

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

	: Filed 09/21/2020 Supreme Court Middle District
NAACP PENNSYLVANIA STATE CONFERENCE,	: No. 57 MAP 2020
	:
Petitioner,	:
	:
v.	:
	:
	: No. 364 MD 2020
	:
KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH, AND JESSICA MATHIS, DIRECTOR OF THE BUREAU OF ELECTION SERVICES AND NOTARIES,	:
	:
Respondents.	:
	:

NOTICE OF APPEAL

Notice is hereby given that Petitioner, the National Association for the Advancement of Colored People Pennsylvania State Conference, appeals to the Supreme Court of Pennsylvania from the September 11, 2020 order dismissing Petitioner's Petition based on Respondents and Intervenors' preliminary objections, which made final the September 11, 2020 order denying Petitioner's Application for Special Relief in the Nature of a Preliminary Injunction. These orders have been entered on the docket as evidenced by the copy of the docket entry, attached as Exhibits A and B. The Transcript of the proceedings relating to Petitioner's Application for Special Relief in the Nature of a Preliminary Injunction is attached

as Exhibits C and D. There is no verbatim record of the proceedings relating to Respondents and Intervenors' preliminary objections. A Jurisdictional Statement is being filed and served concurrently with this Notice of Appeal.

Date: September 21, 2020

/s/ Julia Chapman

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CERTIFICATE OF SERVICE

I, Julia Chapman, hereby certify that on September 21, 2020, I caused a true and correct copy of the foregoing document titled Petitioner's Notice of Appeal to be served via electronic filing to all counsel of record.

Date: September 21, 2020

/s/ Julia Chapman
Julia Chapman (Pa. 315959)

Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State Conference,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 364 M.D. 2020
	:	
Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries,	:	
	:	
Respondents	:	
	:	

ORDER

AND NOW, this 11th day of September, 2020, upon consideration of the preliminary objections to the Petition for Review Addressed to this Court's Original Jurisdiction (Petition) of the National Association for the Advancement of Colored People Pennsylvania State Conference (NAACP), it is hereby **ORDERED** as follows:

1. The first and second preliminary objections of Respondents Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries (Respondents), based on demurrer and ripeness, respectively, are **SUSTAINED**. The third preliminary objection of Intervenors Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenors), based on demurrer, is **SUSTAINED**. The first preliminary objection of Intervenors President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate

Majority Leader Jake Corman (Senate Leader Intervenors), based on ripeness, is **SUSTAINED**. The second and sixth preliminary objections of Intervenors Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (Republican Committee Intervenors), based on ripeness and demurrer, respectively, are **SUSTAINED**. The NAACP has failed to allege adequate facts demonstrating a constitutional violation/injury, beyond mere speculation, that would warrant the grant of the statewide relief requested in the Petition.

2. In light of our decision sustaining preliminary objections challenging the legal sufficiency of the NAACP's Petition (on the basis of demurrer and ripeness), the Court does not address the remaining preliminary objections. The Court notes, however, that the preliminary objection asserted by Respondents, House Leader Intervenors, Senate Leader Intervenors, and Republican Committee Intervenors raising the failure to join indispensable parties, those being the 67 Pennsylvania county boards of elections, has merit in light of the relief the NAACP seeks in its Petition. Nonetheless, if the Court were to grant this preliminary objection, the Court would not have dismissed the Petition without first providing the NAACP with the opportunity to amend its pleading to add the indispensable parties.

3. The Petition is **DISMISSED**.



P. KEVIN BROBSON, Judge

Exhibit B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State Conference,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 364 M.D. 2020
	:	Heard: September 8-9, 2020
Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries,	:	
	:	
Respondents	:	

BEFORE: HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: September 11, 2020

Presently before the Court for disposition in this original jurisdiction action is the “Application for Special Relief in the Nature of a Preliminary Injunction; and Application for Expedited Hearing Schedule” (Preliminary Injunction Application),¹ which Petitioner the National Association for the Advancement of Colored People Pennsylvania State Conference (NAACP) filed on August 6, 2020.² The Court conducted a remote video hearing on the Preliminary Injunction Application on September 8 and 9, 2020, by Cisco WebEx®. The following parties, represented by counsel, participated in the hearing: (1) the NAACP; (2) named Respondents Kathy Boockvar, in her official capacity as Secretary of the Commonwealth, and Jessica Mathis, in her official capacity as the Director of the Bureau of Election

¹ The Court granted the “Application for Expedited Hearing Schedule” portion of the Preliminary Injunction Application by Order dated August 11, 2020.

² The NAACP commenced this action by filing a Petition for Review on June 18, 2020.

Services and Notaries (collectively, Respondents); (3) President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate Majority Leader Jake Corman (Senate Leader Intervenors); (4) Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenors); and (5) Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (collectively, Republican Committee Intervenors).³

³ As the NAACP's claims and relief in this matter, as set forth in its Petition for Review and Preliminary Injunction Application, bear directly on the November 3, 2020 General Election, which is less than two months away, in the interest of time the Court resolved the pending applications for intervention in an expedited fashion, erring on the side of overinclusion for purposes of creating a fulsome record on the Preliminary Injunction Application. The Court, nonetheless, consulted case precedent on the related, but separate questions of standing and intervention in lawsuits that involve the right to vote and the right to have one's vote counted. *See, e.g., Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 995 (Pa. 2002) (holding that because right to vote is personal, "entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan"); *Erfer v. Cmwlth.*, 794 A.2d 325, 330 (Pa. 2002) (applying *Albert* and confirming holding that Pennsylvania State Democratic Committee lacks standing to bring reapportionment challenge), *abrogated on other grounds by League of Women Voters v. Cmwlth.*, 178 A.3d 737 (Pa. 2018); Order, *League of Women Voters v. Cmwlth.* (Pa. Cmwlth., No. 261 M.D. 2017, filed Nov. 13, 2017) (sustaining preliminary objections challenging standing and, applying *Erfer*, dismissing League of Women Voters as a party petitioner for lack of standing). The Court has also looked to recent orders from the Pennsylvania Supreme Court relating to standing and intervention in similar election-related matters. *See Order, Disability Rights Pa. v. Bockvar* (Pa., No. 83 MM 2020, filed May 15, 2020) (denying as moot motions to intervene filed by Senate leaders, House leaders, and Republican political committees); *see also id.* (Wecht, J., concurring) (noting "skepticism that a single chamber of the legislature would have standing to intervene in an action of this nature" based on purported authorization by a majority of the members of each respective chamber); Order, *Crossey v. Bockvar* (Pa., No. 108 MM 2020, filed Aug. 21, 2020) (denying intervention to Republican political committees); *see also id.* (Saylor, C.J., concurring in part & dissenting in part) (noting similar interests between Republican political committees denied intervention and entity named as petitioner); Order, *Pa. Democratic Party v. Bockvar* (Pa., No. 133 MM 2020, filed Sept. 3, 2020) (granting intervention to Senate leaders representing Republican Senate Caucus and to the Republican Party of Pennsylvania, but denying intervention to Republican political committees, other political organizations, and individual electors); *see also id.* (Wecht, J., concurring in part & dissenting in part) (opining that "Republican Party of Pennsylvania can claim only the *prospect* of injury to its political interests, which does not constitute a cognizable basis upon which to intervene in" the case). In light of the foregoing, and in the interest of clarifying

Following the presentation of the NAACP’s case in support of its Preliminary Injunction Application, Respondents, Senate Leader Intervenors, House Leader Intervenors, and Republican Committee Intervenors jointly applied for the suspension of the hearing and an order denying the Preliminary Injunction Application. They contended that the NAACP failed to meet its evidentiary burden on the necessary elements for preliminary injunctive relief. The Court heard oral argument from the parties and, thereafter, on the record, granted the application for suspension of the hearing, noting that it was inclined to deny the NAACP’s Preliminary Injunction Application. The Court provided reasons for its tentative decision on the record but informed the parties that its decision was not final until it issued a written order. This Memorandum Opinion and the accompany Order represent the Court’s final disposition of the NAACP’s Preliminary Injunction Application.

The Petition for Review

Generally speaking, the Petition for Review in this matter sets forth the NAACP’s concern that the current COVID-19 pandemic will cause various disruptions to the November 3, 2020 General Election (General Election), as were apparent in the June 2, 2020 Primary Election (Primary Election), and that the occurrence of such disruptions will result in the disenfranchisement of large numbers of Pennsylvania voters, particularly African Americans and Latinos, and, concomitantly, violations of rights protected under the United States and Pennsylvania Constitutions. More specifically,⁴ the NAACP raises general

the area of the law, the Court would welcome guidance from the Pennsylvania Supreme Court on the question of organizational standing to sue and/or intervene in matters involving “the right to vote and the right to have one’s vote counted.” *Erfer*, 794 A.2d at 330.

⁴ In Count I of the Petition, the NAACP alleges generally that the provisions of the Election Code relating to absentee and mail-in voting, the use of electronic voting machines, and the consolidation of polling places severely burden many Pennsylvanians’ right to vote in violation of

constitutional claims challenging the “election scheme,” as set forth in the Pennsylvania Election Code⁵ (Election Code), as it relates to absentee and mail-in voting, a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552 (Act 77); in-person voting and the use of electronic voting machines, which Act 77 mandated; and the consolidation of polling places, which the General Assembly and the Governor authorized through the Act of March 27, 2020, P.L. 41 (Act 12) (expired).⁶ Specifically, as it relates to the General Election, the NAACP contends that Pennsylvania has failed to take appropriate steps to protect voters during the pandemic and has otherwise prevented voters from casting their ballots either in person or by mail. The NAACP claims that voters in

the free and equal elections clause of article I, section 5 of the Pennsylvania Constitution. Pa. Const. art. I, § 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”). Count II similarly alleges that the Commonwealth’s current election scheme will disproportionately and/or more severely burden many Pennsylvanians’ right to vote in violation of article I, section 5 of the Pennsylvania Constitution, including, in particular, African-American and Latino voters who have been disproportionately affected by COVID-19 in Pennsylvania generally and, on that basis, are more likely to be disproportionately burdened by the current voting scheme in the upcoming General Election. Finally, in Count III, the NAACP alleges that the current election scheme will, again, disproportionately and/or more severely burden Pennsylvania voters in violation of article I, sections 1 and 26 of the Pennsylvania Constitution. Pa. Const. art. I, §§ 1 (“All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”), 26 (“Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”).

⁵ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

⁶ Act 12 amended various provisions of Act 77 and added emergency provisions to the Election Code for the Primary Election only, including provisions postponing the Primary Election to June 2, 2020, permitting the consolidation of polling places, and mandating other steps to ease administration of the Primary Election in light of the unprecedented series of challenges faced by election officials not only due to the COVID-19 pandemic but also because Act 77’s major revisions to the Election Code would be applied to an election for the first time, during a pandemic. Although Act 12 has since expired, which the NAACP acknowledges in its Petition for Review, the NAACP nevertheless argues that there is a “real threat that substantially similar legislation” to Act 12 will be passed for the General Election. (Petition ¶ 73.)

the Primary Election experienced long lines and overcrowding due to the consolidation of polling places, making social distancing nearly impossible (Petition ¶¶ 8-9); inadequate notice of relocated or consolidated polling places (Petition ¶ 10); “an increased risk of transmission of the coronavirus” caused by counties requiring all voters to vote on electronic voting machines and failing to make hand-marked paper ballots available to voters (Petition ¶ 11); and absentee and mail-in ballots that arrived late due to either the county boards of elections’ delay in processing applications and/or sending ballots to voters or delays experienced by the United States Postal Service (USPS), forcing voters to decide either to mail in their ballots and risk that they would arrive late and not be counted or vote in person at great risk to their health (Petition ¶¶ 13, 17). It further claims that African-American and Latino voters, who have been disproportionately affected by the COVID-19 pandemic generally, are more likely to experience these issues compared to other voters. (Petition ¶¶ 18-19.) The NAACP contends that these same issues are likely to repeat themselves in the upcoming General Election without judicial intervention. (Petition ¶¶ 20-21.)

As relief, the NAACP seeks a comprehensive order directing the Secretary to:

- (1) ensure that each county board of elections maintains a sufficient number of polling places so each resident can exercise his or her right to vote;
- (2) require that each county board of elections gives adequate notice to voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, and posts such notice at old polling places;
- (3) require increased access to mail-in voting across the Commonwealth by (a) automatically sending mail-in ballot applications to all registered voters in accordance with their language preferences,
- (b) ensuring that absentee and mail-in ballots are available in formats that are accessible to voters with disabilities without requiring assistance from another

person, (c) requiring each county to provide ballot drop boxes and to accept ballots returned to a drop box by the close of the polls on Election Day, and (d) providing adequate guidance to election officials when verifying mail-in ballots through signature matching and requiring notice and an opportunity to cure a mail-in ballot with facial defects, such as a mismatched signature; and (4) require that all polling places in the Commonwealth use hand-marked paper ballots for the General Election, while retaining at least one electronic voting machine for those voters who request to use same and as required by Federal law. (See Petition at ¶¶ 66-67 (Wherefore Clause).)

Preliminary Injunction Application

The NAACP's Preliminary Injunction Application seeks even more comprehensive relief pertaining to the General Election than that requested in the Petition for Review, including an order directing the Secretary to: (1) ensure that each county board of elections maintains a sufficient number of polling places *to ensure that no voter must wait more than 30 minutes to vote*; (2) require that each county board of elections mails notice to voters of any change in polling place *at least three weeks in advance of the General Election*, as well as posting at old polling places; (3) *ensure that the Secretary provides for the accessibility of polling locations when reviewing county boards of elections' applications to consolidate any polling locations and disapproves any proposed consolidation that would require any voter to travel more than 0.5 miles farther than the distance to their normal polling place*; (4) require *at least two weeks of early in-person absentee and mail-in voting for the General Election in advance of Election Day and instruct county boards of elections offices to establish satellite or mobile locations where voters can request, complete, and submit their mail-in ballots, in a range of easily accessible locations, and during weekends and evenings*; (5) require increased

access to vote by mail across the Commonwealth, by among other things, (a) directing county boards of elections to automatically send mail-in ballot applications to all registered voters in accordance with their language preferences, (b) requiring each county to provide ballot drop boxes, and (c) accepting ballots returned to a drop box by close of the polls on Election Day, (6) *instruct county boards of elections to expand number of ballot drop boxes where voters can return their voted ballots by the close of polls on Election Day*; (7) require the use of *low-touch* hand-marked paper ballots *as the primary voting methods*, while retaining at least one accessible voting machine per polling place for those who request one and as required by Federal law; and (8) *require all persons to wear a mask at all times while in polling places or in lines outside polling places and ensure that all polling places allow six-foot separation at all stages.* (See Preliminary Injunction Application ¶ 8 (additional relief sought in Preliminary Injunction Application indicated by italicized text).)

Preliminary Injunction Standard

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made[;] it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Twp. From Decision of Zoning Hr’g Bd. of Little Britain Twp., Lancaster Cty., Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994), *appeal denied*, 663 A.2d 696 (Pa. 1995). Thus, a preliminary injunction is a temporary remedy granted until the parties’ dispute can be fully resolved. *Id.* The party seeking a preliminary injunction bears a heavy burden and must establish the following:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it;

(3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted.

Brayman Constr. Corp. v. Dep’t of Transp., 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Patriot-News Co. v. The Empowerment Team of the Harrisburg Sch. Dist. Members*, 763 A.2d 539, 546 (Pa. Cmwlth. 2000).

Here, the NAACP seeks a *mandatory* preliminary injunction against the Secretary, requiring her to direct each of the 67 Pennsylvania county boards of elections “to put in place temporary and common-sense procedures to ensure that the constitutional rights of millions of Pennsylvania voters are protected during an unprecedented public health crisis.” (Preliminary Injunction Application at 1.) According to the NAACP, the failure of the Court to grant the mandatory injunctive relief it seeks will result in the unconstitutional disenfranchisement and denial of thousands of Pennsylvania voters’ fundamental right to vote in a free, fair, and equal election. This Court has stated that a mandatory preliminary injunction

is one which goes beyond a mere restraint and commands acts to be done or undone. As such, mandatory preliminary injunctions should be more sparingly issued than those prohibitory in nature. In order to obtain a preliminary mandatory injunction, the moving party must demonstrate that he is legally entitled to immediate relief and that he will suffer irreparable injury if the relief is not granted.

Lewistown Police Ass’n v. Mifflin Cty. Reg’l Police Dep’t, 661 A.2d 508, 510 n.11 (Pa. Cmwlth. 1995); *see Mazzie v. Cmwlth.*, 432 A.2d 985, 988 (Pa. 1981); *Zebra v. Sch. Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972). Furthermore, “courts will grant a mandatory injunction only upon a *strong showing* that the plaintiff has

a clear right to relief.” *Medico v. Makowski*, 793 A.2d 167, 169 (Pa. Cmwlth. 2002) (emphasis added).

Analysis

The Court has considered the record testimonial and documentary evidence offered by the NAACP in support of its Preliminary Injunction Application. The Court finds the testimony of the NAACP’s witnesses credible. Nonetheless, the Court concludes that the NAACP’s evidentiary presentation fell well short of the high burden that must be satisfied before this Court can grant the requested mandatory preliminary injunctive relief.

The NAACP failed to prove that, absent the requested mandatory injunctive relief, the NAACP and/or its members are likely to suffer immediate and irreparable harm. Much of the NAACP’s evidentiary presentation related to the difficulties its members encountered during the Primary Election under Act 77 and Act 12. The NAACP failed to prove that these difficulties, related almost exclusively to the consolidation of polling places in certain counties authorized by Act 12, are likely to recur during the General Election.

Reverend Kenneth L. Huston, Dr. Joan Duvall-Flynn, Ed.D., and Springfield Township Commissioner Eddie Graham, all of whom serve the NAACP in some capacity, honestly and credibly testified about their negative experiences while voting in the Primary Election, their fear of contracting COVID-19, and how deeply they care about their fundamental right to vote. The Court was so moved by their testimony that it is convinced that *nothing*, including a global pandemic, could prevent these three witnesses from voting in the upcoming General Election. Under the Election Code, they, and all Pennsylvanians, will be able to choose to vote in person at a polling place, by mailing in their ballot, or by hand-delivering a mail-in ballot to the county boards of elections.

In fact, Reverend Huston⁷ adamantly testified that despite voting in person in the Primary Election, he will vote by mail-in ballot in the General Election so as not to expose himself to the crowded conditions he experienced while voting in person in the Primary Election. Dr. Duvall-Flynn⁸ testified that she was also able to vote in the Primary Election and did so by mail-in ballot; she plans to use a mail-in ballot for the General Election as well. Commissioner Graham⁹ testified that he, too, voted in the Primary Election; however, he did not receive the mail-in ballot he applied for until the day of the Primary Election, despite having requested it in April 2020. He, therefore, travelled to his consolidated polling place on Election Day with a mask and gloves in order to vote, which he did. Commissioner Graham also testified that he plans to vote in person in the General Election because he does not trust the mail.

What this testimony shows is that these three witnesses are deeply committed to exercising their fundamental right to vote no matter the current, or future, circumstances. It shows that they have elected the option to cast their vote that best fits their personal circumstances and concerns in relation to the COVID-19 pandemic. The NAACP did not show that these voters, or any other voters, will suffer some cognizable harm to their right to vote in the absence of the requested relief in the Preliminary Injunction Application.

⁷ Reverend Huston testified that he lives in Monroeville in Allegheny County, Pennsylvania, serves as President of the NAACP Pennsylvania State Conference, and has been a member thereof for approximately 20 years.

⁸ Dr. Duvall-Flynn testified that she resides in Glen Mills in Delaware County, Pennsylvania, has a doctorate degree in education as well as other degrees, is a lifelong member of the NAACP, and has served the NAACP in a multitude of capacities during her lifetime.

⁹ Commissioner Graham testified that he lives in Oreland in Montgomery County, Pennsylvania, is a retired corporate attorney, is now serving his second term on the Springfield County Board of Commissioners, and has served the NAACP in numerous capacities.

Dr. Marc Meredith,¹⁰ testifying as an expert witness on behalf of the NAACP, opined that the “cost of voting”¹¹ in person increases when potential voters’ polling places are moved; that increased costs of voting may cause potential voters to vote by mail rather than in person or to abstain from voting altogether; and that racial and ethnic minorities are more likely to be disenfranchised due to the increased costs of voting in person. The Court finds the testimony of Dr. Meredith credible from a political science perspective. The Court accepts Dr. Meredith’s expert opinion that lower voting costs tend to increase voter turnout—*i.e.*, the higher the cost to vote, the less likely someone will vote. The Court, however, does not find Dr. Meredith’s opinion sufficient to establish immediate and irreparable harm. Dr. Meredith acknowledged in his testimony that the cost to vote is driven by many factors and that there is no such thing as a “cost-free” election. To the extent this cost-to-vote principle has any value in the context of the Preliminary Injunction Application, the NAACP would have had to show by evidence that, without the requested mandatory preliminary injunctive relief, the cost to vote in the upcoming General Election is likely to be so high that it would infringe upon the constitutional right to vote and to have one’s vote counted. The NAACP failed to establish such a connection.

¹⁰ Dr. Meredith testified that he is an associate professor of political science at the University of Pennsylvania and holds both a master’s degree in political science and a Ph.D. in political economics, as well as other commendable degrees. He explained that his focus is on American politics and elections. The Court accepted Dr. Meredith as an expert in political science and voter behavior, without objection.

¹¹ In this context, “cost to vote” is broadly understood as encompassing both monetary—*e.g.*, the costs of postage, gas, etc., and opportunity—*e.g.*, the value of time spent traveling to a polling place and in line waiting to cast an in-person ballot—costs incidental to exercising one’s right to vote.

Dr. David Weber's testimony¹² was certainly helpful in terms of understanding issues generally relating to the spread of COVID-19 and effective methods to limit the spread of the disease. Like Dr. Meredith's testimony, however, not much weight can be given to Dr. Weber's testimony in terms of proving the NAACP's entitlement to a mandatory preliminary injunction in this case. For example, while Dr. Meredith offered his opinions relating to the risk of transmission of COVID-19 through the use of common touch services, he also opined on how those risks can be mitigated. He certainly did not offer any opinion in support of the view that common touch services must be avoided entirely during the pandemic.

The NAACP failed to present any evidence that the Secretary or the county boards of elections are ignoring the risks of COVID-19 transmission and recommended mitigation efforts when planning for the upcoming General Election. Indeed, both Jonathan Marks, who serves as Deputy Secretary for Elections and Commissions at the Department of State, and Seth Bluestein, who serves as Chief Deputy Commissioner for Philadelphia City Commissioner Al Schmidt and oversees elections in Philadelphia, testified about ongoing efforts to mitigate the risk of spread of the virus during in-person voting. And, of course, voters who remain concerned about contracting the virus at a polling place may exercise the option of voting by mail. Nothing in Dr. Weber's testimony, or in the testimony of Mr. Marks or Mr. Bluestein, convinces the Court that voters will be, or are likely to be, disenfranchised in the upcoming General Election absent the requested mandatory injunctive relief.

¹² Dr. Weber is a medical doctor and professor of medicine, pediatrics, and epidemiology at the University of North Carolina School of Medicine. After sustaining various objections regarding the scope of Dr. Weber's testimony, the Court accepted Dr. Weber as an expert in epidemiology.

In reaching this conclusion, the Court does not pass on the question of whether the relief that the NAACP seeks in this case and in its Preliminary Injunction Application reflects good policy with respect to the administration of elections, during times of a pandemic or otherwise. That is not the question before the Court. The question is whether the requested relief is a constitutional imperative—*i.e.*, whether the requested relief is *necessary* to prevent immediate and irreparable constitutional injury. On this question, we find that the NAACP has not met its burden.

Given that we are not convinced that the NAACP has made the necessary showing of irreparable harm, the Court cannot fully engage in the balancing of harms contemplated by the second criteria for a preliminary injunction. Nonetheless, based on the requested relief and the testimony of both Mr. Marks and Mr. Bluestein, the Court finds that ordering the requested mandatory preliminary injunctive relief will impose costs and burdens on all 67 counties of the Commonwealth. While those costs are not easily quantifiable, the Court does not believe they would be insignificant or *de minimis*. Similarly, the testimony of Mr. Marks and Mr. Bluestein shows that the Department of State and the City of Philadelphia are actively preparing for the upcoming General Election. The testimony also shows that the NAACP is currently engaged in voter education efforts relating to mail-in voting. The mandatory preliminary injunctive relief that the NAACP seeks would certainly disrupt those efforts and likely the efforts of county boards of elections across the state to plan for the upcoming General Election. The Court is concerned that issuing the type of relief the NAACP seeks could also confuse the public as to how, where, and when they may cast their vote. For these reasons, the second and sixth criteria counsel against issuance of the requested mandatory preliminary injunctive relief.

With regard to whether the NAACP established a very strong showing that it has a clear right to the relief it seeks, the Court is not persuaded. The Petition for Review in this matter does not allege that any specific provision of the Election Code is unconstitutional on its face or even as-applied. Rather, the NAACP alleges that the Election Code, as a whole, is inadequate to address the unique circumstances of voting during a global pandemic and that this inadequacy is particularly acute for African-American and Latino voters. The bulk of the NAACP's concerns, however, stem from events during the Primary Election that were confined to a handful of the more populous counties in the Commonwealth, particularly in and around Philadelphia and Allegheny Counties, and in response to Act 12, which is no longer in effect. The Election Code expressly contemplates that issues may arise during an election and provides that such issues are to be addressed by the court of common pleas of each county.¹³ Accordingly, the Court is not convinced that the Petition for Review presents a strong case for the prophylactic *statewide* mandatory preliminary injunctive relief that the NAACP seeks. Even if the NAACP could meet the burden of rebutting the presumption of constitutionality attached to the Election Code,¹⁴ the Court doubts it has the authority to grant the remedy that the NAACP seeks in its

¹³ Section 1206 of the Election Code, 25 P.S. § 3046 (providing that each county court of common pleas "shall act as a committing magistrate for any violation of the election laws; shall settle summarily controversies that may arise with respect to the conduct of the election; shall issue process, if necessary, to enforce and secure compliance with the election laws; and shall decide such other matters pertaining to the election as may be necessary to carry out the intent of this act"); *see In re General Election in City & Cty. of Phila. on November 8, 1938*, 2 A.2d 301 (Pa. 1938) (holding that, where a voter's registration card is not produced by election commission at the voting place at the time of an election, as required by statute, such voter may apply to any judge of the court of common pleas for relief pursuant to Section 1206 of the Election Code); *see also In re General Election—1985*, 531 A.2d 836 (Pa. Cmwlth. 1987) (affirming decision of court of common pleas to suspend general election in eleven election districts for two weeks due to severe flooding, loss of electricity, and heat and water because of extreme weather, and rejecting request to hold new, county-wide election).

¹⁴ *Pa. Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017).

Petition for Review. *See, e.g., In re Fortieth Statewide Investigative Grand Jury*, 197 A.3d 712, 721 (Pa. 2018) (“In responding to the present constitutional challenge, our Court may not usurp the province of the legislature by rewriting the Act to add hearing and evidentiary requirements that grand juries, supervising judges, and parties must follow which do not comport with the Act itself, as that is not our proper role under our constitutionally established tripartite form of governance.”).

With respect to the final criteria, the NAACP’s requested relief would create a new paradigm for the upcoming General Election. It neither preserves the status quo nor restores the parties to any prior status. Moreover, the requested mandatory injunctive relief is overbroad when compared to the alleged constitutional injury. What the NAACP seeks ventures into policymaking territory in the conduct of elections reserved to the General Assembly under the United States Constitution.¹⁵ Indeed, the relief that the NAACP seeks in its Preliminary Injunction Application is, in the Court’s view, incompatible with the policy choices made by the General Assembly, as reflected in the Election Code.

For the above reasons, the NAACP has failed to meet its burden of establishing all of the criteria for entitlement to the mandatory preliminary injunction that it seeks in its Preliminary Injunction Application. The Preliminary Injunction Application is, therefore, denied.



P. KEVIN BROBSON, Judge

¹⁵ U.S. Const. art. I, § 4, cl.1.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State Conference,	:	
	:	Petitioner
v.	:	No. 364 M.D. 2020
	:	
Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries,	:	
	:	
	:	
Respondents	:	

O R D E R

AND NOW, this 11th day of September, 2020, the Application for Special Relief in the Nature of a Preliminary Injunction of Petitioner the National Association for the Advancement of Colored People Pennsylvania State Conference is DENIED for the reasons set forth in the accompanying Memorandum Opinion.



P. KEVIN BROBSON, Judge

Certified from the Record

SEP 11 2020

And Order Exit

Exhibit C



Deposition of:
Hearing

September 8, 2020

In the Matter of:
**NaACP Pennsylvania State
Conferencev. Boockvar, Kathy et al**

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1 COMMONWEALTH COURT OF PENNSYLVANIA
2 ORIGINAL JURISDICTION
3 NO. 364 MD 2020

- - -

4 NAACP PENNSYLVANIA STATE :
5 CONFERENCE,
6 Petitioner, :
7 :
8 vs.
9 :
10 :
11 :
12 :
13 Tuesday, September 8, 2020

- - -

14 Virtual WebEx Hearing Testimony held on
15 the above date at 9:30 a.m., before Rachel L. Cicalese,
16 a Registered Professional Reporter and Certified Court
17 Reporter.

- - -

19 BEFORE: Honorable P. Kevin Brobson
20
21
22

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24		

1

2 THE COURT CRIER: The Honorable Kevin

3

Brobson proceeding.

4

JUDGE BROBSON: Good morning,
5 Everyone. We are here today in the NAACP
6 Pennsylvania State Conference versus Kathryn
7 Boockvar, et al. The Docket number is 364-MD-2020.
8 Petition: The NAACP Pennsylvania State Conference
9 initiated this action in this Court's original
10 jurisdiction by filing a petition for declaratory
11 and injunctive relief.

12

The main respondents are Katherine
13 Boockvar, Secretary of the Commonwealth, and
14 Jessica Mathis, Director of the Bureau of Election
15 Services and Notaries. We will refer to them
16 collectively as the Commonwealth Respondents, and
17 they are being named in their official capacities.

18

The Court granted intervention status
19 in president pro tempore Joseph B. Scarnati, III,
20 and Pennsylvania Senate Majority Leader, Jake
21 Corman, who we will refer to collectively as the
22 Senate leaders; and Speaker of the Pennsylvania
23 House of Representatives Bryan Cutler; and Majority
24 Leader of the Pennsylvania House of

1 Representatives, Kerry Benninghoff. We will refer
2 to them as House Leaders, and we will refer to the
3 Senate Leaders and House Leaders collectively as
4 Legislative Leaders.

5 The Court also granted intervenor
6 status to Donald J. Trump for President, Inc.;
7 Republican Party of Pennsylvania; Republican
8 National Committee; and the National Republican
9 Congressional Committee, which we will refer to
10 collectively as the Republican Party Intervenors.

11 In its petition for review, the NAACP
12 contends that Pennsylvania's current regime for
13 conducting elections, both in person and by mail,
14 places a severe burden on Pennsylvanians who wish
15 to exercise their right to vote during the COVID-19
16 pandemic, particularly for African-American and
17 Latino communities.

18 The NAACP contends this severe burden
19 threatens rights protected by the Free and Equal
20 Elections Clause of the Pennsylvania Constitution
21 and the Equal Protection Guarantees of the
22 Pennsylvania and United States Constitutions.

23 The purpose of today's proceeding is
24 to take evidence on the NAACP's application for

1 special relief in the nature of a preliminary
2 injunction. In the application the NAACP asks the
3 Court to direct respondents to take the following
4 affirmative action: One, require each county board
5 of elections to maintain a sufficient number of
6 polling places for the general election to ensure
7 that voter must wait more than 30 minutes to vote;
8 two, provide that each county board of elections
9 mail notice to voters of any change in polling
10 place at least three in weeks advance of a general
11 election as well as posting at all polling places;
12 three, provide for the accessibility of polling
13 locations when reviewing county board of elections
14 applications to consolidate any polling locations
15 and disapprove any proposed consolidations that
16 would require any voter to travel more than half a
17 mile further than the distance to their normal
18 polling place; four, require at least two weeks of
19 early in-person absentee, and mail-in voting for
20 the general election in advance of election day and
21 instruct county board of elections offices to
22 establish satellite or mobile locations where
23 voters can request, complete, and submit their
24 mail-in ballots in a range of easily accessible

1 locations and during weekends and evenings; five,
2 require increased access to vote by mail across the
3 Commonwealth by, among other things, directing
4 county boards of elections to automatically send
5 mail-in ballot applications to all registered
6 voters in accordance with their language
7 preferences, requiring each county to provide
8 ballot drop boxes and accepting ballots returned to
9 ballot drop boxes by close of polls on election
10 day; six, require an expanded number of ballot drop
11 boxes where voters can return their voted ballots
12 by the close of polls on election day; seven,
13 require use of low-touch, hand-marked paper ballots
14 as the primary voting method while retaining at
15 least one accessible voting machine per voting
16 place for those who requesting one as required by
17 federal law; and eight, require all persons to wear
18 a mask at all times while inside polling places or
19 while in lines outside polling places and ensure
20 all polling places allow six-foot separation at all
21 stages.

22 The purpose of a preliminary
23 injunction prevents irreparable injury or gross
24 injustice by preserving the status quo as it exists

1 or as it previously existed before the acts
2 complained of.

3 Any preliminary injunction is an
4 extraordinary interim remedy that should not be
5 issued unless the moving party's right to relief is
6 clear and a wrong to be remedied is manifest. A
7 preliminary injunction can be prohibitory or
8 mandatory. While the purpose of all injunctions is
9 to preserve the status quo, prohibitory injunctions
10 do this by forbidding an act or acts while
11 mandatory injunctions command the performance of
12 some specific act that will maintain the
13 relationship between the parties.

14 When a preliminary injunction
15 contains mandatory provisions which will require a
16 change in the position of the parties as is the
17 circumstances in this matter, it should be granted
18 even more sparingly than one which is merely
19 prohibitory.

20 There are six essential prerequisites
21 to a preliminary injunction. The moving party must
22 establish: One, an injunction is necessary to
23 prevent immediate and irreparable harm that cannot
24 be adequately compensated by damages; two, greater

1 injury will result from refusing the injunction
2 than from granting it and concomitantly, that
3 issuance of an injunction will not substantially
4 harm other interested parties; three, a preliminary
5 injunction will properly restore the parties to
6 their status as it existed immediately prior to the
7 alleged wrongful conduct; four, a clear right to
8 relief; five, the injunction is reasonably suited
9 to abate the alleged harm; and six, issuance of an
10 injunction will not adversely affect the public
11 interest.

12 Moreover, a preliminary injunction
13 may only be granted where the moving party files
14 appropriate security with the Court which is
15 intended to compensate any person injured by the
16 granting of the preliminary injunction if it is
17 later determined that the preliminary injunction
18 was improperly granted.

19 Also pending before the Court are
20 preliminary objections challenging the legal
21 sufficiency of the NAACP's underlying petition for
22 review. Commonwealth respondents argue that the
23 NAACP does not allege a Constitution violation;
24 that the NAACP lacks standing and its claims are

1 not right; that petition for review should be
2 dismissed for failure to join in necessary parties,
3 namely, each county's bureau of electrics; and
4 four, sovereign immunity bars the petition to the
5 extent it would require Commonwealth respondents to
6 take affirmative action.

7 Said leaders have also filed
8 preliminary actions as have the House Leaders and
9 the Republican Committee Intervenors all similar
10 preliminary objections.

11 We will proceed as follows: We will
12 take evidence and hear argument on the NAACP's
13 request for preliminary injunctive relief. We will
14 then hear oral argument on the pending preliminary
15 objections. The Court also has pending before it
16 Respondent's application in the nature of motion in
17 limine directed at the proper testimony of Dr.
18 David Weber, an identified expert witness for the
19 Petitioner.

20 The Republican Committees have
21 informed the Court that they join in Respondent's
22 requested relief. The Court will consider that
23 motion when Dr. Weber is called to testify. At
24 that point, we will consider the proffered scope of

1 Dr. Weber's testimony and permit the parties a voir
2 dire. The Court will then rule on the in limine
3 motion.

4 The proceedings are held today by
5 WebEx video conference at the parties' preference.
6 I want to thank the parties' counsel for their
7 cooperation with our court staff, particularly our
8 IT professionals in the planning for today's WebEx
9 hearing. I also want to thank the court IT
10 professionals for, once again, doing a tremendous
11 job at facilitating today's hearing.

12 I want to also note for the parties
13 that as you are aware, there is a court reporter
14 taking a stenographic record of today's hearing.
15 While WebEx does help a little bit in preventing
16 the cross talk, it is certainly important to make
17 sure that the court reporter is able to take
18 everybody's testimony down in a clear fashion. So,
19 if everybody, including myself, could find a way to
20 speak slowly so the court reporter can take the
21 testimony down and eliminate the cross talk or
22 minimize the cross talk, I am sure that would be
23 helpful for the court reporter.

24 Mr. Tulane, any preliminary matters

1 before we get to your evidentiary presentation?

2 MR. TULANE: Good morning, Your
3 Honor. I just want to make sure you can hear me.

4 Can you hear me okay.

5 JUDGE BROBSON: I can. Thank you.

6 MR. TULANE: Your Honor, just a brief
7 issue, and I know Ms. Hangley and other intervenors
8 will chime in.

9 As Your Honor is aware, you asked the
10 parties to make efforts to stipulate as much as
11 possible certain of the facts in an effort to
12 narrow the case. And since our status hearing, we
13 have actually made efforts to narrow our case. We
14 have eliminated at least one witness, and there is
15 as well another witness who is not available from
16 the postal service. We have also initiated a
17 process we filed with the court, the protocols that
18 govern this hearing and Your Honor entered an order
19 adopting those protocols.

20 With respect to stipulations,
21 yesterday we did sent proposed stipulations to the
22 intervenors. The process, Your Honor, is that we
23 reached out to Ms. Hangley last week. We couldn't
24 agree on anything. We restarted that process this

1 weekend, and when we thought there was some basic
2 things to stipulate to, such as the number of
3 people who have been infected by the virus in
4 Pennsylvania, some exhibits including our exhibits
5 and also exhibits for the intervenors, we sent that
6 to the intervenors yesterday, and in response all
7 three intervenors told us that given the late hour
8 and given the scope of the stipulations, that they
9 are not going to stipulate to anything.

10 And, so, we wanted to just bring that
11 to the Court's attention because I know Your Honor
12 may be wondering where are these stipulations.

13 Ms. Hangley and our side, we've
14 communicated, and we are, obviously, able to agree.
15 You know, obviously, we know there are three other
16 parties, but we want to object to the extent that
17 there are exhibits and other documents that we've
18 agreed to, and we hope that we can get intervenor's
19 counsel to at least consider some other
20 stipulations.

21 And, by the way, during that time, we
22 have not -- did not receive any requests from their
23 side in terms of any stipulations, any documents
24 that they want to be stipulated to.

1 I want to bring that to the Court's
2 attention. I am not asking for any action,
3 particularly now, but the Court should be aware of
4 that, and I am prepared to proceed. I will give,
5 obviously -- I will leave it to Your Honor
6 afterwards.

7 JUDGE BROBSON: Any additional
8 preliminary matters, Mr. Tulane?

9 MR. TULANE: No, Your Honor.

10 JUDGE BROBSON: Ms. Hangleay.

11 MS. HANGLEY: Yes, first I join in
12 Mr. Tulane's statement about stipulations. I would
13 hope that if we enter into these stipulations --
14 which should not be controversial -- we could
15 probably save about half a day of testimony on
16 Respondent's side. We are hoping that we can get
17 back to the table on that sometime today or tonight
18 and see what we can agree on.

19 Second, I have kind of a foundational
20 legal issue. In our communications with
21 Petitioners and our look at the proposed order of
22 witnesses today, it is my understanding that
23 Petitioners do not intend to introduce any evidence
24 on whether the -- what the feasible solutions are

1 to the harms that they allege and whether the
2 relief that they seek can be practically granted.

3 JUDGE BROBSON: Ma'am, can you
4 suspend for a moment, please?

5 Mr. Baldwin, is there a way to clear
6 up her feedback?

7 MR. BALDWIN: Mr. Tulane, can you
8 turn down your volume a little bit? When you are
9 not addressing the Court, if you could put yourself
10 on mute.

11 MR. TULANE: Okay.

12 JUDGE BROBSON: Ms. Hangle, go
13 ahead.

14 MS. HANGLEY: Can you hear me now?

15 JUDGE BROBSON: That is much better.
16 Thank you.

17 MS. HANGLEY: The issue that we have
18 is that we understand that Petitioners, for
19 example, are asking that all ballot-marking devices
20 be removed and replaced with hand-marked paper
21 ballots, but they don't intend to introduce any
22 evidence in their case as to how that can be
23 accomplished.

24 My understanding is that there are

1 six elements of a preliminary injunction and three
2 of them call for evidence as to what the remedy is;
3 whether that remedy will substantially harm other
4 interested parties; that the injunction is
5 reasonably suited to abate the offended activity;
6 and that the injunction won't harm the public
7 interest.

8 So, I feel that if Petitioners
9 proceed as expected, I feel that Respondents will
10 be at something of a loss because we won't know how
11 to respond to whatever the relief is that they are
12 seeking.

13 So, I want to -- I want to make clear
14 that at the close of Petitioner's case, if they do
15 not introduce evidence of how practically this
16 injunction would affect the public interest; how
17 practically the Respondents could be expected to
18 grant -- to give the relief the Petitioners are
19 seeking, we will ask the Court to rule in
20 Respondent's favor without proceeding to
21 Respondent's case.

22 JUDGE BROBSON: So, is that just an
23 FYI, Ms. Hangle?

24 MS. HANGLEY: It is something of an

1 FYI. It's a request that if the Court agrees that
2 feasibility and remedies are part of Petitioner's
3 case, that the Court communicate that to the
4 parties.

5 JUDGE BROBSON: Well, at the risk of
6 repeating my long introductory statement, I think I
7 indicated what I expected and what my understanding
8 is of the preliminary injunction standard and how
9 hard a standard it is to achieve, particularly when
10 you are seeking mandatory injunctive relief or
11 affirmative injunctive relief as well as all the
12 elements. So, it is certainly the option of any
13 respondent or intervenor at the conclusion of the
14 Petitioner's case to suggest that Petitioners did
15 not meet the burden on the preliminary injunction.
16 But I won't advance prejudice my consideration of
17 the Petitioner's case at this point.

18 Do you have anything else
19 preliminarily?

20 MS. HANGLEY: Only a logistical
21 question, Your Honor. How do you want us to handle
22 exhibits? Should we move them into evidence as we
23 go along or save that till the end?

24 JUDGE BROBSON: I usually let the

1 parties decide how they want to do that? So, if
2 you want to -- I usually find that after hearing
3 the testimony about the evidence that moving it at
4 that point in time is easier than moving it in
5 preliminarily. You know, of course -- it is like
6 that old law school class, right, make sure you
7 move your admission of exhibits, not just mark it,
8 so everything has been premarked at this point in
9 time. I am keeping a record. I know my staff is
10 keeping a record. I am sure the court reporter is
11 keeping a record to make sure exhibits are marked.

12 Ms. Hangley, I guess my preference is
13 -- it looks like we have seasoned lawyers involved
14 here. However you are comfortable doing it is fine
15 with me. Just make sure you understand that unless
16 it is admitted, the Court will not be considering
17 it, and it will not be part of the record.

18 MS. HANGLEY: Thank you.

19 JUDGE BROBSON: Mr. Wallen.

20 MR. WALLEN: Good morning, Your
21 Honor. I would just make a brief comment about
22 these joint stipulations that both counsel and Ms.
23 Hangley spoke about. Ms. Hangley, in particular,
24 talked about us coming back to the table to talk

1 about joint stipulations. We were never brought to
2 the table. We were never consulted about any of
3 these proposed stipulations. They were sent to us
4 at 6:19 last night. There are 63 factual
5 stipulations that were they sent to us that they
6 clearly had been working on for some time.

7 So, our position, along with the
8 other intervenors, was that it was just simply
9 impossible to analyze and stipulate to, you know,
10 63 factual stipulations at -- you know, that we
11 were tendered at 6:19 on Labor Day.

12 And, you know, I just wanted to make
13 the Court aware of where our position came from.
14 It is not from an unwillingness to stipulate or
15 drag out these proceedings longer than they need to
16 be. But that was -- that was just the overall
17 situation of those.

18 I don't have any other preliminary
19 matters. Thank you.

20 JUDGE BROBSON: Mr. Wallen, I guess
21 your point is you simply did not have time to
22 review the stipulations?

23 MR. WALLEN: Correct. I mean
24 generally stipulations are something the parties

1 should be working on together, and we weren't ever
2 a part of that, so to have to review them on Labor
3 Day evening, the evening before this hearing, just
4 wasn't practical.

5 JUDGE BROBSON: Okay. Thank you.

6 Mr. Gore.

7 MR. GORE: Your Honor, I just wanted
8 to join Mr. Wallen's statement. He has accurately
9 recounted the situation with the proposed
10 stipulations. We are, of course, happy to work
11 with the parties toward stipulations that will
12 narrow the issues and the evidence that need to be
13 presented to the Court.

14 Beyond that, I have no preliminary
15 matters.

16 JUDGE BROBSON: Mr. Sheehy.

17 MR. SHEEHY: Yes, Your Honor. Shawn
18 Sheehy on behalf of the Senate Leaders. Two
19 preliminary matters. Initially, I will say that we
20 join the statements by Mr. Gore and Mr. Wallen on
21 the stipulations.

22 We'd also like to inform the Court
23 that we join the secretary's motion to exclude Dr.
24 Weber. And, I guess, finally my last preliminary

1 matter is -- it may not be an issue -- but I don't
2 believe that our witness, Dr. Barry, will be
3 available to testify tomorrow. I don't know if we
4 will be able to get to Dr. Barry tomorrow, but he
5 is prepared and ready to testify Thursday.

6 JUDGE BROBSON: Okay. Thank you.

7 On the stipulations of fact, I am
8 very aware that this was a condensed time period to
9 get ready for this hearing, that the exigency of
10 the nature of the preliminary injunctive relief,
11 plus the coming deadlines for coming elections
12 mandated the condensed time period. I am not going
13 to, certainly, penalize the parties for their
14 inability in advance of the hearings to reach
15 agreement with regard to stipulated facts or
16 exhibits.

17 I will continue to encourage all of
18 you to work together to see if you can continue to
19 streamline this hearing more than it is happening
20 so far, you know, and I will certainly understand
21 the idea of getting stipulations on the eve of a
22 hearing and trying to understand them and decide
23 whether you are going to agree to them. Sometimes
24 facts are facts, and there is really no good reason

1 why certain undisputed facts couldn't be agreed to.

2 For example, a factual stipulation
3 that Judge Brobson is losing his hair is certainly
4 something everybody could agree to, not something
5 that requires a great deal of thought. So, if
6 there are some basic factual stipulations that the
7 parties could still agree to to avoid unnecessary
8 testimony, that would certainly be appreciated.

9 And the same is true with exhibits.
10 If there are exhibits that nobody really has a
11 dispute about it coming in, and we don't really
12 need testimony about the documents -- it speaks for
13 itself -- allowing that to happen is fine. Of
14 course, this does not diminish the idea of no
15 objections to the admissibility of documents, but
16 anything that could be stipulated to be made part
17 of the record to limit testimony would be greatly
18 appreciated by the Court and I am sure by the
19 parties.

20 Hearing no other preliminary matters,
21 Mr. Tulane, I don't really see any need on my part
22 for any kind of opening statement of any kind. I
23 will certainly allow it, if you would like to offer
24 a brief opening statement for you to do that, but I

1 am ready to start hearing testimony on a
2 preliminary injunction.

3 MR. TULANE: I will avoid the
4 temptation of giving an opening statement given the
5 hundreds of pages of briefing on some of these
6 issues. And on behalf of the Petitioner, I am
7 prepared to present our first witness.

8 JUDGE BROBSON: Call your first
9 witness, please.

10 MR. TULANE: Your Honor, Petitioner
11 calls Kenneth Huston.

12 - - -

13 KENNETH HUSTON, having been duly
14 sworn, was examined and testified as follows:

15 JUDGE BROBSON: Good morning, Mr.
16 Huston. Thank you for making yourself available to
17 testify today.

18 Mr. Tulane, you may proceed.

19 DIRECT EXAMINATION

20 BY MR. TULANE:

21 Q. Please state your name for the
22 record, sir.

23 A. Kenneth Huston.

24 Q. Mr. Huston, I think I speak on behalf

1 of all the parties, if you wouldn't mind keeping
2 your voice up and speaking slowly to allow the
3 stenographer to be able to take notes.

4 Can you do that for me?

5 A. I sure can.

6 Q. Sir, where do you live?

7 A. I live in Monroeville, Pennsylvania.

8 Q. And which county is that in?

9 A. That is Allegheny County.

10 Q. Where is that relative to Pittsburgh
11 by distance and direction?

12 A. It is approximately 25 minutes
13 outside of the city. Monroeville is further east
14 of Allegheny County.

15 Q. And who do you live there with?

16 A. My wife and my two sons.

17 Q. How long have you lived in
18 Pennsylvania?

19 A. All of my life except for my eight
20 years in the United States Navy.

21 Q. Which service?

22 A. Navy. I served in the United States
23 Navy.

24 Q. How long did you serve?

1 A. I served for eight years.

2 Q. Are you currently registered to vote
3 in Pennsylvania?

4 A. Absolutely.

5 Q. And how long have you been registered
6 to vote?

7 A. I have been registered to vote since
8 1986.

9 Q. Now, given your registration in
10 voting, have you actually voted since that time?

11 A. No. I actually voted in 1987,
12 because I was in boot camp in the United States
13 Navy; and once I understood that I could still vote
14 in my home state I did.

15 Q. Now, let me pivot to the NAACP State
16 Conference. Are you familiar with that entity?

17 A. Absolutely.

18 Q. And do you mind if I call it just for
19 shorthand the NAACP State Conference?

20 A. Absolutely.

21 Q. How are you familiar with the NAACP
22 State Conference?

23 A. I am a member in the NAACP State
24 Conference of Pennsylvania, and I serve as the

1 president of the State Conference of the NAACP of
2 Pennsylvania.

3 Q. When did you become the state
4 president?

5 A. I was elected to the office of the
6 presidency in October of 2019.

7 Q. How long is your term?

8 A. My term is two years.

9 Q. Share with the Court a little bit
10 about your responsibilities as the state president
11 of the NAACP State Conference?

12 A. Well, my responsibility as the
13 president is to oversee and stimulate, as we like
14 to use, the branches of -- throughout the
15 Pennsylvania State Conference. We have 44 adult
16 branches and our other branches are youth and
17 college branches. My responsibility is to put
18 forth an agenda in concert with what the national
19 NAACP is requiring.

20 Q. And you mentioned that you became
21 president October 2019?

22 A. Yes.

23 Q. Did you have any leadership role with
24 the organization before that?

1 A. Yes, I served as the branch president
2 of the Allegheny East NAACP here in Pennsylvania.

3 Q. Just so we are clear, you serve as
4 both the president of the state branch as well as
5 the Allegheny East branch?

6 A. Yes.

7 Q. And you had mentioned that you are a
8 member. How long have you been a member of the
9 NAACP State Conference?

10 A. I have been a member of the
11 Pennsylvania NAACP for approximately 20-plus years.

12 Q. And are you paid for that job, for
13 being the president?

14 A. No. No.

15 Q. And do you have a paying job?

16 A. I do.

17 Q. And what is that?

18 A. I work for Aerotek company located
19 here in Western Pennsylvania, and we provide
20 pharmaceutical and educational programs.

21 Q. In addition to the NAACP State
22 Conference, are you involved in any other community
23 groups?

24 A. Yes, I am a part of the rotary in

1 Monroeville as well as the Chamber of Commerce
2 and --

3 Q. Sorry. Go ahead. I will let you
4 finish.

5 A. And I serve on the Minority AIDS and
6 HIV Initiative in Allegheny County as well as the
7 African-American Leadership Association.

8 Q. And are you involved in any religious
9 activities?

10 A. Yes. Yes. I pastor a church located
11 in Greensburg, Pennsylvania, Temple of Praise
12 Church of God and Christ.

13 Q. I want to learn a little bit more
14 about the NAACP State Conference. You mentioned
15 the national NAACP.

16 What is the relationship between the
17 two?

18 A. Basically, it's a jurisdictional
19 relationship. As the branches are under the State
20 Conference, the State Conference serves under the
21 leadership of the national association.

22 Q. How old is the State Conference?

23 A. The Pennsylvania State Conference is
24 approximately 85-plus years.

1 Q. And approximately, how many members,
2 adult or youth, does the State Conference have in
3 Pennsylvania?

4 A. Approximately 18,000, between our
5 adult and our youth chapters.

6 Q. And earlier you mentioned that there
7 are 44 branches. Are there any youth branches?

8 A. Yes, there is. Of the 80 -- I am
9 sorry -- of the 66 branches, the other -- the
10 other -- besides the 44 are youth and college.

11 Q. In your role as state president, have
12 you become familiar with the organization and the
13 experience of its members?

14 A. Yes.

15 Q. How have you done so?

16 A. Well, we are constantly meeting in
17 our what is called quarterly meetings where we
18 convene the entire State Conference every quarter.
19 I do communicate with branch presidents
20 individually throughout the State of Pennsylvania
21 as well as our youth chapters and youth colleges.
22 So, there is always an ongoing communication
23 between the office of the presidency and those that
24 are members or in leadership throughout the State

1 of Pennsylvania.

2 Q. Are you involved in any travel in
3 your role as the state president?

4 A. Absolutely.

5 Q. Among your members, are there any who
6 are registered to vote in Pennsylvania?

7 A. Yes.

8 Q. And among your members, are there
9 folks who voted in the primary on June 2, 2020?

10 A. Yes.

11 Q. And among your members, are there
12 folks who intend to vote in the November 3, 2020,
13 Pennsylvania general election?

14 A. Yes.

15 Q. Describe your membership at least
16 racially or ethnically.

17 A. Well, the NAACP Pennsylvania State
18 Conference has a diverse group of individuals from
19 different races across the spectrum of the
20 Commonwealth. We are predominantly an
21 African-American organization, but we do have a
22 diverse aspect of members.

23 Q. And is the NAACP non-partisan or
24 partisan?

1 A. Oh, no, we are non-partisan.

2 Q. I want to talk specifically about
3 voting rights. What is NAACP State Conference's
4 mission as it relates to voting rights?

5 A. Well, our mission as it pertains to
6 voting rights is we want to ensure and assure that
7 voting rights are intact and in place. That is the
8 bedrock of who we are in the NAACP, particularly
9 for black and brown people. We want to ensure that
10 they have that right to vote and the accessibility
11 as well to vote.

12 Q. And right now I want to take you
13 through some of the ways you accomplish this
14 mission, and if you could speak generally, and then
15 we will go into more specifics. During the time
16 that you've been president, has the NAACP State
17 Conference been involved in any voter registration
18 drives?

19 A. Absolutely.

20 Q. Why?

21 A. We want to ensure and assure that
22 everyone that wants to vote, can vote. We want to
23 educate and ensure that individuals throughout the
24 Commonwealth have that flexibility and ability when

1 it comes to voting. It is very important to us.

2 Q. And during that time -- and to be
3 clear for the record, I am talking about since you
4 became president including through the June 2, 2020
5 primary -- has the NAACP State Conference been
6 involved in any voter education?

7 A. Yes. Yes, we have.

8 Q. And give a brief summary of that,
9 knowing I am going to get into specifics later.
10 Can you share that with the Court?

11 A. Well, one of the things we have done
12 is we have put together a program called Wake Up
13 Black Vote, which we created a web page called
14 WakeUpBlackVote.org on our website which gives
15 individuals the ability to click on that site to
16 register with the state. It goes directly to the
17 state registry.

18 As well, we implemented an education
19 component to give individuals the understanding of
20 mail-in balloting, absentee balloting, and the
21 importance of making sure they are registered and
22 that their registration is current.

23 Q. And then I will get to Wake Up Black
24 Vote a little bit later. I wanted to move to was

1 the NAACP State Conference involved in any
2 Get-Out-the-Vote efforts for the June 2, 2020,
3 primary election?

4 A. Yes, we were virtually. Yes.

5 Q. You mentioned virtually. How were
6 you able to do that?

7 A. What we implemented was a Zoom
8 meeting throughout the Commonwealth where we
9 assembled all the branch presidents in the
10 executive leadership to speak about the importance
11 of ensuring and assuring throughout the
12 Commonwealth that individuals had an understanding
13 in this period of the pandemic of what they could
14 do to ensure that they were able to vote in the
15 primary.

16 Q. And does the State Conference intend
17 to continue those efforts for the November general
18 election?

19 A. Yes.

20 Q. Does the State Conference get
21 involved in any grassroots mobilization?

22 A. Yes, we do.

23 Q. And, again, explain briefly what you
24 do?

1 A. Well, what we do is we try to
2 mobilize in our respective communities and give the
3 public information on the upcoming general election
4 on November 3. We give them the clear knowledge
5 and understanding of the importance of voting. If
6 we are -- when we are able to from the aspect of
7 grassroots, we go out into our respective
8 communities, build community forums, and educate
9 our communities relevant to voting. But because of
10 the pandemic, we have done everything virtually.

11 Q. Now, what about voting-related
12 lawsuits or litigation? Is that something that the
13 NAACP State Conference has been involved in since
14 you've been president?

15 A. Yes.

16 Q. Does that include this case?

17 A. Yes. This is one of them, yes.

18 Q. Why does the NAACP State Conference
19 initiate voting in the way of litigation?

20 A. Because we want to make sure that our
21 Constitutional rights as an organization and to the
22 constituents that we serve have that opportunity to
23 do it with safety, clarity, and complete
24 understanding of exercising that right.

1 Q. In your role as the state president,
2 have you learned about the impact that the COVID
3 pandemic has had on your members?

4 A. Absolutely.

5 Q. And how has the pandemic impacted
6 your members, in particular the African-American
7 community?

8 A. Well, it has impacted us as an
9 African-American community because the polling
10 places -- a lot of polling places were closed. The
11 accessibility of where to vote was not totally
12 clear. We have a lot of people that were -- I
13 would say scared because of the pandemic's affect
14 on African-Americans particularly and brown people
15 holistically. Folks didn't know if it was safe to
16 even go out to vote.

17 Q. And has the State Conference done
18 anything in connection with educating your members
19 about the impact of the pandemic on
20 African-Americans?

21 A. Absolutely. Through our health
22 committee, yes.

23 Q. You mentioned a little bit about the
24 impact that the pandemic has had on the State

1 Conference itself. Can you briefly add to that?

2 A. Yes, because primarily most of our
3 members, the core part of our members, are senior
4 African-Americans. They have preexisting
5 conditions that jeopardize their ability to be out
6 in the general public, particularly when it came to
7 voting. They were very, very concerned of how this
8 would impact them health-wise; and therefore,
9 throughout our State Conference, we wanted to
10 ensure and assure that they were safe and that
11 mechanisms were put in place so that they still
12 could exercise their constitutional right to vote.

13 Q. And I want to talk -- kind of pick up
14 on something you had mentioned earlier about
15 polling place closures. Are you aware that there
16 were polling places closed during the primary
17 election?

18 A. Oh, yes. Yes.

19 Q. And you expressed some concern about
20 the impact on your members. Explain to the Court
21 what you did to prepare your members in advance of
22 the primary election about these closures?

23 A. Well, what we did is that we tried to
24 put together a concerted effort through our local

1 branch presidents to identify where they could go
2 to vote. Because there was a vast amount of
3 closures of polling places, we wanted to make sure
4 that research was done in our respective areas
5 where they knew where they could go to vote.

6 Q. And what are the types -- some of the
7 things you did to facilitate this research?

8 A. What we did was that we held
9 conversations with local branch presidents, asked
10 them to identify in their respective areas across
11 the breadth of the Commonwealth where the polling
12 places would be located as it pertained to our
13 general membership. So, for example, in Allegheny
14 County, we wanted to make sure we identified where
15 people could go when it came to polling places to
16 vote because there was such a consolidation of
17 specific locations where you could go to vote.

18 Q. Was the NAACP State Conference
19 involved in any effort to get folks to polling
20 places?

21 A. Yes. There were some mobilizations
22 throughout our branches in concert with
23 partnerships with churches and other community
24 organizations to use their vehicles to get

1 individuals to the polling places.

2 Q. And talk a little bit about that.

3 You said mobilization. If you could unpack that
4 for the Court; what do you mean by that?

5 A. What I mean by that is that we, in a
6 very transparent effort, we tried to partner with
7 our local religious organizations and our community
8 organizations to get individuals, particularly our
9 seniors, those that do not have the transportation
10 vehicles, to get them to the polling places. So
11 they would partner under a memorandum of agreement
12 where we would ensure that we could get them from
13 where they lived to the polling places.

14 Q. In your estimation, were you able to
15 get to provide rides or transportation to everyone
16 who needed it?

17 A. Oh, no. No. No.

18 Q. Why do you say that?

19 A. Because there was such a vast amount
20 of individuals that needed to get to the polling
21 places, and we couldn't cover them all. You know,
22 it is -- the need was so great. We couldn't get
23 everybody that wanted to get to the polling places,
24 to their polling places. We just didn't have the

1 ability transportation-wise to provide that big of
2 a request.

3 Q. You mentioned just a few seconds ago
4 and earlier you expressed concerns about seniors.
5 Why do you keep going back to concerns you have
6 about seniors in the pandemic?

7 A. Because the pandemic had a profound
8 affect on the senior population. It was reported
9 that -- and understood -- particularly in the black
10 community that your more senior individuals were
11 more susceptible to the virus. So, we kind of put
12 a serious concentration on helping the senior
13 population, particularly in our membership, to
14 ensure that they could get to the polling places --
15 and feel safe. That was one of the bigger
16 concerns.

17 Q. And did your organization -- again,
18 as state president -- have concerns about these
19 polling place closures or consolidations?

20 A. Absolutely, yes.

21 Q. And you don't have to share every
22 single one, but if you could tell the Court some of
23 the concerns you had about these closures.

24 A. Well, for one, when they closed the

1 polling places, they basically forced individuals
2 to go to a specific location to vote. That, in
3 turn, made the lines longer. There was a major
4 concern in reference to social distancing.

5 And usually you vote in your
6 community, in your respective community. In the
7 pandemic and with the closure of the polling
8 places, that could not happen.

9 Q. And are you aware of any -- receiving
10 any information from either -- let's use you as an
11 example -- from Allegheny County or from the state
12 as to why certain polling locations were closed?

13 A. Yes, we were -- as I understood it,
14 certain polling places were closed because they
15 were trying to condense where people would go to
16 vote in reference to the pandemic, the virus. And
17 those polling places that normally would be open
18 were closed and consolidation was made.

19 Q. Let me ask it more artfully.

20 Were you provided any information
21 about why a specific location was open and another
22 one was closed?

23 A. No. No. No.

24 Q. And let's move ahead after the

1 primary election. Presently, in advance of the
2 November general election, do you still express
3 concerns about polling places being closed or
4 consolidated?

5 A. Absolutely, yes.

6 Q. What, if anything, is the NAACP State
7 Conference planning to do to prepare for any future
8 closings or consolidations?

9 A. We are trying to figure out ways in
10 which we can be a support vehicle for getting
11 people to the polls as much as we can. The demand
12 is great. We are trying to identify what areas,
13 what locations, for polls will be open and not
14 open. And we are trying to educate our members in
15 reference to mail-in voting, because there is a
16 true fear of going out physically to go vote.

17 Q. And has anyone directly advised the
18 NAACP State Conference that there won't be any
19 closures?

20 A. No. No.

21 Q. Now, you mentioned the mail-in
22 voting, so let's just shift to that. I want you to
23 talk a little bit about -- are you aware that there
24 are new mail-in ballot rules in place after Act 77?

1 A. No.

2 Q. Well, let me put it this way: Before
3 the primary, did the NAACP support or oppose
4 expanding mail-in balloting?

5 A. We supported expanding it.

6 Q. And did you understand there was an
7 expansion of mail-in balloting?

8 A. I'm not sure, no.

9 Q. In other words, did you understand
10 that it is easier now to vote by mail than it was
11 before, you know, last year?

12 A. Yes. Yes. Absolutely. Yes.

13 Q. And what, if any, effort did you --
14 the NAACP State Conference make to share with your
15 members about some of the new mail-in rules before
16 the primary?

17 A. Well, we have tried to inform and
18 educate our members about mail-in balloting, what
19 will be required, the timeframe in which they need
20 to get their mail-in ballots done. We propose to
21 do it early so that we can ensure and assure that
22 their vote is counted.

23 Q. And were there certain of your
24 members that would be ideal to receive the message

1 about vote by mail?

2 A. Yes.

3 Q. Which members?

4 A. All of them.

5 Q. And after the primary election, has
6 the NAACP State Conference continued, or have you
7 stopped your efforts to promote vote by mail?

8 A. No, we continue.

9 Q. And why is that?

10 A. Well, because the pandemic has a
11 profound affect on people of color. It is no
12 secret that from the national perspective -- and
13 we're not sure about the state perspective as to it
14 pertains to percentage -- but nationally, it is
15 quite understood that people of color, particularly
16 African-Americans, are profoundly affected by this
17 pandemic.

18 Q. And I want to talk a little bit about
19 drop boxes. Can you please tell the Court, what
20 are drop boxes?

21 A. Well, I've never seen one. As I
22 understand it, that is a place where you take your
23 ballot and you place it when you are mailing in
24 your vote.

1 Q. Has the State Conference opposed or
2 favored having drop boxes in the general election?

3 A. No, we favor.

4 Q. Why is that?

5 A. Because we feel the drop boxes, and
6 particularly voting by mail, gives people the
7 opportunity, our constituents, the opportunity to
8 vote and feel that that constitutional right is
9 being exercised. And the accessibility that we
10 believe that mail-in balloting and particularly
11 drop boxes will have will give people the ability
12 to go in their respective communities or areas of
13 their community to vote.

14 Q. So, where is your regular voting
15 place?

16 A. My personal voting place is located
17 at -- it's called St. Bart's Church.

18 Q. Is Bart short for Bartholomew?

19 A. Bartholomew, yes.

20 Q. And in talking about your experience
21 during the June 2, 2020 primary, let's go back to
22 St. Bartholomew's Church. How long have you voted
23 there?

24 A. I've voted there almost 20 years.

1 Q. How far is it from where you live?

2 A. It is approximately five minutes from
3 my home.

4 Q. Did you vote during the June 2
5 primary?

6 A. Oh, yes.

7 Q. And did you vote at St. Bartholomew's
8 Church?

9 A. No. No. Our -- St. Bartholomew's
10 was closed. Me and my wife, we were directed to go
11 to the Monroeville Convention Center.

12 Q. Okay. Let me go back. How did you
13 learn that it was closed?

14 A. Well, we went -- actually, we went
15 there and there was signage on the door that we had
16 to go to the convention center. And later, as we
17 got back home, we saw the post cards directing us
18 to the convention center, but we had already voted.

19 Q. And you mentioned Monroeville -- was
20 it convention center?

21 A. It has a convention center, yes.

22 Q. Is that where you ended up voting in
23 the primary?

24 A. Yes.

1 Q. How far is the Monroeville Convention
2 Center from where you live?

3 A. Well, it's approximately
4 25 minutes -- mileage, I would say it is about
5 15 miles from my home.

6 Q. And how did you get there?

7 A. Drove.

8 Q. Could you walk there?

9 A. No. No. Absolutely not.

10 Q. And what about taking public
11 transportation there?

12 A. No. There is no public
13 transportation accessibility.

14 Q. Mr. Huston, please set the scene for
15 the Court what you encountered when you got to the
16 Monroeville Convention Center. When you got there,
17 what did you see?

18 A. When we got to the convention
19 center -- usually myself and my wife vote early
20 because we both go to work. We were both directed
21 there. Because of the pandemic, I said to my wife,
22 we probably will have to take the morning off to go
23 vote.

24 So, when we got to the convention

1 center, one of the things that we were absolutely
2 amazed at was the lines. There were four lines,
3 and they literally came out of the convention
4 center and was wrapped around the parking lot,
5 almost to the main entrance to the convention
6 center. And one of the things that I paid
7 particular attention to was that there were four
8 lines, and the amount of people that was there
9 already. We couldn't -- we couldn't believe it.

10 Q. When you say there already, what
11 time, approximately, did you get there?

12 A. We got there approximately 7:30-ish,
13 I would say, to vote.

14 Q. You keep saying we. Who is the we?

15 A. Me and my wife, Terri. Uh-huh.

16 Q. Give your best guess about
17 approximately how many people were there when you
18 arrived there at the Monroeville Convention Center?

19 A. You know, I didn't count, but I would
20 assume based off of what I could see that there was
21 approximately three, maybe 400 people there.

22 Q. And in your regular voting location,
23 St. Bartholomew's Church, approximately how many
24 people when you voted over time, how many people

1 are there?

2 A. There is usually a very small line.
3 We are usually in and out within minutes. There is
4 never a line. We get there when the polling place
5 opens because we are going there before we go to
6 work. Usually we vote, and within minutes we are
7 out the door.

8 Q. How long did you wait on June 2, 2020
9 to vote?

10 A. Well, I would assume we waited
11 about -- approximately over three hours, three and
12 a half hours to vote.

13 Q. And were you waiting outside, inside
14 or a combination of both?

15 A. You had to wait outside. Again,
16 there was lines. And once you got up to a certain
17 point, they would instruct you to go to another
18 line based on your last name. And then you would
19 get in the convention center, and you had to go to
20 certain sections until you got to where they wanted
21 you to vote.

22 Q. Give the Court a sense of how much of
23 those approximately three hours you were waiting
24 outside and how much of that you were waiting

1 inside?

2 A. Well, I would say we were waiting
3 outside about an hour and a half, and by the time
4 we got in -- I voted first, so I would say about an
5 hour and 45 minutes.

6 Q. So, an hour and 45 minutes outside
7 and an hour and a half inside?

8 A. No, total. An hour and a half
9 outside and 45 minutes inside.

10 Q. So, it's a little bit -- two and a
11 quarter hours?

12 A. Right.

13 Q. Mr. Huston, I have to ask you, why
14 didn't you leave after about an hour of waiting?

15 A. No. No. First of all, voting is the
16 bedrock of my family. My family hails from Macon
17 and Wrightsville, Georgia. They were tobacco
18 slaves. My -- since I was a kid, we always voted.
19 My family, that is who they are. My grandmother is
20 97 years old, and to this day she emphasizes
21 voting. It wasn't even a thought for me to just go
22 and leave and -- it wasn't even a thought. And I
23 am -- I have preexisting conditions. I was very --
24 you know, I don't scare easy, but I was fearful

1 because there was no social distancing. But I -- I
2 voted.

3 Q. Well, let's turn to that. Explain to
4 the Court about some of the precautions inside the
5 convention center.

6 Were people wearing gloves, masks?
7 What did you see?

8 A. Yes, people to their credit had on
9 masks, and they did have -- to the poll workers'
10 credit -- they did have sanitation -- hand
11 sanitizer stations as you was moving to certain
12 areas of the -- inside the convention center, of
13 course.

14 Q. And let's talk about social
15 distancing. What is social distancing, just so we
16 can make a clean record?

17 A. Social distancing, as I understood
18 it, you are supposed to stay six feet apart. We
19 were supposed to be six feet apart from each other
20 while out in the public. Well, you couldn't stand
21 six feet away from each other because there was
22 just too many people there. You couldn't space
23 that many people six feet apart. I guess the
24 anxiety and everybody trying to get in and vote,

1 people were kind of -- I mean, we were close. We
2 were close together.

3 Q. You mentioned about some preexisting
4 health conditions you have.

5 A. Yes.

6 Q. Do you mind sharing that, if it's
7 okay with you, with the Court?

8 A. Well, I am a brittle diabetic. I am
9 insulin dependent. I take medication for it. And
10 I absolutely cannot get the virus. I was very
11 concerned being there, praying that no one had it
12 and that I would not get it. I intentionally
13 stayed close to my wife and kept saying to her I
14 pray everybody is okay here, and I don't get it.
15 You know, I can't get it. So, you know, that was a
16 major concern for me personally. Personally.

17 Q. What do you mean you can't get the
18 virus?

19 A. Well, I can't get the virus because
20 of my diabetes. My body would not be able to fight
21 the virus because of my health condition.

22 Q. So, how did you feel as you were
23 waiting in line and preparing to vote?

24 A. Well, I was angry. There was fear,

1 but I was very angry. And I was angry at the fact
2 that they consolidated all of us. Obviously,
3 people came from other polling places to vote.
4 Obviously. And the fact that we were going into
5 the convention center, there was a lot of confusion
6 about the stations where we needed to go, and I
7 just felt it wasn't -- it just wasn't good.

8 Q. You had testified that you waited
9 somewhere between two and a quarter hours and three
10 hours. Had you waited that long before in any
11 election in which you voted?

12 A. Never. I never waited that long.
13 Even with president -- in '08 and '12 have I waited
14 that long to vote. Never.

15 Q. I want to switch gears to Wake Up
16 Black Vote. You mentioned it in passing.

17 Can you describe a little more what
18 that initiative is?

19 A. Wake Up Black Vote was an initiative
20 that was created in the Pennsylvania State
21 Conference to educate people of color, particularly
22 black people, in the importance of voting and what
23 it means to us as a race of people to vote because
24 the Voting Rights Act, of course, was passed in

1 1955. A lot of people died for that right, and we
2 educate our members and individuals within our
3 association of why it is important to vote.

4 Q. Why was it launched?

5 A. It was launched on Juneteenth,
6 June 19. And it was launched as a vehicle more so
7 of education, of really giving individuals of the
8 educational aspect of exercising that
9 constitutional right.

10 Q. When you mentioned earlier that you
11 linked to certain websites, do you mind explaining
12 what you linked to?

13 A. So, what we did was, it's a direct
14 link to the Pennsylvania State Registry. So, you
15 can register to vote through the link. It's a
16 vehicle to go straight to the Pennsylvania registry
17 as well as it is an education component telling you
18 the importance of mail-in balloting, telling you
19 what you need to do relative to doing a mail-in
20 vote, how to fill it out, and how to check to make
21 sure you are registered and your registration is up
22 to date.

23 Q. And why do you provide these links
24 given that people themselves can go directly to the

1 Secretary of State's website?

2 A. Well, we give -- because that is who
3 we are in the NAACP. That is one of our vehicles.
4 We want to ensure and assure that individuals are
5 educated to the importance of voting. We provide
6 the link because, one, we want to make sure things
7 are done appropriately, and that people understand
8 what they need to do to register.

9 Q. And do you provide any information
10 with respect to anyone interested in being a poll
11 worker?

12 A. No -- well, we do request that you
13 volunteer, but with the pandemic going on, we never
14 really pushed it this election season because we
15 understand people have their reservations about
16 being out in the public.

17 Q. Are you saying you make it available?

18 A. Oh, yes, we do. Absolutely. We
19 encourage with precaution.

20 MR. TULANE: Your Honor, may I have
21 about ten seconds to make sure I have everything?

22 JUDGE BROBSON: You may.

23 MR. TULANE: Thank you. Just a few
24 more questions.

1 BY MR. TULANE:

2 Q. Do you plan to vote in the November
3 election?

4 A. Yes, I do.

5 Q. How do you intend to do so and by
6 what means?

7 A. Well, I am going to do a mail-in
8 vote, you know, because I can't expose myself to
9 that kind of situation again. I just can't.

10 Q. Well, you didn't vote by mail in the
11 primary, and it sounds like you intend to vote by
12 mail in the general election. What accounts for
13 that difference?

14 A. Well, because the understanding of --
15 I had never voted by mail-in my life, so I never
16 had all the true understanding of mail-in voting.
17 But through our initiative in our State Conference,
18 I got a better understanding of mail-in voting; and
19 so, I'm going to do it.

20 Q. And the final question is, obviously,
21 the NAACP State Conference is the Petitioner in
22 this case?

23 A. Mm-hm.

24 Q. Would you mind sharing for the

1 benefit of the Court why is it that you authorized
2 your organization to file this lawsuit?

3 A. I authorized the organization to file
4 the lawsuit because we felt it extremely important
5 for the accessibility and the ability of all
6 Pennsylvanians, whether NAACP or not, to have the
7 opportunity to have accessibility to vote. Voting
8 is extremely important to us. We found it to be
9 incredibly complicated for some throughout the
10 Commonwealth in our organization and out; and we
11 wanted to make sure that we fought for that right
12 and that ability.

13 MR. TULANE: Your Honor, I do believe
14 I have no further questions and release the
15 witness.

16 JUDGE BROBSON: Ms. Hangle,
17 cross-examination.

18 CROSS-EXAMINATION

19 BY MS. HANGLEY:

20 Q. Good morning, President Huston.

21 A. Good morning. How are you?

22 Q. I am very well. Thank you. How are
23 you?

24 A. Great.

1 Q. Your Honor -- I am sorry, President
2 Huston, I represent the Secretary of State and Ms.
3 Mathis, who are the respondents in this case.

4 A. Okay.

5 Q. I believe that you and I agree on
6 most of the important things that you testified to.
7 Do you agree with me that every vote should count?

8 A. Of course.

9 Q. And you agree that the job of
10 election administrators is to ensure that voting
11 rights are in place?

12 A. Yes.

13 Q. And that every person who is
14 qualified to vote should have a full and equal
15 opportunity to vote? Can we agree on that?

16 A. Absolutely.

17 Q. And you agree that election
18 administrators should do their best to eliminate
19 barriers to voting?

20 A. Yes.

21 Q. We also agree, don't we, that
22 elections have to be well managed?

23 A. Yes.

24 Q. If elections are chaotic, it doesn't

1 help anyone, correct?

2 A. No, it doesn't.

3 Q. And, so, there have to be rules for
4 running elections?

5 A. Depending on what those rules are.

6 Q. Got it. So, you know, you described
7 your experience voting in the primary.

8 A. Uh-huh.

9 Q. And that was clearly a very difficult
10 experience, correct?

11 A. It was borderline chaotic, yes.

12 Q. And that experience was not
13 acceptable to you?

14 A. No, it wasn't.

15 Q. Your prior experiences of voting at
16 St. Bartholomew's Church, those were acceptable
17 experiences; is that right?

18 A. Yes. Yes.

19 Q. If things went back to the way they
20 were, and you could again vote at a nearby polling
21 place with fewer people, would that be acceptable
22 to you?

23 A. Yes.

24 Q. Has anyone advised you that polling

1 places will be closed to the same extent they were
2 in the primary?

3 A. I have not received that information,
4 no, ma'am.

5 Q. Do you happen to know the number of
6 polling places that were consolidated in Allegheny
7 County in the primary?

8 A. I do believe that it was
9 approximately 1,000.

10 Q. It went down to about 200 polling
11 places?

12 A. I am not sure of the exact number,
13 but I know it was a lot, a lot that were closed,
14 consolidated.

15 Q. Do you understand that the reason
16 Allegheny County could do that was because of a
17 statute passed by the legislature?

18 A. I'm not familiar, ma'am.

19 Q. So, you don't know one way or the
20 other why Allegheny County had the legal authority
21 to do that?

22 A. Well, I wouldn't say I don't
23 understand that they had the legal authority to do
24 it. I just didn't know if that was coming from

1 Allegheny County or was that on the state level or
2 the federal level. I was not sure.

3 Q. So, do you know whether the statutes
4 applying to voting in the primary also apply today
5 to the general election?

6 A. I'm -- I am not sure. No, ma'am.

7 Q. And if I told you that the statute
8 that allowed Allegheny County to do what it did has
9 expired and that Allegheny County does not have
10 legal authority to do the same level of
11 consolidation in the general, would you have any
12 reason to disagree with that?

13 A. No, ma'am.

14 Q. And are you aware that Allegheny
15 County intends to reopen 96 percent of the polling
16 places for the general that were open a year ago?

17 MR. TULANE: Your Honor, I want to
18 object to that.

19 JUDGE BROBSON: On what grounds?

20 MR. TULANE: There is no foundation.
21 In other words, there is nothing in the record for
22 that basis.

23 JUDGE BROBSON: Well, this is your
24 case in chief, Mr. Tulane. I am not sure how she

1 would put that in the record. I think she is
2 asking him if he is aware. I am not taking it as
3 proof in the record. She is asking if he is aware;
4 so the objection is overruled.

5 Mr. Huston, are you aware of whether
6 Allegheny County intends to reopen 96 percent of
7 the polling places that are closed?

8 THE WITNESS: No, Your Honor, I am
9 not.

10 BY MS. HANGLEY:

11 Q. President Huston, do you have any
12 reason to doubt that that is the case?

13 A. I couldn't doubt it. I don't know.
14 I really don't know.

15 Q. Do you have any information at all
16 about Allegheny County's plans for polling places
17 opening in the general election?

18 A. To this date I do not, no.

19 Q. Let's see. I want to ask more about
20 your background.

21 A. Sure.

22 Q. You've never worked as an election
23 administrator, correct?

24 A. No, ma'am. No.

1 Q. But you do have experience with
2 running a different kind of very large
3 organization, correct?

4 A. Yes. I would say so. Some might
5 argue no, but I would say so.

6 Q. Well, 10,000 members, 44 adult
7 branches and about 22 youth branches, I would count
8 that as a large organization. Would you?

9 A. I certainly would, yes.

10 Q. Okay. And even before being
11 president of the state NAACP, you also have run
12 other organizations not quite as large, but large
13 in their own status?

14 A. Yes.

15 Q. So, as somebody who runs a large
16 organization, you know that sometimes when you try
17 to make a change it has consequences throughout the
18 organization, correct?

19 A. Yes.

20 Q. And sometimes making an improvement
21 in one place can make things worse somewhere else.
22 Do you understand that?

23 A. Well, I wouldn't quite agree with
24 that because when you are trying to make change for

1 the betterment of the organization, you would not
2 want to make one place, area, better and another
3 area weaker. That does not -- for the greater good
4 of the organization, that won't improve anything.

5 Q. So, you have to look at the effect on
6 the whole organization when deciding to make
7 changes?

8 A. You should, yes.

9 Q. You should. And to do that you
10 consult with the people who know how the
11 organization works, right?

12 A. Yes. Oh, absolutely, yes.

13 Q. So, the people who are on the ground
14 running the organization should have -- ideally
15 have their say in big decisions?

16 A. Yes. Yes.

17 Q. And if it turns out that a change --
18 you as president are contemplating a change that
19 initially sounds good and then you learn that it
20 could actually make things worse, you don't make
21 that change, right?

22 A. If I anticipated it making things
23 worse, no.

24 Q. And if someone in the NAACP came and

1 suggested a change that was simply impossible for
2 your organization to carry out, you wouldn't
3 recommend that change, correct?

4 MR. TULANE: Your Honor, I would
5 object to the line of questioning. I understand
6 what counsel is getting at, but I think we are
7 getting far afield. It is very in theory at this
8 point, Your Honor.

9 MS. HANGLEY: Your Honor, this was my
10 last question in this line of questioning.

11 JUDGE BROBSON: Do you want to
12 continue to press it, or should I rule on the
13 objection?

14 MS. HANGLEY: I will move on.

15 JUDGE BROBSON: Okay. Question is
16 withdrawn.

17 BY MS. HANGLEY:

18 Q. So, Mr. Huston, were you on the line
19 when the Court read the list of relief that the
20 NAACP is seeking in this case?

21 A. Yes, I sure was. Yes.

22 Q. Now, let's go back to the question of
23 moving and consolidating polling places. I think
24 -- do you agree with me that all else being equal,

1 it is better to not move polling places?

2 A. Well, I don't know. I don't know.

3 Q. But you agree that when a polling
4 place is moved, it creates potential for confusion,
5 correct?

6 A. It can, yes.

7 Q. It can. And if a -- from the
8 perspective of a voter, it is better to have
9 polling places closer to the vote than farther
10 away? Again, all else --

11 A. Yes.

12 Q. And it is better from your
13 perspective to not relocate polling places in a way
14 that creates crowding, correct?

15 A. In particular in this pandemic, yes.

16 Q. Okay. So, if you learn that some of
17 the relief that the NAACP was seeking in this case
18 would force a substantial number of polling places
19 to move and be consolidated, would you reconsider
20 that relief?

21 MR. TULANE: Your Honor, objection.

22 JUDGE BROBSON: Basis of your
23 objection, Mr. Tulane?

24 MR. TULANE: Ms. Hangley is making

1 assumptions that are not -- been established and
2 this is the Petitioner -- this is -- this is the PI
3 hearing on behalf of the Petitioner. So, clearly,
4 the Court does not find that the relief is
5 available. It is not available. So, I really do
6 not understand if it's a legal assumption being
7 made in Ms. Hangleys question.

8 JUDGE BROBSON: I don't think it's
9 legal assumption. I think it's proper
10 cross-examination, so I will overrule your
11 objection.

12 MR. TULANE: Thank you.

13 BY MS. HANGLEY:

14 Q. Mr. Huston, I think we all agree that
15 long lines at polling places are not desirable,
16 correct?

17 A. Particularly in a pandemic, no.

18 Q. And, particularly, the long lines
19 that you faced in your primary experience, correct?

20 A. For where I live, yes.

21 Q. Okay. Now, have you ever worked as a
22 poll worker?

23 A. No.

24 Q. But you've voted regularly and you've

1 observed poll workers in action?

2 A. Yes.

3 Q. And do you understand that if poll
4 workers are not well trained, that can slow down
5 the process?

6 A. I don't know. I don't know.

7 Q. Do you understand that if poll
8 workers are moving slowly and making mistakes, that
9 can slow down the lines?

10 A. Yes, I would -- I guess, yes.

11 Q. So, you want election administrators
12 to make sure poll workers are well trained; is that
13 right?

14 A. Yes, if someone is working the polls,
15 yes, we want them trained. Yes.

16 Q. Now, if someone who runs a big
17 organization and also your -- what do I say -- your
18 private work in a very sophisticated area, you
19 understand that it takes people time to learn new
20 technology, right?

21 A. Depending on what the technology is
22 for, you know -- it depends on what it is for.

23 Q. Does it take people time to learn new
24 processes, new ways of doing things?

1 A. Yes, of course.

2 Q. And if you try to rush that learning
3 process, they simply may not learn it as well; is
4 that correct?

5 MR. TULANE: Objection. There is no
6 context of this. We are in a theory world, so I
7 object.

8 JUDGE BROBSON: Mr. Tulane, I think
9 what Ms. Hangley is trying to do is to establish
10 what Mr. Huston is not being offered. That is my
11 guess as to why she is asking these questions. And
12 she is trying to confirm that Mr. Huston doesn't
13 have -- is not offering testimony with regard to
14 certain aspects of your case.

15 It's a preliminary injunction matter.
16 For cross-examination, I have got to give her some
17 latitude here.

18 MR. TULANE: That is fine, Your
19 Honor. Just when she's speaking generally about
20 what happens in his organization and so forth --
21 but I take it --

22 JUDGE BROBSON: I think she's trying
23 to relate the issue of elections to his personal
24 experience. That's what I think she's attempting

1 to do. I'm giving her some latitude here.

2 Ms. Hangley, move it along. Your
3 objection is overruled.

4 BY MS. HANGLEY:

5 Q. Do you think it is important that
6 results of elections come out promptly?

7 A. Absolutely.

8 Q. Do you think it important that each
9 part of the Commonwealth of Pennsylvania gets its
10 say in the election?

11 A. Every part of Pennsylvania should get
12 a say.

13 Q. Does the NAACP have a substantial
14 number of members in Philadelphia?

15 A. We do.

16 Q. If results from all over the state
17 were coming in on election night with no results
18 from Philadelphia, would that be a problem from
19 your point of view?

20 A. It would be a concern, yes.

21 Q. So, if you learned that some of the
22 relief the NAACP is seeking could cause that kind
23 of delay in election results, would you think twice
24 about that relief?

1 A. I don't see how. I don't see how
2 what we are requesting would harm or delay results
3 coming from the great City of Philadelphia.

4 Q. Okay. So, you run a statewide
5 organization?

6 A. Yes.

7 Q. You understand that different parts
8 of Pennsylvania have different geography?

9 A. Sure.

10 Q. You understand that some counties are
11 much bigger than others?

12 A. Absolutely.

13 Q. You understand that there is a county
14 in Pennsylvania around -- with under 5,000
15 registered voters and Philadelphia that has more
16 than a million?

17 A. Yes.

18 Q. And you understand that with that
19 kind of diversity in situations, once -- one size
20 fits all relief doesn't always work?

21 A. I am not sure when it comes to
22 voting, ma'am. I don't know what one size fits all
23 would mean when it comes to voting.

24 Q. Have you made any inquiry or analysis

1 of what impact your requested relief would have on
2 the 67 counties in Pennsylvania?

3 A. No. I did not study the 67 counties
4 in Pennsylvania as it pertains to what we are
5 requesting. Our concern is voting.

6 Q. You mentioned the website where you
7 give voters information about applying --
8 registering and applying for ballots?

9 A. Yes.

10 Q. That website has links to the
11 electronic ballot application process?

12 A. Yes.

13 Q. And the electronic ballot application
14 process is -- I presume it is easier for your
15 members who have internet access?

16 A. Yes, ma'am.

17 Q. It is easier than filling out a paper
18 application, right?

19 A. Well, everything electronic is
20 easier. So, yes, I would assume it could be an
21 easier process. Yes.

22 Q. Okay. Are you aware that electronic
23 applications are also easier for the counties to
24 process?

1 A. I am not lettered in the county
2 process, ma'am, so I really couldn't speak to it.

3 Q. Was that -- does that make sense to
4 you, that electronic is faster than paper?

5 A. I would assume, yes.

6 Q. So, have you analyzed cost of any of
7 the relief that the NAACP is seeking in this case?

8 A. No. We have not done any analytics
9 with cost.

10 Q. Okay. Do you -- are you -- do you
11 have any idea how much taxpayer money it would cost
12 to replace ballot-marking devices with hand-marked
13 paper ballots?

14 A. No, ma'am, I am not familiar with the
15 cost.

16 Q. And are you aware of what it would
17 cost for every county to mail out paper mail-in
18 ballot applications to everyone?

19 A. No, ma'am, I am not familiar with
20 costs.

21 Q. Has the NAACP ever considered mailing
22 out ballot applications itself to registered
23 voters?

24 A. No, ma'am, we have never considered

1 mailing them out.

2 Q. Are you familiar with what a drop box
3 costs?

4 A. No, I am not.

5 Q. And are you aware of what it involves
6 for a county to install a drop box?

7 A. No, ma'am.

8 Q. And you are not aware what it costs
9 for a county to manage a drop box?

10 A. No, ma'am.

11 Q. How about -- I don't believe you
12 testified about this on direct, but how about
13 satellite election offices; any idea what those
14 cost?

15 A. No, ma'am. No.

16 Q. I want to ask you about the -- how
17 this relief can be granted. Do you have an
18 understanding of the division of responsibilities
19 between the Secretary of the Commonwealth and the
20 counties?

21 A. I don't know all the divisions of
22 that, no. But I would assume that the secretary
23 who is an elected official works closely with the
24 counties to ensure and assure that the things that

1 are supposed to happen, happens in the respective
2 counties.

3 Q. So, it is your understanding that the
4 secretary can direct the counties to install drop
5 boxes? Is that your understanding?

6 A. I don't know if the secretary can do
7 that. No, that is not my understanding. I don't
8 know the authority on that aspect with the
9 secretary and the counties.

10 Q. So, you just don't know one way or
11 the other whether the secretary has the authority
12 to grant the relief requested in your petition?

13 A. I would -- I am not sure if the
14 secretary alone can do that, but I would assume or
15 believe that the secretary has the leveraging power
16 to give to the counties to ensure that what needs
17 to be done is done.

18 Q. And to the extent that you are
19 requesting relief that would cost money -- which I
20 believe is all the relief that the NAACP is
21 requesting would cost money to grant -- do you have
22 an understanding of who would actually pay for that
23 relief?

24 A. Well, anything that we do in the

1 State of Pennsylvania with respect to counties is
2 going to cost money. And, of course, that would
3 come from taxpayers. I am very familiar that there
4 is a cost that is associated with anything that is
5 done statewide into the individual 67 counties.
6 So, yes, that would come from taxpaying citizens.

7 Q. Do you have an understanding of
8 whether it would come from the county's taxpayers
9 or the Commonwealth's taxpayers?

10 A. No, ma'am, I am not familiar with how
11 that breakdown would occur, no. I don't know if
12 the state would allocate certain amount of cost to
13 the counties or the counties would request a
14 certain amount of allocation from the state. I am
15 not familiar with that -- what that cost would be.

16 MS. HANGLEY: Your Honor, can I have
17 two minutes to consult with my team?

18 JUDGE BROBSON: Yes, two minutes.
19 One minute, 30 seconds. As quickly as you can.

20 MS. HANGLEY: That is all I have.

21 JUDGE BROBSON: Mr. Wallen,
22 cross-examination.

23 MR. WALLEN: Thank you, Your Honor.
24 BY MR. WALLEN:

1 Q. Good morning, Mr. Huston.

2 A. Good morning.

3 Q. I represent the Speaker of the House,
4 Bryan Cutler, and Majority Leader of the House,
5 Kerry Benninghoff.

6 I only have a couple of questions for
7 you.

8 A. Sure.

9 Q. You stated in your direct testimony
10 that the Pennsylvania State Conference conducted
11 voter education efforts for the Pennsylvania
12 primary, correct?

13 A. Yes. We do it for every primary.

14 Q. And for every election?

15 A. Yes.

16 Q. And if laws or circumstances change
17 from an election to election, does the substance of
18 those efforts change?

19 A. If we have a clear understanding of
20 that change, yes, sir.

21 Q. Would it be correct to say that your
22 voter education efforts depend on the particular
23 circumstances of the election, like COVID-19, for
24 example?

1 A. Yes, sir. Uh-huh.

2 MR. WALLEN: I have no further
3 questions, Your Honor.

4 JUDGE BROBSON: Mr. Shapiro.

5 BY MR. SHAPIRO:

6 Q. Good morning, Mr. Huston.

7 A. Good morning, sir.

8 Q. I just want to clarify a couple of
9 things. As I understand it, outside of St. Bart's
10 and the convention center, do you have any
11 firsthand knowledge of what happened in any of the
12 polling places in the primary?

13 A. I do not have firsthand knowledge,
14 no, but I was given some briefings, sir.

15 Q. And I understand that the NAACP --
16 kind of picking up on what Mr. Wallen just asked --
17 in terms of education, the NAACP has multiple ways
18 of contacting people, correct? In other words,
19 social media, mail, phone, correct?

20 A. Yes.

21 Q. Are you aware that voters can already
22 request a mail-in ballot for the general?

23 A. Yes.

24 Q. Is the NAACP already educating people

1 as to that?

2 A. Yes.

3 Q. Is the NAACP already educating people
4 as to the means to return their ballots if they
5 choose to do it by mail-in?

6 A. Yes.

7 Q. And is it already educating people as
8 to the importance of returning their ballots in a
9 timely fashion?

10 A. As early as possible, yes.

11 Q. Have you travelled as the president
12 of the NAACP since the pandemic began?

13 A. Yes, I have.

14 Q. Where have you travelled?

15 A. I travelled to Fayette County.

16 Q. How did you get there?

17 A. I drove.

18 Q. And do you have any way to measure
19 how -- let me go back a step and orient you.

20 You spoke in your testimony about
21 Zoom meetings with both -- I think with both
22 leadership and with members of the NAACP to educate
23 them; is that correct?

24 A. Yes, sir. Uh-huh.

1 Q. Do you know how many people attended
2 those Zoom meetings?

3 A. I don't have those exact numbers, but
4 I can get them for you.

5 Q. Were they well attended?

6 A. Oh, yes.

7 Q. And you also talked about the link,
8 the click-through, from the NAACP page to
9 register -- register to vote, correct?

10 A. Yes, sir.

11 Q. Do you know how many people have
12 taken advantage of that link?

13 A. Not to date, sir. I'd have to check
14 with my Political Action Chair.

15 Q. Has that been successful, to your
16 knowledge?

17 A. I am not sure, sir, to be honest with
18 you.

19 Q. And, Mr. Huston, you spoke -- you
20 said that you were worried when you went to vote
21 and you've added that you can't get the virus
22 because of your preexisting conditions, which I
23 understand. Did you get it from voting in person
24 in the primary?

1 A. I pray not. Not that I know of.

2 Q. I pray not, too.

3 And the last thing I want to follow
4 up on, Ms. Hangley in her cross asked you if you
5 agreed that you need rules for voting, and you said
6 it depends on what the rules are. I want to make
7 sure I understand that.

8 You agree that there have to be
9 rules. You just want them to be the right rules;
10 is that what you are saying?

11 A. Yes, the laws have to be obeyed.
12 Whatever the laws are pertaining to voting, we want
13 them obeyed.

14 MR. SHAPIRO: I have nothing further.
15 Thank you, Mr. Huston.

16 JUDGE BROBSON: Mr. Tulane, redirect?
17 MR. GORE: Your Honor, I have a few
18 questions.

19 JUDGE BROBSON: Mr. Gore, I
20 accidentally skipped over you. I actually have your
21 name circled. I'm not sure why I skipped over it,
22 but okay.

23 BY MR. GORE:

24 Q. President Huston, we have never met

1 before, correct?

2 A. No, sir, we have not.

3 Q. I take pleasure in meeting you even
4 in the current circumstances.

5 A. Yes, sir.

6 Q. I represent the Republican Committee
7 Intervenors in this case, and I have a few
8 questions for you.

9 First to follow up on Mr. Shapiro's
10 question, your wife also did not contract COVID
11 from voting in person in June, correct?

12 A. Not that we know of.

13 Q. We are happy to hear that as well.

14 A. Yes.

15 Q. So, today you are not offering any
16 prediction as to whether polling places will be
17 closed, consolidated, or open for the general
18 election; is that correct?

19 A. I don't know how that will transpire,
20 no, sir.

21 Q. You don't know whether St. Bart's
22 will be open as a polling place on November 3?

23 A. Not to this date, no, sir.

24 Q. But you are planning to vote by mail

1 is what I think you said; is that right?

2 A. Yes, sir, that is my intention.

3 Q. So, you won't be standing in line to
4 vote; is that right?

5 A. No, sir, not if I vote by mail.

6 Q. And you won't be travelling to the
7 convention center?

8 A. Not if I am voting by mail.

9 Q. And you won't be exposing yourself to
10 other people while you stand in line; is that
11 correct?

12 A. No, sir, not if I vote by mail.

13 Q. Are you familiar with Pennsylvania's
14 permanent mail-in ballot request list?

15 A. No, sir, I am not.

16 Q. So, you don't know one way or another
17 whether voters can sign up on a list and
18 automatically receive an application for a mail-in
19 ballot; is that correct?

20 A. No, sir, I didn't know.

21 Q. And would that be something that
22 would be beneficial to your members?

23 A. If they could vote by mail and wanted
24 to, sure.

1 Q. And how about if you have members who
2 wanted to sign up on a list and have election
3 officials automatically send them absentee or
4 mail-in ballots, would that be beneficial?

5 A. If that is their decision.

6 Q. Is that something the NAACP is
7 currently educating its members about?

8 A. We are educating members about voting
9 period, sir, whether it be by mail, in person, or
10 whatever it takes to vote.

11 Q. Sure, and I appreciate that. I am
12 asking specifically about the current mail-in
13 ballot request list.

14 Are you aware whether the NAACP is
15 educating voters about that list in particular?

16 A. Not to my knowledge, no.

17 Q. And you have no basis to dispute that
18 that such a list exists; is that correct?

19 A. Yes, sir, because I am not familiar
20 with it. I don't know if it exists or not. No,
21 sir.

22 MR. GORE: President Huston, that is
23 all the questions that I have.

24 JUDGE BROBSON: Thank you, Mr. Gore.

1 Now, I think, Mr. Tulane, any
2 redirect?

3 MR. TULANE: Yes, very, very briefly.

4 REDIRECT EXAMINATION

5 BY MR. TULANE:

6 Q. Reverend Huston, good morning again.

7 A. Good morning. I have a few
8 questions. Do you recall Ms. Hangley asking you
9 about all these things that would happen if you got
10 any relief? Do you recall those questions?

11 A. Yes, sir, I do.

12 Q. Do you know one way or the other what
13 would happen if you got that relief?

14 A. No, sir, I don't. I don't.

15 Q. After hearing all of those questions,
16 do you still stand by the relief you are seeking in
17 this -- in this hearing?

18 A. One hundred percent, yes.

19 Q. And you had testified when we did our
20 first go-around that you believe that voters will
21 be disenfranchised without this relief, do you
22 recall that?

23 A. Yes, I do.

24 Q. Do you -- in your experience as the

1 president of the Pennsylvania NAACP State
2 Conference, do you think it's worth the state
3 spending money or the county spending money to
4 avoid voters getting disenfranchised?

5 A. Absolutely.

6 MR. TULANE: Your Honor, I have no
7 further questions.

8 JUDGE BROBSON: Mr. Huston, I don't
9 know whether you prefer Mr. Huston, Reverend
10 Huston, President Huston, Citizen Huston, but I
11 thank you for your service, and for all of those, I
12 thank you for your testimony.

13 Is there any counsel who believes
14 this witness should not be released at this time?

15 MS. HANGLEY: No, thank you.

16 THE WITNESS: Thank you.

17 MR. TULANE: May I have on behalf of
18 Reverend Huston -- I don't know if you will -- will
19 he be able to view the hearings after he's
20 released? I don't know what your preference is.

21 JUDGE BROBSON: My understanding is
22 that it's a live WebEx feed. He has probably given
23 it out to his friends and family, so he certainly
24 can view it. He is released, and he can look at

1 it. It is certainly an educational opportunity,
2 that is for sure.

3 MR. TULANE: Thank you, Your Honor.

4 THE WITNESS: Thank you.

5 JUDGE BROBSON: My intention,
6 Counsel, was continue through noon, if that is okay
7 with all of you.

8 Does anybody need a quick convenience
9 break at this point, or can we plow ahead?

10 (Break taken.)

11 JUDGE BROBSON: Ms. Chapman, would
12 you like to call your next witness?

13 - - -

14 MARC MEREDITH, having been duly
15 sworn, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MS. CHAPMAN:

18 Q. Please introduce yourself for the
19 record.

20 A. My name is Marc, M-A-R-C, Meredith,
21 M-E-R-E-D-I-T-H, Associate Professor of Political
22 Science, University of Pennsylvania.

23 Q. What are your responsibilities as an
24 associate professor?

1 A. I have a number of responsibilities,
2 which include doing my own research, supervising
3 Ph.D. students and undergraduates in their
4 research, and teaching classes and other service to
5 the university.

6 Q. And before I get to the
7 responsibilities individually, do you have any
8 particular focus within the field of political
9 science?

10 A. My focus is on American politics and
11 specifically American elections. Most of my
12 research applies to statistical analysis to better
13 understand why people vote and who they vote for,
14 if they choose to vote.

15 Q. So, you testified that you conduct
16 research and you teach. And I want to get to each
17 of those individually, starting with teaching.

18 What courses do you teach?

19 A. I teach a variety of different
20 courses on American politics and statistical
21 methods. I am currently teaching an undergraduate
22 course entitled Statistical Methods for Political
23 Science. In this class I teach people about
24 statistics and also how to use the computer program

1 MAR to engage in statistical computer programming.

2 I teach classes on the public policy
3 process, which is a course on how laws are made in
4 the United States. In the previous semester, I
5 taught a course on regression analysis for people
6 pursuing a Ph.D. in political science at the
7 University of Pennsylvania.

8 I teach a variety of other courses,
9 but those are ones I've taught recently.

10 Q. You also said that you conduct
11 research, right?

12 A. I do.

13 Q. What type of research do you conduct?

14 A. A lot of my research is focused on
15 election law and how it relates to whether people
16 participate in elections. A lot of this research
17 uses information contained in state voter
18 registration databases as a way of measuring who
19 ultimately votes and who is registered to vote.

20 One specific area of expertise of
21 mine is understanding how the different laws that
22 states have regarding criminal disenfranchisement,
23 how those affect the number of voters who
24 successfully cast ballots.

1 Q. Professor Meredith, have you had
2 peer-reviewed articles published before?

3 A. I have. I have roughly 20
4 peer-reviewed articles, including a number of
5 articles in what I consider to be the most
6 important journal for people who publish on
7 American political science topics, including the
8 American Political Science Review, the American
9 Journal of Political Science, and the Journal of
10 American Politics.

11 Q. And have the articles that you've
12 authored related to the subject of voting behavior?

13 A. Yes. I've never authored an article
14 on polling locations before, although I have
15 supervised an undergraduate thesis on the topic.
16 But the articles relate in similar ways to trying
17 to understand how the electoral context someone is
18 operating in, how that affects their ability to
19 successfully cast a ballot or not.

20 Q. Has your work been cited before?

21 A. Yes, one measure of citations that is
22 used is what is known as Google Scholar Citations.
23 This measures how many other articles in Google
24 Scholar has cited your work. The last time I

1 looked, I had almost 2,000 citations in Google
2 Scholar. I have also had my work discussed in
3 popular media outlets.

4 Some of my research has been
5 published on Vox.com and Slate.com. I have also
6 given many quotes over the years to leading
7 publications like the New York Times, Wall Street
8 Journal, the Washington Post about elections. And,
9 so, that is the type of -- the type of citation
10 that my work generates.

11 Q. Beyond that has your work otherwise
12 been recognized within the field of political
13 science?

14 A. Yes, one good marker for a professor
15 is that I was awarded tenure at the University of
16 Pennsylvania six years ago. I have had individual
17 articles recognized. I had an article recognized
18 as the best paper presented at the American
19 Political Science Association Annual Conference on
20 Public Policy in 2014 or 2015.

21 Q. Stepping back in time a little bit,
22 Professor Meredith, can you outline your
23 educational background for the Court?

24 A. I hold a number of degrees from both

1 Northeastern University and Stanford University. I
2 hold both a BA and an MA in economics from
3 Northeastern University. I also hold an MA in
4 applied math from Northwestern University. I hold
5 an MA in political science from Stanford University
6 and a Ph.D. in business administration from
7 Stanford University.

8 Q. Professor Meredith, have you
9 previously provided expert testimony in litigation?

10 A. I twice previously provided expert
11 testimony under oath, one in federal court in New
12 York in a case that was about how they excluded
13 certain registrants from their poll books. My
14 testimony in that case was cited as part of the
15 ultimate decision ruling that the New York practice
16 had violated the law.

17 I also recently offered testimony in
18 a case in federal court in Oklahoma about their
19 mail balloting processes.

20 Q. Were you found qualified to testify
21 as an expert witness in each of the cases that you
22 testified?

23 A. I was.

24 Q. Have you ever been found not

1 qualified to testify as an expert witness?

2 JUDGE BROBSON: Can you suspend for a
3 minute?

4 Ms. Chapman, I am having a hard time
5 hearing your questioning. Can you speak up or move
6 the mic closer to you?

7 MS. CHAPMAN: Of course. Has the
8 audio improved at all?

9 JUDGE BROBSON: Yes, thank you.

10 BY MS. CHAPMAN:

11 Q. Professor Meredith, I want to
12 transition to discussing this case in particular.

13 Is it correct that you have been
14 retained to offer expert opinions in this case?

15 A. Yes.

16 Q. Who retained you?

17 A. The plaintiffs and the plaintiff's
18 counsel.

19 Q. Are you being compensated for your
20 work?

21 A. Yes.

22 Q. At what amount are you being
23 compensated?

24 A. I am compensated at a rate of \$350

1 per hour.

2 Q. Is that compensation tied in any way
3 to the outcome of this case?

4 A. No.

5 Q. Without telling me what they are,
6 have you reached opinions in the case?

7 A. Yes.

8 Q. Do you hold those opinions to a
9 reasonable degree of professional certainty?

10 A. Yes.

11 MS. CHAPMAN: Your Honor, Petitioners
12 move to have Professor Meredith qualified as an
13 expert in political science and voter behavior.

14 JUDGE BROBSON: Petitioners are
15 moving to have Dr. Meredith qualified as an expert
16 in political science and voter behavior.

17 Is there anybody that has an
18 objection?

19 Hearing none -- is there any
20 objection? I want to make sure. We will proceed
21 with him as an expert.

22 Proceed with your examination.

23 MS. CHAPMAN: Thank you.

24 BY MS. CHAPMAN:

1 Q. What was your assignment in this
2 case?

3 A. My assignment was to offer a
4 conclusion about what effect the number of polling
5 locations and placement of polling locations could
6 have on turnout in the November general election.

7 Q. And we are going to discuss what you
8 did to answer that question in detail, but to jump
9 to the end, what were your conclusions for the work
10 that you did in this case?

11 A. I reached three primary conclusions
12 based on my work. The first conclusion is that the
13 movement of polling locations between elections if
14 voters have to travel additional distances between
15 their residence and their polling location and the
16 additional amount of time a voter spends at a
17 polling location before being able to cast a ballot
18 all represent an increase in the cost of in-person
19 voting.

20 My second conclusion is that when
21 voters face -- potential voters face an increase in
22 the cost of in-person voting, some of those
23 potential voters will substitute to using mail
24 ballots instead and other potential voters will

1 substitute a waiver in in-person voting and abstain
2 from voting all together.

3 My third conclusion is that increases
4 in the cost of in-person voting, particularly harm
5 non-white potential voters.

6 Q. Professor Meredith, when you
7 described your conclusions in this case you
8 described the cost of voting, what are you talking
9 about when you talk about the cost of voting?

10 A. The cost of voting is a very bold and
11 extremely well cited and empirically valued
12 framework for understanding why some potential
13 voters choose to vote while others choose to
14 abstain. The basic idea of the cost of voting -- I
15 actually like to refer to it as the calculus of
16 voting. The basic framework of a calculus of
17 voting analysis is that potential voters weigh the
18 benefits they receive from casting a ballot against
19 the cost they incur doing so. And when the
20 benefits outweigh the cost, they will vote and when
21 the costs outweigh the benefits, they will abstain
22 from voting.

23 Q. So, is it fair to say that there is a
24 cost-benefit analysis relating to voting?

1 A. That is accurate.

2 Q. Can voting costs, as you've described
3 them, apply to both in-person and mail-in voting?

4 A. Yes. There are different costs
5 associated with in-person voting and mail voting as
6 well as some costs that apply to both. If we are
7 thinking about mail voting, for example, if you are
8 in a county that doesn't affix postage to a mail
9 return envelope and if you want to return that
10 ballot in the mail, you have to pay the \$0.55 or
11 whatever the cost happens to be on that ballot, so
12 affix the postage. That is an example of a
13 monetary cost of voting.

14 We tend to think usually the more
15 important cost of voting is not monetary but the
16 opportunity cost of time. So, in that example, if
17 you don't have stamps at your household, the cost
18 of voting includes having to go to the post office
19 or convenience store or wherever you go to get your
20 stamps, if you don't know where to get stamps, the
21 time researching to go do that. And what this
22 example illustrates is that the same ask does not
23 apply to the same cost to all potential voters.
24 What is a trivial cost to me, because I have stamps

1 sitting next to my desk that I can affix to a mail
2 ballot, for people who don't have those stamps may
3 be a significant barrier to them.

4 Q. So, you used the stamp example and
5 you said that one of the important costs when it
6 comes to cost of voting is the opportunity cost of
7 time. Can you identify other examples of voting
8 costs that bear on this opportunity cost question?

9 A. In the case of in-person voting, you
10 have to spend time getting from your residence or
11 wherever you are leaving from to get to your
12 polling place. You have to spend time to get
13 there. That is an example of time you are spending
14 that you could be doing something else. If you get
15 to your polling place and there is a line, the time
16 you are spending waiting in line to vote is an
17 opportunity cost because you could be spending time
18 doing other things. If you have to research where
19 your polling location is because either you've
20 never voted before or you note it has moved so you
21 need to go on your internet browser or however you
22 learn that information, that is another example of
23 an opportunity cost involved with the act of
24 voting.

1 Q. Professor Meredith, you mentioned
2 waiting time. Has waiting time in particular been
3 studied in the context to the cost of voting or the
4 calculus of voting analysis?

5 A. Yes. There are three recent studies
6 that investigate the concept of reneging. The idea
7 of reneging is that some people may show up to
8 their polling place intending to vote, get in line
9 to do so, but for whatever reason leave that line
10 before they -- before casting a ballot. The study
11 was focused specifically on California. It found
12 about 2 percent of people who got into line to vote
13 left without casting a ballot, I believe, during
14 the 2008 California primary election.

15 A much larger study was done across
16 many states including Pennsylvania in the 2016
17 election that found a similar pattern when you
18 stand to look at a larger set of places during a
19 presidential election. And then in addition to
20 reneging, having a bad experience at the polls
21 might not prevent you from voting this time because
22 you've already gotten there, you already invested
23 time to do that, but what this research found is
24 that having a bad experience at the polls in terms

1 of longer lines made it less likely that you will
2 show up in a future way.

3 Q. Professor Meredith, have any
4 recommendations been made to account for the impact
5 of wait time in the calculus of voting analysis?

6 A. After the 2012 presidential election,
7 the issue of wait times became quite salient after
8 a number of voters waited a long time to vote. A
9 presidential commission came together and made a
10 recommendation that there would be no more than a
11 30-minute wait time for someone to cast a ballot.

12 Q. Professor Meredith, do you understand
13 that changing the locations of polling places
14 impact the cost of voting analysis?

15 A. Yes.

16 Q. How does it do so?

17 A. The phrase that political scientists
18 have used to describe it, is it adds search costs.
19 The idea of a search cost is you have to spend time
20 learning where your new polling location is. For
21 some this may -- you may realize where your -- your
22 polling location has changed before election day,
23 so this is something you do before election day.
24 For others, you may not know that the polling

1 location has changed until you've shown up to vote
2 where you usually vote and find your location is
3 not there and then there is a search cost on
4 election day itself to find out that you need to
5 find your polling location.

6 Q. And I want to talk more about the
7 search cost, and you gave the example of you show
8 up on election day and you found out it is not
9 there. Is that a situation where the voter would
10 have had no notice of location changing?

11 A. It is possible. It is possible the
12 voter was sent notice, and they didn't see it. It
13 is possible they never got the notice. But it's a
14 case where the voter didn't understand for whatever
15 reason where they were supposed to be voting and
16 then there is different actions that can be
17 undertaken. My understanding is that in
18 Pennsylvania, usually there is notice put on the
19 polling location informing them where a new polling
20 location is address-wise, but you may not know how
21 to get to that address. And, so, all of those --
22 all of those can be explanations for why you may
23 run into problems with the search and find it to be
24 a barrier.

1 Q. When it comes to costs associated
2 with changing locations of polling places, are
3 there any additional costs beyond the search costs
4 that you've described?

5 A. When you have polling location
6 consolidation like happened in the June primary,
7 what is going to happen is that more potential
8 voters than not will end up being moved to a
9 polling location that is further away from their
10 residence. That imposes a travel cost in that, on
11 average, when people have to travel a further
12 distance, it is going to take them longer to do
13 that.

14 Now, the exact cost depends on the
15 specific voter and their situation, if they are
16 walking, if they are driving. If they are driving,
17 what parking looks like. So, when we say travel
18 cost, we are saying the totality of the amount of
19 time, really, that people have to spend getting
20 from where they are -- wherever they are travelling
21 from, their polling location from to where they are
22 travelling to.

23 Q. So, you described and identified some
24 examples of in-person voting costs. Can you

1 explain what happens when in-person voting costs
2 increase?

3 A. Some people who understand in time
4 that their polling location has moved and has
5 either added a search cost or an additional travel
6 cost will select into mail balloting instead. Now,
7 in Pennsylvania, you have -- you request that mail
8 ballot, I believe seven days or more before the
9 election. So, you have to learn about the
10 additional cost in that timeframe. But those who
11 do, some of them will decide this makes in-person
12 voting too costly will then select into a mail
13 ballot. For other voters who don't learn in time,
14 maybe they show up to their polling location --
15 that they think is their polling location -- to
16 only find out that it has moved or perhaps show up
17 to a polling location with a long line, mail-in is
18 no longer an option for those people, so their
19 objection is do I pay this cost or do I abstain
20 from voting altogether.

21 Q. So, you identified two responses to
22 increased cost, shifting to vote by mail-in if that
23 is an option and abstention from voting. I want to
24 start with voting by mail.

1 In the context of the 2020 elections
2 have any particular mail-in costs increased mail-in
3 voting?

4 A. Yes, not only in Pennsylvania but
5 countrywide we have seen a much higher use of
6 mail-in ballots beginning in mid-March at the onset
7 of the COVID-19 pandemic. For some individuals,
8 particularly those who feel like they face higher
9 risks from in-person interactions that don't meet
10 their preferred form of social distancing, this
11 makes in-person voting perhaps prohibitively
12 costly.

13 What we've seen in data in both
14 Pennsylvania and nationwide is a pretty erratic
15 increase use in mail-in ballots. What helps us be
16 pretty certain that it's a function of COVID-19 is
17 that in the presidential elections that happened up
18 through Super Tuesday, there wasn't much change in
19 mail-in ballots and then COVID-19 goes on the radar
20 and then mail-in voting goes up tremendously.

21 Q. Professor Meredith, you said what
22 you've seen in the data. Can you explain a little
23 bit more about what you meant when it comes to the
24 increase in mail-in voting?

1 A. In my declaration, I include a figure
2 that Charles Stewart, a political scientist at MIT,
3 put on the internet just highlighting the change in
4 the use of mail ballots between the 2016 primaries
5 and the 2020 primaries and really identifying
6 mid-March as the point where the big shift happened
7 where we observed a lot more mail balloting
8 happening. Pennsylvania is included in the figure,
9 but lots of other states, too.

10 Q. So, Pennsylvania wasn't unique when
11 it came to the increase in mail-in voting that you
12 saw, correct?

13 A. It wasn't unique. And the fact that
14 it had a law change probably accentuated the
15 increase because not all states had major policy
16 shifts in the availability of mail ballots, but
17 this happened in states that had policy shifts that
18 didn't. All states experienced increases.

19 JUDGE BROBSON: Ms. Chapman, can you
20 suspend for a moment?

21 Is Mr. Wallen still with us? His
22 camera goes out of focus every now and then.

23 (Discussion held off the record.)

24 JUDGE BROBSON: At this point in

1 time, we will take a break for lunch and recess for
2 45 minutes.

3 COURT CRIER: The Commonwealth Court
4 is now in recess.

5 (Break taken.)

6 COURT CRIER: The Commonwealth Court
7 is now in session.

8 JUDGE BROBSON: You may continue your
9 examination.

10 BY MS. CHAPMAN:

11 Q. Professor Meredith, when we left off
12 before the break, we were talking in increase in
13 mail-in voting --

14 JUDGE BROBSON: Can you suspend for a
15 second? Again, your voice is dropping off toward
16 the end of your sentences. If you could keep one
17 solid tone the entire way, that would be very
18 helpful. Thank you.

19 BY MS. CHAPMAN:

20 Q. You testified that increases in
21 in-person voting costs could cause two things: A
22 shift in mail-in voting or abstention, correct?

23 A. That is correct.

24 Q. If there is an alternative in

1 in-person voting available like voting by mail, why
2 doesn't that solve the issue of increased in-person
3 voting costs?

4 A. It is good to have an option like
5 mail balloting. It will mitigate some of the
6 increased costs by allowing people who learn about
7 the policy or the increase in costs in time to
8 request a mail ballot and feel comfortable and able
9 to request and cast a mail ballot to do so. But
10 that is not going to be an option that everyone is
11 going to take advantage of. Some people won't
12 learn of the increase of in-person voting cost
13 until it is too late to request a mail-in ballot.
14 Some people won't understand the process and, in
15 fact, may face search costs for how to acquire
16 mail-in ballots. Other people may prefer not to
17 request mail-in ballots because they don't see the
18 benefits of voting being as high when voting by
19 mail as when voting in person.

20 Q. And are there specific voting groups
21 where you see those concerns play out more than
22 others?

23 A. Based on my review of the literature
24 before doing my own empirical analysis, I wanted to

1 investigate the differences between white
2 registrants and non-white registrants and how they
3 responded to a change in in-person voting costs.
4 The literature shows that non-white voters,
5 especially African-American voters, tend to think
6 that -- have less faith in the counting process
7 behind ballots generally.

8 It is also the case that people tend
9 to trust the vote method they have used before and
10 it is the case that African-Americans are less
11 likely to have cast mail ballots than other groups
12 of voters. And there is also the case that
13 research has shown in recent elections that
14 African-Americans who do cast mail ballots are more
15 likely to have those ballots not count because of
16 an issue with the mail ballots.

17 And to the extent that people are
18 aware of that and that information is getting out
19 there, that may push people who are aware of that
20 to prefer in-person voting as opposed to mail
21 balloting.

22 Q. And you had identified voter
23 abstention as being the other outcome of increased
24 in-person voting costs, and I know you've touched

1 on that briefly. But can you explain what voter
2 abstention is?

3 A. Voter abstention refers to a
4 registrant who is eligible to vote who does not
5 cast a vote in an election -- and probably should
6 not say does not cast a vote because when we are
7 thinking about abstention, there is this gray area
8 about people who cast a vote that ultimately does
9 not count. So, really, we should be thinking about
10 people who are casting ballots that count because
11 that is ultimately what determines who wins
12 elections.

13 Abstention can take a number of
14 different forms. It could be someone who never
15 attempts to vote in an election. It could be
16 someone who showed up to a polling place and
17 determines the line is too long and so does not
18 cast a ballot. Depending on how you are defining
19 abstention, it could be someone who attempts to
20 cast a ballot but does so in a way that does not
21 allows it to count. These are all different forms
22 of voter abstention.

23 Q. I want to focus on Pennsylvania in
24 particular. Do you understand that Pennsylvania

1 consolidated polling places for the June 2020
2 primary election?

3 A. Yes, I understand there were fewer
4 polling places in the June 2020 election than in
5 previous elections.

6 Q. Did you analyze whether the
7 consolidation of polling places for the
8 Pennsylvania primary reduced voter turnout?

9 A. I did.

10 Q. And before we discuss what you found,
11 I want to briefly go through the process that you
12 used to get there. What data did you rely on in
13 conducting your analysis?

14 A. I relied on three primary sources of
15 data. The first source of data was a copy of the
16 Pennsylvania voter registration database that I had
17 downloaded right after the voter registration
18 deadline before the primary. I also relied on a
19 voter registration database that I downloaded after
20 primary, about a month after.

21 The registration database from before
22 the primary defined the people who were eligible to
23 vote in Pennsylvania. The database after primary
24 was where I ascertained whether someone

1 successfully cast a ballot at least as marked in
2 the voter registration database.

3 Finally, I obtained copies from the
4 web of all of the polling locations from Allegheny
5 County and Philadelphia County from the general
6 election from 2018 and from the primary election in
7 2020. I merged with the data in the voter
8 registration database to understand both whether a
9 registrant who was at a given registration address
10 would be voting at a different polling location in
11 the 2020 primary than they would have been assigned
12 to in 2018. And I also went through a process
13 known as geocoding where I processed both the
14 addresses of the registrants and the addresses of
15 the polling locations that gave me a longitude and
16 latitude of the polling locations and the
17 registrants so I could match those two together to
18 calculate out a distance between a polling location
19 that a registrant would have had to travel from
20 their residence in 2018 and 2020.

21 Q. So, Professor Meredith, you were able
22 to identify whether a voter's polling place
23 changed; is that correct?

24 A. Yes.

1 Q. You were also able to identify how
2 far the new polling place had moved; is that
3 correct?

4 A. That is correct.

5 Q. You've started describing this, but
6 can you describe the process you used to conduct
7 your analysis after you had gathered the data?

8 A. After I had gathered the data and
9 ascertained whether a registrant experienced a
10 polling place change, I then used the data from the
11 post-election statewide voter file to calculate
12 turnout rates among people based on -- among
13 registrants in Allegheny and Philadelphia Counties
14 base on whether the polling place remained the same
15 and whether it moved -- and if it did move, how
16 much further away that one location was from their
17 residence.

18 Q. And you testified that you studied
19 Philadelphia and Allegheny Counties, right?

20 A. That is correct.

21 Q. Why did you choose those counties?

22 A. Based on my review of existing
23 literature and political science, it is well
24 established in that literature that both polling

1 place changes and distance to polling locations
2 matter for whether someone votes generally. What I
3 was particularly interested in was something that
4 is not as well established in the literature, which
5 is how different those effects are for registrants
6 of color versus white registrants.

7 To do that analysis, I need some
8 things present in my data. First, I need there to
9 be a sizable number of polling location changes to
10 give me sufficient sample size. And Allegheny and
11 Philadelphia Counties were two of the counties that
12 had some of the most polling location changes
13 between the 2018 general election and the 2020
14 primary. In order to do an analysis of white
15 registrants versus non-white registrants, I need
16 there to be diversity of race and ethnic background
17 registrants are within the counties and both
18 Philadelphia and Allegheny Counties are both
19 diverse counties that meet that criteria. And
20 third, Allegheny County and Philadelphia County are
21 the two largest counties in Pennsylvania. I think
22 something between 20 and 25 percent of the
23 population of the state is located in those
24 counties, so what is happening there is also

1 electorally consequential because of the number of
2 people affected by what those counties are doing.

3 Q. Professor Meredith, what conclusions
4 did you draw from your analysis of the
5 consolidation in Philadelphia and Allegheny
6 Counties?

7 A. The first conclusion I draw is that
8 there were differences between the two counties and
9 who were the most affected groups based on race and
10 ethnicity. In both counties a majority of people
11 experienced a polling location change. In
12 Allegheny County, registrants of color were
13 slightly more likely to experience a change. In
14 Philadelphia County, white registrants were
15 slightly more likely to experience a change.

16 The second conclusion I reach is that
17 voters or registrants who experience a polling
18 location change were less likely to vote in the
19 primary election than registrants whose polling
20 location was the same.

21 And the third conclusion I reached is
22 that the effect of having a changed polling
23 location was larger for registrants of color than
24 for white registrants.

1 Q. And in the context of analyzing
2 whether a voter had a polling place location
3 change, did you examine whether voters were
4 travelling further to their new polling place?

5 A. Yes. When doing my analysis, I broke
6 up the distance -- how that distance between their
7 old and new polling locations varied. There were
8 some registrants who experienced a polling location
9 change but actually were now residing closer to
10 their polling location than they were before.
11 There were some who had negligible change in
12 distance. There were some who experienced a
13 polling location change of between .1 and .5 miles,
14 and then there were some registrants that
15 experienced a change of greater than .5 miles.

16 So, for my analysis, I differentiated
17 between those four groups.

18 Q. And I want to talk about that polling
19 place location change, that issue, and I want to
20 start with Allegheny County in particular. Did you
21 see increased travel time in June 2020 as compared
22 to November 2018?

23 A. Yes. On average a voter had to
24 travel further to their polling location in the

1 primary than they did in the 2018 general. In my
2 declaration I have the exact numbers, but there was
3 a sizable number on -- I want to say maybe almost a
4 majority of not a majority who experienced a change
5 of .5 miles or more.

6 Q. Did you see any differences across
7 racial groups in whether travel time increased?

8 A. In Allegheny County it was slightly
9 more likely that a registrant of color would
10 experience a large distance change of a .5 measure
11 than a white registrant.

12 Q. Did you see similar effects in
13 Philadelphia County?

14 A. No, I saw the opposite pattern in
15 Philadelphia County. In Philadelphia County, there
16 were fewer registrants who experienced a large
17 change in their polling location distance between
18 the two elections; and white registrants were
19 slightly more likely to experience a large change
20 than registrants of color.

21 Q. When you say large change, can you
22 explain what you mean?

23 A. When I am saying large change here, I
24 am using .5 miles to be my threshold for whether a

1 polling location change was large or not. And I am
2 calibrating that roughly based on how long it would
3 take somebody who was walking to their polling
4 place to walk an additional .5 miles. That is
5 going to depend on the speed at which someone is
6 walking. I believe I was using how long it would
7 take for someone who is walking three miles per
8 hour to walk a half mile, whether that would be ten
9 minutes or not as a rough benchmark of how I was
10 calibrating that. That is what I am thinking about
11 what a large might be, what might be an additional
12 ten minutes. Importantly, that is ten minutes
13 perhaps on both sides because you both have to get
14 to the polling location and then get home.

15 Q. Professor Meredith, in your analysis
16 of Pennsylvania's June 2020 primary, did you reach
17 any conclusions regarding whether certain racial
18 groups were more or less likely to vote at all if
19 their polling place changed?

20 A. The way to think about this is you
21 want to be comparing within the racial group what
22 is the difference in the turnout rate of that
23 racial group when their polling location was the
24 same versus if it changed. So, I believe it's the

1 case in both counties just overall that white
2 registrants were more likely to vote than
3 registrants of color independent of change in
4 polling locations.

5 So, what is key is the difference in
6 the turnout rate within the racial group based on
7 whether they experienced a polling location change
8 or not. In both counties there is evidence that
9 minority registrants were less likely to vote when
10 they experienced a polling location change as
11 opposed to white registrants.

12 Q. Professor Meredith, did you prepare
13 figures that reflect those findings?

14 A. I did.

15 Q. I want to start with Allegheny
16 County. And Professor Meredith, I would like to
17 show you a document that has been previously marked
18 as Petitioners Exhibit 86E.

19 MS. CHAPMAN: Can we please display
20 Petitioners 86E, that is on Page 11 of Petitioner's
21 86 file?

22 MR. BALDWIN: Which page did you want
23 of this?

24 MS. CHAPMAN: 11.

1 BY MS. MEREDITH:

2 Q. Professor Meredith, did you prepare
3 the chart in Petitioner's Exhibit 86E?

4 A. Yes.

5 Q. What does the chart in Exhibit 86E
6 show?

7 A. The chart is showing the turnout rate
8 for five different groups of registrants of color
9 in Allegheny County. The five groups are those in
10 the furthest to my left in the same location, which
11 are the registrants which were assigned to the same
12 polling location in the 2020 primary and 2018
13 general election.

14 How you can read these numbers is
15 that there was a total turnout rate within that
16 group of 29.7 percent, meaning 29.7 percent of
17 registrants of color in Allegheny County voted in
18 the 2020 primary if they were at the same polling
19 location between those two locations. Within that
20 part of the graph, I separate out those registrants
21 who voted by mail. So, 17.2 percent of those
22 registrants voted by mail and 12.5 of those
23 registrants voted in person.

24 Then in the rest of this chart, we

1 are going to compare the turnout rate of that group
2 to other registrants of color in Allegheny County
3 who experienced a location change. We are going to
4 break it down by whether their new location was
5 .1 miles or closer, whether the new polling
6 location had a minimal change in distance, whether
7 it was between .5 or .1 miles closer -- that was
8 confusing. I will restate.

9 If it was between .1 miles or .5
10 miles from the residence or in the final group, the
11 much farther, whether they had to travel .5 miles
12 more than in 2018 to get to their polling location.

13 What you see in the graph is relative
14 to the group who experienced no polling location
15 change. Registrants of color in Allegheny County
16 who experienced a polling location change were less
17 likely to vote in all four of these groups. The
18 difference is largely when you look at the black
19 bars reflecting the difference in the rates of
20 turnout in person and when your polling location
21 changed, especially the last group when it was much
22 further, you were less likely to vote in person.

23 Q. Professor Meredith, does Exhibit 86E
24 reflect the data sources that you identified

1 earlier in your testimony?

2 A. Yes.

3 MS. CHAPMAN: Your Honor, I'd like to
4 move Petitioner's Exhibit 86E into evidence.

5 JUDGE BROBSON: I only have 186.

6 What is 86E?

7 MS. CHAPMAN: Your Honor, within the
8 86 file, there are individual slip sheets. For the
9 Court's convenience at the end of today, we can
10 break those up into individual files. 86E is
11 reflected on Page 11 of 86.

12 JUDGE BROBSON: But you are only
13 moving Page 11 of 86 in?

14 MS. CHAPMAN: That is correct, Your
15 Honor.

16 JUDGE BROBSON: Any objections? I
17 can't see all the counsel, but I am not hearing
18 anybody object, so 86E will be admitted.

19 (Exhibit 86E was previously marked
20 and admitted into evidence.)

21 MS. CHAPMAN: Thank you, Your Honor.

22 BY MS. CHAPMAN:

23 Q. Professor Meredith, did you do a
24 similar analysis for Allegheny County?

1 A. I did.

2 Q. Professor Meredith, I will show you a
3 document that has been previously marked as
4 Petitioner's Exhibit 86F, which is on Page 13 of
5 the 86 file. We will be going through a bunch of
6 these as we go through the testimony.

7 Professor Meredith, did you prepare
8 the chart reflected in Petitioner's Exhibit 86F?

9 A. I did.

10 Q. What does Exhibit 86F show?

A. It is the exact same graph that we just walked through except for white registrants in Allegheny County. So, if we look at what is to my left and we look at the same location what we observed was that when white registrants in Allegheny County who were at the same polling location in these two different elections, about 37.6 percent of them voted. One additional thing that is useful and important for my conclusions to note is that if you look at the percentage of people who are voting by mail who are at their same location, that rate is higher based on this chart and the previous one among white registrants in Allegheny County as opposed to registrants of

1 color.

2 Much like what we saw in the previous
3 figure we discussed it is the case when we sum
4 these two numbers together that the turnout rate is
5 the highest among people -- among white registrants
6 in Allegheny County who were voting at the same
7 polling location but the difference is not as
8 large; and one reason why as you go across this
9 graph is you see that fewer registrants were voting
10 in person if they experienced a polling location
11 change, but that is more compensated by increased
12 use of mail balloting of registrants who are
13 experiencing a polling location change.

14 Q. And we've been discussing your
15 analysis of Allegheny County specifically. Did you
16 conduct a similar analysis in Philadelphia County?

17 A. I did.

18 Q. And were your findings consistent
19 with those from Allegheny County?

20 A. They were broadly consistent. I
21 think there are two slight differences. The first
22 difference is that there is more evidence in
23 Philadelphia County of decreased turnout when
24 people experience one of these larger changes in

1 their polling location distances. The second
2 difference between Allegheny County and
3 Philadelphia County is that there isn't as clear
4 evidence among white registrants of a decrease in
5 turnout when people experience a polling location
6 change.

7 I said two. I should say three. As
8 opposed to Allegheny County where both groups --
9 both white registrants and non-white registrants
10 were more likely to vote by mail than in person, in
11 Philadelphia County white registrants were more
12 likely to vote by mail and registrants of color
13 were more likely to vote in person.

14 Q. Did you prepare figures reflecting
15 that analysis as well?

16 A. I did.

17 MS. CHAPMAN: Can we please display
18 Petitioner's Exhibit 86H, which is Page 17 of the
19 Petitioner's Exhibit 86 file?

20 Thank you.

21 BY MS. CHAPMAN:

22 Q. Professor Meredith, you explained
23 this briefly, but what does the -- I should stop
24 there. Professor Meredith, did you prepare the

1 chart reflected in Exhibit 86H?

2 A. I did.

3 Q. I know you discussed this briefly but
4 what does the chart in 86H show?

5 A. The chart you are seeing now reflects
6 that residents of color in Philadelphia County were
7 most likely to vote in the primary election when
8 they did not experience a polling location change
9 if you add the two numbers together. The one on my
10 further left showing the same location, what this
11 shows is that registrants of color in Philadelphia
12 County who did not experience a polling location
13 change, 32.7 percent of those registrants voted.
14 And when you compare the turnout rate in that group
15 to each of those other groups, that is the highest
16 turnout rate that you see. All of those groups
17 that experience a polling location change voted at
18 a lower rate.

19 MS. CHAPMAN: Your Honor, I will
20 pause there. Rather than moving Professor
21 Meredith's figures in individually, it may be more
22 efficient for us to move his declaration, which is
23 Exhibit 33 on Petitioner's exhibit list into
24 evidence. So, I'd like to do that now.

1 JUDGE BROBSON: You want to move the
2 entire Exhibit 33 into evidence right now?

3 MS. CHAPMAN: Yes, Your Honor, which
4 includes the figures that we are currently
5 reviewing with Professor Meredith.

6 MR. WIYGUL: Yes, Your Honor. This
7 is Robert Wiygul for the Respondents. I object to
8 the admission of Professor Meredith's entire
9 declaration on hearsay grounds, and I believe it is
10 also one of the provisions in the set of protocols
11 that the parties agreed to that the declarations
12 would not be fully in evidence.

13 JUDGE BROBSON: I do remember that it
14 being the protocols that you would not move the
15 declarations in.

16 Do you have a reason to violate the
17 protocols at this point?

18 MS. CHAPMAN: No, Your Honor. I was
19 hoping it would be more efficient. I completely
20 understand and will proceed on a figure-by-figure
21 basis.

22 JUDGE BROBSON: I hope we can get
23 more efficient with Professor Meredith's testimony,
24 too. Am I to understand your case that you intend

1 to produce evidence that the same polling
2 consolidations that happened in the primary is
3 going to happen in the general or are likely to
4 happen in the general? Am I going to hear evidence
5 about that at some point?

6 MS. CHAPMAN: Not from Professor
7 Meredith, Your Honor.

8 JUDGE BROBSON: But you are going to
9 put a witness on that is going to testify that it
10 is likely that polling consolidation that Professor
11 Meredith is concerned about is going to happen in
12 the general election?

13 MS. CHAPMAN: Petitioners are going
14 to call witnesses and exhibits who are on
15 Respondent's exhibit list to support that, yes,
16 Your Honor.

17 JUDGE BROBSON: Including witnesses
18 that are on Petitioner's witness list?

19 MS. CHAPMAN: Respondent's witness
20 list -- I am sorry, Your Honor -- to call as
21 witnesses.

22 But I understand, and we will move
23 more efficiently through Professor Meredith's
24 testimony.

1 JUDGE BROBSON: Ms. Chapman, I am
2 just going to say we are spending a lot of time on
3 this poll consolidation, what happened in the
4 primary. And we are here to talk about the general
5 election. I can't undo what already happened in
6 the primary. What I would hope to get to as soon
7 as you possibly can, instead of having testimony
8 sort of in the abstract, maybe actually present
9 your testimony on the facts first in terms of
10 you're being able to prove such that the Court
11 should step in from an affirmative injunctive
12 perspective that there is a strong likelihood, if
13 not certainty, that the polling consolidations is
14 going to happen in the general.

15 MS. CHAPMAN: I understand, Your
16 Honor. Mr. Meredith is not going to speak to that.
17 We will move quickly through the rest of his
18 testimony about the impact of consolidation.

19 JUDGE BROBSON: Assuming that
20 consolidation is going to happen, it is relevant.

21 MS. CHAPMAN: Yes.

22 JUDGE BROBSON: Let's try to get to
23 that point. So, do you want to move separately
24 Exhibits 86F and H in?

1 MS. CHAPMAN: Yes, Your Honor.

2 JUDGE BROBSON: Any objection to
3 Exhibit 86F and 86H?

4 No objection. The exhibits are
5 admitted.

6 (Exhibits 86F and 86H were
7 previously marked and admitted into evidence.)

8 You can proceed.

9 MS. CHAPMAN: Thank you, Your Honor.
10 BY MS. CHAPMAN:

11 Q. Professor Meredith, did you conduct
12 an analysis of whether -- did you conduct
13 additional analysis to determine whether
14 registrants of color were disproportionately harmed
15 when the cost of voting increased?

16 A. Yes, I used these figures largely for
17 illustrative purposes but conducted a regression
18 analysis to do my formal statistical test of these
19 effects.

20 Q. And did you also examine Philadelphia
21 and Allegheny Counties?

22 A. Yes, ma'am.

23 Q. I want to start with Philadelphia. I
24 am going to show you a document that has been

1 previously marked as Petitioner's Exhibit 86I.

2 MS. CHAPMAN: Can we please display
3 that for Mr. Meredith? I apologize it's on Page 21
4 of the 86 file. Perfect. Thank you.

5 BY MS. CHAPMAN:

6 Q. Professor Meredith, did you prepare
7 the chart reflected in 86J.

8 A. I did.

9 Q. And what is Exhibit 86J?

10 A. This exhibit shows the effect of
11 polling -- experiencing a polling location change
12 relative to not experiencing a change. So, the
13 control group to all these graphs are individuals
14 in Philadelphia County who did not experience a
15 polling location change and showing how the effect
16 of experiencing this type of polling location
17 change affects turnout depending on your
18 probability of being a white registrant. And while
19 doing this analysis, we are holding constant the
20 registrant's turnout in the 2016 primary, the 2016
21 general, the 2018 general, and the 2019 general
22 elections.

23 Q. What conclusions can you draw from
24 Petitioner's Exhibit 86J?

1 A. The dotted line -- the dotted
2 horizontal line is showing the zero line which
3 would be if someone who is experiencing that type
4 of polling location change and that predicted
5 probability of being white is equally likely to
6 vote as someone who didn't experience a polling
7 location change.

8 In all cases, taking one step back,
9 the shaded area is showing a 95 percent confidence
10 interval. In all cases, the 95 percent confidence
11 interval is below the zero line for people who are
12 predicted to have a zero percent probability of
13 being white, evidenced that experiencing that type
14 of polling location change is causing them to vote
15 less.

16 What you see there is a particularly
17 big decrease in the turnout for a minority
18 registrant if they experience a polling location
19 change of .5 miles or more. The evidence is a
20 little more mixed, as I earlier mentioned, among
21 those that have a probability of being white of
22 one. In two of the groups there is some evidence
23 of a reduction in turnout in one group. You can't
24 reject the confidence interval. In one group the

1 confidence interval actually goes above the zero
2 line for those who experienced a small increase in
3 polling location change and have a high
4 probability -- predictive probability of being
5 white.

6 JUDGE BROBSON: Can you suspend for a
7 minute?

8 I am a fact finder in this
9 proceeding, so I need to understand your testimony.
10 You've been testifying up to this point about
11 non-white voters versus white voters, and now you
12 are talking about someone who is predictedly
13 possibly white. What data did you use to determine
14 a voter's race?

15 THE WITNESS: I used a technique that
16 has recently been published in a political
17 methodology journal for estimating predicted
18 probability that registrants are of different
19 racial and ethnic groups.

20 What is true is that Pennsylvania
21 voter registration database does not contain
22 information directly on someone's race or
23 ethnicity. My analysis uses a method that has been
24 through the peer-review process and applied in

multiple peer-reviewed journal articles in political science to combine information on the census group the registrant lives in as well as their last name. It runs an algorithm to predict the probability that a registrant that resides in that census group with that last name is white, is Asian, is Hispanic, or is other, meaning they don't fit into those four groups.

9 So, what is happening in that graph
10 is I am taking that probability, the probability
11 that the voter is white, and infusing that as one
12 of my explanatory variables in my regression
13 analysis.

JUDGE BROBSON: So, in all the charts
that you have admitted in terms of race and the
voting in person and the changing of the polling
places, all of that is based on this algorithm
based on census block data and last name?

19 THE WITNESS: That is correct.

20 JUDGE BROBSON: So, every one of your
21 charts that you have put in is predicted
22 African-American voter, predicted non-white vote,
23 everything is based on this algorithm?

24 THE WITNESS: That is correct, and

1 the difference in this chart and charts you were
2 seeing before is in the charts -- the first chart
3 you were shown we were doing race classification,
4 meaning we were taking whether you were -- had a
5 higher than a .5 probability of being white; those
6 individuals were classified as white registrants.
7 If you had a less than .5 probability of being
8 white, you were classified as being a non-white
9 registrant.

10 In this chart we are using the
11 measure continuously, so it's not just classifying
12 someone into one group or the other, but using the
13 information contained in the probability to assign
14 the fact that someone with a .05 probability of
15 being white, 5 percent of the time they will be
16 white and 95 percent of the time they will not.

17 JUDGE BROBSON: Okay. Thank you for
18 that explanation.

19 Ms. Chapman, you can proceed.

20 MS. CHAPMAN: Thank you, Your Honor.

21 BY MS. CHAPMAN:

22 Q. Professor Meredith, I want to
23 specifically focus on the final column that is
24 reflected in Exhibit 86G, which is the .5 miles or

1 further. Do you see that?

2 A. I do.

3 JUDGE BROBSON: What exhibit are we
4 on, 86G?

5 MS. CHAPMAN: Yes, Your Honor.

6 JUDGE BROBSON: G as in Grover?

7 MS. CHAPMAN: Yes, Your Honor.

8 JUDGE BROBSON: That is Page 21? I
9 had written down I.

10 MS. CHAPMAN: I apologize. I
11 misspoke. It is 86J.

12 JUDGE BROBSON: Okay, 86J. Thank
13 you.

14 BY MS. CHAPMAN:

15 Q. I want to speak about the .5. Is
16 that consistent with the large change in location
17 that you were referring to earlier?

18 A. That is correct.

19 Q. And why is that significant here?

20 A. I think it's significant because both
21 for white registrants and more so for registrants
22 of color, it's a substantial decrease in the
23 probability of turnout.

24 Q. And Professor Meredith, I'd like to

1 show you Petitioner's Exhibit 86G, which is Page 15
2 of the Petitioner's file. Did you conduct a
3 similar analysis in Allegheny County?

4 A. I did.

5 Q. Were your findings consistent with
6 those in Philadelphia?

7 A. Yes. In all four groups in this case
8 of registrants, both white registrants and
9 registrants of color, were less likely to vote when
10 they experienced a polling location change and the
11 magnitude of this effect was larger among
12 registrants of color than white registrants. I,
13 unfortunately, made a typo in this figure.
14 Everywhere it says .05 should be .1. I am using
15 the same scale as I used in the Philadelphia
16 figure. I mislabeled this.

17 MS. CHAPMAN: Thank you for the
18 clarification. Your Honor, I move Petitioner's
19 Exhibit 86G and 86J into evidence.

20 JUDGE BROBSON: Any objections?

21 MR. WALLEN: I guess I object on the
22 basis that we are moving an exhibit into evidence
23 that we know has an incorrect scale based on how
24 it's labeled. I don't have an objection if that is

1 fixed, but for that to be part of the factual
2 record with an incorrect scale, I would object to
3 that.

4 MS. CHAPMAN: Petitioners are happy
5 to correct that typo and submit that if that would
6 resolve your concern.

7 MR. WALLEN: It would, yes.

8 JUDGE BROBSON: With that caveat, 86G
9 and 86J will be admitted. Is it 86G that had the
10 typo?

11 MS. CHAPMAN: Yes, your honor.

12 JUDGE BROBSON: Before the close of
13 the business day, if you could have someone on your
14 team resubmit that for the report, we will admit
15 it.

16 MS. CHAPMAN: Thank you, Your Honor.

17 (Exhibit 86I was previously marked
18 for identification.)

19 (Exhibits 86J and 86G were
20 previously marked and admitted into evidence.)

21 BY MS. CHAPMAN:

22 Q. Professor Meredith, does the size of
23 the municipality in which the polling place
24 consolidation takes place influence the cost of

1 consolidation on voting?

2 A. What my analysis showed is that
3 larger municipalities are more likely to contain a
4 higher percentage of non-white registrants. And,
5 so, if you engage in certain forms of
6 consolidation, the form that Allegheny County used
7 in the primary where setting aside Pittsburgh, they
8 gave each municipality one polling location, then
9 that form of consolidation is going to leave
10 minority registrants with more registrants going to
11 the same polling location and more experiencing a
12 polling location change -- higher percentage of
13 minority registrants in Allegheny County
14 experiencing a change and having to travel farther
15 to their polling location and having more voters
16 have a single voting location.

17 Q. So, is the issue proportionality? Is
18 that fair to say?

19 A. The issue is that when you don't do
20 polling locations proportional to population, you
21 are going to have a smaller number of polling
22 locations per registrant in places that have more
23 minorities than in places that have fewer
24 minorities.

1 Q. Professor Meredith, we discussed the
2 impact of consolidation of polling places on voting
3 costs at length now. Does notice of polling place
4 change impact the cost of voting that the polling
5 place change has?

6 A. It certainly can. I mean if you want
7 to substitute to a mail ballot, you need to know
8 about a polling location change before the mail
9 ballot request deadline. And, so, those
10 individuals who are only learning about their
11 voting location change on election day, it is too
12 late to substitute to a different form. Notice
13 needs to be received in time for someone to act on
14 it if they want to substitute.

15 Q. Does providing additional notice of
16 polling place changes have any negative impacts on
17 the cost of voting?

18 A. None comes to mind.

19 MS. CHAPMAN: Your Honor, may I just
20 have a moment to check my notes?

21 JUDGE BROBSON: You may.

22 BY MS. CHAPMAN:

23 Q. Professor Meredith, what are the
24 implications of your findings for the November 2020

1 election?

2 A. These findings are consistent with
3 existing political science research show that every
4 time you move a polling location, you are reducing
5 the number of people who will successfully vote in
6 the election holding all else equal. If these
7 polling location changes result in people being
8 farther away from their polling location, meaning
9 their residence is further, that disenfranchising
10 will be larger. It will likely be larger if those
11 polling place changes are larger and are happening
12 to voters who normally don't use a motor vehicle to
13 get to their polling location, and they will be
14 larger if they aren't given notice and sufficient
15 time to substitute to other options like mail-in
16 ballots.

17 MS. CHAPMAN: Thank you, Professor
18 Meredith.

19 Your Honor, I pass the witness.

20 JUDGE BROBSON: Thank you.

21 Mr. Wiygul, did I pronounce your name
22 correctly?

23 MR. WIYGUL: You did. Perfectly,
24 Your Honor.

1 JUDGE BROBSON: That's amazing. I
2 can't believe I did that.

3 Your witness.

4 CROSS-EXAMINATION

5 BY MR. WIYGUL:

6 Q. Good afternoon, Professor Meredith.
7 My name is Robert Wiygul. I am one of the
8 attorneys representing the Respondents in these
9 proceedings, and that is the Secretary of the
10 Commonwealth and the Director of the Bureau of
11 Election Services and Notaries of the Pennsylvania
12 Department of State.

13 You mentioned a declaration that you
14 had submitted in this case. Do you remember that?

15 A. Yes.

16 Q. Is it true that the opinions and the
17 facts according to those opinions that you've
18 offered in your testimony this morning, those are
19 all set forth in your declaration?

20 A. I believe so.

21 Q. Now, I confess that I'm certainly
22 not -- I may be an amateur historian, but I am not
23 a professional political scientist, and I certainly
24 don't have your statistical acumen. And given the

1 amount of things that you testified to this
2 morning, I'd like to just make sure that I have a
3 grasp of the key propositions. One of them, as I
4 understood it, was that as the cost of voting
5 increase, the likelihood that voters will vote
6 decreases; is that fair?

7 A. Yes, that is fair.

8 Q. And the opposite is true as well,
9 right, if the cost decreased, then you'd expect
10 more voters to vote; is that true?

11 A. Yes.

12 Q. That is a very general proposition
13 that applies irrespective of the particular cost or
14 benefits that we have been talking about; is that
15 fair?

16 A. Assuming the costs and the benefits
17 you are referring to are the costs and benefits of
18 voting, yes.

19 Q. Okay. That is what I mean.

20 So, for instance, just to take an
21 example, if voters were provided with a stipend to
22 encourage them to vote, every time they voted, they
23 got some sort of stipend to offset whatever cost
24 they might have incurred, you would expect that to

1 increase the amount of voting; is that fair?

2 A. Probably.

3 Q. And you aware that some jurisdictions
4 actually legally require registered voters to vote,
5 correct?

6 A. Not in the United States, but
7 internationally, yes.

8 Q. Correct, internationally.

9 And if they don't vote, those voters
10 may face some sort of legal penalty or sanction,
11 correct?

12 A. Yes.

13 Q. And that would be another way of in
14 effect decreasing the cost of voting and increasing
15 voter turnout, correct?

16 A. It would be increasing the cost of
17 not voting and yes, you'd get higher turnout in
18 compulsory systems, yes.

19 Q. And even something like if the
20 weather is bad on the date of the election, that
21 would be a cost of voting that you would expect to
22 effect voter turnout on that election, correct?

23 A. Correct.

24 Q. Another proposition that I understood

1 you to opine is that racial and ethnic minorities
2 are more likely than white potential voters to hold
3 a strong preference for casting in-person ballots?

4 A. That is right.

5 Q. And then you also opine in the June
6 2020 primary election, the reduction of the number
7 of polling places in Philadelphia and Allegheny
8 Counties and the relocation of many polling places
9 to sites farther from voters' residences increase
10 the cost of in-person voting in these counties in
11 that election; is that right?

12 A. That's correct.

13 Q. And as a result, you opine that there
14 were lower rates of voting in those counties than
15 would otherwise have been the case?

16 A. In those precincts within those
17 counties, within precinct analysis. So,
18 comparing -- the rate of turnout in a precinct in
19 Allegheny County that experienced a polling
20 location change versus one that did not.

21 Q. And you opine that voters of color,
22 racial and ethnic minorities were
23 disproportionately affected by the increase in the
24 cost and in-person voting that you described in the

1 June primary election?

2 A. Yes. Yes.

3 Q. Now, your opinions regarding the 2020
4 primary election are not based on any data from any
5 counties other than Philadelphia and Allegheny; is
6 that correct?

7 A. That is correct.

8 Q. And I believe you testified on direct
9 examination that differences in the characteristics
10 of municipalities can matter in terms of your
11 calculus of voting analysis, correct?

12 A. I think the calculus of voting
13 applied across municipality but certainly the form
14 of a polling location change of .5 miles will
15 depend on characteristics of the specific voter,
16 which frankly depends on the municipality that they
17 live in, yes.

18 Q. And you testified the differences in
19 the size of different municipalities is also
20 relevant to the analysis, correct?

21 A. Not for the analysis in Allegheny
22 County or Philadelphia County. It is more about
23 the consequence when you have a single polling
24 location per municipality that is going to harm

1 larger municipalities as opposed to smaller
2 municipalities. But the size of the municipality
3 necessarily does not affect the polling location
4 change.

5 Q. And just to be clear, I think this is
6 what you told me initially, but you didn't do any
7 analysis based on data from other counties besides
8 Philadelphia and Allegheny to try to determine what
9 the cost of voting or change in the cost of voting
10 was for voters in those counties, correct?

11 A. That is correct.

12 Q. And your analysis also did not
13 investigate why polling places were consolidated
14 and relocated in the June 2020 primary election; is
15 that right?

16 A. Could you clarify the question? I
17 mean I think the declaration did highlight the
18 response to Act 12 and ability of the places to do
19 that, if that is what you are getting at.

20 Q. Okay. But beyond noting that there
21 was legal authority in Act 12 to do it, I didn't
22 see in your declaration, correct me if I am wrong,
23 any analysis of why counties consolidated polling
24 places or why they did it to the extent that they

1 did; is that right?

2 A. That is correct.

3 Q. And you mentioned Act 12 a moment
4 ago. So, I take it you understand that there were
5 specific statutory provisions in effect during the
6 June 2020 primary election that authorized the
7 extent of consolidation and relocation of polling
8 places that occurred in that election and in
9 particular occurred in Philadelphia and Allegheny
10 Counties; are you aware of that?

11 A. Yes, sir.

12 Q. Do you understand those statutory
13 provisions that I just referenced have expired and
14 not been reenacted?

15 A. No.

16 Q. Do you understand that the laws that
17 is currently in effect in Pennsylvania do not
18 permit the kind of consolidation and relocation of
19 polling places that occurred during the June 2020
20 primary, correct?

21 A. I do not know what exact forms of
22 consolidation are allowed other than the normal
23 one.

24 Q. Fair enough. Your analysis doesn't

1 make any prediction about the extent, if any, that
2 polling places will be consolidated or otherwise
3 relocated in the November 2020 general election,
4 correct?

5 A. Right.

6 Q. And that's true, it doesn't make a
7 prediction for Philadelphia or Allegheny or any
8 other county, correct?

9 A. No.

10 Q. Professor Meredith, you haven't made
11 any analysis or determination of the feasibility --
12 well, let's strike that, and I will back up.

13 Are you aware, sir, that one of the
14 items that Petitioner has requested in its
15 preliminary injunction application is for counties
16 to be restricted from relocating -- relocating
17 polling places to make them half a mile or farther
18 from any voters' residence than they currently are?

19 A. I learned that this morning, yes.

20 Q. Okay. So, that may answer my next
21 question, but just so the record is clear: Is it
22 fair that you haven't undertaken any analysis or
23 made any determination of the feasibility of
24 imposing that sort of restriction in all 67

1 counties in Pennsylvania?

2 A. No.

3 Q. No, meaning I'm --

4 A. No, I have not done that analysis.

5 Q. Thank you. That was my flaw in the
6 question. But thank you for clarifying.

7 And it's also fair that you haven't
8 conducted that analysis or made that determination
9 with respect to any individual county in
10 Pennsylvania; is that right?

11 A. Yes.

12 Q. Can we agree, sir, that counties
13 should not reduce the number of polling places or
14 relocate them unless it is necessary to do so?

15 A. All things equal, it is better to
16 keep polling locations the same.

17 Q. And if the relief sought by the
18 petition in this case resulted in the need to
19 relocate polling places, that relocation would
20 increase the cost of voting under your analysis,
21 correct?

22 A. Depending on the scheme, there would
23 be potentially some costs and some benefits, and
24 you'd have to do an analysis to determine the

1 affect of all of that would be.

2 Q. Well, I think I heard you say toward
3 the end of your direct examination that -- and tell
4 me -- I think this is a quote, and tell me if I
5 misheard -- every time you move a polling location,
6 you are reducing the number of people who will vote
7 in the election all else equal. That's correct?

8 A. That's correct.

9 Q. So, if the relief sought by
10 Petitioner resulted in the need to relocate polling
11 places, if all else equals, that relocation would
12 increase the cost of voting, correct?

13 A. Any relocation that happens would
14 potentially reduce turnout, yes.

15 Q. Can we agree, sir, that long lines at
16 polling places are not desirable?

17 A. Yes. As I said in my declaration,
18 there's political science evidence supporting that
19 voters will leave lines when they are long and not
20 successfully cast a ballot.

21 Q. So, long lines we could describe as
22 another cost on voters, correct?

23 A. Yes, that's described as a cost on
24 voting in my declaration.

1 Q. Do you agree with me that whether
2 long lines exist at a polling place is potentially
3 a function of many different variables?

4 A. Yes.

5 Q. And we can agree that voter confusion
6 is an undesirable thing, correct?

7 A. Could you be more specific?

8 Q. Sure. If voters are confused about
9 how to vote or how the voting process is to play
10 out on election day, that is an undesirable thing,
11 correct?

12 A. Yes.

13 Q. You agree with me that voter
14 confusion can increase the amount of time it takes
15 to vote, correct?

16 A. Potentially.

17 Q. And that could lead potentially to
18 longer lines, correct?

19 A. Yes.

20 Q. And if poll workers aren't well
21 trained, that could lead to longer lines and
22 delays, correct?

23 A. Yes.

24 Q. Would you agree with me that if poll

1 workers are asked to learn a new voting system at
2 the last minute, it is possible that they won't
3 learn that system well?

4 A. It is possible.

5 Q. And that could lead to long lines,
6 correct?

7 A. It is possible.

8 Q. And if voters are forced to switch to
9 a new type of voting system with inadequate
10 education and time to learn about it, that could
11 lead to voter confusion, correct?

12 A. It could.

13 Q. And that could lead to long lines in
14 turn, correct?

15 A. It could.

16 Q. Sir, is it correct that you haven't
17 done an analysis and you're not offering an opinion
18 regarding the monetary cost of the relief that
19 Petitioner seeks in its preliminary injunction
20 application; is that right?

21 A. That is correct.

22 Q. And that is true whether we are
23 talking about the sum total of the cost of all the
24 relief they are seeking or the cost of any

1 individual item of relief? You are not offering an
2 opinion on any of that, correct?

3 A. I am not.

4 Q. Sir, as a social scientist, I assume
5 you would agree with me that policy changes
6 sometimes have unintended consequences?

7 A. Yes.

8 Q. And would you agree with me that when
9 one is trying to determine the net cost or benefit
10 of a particular proposed policy change, it is
11 important to consider not just the immediate
12 effects of that policy change but the second order
13 effects and third order effects and so on?

14 A. Yes.

15 Q. And, Professor Meredith, am I right,
16 you are not offering an opinion in this litigation
17 on what the total consequences would be if the
18 Court granted all of the relief that Petitioner's
19 seeks in its preliminary injunction application?

20 A. I am not offering an opinion on all
21 of that, no.

22 Q. And are you offering an opinion on
23 the ultimate consequences of any of the particular
24 items of relief that Petitioner is requesting in

1 its preliminary injunction application?

2 A. I am offering an opinion that you if
3 you move polling locations and essentially if you
4 make those polling locations further away from
5 someone's residence or the way you are designing
6 polling locations is making lines longer, you will
7 be reducing turnout in the November election.

8 Q. And other than that, though, you are
9 not offering opinions on the consequences of the
10 relief sought by Petitioner; is that fair?

11 A. That is fair.

12 MR. WIYGUL: Your Honor, if I may
13 have a second, please.

14 I have no further questions. Thank
15 you.

16 JUDGE BROBSON: Mr. Wallen.

17 BY MR. WALLEN:

18 Q. Good afternoon, Dr. Meredith.

19 A. Good afternoon.

20 Q. To recap on your earlier testimony,
21 would you agree -- strike that. The Pennsylvania
22 voter file, would you agree that there is no racial
23 category within the voter file?

24 A. I agree.

1 Q. Is that true nationwide as you look
2 at voter files?

3 A. No, there are a small number of
4 states where they include information on voters'
5 race.

6 Q. And do you analyze states in both
7 different categories; the states that have voter
8 race and the states that do not?

9 A. I have in other work, but I only
10 analyzed Pennsylvania in this case.

11 Q. Would you agree that it is more
12 challenging for the work that you are doing based
13 on whether or not you have the racial information
14 available to you?

15 A. I would rather have the information
16 than not have it, yes.

17 Q. Sure. So, in looking at your data
18 for the present case, let me draw you to the
19 definition of registrant of color. Are you
20 familiar with that definition?

21 A. In my analysis, yes.

22 Q. Yes.

23 A. Yes.

24 Q. What was the definition of a

1 registrant of color?

2 A. It's changes based on whether you are
3 looking at the figures or at the table, as I
4 explained to the judge. When you are looking at
5 figures, a registrant of color is one who has less
6 than a 50 percent probability of being white.

7 When you are doing the analysis in
8 the progression with the corresponding graphs, a
9 registrant of color is one who has zero probability
10 of being white.

11 Q. So, in the first category, you are
12 making that definition and the tabulation based
13 essentially on whether or not your data is better
14 than flipping a coin?

15 A. If for the small number of cases that
16 are right at .5, then it matters on which edge you
17 fall. A vast majority of the data have a
18 probability that is quite close to zero or quite
19 close to one. But there is some people who are
20 quite close to .5, yes.

21 Q. Would you agree that the biggest
22 county in Pennsylvania by population is
23 Philadelphia?

24 A. Yes.

1 Q. And would it be correct to understand
2 from your research of the primary as it pertains to
3 the primary election that more white registrants
4 were reassigned to further locations than
5 registrants of color?

6 A. Yes. That is what I found.

7 MR. WALLEN: All right. Thank you,
8 Dr. Meredith. No further questions.

9 JUDGE BROBSON: Mr. Gore.

10 MR. GORE: Thank you, Your Honor, and
11 thank you, Dr. Meredith.

12 BY MR. GORE:

13 Q. I am John Gore. I represent the
14 Republican Committee Intervenors in this case.

15 Dr. Meredith, you and I haven't met
16 before, have we?

17 A. Not that I remember.

18 Q. All right. Well, it's great to meet
19 you, even in the current circumstances.

20 I want to ask you a few questions
21 about your report and the testimony that you gave
22 in response to Ms. Chapman. Just to followup on
23 where she finished, you are not making any
24 predictions about whether any polling places will

1 or will not be closed for the upcoming general
2 election; is that correct?

3 A. That is correct.

4 Q. Great. Can I then have -- I'd like
5 to go back to Petitioner's Exhibit 86E, which is
6 part of Petitioner's Exhibit 86, in that file page
7 11.

8 While that is coming up, Dr.
9 Meredith, I just want to confirm with you some
10 things. First of all, you wold agree with me that
11 there may be other factors that may be cost of
12 voting within this larger calculus of voting that
13 voters undertake; is that correct?

14 A. That is correct.

15 Q. And voters may choose to vote or not
16 to vote for a whole host of reasons; is that right?

17 A. Yes.

18 Q. It could be enthusiasm for the
19 candidates, right?

20 A. Yes.

21 Q. We also know that turnout varies
22 between the primary and general election; is that
23 right?

24 A. Yes.

1 Q. It can vary based on time of year; is
2 that right?

3 A. Potentially. I'm not sure on that
4 one. I wouldn't say that one.

5 I wouldn't say what is it about the
6 time of year. Later in the primary things are more
7 resolved than earlier.

8 Q. Thank you. I should have clarified
9 that with timing within an election cycle. But I
10 understand one of your opinions is that one of the
11 factors that influences turnout is the distance
12 from a voter's residence to the polling place; is
13 that correct?

14 A. That is correct.

15 Q. And the greater that distance is, all
16 other things being equal, the less likely a voter
17 is to turn out; is that correct?

18 A. That is correct.

19 Q. Okay. Thank you.

20 So, I want to take a look at that
21 Exhibit 86E, and I want to look first in the
22 category of minimal change. And those are voters,
23 who as I understand it, experienced a change in
24 polling place in the primary election but the

1 distance change from their old polling place is
2 within plus or minus one-tenth of a mile; is that
3 right?

4 A. That is right.

5 Q. And according to this Exhibit, 15.6
6 percent of registrants of color in Allegheny County
7 who experienced only a minimal change in polling
8 place, voted by mail in the 2020 primary election;
9 is that right?

10 A. That is correct.

11 Q. And 10.5 percent of voters voted in
12 person; is that right?

13 A. That is correct.

14 Q. So, the total percentage of voters
15 who turned out in this category was 26.1 percent;
16 is that right?

17 A. That is right.

18 Q. Okay. Let's look at the further
19 category. This category refers to voters whose
20 polling place location was changed, and it
21 increased the distance from their residence to
22 their polling place by between one-tenth and
23 one-half of a mile; is that right?

24 A. That is correct.

1 Q. And according to this exhibit, 17.1
2 percent of voters of color registered to vote in
3 Allegheny County voted by mail; is that right?

4 A. That is correct.

5 Q. And 10 percent of voters in that
6 category voted in person; is that correct?

7 A. That is correct.

8 Q. That's a total of 27.1 percent of
9 voters in this category turned out; is that
10 correct?

11 A. That is correct.

12 Q. That is one percentage point higher
13 than the total turnout of voters in the minimal
14 change category; is that correct?

15 A. That is correct.

16 Q. And that is correct, even though
17 voters in the further distance category had a
18 farther distance to travel to their polling place
19 than voters in the minimal change category?

20 A. Yes, what you are highlighting is why
21 better analysis, the statistical analysis, is those
22 contained in the graphs because when --

23 Q. But I will ask you about the graphs
24 in a moment.

1 Finish your answer, but I will ask
2 you about the graphs in a moment. But I am asking
3 just about total turnout. There was a higher total
4 turnout in further category than in the minimal
5 change category?

6 A. Yes. This analysis is not accounting
7 for the propensity of people in different
8 categories to vote.

9 Q. Thank you. And that propensity might
10 be one of these factors that goes into the cost of
11 voting, correct?

12 A. It goes more into a summary measure
13 of it. It is saying in the past has this person
14 voted or not.

15 Q. It is saying does their past outweigh
16 the cost; yes?

17 A. Just so the record is clear, even
18 though voters in the further category experienced a
19 greater change in their polling place distance than
20 voters in the minimal change category, overall they
21 were more likely to turn out to vote in the primary
22 election than voters in the minimal change
23 category; is that correct?

24 A. That is correct.

1 Q. I want to talk a little bit about how
2 you measured the distance between a voter's
3 residence and a voter's polling place.

4 A. Yes.

5 Q. I believe you said you used a
6 computer program to calculate the shorter distance
7 on any ellipsoid between those two places; is that
8 correct?

9 A. Yes.

10 Q. And in layman's terms, that would be
11 as the crow flies, correct?

12 A. That is correct.

13 Q. It's a straight line between those
14 two points, correct?

15 A. Yes, almost straight line.

16 Ellipsoid.

17 Q. The curvature of the earth, right,
18 that is the ellipsoid piece of it; is that right?

19 A. Yes.

20 Q. But that distance is not the distance
21 that the voter would have to follow to get to it,
22 correct?

23 A. Yes.

24 Q. That route might not be open to

1 travel?

2 A. Correct.

3 Q. The road might not run along that
4 route, correct?

5 A. Yes.

6 Q. The sidewalk might not run along that
7 route?

8 A. Correct.

9 Q. There might be private property in
10 between obstructing that route as well?

11 A. It's possible.

12 Q. Some natural feature, a stream or
13 something like that may obstruct that?

14 A. It is possible.

15 Q. So, even though a polling place may
16 be further away from the voter's residence on that
17 measure, it may take the voter less time to travel
18 there than it took the voter to travel to the old
19 polling place?

20 A. In any individual case it is possible
21 with a minimal change you may have to go to
22 farther. In the aggregate, it would be the case in
23 the farther category are traveling farther than
24 people with a minimal change.

1 Q. What did you do to analyze that
2 aggregate effect?

3 A. There is some measurement as you are
4 pointing out. Some people who are in the further
5 were actually much further. Some people in the
6 further may -- it's unlikely that it would be
7 shorter as the crow flies, but there are some
8 people who were classified as minimal change that
9 should be in the further and maybe people in
10 further should be much further.

11 If anything, that should have caused
12 me to underestimate my results because we have
13 measurement error in data that attenuates the
14 effects toward zero.

15 Q. You used this as the crow flies
16 distance as a proxy for distance that the person
17 would have to travel, correct?

18 A. Correct.

19 Q. That is not always going to be the
20 distance that the person has to travel, correct?

21 A. Correct.

22 Q. It may be longer or shorter depending
23 on a variety of factors, correct?

24 A. Unlikely to be shorter but could be

1 longer, yes.

2 Q. Could be longer. And compared to the
3 old polling place location, it could be shorter
4 than that distance, correct?

5 A. It is possible, yes.

6 Q. Professor, you'd agree with me, would
7 you not, that moving a polling place further away
8 from a voter's residence doesn't necessarily make
9 it inconvenient for that voter, correct?

10 A. In the aggregate it does, but in any
11 individual case, you could come up with examples
12 where it could make it easier.

13 Q. Well, we have talked about distance a
14 little bit, but what about if the new location is
15 closer to the voter's work?

16 A. Yes, there are a variety of reasons
17 why much further is again aggregate level and what
18 is convenient for any individual could depend on
19 where they are going that day. A variety of
20 things.

21 Q. It could be closer to their school,
22 correct?

23 A. Possible, yes.

24 Q. Closer to the daycare center where

1 they are leaving their children?

2 A. Possible, yes.

3 Q. Maybe it's more accessible by main
4 routes?

5 A. Possible, yes.

6 Q. More easily accessible by public
7 transportation, correct?

8 A. Possible.

9 Q. Closer to commuter routes to and from
10 home and work or home and school; is that correct?

11 A. Possible, yes.

12 Q. Let me ask you about your model for
13 imputing race to voters.

14 A. Yes.

15 Q. Have you ever testified to this model
16 in court before?

17 A. Yes.

18 Q. When was that?

19 A. When I testified in New York Federal
20 Court.

21 Q. Now, you stated that you used a
22 50 percent probability as a cut-off for imputing
23 race to voters; is that correct?

24 A. For the figures but not for the

1 regression analysis.

2 Q. Okay, for the figures. So, if
3 someone had a 50.1 percent chance of being white,
4 your model categorizes them as white?

5 A. Yes.

6 Q. And if they had a 49.9 chance of
7 being white, your model categorizes them as being
8 non-white, correct?

9 A. That is correct.

10 Q. What is the margin of error in your
11 model?

12 A. On the race?

13 Q. Yes.

14 A. The races are based in probability,
15 so the margin of error is built into the
16 probability themselves.

17 Q. You didn't provide a figure for that
18 in your report, did you?

19 A. I didn't put a distribution of
20 probability in my report, no.

21 Q. Did you do anything to validate the
22 results that came out of your model against
23 existing racial data from another source?

24 A. I have done that before to make sure

1 that all my stuff was working right. I have done
2 that exercise, but I did not put that into this
3 report that you have seen.

4 Q. Did you conduct any survey of voters
5 in Pennsylvania and compare those survey results to
6 the results of your model with respect to the
7 voters' races?

8 A. No.

9 Q. Did you aggregate your model's
10 predictions to the census block or census block
11 group level and then compare those aggregations to
12 the census data on race?

13 A. By definition, the model does that.

14 Q. But you didn't report any of that in
15 your report, correct?

16 A. Correct.

17 Q. Can I go to now -- I want to ask you
18 something about one of the articles you cited. It
19 is Republican Committee Intervenors Exhibit 2. If
20 we start on Page 2 of that exhibit for the benefit
21 of the witness and counsel, I would appreciate
22 that.

23 MR. BALDWIN: I am sorry. Republican
24 Committee Intervenors exhibits, I have a couple of

1 different ones marked as two. So, I will bring the
2 first one up that I have.

3 MR. GORE: That is not what I am
4 looking for. It is also available as Petitioners
5 Exhibit 58, I believe.

6 BY MR. GORE:

7 Q. Dr. Meredith, I would like to ask you
8 about this article, and I'd like some help first
9 pronouncing the last names.

10 A. Imai and Khanna.

11 Q. You said in your report that you
12 based your model on the model that is described in
13 this article; is that correct?

14 A. Yes, that is correct.

15 Q. You said that Imai and Khanna ran a
16 Bayesian analysis with respect to predicting
17 voters' races in Florida; is that correct?

18 A. Yes.

19 Q. Because Florida, unlike Pennsylvania,
20 collects racial data for voters, they were able to
21 compare the output of their model to actual for
22 data in Florida; is that right?

23 A. That is correct.

24 Q. They computed an error rate with

1 respect to their model and its result; is that
2 right?

3 A. They do a couple of different things,
4 but it depends -- can you be more specific about
5 which table you are referring to?

6 Q. That is fine. Let's go to Page 6, if
7 we can. I am talking about Table 1 right here. As
8 I understand, they ran five different combinations
9 to try to compute the race of voters. One was just
10 using the names with the census, surname --
11 databases, I believe, you testified that you used.
12 One was a combination of the name and the precinct
13 where they lived and another was name and census
14 block and so on; is that right?

15 A. Yes.

16 Q. And, so, this table shows their
17 overall error rate and error rates by different
18 racial groups on those various methods that they
19 use; is that correct?

20 A. That is correct. Well, it is their
21 classification there.

22 Q. Right. It is a classification of the
23 voter's race?

24 A. The difference that they classify

1 when you do what I am doing with the figures where
2 you assign a voter a specific versus what the race
3 actually is.

4 Q. But it is a comparison between what
5 their model assigned or classified the voter as and
6 what the voter themselves identified as; is that
7 correct?

8 A. That is correct.

9 Q. You said you used a combination of
10 name and geocoding; is that correct, to do your
11 model?

12 A. I used what they refer to as name
13 block.

14 Q. Name block, okay.

15 So, when they ran that particular
16 analysis in Florida, they computed an overall error
17 rate of .152 under the name block method; is that
18 correct?

19 A. Yes, they are using a different
20 method of assigning -- they are classifying down to
21 subcategories of registrants of color which will
22 make their classification error rate higher than
23 mine.

24 Q. But subject to that, that means that

1 15.2 percent of their classifications were
2 erroneous; is that correct?

3 A. That is an important distinction
4 because if you look at their error rate among
5 smaller racial groups like Asians and others, it is
6 quite high because it is very hard -- especially
7 when groups have a lot of potential probabilities,
8 it is not an apples-to-apples comparison of this
9 error rate to what I did.

10 Q. You testified you use a name block
11 analysis, correct?

12 A. I did, but I am telling you that I
13 use a different tool of classification.

14 Q. I understand that. I am just
15 pointing out that when this was done and this was
16 the article that you cited in your report, they
17 found a 15.2 percent error rate?

18 A. For classification they are doing,
19 yes, which is not the classification I was using.

20 Q. Thank you. Subject to that -- and
21 that included a 26.6 percent false positive of
22 white; is that correct?

23 A. That is correct.

24 Q. It included a 5.9 percent false

1 negative of white; is that correct?

2 A. That is correct.

3 Q. And, so, their model, at least, their
4 name block model tended to overclassify as white
5 voters who are not white; is that correct?

6 A. It will, because if you look on the
7 left, you tend to overclassify to the majority
8 group in the census block and because statewide in
9 Florida the majority group is white, they tend to
10 overclassify as white.

11 Q. They found a .320 false negative for
12 black; is that correct?

13 A. That is correct.

14 Q. 32 percent, correct?

15 A. That is correct.

16 Q. As you mentioned Asians 53.3 percent
17 false negative for Asian voters; is that correct?

18 A. That's correct.

19 Q. And 96.9 percent other voters,
20 however, they were classified as other voters; is
21 that correct?

22 A. That is correct.

23 Q. And you did not report any error
24 rates with respect to your analysis in your report

1 that you submitted in this case, correct?

2 A. They are reporting this in Florida
3 where they know from the voter file the race, but
4 because I don't have the race, I can't report the
5 similar error rates.

6 Q. I understand that, but you did not
7 actually report any error rates in your report?

8 A. No. It is not feasible to report
9 those rates.

10 Q. So, the answer is no, you didn't
11 report it, correct?

12 A. I can't report it, yes.

13 MR. GORE: Thank you. I have no
14 further questions for the witness.

15 JUDGE BROBSON: Mr. Gore, I don't
16 know whether you do or don't want to, but did you
17 want to admit that article into evidence? We did
18 find the version of RCI-2 that is the same article.

19 MR. GORE: That would be fine, Your
20 Honor. We would like to move that into evidence.

21 JUDGE BROBSON: Any objection? No
22 objection; RCI2 is admitted. Thank you, Mr. Gore.

23 (Exhibit RCI-2 was previously marked
24 and admitted into evidence.)

1 BY MR. SHEEHY:

2 Q. Good afternoon. My name is Shawn
3 Sheehy. I represent the Senate Leader Intervenors.
4 Thank you for your time today.

5 Did you decrease the costs of voting
6 to increase turnout? Correct? Do I understand
7 that correctly?

8 A. Correct.

9 Q. Now, in your declaration you note
10 that if you put a stamp on a mail-in voting, if the
11 state provides a stamp for mail-in voting, that
12 increases turnout, correct?

13 A. There are studies that showed that to
14 be the case, yes.

15 Q. And actually, the study you cited
16 favorably to that proposition said it could
17 increase turnout by 4 percent, correct?

18 A. There are some studies that find
19 differing effect, so it is possible.

20 Q. Okay. If we could go to Petitioner's
21 Exhibit 33 and specifically go to Page 16,
22 Paragraph 27.

23 MR. BALDWIN: Mr. Sheehy, which page?

24 MR. SHEEHY: Page 16. Thank you very

1 much. Paragraph 27.

2 BY MR. SHEEHY:

3 Q. And do you see where you write that
4 moreover, there is a slowdown in mail distribution
5 in Philadelphia caused by staffing shortages due to
6 COVID-19, increased parcels, and new USPS policies
7 prioritizing minimizing labor costs over the timely
8 delivery of mail?

9 A. Yes, I see that.

10 Q. And before that proposition you cite
11 an article from the Philadelphia Inquirer from
12 August 2, 2020?

13 A. I can't see it, but that sounds
14 right.

15 Q. We can scroll down to verify that.
16 And 42 is the Philadelphia Inquirer article from
17 August 2, 2020?

18 A. Yes, I see that.

19 Q. You are not an expert on postal
20 service delivery standards, are you?

21 A. I have learned a lot from testifying
22 but I would say I am aware -- I am quite aware of
23 the situation; but I am not sure if that counts me
24 as an expert or not.

1 Q. Well, you certainly haven't been
2 qualified here --

3 JUDGE BROBSON: Mr. Sheehy, can you
4 suspend, please?

5 MR. SHEEHY: Sorry, Your Honor.

6 JUDGE BROBSON: I want to move this
7 along. Please limit your examination to the direct
8 examination that the professor gave and not what is
9 in his declaration. I don't think he testified at
10 all about slowing down the mail in Philadelphia or
11 the Philadelphia Inquirer. So, if we could stay on
12 target, it would help move things along.

13 MR. SHEEHY: That would be fine, Your
14 Honor.

15 JUDGE BROBSON: Unless you want to
16 stipulate to his declaration.

17 MR. SHEEHY: I do not. If we could
18 go to Pages 10 and 11, Paragraph 19, this is
19 concerning long lines and reneging. This is at the
20 beginning of your testimony today.

21 THE WITNESS: Yes.

22 BY MR. SHEEHY:

23 Q. Here you discuss a study of about
24 11,858 potential voters at the California

1 presidential primary.

2 A. Yes.

3 Q. And you say that the study shows a
4 1.9 percent of voters reneged?

5 A. Yes.

6 Q. That study only recorded voters who
7 walked away, correct?

8 A. Yes, my memory is that study cannot
9 tell whether the voters who left returned to the
10 polling place or not.

11 Q. In fact, didn't the study say for
12 those people who left but came back later they
13 reported two people going into the polling place
14 and one person reneging?

15 A. That is my memory, yes.

16 Q. For that one person, it would be a
17 50 percent reneging rate, correct?

18 A. Correct.

19 Q. Even though that one person didn't
20 renege at all; they voted, correct?

21 A. Correct.

22 MR. SHEEHY: Your Honor, I don't have
23 any additional questions.

24

(Exhibit Petitioner's Exhibit 33 was previously marked for identification.)

3 JUDGE BROBSON: I have a couple of
4 questions just to make sure I understand your
5 testimony.

6 It seems to me like your testimony is
7 that the higher the cost of the election, the less
8 likely someone is to vote. That seems to be a
9 general principle, right?

10 THE WITNESS: That is correct.

11 JUDGE BROBSON: Isn't that a general
12 principle on almost everything? The more effort
13 that is required, the less likely you are to engage
14 in activity?

What is important about the cost of
voting framework, it establishes not just that cost

1 matters; but that there are people on the margin
2 whose turnout does depend on whether these costs go
3 up by a little bit or down by a little bit, and
4 these can have consequential effects on turnout,
5 even on relatively modest changes in costs.

6 JUDGE BROBSON: So, you are saying
7 that the change in costs for the distance one would
8 have to travel based on your analysis was more
9 significant for non-white voters than white voters
10 in terms of it altering behavior?

11 THE WITNESS: Yes.

12 JUDGE BROBSON: And in terms of --
13 you would agree there is no such thing as a
14 cost-free election, right?

15 THE WITNESS: Yes.

16 JUDGE BROBSON: So, every election
17 has a cost?

18 THE WITNESS: Yes.

19 JUDGE BROBSON: And is there like a
20 bucket of cost -- I think the lawyers kept asking
21 you questions about all these other factors -- is
22 there almost an incalculable number of costs that
23 could go into a decision to vote?

24 THE WITNESS: There are definitely an

1 infinite number of potential costs. I think there
2 are a relatively small number of costs that
3 political scientists have established that election
4 administration imposes in such a way that these are
5 choices.

6 So, election administrators can't do
7 anything to change whether someone feels a high
8 personal risk of COVID or not, that cost they
9 can't -- they can't change that. What they can do
10 is change how accessible mail balloting is and so,
11 there is a small number of tools that have been
12 identified by political science that are within
13 what I would call the policy sets of election
14 administrators that are both changeable and
15 consequential for voter turnout.

16 JUDGE BROBSON: So, there is some
17 factors, some costs, that cannot be managed from an
18 election perspective?

19 THE WITNESS: Yes.

20 JUDGE BROBSON: Did you do any
21 analysis of the statistical significance for the
22 travel issue and polling changes from a cost of
23 election perspective to every other cost of an
24 election that is in the bucket?

1 THE WITNESS: The way I think about
2 it as follows --

3 JUDGE BROBSON: I just want to make
4 sure, did you look at the statistical perspective
5 of this particular cost compared to all of the
6 other potential costs of an election?

7 THE WITNESS: This is focused solely
8 on this cost just as a useful benchmark, I think.
9 When people talk about weather and talk about
10 turnout -- because the journalists like to talk
11 about that and political scientists have studied
12 this. Bad weather causes about a 1 percent point
13 reduction in voter turnout. When you are trying to
14 calibrate effect size of this cost relative to
15 something like bad weather, I think that is a
16 useful calibration device to think about how this
17 cost compares to something that people can wrap
18 their heads around.

19 JUDGE BROBSON: And did you do that
20 comparison?

21 THE WITNESS: Because I am only
22 focused on a specific election day that just has
23 one form of weather, I can't do that here. I
24 didn't go out and analyze lots of different

1 election dates. I just focused on the primary.
2 Any of these other costs that people talk about are
3 being held constant because we are trying to
4 isolate the effect of one specific cost.

5 JUDGE BROBSON: Okay. I think I
6 understand your testimony.

7 Ms. Chapman, you may redirect.

8 REDIRECT EXAMINATION

9 BY MS. CHAPMAN:

10 Q. Professor Meredith, they asked you
11 the racial probability tool set forth in the
12 article. Do you recall that?

13 A. Yes.

14 Q. They also asked you about potential
15 false negatives and false positives. Do you recall
16 that?

17 A. Yes.

18 Q. Do the issues that Mr. Wallen and Mr.
19 Gore raised regarding false positive or false
20 negatives impact your analysis here?

21 A. I view the principle analysis as the
22 figures showing the output of the regression
23 analysis. When we were looking at the paper of
24 Imai and Khanna, the table that is more relevant

1 for justifying my analysis is not Table 1 but Table
2 in that paper. What they do in Table 2 is show
3 how you can use a weighted turnout where -- in
4 their analysis, they are using the probabilities as
5 their weights to come up with accurate measures of
6 precinct-level turnout by race.

7 I think the way you can think about
8 it is -- when you are dealing with these measures
9 in a binary way as this classification in Table 1
10 points out -- for purposes of my analysis what is
11 relevant from their paper is Table 2 which shows
12 you can accurately and with minimal bias represent
13 turnout by race at the precinct level, which is
14 what I am doing in this analysis. A key unit of
15 analysis is at the precinct and what turnout of
16 different racial groups are at the precinct level
17 when they are experiencing polling place changes.

18 So, when you consider Table 2 in Imai
19 and Khanna's paper, it justifies the approach I am
20 using with probabilities can do a good job of
21 estimating turnout at a precinct level.

22 Q. When you say can do a good job, can
23 you be more specific there?

24 A. So, what Imai and Khanna do in their

1 paper is they take the state of Florida, which as
2 we discussed, you know the people's race, the
3 registrant's race in Florida. So, what they do for
4 every precinct in the state is calculate what the
5 turnout rate is for different racial groups, what
6 the turnout rate is when you construct the turnout
7 rate, usually in the probabilities that they
8 produce from their method. Then calculate are you
9 able to do this without bias, and they find for
10 most racial groups they are. It turns out that for
11 very small racial groups, the Asian and the other,
12 there is some bias involved with doing that.

13 But I am not trying to impute those
14 very small racial groups in my analysis. This in
15 part informs why when I do my analysis I try to
16 keep it to white and non-white to try avoid some of
17 the issues with very small groups and the problems
18 of this method of assigning race in those cases.

19 Q. You said your regression analysis.
20 But you mentioned your regression analysis during
21 Mr. Gore's examination. And can you very briefly
22 tell me what that regression analysis tells us?

23 A. What the regression analysis tells us
24 is that when we control for people's propensity to

1 vote and then look at how voters respond to polling
2 place changes based on whether they are assigned a
3 high probability or not of being white, we can
4 conclude that generally voters of all races, their
5 turnout declines when they experience a polling
6 location change, although there is some
7 counter-evidence to that. But across the board,
8 there is evidence that voters have a low
9 probability of white, at the extreme have zero
10 probability of being white, their turnout is
11 negatively affected by polling location changes,
12 especially if a change moves them more than
13 .5 miles away from their residence.

14 Q. Do the issues that Mr. Gore raised
15 with respect to Imai and Khanna misclassification
16 apply to your regression analysis?

17 A. No. The misclassification is one
18 that only applies to the figures, not to the
19 regression analysis.

20 Q. During Mr. Wallen's examination, I
21 believe you referred to the racial probability
22 analysis in certain circumstances as a coin; do you
23 recall that?

24 A. Yes.

1 Q. And does that concern, the coin flip,
2 in turn impact your regression analyses at all?

3 A. What the regression analyses
4 acknowledge is that someone that has a .5
5 probability of being white, half the time they will
6 be white and half the time they will not be white.
7 And analogous to what Imai and Khanna are doing in
8 a slightly different form, I am assigning half of
9 their turnout to white registrants and the other
10 half to non-white registrants. So, it is not doing
11 this binary classification. The reason why we are
12 using the probability instead of doing that is, in
13 fact, we are trying to avoid this coin-flip element
14 of people who get back probabilities that are near
15 the center of the 50/50 distribution.

16 Q. Professor Meredith, Mr. Gore asked
17 you about certain individual circumstances that may
18 make a relocated polling place more convenient for
19 an individual voter. Do you recall that?

20 A. Yes.

21 Q. Why is it important to analyze the
22 question of polling place relocation in the
23 aggregate rather than on an individual basis?

24 A. Because people who vote -- from a

1 variety of locations as he pointed out, people's
2 day on election day is different. But what we know
3 from political science is the most common times
4 that people vote, especially people who work, is on
5 the way to work and on the way home from work.

6 By definition, that means some people
7 are coming from their residence -- I guess not by
8 definition, but usually that means they are coming
9 from their residence or going back to their
10 residence after being at the polling place. So,
11 for a lot of people when they vote, who are voting
12 with that pattern, the distance between their
13 residence and polling place is consequential.

14 Q. Professor Meredith, Respondent's
15 counsel asked you about your use of data from
16 Philadelphia and Allegheny Counties in particular.
17 Do you recall that?

18 A. Yes.

19 Q. And Professor Meredith, you didn't
20 analyze data from other counties, correct?

21 A. No.

22 Q. Why did the data that you used in
23 Philadelphia and Allegheny Counties provide
24 information sufficient for you to conduct your

1 analysis here?

2 A. My declaration includes lots of
3 previous analyses focused on understanding how
4 polling location changes and distance relate to
5 turnout in a variety of settings.

6 One of the studies I cited was from
7 LA County, one is from rural New York, one is from
8 Manatee County, Florida. So, it was all different
9 settings. It is pretty clear from this evidence
10 that there is a relationship between polling
11 location changes and turnout in a variety of
12 settings. What the literature does not establish
13 clearly is whether this relationship is different
14 for registrants who are registrants of color versus
15 white registrants. There are some analyses in
16 these papers, but they don't produce the same sum
17 of evidence as on the main findings.

18 And, so, looking at these counties
19 where you have a lot of registrants of color was
20 essential to be able to go out and test this
21 premise and in Pennsylvania specifically and show
22 that the pattern that I found was there.

23 MS. CHAPMAN: Your Honor, I have no
24 further questions.

1 JUDGE BROBSON: Mr. Meredith, I thank
2 you for your testimony. Is there anyone who
3 objects to excusing the witness?

4 I thank you for your testimony. You
5 are excused.

6 JUDGE BROBSON: At this point, we
7 will take a brief recess to reset.

8 COURT CRIER: The Commonwealth Court
9 is now in recess.

10 (Break taken.)

11 COURT CRIER: The Commonwealth Court
12 is now in session.

13 JUDGE BROBSON: Mr. Lovett, please
14 call your next witness.

15 MR. LOVETT: Your Honor, Petitioners
16 call Joan Duvall-Flynn.

17 JOAN DUVALL-FLYNN, having been duly
18 sworn, was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. LOVETT:

21 Q. Good afternoon. Please introduce
22 yourself to the Court.

23 A. My name is Joan Evelyn Duvall-Flynn.

24 Q. And where do you live, Dr.

1 Duvall-Flynn?

2 A. I live in Glen Mills, Pennsylvania.

3 Q. How long have you lived in
4 Pennsylvania?

5 A. I have lived in Pennsylvania just
6 over 50 years.

7 Q. Where are you originally from?

8 A. I am originally from Sandusky, Ohio.

9 Q. Do you have family here in
10 Pennsylvania?

11 A. Only my husband.

12 Q. Dr. Duvall-Flynn, can you tell us why
13 you are here testifying?

14 A. Well, because I am here today because
15 I am concerned about my vote, my mail-in vote.

16 Q. You said you lived in Pennsylvania
17 for 50 years. So, regarding voting, are you
18 registered to vote in Pennsylvania?

19 A. Yes.

20 Q. Now, before you lived in
21 Pennsylvania, were you registered to vote?

22 A. Yes.

23 Q. Now, over the years, have you voted
24 in presidential elections?

1 A. Yes.

2 Q. And how often do you vote in
3 presidential elections?

4 A. My first vote was in 1968, and I have
5 missed very few votes since then.

6 Q. Does that go for elections in general
7 or just presidential elections?

8 A. Elections in general.

9 Q. So, you've been voting in most
10 elections in general; is that fair?

11 A. I do.

12 Q. Why is it that you try to vote in
13 most elections?

14 A. It is our citizen's responsibility to
15 try to vote in all elections. We must value our
16 vote and vote our values and, hopefully, vote for
17 people who respect our values so we can live in a
18 society that we believe in.

19 Q. I want to move a little bit to your
20 membership and involvement in the community.

21 Dr. Duvall-Flynn, what, if any,
22 community-based organizations are you involved in?

23 A. I am a life member of the NAACP. I
24 am a member of Kiwanis International. And

1 recently, I have joined the League of Women Voters.

2 Q. Thank you. Regarding the NAACP,
3 specifically how long have you been involved with
4 NAACP?

5 A. I've been involved with the NAACP
6 since I was nine years old.

7 Q. You said you grew up in Ohio. Could
8 you describe -- let me back up a second. Have you
9 been involved with the NAACP in Ohio?

10 A. Yes, I grew up and was trained in
11 civic information in the youth counsel of the
12 Sandusky branch of the NAACP, where I learned to
13 read the Constitution, and I learned what civil
14 liberties are, and I learned what my rights as a
15 citizen are.

16 Q. Can you describe for us your
17 involvement with the NAACP in Pennsylvania?

18 A. Yes, I served about 12 years as the
19 president of the local Media area NAACP, and I was
20 elected twice as president of the Pennsylvania
21 State Conference of NAACP branches.

22 Q. And have you ever received any
23 community awards for your involvement with the
24 NAACP?

1 A. Yes, I actually received the
2 President's Award from the State Conference for
3 branch leadership and I received Keystone Research
4 Center's Award for community service. And
5 another -- well, I have a lot of awards.

6 Q. Okay, fair enough.

7 And what years did you serve as
8 president of the NAACP Pennsylvania state chapter?

9 A. Oh, I am dyslexic. I am going to
10 have to think for a minute. 2015 I was first
11 elected; 2017, I was elected a second time.

12 Q. Okay. Since your term as president
13 ended, what has your involvement with the NAACP
14 been?

15 A. I am sorry. Would you repeat that?

16 Q. Sure thing.

17 Since your term as president ended
18 what has your involvement with the NAACP been?

19 A. Yes. I was elected first
20 vice-president the local branch in Media again and
21 I served on the WIN committee, which is Women of
22 the NAACP. Our mission is to the welfare of women
23 and children, and I serve as the education chair
24 and attend to any complaints that come in

1 concerning education.

2 Q. Okay. So, you are currently involved
3 with the Media branch of the NAACP?

4 A. Yes.

5 Q. What county is that?

6 A. Delaware.

7 Q. Now, I want to focus on voting
8 specifically. In your time with the Media branch,
9 how have you been involved with voting?

10 A. In my term as president, because
11 voting is the number one priority of the NAACP, we
12 arranged for candidates forums. We worked with the
13 League of Women Voters to facilitate those
14 sometimes. We did registration drives. We --
15 Cheney University of Pennsylvania is within our
16 jurisdiction, so we register students on campus.
17 We arrange to drive those students to the polls.
18 We worked with the Delaware County Board of
19 Elections to get a poll placed in safe proximity
20 for those students. We trained on a system called
21 Voter Analysis Network so that we could focus on
22 places in our jurisdiction that had lower
23 registration. We trained people on what state laws
24 were concerning voting. We took voting machines to

1 the campus at one time to train students on how to
2 use voting machine.

3 Those are the kinds of things I did
4 when I was the president.

5 Q. Okay. In the last year or so, have
6 you been involved with the NAACP in terms of voter
7 registration?

8 A. Yes, the NAACP works 365 days every
9 year to vote -- to register people to vote, and we
10 also arrange candidates forums -- we did two that I
11 coordinated last year, which was one on Cheney's
12 campus, but it was live on Facebook to have people
13 hear from the candidates that were running in
14 Delaware County. And we've also -- let's see that
15 was one. The other, we held a judges' forum to
16 acquaint people with those persons that were
17 running as judges in Delaware County.

18 Q. Thank you. I want to talk about the
19 reason why we are talking through a screen today,
20 which is the COVID-19 pandemic.

21 A. Yes.

22 Q. What, if any, concerns do you have
23 about exposure to the COVID-19 virus?

24 A. My husband is a diabetic and uses

1 insulin. I take a high blood pressure pill. So,
2 those are two categories. And we are in our
3 seventies. Those are three categories that are in
4 highest jeopardy, if we contract the virus.

5 Q. I understand. As a result of that,
6 what precautions, if any, have you and your husband
7 been taking to stay safe?

8 A. We wear masks. We wear gloves. We
9 disinfect constantly. We wash our hands all the
10 time. And we stay as close to home as possible.

11 Q. You stay as close to home as
12 possible. Do you ever go out? Do you ever leave
13 the house?

14 A. Yes, we go to the supermarket and
15 other life-sustaining appointments. I have been
16 seeing my doctor on video, but my husband sometimes
17 has to go to keep his appointments.

18 Q. And coming back to voting
19 specifically, were you able to vote in the primary
20 election this past June?

21 A. Yes.

22 Q. What method did you use to vote?

23 A. My husband and I both used mail-in
24 ballots.

1 Q. Why did you choose to vote by mail
2 instead of in person?

3 A. Well, we did not feel safe going to
4 polls. My husband is a poll worker. He is a
5 clerk. He and two other persons in his age range
6 did not work the polls in June. We were just
7 concerned about exposure. And in June we were
8 still staying in the house. We did not start to go
9 out of the house until the middle of August, late
10 August other than the supermarket.

11 Q. Now, you told us earlier you've been
12 working on Get-Out-the-Vote efforts as part of your
13 involvement in the local NAACP?

14 A. Yes.

15 Q. Could you talk about how this
16 Get-Out-the-Vote effort has evolved since the
17 COVID-19 pandemic happened?

18 A. Well, mostly it has to be done
19 through social media. Historically, we could
20 target an area where registration was low and go
21 door to door with registration forms and see that
22 people were registered. Since COVID, we have had
23 to do things by trying to arrange things in Zoom,
24 emailing, posting on our website, posting on our

1 Facebook site.

2 Q. Would you say that has made
3 Get-Out-the-Vote efforts more or less difficult?

4 A. More difficult. There is nothing
5 like face to face and getting that form filled out
6 and making sure people fill it out correctly.

7 Q. Why is that face-to-face interaction
8 so important?

9 A. We can assure the form will not be
10 rejected because we can assure all the boxes are
11 filled in. Now, we are telling people to go online
12 and register and make sure they have that link, but
13 we don't get to see how that goes.

14 Q. Right. Are you planning to vote in
15 the upcoming November general election?

16 A. Yes.

17 Q. And what method are you planning to
18 use to vote?

19 A. Mail-in ballot.

20 Q. What, if any, concerns do you have
21 about voting by mail in the upcoming general
22 election?

23 A. I am concerned about the movement of
24 the mail. Our mail comes from the Philadelphia

1 clearing -- post office clearing center -- and the
2 other day -- let's see. Where are we in August?
3 In June, I got a bill on June 1, that was due on
4 June 1; and it was a bill that usually got to me at
5 least 14 days early. So, that's when it hit me
6 that we have a mail movement problem.

7 Q. Have you had any other personal
8 experience with mail delays?

9 A. I can't judge. I have thought about
10 that because certain things that come I don't check
11 the date it is stamped, so I haven't been
12 regulating whether or not mail was getting here in
13 a timely fashion. But that hit me because I had to
14 pay my bill late.

15 Q. Right. And can you say exactly how
16 much earlier do you usually receive that bill prior
17 to the date that you have to pay it?

18 A. At least 14 days. I am not saying
19 that's perfectly correct. I know it is at least
20 14 days.

21 Q. Thank you. And just to circle back,
22 in November, why won't you vote in person?

23 A. Oh, my goodness. We are really
24 concerned about exposure because of our health

1 conditions, because we have received no information
2 as to what precautions would be potentially put in
3 place at the polls, because the three clerks -- the
4 two with whom my person worked as the third, they
5 are not going because they have health conditions
6 that jeopardize them.

7 Q. So, you are concerned for your
8 safety; is that what I am getting at?

9 A. Yes, we are afraid.

10 Q. Thank you.

11 MR. LOVETT: Your Honor, I have no
12 further questions, and I will pass the witness.
13 Thanks, Dr. Duvall-Flynn.

14 THE WITNESS: You are welcome.

15 JUDGE BROBSON: Ms. Mathias, are you
16 standing in for the Respondents at this point? I
17 didn't have your name on my list, but welcome
18 aboard.

19 MS. MATHIAS: Thanks, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. MATHIAS:

22 Q. Good afternoon, Dr. Duvall-Flynn.

23 A. Good afternoon.

24 Q. Thanks for being here today.

1 I just have a few more questions.
2 Have you already applied for your mail-in ballots
3 for the November 2020 general election?

4 A. Yes.

5 Q. Okay. And have you, in your efforts
6 with NAACP and otherwise to educate people about
7 their voting options, have you encouraged others to
8 request and turn in their mail-in ballots early?

9 A. Yes.

10 Q. And you plan to return your own
11 mail-in ballot as early as possible?

12 A. We will fill that out the day we get
13 it and send it back the next day.

14 Q. Okay. Okay.

15 MS. MATHIAS: I think that is all
16 the questions that I have, actually. So, thank you
17 very much.

18 THE WITNESS: You are welcome.

19 JUDGE BROBSON: Thank you.

20 Mr. Wallen.

21 MR. WALLEN: No questions, Your
22 Honor.

23 JUDGE BROBSON: Mr. Giancola?

24 MR. GIANCOLA: Thank you, Your Honor.

1 BY MR. GIANCOLA:

2 Q. Dr. Duvall-Flynn, in addition to
3 applying by mail voters are also permitted to go to
4 the elections office to do so, correct?

5 A. Yes.

6 Q. So, if there was concern about
7 applications getting in on time or getting ballots
8 turned in on time, voters could always do this in
9 person on the spot, correct?

10 A. Our center is heavily trafficked.
11 It's a government center. It is just as dangerous
12 for us to go there with all the traffic in and out
13 of that courthouse complex as it would be to go to
14 the polls.

15 Q. Okay. You mentioned before that you
16 view the right to vote as a duty, I think was your
17 word?

18 A. It's a citizen's responsibility to
19 vote.

20 Q. You deem that an essential activity?

21 A. Absolutely.

22 MR. GIANCOLA: Okay. No other
23 questions, Your Honor. Thank you.

24 JUDGE BROBSON: Mr. Shapiro.

1 MR. SHAPIRO: I apologize, Your
2 Honor.

3 BY MR. SHAPIRO:

4 Q. Good afternoon. And was it Dr.
5 Duvall-Flynn?

6 A. Yes.

7 Q. How are you this afternoon?

8 A. I am well. Thank you.

9 Q. I have just a couple of questions for
10 you. First of all, if I understood your testimony
11 correctly, you were voting by mail-in, and the
12 location of your polling place will have nothing to
13 do with that, correct?

14 A. If I understand you correctly, are
15 you asking me if how far away from me the poll is
16 my concern? Is that your question?

17 Q. That is my question.

18 A. It is not the distance to the poll.

19 Q. Because you are mailing it no matter
20 where the polling place is; is that correct?

21 A. Yes.

22 Q. And I just -- the only other thing I
23 wanted to pick up on was we heard also from
24 Mr. Huston this morning, and I think again from you

1 about the extraordinary efforts that the NAACP is
2 going through to educate people. My sense is
3 Mr. Huston -- he has a lot of titles -- I don't
4 remember which one -- my sense is Mr. Huston and
5 the NAACP have done a really phenomenal job so far
6 in responding to COVID.

7 Is that a fair statement in your
8 view?

9 A. I am not sure what you mean, but in
10 terms of voting, the website carries a tremendous
11 amount of information.

12 Q. Let me try to be more clear. Both
13 you and Mr. Huston have testified about all the
14 expanded education and all the ways in which you
15 are reaching potential voters and the ways in which
16 you have adjusted to COVID; is that right?

17 A. Yes.

18 Q. So, for instance, you said -- you
19 gave us a couple of things on the list. You said
20 Zoom, email, Facebook. Are there other ways in
21 which you are reaching voters to educate them?

22 A. Mainly those approaches. The state
23 website carries educational material which gets
24 shared with the state membership and local

1 branches, yes.

2 MR. SHAPIRO: Okay. I have nothing
3 further.

4 JUDGE BROBSON: I have couple other
5 questions. They are not particularly relevant to
6 the subject matter we have before us, but I am just
7 curious as to what your background, your
8 educational background is.

9 THE WITNESS: I have an earned
10 doctorate in education. I have a master's degree
11 in pastoral counseling. I taught for 40 years,
12 preschool through graduate school.

13 JUDGE BROBSON: Wow, impressive
14 career. I will hand you back to Mr. Lovett for any
15 final redirect.

16 MR. LOVETT: I have nothing further,
17 Your Honor. Thank you.

18 JUDGE BROBSON: Any objection to the
19 witness being excused? No objection.

20 Dr. Duvall-Flynn, thank you so much.
21 I wish you and your husband good health and safety,
22 and we appreciate your testimony today.

23 THE WITNESS: Thank you so much.

24 JUDGE BROBSON: With that, we will do

1 a brief recess to reset the deck. Two minutes.

2 (Break taken.)

3 COURT CRIER: The Commonwealth Court
4 is now in session.

5 JUDGE BROBSON: Ms. Engsell, call
6 your next witness.

7 MS. ENGSSELL: Your Honor, Petitioner
8 calls Dr. David Weber.

9 DAVID WEBER, M.D., having been duly
10 sworn, was examined and testified as follows:

11 VOIR DIRE

12 BY MS. ENGSSELL:

13 Q. Good afternoon Dr. Weber.

14 Can you please state your name for
15 the record?

16 A. David J. Weber.

17 Q. Dr. Weber, what do you do for a
18 living?

19 A. I am a professor of medicine and
20 pediatrics at the University of North Carolina at
21 Chapel Hill School of Medicine and a professor of
22 epidemiology at the Gillings School of Public
23 Health, also at the University of North Carolina.

24 Q. Why are you here today?

1 A. I am here as an expert in infectious
2 disease epidemiology and COVID.

3 Q. For whom are you testifying?

4 A. For the NAACP.

5 Q. Have you been compensated by the
6 petitioner, the NAACP, for your work on this case?

7 A. No.

8 Q. Why did you agree to do this case for
9 no pay or on a pro bono basis as we say it?

10 A. I am a public health epidemiologist,
11 and I serve as medical director of our Infection
12 Prevention Department. My goal is to safeguard the
13 public's health.

14 MS. ENGSSELL: Mr. Baldwin, could you
15 please bring up Petitioner's 31?

16 BY MS. ENGSSELL:

17 Q. Dr. Weber, Mr. Baldwin brought up
18 Petitioner's Exhibit 31. Do you recognize this?

19 A. Yes, it is my curriculum vitae.

20 Q. And is this a truthful and accurate
21 representation of your background in the field of
22 infectious diseases and epidemiology as of today?

23 A. Yes.

24 MS. ENGSSELL: Your Honor, I would

1 like to move P31 into the record.

2 JUDGE BROBSON: Any objection?

3 Hearing none, Petitioner's Exhibit 31
4 is admitted into the record.

5 (Exhibit Petitioner's 31 was
6 previously marked and admitted into evidence.)

7 MS. ENGESELL: Thank you, Your Honor.

8 BY MS. ENGESELL:

9 Q. Since your curriculum vitae will be
10 into the record, I would like to walk through some
11 of your background for the Court. Please tell the
12 Court about your educational background.

13 A. I graduated from Wesleyan University
14 in Middletown, Connecticut, magna cum laude with a
15 bachelor's degree in 1973. After that, I attended
16 University of California, San Diego Medical School
17 where I graduated in 1977. From there, I went to
18 Boston and did further training in medicine at
19 Massachusetts General Hospital, one of the Harvard
20 Hospitals. I was there from '77 to '85. I did a
21 three-year internal medicine residency, one year
22 training in ambulatory care and preventive medicine
23 and then spent the rest of my time as an infectious
24 disease fellow.

1 In addition, I received a master's of
2 public health from Harvard University, and then I
3 moved down here to North Carolina.

4 Q. Please tell the Court about your
5 career as physician.

6 A. Certainly. So, I arrived here in
7 1985. I have been here ever since. I was -- I did
8 adult and pediatric infectious diseases and
9 critical care medicine. I was hired initially and
10 I served and still serve as the medical director of
11 the Infection Prevention Department. This is our
12 department for approximately 20 individuals whose
13 goal is to prevent infectious disease from
14 spreading between patients, patients to staff and
15 the hospital, and staff to patients.

16 I also served as medical director of
17 our Occupational Health Department at the hospital
18 taking care of approximately 13,000 workers for
19 28 years. For a number of years now, I have served
20 as an associate chief medical officer at the
21 medical center. I also teach at the School of
22 Public Health and the Department of Epidemiology.
23 Depending on the year, I teach somewhere between
24 two and three courses. Currently, I am teaching a

1 course on COVID.

2 Q. Do you currently practice as an
3 epidemiologist seeing patients?

4 A. Well, I practice as a physician
5 seeing patients, yes. I attend now several months
6 a year on the adult infectious disease service. It
7 has been a few years, but I have in the past
8 attended on the pediatric infectious disease
9 service as well as critical care service.

10 And as I mentioned, for 28 years I
11 physically saw our 13,000 employee, supervising one
12 nurse practitioner and a number of nurses.

13 Q. Now, what is infectious disease
14 epidemiology?

15 A. So, of course, infectious diseases is
16 the study of diseases transmitted by germs from
17 person to person. Let me make a distinction
18 between what I do as a physician and what I do as
19 an epidemiologist. Physicians are trained, as are
20 nurses, to take care of the person in front of
21 them. It is a one-on-one experience. Patient
22 comes in with a complaint, signs and symptoms of a
23 disease. You provide a proper diagnosis and proper
24 treatment.

1 Epidemiology by its nature only deals
2 with groups of individuals although it can deal, as
3 I do, with infectious diseases. It is focused on
4 risks and determinants of diseases, how they are
5 transmitted among people, and most importantly
6 mitigation and prevention evidence and I do that
7 focusing mostly on infectious diseases.

8 Q. Now, you discussed your work at UNC.
9 Are you also a member of any professional
10 organizations or working groups?

11 A. The answer is yes, a number of those.
12 I am a member of the Society for Healthcare
13 Epidemiology of America that represents hospital
14 epidemiologists, physicians who do infection
15 prevention. I actually serve at the current time
16 as secretary of the board of trustees and as the
17 board liaison to the guidelines committee. In
18 addition, I am a fellow of that society.

19 I am a fellow of the Infectious
20 Disease Society of America. In the recent past, I
21 served on their guidelines committee, and I am
22 still on two -- thought I rotated off, I am still
23 working on two guidelines that have not yet been
24 published.

1 I served as an advisor for the
2 Centers for Disease Control, their writing group
3 for their guidelines on occupational health. The
4 first part of that has been published; the
5 remainder hasn't.

6 For six years I served as the SHEA
7 liaison to the advisory committee of immunization
8 practices. That group advises the CDC on vaccines.
9 Up until July 1, I was a member of the working
10 group on COVID vaccines and although I have been
11 replaced as the liaison, I remain a member of two
12 additional working groups that I started working on
13 there.

14 I am also a fellow in the Royal
15 Society of Medicine and as well in other groups
16 that I advise in terms of COVID.

17 I am advisor to the World Health
18 Organization and was on the working group and
19 co-author of their paper on sterilization and
20 disinfection.

21 I serve as an advisor to the
22 lieutenant general commanding the 18th Airborne
23 Corps at Fort Bragg with 90,000 troops under his
24 command on COVID mitigation, and I have and am

1 serving as an advisor to the chancellor at UNC
2 Chapel Hill and to the president of the 17 colleges
3 of the University of North Carolina system on COVID
4 mitigation.

5 Q. Over the course of your career, have
6 you published any research articles?

7 A. Yes, I have approximately 440
8 citations that have been found in the National
9 Library of Medicine's PubEd. It is a listing of
10 peer reviewed journal, and I have roughly 440
11 citations there.

12 Q. And just to clarify the articles that
13 you mentioned, those are all peer reviewed?

14 A. They would follow the standard
15 practice. They are reviewed by an editor and maybe
16 an associate editor and sent out to at least two
17 and sometimes more outside reviewers. Those
18 reviews are reviewed by the associate editor and
19 the editor before the article is published or
20 accepted and then published.

21 Q. Have you authored or edited any
22 textbooks?

23 A. Yes, with a colleague of mine, Jim
24 Thomas, at the School of Public Health a number of

1 years ago we published a textbook on infectious
2 disease epidemiology. More recently with a
3 colleague of mine, Tom Talbot, at Vanderbilt
4 University, we are publishing and will be the
5 editors on the fifth edition of Mayhall's textbook
6 on hospital epidemiology. The book is complete and
7 will be published in November.

8 Q. Have you authored any publications on
9 coronaviruses specifically?

10 A. The answer is yes. I worked on
11 SARS-CoV-1; and I should say just in that realm
12 that I actually personally took care of the eighth
13 and last case of SARS in the United States from
14 SARS-CoV-1. We did a number of basic science
15 studies using surrogate viruses or coronaviruses.
16 I have published review articles on emerging
17 diseases that included SARS and more recently
18 roughly half a dozen papers on SARS-CoV-2 or COVID.

19 Q. Have you authored any guidelines or
20 publications for the United States Centers for
21 Disease Control and Prevention on the transmission
22 of infectious disease or best practices to prevent
23 transmission?

24 A. The answer is yes. I was on the

1 working group that developed the guidelines for
2 prevention of infectious transmission in
3 hemodialysis, and I was the co-author on the CDC's
4 2008 sterilization and disinfection guidelines
5 which still remain the most current guidelines on
6 the subject.

7 Q. Dr. Weber, have you ever testified
8 before as an expert witness in state or federal
9 court?

10 A. The answer is yes.

11 Q. What has been the nature of some of
12 the topics on which you have testified?

13 A. I testified several times for the
14 Carolina Medical Board only as an expert providing
15 testimony when they've asked me about infectious
16 disease issues or infection prevention issues when
17 they've had complaints against physicians.

18 I am a member of the North Carolina
19 group that reviews in North Carolina any physician
20 who has Hepatitis B or HIV has to report that to
21 the state, and they set up an expert panel. I have
22 been a member of the panel for a couple of decades.

23 In addition, I have helped the
24 attorney general in North Carolina. The most

1 recent case I am working on is TB transmission in
2 North Carolina prisons. I am also helping the
3 attorney general in the Northern District of
4 Florida -- I haven't gotten started, but I will be
5 on a case there.

6 I am also helping the federal
7 attorney general in North Carolina on a food
8 poisoning case that involved a civilian who had a
9 claim about getting food poisoning at Fort Bragg.

10 MS. ENGSSELL: Your Honor, at this
11 time I would like to proffer Dr. Weber as an expert
12 in the field of infectious disease epidemiology,
13 specifically with respect to transmission of the
14 coronavirus and COVID-19, as well as the risk of
15 transmitting COVID-19 imposed by voting in person
16 in the upcoming general election.

17 JUDGE BROBSON: Petitioners are
18 offering Dr. Weber as an expert in infectious
19 disease epidemiology and coronaviruses including
20 COVID-19 transmission of the disease and in
21 particular transmission in the context of the
22 upcoming general election and voting in person.

23 Mr. Wiygul, your position?

24 MR. WIYGUL: Your Honor, we do not

1 dispute Dr. Weber's qualifications as an
2 epidemiologist generally; however, we do object to
3 the admissibility of the specific opinions that
4 based on Petitioner's disclosure we understand he
5 intends to offer in this case regarding as a
6 general matter the relative risk of contracting
7 COVID in ballot marking device based voting systems
8 versus hand-marked ballot based systems, and we
9 have set forth as the grounds for a motion in
10 limine.

11 JUDGE BROBSON: Mr. Wiygul, would you
12 like to voir dire Dr. Weber?

13 MR. WIYGUL: I would, Your Honor.

14 JUDGE BROBSON: Please proceed.

15 BY MR. WIYGUL:

16 Q. Dr. Weber, the facts and opinions
17 that you intend to offer in your testimony in this
18 case were set forth in your affidavit dated
19 July 31, 2020; is that correct?

20 A. Yes.

21 Q. Did you personally draft the entirety
22 of that affidavit?

23 A. Yes.

24 Q. And you are an epidemiologist, sir;

1 is that correct?

2 A. Yes.

3 Q. You do not claim any expertise in
4 voting machines or voting systems; is that correct?

5 A. I claim an expertise in sterilization
6 and disinfection of environmental surfaces that
7 would include touch screens. We use those in the
8 hospital as well as any other materials whether
9 they are used in households, businesses, or
10 elsewhere.

11 Q. Sir, have you ever -- you have lived
12 in North Carolina for the last 35 years; is that
13 right?

14 A. Yes.

15 Q. And you have voted in North Carolina
16 during this entire time; is that right?

17 A. Yes.

18 Q. North Carolina had its primary
19 election in March of this year, I believe; is that
20 right?

21 A. Yes.

22 Q. Did you vote in that election?

23 A. I did.

24 Q. Prior to submitting an affidavit in

1 this case, you submitted an affidavit in a case
2 brought in North Carolina State Court; is that
3 correct?

4 A. Yes.

5 Q. The plaintiff in that case, similar
6 to the plaintiff here or petitioners here, sought
7 an order requiring, among other things, North
8 Carolina to switch from ballot marking devices to
9 hand-marked paper ballots because of the alleged
10 health risks related to COVID; is that right?

11 A. In part that is -- yes, that is part
12 of their claims, but yes.

13 Q. In addition to submitting an
14 affidavit in that case, you also testified in
15 person at a preliminary injunction hearing; is that
16 correct?

17 A. Yes.

18 Q. And the ballot marking device used in
19 North Carolina is the ExpressVote XL machine; is
20 that correct?

21 A. I believe so, yes.

22 Q. When you voted in North Carolina, did
23 you use a ballot marking device or use a
24 hand-marked paper ballot?

1 A. I used a paper ballot.

2 Q. In fact, you at the time testified at
3 the preliminary injunction hearing in the North
4 Carolina case, you had never seen an ExpressVote XL
5 machine; is that correct?

6 A. Only pictures, yes.

7 Q. Do you know when Pennsylvania
8 conducted its primary election this year?

9 A. No.

10 Q. Did you observe any procedures in
11 place at any polling places in Pennsylvania during
12 the primary election?

13 A. Not physically, no.

14 Q. In informing your opinions, did you
15 communicate with any officials at the Pennsylvania
16 Department of State about the procedures in place
17 at polling places in Pennsylvania during the
18 primary election?

19 A. No.

20 Q. Did you speak to any such official
21 about the procedures expected to be in place during
22 the November general election?

23 A. No.

24 Q. In forming your opinions, did you

1 communicate with any election officials at the
2 county boards of elections about the procedures in
3 place at polling places in Pennsylvania during the
4 June 2020 primary election?

5 A. No.

6 Q. Did you speak to any such officials
7 about the procedures expected to be in place during
8 the November general election?

9 A. No.

10 Q. Your affidavit indicates that in
11 forming your -- excuse me -- in forming your
12 opinions you reviewed a memorandum by the
13 Pennsylvania Department of State dated April 28,
14 2020, entitled Election Operations During COVID-19?

15 A. Yes.

16 Q. And your affidavit doesn't identify
17 any other documents that you reviewed concerning
18 election processes and procedures at Pennsylvania
19 polling places, correct?

20 A. Yes.

21 Q. Did you, in fact, review any other
22 documents concerning election processes and
23 procedures at Pennsylvania polling places?

24 A. I have since reviewed the

1 recommendations from three different manufacturers
2 of election devices for sterile -- for disinfecting
3 their touch screens.

4 Q. Anything else?

5 A. I have reviewed -- let me look
6 through what I have here. Give me just a second.
7 I reviewed the CDC guidelines dated June 22,
8 Considerations For Election Polling Locations and
9 Voters. I looked at --

10 Q. Sir, to interrupt briefly. So my
11 question is clear, I am asking you about documents
12 concerning election policies and procedures at
13 Pennsylvania polling places.

14 A. No, beyond the guidelines for
15 disinfecting the equipment that is being used in
16 Pennsylvania.

17 Q. When you submitted your affidavit in
18 this case what, if anything, had you done to
19 investigate the specific COVID-19 safety
20 precautions that were actually in place in
21 Pennsylvania during the primary election?

22 A. I didn't review any additional
23 documents beyond what I told you.

24 Q. You would agree with me that your

1 affidavit that you submitted in this case doesn't
2 discuss the possibility of voters using disposable
3 styluses to vote on electronic voting machines,
4 correct?

5 A. Yes.

6 Q. Yes, you agree with me?

7 A. Yes, I agree with you.

8 Q. And you agree with me that your
9 affidavit does recommend that poll workers who are
10 handling paper ballots wear glove?

11 A. Correct.

12 JUDGE BROBSON: Mr. Wiygul, you are
13 getting close to cross-examination. This is voir
14 dire.

15 Can we stick to the data that he is
16 using and that he reviewed to support his opinions?
17 You are kind of crossing the line into
18 cross-examining his declaration.

19 Let's get back to voir dire.

20 MR. WIYGUL: I apologize, Your Honor.
21 To be clear, I am trying elicit both what he relied
22 on and what he didn't rely on.

23 BY MR. WIYGUL:

24 Q. Dr. Weber, to that effect, am I

1 correct that you did not consider in your affidavit
2 the possibility that voters would vote on
3 electronic voting machines using disposable gloves?

4 A. Certainly that would be part of sound
5 practices for them to be using disposable gloves as
6 was noted in the June 22 CDC guideline.

7 Q. But your opinion doesn't discuss the
8 effect from a public health standpoint of voters
9 using those gloves, correct?

10 A. Yes.

11 Q. I'm sorry. My problem is the
12 question. Yes, I am correct?

13 A. Yes, you are correct. Sorry.

14 MR. WIYGUL: Your Honor, at this
15 point, I would object to -- again, I do not object
16 to Dr. Weber being qualified as an epidemiologist
17 generally, although I am not sure it is relevant in
18 this proceeding. I do object to him being
19 qualified as an expert on the risk of transmission
20 of COVID-19 in different types of voting systems
21 that may be used in Pennsylvania elections.

22 JUDGE BROBSON: Ms. Gallagher, do you
23 have any voir dire?

24 BY MS. GALLAGHER:

1 Q. Hi, I am Kathleen Gallagher with the
2 Republican Committee interveners.

3 Sir, it is nice to meet you.

4 I believe that Mr. Wiygul had asked
5 you or you responded, did you testify that you had
6 reviewed the June 27, 2020 CDC guideline
7 Consideration for Election Polling Locations in
8 Voters?

9 A. I had reviewed it once it was
10 published, yes.

11 MS. GALLAGHER: That is all I have,
12 sir.

13 JUDGE BROBSON: Let me see. Who
14 else? Mr. Wallen.

15 MR. WALLEN: I don't have any
16 questions, but I do join in Mr. Wiygul's motion.

17 JUDGE BROBSON: If I understand the
18 objection here, there is really no question that
19 seems to be Dr. Weber's qualifications to testify
20 generally as an epidemiologist, someone who is
21 familiar with coronavirus and COVID-19 and
22 specifically about the methods and risks of
23 transmission of the disease. And certainly that is
24 information that is beyond the average layperson's

1 understanding, although we certainly listen to the
2 news and are told things as a matter of public
3 health of things that we should be careful about.
4 We don't suspend that here.

5 I think the objection is targeted to
6 Dr. Weber offering any specific testimony about the
7 relative risk of transmission with regard to
8 elections in Pennsylvania and whether he has any
9 specific knowledge, has done any specific studies,
10 reviewed any specific literature that would allow
11 him to offer an opinion specific as to in-person
12 voting with touch screen devices in Pennsylvania,
13 under Pennsylvania election guidelines.

14 As I understood the testimony on voir
15 dire, Dr. Weber has not engaged in any specific
16 studies relating to transmission or risk of
17 transmission of COVID in Pennsylvania elections,
18 particularly using the touch screen methodology.

19 The objection appears to be him
20 offering any conclusions specific to that point.
21 This does not preclude him offering his testimony
22 with regard to the risks of transmission of COVID
23 generally and perhaps even the use of surfaces that
24 are used, I guess, similar to some kind of touch

1 screen surface like his experience in the hospital.
2 But to extrapolate that to a Pennsylvania election
3 experience is what the objection is. Can you
4 respond to that specific objection?

5 MS. ENGSELL: Sure. We certainly are
6 not offering Dr. Weber as an expert in Pennsylvania
7 voting practices and procedures. What we are
8 offering him as is an expert in, as you said, in
9 the fields of epidemiology and infectious disease,
10 and he has knowledge with respect to the best
11 practices in cleaning procedures and methods of
12 preventing the transmission of coronavirus and
13 COVID-19 in public places and via shared common
14 surfaces.

15 What he would be doing in his
16 testimony is applying those best practices and that
17 knowledge and that experience to the facts in this
18 case which concern polling places, but also the
19 things they use as well, which is the use of touch
20 screens through electronic voting machines or
21 crowding or gathering together in indoor spaces.

22 So, it is not with respect to voting
23 in Pennsylvania specifically, but certainly in
24 conditions that could be present in voting.

1 JUDGE BROBSON: Well, you have me to
2 a certain extent. So, you are not going to be
3 asking Dr. Weber to testify about the risk of
4 in-person voting in Pennsylvania where in-person
5 voting involves a touch screen? He is not going to
6 be testifying and offering an ultimate opinion on
7 that risk; is that correct?

8 MS. ENGSELL: He would be offering an
9 opinion on the risk of touching a common surface
10 such as a touch screen.

11 JUDGE BROBSON: Ms. Engsell -- Ms.
12 Engsell --I know we are on WebEx, but I need you to
13 try to respond to my question that I am asking.

14 Are you offering Dr. Weber to give an
15 ultimate opinion on the safety of voting in person
16 in Pennsylvania counties that use touch screen
17 ballots?

18 MS. ENGSELL: No, we are not offering
19 him to provide that ultimate opinion. We are
20 offering him to explain the risks of shared common
21 surfaces and the Court being the fact finder would
22 make the conclusion that the Court deems
23 appropriate.

24 JUDGE BROBSON: Any response?

1 MR. WIYGUL: Just by way of
2 clarification. Here, I think it might be helpful
3 to refer to Dr. Weber's affidavit --

4 JUDGE BROBSON: I am not referring to
5 an affidavit. The witness is here to testify. I
6 haven't even looked at the affidavit.

7 MR. WIYGUL: Just to be clear, Your
8 Honor, so I know how we are going to proceed. My
9 objection is specifically to an opinion that was
10 proffered in the affidavit that says that the risk
11 of transmitting COVID imposed by voting in person
12 at polling places where the use of electronic
13 ballot marking devices is required is far greater
14 than the risk imposed by voting at places where
15 most voters are casting hand-marked paper ballots.

16 As I understand from Petitioner's
17 colloquy with Your Honor, they are not going to
18 offer that opinion into evidence in this case.
19 That is my central objection to that opinion.

20 JUDGE BROBSON: That is my
21 understanding from Ms. Engsell's response, that she
22 is not going to offer Dr. Weber to testify to that
23 opinion. Am I correct about that, Ms. Engsell?

24 MS. ENGSSELL: That is correct, Your

1 Honor.

2 JUDGE BROBSON: Ms. Gallagher, do you
3 have anything further on the motion in limine?

4 MS. GALLAGHER: No objection, Your
5 Honor.

6 JUDGE BROBSON: Mr. Wallen?

7 MR. WALLEN: If that is what the
8 witness is going to testify to, I guess I would
9 just have a broad sort of relevance objection to
10 spending the Court's time on COVID and testimony
11 when we are here to discuss the preliminary
12 injunction.

13 JUDGE BROBSON: I am not an
14 epidemiologist. The standard for expert evidence
15 is when testimony of an expert can inform a
16 layperson. I am about a layperson as you can get.
17 So, I certainly would welcome Dr. Weber's testimony
18 on the methods and manner that COVID is
19 transmitted.

20 I don't understand -- understand from
21 Ms. Engsell that he is not going to offer an
22 opinion as to the risk of touch screen in-person
23 voting versus paper ballot in-person voting, that
24 that is not an opinion she is going to offer him

1 for.

2 So, I guess at this point in time,
3 since she is not offering him for that purpose
4 there is no reason to grant your motion in limine.
5 I will deny it without prejudice, but certainly if
6 Ms. Engsell does goes far afield from where she is
7 -- if she doesn't keep Dr. Weber confined, please
8 lodge your objection, and I will rule on it at that
9 point.

10 MR. WALLEN: Thank you, Your Honor.

11 JUDGE BROBSON: Ms. Engsell, please
12 proceed. I will accept Dr. Weber as an expert in
13 infectious disease epidemiology, coronavirus, and
14 COVID-19. I will not accept him in terms of
15 relative risks of in-person voting vis-a-visa
16 transmission of COVID in Pennsylvania depending on
17 the method of ballot marking.

18 MS. ENGSSELL: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY MS. ENGSSELL:

21 Q. Dr. Weber, what is COVID-19?

22 A. COVID-19 is an infection, a
23 respiratory tract infection caused by the virus, or
24 coronavirus Type 2. This is one of three epidemic

1 coronaviruses. We had SARS-CoV-1; we had MERS, the
2 Middle Eastern Respiratory Syndrome.

3 We have four endemic coronaviruses
4 that normally are transmitted by things much like
5 influenza that occur in the winter months in the
6 United States. It causes primarily initially a
7 respiratory tract infection although it can have
8 other severe consequences.

9 Q. When did you first become familiar
10 with COVID-19?

11 A. With the publication of the -- and
12 reports by the WHO of the outbreak in China that
13 occurred -- the first reports in January of this
14 year.

15 Q. Is COVID-19 a coronavirus?

16 A. Yes, COVID-19 is caused by a
17 coronavirus called SARS-CoV-2. Coronavirus meaning
18 crown because when you see these viruses under the
19 electron microscope, there are little spikes
20 sticking up that make people think of crowns.

21 Q. Other than the helpful visual you
22 just gave us, what is coronavirus that a
23 non-physician might understand?

24 A. Coronaviruses predominantly cause

1 respiratory tract illnesses, as I said, starting
2 off with a sore throat, runny nose. In mild cases,
3 many people might have no symptoms at all. More
4 severe cases, they progress to shortness of breath,
5 cough. When the virus invades the lungs, it causes
6 pneumonia and people who are older,
7 immunocompromised or just unlucky it can cause a
8 more general body infection that ultimately can
9 result in death either through failure of the lungs
10 to provide oxygen or through the heart, kidney, or
11 other vital organs. This would be the seventh
12 human coronavirus that has been involved -- they
13 are all transmitted in similar ways.

14 Q. And how is the relevant coronavirus
15 here, SARS-CoV-2, transmitted?

16 A. It is predominantly transmitted by
17 respiratory droplets. An infected person -- and 40
18 to 80 percent may not have symptoms, and they are
19 infectious. People can also transmit
20 pre-symptomatically, that is the day before the
21 day -- the day or two before they develop symptoms
22 and that is well described in influenza, mumps,
23 measles, rubella, chicken pox, other viruses.

24 When they cough or sneeze or even

1 just talking, playing musical instruments, they
2 spew out viral particles into the air. A person
3 within a nearby range -- CDC would say six feet --
4 breathes those in, it affects their lining of the
5 mouth and nose and ultimately, potentially, their
6 lungs and causes disease. That is the most
7 predominant way it spread.

8 There are other ways, certainly
9 direct contact, touching, kissing, hugging, sharing
10 body respiratory secretions that come from the nose
11 or the mouth. It can also be transmitted in two
12 other ways: One is through contaminated
13 surfaces -- and again, an infected person can be
14 asymptomatic -- rubs their mouth or nose where the
15 virus is present, touches an object, door handle,
16 for instance, another object, elevator button
17 potentially, another person, and they don't provide
18 hand hygiene before they do that, another person
19 comes along and touches that surface and rub their
20 mouth or nose and they become infected.

21 This virus as with other
22 coronaviruses lives hours to days on those surfaces
23 leading to infection and, of course, if people rub
24 their nose or mouth, shake hands with someone, they

1 rub their nose or mouth without hand hygiene, they
2 could transmit infection between them.

3 Q. What diseases or symptoms are caused
4 by SARS-CoV-2?

5 A. It is very similar to what you find
6 with flu, often starting off with sore throat,
7 runny nose, cough, progressive to shortness of
8 breath. Much like influenza, people will often
9 have fever and chills. Those are quite common.
10 They may have muscle aches, joint pains, fatigue,
11 and in sicker cases profound fatigue is common.
12 All ages but more common in children, they can have
13 nausea, vomiting, and diarrhea. And then one very
14 unusual symptom, which is really only described for
15 COVID, which is loss of sense of smell which can
16 last for a substantially long period of time but
17 seems to be a unique symptom for that.

18 Much less commonly, this virus, which
19 can cause other symptoms those that are in the
20 lungs -- but some people -- but uncommonly -- could
21 present with symptoms where throats are inflamed
22 and there is inflammation around the heart or other
23 general problems, but that is uncommon.

24 Q. Can COVID-19 result in death?

1 A. The answer is yes. We have good data
2 on the number of people who become symptomatic.
3 About 80 percent of people who develop symptoms
4 have mild enough disease that they don't require
5 hospitalization. About 20 percent do get
6 hospitalized and once hospitalized the mortality
7 rate is approximately 15 percent.

8 Q. Are there certain groups of people
9 who are at greater risk of being infected or
10 suffering a more severe form of COVID-19?

11 A. The answer is yes. Let me take those
12 two questions separately. In terms of the greater
13 risk of becoming infected, data would suggest that
14 we have higher rates of infection in
15 African-Americans and Latinos, for instance. And
16 certainly in terms of developing more severe
17 illness, age is really a predominant factor. If
18 you are 50 years of age, your chance of developing
19 severe illness compared to a 20-year-old is one
20 hundredfold higher and over 50 is another
21 hundredfold higher, so a 10,000-fold difference
22 from 20 to age 100. A lot of diseases that
23 certainly compromise the immune system such as
24 having a solid organ transplant, cancer puts you at

1 risk. Then a whole variety of other things,
2 obesity, hypertension, diabetes, lung disease, puts
3 you at higher risk for severe disease.

4 I should say that in terms of
5 acquisition other things play a role. Based on the
6 fact that it is transmitted by people mostly by
7 droplets that an infected person coughs or sneezes
8 out; time within that six-feet period, the CDC says
9 15 minutes puts you at higher risk if you are
10 within that distance with someone for 15 minutes.
11 Not if you are wearing masks -- if you are highly
12 protective, both on the person that is infected and
13 the person not infected not wearing masks or being
14 around somebody, even if you are wearing a mask,
15 but somebody who is not wearing a mask certainly
16 puts you at higher risk.

17 Not performing hand hygiene after
18 touching a shared item or after -- in terms of
19 transmitting it to a shared item after touching
20 your nose or mouth would be a risk factor and,
21 obviously, it's recommended by the CDC and WHO not
22 to touch shared items outside your household if you
23 are at risk for COVID.

24 Q. Are there certain racial groups at

1 greater risk of suffering COVID-19?

2 A. The answer is yes, and that is true
3 throughout the United States that Latinos have been
4 predominantly at much higher risk as well as
5 African-Americans, the two groups that have been
6 noted in repeated publications including by the
7 Centers for Disease Control.

8 Q. And what are some of the adverse
9 impacts that have been observed in the
10 African-American and Latino populations with
11 respect to COVID-19?

12 A. First of all, when people have gone
13 to their communities and tested symptomatic and
14 asymptomatic, they have much higher rate of
15 infection. That is due to a variety of factors, in
16 part jobs they have that bring them into contact
17 with people such as clerks in stores and restaurant
18 waiters and other jobs. There in part it is
19 socioeconomic that they might not have financial
20 resources to stay at home.

21 And it is well known that
22 African-Americans have a higher rate of certain
23 underlying diseases that put you at risk of COVID,
24 particularly in African-Americans, obesity,

1 diabetes, and hypertension are more predominant in
2 that group.

3 Q. Dr. Weber, what is a pandemic?

4 A. So, we have an epidemic. First of
5 all, an outbreak is in a local area; it is more
6 than an expected number of cases. An epidemic is
7 generally a larger area than simply a city or
8 state, which have, again, much more than an
9 expected number of cases.

10 SARS-CoV-2 is a new disease to
11 humans. Prior to 2019, this disease did not exist
12 in humans, so even one case in an area would be
13 considered an outbreak.

14 A pandemic is an outbreak that
15 involved more than two continents, so there is no
16 question that COVID is now an epidemic in every
17 inhabited continent in the world. It is a pandemic
18 as described both on the CDC and WHO web pages.

19 Q. Do you have a professional opinion as
20 to whether COVID-19 will continue as a pandemic
21 throughout the fall of 2020.

22 A. Absolutely. The most recent CDC
23 studies looking at ten cities or states in the
24 United States where they are getting data from

1 commercial testers of COVID that report to them
2 show that somewhere between 3 and 10 percent of the
3 population -- with the exception of New York City
4 which is 20 percent -- have been infected.

5 Turning that around, that means
6 90 percent of the population despite more than six
7 million cases of COVID in the United States is not
8 infected, so this virus will continue to circulate.
9 It may ebb and flow depending on actions we take in
10 terms of limiting spread such as not opening movie
11 houses and sports arenas and on the other side, not
12 opening colleges and others. This virus will
13 become endemic. It will remain in humans and is
14 not going to disappear like SARS and SARS-CoV-1
15 did. It will be like the 2009 H1N1 epidemic. Here
16 we are 12 years later, and that virus continues to
17 circulate and will continue to circulate. It will
18 be true with this virus as well. This virus will
19 be with us for the foreseeable future, and
20 certainly will be with us with large amounts of
21 infection for months to come.

22 Q. In the course of preparing for your
23 testimony today did you review the data for
24 COVID-19 in Pennsylvania?

1 A. I did. They have been since late
2 May, so going on several months now. It ebbs and
3 flows but somewhere in the range of 500 to 1,000
4 new cases a day for months. It dropped a little
5 below 500 at times and a little bit over 1,000 at
6 times; but roughly 500 to 1,000 cases a day.

7 Keep in mind those are cases detected
8 by testing. And we do believe that since we are
9 not routinely testing by everybody in the
10 population, this is clearly an underestimate
11 because we are not testing everybody that would be
12 asymptomatic.

13 Q. Dr. Weber, do you have a professional
14 opinion on whether the COVID-19 outbreak will
15 persist in Pennsylvania area specifically?

16 A. Yes. And that is based on all the
17 data I have told you but also on the fact that it
18 has been relatively steady for months in
19 Pennsylvania bearing between 500 and 1,000 new
20 cases a day.

21 Q. Through your work on COVID-19, have
22 you formed a professional opinion for best
23 practices for minimizing the spread of COVID-19?

24 A. Yes, the two major ones are wearing

1 masks. If a person is infected, even if
2 asymptomatic, wears a mask that limits and largely
3 eliminates any spread of infectious materials. But
4 one public study showed without a mask, we can
5 measure expelled particle that go eight feet. Just
6 a simple bandana draped over the nose and mouth
7 reduced that to four feet. Even homemade -- they
8 looked at the homemade cloth mask, that reduced
9 expelling particles to two inches.

10 In addition they put masks on
11 patients with not SARS-CoV-2, but regular
12 coronaviruses, and showed that if an infected
13 person is wearing a mask, they will not expel
14 infected particles into the air.

15 Now, if you are uninfected, turning
16 that the other way, wearing a mask has been shown
17 to be protective. We had a paper in the Journal of
18 the American Medical Association, and we are
19 working on other papers showing how effective
20 wearing a mask is at preventing you from
21 getting infected.

22 I will give the Court a few
23 real-world examples. I will start off with
24 medicine in the Asian countries. They didn't

1 realize this person had COVID, but she was quite
2 sick. They put her in a multi-bed ward. Everyone
3 including the other patients in that ward wore a
4 mask, and no one got infected.

5 To the point of sort of real-world in
6 the United States, there was a case that the CDC
7 published recently where a hair stylist developed
8 COVID, worked while sick, actually proved she was
9 infectious and gave it to a co-worker while at
10 break. When taking care of clients, she wore a
11 mask and all the clients wore masks. Even though
12 the hair stylists were within a foot or two from
13 uninfected people for a substantial amount of time,
14 not a single person became infected.

15 So, masks clearly work, and I should
16 say the CDC would say if you are wearing a mask, if
17 there is somebody near you not wearing a mask who
18 is infected unless you are also wearing eye
19 protection, goggles or a face shield, if you are
20 within six feet of them for 15 minutes, they would
21 consider that person exposed to COVID. If they
22 were a healthcare provider they would be sent home,
23 furloughed at least two weeks because of the
24 likelihood for developing COVID.

1 The other issue is this disease like
2 influenza only goes about six feet. So, a distance
3 as you cough out, what you expel, it gets diluted.
4 If you are outside, UV light helps kill it. It
5 settles on the ground, it dries out. All of that
6 being said, being within six feet of somebody is
7 also a risk factor.

8 So, distance -- we like the term
9 physical distancing. I think people should not
10 social distance. We should stay in contact -- it's
11 a stressful time -- by telephone or other
12 electronic means, but physically distanced.

13 Finally, the two other mechanisms,
14 are good hand hygiene -- Purell or any of the other
15 waterless products -- products that are 60 to 90
16 percent alcohol work well. Ten seconds, wash with
17 soap and water and with hot water is quite
18 effective and should be done if you touched your
19 mouth and nose as well as just a mask.

20 And finally, disinfecting shared
21 items when you are outside of your household like
22 using CDC guidelines on the correct disinfectants
23 and the correct times.

24 Q. Dr. Weber, I believe you testified to

1 this already, but just to clarify for the record,
2 but do crowds and public gatherings play a role in
3 the transmission of COVID-19?

4 A. Absolutely. There are many, many
5 reports, often published by the Centers for Disease
6 Control and by many people that outbreaks have been
7 linked to weddings, bar mitzvahs, to New Orleans,
8 their festival. They've been linked to -- as you
9 know, one of the first outbreaks was in Boston at a
10 convention by a pharmaceutical company in a hotel.
11 There were more than 25 outbreaks on cruise ships.
12 And, of course, we saw spikes in cases after
13 Memorial Day, Fourth of July, and anybody has been
14 listening to the news in just the last few days has
15 seen concern that Labor Day and crowds in beaches
16 and restaurants and others will lead to another
17 spike. It usually takes about two to four weeks to
18 see the spike because the incubation period from
19 exposure to illness takes another two weeks. But
20 there is great concern that we will see another
21 spike related to Labor Day celebrations.

22 Q. Now, are there other concerns about
23 transmission of coronavirus in indoor settings?

24 A. The answer is absolutely yes, and

1 there are specific guidelines by the Center for
2 Disease Control on voting places, K-12 classrooms,
3 business, for those reasons. Those guidelines are
4 just as I have stated: Keep people apart by six
5 feet, have everybody wear masks, practice good hand
6 hygiene, and disinfect shared items.

7 And, actually, indoors is more of a
8 concern than outdoors. Outdoors is a large volume
9 of space for infectious particles to be distributed
10 and the winds will continue to disperse it.

11 Ultraviolet light can damage the virus, so there is
12 actually more concern about the transmission
13 indoors than out of doors, but there is still risk
14 as we saw with Mardis Gras and other celebrations
15 as well.

16 Q. What are some of the reasons why the
17 virus might spread more easily indoors?

18 A. A number of reasons, obviously, just
19 walking by somebody on the street you won't be next
20 to them for more than a few seconds. Indoors,
21 people spend longer periods of time. There is no
22 UV light indoors; that is filtered out by windows.
23 Air is still allowing the virus to stay in a cloud.

24 Outdoors people are less likely to be

1 sharing common items. Indoors they more likely to
2 be touching repeatedly, sharing similarly-touched
3 items. Indoors, in addition to fans, air
4 conditioning, or vents that are blowing on
5 somebody -- that can spread the virus downwind from
6 that person as was demonstrated in an outbreak in a
7 restaurant in Pennsylvania.

8 There is more concern and most of the
9 outbreaks, total number of outbreaks, most of those
10 happened in indoor spaces than outdoor spaces.

11 Q. I would like to shift gears to talk
12 about disinfection procedures or cleaning
13 procedures associated with reducing transmission of
14 COVID-19. Just so we are all on the same page,
15 what is a common surface?

16 A. Let me first, if I can, distinguish
17 between cleaning and disinfecting. Cleaning is
18 removing grime and dirt. When you clean your
19 dishes because there is dried food on them, you are
20 cleaning the dishes. That is not killing germs.
21 In fact, if you could wipe something with water and
22 a rag, it could look physically clean, but all of
23 those germs are still on the rag. All you are
24 going to do if you took that rag someplace else is

1 move the germs someplace else. Use a dishwasher at
2 a hot temperature and it will remove and kill
3 germs.

4 Removing and killing germs is called
5 disinfection. The most common way we do it is with
6 a chemical that is registered by the EPA to kill
7 germs. Germs can also be killed by things such as
8 UV light and heat and other processes, but chemical
9 disinfection is most common.

10 Obviously, shared surfaces, here we
11 are talking about touchable surfaces. We are not
12 concerned about walls. People don't touch them.
13 We are concerned about surfaces that people touch
14 and share. So, obviously, in a restaurant sharing
15 a common water pitcher from table to table would be
16 an example. In a hospital, a blood pressure cuff.
17 Obviously, in the hospital, for instance, we have
18 computer stations at all nursing stations. Those
19 are electronic and those get shared among nurses,
20 physicians, and others. Those things would be
21 considered touchable objects because people are
22 touching them.

23 Q. How long can the coronavirus live on
24 a common surface?

1 A. We know for coronaviruses in general
2 and we know for SARS-CoV-2 specifically that they
3 survive least well on paper, meaning they can
4 survive up to three hours on paper. They can
5 survive on surfaces from hours to a few days. They
6 survive better at lower temperature, lower humidity
7 and where there is not UV light there -- which is,
8 by the way, one of the reasons we see these
9 respiratory viruses more in the winter than in
10 summer. But it will still spread in the summer as
11 we see, here we are at the end of summer and there
12 was a good deal of transmission in the summer as
13 there was in the summer in Australia and New
14 Zealand.

15 Q. And how long can coronavirus survive
16 in the air?

17 A. There are two experiments that we
18 specifically looked at that, that injected live
19 coronavirus into a rotating drum. Think of a
20 closed blender lying on its side rotating around.
21 One study, coronavirus survived three hours and
22 another study like that, it survived for 16 hours.

23 Q. Now, turning back to common surfaces,
24 how do you kill the coronavirus on a common

1 surface?

2 A. The EPA licenses disinfectants, and
3 anything the EPA would list as having an emerging
4 virus claim will kill SARS-CoV-2. A list of all
5 those chemicals is easily available on the CDC web
6 page about sterilization and disinfection. They
7 call it List N there.

8 Any of those chemicals -- I should
9 say there are two things for a chemical. First of
10 all, whatever chemical, it has to physically touch
11 the surface and the germs. You have to cover the
12 entire surface with the chemical. It doesn't work
13 if it doesn't touch the surface.

14 Then you have to follow per EPA and
15 CDC requirements and recommendations, you have to
16 follow the recommendations of the manufacturer
17 about how long a chemical needs to be in contact
18 with the surface. In general, those chemicals have
19 anywhere from a 30-second to a 10-minute claim. If
20 you are using something with a 10-minute claim, and
21 after five minutes the surface was no longer wet,
22 then you have to reapply the chemical.

23 Q. In terms of common or shared
24 surfaces, why is disinfecting an important aspect

1 of preventing the transmission of COVID-19?

2 A. Again, we have to disinfect between
3 each use because any person could be infected.
4 Most people don't know they have been infected. A
5 substantial percent are presymptomatic so they have
6 no way of knowing if they are infected. If they
7 rub their nose or mouth -- and even healthy people
8 are always rubbing their nose and mouth, it's
9 common -- if they touch a surface that is common
10 that surface will remain contaminated until a
11 substantial amount of time has passed or until a
12 disinfectant is applied. The next person touches
13 that surface, and they touch their nose or mouth
14 they can acquire SARS-CoV-2.

15 Q. Have you formed a professional
16 opinion about the role that common surfaces play in
17 the transmission of coronavirus or COVID-19.

18 A. The answer is yes. My opinion is
19 exactly what the WHO and Centers for Disease
20 Control say. This is one of the four major ways of
21 preventing spread of coronaviruses. We talked
22 about masks, physical distancing, hand hygiene and
23 disinfection of common surfaces. These clearly
24 play a role as those organizations have stated in

1 the transmission of the virus and why there are
2 specific guidelines by both of those organizations
3 for disinfecting shared surfaces.

4 And, again, those guidelines are not
5 specific to any particular spot. Those guidelines
6 by the CDC include hospitals and healthcare
7 facilities, K-12 schools, businesses, cruise ships,
8 voting places. There are guidelines specific to
9 each of those; all of them contain a recommendation
10 for disinfecting shared surfaces.

11 MS. ENGSSELL: Your Honor, may I have
12 a short break to check my notes? I think I am
13 getting close to wrapping up the end of my
14 questioning.

15 JUDGE BROBSON: You may.

16 (Discussion held off the record.)

17 MS. ENGSSELL: Thank you, Your Honor.
18 I have more questions I'd like to pursue.

19 BY MS. ENGSSELL:

20 Q. Dr. Weber, I'd like to focus your
21 attention on this case. As a preliminary matter,
22 do you understand an electronic voting machine
23 which has a touch screen to be a type of shared
24 surface?

1 A. Yes, anything you touch is a shared
2 surface that other people would touch.

3 Q. Does an electronic voting machine
4 pose a risk?

5 A. Touch screen pose a risk of viruses
6 and other diseases that would get deposited on them
7 from touching your nose or mouth and then the next
8 person if the machine is not adequately disinfected
9 as recommended from the CDC and EPA using the
10 proper chemical would pose a risk to them, yes.

11 MS. ENGSSELL: Mr. Baldwin I'd like to
12 call up Exhibit P35, please.

13 BY MS. ENGSSELL:

14 Q. Dr. Weber, before you is Exhibit P35.
15 What is this?

16 A. This is the CDC recommendations for
17 limiting, mitigating the transmission of COVID when
18 one is voting.

19 Q. Just for clarity, Doctor, what is the
20 CDC?

21 A. The CDC is the Centers for Disease
22 Control and Prevention. It is the premier
23 institute in the world whose goal is to limit the
24 transmission of infections between individuals and

1 the public. Although they, obviously, focus on
2 healthcare providers and many other situations as
3 well. And they also study some non-infectious
4 diseases. It is not just infections that they are
5 promoting as well, but disease prevention.

6 Q. Is the CDC a federal government
7 agency?

8 A. Yes, it is.

9 Q. Did you review these particular
10 guidelines from the CDC in preparation for your
11 testimony today?

12 A. Yes.

13 MS. ENGSSELL: Your Honor, I would
14 like to move Petitioner's 35 into evidence, please.

15 JUDGE BROBSON: Any objection?

16 Hearing none, P35 is admitted into evidence.

17 (Exhibit Petitioner's 35 was
18 previously marked and admitted into evidence.)

19 MS. ENGSSELL: Thank you, Your Honor.

20 BY MS. ENGSSELL:

21 Q. Dr. Weber, you said you had occasion
22 to review these --

23 JUDGE BROBSON: Can I just interrupt
24 you for a second?

1 MS. ENGSSELL: Sure.

2 JUDGE BROBSON: I can read the
3 document. So, is there something you want to ask
4 him about other than that?

5 MS. ENGSSELL: Certainly. Certainly I
6 will try to preserve the Court's time.

7 BY MS. ENGSSELL:

8 Q. Dr. Weber, in your professional
9 opinion, what are some of the most important
10 guidelines or practices that are recommended by the
11 CDC in this document?

12 A. So, they, of course, mention the
13 things that I did, that everybody be masked,
14 maintain physical distancing, use appropriate hand
15 hygiene with 60 to 90 percent alcohol or soap and
16 water. One thing they are very explicit about is
17 when they recommend disinfection of surfaces, they
18 recommend that if they use an alcohol-based spray
19 or rub, it contain at least 70 percent alcohol and
20 they do explicitly say that when using a
21 disinfectant, you should follow the manufacturer's
22 recommended contact time for that.

23 Q. Now, Dr. Weber, do you understand
24 that in Pennsylvania there are three different

1 manufacturers of voting machines?

2 A. Yes.

3 Q. They are ES&S, Dominion, and Unisyn?

4 A. Yes.

5 Q. Do you understand that each of those
6 manufacturers have issued guidelines with respect
7 to disinfecting their machines?

8 A. Yes.

9 Q. Have you had an opportunity to review
10 those guidelines in preparation for your testimony
11 today?

12 A. Yes.

13 Q. I'd like to walk through some of
14 those cleaning instructions with you.

15 MS. ENGSSELL: Mr. Baldwin, I'd first
16 like to call up Petitioner's Exhibit 11.

17 BY MS. ENGSSELL:

18 Q. Dr. Weber, before you on the screen
19 is Petitioner's Exhibit 11. Are you familiar with
20 this document?

21 A. Yes.

22 Q. What is it?

23 A. This is the cleaning -- best
24 practices for cleaning and disinfecting from

1 Election Systems and Software that is available on
2 their web page.

3 Q. Did you review this for ES&S for your
4 testimony today?

5 A. Yes.

6 Q. Certainly, I am trying to keep things
7 efficient, so I won't read through this document.
8 Upon your review this of the document, did you have
9 any concerns about the cleaning procedures that
10 were recommended by ES&S?

11 A. Yes. You can see right there in the
12 box at the bottom: Required supplies. They say
13 soft lint-free cloth with isopropyl alcohol
14 70 percent or less. Keep in mind, CDC says 70
15 percent or at least 70 percent alcohol. With this,
16 you could be using 50 percent or 20 percent. This
17 is inconsistent with CDC recommendations and it is
18 not consistent with the literature on what is an
19 effective concentration of alcohol to kill
20 SARS-CoV-2.

21 In addition, they make the point that
22 I have already made that you should follow the
23 manufacturer's recommendations, but they note that
24 it could take anywhere -- on the next page --

1 30 seconds to 10 minutes depending on the product.
2 This would be a substantial amount of time.
3 Finally, they do say that, and I quote, do not
4 touch the back sensor tracks on the edges of the
5 screen. Well, somebody who is trained and who read
6 this document and follows that, that would mean
7 that those surfaces -- certainly somebody touching
8 a screen may touch those surfaces and those
9 surfaces would not be disinfected if you follow
10 their guidelines and, therefore, any surfaces not
11 disinfected could lead to infection with
12 SARS-CoV-12.

13 Q. Thank you.

14 MS. ENGSSELL: Mr. Baldwin, I would
15 next like to call up Exhibit 23, please.

16 BY MS. ENGSSELL:

17 Q. I would like to show you Exhibit 23.
18 Are you familiar with this document?

19 A. I am.

20 Q. And what is it?

21 A. This is the recommendations from
22 Dominion Voting for their practices for cleaning
23 and disinfection. They also mention hand
24 sanitation as well.

1 Q. Is this one of the documents that you
2 mentioned today?

3 A. It is.

4 Q. Based on your review, do you have a
5 concern about Dominion's disinfecting practices?

6 A. Yes. They recommended that units be
7 cleaned and disinfected before they are turned on.
8 They also recommended that they are disinfected
9 when they are turned off at the end of the day.
10 They make explicit statement if you scroll down a
11 bit. They say, quote, cleaning the units while
12 powered on is not recommended there.

13 So, that -- presumably they are
14 worried about the probability of alcohol -- I don't
15 know that for a fact -- so they want to power the
16 units off. As we've already said, you need to
17 disinfect anything that's touched after each person
18 touching. That would mean you'd have to power off
19 the entire unit after each person following their
20 guidelines and use the appropriate chemical for the
21 appropriate time. Then you need to power it back
22 up.

23 It also says in their recommended
24 agents to use an isopropyl alcohol solution with

1 water with a ration of at least 50 percent alcohol.
2 Again, the CDC guideline based on sound scientific
3 principle is to use at least a 70 percent solution
4 of alcohol. Again, as with ES&S, there is an
5 inadequate amount of alcohol, so they would not
6 necessarily provide an activation or killing of
7 germs including SARS-CoV-2.

8 Q. Based on your review of the cleaning
9 instructions from two of the manufacturers of
10 voting machines in Pennsylvania, do you have any
11 opinions about how long it would take to clean a
12 voting machine between voters?

13 A. Well, certainly at a minimum.

14 MR. WIYGUL: Your Honor, I object to
15 lack of foundation here. The witness is simply
16 going to state what he read in the document. If he
17 doesn't have an independent basis, I ask counsel to
18 lay a foundation.

19 JUDGE BROBSON: Ms. Engsell, your
20 response?

21 MS. ENGSELL: He testified to his
22 review of these documents. He also testified to
23 his familiarity with the CDC's disinfecting
24 procedures.

1 JUDGE BROBSON: He testified to his
2 familiarity because he read the document. I can
3 read the document. What is the professional,
4 educated, peer reviewed, scientific reasoning for
5 his conclusion for how long it takes to disinfect
6 the machine?

7 MS. ENGSSELL: I will withdraw the
8 question. If I could ask a different question.

9 JUDGE BROBSON: The question is
10 withdrawn. Go ahead.

11 BY MS. ENGSSELL:

12 Q. You stated earlier that you are
13 familiar with the CDC's recommended best practices
14 for disinfecting shared common surfaces, right?

15 A. Yes. I was a co-author on their
16 guidelines on sterilization and disinfection.

17 Q. If a poll worker were to follow the
18 CDC best practices for disinfecting a shared
19 surface, do you have an opinion how long it would
20 take to clean a shared surface for an electronic
21 polling machine?

22 A. Yes. So, at a minimum, you have to
23 open the chemical whether it's a spray or wipe.
24 You have to cover all the shared surface, which is

1 not a simple as it seems since most of these
2 chemicals don't have any color, so you have to go
3 over it several times. Then you have to follow as
4 the CDC and in the ES&S documents, the
5 manufacturer's time of contact which ranges from
6 30 seconds to 10 minutes. And you have to,
7 obviously, cover all the surfaces that may be
8 touchable. So, it certainly depends on how big
9 your wipe is and how fast you work. Several
10 minutes plus the contact time would be the minimum.

11 Q. Now, the respondents here contend at
12 least in some counties in Pennsylvania there may be
13 disposable gloves or a disposable stylus of some
14 kind, like maybe a Q-tip or a straw used by voters
15 using that machine and that may help to mitigate
16 the risk of COVID-19 transmission. So, I ask that
17 you assume that voters will be given a glove or a
18 Q-tip or a stylus of some kind.

19 MR. WALLEN: Objection to the
20 question. There are so many parts to this.

21 JUDGE BROBSON: Ms. Engsell, it
22 sounds like to me that you are going to rephrase
23 the question.

24 MS. ENGSELL: I will try to. I think

1 I understand his objection.

2 BY MS. ENGSSELL:

3 Q. Dr. Weber, the Respondents here
4 contend that the voters in at least some counties
5 in Pennsylvania will be given or may be given
6 disposable gloves when using an electronic voting
7 machine. Assuming voters are given disposable
8 gloves, in your professional opinion, will the
9 disposable gloves be adequate to prevent the
10 transmission of COVID-19?

11 MR. WIYGUL: Objection. You are
12 soliciting an opinion beyond the scope of the
13 expert disclosures. I believe Dr. Weber confirmed
14 during my voir dire of him that he did not offer an
15 opinion on this issue.

16 JUDGE BROBSON: If you want to ask
17 him a general question about wearing gloves
18 reducing the transmission rate when touching shared
19 surfaces, I think that is appropriately within the
20 scope of his expertise and what he has been
21 qualified for. The minute you try to start to link
22 it to practices in counties, I think you are going
23 beyond the scope of his expert testimony.

24 MS. ENGSSELL: Understood, Your Honor.

1 JUDGE BROBSON: Just to be clear, I
2 am sustaining the objection. You need to ask
3 another question.

4 MS. ENGESELL: Sure.

5 BY MS. ENGESELL:

6 Q. Dr. Weber, do you have a professional
7 opinion as to whether the use of plastic gloves
8 when handling a shared or common surface can reduce
9 the transmission of COVID-19?

10 A. The answer is yes. Plastic glove use
11 per CDC recommendations to prevent the transmission
12 of infectious agents, you should perform hand
13 hygiene when putting the gloves on and perform hand
14 hygiene when you take it off because if the glove
15 is contaminated when you pull the glove off, the
16 outside surface of the gloves can contaminate your
17 hands and that has been very well demonstrated
18 including by our research, hand hygiene before and
19 after glove removal.

20 The second is how the gloves are
21 presented to the person and how they are used. So,
22 certainly, for instance, as most commonly there is
23 a large box with many gloves stacked into the box
24 and many people reaching into the box to take out

1 the gloves, if they were contaminated, they would
2 then contaminate multiple gloves by reaching into
3 the box. And when they put the gloves on, that may
4 protect the next person reaching into the box and
5 is now touching the contaminated outside of the
6 gloves. Even if they put the glove on and take it
7 off, unless they performed hand hygiene before and
8 after using the gloves, again, if they have touched
9 their hand or mouth, the glove itself could cause
10 contamination. So, you have to use those caveats.

11 Q. Dr. Weber, do you have an opinion as
12 to whether the stylus on a shared touch screen
13 device is effective in reducing the spread of
14 COVID?

15 MR. WIYGUL: Same objection as
16 before. This is beyond the scope, the opinions set
17 forth in the affidavit. I believe the question was
18 specific to the use of electronic touch screen
19 devices.

20 JUDGE BROBSON: I am not sure she is
21 talking about anything but an electronic touch
22 screen device. I think by definition you use a
23 stylus with nothing but a touch screen. She is not
24 asking specifically about a voting machine or

1 election day. She is saying a stylus on a touch
2 screen generally. I think he's qualified to answer
3 that based on what I have qualified him as an
4 expert for.

5 Objection overruled.

6 Dr. Weber, can you answer that
7 question? Does the use of a stylus when using a
8 touch screen reduce the transmission of COVID as
9 opposed to using a finger?

10 THE WITNESS: The answer is
11 potentially yes. Same comments I stated before.
12 Obviously, if the stylus is in with a whole bunch
13 of other materials and you have to reach into a
14 common box or jar where the stylus is, you would
15 potentially be contaminating the other styluses.
16 When we use those types of devices into the
17 hospital, we have them in single peel wrappers for
18 that. We do try to reduce infection in hospitals
19 when we use common touch screens in patient care
20 areas using styluses to reduce touching the screen.
21 My own personal experience in introducing that here
22 is that even when you train people for a long
23 period of time, people are used to touching things
24 like your cell phone without a stylus, and it is

1 very easy and often people will forget anyway, even
2 if they are using the stylus in their hand.

3 JUDGE BROBSON: Dr. Weber, I am not
4 sure we could stop people from doing what they
5 choose to do, but I understand your answer to the
6 question.

7 Ms. Engsell, anything further?

8 BY MS. ENGSSELL:

9 Q. Dr. Weber, I would like you to assume
10 for a moment that someone who works in an operating
11 room or hospital setting says there hasn't been the
12 spread of COVID-19 in their hospital despite the
13 exposure of COVID-19 there. Does that impact your
14 opinion about the risk of spread of COVID-19 in
15 polling places?

16 A. No. The problem, as we said, is that
17 40 to 80 percent of people are asymptomatic. Short
18 of doing what the Army does, test everybody, lock
19 them up in barracks, Army barracks -- and I know
20 this because, as I said, I am advising the general
21 at Fort Bragg -- lock them in their barracks for
22 two weeks and test them again in the barracks and
23 don't let them off the base and enforce all of the
24 preventive measures. You can never be sure that

1 there are not people that do not have COVID. It is
2 widespread throughout the United States. It is
3 widespread in Pennsylvania. And there are cases in
4 the United States, while it's true they have
5 decreased, keep in mind we are still, throughout
6 the United States, substantially through any time
7 since when our initial first peak occurred.

8 MS. ENGSELL: Your Honor, if I could
9 just ask for the Court's indulgence one more time
10 to confer with my clients. I think I'm about to
11 wrap up my questioning.

12 JUDGE BROBSON: Okay. Please confer.

13 MS. ENGSELL: I have no further
14 questions. Thank you.

15 JUDGE BROBSON: Okay. Before
16 cross-examination, we will take a brief recess.
17 Five minutes. We will take a five-minute recess.

18 COURT CRIER: The court is now in
19 recess.

20 (Break taken.)

21 COURT CRIER: The Commonwealth court
22 is now in session.

23 JUDGE BROBSON: Mr. Wiygul,
24 cross-examination.

1 CROSS-EXAMINATION

2 BY MR. WIYGUL:

3 Q. Dr. Weber, I just want to confirm a
4 few points that you made in your direct examination
5 testimony. First is that masks are an important
6 and effective safety precaution in prevention of
7 COVID-19. Is that right?

8 A. Yes.

9 Q. And I believe that the CDC defines
10 one sort of exposure as being within six feet of an
11 unmasked infected person for 15 minutes or more; is
12 that correct?

13 A. That is how they define exposure to a
14 healthcare provider if the healthcare provider is
15 not wearing eye care protection.

16 Q. And you also noted that hand hygiene
17 is an important component of measures to protect
18 against transmission of COVID-19?

19 A. Yes. To be clear, I am using hand
20 hygiene to encompass soap and water as well as
21 waterless alcohol products.

22 Q. Am I right that the primary means of
23 transmitting COVID-19 is through respiratory
24 droplets an infected person breathes out when they

1 talk or yell or sneeze or cough?

2 A. Yes.

3 Q. I believe your testimony was the
4 current science indicates that those droplets don't
5 tend to travel more than six feet. There may be
6 exceptions, but that is a typical distance,
7 correct?

8 A. Yes.

9 Q. Your testimony was you believe
10 another means by which COVID-19 could be
11 transmitted is through touching contaminated
12 objects; is that right?

13 A. Touching contaminates the objects,
14 yes, but then another person would touch that
15 object now contaminated, rub their nose or mouth
16 and get contaminated as stated by CDC and WHO.

17 Q. I want to make sure I understand the
18 steps in this pathway. This is sometimes known as
19 indirect contact transmission?

20 A. You are correct.

21 Q. Indirect surfaces are called fomites;
22 is that correct?

23 A. Close. It is called fomites.

24 Q. Then I got it wrong. I apologize.

1 So, the pathway as I understand it is an infected
2 person would touch an object thereby contaminating
3 that object; is that correct?

4 A. Yes.

5 Q. And then a person not infected would
6 touch that object thereby contaminating their own
7 hand, correct?

8 A. Yes.

9 Q. My understanding is that would
10 complete the pathway, the second person would need
11 to touch a mucous membrane, probably their mouth or
12 their nose or eyes in order to infect themselves,
13 correct?

14 A. Yes.

15 Q. And, so, one of the means of
16 protecting against that indirect contact
17 transmission is by using disposable gloves; is that
18 correct? I believe you testified to that?

19 A. Yes.

20 Q. Another means that would operate
21 along similar lines is to use an intermediary like
22 a stylus so that individuals are never directly
23 contacting the surface itself with their hands; is
24 that correct?

1 A. Yes.

2 Q. And your testimony was when used
3 properly, gloves and styluses do help to protect
4 against transmission of COVID-19, correct?

5 A. Yes.

6 Q. And, sir, your testimony was you
7 don't have any knowledge of the actual procedures
8 that Pennsylvania elections -- I am sorry
9 Pennsylvania jurisdictions used in the primary in
10 terms of protections that they made available to
11 voters to protect against the transmission of
12 COVID-19; is that correct?

13 A. Yes.

14 Q. Sir, you also don't have any data
15 indicating that there was an increase in COVID-19
16 infection associated with the Pennsylvania primary
17 election, correct?

18 JUDGE BROBSON: Don't answer that
19 question.

20 Mr. Wiygul, Ms. Engsell didn't offer
21 an objection here, but I am going to hold both
22 sides equally accountable as to scope as I held Ms.
23 Engsell. You want to get into something that you
24 fought vigorously not to get into, and now you are

1 getting into it with this doctor?

2 MR. WIYGUL: Fair enough, Your Honor.

3 I appreciate that, and I withdraw the question.

4 JUDGE BROBSON: Good idea.

5 BY MR. WIYGUL:

6 Q. You were shown some documents that
7 showed disinfection and cleaning instructions that
8 you believe were published by voting machine
9 manufacturers. Do you remember that?

10 A. Yes.

11 Q. And I believe those instructions were
12 -- I can't remember the exact terminology you used
13 -- but something along the lines that they were
14 inconsistent with CDC guidelines. Do you remember
15 that?

16 A. Yes.

17 Q. And you said the CDC said that
18 solutions that were used to disinfect surfaces to
19 protect against COVID should be 70 percent or more
20 alcohol in concentration; is that right?

21 A. I believe they specifically said
22 70 percent, but more would work as well.

23 Q. Would you agree that both of the
24 documents that you looked at for counsel for

1 Petitioner, they included in the range they
2 provided 70 percent alcohol; is that right?

3 A. They did.

4 Q. And, again, just to be clear, you
5 don't know what cleaning solution --

6 JUDGE BROBSON: Mr. Wiygul, could you
7 suspend for a moment? Am I the only one who is
8 getting a lag from Dr. Weber's audio? Mr. Wiygul,
9 if you could do a little bit longer pause after you
10 hear Dr. Weber's audio until my audio clears up.

11 MR. WIYGUL: I am happy to, Your
12 Honor, and do cut me off, if you need a longer
13 pause.

14 BY MR. WIYGUL:

15 Q. Dr. Weber, I apologize if I have
16 asked the question. The question I have in mind is
17 you don't know what cleaning solutions are or are
18 not used at Pennsylvania polling places, correct?

19 A. Yes.

20 Q. And you don't know how Pennsylvania
21 polling places may or may not be using gloves or
22 styluses; is that correct?

23 A. Yes.

24 Q. I want to ask you one more question

1 about the documents that we looked at from the
2 voting machine manufacturers. You understood, did
3 you not, that the cleaning instructions that they
4 gave pertain to the entire device and not just the
5 touch screen?

6 A. Yes.

7 Q. You would agree with me that the time
8 required to clean just the touch screen may well be
9 less than the time to clean the entire device?

10 A. Yes.

11 Q. You talked a bit about shared
12 surfaces whether they be electronic touch screens
13 or other shared surfaces. Just to be clear, there
14 is nothing magic or special about a touch screen as
15 a shared surface that could possibly transmit COVID
16 in the same way; is that right?

17 A. Yes.

18 Q. And I believe your testimony in my
19 voir dire was that you have traditionally voted
20 with hand-marked paper ballots; is that correct?

21 A. Yes.

22 Q. So, you would agree with that that
23 infected voter touched surface in a polling station
24 other than a touch screen, say a check-in table,

1 that could contaminate that table, correct?

2 A. Yes.

3 Q. And if a voter touched another
4 surface in the course of filling out their ballot,
5 that could contaminate the surface, correct?

6 MS. ENGSELL: Objection. We are
7 getting into specific voting practices in
8 Pennsylvania. I was told to stay away from that.
9 This is beyond the scope of redirect.

10 JUDGE BROBSON: Ms. Engsell, you are
11 100 percent correct. I don't understand why you
12 are doing this. You fought tooth and nail with
13 counsel on your side to prevent Dr. Weber from
14 testifying about this stuff and now, you are
15 getting into it. I don't understand what you are
16 doing here. I am going to sustain the objection.

17 MR. WIYGUL: By way of explaining,
18 Your Honor, and I absolutely accept your ruling.
19 My concern is that I am not sure whether Petitioner
20 has withdrawn this particular claim for relief
21 which is predicated on the notion that one type of
22 voting system is inherently more dangerous than the
23 other. I don't know whether they are going to try
24 to elicit testimony from other witnesses on that,

1 but that is why I am trying to get this evidence
2 from Dr. Weber.

3 JUDGE BROBSON: You can't do it that
4 way, Mr. Wiygul. I have been doing this a while.
5 You can't shore up your case on cross-examination
6 that is beyond the scope of direct, particularly on
7 an expert from another side. I am going to stick
8 with it. You need to stay on the scope of direct
9 examination as limited based on your request.

10 MR. WIYGUL: Understood, Your Honor.
11 With that helpful guidance, I will rest my
12 examination.

13 JUDGE BROBSON: Mr. Wallen.

14 MR. WALLEN: I have no questions.

15 JUDGE BROBSON: Ms. Gallagher.

16 BY MS. GALLAGHER:

17 Q. With respect to indirect contact
18 transmission, I believe that you stated earlier in
19 your testimony that within hospitals there are
20 touch screens used and there is an attempt to
21 mitigate the spread of coronavirus with the use of
22 with self-contained styluses; is that correct?

23 A. The way we use them is in our
24 dialysis unit. We use what we call a bubble

1 theory. Anything around the patient, a couple of
2 feet that are potentially blood contaminated, we
3 use Q-tips though oftentimes an alarm will ring and
4 rather than our healthcare provider having to do
5 hand hygiene multiple times they would use a Q-tip
6 to turn off the button.

7 Q. But it's a part of hospital life with
8 respect -- at least in that instance -- to touch
9 screen devices?

10 A. It would be similar to using a touch
11 screen, I could agree.

12 Q. Would you agree with me that using
13 ATM machines pose the same risk if it is a touch
14 screen ATM type machine?

15 A. Yes.

16 Q. Would you also agree the checkout
17 counter at the local grocery store, which has a
18 machine where an individual places his or her card
19 in there and has to put in numbers would pose the
20 same risk?

21 A. Yes.

22 MS. GALLAGHER: Nothing further.
23 Thank you.

24 JUDGE BROBSON: Mr. Sheehy?

1 MR. SHEEHY: Thank you, Your Honor.

2 BY MR. SHEEHY:

3 Q. Doctor, you testified before about
4 mass gatherings in New Orleans and Boston. Do you
5 recall that testimony?

6 A. Yes.

7 Q. In New Orleans, that was the Mardi
8 Gras festival in March, late February, early March;
9 is that correct?

10 A. Yes.

11 Q. And people generally were not wearing
12 masks at that, were they?

13 A. They were not wearing masks, that is
14 correct.

15 Q. At the Boston meeting that you
16 referred to on direct, that was also in late
17 February, early March, correct?

18 A. Correct.

19 Q. And they were not wearing masks; is
20 that correct?

21 A. That is correct.

22 MR. SHEEHY: I have no further
23 questions.

24 THE WITNESS: That is correct.

1 JUDGE BROBSON: Before I send you
2 back to Ms. Engsell on redirect, I had a couple of
3 questions on your testimony.

4 You are currently a physician with
5 privileges at what hospital?

6 THE WITNESS: The University of North
7 Carolina, Chapel Hill Medical Center. It's a
8 1,000-bed academic hospital.

9 JUDGE BROBSON: You see patients at
10 that hospital, correct?

11 THE WITNESS: Yes.

12 JUDGE BROBSON: At that facility you
13 use touch screen devices?

14 THE WITNESS: We do.

15 JUDGE BROBSON: You used them before
16 the COVID pandemic?

17 THE WITNESS: Yes.

18 JUDGE BROBSON: You haven't stopped
19 using them as a result of the COVID pandemic; is
20 that my understanding?

21 THE WITNESS: That is true. We still
22 use touch screen devices.

23 JUDGE BROBSON: The other question I
24 had was you talked about the different ways to

1 reduce transmission of the virus, and there was a
2 question about interrupting the pathway of this
3 indirect contact transmission. Do you recall that
4 testimony?

5 THE WITNESS: Yes.

6 JUDGE BROBSON: Can anything -- if
7 you cut the transmission pathway at any point, is
8 it equally effective?

9 THE WITNESS: For a single pathway,
10 anyway you cut it would work. That would be true.

11 JUDGE BROBSON: Okay. So, if you
12 sanitize your hands before you use the touch
13 screen, that would prevent you from infecting the
14 screen if you were COVID-positive?

15 THE WITNESS: Yes.

16 JUDGE BROBSON: If you sanitize your
17 hands after using the touch screen before you touch
18 your face or anything like that, that would also
19 break the virus transmission; is that correct?

20 THE WITNESS: Yes.

21 JUDGE BROBSON: Is that true even if
22 you don't sanitize the touch screen?

23 THE WITNESS: Yes.

24 JUDGE BROBSON: Okay. I think I

1 understand your testimony.

2 JUDGE BROBSON: Ms. Engsell, any
3 redirect?

4 MS. ENGSELL: Your Honor, I have no
5 further questions.

6 (Exhibits Petitioner's 11 and 23 were
7 previously marked for identification.)

8 JUDGE BROBSON: May he be excused?

9 MS. ENGSELL: He may. Thank you,
10 Your Honor.

11 JUDGE BROBSON: Anybody have anything
12 else?

13 Dr. Weber, thank you for your
14 testimony, and thank you for your work as a
15 frontline worker.

16 THE WITNESS: And thank you from
17 epidemiologists for your last set of questions.

18 JUDGE BROBSON: Thank you.

19 Ms. Engsell, you have no more
20 witnesses for today; is that correct?

21 MS. ENGSELL: That is correct.

22 JUDGE BROBSON: Are there any other
23 matters that we need to take up for today until we
24 recess until tomorrow morning?

1 MS. ENGSSELL: Could I consult with my
2 colleagues?

3 JUDGE BROBSON: That is fine. If you
4 want to come back, we can put you back on, or you
5 can assign somebody else. We can also put you back
6 in the lobby.

7 MS. ENGSSELL: Yes, I think that would
8 be appropriate. I would like to defer to my
9 colleagues on those issues.

10 JUDGE BROBSON: Yes.

11 (Discussion held off the record.)

12 JUDGE BROBSON: Mr. Tulane, I want to
13 confirm we exhausted your witnesses for today?

14 MR. TULANE: Yes, we had Mr. Graham,
15 who is chair of the board of commissioners who is
16 not available, but he will be available tomorrow.

17 JUDGE BROBSON: Tomorrow at 9:30?

18 MR. TULANE: Yes. The one issue I
19 wanted to bring to the Court's attention is with
20 respect to -- we didn't want -- Ms. Hangley said at
21 the outset of the hearing today we reached out to
22 her with the possibility of calling some of her
23 witnesses that were on her witness list that we
24 cross-designated. That is Jonathan Marks, Mr.

1 Bluestein, and Mr. Boyd.

2 As of cross in our case, we also
3 anticipated for sake of efficiency that we would be
4 able to elicit their testimony. Ms. Hangley
5 advised that she objects to that, and that Mr. Boyd
6 and Mr. Bluestein -- by way of reference, Mr. Boyd
7 is an elections official in Allegheny County and
8 Mr. Bluestein is an election official in
9 Philadelphia County. That is a matter that we will
10 discuss over the break, and I will present to the
11 Court tomorrow morning. I just wanted to bring
12 that to the Court's attention.

13 JUDGE BROBSON: You are saying that
14 you might have more than one witness, Mr. Graham?

15 MR. TULANE: Yes. There were
16 witnesses that Respondents were intending to call
17 in any event, and we wanted to elicit testimony
18 relevant to our case. Ms. Hangley objected and
19 understand her objection and understand that this
20 may come before Your Honor tomorrow morning.

21 JUDGE BROBSON: I am not sure what is
22 going to come back before me, but okay. We will
23 see what happens. But we are planning to proceed
24 with Mr. Graham at 9:30. That is the plan?

1 MR. TULANE: Yes, your honor.

2 JUDGE BROBSON: Are you going to
3 complete your evidentiary presentation tomorrow?

4 MR. TULANE: That depends on whether
5 we are able to call the three witnesses identified
6 as of cross in our case. That is the issue.

7 JUDGE BROBSON: I think you need to
8 try to work out whatever you want to work out. I
9 am not going to delay your case in chief. You have
10 had notice of this hearing, and you had to have
11 your witnesses prepared. I expect them to testify
12 in sequence unless there is some medical emergency
13 or something that prevents a witness from
14 appearing. But you've had fair notice of this. I
15 realize it was on an expedited schedule, but you
16 even had another week than you originally had.
17 That is what we are looking at here. So, given the
18 time crunch, I won't be too open to keeping the
19 record open for you to muster your witnesses that
20 you should have mustered before today.

21 MR. TULANE: Yes, Your Honor. To be
22 clear, other than Mr. Graham, we are not calling
23 any other separate witnesses other than what we
24 have contested with Ms. Hangleay.

1 JUDGE BROBSON: I am not going to
2 prejudice anything. You understand that just
3 because another side wrote a witness on their list
4 doesn't mean they have to produce them in your
5 case in chief.

6 Anything else we have to talk about
7 right now?

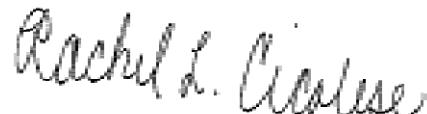
8 We will be in recess until tomorrow
9 morning at 9:30.

1 C E R T I F I C A T E

2
3 I do hereby certify that I am a Notary
4 Public in good standing, that the aforesaid testimony
5 was taken before me, pursuant to notice, at the time and
6 place indicated; that said deponent was by me duly sworn
7 to tell the truth, the whole truth, and nothing but the
8 truth; that the testimony of said deponent was correctly
9 recorded in machine shorthand by me and thereafter
10 transcribed under my supervision with computer-aided
11 transcription; that the deposition is a true and correct
12 record of the testimony given by the witness; and that I
13 am neither of counsel nor kin to any party to said
14 action, nor interested in the outcome thereof.

15

16 WITNESS my hand and official seal this 16th day
17 of September, 2020.

18 
19

20 Notary Public

21

22

23

24

Exhibit D



Deposition of:
hearing

September 9, 2020

In the Matter of:
**NaACP Pennsylvania State
Conferencev. Boockvar, Kathy et al**

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1 COMMONWEALTH COURT OF PENNSYLVANIA
2 ORIGINAL JURISDICTION
3 NO. 364 MD 2020

- - -

4 NAACP PENNSYLVANIA STATE :
5 CONFERENCE,
6 Petitioner, :
7 :
8 vs.
9 :
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24 :
KATHY BOOCKVAR, SECRETARY
OF THE COMMONWEALTH, AND :
JESSICA MATHIS, DIRECTOR
OF THE BUREAU OF ELECTION :
SERVICE AND NOTARIES,
Respondents. :

Wednesday, September 9, 2020

- - -

Virtual WebEx Hearing Testimony held on
the above date at 9:30 a.m., before Rachel L. Cicalese,
a Registered Professional Reporter and Certified Court
Reporter.

BEFORE: Honorable P. Kevin Brobson

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2 THE COURT CRIER: Good morning.

3 Welcome. The Honorable Kevin Brobson presiding.

4 JUDGE BROBSON: Good morning,

5 everyone. This is a continuation of the
6 preliminary injunction hearing in the NAACP of
7 Pennsylvania State Conference versus Secretary
8 Boockvar and Jessica Mathis.

9 Mr. Castiglia, I see you are on for
10 Petitioners. Would you like to call your next
11 witness?

12 MR. CASTIGLIA: Good morning. Your
13 Honor, Petitioners would like to call the next
14 witness, Mr. Eddie Graham.

15 JUDGE BROBSON: Mr. Holland, suspend
16 for a minute.

17 (Discussion held off the record.)

18 - - -

19 EDDIE T. GRAHAM, having been duly sworn,
20 was examined and testified as follows:

21 MR. CASTIGLIA: Your Honor, may I
22 proceed to examine the witness?

23 JUDGE BROBSON: You may.

24 DIRECT EXAMINATION

1 BY MR. CASTIGLIA:

2 Q. Good morning, Mr. Graham.

3 A. Good morning.

4 Q. Would you please introduce yourself
5 for the Court?

6 A. My name is Eddie Graham. I am a
7 retired corporate attorney for the SMP. Presently
8 I am the vice-president of the Springfield Township
9 Montgomery County Board of Commissioners. I also
10 serve as the political action chair for the
11 Cheltenham branch of the NAACP as well as serving
12 on the state political action committee.

13 Q. And, Mr. Graham, would you please
14 tell us why you are here to testify today?

15 A. I am here to testify concerning
16 mail-in ballots.

17 Q. Mr. Graham, where do you live?

18 A. I live in Oreland, Pennsylvania.

19 Q. And how long have you lived in
20 Pennsylvania?

21 A. All of my life.

22 Q. What township is that, that you
23 presently live in?

24 A. Springfield Township, Montgomery

1 County, Pennsylvania.

2 Q. Do you have a family in Pennsylvania?

3 A. Yes.

4 Q. And, Mr. Graham, I think you
5 indicated this already: What do you presently do
6 for a living?

7 A. Well, I am retired, but I was -- I am
8 serving my second term as the Springfield -- on the
9 Springfield Township Board of Commissioners.

10 Q. And what are your responsibilities as
11 a commissioner of Springfield Township?

12 A. As a commissioner we oversee the
13 day-to-day activities of the township. Basically,
14 our charter prohibits having a mayor, so we have a
15 Board of Commissioners. So, I guess you could say
16 I am a mayor in Springfield Township, Montgomery
17 County.

18 Q. Mr. Graham, you mentioned that you
19 are --

20 MR. SHAPIRO: Your Honor, I apologize
21 for interrupting, but I am getting texts that Zac
22 Wallen wants to be on the panel right now but not
23 represented on the panelists.

24 JUDGE BROBSON: Yes, that is

1 problematic. The good news is he's been hopefully
2 able to hear the questioning. Let's bring Mr.
3 Wallen in.

4 MR. WALLEN: Thank you, Your Honor.

5 JUDGE BROBSON: I just want to do a
6 quick body count and make sure we have everybody
7 here. It looks like nobody else is missing.

8 So, Mr. Castiglia, why don't you
9 continue with your examination.

10 MR. CASTIGLIA: Thank you, Your
11 Honor.

12 BY MR. CASTIGLIA:

13 Q. Mr. Graham, you mentioned that you
14 are affiliated with the Pennsylvania State Chapter
15 of the NAACP. How long have you been affiliated
16 with the Pennsylvania State Chapter?

17 A. With the Pennsylvania State Chapter,
18 I was just elected to the committee within the last
19 year.

20 Q. And how long have you been affiliated
21 with the Cheltenham NAACP, which you mentioned
22 being affiliated with?

23 A. Approximately, seven years.

24 Q. What do you do as a member of the

1 Pennsylvania State Chapter of the NAACP?

2 A. I'm the political action chair.

3 Q. What responsibilities does that
4 include?

5 A. The political action chair basically
6 ensures the political, educational, social, and
7 economic equality of rights for all persons and to
8 eliminate racial hatred and racial discrimination.

9 Q. How about your role in the Cheltenham
10 NAACP?

11 A. That would be the same, both mission
12 statements are the same except one for the
13 Cheltenham branch. It just covers five townships
14 which include Jenkintown, Plymouth Meeting, White
15 Marsh, Springfield, and Cheltenham. The state
16 basically encompasses the entire state of
17 Pennsylvania.

18 Q. And in your roles with the NAACP
19 what, if anything, have you done relating to
20 elections and voting?

21 A. We've had several voter registration
22 drives. We have gone into our local high schools
23 in order to register all students. Once they reach
24 the age of 18, we go in there and register them,

1 making sure that they fill out the paperwork
2 properly and get it to our Montgomery County voter
3 registration services. We also follow up.

4 We also have initiatives where
5 students that have graduated from our high schools
6 and are in college, we reach out to them making
7 sure that they complete absentee ballots in order
8 to mail their vote, and we also -- we were all over
9 the county before the pandemic, setting up voter
10 registration, making sure our residents were able
11 to vote despite the pandemic.

12 JUDGE BROBSON: Mr. Castiglia, we
13 heard extensive testimony presented by other
14 witnesses on the tremendous efforts made by the
15 NAACP with regard to voting, registration,
16 education pre and post-COVID or during COVID. So,
17 I am not sure we need to spend Mr. Graham's time
18 eliciting that additional information, the same
19 information. So, maybe you could use the time a
20 little bit better.

21 BY MR. CASTIGLIA:

22 Q. You said you lived in Pennsylvania
23 your entire tire life. Do you still live in
24 Pennsylvania?

1 A. Yes.

2 Q. How often do you vote?

3 A. Since I turned 18 in high school. I
4 don't think I've missed too many elections.

5 Q. And why is voting so important to
6 you?

7 A. Voting is important to me personally
8 in my family because in 1959, we had two family
9 members that were lynched and murdered in Big Dam
10 Swamp, South Carolina, where my family is from. As
11 a result of that, voter registration and voting is
12 paramount in my family.

13 Q. Mr. Graham, I am sorry to hear that.
14 Thank you for sharing that information.

15 Did you vote in the primary in
16 June 2020?

17 A. Yes, I did.

18 Q. What method did you use to vote?

19 A. Initially, my family -- which is my
20 wife and my son and daughter. My daughter lives in
21 Washington, and my son lives here. We went online
22 to order mail-in ballots in April of this year,
23 April of 2020.

24 Q. And why did you initially want to

1 vote by mail-in the June 2020 primary?

2 A. Because of the COVID virus.

3 Q. Have you taken other precautions
4 because of the pandemic?

5 A. I haven't been to the barber shop as
6 you can well see. We only go out basically for
7 necessities, for food shopping, and when we do go
8 out, we wear gloves and masks.

9 Q. Had you voted by mail prior to
10 June 2020?

11 A. No.

12 Q. You said that you applied for your
13 mail-in ballots in April. So, is that roughly six
14 weeks before the election?

15 A. Yes, or so.

16 Q. When did you receive your mail-in
17 ballots?

18 A. That is the thing. My wife and I, my
19 son, we all registered on the same date. As a
20 matter of fact, I sent out an email to my -- sorry
21 about that. I sent out an email to all of my
22 family members to make sure that they registered in
23 a timely fashion to receive the mail-in ballots on
24 the application. My wife got hers right away -- I

1 would say within the first 14 days approximately.
2 My son got his a few weeks later. My mail-in
3 ballot didn't come until the actual day of the
4 election.

5 Q. When did you expect to receive your
6 mail-in ballot?

7 A. When my wife got hers so quickly, you
8 know, I thought it was just the mail so I waited.
9 A couple of weeks later, my son got his. I never
10 got mine. I hadn't gotten it until the date of the
11 election. That is when it came in the mail.

12 Q. Did you follow up regarding the
13 status of your mail-in ballots?

14 A. I did not. I did not.

15 Q. Were you ever told that there was an
16 error with your application?

17 A. No. No. There was nothing received
18 other than my -- you know, the mail-in ballot
19 itself. So, no, I never got anything, and I did
20 not follow up.

21 Q. Were you ever told any reason for the
22 delay?

23 A. No.

24 Q. What did you do after you received

1 your mail-in ballots on June 2?

2 A. When my wife -- to be honest with
3 you, I laughed about it. But then I -- I actually
4 went to the polls that day. I put on my mask and
5 gloves, and I went to the polls that day to vote
6 because I didn't -- you know, I felt that I had to
7 get my vote in and didn't trust the mailing system
8 because of the delay in receiving my ballot.

9 Q. Mr. Graham, would you please describe
10 your experience when you went to vote in person on
11 election day?

12 A. That was right during -- I would
13 guess the pinnacle of COVID. I was a little
14 nervous because I noticed that even though our poll
15 workers, you know, they had on protective
16 material -- protective material. I would say it's
17 a 50/50 chance of people that came in to vote
18 without masks, so I was a little concerned and
19 tried to keep my distance from them when I went in
20 to vote, and it was also because -- because they
21 had narrowed the places within our township. We
22 had five districts going into one. It was a little
23 chaotic.

24 Q. What did you do about your concerns

1 when you arrived at polls?

2 A. Because I had been a poll worker for
3 so many years, I basically knew everyone that was
4 in there and voiced my concerns to the judge of
5 elections in our ward, which is Ward 71.

6 Q. How did the judge of elections
7 respond to your concerns?

8 A. He kind of just shrugged it off like,
9 you know, what can I do?

10 Q. Mr. Graham, do you plan to vote in
11 the general election in November 2020?

12 A. I do. I am.

13 Q. And what method do you plan to use in
14 November?

15 A. Oh, I am going to the polls.

16 Q. Why do you plan on voting in person
17 despite the COVID pandemic?

18 A. I just don't trust the mail-in
19 ballots.

20 MR. CASTIGLIA: Your Honor, I have no
21 further questions. I would release the witness.

22 JUDGE BROBSON: Ms. Mathias,
23 cross-examination.

24 MS. MATHIA: Thank you.

1 JUDGE BROBSON: Ms. Mathias, I
2 understand one of your co-counsel had good news.

3 MS. MATHIAS: Yes, John Paul had a
4 baby.

5 JUDGE BROBSON: Please send my
6 congrats.

7 MS. MATHIAS: I will.

8 JUDGE BROBSON: You always count your
9 blessings during difficult times. That is
10 wonderful.

11 MS. MATHIAS: They are doing
12 wonderfully. I will pass that on. Thank you.

13 CROSS-EXAMINATION

14 BY MS. MATHIAS:

15 Q. How are you?

16 My name is Christina Mathias. I am
17 one of the attorneys representing one of the
18 Respondents in this case, Kathy Boockvar, and
19 Director of Election Services, Jessica Mathis.

20 Thank you for your time this morning.

21 A. Thank you.

22 Q. So, you testified that your ballots
23 did not arrive until election day during the June
24 primary?

1 A. Correct.

2 Q. That was just your own personal
3 experience with your ballots; is that right?

4 A. That is correct.

5 Q. Okay. And you are not quite certain
6 what the cause of that delay was?

7 A. I am not.

8 Q. Okay. And then you testified that
9 you actually went to the polls for the June
10 primary; is that right?

11 A. I did.

12 Q. Okay. And you said that safety
13 protocols were not necessarily perfect across the
14 board?

15 A. That is correct.

16 Q. Okay. And, again, that was based on
17 your personal experience at your polling place in
18 the June primary?

19 A. That is correct. When I went to the
20 polls, I would say half of the people that came in
21 to vote did not have on masks or gloves.

22 Q. Okay. And you said that your -- the
23 polling location had been consolidated on five
24 different precincts; is that right?

1 A. Correct.

2 Q. Okay. And you didn't go to any other
3 places during the June primary? You just went to
4 the place where you cast your ballot; is that
5 right?

6 A. That is correct.

7 Q. And you have -- you have been
8 informed that the places in Montgomery County will
9 be consolidated again in the November general
10 election?

11 A. I believe that they are working on it
12 now. We have not -- we have not received any
13 definitive answer as of today's date.

14 Q. Okay. So, you have not been informed
15 that your regular polling place where you went in
16 June would be consolidated again?

17 A. That is correct.

18 Q. And you said that when you go out to
19 the grocery store or where you -- anywhere you
20 might have to go during this pandemic, you have
21 been taking precautions like wearing gloves and
22 washing your hands and things like that?

23 A. Oh, definitely. And that is because
24 of my age and my race. We are in -- I'm in the

1 highest risk group of catching the virus. So, my
2 wife makes sure that we are very conservative about
3 when we go out of the house.

4 Q. Okay. Good.

5 And you took those precautions when
6 you went to the polls in June?

7 A. Yes, I did.

8 Q. Yes. And you plan to take those same
9 precautions when you go in November?

10 A. Yes, I do.

11 Q. Okay. And you are not currently
12 aware of how many voters will be allocated to your
13 polling location when you go to vote in person in
14 November; is that right?

15 A. I do. I know the approximate number
16 because of my -- me working there in the past, yes.

17 Q. Okay. Okay. But you don't have an
18 indication that additional voters will be allocated
19 to your polling place than would in a normal
20 election cycle; is that right?

21 A. Not at this time. That is only
22 because the Montgomery County polling services
23 hasn't confirmed our polling locations.

24 Q. Okay.

1 MS. MATHIAS: Can I just have one
2 moment?

3 JUDGE BROBSON: Sure.

4 MS MATHIAS: I have no further
5 questions. I wish you a good experience in voting
6 in November.

7 JUDGE BROBSON: Mr. Wallen.

8 MR. WALLEN: No questions.

9 JUDGE BROBSON: Mr. Giancola.

10 MR. GIANCOLA: Thank you, Your Honor.

11 BY MR. GIANCOLA:

12 Q. Mr. Graham, very briefly, with
13 respect to your mail-in ballot application.

14 I understand it was delayed in the
15 primary?

16 A. Correct.

17 Q. If you are concerned about voting in
18 person and you don't trust the mail, have you
19 considered going to the elections office to apply
20 in person?

21 A. I don't understand the question.

22 Q. Have you considered going to the
23 elections office, Montgomery County Elections
24 Office to apply for a ballot in person?

1 A. No. That is because I have already
2 decided because of my past experiences to go
3 directly to the polls, taking my precautions to go
4 directly to the polls.

5 MR. GIANCOLA: Understood.

6 No further questions, Your Honor.

7 JUDGE BROBSON: Mr. Shapiro.

8 BY MR. SHAPIRO:

9 Q. Good morning, Mr. Graham.

10 A. Good morning.

11 Q. I recognize you from reading about
12 you in the Chestnut Hill Local. I get your
13 coverage. Nice to see you in person.

14 A. Thank you very much.

15 Q. I have only a couple of short
16 questions.

17 How does your wife choose to vote?

18 A. My entire family -- other than my
19 daughter, because she lives in Washington DC, she
20 has already applied for mail-in -- we are all going
21 to the polls this election period.

22 MR. SHAPIRO: I have nothing further.

23 JUDGE BROBSON: I have a couple of
24 follow-up questions from your testimony so I

1 understand it.

2 What time did you vote on election
3 day?

4 THE WITNESS: I went to the polls at
5 approximately 11:00 a.m.

6 JUDGE BROBSON: Okay. So, you had
7 received your mail before you left for the polling
8 place that day?

9 THE WITNESS: I did.

10 JUDGE BROBSON: Okay. Did you know
11 whether you could have taken your mail-in ballot to
12 the Bureau of Elections before the polling place?

13 THE WITNESS: I did.

14 JUDGE BROBSON: But you chose to go
15 to the polling place instead of taking it filled
16 out to the Bureau of Elections?

17 THE WITNESS: Yes, my polling
18 location was closer.

19 JUDGE BROBSON: And in terms of
20 voting, as I understand your testimony, you take
21 voting very seriously, right?

22 THE WITNESS: Extremely.

23 JUDGE BROBSON: Okay. So, the COVID
24 pandemic or lack of you receiving your ballot was

1 not going to prevent you from going and voting that
2 day?

3 THE WITNESS: That is correct.

4 JUDGE BROBSON: And it is not going
5 to prevent you from going and voting this upcoming
6 election?

7 THE WITNESS: That is correct.

8 JUDGE BROBSON: Okay.

9 Mr. Castiglia, any redirect?

10 MR. CASTIGLIA: No, Your Honor.

11 Thank you.

12 JUDGE BROBSON: Mr. Graham, thank you
13 for your testimony and thank you so much for your
14 service, and so much for your good work that your
15 service does to educate your voters.

16 I appreciate it.

17 (Break taken.)

18 THE COURT CRIER: Commonwealth Court
19 will now resume.

20 JUDGE BROBSON: Mr. Steiner, next
21 witness.

22 MR. STEINER: I'd like to call
23 Jonathan Marks.

24 I understand there is going to be an

1 objection.

2 JUDGE BROBSON: What is the
3 objection?

4 MS. HANGLEY: Respondent is objecting
5 to calling Mr. Marks on the basis that he wasn't
6 listed in the pretrial memorandum. There is no
7 proffer for him. They haven't subpoenaed him.

8 JUDGE BROBSON: He actually is
9 listed. He is cross-designated. They
10 cross-designated everyone in your list.

11 MS. HANGLEY: They made a general
12 cross-designation of the witnesses on our list.
13 They didn't make a proffer as to what they were
14 going to offer him for.

15 JUDGE BROBSON: Is that your only
16 objection?

17 MS. HANGLEY: It is, Your Honor.

18 JUDGE BROBSON: Anybody else have an
19 objection? Okay. Is Mr. Marks able to be brought
20 in right now?

21 MS. HANGLEY: Yes, he is.

22 JUDGE BROBSON: I will overrule the
23 objection.

24 MR. STEINER: Thank you, Your Honor.

1 JUDGE BROBSON: Mr. Steiner, I assume
2 you are going to call him on cross?

3 MR. STEINER: Yes, Your Honor.

4 - - -

5 JONATHAN MARKS, having been duly
6 sworn, was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. STEINER:

9 Q. Good morning, Mr. Marks.

10 JUDGE BROBSON: Hold on for a second.

11 (Discussion held off the record.)

12 JUDGE BROBSON: Back on the record,
13 Mr. Marks. Mr. Steiner, you may examine.

14 MR. STEINER: Thank you.

15 BY MR. STEINER:

16 Q. Good morning, Mr. Marks.

17 A. Good morning. How are you?

18 Q. Doing well.

19 You are the deputy secretary for
20 elections and commissions for the Department of
21 State; is that right?

22 A. That is correct.

23 JUDGE BROBSON: Mr. Steiner, suspend
24 for a minute. I do think it is fair -- I don't

1 know if you conducted a deposition of Mr. Marks or
2 what have you, but why don't you give us a proffer
3 or the scope of testimony that you are seeking to
4 elicit, so it doesn't look like a fishing
5 expedition.

6 MR. STEINER: Certainly, Your Honor.
7 I have not conducted a deposition of Mr. Marks, but
8 I do have a transcript of a deposition that was
9 taken by one of the Interveners in one of the other
10 cases. And, so, this will -- and Mr. Marks has put
11 in, I think, one, if not, two declarations in this
12 case.

13 I think the scope of the testimony
14 will be -- within that June primary plans for
15 November general election, in-person voting issues,
16 mail-in voting issues, and then feasibility of some
17 of the things Petitioners are asking for in the
18 case.

19 JUDGE BROBSON: So, you are -- that
20 was a lot. I think that is all within the scope of
21 the declarations that he filed in the case.

22 MR. STEINER: I believe that it is,
23 Your Honor. I believe it's within the scope of the
24 declarations that he's filed or briefing that's

1 been done based on his knowledge. I don't think
2 there is anything that I am going outside of
3 Mr. Marks' regular knowledge in his --

4 JUDGE BROBSON: I'm certain of that.
5 I want to make sure that -- I just want to make
6 sure that this isn't going to be a Discovery
7 deposition of some type in the form of a hearing.
8 I expect your questions to be pointed. I expect
9 your questions to be targeted toward the claims in
10 this action, and I don't expect it to go beyond
11 that.

12 Am I understood?

13 MR. STEINER: You certainly are. If
14 I am taking a Discovery deposition in open court, I
15 have truly failed and will do my best.

16 JUDGE BROBSON: Okay. You may
17 proceed, Mr. Steiner.

18 BY MR. STEINER:

19 Q. Mr. Marks, your role is a
20 senior-level role in the Secretary's office with
21 overall responsibility for elections; is that
22 right?

23 A. That is correct. Yes.

24 Q. You have worked your way up through

1 the elections office, and you have been there for
2 about 18 years?

3 A. Yes.

4 Q. Part of your role is to try to ensure
5 that voting is safe, secure, and accessible to
6 eligible voters throughout the Commonwealth of
7 Pennsylvania; is that right?

8 A. That is right, yes.

9 Q. You have responsibility to make sure
10 voting is fair, honest, and efficient?

11 A. Correct, yes.

12 Q. You have those responsibilities with
13 respect to both in-person and mail-in voting; is
14 that right?

15 A. Correct. Yes.

16 Q. And I think we can agree on this, but
17 would you agree that COVID-19 will have a
18 significant impact on the conduct of the general
19 election in November of this year?

20 A. Certainly COVID-19 will have an
21 impact; and depending on how you define
22 significant, there will be a significant impact.
23 How it compares to the primary, I can't guess to
24 that fact.

1 JUDGE BROBSON: Wait a second.

2 Mr. Frye, can you put Mr. Shapiro in
3 the lobby, please? Thank you. Mr. Steiner, you
4 can proceed.

5 MR. STEINER: Thank you.

6 BY MR. STEINER:

7 Q. And elections are directly
8 administered at the county level; is that right?

9 A. That is correct, yes.

10 Q. But you would agree that the
11 Secretary also has responsibility with respect to
12 the conduct of elections, right?

13 A. Yes.

14 Q. And in your role as the deputy
15 director of elections, part of what you are trying
16 to do is to do what you can to limit the spread of
17 COVID-19 -- to limit the spread of COVID-19 and to
18 promote healthy voting options for citizens
19 throughout Pennsylvania who are voting in an
20 election; is that right?

21 A. I would agree with the second part of
22 that. I am not sure that we have direct control
23 over limiting the spread of COVID-19. It would be
24 certainly fair to say that in the conduct of

1 elections we would do everything possible to limit
2 the spread as elections are happening.

3 Q. One of the ways of doing that in the
4 era of COVID-19 is to encourage the use of mail-in
5 or absentee voting to reduce crowding in polling
6 places on election day, right?

7 A. Yes.

8 Q. The Secretary has a number of rules
9 to exercise her responsibility with respect to
10 voting; is that right?

11 A. Yes.

12 Q. One of the things that she can do is
13 require reports on elections and the administration
14 of elections?

15 A. Yes.

16 Q. Okay. And she did that in connection
17 with the required reporting under Act 35; is that
18 right?

19 A. That is correct, yes. Act 35 very
20 explicitly required a report from the Department of
21 State and Montgomery County Board of Election.
22 Yes, she also has authority over voting in the
23 county.

24 MR. STEINER: If we could put up

1 Exhibit 14 quickly.

2 BY MR. STEINER:

3 Q. Mr. Marks, I am showing you what has
4 been marked as Petitioner's Exhibit 14. This is
5 the Act 35 Report; is that right?

6 A. Yes, that is the front cover of the
7 Act 35.

8 Q. And was this the report that was
9 issued by the Secretary's office in accordance with
10 the requirements of Act 35?

11 A. It is, yes.

12 MR. STEINER: And I would move
13 Petitioner's 14 into evidence.

14 JUDGE BROBSON: Any objection?

15 MS. HANGLEY: No, Your Honor.

16 JUDGE BROBSON: Hearing no objection,
17 Exhibit P14 is admitted without objection.

18 (Exhibit Petitioner's 14 was
19 previously marked and admitted into evidence.)

20 MR. STEINER: Thank you.

21 BY MR. STEINER:

22 Q. And other tools that the Secretary
23 has is that she can issue guidance and directives,
24 right?

1 A. Correct, yes.

2 Q. And when the Secretary issues
3 guidance to county elections commissioners, you
4 expect the guidance will be followed, right?

5 A. That is our expectation.

6 Q. And then the directive carries
7 greater weight than guidance; is that right?

8 A. It does to the extent that the
9 statute provides authority for the Secretary to
10 issue directives.

11 Q. And you certainly expect that the
12 directives will be followed, right?

13 A. Yes.

14 Q. Now, another area where the Secretary
15 has responsibility is certifying election
16 equipment; is that right?

17 A. That is correct. Yes.

18 Q. And in 2018, the Secretary issued a
19 directive for all counties to purchase modern
20 voting equipment; is that right?

21 A. That is right.

22 Q. And she required that counties put
23 new systems in place by 2020; is that right?

24 A. Yes. They were required to purchase

1 them by the end of 2019.

2 Q. And first elections that any of the
3 new equipment was used for was the November --

4 JUDGE BROBSON: Mr. Steiner, please
5 suspend.

6 (Discussion held off the record.)

7 BY MR. STEINER:

8 Q. So, the earliest election that the
9 new voting systems were used was the November 2019
10 general elections; is that right?

11 A. No. Actually, I believe Susquehanna
12 County was the first to use the new voting
13 equipment, and they actually employed theirs in
14 November 2018. I believe there were a number of
15 other counties, approximately 20 by my
16 recollection, that implemented them in the 2019
17 primary, and then a much larger number implemented
18 them in the 2019 November election.

19 Q. For example, Philadelphia County
20 implemented in November of 2019; is that right?

21 A. Correct, yes.

22 Q. And some counties didn't implement
23 until the primary election of 2020, right?

24 A. Correct.

1 Q. And the November 2019 election as an
2 off year election was a relatively low-turnout
3 election; is that right?

4 A. It was, yes.

5 JUDGE BROBSON: Mr. Steiner, judges
6 don't like hearing that odd year elections are off
7 year, but --

8 MR. STEINER: No offense to His
9 Honor. It is an ongoing problem in the
10 Commonwealth. I apologize.

11 BY MR. STEINER:

12 Q. The important but low-turnout
13 election in 2019; is that right?

14 A. That is right.

15 Q. For example, Philadelphia County
16 turnout was somewhere just below 30 percent?

17 A. I believe -- I believe that is right,
18 correct.

19 Q. And then the next election, statewide
20 election, after November of 2019, was the June 2020
21 primary; is that right?

22 A. That is correct, yes.

23 Q. And the June 2020 primary was
24 obviously affected by the pandemic and more than

1 half the voters in that primary voted by mail-in or
2 absentee ballot; is that right?

3 A. That is right, yes.

4 Q. And one of the reasons that there was
5 extensive use of mail-in ballots was that they were
6 permitted by Act 77, right?

7 A. Right. Act 77 was enacted shortly
8 before the November 2019 election -- actually, a
9 week -- less than a week before the November 2019
10 election, and it was effective -- most of the
11 provisions were effective for the first time in the
12 June primary.

13 Q. So, the Act 77 allowed mail-in
14 balloting and the tremendous spike you would
15 attribute to COVID-19 and safety provisions, right?

16 A. It is hard to draw a direct line to,
17 you know -- certainly the fact that mail-in voting
18 was an option coupled with the fact that COVID-19
19 was an issue, I think certainly -- it exceeded our
20 expectations, let's put it that way.

21 Q. And you also expect a high percentage
22 of absentee and mail-in ballots for the general
23 election this November, correct?

24 A. Yes, that is our expectation.

1 Q. And you would estimate sitting here
2 today that 60 percent or more of votes in the
3 November 2020 election will be mail-in or absentee?

4 A. I would -- if given our very limited
5 experience here in Pennsylvania with it, I would
6 think that it would be certainly equal to what we
7 saw in the primary, which is somewhere between 50
8 and 60 percent. Close to 60 percent.

9 Q. And I think you've estimated
10 somewhere that, you know, roughly -- you expect
11 three million voters to be mail-in or absentee; is
12 that right?

13 A. Yes. I would think approximately
14 three million, maybe a little more assuming that
15 turnout, overall turnout, is above six million
16 which is also what we expect.

17 Q. And that is out of roughly eight and
18 a half million registered voters in the state?

19 A. Correct.

20 Q. And that would leave somewhere fewer
21 than three million voters voting in person on
22 election day; is that right?

23 A. That is correct.

24 Q. Now, the three million or more voters

1 who will vote mail-in or absentee, all of those
2 voters vote on paper ballots; is that right?

3 A. Yes.

4 Q. And the voters fill out the mail-in
5 or absentee ballot and return it to a county
6 office, right?

7 A. Correct.

8 Q. And then the counties collect them
9 and open and scan them in a central location; is
10 that right?

11 A. That is correct, yes.

12 Q. And every one of the 67 counties in
13 Pennsylvania has scanners in a central location
14 that are capable of processing that volume of mail
15 and absentee ballots; is that right?

16 A. That is right, yes.

17 Q. And then of the, you know, something
18 less than three million votes, two and a half to
19 three million votes, that will be cast in person,
20 some percentage of those will also be cast on
21 paper; is that right?

22 A. That is correct, yes.

23 Q. And --

24 A. Actually, all of them will be cast on

1 paper. There may be a distinction how they are
2 marked, but they will all be cast on paper to be
3 clear.

4 Q. And I appreciate the clarification.

5 So, on the three million or so
6 mail-in and absentee ballots, those will all be on
7 hand-marked paper ballots, correct?

8 A. That is correct, the overwhelming
9 majority of them.

10 Q. And of the two and a half to three
11 million votes cast in person, some percentage of
12 those will also be on hand-marked paper ballots,
13 right?

14 A. That is correct, yes.

15 Q. Because many counties continue to use
16 hand-marked paper ballots that are scanned, right?

17 A. Yes.

18 Q. As an example, Allegheny County is
19 the second largest county in Pennsylvania?

20 A. Yes, it is population-wise. Yes.

21 Q. And registered voter-wise?

22 A. Correct.

23 Q. And in terms of expected turnout,
24 you'd also expect it to be second in terms of the

1 number of votes cast, right?

2 A. In the raw number of votes cast in
3 turnout -- you mean the percentage of turnout?

4 Q. No, in terms of --

5 A. Number of votes cast? They will
6 likely be second in terms of the number of votes
7 cast, correct.

8 Q. And Allegheny continues to use
9 hand-marked paper ballots for its elections?

10 A. Correct, that is their primary
11 system.

12 Q. And some counties that had planned to
13 go to ballot-marking devices changed their plans
14 for the November -- sorry, for the June primary and
15 used hand-marked paper ballots because of COVID,
16 correct?

17 A. Yes, I believe yes, there were a
18 handful of counties that decided to centrally
19 tabulate their ballots.

20 Q. And there are no issues with those
21 counties doing that in the primary; is that right?

22 A. Correct. That certainly is allowed.

23 Q. And you are not aware -- not aware of
24 any problems that arose as a result of the counties

1 using hand-marked paper ballots in the primary?

2 A. I don't -- I don't recall any
3 significant problems with hand-marked paper ballots
4 in those counties. There were some issues in
5 Lancaster County. I believe that is reflected in
6 the Act 35 report.

7 Q. And those counties that went back to
8 hand-marked paper ballots for the primary, to your
9 knowledge, plan to do so for the general election
10 as well, correct?

11 A. I don't know that. I'm not -- not --
12 I haven't received any confirmation from those
13 counties that they are going to do exactly the same
14 thing for the November election.

15 Q. Regardless, it would certainly be
16 permitted for those counties to do that, right?

17 A. It would be, yes.

18 Q. And, now, for counties that use
19 ballot-marking devices, those counties are still
20 required to have a supply of paper ballots on hand
21 in case of power outages or other emergencies,
22 right?

23 A. Yes, they have to have emergency
24 paper ballots in case of voting system error.

1 Q. And they are required to have on hand
2 paper ballots equal to 20 percent of registered
3 voters, correct?

4 A. That is our recommendation, that they
5 have emergency ballots on hand equal to 20 percent.

6 Q. And again, that is something that you
7 expect the counties to follow?

8 A. Yes.

9 Q. And, so, if more than half of the
10 votes in November will be by mail-in or absentee
11 ballot and counties are also expected or ready to
12 have 20 percent of -- 20 percent of the registered
13 voting population, that number of paper ballots,
14 would you agree with me that it would only take a
15 small incremental number of paper ballots to be
16 available for -- if there was hand-marked paper
17 ballots used in polling places?

18 MS. HANGLEY: Objection.

19 JUDGE BROBSON: What is your
20 objection?

21 MS. HANGLEY: Mischaracterizes the
22 previous testimony. There was no testimony of an
23 expectation of 20 percent of ballots.

24 MR. STEINER: I think the witness

1 just testified -- I can clarify if I need to --
2 that the recommendation which he expects counties
3 to follow is that they have on hand paper ballots
4 equal to 20 percent of registered voters.

5 MS. HANGLEY: The objection --

6 JUDGE BROBSON: Ms. Hangley, suspend.

7 Mr. Steiner, first of all, I can
8 appreciate the fact that when the government gives
9 a guideline or directive, they expect it to be
10 followed. I deal with the law, though. The fact
11 that Mr. Marks expects county boards of elections
12 to abide by directives, that is nice. You are
13 going to have to tie that together with some law at
14 some point in time, I hope.

15 In terms of the 20 percent, my
16 recollection was it is a recommendation that they
17 keep 20 percent of paper ballots that the boards of
18 elections have on hand, enough paper ballots to
19 cover 20 percent of the voters for that particular
20 precinct.

21 I think your question was a little
22 bit different to Ms. Hangley's point. I think you
23 are extrapolating a little bit from that point. I
24 am going to sustain the question and let you

1 rephrase the question.

2 MR. STEINER: Sure.

3 Can we look at Petitioner's
4 Exhibit 87, please?

5 BY MR. STEINER:

6 Q. You are familiar with Petitioner's
7 Exhibit 87, right?

8 A. Yes.

9 Q. This is the Secretary's directive
10 going back to 2008 on maintaining a supply of paper
11 ballots; is that right?

12 A. Yes. Yes. Guidance on -- I wouldn't
13 call this a directive.

14 Q. Okay.

15 MR. STEINER: And if we could scroll
16 down for the witness to the bottom of page one and
17 top of Page 2.

18 BY MR. STEINER:

19 Q. This is guidance put out by the
20 Secretary's office, correct?

21 A. Yes.

22 Q. If you see the bottom paragraph on
23 page one that carries over, that was the guidance
24 that the Secretary believes that counties should

1 maintain paper ballots up to 20 percent of the
2 registered voters?

3 A. Yes, emergency ballots up to
4 20 percent of the registers.

5 Q. It is your expectation that counties
6 are, in fact, doing that correct?

7 A. Yes, it is our expectation that they
8 are, in fact, following that guidance.

9 MR. STEINER: If I could, I would
10 like to move Exhibit 87 into evidence.

11 MS. HANGLEY: No objection.

12 JUDGE BROBSON: Hearing no objection,
13 Petitioner's Exhibit 87 is in.

14 (Exhibit Petitioner's 87 was
15 previously marked and admitted into evidence.)

16 BY MR. STEINER:

17 Q. I'd like to talk about the new voting
18 machines for a minute. One of the responsibilities
19 the Secretary had was to certify acceptable voting
20 machines, right?

21 A. That is correct. Yes.

22 Q. And the Secretary certified a number
23 of different machines by different manufacturers?

24 A. Yes.

1 Q. And the certification is an important
2 part of the process; is that right?

3 A. It is, yes.

4 Q. And that essentially involved testing
5 to make sure that the machines accurately capture
6 the votes being cast, right?

7 A. Right. Among other things, yes.
8 There is federal testing, which is a prerequisite
9 of certification here in Pennsylvania and then we
10 contract with an examiner to do additional security
11 and functional testing as well as accessibility
12 testing of the voting.

13 Q. By the way, did the Secretary do the
14 testing or the Secretary's office do the testing
15 for certification or was that outsourced, for
16 example, with ES&S doing the certification for
17 their own machines?

18 A. It's -- we actually -- the
19 Commonwealth, the department contracts with a
20 vendor, an examiner, a voting system examiner. So,
21 it's not the vendor, the voting system vendor is
22 doing the testing themselves. It is actually a
23 testing -- a testing laboratory that has expertise
24 in voting system testing that conducts the testing

1 in conjunction with the Department of State staff.

2 Q. And that is done independent of the
3 vendor?

4 MS. HANGLEY: Your Honor, I object to
5 this line of questioning. We appear to be getting
6 into Discovery for a different case about
7 certification of voting machines, the NEDC case,
8 where Petitioner's counsel is also counsel.

9 JUDGE BROBSON: Mr. Steiner?

10 MR. STEINER: Yes.

11 JUDGE BROBSON: This is what I was
12 concerned about. This is what I specifically
13 cautioned you about.

14 MR. STEINER: I apologize, Your
15 Honor. I think that the -- that the -- that there
16 has been testimony about the use of these machines.
17 There has already been testimony in the case about
18 the machines on election day and various safety
19 precautions, which is really what I'm --

20 JUDGE BROBSON: No, sir, there has
21 been no testimony about any specific machine being
22 used on election day by any county board of
23 elections in this case. Zero. To my
24 understanding, there is no issue in this case about

1 the certification of machines that are being used
2 in different counties.

3 I will sustain the objection, and you
4 should go on to a different topic.

5 MR. STEINER: Your Honor,
6 respectfully, I think there has been testimony in
7 the case about the use of, for example, gloves and
8 styluses with the machines. And my anticipated
9 line of questions, which is only four or five of
10 them, have to do with whether that use of the
11 machines was part of the certification testing,
12 which I respectfully believe is part of this case.

13 If you want me to move on, I will
14 move on, but --

15 JUDGE BROBSON: What does that have
16 to do with certification? And Mr. Steiner, I
17 mean -- I may be misremembering this, but the
18 testimony that you are hearing was about COVID
19 transmission and ways of mitigating transmission
20 for common touch surfaces which may include touch
21 screen devices, whether that is in a hospital or
22 whether that's in a voting place.

23 That was the testimony of Dr. Weber.
24 I don't have any record in here right now as to

1 what machines are being used by any counties,
2 whether touch screen or not touch screen. I think
3 Mr. Marks testified a little bit that some counties
4 are still using paper ballots and some have moved
5 to other types of devices, but there is nothing in
6 the record on the exact voting devices that are
7 being used by counties and whether they've been
8 certified or not. So, I think you are getting far
9 afield here by going into certifications.

10 MR. STEINER: I will move on.

11 JUDGE BROBSON: I am sustaining the
12 objection.

13 BY MR. STEINER:

14 Q. Now, in the June 2020 primary,
15 Mr. Marks, a number of counties had significant
16 consolidation of polling places; is that right?

17 A. Yes, that's correct.

18 Q. Okay. I think four counties had
19 greater than 60 percent consolidation?

20 A. That is correct.

21 Q. And that included the two largest
22 counties both in population and number of
23 registered voters; is that right?

24 A. Yes.

1 Q. Those, of course, are Allegheny and
2 Philadelphia?

3 A. Right.

4 Q. And between those two counties, that
5 is roughly a quarter of the state's voting
6 population?

7 A. Yes. It's a little -- I think it's
8 just shy of 25 percent, yes.

9 Q. I think we all agree that Act 12 is
10 expired, right?

11 A. Yes, Act 12, the emergency provisions
12 related to the June primary are no longer
13 effective.

14 Q. So, it is your hope that there won't
15 be similar consolidation in November, correct?

16 A. I think it is not just my hope, it is
17 my expectation that there will not be that level of
18 consolidation in November. It is not an easy thing
19 to accomplish without that kind of explicit
20 statutory authority.

21 Q. And even if it's not easy to
22 accomplish, you unfortunately, can't testify here
23 today that there won't be consolidation, right?

24 A. I can't testify that there will be

1 absolutely no consolidation, correct.

2 Q. And whether there is consolidation
3 and the extent of consolidation depend on the state
4 of COVID-19 in the first week of November, correct?

5 A. Well, it may -- it will depend
6 typically -- and to clarify, when we talk about
7 consolidation in this context, we are talking about
8 the location of places primarily. What really
9 drives it is availability of poll workers and
10 suitable polling locations which may be linked to
11 COVID-19.

12 Q. And both of the -- right. And that
13 was going to be my next question. Both of these
14 things are highly dependent on COVID-19; is that
15 right?

16 A. If you are talking about the
17 availability of poll workers and the availability
18 of polling places, it certainly is impacted by
19 COVID-19.

20 Q. Right. COVID-19 and its status in
21 early November will impact whether poll workers are
22 sick or able to work on election day, right?

23 A. It has some potential to, yes.

24 Q. And, likewise, the potential to

1 impact whether poll workers will show up or call in
2 sick for fear of COVID-19, correct?

3 A. I am doing -- you know, there is a
4 lot of prognosticating here, but yes, it has that
5 potential.

6 Q. For all of those reasons, you agree
7 that it is important to have an effective mail-in
8 and absentee ballot process for the November
9 election, right?

10 A. Yes.

11 Q. You are also aware, I take it, that
12 the postal service has advised the Secretary that
13 there may be issues or problems delivering ballots
14 on the timelines required by the election code,
15 right?

16 A. Yes. We did -- the Secretary of the
17 Commonwealth received a letter from the US Postal
18 Service that indicated requests that come in at or
19 near the deadline to apply, the US Postal Service
20 may have difficulties of timely delivering them.

21 Q. Let's look at that letter.

22 MR. STEINER: I think it's Exhibit 28
23 if we could put that up briefly.

24 BY MR. STEINER:

1 Q. Mr. Marks, this is the letter that
2 you were referring to dated July 29, 2020 from the
3 US Postal Service to Secretary Boockvar?

4 A. Yes, my eyesight isn't as good as it
5 was.

6 Q. Unfortunately, I don't know that we
7 can blow it up.

8 A. There you go.

9 MR. STEINER: I would move Exhibit 28
10 into evidence.

11 MR. WALLEN: I would object to that.
12 I don't think proper foundation has been laid to
13 either the source of the letter or the
14 authenticity. I mean Mr. Marks may have general
15 familiarity with any document that is posted in
16 various places, but he's neither party to this
17 letter, nor is it an official government document.

18 JUDGE BROBSON: Mr. Steiner, can you
19 lay more foundation, please?

20 MR. STEINER: Certainly, Your Honor.

21 BY MR. STEINER:

22 Q. Mr. Marks. This July 29 letter, is
23 this a letter that you directed to Secretary
24 Boockvar? Is that right?

1 A. It is, yes.

2 Q. When Secretary Boockvar or the
3 Secretary's office received the letter, did you
4 personally get a copy of the letter in roughly
5 August of this year?

6 A. I did, yes.

7 Q. And are communications from the
8 postal service about mail delivery in connection
9 with elections the types of documents that the
10 Secretary's office maintains and relies on in the
11 ordinary course of its government functions?

12 A. Repeat the question. I want to make
13 sure I understood exactly what you were asking.

14 Q. Sure. Are communications from, for
15 example, the postal service the types of
16 communications that the Secretary's office --
17 strike that. Let me ask it better.

18 When the Secretary's office receives
19 a letter from a federal government office, from the
20 postal service, about the conduct of elections, is
21 that the type of communication that the Secretary's
22 office maintains in connection with its
23 government -- in its files in connection with its
24 government functioning?

1 A. Yes.

2 Q. And is it the type of communication
3 that the Secretary's office relies on in carrying
4 out its government functions?

5 A. Yes. We would certainly be -- we
6 communicate with the US Postal Service and other
7 entities that support elections. So, yes, we would
8 certainly take notice of those communications from
9 the US Postal Service and, you know, react
10 accordingly, if necessary.

11 Q. And this July 29 letter is one such
12 communication that you received a copy of from the
13 postal service and maintained and relied on when --

14 MR. WALLEN: Objection. I think that
15 mischaracterizes his testimony. You can see based
16 on how the letter is addressed that it is not to
17 him.

18 JUDGE BROBSON: Well, look. We are
19 making this a little bit too complicated.

20 Mr. Marks, I want you to look at P28
21 and feel free to direct the Court to scroll to
22 different pages if you need to see the full
23 document. Let me know if you have seen this
24 document.

1 THE WITNESS: I would appreciate
2 seeing the whole document.

3 I can't recall. I am not even sure
4 if I was copied on it. You can keep going.

5 Thank you.

6 JUDGE BROBSON: Is that the bottom
7 the document, Mr. Frye?

8 MR. FRYE: Yes.

9 JUDGE BROBSON: Mr. Marks, have you
10 seen the document before?

11 THE WITNESS: Yes.

12 JUDGE BROBSON: Can you identify it
13 for the record, please?

14 THE WITNESS: Yes. It's a copy of
15 the letter to Secretary Boockvar from the general
16 counsel for the US Postal Service regarding
17 Pennsylvania deadlines for requesting mail-in
18 ballots and absentee ballots and the US Postal
19 Service's ability to have mail-in ballots within
20 that timeline.

21 JUDGE BROBSON: In what context have
22 you seen this letter before today?

23 THE WITNESS: It was forwarded to me
24 via e-mail as I recall from the Secretary as well

1 as to a number of other staff in the department.

2 JUDGE BROBSON: Is this the type of
3 communication that the Secretary would normally
4 forward you based on your position with the
5 Department of State?

6 THE WITNESS: Yes, she would.

7 JUDGE BROBSON: Mr. Wallen, does that
8 address your foundational questions?

9 MR. WALLEN: Yes, it does, Your
10 Honor.

11 JUDGE BROBSON: So, your foundational
12 objection is overruled.

13 And just so you all know that I still
14 know how to cross-examine a witness or examine a
15 witness. Sometimes you make things a little too
16 complicated.

17 Go ahead.

18 MR. STEINER: Is 28 in?

19 JUDGE BROBSON: Mr. Wallen, did you
20 withdraw your objection on foundation?

21 MR. WALLEN: I will leave it in, but
22 it is going to be overruled.

23 JUDGE BROBSON: Your objection is
24 overruled.

1 P28 is admitted into the record. You
2 may continue, Mr. Steiner.

3 (Exhibit Petitioner's 28 was
4 previously marked and admitted into evidence.)

5 BY MR. STEINER:

6 Q. And the issue identified by the
7 postal service in Exhibit 28 makes the mail-in
8 aspects of conducting the November election more
9 challenging; is that correct?

10 A. Yes, I would think that is a fair
11 characterization.

12 MR. STEINER: And it is okay to go
13 ahead and take 28 down. I'm not sure -- perfect.

14 BY MR. STEINER:

15 Q. Now, there are a variety of actions
16 that can be taken to support mail-in balloting; is
17 that right?

18 A. Yes.

19 Q. For example, some counties mailed
20 applications for mail-in ballots to all registered
21 voters in advance of the June primary; is that
22 right?

23 A. Yes. There were a handful of
24 counties who did that.

1 Q. And Allegheny were one of those
2 counties?

3 A. Yes.

4 Q. And Allegheny, to your knowledge,
5 plans to do that again for the general election; is
6 that right?

7 A. I have not received confirmation but
8 based on discussions with the election director
9 there, I believe they are.

10 Q. And in the case of Allegheny, there
11 was a relatively high percentage of mail-in
12 balloting for the June primary; is that right?

13 A. Yes. I don't know if that was
14 isolated or limited to Allegheny County, but yes,
15 there was a high percentage of ballots cast by
16 mail.

17 Q. And the percentage cast by mail was
18 higher on a relative basis in Allegheny than
19 throughout the rest of the state; is that right?

20 A. I don't have the data committed to
21 memory, so I'd have to look at the data. I would
22 base it solely on my recollection. I do believe
23 they have a higher percentage, but I couldn't tell
24 you a higher percentage of, you know, compared to X

1 number of counties without looking at data.

2 Q. And would you agree that is all in
3 the Act 35 report, which is Exhibit 14, right?

4 A. Yes. Certainly the number of ballots
5 cast by mail or absentee is reflected in the Act
6 35.

7 Q. I won't take your time or won't take
8 the Court's time just to look at numbers because it
9 is in evidence. But the Secretary has not issued a
10 directive or guidance recommending the mailing of
11 mail-in or absentee ballot applications to all
12 registered voters; is that right?

13 A. That is correct.

14 Q. Okay. And there are a number of
15 other steps that can be taken to support mail-in
16 balloting; is that correct?

17 A. Yes.

18 Q. For example, you could have satellite
19 locations where you can apply for mail-in ballots,
20 receive it, fill it out, and return it all in one
21 stop?

22 A. Yes, within the discretion of the
23 county, it could have additional county office
24 locations.

1 Q. And the County could also have drop
2 box locations for the return of mail-in ballots,
3 correct?

4 A. Correct.

5 Q. And you have issued guidance in that
6 regard, right?

7 A. Yes.

8 Q. I think, in fact, just in the last
9 couple of weeks you've issued that guidance?

10 A. Yes, I believe it was in the last
11 couple of weeks.

12 MR. STEINER: If you could look at
13 Exhibit 50, please.

14 BY MR. STEINER:

15 Q. Mr. Marks, Exhibit 50 is on the
16 screen. I know it is a long document. It is about
17 eight pages. I think I will only ask you about
18 Page 3, which we will get to in a minute. I don't
19 know if it is permitted or not, but if you have a
20 copy that you want to look at, I certainly don't
21 have a problem with it.

22 But my first question: This is the
23 guidance that the Secretary's office put out for
24 2020; is that right?

1 A. Yes, it appears to be that guidance.

2 Q. And you were involved in the
3 preparation of this guidance?

4 A. I was, yes.

5 MR. STEINER: I will move Exhibit 50
6 into evidence, please.

7 JUDGE BROBSON: Any objection?
8 Hearing none, Exhibit 50 is admitted without
9 objection.

10 (Exhibit Petitioner's 50 was
11 previously marked and admitted into evidence.)

12 BY MR. STEINER:

13 Q. And this guidance is something you
14 expect counties to follow, right?

15 A. Yes, it is our expectation that
16 counties would follow this guidance. And to be
17 clear, a lot of what is in this guidance is if the
18 county uses its discretion, then this is what they
19 need to be aware of and how they should go about
20 doing it.

21 Q. And, so, for example, if we can go to
22 Page 3 and look at Section 1.1. I don't know if
23 there is a way to make that more readable for you,
24 but one of the things that the county may do is

1 establish multiple ballot return locations, right?

2 A. I am sorry. Multiple?

3 Q. Multiple ballot return locations to
4 be able to turn a vote in -- mail-in or absentee
5 ballot.

6 A. Yes.

7 Q. And those ballot return locations
8 cost roughly a few thousand dollars each; is that
9 right?

10 A. I can't say with, you know -- but
11 yes, I would think to procure -- you are talking
12 about a ballot drop-off location, you know, you
13 would have to procure a suitable, you know, ballot
14 drop box that would be secure so, yes, I would
15 think on average it would cost a few thousand
16 dollars but that would vary upon the size and
17 volume of ballots the county is expecting.

18 Q. And in your work as the deputy
19 director for elections at the Secretary's office,
20 you are aware that the Election Security Division
21 at the Department of Homeland Security has issued
22 guidelines on the use of drop boxes, correct?

23 A. Yes.

24 Q. Okay. And you are aware that that

1 guideline is that you would have one drop box for
2 every approximately 15 to 20,000 registered voters?

3 A. That is my recollection. I'd have to
4 look at the guidance to confirm that, but I believe
5 that is their recommendation.

6 Q. And would you agree that that's
7 appropriate guidance, correct?

8 MR. WALLEN: Objection. Goes to
9 speculation.

10 MS. HANGLEY: Yes, I object to the
11 foundation of these questions.

12 MR. STEINER: I think it's within his
13 responsibilities as the deputy director of
14 elections.

15 MR. WALLEN: To speculate on Homeland
16 Security guidance?

17 JUDGE BROBSON: Hold on. Hold on.
18 Mr. Steiner, since I'm sort of the fact finder in
19 this proceeding, I think you want to make sure I
20 understand what you are talking about. The
21 document that is currently on the screen is issued
22 by the Department of State. What you had him
23 testify to in 1.1 which said county boards of
24 election may establish where voters may return

1 their own voted ballot.

2 Now, I think you are talking about
3 how many boxes the department of Homeland Security
4 recommends as a guidance.

5 Is that your questioning?

6 MR. STEINER: Well, I think he has
7 testified in his capacity as deputy director of
8 elections he is familiar that the Elections
9 Security Division of Homeland Security recommends
10 one for every 15 to 20,000 registered voters and
11 the question that was objected to is asking him to
12 confirm that he agrees -- that that number, one for
13 roughly every 15 to 20,000 registered voters was
14 followed.

15 JUDGE BROBSON: Ms. Hangle, your
16 objection is?

17 MS. HANGLEY: The objection is that
18 we don't have the document in front of us. We
19 don't know the context of that recommendation or
20 what it says. And Mr. Steiner hasn't established
21 that Mr. Marks does either.

22 JUDGE BROBSON: I think Mr. Marks
23 confirmed that he has seen the guidance from
24 Homeland Security. I think that was his testimony.

1 So, if you want to throw -- if you think his
2 recollection is incorrect, you can cross-examine
3 him on that. So, I think -- where I am a little
4 fuzzy is I think Mr. Steiner is asking Mr. Marks
5 whether he has an option that he agrees with
6 Homeland Security. I guess he can ask that
7 question.

8 Mr. Marks, do you agree with Homeland
9 Security's recommendation?

10 THE WITNESS: I don't have any reason
11 to disagree with it. I think their rationale is
12 sound.

13 JUDGE BROBSON: Objections are
14 overruled.

15 BY MR. STEINER:

16 Q. Now, you also provide in the document
17 -- and go down to 1.2 -- the considerations that
18 the counties should use with respect to where drop
19 boxes should be located; is that right?

20 A. Correct.

21 Q. And I won't go through all of them
22 but, for example, drop boxes should be usable and
23 recognizable in the community, right?

24 A. When you say drop boxes should be --

1 Q. Sorry. Ballot return sites should be
2 easily recognizable and accessible for the
3 community.

4 A. Yes. Those are recommendations and
5 again, to be clear, that section of the guidance
6 begins with sites may include and then, you know,
7 provides a list of common things that counties
8 should be cognizant of in choosing those locations
9 for drop boxes.

10 Q. Right. And these are the Secretary's
11 guidance for what counties should be considering,
12 correct?

13 A. Correct.

14 Q. And you agree that satellite and
15 mobile voting locations would be helpful for larger
16 counties with hundreds of thousands of registered
17 voters; is that right?

18 A. I agree that -- I don't know that
19 they would just be helpful for densely-populated
20 counties. They are sometimes helpful in
21 sparsely-populated counties for different reasons.
22 But certainly, they would be more convenient in
23 those types of counties.

24 Q. And, for example, the Philadelphia

1 County is doing that or plans to do that for the
2 November election; is that right?

3 MS. HANGLEY: Objection.

4 THE WITNESS: My understanding --

5 JUDGE BROBSON: Hold it, Mr. Steiner.

6 Ms. Hangley, you have an objection?

7 MS. HANGLEY: My objection is that
8 Philadelphia County plans to do that, and it is not
9 clear to me what Mr. Steiner is asking.

10 MR. STEINER: I can certainly clarify
11 that.

12 JUDGE BROBSON: Mr. Steiner, why
13 don't you clarify the question. Are you saying
14 that Philadelphia plans to have multiple ballot
15 return sites?

16 BY MR. STEINER:

17 Q. Mr. Marks, Philadelphia County plans
18 to have satellite offices for the November 2020
19 election, right?

20 A. I believe that is correct based on
21 conversations with them.

22 Q. And they also plan to have -- in
23 addition to the satellite offices, they plan to
24 have multiple additional ballot return sites; is

1 that right?

2 A. That is my understanding, yes.

3 Q. Okay. But, for example, Allegheny
4 County does not plan to do either of those things;
5 is that right?

6 A. I don't believe they do. I am not
7 sure if a final determination has been made
8 regarding satellite offices, but I have not
9 received any information that indicates that they
10 are certain.

11 Q. And you, likewise, haven't received
12 any information that they are going to have
13 multiple ballot return sites beyond the county
14 offices, right?

15 A. Right.

16 Q. And there are other counties that
17 have, say, in excess of 250,000 registered voters
18 that don't plan to have either satellite offices or
19 multiple return sites; is that right?

20 A. Well, I do believe there are other
21 counties that plan to do that, you know, in the
22 southeastern part of the state and perhaps other
23 locations. So --

24 Q. Right. You are aware that there are

1 a number of counties in, in essence, the
2 Philadelphia suburbs and in the southeastern part
3 of the state that plan to do it and also a number
4 of counties with -- in excess of 200 and 250,000 of
5 voters that don't plan to do it, right?

6 A. Again, I'd have to sit and look at
7 the data to confirm and cross-reference, but yes,
8 there are some -- I believe there are some counties
9 that are that large that don't have any -- at least
10 at this point that don't have any specific plans.

11 Q. And the Secretary hasn't issued a
12 directive or guidance suggesting to the county --
13 to those large counties that they should; is that
14 right?

15 A. That is correct.

16 MR. STEINER: Your Honor, if I could
17 have just a minute, I believe I am done, but I'd
18 like to check my notes, if that is okay.

19 JUDGE BROBSON: Certainly. Can we
20 take the exhibit down?

21 MR. STEINER: Certainly we can.

22 I have no further questions.

23 JUDGE BROBSON: Ms. Hangleay.

24 MS. HANGLEY: Yes, Your Honor.

1 Before I start, just a point of order, I plan to do
2 redirect or do my direct in response to the cross
3 now, but also put Mr. Marks on in direct during our
4 case. Would that be acceptable, because I would
5 like to make motions at the end of Petitioner's
6 case?

7 JUDGE BROBSON: You have no
8 obligation to conduct your direct examination of
9 Mr. Marks at this point in time. You are doing
10 cross -- Mr. Marks, who was called as on cross by
11 Mr. Steiner. So, you will be subject to the same
12 scope of limitation of cross-examination that I
13 would otherwise be expecting in a normal
14 cross-examination. You will not be prejudiced for
15 calling Mr. Marks later in your case in chief if
16 that is your concern.

17 MS. HANGLEY: That is my concern.
18 Thank you, Your Honor.

19 JUDGE BROBSON: You're welcome.

20 CROSS-EXAMINATION

21 BY MS. HANGLEY:

22 Q. Mr. Marks, you testified that you
23 have an expectation that counties will follow the
24 Department of State's guidance. Is there any law

1 requiring the counties to follow that guidance?

2 MR. STEINER: Objection, Your Honor.

3 JUDGE BROBSON: What is your
4 objection, Mr. Steiner?

5 MR. STEINER: I don't believe that
6 Mr. Marks is qualified to give opinions as to
7 Pennsylvania law. That is legal argument for the
8 Court.

9 MS. HANGLEY: Your Honor, this is
10 just the same --

11 JUDGE BROBSON: Ms. Hangley, maybe
12 you can rephrase the question. I think Mr.
13 Steiner's point is correct. I am expecting the
14 lawyers to tell me what they believe the law is. I
15 will tell you what I think the law is. However, I
16 know of -- Mr. Marks, you are not a lawyer, right,
17 if I remember that correctly?

18 THE WITNESS: I am not, no.

19 JUDGE BROBSON: Okay,
20 congratulations. I will say this, Mr. Steiner. I
21 have had Mr. Marks in my courtroom an innumerable
22 amount of times, and I cannot think of anyone who
23 has a better understanding of election law based on
24 his position. That being said, I will allow Ms.

1 Hangley to ask him if he is aware of any election
2 law that would somehow require the counties to
3 concede to the recommendations and guidance.

4 MR. STEINER: Thank you, Your Honor.

5 JUDGE BROBSON: You may proceed, Ms.
6 Hangley.

7 Can we ask Mr. Marks to answer that
8 question?

9 MS. HANGLEY: Of course.

10 BY MS. HANGLEY:

11 Q. Mr. Marks, are you aware of any law
12 that requires counties to follow the guidance of
13 the Department of the Commonwealth?

14 A. If we are talking about guidance, no,
15 I am not aware of it.

16 Q. And to your knowledge, can the
17 Department compel counties to follow guidance?

18 A. We cannot.

19 Q. And in your experience do counties
20 always follow the Department's guidance?

21 A. Not always.

22 Q. You heard questions about emergency
23 paper ballots being provided to places. That was
24 20 percent of registered voters. To your

1 knowledge, do counties always provide that
2 20 percent of emergency paper ballots?

3 A. Not always, no.

4 Q. And in your experience, do you know
5 what percentage of those ballots actually get
6 voted?

7 A. In most elections a very small
8 percentage of them get voted. Now, again, they are
9 there as a back-stop or fail-safe in the event that
10 there are machine malfunctions. So, they are an
11 insurance policy. The majority of them do not get
12 voted in the average election.

13 Q. There was some questioning about
14 mailing of paper ballot applications. Are you
15 aware of any drawbacks to counties mailing paper
16 ballot applications?

17 A. Well, yes. I mean, there are
18 certainly some drawbacks. Mailing applications,
19 paper applications, to voters, obviously, will
20 require them to fill them out, mail them back to
21 the county election office. The county election
22 offices then have to data enter them, and I do
23 understand that in the counties that did that, they
24 did have a significant number of duplicate requests

1 that came in and, obviously, had a higher
2 percentage of requests on paper versus
3 electronically through the online absentee request
4 form.

5 There are some administrative
6 disadvantages, I guess, is the fairest way to say
7 it.

8 Q. For a voter, what is the alternative
9 to doing a paper application? Is there another way
10 to apply for a ballot?

11 A. Yes, a voter can apply on-line
12 through our online absentee request form for either
13 absentee ballot or mail-in ballot.

14 Q. Which kind of application is more
15 convenient for counties to process?

16 A. I mean, certainly the electronic
17 application that comes in online is more
18 convenient. It reduces the amount of data entry
19 and as a result also reduces the amount of data
20 entry potential errors that occur in the
21 application process.

22 Q. Let's talk about polling place
23 consolidation. Today if a county asked the
24 Department to consolidate its polling places, would

1 the Department grant that request?

2 A. There is -- there isn't a statutory
3 mechanism for counties to ask the department for
4 approval of consolidation. But if a county were to
5 request consolidation at the level that we saw in
6 the primary, there would be no impetus to approve
7 that or assent to that.

8 Q. And --

9 A. I don't know if that answers your
10 question.

11 Q. Would there be a legal mechanism for
12 the department to approve that?

13 A. There isn't, no.

14 Q. To your knowledge, is there any
15 legislative effort underway to give the department
16 authority to approve those requests?

17 A. I am not aware of any legislative
18 effort to provide, you know, similar emergency
19 provisions as those provided for the June primary.

20 Q. Has the Department asked the
21 legislature for that authority for the November
22 election?

23 A. We have not.

24 Q. To your knowledge, has any county

1 asked the legislature for that authority?

2 A. To my knowledge, no.

3 Q. And has any county asked the
4 Department to lobby the legislature for that
5 authority?

6 A. No, I am not aware of any county
7 asking the department to lobby the legislature.

8 Q. And as you sit here today, do you
9 have any evidence that any county in Pennsylvania
10 is in need of significant polling place
11 consolidation?

12 A. I am not.

13 Q. Okay. Understanding that we are in
14 September and the election is in November, to your
15 knowledge, have the -- are the counties in the
16 process of securing the number of places that they
17 need for November?

18 A. They are, yes.

19 Q. Are you working with the counties on
20 that front?

21 A. We are. We are working with the
22 counties and other agencies as appropriate to try
23 to locate places as the counties need them.

24 Q. And so far have you been able to do

1 so?

2 A. We have. I can't say that we have
3 met every single county's need, but, you know, I am
4 not aware of a large need or, you know -- similar
5 to what we saw in the June primary. We have
6 actually been working on recruiting poll workers
7 and identifying additional options for polling
8 places for counties to address those -- really
9 since the June primary.

10 Q. Okay. You were addressed about drop
11 boxes. Just so we are clear, has the Department
12 recommended that every county install drop boxes?

13 A. We have not.

14 Q. Who makes the decision about whether
15 to install drop boxes or other ballot return
16 locations?

17 A. It would be the individual county
18 boards of elections.

19 Q. And do you know what counties rely on
20 when they are making those decisions?

21 A. Yes, I can't speak for every single
22 county that deploys them but typically counties
23 rely on, you know -- really the things that we
24 outline in our guidance, you know, counties are

1 certainly aware of -- aware, you know, where they
2 are sort of -- community -- commuting hubs and
3 heavily, densely-populated areas are -- counties
4 are aware of, you know -- certainly where the
5 county provides other county services comes into
6 play. It is really unique to each county depending
7 on how the county government is set up and how they
8 deliver other services, those come into play as
9 well.

10 Q. Now, you had questions about a DHS
11 guidance and you said you were familiar with that
12 guidance; is that correct?

13 A. Yes.

14 Q. From what you recall of that
15 guidance, was it a nationwide guidance?

16 A. I believe it was, yes. Yes, I
17 believe it was -- well, it was -- as I recall the
18 context of it, it was nationwide but it was
19 directed towards those states that use mail-in
20 balloting when you have drop boxes.

21 Q. And do you know whether -- so, other
22 states in America use mail-in balloting, correct?

23 A. Yes. And some states use it
24 exclusively. Other states are -- excused absentee

1 is usually the term in other jurisdictions.

2 Q. So, when you say a state uses mail-in
3 balloting exclusively, what do you mean by that?

4 A. Meaning that that is -- that is how
5 voters vote in those jurisdictions. There are a
6 handful of jurisdictions where voting occurs almost
7 entirely by mail. They do have votes that are set
8 up for, you know, ballot replacement or other
9 issues but they are primarily voting by mail-in
10 those jurisdictions.

11 Q. So, in those other states what are
12 the options for voting in person?

13 A. Typically they are at a vote center
14 type of set-up where, you know, in county, a
15 jurisdiction would have locations throughout the
16 county, not necessarily a precinct base, but
17 locations throughout the County for voters to
18 return their ballot or get another ballot if they
19 needed to exchange the ballot.

20 Q. And so are recommendations suitable
21 for one state always suitable for all of the
22 states?

23 A. No. I think like Pennsylvania, the
24 United States is diverse and certainly implementing

1 a one-size-fits-all for every single state of the
2 union is -- certainly would not meet the needs of
3 every single state.

4 Q. Now, you had a question about the
5 cost of drop boxes. What cost -- you used the
6 words a few thousand. What cost was that referring
7 to?

8 A. I was trying to make a distinction,
9 too. It depends on -- depends on, you know, what
10 type of volume, what type of box you were
11 procuring, which is largely based on the volume of
12 ballots that you can expect to receive so that --
13 you know, those receptacles themselves are not all
14 equal. They have range from almost a mailbox size
15 to something that looks like a large almost, you
16 know, like a small car. So, the price range varies
17 significantly.

18 And there are certainly costs
19 associated with securing those locations whether
20 they are staffed throughout the day or monitored
21 through some sort of surveillance. But, I was
22 trying to distinguish -- I believe just purchasing
23 the box, you are talking about a few thousand
24 dollars depending -- but it could be tens of

1 thousands of dollars depending on what kind of box
2 you are purchasing.

3 Q. And for counties that are installing
4 drop boxes, who is paying for that?

5 A. The county boards of elections
6 primarily.

7 Q. Now, you testified that -- about
8 directives. Has the department issued any
9 directives relating to mail-in voting?

10 A. I don't believe that we've issued any
11 directives related to mail-in.

12 Q. Can the department issue any
13 directives on anything it likes?

14 A. No. There is -- there is narrow
15 authority, you know, explicit authority to issue
16 directives, for example, on voting systems, but
17 there isn't a broad authority that I'm aware of for
18 the election -- for the Secretary to issue
19 directives on all election matters.

20 Q. On the topics that Mr. Steiner asked
21 you about on his cross, are any of those topics on
22 which the department can issue directives?

23 A. With the exception of the -- we
24 did -- we start down the voting system line of

1 questions. But certainly, we can issue directives
2 on the implementation on voting systems, but the
3 rest of it, as I recall, that line of questioning
4 would be no.

5 MS. HANGLEY: If I could just have
6 one minute, Your Honor.

7 JUDGE BROBSON: You can have it.

8 THE WITNESS: I apologize, Your
9 Honor. Is it okay if I excuse myself briefly?

10 JUDGE BROBSON: Sure, Mr. Marks. Go
11 ahead.

12 Any more questions?

13 MS. HANGLEY: One more question or a
14 pair of questions.

15 BY MS. HANGLEY:

16 Q. Mr. Marks, I believe Mr. Steiner
17 mentioned something called central scanning. Do
18 you know what that is?

19 A. Yes, central scanning or central
20 tabulation of ballots. It is basically when the
21 county, you know, as opposed to tabulation
22 occurring at the precinct, counties actually
23 tabulate the ballots or count them at the county.

24 Q. Do you know how many counties have a

1 practice of doing central scanning?

2 A. Well, with Act 77 and mail-in
3 balloting, they are all doing some level of central
4 scanning of those ballots, but there are only a
5 small handful of counties that are doing central
6 tabulation of all ballots.

7 Q. And what kind of counties are those?
8 Do they share any characteristics?

9 A. Typically, they are smaller, less
10 populated counties that rely on that model.

11 Q. In your view, is central scanning a
12 practical solution for any large county?

13 A. You know, I don't think it's a
14 practical solution from the perspective of -- if
15 you are talking a county the size of Philadelphia
16 or Allegheny or even one of the small -- I don't
17 want to say small -- one of the southeastern
18 counties, you are talking about tabulating hundreds
19 of thousands of ballots centrally. The big
20 concern, of course, is how long it is going to take
21 to tabulate those ballots. It is certainly not
22 practical within the context of efficiently
23 tabulating all the ballots.

24 Q. Are you aware of whether or not all

1 the counties have the scanning capacity to increase
2 the number of ballots they scan by hundreds of
3 thousands of ballots?

4 A. I would think most counties do not
5 have that capacity. Their -- you know, we have
6 been working with a number of counties, larger
7 counties primarily, to ensure that they have
8 adequate equipment to tabulate the volume of
9 mail-in and absentees they expect. Going above
10 that, I am not aware of a county that is prepared
11 for the idea of tabulating all of them centrally.

12 Q. And if a county -- excuse me, say a
13 medium to large county had to double the number of
14 paper ballots that had to scan centrally, what
15 would the county need to do to prepare for that?

16 A. Well, in addition to -- so, as we
17 worked with counties, you know, it is -- you have
18 the equipment, tabulating equipment, to tabulate
19 that volume of ballots, but it is not limited to
20 that. On the front end, you also have to have an
21 efficient way to process the incoming ballots
22 which, you know, as it stands now cannot be
23 canvassed or pre-canvassed until 7:00 a.m. on
24 election day.

1 So, you also have to address the
2 front-end of the process. As ballots come in, they
3 have to be checked, reviewed, and then opened.
4 Typically, you will have staff flatten them. So, I
5 think the volume we are talking about, our
6 recommendation to counties that have a large volume
7 of mail-in and absentees, they procure envelope
8 opening equipment, mail slicer, mail extractors,
9 and to my knowledge, those are primarily limited to
10 the larger counties. And I am not sure even the
11 larger counties would have enough to efficiently
12 open twice as many ballots if that is what we are
13 talking.

14 MS. HANGLEY: All right. That is all
15 I have, Your Honor.

16 JUDGE BROBSON: Mr. Wallen.

17 MR. WALLEN: Thank you, Your Honor.

18 BY MR. WALLEN:

19 Q. I just have a couple of different
20 ones for you. Very frequently in your testimony
21 you used the word expectation, for example, in the
22 context of paper ballots or absentee and mail-in
23 guidance. Is there a particular reason why you
24 kept using the word expectation?

1 A. I think in the overwhelming majority
2 of cases counties follow our guidance, so when we
3 issue guidance, we expect that counties are going
4 to take notice of it and will follow it. They may
5 not always be happy about it, but they will follow
6 it.

7 Q. But is there a reason you didn't use
8 the word direct or command?

9 A. Yes. You know, as I testified
10 earlier, you know, there is guidance -- guidance
11 is, you know, a recommendation that we make to
12 counties, you know, if they exercise their
13 discretion to do something we will provide them
14 with best practices, recommendation, guidance on
15 how we think they should do it versus a directive
16 where the Secretary has the authority to direct the
17 county to do something.

18 Q. Or versus a statute like Act 77 that
19 directly required various procedures?

20 A. Right.

21 MR. WALLEN: Let's turn briefly --
22 can we pull up Petitioner's Exhibit 28, please, and
23 go to the second page. I guess scrolling to the
24 paragraph which starts with to be clear on Page 2.

1 Thank you.

2 BY MR. WALLEN:

3 Q. Are you familiar with the language in
4 the second full paragraph of Page 2 that says: To
5 be clear the postal service is not purporting to
6 definitively interpret the requirements of your
7 state's election laws and also is not recommending
8 that such laws be changed to accommodate the postal
9 service's delivery standards?

10 A. I do recall reading that paragraph.

11 MR. WALLEN: Okay. We can take down
12 that exhibit.

13 BY MR. WALLEN:

14 Q. We talked in your testimony -- in
15 your testimony you talked a good bit about return
16 locations and satellite locations. Are you
17 familiar with where either of those terms are in
18 the election code?

19 A. Well, satellite offices, those are
20 terms of art. But, you know, the board of
21 elections may have a primary office, but they also
22 may have additional locations, you know, to the --
23 if necessary, that would be provided for them to
24 conduct their activities.

1 Q. But you are not familiar with an
2 expressed statutory authorization for any of those
3 items?

4 MS. HANGLEY: Objection. Objection.

5 JUDGE BROBSON: I anticipated those,
6 too. Ms. Hangley, what is your objection?

7 MS. HANGLEY: My objection is it is
8 beyond the scope and this appears to be Discovery
9 in a different case, a case pending in the Western
10 District of Pennsylvania.

11 MR. WALLEN: I am not in that case.

12 JUDGE BROBSON: But there is also --
13 the question of the lawful authorization for
14 so-called ballot drop boxes is currently the
15 subject of a Pennsylvania Supreme Court proceeding,
16 at least, in the Pennsylvania Democratic party case
17 which the Supreme Court took case bench on, and I
18 am not going to be deciding the legality of drop
19 boxes in this case. It is not an issue in this
20 case, so Mr. Wallen, I am sustaining Ms. Hangley's
21 objection.

22 MR. WALLEN: Can I just offer -- as I
23 understand it at least, that one, Mr. Marks talked
24 a great deal about these ballot return locations

1 and, secondly, it is on the list of requested
2 relief subject to this application.

3 To me, I would see some relevance
4 based on that testimony as to whether there is a
5 specific statutory authorization for any of that.

6 JUDGE BROBSON: Mr. Wallen, I would
7 assume you have in your hand a legal argument ready
8 to go on the question of whether drop boxes are
9 lawful in Pennsylvania. I have every confidence
10 that if you think that is a germane main legal
11 argument you will raise it at the appropriate time
12 in this case.

13 In terms of questioning Mr. Marks on
14 this, I think it is beyond the scope, and I will
15 sustain the objection.

16 MR. WALLEN: I have no further
17 questions, Your Honor.

18 JUDGE BROBSON: Ms. Gallagher.

19 BY MS. GALLAGHER:

20 Q. Deputy Secretary Marks, my name is
21 Kathleen Gallagher, and I represent the Republican
22 Committee intervener here. I want to follow up
23 here. As I understand it -- and I was having
24 difficulty hearing at one point. Was it your

1 testimony that the Department does not have the
2 authority to make directives to the counties
3 regarding mail-in or absentee voting? Would you
4 agree with that?

5 A. That is my understanding, yes.

6 Q. Okay. And would you also agree based
7 on your familiarity with the Act to carry out your
8 duties as the Deputy Secretary, that the authority
9 to regulate the manner of conducting mail-in
10 balloting or absentee balloting lies solely within
11 the discretion of the individual counties?

12 A. Yes, that is my understanding.

13 Q. Okay. And, finally, with respect to
14 that, would you likewise agree that within the
15 context of the election code that the ability of a
16 county to regulate or administer the manner of
17 mail-in or absentee ballot, is that it cannot be
18 consistent with the law?

19 MS. HANGLEY: Objection.

20 MS. GALLAGHER: I am only asking for
21 his understanding, Your Honor. I am not asking for
22 a legal opinion.

23 JUDGE BROBSON: Ms. Hangley, what is
24 your objection?

1 MS. HANGLEY: My objection is, first
2 of all, legal opinion but also, again, we are
3 straying into sound bytes for our case that is not
4 before Your Honor. This is not a case about the
5 legality of drop boxes.

6 JUDGE BROBSON: I don't think Ms.
7 Gallagher asked about drop boxes. I think she
8 asked about mail-in voting.

9 Ms. Gallagher, I will give you an
10 answer to the question: No, the county boards of
11 elections cannot do anything that the statute does
12 not allow them to do.

13 MS. GALLAGHER: That is a good
14 answer. Thank you.

15 JUDGE BROBSON: I don't think we need
16 to spend time on questions that we all know the
17 answers to, so let's move on.

18 Any more questions, Ms. Gallagher?

19 MS. GALLAGHER: No, sir.

20 JUDGE BROBSON: Mr. Limburg.

21 MR. LIMBURG: No questions, Your
22 Honor.

23 JUDGE BROBSON: Any redirect,
24 Mr. Steiner?

1 MR. STEINER: Just briefly, Your
2 Honor.

3 BY MR. STEINER:

4 Q. Mr. Marks, you talked a little bit on
5 cross about central tabulation. Do you recall that
6 testimony?

7 A. I do, yes.

8 Q. And the capacity of larger counties
9 with respect to central tabulation?

10 A. Yes.

11 Q. Okay. Now, you are aware, are you
12 not, that Philadelphia has ordered high-speed
13 scanners for use in the November 2020 election,
14 right?

15 A. I am, yes.

16 Q. And those high-speed scanners scan
17 300 ballots per minute; is that right?

18 A. Yes, I believe that's accurate.

19 Q. Okay. And, so, that's 18,000 ballots
20 per hour per scanner; is that right?

21 A. Yes, if my math is correct. I think
22 they are using two different types of scanners, so
23 I don't know that every scanner has the same
24 capacity. But, yes, the larger scanners that can

1 do 300 a minute could do 18,000 an hour.

2 Q. Right. And just so we have a clear
3 record, although I think Mr. Bluestein can
4 certainly clean up any misunderstanding or if you
5 don't know -- but is it your understanding that
6 they've ordered four of the high-speed scanners and
7 then an additional four slower scanners -- slower
8 only in relation to the 300 per minute?

9 A. Yes, they are both -- they are both
10 central high-speed tabulators, but one has
11 significantly higher capacity than the other. But
12 I believe that is correct, that it is four and
13 four, as I understand it.

14 Q. And just with that additional
15 capacity of those additional high-speed machines,
16 those machines alone could scan ballots from every
17 registered voter in Philadelphia in something under
18 15 hours; is that right?

19 A. I don't know. I don't know that
20 that's true. Again, you are -- you know, the
21 high-end capacity -- I mean -- I think probably
22 there is a better witness that would be better able
23 to testify because you are using a mix of different
24 types of scanners, one having a much lower

1 capacity. I don't know that the math necessarily
2 works out to 15 hours for every single registered
3 voter if they were to vote by paper or by paper
4 ballot.

5 MR. STEINER: Okay. We will reserve
6 the rest of that to someone with more direct
7 knowledge. Thank you for your time, Mr. Marks.

8 JUDGE BROBSON: Thank you. Any
9 reason why the witness cannot be released pending
10 the possible recall in the Respondent's case in
11 chief?

12 Mr. Marks, I can't say you are
13 permanently released, but you are at least released
14 from this portion of the proceeding. Thank you for
15 this portion of your testimony.

16 THE WITNESS: Thank you, Your Honor.

17 JUDGE BROBSON: It is noon.

18 Mr. Steiner, how many more witnesses does your side
19 have?

20 MR. STEINER: I believe we call next
21 Mr. Bluestein with the same caveats we went through
22 this morning with Mr. Marks, and he would be our
23 last witness that we would call.

24 JUDGE BROBSON: What is the caveat?

1 MR. STEINER: He was a
2 cross-designated witness, so subject Ms. Hangley's
3 same objection in the same procedure we just went
4 through, he would be our next witness.

5 MS. HANGLEY: Your Honor, there is a
6 different issue here. Mr. Bluestein is a third
7 party. He has not been subpoenaed and no
8 arrangement made with him to appear in Petitioner's
9 case, as far as I know. He has agreed to appear in
10 Respondent's case. But that -- as far as my
11 understanding is that, that doesn't subject him to
12 appear.

13 JUDGE BROBSON: It is your
14 understanding what?

15 MS. HANGLEY: It is my understanding
16 that simply agreeing to appear as a Respondent's
17 witness does not mean he is subject to appearing in
18 Petitioner's case on such short notice.

19 JUDGE BROBSON: What is your
20 understanding based on?

21 MS. HANGLEY: That witnesses have to
22 be subpoenaed or here by agreement. He has not
23 been in Petitioner's case. At the close of
24 Petitioner's case, they intend to move for --

1 JUDGE BROBSON: I understand. I
2 understand. I know exactly why you are doing what
3 you are doing. I get it. I am trying to
4 understand.

5 Look, we will come back at 1 o'clock.
6 If you have any law that you want to provide me on
7 this question, you can provide it to me then. I
8 will hear a little bit of argument on that and make
9 my ruling and see where we are at 1 o'clock.

10 MS. HANGLEY: Thank you, Your Honor.

11 COURT CRIER: The Commonwealth Court
12 is now in recess.

13 (Lunch break taken.)

14 COURT CRIER: Commonwealth Court will
15 now resume.

16 JUDGE BROBSON: So, before we went
17 off the record for the lunch break, Ms. Hangley
18 raised an objection to the calling of a witness.
19 Was the witness Mr. Bluestein?

20 MS. HANGLEY: Mr. Bluestein, Your
21 Honor.

22 JUDGE BROBSON: Bluestein, who I
23 believe is an election official with the City of
24 Philadelphia.

1 MS. HANGLEY: That is correct.

2 JUDGE BROBSON: Okay. And I guess
3 Ms. Hangley, just so the record is clear, what is
4 the nature of your objection?

5 MS. HANGLEY: The nature of the
6 objection is that he has not been subpoenaed and no
7 arrangements have been made with the City to bring
8 him in, and he's a third party witness. Also, the
9 same objection with Mr. Marks, that he was not --
10 there was no proffer for him on the Petitioner's
11 pretrial memorandum.

12 That said, Your Honor, before we get
13 into it, we do -- we strongly object to the
14 procedure here. There was no warning, no
15 cooperation with the City, and we weren't expecting
16 the Petitioners until mid-day yesterday when they
17 told us this, we weren't expecting them to throw
18 off our case this way.

19 That said, the City is willing to
20 produce Mr. Bluestein to avoid an inconvenience to
21 the Court. On the same -- again, I would cross him
22 in this proceeding, and then examine him directly
23 in my case. There is another witness --

24 JUDGE BROBSON: Ms. Hangley, you

1 don't represent Mr. Bluestein, do you?

2 MS. HANGLEY: No, I don't.

3 JUDGE BROBSON: But your
4 understanding is he has voluntarily agreed to
5 appear?

6 MS. HANGLEY: He has. There is
7 another witness who Petitioners said they would
8 like to call and who is not available to either of
9 us, and I just want to make sure that is --

10 JUDGE BROBSON: Let's take one
11 witness at a time. The bottom line is Mr.
12 Bluestein has agreed to appear voluntarily.

13 MS. HANGLEY: He has, Your Honor.

14 JUDGE BROBSON: He is not refusing to
15 testify as part of the petitioner's case?

16 MS. HANGLEY: He is not.

17 Respondent's request a proffer.

18 JUDGE BROBSON: You would like a
19 proffer?

20 MS. HANGLEY: We would.

21 JUDGE BROBSON: Okay. Mr. Castiglia,
22 what is the scope of the testimony that you intend
23 to elicit from this witness?

24 MR. CASTIGLIA: Your Honor, we intend

1 to elicit testimony consistent with what Mr.
2 Bluestein explained in his declaration in this
3 case, which is the administration of elections in
4 this primary election and the upcoming general
5 election, their effectiveness and safety
6 precautions and the feasibility of our requested
7 relief.

8 JUDGE BROBSON: What declaration are
9 you talking about, because I don't have any
10 declarations in front of me?

11 MR. CASTIGLIA: We submitted a
12 declaration in this case. I believe it is marked
13 as Petitioner's Exhibit 52.

14 JUDGE BROBSON: I understand you
15 marked it as an exhibit. I want to know where it
16 came from.

17 MR. CASTIGLIA: Oh, it was submitted
18 with, I believe, in the opposition to our
19 preliminary injunction brief by the Respondent.

20 JUDGE BROBSON: Okay. So, Ms.
21 Hangle you secured a declaration and you submitted
22 it in support of your opposition; is that correct?

23 MS. HANGLEY: That is correct, Your
24 Honor.

1 JUDGE BROBSON: So, the proffer is
2 going to be I'm eliciting essentially -- why don't
3 you just stipulate to the admission of the
4 declaration.

5 MS. HANGLEY: Your Honor -- the
6 parties have agreed that declarations -- neither of
7 us will try to introduce declarations in this case.
8 The declaration goes beyond the scope of the case
9 the petitioners have introduced so far. And there
10 are also things that he would presumably be
11 questioned about that are not in the declaration.

12 JUDGE BROBSON: That is not what I
13 just heard from Mr. Castiglia. He just said what he
14 was going to keep it within the scope of the
15 declaration. Mr. Castiglia, are you basically
16 going to ask him what the declaration says?

17 MR. CASTIGLIA: We would like to
18 examine him about the basis for his opinion and
19 what he's explained in his declaration, but we
20 don't intend to go beyond the scope about things
21 that he addressed in the declaration.

22 JUDGE BROBSON: Mr. Castiglia, how do
23 you respond to Paragraph 3 of this court's order
24 which was dated August 25, 2020, where we wrote in

1 Paragraph 3: It shall be the responsibility of
2 counsel to maintain contact with their witnesses
3 and at the appropriate time to instruct their
4 witnesses when to log on to WebEx video conference
5 to testify?

6 Before today, have you had any
7 contact with this witness?

8 THE WITNESS: We have not had direct
9 contact with the witness, Your Honor, but my
10 understanding is that Mr. Bluestein was going to be
11 here to testify today and he didn't believe it was
12 appropriate to subpoena a witness who is
13 cooperating with the court staff and testing the
14 equipment with the court staff.

15 JUDGE BROBSON: What prompted you
16 to -- what prompted you to come to that conclusion,
17 that you had no obligation to make sure your
18 witnesses were available to testify today?

19 MR. CASTIGLIA: Your Honor, that was
20 just our understanding based on the belief and
21 correspondence with the respondents about his
22 availability.

23 JUDGE BROBSON: So, clearly there
24 is -- look, I understand when we do a WebEx video

1 conferencing, and there is no physical courtroom
2 that makes things a little bit more difficult.

3 Mr. Castiglia, what I will tell you
4 is I am a little chagrined by the fact that your
5 side has not taken what appear to be reasonable
6 steps to secure attendance of the witnesses that
7 you believe you needed to prove your case in chief;
8 and that instead you were going to rely on this
9 idea that the Respondents were going to make their
10 witnesses available and that you were going to
11 piggyback off their efforts to secure third-party
12 witnesses.

13 You know, I've not seen this before.
14 And it's -- I am willing to give you latitude given
15 the exigency of the circumstances and also given
16 the fact that Mr. Bluestein has agreed to
17 voluntarily appear, not through your efforts but
18 through the efforts of Ms. Hangley and her side.

19 So, I will allow Mr. Bluestein to
20 testify, understanding that I am looking with a
21 little bit of a dim view the idea that your side
22 did not take reasonable steps to secure the
23 attendance of witnesses for your case. But we will
24 allow -- if Mr. Bluestein -- is he in the lobby?

1 Okay. We will hear from Mr. Bluestein. We will
2 take up your next witness whatever issues may be
3 attended with that.

4 These are third-party witnesses, Mr.
5 Castiglia. These are witness not in any control of
6 any party in this case. Usually when you want a
7 third-party witness to appear, you have to subpoena
8 them unless you get their agreement to appear. It
9 doesn't sound like to me like your side did either.

10 Do you understand my concern?

11 MR. CASTIGLIA: I do understand your
12 concern, Your Honor. I thank you for your
13 latitude, and I apologize for the inconvenience.
14 And we expect there won't be any issues moving
15 forward.

16 JUDGE BROBSON: I want the record to
17 be clear that I am -- you know, I am bending over
18 backwards here for you on this one. And, you know,
19 hopefully -- hopefully, this can be resolved
20 without much more fanfare than I've already given
21 it. Let's bring in the witness.

22 - - -

23 MR. CASTIGLIA: Your Honor, may I
24 proceed?

1 JUDGE BROBSON: You may.

2 MR. CASTIGLIA: Thank you.

3 - - -

4 SETH BLUESTEIN, having been duly
5 sworn, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. CASTIGLIA:

8 Q. Good morning, Mr. Bluestein. My name
9 is Craig Castiglia. You are the Chief Deputy
10 Commissioner for the Philadelphia City Commissioner
11 Al Schmidt; am I correct?

12 A. Correct.

13 Q. And you've held that position since
14 July 2017, correct?

15 A. Correct.

16 Q. You are also the Chief Integrity
17 Officer for the Office of the City Commissioners in
18 Philadelphia, correct?

19 A. Correct.

20 Q. And you've held that position since
21 January 2018?

22 A. Correct.

23 Q. You do not hold any positions
24 overseeing elections other than Philadelphia; is

1 that correct?

2 A. Correct.

3 Q. And you do not have any specialized
4 experience in mitigating the spread of a worldwide
5 pandemic; is that correct?

6 A. I do not.

7 Q. And you are not a doctor?

8 A. I am not.

9 Q. You never went to school for any
10 medical degrees?

11 A. No.

12 Q. Mr. Bluestein, you understand that
13 COVID-19 will have a significant impact on the
14 general 2020 election, correct?

15 A. Correct.

16 Q. You are doing what you can to limit
17 the spread of COVID-19 with healthy voting options
18 for the citizens of Philadelphia; is that correct?

19 A. Yes.

20 Q. And you are planning to open --

21 JUDGE BROBSON: Mr. Castiglia, I am a
22 having a hard time understanding you. If you could
23 slow down in your questioning. I know the court
24 reporter is fantastic, but it might help us a

1 little bit. I don't know if it's a video lag, but
2 I am having a hard time making out all of your
3 questions.

4 MR. CASTIGLIA: I will try to slow
5 down, Your Honor, but let me know if it continues.

6 JUDGE BROBSON: I appreciate that.

7 BY MR. CASTIGLIA:

8 Q. Mr. Bluestein, are you planning to
9 open satellite offices for in-person voting and
10 early in-person voting? Is that correct?

11 A. We do aspire to have satellite
12 election offices for in-person mail-in voting.

13 Q. And you intend to have 15 locations
14 where you can apply for, receive, and complete a
15 ballot all at the same time; is that correct?

16 A. Fifteen satellite offices, correct.

17 Q. And those centers will cost roughly
18 100,000 to 125,000 for each location in order to
19 staff, repair, and maintain up to and leading into
20 the general election, correct?

21 A. Approximately, yes.

22 Q. And you've secured funding for that
23 already?

24 A. We have.

1 Q. Those locations will then become
2 locations for the return of mail-in ballots; is
3 that correct?

4 A. That is one function they can serve,
5 yes.

6 Q. And you are also putting in drop
7 boxes in the community to attempt to make the
8 return of mail-in ballots more convenient, right?

9 A. We do aspire to have drop boxes
10 available.

11 Q. And one of the reasons that is
12 important is because the post office has already
13 advised the state that it can't guarantee timely
14 processing of all mail-in ballots; is that correct?

15 MS. HANGLEY: Objection.

16 JUDGE BROBSON: Ms. Hangley?

17 MS. HANGLEY: Foundation.

18 JUDGE BROBSON: I think that is a
19 fair objection. Mr. Castiglia although this is a
20 designated witness of the Petitioners, this is not
21 a witness under the control of the Petitioner. So,
22 you can't just lead the witness as much as you are
23 doing. You need to lay a foundation.

24 MR. CASTIGLIA: Thank you.

1 BY MR. CASTIGLIA:

2 Q. Mr. Bluestein, how much does it cost
3 to -- how much does each drop box cost?

4 A. I don't have an exact figure for each
5 drop box.

6 Q. Does Philadelphia plan to send
7 postcards to all Philadelphia voters informing them
8 of each polling place location?

9 A. We do.

10 Q. Does Philadelphia have the money to
11 mail those postcards to all of the residents?

12 A. We do.

13 Q. And has the capacity to do that,
14 right?

15 A. Yes. We have a vendor who will mail
16 them for us.

17 Q. Are you aware that some other
18 counties in Pennsylvania mailed application ballots
19 for the June primary?

20 A. For the primary, I am aware of one
21 county that did.

22 Q. That county would be Allegheny,
23 right?

24 A. Correct.

1 Q. And would you agree that it is one of
2 the larger counties in Pennsylvania?

3 A. It is.

4 Q. Now, you agreed that you are planning
5 to mail and advise all registered voters of their
6 polling locations. You are not going to include an
7 application for a mail-in ballot with that mailing,
8 are you?

9 A. We are not.

10 Q. You are not planning to mail mail-in
11 ballot applications separately, are you?

12 A. We are not.

13 Q. Would you agree that a mail-in or an
14 absentee ballot is a paper ballot?

15 A. A mail-in or absentee ballot is a
16 paper ballot.

17 Q. And a paper ballot is a ballot that
18 someone fills out with pen or pencil, correct?

19 A. Ideally a pen with black or blue ink,
20 yes.

21 Q. More than half of voters in
22 Philadelphia vote with a mail-in ballot or absentee
23 ballot, correct?

24 A. Approximately half, yes.

1 JUDGE BROBSON: Mr. Castiglia --

2 suspend for a minute.

3 Mr. Castiglia, if you could, again,
4 slow down a little bit and maybe get a little
5 closer to your microphone, that would be helpful.

6 BY MR. CASTIGLIA:

7 Q. Mr. Bluestein, more than half of the
8 voters in the June primary in Philadelphia voted by
9 mail-in or absentee ballot; is that correct?

10 A. Approximately half, yes.

11 Q. And the way that paper ballots get
12 counted is by using scanners, right?

13 A. Paper ballots do get counted using a
14 scanner, correct.

15 Q. And Philadelphia has high-speed
16 scanners to count these ballots?

17 A. We do have high-speed central
18 scanners, yes.

19 Q. Mr. Bluestein, what is a central
20 count scanner?

21 A. I am sorry. Can you repeat the
22 question?

23 Q. What is a central count scanner?

24 A. A central count scanner is a scanner

1 at our central office to count paper ballots.

2 Q. And ES&S manufactures the DS450
3 central count scanner and tablet, right?

4 A. They do.

5 Q. And a single DS450 scanner can scan
6 and tabulate 90 ballots per minute; is that
7 correct?

8 A. I don't know how many ballots per
9 minute it can scan.

10 Q. Do you have any reason to doubt that
11 the DS450 machine can scan and tabulate 90 ballots
12 per minute?

13 A. That could be the manufacturer's
14 information that they print on marketing materials,
15 but there are a number of factors that could limit
16 the number of ballots counted per minute.

17 Q. Okay. Assuming that the manufacturer
18 accurately describes the machine's capacity to
19 count 90 ballots per minute, that would be 5,400
20 ballots per hour, correct?

21 A. That math checks out.

22 Q. ES&S sold DS450 scanners to
23 Philadelphia in May 2019, correct?

24 A. Correct.

1 Q. ES&S also manufactures the DS850
2 high-speed scanner, correct?

3 A. Correct.

4 Q. And a single DS850 high-speed
5 scanner, that can tabulate about 300 ballots per
6 minute, correct?

7 A. Same answer as before. I don't know
8 the exact figure of how many ballots per minute it
9 can scan.

10 Q. Okay. Well, assuming that it can
11 tabulate 300 ballots per minute, that would mean it
12 can tabulate around 18,000 ballots per hour,
13 correct?

14 MS. HANGLEY: Objection. I object to
15 the relevance of questions of abstract math. There
16 is no evidence as to what number of ballots can be
17 scanned per minute.

18 JUDGE BROBSON: Mr. Castiglia, do you
19 have any plan to produce any evidence as to the
20 manufacturer's specifications of these particular
21 machines and what the manufacturer represents their
22 scanning capability is?

23 MR. CASTIGLIA: Well, Your Honor,
24 Mr. Mark just testified to the fact that the DS850

1 can scan 300 ballots per minute, and we have an
2 exhibit that we can flag and show the capacity of
3 the DS450 scanner.

4 JUDGE BROBSON: I am not sure what he
5 testified to. He was being led pretty hard on the
6 direct examination as on cross. I guess the
7 question is what evidence do you have of the
8 manufacturer's specifications. It almost doesn't
9 matter, Mr. Castiglia, does it? I mean, what does
10 that mean? I mean --

11 MR. CASTIGLIA: I will try to get
12 there quickly, Your Honor. I am almost finished
13 with that line of questioning.

14 JUDGE BROBSON: I understand. I am
15 not sure how helpful this information is, but I
16 will let you go forward. But the fact -- look, a
17 manufacturer can specify that my laser printer can
18 print 500 pages a minute. That doesn't necessarily
19 mean it prints 500 pages a minute. It can also
20 specify that it can scan 300 pages a minute. It
21 probably depends on how many pages I can feed into
22 the thing. I am not sure you are getting what you
23 want. If you want to do straight-up math, I guess
24 you can ask Mr. Bluestein if he can do straight-up

1 math.

2 I think Ms. Hangley's objection to
3 foundation is well founded. I will overrule it
4 with your representation that you will produce
5 evidence of what the actual manufacturer's
6 specifications are.

7 MR. CASTIGLIA: Would the Court
8 please show Petitioner's Exhibit 89?

9 MR. BALDWIN: I did not have an 89.
10 Your exhibits in the file go from 88 to 91.

11 MR. CASTIGLIA: Okay.

12 MR. BALDWIN: Give me a second. I
13 will verify that.

14 JUDGE BROBSON: I have an 89 on the
15 list, a website, a website with a PDF.

16 MR. BALDWIN: I don't have anything
17 in the file. I don't have an 89. What they
18 uploaded to me goes from 88 to 91.

19 MR. CASTIGLIA: Your Honor, we could
20 provide that now quickly if you would allow it and
21 come back to this line of questioning.

22 JUDGE BROBSON: Look, I know the
23 exhibit is marked on your list. I see 88 and 89
24 are on the list. See if they could send that right

1 now.

2 MR. CASTIGLIA: I can get it sent
3 over immediately.

4 JUDGE BROBSON: Mr. Castiglia, you
5 can proceed.

6 BY MR. CASTIGLIA:

7 Q. Mr. Bluestein, within the last few
8 weeks Philadelphia received a \$10 million grant
9 from the Center for Tech and Civic Life to help run
10 its election; is that right?

11 A. Approximately, \$10 million.

12 Q. And in that grant, Philadelphia has
13 stated that it plans to use some of the grant money
14 to buy four new DS450 scanners and four new DS850
15 high-speed scanners; is that correct?

16 A. Yes, that is correct.

17 Q. Philadelphia will have a total of
18 eight DS450 scanners after purchasing four more?

19 A. Correct.

20 Q. And it will have four DS850 scanners
21 after purchasing the new machines?

22 A. Correct.

23 Q. So, Mr. Bluestein, bear with me. I
24 will walk through some of the arithmetic, and I

1 will try to be as quick as possible with you.

2 If you got the eight DS450 scanners
3 and each machine is processing 5,400 ballots per
4 hour, eight times that point is 43,200?

5 MR. WALLEN: I am going to object. I
6 don't understand where all of this is going.

7 JUDGE BROBSON: Mr. Castiglia --

8 MR. WALLEN: I thought we said we
9 weren't going to do this basic math, and we are
10 doing it again.

11 MR. CASTIGLIA: Your Honor, this goes
12 to feasibility of the Philadelphia and all other
13 counties' capacity to count the mail-in ballots.

14 JUDGE BROBSON: I am not sure how it
15 goes to other counties. Philadelphia and Allegheny
16 are not Tioga, Lycoming, Bedford, Dauphin, Cambria,
17 Indiana, Erie, Crawford, Mercer, Pike,
18 Susequehanna, Lehigh, Luzerne, Lackawanna,
19 Northampton, Northumberland. I can go on, Mr.
20 Castiglia. But, right now, if all you are trying
21 to establish is that Philadelphia has the capacity
22 to process all paper ballots, why don't you just
23 ask Mr. Bluestein that question?

24 BY MR. CASTIGLIA:

1 Q. Okay. Mr. Bluestein, if Philadelphia
2 purchases the DS450 and the DS850, does it have the
3 capacity to process all paper ballots if every
4 voter in Pennsylvania were to vote by paper ballot?

5 MR. WALLEN: Objection. I don't know
6 how he has the capacity to opine in the State of
7 Pennsylvania.

8 JUDGE BROBSON: I think Mr. Castiglia
9 misspoke. You mean in the County of Philadelphia,
10 don't you?

11 MR. CASTIGLIA: I do. Thank you,
12 Your Honor.

13 JUDGE BROBSON: Mr. Bluestein, can
14 you answer that question?

15 THE WITNESS: Can you repeat the
16 question?

17 BY MR. CASTIGLIA:

18 Q. With your purchases of the new
19 scanners, does Philadelphia have the capacity to
20 process all paper ballots, whether mail or at the
21 polling place, and scan those ballots if all voters
22 vote by paper in Philadelphia?

23 MR. WALLEN: Objection. Compound
24 question.

1 JUDGE BROBSON: I'm going to overrule
2 that objection.

3 THE WITNESS: So, the main limiter to
4 processing paper ballots is not actually the
5 scanning equipment. And, also, your question
6 didn't ask about a timeframe, so is it
7 hypothetically possible to process all paper
8 ballots, yes, given unlimited time and unlimited
9 other resources. But the main problem is that
10 there are other many other factors beyond the
11 actual central scanning equipment that will limit
12 Philadelphia's capacity to actually process paper
13 ballots in a timely manner.

14 BY MR. CASTIGLIA:

15 Q. Okay. Thank you, Mr. Bluestein.
16 The board has applied and seeks
17 permission to consolidate polling places from 838
18 to 188 during the June 2020 primary election,
19 correct?

20 A. Yes.

21 Q. Would it be fair to say that that is
22 approximately a 77 percent reduction?

23 A. Yes.

24 Q. Apart from Act 12, the board has

1 limited power to consolidate polling places,
2 correct?

3 A. Correct.

4 Q. Philadelphia does expect to have
5 between 700 and 800 places for the general
6 election, right?

7 A. Correct.

8 Q. And even if you consolidated 700
9 places, would it be fair to say that you could
10 consolidate by as much as 15 percent when compared
11 to last November's election?

12 A. If we have 700 polling places, that
13 would be approximately a reduction from last
14 November of 15 percent.

15 Q. Thank you. And that would be fewer
16 polling places than were available in the
17 November 2019 election, correct?

18 A. Correct.

19 Q. And the November 2019 election had
20 lower turnout than we were anticipating for the
21 November 2020 election, correct?

22 A. Not necessarily when it comes to
23 in-person turnout.

24 Q. But general turnout?

1 A. The overall turnout in November of
2 2019, will be lower than the overall turnout in the
3 2020 general.

4 Q. Okay. Thank you, Mr. Bluestein.

5 I want to turn to the safety
6 equipment provided to workers and voters.

7 Counties are not required to provide
8 masks and gloves to poll workers; is that correct?

9 A. I don't know what other counties are
10 required to provide.

11 Q. Do you know if Philadelphia is
12 required to provide masks or gloves to poll workers
13 and voters?

14 A. I don't believe we are required.

15 Q. Now, even if you do provide gloves,
16 you haven't trained workers or voters how to
17 properly put on latex gloves, did you?

18 A. I don't personally do the training,
19 but our trainers do demonstrate how to utilize
20 gloves.

21 Q. Well, there is a curtain surrounding
22 each election machine; is that right?

23 A. Correct.

24 Q. And, so, there is no way of knowing

1 whether a voter uses the latex gloves once they are
2 behind the curtain; is that correct?

3 A. The voters should be putting on latex
4 gloves before they even sign in to the poll.

5 Q. But they are not required to put on
6 the latex gloves, right?

7 A. They are not required.

8 Q. Do you understand that masks reduce
9 the transmission of COVID-19?

10 A. That is my understanding.

11 Q. And regardless of whether a voter
12 wears a mask, the Philadelphia Board has not
13 instructed polling locations to refuse entry to a
14 voter who appears without a mask, correct?

15 A. We did not. We provided other
16 procedures.

17 Q. Mr. Bluestein, Philadelphia selected
18 ExpressVote XL machine for use at polling
19 locations, correct?

20 A. Correct.

21 Q. And the board depended on the
22 Pennsylvania Department of State certification
23 process, but it did select the ExpressVote XL
24 machine in Philadelphia, correct?

1 MS. HANGLEY: Objection.

2 JUDGE BROBSON: Go ahead.

3 MR. HANGLEY: This is similar to my
4 objection about the certification of the previous
5 witness. If we are getting into certification
6 decisions, I believe we are doing Discovery for a
7 different case.

8 JUDGE BROBSON: Mr. Castiglia,
9 relevance?

10 MR. CASTIGLIA: My understanding was
11 your ruling with Mr. Steiner's line of questioning
12 was that it didn't have a connection to a specific
13 voting machine or a specific county; and I am tying
14 it to Philadelphia and the ES&S machines. And it
15 goes to the relevance of the cleaning procedures
16 and the way that a voter uses the machine when they
17 go up on election day.

18 JUDGE BROBSON: Why don't you ask Mr.
19 Bluestein if he is familiar with the cleaning --
20 remember, you are direct examination. You are not
21 cross-examining. He's a third-party witness. You
22 are going to need some foundation here, not lead
23 the witness as much, and what is the relevance of
24 the certification? I don't think anybody is

1 disputing that Philadelphia didn't purchase a
2 certified machine. They did.

3 So, what is the relevance?

4 MR. CASTIGLIA: The relevance is
5 whether the machine was tested for use with gloves
6 when it was certified.

7 JUDGE BROBSON: How would he know
8 that? He didn't do the testing. I mean, you can
9 ask him. I still -- Mr. Bluestein, as I understand
10 it, is doing his job, and he didn't select the
11 machines. He is the one that is putting the
12 machines into play. So, I am not sure what the
13 certification has to do with anything. Actually, I
14 think a lot of these certifications happened prior
15 to COVID, didn't they?

16 MR. CASTIGLIA: That was part of the
17 point, Your Honor. My basis is that Mr. Bluestein
18 is the deputy chief commissioner for the City of
19 Philadelphia, and I am sure he played a role in
20 selecting the ES&S machine.

21 JUDGE BROBSON: Why don't you lay the
22 foundation, and I will temporarily overrule the
23 objection. Let's lay some foundation.

24 BY MR. CASTIGLIA:

1 Q. Mr. Bluestein, let's stay with the
2 topic of the ExpressVote machines. How were they
3 selected for use in Philadelphia?

4 A. Philadelphia had a competitive RFP
5 bidding process, and the Board of Elections
6 selected the final system off of recommendations
7 from a procurement commissioner.

8 Q. Did you have a role in selecting the
9 ES&S machines in Philadelphia?

10 A. Yes.

11 Q. When you selected the ES&S machine
12 for use in Philadelphia, did approval depend on the
13 Pennsylvania Department of State certification
14 process?

15 A. So, counties can only choose a system
16 off the menu of certified options.

17 Q. So, you can't use a voting machine
18 that isn't certified, right?

19 A. Correct.

20 Q. And that certification process for
21 the ES&S machine occurred before Philadelphia
22 County placed its orders for the machines in 2019,
23 correct?

24 MS. HANGLEY: Objection.

1 JUDGE BROBSON: What is your
2 objection, Ms. Hangley?

3 MS. HANGLEY: Again, I don't see the
4 relevance of the certification process for the ES&S
5 machines. The machines are what they are. This is
6 not a case about whether they were properly
7 certified or properly purchased.

8 JUDGE BROBSON: Mr. Castiglia --
9 instruct me. I am trying to give you some latitude
10 here. This case is not about whether a machine
11 should be decertified from use. They are using a
12 certified machine. As far as the law is
13 considered, that is fine.

14 MR. CASTIGLIA: I agree, Your Honor.
15 The Petitioner's point would be that Respondents
16 are arguing that to reduce the spread of COVID,
17 they will provide voters with gloves or stylus to
18 use the machine. So, it is not the certification
19 of the machine. It goes to what the machine was
20 certified for and the manner in which it was
21 certified.

22 JUDGE BROBSON: Mr. Castiglia,
23 Respondents aren't arguing anything. This is your
24 case in chief. This is where you produce your

1 evidence. So, the Respondents haven't produced any
2 evidence yet. They haven't produced any evidence
3 that the City of Philadelphia is going to be doing
4 gloves and styluses. So, again, I am a little
5 perplexed about the way you are approaching this.
6 The certification -- the City of Philadelphia is
7 using a certified machine. That is appropriate
8 under the law, and I think you need to move on.

9 If you want to talk to him about any
10 safety concerns that he has about the use of
11 machine or anything like that, I think that's fair
12 game.

13 MR. CASTIGLIA: Okay, Your Honor.
14 Just to be clear, my point was that -- I am sorry.

15 JUDGE BROBSON: I am sustaining the
16 objection.

17 MR. CASTIGLIA: Okay.

18 BY MR. CASTIGLIA:

19 Q. Mr. Bluestein, I want to walk through
20 how a machine operates on election day, and tell me
21 if I get any of them wrong. Before each voting
22 session on the ExpressVote vote XL machine, the
23 poll worker has to insert a paper ballot into the
24 card slot, right?

1 A. No, that is not correct.

2 Q. How would it work?

3 A. So, for the general election, an
4 individual would be handed the paper ballot at the
5 check-in table, and they will inserting their own
6 paper into the paper path module, just like they
7 did last --

8 Q. I missed the last part. Did you say
9 just like they did last January?

10 A. It's the same procedure as last
11 November's election.

12 Q. That was a different procedure than
13 was implemented in the June 2020 primary?

14 A. Correct.

15 Q. Does the poll worker touch the
16 machine at all?

17 A. For the general election the poll
18 worker, other than the machine inspector setting up
19 the machine in the morning and closing the machine
20 in the evening, for a normal vote session would not
21 need to touch the machine at all.

22 Q. But each voter will physically touch
23 the machine to vote?

24 A. With a gloved hand, yes.

1 Q. Now, the reason the Philadelphia
2 Board instructs poll workers -- let me retract that
3 question.

4 JUDGE BROBSON: Mr. Castiglia, just
5 so you know, those two exhibits have been uploaded
6 if you want to get back to them, but they have been
7 uploaded.

8 MR. CASTIGLIA: Thank you, Your
9 Honor.

10 BY MR. CASTIGLIA:

11 Q. The poll workers will periodically
12 clean the machines, correct?

13 A. Not that I'm aware of.

14 Q. Is it your testimony that the
15 Philadelphia poll workers will not be cleaning the
16 polling machines at all on election day?

17 MS. HANGLEY: I object to
18 the leading.

19 JUDGE BROBSON: Sustained.

20 BY MR. CASTIGLIA:

21 Q. How often will poll workers clean the
22 machines on election day?

23 A. As needed.

24 Q. The Philadelphia Board hasn't

1 provided a frequency that poll workers will clean
2 the machines on election day, have they?

3 A. We have not.

4 Q. And even if they do clean the
5 machines, certain parts of the voting machine
6 specifically can't be touched with disinfectant,
7 right?

8 MS. HANGLEY: Again, objection.

9 JUDGE BROBSON: I didn't hear the
10 last part of the question.

11 Mr. Castiglia, what was the last part
12 of your question?

13 MR. CASTIGLIA: I will read the full
14 question, Your Honor. I asked if poll workers do
15 clean the machine, whether there are certain parts
16 that cannot be touched by disinfectant.

17 JUDGE BROBSON: Okay. That was --
18 so, Ms. Hangley, do you have an objection to that,
19 whether Mr. Bluestein is aware whether certain
20 parts of the machine can be touched by
21 disinfectant?

22 MS. HANGLEY: No objection to that.
23 My objection was to the leading.

24 JUDGE BROBSON: Okay. Is it

1 Bluestein or Blumenstine? I don't want to
2 mispronounce your name.

3 THE WITNESS: It's Bluestein.

4 JUDGE BROBSON: Mr. Bluestein, I
5 apologize. Are you aware of whether there are
6 certain parts of this voting machine that you use
7 in Philadelphia that cannot be touched by
8 disinfectant?

9 THE WITNESS: The manufacturer
10 recommends to avoid the edges of the screen. These
11 are the same edges that voters will not be touching
12 anyway.

13 BY MR. CASTIGLIA:

14 Q. Mr. Bluestein, you mentioned that the
15 machines will be cleaned as needed or as necessary.
16 Who determines when the voting machines need
17 cleaning?

18 A. The judge of elections at each
19 polling place is responsible for the operations of
20 that polling place.

21 Q. What factors does the judge of
22 elections rely on when they decide whether a
23 machine needs cleaning?

24 A. I am not a judge of elections, so I

1 don't know what individual judges of elections
2 would rely on for their decision on whether it
3 needs cleaning.

4 Q. Well, how are the judges of elections
5 supposed to know how frequently a voting machine
6 needs cleaning?

7 A. They would use their judgment on
8 whether they felt like voters used it and it needed
9 cleaning.

10 Q. So, are you testifying that the board
11 provides no instruction or training on how
12 frequently these machines need to be cleaned?

13 A. The board provides training on how to
14 clean it and what procedures to mitigate against
15 risk of contamination and leaves it to the judge of
16 elections if it needs to be cleaned on election
17 day.

18 Q. It is entirely up to the judge of
19 election's discretion on how frequently to clean
20 the machine on election day?

21 A. As it would be with any privacy booth
22 or any other materials, yes.

23 Q. And there is a separate election
24 judge for each precinct, isn't there?

1 A. Each precinct has a judge of
2 elections.

3 Q. And judges of elections are not
4 necessarily equipped with medical background or
5 experiences, are they?

6 A. Most of them probably have no medical
7 background.

8 Q. Mr. Bluestein, do you understand that
9 each -- each time you clean the machine, it could
10 take anywhere from 30 seconds to 10 minutes?

11 A. I am not aware of that timeline that
12 you are laying out.

13 Q. Mr. Baldwin -- let me retract that
14 statement.

15 You follow the best practices
16 followed by the machine manufacturer, don't you?

17 A. Yes.

18 Q. And the ExpressVote XL machines are
19 manufactured by Election Systems and Software,
20 correct?

21 A. Yes.

22 MR. CASTIGLIA: Mr. Baldwin, would
23 you please show Petitioner's Exhibit 11?

24 BY MR. CASTIGLIA:

1 Q. Mr. Bluestein, this is Best Practices
2 for Cleaning and Disinfecting Equipment, correct?

3 A. That is what it says on the title.

4 MS. HANGLEY: I was on mute, but I
5 just objected.

6 JUDGE BROBSON: Mr. Castiglia, you
7 cannot lead this witness.

8 MR. CASTIGLIA: I will rephrase, Your
9 Honor.

10 BY MR. CASTIGLIA:

11 Q. What is this document?

12 A. It says best practices for COVID-19,
13 Best Practices for Cleaning and Disinfecting
14 Equipment.

15 MR. CASTIGLIA: Could we scroll to
16 the fifth paragraph on the first page?

17 BY MR. CASTIGLIA:

18 Q. Mr. Bluestein, would you please read
19 page one, the first sentence in the fifth
20 paragraph?

21 A. The one that starts with the Centers
22 for Disease Control and Prevention?

23 Q. I am sorry. The first paragraph
24 under cleaning and disinfecting procedure for ES&S

1 Equipment.

2 A. These procedures apply to all ES&S
3 devices. Procedures may be used on all services
4 including touchscreens, ADA peripherals, input
5 trays, ballot boxes, stands, and external surfaces
6 of the equipment. Following these steps will clean
7 and disinfect. These steps may be conducted while
8 the device is running, but must only be applied to
9 external surfaces.

10 Q. And Mr. Bluestein, you testified that
11 this is the document that the Philadelphia Board
12 would rely on?

13 A. We would.

14 JUDGE BROBSON: Is there an
15 objection?

16 MR. WALLEN: I didn't feel like I got
17 it in on time. My objection is that Mr. Bluestein
18 hasn't testified that he even has any familiarity
19 with this document. There is no foundation.

20 JUDGE BROBSON: Mr. Castiglia, I
21 don't think you laid a foundation that the witness
22 has seen this document. You have got to lay a
23 foundation.

24 MR. CASTIGLIA: My apologies. I

1 thought he testified that he relied on that.

2 BY MR. CASTIGLIA:

3 Q. Mr. Bluestein, did the Philadelphia
4 Board of Elections rely on the Best Practices of
5 the ES&S machine when they made suggestions about
6 the cleaning of machines?

7 A. We generally attempt to rely on all
8 best practices from the manufacturers.

9 Q. Would the Philadelphia Board of
10 Elections rely on a document like Petitioner's
11 Exhibit 11 that was posted on the screen?

12 A. They would take it under advisement
13 and rely on it as was practical.

14 MR. CASTIGLIA: Your Honor, may we
15 show Petitioner's Exhibit 11 again?

16 JUDGE BROBSON: You may.

17 BY MR. CASTIGLIA:

18 Q. So, Mr. Bluestein, just to be clear,
19 this is a document that the Philadelphia Board of
20 Elections relied on, correct?

21 MS. HANGLEY: Objection.

22 JUDGE BROBSON: Ms. Hangley, your
23 objection?

24 MS. HANGLEY: Objection, leading.

1 JUDGE BROBSON: I agree, Mr.
2 Castiglia, it is leading. You still have not had
3 him identify a foundation for this document.

4 Do you understand the objection, sir?

5 MR. CASTIGLIA: I do.

6 BY MR. CASTIGLIA:

7 Q. Mr. Bluestein, have you ever seen
8 this document?

9 A. I have seen it.

10 Q. Did you rely on this document when
11 the Philadelphia Board selected the ES&S voting
12 machines?

13 A. I did not see this document prior to
14 the selection of ES&S's machines. I don't believe
15 COVID-19, the title, was even a thing at the time
16 of the selection.

17 Q. Had you ever reviewed this document
18 within the scope of your responsibility as an
19 employee of the board of elections?

20 A. I don't recall when I've seen this
21 document, but I know I've seen it.

22 MR. CASTIGLIA: Your Honor, I would
23 move to admit Petitioner's Exhibit 11 into
24 evidence.

1 MR. WALLEN: I would object. I don't
2 think a foundation has been laid. His only
3 testimony was he may have seen it before in some
4 capacity.

5 MR. CASTIGLIA: I understood Mr.
6 Bluestein to testify that the board relies on best
7 practices for cleaning election machines, and that
8 he had seen this document before -- and this is the
9 type of machine that Philadelphia selected.

10 JUDGE BROBSON: Mr. Castiglia, he
11 didn't testify that this is ES&S's best practice
12 document. He didn't testify to that.

13 MR. CASTIGLIA: I could ask him more
14 specifically what the question is, Your Honor.

15 JUDGE BROBSON: I think you have
16 asked him the question multiple times. I will give
17 you a chance to ask him what document it is. He
18 said I can tell you what it says. He said he has
19 seen it before, but he can't remember when or
20 where. I will let you ask him one more time.

21 The proper way to ask him is can you
22 identify the document? Have you seen it before?
23 Do you know what it is?

24 MR. CASTIGLIA: Thank you.

1 JUDGE BROBSON: So, I will sustain.
2 We will not move it at this time. I will give you
3 one more chance to lay a foundation with this
4 witness.

5 MR. CASTIGLIA: Thank you, Your
6 Honor.

7 BY MR. CASTIGLIA:

8 Q. Mr. Bluestein, for what purpose did
9 you review the documents that is Petitioner's
10 Exhibit 11?

11 A. I don't recall when or for what
12 purpose I reviewed it. All I know is that I have
13 seen the document before.

14 Q. Can you identify what the document
15 is?

16 A. Again, I can tell you what it says at
17 the top. I can't stipulate that it was actually
18 received from ES&S.

19 Q. So, your testimony is that you don't
20 know -- that you have seen the document, but -- and
21 you know that it is best practices, but you don't
22 know that it was received from ES&S?

23 A. I believe what I said is that on the
24 top it says that it is a best practices model, but

1 given that, I don't know when I read it or from
2 whom I received it, I can't testify to something
3 that I don't recall. All I can tell you
4 definitively is that I have seen it before.

5 MR. CASTIGLIA: Your Honor, I move to
6 admit Petitioner's Exhibit 11 based on the
7 witness's familiarity with the document.

8 MR. WALLEN: Objection. That is not
9 a foundation.

10 JUDGE BROBSON: Any other objection?

11 MR. GORE: Objection, based
12 authenticity. The witness is not able to
13 authenticate this document.

14 JUDGE BROBSON: Any other objection?

15 MS. HANGLEY: Same objection, Your
16 Honor.

17 MR. CASTIGLIA: Mr. Castiglia, I
18 don't believe you laid the requisite foundation to
19 admit the document, so I will deny your request to
20 admit it.

21 MR. CASTIGLIA: Thank you, Your
22 Honor.

23 (Exhibit Petitioner's 11 was
24 previously marked for identification.)

1 BY MR. CASTIGLIA:

2 Q. Mr. Bluestein, each polling place
3 will be equipped with provisional ballots in
4 November; true?

5 A. Each precinct will have provisional
6 ballots, yes.

7 Q. Are provisional ballots paper
8 ballots?

9 A. Provisional ballot are paper ballots.

10 Q. How are they completed by a voter?

11 A. A voter would fill out the ballot
12 with black or blue ink and then place it inside of
13 an envelope which they would seal and complete the
14 affidavit on the back of the envelope.

15 Q. And where are they completed by a
16 voter?

17 A. At the polling place.

18 Q. And how is a provisional ballot
19 scanned or counted?

20 A. After the provisional ballots are
21 returned to our office, the declaration envelopes
22 are reviewed and scanned centrally.

23 Q. Are those scanners the DS450 and 850
24 that we discussed earlier?

1 A. In the primary, we used the DS450s.

2 Q. Do polling places have to have a
3 certain number of provisional ballots?

4 A. We attempt to provide provisional
5 ballots for 20 percent of the registered voters.

6 JUDGE BROBSON: Mr. Bluestein, what
7 percentage was that? You cut out a little.

8 THE WITNESS: Sorry, 20 percent.

9 BY MR. CASTIGLIA:

10 Q. Mr. Bluestein, Philadelphia has
11 roughly 1,076,000 registered voters; is that
12 correct?

13 A. Approximately.

14 Q. And how many voters turned out in the
15 2020 primary?

16 A. Just under 350,000.

17 Q. Is it fair to say that would be
18 roughly a 30 percent turnout?

19 A. I believe it was a 32 percent
20 turnout.

21 Q. That would mean about half of the
22 voters in the primary voted by mail or absentee
23 ballot?

24 A. Correct. Approximately half.

1 Q. So, what percentage of registered
2 voters voted in the primary in person?

3 A. Approximately, 16 percent.

4 Q. Do you expect a higher turnout in the
5 general election?

6 A. I expect a higher turnout overall in
7 the general election compared to the primary, yes.

8 Q. Would a 60 percent turnout be
9 considered a good turnout in Philadelphia?

10 MS. HANGLEY: Objection.

11 JUDGE BROBSON: Ms. Hangley, your
12 objection?

13 MS. HANGLEY: The question is
14 confusing. Considered by whom?

15 JUDGE BROBSON: True. And, Mr.
16 Castiglia, you are leading a little bit. Again, I
17 am trying to give you some latitude, but let's move
18 this along. If you are asking Mr. Bluestein what
19 he would consider a good turnout, the who, what,
20 when, why questions are always good to avoid
21 leading.

22 BY MR. CASTIGLIA:

23 Q. Mr. Bluestein, in your capacity as
24 deputy commissioner for the Philadelphia City

1 Commissioner Al Schmidt, what would be considered a
2 good turnout for Philadelphia in a general
3 election?

4 A. We all hope for 100 percent turnout.

5 Q. But we don't always get 100 percent
6 turnout, right?

7 A. No.

8 Q. So, what is a realistic turnout that
9 you could expect based on your experience as an
10 election official in Philadelphia?

11 A. In recent presidential general
12 elections, turnout has been 66 to 68 percent
13 depending on the circumstances.

14 Q. Mr. Bluestein, does Philadelphia have
15 to supply emergency ballots at each polling place?

16 A. My understanding is emergency paper
17 ballots may be used from the same stock as other
18 paper ballots.

19 Q. What amount of stock paper ballot do
20 counties in Philadelphia have to maintain?

21 A. Can you repeat the question?

22 Q. What percentage of paper ballots do
23 counties in Philadelphia need to maintain?

24 A. It depends on the type of paper

1 ballot you are asking about.

2 Q. What percentage of emergency paper
3 ballots do counties in Philadelphia need to
4 maintain?

5 A. For the purpose of emergency ballot,
6 Philadelphia utilizes its provisional ballot stock
7 and, therefore --

8 Q. I am sorry. Can you repeat the
9 percentage?

10 A. 20.

11 Q. And Mr. Bluestein, you testified that
12 Philadelphia had a roughly 16 percent in-person
13 turnout during the June 2020 primary; is that
14 right?

15 A. Approximately.

16 Q. Would that mean that Philadelphia was
17 more than equipped to handle in paper voting if
18 every voter in Philadelphia voted by paper for the
19 June 2020 primary?

20 MS. HANGLEY: Objection, leading.

21 MR. CASTIGLIA: I can rephrase that.

22 JUDGE BROBSON: Why don't you try to
23 rephrase the question. I thought he answered this
24 question previously, but I think he -- I may be

1 wrong, but I thought you asked him whether they
2 would be able to handle all the ballots in
3 Pennsylvania if everybody voted by paper, and he
4 said technically yes, but there are a lot of
5 factors, I believe Mr. Bluestein indicated.

6 Are you asking a different question?

7 MR. CASTIGLIA: No, that is along
8 similar lines. I was confirming that based on the
9 statistics that we received.

10 JUDGE BROBSON: If you want to
11 rephrase it, go ahead. But this line of
12 questioning I seem to remember. Go ahead and
13 rephrase it, if you'd like.

14 BY MR. CASTIGLIA:

15 Q. Mr. Bluestein, will the Philadelphia
16 Board of Elections follow the 20 percent guideline
17 that you testified about in the 2020 general
18 election?

19 A. Yes.

20 MR. CASTIGLIA: Your Honor, I think I
21 may have almost finished here. With the Court's
22 indulgence, I'd like to consult with my team
23 briefly.

24 JUDGE BROBSON: You may and the two

1 exhibits that you wanted to discuss briefly are up,
2 if you want to discuss briefly.

3 MR. CASTIGLIA: Thank you, Your
4 Honor.

5 Your Honor, I have no further
6 questions at this time.

7 JUDGE BROBSON: Ms. Hangle, cross
8 examine.

9 MS. HANGLEY: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. HANGLEY:

12 Q. Mr. Bluestein, you testified about a
13 cost of satellite offices. Do you have any
14 knowledge about what it would cost in other
15 counties outside of Philadelphia to put satellite
16 offices in place?

17 A. I do not.

18 Q. I am having trouble hearing you now.

19 A. I do not.

20 Q. And do you know what processes would
21 be involved to put satellite offices in place in
22 other counties?

23 A. I do not.

24 Q. How about drop boxes? Do you know

1 what it would involve to install drop boxes in
2 other counties?

3 A. No.

4 Q. Do you know what the cost would be?

5 A. In other counties?

6 Q. In other counties.

7 A. No.

8 Q. Okay. Well, you are fading in and
9 out.

10 You testified about these high-speed
11 scanners that Philadelphia is purchasing. What is
12 Philadelphia purchasing these high-speed scanners
13 for?

14 A. The intention of purchasing the
15 high-speed scanners is to more promptly scan the
16 mail-in and absentee ballots that we receive before
17 the election.

18 Q. And is -- is your calculation on the
19 number of scanners you need, what was that based
20 on?

21 A. Advice from the state and
22 non-profits.

23 Q. Did you when -- when deciding how
24 many high-speed scanners to purchase, did you take

1 into account the possibility that you might have to
2 scan every ballot cast in Philadelphia in the
3 general election?

4 A. We did not.

5 Q. Has Philadelphia planned for that
6 possibility?

7 A. No.

8 Q. You had questions about mailing out
9 paper applications for absentee and mail-in
10 ballots. Is Philadelphia planning to do that?

11 A. No.

12 Q. Why isn't Philadelphia planning to do
13 that?

14 A. There are a few reasons why mailing
15 paper applications for mail-in ballots is
16 problematic, the first being that there are other
17 organizations that have mailed paper applications
18 in Philadelphia and voters tend to get confused
19 upon receiving multiple applications and don't
20 think that their original application was received
21 and, therefore, submit additional paper
22 applications creating duplicates and problems in
23 efficiently processing new applications.

24 Additionally, we always advise

1 potential applicants to apply via the state's
2 online portal, if possible, because it is much more
3 efficient and easier to process an online
4 application than a paper application.

5 Q. Do you know the difference in
6 processing time for Philadelphia County between an
7 online application and a paper application?

8 A. The feedback I received from the
9 staff is that it is approximately seven times
10 longer to process a paper application than it is to
11 process a new online application.

12 Q. And when voters are applying online
13 for their ballot, are they able to apply more than
14 once online?

15 A. I don't believe so.

16 Q. In your experience have there been
17 duplicate applications received online?

18 A. No. In my experience the first
19 application that you receive online, then
20 duplicates could be only on paper.

21 Q. What happens to the duplicates that
22 are received on paper?

23 A. Our staff have to process the
24 duplicate application and enter all of the

1 information on it to determine whether it is, in
2 fact, a duplicate. So, it has to get essentially
3 processed the same as a regular application before
4 being declined.

5 Q. You were questioned about the
6 cleaning of polling places. What surfaces to your
7 understanding need to get cleaned in places
8 throughout the day?

9 A. If the board of elections deems it
10 necessary, the check-in table could need to be
11 cleaned, or the touch screen where the voter is
12 making their selections would need to be cleaned.

13 Q. How about polling place
14 consolidation? What is your expectation -- what is
15 Philadelphia's expectation right now for the number
16 of places that will be open for the November
17 general election?

18 A. Our goal is to reach 800 places, but
19 I expect that we will end up somewhere between 700
20 and 800.

21 Q. How many polling locations have you
22 confirmed so far?

23 A. We have confirmed over 650 polling
24 places so far.

1 Q. Are you making efforts to confirm
2 additional polling places?

3 A. We are.

4 Q. You had mentioned that there are
5 other factors besides productivity that go into
6 whether you need additional scanners. Can you
7 explain what drives the process of central scanning
8 ballots from polling places?

9 A. Sure. So, handling paper is a
10 significant concern. So, starting with having the
11 collection bins, the proper secure collection bins,
12 for a different sized paper for every voter, we
13 would need to procure those and have those
14 available at the polling places, and they would be
15 much larger than the bins that are used with the
16 ExpressVote XL, which leads to the main problem of
17 transporting all of those bins back to our
18 headquarters on election night.

19 So, with the ExpressVote XL bins, we
20 don't receive all of those bins back until possibly
21 up until midnight. And I would think that this
22 would be a much larger container and would take
23 much longer to receive back. And then there is the
24 human cost of opening 1,700 bins, one for each

1 precinct, organizing all the paper that comes out
2 of them, and then preparing that paper for being
3 scanned.

4 One of the reasons we put the legwork
5 in for preparing the paper in advance is because
6 with the central scanner there is a risk of jamming
7 or not being read clearly if not organized in
8 advance. So, that slows down the scanning so you
9 need to prepare and organize the batches of paper
10 in advance.

11 Q. What is the next step in the scanning
12 process?

13 A. So, after all of the ballots are
14 removed from the secure containers and organized,
15 they would then be put through the central scanners
16 where the central scanner would read the marks, and
17 if they are able to be read, they would then be
18 tabulated.

19 Q. And in your opinion if Philadelphia
20 were to do all central scanning for every ballot in
21 its polling places, what would be the effect on the
22 timeliness of election results?

23 A. If Philadelphia were asked to
24 centrally scan all of the paper ballots that were

1 cast at polling places on election day, those
2 results from those paper ballots would not be known
3 on election night.

4 Q. Do you believe they would be known
5 the next morning?

6 A. Some of them would be known the next
7 morning but not all of them.

8 MS. HANGLEY: Your Honor, I will save
9 the rest for direct.

10 JUDGE BROBSON: Thank you.

11 Mr. Wallen.

12 MR. WALLEN: No questions, Your
13 Honor.

14 JUDGE BROBSON: Mr. Gore.

15 BY MR. GORE:

16 Q. Good afternoon, Mr. Bluestein. I am
17 John Gore. I represent the Republican Committee
18 Intervenors in this case.

19 I don't believe we've met before.

20 A. I don't believe so.

21 Q. So, nice to meet you over WebEx. I
22 have a question about the processing of emergency
23 provisional ballots. I think you said that those
24 are collected centrally and counted through the

1 central scanners; is that right?

2 A. The emergency paper ballots and
3 provisional ballots are cast at the polling place
4 and then scanned centrally using the central
5 scanners.

6 Q. And does Philadelphia use the same
7 process to scan those ballots as the process that
8 you just described?

9 A. There are additional steps that need
10 to occur with provisional ballots but in general,
11 yes.

12 Q. And in a recent -- take the June 2020
13 primary election, how many of these emergency or
14 provisional ballots were cast, if you know?

15 A. I don't know the exact number.

16 MR. GORE: I have no further
17 questions, sir.

18 JUDGE BROBSON: Mr. Limburg.

19 MR. LIMBURG: We have no questions,
20 Your Honor.

21 JUDGE BROBSON: Mr. Bluestein, before
22 I send you back for any redirect I think there was
23 a number in your testimony that I missed. I
24 understand that your goal is to have 800 voting

1 locations, that is actually in-person voting
2 locations in Philadelphia; is that correct?

3 THE WITNESS: Correct. The goal is
4 to have 800 separate polling place buildings.

5 JUDGE BROBSON: And that is separate
6 from any plans to have satellite offices or drop
7 boxes, correct?

8 THE WITNESS: Correct.

9 JUDGE BROBSON: And how many separate
10 places did Philadelphia have in the November 2019
11 primary election?

12 THE WITNESS: 830, approximately.

13 JUDGE BROBSON: You are shooting to
14 be 30 fewer than what you had in the November
15 general election?

16 THE WITNESS: That is the goal. I do
17 expect that we will be somewhere between 700 and
18 800.

19 JUDGE BROBSON: Okay. That helps to
20 clarify your testimony.

21 Mr. Castiglia, any redirect?

22 MR. CASTIGLIA: Very briefly, Your
23 Honor.

24 BY MR. CASTIGLIA:

1 Q. If Philadelphia sticks with the
2 current plan, can they guarantee that they would
3 have all the ballots counted on election night?

4 A. Are you referring to in-person votes.

5 Q. I am referring to all votes.

6 A. No.

7 MR. CASTIGLIA: Your Honor, I have no
8 further questions.

9 JUDGE BROBSON: Any reason we cannot
10 release the witness?

11 Seeing no objection, Mr. Bluestein,
12 thank you for your testimony, and I am sure Ms.
13 Hangley will let you know if you are needed for
14 another stage of testimony.

15 THE WITNESS: Thank you, Your Honor.

16 JUDGE BROBSON: We will take a brief
17 recess to shuffle the deck.

18 COURT CRIER: The Commonwealth Court
19 is in recess.

20 (Break taken.)

21 COURT CRIER: The Commonwealth Court
22 will now resume.

23 JUDGE BROBSON: Okay. Mr. Steiner,
24 do you have any more witnesses?

1 MR. STEINER: No, Your Honor.

2 JUDGE BROBSON: You rest your case?

3 MR. STEINER: We do.

4 JUDGE BROBSON: Ms. Hangle, you have
5 telegraphed the idea that you want to make a motion
6 in some not so subtle moments. So, why don't you
7 go ahead and offer whatever motion you want to
8 make.

9 MS. HANGLEY: Your Honor, I think I
10 maybe have more than telegraphed it. I also faxed
11 it and phoned it in. But Petitioners have not
12 shown even a *prima facie* case of entitlement to a
13 preliminary injunction of entitlement to any of the
14 six or seven types of relief that they seek. They
15 haven't made a very strong showing of a clear right
16 to relief of a statewide right of relief necessary
17 to receive a mandatory injunction.

18 They haven't shown any likelihood of
19 constitutional violations of the type that they are
20 relying on. At best, they've shown problems in the
21 primary and no likelihood that they will be
22 repeated in the general election. They haven't
23 shown that any of the relief that they seek has any
24 connection to the constitutional violations that

1 they allege or that it is at all reasonably suited
2 to remedy those violations. And they haven't shown
3 any evidence that the relief that they seek won't
4 do more harm than good and harm of public interest.

5 They seek -- as you know, they have a
6 very long list of relief they are seeking. I can
7 go through the items one by one. One that has
8 taken up a great deal of the Court's time so far
9 and will take up a lot more time if this
10 proposition that both ballot marking devices need
11 to be thrown out and replaced with hand-marked
12 paper ballots.

13 There has been no evidence in the
14 record at all that ballot marking devices are less
15 safe COVID-wise than hand-marked paper ballots.
16 So, there's no evidence that there is a
17 constitutional violation there.

18 And with respect to their other items
19 of relief, mailing out paper ballots, drop boxes,
20 of polling place closures, again, there is no
21 evidence that these things are likely to happen and
22 no evidence that the cure that you order, that Your
23 Honor is being asked to pose, that wouldn't be
24 worse than any disease, especially taking into

1 account we have 67 Counties in the Commonwealth and
2 have heard no evidence as to all but two of them.

3 That is my motion. I believe that it
4 is not necessary for Respondents to put on a case
5 at this point, but if we do, we would appreciate
6 Your Honor's guidance as to any of the elements
7 that Petitioner's claim can be denied at this point
8 because that will certainly influence our choice of
9 how many witnesses they put on, how extensively
10 they testify, and how much longer we will be here.

11 JUDGE BROBSON: I understand. Before
12 I go back to Mr. Steiner; Mr. Wallen, did you also
13 want to make a motion?

14 MR. WALLEN: Yes, I would join in Ms.
15 Hangley's motion. As Your Honor laid out, when we
16 started yesterday morning, the granting of a
17 preliminary injunction is a question of satisfying
18 legal elements, and I would submit that the
19 Petitioners haven't satisfied any of them. And
20 certainly the Petitioner hasn't shown irreparable
21 harm as of the granting of the injunction. So,
22 that is why I join in Ms. Hangley's motion.

23 JUDGE BROBSON: Are we missing
24 someone? I see. Sorry, Mr. Sheehy. I have like a

1 passport photo of everyone but you, so it threw me
2 off for a second.

3 Mr. Gore.

4 MR. GORE: Thank you, Your Honor.

5 Yes, we also join in Ms. Hangley's motion, the
6 motion of Respondents. We think the failures of
7 proof here not only failed to establish entitlement
8 to a preliminary injunction but require a non-suit
9 under Rule 230.1. There has been no showing of a
10 cause of action here at all. Remember what this
11 case is supposed to be about is voters having their
12 voting rights burdened or otherwise harmed for the
13 upcoming imminent general election due to the
14 effect of the COVID-19 pandemic on election
15 administration.

16 We have heard virtually nothing about
17 what is going to happen in the general election.
18 We have heard nothing as to election
19 administration. We have heard nothing that any
20 voters will be unable to vote or will face of any
21 kind about burden or challenge to vote.

22 We have only heard from three voters
23 in this case; and all three have testified that
24 they will vote no matter what. Two of those voters

1 will vote by mail, that was President Huston and
2 Dr. Duvall-Flynn. And Mr. Graham said he will vote
3 in person no matter what and regardless of what
4 happens with the pandemic.

5 There has been no showing of a
6 Constitutional injury here. There has just been
7 some speculation that because there were
8 pandemic-related effects on the primary election,
9 we might have something like that in the general
10 election. That is not nearly enough to establish a
11 cause of action or nearly enough to establish a
12 clear right to relief as is required by a
13 preliminary injunction.

14 Pennsylvania Supreme Court made that
15 clear leading up to the primary and Disability
16 Rights PA and Boockvar were dismissed cases where
17 because there was only speculation and no proof of
18 any constitutional injury in an imminent general
19 election.

20 To drive home Ms. Hangley's point,
21 let me talk a minute about polling place closures.
22 I think we have heard now several times that the
23 Act 12 authority under which counties closed
24 polling places in the primary election has expired

1 and is not under consideration to be reviewed by
2 the General Assembly. Mr. Marks confirmed that the
3 Secretary's office has not asked the General
4 Assembly to review that authority, nor are they
5 aware that any county board has asked for that
6 authority. So, there is absolutely no basis to ask
7 for any relief with respect to polling place
8 closures or notice with respect to those closures
9 or anything else that Petitioners have asked for in
10 that regard.

11 With respect to mail-in voting,
12 again, there has been no showing of any voter who
13 is being burdened here or any constitutional injury
14 to anybody. In fact, there has been no showing
15 that Petitioner even has a standing to be in court
16 today bringing these claims. Petitioner has not
17 shown, number one, that it has the right to vote --

18 JUDGE BROBSON: Mr. Gore, I don't
19 want to get into preliminary objections. Let's
20 just stick with the elements of preliminary
21 injunction.

22 MR. WALLEN: Certainly, Your Honor.
23 The last thing I will say is that we heard
24 extensive testimony that the bodies that will

1 administer this election and that would be
2 responsible for implementing this relief for the
3 county and the counties aren't even here. There
4 has been no showing of relief against the
5 Respondents that are here in court in this case and
6 there is no basis for this case to continue at this
7 point, either on the preliminary objection or even
8 as a suit.

9 So, we ask the Court to deny the
10 preliminary injunction and even grant the non-suit
11 in this case.

12 JUDGE BROBSON: Well, I am going deny
13 the non-suit because we are here on a PI; we are
14 not here on the actual trial. So, the non-suit
15 motion is denied.

16 JUDGE BROBSON: Mr. Sheehy?

17 MR, SHEEHY: Thank you, Your Honor.
18 I will join Ms. Hangleys motion as well. Your
19 Honor laid out the standard for a mandatory -- for
20 obtaining a mandatory injunction is higher than the
21 standard for obtaining a preliminary injunction,
22 and we don't believe that Petitioners have met the
23 standard for a preliminary injunction whether it be
24 preventive or mandatory. And otherwise, I join my

1 colleagues in the motion. Thank you.

2 JUDGE BROBSON: Thank you. Okay.

3 Mr. Steiner, I will give you plenty of time to
4 field your responsive argument to the motion.

5 MR. STEINER: Thank you, Your Honor.

6 First, I think as Your Honor just noted, we are
7 here -- I think that the motions that everyone else
8 has made are procedurally improper because we are
9 here on a preliminary injunction, and I think if
10 Ms. Hangleys argument are we haven't put on enough
11 evidence and she doesn't feel she needs to put
12 anything on, we can proceed from that, whatever
13 findings or argument you want to have; but I think
14 unlike a trial where after putting on one side's
15 evidence, you have procedures that specifically
16 provide for directed verdicts and things like that,
17 I don't think these apply in the preliminary
18 injunction setting. And I think that is
19 particularly true here.

20 As Your Honor has noted, you will
21 make findings. There are five parties here and
22 certainly a decent likelihood that whatever those
23 findings are, one of the five of us or more will
24 end up continuing, so to cut off a hearing if Ms.

1 Hangley thinks she has additional evidence that she
2 wants in the record at some point, I would think
3 procedurally for the same reasons that you are not
4 hearing the preliminary objections until after the
5 conclusion of the evidentiary hearing, you would
6 make rulings part way through the preliminary
7 injunction.

8 But putting that aside, as to the
9 substance, I think what we have shown -- we have a
10 single claim here, right, and it is a claim that
11 the conduct of the election or the anticipated
12 conduct of the election in November is going to
13 impose restrictions because -- in the context of
14 COVID-19 that there would be restrictions and
15 infringements on fundamental rights guaranteed by
16 the Pennsylvania Constitution.

17 And I think what we have shown is
18 that everyone agrees that COVID-19 is here, it is
19 going to be here, and it is going to affect the
20 November election. I think we've shown that the
21 conduct of the June primary violated -- because of
22 COVID-19 and the combination of the closing of
23 polling places and risks to health violated the
24 fundamental right to vote, and infringed and

1 prevented voting in Pennsylvania. And that's a
2 combination of factors of the availability of
3 in-person voting, the availability of mail-in, and
4 absentee alternatives.

5 What we have heard is that yes, Act
6 12 is expired, and we recognize that Act 12 is
7 expired, and we are certainly in agreement with the
8 Secretary's witnesses that it is better to have
9 in-person voting available. But what we've heard
10 is there is not current authorization for it, but
11 can't guarantee it will happen because we know
12 COVID-19 is here and part of it will depend on what
13 conditions are like in the first week of November
14 and whether, in fact, we can use the places that
15 were designated, whether, in fact, we will have
16 sufficient poll workers, which is a function of
17 what the state of COVID-19 is like at that time.

18 I think on top of that, yes, we have
19 mail-in voting that is being done at different
20 levels in different counties. I think Mr. Marks
21 testified to that, not just as to Philadelphia and
22 Allegheny, but likewise, there are other counties,
23 big counties, small counties that are doing
24 different things. Mr. Marks has testified that

1 because of COVID-19 and the impact COVID-19 has
2 had, it is critically important to have viable
3 mail-in voting as an alternative whether through
4 mail. That, of course, has been complicated by the
5 postal service's advice to the State of
6 Pennsylvania that it may not be able to deliver or
7 deliver and return ballots on time. And it's --
8 and, so, there is the aspect of mail-in voting.
9 And then as Mr. -- as Mr. Marks testified, there is
10 a variety of things that can be done. The
11 Secretary has put out guidance as to some of those
12 things, not as to others of those things and some
13 counties are following the Secretary's guidance and
14 some counties aren't following the Secretary's
15 guidance or are following it to varying degrees.
16 And I think the combination of those things creates
17 the likelihood that we are going to have a repeat
18 in November absent relief and better direction, you
19 know -- for the conduct of the election in
20 November, the likelihood that we are going to have
21 a repeat and have a much higher turnout election, a
22 presidential.

23 I think the testimony is that
24 68 percent, you know, is kind of an anticipated

1 level of voter turnout if I remember, at least for
2 Philadelphia, okay. And I believe Mr. Marks'
3 testimony was somewhat similar to that. He said 70
4 statewide. So, as opposed to a 30 percent turnout
5 election, we are gearing up to have a 70 percent
6 turnout election. I think those things that -- we
7 have shown those violations. I think we have shown
8 evidence of things that -- you know, between
9 Professor Meredith's testimony, between Mr. Marks'
10 testimony, things that are effective tools to help
11 reduce the voting costs and alleviate some of the
12 problems caused by the pandemic and the mail
13 service. I think we've put that out there.

14 And in terms of feasibility, I think
15 that the testimony is that at least many of the
16 things that we are asking for are feasible. You
17 have a significant percentage -- to Ms. Hangley's
18 point, a significant percentage of Pennsylvania
19 elections right now whether -- you know, whether it
20 is by design or not, are done on paper ballots and
21 scanned, whether they are scanned at the precinct
22 or scanned centrally they are. I think there is
23 evidence, for example, in Allegheny County there
24 was a mailing of mail-in and absentee ballot

1 applications that alleviated and increased mail
2 voting participation in Allegheny compared to the
3 rest of the state, that Philadelphia County has
4 gotten a grant to try to set up some of these
5 centers.

6 But what we've shown is Philadelphia
7 is doing that. But I think Mr. Marks has testified
8 that it would be beneficial for counties with -- at
9 least counties and maybe other counties as well,
10 but at least counties with several hundred thousand
11 voters in them. Putting aside Philadelphia and
12 maybe a couple other Southeastern counties, there
13 are many other counties throughout the state where
14 that is not being done.

15 I think that satisfies and certainly
16 in terms of midway through the hearing, I think
17 more than satisfies our burden at this point to,
18 you know, go forward and complete the hearing or if
19 Ms. Hangley is confident in her position, to have
20 her rest and not call any witnesses and proceed to
21 the next stage.

22 JUDGE BROBSON: Anything further,
23 Mr. Steiner?

24 MR. STEINER: Not unless Your Honor

1 has any questions.

2 JUDGE BROBSON: I want to address
3 your procedure point first. I think your point is
4 well taken. I am hard pressed to think of a time
5 that I have been on the bench where I've been put
6 in a position where I actually have to think very
7 carefully about whether I think a preliminary
8 injunction proceeding should go forward for
9 purposes of having the Respondents present
10 evidence.

11 There is a lot of challenges involved
12 in this case, but they are sort of packed into what
13 you generally described it as being, which is the
14 conduct of the elections because of -- in the COVID
15 context, and whether that is infringing the
16 Constitutional right to vote.

17 There are certain elements under a PI
18 that have to be satisfied, and I went through those
19 elements before the hearing. The injunction has to
20 be necessary to prevent immediate irreparable harm
21 that cannot be adequately compensated in damages.
22 I don't think anybody is questioning the idea that
23 if somebody loses the franchise, loses the right to
24 vote in an election that that is something that

1 cannot be compensated in damages.

2 The question is whether the relief in
3 the injunction that you are seeking is necessary to
4 prevent immediate and irreparable harm. That is
5 the real question in that element.

6 Greater injury will result from
7 refusing an injunction than from granting it. The
8 issuance of the injunction will not substantially
9 harm other interested parties.

10 Preliminary injunction will properly restore the
11 parties to their status, that is, restored to the
12 status quo argument or element. Clear right to
13 relief -- which the Supreme Court has described in
14 different contexts, but the one I like most is, is
15 there a substantial issue, a substantial legal
16 question that should be resolved such that there is
17 a clear right to relief.

18 Is the injunction that is sought
19 reasonably suited to abate the alleged harm? That
20 is sort of that narrowly-tailored element. And the
21 final one is the injunction will not adversely
22 affect the public interest.

23 I listened very carefully to the
24 witnesses that you offered in support of your case

1 in chief, your prima facie case. And on that
2 point, I will note that there is no obligation for
3 the Respondents to put up any evidence. Your
4 client solely has the burden on every one of those
5 elements in the injunction.

6 In terms of whether Ms. Hangley wants
7 to do this or Ms. Hangley wants to do that or that
8 other parties want to do that, Ms. Hangley has made
9 no bones about it since this proceeding began that
10 she wanted to make this motion. And I assume that
11 she and counsel and co-counsel as well as the other
12 parties have made the strategic decision that if I
13 grant this motion and essentially rule against your
14 preliminary injunction without them presenting any
15 evidence and for some reason the Supreme Court
16 thinks I was off my rocker, we may be back here all
17 over again -- or maybe we won't be. I don't know
18 what they will do, but I think she has made a
19 strategic choice in making this motion. It doesn't
20 happen every time. But she made that choice, and
21 so have other counsel, and I respect that.

22 Mr. Huston was, as was all of your
23 witnesses, were very impressive. I was impressed
24 by Mr. Huston's honesty, his service, the testimony

1 about the efforts of the NAACP State Conference,
2 and the local conference, and the national
3 organization for that matter, Get-Out-to-Vote
4 efforts, particularly with respect to how they've
5 been handling all of their mission during the COVID
6 pandemic. I thought his testimony was honest and
7 credible. Mr. Huston also testified that he was
8 able to vote during the primary, and he also
9 testified that he intended to vote by mail during
10 the upcoming general election.

11 So, moving on to Professor Meredith.
12 I found Professor Meredith's testimony credible,
13 but I am not sure how much weight it goes to bear
14 on your case. I think if I was to summarize his
15 testimony in general, his testimony is, from a
16 political science perspective the lower the cost of
17 voting, the better turnout, the more likely people
18 are to vote. Now, I am not sure I needed an expert
19 for that, but I will take his expert testimony on
20 that, that cost to voting increased the likelihood
21 that someone will choose not to vote. Whether that
22 is showing up to the poll and the line being long,
23 and they leave and don't come back -- and I think
24 what he testified to was reneging -- or whether

1 they are just not showing up at all or how far they
2 have to travel to a poll.

3 This is all calculus that voters
4 make, I think, in every election as to whether it's
5 worth it to them to vote. And for some voters the
6 cost of voting is higher than others based on any
7 number of factors available. But, I think, Dr.
8 Meredith's testimony was from a political science
9 perspective, it is good policy to reduce as much as
10 possible the cost of voting. I certainly can agree
11 with that. It sounds like a good policy to me.

12 Dr. Duvall-Flynn, incredibly credible
13 witness. Again, commend her for her service,
14 commend her for work she has done in education,
15 commend her for her work done in the NAACP, commend
16 her for the fact that she's going to vote and that
17 she's working to make sure that others vote as
18 well.

19 Dr. Weber, again, I think his
20 testimony as an expert in epidemiology was helpful.
21 We get a lot of information these days, conflicting
22 information out in the public in terms of the
23 spread of COVID-19, how easily it is spread; how
24 the transmission can be minimized from surface

1 contact and in-person contact; the importance of
2 masks; the importance of what he referred to as
3 physical, not social, distancing; the use of
4 sanitation devices, sanitizing agents; gloves,
5 styluses. Again, I am not sure anybody would
6 disagree with that, but it's helpful when you have
7 all the noise out there of people talking about
8 what may or may not be the way that COVID
9 transmits.

10 In the context of an evidentiary
11 proceeding having an expert testify as to how to
12 mitigate the risk of transmission, and I think Dr.
13 Weber was certainly helpful on that.

14 And Mr. Grahams's testimony, again, a
15 very credible witness certainly, again, as I said,
16 with Mr. Huston, Reverend Huston, Veteran Huston
17 and Dr. Duvall-Flynn, very credible testimony about
18 his commitment to the causes and work of the NAACP
19 and work on voting rights and Get-Out-the-Vote
20 efforts and registering young people to vote which
21 is critically important nowadays. It has always
22 been important, but to hear someone emphasize the
23 importance of getting young people to register to
24 vote it's a great thing to hear, and I commend him

1 for that work. Mr. Graham indicated, however, that
2 he's going to vote.

3 I would say my sense of the testimony
4 from Mr. Huston and Dr. Duvall-Flynn were similar.
5 They are people that care deeply about the right to
6 vote, and I am not sure there is anything that
7 could prevent these three individuals from either
8 voting by mail or casting their vote in person or
9 if they don't want to go to polling place,
10 delivering their mail-in ballots to the Board of
11 Elections or a drop box if they are in a county
12 that is going to use a drop box, what have you.
13 These people are deeply committed to the right to
14 vote, and I accepted their testimony in that
15 regard.

16 Mr. Marks has been a committed
17 servant in the area of election law in the
18 Commonwealth of Pennsylvania for a long time. I
19 think he understands the challenges of
20 administering elections in the 67 county system. I
21 think he testified credibly as much as he could
22 about the efforts of the Secretary in trying to
23 give guidance to the 67 counties. And he walked a
24 fairly good line of understanding the balance

1 between the role of the Secretary and the role of
2 the officials entrusted by the county to administer
3 elections on the county base.

4 A lot of your testimony offered
5 during the hearing really related to two counties,
6 Allegheny County and Philadelphia County. I
7 actually think Dr. Duvall-Flynn may have been from
8 Delaware County, and I think Mr. Graham from
9 Montgomery County, but, you know, the Commonwealth
10 is -- the Commonwealth is vast with different
11 geography, different electorates, different cost
12 centers, different demographics. I think Mr. Marks
13 has a very good understanding of how the so-called
14 one-size-fits-all could be harmful in some counties
15 that don't have the resources than maybe wealthier
16 counties do, that larger counties do. So, I think
17 he offered for good testimony.

18 What I also think was good about
19 Mr. Marks' testimony was the Secretary is aware of
20 COVID and everyone is. So, it sounds to me like
21 the secretary has told her staff to work closely
22 with the county boards of elections to do
23 everything that they can to properly mitigate
24 against the cause of the transmission of COVID.

1 Can anybody guarantee it? I don't
2 think so, but there certainly was no evidence on
3 your part that any of the polling that happened in
4 the primary election, on which you focused a lot of
5 your testimony on, resulted in COVID positive
6 outbreaks anywhere in the Commonwealth of
7 Pennsylvania.

8 This is not to say that voting in
9 person is 100 percent fool-proof safe. It is not.
10 In administering elections, we rely on people. We
11 rely on people to act responsibly. We rely on
12 people to be responsible with how they cast their
13 vote, and we rely on people to not just be
14 responsible for their safety but the safety of
15 others as well. When you rely on people, sometimes
16 people fail. That doesn't mean that the
17 constitution failed. It means people failed.

18 You have offered a lot of policy -- a
19 lot of suggested changes to the way we should
20 conduct elections statewide, and you are requesting
21 me to put them in an order of Court directing the
22 Secretary to order -- assuming she could do that, I
23 am not convinced that she can -- every board of
24 elections in 67 counties to do their election the

1 way that Petitioners would like them to do it. And
2 your requested relief may very well be good policy.
3 It may be good policy, and it may be a way to
4 soundly administer elections during COVID. That is
5 not the question that's in front of the Court in
6 this case.

7 The question for the Court is whether
8 the relief that you are requesting is a
9 constitutional imperative, whether you have shown
10 that in the absence of that relief constitutional
11 rights are going to be lost, I am not convinced. I
12 am convinced that there are good voters out there
13 that are going to vote. And I am convinced that
14 there are election administrators particularly in
15 the City of Philadelphia, working for the
16 Commonwealth, doing everything that they can do to
17 make voting as safe as possible, particularly
18 encouraging voters to vote by mail-in ballots which
19 was never previously available in the Commonwealth
20 of Pennsylvania until the primary of this year.
21 That is a huge change. And I would assume that if
22 absence of mail-in voting rendered our voting
23 unconstitutional, someone would have brought that
24 action before the primary.

1 But what it does is it gives people
2 three choices when they only really ever had one
3 true choice and an alternative absentee ballot.

4 People can vote in person. They can
5 exercise their constitutional right by getting out
6 of their homes or out of their offices, walking or
7 driving or riding to a place where people gather to
8 exercise our sacred constitutional right to elect
9 people and people choose to do that. People choose
10 not to. They now have a choice they didn't have
11 before: They can vote my mail, exercising their
12 right that way -- an option that previously didn't
13 exist but now does.

14 They have a third option: They can
15 get that mail-in ballot, they can cast it, and they
16 can hand deliver it to the elections office if they
17 don't want to go to their polling place. This is a
18 third option.

19 And if there is anything that happens
20 during the election, there is a remedy in the
21 election code, as I understand it, that allows you
22 to go into a Court of Common Pleas and seek relief
23 to address anything that might arise on election
24 day or maybe even before elections. This is all

1 contemplated in the current election code.

2 So, I am not convinced based on
3 evidence that you have presented that the relief
4 you are seeking, these new policies, are necessary,
5 are imperative to preserve the constitutional right
6 to vote in a fair and free and equal election. I
7 am not convinced that implementing the protocols
8 that you are asking for statewide will not
9 substantially harm other interested parties,
10 particularly the counties who are not here and may
11 have very good reasons why implementation of those
12 new policies could impact their communities
13 financially and otherwise.

14 I am certainly not convinced that
15 what you are asking for is restoring us to any
16 status quo. If anything, what you are asking
17 alters the status quo -- drastically, at least in
18 counties that have not voluntarily opted for what
19 you are asking. I understand some asked for
20 mail-in ballot applications. That is fine, that is
21 a choice they have made; but forcing another county
22 to do that, that is altering the status quo.

23 I don't think you have a established
24 a clear right to relief. I am not clear that --

1 although I understand COVID has imposed challenges
2 on the administration of elections this year, and I
3 understand that the primary was probably not a
4 shining moment, but it was -- not a shining moment
5 under a difficult circumstance. But I am also not
6 convinced that the errors of primary are going to
7 be revisited in the general. If anything, I heard
8 no evidence to convince me that election officials
9 anywhere are trying to suppress the vote.

10 So, I have to believe they are doing
11 everything they can do to allow the vote. I
12 believe your request for injunctive relief is
13 incredibly over-broad, and I believe that granting
14 it under these circumstances so close to the
15 election and the kind of seed change that you are
16 asking for will adversely affect the public by
17 making what is already challenging, more confusing.

18 For those reasons I am going to grant
19 Ms. Hangleys motion and deny your preliminary
20 injunction application now. This is not my final
21 determination. I will issue an order affecting
22 this ruling. The order will either come out today
23 or tomorrow, hopefully, which is the day from which
24 would trigger any appeal.

1 So, I want to make sure I am clear on
2 the record. This is not my final decision. The
3 order, the written order, will be my final
4 decision.

5 Moving on, in terms of the
6 preliminary objections, we still will have oral
7 arguments and preliminary objections. That
8 argument will happen tomorrow at 1:00 p.m. by
9 WebEx.

10 So, with that, Ms. Hangle, I am
11 granting your motion and granting the other
12 Respondent Interveners' motions and am now denying
13 the preliminary motion. Again, my final order will
14 be written and that will be the order that triggers
15 the appeal.

16 Preliminary motions will be at 1
17 o'clock.

18 Mr. Steiner, do you have anything
19 else for the Court at this time?

20 MR. STEINER: No, Your Honor.

21 JUDGE BROBSON: Ms. Hangle,
22 anything?

23 MS. HANGLEY: Nothing, Your Honor.

24 JUDGE BROBSON: Mr. Gore?

1 MR. GORE: Nothing, Your Honor.

2 JUDGE BROBSON: Mr. Wallen?

3 MR. WALLEN: No, Your Honor.

4 JUDGE BROBSON: I will see you all at

5 1 o'clock.

6 (Hearing adjourned at 3:07 p.m.)

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1 C E R T I F I C A T E

2
3 I do hereby certify that I am a Notary
4 Public in good standing, that the aforesaid testimony
5 was taken before me, pursuant to notice, at the time and
6 place indicated; that said deponent was by me duly sworn
7 to tell the truth, the whole truth, and nothing but the
8 truth; that the testimony of said deponent was correctly
9 recorded in machine shorthand by me and thereafter
10 transcribed under my supervision with computer-aided
11 transcription; that the deposition is a true and correct
12 record of the testimony given by the witness; and that I
13 am neither of counsel nor kin to any party to said
14 action, nor interested in the outcome thereof.

15

16 WITNESS my hand and official seal this 17th day
17 of September, 2020.

18 
19

20 Notary Public

21

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23

24

Commonwealth of Pennsylvania Rules of Civil
Procedure

Title 231, Chapter 4000

Depositions and Discovery

Rule 4017

(c) When the testimony is fully transcribed a copy of the deposition with the original signature page shall be submitted to the witness for inspection and signing and shall be read to or by the witness and shall be signed by the witness, unless the inspection, reading and signing are waived by the witness and by all parties who attended the taking of the deposition, or the witness is ill or cannot be found or refuses to sign. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the person before whom it was taken with a statement of the reasons given by the witness for making the changes. If the deposition is not signed by the witness within thirty days of its submission to the witness, the person before whom the deposition was taken shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the refusal to sign together with the reason, if

any, given therefor; and the deposition may then be used as fully as though signed, unless the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

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