

Multiple Documents

Part	Description
1	21 pages
2	Exhibit A
3	Exhibit B
4	Exhibit C
5	Exhibit D
6	Declaration of B. Spiva

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

BARBARA H. LEE, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS,
et al.,

Defendants.

Civil Action No. 3:15-CV-357-HEH

**PLAINTIFFS' BRIEF IN OPPOSITION TO THE VIRGINIA DEPARTMENT OF
MOTOR VEHICLES' MOTION FOR COSTS INCURRED RESPONDING TO
PLAINTIFFS' SUBPOENA**

Plaintiffs Barbara Lee, Gonzalo J. Aida Brescia, and the Democratic Party of Virginia hereby submit this memorandum in response to the Virginia Department of Motor Vehicles' ("DMV") Motion for Costs Incurred Responding to Plaintiffs' Subpoena (hereinafter "the DMV's Motion"). For the reasons set forth herein, most notably that the DMV has waived its right to seek reimbursement of costs and is not entitled to the protection of cost-shifting, Plaintiffs respectfully request that the Court deny the DMV's Motion and instead order the DMV to reimburse Plaintiffs with the costs and fees associated with responding to the DMV's Motion.

I. FACTUAL BACKGROUND

On June 11, 2015, Plaintiffs brought suit against the Virginia State Board of Elections, the Virginia Department of Elections, and several officers of those state agencies in their official capacities, alleging that Virginia's photo identification law was unconstitutional and violated Section 2 of the Voting Rights Act. In order for Plaintiffs to make their case, their expert

witnesses needed individual voter-specific information from the Virginia voter registration file and the Virginia DMV database to perform a “matching analysis” that would determine the rates of DMV ID possession among registered voters. The type of matching analysis performed by Plaintiffs’ experts is routinely conducted by expert witnesses in lawsuits challenging voter ID laws, and is crucial to determining two critical issues in voter ID cases: the number of registered voters who do not possess an ID to vote and the demographic characteristics of those voters. Indeed, in 2014 and 2015, the Virginia State Board of Elections performed several of its own matching analyses between the Virginia voter file and the DMV database.¹ Accordingly, in addition to needing the DMV and voter registration data to conduct their own analyses, Plaintiffs’ experts needed the data to test the accuracy of the analyses performed by the Commonwealth.

Thus, on September 18, 2015, Plaintiffs served on counsel for Defendants² a subpoena pursuant to Rule 45 on the DMV, a state agency, demanding production by October 19, 2015 of a list of all persons who applied for and/or received a form of ID issued by the DMV each year between 2008 and 2015.³ The DMV routinely produces the information Plaintiffs requested as part of its participation in the Electronic Registration Information Center (“ERIC”) program, a data-sharing project aimed at increasing the accuracy of states’ voter registration records.⁴ Virginia has been a member of ERIC since the program’s inception in 2010, and as part of that

¹ See, e.g., “Commonwealth of Virginia Department of Elections, Voter Registration and No DMV ID Statistics,” July 23, 2015, *available at* http://elections.virginia.gov/Files/VoterRegistration/Information/Voters_Registration_and_No_DMV_ID_Statistics-July.pdf.

² Counsel for Defendants represented the DMV and agreed to accept service of Plaintiffs’ subpoena on its behalf.

³ Plaintiffs’ request is referred to herein as a request for the “DMV files” or “DMV database.”

⁴ See Exhibit A, Virginia State Board of Elections, “Annual Report on Voter Registration List Maintenance Activities,” January 6, 2014.

program, it uploads DMV data, including individual-identifying information such as Social Security Numbers (“SSNs”) and driver’s license numbers (“DLNs”) in hashed format, to ERIC every 60 days.⁵

On October 2, 2015, the DMV served objections to Plaintiffs’ subpoena, and specifically objected to Plaintiffs’ requests for copies of the DMV database by stating, in relevant part, the following objection (or some very similar form of the following objection):

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms “reasonable person,” “maintained,” and “identification issued by the DMV” which are not defined. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks “all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver’s license number, social security number as well as any other individual level information maintained in that list” without reasonable limitation. *Quality Aero Tech., Inc. v. Telemetrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover [sic] request for “all documents” when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”).

Objections to Subpoena of Richard D. Holcomb, Commissioner, Virginia Department of Motor Vehicles to Produce Documents, Information or Objects at 16.⁶

The DMV did not specifically object to Plaintiffs’ request for copies of the DMV database on the grounds of “undue expense” or “excessive cost.”⁷ On October 9, 2015, the

⁵ *Id.* at 5-6.

⁶ *See* Exhibit B (Objections to Subpoena of Richard D. Holcomb, Commissioner, Virginia Department of Motor Vehicles to Produce Documents, Information, or Objects).

DMV served written responses to Plaintiffs' subpoena indicating that, subject to its objections, it would produce responsive documents, including copies of the DMV file without voters' SSNs or DLNs.⁸ On October 26, 2015, seven days after the DMV's responsive documents were required to be produced to Plaintiffs, the DMV produced responsive documents to Plaintiffs, including copies of the DMV file without voters' SSNs or DLNs.

Given that Defendants and the DMV had refused to produce the voter registration and DMV files with individual voters' SSNs and DLNs because of concerns about protecting the privacy of confidential information, and matching the two sets of files without that information could have negatively affected the quality of Plaintiffs' experts' matching analysis, on October 19, 2015, Plaintiffs moved to compel the discovery of the SSN and DLN of each individual voter listed in the Virginia voter registration and DMV files. (ECF Nos. 87, 88). On November 30, 2015, after the briefing on the Motion to Compel was complete, and the parties had participated in an oral argument before Magistrate Judge Young by telephone, the Court ordered Defendants and the DMV to reproduce the DMV and voter registration files with SSNs and DLNs in "hashed format"⁹ by December 7, 2015. (ECF No. 105). Pursuant to the Court's November 30, 2015 order, the DMV reproduced the requested DMV files containing SSN and DLN information on December 7, 2015.

⁷ The DMV asserted a general objection to "all definitions, instructions and requests to the extent they seek information the discovery of which is cumulative or duplicative, or is obtainable from some other more convenient, less burdensome, or less expensive source." *See* Exhibit B at 3. However, similar to the DMV's specific objection to Plaintiffs' requests for the DMV file, this objection was not stated with the requisite level of specificity necessary to be valid. Moreover, had the DMV objected to Plaintiffs' requests on the grounds of expense, or at the very least provided some notice to Plaintiffs that producing the files would be too costly, Plaintiffs would have conferred with the DMV to find a less expensive method of producing the files, including by offering to copy the DMV files themselves.

⁸ *See* Exhibit C (Response to Subpoena of Richard D. Holcomb, Commissioner, Virginia Department of Motor Vehicles to Produce Documents, Information, or Objects).

⁹ Plaintiffs' counsel had proposed the production of the DMV files in "hashed" format prior to moving to compel, but the DMV declined, through Defendants' counsel, to produce SSNs and DLNs in that format.

At no time between September 18, 2015 (when Plaintiffs served the DMV with the subpoena) and November 24, 2015 (when the DMV reproduced the requested files), including during the briefing and oral argument on the Motion to Compel, did counsel for the DMV assert any argument against production of the files based on excessive costs. Nor did counsel for the DMV ever indicate that the DMV would seek reimbursement for costs associated with the production of the files. *See* Declaration of Bruce V. Spiva (“Spiva Decl.”) at ¶ 2.

On November 29, 2015, Plaintiffs received an invoice dated October 22, 2015 from the DMV for \$1,325,780.07 for “AdHOC Cost for ANE344-15 Barbara H. Lee, et al v. Virginia State Board of Elections.” *See* Spiva Decl. at ¶ 3, Ex. A. The invoice total included a \$10.00 “[o]ne time administration fee assessed for invoices more than 30 days past due” despite the fact that Plaintiffs had never been informed about any costs associated with the DMV’s production and the October 22, 2015 invoice was the first invoice Plaintiffs had ever received from the DMV. *See* Spiva Decl. at ¶ 3, 4. Plaintiffs’ counsel contacted counsel for the DMV (and Defendants) on December 7, 2015 regarding the October 22, 2015 invoice. *Id.* at ¶ 5. At that time, counsel for the DMV informed Plaintiffs’ counsel that the DMV invoice had been generated automatically using the DMV’s standard per record charge, and that it been sent to Plaintiffs in error and should be disregarded. *Id.* He did not indicate that the DMV would seek reimbursement of costs for a reduced amount or that the DMV would seek reimbursement at all. *Id.* In reliance on the conversation with counsel for the DMV, Plaintiffs disregarded the October 22, 2015 invoice. *Id.* at ¶ 6.

Plaintiffs were not notified that the DMV was seeking reimbursement for purported costs associated with complying with Plaintiffs’ subpoena until April 4, 2016, approximately one month after the trial in this case had ended and approximately seven months after Plaintiffs

served the subpoena on the DMV. *Id.* ¶ 7. On April 4, 2016, Plaintiffs received an email from Defendants' counsel containing an invoice for \$1,325,770.07 and informing Plaintiffs that the DMV would accept \$30,000 to satisfy the invoice. *Id.* at ¶ 8. The invoice includes a fee for 75 hours of "programming costs" and clearly has no remote relationship to the actual costs to the DMV incurred by electronically copying the DMV database. By contrast, Plaintiffs' expert made a copy of the same data in less than three hours. *See Spiva Decl.* at ¶ 10. Counsel for the DMV did not indicate why the DMV was willing to accept \$30,000 to satisfy a \$1.3 million invoice aside from the fact that the DMV wanted to "ensure prompt payment."¹⁰ Given that the production of the DMV database involved the electronic copying of a database that was already in electronic form, a task that the DMV performs on a bimonthly basis as part of its participation in ERIC, it is unlikely that the DMV's actual production costs amounted to \$30,000. If the DMV had specifically objected to Plaintiffs' subpoena on the grounds of expense, or provided notice to Plaintiffs that they intended to seek reimbursement of costs in the amount of \$30,000 for the purported costs associated with producing the database, then Plaintiffs would have had the opportunity to offer to take steps to minimize the costs incurred by offering to use Plaintiffs' own resources to copy the database or by hiring a third party vendor to copy the database at a lower rate. *See Spiva Decl.* at ¶ 9.

For the reasons set forth herein, specifically that the DMV has waived its right to seek reimbursement, Plaintiffs informed Defendants' counsel that they did not intend to pay the DMV's invoice. Subsequently, Defendants' counsel filed a motion for costs on behalf of the DMV. (ECF Nos. 220, 221). Plaintiffs file this brief in opposition to the DMV's Motion.

¹⁰ *See* Exhibit D (Email from S. Schneider to B. Spiva and A. Branch dated April 4, 2016).

II. ARGUMENT

A. The DMV waived its right to seek reimbursement for costs incurred in responding to Plaintiffs subpoena.

“Typically, a nonparty is required to absorb the costs of complying with a subpoena duces tecum.” *Warshay v. U.S.*, No. CV-97-1659, 1999 WL 250777, at *1 (E.D.N.Y. Mar. 10, 1999) (quoting *Cantiline v. Raymark Industries, Inc.*, 103 F.R.D. 447, 450 (S.D. Fla. 1984). While Rule 45 does provide mechanisms by which a nonparty can protect itself from undue burden associated with responding to a subpoena, the nonparty must actually take advantage of those protective mechanisms in order to preserve its right to seek reimbursement of costs associated with responding to a subpoena. *See McCabe v. Ernst & Young*, 221 F.R.D. 423, 427 (D.N.J. 2004).

Here, by failing to undertake the actions necessary under Rule 45 to assert and maintain an objection to Plaintiffs’ subpoena, the DMV waived its objection based on “undue burden” and its attendant right to seek reimbursement for costs purportedly incurred in responding to Plaintiffs’ subpoena. In particular, without any valid reason, the DMV failed to (1) specifically object to Plaintiffs’ subpoena based on undue cost as is required by Federal Rule of Civil Procedure 45(d)(1); (2) challenge Plaintiffs’ subpoena, and instead the DMV produced the DMV files voluntarily; and (3) condition compliance with Plaintiffs’ subpoena upon reimbursement of the costs associated with compliance, or at the very least, provide notice to Plaintiffs that it would seek reimbursement. As a result, the DMV has waived its ability to now – seven months after Plaintiffs originally served the subpoena – seek reimbursement for its compliance costs.

1. The DMV failed to specifically object to Plaintiffs’ subpoena on the grounds of expense.

In order to preserve its right to object to a subpoena, a non-party must serve written objections within 14 days after service of the subpoena. Fed. R. Civ. P. 45(d)(2)(B). When the

burdensomeness of a subpoena is at issue, the onus is on the objecting party to *specifically* assert the ways in which a subpoena is unduly burdensome. Courts have found that “[a] showing of such [undue] burden must be specific.” *Flatow v. The Islamic Republic of Iran*, 196 F.R.D. 203, 207 (D.D.C. 2000), *vacated in part*, 305 F.3d 1249 (D.C. Cir. 2002) (citing *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984)). Moreover, “[t]he mere assertion that compliance with a subpoena is burdensome and onerous is alone not sufficient without showing of the manner and extent of the burden and the injurious consequences of compliance.” *Long Beach Fed. Sav. and Loan Ass’n v. Fed. Home Loan Bank Bd.*, 189 F. Supp. 589, 604 (S.D. Cal. 1960), *rev’d on other grounds*, *Fed Home Loan Bank Bd. v. Long Beach Fed. Sav. and Loan Ass’n*, 295 F.2d 403 (9th Cir. 1961); *see also Ghandi v. Police Dep’t of City of Detroit*, 74 F.R.D. 115 (E.D. Mich. 1977) (objection that production of documents requested by subpoena on the grounds that it would be burdensome because it would be time consuming does not constitute sufficient harm or indicate such injurious consequences of compliance requiring court to quash subpoena). For example, a showing of burden without “specific estimates of staff hours needed to comply” will be “categorically rejected.” *Flatow*, 196 F.R.D. at 207 (internal citation omitted).

While the DMV did object to Plaintiffs’ subpoena within 14 days of service, its objections were not stated with the specificity necessary to set forth a valid objection based on “undue burden and cost” under Rule 45. For example, the DMV objected to Plaintiffs’ requests for the DMV files because they were “overly broad” and “unduly burdensome,” but never so much as mentioned that compliance with the subpoena would be unduly costly or expensive. Nor did the DMV provide estimates of the number of staff hours or costs associated with complying with the subpoena. By failing to take the necessary actions to assert and maintain an

objection to Plaintiffs' subpoena based on "undue cost," including by failing to make the objection with specificity, the DMV waived its undue burden objection and its related right to seek reimbursement of costs incurred in responding to the subpoena.

2. The DMV failed to challenge Plaintiffs' subpoena and instead produced the DMV files voluntarily.

Courts have held that for a non-party to be eligible for an award of subpoena compliance costs under the procedure set forth in Rule 45, the nonparty must indicate its intention to seek costs before, and as a condition of responding to the subpoena, or the award must be a condition of the court's issuance of an order compelling production by the nonparty, which would not occur unless the nonparty had filed a motion to quash, or having served written objections upon the party or attorney requesting production, the party sought an order to compel. *See McCabe*, 221 F.R.D. at 425 (absent a court order following a motion to compel that compels the subpoenaing party to pay for production costs, a non-party bears its own production expenses); *Tutor-Saliba Corp. v. U.S.*, 32 Fed. Cl. 609, 611 (Fed. Cl. 1995). Where a non-party complies with a subpoena "without filing an objection and then submit[s] a bill of costs, the court would deny the motion because the [non-parties] would have waived their right to complain about the undue burden of the subpoenas." *McCabe*, 221 F.R.D. at 426 (citing *Angell v. Shawmut Bank Connecticut Nat'l Ass'n*, 153 F.R.D. 585, 590 (M.D.N.C. 1994)).

Because the DMV produced the DMV files to Plaintiffs voluntarily and never provided any notice to Plaintiffs – in the form of a legal challenge or otherwise – of the costs the DMV would incur to make the production, or that the DMV would seek reimbursement for such costs, Plaintiffs were deprived of the opportunity to offer ways to minimize the production costs. Had Plaintiffs been given that opportunity, they would have offered to use their own resources to make copies of the DMV database or offered to hire a third party vendor to copy the files at a

lower rate. *See* Spiva Decl. at ¶ 9. In any event, it is highly unlikely that the DMV's production costs amounted to \$30,000. As stated above, the DMV already provides the DMV files that Plaintiffs requested to ERIC on a bimonthly basis. Thus, this was a routine production for the agency. Furthermore, the DMV files were already stored in an electronic format, which meant that any costs the DMV incurred were for making electronic copies of files that were already in an electronic format. Finally, the DMV's invoice indicates that DMV personnel spent 75 hours working on producing the DMV database. By contrast, Plaintiffs' expert made an electronic copy of the DMV database in two hours and 50 minutes. *See* Spiva Decl. at ¶ 10. It is thus unreasonable to charge Plaintiffs for 75 hours of DMV personnel time spent to produce the DMV database, and in any event this is precisely why the rules require that litigants raise any significant issues concerning costs in advance of production, so that the parties can discuss the manner and means of production and ways to avoid unnecessary expense.

At bottom, by producing the DMV files voluntarily without providing any notice of costs incurred or an intent to seek reimbursement, and by failing to challenge Plaintiffs' subpoena on the grounds of expense, which would have provided Plaintiffs with the opportunity to offer ways to minimize the production costs and the DMV the opportunity to obtain a court order that would have protected it from incurring the alleged "undue" production expenses it now seeks. The DMV failed to follow the procedures set forth under Rule 45, and is thus not entitled to the reimbursement protection afforded by the Rule. *See McCabe*, 221 F.R.D. at 426.

3. The DMV's motion for costs is untimely.

As a general rule, a non-party should request reimbursement for expenses prior to responding to a subpoena. *See Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 550 (N.D. Tex. 1985) ("The usual procedure for requesting reimbursement [for expenses incurred in

producing documents in response to a subpoena] is to file a motion prior to the time for responding to the subpoena”); *Sun Capital Partners, Inc. v. Twin City Fire Insurance Co.*, No. 12-CV-81397, 2016 WL 1658765, at * 5 (S.D. Fla. Apr. 26, 2016) (denying non-parties’ motion for fees associated with responding to a subpoena because the non-parties’ “failure to notify the Court and [the subpoenaing party] of the significant expenses the Non-Parties were incurring prevented the Court from further protecting the Non-Parties from significant expense and prevented [the subpoenaing party] from further taking steps to try to reduce the expense,” and allowing the Non-Parties to “sit back . . . and then later assert they require reimbursement of more than \$136,000 in fees and costs” was “akin to sandbagging” and would not be permitted); *Tutor-Saliba Corp.*, 32 Fed. Cl. at 611 (“The case law also uniformly holds that, to preserve its ability to seek costs, other than in abuse of process circumstances . . . a nonparty must move to quash the subpoena or otherwise indicate its intention to seek costs before, and as a condition of, responding.”). The DMV’s failure to seek reimbursement (or notify Plaintiffs of its intention to seek reimbursement) in a timely fashion is fatal to its Motion.

While the DMV asserts that it was not required to seek reimbursement for costs prior to responding to the subpoena, the vast majority of the case law on this issue indicates that non-parties are typically awarded reimbursement only when, prior to compliance with the subpoena, they either seek reimbursement, provide notice of an intent to seek reimbursement, or expressly reserve the right to seek reimbursement. *See McCabe*, 221 F.R.D. at 427 (citing *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001) (non-party agencies sought reimbursement of expenses prior to compliance with subpoena in response to motion to compel compliance); *U.S. v. Columbia Broad. Sys., Inc.*, 666 F.2d 364 (9th Cir. 1982) (within its motion to quash a subpoena, non-party expressly reserved the right to seek reimbursement of discovery costs if

production was ordered); *Williams v. City of Dallas*, 178 F.R.D. 103 (N.D. Tex. 1998) (non-parties moved to quash subpoenas prior to compliance); *Mycogen Plant Sci., Inc. v. Monsanto Co.*, 164 F.R.D. 623 (E.D. Pa. 1996) (non-parties who moved to quash subpoenas and for a protective order prior to compliance were entitled to reimbursement); *Kisser v. Coalition for Religious Freedom*, No. 95-MC-0174, 1995 WL 590169 (E.D. Pa. Oct. 4, 1995) (non-party who moved to quash or modify a subpoena prior to compliance was entitled to reimbursement); *In re Letters Rogatory*, 144 F.R.D. 272 (E.D. Pa. 1992) (non-party moved to quash or modify subpoena and sought expenses prior to compliance)).

At the very least, in cases where a non-party is reimbursed for production costs, the non-party has provided the subpoenaing party with some notice of its intention to seek reimbursement at the time of or prior to compliance. Indeed, even in *In re First Am. Corp.*, 184 F.R.D. 234, 239 (S.D.N.Y. 1998), a case cited by the DMV in its Motion, the Court makes clear that the non-party “raised the issue of costs many times prior to producing the documents.” By contrast, here, the DMV *never* raised the issue of seeking reimbursement for compliance costs. To the contrary, when Plaintiffs received the exorbitant \$1.3 million bill from the DMV on November 29, 2015,¹¹ Plaintiffs’ counsel raised the issue with Defendants’ counsel right away, and he stated that the bill had been sent to Plaintiffs in error and should be disregarded. *See Spiva Decl.* at ¶ 5.

The DMV’s excuses for its failure to notify Plaintiffs of its intention to seek reimbursement should be rejected. First, the DMV’s assertion that it could not seek reimbursement of costs at the time of production because the *amount* of the costs were unknown does not explain why the DMV failed to notify Plaintiffs of its intention to seek reimbursement

¹¹ Plaintiffs do not agree, and the DMV does not seriously assert that the DMV incurred costs of \$1.3 million in responding to Plaintiffs’ subpoena. The DMV’s willingness to accept \$30,000 to satisfy the invoice makes clear that there is no relationship between the DMV’s actual costs and \$1.3 million.

at all. Additionally, given that the DMV provides the data to ERIC on a bimonthly basis, it must have known almost precisely what it would cost to produce the DMV files to Plaintiffs. Second, to the extent that the DMV argues that it produced the files voluntarily without challenging Plaintiffs' subpoena because Plaintiffs had an "imminent need for discovery," *see* DMV Br. in Support of Mot. at 6, courts have found that "[h]ad the promulgators of Rule 45 intended to permit reimbursement to a non-party who failed to object to a subpoena or condition compliance on reimbursement because it was more expedient to simply comply, they would have provided so." *McCabe*, 221 F.R.D. at 427. Further, "expedient compliance does not outweigh the prejudice that would ensue to [the requesting party] if required to pay exorbitant . . . fees absent an opportunity to address their subpoenas and mitigate . . . fees." *Id.* Here, the DMV produced the DMV files to Plaintiffs on October 26, 2015 voluntarily. The DMV did not file a motion to quash Plaintiffs' subpoena nor did it withhold the files until Plaintiffs filed a motion to compel.¹²

For these reasons, most courts have recognized that "fix[ing] the costs in advance of production [is] . . . the most satisfactory accommodation to protect a party seeking discovery from excessive costs." *In re First Am. Corp.*, 184 F.R.D. at 239. Even if the DMV's argument was not foreclosed, it still would not support the DMV's failure to seek reimbursement for compliance costs until approximately *six months after* the DMV first produced responsive documents. The DMV sat on whatever right it may have had, and its request to seek reimbursement at this late date should be rejected.

¹² While Plaintiffs filed a motion to compel copies of DMV files that included SSNs and DLNs, the DMV was withholding that data based on its privacy objection, not cost concerns. The DMV had already voluntarily produced the DMV files to Plaintiffs prior to the Court's November 9, 2015 order granting Plaintiffs' motion to compel the files with SSNs and DLNs.

B. The Court should not shift the costs of responding to Plaintiffs’ subpoena to Plaintiffs.

The general assumption in Rule 45 discovery is that the complying party should bear the costs of production. *Warshay*, 1999 WL 250777, at *1. Cost-shifting is a mechanism by which nonparties can be protected from undue burden under Rule 45, but only where a multi-step inquiry determines that the balance of certain factors weigh in favor of shifting the costs of compliance from the complying party to the subpoenaing party. *See Bell, Inc. v. GE Lighting, LLC*, No. 6:14-CV-00012, 2014 WL 1630754, at * 12 (W.D. Va. Apr. 23, 2014). “These factors include: (1) whether the nonparty has an interest in the outcome of the case; (2) whether the nonparty can more readily bear its costs than the requesting party; and (3) whether the litigation is of public importance.” *Id.* (quoting *DeGeer v. Gillis*, 755 F.Supp.2d 909, 928-29 (N.D.Ill. 2010)). In making the cost-shifting determination, many other factors are also considered by courts, including “the relevance of the discovery sought, the requesting party’s need, and the potential hardship to the party subject to the subpoena,” along with “the particularity with which the documents are described and the burden imposed.” *Id.* (quoting *Boykin Anchor Co., Inc. v. Wong*, No. 5:10-CV-591-FL, 2012 WL 27328, at *2-3 (E.D.N.C. Jan. 4, 2012)). As discussed below, the application of these factors to this case supports Plaintiffs’ position that the costs should not be shifted and the DMV should remain responsible for any costs associated with complying with Plaintiffs’ subpoena.

1. As an agency of the Commonwealth, the DMV was an interested party in this litigation.

Courts have interpreted the term “interested party” to mean “[a] party who has a recognizable stake (and therefore standing) in a matter.” *Bell, Inc.*, 2014 WL 1630754, at *13 (citing Black’s Law Dictionary (9th ed. 2009)). When the nonparty producing materials has a potential interest in the underlying litigation, courts have weighed that interest against shifting

the costs of production to the requesting party. *Id.* Given that the DMV qualifies as an interested party in this case, this factor does not weigh in favor of shifting the DMV's costs to Plaintiffs. As the Supreme Court has explained, "[a] suit against a state officer in his official capacity is, of course, a suit against the State." *Diamond v. Charles*, 476 U.S. 54, 57 n.2 (1986). Thus, [when a plaintiff sues a state official in his official capacity] a controversy exists not because the state official is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of the injury." *Wilson v. Stocker*, 819, F.2d 943, 947 (10th Cir. 1987) (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)).

In this case, Plaintiffs brought suit against two entities charged with enforcing Virginia's photo ID law, the Virginia State Board of Elections and the Virginia Department of Elections, as well as several state officers in their official capacities. Under the reasoning in *Diamond*, by bringing suit against Virginia state agencies and state officers, Plaintiffs effectively brought suit against the Commonwealth of Virginia. Because the DMV is an agency of the Commonwealth, and it was represented by the same counsel as Defendants, its interests are aligned with the Commonwealth, and by extension, with the Defendants in this matter. Given this framework, and the DMV's status as part of the Commonwealth, it is not surprising that the DMV, which housed critical discovery for Plaintiffs in this case, is now trying to increase Plaintiffs' litigation costs by moving for reimbursement.

2. The DMV can more readily bear the costs of production than Plaintiffs.

The DMV contends that because Plaintiffs are not financing this litigation, that the DMV's costs should be shifted. This argument is misplaced for several reasons. First, as part of its ordinary course of business, the DMV already routinely bears any costs associated with the

production of the DMV file, including hashing¹³ SSNs and DLNs, at least as frequently as bimonthly when it produces the file to ERIC for the purpose of comparing and analyzing voter registration records.¹⁴ *See* Dep. Tr. at 98:21-99:10 (Riemer).¹⁵ As stated above, Virginia has been a member of ERIC since at least 2010, and has “upload[ed] [its] anonymized DMV and voter registration information [to the ERIC database] on a regular, recurring schedule” since that time. Thus, as part of the DMV’s obligations under ERIC, it had already incurred the costs necessary to respond to Plaintiffs’ subpoena, which necessarily requested the same exact information that the DMV provides to ERIC on a regular basis. Given that the DMV voluntarily and regularly produces the DMV file to a third party, the DMV’s claim that performing the same task in the context of this litigation was unduly burdensome or costly, and thus should not be paid for by the DMV, rings hollow and should be rejected. Third, many of the costs that the DMV proposes to shift to Plaintiffs, such as the CPU/database fee charged to the DMV by the Virginia Information Technologies Agency, are internal charges among state agencies and should not be recoverable any more than the Defendants’ expenses.

3. This litigation is of public importance.

This litigation is clearly of public importance and the DMV does not dispute this issue. *See* DMV Br. in Support of Mot. at 7. This litigation is about whether Virginia’s photo ID law unconstitutionally deprives Virginia citizens and taxpayers of the fundamental right to vote. Thus, this factor does not weigh in favor of shifting the DMV’s alleged costs to Plaintiffs.

¹³ The DMV contends that it is not charging Plaintiffs for costs associated with hashing SSNs and DLNs. However, the DMV is charging for staff time associated with the production of the DMV files and some of that staff time was clearly spent hashing the data.

¹⁴ *See* Exhibit A.

¹⁵ *See* Exhibit E (Deposition Transcript of J. Riemer).

4. The other factors considered by courts in the cost-shifting analysis do not weigh in favor of shifting costs to Plaintiffs.

The other factors considered by courts when determining whether to shift costs to the subpoenaing party, including the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena, along with the particularity with which the documents are described and the burden imposed, do not weigh in favor of shifting costs to Plaintiffs. The information provided by the DMV in the DMV files was core evidence in this case which did not create any undue or unusual burden on the DMV. As discussed above, given that the DMV routinely produces copies of the DMV file to an outside party on a bimonthly basis, there was no hardship associated with DMV's production of the file in the context of this litigation. And, as the Court recognized by granting Plaintiffs' Motion to Compel, Plaintiffs' experts needed the DMV file in order to conduct the analyses necessary to obtain evidence pertaining to crucial issues in this case such as determining the number of Virginia voters who do not possess the requisite ID for voting.

Furthermore, a court's decision to shift a state agency's costs of subpoena compliance to plaintiffs in a voting rights case such as this one could make it more difficult for plaintiffs in future voting rights cases to obtain the critical information they need from states in order to prove their claims. For example, it could mean that costs associated with voting rights cases would differ from state to state depending on a state's choice as to whether its voter ID law is implemented through the DMV and/or the state's department or board of elections.

C. The Virginia law that permits the DMV to collect fees for producing information is inapplicable in the context of a federal lawsuit.

Non-party subpoenas in a federal lawsuit are governed by Rule 45, not by state statute, because as a general rule, state laws are inapplicable in the context of discovery in a federal

lawsuit. *See Spiegel v. Engagetel*, No. 15 C 1809, 2015 WL 8986932 (N.D. Ill. Dec. 16, 2015) (“[L]itigants cannot use state statutes or constitutional provisions to skirt the requirements of Rule 45”); *In re Transbrasil S.A. Linhas Aereas*, No. 11-19484-BkC-AJC, 2014 WL 1655990, at *3 (Bankr. S. D. Fla. Apr. 24, 2014) (“State law rights of privacy, even where enshrined in a state constitution, must yield to a federal subpoena”); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565 (D.Md. 2010) (holding that because Rule 26(b)(1) permits discovery into any relevant, non-privileged matter, “there is no legal justification for claiming that [a state law, the Maryland Public Information Act] is a privilege that would warrant refusal to produce documents pursuant to [Rule 26]”); *Snierson v. Chem. Bank*, 108 F.R.D. 159, 162 (D. Del. 1985) (“Assuming *arguendo* that both the state constitution and the common law of New Jersey create a right to privacy in financial records, such state privileges do not preclude discovery of relevant information in a federal court suit”) (internal citation omitted). In fact, during the briefing on Plaintiffs’ Motion to Compel Discovery of SSNs and DLNs (ECF No. 87) in this case, Defendants and the DMV relied on a Virginia statute to argue that they were prohibited by state law from producing voter registration and DMV files containing SSNs and DLNs, even in hashed format, to Plaintiffs. *See* ECF No. 92 at 4-5. The Court essentially dismissed this argument by ordering Defendants and the DMV to produce the information in hashed format. *See* ECF No. 105.

D. The DMV should pay for all costs and fees associated with Plaintiffs’ response to the DMV’s Motion.

Local Rule 37(G) provides in relevant part that, “[t]he presentation to the Court of unnecessary discovery motions . . . will subject such party to appropriate remedies and sanctions, including the imposition of costs and counsel fees.” Given that the DMV has clearly waived its right to seek reimbursement of costs from Plaintiffs by (1) failing to properly object to Plaintiffs’

subpoena on the grounds of expense, (2) failing to provide Plaintiffs with any notice that it would seek reimbursement of fees of any amount; and (3) waiting until approximately six months after it complied with Plaintiffs' subpoena to request reimbursement, Plaintiffs contend that the DMV's Motion for Costs was unnecessary and unwarranted. Accordingly, pursuant to Local Rule 37(G), Plaintiffs request that the Court order the DMV to reimburse Plaintiffs for all costs and fees and associated with responding to the DMV's Motion.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the DMV's Motion for Costs Incurred Responding to Plaintiffs' Subpoena and order the DMV to reimburse Plaintiffs for all costs and fees associated with responding to the DMV's Motion pursuant to Local Rule 37(g).

DATED: June 3, 2016

By: /s/ Aria C. Branch

Marc Erik Elias (admitted *pro hac vice*)
Bruce V. Spiva (admitted *pro hac vice*)
Elisabeth C. Frost (admitted *pro hac vice*)
Aria Branch (VSB # 83682)
Amanda R. Callais (VSB # 85891)
Ceridwen Cherry (admitted *pro hac vice*)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.434.1627
Facsimile: 202.654.9106
Email: MElias@perkinscoie.com
Email: BSpiva@perkinscoie.com
Email: EFrost@perkinscoie.com
Email: ABranch@perkinscoie.com
Email: ACallais@perkinscoie.com
Email: CCherry@perkinscoie.com

Joshua L. Kaul (admitted *pro hac vice*)

PERKINS COIE LLP

1 East Main Street, Suite 201

Madison, WI 53703-5118

Telephone: 608.663.7460

Facsimile: 608.283.1007

Email: JKaul@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

On June 3rd, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

Dana J. Finberg
Sara Schneider
ARENT FOX LLP
55 Second Street, 21st Floor
San Francisco, CA 94105
Tel: 415.757.5500
Fax: 415.757.5501
dana.finberg@arentfox.com
sara.schneider@arentfox.com

Mark F. (Thor) Hearne, II
Stephen S. Davis
ARENT FOX LLP
112 S. Hanley Road, Suite 200
Clayton, MO 63105
Tel: 314.296.4000
thornet@ix.netcom.com
stephen.davis@arentfox.com

Kirsten A. Hart
ARENT FOX LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013
Tel: 213.629.7400
Fax: 213.629.7401
kirsten.hart@arentfox.com

Attorneys for Defendants and the DMV


By /s/ Aria C. Branch
Aria C. Branch (VSB # 83682)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
ABranch@perkinscoie.com

Attorney for Plaintiffs

EXHIBIT A



★VIRGINIA★
STATE BOARD
of **ELECTIONS**



**Annual Report on
Voter Registration List Maintenance Activities**

**Report to the House and Senate Committees on
Privileges and Elections**

Prepared by:

The Honorable Donald Palmer
Secretary, State Board of Elections

Justin Riemer
Deputy Secretary, State Board of Elections

Matthew Davis
Information Services Manager, State Board of Elections

January 6, 2014

Table of Contents

Executive Summary	3
Legislative History and Overview	3
ERIC and Interstate Crosscheck.....	5
The Electronic Registration Information Center (ERIC)	5
The Interstate Voter Registration Crosscheck Program (Crosscheck).....	6
ERIC and Crosscheck Comparison	7
SBE’s Efforts in Outreach to Neighboring States	8
Other List Maintenance Activities Identifying Moving Voters.....	10
National Change of Address (NCOA)	10
Other Processes through the USPS System	11
Summary of Data Matches from Summer of 2012 to Present.....	12
ERIC Activities	12
Summary of 2013 Crosscheck Activities	13
Summary of Other List Maintenance Processes.....	15
Deceased Voters	15
Ineligible Felon and Mentally Incapacitated Data	15
Non-Citizen Data.....	15
Conclusion.....	16
Contact Information	16
Appendix A	
Appendix B	

Executive Summary:

The Virginia State Board of Elections (SBE) is pleased to report to the members of the Privileges and Elections Committees of the Virginia General Assembly on its annual Voter Registration List Maintenance activities. This report focuses specifically on SBE's efforts to share voter registration and voter history data with neighboring states and the District of Columbia (DC)¹ and also presents you with a brief summary of all of Virginia's voter registration list maintenance activities.

In 2012, the Pew Center on the States (Election Initiatives) released a study titled "Inaccurate, Costly, and Inefficient - Evidence That America's Voter Registration System Needs an Upgrade." The study found the lack of communication and data-sharing between states was causing the voter registration lists to remain significantly outdated and plagued with errors. The study found that approximately 24 million—one out of every eight—voter registrations in the United States were no longer valid or were significantly incorrect. More than 1.8 million deceased individuals were erroneously listed as voters and approximately 2.75 million people had registrations in more than one state. Further, the researchers estimate at least 51 million eligible U.S. citizens were unregistered, or more than 24 % of the eligible population. SBE's own research confirms the negative impacts that inaccurate voter registration data has on the electoral system. In a survey conducted following the 2012 General Election, general registrars and electoral board members reported voter registration problems and inactive voter registrations as the second and third biggest problems encountered at the polls during the 2012 General Election.

Virginia is a nationwide leader and pioneer in working with other states to improve and keep its voter registration records accurate and current. Virginia is one of only two states (Colorado being the other) that has participated in both of the two major interstate voter registration data sharing programs: The Electronic Registration Information Center (ERIC) and the Interstate Voter Registration Crosscheck Program (Crosscheck). The State Board of Elections was a founding member of ERIC and the first state on the Eastern Seaboard to join Crosscheck. Virginia enacted legislation enabling these important activities well in advance of most other states and continues to be a leader in modernizing and upgrading its voter registration system, particularly its list maintenance activities, to protect the integrity of its voter rolls.

SBE is pleased to announce that as of January 1, 2014, Virginia is engaged in formal voter registration list sharing agreements with all of Virginia's neighboring states.

Legislative History and Overview:

In 2013, the General Assembly unanimously passed legislation (HB2022, Rush) that required SBE to share voter registration and voter history data with neighboring states, conduct list maintenance on that data and report back to the House and Senate Privileges and Elections Committee annually on its progress.² This bill followed other related legislation, including bills

¹ The District of Columbia is included as a state for purposes of references to the numbers of states participating in various activities discussed in this report.

² § 24.2-404.4. Exchange of registered voter lists with other states.

introduced and enacted in 2007 by Delegate Brink, in 2011 by Senator Obenshain, and in 2013 by Delegate Robert Bell.³ Collectively, these bills expanded the authority of SBE and the localities to share registration data with other states and mandated that SBE and the localities engage in interstate voter registration list maintenance efforts. Specifically, Senator Obenshain's 2011 bill, SB1196, gave Virginia the authority to share the data necessary to participate in the two data-sharing agreements most pivotal to Virginia's efforts: ERIC and Crosscheck. Delegate Rush's 2013 bill was the first state law aimed directly at sharing data with Virginia's neighboring states.

Prior to this series of bills, Virginia did share registration data with other states; however, it was done in an ad hoc and piecemeal manner. The main data source was based on previous address information self-reported by voters who registered to vote in a new state after leaving Virginia. The Virginia Voter Registration Application has required applicants to provide their previous voter registration address on the application since at least 1993 (and likely much earlier) when this requirement was added to the Code of Virginia when Title 24.1 was recodified into Title 24.2.⁴ This change required the Virginia general registrar to send that previous registration information to the registration official in the state where the applicant was previously registered so the election official in that state could cancel that record. Later, legislation was enacted to require the general registrar to keep a copy of the previous registration information on file.⁵ While this process is helpful for list maintenance, relying on voters to self-report and for local election officials to communicate this information to officials in other states is not a substitute for organized multistate data-sharing agreements.

Federal legislative efforts have also addressed states' voter registration list maintenance with the passage in 1993 of the National Voter Registration Act (NVRA) and in 2003 with the Help America Vote Act (HAVA). The NVRA addresses voter registration list maintenance for cross-state movers, requiring states to systematically take steps to remove ineligible voters from the voter rolls in a reasonable time frame. In the past, SBE has identified voters who have moved to another state chiefly through the United States Postal Service's National Change of Address (NCOA) registry and election-related mail returned undeliverable from former residences of registered voters. (Additional information on the NCOA process is explained in detail below.) In addition, HAVA in its requirement that states adopt "a single, uniform, official, centralized, interactive computerized statewide voter list" requires states to "perform list maintenance with respect to the computerized list on a regular basis."⁶ The HAVA requirement for this

Pursuant to its authority under subsection A of § 24.2-405 and subsections B and C of § 24.2-406, the State Board shall request voter registration information and lists of persons voting at primaries and elections, if available, from the states bordering the Commonwealth to identify duplicate registrations, voters who no longer reside in the Commonwealth, and other persons who are no longer entitled to be registered in order to maintain the overall accuracy of the voter registration system. Upon receipt of this data, the State Board shall compare it with the state voter registration list and initiate list maintenance procedures under applicable state and federal law. The State Board shall report to the House and Senate Committees on Privileges and Elections annually on the progress of activities conducted under this section, including the number of duplicate registrations found to exist and the procedures that the State Board and general registrars are following to eliminate duplicate registrations from the Virginia registered voter lists.

³ 2007: HB2141 (Brink); 2011: SB1196 (Obenshain); and 2013: HB1764 (Bell)

⁴ 1993 Va. SB 649; 1993 Va. ALS 641; 1993 Va. Acts 641; 1993 Va. Ch. 641

⁵ 2010 Va. SB 309 (Martin)

⁶ 42 USC § 15483

computerized statewide database makes SBE's current efforts with multistate data sharing on a large scale possible.

ERIC and Interstate Crosscheck:

Two major interstate voter registration data sharing partnerships exist and Virginia is a participant in both. This section provides a summary of both ERIC and Crosscheck and provides a comparison between the two. Appendix B below provides an overview of what states participate in the two programs.

The Electronic Registration Information Center (ERIC):

In early 2010, Virginia took a major step in its efforts to broaden voter registration data sharing when Virginia became involved in a project titled the Electronic Registration Information Center (ERIC). ERIC was originally an initiative of the Pew Charitable Trusts Center on the States, who after evaluating states' performances in the 2008 General Election, identified the long-standing problem of how inaccurate and outdated voter registration data, particularly the lack of interstate cooperation in sharing data, negatively impacted the electoral system. Pew worked to bring together experts from the Information Technology (IT) industry, election officials from around the country, and other stakeholders in the elections' community with the goal of establishing an interstate cooperative where states would securely share and compare their voter registration, voter history, and Department of Motor Vehicles (DMV) data to increase the accuracy of their voter rolls.

Pew worked with IBM and other leaders in the data and IT industries to develop a data sharing center where states would upload their anonymized⁷ DMV and voter registration information on a regular, recurring schedule. The data-matching software compares the data and reports back to the states identifying voters who are deceased, have moved residence addresses within Virginia, or moved out of state. In addition, ERIC identifies those who moved to Virginia from another state but who have not registered to vote here. A key component of the ERIC data is the inclusion of activity dates for individuals' voting history, voter registration transactions, and transactions at DMV. This allows the data-matching software to provide a more accurate match and precisely identifies which state should take action on the duplicate voter registration record. A diagram illustrating this process is included in Appendix A.⁸

ERIC was officially born in June of 2012 after two years of preparations that included obtaining legislative changes in charter member states, the building of the IT and business process infrastructure needed for participation, navigating through various complex legal and policy issues for the list maintenance processes, and the negotiation of bylaws and a membership agreement. In addition to Virginia, the charter members of ERIC were Colorado, Delaware,

⁷ Anonymization is a process where any data submitted to ERIC is first run through a software application that takes the social security number and Driver's License Number for each record and converts them into a one-way hashed string of data. Each state performs this process on their data before submission to ERIC using the same hashing method. ERIC can then perform matches on this hashed data instead of having access to individual's actual Social Security Numbers and Driver's License Numbers. This ensures the privacy and security of any shared data.

⁸ A video explaining the dataflow and matching process is available at ERIC's website: www.ERICStates.org.

Maryland, Nevada, Utah, and Washington. In addition, the District of Columbia has announced that it will join ERIC effective January 1, 2014.

Virginia uses/will use ERIC data for five main purposes to identify:

1. Individuals who are registered Virginia and who moved out of Virginia into another state and registered in that state.
2. Virginia voters who moved residences within the Commonwealth of Virginia and did not update their registration address.
3. Mistakes, errors, outdated information, and other inaccuracies in Virginia registration records and to contact those voters to correct those mistakes. Comparing Virginia's voter registration data against its DMV data is especially helpful in this regard.⁹
4. Individuals who moved into Virginia, are eligible to vote, and who have remained unregistered for a certain period of time after establishing residency in the Commonwealth.
5. Registered voters who died and allow states to cancel these records from their voter rolls. ERIC utilizes data from the Social Security Death Index and provides reports to participating states of the death matches.¹⁰

ERIC will report to Virginia with each matched record, a "score" that will let SBE and the general registrar know the level of confidence in each match. For example, ERIC will report a 100% confidence match if two states share a record for an individual with the exact name, date of birth, last four digits of social security numbers in DMV and voter registration data. The 100% match will let officials know it is a certainty that two states have the same person registered to vote on their rolls.

Virginia uploads its applicable data every 60 days and receives reports after each upload. The data report is then reviewed by SBE staff for accuracy. The data from each report is then to be processed accordingly (e.g. – records identified on the deceased report will be provided to the locality where the individual is registered so that the voter record can be cancelled). To allow for a regular and routine process for list maintenance, Virginia must abide by specific mailing deadlines for list maintenance and registration outreach activities as outlined in the ERIC membership agreement.

The Interstate Voter Registration Crosscheck Program (Crosscheck):

Virginia joined the Interstate Voter Registration Crosscheck Program (Crosscheck) in December of 2012. The Crosscheck Program was founded in 2005 through a bipartisan effort by a number of Secretaries of State, including then-Kansas Secretary of State Ron Thornburg and then-Missouri Secretary of State Robin Carnahan. Crosscheck originally consisted of the

⁹ In the comparison of data of the seven ERIC states, the ERIC identified about 800,000 individuals among those states whose address on the voter file was not as up-to-date as the address on their motor vehicles record. The data center identified almost 100,000 persons who had moved from one of the ERIC states to another ERIC state and over 23,000 deceased and 14,000 duplicate voters erroneously remaining on the rolls. See transcript of Presidential Commission on Election Administration at page 32 available at:

<https://www.supportthevoter.gov/files/2013/11/PCEA-Cincinnati-Public-Meeting-Transcript-Day-2.pdf>

¹⁰ Using the ERIC software with deceased data has provided an increase of 25% matches of deceased voters on the rolls. See transcript of Presidential Commission on Election Administration on page 31 at link cited in footnote 9.

Midwest states of Nebraska, Kansas, Iowa, and Illinois. Since 2005, the Interstate Crosscheck has steadily grown in numbers and out from its Midwest roots to include states from around the country. Kentucky and Tennessee both states neighboring Virginia, have also participated in the Crosscheck. In the 2013 Crosscheck a total of 21 states participated in the program sharing over 84 million voter registration records. Twenty-eight states are currently scheduled to participate in the January 2014 Crosscheck, including neighboring Kentucky, North Carolina, Tennessee, and recent addition West Virginia. Appendix B outlines the states that currently participate in Crosscheck.

Each January, participating states upload their data to a secure server. The data includes the participating states' entire list of registered voters, including fields for each voter's date of birth, last four digits of social security number (where allowed by law), current voter registration residence address, voter history from the most recent General Election, and applicable dates of registration activity. Kansas state election officials perform a match of this data and a report is provided to each state with a list of voters who are registered in more than one participating state with applicable dates of activity to identify whether someone was moving into or out of a particular state. States then work together to further research possible matches and potential instances of double-voting and take appropriate action based on their particular state laws. An analysis and statistics on Virginia's results from the 2013 Crosscheck are provided below.

ERIC and Crosscheck Comparison:

ERIC and Crosscheck share many similarities and both are valuable tools for Virginia to perform voter registration list maintenance. They are both programs where participating states share their voter registration and voter history data, upload that information to one database and compare participating states' data, match records, and report back to the states take action on that data. Both ERIC and Crosscheck use many of the same data fields including first, middle and last names, any name suffix, date of birth, registration address, locality of registration, registration status (active or inactive), last four digits of the social security number, date of registration, and voter history dates. However, ERIC uses additional information not included in Crosscheck including Department of Motor Vehicles data, a key difference between the two programs, and the Social Security Deceased Index (SSDI) for matching death records. In the future, ERIC will add additional data sources to its list comparison, including United State Postal Service National Change of Address (NCOA) information and other data.

Generally speaking, ERIC is designed to be a much more extensive and comprehensive program than Crosscheck. As part of the ERIC membership agreement, each member is required to perform mailings on a particular schedule and upload data and receive reports of matches on a regular basis, whereas the Crosscheck is performed only once each year in January.

Finally, ERIC has an additional purpose and obligation for member states. ERIC also produces reports of individuals that have moved from one member state to another and who have not registered to vote in the new state (nor in many instances cancelled their registration in their old state). ERIC produces this data via a comparison of states' DMV records and voter data. For example, an individual moves from Colorado to Virginia, visits a DMV in Virginia to obtain a Virginia Driver's License, does not register to vote in Virginia, and does not cancel their

registration in Colorado. The report to Virginia will show that an individual moved into the state, is eligible to register but did not do so. Member states then send a mailing to these individuals informing them of their potential eligibility to register to vote in Virginia. Colorado can then take steps to cancel the registration of the voter no longer residing in the state. Now that Virginia has online voter registration, the mailing will provide the individual a link to the online voter registration portal with instructions on how to apply to register online. (Previous to online voter registration, SBE or the local registrar would be required to also mail a paper application or the recipient would have to take steps to obtain and mail in a paper application him or herself.) Since Crosscheck does not process the DMV data, it is impossible to use Crosscheck data to identify potential eligible voters who have moved into Virginia but have not registered.

SBE is pleased that there are two options for participation in interstate voter registration programs. Each program has its strengths and weaknesses. The Crosscheck data is an extremely valuable tool for the future in that the program involves over half of the states in the U.S. for a total of over 110 million registration records matched. Tens of thousands of former residents are identified as registered and voting in another state. On the whole, SBE is more invested in the ERIC program and has allocated more of its technical resources, time, and energy into getting ERIC launched including recruiting other states for participation. Overall, ERIC is a higher priority for the agency than is Crosscheck. ERIC, with currently eight member states, has a corresponding smaller pool of records that is amplified with additional DMV and social security records inserted into the matching process. ERIC will provide data reports on a more regular and real-time basis and provides more refined data with established upload and download data guidelines.

Because of its more comprehensive approach and its setup as each state having an equal share in ownership, the costs for participating in ERIC are higher than Crosscheck. Crosscheck data-matching is done by Kansas election officials free of charge while ERIC member states are obligated to pay an entrance fee, annual membership dues, and the expenses incurred for the required mailings.

SBE's Efforts in Outreach to Neighboring States:

SBE was aggressive in recruiting Virginia's neighbors and other states into ERIC and Crosscheck even prior to passage of Delegate Rush's legislation directing SBE to engage in such efforts. SBE has focused its efforts in recruiting other states ERIC and to a lesser extent the Crosscheck program. This is more effective than working out ad hoc agreements state-by-state. SBE is pleased to announce that Virginia is now engaged in formal list sharing with all of Virginia's neighboring states. Below is a summary of each neighboring state and its status:

1. **District of Columbia (DC):** The District of Columbia participated in some of the early stages of ERIC development but later pulled out of the program shortly prior to ERIC's launch. In November of 2013, DC announced they would join ERIC effective January 1, 2014.

Following its departure from involvement in ERIC, SBE reestablished contact with the District of Columbia in the spring of 2013 about a one-on-one data-sharing agreement. SBE

conducted a test data match DC in May of 2013. SBE recently received an updated list from DC and has identified approximately 3,718 individuals registered in both Virginia and the District of Columbia. Due to the close proximity to the November 2013 General Election, SBE marked some of these records for a confirmation mailing rather than cancellation. Marking for confirmation required any of these voters who showed up to vote on Election Day to provide additional confirmation details and sign an Affirmation of Eligibility form before being able to cast a ballot. Additional research will now be performed on these records and SBE will provide the necessary information to the local general registrars to cancel the registrations of individuals who have moved from Virginia to the District of Columbia. Additional confirmation mailings will be performed for those records when it is unclear if the individual should still be registered in Virginia. However, DC's imminent participation in ERIC may result in SBE using the DC data received from ERIC to conduct list maintenance rather than the data received in the one-on-one data sharing agreement because the ERIC software and DMV data provided by DC will increase the accuracy of the matching process.

2. **Kentucky:** Kentucky participates in Crosscheck. SBE is unaware of any plans for Kentucky to participate in ERIC. SBE has discussed ERIC with Kentucky election officials at a National Association of State Election Directors (NASED) meeting and is unaware of any plans for Kentucky to participate. SBE plans on reaching out to Kentucky again about participating in ERIC in early 2014.
3. **Maryland:** Maryland was a charter member of ERIC and has participated in the program since its inception.
4. **North Carolina:** There have been several developments in North Carolina in recent months relating to the state's ability to share registration data with other states. Historically, North Carolina law was extremely restrictive in regards to sharing its voter registration activity with other states to the extent that it made participation in ERIC, Crosscheck, or even a one-on-one data sharing agreement impossible. However, legislation enacted during its 2013 legislative session opened up North Carolina's laws to participation in these efforts.

SBE learned in late November, 2013 that North Carolina will participate in the 2014 Interstate Crosscheck Program. Prior to learning of its participation in Crosscheck SBE was negotiating a one-on-one data sharing agreement with North Carolina. Now that North Carolina will participate in Crosscheck such an ad hoc agreement is unnecessary.

SBE believes there is a good chance that North Carolina will join ERIC in the near future. In August of 2013, North Carolina Governor Pat McCrory specifically referenced North Carolina's ability to join ERIC when signing into law the legislation opening up North Carolina to sharing data with Virginia and other states.¹¹

5. **Tennessee:** Similar to Kentucky, Tennessee participates in Crosscheck but SBE is unaware of any plans for Tennessee to participate in ERIC. SBE plans on reaching out to Tennessee about participating in ERIC.

¹¹ Governor Pat McCrory, "Why I signed the Voter ID/election reform bill." August 12, 2013; The News Observer; available at: <http://www.newsobserver.com/2013/08/12/3102124/gov-pat-mccrory-why-i-signed-the.html>

6. **West Virginia:** West Virginia was a participant in the early developmental stages of ERIC but, ultimately, the state had technical issues with its voter data and lack of legislative authority to share data that made participation in ERIC impossible. In the past year, SBE has reached out to the Director of Elections and Secretary of State on future participation in ERIC. West Virginia has recently enacted legislation that facilitates registration data sharing and SBE hopes they will be able to join ERIC in 2014. Shortly before submitting this report, SBE learned that West Virginia plans to participate in the 2014 Crosscheck. SBE had previously been in discussions with West Virginia about an ad hoc sharing data sharing agreement but their participation in Crosscheck makes such an agreement unnecessary.

It is impossible to predict what states will join ERIC and Crosscheck and when. However, SBE has been active in monitoring activity in other states, particularly Virginia's neighbors, as well as communicating with state election officials about the benefits of participating in these programs. Discussions with North Carolina and West Virginia have SBE hopeful that those states move toward participation in ERIC. As mentioned above, SBE's recruitment efforts have yielded success. The District of Columbia announced it will join ERIC effective January 1, 2014. SBE was aggressive in recruiting DC into ERIC and is pleased they are joining the partnership. SBE also plans on discussing ERIC participation further with Kentucky and Tennessee. In the meantime, SBE is pleased that every neighboring state is involved in either ERIC or Crosscheck.

While there is a strong likelihood that additional states will join ERIC and Crosscheck, various hurdles exist to participation in either program including state laws that restrict the sharing of voter registration, voter history, and Department of Motor Vehicles data with other states. In addition, a lack of financial resources, insufficient centralization of voter registration records, and initial refusal and reluctance from state DMVs to cooperate in sharing their data have also made expansion of ERIC and Crosscheck slower than SBE's preferences. ERIC, in particular, requires a significant investment of time and resources and with competing priorities many states have been slow to move towards participation.

Other List Maintenance Activities Identifying Moving Voters:

National Change of Address (NCOA):

Pursuant to state and federal law, SBE conducts an annual address match of Virginia registered voters against records in the United States Postal Service's (USPS) National Change of Address (NCOA) registry.¹² The NCOA database consists of information reporting change of address requests submitted by individuals to USPS when moving. USPS records the change of address requests and shares that information with commercial vendors for a variety of purposes.

SBE annually submits the entire list of registered voters to a vendor to determine if any voters have submitted a change of address with the USPS. Voters who have a standing change

¹² Code of Virginia § 24.2-428 and 42 USCS § 1973gg-6

of address with the USPS are then sent a confirmation mailing to the last known address asking the voter to verify their address or request cancellation of the voter's record. Voters are provided a postage prepaid envelope where the voter can respond confirming that his/her address did or did not change and requesting the general registrar to cancel his/her registration, if appropriate. Voters who do not respond to the notice within 30 days are moved to an inactive status. Those voters will then be removed from the rolls if they fail to vote over a period of two federal elections.

SBE conducted its most recent annual National Change of Address match between May and July 2013. Approximately, 287,733 voters were mailed a confirmation notice. As a result of this process, approximately 193,500 voters were moved from active to inactive status in August. As of December 26, 2013, registrars updated 138,516 records after voters who received the mailing returned the notice to the registrar confirming their residence address or providing a new registration address.

Following each federal election, SBE will cancel those individuals who have been on the inactive list without voting for a period of two federal elections. Following the 2012 General Election, SBE cancelled approximately 202,804 inactive records from the voter rolls.

Other Processes through the USPS System:

SBE engages in a similar confirmation process for official election mail sent to voters that USPS returns undeliverable. Over the past few years, state and local election officials have sent several statewide or near statewide mailings to voters. During the redistricting process, SBE mailed new voter registration cards to nearly every voter in the Commonwealth. Many voters received multiple cards depending on how many times their election districts or precincts changed.¹³ Similarly, SBE mailed new registration cards with educational information to all voters when implementing new photo ID requirements in fall of 2012. Statewide election mailings to voters had not occurred in several years and these mailings revealed the many voters who no longer resided at their registration address. The USPS returned tens of thousands of undeliverable voter cards mailed to individuals, indicating that the voter had moved, died, or otherwise no longer resided at the address on record.

After USPS returns that piece of mail back as undeliverable, SBE returns that mailer to the local general registrar who then "flags" those records for a confirmation mailing. Those records are then caught up in the annual NCOA mailing process described above which results in many of the voters being moved to inactive status and eventual removal from the voter rolls. At the local level, the general registrars use the same process for returned mail from more routine mailings made to their voters.

¹³ Redistricting for state, congressional, and local lines was done in several stages and resulted in the requirement that some voters received a new voter card multiple times during the process.

Summary of Data Matches from Summer of 2012 to Present:

ERIC Activities:

SBE coordinated with partner ERIC states throughout 2011 and 2012 to refine the data-sharing process and ensure that all data integrity issues were resolved prior to taking any official action on ERIC data. SBE received its first official ERIC data report in the late summer of 2012. This first data report contained a list of those individuals residing in Virginia who were unregistered but eligible to register to vote (Known as the “Eligibility Report.”). Virginia compared these records against the official list of prohibited voters, performed other integrity checks, and ultimately narrowed the list down to 1,322,306 individuals (living at 867,852 unique addresses). SBE then mailed these individuals a postcard that displayed information on how to register to vote with an extra note on the eligibility requirements for voting in Virginia. Approximately 62,667 of these individuals registered to vote by the registration deadline for the November 2012 General Election, with approximately 16,571 of these individuals registered to vote prior to receiving the mailing. It is likely that a very high percentage of the 46,096 remaining individuals registered in response to the ERIC mailing from SBE. In sum, approximately 7.2% of the households receiving the mailer registered to vote after receiving the notification before the November 2012 General Election registration deadline. A recent report by RTI International evaluated ERIC and found that the voter education mailings to identified non-registered voters had a positive impact on the overall registration process among participating states.¹⁴ The ERIC states increased their new-voter registration rates by 1.14 percentage points, compared with just 0.27 points in non-ERIC states.

SBE received additional data from ERIC in late summer and fall of 2013. Review and processing of the reports is currently underway. These reports have the following information:

1. In-State Updates: This reports on records where DMV has a more up to date record of an individual than does SBE. Information that may differ includes: Residential address, mailing address, phone, or email.
2. In-State Duplicates: This report shows potentially duplicate voter records within Virginia.
3. Cross-State Matches: This report shows matches of Virginia voters to voters or DMV records in other states
4. Possibly Deceased: The Social Security Death Master (SSDM) file records are included in the data-comparison.
5. Eligible but Unregistered: This report shows DMV records where a match was not made to a voter record indicating a potentially eligible voter has moved into Virginia and not registered to vote.

While SBE has not taken official action on the additional data due to its arrival immediately prior to the November 2013 General Election, SBE will do so in early 2014. Preliminary and unofficial results from this data are included below in Table 1 (based on an 80% confidence match or higher).

¹⁴ Report available at: <http://www.pewstates.org/research/analysis/data-show-improvements-in-election-administration-in-states-using-eric-85899526497>.

Table 1: Preliminary ERIC Data		
In-State Update Matches:	78,386	Individuals who have moved from one address to Virginia to another in Virginia and have not updated their registration address.
In-State Duplicates:	640	Potential duplicate registrations within Virginia.
Possibly Deceased:	646	Potential registrations of deceased within Virginia.
Cross-State Matches		
		Preliminary data with number of voters registered in Virginia and the following states.
Colorado	3,049	
Delaware	1,058	
Maryland	14,014	
Nevada	925	
Oregon	826	
Utah	333	
Washington	2,739	
Total State Matches:	22,944	

Summary of 2013 Crosscheck Activities:

Twenty-two states participated in the 2013 Crosscheck matching program. Approximately 84,877,703 records were compared among participating states. Following the matching process in early 2013, Virginia received approximately 308,579 potential duplicate registration records from the other 21 participating states. Following receipt of the data, SBE was tasked with performing additional quality checks and going state-by-state to identify potential peculiarities that may impact SBE and the general registrars' ability to act on the records.

Ultimately, SBE was able to identify approximately 80,000 records with an extremely high probability of an exact match of an individual's registration in multiple states. These 80,000 records exactly matched a record in another state (or in some instances records in multiple states) with the same first and last names, date of birth, and last four digits of a social security number. Of those matches, general registrars removed approximately 23,222 from the list of registered voters in Virginia through normal cancellation procedures in between when Virginia received the Crosscheck data, processed the data, and provided it to the localities. These cancellations could have happened through a variety of processes, including:

1. A direct notification from a local registration official in another state to a registrar in Virginia that the individual had registered in their jurisdiction and should be removed;
2. The voter him/herself writing the Virginia registrar with a request to cancel;
3. The NCOA mailing process that is described above, or another scenario.

SBE then provided a list of the remaining 57,293 registered voters to the general registrars with instructions to review the list and take action based on the information available to them from the data report. Approximately 30,251 of the registered voters identified in the report were already inactive voters on the list of registered voters in Virginia, meaning the general registrar already scheduled them for cancellation if they failed to vote in two consecutive

federal elections. By Election Day, the general registrars had removed approximately 38,870 of the total records from the list of registered voters. As of December 26, 2013, registrars had cancelled a total of 41,637 registrations.

SBE's steps for quality control for verifying the data matches were extensive and are the primary reasons why only 57,000 of the 308,579 were identified for possible cancellation. The first step in this vetting process was to forgo taking action on records from states that failed to provide social security number data. These states included Florida, Michigan, Missouri, and South Dakota and represented over one-quarter of all records. The lack of social security number data took out one important identifier in the matching process. Second, SBE performed additional analysis on the remaining records, reviewing for additional voter registration or voter history activity date in Virginia *after* activity in another state, an indication that the registered voter still resided in Virginia (or moved back to Virginia after leaving), despite their registration in another state. Of note, the Crosscheck data enabled SBE to identify two voters registered in seven different states, ten voters registered in six different states, 113 voters registered in five different states, 1,123 voters registered in four different states and 16,361 voters registered in three different states. A summary of the records cancelled by state is provided below in Table 2.

Work on the remaining records will now resume in the wake of the 2013 General Election and subsequent Attorney General Election Recount. In addition, SBE will continue its review of the additional records not identified for cancellation to determine what steps are appropriate. SBE's approach was to first take out the "low-hanging fruit" and then move on to the records that required further research and potential follow-up with individual states. This process will take place in early 2014. In the meantime, SBE continues to refine and develop additional procedures and policies for local election officials to utilize when taking action on this data.

State	Number of Voters Cancelled
Alaska	554
Arizona	4,350
Arkansas	679
Colorado	3,683
Illinois	4,034
Iowa	377
Kansas	930
Kentucky	3,407
Louisiana	1,681
Mississippi	895
Nebraska	85
Ohio	5,501
Oklahoma	681
Oregon	520
South Carolina	9,520
Tennessee	4,740
Total:	41,637

Summary of Other List Maintenance Processes:

Deceased Voters:

Annual Death Verification Check – In August of 2013, SBE submitted the entire list of registered voters to a vendor with expertise in processing death records to determine if any individuals on the list of registered voters had become deceased and one of our other death record sources had not identified. The verification resulted in SBE providing a list of 2,981 voters who needed to be reviewed further to determine if they should remain registered to vote or not.

National Technical Information Service (NTIS) – SBE receives a monthly update to the master Death Index from the Social Security Administration. SBE processes this file and the records of those voters who are matched to this file are provided to the general registrars on a monthly basis for them to make a registration decision.

Virginia Department of Health (VDH) – SBE receives a monthly file from the Bureau of Vital Statistics listing all of the deaths in the Commonwealth. SBE processes this file and the records of those voters who are matched to this file are provided to the general registrars on a monthly basis for them to make a registration decision.

Ineligible Felon and Mentally Incapacitated Data:

Virginia State Police – SBE receives a monthly file from the Virginia State Police listing all of the felony convictions in the Commonwealth for the previous month. SBE processes this file and the records of those voters who are matched to this file are provided to the general registrars on a monthly basis for them to make a registration decision. In addition, these individuals are added to our prohibited voter list so that they cannot register to vote in the future. Additionally, SBE received the entire list of felony convictions for the previous year from the VSP in August 2013. This list included over 18 million records. SBE identified 789 voter records and provided the information to the general registrars for them to make a registration decision.

Courts – SBE receives paper reports by electronic mail from federal and Virginia state courts notifying SBE of felony convictions. SBE adds these records to our prohibited list manually as they are provided. SBE provides any matches to currently registered voters to appropriate general registrar so that the registrar can make a registration decision. The Circuit Court clerks also provide SBE paper reports of those adjudicated mentally incapacitated. Those records are also added to the prohibited list and sent to the general registrars for processing.

Non-Citizen Data:

DMV Non-Citizens – SBE receives a monthly file from the Department of Motor Vehicles listing all individuals who indicated to DMV that they were not a citizen. SBE processes this file and provides the records of those voters who are matched to this file to the general registrars on a monthly basis for them to make a registration decision. In addition, SBE adds these individuals to the prohibited voter list so that they cannot register to vote in the future.

Social Security Number Audit – SBE received information from the August 2013 death verification check that the Social Security Numbers of 5,100 voters were potentially incorrect. SBE provided this information to the general registrars so that they could review the original source documentation for keystroke errors, review other records available to them for verification, or contact the voter for final verification of the accuracy of the provided Social Security Number.

Conclusion:

The State Board of Elections (SBE) thanks the members of the Privileges and Elections Committees for the opportunity to provide this report. Virginia is a leader in developing and participating in interstate partnerships for sharing voter registration data. There are many tools available to ensure that Virginia’s voter rolls only contain eligible voters and that official state election officials can reach unregistered but eligible individuals. SBE spearheaded participation in ERIC and will now be participating in Crosscheck for the second time—one of only two states to have participated in both programs. SBE’s recruitment efforts have yielded success with now every state neighboring Virginia slated to participate in either ERIC or Crosscheck. As demonstrated by the data reports referenced above from both Crosscheck and ERIC—these programs are yielding important dividends in Virginia’s list maintenance efforts. As more states sign up for participation in these interstate programs, Virginia will continue to increase its efforts to identify and remove all existing “deadwood” on its rolls and to keep the rolls accurate moving forward.

Contact Information:

Please do not hesitate to contact SBE with any questions or comments about this report. We welcome your advice and suggestions.

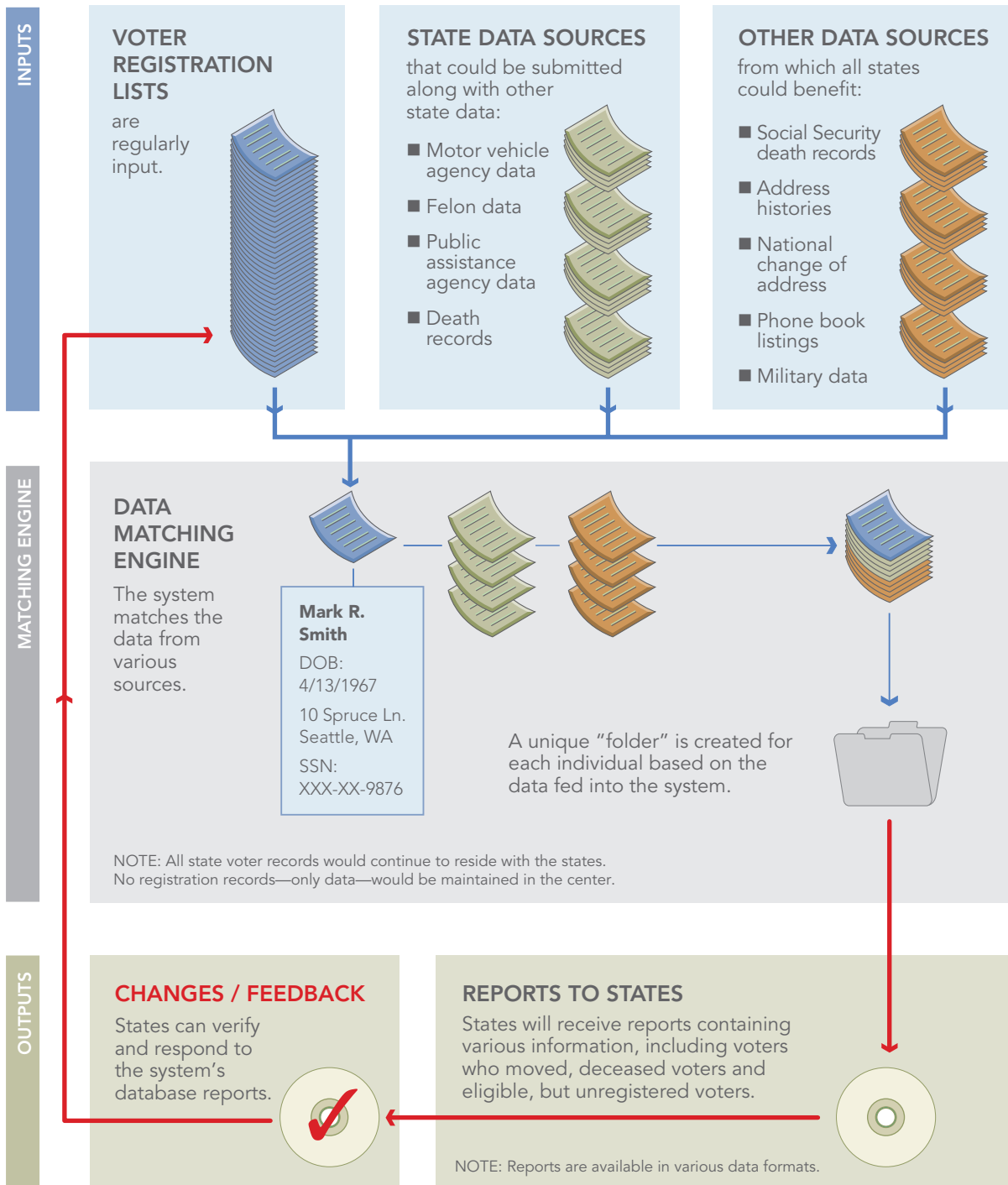
Donald Palmer, Secretary
State Board of Elections
Email: Don.Palmer@SBE.Virginia.gov
Phone: 804-864-8903

Matthew Davis, Information Services Manager
State Board of Elections
Email: Matthew.Davis@SBE.Virginia.gov
Phone: 804-864-8906

Exhibit 2

How a Data Center Would Work

The system would have three main parts: **inputs** of data on eligible voters; a **matching engine**; and a system of **outputs** that would provide participating states with up-to-date information about their eligible voters.



SOURCE: Pew Center on the States, 2010.

Note: Reprinted from the Pew Center on the State's "Upgrading Democracy" report from November, 2010.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

BARBARA LEE, *et al.*,

Plaintiff,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

Case No. 3:15CV357 HEH

**OBJECTIONS TO SUBPOENA OF RICHARD D. HOLCOMB, COMMISSIONER,
VIRIGIA DEPARTMENT OF MOTOR VEHICLES TO PRODUCE
DOCUMENTS, INFORMATION, OR OBJECTS**

Pursuant to Federal Rule of Civil Procedure 45 and Local Rule 45, Richard D. Holcomb, in his capacity as Commissioner of the Virginia Department of Motor Vehicles (“DMV”), hereby respectfully submits the following objections on behalf of the DMV to the subpoena propounded by Plaintiffs Barbara H. Lee, Gonzalo J. Aida Brescia and the Democratic Party of Virginia (“Plaintiffs”):

GENERAL OBJECTIONS

The DMV makes the following general objections, whether or not separately set forth in response to each definition, instruction, and request for production in Plaintiffs' subpoena. The insertion of specific objections in the response to any individual request for production shall not be construed as a waiver of such objection in any other response. These general objections are continuing in nature. The DMV reserves the right to supplement, amend or otherwise alter these objections in the future and to object to any further discovery.

1. The DMV objects to all definitions, instructions, and requests to the extent that they call for production of documents and/or information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, and/or any other applicable privilege or immunity. *See* Fed. R. Civ. P. 26(b)(1) and 26(b)(5). Subject to and without waiver of the DMV's objections, any inadvertent production of any document that contains privileged information, was prepared in anticipation of litigation or for trial, or that is otherwise immune from discovery, shall not constitute a waiver of any privilege or any ground for objection to discovery with respect to such document, or the subject matter thereof, or of the right of the DMV to object to the use of any such document or information during any subsequent proceeding, hearing, or trial.

2. The DMV objects to all definitions, instructions, and requests to the extent that they seek to require the DMV to produce document and/or other than that which may be obtained through a reasonably diligent search of their records. *Quality Aero Tech, Inc. v. Telemetrie Elektronik GmbH*, 211 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for "all documents" when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce).

3. The DMV objects to all definitions, instructions and requests to the extent that they, in whole or in part, are overbroad, unduly burdensome, oppressive, vague, ambiguous, non-specific, and to the extent they seek information that is neither relevant to a claim or defense of a party nor reasonably calculated to lead to the discovery of admissible evidence.

4. The DMV objects to all definitions, instructions and requests to the extent that they purport to impose obligations that exceed the permissible scope of discovery as set forth in the Federal Rules of Civil Procedure, the Local Rules of the Eastern District of Virginia, or any other applicable law or rules. On that basis, the requests seek information which is irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence in this action.

5. The DMV objects to all definitions, instructions and requests to the extent they seek information that is: (a) not in the DMV's possession, custody, or control as those terms are defined in the Federal Rules of Civil Procedure; (b) in the possession, custody, or control of Plaintiffs; (c) publicly available; or (d) equally available and/or as readily accessible to Plaintiffs as to the DMV. Subject to and without waiver of the DMV's objections, to the extent that the requests seek information in the custody or control of persons and/or entities other than the DMV, any response to the requests will be made only on behalf of The DMV.

6. The DMV objects to all definitions, instructions and requests to the extent that they seek production of documents in the possession, custody, or control of other governmental agencies not named in the subpoena.

7. The DMV objects to all definitions, instructions and requests to the extent they seek information the discovery of which is cumulative or duplicative, or is obtainable from some other more convenient, less burdensome, or less expensive source.

8. The DMV objects to all definitions, instructions and requests to the extent they purport to seek “all” information on a particular subject, or the production of “all documents relating to” a particular subject. All such definitions, instructions and requests are vague and ambiguous, overly broad, burdensome, and harassing. Subject to and without waiver of each objection stated herein, and further subject to agreement as to reasonable limitations on the scope and breadth of the requests, the DMV will respond to such requests based upon a reasonable search and diligent inquiry for responsive, non-privileged information and documents.

9. The DMV objects to all definitions, instructions and requests to the extent that they seek production of documents requested from and/ or produced by Defendants in the instant litigation.

10. The DMV objects to all definitions, instructions and requests to the extent that they seek production of documents and/or information that are prohibited from disclosure pursuant to agreements with third parties.

11. The DMV objects to all definitions, instructions and requests to the extent they seek the disclosure of information, including addresses and dates of birth, that would violate the privacy interests of third parties. The DMV will withhold this information until a Protective Order that safeguards this personal information has been entered.

12. The DMV objects to all definitions, instructions and requests to the extent that they seek disclosure of social security numbers and drivers’ license numbers on the ground that the DMV is prohibited by law from disclosing that information.

13. The DMV objects to all definitions, instructions and requests to the extent that they call for legal conclusions.

14. The DMV's responses, if any, to each request will be made without waiver of and will intentionally preserve: (a) all questions as to the competence, relevance, materiality, and admissibility as evidence for any purpose of the information or documents, or the subject matter thereof, in any aspect of this or any other court action or judicial or administrative proceeding or investigation; (b) the right to object on any ground to the use of any such information or documents, or the subject matter thereof, in any aspect of this or any other court action or judicial or administrative proceeding or investigation; (c) the right to object at any time to any further response to this or any other request for information or production of documents including all objections as to undue burden, vagueness, overbreadth, and ambiguity; and (d) the right at any time to supplement their responses.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. The DMV objects to the definition of "any and all" to the extent it seeks to impose duties or obligations differing from or exceeding those set forth in Federal Rules of Civil Procedure 26 and 45 or the Local Rules of the Eastern District of Virginia, thus rendering the interrogatories overbroad, unduly burdensome, and neither relevant to a claim or defense of a party nor reasonably calculated to lead to the discovery of admissible evidence.

2. The DMV objects to the definitions of "relating to," "regarding," or "concerning" to the extent they seek to impose duties or obligations differing from or exceeding those set forth in Federal Rules of Civil Procedure 26 and 45 or the Local Rules of the Eastern District of Virginia, thus rendering the requests overbroad, unduly burdensome, and neither relevant to a claim or defense of a party nor reasonably calculated to lead to the discovery of admissible evidence.

3. The DMV objects to the definition of “communication” to the extent it seeks to impose duties or obligations differing from or exceeding those set forth in Federal Rules of Civil Procedure 26 and 45 or the Local Rules of the Eastern District of Virginia, thus rendering the requests overbroad, unduly burdensome, and neither relevant to a claim or defense of a party nor reasonably calculated to lead to the discovery of admissible evidence.

4. The DMV objects to the definition of “person” to the extent it seeks to impose duties or obligations differing from or exceeding those set forth in Federal Rules of Civil Procedure 26 and 45 or the Local Rules of the Eastern District of Virginia, thus rendering the requests overbroad, unduly burdensome, and neither relevant to a claim or defense of a party nor reasonably calculated to lead to the discovery of admissible evidence.

5. The DMV objects to the definition of “You” and “Your” because they are overbroad and require discovery into documents and/or information that is not within the DMV’s possession, custody, or control. To that extent, the definitions are overbroad, unduly burdensome, and seek information that is neither relevant to a claim or defense of a party nor reasonably calculated to lead to the discovery of admissible evidence.

6. The DMV objects to instructions 1 and 7 to the extent that they seek documents and/or information that are not within the possession, custody, or control of the DMV.

7. The DMV objects to instruction 2 to the extent it seeks to impose duties or obligations in organizing the production that differ from or exceed those set forth in Federal Rules of Civil Procedure 26 and 45, or the Local Rules of the Eastern District of Virginia, thus rendering the requests unduly burdensome.

8. The DMV objects to instructions 3 and 4 to the extent they seek to impose duties or obligations for producing electronically stored information that differ from or exceed those

set forth in Federal Rules of Civil Procedure 26 and 45, or the Local Rules of the Eastern District of Virginia, thus rendering the requests unduly burdensome.

9. The DMV objects to instructions 5 and 6 to the extent they seek to impose duties or obligations in responding to the requests that differ from or exceed those set forth in Federal Rules of Civil Procedure 26 and 45, or the Local Rules of the Eastern District of Virginia, thus rendering the requests unduly burdensome.

10. The DMV objects to instruction 8 to the extent it seeks documents and/or information from more than four years before the legislation at issue was enacted, and thus encompasses information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

OBJECTIONS TO DOCUMENT PRODUCTION TOPICS

DOCUMENT PRODUCTION TOPIC NO. 1:

All studies, reports, statistics, and analyses, and the data underlying such studies, reports, statistics, analyses, conducted from January 1, 2008 through the date of this request to determine the number of registered voters, both active and inactive, who do not have a Virginia DMV record. This request includes, without limitation, all documents that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, partisan affiliation and the expiration date of any form of photo identification issued by the DMV.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 1:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms “reasonable person” and “identification issued by the DMV” which are not

defined. The DMV further objects on the grounds that the request seeks documents and/or information from more than four years before the legislation at issue was enacted. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks “the data underlying” any “studies, reports, statistics, and analyses” without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for “all documents” when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court’s deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 2:

A complete, current copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver’s license number, social security number, type of identification, expiration date of identification as well as any other individual level information

maintained in that list. This request also includes a list of those people who have applied for identification issued by the DMV and are currently being processed.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 2:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms “reasonable person,” “maintained,” and “identification issued by the DMV” which are not defined. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks “all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver’s license number, social security number as well as any other individual level information maintained in that list” without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for “all documents” when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers’ license numbers on the ground that the DMV is prohibited by law from disclosing that information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly

burdensome and time consuming to collect and produce within the Court's deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 3:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2008. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 3:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms "reasonable person," "maintained," and "identification issued by the DMV" which are not defined. The DMV further objects on the grounds that the request seeks documents and/or information from more than four years before the legislation at issue was enacted. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks "all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list" without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for "all documents" when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the

producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers’ license numbers on the ground that the DMV is prohibited by law from disclosing that information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court’s deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 4:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2009. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver’s license number, social security number as well as any other individual level information maintained in that list.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 4:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms “reasonable person,” “maintained,” and “identification issued by the DMV”

which are not defined. The DMV further objects on the grounds that the request seeks documents and/or information from more than three years before the legislation at issue was enacted. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks “all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver’s license number, social security number as well as any other individual level information maintained in that list” without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for “all documents” when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers’ license numbers on the ground that the DMV is prohibited by law from disclosing that information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court’s deadlines. *See Fed. R. Civ. P. 34(b)(1)(b).*

The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 5:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2010. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 5:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms "reasonable person," "maintained," and "identification issued by the DMV" which are not defined. The DMV further objects on the grounds that the request seeks documents and/or information from more than two years before the legislation at issue was enacted. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks "all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list" without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for "all documents" when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007)

(Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers’ license numbers on the ground that the DMV is prohibited by law from disclosing that information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court’s deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 6:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2011. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver’s license number, social security number as well as any other individual level information maintained in that list.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 6:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms “reasonable person,” “maintained,” and “identification issued by the DMV” which are not defined. The DMV further objects on the grounds that the request seeks documents and/or information from more than one year before the legislation at issue was

enacted. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks “all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver’s license number, social security number as well as any other individual level information maintained in that list” without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for “all documents” when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers’ license numbers on the ground that the DMV is prohibited by law from disclosing that information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court’s deadlines. *See Fed. R. Civ. P. 34(b)(1)(b)*. The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 7:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2012. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 7:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms "reasonable person," "maintained," and "identification issued by the DMV" which are not defined. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks "all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list" without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for "all documents" when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request "may be overly broad on its face if it uses an omnibus term such as 'relating to,' 'pertaining to,' or 'concerning.'"). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a

Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers' license numbers on the ground that the DMV is prohibited by law from disclosing that information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court's deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 8:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2013. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 8:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms "reasonable person," "maintained," and "identification issued by the DMV" which are not defined. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks "all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list"

without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for “all documents” when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers’ license numbers on the ground that the DMV is prohibited by law from disclosing that information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court’s deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 9:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2014. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender,

eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 9:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms "reasonable person," "maintained," and "identification issued by the DMV" which are not defined. The DMV further objects on the grounds that the request seeks documents and/or information from more than four years before the legislation at issue was enacted. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks "all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list" without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for "all documents" when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request "may be overly broad on its face if it uses an omnibus term such as 'relating to,' 'pertaining to,' or 'concerning.'"). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent that it seeks disclosure of social security numbers and drivers' license numbers on the ground that the DMV is prohibited by law from disclosing that

information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court's deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DOCUMENT PRODUCTION TOPIC NO. 10:

A complete list of all people who applied for a form of identification issued by the DMV from January 1, 2008 through the date of this request and whose application was denied. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by age, race, ethnicity, gender, and/or partisan affiliation, address, date of application, and reason for rejection.

OBJECTION TO DOCUMENT PRODUCTION TOPIC NO. 10:

The DMV objects to this request on the grounds that it is vague and ambiguous including its use of the terms "reasonable person," "maintained," and "identification issued by the DMV" which are not defined. The DMV further objects on the grounds that the request seeks documents and/or information from more than four years before the legislation at issue was enacted. The DMV also objects on the grounds that the request is overbroad and unduly burdensome because it seeks "all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list" without reasonable limitation. *Quality Aero Tech., Inc. v. Telemtrie Elektronik GmbH*, 212 F.R.D. 313, 317 (E.D.N.C. 2002) (Denying discover request for "all documents" when the request sought potentially voluminous materials without setting forth any restrictions or parameters for the

producing party to follow in determining what information to produce); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2007 U.S. Dist. Lexis 38754, at *30 (D. Kan. May 25, 2007) (Holding that a discovery request “may be overly broad on its face if it uses an omnibus term such as ‘relating to,’ ‘pertaining to,’ or ‘concerning.’”). The DMV also objects to this request to the extent that it seeks the disclosure of information that would violate the privacy interests of third parties; the DMV will not produce document and/or information until a Protective Order has been entered that protects the disclosure of this personal information. The DMV further objects to this request to the extent it calls for documents and/or information that is not readily ascertainable and/or would be unduly burdensome and time consuming to collect and produce within the Court’s deadlines. *See* Fed. R. Civ. P. 34(b)(1)(b). The DMV further objects to this request to the extent that it seeks historical and demographic data, including, but not limited to, race and ethnicity, that the DMV does not maintain.

DATED: October 2, 2015

Respectfully submitted,

/s/ Dana J. Finberg
DANA J. FINBERG
Arent Fox LLP
55 Second Street, 21st Floor
San Francisco, CA 94105
Tel: (415) 757-5500.
Fax: (415) 757-5501
dana.finberg@arentfox.com

MARK F. (THOR) HEARNE, II
Arent Fox LLP
112 S. Hanley Road, Suite 200
Clayton, MO 63105
Tel: (314) 296-4000
Fax: (202) 857-6395
thornet@ix.netcom.com

STEPHEN G. LARSON
Arent Fox LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013
Tel: (213) 629-7400
Fax: (213) 629-7401
stephen.larson@arentfox.com

Counsel for the DMV

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the Court's CM/ECF system

on **October 2, 2015**, to the following:

Aria C. Branch

Marc E. Elias

Bruce V. Spiva

Elisabeth C. Frost

Amanda R. Callais

Ceridwen B. Cherry

PERKINS COIE LLP

700 Thirteenth Street, N.W., Suite 600

Washington, DC 20005-3960

Telephone: 202-654-6200

Email: abran@perkinscoie.com; melias@perkinscoie.com; BSpiva@perkinscoie.com;
EFrost@perkinscoie.com; ACallais@perkinscoie.com; CCherry@perkinscoie.com

Joshua L. Kaul

PERKINS COIE LLP

1 East Main Street, Suite 201

Madison, WI 53703-5118

Telephone: 608-294-4007

Email: JKaul@perkinscoie.com

/s/ Dana J. Finberg
DANA J. FINBERG
Arent Fox LLP

Counsel for the DMV

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

BARBARA LEE, *et al.*,

Plaintiff,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

Case No. 3:15CV357 HEH

**RESPONSE TO SUBPOENA OF RICHARD D. HOLCOMB, COMMISSIONER,
VIRIGIA DEPARTMENT OF MOTOR VEHICLES TO PRODUCE
DOCUMENTS, INFORMATION, OR OBJECTS**

Pursuant to Federal Rule of Civil Procedure 45 and Local Rule 45, Richard D. Holcomb, in his capacity as Commissioner of the Virginia Department of Motor Vehicles (“DMV”) and subject to the General and Specific Objections previously served, hereby respectfully submits the following response on behalf of the DMV to the subpoena propounded by Plaintiffs Barbara H. Lee, Gonzalo J. Aida Brescia and the Democratic Party of Virginia (“Plaintiffs”):

RESPONSES TO DOCUMENT PRODUCTION TOPICS

DOCUMENT PRODUCTION TOPIC NO. 1:

All studies, reports, statistics, and analyses, and the data underlying such studies, reports, statistics, analyses, conducted from January 1, 2008 through the date of this request to determine the number of registered voters, both active and inactive, who do not have a Virginia DMV record. This request includes, without limitation, all documents that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, partisan affiliation and the expiration date of any form of photo identification issued by the DMV.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 1:

Subject to and without waiving the DMV's Specific and General Objections, the DMV responds that the DMV does not maintain the information requested.

DOCUMENT PRODUCTION TOPIC NO. 2:

A complete, current copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number, type of identification, expiration date of identification as well as any other individual level information maintained in that list. This request also includes a list of those people who have applied for identification issued by the DMV and are currently being processed.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 2:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the

extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV, including, but not limited to, information regarding race, ethnicity, and partisan affiliation. Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 3:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2008. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 3:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV, including, but not limited to, information regarding race, ethnicity, and partisan affiliation. Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 4:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2009. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 4:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV, including, but not limited to, information regarding race, ethnicity, and partisan affiliation. Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 5:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2010. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 5:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV, including, but not limited to, information regarding race, ethnicity, and partisan affiliation. Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 6:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2011. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 6:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV, including, but not limited to, information regarding race, ethnicity, and partisan affiliation.

Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 7:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2012. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 7:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV, including, but not limited to, information regarding race, ethnicity, and partisan affiliation. Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 8:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2013. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender,

eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 8:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV, including, but not limited to, information regarding race, ethnicity, and partisan affiliation. Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 9:

A complete copy of a list of all persons who have applied for and/or received a form of identification issued by the DMV as of January 1, 2014. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by name, date of birth, race, ethnicity, gender, eye color, partisan affiliation, address, driver's license number, social security number as well as any other individual level information maintained in that list.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 9:

Subject to and without waiving the DMV's Specific and General Objections, the DMV will produce responsive, non-privileged documents sufficient to respond to this request, to the extent such documents exist, are within the DMV's possession, custody, or control, and are located after a reasonable search of the location or locations where responsive documents are likely to be located. Some of the information requested is not maintained by the DMV,

including, but not limited to, information regarding race, ethnicity, and partisan affiliation. Further, due to certain legal restrictions, including, but not limited, to Va. Code § 2.2-3808.1, the DMV will not produce information regarding social security and drivers' license numbers.

DOCUMENT PRODUCTION TOPIC NO. 10:

A complete list of all people who applied for a form of identification issued by the DMV from January 1, 2008 through the date of this request and whose application was denied. This request includes, without limitation, all documents and/or communications that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by age, race, ethnicity, gender, and/or partisan affiliation, address, date of application, and reason for rejection.

RESPONSE TO DOCUMENT PRODUCTION TOPIC NO. 10:

Subject to and without waiving the DMV's Specific and General Objections, the DMV responds that the DMV does not maintain the information requested.

DATED: October 9, 2015

Respectfully submitted,

/s/ Dana J. Finberg
DANA J. FINBERG
Arent Fox LLP
55 Second Street, 21st Floor
San Francisco, CA 94105
Tel: (415) 757-5500.
Fax: (415) 757-5501
dana.finberg@arentfox.com

MARK F. (THOR) HEARNE, II
Arent Fox LLP
112 S. Hanley Road, Suite 200
Clayton, MO 63105
Tel: (314) 296-4000
Fax: (202) 857-6395
thornet@ix.netcom.com

STEPHEN G. LARSON
Arent Fox LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013
Tel: (213) 629-7400
Fax: (213) 629-7401
stephen.larson@arentfox.com

Counsel for the DMV

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email on **October 9, 2015**, to

the following:

Aria C. Branch

Marc E. Elias

Bruce V. Spiva

Elisabeth C. Frost

Amanda R. Callais

Ceridwen B. Cherry

PERKINS COIE LLP

700 Thirteenth Street, N.W., Suite 600

Washington, DC 20005-3960

Telephone: 202-654-6200

Email: abran@perkinscoie.com; melias@perkinscoie.com; BSpiva@perkinscoie.com;
EFrost@perkinscoie.com; ACallais@perkinscoie.com; CCherry@perkinscoie.com

Joshua L. Kaul

PERKINS COIE LLP

1 East Main Street, Suite 201

Madison, WI 53703-5118

Telephone: 608-294-4007

Email: JKaul@perkinscoie.com

/s/ Dana J. Finberg
DANA J. FINBERG
Arent Fox LLP

Counsel for the DMV

Exhibit D

Branch, Aria C. (Perkins Coie)

From: Schneider, Sara T. <Sara.Schneider@arentfox.com>
Sent: Monday, April 04, 2016 1:14 PM
To: Spiva, Bruce V. (Perkins Coie); Branch, Aria C. (Perkins Coie)
Cc: Finberg, Dana J.
Subject: DMV Subpoena Invoice
Attachments: img-X22111317-0001.pdf

Bruce and Aria,

The DMV had previously submitted the attached invoice. Virginia Code § 46.2-214 authorizes DMV to “make a reasonable charge for furnishing [the] information.” That “reasonable charge” is \$8 per individual record, unless there is a bulk request. For bulk requests, the DMV charges the significantly reduced rate of \$30.00 per 1,000 records produced. The breakdown below reflects this reduced bulk rate as well as programming, database and overhead costs incurred in producing the records responsive to Plaintiffs’ subpoena.

To ensure prompt payment, the DMV is willing to accept payment of 30,000 for its response to Plaintiffs’ subpoena. Please advise by the close of business Wednesday whether Plaintiffs are willing to accept this substantial compromise.

Best regards,
 Sara

Programming Cost =	75	Hours	* 36.68	\$	2,751.00
CPU / Database Cost				\$	15,000.00
		Subtotal:		\$	17,751.00
Management/OH	21.74%			\$	3,859.07
		Subtotal:		\$	21,610.07
\$30.00 per 1,000 records produced		43,472	*30	\$	1,304,160.00
		Total		\$	1,325,770.07

Sara T. Schneider
 Associate

Arent Fox LLP | Attorneys at Law
 55 2nd Street, 21st Floor
 San Francisco, CA 94105
 415.757.5911 DIRECT | 415.757.5501 FAX

sara.schneider@arentfox.com | www.arentfox.com

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**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

BARBARA H. LEE, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS,
et al.,

Defendants.

Civil Action No. 3:15-CV-357-HEH

**DECLARATION OF BRUCE V. SPIVA IN SUPPORT OF PLAINTIFFS' RESPONSE IN
OPPOSITION TO THE DMV'S MOTION FOR COSTS INCURRED RESPONDING TO
PLAINTIFFS' SUBPOENA**

I, Bruce V. Spiva, swear under penalty of perjury that the following is true and correct.

1. I am a partner with the law firm of Perkins Coie LLP in Washington, D.C. I am one of the attorneys representing the Plaintiffs in this matter.
2. Throughout this litigation, and indeed up until April 4, 2016, counsel for the DMV never indicated that it was specifically objecting to Plaintiffs' subpoena on the grounds of expense. Nor did counsel for the DMV ever indicate that the DMV would seek reimbursement for costs associated with responding to Plaintiffs' subpoena.
3. On November 29, 2015, Plaintiffs received an invoice dated October 22, 2015 from the Virginia Department of Motor Vehicles ("DMV") for \$1,325,780.07. The invoice total included what appeared to be a late fee in the amount of \$10.00. The invoice is attached as Exhibit A.
4. The October 22, 2015 invoice was the first invoice Plaintiffs had ever received from the DMV.
5. On December 7, 2015, I contacted Dana Finberg, counsel for Defendants and the DMV, by telephone regarding the October 22, 2015 invoice. Mr. Finberg indicated that the invoice had been generated automatically using the DMV's standard per record charge, and that it had been sent to Plaintiffs in error and should be disregarded. During our telephone conversation, Mr. Finberg did not indicate that the DMV would seek reimbursement of costs for a lesser amount than the fee charged in the October 22, 2015 invoice, or that the DMV would seek reimbursement at all.

6. In reliance on this conversation with Mr. Finberg, Plaintiffs disregarded the October 22, 2015 invoice.
7. Plaintiffs were first informed that the DMV was seeking reimbursement for costs associated with responding to Plaintiffs' subpoena on April 4, 2016.
8. On April 4, 2016, Plaintiffs received an email from counsel for the DMV containing an invoice for \$1,325,770.07 and informing Plaintiffs that the DMV would accept \$30,000 to satisfy the invoice.
9. If the DMV had objected to Plaintiffs' subpoena on the grounds of expense or provided notice to Plaintiffs that it intended to seek reimbursement of costs in the amount of \$30,000, then Plaintiffs would have offered to take steps to minimize the costs incurred by offering to use Plaintiffs' own resources or hiring a third party vendor to copy the database.
10. Upon receipt of the DMV database from the DMV, Plaintiffs' expert made an electronic copy of the database in two hours and 50 minutes.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief and that this declaration was executed on the 3rd day of June, 2016, in Washington, D.C.

DATED: June 3, 2016

/s/ Bruce V. Spiva
Bruce V. Spiva

EXHIBIT A



DEPARTMENT OF MOTOR VEHICLES
RECEIPTING CENTER

P.O. BOX 27412 RICHMOND, VA 23269-0001

THIS IS YOUR INVOICE. NO OTHER STATEMENT IS RENDERED.

MAKE CHECKS PAYABLE TO DMV

DMVV106 - 2

PERKINS COIE LLP
700 13TH ST NW, SUITE 600
WASHINGTON DC 20005

ACCOUNT NO: 100000000000
INVOICE DATE: 10/22/15
INVOICE DUE DATE: 11/21/15
INVOICE NUMBER: 15295950

30 DAY FOLLOW UP INVOICE

FOLLOW-UP DATE: 11/23/15

ADHOC COST FOR ANE344-15
BARBARA H. LEE, ET AL V. VIRGINIA STATE
BOARD OF ELECTIONS

1,325,770.07

ONE TIME ADMINISTRATION FEE ASSESSED
FOR INVOICES MORE THAN 30 DAYS PAST DUE

10.00

OUR RECORDS SHOW THAT YOUR ACCOUNT
IS PAST DUE. PLEASE MAKE PAYMENT
IMMEDIATELY OR DMV WILL BE FORCED
TO TERMINATE ALL SERVICES. IN
ADDITION, WE ARE AUTHORIZED BY LAW
TO REVOKE THE REGISTRATION OF ANY
VEHICLE SHOWN AS OWNED BY YOU UNTIL
PAYMENT IS MADE.
QUESTIONS? CALL (804) 367-6080
OR E-MAIL BILLING@DMV.VIRGINIA.GOV
FOR PAYMENTS GO TO DMVNOW.COM

CURRENT: \$ 0.00
1-30 PAST DUE: \$ 1,325,780.07
31-60 PAST DUE: \$ 0.00
OVER 60 PAST DUE: \$ 0.00
DUE THIS INVOICE: \$ 1,325,780.07
INTEREST: \$ 0.00
CREDIT AMOUNT: \$ 0.00

PERKINS COIE LLP

ACCOUNT NO: 100000000000
INVOICE DATE: 10/22/15
INVOICE DUE DATE: 11/21/15
INVOICE NO: 15295950

TOTAL DUE: \$ 1,325,780.07

AGENCY: 154

* * * RETURN THIS PORTION WITH YOUR PAYMENT * * *

General Information

Court	United States District Court for the Eastern District of Virginia; United States District Court for the Eastern District of Virginia
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	3:15-cv-00357
Status	Closed