the municipal and county boards of election commissioners. Wis. Stat. §§7.10, 7.15, 7.21. The Wisconsin Legislature has directed that these officials, along with the WEC, administer elections in Wisconsin. *See* Wis. Stat. chs. 5 to 10 and 12. When the polls close after an election, these officials make sure that "all ballots cast at an election … be counted for the person … for whom … they were intended." Wis. Stat. §7.50(2). Once all the votes have been counted, the WEC chairperson "shall publicly canvass the returns and make his or her certifications and determinations on or before … the first day of December following a general election." Wis. Stat. §7.70(3)(a). For the determination of Presidential Electors, the Wisconsin Legislature has directed the WEC to "prepare a certificate showing the determination of the results of the canvass and the names of the persons elected." Wis. Stat. §7.70(5)(b). The legislature has further directed that "the governor shall sign [the certificate], affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services." *Id.* At noon on

the first Monday after the second Wednesday in December, the Presidential Electors meet to vote for the presidential candidate from the political party which nominated them. Wis. Stat. §7.75.

In addition to logistically administering the election, the Wisconsin Legislature has directed the WEC to issue advisory opinions, Wis. Stat. §5.05(6a), and "[p]romulgate rules … applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The WEC is to "conduct or prescribe requirements for educational programs to inform electors about voting procedures, voting rights, and voting technology." Wis. Stat. §5.05(12).

Finally, the Wisconsin Legislature has provided detailed recount procedures. Wis. Stat. §9.01. After requesting a recount, "any candidate … may appeal to circuit court." Wis. Stat. §9.01(6). The legislature has also directed that "[Wis. Stat. §9.01] constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. §9.01(11).

3. WEC'S GUIDANCE IN ADVANCE OF THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

Consistent with its statutory mandate, since the start of the year, the WEC has published more than 175 messages to County and Municipal elections officials in anticipation of the November 2020 general election. *See Recent Clerk Communications*, Wisconsin Elections Commission, https://elections.wi.gov/clerks/recent-communications. In addition to notifying elections officials of training opportunities, relevant court decisions, and upcoming deadlines, these messages provided detailed guidance on how to prepare for the election and count the resulting votes. *See id.* As stipulated by the parties, the WEC issued specific guidance on three specific issues flagged by plaintiff: missing or incorrect absentee ballot witness certificate addresses, voters claiming indefinitely confined status, and absentee ballot drop boxes. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶11.)

WEC's guidance on at least one of these issues dates back even further. More than four years ago, on October 18, 2016, the WEC issued written guidance to city and county elections boards providing guidance on the topic of witness addresses provided in connection with absentee

balloting. (Stipulation, ECF No. 127 ¶4.)[5] This guidance explained to elections officials how to handle missing or incorrect witness addresses on absentee certificate envelopes. (Pl. Ex. 73, ECF No. 117-72.) The memo highlighted Wis. Stat. §6.87, which states "[i]f a certificate is missing the address of a witness, the ballot may not be counted." (*Id.*) Since the statute does not provide any additional details, the WEC defined "address" as a "street number, street name and name of municipality." (*Id.*) The memo then provided guidance for situations where a voter may have left off the certificate one or more components of the witness address. In the memorandum, the WEC states "clerks **must** take corrective actions in an attempt to remedy a witness address error." (*Id.*) The guidance allowed clerks to contact the voter to notify them of the address requirement; however, the clerk only had to contact the voter if the clerk could not "remedy the address insufficiency from extrinsic sources." (*Id.*) The WEC stated "clerks shall do all that they can reasonably do to obtain any missing part of the witness address." (*Id.*) The purpose of the guidance was to "assist voters in completing the absentee certificate sufficiently so their votes may be counted." (*Id.*) This has been the unchallenged guidance on the issue for more than four years.

In September 2020, as directed in Wis. Stat. §7.08(3), the WEC updated the Wisconsin Election Administration Manual. The updated manual states "[c]lerks may add a missing witness address using whatever means are available." *Wis. Election Admin. Manual*, 99 (September 2020). Finally, on October 19, 2020, the WEC issued "Spoiling Absentee Ballot Guidance," reaffirming the previous guidance, and stating "the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness). The witness does not need to appear to add a missing address." (Pl. Ex. 35, ECF No. 117-35.)

On March 29, 2020, in the early stages of the COVID-19 pandemic, the WEC issued "Guidance for Indefinitely Confined Electors COVID-19" to election officials across the state. (Pl. Ex. 2, ECF No. 117-2.) Through the published guidance, the WEC stated that "many voters

[5] The parties' stipulation describes this as an October 19, 2016 memorandum. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶4.) The memo itself is dated October 18, 2016, however. (ECF No. 117-72.) The Court will use the date on the actual document.

of a certain age or in at-risk populations" may meet the standard of indefinitely confined due to the ongoing pandemic. (*Id.*) The Guidance also stated:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
>
> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness or infirmity, or disability.

(*Id.*) The WEC issued this guidance after the Dane County Clerk issued a statement advising that the pandemic itself was sufficient to establish indefinite confinement for all voters. (*See* Stipulation, ECF No. 127 ¶23.) The statement was challenged in court, and the Wisconsin Supreme Court granted a temporary injunction against the Dane County Clerk. *See Jefferson v. Dane County*, 2020AP557-OA (March 31, 2020). In concluding that the Dane County guidance was incorrect, the Wisconsin Supreme Court expressly confirmed that the WEC guidance quoted above provided "the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Id.*

On August 19, 2020, the WEC sent all Wisconsin election officials additional guidance that, among other things, discussed absentee ballot drop boxes. (Pl. Ex. 13, ECF No. 117-13.) Wisconsin law provides that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat §6.87(4)(b). The WEC memorandum provided advice on how voters could return their ballots to the municipal clerk, including "information and guidance on drop box options for secure absentee ballot return for voters." (Pl. Ex. 13, ECF No. 117-13.) Citing to a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency (CISA), the guidance states the "drop boxes can be staffed or unstaffed, temporary or permanent." (*Id.*) The memorandum stated that the "drop boxes … allow voters to deliver their ballots in person" and will allow voters "who wait until the last minute to return their ballot." (*Id.*) The memorandum lists potential types of drop boxes, along with security requirements, chain of custody, and location suggestions for the drop boxes. (*Id.*)

As stipulated by the parties, election officials in Milwaukee County, the City of Milwaukee, Dane County, and the City of Madison relied on the above WEC guidance when

handling absentee ballots with missing or incorrect witness address, using absentee ballot drop boxes, and handling voters that had claimed indefinitely confined status. (Stipulation, ECF No. 127 ¶11.) Because they relied on the guidance, election workers added missing information to the witness address on at least some absentee ballots, more than five hundred drop boxes were used throughout the state, and approximately 240,000 "indefinitely confined" voters requested absentee ballots. (*Id.* ¶¶ 17, 18, 28.)

4. THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

On November 3, 2020, nearly 3.3 million Wisconsin voters cast their ballots in the general election for the President and Vice President of the United States. (Stipulation, ECF No. 127 ¶7.) At 8:00 p.m., all polls in Wisconsin closed. Wis. Stat. §6.78. The respective boards of canvassers began to publicly canvass all the votes received at the polling place. Wis. Stat. §7.51.

Voting officials in Milwaukee dealt with an unprecedented number of absentee ballots during this election. (Pl. Ex. 62, ECF No. 117-61.) In Milwaukee and Dane Counties, and likely other locations, election officials processed the absentee ballots in accordance with guidance published by the WEC. (Stipulation, ECF No. 127 ¶11.) The WEC received the last county canvass on November 17, 2020. (*Id.* ¶8.) On November 18, 2020, the deadline for requesting a recount, plaintiff sought a recount under Wis. Stat. §9.01 of only Dane and Milwaukee Counties.[6] (*Id.* ¶9.) The Milwaukee County recount was completed on November 27, 2020 and the Dane County recount was completed on November 29, 2020. (Id. ¶10.) Once the recount was complete, the WEC prepared the Certificate of Ascertainment for the Governor's signature. *See* Wis. Stat. §7.70(5)(b). On November 30, 2020, Governor Evers signed the certificate and affixed the state seal. (Def. Ex. 501, ECF No. 119-1.)

On December 1, 2020, the day after Wisconsin certified its election results, Donald Trump, Michael Pence, and the Trump campaign filed a petition in the Wisconsin Supreme Court against Governor Tony Evers, the Wisconsin Elections Commission, and other state election officials.

[6] After receiving a recount petition and $3 million payment from the Trump campaign, the six-member, bipartisan commission conducted a meeting on November 18, 2020, at which the commission unanimously approved the recount order. The WEC ordered a partial recount of the presidential election results in Dane and Milwaukee Counties on November 19, 2020. The recount order required Dane and Milwaukee Counties' boards of canvassers to convene by 9 a.m. Saturday, November 21, and complete their work by noon on Tuesday, December 1. Wis. Elections Comm'n Order for Recount, Recount EL 20-01, https://elections.wi.gov/node/7250.

Trump v. Evers, No. 2020AP001971 (Wis. S. Ct.). The issues presented by the plaintiffs included whether absentee ballots should be excluded due to various alleged deviations from legislated election procedures. As a remedy, they asked the Court to decertify the state's election results and exclude 221,000 votes in Milwaukee and Dane Counties from the count. On December 3, 2020, the Wisconsin Supreme Court denied the petition for leave to commence an original action in the state Supreme Court, but noted that, as an aggrieved candidate, plaintiff could refile at the circuit court level.

That same day, plaintiff filed his complaint in this Court. Additionally on that day, plaintiff, along with Michael R. Pence, and Donald J. Trump for President, Inc. filed complaints in Dane and Milwaukee County Circuit Courts against Joseph R. Biden, Kamala D. Harris, and several Wisconsin election officials, some of whom are defendants in this case. *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.). Chief Justice Roggensack of the Wisconsin Supreme Court combined the cases and appointed Racine County Reserve Judge Stephen A. Simanek to hear it. The suits are substantially similar and both allege irregularities in the way absentee ballots were administered. In the Milwaukee County case, the plaintiffs allege the ballots were issued without the elector having first submitted a written application; there were incomplete and altered certification envelopes; and there was a massive surge in indefinitely confined absentee ballot voters. The Dane County case included the same claims, plus one involving an allegation that absentee ballots were improperly completed or delivered to City of Madison employees at a public event, "Democracy in the Park." The plaintiffs asked the state court to set aside the county board of canvassers' legal determinations that certain absentee ballots should be counted due to deviations in state elections laws.[7]

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff claims that defendants violated his rights under the Electors Clause by "deviating from the law, substituting their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) In the complaint, plaintiff contends three specific pieces of guidance issued by the WEC, and followed by the named defendants, contradict

[7] On December 11, Judge Simanek affirmed the recount and ruled against plaintiff in the state court proceeding. *Trump v. Biden*, No. 2020CV007092, Doc. 101 (Milw. Co. Cir. Ct. Dec. 11, 2020). Plaintiff has since filed an appeal in the Wisconsin Supreme Court.

Wisconsin's election statutes, and that the WEC lacked the authority to issue any guidance in contravention of Wisconsin law. (Compl., ECF No. 1.) Invoking the Court's federal question jurisdiction under 28 U.S.C. §1331, plaintiff asserts claims for the violation of his federal Constitutional rights under 42 U.S.C. §1983. (*Id.*) Among other remedies, he seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §2201, and asks this Court to declare the Wisconsin general election void under the U.S. Constitution. (*Id.*)

I. This Court Has Limited Jurisdiction to Resolve Plaintiff's Electors Clause Challenge.

Before addressing the merits of plaintiff's claims, this Court has the obligation of confirming that it has jurisdiction even to consider them. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal district courts "possess only that power authorized by Constitution and statute"). Defendants offer a host of arguments related to the justiciability of plaintiff's claims. They insist that plaintiff lacks standing to assert his claims, that his claims are barred by the Eleventh Amendment, and that they are moot. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) Finally, they contend that even if this Court could resolve plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) Despite the tricky questions of federal jurisdiction implicated by plaintiff's claims and requests for relief, the Court concludes plaintiff's claims are justiciable, at least in part. Given the importance of the issues at stake and the need for a prompt resolution, the Court will not abstain from ruling on whether defendants violated plaintiff's federal rights under the Electors Clause.

A. Plaintiff Has Standing to Seek an Adjudication of the Alleged Violation of His Rights under the Electors Clause.

Defendants insist that plaintiff lacks standing to assert claims and obtain declaratory relief based on the Electors Clause. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) That plaintiff seeks primarily declaratory relief does not remove his obligation to establish standing. The Declaratory Judgment Act permits the Court to "declare the rights and other legal relations of any interested party," but only when there is "a case of actual controversy within its jurisdiction." 28 U.S.C. §2201(a). "A 'controversy' in this sense must be one that is appropriate for judicial determination," *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937), and

"the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

To establish standing, plaintiff bears the burden of proving that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016). An injury in fact is one in which plaintiff claims to have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

Plaintiff asserts that he suffered an injury in fact when he "was denied the Constitutional right to have electors appointed in a lawful manner in an election in which he was a candidate." (Pl. Br., ECF No. 109.) The Court agrees. The Eighth Circuit and the Eleventh Circuit have concluded that losing candidates likely have standing to bring a claim under the Electors Clause, because such a candidate has suffered a "personal, distinct injury." *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, at *4 (11th Cir. Dec. 5, 2020); *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors."). That is the situation here: plaintiff, a candidate for election, claims he was harmed by defendants' alleged failure to comply with Wisconsin law. Assuming he could prove his claims, he has suffered an injury. Plaintiff, as a candidate for election, has a concrete, particularized interest in the actual results of the general election. *Carson*, 978 F.3d at 1057; *see Carney v. Adams*, ___ S. Ct. ___, 2020 WL 7250101 (Dec. 10, 2020) (holding plaintiff had not proved injury in fact sufficient to establish standing where plaintiff was merely potential candidate and had not yet applied for judicial position). Plaintiff has therefore established injury in fact.

Based on the allegations in his complaint, plaintiff also meets the other requirements for standing. He contends that defendants' failure to comply with Wisconsin law has resulted in a failed election, one in which he was one of the two major-party candidates for President. (Compl., ECF No. 1.) As administrators of the election, defendants implemented the Wisconsin election statutes and WEC's guidance. His harms are therefore traceable to defendants. And as redress, he seeks a declaration that defendants violated the Electors Clause by failing to follow the

directions of the Wisconsin Legislature during the 2020 Presidential Election.[8] (*Id.*) Redressability is established because "plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). Thus, his alleged injury is fairly traceable to the challenged conduct of the defendants and would be redressed by a favorable judicial decision.

Defendants' arguments against standing are largely premised on their challenges to the merits of plaintiff's claims. For example, defendants complain that "[p]laintiff offers no proof whatsoever of how many votes were affected in the three categories of alleged state election law violations he identifies." (Def. Br., ECF No. 98.) But that argument puts the cart before the horse. A court must determine standing based on the allegations in the complaint, not based on its final resolution of the veracity of those allegations. *Spokeo*, 136 S. Ct. at 1547 ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element."). If plaintiff were to succeed in proving that defendants violated the Electors Clause, causing Wisconsin's Presidential Electors to be appointed in a manner inconsistent with the Wisconsin Legislature's directives, and depriving plaintiff of his opportunity to win those Presidential Electors, he should have the ability (and the standing) to enforce the Constitution's plain terms in federal court.

B. The Eleventh Amendment and *Pennhurst* Do Not Apply to Plaintiff's Unique Article II Claims.

Defendants next argue that plaintiff's claims are barred by the Eleventh Amendment and the Supreme Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). (Defs. Brs., ECF No. 75, 81, 98, 101, and 120.) They contend that plaintiff is complaining that defendants failed to comply with state law such that the Eleventh Amendment bars this Court from entertaining such claims. (*Id.*)

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[8] The complaint alleges the exclusive remedy for a failed election resides in the Wisconsin Legislature. (Compl., ECF No. 1.) That allegation brought strongly into question whether this Court could redress Plaintiff's injury, a point raised by the Court at the initial hearing with the parties. Plaintiff has since explained that he seeks a declaration that the Wisconsin general election was a failed election under 3 U.S.C. §2, a declaration he argues is a predicate to allowing the Wisconsin Legislature to take action to determine the manner in which the state should appoint its Presidential Electors now that the originally chosen method has "failed." (Transcript, ECF No. 130.) While this explanation is tenuous, it sufficiently ties the relief requested to a potential remedy to establish standing.

The Eleventh Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Defendants are correct that, as a general matter, the Eleventh Amendment bars litigation in federal courts against a state.[9] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000) ("[The Eleventh] Amendment bars federal jurisdiction over suits brought against a state … [and] extends to state agencies as well."). But the Supreme Court has long held that suits against state agents, rather than against the state itself, based on those agents' violations of federal law, can be maintained in federal court without running afoul of the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). A federal court thus may adjudicate and order relief against state officers based on allegations of ongoing unconstitutional conduct. *Id.*; *MCI Telecommunications Corp.*, 222 F.3d at 345.

In *Pennhurst*, the Supreme Court clarified that the rule in *Ex parte Young* does not extend to claims based merely on alleged violations of state law. 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Thus, under the Eleventh Amendment and state sovereign immunity, a federal court "cannot enjoin a state officer from violating state law." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999).

The *Pennhurst* exception to *Ex parte Young* does not apply here, because plaintiff's claims are based on federal law—the Electors Clause of Article II, Section 1 of the U.S. Constitution. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *75 (W.D. Pa. Oct. 10, 2020) (holding that claims under the Electors Clause are not barred by the Eleventh Amendment); *cf. Dean Foods Co.*, 187 F.3d at 614 ("the question at the heart of this jurisdictional matter is what is the source of the regulations' potential invalidity"). While plaintiff also cites provisions of Wisconsin's election statutes, he does so in an attempt to show that defendants violated not merely those statutes, but rather the Electors Clause itself. In this

[9] The Eleventh Amendment precludes a federal suit against state agencies, and this likely includes the Wisconsin Elections Commission. *See* Wis. Stat. §5.05; *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000); *Feehan v. Wisconsin Elections Commission*, No. 20-cv-1771, 2020 WL 7250219 (E.D. Wis. Dec. 9, 2020). The WEC has not made this argument. Even if it had, plaintiff's claims against the individual commission members would survive.

unique context, alleged violations of state laws implicate and may violate federal law. *See Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution."). This is the opposite of what the Eleventh Amendment forbids; here, a truly federal cause of action is being articulated. Because plaintiff's claims and request for relief are premised on a federal Constitutional violation, not merely a violation of state law, *Pennhurst* does not apply, and the Eleventh Amendment does not bar plaintiff's claims.

C. Plaintiff's Claims Are Not Moot.

Defendants also contend plaintiff's claims are moot. (Defs. Brs., ECF No. 70, 75, 95, 120.) They insist that because plaintiff waited until after Wisconsin certified the election results to file suit, his suit is too late. (*Id.*) They further maintain that plaintiff's claims are moot because Governor Evers has already signed a "Certificate of Ascertainment For President, Vice President, and Presidential Electors General Election - November 3, 2020" (2020 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2020) on November 30, 2020, an act they contend makes this action irrelevant. (*Id.*)

The final determination of the next President and Vice President of the United States has not been made, however, and the issuance of a Certificate of Ascertainment is not necessarily dispositive on a state's electoral votes. *See Bush v. Gore*, 531 U.S. 98, 144 (2000) (Ginsburg J., dissenting) (noting none of the various Florida elector deadlines "has ultimate significance in light of Congress' detailed provisions for determining, on 'the sixth day of January,' the validity of electoral votes").

Under the federal statute governing the counting of electoral votes, a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C. §6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes on January 6 to count the electoral votes. Indeed, the WEC acknowledged that plaintiff's claims are not moot in a filing with the Wisconsin Supreme Court. (Response of Respondents Wisconsin Elections Commission and Commissioner Ann Jacobs, *Trump v. Evers*, No. 20AP1971-OA, filed

Dec. 1, 2020, ECF No. 109-1.) At this time, it is also unclear whether the litigation commenced in state court, *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.), is coming to a final resolution sufficient to resolve plaintiff's challenges. Given plaintiff's pending appeal and the limited time available should that appeal succeed on the state law issues, this Court will proceed to decide the merits of the federal law claims. The Court concludes this case is not yet moot.

D. This Court Is Not Required to Abstain from Deciding Plaintiff's Challenge under the Electors Clause.

Defendants also contend that even if this Court could adjudicate plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) They focus on three different abstention doctrines: (1) *Wilton/Brillhart* abstention; (2) *Pullman* abstention; and (3) *Colorado River* abstention. (*Id.*) After reviewing the law under all three forms of abstention, this Court will decline defendants' invitation to abstain.

Defendants first invoke the *Wilton/Brillhart* abstention doctrine, derived from *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995), and *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942). Under the *Wilton/Brillhart* abstention doctrine, "district courts possess significant discretion to dismiss or stay claims seeking declaratory relief, even though they have subject matter jurisdiction over such claims." *R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 713 (7th Cir. 2009). While labelled with Supreme Court case names, this form of abstention arises from the plain terms of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, itself. Section 2201 expressly provides that district courts "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). The statute thus gives district courts the discretion not to declare the rights of litigants. The Seventh Circuit has confirmed that a district court properly exercises discretion to abstain where, for example, "declaratory relief is sought and parallel state proceedings are ongoing." *Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983, 986 (7th Cir. 2010).

Defendants also invoke *Pullman* abstention. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501-02 (1941). The *Pullman* doctrine "applies when 'the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law.'" *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664

F.3d 139, 150 (7th Cir. 2011) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996)). *Pullman* abstention is appropriate if there is (1) "a substantial uncertainty as to the meaning of the state law" and (2) "a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Id.* (internal quotation marks omitted).

Finally, defendants ask the Court to avoid deciding this case under *Colorado River* abstention. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976). Under *Colorado River* abstention principles, a federal court should abstain in favor of a parallel state court lawsuit if (1) "the concurrent state and federal actions are actually parallel" and (2) "the necessary exceptional circumstances exist to support a stay or dismissal." *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 953 F.3d 469, 477 (7th Cir. 2020) (internal quotation marks omitted).

The Court declines to abstain under any of these doctrines. The federal Constitutional issues raised in plaintiff's complaint are obviously of tremendous public significance. For the first time in the nation's history, a candidate that has lost an election for president based on the popular vote is trying to use federal law to challenge the results of a statewide popular election. While there is parallel litigation pending in the state court, that litigation does not address the federal constitutional issue that is the center of plaintiff's case. Given the importance of the federal issue and the limited timeline available, it would be inappropriate to wait for the conclusion of the state court case. In these circumstances, the Court will exercise its discretion to declare plaintiff's rights under the Electors Clause and will decline to utilize *Pullman* or *Colorado River* abstention principles to defer to the state court proceedings.

II. Plaintiff's Claims Fail on Their Merits—Wisconsin's Appointment of Presidential Electors for the 2020 Presidential Election Was Conducted in the Manner Directed by the Wisconsin Legislature.

To succeed on his claims for relief under 42 U.S.C. §1983, plaintiff must prove that defendants acted under the color of state law and deprived him of a right secured by the Constitution or laws of the United States. *Wilson v. Warren Cnty., Ill.*, 830 F.3d 464, 468 (7th Cir. 2016) (citations omitted). Plaintiff alleges that the defendants violated his rights under the Electors Clause in Article II, Section 1. (Compl., ECF No. 1.) There is no dispute that defendants' actions as alleged in the complaint were undertaken under the color of Wisconsin law.

Defendants strongly and uniformly dispute, however, that their conduct violated any Constitutional provision. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.)

A. The Wisconsin Legislature Has Directed the Appointment of Presidential Electors to Be by Popular Vote.

The Electors Clause directs state legislatures to appoint presidential electors in a manner of their choosing. U.S. CONST. art. II, § 1, cl. 2. As the Supreme Court explained just this past summer, the Electors Clause was the result of "an eleventh-hour compromise" at the 1787 Constitutional convention. *Chiafalo v. Washington*, __ U.S. __, 140 S. Ct. 2316, 2320 (2020). Apparently fatigued and ready to return to their homes, the delegates decided on language that would give state legislatures the responsibility of choosing the "Manner" in which presidential electors would be appointed. *Id.* And the Supreme Court has confirmed that state legislators have "the broadest power of determination" over who becomes a Presidential Elector. *Id.* at 2324 (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

Today, the manner of appointment among the states is largely uniform. *See Chiafalo*, 140 S. Ct. at 2321. All states use an appointment process tied to the popular vote, with political parties fielding presidential candidates having the responsibility to nominate slates of Presidential Electors. *Id.* at 2321-22. But that manner of appointing Presidential Electors is not required by the Constitution. As Chief Justice Fuller explained in 1892:

> The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

McPherson, 146 U.S. at 27. Historically, presidential electors have been appointed directly by state legislatures, by general ticket, by districts, and by majority popular vote. *Id.* at 27-32 (summarizing the methods by which presidential electors were appointed by state legislatures during the first four presidential elections). But by 1832, "all States but one had introduced popular presidential elections." *Chiafalo*, 140 S. Ct. at 2321.

The Wisconsin Legislature's decision to appoint the state's presidential electors by popular vote is embodied in Wis. Stat. §8.25(1). This statute provides:

> Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.

Wis. Stat. §8.25(1). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States … presidential electors." Wis. Stat. §5.02(5).

Plaintiff contends defendants have violated the Electors Clause by failing to appoint the state's presidential electors in the "Manner" directed by the Wisconsin Legislature. (Compl., ECF No. 1.) By this, plaintiff means that he has raised issues with the WEC's guidance on three issues related to the administration of the election. This argument confuses and conflates the "Manner" of appointing presidential electors—popular election—with underlying rules of election administration. As used in the Electors Clause, the word "Manner" refers to the "[f]orm" or "method" of selection of the Presidential Electors. *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring) (citations omitted). It "requires state legislatures merely to set the approach for selecting Presidential electors." *Id.* Put another way, it refers simply to "the mode of appointing electors—consistent with the plain meaning of the term." *Id.*; *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("It has been said that the word 'appoint' is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode…").

The approach, form, method, or mode the Wisconsin Legislature has set for appointing Presidential electors is by "general ballot at the general election." Wis. Stat. §8.25(1). There is no dispute that this is precisely how Wisconsin election officials, including all the defendants, determined the appointment of Wisconsin's Presidential Electors in the latest election. They used "general ballot[s] at the general election for choosing the president and vice president of the United States" and treated a "vote for the president and vice president nominations of any party is a vote for the electors of the nominees." Absent proof that defendants failed to follow this "Manner" of determining the state's Presidential Electors, plaintiff has not and cannot show a violation of the Electors Clause.

Plaintiff's complaints about the WEC's guidance on indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses accompanying absentee ballots

are not challenges to the "Manner" of Wisconsin's appointment of Presidential Electors; they are disagreements over election administration. Indeed, the existence of these (or other) disagreements in the implementation of a large election is hardly surprising, especially one conducted statewide and involving more than 3.2 million votes. But issues of mere administration of a general election do not mean there has not been a "general ballot" at a "general election." Plaintiff's conflation of these potential nonconformities with Constitutional violations is contrary to the plain meaning of the Electors Clause. If plaintiff's reading of "Manner" was correct, any disappointed loser in a Presidential election, able to hire a team of clever lawyers, could flag claimed deviations from the election rules and cast doubt on the election results. This would risk turning every Presidential election into a federal court lawsuit over the Electors Clause. Such an expansive reading of "Manner" is thus contrary both to the plain meaning of the Constitutional text and common sense.

B. Even If "Manner" Includes Aspects of Election Administration, Defendants Administered Wisconsin's 2020 Presidential Election as Directed by the Wisconsin Legislature.

Plaintiff's claims would fail even if the Court were to read the word "Manner" in Article II, Section 1, Clause 2 to encompass more than just the "mode" of appointment. Including material aspects of defendants' election administration in "Manner" does not give plaintiff a win for at least two reasons. First, the record shows defendants acted consistently with, and as expressly authorized by, the Wisconsin Legislature. Second, their guidance was not a significant or material departure from legislative direction.

Plaintiff's "Manner" challenges all stem from the WEC's having issued guidance concerning indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses on absentee ballots. (Compl., ECF No. 1.) Plaintiff expresses strong disagreement with the WEC's interpretations of Wisconsin's election statutes, accusing the WEC of "deviat[ing] from the law" and "substitut[ing] their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) While plaintiff's statutory construction arguments are not frivolous, when they are cleared of their rhetoric, they consist of little more than ordinary disputes over statutory construction.

These issues are ones the Wisconsin Legislature has expressly entrusted to the WEC.

Wis. Stat. §5.05(2w) ("The elections commission has the responsibility for the administration of chs. 5 to 10 and 12."). When the legislature created the WEC, it authorized the commission to issue guidance to help election officials statewide interpret the Wisconsin election statutes and new binding court decisions. Wis. Stat. §5.05(5t). The WEC is also expressly authorized to issue advisory opinions, Wis. Stat. §5.05(6a), and to "[p]romulgate rules … applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The Wisconsin Legislature also directed that the WEC would have "responsibility for the administration of … laws relating to elections and election campaigns." Wis. Stat. §5.05(1). In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the WEC was in fact acting pursuant to the legislature's express directives.

If "Manner" in the Electors Clause is read to includes legislative enactments concerning election administration, the term necessarily also encompasses the Wisconsin Legislature's statutory choice to empower the WEC to perform the very roles that plaintiff now condemns. Thus, the guidance that plaintiff claims constitutes an unconstitutional deviation from the Wisconsin Legislature's direction, is, to the contrary, the direct consequence of legislature's express command. And, defendants have acted consistent with the "Manner" of election administration prescribed by the legislature.

Plaintiff points to language in Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, stating that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). But the record does not show any *significant* departure from the legislative scheme during Wisconsin's 2020 Presidential election. At best, plaintiff has raised disputed issues of statutory construction on three aspects of election administration.[10] While plaintiff's disputes are not frivolous, the Court finds these issues do not remotely rise to the level of a material or significant departure from Wisconsin Legislature's plan for choosing Presidential Electors.

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[10] Even these three statutory construction issues were raised only after-the-fact. If these issues were as significant as plaintiff claims, he has only himself to blame for not raising them *before* the election. Plaintiff's delay likely implicates the equitable doctrine of laches. The Court does not need to reach that issue, however, and therefore makes no findings or holdings on laches.

Because plaintiff has failed to show a clear departure from the Wisconsin Legislature's directives, his complaint must be dismissed. As Chief Justice Rehnquist stated, "in a Presidential election the clearly expressed intent of the legislature must prevail." *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring). That is what occurred here. There has been no violation of the Constitution.

CONCLUSION

Plaintiff's Electors Clause claims fail as a matter of law and fact. The record establishes that Wisconsin's selection of its 2020 Presidential Electors was conducted in the very manner established by the Wisconsin Legislature, "[b]y general ballot at the general election." Wis. Stat. §8.25(1). Plaintiff's complaints about defendants' administration of the election go to the implementation of the Wisconsin Legislature's chosen manner of appointing Presidential Electors, not to the manner itself. Moreover, even if "Manner" were stretched to include plaintiff's implementation objections, plaintiff has not shown a significant departure from the Wisconsin Legislature's chosen election scheme.

This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits. In his reply brief, plaintiff "asks that the Rule of Law be followed." (Pl. Br., ECF No. 109.) It has been.

IT IS HEREBY ORDERED:

1. Plaintiff's complaint, ECF No. 1, is DISMISSED WITH PREJUDICE.
2. Plaintiff's motion for preliminary injunction, ECF No. 6, is DENIED as moot.
3. Defendants' motions to dismiss, ECF No. 69, 71, 78, 84, 86, 96, 97, and 99, are GRANTED.
4. Defendant Governor Evers' oral motion for judgment under Fed. R. Civ. P. 52 is GRANTED.

Dated at Milwaukee, Wisconsin on December 12, 2020.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge

SUPREME COURT OF ARIZONA

KELLI WARD, Plaintiff/Appellant, v. CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and, STEVE GALLARDO, Defendants/Appellees, and KATIE HOBBS, in her official capacity as the Arizona Secretary of State; ADRIAN FONTES, in his official capacity as the Maricopa County Recorder; and the MARICOPA COUNTY BOARD OF SUPERVISORS, Intervenors.	Arizona Supreme Court No. CV-20-0343-AP/EL Maricopa County Superior Court No. CV2020-015285 **FILED 12/08/2020**

DECISION ORDER

The Court accepted jurisdiction of this expedited election appeal and en banc has considered the record, the trial court's December 4, 2020 minute entry, and the briefing of Appellant Kelli Ward, Defendant Biden Electors, Intervenors Maricopa County and the Secretary of State, and amicus curiae The Lincoln Project.

The Secretary duly certified the statewide canvass and on

November 30, 2020, she and the Governor signed the certificate of ascertainment for presidential electors, certifying that in Arizona the Biden Electors received 1,672,143 votes and the Trump Electors received 1,661,686 votes (a difference of 10,457 votes out of a total of 3,333,829 cast for these two candidates). Although slim, the margin was outside the one-tenth of one percent of the total number of votes cast for both of the presidential electors which is the statutory trigger for an automatic recount. A.R.S. § 16-661(A)(1).

The Secretary's certification followed Maricopa County's audit. Under Arizona law, the county officer in charge of the election conducts a hand count prior to the canvass. A.R.S. § 16-602(B). The statute provides detailed instructions on the hand count process, and in this case the November 9, 2020 Maricopa County hand count included 5000 early ballots and a hand count of Election Day Ballots from two-percent of the vote centers. The audit revealed no discrepancies in the tabulation of the votes between hand count totals and machine totals. The County completed its canvass on November 23, 2020.[1] Maricopa County is the only county implicated in this proceeding.

Appellant filed her contest under A.R.S. § 16-673 raising three statutory bases for a challenge under A.R.S. § 16-672 which include "misconduct" by an election board or officer; "[o]n account of illegal votes"; or "[t]hat by reason of erroneous count of votes the

[1] https://azsos.gov/sites/default/files/2020_General_Maricopa_Hand_Count.pdf

person declared elected ... did not in fact receive the highest number of votes." A.R.S. § 16-672(A)(1), (4) and (5). In her First Amended Complaint, Appellant sought the inspection of an unspecified number of ballots under A.R.S. § 16-677, which authorizes the inspection of ballots before preparing for trial after the statement of contest has been filed.

Under Arizona law, "If any ballot, including any ballot received from early voting, is damaged, or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot in the presence of witnesses and substituted for the damaged ballot. All duplicate ballots shall be clearly labeled 'duplicate' and shall bear a serial number that shall be recorded on the damaged or defective ballot." A.R.S. § 16-621(A).

In this election, Maricopa County had 27,869 duplicate ballots pertaining to the Presidential Electors. Witness testimony explained that "duplicate ballots" include those reflecting "overvotes" or votes for more than one candidate; overseas ballots; and ballots that are damaged or otherwise cannot be machine tabulated. The trial court also heard testimony from a number of witnesses who presented credible testimony that they saw errors in which the duplicate ballot did not accurately reflect the voter's apparent intent as reflected in the original ballot.

Before the trial, the parties conducted a review of randomly

chosen sample ballots. The first review was of 100 ballots and the second was of 1526 ballots, and of the 1626 total, there were nine errors, (1617 correct duplicate ballots) that if correct would have given the Trump Electors an additional seven votes and the Biden Electors an additional two votes. The Secretary maintains that this constitutes an error of no more than 0.37% within the sample. Appellant argues that the error rate was 0.55%, and the trial court concluded the results were "99.45% accurate." When this is extrapolated to the total number of duplicate ballots it is not sufficient to come close to warranting a recount under A.R.S. § 16-661.

Although Appellant requested additional time and the opportunity to review additional ballots, Appellant offered no evidence to establish that the 1626-ballot sample was inadequate to demonstrate any fraud, if present. As the trial court noted, this review confirmed the witness testimony that there were mistakes in the duplication process, the mistakes were few, and when brought to the attention of election workers, they were fixed. Extrapolating this error rate to all 27,869 duplicate ballots in the county would result in a net increase of only 103 votes based on the 0.37% error rate or 153 votes using the 0.55% error rate, neither of which is sufficient to call the election results into question.

The parties also presented evidence after reviewing a sample of the envelope signatures on mail-in ballots. Their experts determined

that out of 100 signatures, six to eleven of the signatures were "inconclusive" but neither expert could identify any sign of forgery or simulation and neither could provide any basis to reject the signatures.

Election contests are "purely statutory and dependent upon statutory provisions for their conduct." *Fish v. Redeker*, 2 Ariz. App. 602 (1966). Elections will not be held invalid for mere irregularities unless it can be shown that the result has been affected by such irregularity. *Territory v. Board of Sup'rs of Mohave County*, 2 Ariz. 248 (1887). The validity of an election is not voided by honest mistakes or omissions unless they affect the result, or at least render it uncertain. *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Where an election is contested on the ground of illegal voting, the contestant has the burden of showing that sufficient illegal votes were cast to change the result, *Morgan v. Board of Sup'rs*, 67 Ariz. 133 (1948).

The legislature has expressly delegated to the Secretary the authority to promulgate rules and instructions for early voting. A.R.S. § 16-452(A). After consulting with county boards and election officials, the Secretary is directed to compile the rules "in an official instructions and procedures manual." The Election Procedures Manual or "EPM," has the force of law. The Court recently considered a challenge to an election process and granted relief where the county recorder adopted a practice contrary to the EPM.

Arizona Pub. Integrity All. v. Fontes, ___ Ariz. ___, 475 P.3d 303, 305 (Ariz. November 5, 2020). Here, however, there are no allegations of any violation of the EPM or any Arizona law.

Intervenor Maricopa County argues that the trial court could not entertain this challenge under A.R.S. § 16-672(A) which authorizes a contest of the "election of any person declared elected to state office." Intervenors/Defendants/Amicus contend that the Court must decide this matter within the "safe harbor" deadline of 3 U.S.C. § 5.

The Court concludes, unanimously, that the trial judge did not abuse his discretion in denying the request to continue the hearing and permit additional inspection of the ballots. The November 9, 2020 hand count audit revealed no discrepancies in the tabulation of votes and the statistically negligible error presented in this case falls far short of warranting relief under A.R.S. § 16-672. Because the challenge fails to present any evidence of "misconduct," "illegal votes" or that the Biden Electors "did not in fact receive the highest number of votes for office," let alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of the election results, the Court need not decide if the challenge was in fact authorized under A.R.S. § 16-672 or if the federal "safe harbor" deadline applies to this contest. Therefore,

IT IS ORDERED affirming the trial court decision and confirming the election of the Biden Electors under A.R.S. § 16-676(B).

IT IS FURTHER ORDERED directing Defendants/Intervenors to file a

response, which may be a collective response, to Appellant's Motion to Unseal Exhibits no later than Friday, December 11, 2020.

IT IS FURTHER ORDERED denying the Secretary's request for attorneys' fees under A.R.S. § 12-349.

DATED this 8th day of December, 2020.

_____/S/_____
ROBERT BRUTINEL
Chief Justice

TO:

Dennis I Wilenchik
N L Miller Jr
John D Wilenchik
Sarah R Gonski
Daniel A Arellano
Roy Herrera
Joseph I Vigil
Joseph Branco
Thomas P Liddy
Emily M Craiger
Joseph Eugene La Rue
Roopali H Desai
Kristen M Yost
Susan M Freeman
Bruce E Samuels
Hon. Randall H Warner
Hon. Jeff Fine

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3371

DONALD J. TRUMP FOR PRESIDENT, INC.;
LAWRENCE ROBERTS; DAVID JOHN HENRY,

Appellants

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA;
ALLEGHENY COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; DELAWARE COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS;
PHILADELPHIA COUNTY BOARD OF ELECTIONS

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 4:20-cv-02078)
District Judge: Honorable Matthew W. Brann

Submitted Under Third Circuit L.A.R. 34.1(a)
on November 25, 2020

Before: SMITH, *Chief Judge*, and CHAGARES and BIBAS, *Circuit Judges*

(Filed: November 27, 2020)

OPINION*

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* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

BIBAS, *Circuit Judge*.

Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.

The Trump Presidential Campaign asserts that Pennsylvania's 2020 election was unfair. But as lawyer Rudolph Giuliani stressed, the Campaign "doesn't plead fraud. … [T]his is not a fraud case." Mot. to Dismiss Hr'g Tr. 118:19–20, 137:18. Instead, it objects that Pennsylvania's Secretary of State and some counties restricted poll watchers and let voters fix technical defects in their mail-in ballots. It offers nothing more.

This case is not about whether those claims are true. Rather, the Campaign appeals on a very narrow ground: whether the District Court abused its discretion in not letting the Campaign amend its complaint a second time. It did not.

Most of the claims in the Second Amended Complaint boil down to issues of state law. But Pennsylvania law is willing to overlook many technical defects. It favors counting votes as long as there is no fraud. Indeed, the Campaign has already litigated and lost many of these issues in state courts.

The Campaign tries to repackage these state-law claims as unconstitutional discrimination. Yet its allegations are vague and conclusory. It never alleges that anyone treated the Trump campaign or Trump votes worse than it treated the Biden campaign or Biden votes. And federal law does not require poll watchers or specify how they may observe. It also says nothing about curing technical state-law errors in ballots. Each of these defects is fatal,

and the proposed Second Amended Complaint does not fix them. So the District Court properly denied leave to amend again.

Nor does the Campaign deserve an injunction to undo Pennsylvania's certification of its votes. The Campaign's claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters. Plus, tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too. That remedy would be grossly disproportionate to the procedural challenges raised. So we deny the motion for an injunction pending appeal.

I. BACKGROUND

A. Pennsylvania election law

In Pennsylvania, each county runs its own elections. 25 Pa. Stat. §2641(a). Counties choose and staff polling places. §2642(b), (d). They buy their own ballot boxes and voting booths and machines. §2642(c). They even count the votes and post the results. §2642(k), (*l*). In all this, counties must follow Pennsylvania's Election Code and regulations. But counties can, and do, adopt rules and guidance for election officers and electors. §2642(f). And they are charged with ensuring that elections are "honestly, efficiently, and uniformly conducted." §2642(g).

1. *Poll watchers and representatives*. Counties must admit qualified poll "watchers" to observe votes being tallied. 25 Pa. Stat. §2650(a). Poll watchers must be registered to vote in the county where they will serve. §2687(h). Each candidate can pick two poll watchers per election district; each political party, three. §2687(a). The poll watchers

remain at the polling place while election officials count in-person ballots. §2687(b). They can ask to check voting lists. *Id.* And they get to be present when officials open and count all the mail-in ballots. §3146.8(b). Likewise, candidates' and political parties' "representatives" may be present when absentee and mail-in ballots are inspected, opened, or counted, or when provisional ballots are examined. §§2602(a.1), (q.1), 3050(a.4)(4), 3146.8(g)(1.1) & (2); *see also* §3050(a.4)(12) (defining provisional ballots as those cast by voters whose voter registration cannot be verified right away).

Still, counties have some control over these poll watchers and representatives. The Election Code does not tell counties how they must accommodate them. Counties need only allow them "in the polling place" or "in the room" where ballots are being inspected, opened, or counted. §§2687(b), 3050(a.4)(4), 3146.8(g)(1.1) & (2). Counties are expected to set up "an enclosed space" for vote counters at the polling place, and poll watchers "shall remain outside the enclosed space." §2687(b). So the counties decide where the watchers stand and how close they get to the vote counters.

2. *Mail-in ballots*. For decades, Pennsylvania let only certain people, like members of the military and their families, vote by mail. *See, e.g.*, 25 Pa. Stat. §3146.1. But last year, as part of a bipartisan election reform, Pennsylvania expanded mail-in voting. Act of Oct. 31, 2019, Pub. L. No. 552, sec. 8, §1310-D, 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Now, any Pennsylvania voter can vote by mail for any reason. *See* 25 Pa. Stat. §§2602(t), 3150.11(a).

To vote by mail, a Pennsylvania voter must take several steps. First, he (or she) must ask the State (Commonwealth) or his county for a mail-in ballot. 25 Pa. Stat. §3150.12(a).

To do that, he must submit a signed application with his name, date of birth, address, and other information. §3150.12(b)–(c). He must also provide a driver's license number, the last four digits of his Social Security number, or the like. §§2602(z.5), 3150.12b(a), (c). Once the application is correct and complete, the county will approve it. *See* §§3150.12a(a), 3150.12b.

Close to the election, the county will mail the voter a mail-in ballot package. §3150.15. The package has a ballot and two envelopes. The smaller envelope (also called the secrecy envelope) is stamped "Official Election Ballot." §3150.14(a). The larger envelope is stamped with the county board of election's name and address and bears a printed voter declaration. *Id.*

Next, the voter fills out the ballot. §3150.16(a). He then folds the ballot; puts it into the first, smaller secrecy envelope; and seals it. *Id.* After that, he puts the secrecy envelope inside the larger envelope and seals that too. *Id.* He must also "fill out, date and sign the declaration printed" on the outside of the larger envelope. §§3150.16(a), 3150.14(b). The declaration for the November 2020 election read thus:

> I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.
>
> [BAR CODE]

Voter, sign or mark here/Votante firme o mar[q]ue aqui

X_____

_____

Date of signing (MM/DD/YYYY)/Fechade firme (MM/DD/YYYY)

_____

Voter, print name/Votante, nombre en letra de impreta

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, Nos. 31–35 EAP & 29 WAP 2020, ___ A.3d ___, 2020 WL 6875017, at *4 (Pa. Nov. 23, 2020). Once the voter assembles the ballot packet, he can mail it back or deliver it in person. 25 Pa. Stat. § 3150.16(a).

Not every voter can be expected to follow this process perfectly. Some forget one of the envelopes. Others forget to sign on the dotted line. Some major errors will invalidate a ballot. For instance, counties may not count mail-in ballots that lack secrecy envelopes. *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 378–80 (Pa. 2020). But the Election Code says nothing about what should happen if a county notices these errors before election day. Some counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.

B. Facts and procedural history

On appeal from the dismissal of a complaint, we take the factual allegations as true:

1. *Mail-in voting*. For months, Pennsylvanians went to the polls, so to speak. The first batch of mail-in ballots went out to voters in late September. As they trickled back in, election officials noticed that some voters had not followed the rules. Some ballots were

not in secrecy envelopes, so those packages were lighter and thinner than complete ballot packages. Others had declarations that voters had not completed. Some counties did not notify voters about these defective ballots. Others, including the counties named in this suit, decided to reach out to these voters to let them cure their mistakes by voting provisionally on Election Day or asking for a replacement ballot.

2. *Election Day*. Though more than two million Pennsylvanians voted by mail, even more voted in person. On Election Day, November 3, the Campaign set up poll watchers at polling places around the Commonwealth. Appellees' election officials kept poll watchers and representatives away from where ballots were opened, counted, and tallied. In Philadelphia, for instance, poll watchers were kept six to twenty-five feet back from officials. In comparison, other, "Republican[-]controlled" counties did give the Campaign's poll watchers and representatives full access. Second Am. Compl. ¶¶ 151, 154.

In all, nearly seven million Pennsylvanians voted, more than a third of them by mail. *Unofficial Returns for the 2020 Presidential Election*, Pa. Dep't of State, https://www.electionreturns.pa.gov/ (last visited Nov. 27, 2020). As of today, former Vice President Biden leads President Trump in Pennsylvania by 81,660 votes. *Id.*

Pennsylvania's counties certified their election results by the November 23 certification deadline. 25 Pa. Stat. § 2642(k). The next morning, the Secretary of State (technically, Secretary of the Commonwealth) certified the vote totals, and the Governor signed the Certificate of Ascertainment and sent it to the U.S. Archivist. *Department of State Certifies Presidential Election Results*, PA Media, https://www.media.pa.gov/Pages/State-details.aspx?newsid=435 (last visited Nov. 27, 2020). The certified margin of victory was 80,555 votes. *Id.*

3. *This lawsuit.* Almost a week after the election, the Campaign (as well as two voters) sued seven Pennsylvania counties and Secretary of State Kathy Boockvar. It alleged that they had violated the Due Process, Equal Protection, and Electors and Elections Clauses of the U.S. Constitution by taking two basic actions: First, the counties (encouraged by Secretary Boockvar) identified defective mail-in ballots early and told voters how to fix them. Second, they kept poll watchers and representatives from watching officials count all ballots.

So far, the Campaign has filed or tried to file three complaints. The original Complaint, filed November 9, set out six counts (plus a duplicate). After Boockvar and the counties moved to dismiss, on November 15 the Campaign filed a First Amended Complaint as of right, dropping four of the six counts (plus the duplicate), including all the counts relating to poll watchers and representatives. The Campaign sought a preliminary injunction to block certifying the election results. Boockvar and the counties again moved to dismiss. On November 18, the Campaign sought to file a Second Amended Complaint, resurrecting four dropped claims from the original Complaint and adding three more about how Philadelphia had blocked poll watching.

The District Court ended these volleys, denying leave to file the Second Amended Complaint. Instead, it dismissed the First Amended Complaint with prejudice and denied the Campaign's motion for a preliminary injunction as moot. *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ___ F. Supp. 3d ___, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020). In doing so, it held that the individual voters lacked standing. *Id.* at *5–

6. We commend the District Court for its fast, fair, patient handling of this demanding litigation.

4. *This appeal.* The Campaign filed this appeal on Sunday, November 22, and we granted its motion to expedite. The Campaign filed its brief and another motion November 23; opposing briefs and filings arrived the next day. We are issuing this opinion nonprecedentially so we can rule by November 27.

The Campaign does not challenge the District Court's finding that the voters lacked standing, so we do not consider their claims. On appeal, it seeks only narrow relief: to overturn the District Court's decision not to let it amend its complaint again. We address that claim in Part II. Separately, the Campaign asks us for an injunction to prevent the certified vote totals from taking effect. We address that claim in Part III.

II. THE DISTRICT COURT PROPERLY DENIED LEAVE TO AMEND THE COMPLAINT AGAIN

After one amendment, the District Court denied the Campaign's motion to amend the complaint a second time. We review that denial for abuse of discretion. *Premier Comp. Sol., LLC v. UPMC*, 970 F.3d 316, 318–19 (3d Cir. 2020). But on any standard of review, the court got it right.

Courts should grant leave to amend "freely … when justice so requires." Fed. R. Civ. P. 15(a)(2). In civil-rights cases, that means granting leave unless "amendment would be futile or inequitable." *Vorchheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 113 (3d Cir. 2018); *Cureton v. NCAA*, 252 F.3d 267, 272–73 (3d Cir. 2001) (giving undue delay as an example of inequity). Here, the Campaign's request fails as both inequitable and futile.

A. The Campaign's delay was undue, given its stress on needing to resolve the case by November 23

When the Campaign was before the District Court, it focused its arguments on the need to resolve the case by Pennsylvania's deadline for counties to certify their votes: Monday, November 23. Indeed, all three iterations of the complaint focused their prayers for relief on blocking the certification of the vote tally. The Campaign said it could get no "meaningful remedy" after that date. Br. in Supp. of Mot. for TRO & PI, Dkt. 89-1, at 4.

The Campaign filed its First Amended Complaint on November 15, eight days before the certification deadline. In response to several pending motions to dismiss, it dropped many of the challenged counts from the original Complaint. It did not then move to file a Second Amended Complaint until November 18, when its opposition to the new motions to dismiss was due. And it did not file a brief in support of that motion until Friday, November 20. Certification was three days away.

As the District Court rightly noted, amending that close to the deadline would have delayed resolving the issues. True, delay alone is not enough to bar amendment. *Cureton*, 252 F.3d at 273. But "at some point, the delay will become 'undue,' placing an unwarranted burden on the court." *Id.* (quoting *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). The Campaign's motion would have done just that. It would have mooted the existing motions to dismiss and required new briefing, possibly new oral argument, and a reasoned judicial opinion within seventy-two hours over a weekend. That is too much to ask—especially since the proposed Second Amended Complaint largely repleaded many claims abandoned by the first one. *Cf. Rolo v. City Investing Co. Liquidating Tr.*, 155 F.3d 644, 654–

55 (3d Cir. 1998) (affirming denial of leave to amend because the movant sought largely to "replead facts and arguments that could have been pled much earlier").

Having repeatedly stressed the certification deadline, the Campaign cannot now pivot and object that the District Court abused its discretion by holding the Campaign to that very deadline. It did not.

B. Amending the Complaint again would have been futile

The Campaign focuses on critiquing the District Court's discussion of undue delay. Though the court properly rested on that ground, we can affirm on any ground supported by the record. Another ground also supports its denial of leave to amend: it would have been futile.

1. *The Campaign had to plead plausible facts, not just conclusory allegations*. Plaintiffs must do more than allege conclusions. Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The Second Amended Complaint does not meet *Twombly* and *Iqbal*'s baseline standard of specifics.

To start, note what it does not allege: fraud. Indeed, in oral argument before the District Court, Campaign lawyer Rudolph Giuliani conceded that the Campaign "doesn't plead fraud." Mot. to Dismiss Hr'g Tr. 118:19–20 (Nov. 17, 2020). He reiterated: "If we had alleged fraud, yes, but this is not a fraud case." *Id.* at 137:18.

Though it alleges many conclusions, the Second Amended Complaint is light on facts. Take the nearly identical paragraphs introducing Counts One, Two, Four, and Six: "Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination ... by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce [certain ballot] requirements." Second Am. Compl. ¶¶ 167, 193, 222, 252. That is conclusory. So is the claim that, "[u]pon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have been counted." *Id.* ¶¶ 168, 194, 223, 253. "Upon information and belief" is a lawyerly way of saying that the Campaign does not know that something is a fact but just suspects it or has heard it. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Yet the Campaign offers no specific facts to back up these claims.

2. *The Campaign has already litigated and lost most of these issues*. Many of the Second Amended Complaint's claims have already had their day in court. The Campaign cannot use this lawsuit to collaterally attack those prior rulings. On Counts One, Two, Four, and Six, the Campaign has already litigated whether ballots that lack a handwritten name, address, or date on the outer envelope must be disqualified. *See In re: Canvass of Absentee and Mail-in Ballots*, 2020 WL 6875017, at *1. The Pennsylvania Supreme Court ruled against the Campaign, holding: "[T]he 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." *Id.* at *1. That holding undermines the Campaign's suggestions that defective ballots should not have been counted.

Counts One and Two also challenge the requirement that poll watchers be registered electors of the county they wish to observe and that observers be Pennsylvania lawyers. But a federal district court has already held "that the county-residency requirement for poll watching does not, as applied to the particular circumstances of this election, burden any of [the Campaign's] fundamental constitutional rights." *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, ___ F. Supp. 3d ___, 2020 WL 5997680, at *66 (W.D. Pa. Oct. 10, 2020). The Campaign never appealed that decision, so it is bound by it.

Count Seven alleges that Philadelphia's Board of Elections violated due process by obstructing poll watchers and representatives. But nothing in the Due Process Clause requires having poll watchers or representatives, let alone watchers from outside a county or less than eighteen feet away from the nearest table. The Campaign cites no authority for those propositions, and we know of none. (Ditto for notice-and-cure procedures.) And the Campaign litigated and lost that claim under state law too. The Pennsylvania Supreme Court held that the Election Code requires only that poll watchers be in the room, not that they be within any specific distance of the ballots. *In re Canvassing Observation Appeal of: City of Phila. Bd. of Electors*, No. 30 EAP 2020, ___ A.3d ___, 2020 WL 6737895, at *8–9 (Pa. Nov. 17, 2020).

The Campaign does not even challenge the dismissal of Counts Three, Five, and Nine, the Electors and Elections Clause counts. It concedes that under our recent decision, it lacks standing to pursue alleged violations of those clauses. *Bognet v. Sec'y Commonwealth of*

Pa., No. 20-3214, ___ F.3d ___, 2020 WL 6686120, at *6–9 (3d Cir. Nov. 13, 2020). Given its concession, we need not consider the issue any more.

The Second Amended Complaint thus boils down to the equal-protection claims in Counts Two, Four, Six, and Eight. They require not violations of state law, but discrimination in applying it. Tbose claims fail too.

3. *The Campaign never pleads that any defendant treated the Trump and Biden campaigns or votes differently.* A violation of the Equal Protection Clause requires more than variation from county to county. It requires unequal treatment of similarly situated parties. But the Campaign never pleads or alleges that anyone treated it differently from the Biden campaign. Count One alleges that the counties refused to credential the Campaign's poll watchers or kept them behind metal barricades, away from the ballots. It never alleges that other campaigns' poll watchers or representatives were treated differently. Count Two alleges that an unnamed lawyer was able to watch all aspects of voting in York County, while poll watchers in Philadelphia were not. It also makes a claim about one Jared M. Mellott, who was able to poll watch in York County. Counts Four and Six allege that poll watcher George Gallenthin had no issues in Bucks County but was barred from watching in Philadelphia. And Count Eight alleges that Philadelphia officials kept Jeremy Mercer too far away to verify that ballots were properly filled out. None of these counts alleges facts showing improper vote counting. And none alleges facts showing that the Trump campaign was singled out for adverse treatment. The Campaign cites no authority suggesting that an actor discriminates by treating people equally while harboring a partisan motive, and we know of none.

These county-to-county variations do not show discrimination. "[C]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state." *Donald J. Trump for President, Inc.*, 2020 WL 5997680, at *44 (collecting cases). Even when boards of elections "vary … considerably" in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635–36 (6th Cir. 2016); *see also Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) (recognizing that equal protection lets different counties use different voting systems).

Nor does *Bush v. Gore* help the Campaign. 531 U.S. 98 (2000) (per curiam). There, the Florida Supreme Court had ratified treating ballots unequally. *Id.* at 107. That was because the principle it set forth, the "intent of the voter," lacked *any* "specific standards to ensure its equal application." *Id.* at 105–06. The lack of any standards at all empowered officials to treat ballots arbitrarily, violating equal protection. *Id.* Here, by contrast, Pennsylvania's Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.

4. *The relief sought—throwing out millions of votes—is unprecedented.* Finally, the Second Amended Complaint seeks breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly, not the voters, to choose Pennsylvania's presidential electors. It cites no authority for this drastic remedy.

The closest the Campaign comes to justifying the relief it seeks is citing *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). But those facts were a far cry from the ones here. In *Marks*, the district court found that the Stinson campaign had orchestrated "massive absentee ballot fraud, deception, intimidation, harassment and forgery." *Id.* at 887 (quoting district court's tentative findings). It had lied to voters, deceived election officials, and forged ballots. *Id.* at 877. We remanded that case, instructing that "the district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for wrongdoing." *Id.* at 889. And that seemed likely: the Stinson campaign had gotten about 600 net absentee-ballot applications (roughly 1000 minus 400 that were later rejected), more than the 461-vote margin of victory. *Id.* at 876–77.

Here, however, there is no clear evidence of massive absentee-ballot fraud or forgery. On the contrary, at oral argument in the District Court, the Campaign specifically disavowed any claim of fraud. And the margin of victory here is not nearly as close: not 461 votes, but roughly 81,000.

Though district courts should freely give leave to amend, they need not do so when amendment would be futile. Because the Second Amended Complaint would not survive a motion to dismiss, the District Court properly denied leave to file it.

III. NO STAY OR INJUNCTION IS WARRANTED

We could stop here. Once we affirm the denial of leave to amend, this case is over. Still, for completeness, we address the Campaign's emergency motion to stay the effect of certification. No stay or injunction is called for.

Though the Campaign styles its motion as seeking a stay or preliminary injunction, what it really wants is an injunction pending appeal. But it neither requested that from the District Court during the appeal nor showed that it could not make that request, as required by Federal Rule of Appellate Procedure 8(a)(2)(A). That failure bars the motion.

Even if we could grant relief, we would not. Injunctions pending appeal, like preliminary injunctions, are "extraordinary remed[ies] never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). For a stay or injunction pending appeal, the movant must show both (1) a "strong" likelihood of success on the merits and (2) irreparable injury absent a stay or injunction. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The first two factors are "the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). After that, we also balance (3) whether a stay or injunction will injure other interested parties (also called the balance of equities) and (4) the public interest. *Hilton*, 481 U.S. at 776; *In re Revel AC, Inc.*, 802 F.3d 558, 568–71 (3d Cir. 2015). None of the four factors favors taking this extraordinary step.

A. The Campaign has no strong likelihood of success on the merits

As discussed, the Campaign cannot win this lawsuit. It conceded that it is not alleging election fraud. It has already raised and lost most of these state-law issues, and it cannot relitigate them here. It cites no federal authority regulating poll watchers or notice and cure. It alleges no specific discrimination. And it does not contest that it lacks standing under the Elections and Electors Clauses. These claims cannot succeed.

B. The Campaign faces no irreparable harm

The Campaign has not shown that denying relief will injure it. "Upon information and belief," it suspects that many of the 1.5 million mail-in ballots in the challenged counties were improperly counted. Second Am. Compl. ¶¶168, 194, 223, 253. But it challenges no specific ballots. The Campaign alleges only that at most three specific voters cast ballots that were not counted. *Id.* ¶237 (one voter); First Am. Compl. ¶¶15–16, 112 (three). And it never alleges that anyone except a lawful voter cast a vote. Of the seven counties whose notice-and-cure procedures are challenged, four (including the three most populous) represented that they gave notice to only about 6,500 voters who sent in defective ballot packages. Allegheny Cty. Opp. Mot. TRO & PI 7–8, D. Ct. Dkt. No. 193 (Nov. 20, 2020). The Campaign never disputed these numbers or alleged its own. Even if 10,000 voters got notice and cured their defective ballots, and every single one then voted for Biden, that is less than an eighth of the margin of victory.

Without more facts, we will not extrapolate from these modest numbers to postulate that the number of affected ballots comes close to the certified margin of victory of 80,555 votes. Denying relief will not move the needle.

Plus, states are primarily responsible for running federal elections. U.S. Const. art. I, §4, cl. 1; 3 U.S.C. §5. Pennsylvania law has detailed mechanisms for disputing election results. 25 Pa. Stat. §§3261–3474. Because the Campaign can raise these issues and seek relief through state courts and then the U.S. Supreme Court, any harm may not be irreparable. *Touchston v. McDermott*, 234 F.3d 1130, 1132–33 (11th Cir. 2000) (per curiam) (en banc).

C. The balance of equities opposes disenfranchising voters

Nor would granting relief be equitable. The Campaign has already litigated and lost most of these issues as garden-variety state-law claims. It now tries to turn them into federal constitutional claims but cannot. *See Bognet*, 2020 WL 6686120, at *11.

Even if it could, it has delayed bringing this suit. For instance, in proposed Count Four, it challenges giving voters notice and letting them cure ballot defects as violating equal protection. The Campaign could have disputed these practices while they were happening or during the canvassing period. Instead, it waited almost a week after Election Day to file its original complaint, almost another week to amend it, and then another three days to amend it again. Its delay is inequitable, and further delay would wreak further inequity.

And the Campaign's charges are selective. Though Pennsylvanians cast 2.6 million mail-in ballots, the Campaign challenges 1.5 million of them. It cherry-picks votes cast in "Democratic-heavy counties" but not "those in Republican-heavy counties." Second Am. Compl. ¶8. Without compelling evidence of massive fraud, not even alleged here, we can hardly grant such lopsided relief.

Granting relief would harm millions of Pennsylvania voters too. The Campaign would have us set aside 1.5 million ballots without even alleging fraud. As the deadline to certify votes has already passed, granting relief would disenfranchise those voters or sidestep the expressed will of the people. Tossing out those ballots could disrupt every down-ballot race as well. There is no allegation of fraud (let alone proof) to justify harming those millions of voters as well as other candidates.

D. The public interest favors counting all lawful voters' votes

Lastly, relief would not serve the public interest. Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes.

What is more, throwing out those votes would conflict with Pennsylvania election law. The Pennsylvania Supreme Court has long "liberally construed" its Election Code "to protect voters' right to vote," even when a ballot violates a technical requirement. *Shambach v. Bickhart*, 845 A.2d 793, 802 (Pa. 2004). "Technicalities should not be used to make the right of the voter insecure." *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954) (internal quotation marks omitted). That court recently reiterated: "[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice." *Pa. Dem. Party*, 238 A.3d at 356. Thus, unless there is evidence of fraud, Pennsylvania law overlooks small ballot glitches and respects the expressed intent of every lawful voter. *In re: Canvass of Absentee and Mail-in Ballots*, 2020 WL 6875017, at *1 (plurality opinion). In our federalist system, we must respect Pennsylvania's approach to running elections. We will not make more of ballot technicalities than Pennsylvania itself does.

* * * * *

Voters, not lawyers, choose the President. Ballots, not briefs, decide elections. The ballots here are governed by Pennsylvania election law. No federal law requires poll watchers or specifies where they must live or how close they may stand when votes are counted. Nor does federal law govern whether to count ballots with minor state-law defects or let voters

cure those defects. Those are all issues of state law, not ones that we can hear. And earlier lawsuits have rejected those claims.

Seeking to turn those state-law claims into federal ones, the Campaign claims discrimination. But its alchemy cannot transmute lead into gold. The Campaign never alleges that any ballot was fraudulent or cast by an illegal voter. It never alleges that any defendant treated the Trump campaign or its votes worse than it treated the Biden campaign or its votes. Calling something discrimination does not make it so. The Second Amended Complaint still suffers from these core defects, so granting leave to amend would have been futile.

And there is no basis to grant the unprecedented injunction sought here. First, for the reasons already given, the Campaign is unlikely to succeed on the merits. Second, it shows no irreparable harm, offering specific challenges to many fewer ballots than the roughly 81,000-vote margin of victory. Third, the Campaign is responsible for its delay and repetitive litigation. Finally, the public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising millions of Pennsylvania voters who voted by mail. Plus, discarding those votes could disrupt every other election on the ballot.

We will thus affirm the District Court's denial of leave to amend, and we deny an injunction pending appeal. The Campaign asked for a very fast briefing schedule, and we have granted its request. Because the Campaign wants us to move as fast as possible, we also deny oral argument. We grant all motions to file overlength responses, to file amicus briefs, and to supplement appendices. We deny all other outstanding motions as moot. This Court's mandate shall issue at once.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE LAW, AN INDIVIDUAL; MICHAEL MCDONALD, AN INDIVIDUAL; JAMES DEGRAFFENREID, III, AN INDIVIDUAL; DURWARD JAMES HINDLE, III, AN INDIVIDUAL; EILEEN RICE, AN INDIVIDUAL; AND SHAWN MEEHAN, AN INDIVIDUAL, AS CANDIDATES FOR PRESIDENTIAL ELECTORS ON BEHALF OF DONALD J. TRUMP,
Appellants,
vs.
JUDITH WHITMER, AN INDIVIDUAL; SARAH MAHLER, AN INDIVIDUAL; JOSEPH THRONEBERRY, AN INDIVIDUAL; ARTEMESIA BLANCO, AN INDIVIDUAL; GABRIELLE D'AYR, AN INDIVIDUAL; AND YVANNA CANCELA, AN INDIVIDUAL, AS CANDIDATES FOR PRESIDENTIAL ELECTORS ON BEHALF OF JOSEPH R. BIDEN, JR.,
Respondents.

No. 82178

FILED
DEC 08 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying an election contest. First Judicial District Court, Carson City; James Todd Russell, Judge.

On November 3, 2020, Nevada voters elected candidates for the office of presidential elector. Following the canvass required by NRS 293.395(2), the Governor of Nevada transmitted a Certificate of Ascertainment to the National Archives on December 2, 2020, which

20-44711

certifies that the Democratic Party Electors received the highest number of votes cast for presidential electors in the 2020 General Election.[1] On the last day allowed by Nevada law, *see* NRS 293.413(1), appellant Republican Party Electors filed an action contesting the election of the respondent Democratic Party Electors. *See generally* NRS 293.407 (allowing for contest of election to the office of presidential elector); NRS 293.410(2) (identifying the grounds on which an election may be contested). The district court expedited the proceedings, with the parties submitting deposition testimony and other evidence on December 2, 2020, and the court considering that evidence and hearing argument on December 3, 2020. The district court entered a detailed written order the following day.

This appeal was docketed in this court on December 7, 2020, and the parties promptly filed competing motions. Respondents moved for a summary affirmance without briefing, while appellants moved for an expedited briefing schedule (although they asked this court to decide this matter by December 14, they did not propose a specific briefing schedule). We directed the parties to respond to each other's motions by 2 p.m. today, December 8. We also directed the district court clerk to transmit the available portions of the district court record to this court's clerk immediately, which the district court clerk did. Then, having considered the pending motions and responses, we directed the parties to file supplemental briefs by 7 p.m. today. In particular, we ordered appellants to identify by page and paragraph number the specific portions of the district court order they contest. The parties have filed those briefs.

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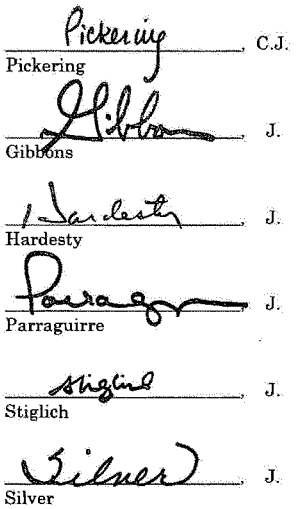
[1]The Governor's Certificate of Ascertainment can be viewed at https://www.archives.gov/files/electoral-college/2020/ascertainment-nevada.pdf.

The district court entered a 34-page order, setting forth its findings of fact, conclusions of law, and evidentiary rulings. The district court's order is attached. To prevail on this appeal, appellants must demonstrate error of law, findings of fact not supported by substantial evidence, or an abuse of discretion in the admission or rejection of evidence by the district court. *See Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105-06, 294 P.3d 427, 432 (2013) (reviewing a district court's factual findings for an abuse of discretion and providing that those findings will not be set aside unless they are clearly erroneous or not supported by substantial evidence); *Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) (stating that questions of law are reviewed de novo, while factual findings are reviewed for substantial evidence). We are not convinced they have done so.[2] In particular, appellants have not demonstrated any legal error in the district court's application of NRS 293.410(2)(c). We also are not convinced that the district court erred in applying a burden of proof by clear and convincing evidence, as supported by the cases cited in the district court's order. And, in any event, the district court further determined that appellants had not met their burden even if it applied a lesser standard. Finally, the district court's order thoroughly addressed the grounds asserted in the statement of contest filed by appellants and considered the evidence offered by appellants even when that evidence did not meet the requirements under Nevada law for expert testimony, *see* NRS 50.275; *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008) (explaining requirements for witness to testify as an expert), or for admissibility, *see*,

[2]We have not considered any issues or grounds for contesting the election that were not raised below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

e.g., NRS 51.065 (providing that hearsay is inadmissible except as otherwise provided in Nevada law). Despite our earlier order asking appellants to identify specific findings with which they take issue, appellants have not pointed to any unsupported factual findings, and we have identified none. The clerk of this court shall issue the remittitur forthwith. *See* NRAP 2 (allowing the court to suspend any rules in a particular case except for the time to file a notice of appeal). For these reasons, we

ORDER the judgment of the district court AFFIRMED.[3]



_____, C.J.
Pickering

_____, J.
Gibbons

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Hardesty

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Parraguirre

_____, J.
Stiglich

_____, J.
Silver

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[3]Given our disposition, we will take no action on the pending motions.

Justice Elissa F. Cadish voluntarily recused herself from participation in the decision of this matter.

cc: Hon. James Todd Russell, District Judge
Harvey & Binnall, PLLC
Weir Law Group LLC
Perkins Coie, LLP/Seattle
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Perkins Coie, LLP/Washington DC
Carson City Clerk

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AUDREY ROWLATT
CLERK
BY
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

JESSE LAW, an individual; MICHAEL MCDONALD, an individual; JAMES DEGRAFFENREID III, an individual; DURWARD JAMES HINDLE III, an individual; EILEEN RICE, an individual; SHAWN MEEHAN, an individual, as candidates for presidential electors on behalf of Donald J. Trump, Contestants, vs. JUDITH WHITMER, an individual; SARAH MAHLER, an individual; JOSEPH THRONEBERRY, an individual; ARTEMISA BLANCO, an individual; GABRIELLE D'AYR, an individual; and YVANNA CANCELA, an individual, as candidates for presidential electors on behalf of Joseph R. Biden, Jr., Defendants.	Case No.: 20 OC 00163 1B Dept.: 1 **ORDER GRANTING MOTION TO DISMISS STATEMENT OF CONTEST**

PROCEDURAL HISTORY

On November 17, 2020, Contestants—Republican Party presidential elector candidates—filed a statement of contest challenging the results of the 2020 presidential election in Nevada, seeking an order from this Court either declaring President Donald Trump the winner in Nevada and certifying Contestants as the State's duly elected presidential electors, or holding that President-elect Joe Biden's victory "be declared null and void" and that the November 3 election "be annulled and that no candidate for elector for the office of President of the United States of

America be certified from the State of Nevada." Statement of Contest of the Nov. 3, 2020 Presidential Election 20. In orders dated November 19 and 24, 2020, this Court expanded the depositions available to each party from 10 to 15 and shortened the time for notice from seven days to 48 hours. The parties submitted their evidence to the Court on Wednesday, December 2, 2020. Defendants submitted the testimony by deposition of four witnesses and Contestants submitted the testimony by deposition of eight witnesses along with numerous declarations, affidavits, and other documents. The Court held a hearing on December 3, 2020.

FINDINGS OF FACT

Having reviewed the full evidentiary record submitted by Contestants and Defendants, and having considered, without limitation, all evidence submitted to the Court as well as the parties' written and oral arguments, the Court makes the following findings of fact:

I. The Election Results

1. In the November 3, 2020 General Election for President of the United States, President-elect Joe Biden prevailed over President Donald Trump in the State of Nevada by 33,596 votes.

II. The Agilis Machine

2. The COVID-19 pandemic spurred a sharp increase in mail voting for Nevada's June 2020 Primary Election. The transition to expanded mail voting placed particular stress on larger counties like Clark County because processing and counting mail ballots is time- and labor-intensive. Deposition of Wayne Thorley dated Dec. 1, 2020 ("Thorley Dep.") 12:9–14:11; Deposition of Joseph Gloria dated Dec. 1, 2020 ("Gloria Dep.") 13:11–12.

3. Accordingly, Clark County looked for solutions to enable it to meet this increased interest in mail voting. It ultimately acquired an Agilis Ballot Sorting System (the "Agilis machine") from Runbeck Election Services ("Runbeck"). Thorley Dep. 14:10–15:18; Gloria Dep. 12:20–13:22.

4. Runbeck is a well-respected election services company headquartered in Phoenix, Arizona. It provides a suite of hardware and software products that assist with mail ballot sorting

and processing, initiative petitions, voter registration, and ballot-on-demand printing. It is also one of the largest printing vendors for ballots in the United States. In 2020 alone, it printed 76 million ballots and mailed 30 million. Runbeck's clients are state and county election officials in the United States. Runbeck does not do work for political parties or candidates. Deposition of Jeff Ellington dated Nov. 3, 2020 ("Ellington Dep.") 8:2–19; 10:4–11; Thorley Dep. 16:1–12; Gloria Dep. 12:20–14:3.

5. The Agilis machine is a ballot-sorting machine similar to those used by the U.S. Postal Service ("USPS"). As a ballot envelope is run through the machine, the Agilis takes a picture of the envelope. It also does preliminary processing to ensure the ballot is appropriate to be counted. For example, the machine scans the envelope to see if it was signed by the voter, weighs the envelope to determine if it properly contains only one ballot, and reads a barcode on the envelope to help ensure that the ballot is for the election that is being processed. The Agilis machine then sorts the mail pieces into those appropriate for counting and those with likely deficiencies, as well as by precinct or district. Ellington Dep. 11:18–13:11.

6. Runbeck sells the Agilis machine with automatic signature verification software licensed from Parascript. Parascript is a preeminent provider of handwriting and signature verification software that is widely used by USPS and financial institutions across the United States. Upwards of 80 percent of bank checks in the United States are verified by Parascript's automatic signature verification technology. Ellington Dep. 13:20–14:24.

7. As offered with the Agilis machine, the automatic signature verification software takes a picture of the signature on the ballot envelope. It then compares the signature from the envelope to a comparator signature from the voter registration files and, using a logarithmic algorithm, scores the signature. If that score is above the threshold setting chosen by the jurisdiction, the ballot is sorted for counting. A ballot below the threshold setting is flagged for further review. Ellington Dep. 13:3–11, 15:25–16:6; Gloria Dep. 12:1–13.

8. Clark County acquired and used the Agilis machine for the June primary. Before acquiring the Agilis, Clark County approached the Office of the Nevada Secretary of State (the

"Secretary") to request funding for the acquisition. The Secretary and Clark County engaged in extensive conversations about how the County planned to use the Agilis machine and what exactly it would do for them. Ultimately, the Secretary approved the funding. Thorley Dep. 14:15–15:21, 18:1–19:6; Gloria Dep. 14:4–13.

9. Clark County used the Agilis machine during the June primary and November election. Before each election, Clark County conducted testing on the machine to determine what threshold setting to use. After completing this testing process, the County ultimately set the machine at a setting of 40. More testing was performed after the June primary to confirm the setting was appropriate for the November election. As a result, Clark County continued to use the Agilis machine at a setting of 40 for the November election. Gloria Dep. 16:10–17:4; 22: 1–10.

10. The threshold setting determines what score a signature must be given by the Agilis machine to be accepted. While it operates on a 1 to 100 scale, it does not correlate to a percentage; in other words, a setting of 40 does not represent a 40 percent likelihood that the signature is accurate, nor will a setting of 40 instruct the Agilis machine to accept 40 percent of ballots. Instead, the threshold setting is merely a cutoff for which signature scores will be accepted. Ellington Dep. 16:1–17:9.

11. While the Agilis machine comes preset at 50, that setting does not constitute a recommended setting. Runbeck does not recommend that its customers run the machine at any particular setting. Ellington Dep. 17:10–21, 18:7–12; Gloria Dep. 15:5–22; 16:23–17:4.

12. Instead, Runbeck recommends that its customers do their own testing to determine a setting with which they are comfortable. Clark County complied with this best practice in choosing the setting of 40. Ellington Dep. 19:2–6.

13. Many jurisdictions run their Agilis machines below a threshold setting of 50. Ellington Dep. 17:17–18, 18:17–19:1; Deposition of Scott Gessler dated Dec. 1, 2020 ("Gessler Dep.") 22:16–20.

14. Because the automatic signature verification is a logarithmic algorithm, there is no significant difference in the number of signatures that are verified at a setting of 40 versus a setting

of 50. Instead, the rate of verification sees a sudden high rate of change at the two extremes but not in the middle. Any setting between a 15 and 85 would produce substantially similar results. Ellington Dep. 17:12–18:6.

15. Accordingly, during both the June primary and November election in Clark County, a ballot envelope bearing a signature that was scored 40 or better by the Agilis machine was accepted without further review. Gloria Dep. 11:6–12:13.

16. If a signature was scored below 40, it was flagged for human verification. Clark County's permanent election personnel were initially trained by a forensic signature expert and former FBI agent, and they developed a training program for temporary staff based on this instruction. During the human verification process, an election worker reviewed the signature against a reference signature on a computer screen. If the reviewer was uncertain about a signature, the signature was passed along for additional review and compared against the voter's entire history of signatures. If uncertainty persisted, the signature was reviewed by Joseph P. Gloria, Clark County's Registrar of Voters, as a final check. If the signature was then rejected, the voter could undertake Nevada's statutory cure process. Gloria Dep. 17:10–20:6.

17. Accordingly, no ballot was rejected for signature mismatch by Clark County without first being reviewed by Clark County employees. A ballot would only ever be rejected if "at least two employees" agreed that the signature on the envelope differed in "multiple, significant and obvious respects from the signatures of the voter available in" the County's records. Nevada Revised Statutes ("NRS") 293.8874; *see also* Thorley Dep. 17:13–19.

18. During the November election, roughly 30 percent of signatures were verified by the Agilis machine, while roughly 70 percent were flagged for human verification. Gloria Dep. 12:1–13.

19. The Agilis machine's verification rate was relatively low because many of the comparator signatures in Clark County's database are low-quality images from the Department of Motor Vehicles ("DMV"). A low-quality image is one with a DPI (dots per inch) below 200. Ellington Dep. 21:12–22:1.

20. When an image is below 200 DPI, the Agilis machine cannot make a match because it will not read the image file as containing a signature. Instead, it will read the image file as a series of squares and pass the signature along for human verification. In other words, low-quality comparator signatures will cause the Agilis machine to not verify signatures; it will not cause the Agilis machine to erroneously accept signatures that are not genuine. Ellington Dep. 19:19–22:1.

21. During the November election, 6,864 ballots were initially rejected by Clark County for signature mismatch, representing 1.51 percent of all mail ballots received. Of those, 5,506 voters (or 80.22 percent of voters whose ballots were rejected) cured their ballots, resulting in 1,358 (or 0.30 percent of) ballots being rejected for signature mismatch. See Deposition of Dr. Michael Herron dated Dec. 2, 2020 ("Herron Dep.") 30:25–32:24, Expert Declaration of Dr. Michael Herron dated Dec. 30, 2020 ("Herron Decl."), 23-24 (Defs.' Ex. 6).

22. Clark County's pre-cure signature mismatch rate of 1.51 percent is nearly equivalent to that of Washoe County, which was 1.53 percent in the 2020 General Election. Washoe County did not use the Agilis machine in processing mail ballots in the 2020 General Election. The signature mismatch rate in the 2016 general election was 0.13 in both Clark County and statewide. *See* Herron Dep. 36:15–39:7; Herron Decl. 25–26.

III. Electronic Voting Machines

23. Clark County, along with 15 other counties in Nevada, uses Dominion Voting Systems to conduct in-person voting. Thorley Dep. 23:3–11.

A. In-Person Voting Technology

24. When a voter shows up at a polling place, she must first check in with an election worker. Clark County, like other counties in Nevada, uses an electronic poll book to check the voter in and confirm the voter's identity. Thorley Dep. 26:9–13.

25. First, the election worker will look up the voter on an electronic roster and, upon locating the voter's record, confirm her identity. This process can involve checking more than the voter's name if there are multiple records with the same name. Thorley Dep. 26:13–19.

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26. Next, the election worker will ensure that the voter does not need to make any changes to her voter registration information. Thorley Dep. 26:20–21.

27. Finally, the election worker will provide a pen with a metal screen tip to the voter, which will allow her to sign an electronic tablet to provide a signature. Thorley Dep. 22–24; Gloria Dep. 99:24–100:3.

28. In Clark County, after successfully checking in the voter, the election worker will initialize a voting machine activation card—"voter card"—and provide it to the voter. The voter must insert the voter card into the electronic voting machine for her ballot to appear and to begin the voting process. Clark County uses "vote centers," meaning any voter in the County can vote at any polling location. The voter card ensures that the voter is presented the ballot for her specific precinct. Thorley Dep. 26:5–27:10.

29. When the voter inserts the voter card into the voting machine (also called the "ICX"), the voting machine pulls up the correct ballot, allowing the voter to go through and make selections on a touchscreen. The voter has various opportunities to make changes and review the ballot on the screen itself. Thorley Dep. 27:11–16.

30. Once the voter has reviewed her selections, a printer connected to the voting machine (the voter verified paper audit trail printer, or "VVPAT") flashes a green light before creating a printout of the voter's selections. The printout is printed on a roll of paper—like a receipt from a grocery store cash register—behind a plastic covering, which allows the voter to privately review her selections. The printout is statutorily required for electronic voting machines as an alternative method for voters to confirm the selections made on electronic voting machines. If there is anything wrong with the printer, such as a paper jam or a need for more paper, the printer will flash a red light so that the voter can be assisted. Thorley Dep. 27:17–25, 28:10–22; Gloria Dep. 28:13–21, 42:13–25.

31. A voter can make changes on the touchscreen, if necessary, after reading the printout. Otherwise, the voter touches the "cast-ballot" button on the machine, completing the

voting process. The voter will then retrieve the voter card from the machine, hand it to a poll worker, and receive an "I Voted" sticker. Thorley Dep. 27:25–28:9; Gloria Dep. 29:7–12.

32. Voters who check in but do not complete the voting process are known as "fled voters." Fled voters can be explained for various innocuous reasons, including voter confusion or an ultimate decision not to vote. Thorley Dep. 30:11–25; Gloria Dep. 52:14–18.

B. Certification and Auditing

33. These voting systems are subject to extensive testing and certification before each election and are audited after each election. Thorley Dep. 35:12–39:23; Gloria Dep. 31:3–32:7, 33:9–21.

34. For example, the electronic voting systems used by Clark County were certified by the federal government when they were first brought on the market, as well as any time a hardware or software component is upgraded. This certification is done by a voting system test laboratory. Thorley Dep. 36:19–37:12.

35. The electronic voting machines are also tested and certified by the Secretary, who contracts with the Nevada Gaming Control Board for this certification. Thorley Dep. 37:17–38:21.

36. Clark County's electronic voting machines were last inspected by the Gaming Control Board in December 2019 and certified by the Secretary shortly thereafter. Thorley Dep. 39:6–15; Gloria Dep. 31:3–32:7.

37. The voting machines are also audited against a paper trail that is generated, as discussed above, when voters make their selections. A Clark County voting machine will not operate unless it is connected to a printer (the VVPAT), which creates a paper record that voters can review. Thorley Dep. 28:11–29:6; Gloria Dep. 28:13–29:5.

38. After each election, Clark County, like Nevada's other counties, conducts a random audit of its voting machines. Specifically, it compares the paper trail created by the printer against the results recorded by the voting machine to ensure they match. Thorley Dep. 35:12–36:12; Gloria Dep. 33:9–21.

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39. If there are any issues with or discrepancies in the data recorded by Clark's voting machines, or issues with the accuracy of the paper trail created by the printers, then they would appear in this audit; indeed, that is what the audit is designed to catch. Thorley Dep. 36:8–12.

40. Clark County conducted this audit following the November election and there were no discrepancies between the paper audit trail created by the printer and the data from the voting machine. Gloria Dep. 33:9–21.

IV. Previous Lawsuits

41. Several of the issues raised in Contestants' statement have been litigated and resolved in previous state and federal cases.

A. *Kraus v. Cegavske*

42. District Judge James E. Wilson, Jr. concluded that Clark County's use of the Agilis machine is permissible under Nevada law in *Kraus v. Cegavske*, No. 20 OC 00142 1B, slip op. at 12 (Nev. 1st Jud. Dist. Ct. Oct. 29, 2020).

43. During a ten-hour evidentiary hearing, the parties' counsel—including Contestants' counsel, Jesse Binnall—addressed Clark County's use of the Agilis machine. *See, e.g.*, Transcript of Video-Recorded Hearing 19–20, 36–37, 47–56, 70–74, 76–78, 240–43, *Kraus v. Cegavske*, No. 20 OC 00142 1B (Nev. 1st Jud. Dist. Ct. Oct. 28, 2020).

44. Judge Wilson found that "major metropolitan areas including Cook County, Illinois, Salt Lake City, Utah, and Houston, Texas use Agilis," and that the same system was "used for the June primary election," during which "[n]o evidence was presented that the setting used by Clark County causes or has resulted in any fraudulent ballot being validated or any valid ballot invalidated." *Kraus*, slip op. at 4.

45. Judge Wilson concluded that "[t]here is no evidence that any vote that should lawfully not be counted has been or will be counted," and that "[t]here is no evidence that any election worker did anything outside of the law, policy, or procedures." *Id.* at 9.

46. On the merits of the challenge to the Agilis machine, Judge Wilson explained that Assembly Bill 4 ("AB 4")—omnibus election legislation enacted by the Nevada Legislature during

a special session in the summer of 2020—"specifically authorized county officials to process and count ballots by electronic means. Petitioners' argument that AB 4, Sec. 23(a) requires a clerk or employee check the signature on a returned ballot means the check can only be done manually is meritless. The ballot must certainly be checked but the statute does not prohibit the use of electronic means to check the signature." *Id.* at 12 (citation omitted).

47. Judge Wilson rejected the argument that Clark County's use of the Agilis machine violates equal protection, concluding that "[n]othing the State or Clark County has done values one voter's vote over another's." *Id.* at 13.

48. Judge Wilson further determined that the "[p]etitioners [] failed to prove" that Mr. Gloria "has interfered with any right they or anyone else has as an observer" and that "Gloria has not failed to meet his statutory duties . . . to allow members of the general public to observe the counting of ballots." *Id.* at 11.

49. The *Kraus* petitioners filed an emergency motion for immediate relief with the Nevada Supreme Court, which denied the request after concluding that they "ha[d] not demonstrated a sufficient likelihood of success to merit a stay or injunction." *Kraus v. Cegavske*, No. 82018, slip op. at 2–3 (Nev. Nov. 3, 2020).

50. The *Kraus* petitioners subsequently dismissed the appeal. *See Kraus v. Cegavske*, No. 82018, slip op. at 1–2 (Nev. Nov. 10, 2020).

B. Other Cases

51. In *Donald J. Trump for President, Inc. v. Cegavske*, Donald J. Trump for President, Inc. (the "Trump Campaign"), the Republican National Committee, and the Nevada Republican Party challenged AB 4 soon after the law was enacted, and the U.S. District Court for the District of Nevada dismissed the lawsuit after concluding that these plaintiffs lacked standing. *See* No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *7 (D. Nev. Sept. 18, 2020).

52. Both the Eighth Judicial District Court and the Nevada Supreme Court denied relief requested by the Election Integrity Project of Nevada and Sharron Angle in a lawsuit alleging, among other claims, that AB 4 violates equal protection. *See Election Integrity Project of Nev. v.*

State ex rel. Cegavske, No. A-20-820510-C, slip op. at 12 (Nev. 8th Jud. Dist. Ct. Sept. 28, 2020); *Election Integrity Project of Nev. v. Eighth Jud. Dist. Ct.*, No. 81847, slip op. at 6 (Nev. Oct. 7, 2020).

53. On November 5, 2020, another group of plaintiffs, again backed by the Trump Campaign, filed suit in federal court and alleged that Clark County's use of the Agilis machine violates Nevada law; after conducting a hearing and concluding that use of the Agilis machine does not "conflict with the other provisions of the Nevada election laws" and that there was "little to no evidence that the machine is not doing what it's supposed to do, or incorrectly verifying other signatures," the court denied the plaintiffs' motion for temporary restraining order and preliminary injunction. Reporter's Tr. of Proceedings at 79:5–7, 79:24–80:1, *Stokke v. Cegavske*, No. 2:20-cv-02046-APG-DJA (D. Nev. Nov. 6, 2020). The *Stokke* plaintiffs voluntarily dismissed their case. *See* Notice of Voluntary Dismissal Under FRCP 41(a)(1)(A)(i), *Stokke v. Cegavske*, No. 2:20-cv-02046-APG-DJA (D. Nev. Nov. 24, 2020), ECF No. 31.

54. Other lawsuits challenging Clark County's administration of the November election have been dismissed on various grounds. *See, e.g.*, *Becker v. Gloria*, No. A-20-824878-W, slip op. at 4 (Nev. 8th Jud. Dist. Ct. Dec. 2, 2020) ("The Court finds that Plaintiff has offered no evidence sufficient to find any error on the part of either Clark County or Registrar Gloria that would warrant granting the relief sought here."); *Rodimer v. Gloria*, No. A-20-825130-W, slip op. at 4 (Nev. 8th Jud. Dist. Ct. Nov. 25, 2020); *Marchant v. Gloria*, No. A-20-824878-W, slip op. at 4 (Nev. 8th Jud. Dist. Ct. Nov. 23, 2020).

V. Evidence Presented

A. Contestants' Evidence

55. The Court's orders required Contestants to disclose all witnesses and provide Defendants with all evidence they intended to use at the hearing in this matter by 5:00 p.m. on November 25, 2020.

56. Contestants did not issue their first deposition notices until Friday, November 27, 2020.

57. Much of Contestants' evidence consists of non-deposition evidence in the form of witness declarations. These declarations fall outside the scope of the contest statute, which provides that election contests "shall be tried and submitted so far as may be possible upon depositions and written or oral argument as the court may order." NRS 293.415. The reason for this is to allow for the cross-examination of the deponent under oath.

58. These declarations also constitute hearsay, as they are out-of-court statements offered in evidence to prove the truth of the matters asserted. *See* NRS 51.035, 51.065; *Cramer v. State*, 126 Nev. 388, 392, 240 P.3d 8, 11 (2010) ("An affidavit is generally inadmissible hearsay."). Most of these declarations were self-serving statements of little or no evidentiary value.

59. The Court nonetheless considers the totality of the evidence provided by Contestants in reaching and ruling upon the merits of their claims.

B. Contestants' Expert Evidence

i. Michael Baselice

60. Contestants offered Mr. Baselice to opine on the incidence of illegal voting in the 2020 General Election based on a phone survey of voters.

61. The Court questions Mr. Baselice's methodology because he was unable to identify the source of the data for his survey and conducted no quality control of the data he received. Baselice Dep. 29:13–30:8, 34:24–35:21, 57:13–58:14.

ii. Jesse Kamzol

62. Contestants offered Mr. Kamzol to opine that significant illegal voting occurred in Nevada during the 2020 General Election, based on his analysis of various commercially available databases of voters.

63. The Court questions Mr. Kamzol's methodology because he had little to no information about or supervision over the origins of his data, the manner in which it had been matched, and what the rate of false positives would be. Additionally, there was little or no verification of his numbers. Kamzol Dep. 58:6–11, 58:15–17, 59:22–24.

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iii. Scott Gessler

64. Contestants offered Mr. Gessler to opine on the transition to and administration of mail voting.

65. Mr. Gessler's report lacked citations to facts and evidence that he used to come to his conclusions and did not include a single exhibit to support of any of his conclusions.

66. The Court finds that Mr. Gessler's methodology is unsound because he based nearly all his opinions on a handful of affidavits that he took no steps to corroborate through independent investigation. Gessler Dep. 44:12–14, 48:11–25, 50:8–22, 66: 1–7.

C. Defendants' Evidence

67. Defendants put forth the testimony by deposition of Wayne Thorley, Nevada's former Deputy Secretary of State for Elections. This testimony is credible because of Mr. Thorley's experience, lack of bias, and first-hand knowledge of the subjects he testified to.

68. Defendants put forth the testimony by deposition of Jeff Ellington, President and Chief Operating Office of Runbeck, which manufactures the Agilis machine. This testimony is credible because of Mr. Ellington's experience, lack of bias, and first-hand knowledge of the subjects he testified to.

69. Defendants put forth the testimony by deposition of Joseph P. Gloria, the Registrar of Voters for Clark County. This testimony is credible because of Mr. Gloria's experience, lack of bias, and first-hand knowledge of the subjects he testified to.

70. Defendants put forth the testimony by deposition of Dr. Michael Herron. Dr. Herron is qualified as an expert in the areas of election administration, voter fraud, survey design, and statistical analysis. Dr. Herron holds advanced degrees in statistics and political science; has published academic papers in peer-reviewed journals about election administration and voter fraud; and has an extensive record of serving as an expert on related topics in litigation before numerous courts, none of which has found that his testimony lacks credibility.

71. The Court finds the testimony of Dr. Herron credible and his methodology and conclusions reliable. His testimony is relevant and limited in scope because it considered each

ground for contest, both individually and within the context of Nevada's registration and voting system, and the prevalence of voter fraud nationwide and in Nevada. His methodology is reliable because it is similar to that which he uses in his published work and because he produced all of the data on which he relied, such that his conclusions are testable by others in his field.

VI. Illegal or Improper Votes

A. Voter Fraud Rates

72. Contestants allege that fraud occurred at multiple points in the voting process in Nevada in rates that exceed the margin of victory in the presidential race. Based on Dr. Herron's analysis, the Court finds there is no evidence that voter fraud rates associated with mail voting are systematically higher than voter fraud rates associated with other forms of voting. *See* Herron Dep. 17:7–13; Herron Decl. 17.

73. Based on Dr. Herron's analysis, the Court finds there is no evidence that voter fraud rates associated with mail voting are systematically higher than voter fraud rates associated with other forms of voting. *See* Herron Dep. 17:7–13; Herron Decl. 17.

74. After examining voter turnout in Nevada and constructing a database of voter fraud instances in the State from 2012 to 2020, Dr. Herron concluded that out of 5,143,652 ballots cast in general and primary elections during that timeframe (not including the 2020 General Election), the illegal vote rate totaled at most only 0.00054 percent. Herron Dep. 22:19–24:7; Herron Decl. 18–21.

75. Dr. Herron considered the academic literature on voter fraud in the United States (including published papers that he has authored) and analyzed publicly available election data in Clark County to evaluate Contestants' allegations of fraud. Based on his study, Dr. Herron concluded that Contestants' allegations "strain credulity." Herron Dep. 41:4–18; Herron Decl. 28 (explaining that Contest implied that double-voting rate experienced by mail-in voters in Nevada was at least 89 times greater than conservative academic estimate); Herron Dep. 45:2–46:24; Herron Decl. 33 (explaining that only 537 ballots arrived after deadline in Clark County and that there is no evidence that single one was counted).

76. Dr. Herron's comparative analysis across counties of signature mismatch rates was similar to an analysis he conducted in North Carolina's Ninth Congressional District in 2018, during which publicly available absentee ballot data was consistent with allegations of fraud. His analysis there was credited by the North Carolina State Board of Elections. Herron Dep. 9:19–10:9. In contrast to his study in North Carolina, Dr. Herron's comparative analysis in the 2020 Nevada election revealed no irregularities across counties. *See* Herron Dep. 33:9–34:25 (finding nearly identical signature mismatch rates in Clark County and Washoe County despite that one uses the Agilis machine and one does not).

77. Based on his evaluation of Contestants' allegations, Dr. Herron concluded that "none of the grounds [in the Contest] contains persuasive evidence [(1)] that there were fraudulent activities associated with the 2020 General Election in particular [or] the presidential election in Nevada; [(2)] that these fraudulent activities led to fraudulent votes, [or (3)] that these allegedly fraudulent votes affected the vote margin of 33,596 . . . that separates Joe Biden and Donald Trump in Nevada." Herron Dep. 25:1–17; Herron Decl. 1, 21. The Court credits these findings and accepts them as its own.

78. Dr. Herron's testimony is buttressed by Contestants' own expert witness, Mr. Gessler, who also testified that he has no personal knowledge that any voting fraud occurred in Nevada's 2020 General Election. Gessler Dep. 7:3–9, 40:13–12.

79. Based on this testimony, the Court finds that there is no credible or reliable evidence that the 2020 General Election in Nevada was affected by fraud. Herron Dep. 56:19–57:21.

B. Provisional Ballots

80. Contestants allege problems and irregularities with the provisional balloting process, including that certain voters were allowed to vote without proper Nevada identification and that the consequences of voting provisionally were not explained to voters.

81. The record does not support a finding that election officials counted ballots cast by same-day registrants who only provided proof of a DMV appointment in place of a Nevada photographic identification. *Cf.* Doe 3 Dep. 38:7–13, 41:6–8 (testifying that voters who provided

only proof of DMV appointments after election day were given provisional ballots, but admitting that she did not participate in counting of provisional ballots and did not know whether any such ballots were counted); Doe 5 Decl. (LAW 000462) (hearsay declaration stating that voters without identification could make DMV appointment and vote, but not alleging that this process was improper or illegal).

82. The record does not support a finding that any provisional voters were wrongfully disenfranchised because of directions provided by election officials or because they were not given an opportunity to cure their ballots. *Cf.* Gloria Dep. 55:5–56:11 (testifying that all provisional voters received a set of paperwork explaining why they voted provisionally).

83. The record does not support a finding that voters were made to cast provisional ballots on election day and then not given the opportunity to cure their lack of identification. *Cf.* Doe 3 Dep. 38:7–13, 41:6–8 (testifying that voters with DMV appointments after election day were given provisional ballots, but admitting that she did not participate in counting of provisional ballots and not testifying that such voters were not given opportunity to cure); Huff Decl. (LAW 001689–92) (hearsay declaration alleging various issues with cure process, but never identifying any voters who were denied the opportunity to cure).

84. The record does not support a finding that same day registrants with out-of-state identification were permitted to vote a regular, rather than provisional, ballot. *Cf.* Doe 1 Dep. (describing that such voters were made to vote provisional ballots to be later verified).

C. Mismatched Signatures

85. Contestants assert that the Agilis machine consistently malfunctioned and accepted invalid signatures because the machine setting was set impermissibly low and approved signatures based on low quality reference images.

86. The record does not support a finding that the Agilis machine functioned improperly and accepted signatures that should have been rejected during the signature verification process.

87. The record does not support a finding that election workers counted ballots with improper signatures that should have been rejected. *Cf.* Blanco Decl. (LAW 000238) (hearsay declaration asserting that single signature from Clark County did not appear to match, but providing no evidence that it was not the voter's signature); Cordell Criddle Decl. (LAW 000364) (hearsay declaration alleging that illegible signature was nevertheless accepted, but not that vote was illegal); Debra Criddle Decl. (LAW 000364) (same); Doe 6 Decl. (LAW 000454) (hearsay declaration alleging several instances where signatures appeared to have been signed by others assisting voters, but not providing evidence that this assistance was unlawful).

88. The record does not support a finding that election workers authenticated, processed, or counted ballots that presented problems and irregularities under pressure from election officials. *Cf.* Doe 2 Dep. 53:19–54:18 (testifying that ballots with purportedly strange signatures were counted, but admitting that she did not see comparator signatures and could not confirm that these were not voters' actual signatures); Doe 3 Dep. 43:15–20 (testifying that on election day she was instructed not to score or surrender ballots, but not that any unlawful ballots were counted as result).

89. The record does not support a finding that illegal ballots were cast because the signature on the ballot envelope did not match the voter's signature. *Cf.* Blanco Decl. (LAW 000238) (hearsay declaration asserting that single signature from Clark County did not match, but providing no evidence that signature was not voter's); Cordell Criddle Decl. (LAW 000364) (hearsay declaration alleging that illegible signature was nevertheless accepted, but not that vote was illegal); Debra Criddle Decl. (LAW 000364) (same); Doe 6 Decl. (LAW 000454) (hearsay declaration alleging several instances where signatures appeared to have been signed by others assisting voters, but not providing evidence that this assistance was unlawful).

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D. Illegal Votes from In-Person Voting Technology

90. Contestants allege that 1,000 illegal or improper votes were cast and counted as a result of maintenance and security issues with voting machines and that 1,000 legal votes were not counted due to issues with voting machines.

91. The record does not support a finding that maintenance and security issues resulted in illegal votes being cast and counted or legal votes not being counted. *See* Gloria Dep. 33:9–21, 36:8–12 (testifying that the voting machines were audited against a paper trail and that audit turned up no discrepancies).

E. Ineligible Voters and Double Voting

92. Contestants allege that voters were sent and cast multiple ballots and otherwise double voted, that non-Nevada residents cast ballots and those ballots were counted, and that numerous persons arrived to vote in-person on election day only to find out that a mail ballots was cast in their name already.

93. The record does not support a finding that any Nevada voter voted twice. *See* Doe 4 Dep. 10:6–13 (testifying that two voters he checked in were not allowed to vote because of record that they already voted).

94. The record does not support a finding that any individuals were sent and cast multiple mail ballots. *Cf.* Negrete Decl. (LAW 001626) (hearsay declaration alleging that she received two ballots, one each for her married and maiden names, but not that she or anyone else cast multiple votes); Finley Decl. (LAW 004944) (hearsay declaration alleging that voter received two ballots, but providing no evidence that ballot was cast or counted).

95. The record does not support a finding that numerous voters arrived to vote at their respective polling places only to be informed that a mail ballot had already been received on their behalf when, in fact, the voter had not submitted a mail ballot. *Cf.* Doe 3 Dep. 36:18–25, 37:1–18 (testifying that single unidentified man arrived at her polling place and claimed that he did not cast mail ballot allegedly received by election officials, but not providing any corroborating evidence);

Doe 4 Dep. 10:6–13 (testifying that two voters he checked in were not allowed to vote because of record that they already voted, but not demonstrating whether these voters had in fact cast ballots).

96. The record does not support a finding that election officials counted mail ballots from voters who also voted in other states. *Cf.* Doe 2 Dep. 56:15–25 (testifying that she saw ballots arrive from out of state but admitting that she did not know whether they were lawfully cast); Doe 3 Dep. 12:8–16 (testifying that she was asked to accept a voter's California identification with Nevada address and was instructed to give them a provisional ballot, but not that voter had also voted in California).

97. The record does not support a finding that election officials counted ballots from voters who did not meet Nevada residency requirements. *Cf.* Doe 2 Dep. 56:15–25 (testifying that voters were allowed to cast ballots without presenting identification, but not that voters did not meet residency requirements); Doe 4 Dep. 10:14–11:12, 40:7–23 (testifying to belief that individuals with out-of-state identification were allowed to vote, but admitting that he did not know if these individuals voted after they were directed to team leaders); Linda Smith Decl. (LAW 004650) (hearsay declaration describing voters arriving with out-of-state license plates, but not claiming that these voters were ineligible to vote in Nevada);*see* Thorley Dep. 47:1–48:12 (testifying that Nevada directs the USPS not to forward ballots and that ballots are mailed as marketing mail, which does not include mail forwarding, a feature that requires additional payment).

F. Ballot Issues

98. Contestants allege that Clark County election workers were pressured to push ballots through despite deficiencies.

99. The record does not support a finding that Clark County election workers were pressured to process and count ballots that presented problems and irregularities. *Cf.* Doe 2 Dep. 53:19–54:18 (testifying that ballots with purportedly strange signatures were counted, but admitting that she did not see comparator signatures and could not confirm that these were not

voters' actual signatures); Doe 3 Dep. 43:15–20 (testifying that on election day she was instructed not to score or surrender ballots, but not that any unlawful ballots were counted as result).

G. Deceased Voters

100. Contestants allege that votes from deceased voters were improperly cast and counted.

101. The record does not support a finding that, as Contestants allege, 500 votes were illegal or improper because they were cast by deceased voters. *See* Thorley Dep. 44:2–45:24 (testifying to the process in place to maintain voter rolls, including removing confirmed deceased voters); Gloria Dep. 63:24–64:8, 90:7–23 (same); Hartle Decl. (LAW 000260–61) (hearsay declaration asserting only that single vote from deceased wife was counted during November election); 2020 General Election Rejection Log (LAW 004366, 004527) (showing only two "voter is deceased" entries).

H. Voter Impersonation

102. Contestants allege that persons cast mail ballots in other persons' names.

103. The record does not support a finding that ballots that were completed and submitted by anyone other than the proper voters. *Cf.* Doe 3 Dep. 14:8–14, 35:1–5 (testifying that unidentified persons near purported Biden-Harris bus next to polling location prefilled mail ballots and put them in pink ballot envelopes, but admitting that she did not see these ballots cast and cannot confirm that these ballots were counted); Walters Decl. (LAW 000266) (hearsay declaration claiming that occupants of van seen following USPS truck took mail ballots from mailboxes, but providing no evidence that these ballots were cast and counted); Garrett Smith Decl. (LAW 000453) (hearsay declaration claiming that he did not vote and that "[a] search of the Clark County web site [] disclosed that a ballot in my name was accepted by the county on November 7, 2020," but providing no evidence that this was his ballot and not ballot of someone with same name).

I. Untimely Ballots

104. Contestants allege that election officials counted ballots that arrived after the deadline for submitting them.

105. The record does not support a finding that election officials counted untimely mail ballots that were submitted after deadlines.

J. Other Allegedly Illegal or Improper Votes

106. Contestants allege that Nevada failed to properly maintain its voter lists resulting in illegal votes cast and counted, and that the postal service was directed to violate USPS policy and improperly deliver ballots.

107. The record does not support a finding that Nevada failed to cure its voter lists to reflect returned ballots during the 2020 primary election and that, as a result, ballots were delivered to addresses where no known voter lives and were cast and counted at all or in an amount equal to or greater than 33,596. *Cf.* Walter Decl. (LAW 000266) (hearsay declaration alleging that he received ballot for individual who never lived at his address, but not demonstrating that the ballot was voted or counted); Gessler Dep. 41:23–42:10 (testifying that he has no knowledge of how Nevada maintains its voter rolls and that he knows of no one who is improperly included in those rolls).

108. The record does not support a finding that USPS letter carriers were directed to violate USPS policy by delivering mail ballots to addresses where the addressee of the ballot was known to be deceased, known to have moved from that address, or had no affiliation with that address at all. Thorley Dep. 46:18–48:14; *cf.* Doe 7 Decl. (LAW 000265) (hearsay declaration alleging that deceased mother's ballot was forwarded to son in California, but not demonstrating that person was actually deceased and not simply living with son temporarily); *id.* (alleging that USPS supervisor instructed her to forward ballot to deceased person in California, but providing no evidence that such ballot was returned as voted).

109. Despite two of Contestants' experts testifying to "questionable ballots" and "illegal ballots," Baselice Dep. 52:20–25 ("questionable ballots"); Kamzol Dep. 53:10–14 ("illegal

ballots"), neither provided evidence to support Contestants' allegations regarding the presence of illegal votes in the 2020 presidential election. *See* Herron Dep. 59:22–60:12, 68:13–69:12 (testifying that neither Mr. Baselice nor Mr. Kamzol disclosed the data underlying their analysis); Baselice Dep. 24:7–15 (explaining that he did not participate in compiling the data he used and "shouldn't even surmise" "what the original source of the data was"); Kamzol Dep. 58:6–59:15 (explaining that he did not know how the matching work to enhance the data he used was performed); Baselice Dep. 60:8–61:17 (acknowledging that he could not determine how many "questionable" ballots were actually counted, contained votes in the presidential election, or were cast for a particular candidate); Kamzol Dep. 92:4–16 (same). Little or no verification of numbers was done by Mr. Kamzol.

VII. Observation of the Ballot Processing and Counting Process

110. The record does not support a finding that Clark County's policy for observation of ballot counting and ballot duplication was designed to shield voter fraud or actually led to voter fraud. Gessler Dep. 64:16-66:21 (testifying he has no knowledge of Nevada law relating to voting observation and no personal knowledge of how Clark County allowed observation of ballot counting and ballot duplication).

111. The record does not support a finding that election workers marked choices for any unfilled elections or questions on duplicated ballots. *Cf.* Fezza Decl. (LAW 000257) (hearsay declaration describing ballot duplication process, but providing no evidence that anything unscrupulous occurred and noting that duplication teams were comprised of members of opposite parties, that each team "worked well together," and that "getting things done right was encouraged over speed"); Taylor Decl. (LAW 001749) (hearsay declaration describing ballot duplication process, but providing no evidence that anything unscrupulous occurred); Kraus Decl. (LAW 000440) (similar); Stewart Decl. (LAW 000456) (similar).

112. The record does not support a finding that members of the public were denied the right to observe the processing and tabulation of mail ballots. *Cf.* Fezza Decl. (LAW 000257) (hearsay declaration asserting that observers were confined to "tiny, taped off area" in corner of

room, but admitting that observers were always present and given access); Kraus Decl. (LAW 000441) (hearsay declaration alleging insufficient access to Clark County's facilities for "meaningful observation," but confirming he was consistently given access to facilities); Taylor Decl. (LAW 001749) (similar); Percin Decl. (LAW 001642–88) (similar); Stewart Decl. (LAW 000456) (similar); Gloria Dep. 61:1–7 (explaining that observers were stationed in pre-designated locations that ensured social distancing).

113. In *Kraus*, Judge Wilson found that Clark County had not interfered with any individual's statutory right to observe ballot processing. *Kraus*, slip op. at 10–11 ("Petitioners have failed to prove Registrar Gloria has interfered with any right they or anyone else has as an observer."). The Court adopts this finding of fact as its own.

VIII. Candidate Misconduct

A. The Nevada Native Vote Project

114. The record does not support a finding that groups or individuals linked to the Biden-Harris campaign offered or gave, directly or indirectly, anything of value to manipulate votes in this election or otherwise alter the outcome of the election. *Cf.* LAW 004662–751 (depicting only two posts including Biden-Harris paraphernalia, neither of which were affiliated with Nevada Native Vote Project or Biden-Harris campaign). The record also does not support a finding that any group or individual offered anything of value to voters to manipulate the voters' choice for president. *Cf.* LAW 000274–358 (showing purported Facebook screenshots from groups and individuals, but not demonstrating that they offered anything of value to alter outcome of election).

115. Although the Nevada Native Vote Project ("NNVP") organized voter drives, that organization expressly disclaimed any relationship with President-elect Biden's or any other political campaign. *See* Official Statement from the Nevada Native Vote Project ("The NNVP is a non-partisan, non-profit organization that is dedicated to engaging the Native community in their Constitutional right to vote. Regardless of party affiliation, the ability to make your voice heard and ensure the Native perspective is present in every determination made on the ballot is of the utmost importance.").

116. The record does not support a finding that NNVP or any other group or individual engaged in voting drives acted on behalf of Defendants or President-elect Biden. *Cf.* LAW 000274–358 (showing purported Facebook screenshots from groups and individuals, but not demonstrating any partisan activity linked to Biden-Harris campaign).

B. The Biden-Harris Bus

117. The record does not support a finding that multiple ballots were filled out against a bus bearing the Biden-Harris emblem outside a polling place in Clark County. *Cf.* Doe 3 Dep. 14:13–19:7. While Doe 3 testified to alleged ballot-stuffing occurring in broad daylight outside a busy polling location in Nevada's most populous county, no other witness corroborated Doe 3's account. The Court finds Doe 3's account not credible.

118. The record does not support a finding that the Biden-Harris campaign paid anything of value for anyone to alter votes. *Cf.* Doe 3 Dep. 23:21–24:10 (admitting that she had no hard evidence tying activities she saw to Democratic candidates); *id.* 35:1–8 (admitting to not knowing whether these allegedly unlawful ballots were accepted and counted).

CONCLUSIONS OF LAW

I. Expert Evidence by Contestants

119. "To testify as an expert witness . . . , the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of 'scientific, technical or other specialized knowledge' (the qualification requirement); (2) his or her specialized knowledge must 'assist the trier of fact to understand the evidence or to determine a fact in issue' (the assistance requirement); and (3) his or her testimony must be limited 'to matters within the scope of [his or her specialized] knowledge' (the limited scope requirement)." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (alteration in original) (quoting NRS 50.275); *see also Higgs v. State*, 126 Nev. 1043 1, 16, 222 P.3d 648, 658 (2010).

120. As reflected herein, the Court finds that the expert testimony provided by Contestants was of little to no value. The Court did not exclude consideration of this evidence, which it could have, but gave it very little weight.

121. To determine whether these three requirements are satisfied, Nevada courts consider several non-exhaustive factors. *See Higgs*, 126 Nev. at 16–17, 222 P.3d at 657–58.

122. For the qualification requirement, the Court must consider the witness's "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." *Hallmark*, 124 Nev. at 499, 189 P.3d at 650–51 (footnotes omitted).

123. For the assistance requirement, the expert's testimony must be (1) relevant and (2) reliable. *Id.* at 500, 189 P.3d at 651; *see also Perez v. State*, 129 Nev. 850, 858, 313 P.3d 862, 867–68 (2013) ("Evidence is relevant when it tends 'to make the existence of any fact that is of consequence to the determination of the action more or less probable.'" (quoting NRS 48.015)); *Hallmark*, 124 Nev. at 500–01, 189 P.3d at 651–52 ("In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community . . . ; and (5) based more on particularized facts rather than assumption, conjecture, or generalization." (footnotes omitted)).

124. For the limited scope requirement, the expert testimony must be related to the "highly particularized facts" of the case, *Higgs*, 126 Nev. at 20, 222 P.3d at 660, and fall within the scope of the witness's specialized knowledge. *See Perez*, 129 Nev. at 861, 313 P.3d at 869.

125. As reflected above, this Court gave very little weight to Contestants' experts and could possibly have excluded their testimony under the above stated standards. The Court is concerned about the failure of these experts to verify the data they were relying on.

126. The Court nonetheless considers Contestants' proffered expert testimony in reaching and ruling upon the merits of Contestants' claims.

II. Issue Preclusion

127. Under Nevada law, issue preclusion applies when (1) the issue decided in the prior litigation is identical to the issue in the current action; (2) the initial ruling was on the merits and

has become final; (3) the party against whom the judgment is asserted was a party or in privity with a party to the prior litigation; and (4) the issue was necessarily and actually litigated. *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008).

128. Contestants' challenges to Clark County's use of the Agilis machine and its observation policies are identical to issues raised by the *Kraus* petitioners because two challenges are the same and the same facts underlie these challenges and the *Kraus* claims. *See LaForge v. State, Univ. & Cmty. Coll. Sys.*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000); *see also Kraus*, slip op. at 12–13.

129. Contestants' challenge to an alleged lack of meaningful observation was also raised and addressed in *Kraus*. *See* slip op. at 10–11, 13.

130. This Court issued a thorough, well-reasoned opinion in *Kraus* denying the petitioners mandamus relief, which constituted a final decision on the merits because it was neither tentative nor subject to further determination. *See Kirsch v. Traber*, 134 Nev. 163, 166–67, 414 P.3d 818, 821–22 (2018); *Hoffman v. Second Jud. Dist. Ct.*, No. 60119, 2013 WL 7158424, at *4 (Nev. Dec. 16, 2013).

131. As Trump electors, Contestants are in privity with the Kraus petitioners—specifically, the Trump Campaign and Nevada Republican Party—because they were "nomin[ated]" and "select[ed]" to serve as electors by the Nevada Republican Party, NRS 298.035(1), and are functionaries of the Trump Campaign. *See* NRS 298.065; NRS 298.075; *see also Chiafalo v. Washington*, 140 S. Ct. 2316, 2322 (2020). Contestants are thus "sufficiently close" to, such that their interests were "adequate[ly] represent[ed]" by, the *Kraus* petitioners. *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017) (first quoting *Vets N., Inc. v. Libutti*, No. CV-01-7773-DRHETB, 2003 WL 21542554, at *11 (E.D.N.Y. Jan. 24, 2003); and then quoting *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 261, 321 P.3d 912, 917 (2014)); *cf. In re Coday*, 130 P.3d 809, 816–17 (Wash. 2006).

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132. The issues relating to the Agilis machine and meaningful observation of tabulation were necessarily and actually litigated in *Kraus* because they were properly raised and submitted for determination. *See Alcantara*, 130 Nev. at 262, 321 P.3d at 918.

133. Each of the four requirements for issue preclusion is therefore satisfied as to Contestants' grounds for contest related to the lawfulness of the Agilis machines and meaningful observation of ballot tabulation

134. While issue preclusion provides alternative grounds to dispose of these issues, the Court reaches and rules on the merits of all of Contestants' claims.

III. Grounds for Contests

135. Although Nevada has not addressed this issue, the Court believes that Contestants are required to prove the grounds for their contest by clear and convincing evidence. *See, e.g.*, *Gooch v. Hendrix*, 851 P.2d 1321, 1328 (Cal. 1993); *Bazydlo v. Volant*, 647 N.E.2d 273, 276 (Ill. 1995); *Adair Cnty. Bd. of Elections v. Arnold*, No. 2015-CA-000661-MR, 2015 WL 5308132, at *6 (Ky. Ct. App. Sept. 11, 2015); *Snyder v. Glusing*, 520 A.2d 349, 357 (Md. 1987); *Drummond v. Town of Virginia City*, 833 P.2d 1067, 1070 (Mont. 1992); *Harmon v. Baldwin*, 837 N.E.2d 1196, 1201 (Ohio 2005) (per curiam); *Quinn v. City of Tulsa*, 777 P.2d 1331, 1341 (Okla. 1989); *Thomas v. Penfold*, 541 P.2d 1065, 1067 (Or. 1975); *Gonzalez v. Villarreal*, 251 S.W.3d 763, 773 (Tex. Ct. App. 2008).

136. This higher standard of proof is appropriate in election contests because it "adequately balances the conflicting interests in preserving the integrity of the election and avoiding unnecessary disenfranchisement of qualified absentee voters." *Bazydlo*, 647 N.E.2d at 276 (quoting *Bazydlo v. Volant*, 636 N.E.2d 1107, 1110 (Ill. App. Ct. 1994)); *accord Sadler v. Connolly*, 575 P.2d 51, 55 (Mont. 1978) ("The underlying basis for [the clear and convincing evidence] standard is that an election contest . . . , if successful, has the serious effect of disenfranchisement of the voters." (citing *Thornton v. Johnson*, 453 P.2d 178, 182 (Or. 1969) (per curiam))).

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137. "In Nevada, a plaintiff must prove a general civil fraud claim, which requires intent to defraud, with clear and convincing evidence." *Nellis Motors v. State*, 124 Nev. 1263, 1267, 197 P.3d 1061, 1064 (2008).

138. "[C]lear and convincing evidence must be 'satisfactory' proof that is 'so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn.'" *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (alteration in original) (quoting *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).

139. However, even if a preponderance of the evidence standard was used, the Court concludes that Contestants' claims fail on the merits there under or under any other standard.

A. Contestants did not prove that there was a "malfunction of any voting device or electronic tabulator, counting device or computer in a manner sufficient to raise reasonable doubt as to the outcome of the election."

140. Contestants' evidence does not establish by clear and convincing proof, or under any standard of evidence, that "there was a malfunction of any voting device or electronic tabulator, counting device or computer in a manner sufficient to raise reasonable doubt as to the outcome of the election." NRS 293.410(2)(f).

141. A "malfunction" is "[a] fault in the way something works," *Malfunction, Black's Law Dictionary* (11th ed. 2019), and "a failure to operate or function in the normal or correct manner," *Malfunction, Merriam-Webster's Collegiate Dictionary* (11th ed. 2003); *see also Otis Elevator Co. v. Reid*, 101 Nev. 515, 520, 706 P.2d 1378, 1381 (1985) (describing incidents where elevator operated differently than "normal" as "malfunctions").

142. Contests did not prove under any standard of proof that the Agilis machine malfunctioned.

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143. Contestants did not prove under any standard of proof that the Agilis machine malfunctioned in a manner sufficient to raise reasonable doubt as to the outcome of the election.

144. Contests did not prove under any standard of proof that the electronic voting machines malfunctioned in a manner sufficient to raise reasonable doubt as to the outcome of the election.

B. Contestants did not prove that "[i]llegal or improper votes were cast and counted," and/or "[l]egal and proper votes were not counted . . . in an amount that is equal to or greater than the margin between the contestant and the defendant, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election."

145. Contestants evidence does not establish by clear and convincing proof, or under any standard of evidence, that "[i]llegal or improper votes were cast and counted," and/or "[l]egal and proper votes were not counted . . . in an amount that is equal to or greater than the margin between the contestant and the defendant, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election." NRS 293.410(2)(c).

146. "Illegal or improper votes" are those that could not have been lawfully cast and therefore should not be counted. *See, e.g.*, *Mahaffey v. Barnhill*, 855 P.2d 847, 850 (Colo. 1993) (defining votes cast by those ineligible to vote as "illegal votes"); *Turner v. Cooper*, 347 So. 2d 1339, 1341 (Ala. 1977) (describing "illegal votes" as those cast by unqualified voters); *Grounds v. Lawe*, 193 P.2d 447, 449 (Ariz. 1948) (explaining that trial court found "fifteen illegal votes" because "fifteen [votes] had been cast by persons not qualified to vote"); *Harris v. Stewart*, 193 So. 339, 341 (Miss. 1940) (describing "illegal votes" as those cast by someone "not a qualified voter"); *Jaycox v. Varnum*, 226 P. 285, 288 (Idaho 1924) (similar); *Montoya v. Ortiz*, 175 P. 335, 337 (N.M. 1918) ("There was no question raised as to illegal votes. All voters who voted at the election were concededly qualified voters."); *Horton v. Sullivan*, 86 A. 314, 314 (R.I. 1913) (using "illegal votes" to describe those cast by "illegal voters").

147. Contestants did not prove under any standard of proof that illegal votes were cast and counted, or legal votes were not counted at all, due to voter fraud, nor in an amount equal to

or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

148. Contestants did not prove under any standard of proof that voters who were given provisional ballots cast illegal votes which were then counted, or voters who were given provision ballots cast legal votes which were not counted at all, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

149. Contestants did not prove under any standard of proof that illegal votes were cast and counted that should have been rejected during the signature verification process, or legal votes were not counted that should have been accepted during the signature verification process at all, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

150. Contestants did not prove under any standard of proof that illegal votes were cast and counted, or legal votes were not counted at all, due to issues with in-person voting technology, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

151. Contestants did not prove under any standard of proof that illegal votes by ineligible voters were cast and counted, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

152. Contestants did not prove under any standard of proof that illegal votes were cast and counted wherein the ballots had problems or irregularities, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

153. Contestants did not prove under any standard of proof that illegal votes by deceased voters were cast and counted, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

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154. Contestants did not prove under any standard of proof that illegal votes were cast by individuals other than the intended voters and counted, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

155. Contestants did not prove under any standard of proof that illegal votes submitted after deadlines were cast and counted, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.

156. Contestants did not prove under any standard of proof that any illegal votes were cast and counted, or legal votes were not counted at all, for any other improper or illegal reason, nor in an amount equal to or greater than 33,596, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election. Reasonable doubt is one based on reason, not mere possibility.

C. Contestants did not prove that that "the election board or any member thereof was guilty of malfeasance."

157. Contestants evidence does not establish by clear and convincing proof, or under any standard of evidence, that "the election board or any member thereof was guilty of malfeasance." NRS 293.410(2)(a).

158. Under Nevada law, "malfeasance . . . constitute[s] an act of commission as distinguished from an act of omission." *Jones v. Eighth Jud. Dist. Ct.*, 67 Nev. 404, 408, 219 P.2d 1055, 1057 (1950).

159. "Omissions to act are not acts of malfeasance in office, but constitute nonfeasance. A distinct difference is recognized between the two. Conduct invoking one charge will not be sufficient to justify the other." *Buckingham v. Fifth Jud. Dist. Ct.*, 60 Nev. 129, 136, 102 P.2d 632, 635 (1940).

160. Malfeasance requires, at the very least, an allegation of knowledge that the act was wrongful, if not a greater level of nefarious intent. *See Jones*, 67 Nev. at 415–18, 219 P.2d at 1060–62 (finding that complaint sufficiently alleged malfeasance by alleging knowledge and agreeing

that officer "must have done [the illegal act] knowing that he was doing wrong or at least under such circumstances that any reasonable person who had done the same thing would have known that he was doing something wrong" (quoting *Atwood v. Cox*, 55 P.2d 377, 393 (Utah 1936))).

161. Contestants did not prove under any standard of proof that any of Nevada's election officials committed malfeasance.

162. Contestants did not prove under any standard of proof that Clark County or any other county or state election officials violated any right to observation provided for in Nevada Law. *Cf. Kraus*, slip op. at 11 (concluding that "[p]etitioners [] failed to prove Registrar Gloria has interfered with any right they or anyone else has as an observer" and that Registrar "Gloria has not failed to meet his statutory duties . . . to allow members of the general public to observe the counting of ballots").

163. Contestants did not prove under any standard of proof that Clark County election officials or any other election officials acted with knowledge or intent that they were violating the law as it relates to public observation of ballot processing or counting.

164. Contestants did not prove under any standard of proof that Clark County's use of the Agilis machines constitutes malfeasance.

165. Clark County's use of the Agilis machines was lawful under Nevada law. *See* NRS 293.8871(2)(a) (permitting processing and counting of mail ballots "by electronic means").

166. Clark County did not violate the Equal Protection Clauses of the Nevada or U.S. Constitutions by using the Agilis machine, let alone intentionally so, because county by county differences in the way votes are processed does not violate equal protection unless it impedes or obstructs the ability of individual citizens to cast their votes or have those votes counted. *See Kraus*, slip op. at 12–13 (concluding that Clark County's use of Agilis machine is permitted under Nevada's election law and Equal Protection Clause).

167. Contestants did not prove under any standard of proof that Clark County election officials had knowledge that their use of the Agilis, including the settings it was used with and its

use to verify certain ballots without additional human review violated any law, nor that election officials acted with nefarious intent.

168. Contestants did not prove under any standard of proof that any state or county election officials misused electronic voting machines or other voting equipment.

169. Contestants did not prove under any standard of proof that any election officials knowingly committed any misconduct relating to the operation of electronic voting machines, nor that election officials acted with nefarious intent in doing so.

D. Contestants did not prove that "the defendant or any person acting, either directly or indirectly, on behalf of the defendant has given, or offered to give, to any person anything of value for the purpose of manipulating or altering the outcome of the election."

170. Contestants evidence does not establish by clear and convincing proof, or under any standard of evidence, that "the defendant or any person acting, either directly or indirectly, on behalf of the defendant has given, or offered to give, to any person anything of value for the purpose of manipulating or altering the outcome of the election." NRS 293.410(2)(e).

171. By its plain terms, this ground requires intentional wrongdoing by a person who (1) has an agency relationship with the candidate—"the defendant or any person acting, either directly or indirectly, on behalf of the defendant"—and (2) offers a thing of value "for the purpose of manipulating or altering the outcome of the election." NRS 293.410(2)(e).

172. Contestants did not prove under any standard of proof that Defendants, the Biden-Harris Campaign, or anyone acting on their behalf gave or offered to give to any person anything of value for the purpose of manipulating or altering the outcome of the election.

173. Contestants did not prove under any standard of proof that NNVP had an agency relationship with Defendants or the Biden-Harris Campaign, or otherwise acted on the behalf of, either directly or indirectly, Defendants or the Biden-Harris campaign.

174. Contestants did not prove under any standard of proof that NNVP gave or offered to give to any person anything of value for the purpose of manipulating or altering the outcome of the election.

175. Contestants did not prove under any standard of proof that the persons witnessed by Doe 3 had an agency relationship with Defendants or the Biden-Harris Campaign, or otherwise acted on the behalf of, either directly or indirectly, Defendants or the Biden-Harris campaign.

176. Contestants did not prove under any standard of proof that the persons witnessed by Doe 3 gave or offered to give to any person anything of value for the purpose of manipulating or altering the outcome of the election.

CONCLUSION

177. The Contestants failed to meet their burden to provide credible and relevant evidence to substantiate any of the grounds set forth in NRS 293.410 to contest the November 3, 2020 General Election.

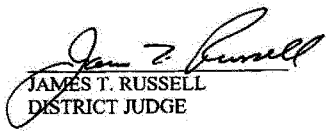
JUDGMENT

Therefore, based upon the above Findings of Fact and Conclusions of Law made by this Court, after trial, and good cause appearing, the following Judgment is entered by the Court:

IT IS HEREBY ORDERED that Contestants' contest is **DENIED** and this case is **DISMISSED** with prejudice.

IT IS HEREBY FURTHER ORDERED that Contestants are shall pay Defendants' costs pursuant to NRS 293.420.

DATED this 4 th day of December, 2020.



JAMES T. RUSSELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 4th day of December, 2020, I caused to be transmitted via email, a true and correct copy of the foregoing Order addressed as follows:

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OPINION *This piece expresses the views of its author(s), separate from those of this publication.*

Madeleine Albright, Michael Chertoff: Trump's behavior is threat to America's democracy

The president's behavior is causing both long-term dangers to our system and presenting more immediate challenges to the crises we face today.

Madeleine Albright and Michael Chertoff Opinion contributors
Published 6:01 a.m. ET Dec. 14, 2020

For the first 174 years of our nation's history, no law dictated how long a president could hold office. Until the 22nd Amendment was ratified in 1951, the "two-term rule" was merely a tradition established by our first president.

Troubled by the possibility that the country could one day slide into tyranny, George Washington set aside personal ambitions for the good of the republic, calling it quits after eight years. Others followed suit.

Norms such as these maintain an orderly society and are just as important as the policies enshrined in the Constitution.

One of us served as President Bill Clinton's Secretary of State, and the other led President George W. Bush's Department of Homeland Security. Together, we have seen firsthand what can happen to nations when democratic norms unravel, and we remain gravely concerned about President Donald Trump's assault on the customs that have made America the world's most durable constitutional system.

Over the years, American citizens have grown to expect certain things of their political leaders. Among them: respect for the free press, firm opposition to political violence and a willingness to accept election results.

Presidents cannot be prosecuted for violating these norms, but they can endure public outrage and political consequences. These "civic guardrails" exist to protect us in turbulent times.

President Trump's wanton attitude toward tradition is not new. Over the past four years, he has called for imprisoning political opponents, dangled pardons for those willing to commit crimes on his behalf and demonized journalists who dare to question these actions.

Trump's claims aren't based in fact

Weeks after the election and after a litany of court defeats, he continues to spread baseless conspiracies ahout voter fraud and refuses to concede to President-elect Joe Biden. This behavior poses an immense threat to future elections, encouraging unfounded parauoia, legal chicanery and a spiraling cycle of partisan retribution.

The president's behavior is causing both long-term dangers to our system aud presenting more immediate challenges to the crises we face today.

Even after the most hard-fought elections in our country's history, the transition between administrations has been marked by bipartisan cooperation, allowing the incoming administration to hit the ground running on day one.

But for weeks after Election Day, the Trump administration needlessly stalled on ascertaining the winner of the election, thus preventing the process from officially beginning. It finally relented in late November and allowed the transition to move forward, but the delay may have been costly.

In the battle against COVID-19, each day means thousands more Americans become sick and die. Dr. Anthony Fauci recently warned that "the virus is not going to stop and call a time-out while things change." He's absolutely correct; we cannot defeat this virus without cooperation between administrations.

It appears that distribution of the Pfizer and Moderna vaccines will begin soon — and beginning Jan. 20, President-elect Biden will be responsible for ensuring that 330 million Americans are inoculated.

This will be a massive logistical undertaking. November saw the highest number of coronavirus cases in the United States. It is imperative that the new administration be well positioned to handle the pandemic.

Delays put national security at risk

The national security implications of the Trump administration's delay are just as stark.

President-elect Biden has only just begun receiving vital daily intelligence briefings, a necessary procedure to help bring any president-elect up to speed.

These classified briefings could contain crucial information on foreign threats, troop drawdowns in Afghanistan and ongoing nuclear negotiations with Russia.

Moreover, background checks and security clearances for new officials now have less time to be processed, meaning key defense and intelligence posts could remain vacant after inauguration.

The bipartisan 9/11 Commission cited the delay in the 2000 transition as a contributing factor to our nation's ability to preempt and respond to that deadly terrorist attack.

We cannot allow this needless and costly foot-dragging to be the new normal. President Trump's willingness to forego bipartisan norms and sew chaos and distrust in the election signals to autocrats and adversaries that there are vulnerabilities in our system that can be exploited, and he is setting a terrible example for burgeoning democracies across the globe.

When one of us — Madeleine Albright — fled authoritarianism as a young child, the United States was a beacon of hope, a reminder that a better life was within reach for those daring enough to seize it. We can still be that example.

Democracy is resilient, but it's built on a delicate foundation of mutual trust. Without public faith in our institutions, American democracy will fail. The hard work of restoring that faith must begin right away, with leaders from both sides of the aisle coming together to ensure President-elect Biden has the smoothest transition possible.

Together, we can ensure that norms are once again normal.

Democrat Madeleine Albright served as Secretary of State under President Bill Clinton. Republican Michael Chertoff served as Secretary of Homeland Security under President George W. Bush. Both are members of the bipartisan National Council on Election Integrity.

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Trump's election antics weaken America — at home and abroad

BY KENNETH C. BRILL, OPINION CONTRIBUTOR — 12/10/20 11:00 AM EST
THE VIEWS EXPRESSED BY CONTRIBUTORS ARE THEIR OWN AND NOT THE VIEW OF THE HILL

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Ben Franklin famously replied to Elizabeth Powel's question about whether the Constitutional Convention had produced a republic or a monarchy by saying, "A republic, Madam, if you can keep it."

Events since voting ended Nov. 3 suggest the real loser in 2020 may not have been a candidate for office, but could instead be the American approach to self-governance, which has underpinned political and economic progress at home and American power abroad.

Let me explain.

As a career diplomat, I worked in or with countries that had a range of views about elections. Some took elections seriously, with leaders being voted out of power as a matter of course. Others managed elections carefully, ensuring the outcome desired by those in power, regardless of what the popular will might have been. And still others did not bother with elections at all.

Regardless of how they viewed their own elections, people, officials, and leaders in all countries — including those with patently undemocratic governments — followed American presidential campaigns closely.

Citizens in other countries marveled at how open the American electoral system was and how leaders needed to win support to gain and then retain office.

Many foreign government officials and leaders could not understand how the most powerful leader in the world would have to stand for re-election — and might lose. The more cynical foreign observers thought American elections were more about theater than substance and invariably were decided by money.

But all foreign observers I interacted with in over 35 years as a diplomat were impressed by how America and its leaders came together once the elections were over and a winner was declared, including after the hanging chads of Florida in the 2000 election. This attribute of American political life impressed foreign leaders and citizens because it was an unmistakable sign of America's strength as a nation.

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Americans competed hard during elections, but afterwards they rallied to support the Constitutional order that had helped produce the world's leading power — and most prosperous economy.

Foreign respect for American political institutions and processes is a source of power that is hard to quantify, but it's very real.

The transparency of the American electoral system and the unfettered reporting of the vast majority of the American media buttress the case that the 2020 elections were conducted freely, and the counting of votes was done fairly.

There is no doubt: Joe Biden won the election, and Donald Trump lost.

But Trump finds it financially rewarding to fundraise by continuing to feed baseless conspiracy theories about the election, and his lies have gained traction among his supporters, with polls indicating a majority of Republicans believe Trump won, not Biden.

Election officials of both parties, as well as judges appointed by presidents of both parties, have resisted pressure and threats, showing the kind of courage the Founders would recognize and applaud.

But Trump's ongoing lies and unwillingness to accept his electoral loss is undermining the fundamental source of America's strength and standing in the world, even as it fuels division at home.

Foreign leaders may feel less pressure to listen to American concerns about how they conduct their domestic and external affairs because of the example we're now setting. Foreign investors may approach investments in America more carefully if its domestic politics are increasingly bitter and divided — and potentially unstable.

There is no challenge facing the American people today that would not benefit from bipartisan approaches. To paraphrase Lincoln, a house divided against itself cannot prosper.

CNN parent refuses to run Trump ads over election fraud claims: report

FDA authorizes first fully at-home, over the counter COVID-19 test

To keep America strong both at home and abroad, Republicans need to meet President-elect Biden at least halfway by acknowledging he won the election and then holding him to his commitment to be the president of all the American people.

Doing so will help keep the American republic strong, here at home and around the world.

Kenneth C. Brill is a retired career Foreign Service Officer who served as U.S. Ambassador to the IAEA in the George W. Bush administration and as a senior intelligence official in the Obama Administration. He was founding director of the U.S. National Counterproliferation Center in the Office of the Director of National Intelligence (2005-2009). He was involved in international environmental issues and negotiations in both the Clinton and George W. Bush administrations.

TAGS DONALD TRUMP JOE BIDEN BENJAMIN FRANKLIN CLAIMS OF 2020 ELECTION FRAUD CONTESTED ELECTION TRUMP LEGAL TEAM 2020 TRUMP CAMPAIGN REPUBLICAN PARTY REPUBLICAN REACTIONS TO DONALD TRUMP'S CLAIMS OF 2020 ELECTION FRAUD AMERICAN LEADERSHIP FOREIGN RELATIONS AMERICAN DEMOCRACY

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America may not be so lucky next time

Benjamin L. Ginsberg

The country was lucky that President Trump and his reelection campaign were so inept. He ultimately lost by a wide margin, and his challenges to the results have been farcical. His rhetoric ramped up in inverse proportion to his ability to produce evidence supporting his charges of systemic "fraud" or "rigged" elections.

The United States might not be so lucky next time. What if the 2020 election had been as close as it was in 2000, and the outcome hinged on a state (or states) with a truly narrow margin? How would the country have fared under a Trump-style assault on democracy's foundations?

Trump's attempts to negate millions of votes by challenging state certifications revealed cracks in those foundations. Some shoring-up is clearly needed before the next election cycle begins. A good place to start might be with the appointment of a bipartisan commission that would propose election reforms to Congress and the states. Here are half a dozen suggestions to get things started:

Revise the Electoral Count Act of 1887, a law that came perilously close to being invoked for the first time in its history. Its muddled language would not have provided clear answers to myriad crucial questions. What happens if a state submits competing slates of electors? How to determine if a "majority" of the electoral college refers to all 538 electors or only those present and voting? If choosing the president fell to the House, with a single vote for each state, could a majority of members prevent the swearing-in of enough minority members (who nonetheless represented more states) so that the majority's presidential candidate would win? The 1887 law clearly needs updating and clarifying.

The testing of voting machines needs to be strengthened to discourage fictional tales of "cheating algorithms." Most states now require sample ballots to be run through each machine both before an election and before tabulation to confirm that each machine is counting correctly. Increase the number of test ballots and amend laws so that in post-election litigation, any complaining about the machines would be an obvious case of sour grapes.

Given that mail-in balloting exploded during the pandemic, and voters could well continue to favor their use, improving the security and processing of mail-in voting is vital. Technological advances that upgrade signature-match methods should be incorporated into law. States should allow the processing of mail-in ballots well before Election Day to avoid delays in reporting results, and states need to clarify whether election officials can contact voters to "cure" mistakes and omissions on absentee ballot envelopes.

All states should make their vote certification process purely a matter of administrative processing, and not subject to the sort of political gamesmanship that marred the election aftermath in Michigan.

One thing the post-election wrangling made clear is that states need to consolidate

jurisdictions responsible for overseeing voting and for counting ballots. Right now, about 10,500 jurisdictions have that responsibility — far too many to ensure that all qualified ballots are treated equally. That's a lurking equal-protection problem, especially in a very close election.

Finally, it would be helpful if the Supreme Court took up the Pennsylvania case brought to it just before the election. The court's actions now preclude the possibility of a ruling that would affect the state's final tally, but clarification on two issues would be welcome. Is the legislature the sole body that can determine a state's "time, place and manner" for elections, or can a state's supreme court and governor play a role? And does Election Day mean only the first Tuesday after the first Monday in November, as Congress stipulated in 1845, or do absentee ballots postmarked on Election Day but received later qualify?

Strengthening election laws and modernizing the processing of ballots are important, but no matter how laws are written or what upgrades are instituted, bad actors can find a way to test the limits. The 2020 election showed that the United States' laws and institutions can always be improved. Yet the reason the system held and Trump failed was that countless individuals honorably did their duty under those laws, even while sometimes under furious attack from the president and his allies.

As a Republican, I am especially proud of how those from my own party charged with running and certifying elections met the moment. They and their colleagues in the states and localities are the reason the country passed this stress test. The Founders, in their wisdom, designed a system that could rely on Americans themselves as the nation's last line of defense.

Read more:

Trump fired me for saying this, but I'll say it again: The election wasn't rigged

Christopher Krebs

Christopher Krebs is the former director of the Cybersecurity and Infrastructure Security Agency. Post columnist David Ignatius interviewed Krebs Dec. 2 about the 2020 election on Washington Post Live.

On Nov. 17, I was dismissed as director of the Cybersecurity and Infrastructure Security Agency, a Senate-confirmed post, in a tweet from President Trump after my team and other election security experts rebutted claims of hacking in the 2020 election. On Monday, a lawyer for the president's campaign plainly stated that I should be executed. I am not going to be intimidated by these threats from telling the truth to the American people.

Three years ago, I left a comfortable private-sector job to join, in the spirit of public service, the Department of Homeland Security. At the time, the national security community was reeling from the fallout of the brazen Russian interference in the 2016 presidential election. I wanted to help.

> Chris Krebs, the former CISA director, spoke to "60 Minutes" about the 2020 vote in an interview that aired on Nov. 29. Here are some highlights. (The Washington Post)

Across the nation's security agencies, there was universal acknowledgment that such foreign election interference could not be allowed to happen again. The mission was clear: Defend democracy and protect U.S. elections from threats foreign and domestic.

With the advantage of time to prepare for the 2020 election, we got to work. My team at the Cybersecurity and Infrastructure Security Agency, or CISA, had primary responsibility for working with state and local election officials and the private sector to secure their election infrastructure — including the machines, equipment and systems supporting elections — from hacking. (Other agencies handle fraud or other criminal election-related activity.) The Russian assault in 2016 had not included hacking voting machines, but we couldn't be sure that Moscow or some other bad actor wouldn't try it in 2020.

States are constitutionally responsible for conducting the nation's elections. At CISA, we were there to help them do it securely. Our first job was to improve CISA's relationships with state and local officials, building trust where there was none. We also worked closely with representatives from across the election-security community, public and private, in groups called coordinating councils. A key development was the establishment of the Elections Infrastructure Information Sharing and Analysis Center to share security-related information with people who can act on it for defensive purposes. By the 2018 midterm elections, all 50 states and thousands of jurisdictions had joined the center.

We offered a range of cybersecurity services, such as scanning systems for vulnerable software or equipment, and conducting penetration tests on networks. Election officials across the country responded by markedly improving cybersecurity, including upgrading to more modern systems, hardening user accounts through additional log-on measures and being quicker to share suspicious-event information.

But there was a critical weak spot. Voting machines known as Direct Recording Electronic machines, or DREs, do not generate paper records for individual votes. And paper ballots are essential pieces of evidence for checking a count's accuracy. With DREs, the vote is recorded on the machine and combined with voting data from other machines during the tabulation process. If those machines were compromised, state officials would not have the benefit of back-up paper ballots to conduct an audit.

In 2016, five states used DREs statewide, including Georgia and Pennsylvania, with a handful of others using DREs in multiple jurisdictions. Fortunately, by 2020, Louisiana was the last one with statewide DRE usage. Congress provided grant funding in 2018, 2019 and 2020 to states to help them retire the paperless machines and roll out auditable systems. As the 2020 election season began, Delaware, Georgia, Pennsylvania and South Carolina all swapped over to paper-based systems. Then the emergence of the pandemic prompted a nationwide surge toward the use of voting by mail.

The combined efforts over the past three years moved the total number of expected votes cast with a paper ballot above 90 percent, including the traditional battleground states. While I no longer regularly speak to election officials, my understanding is that in the 2020 results no significant discrepancies attributed to manipulation have been discovered in the post-election canvassing, audit and recount processes.

This point cannot be emphasized enough: The secretaries of state in Georgia, Michigan, Arizona, Nevada and Pennsylvania, as well officials in Wisconsin, all worked overtime to ensure there was a paper trail that could be audited or recounted by hand, independent of any allegedly hacked software or hardware.

That's why Americans' confidence in the security of the 2020 election is entirely justified. Paper ballots and post-election checks ensured the accuracy of the count. Consider Georgia: The state conducted a full hand recount of the presidential election, a first of its kind, and the outcome of the manual count was consistent with the computer-based count. Clearly, the Georgia count was not manipulated, resoundingly debunking claims by the president and his allies about the involvement of CIA supercomputers, malicious software programs or corporate rigging aided by long-gone foreign dictators.

The 2020 election was the most secure in U.S. history. This success should be celebrated by all Americans, not undermined in the service of a profoundly un-American goal.

Read more:

Opinion: Christopher Krebs: We prepared for more Russian interference. But this year the assault on democracy was from within the US

Opinion by Christopher Krebs

"Christopher Krebs served as the director of the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency. Part of this op-ed is adapted from his written congressional testimony. The views expressed in this commentary are his own. View more opinion at CNN. "

*(CNN)*On Wednesday, I will testify before the Senate Committee on Homeland Security and Governmental Affairs. Though I am no longer a public servant, it remains an honor to serve the public, and I am proud to heed the call of our Senate leaders to tell the public about the methodology of the agency I led, the Cybersecurity and Infrastructure Security Agency (CISA), to secure the 2020 presidential election.

I joined the Department of Homeland Security in March of 2017. I believe, then and now, that the Russian Federation attempted to interfere in our 2016 election to disparage Hillary Clinton to the advantage of then-presidential candidate Donald Trump, as laid out in the 2017 Intelligence Community Assessment. Russia attempted to advance its candidate of choice and to corrode public faith in American democracy through cyberattacks and a coordinated disinformation campaign.

Our democratic institutions are facing targeted, calculated threats from without, and from within. This is why we prioritized election security as the primary focus of CISA. I made that mission clear at my confirmation hearing when I took an oath to defend the Constitution from enemies foreign and domestic. Our task was to work with state and local election officials to secure from hacking their election infrastructure, including the machines, equipment and information systems.

It was also central to our mission, and is still central to my own values, to protect the American public from disinformation warfare. This is why on November 12,

CISA joined an election security community statement assuring people that "there is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised." Today, this statement remains true, and I will continue to clarify and correct this onslaught of false information alleging systems interference where none has occurred.

Our initial strategy to secure the 2020 election centered on defensive measures against the kind of three-pronged Russian attack that was activated in 2016, targeting systems supporting elections, political candidates and public perception. Across the nation's security agencies, there was unanimous agreement that we could not let it happen again.

Our planning was not just focused on preventing a repeat of the Russian 2016 efforts. We worked with partners in the intelligence community to anticipate diverse tactics that Russia, Iran, China and non-state cyber criminals could attempt to disrupt the election. We prepared for efforts that included a disinformation component, or what is known as a "perception hack," in which the malicious actor either falsely claims a cyberattack that never happened or claims that an insignificant incident wreaked much more damage than it actually did. In these scenarios, which include the current false claims of voter fraud, those on defense are caught playing catch-up, trying to disprove a negative.

Disinformation targeting elections is one of the hardest problems that remains before the US government. While there are multiple ways to tackle disinformation, we viewed it as a "supply and demand" problem. Some government agencies sought to disrupt the supply of disinformation, but we worked to minimize demand by making the American people more critical of information they encountered in social and news media, and therefore more resilient to it. Ours was an effort to inoculate people from false information.

One innovation in our efforts to counter perception hacks was a program called "Rumor Control." The idea was simple. We would share our scenario planning efforts with American voters in a straightforward, digestible way. In doing so, we could preempt disinformation campaigns and perception hacks by providing facts to help American voters make their own decisions. We were looking to protect the public from misleading disinformation before it took root and became perceived as true. This, and other measures to counter disinformation were successful in maintaining voter confidence and squelching false information before it spread. But these efforts must be fortified and properly funded to defend our information ecosystems from more aggressive, coordinated attacks in the future.

As Election Day came and went, we continued to monitor networks across the country and work with our partners, with them reporting any suspicious activity to

us. As I said in a news briefing, Election Day was "just another Tuesday on the internet." Normal sorts of scanning and probing were happening, but we did not see any successful attacks or damaging disruptions.

Unfortunately, as we moved on from November 3, we began to see wild and baseless claims of domestic origin, about hackers and malicious algorithms that flipped the vote in states across the country, singling out election equipment vendors for having ties to deceased foreign dictators. None of these claims matched up with the intelligence we had, based on reporting from election officials or how elections actually work in this country.

To address this scenario, we once again took to Rumor Control, to correct public perception by highlighting facts about security controls and checks in place that would prevent such attacks. Before, during and after the election, our team held regular briefings with congressional staff, political campaigns, and state and local election officials. I personally led member-level, unclassified phone briefings for both chambers of Congress. This was a continuation of our commitment to transparent, non-partisan work.

All authorities and elected representatives have a duty to inform themselves of these facts, and to reinforce them to the American people, as our team did, in the face of false allegations that election machines have been used to change millions of votes across the country. These claims are not only inaccurate and "technically incoherent" according to 59 election security experts, but they are also dangerous and only serve to confuse, scare and ultimately undermine confidence in the election.

To understand CISA's relationship to the issue of fraud, it is important to define a key distinction between two issues that are often conflated, sometimes intentionally: the security of elections and election-related fraud. My team at CISA had lead responsibility for working with state and local election officials to secure from hacking the election infrastructure, including the machines, equipment and systems supporting elections. We also led a centralized, interagency effort among the National Security Agency, Office of the Director of National Intelligence, FBI and others at the federal level to combat the pernicious effects of disinformation campaigns on our elections. The FBI, state and local law enforcement are responsible for investigating voter fraud and other criminal election activity.

In order to maintain American resiliency, Congress and the incoming administration must continue to reinvent, fortify and fund the American defense on the battlefield of disinformation through both centralized and regionalized interagency cooperation.

Rumor Control was part of CISA's collaboration with the FBI, and I urge the transition team and the FBI leadership to expand this program in order to remain resilient against increasingly aggressive threats from foreign state actors and private domestic interests. It is also critical going forward for CISA to designate and embed field personnel in each FBI field office. CISA is currently piloting that concept in a Southeastern US field office. I urge Congress to support and fund expansion of these critical FBI-CISA programs.

Moving forward, CISA should also augment its partnerships with the NSA Cybersecurity Directorate leadership by assigning a senior representative to Fort Meade to advise and consult.

Elections in this country are, and should continue to be, run by state and local officials as prescribed by state legislatures in accordance with congressional oversight. But they cannot do their jobs if they do not have adequate support, including a stable stream of funding from Congress so that election officials can work with state legislatures to craft budgets they can depend on to complete the critical transition to paper ballot systems, institute post-election audits, and to implement other appropriate infrastructure and personnel investments.

As foreign and domestic interests attack our democracy for political and financial gain, attempting to infiltrate American public opinion and confidence in our most sacred institutions, our elected representatives must now show true leadership in defending the people by defending the truth.

Freedom House Statement for the Record
Senate Homeland Security and Governmental Affairs Committee Hearing: Examining Irregularities in the 2020 Election
December 16, 2020

Chairman Johnson, Ranking Member Peters, and Members of the Committee,

Freedom House is honored to submit a statement for the record for today's important hearing.

Freedom House is a non-profit, non-partisan organization dedicated to the expansion of freedom and democracy around the world. We enjoy strong bipartisan support for our work, which is founded on the core conviction that freedom flourishes in democratic nations where governments are accountable to their people; the rule of law prevails; and freedoms of expression, association, and belief, as well as respect for the rights of women, minorities and historically marginalized groups, are guaranteed.

We are convinced that American leadership is essential if democracy and human rights are to prevail over the forces of tyranny and oppression. It is no coincidence that the remarkable gains for democracy during the 20th century were achieved as the United States led global alliances against fascism and communism, assured in the understanding that the spread of freedom was intertwined with US national interest.

While many have rightly pointed out our country's mistakes during these endeavors and our need to reckon with and address issues such as ongoing racial injustice, the United States has long been the most visible and influential exemplar of democratic governance on the global stage. It may be hard to imagine from where we sit, but for people who fight every day for their rights and freedoms in repressive environments, the certainty that democracy works in the United States can be a great source of hope and inspiration.

We are especially troubled, therefore, by the continued politicized attacks on the United States' electoral process, which are not only damaging to our country, but also harmful to the cause of democracy around the world.

Freedom House research has tracked an erosion in America's democratic institutions over the last decade. The challenges facing American democracy did not begin with President Trump, but have continued during his tenure. President Trump's unfounded claims of election fraud exacerbate that trend. By convincing a large part of the population that there was widespread malfeasance, the president is seeding a myth that may endure for years and contribute to a substantial loss of public confidence in our political system. Ongoing, unsubstantiated claims of widespread voter fraud damage relations with our democratic allies, discourage foreign democracy advocates, and embolden authoritarian adversaries. In fact, President Trump's unsubstantiated accusations and attempts to

interfere with the electoral process more closely resemble the tactics of an authoritarian leader trying to cling to power than those of an American president. What is especially unusual about this situation, even from a global perspective, is that it is the sitting president in a well-established democracy who is accusing the *opposition* of rigging the electoral system—the same system that brought him to power in 2016 and that otherwise yielded gains for his party this year. Setting aside for a moment the lack of any evidence to support the specific claims, in general terms it is exceptionally difficult for any party in opposition to rig a nationwide election. By definition, the party in power has more tools to influence voting rules, officials, and the electorate, and thus to shape the outcome.

Another troubling aspect of the president's false assertions is the cover that they give to foreign dictators, who are only too happy to claim superiority to the world's greatest democratic power. For example, Tanzania held a deeply flawed and repressive election seven weeks ago. When the ruling party's secretary general declared the victory to be legitimate, he said, "We don't have vote-rigging machines as they are accusing each other now in America."[1] Meanwhile, the Chinese Communist Party is actively pushing a public relations campaign to tout its own, thoroughly oppressive system as a better model for the world. The disarray and conflicting messages here unfortunately feed the CCP's narrative.

We are deeply troubled that unsubstantiated claims of widespread voter fraud in the United States have created a crisis of confidence in American democracy, both at home and abroad, the effects of which could last for years to come. It is essential to the future of our country and the cause of freedom around the world that we repair this damage and restore the standing of the United States as a beacon of democracy.

[1] Centre for Strategic Litigation, 29 November 2020 Daily Civic Space Round Up, http://strategiclawcenter.or.tz/

STATEMENT OF LAW ENFORCEMENT LEADERS ON KEEPING OUR ELECTION OFFICIALS SAFE

As leaders in law enforcement, we condemn, in the strongest possible terms, the threats of violence, harassment and intimidation leveled at election officials across this country since Election Day.

We are committed to working with others in government and law enforcement to protect election officials and to hold accountable those who would illegally threaten and harass them. The people who administer our elections should not have to put their lives and safety at risk.

We deeply value the First Amendment, but there is no constitutional protection for violence, unlawful conduct, threats of imminent violence, trespassing, or destruction of property. We will not tolerate illegal actions against election officials in our jurisdictions; nor should anyone, anywhere in the country.

Taking a stand against threats of violence is not a partisan issue. It is about public safety and protecting public servants. Our election officials are the guardians of our democracy. We owe them our gratitude.

Examples of Threats and Incidents of Violence Aimed at Election Officials

Below is a non-exhaustive list of threats and incidents of violence related to the 2020 election across the country. These incidents were compiled from open-source materials and public reporting.

Arizona

- 11/9/20: "Sheriff's deputies in tactical gear had to move inside the Maricopa County Elections center in Arizona last Wednesday night as Trump supporters rallied outside chanting 'count the votes!' as elections officials continued to tabulate ballots in the state that Biden is also projected to win."
- 12/2/20: "Sophia Solis, a spokesperson for Arizona Secretary of State Katie Hobbs, said the office has received threats via email, social media, and by phone, and that they are working with the Arizona Counter Terrorism Information Center."
- 12/11/20: "In Phoenix, about 100 Trump supporters, some armed, protested at the building where officials were counting votes."
- 12/14/20: "In Arizona, another key swing state, security has been increased in the state Capitol executive tower in Phoenix, Bart Graves, a spokesperson for the Arizona Department of Public Safety, confirmed to The Post."
- 12/14/20: "In Arizona, state officials are holding the vote at an undisclosed location for safety reasons, far from what is expected to be a heated hearing on election integrity issues that Republicans will conduct in the Statehouse."

Delaware

- 12/14/20: "Even in Delaware, the tiny, deeply Democratic home state of the president-elect, officials relocated their ceremony to a college gymnasium, a site considered to have better security and public health controls."

Georgia

- 11/23/20: "Georgia's Secretary of State Brad Raffensperger has voiced concerns about death threats directed at him and his wife. He is a Republican and certified the state's results on Friday."
- 12/7/20: "In one of the most striking rebukes to President Trump since he launched his baseless attacks on the American electoral process, a top-ranking Georgia election official lashed out at the president on Tuesday for failing to condemn threats of violence against people overseeing the voting system in his state. 'It has to stop,' Gabriel Sterling, a Republican and Georgia's voting system implementation manager, said at an afternoon news conference at the state Capitol, his voice shaking with emotion. 'Mr. President, you have not condemned these actions or this language.' He added: 'This is elections. This is the backbone of democracy, and all of you who have not said a damn word are complicit in this. It's too much.'"
    - "Mr. Sterling said that 'the straw that broke the camel's back' had involved a threat against a 20-year-old contractor for a voting system company in Gwinnett

County. He said the young worker had been targeted by someone who hung a noose and declared that the worker should be 'hung for treason,' simply for doing a routine element of his job. Mr. Sterling did not provide any other details."

- 12/11/20: "A Georgia poll worker went into hiding after a viral video falsely claimed he had discarded ballots."
- 12/13/20: "Gabriel Sterling, a Republican voting official in Georgia who was also named on the list, described mounting threats to election workers at a news conference Thursday. 'We have people stalking outside of our elections offices in Cobb County,' Sterling said. 'We've had a warehouse manager, he was simply taking trash out to the dumpster, and he had somebody follow him with a camera telling him he's going to prison.'"
- 12/14/20: "Van R. Johnson, the mayor of Savannah, Ga., said his security detail had been ramped up because of his role as an elector. He described the decision as a 'precautionary measure' that did not stem from specific threats but, he said, was a reflection of the climate electors were working in."

Michigan

- 11/17/20: "On November 11, The Detroit News reported that a public Zoom meeting of Wayne County election canvassers had been interrupted by a person who threatened rape and violence against the board members' mothers."
- 12/7/20: "Michigan Secretary of State Jocelyn Benson says 'dozens' of armed protesters descended on her home Saturday night, using megaphones to disrupt what had been a quiet evening with her young son. "
- 12/8/20: "Michigan state Rep. Cynthia Johnson was at a hearing recently where Trump attorney Rudy Giuliani presented unfounded accusations of election fraud. On her Facebook page, Johnson posted the threatening voicemails she received after that hearing."
- 12/11/20: "Michigan's 16 electors have been assured that they will receive a police escort from their cars to the state's Capitol on Monday when they cast their votes in the Electoral College for President-elect Joseph R. Biden Jr."
- 12/14/20: "The 16 who will cast their votes for Mr. Biden in Michigan are expected to have to traverse a gauntlet of protesters, some armed, from a group that believes the election was stolen from Mr. Trump."
- 12/15/20: "Hours before electors met in Michigan's state capitol on Monday to cast their ballots for President-elect Joe Biden, state Rep. Gary Eisen (R) warned a radio host that he was working with an unnamed group to mount a 'dangerous' protest to pressure them into backing President Trump instead. 'Can you assure me that this is going to be a safe day in Lansing?' WPHM interviewer Paul Miller asked. 'No,' Eisen said. 'I don't know. Because what we're doing today is uncharted.' Fellow Republicans in the State House quickly condemned Eisen's on-air comments, which they described as a violent threat, and stripped Eisen's committee assignments for the rest of the legislative session."

Nevada

- 12/2/20: "Jennifer Russell, a spokesperson for Nevada Secretary of State Barbara K. Cegavske's office, said that that office has received 'a few threatening communications that have been turned over to law enforcement.' PBS reported a threatening voicemail to that office that said in part, 'You guys are f------ dead.' Cegavske, a Republican, released a statement on Nov. 17 saying that under Nevada law, she plays 'only a ministerial role in the process of certifying election returns.' The Nevada Supreme Court certified Biden's win in the state on Nov. 24."

Pennsylvania

- 11/9/20: "Republican Philadelphia City Commissioner Al Schmidt has revealed staff in his office that runs the election vote count have been receiving death threats since last week."
- 11/17/20: "In Philadelphia, two Virginia men were arrested on firearms charges on November 5 after the FBI received a tip they were traveling to polling locations with AR-15 rifles to 'straighten things out.' The men, who have pleaded not guilty, were found with weapons and ammunition in a Hummer bearing a windshield sticker for QAnon — an online conspiracy group that has promoted baseless claims of election fraud."
- 12/11/20: "Seth Bluestein, a Philadelphia official, received anti-Semitic and violent threats after Pam Bondi, a Trump ally, publicly mentioned him."
- 12/13/20: "For the second presidential election in a row, the traditionally perfunctory exercise is beset by fears of violence and widespread doubt that the Electoral College winner belongs in the White House. Even the electors don't know where they'll be casting their ballots Monday, Street said. They'll find out Monday and be escorted by Capitol police to the location. 'Although we are not aware of any specific threats, the Electoral College is a significant event and the Pennsylvania State Police is coordinating with its law enforcement partners, including Capitol Police and Harrisburg Police, to ensure a peaceful proceeding,' State Police spokesman Ryan Tarkowski said."

Texas

- 12/16/20: "An ex-captain in the Houston Police Department was arrested Tuesday for allegedly running a man off the road and assaulting him in an attempt to prove a bizarre voter-fraud conspiracy pushed by a right-wing organization. The suspect, Mark Anthony Aguirre, told police he was part of a group of private citizens investigating claims of the massive fraud allegedly funded by Facebook CEO Mark Zuckerberg and involving election ballots forged by Hispanic children. He said the plot was underway in Harris County, Texas, prior to the Nov. 3 election."

Vermont

- 12/3/20: "Vermont state election officials have received multiple voice mails threatening violence including execution by firing squad. 'When it rises to the level of obscenities being shouted at my staff on a regular basis, or threats of physical violence, it has gone too far,' the state's Secretary of State Jim Condos (D) told the Post in a statement."

Washington State

- 12/14/20: "Secretary of State Kim Wyman, a Republican, choked up while speaking at the start of the noon ceremony. She expressed pride in the near-record voter turnout and relief at the end of 'one of the most contentious elections' she could recall. 'As you can see, this is getting to me,' said Wyman, calling the election 'fair and accurate' despite attempts to discredit it. Wyman's office on Monday reported a personal threat against one of her top aides by a website that has targeted elections officials of both parties as 'enemies of the people.' Lori Augino, the state's elections director, was targeted over the weekend by the site, which posted her home address and a photo of her with cross hairs superimposed on it. The threat has been reported to authorities, including the Department of Homeland Security, a Wyman spokeswoman said."
    - "Despite the clear result here, tensions between Trump supporters and counterdemonstrators have led to violent clashes in Olympia since the Nov. 3 election. On Saturday, a Shoreline man was arrested after a shooting outside the state Capitol. There were no reports of violence or other problems at the Capitol on Monday. A Washington State Patrol spokesperson said the agency had been on the lookout for potential threats."

Wisconsin

- 12/14/20: "In Wisconsin, electors were given new security protocols on Friday, complete with instructions to enter the Capitol grounds through an unmarked side door away from expected protesters."
    - "Mr. Penebaker and Wisconsin's nine other electors have in recent weeks received an onslaught of pleas on social media and via email from Trump supporters urging them to disown their loyalty to Mr. Biden. Some posted comments to a photo Mr. Penebaker shared on Instagram of his teenage son's new haircut, urging him to abandon Mr. Biden."
- 12/11/20: "On Twitter, Trump supporters have posted photographs of the home of Ann Jacobs, a Wisconsin official, and mentioned her children."

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

December 16, 2020

Senator Ron Johnson
Majority Chairman,
Committee on Homeland Security
and Governmental Affairs
328 Hart Office Building
Washington, DC 20510

Senator Gary Peters
Ranking Member,
Committee on Homeland Security
and Governmental Affairs
724 Hart Office Building
Washington, DC 20510

Chairman Johnson and Ranking Member Peters,

In anticipation of today's hearing, *Examining Irregularities in the 2020 Election*, I would like to take this opportunity to address some of the unfounded, inaccurate, and misleading allegations and statements made by Pennsylvania State Representative Francis Ryan in his December 4, 2020 letter to United States Representative Scott Perry.

In 2019, with broad and bipartisan support, the Pennsylvania General Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code. Among them were provisions that, for the first time, offered the option of mail-in voting to all Pennsylvania voters. This change made it more convenient for all Pennsylvanians to exercise their right to vote and brought the Commonwealth more in line with the practice of dozens of other states, which was especially timely due to the COVID-19 pandemic.

Despite the challenges posed by the pandemic, election administrators' adjustment to significant amendments to the Pennsylvania Election Code, record voter registration and voter turnout, and a bitterly partisan political environment, the election itself and the canvassing and tabulation of the votes proceeded efficiently and with far fewer significant incidents reported than in years past.

Rep. Ryan's December 4, 2020 letter to Congressman Perry regarding the administration of the 2020 General Election in Pennsylvania rehashes, with the same lack of evidence and the same absence of supporting documentation, repeatedly debunked conspiracy theories regarding the November 3 election that have been repeatedly litigated and soundly rejected by both state and federal courts at every level. State and federal Judges have sifted through hundreds of pages of unsubstantiated and false allegations and found no evidence of fraud or illegal voting.

The letter also cites so-called "inconsistencies" that Rep. Ryan claims to have identified based on his analysis of Department of State (DOS) data. His letter is a perfect example of the dangers of

uninformed, lay analysis while lacking both understanding of election administration as well as knowledge of basic election laws, including election deadlines the Representative himself voted to make law.

For example, Rep. Ryan notes that 27,995 ballots were mailed on or before 9/11/2020. This is neither unlawful nor unusual. As Rep. Ryan should be aware, under Act 77, which the Representative voted for, Pennsylvania counties are authorized to begin processing mail-in and absentee ballots more than 50 days prior to the election and are required to begin mailing ballots as soon as they are available. In addition, counties are required by both federal and state law to begin mailing ballots to certain military and overseas civilian voters much earlier than other voters – 70 days before the election for military/overseas civilian voters in a remote or isolated area of the world and 45 days before the election for all military/civilian overseas voters. The fact that counties began mailing ballots as of the second week of September is neither illegal, nor unauthorized, nor even surprising given the volume of requests for mail-in and absentee ballots counties received and processed.

Similarly, Rep. Ryan cites as anomalous a number of ballots that show they were submitted on or before the mailed date. Again, as Rep. Ryan should know, Act 77 authorized eligible Pennsylvania voters to vote early in person (by mail ballot) at their county election offices, and over 100,000 Pennsylvania voters availed themselves of this option. Most of these voters would be shown as having been approved and provided their ballot on the same date they cast it at their county election office. Far from an anomaly, the data Rep. Ryan cites is an obvious result of the legislation he himself supported.

Any dates listed incorrectly as cast before the mail date are likely routine data entry errors by the county election offices. DOS worked with county election officials to ensure that dates in the state's election registration system accurately reflected the date on which ballots were actually mailed. In fact, DOS implemented a utility in August to help counties manage this function to ensure that voters could access accurate information regarding when their ballots were mailed. Similarly, the allegations of some ballot entries lacking a mail date are caused either by a data entry error or omission, which occurred on occasion when counties printed ballot labels for voters who voted a mail-in ballot in person at their county election office. These dates can be checked by the county by reviewing the documentation in the county's possession.

Most misleadingly, Rep. Ryan asserts that there is an unexplained discrepancy of approximately 400,000 ballots between November 2 and November 4. This is blatantly false. Pennsylvania counties sent 3.1 million ballots to approved voters in the general election. Of this total, 2.7 million were mail-in ballots and 400,000 were absentee ballots. For unknown reasons, Rep. Ryan appears to present only the mail-in ballot figure, thereby creating the misleading impression that roughly 400,000 ballots simply appeared. In reality, by the morning of October 27, the total number of absentee and mail-in ballots sent out by Pennsylvania counties was already nearly 3.1 million. At no point after October 26 was the number of absentee and mail-in ballots sent below 3 million.

These obvious errors and misinformation put forth by Rep. Ryan and others, and the lack of understanding of Pennsylvania's election law and administration that underlies them, is the hallmark of so many of the claims made about this year's Presidential election. When exposed to even the simplest examination, courts at every level have found these and similar conspiratorial claims to be wholly without basis. Despite this and despite all evidence refuting his claims, Rep.

Ryan calls on Congress to overturn the legally cast votes of over 6.9 million Pennsylvanians. These efforts can only serve to impugn the extraordinary work of thousands of county and local election officials in conducting a free and fair election and undermine public confidence in the integrity of our democratic process. I urge you to reject this effort.

Thank you for your consideration.

Sincerely,

Kathy Boockvar

Kathy Boockvar
Secretary of the Commonwealth

Introduction and Qualifications

1. I am the owner of RSM Election Solutions LLC, an election technology and cybersecurity consulting and advising company organized in Washington, District of Columbia, registered as a foreign LLC in Oklahoma, and operating out of Tulsa, Oklahoma. RSM Election Solutions LLC's core principle is: Resiliency in the election infrastructure = Securing election technology + Mitigating risk to the democratic process.

2. I declare that the following facts that are based on my personal knowledge or on my review of documents and records created, maintained, and retained in the ordinary course of business. I have not had access to the Antrim County voting equipment, or any voting equipment in the State of Michigan.

3. I am a subject matter expert on election technology, security, and policy. In this capacity, I have developed strategies and advise the election community on ways to build resiliency in the election infrastructure. I engage directly with election officials to identify risks to the election infrastructure and processes, as well as highlight mitigative measures, compensating controls, and best practices that election officials and private sector partners can implement to manage the risks. Previously I was the Acting Director of U.S. Election Assistance Commission (EAC) Voting System Testing and Certification Program, where I was the lead on modernizing the Voluntary Voting System Guidelines (VVSG), version 2.0,[1] which focus on ensuring all voting systems are secure, accurate, and accessible. I developed the 17-Functions process model that defined the scope of the VVSG 2.0 so that non-traditional election technologies could be tested to the same standards as traditional voting systems. In that role, I managed multiple applications and

[1] https://www.eac.gov/sites/default/files/eac_assets/1/6/VVSGv_2_0_Scope-Structure(DRAFTv_8).pdf (last accessed December 15, 2020).

testing campaigns by Dominion Voting Systems, including the Democracy Suite 5.5 Voting System that is used in the State of Michigan. Prior to joining the EAC, I spent 10 years with the California Secretary of State developing and implementing legislation, policies, and procedures on election technology and security, including overseeing all voting system testing and certification.

Expert Analysis

1. My review of the Allied Security Operations Group (ASOG) Antrim Michigan Forensics Report (Report) determined that ASOG has a grave misunderstanding of the DVS D-Suite 5.5 voting system, a lack of knowledge of election technology and process, and therefore, has come to a preposterous conclusion. Much of this conclusion was derived by regurgitating unsubstantiated claims of misinformation and disinformation about voting system companies and voting system software, many of which are not used in Antrim County.

2. The Dominion Voting System's (DVS) Democracy Suite (D-Suite) 5.5 was certified by the United States (U.S.) Election Assistance Commission (EAC) – a bipartisan commission that overseas the administration of elections and the federal voting system certification process – on September 14, 2018.[2] It was certified to the EAC's Voluntary Voting Systems Guidelines (VVSG) version 1.0.[3] Testing against the VVSG as well as obtaining EAC certification is voluntary and not mandated by federal law, as indicated in the Report. Further, there are references to accuracy requirements of the Federal Election Commission (FEC) 2002

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[2] https://www.eac.gov/sites/default/files/voting_system/files/DSuite55_CertConf_Scope%28FINAL%29.pdf (last accessed on December 15, 2020)

[3] https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.0_Volume_1.PDF (last accessed on December 15, 2020)

Voting System Standards (VSS), as well as the VVSG version 1.1, neither of which are applicable to the certification of the voting system that was reviewed.[4]

3. The D-Suite 5.5 voting system is comprised of multiple software, hardware, and firmware components. The back-end computer server system, known as the Election Management System (EMS), is a suite of multiple independent software applications. Further, there are multiple tabulators to facilitate the scanning and tabulating of paper records.

4. Antrim County has not purchased, installed, and did not use the full suite of the DVS D-Suite 5.5 voting system. Rather it has a subset of the EMS applications and only one of the tabulators. The EMS software that Antrim County utilizes are the Election Event Designer (EED) version 5.5.12.1 and Results Tally & Reporting (RTR) version 5.5.12.1. The tabulator that Antrim County uses to scan paper records and tabulate the results is the ImageCast Precinct (ICP).

5. Antrim County does not own a license for, nor has it installed the EMS Adjudication software applications and services. The version of this optional software that was certified with the DVS D-Suite 5.5 voting system is EMS Adjudication version 5.5.8.1. Additionally, Antrim County does not own the hardware, software, and firmware for the ImageCast Central tabulator, which is the only tabulator that is compatible with Adjudication software.

6. The report purports to have performed "forensic duplication of the **Antrim County Election Management Server** running **Democracy Suite** 5.5.3-002" (Paragraph 20, Page 12). This is factually incorrect, as there is not a Democracy Suite 5.5.3-002. Rather 5.5.3-002 is the version of the ImageCast Precinct tabulator (i.e., the scanner voters place their ballot into), not the

[4] https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines (last accessed on December 15, 2020)

election management server. This alone demonstrates gross negligence in the research, review, and forensic analysis performed. Further, this is the only reference to any voting system software. All other references are the underlying Windows Operating System or ballot definition (i.e., database configuration) files. The ballot definition files are the files that the State of Michigan and Antrim County have identified as having an error prior to the election and therefore needed to be updated in advance of the election. These configuration files are not part of the certified voting system software, are unique to every election, and are regularly updated in advance of the election.

7. Many of the unsubstantiated claims of fraud allude to the ability of the Adjudication software to have "[b]allots sent to adjudication can be altered by administrators…" (Paragraph 11, Page 2). This is the software that the county does not own nor would it have the capability to use because its voting system tabulators are not compatible.

8. The report distorts the Adjudication software with the process of adjudicating a ballot – where an election official or bipartisan team determines the voter intent. It implies that any ballot that is distinguished as needing to be adjudicated as being fraudulent because an administrator can change a vote in the Adjudication software. As previously described, Antrim County does not have the Adjudication software and any ballot that would need adjudication would be conducted manually (i.e., by duplicating a ballot or manually determining the validity of a write-in candidate).

9. Further, the Report states "all adjudication log entries for the 2020 election cycle are missing…Removal of these files violates state law and prevents a meaningful audit…We must conclude that the 2020 election cycle records have been manually removed." Since Antrim County does not have the Adjudication software, there should be no record of Adjudication software files. Without the Adjudication software there would not be any Adjudication software logs. All ballot

adjudication and ballot duplication would have been conducted manually and therefore any logging of that process would have also been conducted manually (i.e., on a piece of paper). Therefore, the forensic audit of the software would not have turned up any records.

10. Section J of the report, entitled "Error Rates" is based on a lack of understanding of the voting system. It describes three settings "divert," "reversed," and "override". Each of these settings are parameters that are set on the ICP tabulator to handle ballots with exceptions, not "errors". Divert is a parameter that will physically separate a ballot in the ballot box when the ballot is marked by the voter with specific conditions (i.e., voter voted for a write-in or overvoted a contest). Reversed is a command for the ICP tabulator to kick the ballot back out - or reverse the ballot – to the voter because the ballot is unrecognizable (i.e., damaged timing marks or ballot for the wrong precinct or county). Override is a setting that allows a voter cast a ballot that has a voter initiated error or mark on the ballot, such as when a voter overvotes a ballot. In this instance the voter marks more candidates than allowable (i.e., marks all candidates for president), the ballot is then reversed to the voter and notifies the voter of the error they made when marking the ballot, yet provides an opportunity for the voter to override and count the ballot as marked with the voter initiated error – a voter may do this as a protest vote or may not want to spoil their ballot and take the time to mark a new one. In conclusion, any logging of "divert," "reversed," and "override" is not an error, as the machine is accurately handling the ballot based on the voting machine configuration. To draw an analogy, calling these an error would be synonymous with stating that you reviewed a car's logs and for each instance that the gas light turned on we will call it an error.

11. Paragraph 3 of Section J mentions "an algorithm used that will weight one candidate greater than another (for instance, weight a specific candidate at a 2/3 to approximately 1/3 ratio). In the logs we identified that the RCV or Ranked Choice Voting Algorithm was enabled

(see image below from the Dominion manual)." The version of D-Suite (version 5.5) used in Antrim County does not have the capability to run the RCV algorithm – the screenshot provided is for the D-Suite 5.11 voting system.

12. The implied voter fraud is based off a description of software Antrim County does not own, for versions of the software that are not compatible with the version of the voting system Antrim County owns and would require hardware Antrim County does not have. The Report concluded that this perceived fraud should invalidate the results of the election in Antrim County and the entire State of Michigan. The main point to emphasize is that the results of an election are certified based on the results of each valid vote and Michigan has a paper record for each valid vote, which can be – and will be in Antrim County - hand counted to validate the outcome of the election.

Conclusion

13. Based on my review of the ASOG Antrim County Forensic Report with my expertise in election technology, I conclude that the majority of the findings are false and misleading due to the fact that the entities reviewing the system lack knowledge and expertise in election technology. Further, I conclude that the majority of the findings do not pertain to the version of the voting system in use in Antrim County and therefore, were intentionally derived, based on biases and a predetermined outcome, to spread mis and disinformation that has been previously disputed by the election community, federal government, and experts alike. I concur with each of these individuals that "The November 3rd election was the most secure in American history." There is nothing in this report that would prove otherwise.

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Ryan Macias

The election is over, but Ron Johnson keeps promoting false claims of fraud.

Linda Qiu

Dec. 16, 2020, 7:37 p.m. ETDec. 16, 2020

Dec. 16, 2020

Linda Qiu

Credit...Pool photo by Greg Nash

Two days after the Electoral College confirmed President-elect Joseph R. Biden Jr.'s victory, a Senate committee provided a platform on Wednesday for another round of specious legal arguments and falsehoods about widespread voter fraud that have been repeatedly rejected by courts across the country.

The hearing was the latest effort by the Republican chairman of the homeland security committee, Senator Ron Johnson of Wisconsin, to amplify the claims and concerns of President Trump. Mr. Johnson previously used his committee to investigate Mr. Biden's son, Hunter, and to elevate fringe theories about the coronavirus pandemic.

Though Mr. Johnson conceded in his opening remarks that fraudulent voting did not affect the outcome of the election, he said that "lax enforcement, denying effective bipartisan observation of the complete election process, and failure to be fully transparent or conduct reasonable audits has led to heightened suspicion."

"The fraud happened. The election in many ways was stolen," Senator Rand Paul, Republican of Kentucky, said at one point.

Those claims are false. The Trump campaign has failed to provide evidence in a number of lawsuits that Republican observers were barred from witnessing vote tabulating. Recounts and postelection audits in several battleground states have either concluded and reconfirmed Mr. Biden's victory, or are underway. There is no evidence that the election was "stolen."

Witnesses called by Mr. Johnson included three men — two lawyers for Mr. Trump and a Pennsylvania state representative — who have unsuccessfully sought to overturn election results. They also included Ken Starr, who represented Mr. Trump during the impeachment hearing this year.

Even as several witnesses insisted there was proof of widespread fraud — and as their claims were echoed in viral posts on social media — Christopher C. Krebs, the former head of the government's cybersecurity agency, testified that the election was the most secure in American history.

A rejected claim of 200,000 improper votes in Wisconsin

James Troupis, a lawyer for Mr. Trump in Wisconsin, claimed that 200,000 people had voted improperly in the state. He argued that accepting absentee ballots in Dane and Milwaukee Counties — two Democratic bastions — before Election Day violated state law, and that those votes should be thrown out.

But the Wisconsin Supreme Court rejected the case on Monday, and a conservative justice said that one of Mr. Troupis's four claims was "meritless" and that time had run out on the other three. Justices also noted during the trial that Mr. Troupis was not seeking to throw out ballots in other counties that used the same procedures but that Mr. Trump had won.

A Republican member of the state's elections commission observed this month that the Trump campaign "has not made any claims of fraud in this election" but rather leveled "disputes in matters of law."

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'No proof' of 130,000 cases of voter fraud in Nevada

Similarly, Mr. Trump's campaign lawyer in Nevada used the hearing to rehash false claims and arguments rejected by courts in the state. The lawyer, Jesse Binnall, said that the campaign's experts had identified "130,000 unique instances of voter fraud" in Nevada and that their evidence had "never been refuted, only ignored."

A district court in Nevada rejected those claims and dismissed the lawsuit this month, and the Nevada Supreme Court upheld that decision last week.

The lower court said that it found "no credible or reliable evidence that the 2020 general election in Nevada was affected by fraud" and that the campaign's expert testimony "was of little to no value." Mr. Binnall and others on the legal team "did not prove under any standard of proof" their claims about double voting, deceased people voting, and noncitizens and nonresidents voting, the court wrote.

The state's highest court, in upholding that decision, wrote that it asked the Trump campaign to identify findings from the district court that it took issue with, but "appellants have not pointed to any unsupported factual findings, and we have identified none."

Dismissed claims about Pennsylvania

State Representative Francis Ryan of Pennsylvania also repeated a number of claims that appeared in Texas' lawsuit seeking to toss out election results in Pennsylvania and other swing states. The Supreme Court rejected that lawsuit last week.

Mr. Ryan said that a data portal initially and erroneously listed 508,112 ballots counted in Philadelphia County despite only 432,873 ballots being issued to voters. He then acknowledged that the 500,000 figure was corrected later.

He also claimed that the state reported that 3.1 million mail-in ballots were sent out, but the number was 2.7 million "the day before the election." Pennsylvania, in a filing responding to the lawsuit, noted that Mr. Ryan's analysis was "fundamentally faulty" and that the 3.1 million figure included 2.7 million mail-in ballots and 400,000 absentee ballots.

Additionally, Mr. Ryan expressed skepticism that more than 1,500 voters reported being over 100 years old. But that figure includes dozens of instances where a birthday is entered as Jan. 1, 1900, as a placeholder. It is also consistent with reports from the census and the Centers for Disease for Control and Prevention on the number of people that age in Pennsylvania and the United States.

Mr. Starr separately argued that Pennsylvania "flagrantly violated" state law in expanding mail-in voting. A lawsuit making the same point was rejected by the state's Supreme Court, which was then upheld by the U.S. Supreme Court.

A misleading reference to the Carter-Baker commission

Mr. Johnson and Mr. Starr also cited Democratic officials who had previously raised concerns about election security to suggest that Republicans were being unfairly maligned in their efforts to cast light on the issue.

"I don't recall the media or anyone else accusing these eight congressional Democrats of indulging in, quote, quackery and conspiracy theories, unquote," Mr. Johnson said as he read passages from three letters written by Democratic senators.

Those three letters were about potential foreign efforts to hack election security software and the involvement of private equity firms in companies that make election equipment.

Mr. Starr repeatedly referred to a 2005 commission led by former President Jimmy Carter and former Secretary of State James A. Baker III that issued a "warning" about mail-in ballots.

But Mr. Carter urged the expansion of mail-in voting this year and his foundation, the Carter Center, noted that the 2005 report found "there was little evidence of voter fraud" in places with adequate safeguards.

A C.I.A. supercomputer and a 68 percent error rate

Mr. Krebs cited and debunked a number of false conspiracy theories and rumors, including those advanced by Mr. Trump and his allies.

The claim about "a C.I.A. supercomputer and program that were flipping votes throughout the country, and in Georgia specifically" — pushed by Sidney Powell, a former lawyer for Mr. Trump — is disproved by the paper ballots, he said.

"You can always go back to the receipts. You can check your math, and Georgia did that three times, and the outcomes were consistent over and over and over again,"

Mr. Krebs said.

Mr. Krebs also addressed a false claim, repeated by Mr. Trump, of a 68 percent error rate in vote counting in Antrim County in Michigan. But that, he said, was based on a misinterpretation of the programming language.

"In fact, it was not that there was 68 percent of the votes that were errors; it was that the election management system's logs had recorded 68 percent of the logs themselves had some sort of alert rate," Mr. Krebs said. "The problem is the report itself doesn't actually specify any of those errors except for one."

Mr. Krebs added: "We have to stop this. It is undermining confidence in democracy."

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