NO. 03-17-00662-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AUSTIN, TEXAS

IN RE
ROLANDO PABLOS, SECRETARY OF STATE FOR THE STATE OF TEXAS, AND KEITH INGRAM, DIRECTOR, TEXAS ELECTIONS DIVISION OF THE SECRETARY OF STATE,
RELATORS,

Original Proceeding to Cause No. D-1-GN-17-003451
Pending in the 98th Judicial District Court,
Travis County, Texas,
Honorable Tim Sulak, Presiding

REAL PARTIES IN INTEREST'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Myrna Pérez, Esq.
Maximillian Feldman, Esq.
Brennan Center for Justice
120 Broadway, Suite 1750
New York, NY 10271
Phone (646) 292-8310
Fax (212) 463-7308
myrna.perez@nyu.edu
max.feldman@nyu.edu

Charles W. McGarry, Esq.
Law Office Of Charles McGarry
Texas Bar No. 13610650
701 Commerce Street, Suite 400
Dallas, Texas 75202
Phone (214) 748-0800
Fax (214) 748-9449
cmcgarry@ix.netcom.com

Attorneys for Real Parties in Interest

Additional counsel on inside cover

Michael A. Glick, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
Phone (202) 879-5000
Fax (202) 879-5200
michael.glick@kirkland.com

(Admitted pro hac vice)

Daniel T. Donovan, Esq.
Susan M. Davies, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
Phone (202) 879-5000
Fax (202) 879-5200
daniel.donovan@kirkland.com
susan.davies@kirkland.com

(Pro hac vice applications forthcoming)

Jeremy M. Feigenbaum, Esq.
J. Keith Kobylka, Esq.
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
Phone (212) 446-4800
Fax (212) 446-4900
jeremy.feigenbaum@kirkland.com
keith.kobylka@kirkland.com

(Admitted pro hac vice)

STATEMENT REGARDING ORAL ARGUMENT

Real parties in interest the League of Women Voters of Texas, Texas State Conference of the National Association for the Advancement of Colored People (NAACP), and Ruthann Geer do not believe oral argument is necessary because this Court's precedent forecloses each argument in the Petition for Writ of Mandamus. However, real parties in interest will of course participate in oral argument if it will aid the Court.

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TO THE HONORABLE THIRD COURT OF APPEALS:

Relators' Petition for Writ of Mandamus is based on a theory that has never been accepted by this Court or any other Texas court. The district court, Relators assert, was required to rule on their Plea to the Jurisdiction ("PTJ") within *two weeks* after Relators belatedly filed it. In fact, Relators began demanding a ruling from the district court just *three days* after filing that Plea. The district court, quite reasonably, declined to issue a ruling on the PTJ immediately. To be clear, the court did not deny

the PTJ. Nor did it categorically refuse to rule on the PTJ. Nor did it refuse to rule in the near future. The court simply explained that it was not yet ready to resolve the dispositive motion, and that it could resolve the PTJ as early as the following week or at another time. Rather than wait for the court to consider and rule on the PTJ, however, Relators rushed to this Court and demanded emergency relief.

The question at the heart of the case is thus whether the district court had to rule on Relators' late-in-the-day PTJ immediately. And because this case arrives on a petition for mandamus, the issue is really whether Relators have "a clear and indisputable right" to an immediate ruling that is "beyond dispute" as a matter of law. *In re Tharp*, 351 S.W.3d 598, 600 (Tex. App.—Austin 2011). The answer is obvious: Relators have not established such a clear right to relief.

This Court has never before taken issue with a decision not to resolve a motion after two weeks. That is unsurprising, because Relators' approach would impose a draconian and unrealistic burden on courts, demanding decisions on complicated and significant issues before judges can evaluate the proper course of action and write an opinion laying out their reasoning. District courts, experts at managing their heavy dockets, need time to weigh arguments, decide if discovery is warranted, and draft opinions. Especially if no emergency exists (as is the case here), judges should rely on their experience managing thousands of cases to decide when to rule. To allow district judges to do so, Relators' Petition must be denied.

STATEMENT OF FACTS

After Relator Secretary of State Rolando Pablos made clear that his office planned to turn over sensitive voter data to the Presidential Advisory Commission on Election Integrity (the "Commission"), the League of Women Voters of Texas, Texas State Conference of the National Association for the Advancement of Colored People (NAACP), and Ruthann Geer (collectively, "Plaintiffs"), filed a Petition for Declaratory Relief on July 20, 2017 (amended on September 20 and September 21, 2017). Rec. 1-79. In that petition, Plaintiffs explained that the voter data is not widely available in Texas, and instead can be released only under certain circumstances and conditions according to Texas's voting laws. Rec. 34-39, 50-54, 58-62; *see also* Tex. Elec. Code § 18.066; Tex. Gov't Code § 552.101. Individuals and entities seeking large-scale voter information can only access some data in Texas's computerized voter registration files, and even then only if they have met certain conditions, including executing a notarized affidavit stating that they will not use the data for certain purposes. Rec. 50-54. As Plaintiffs' petition set forth, the Commission cannot satisfy these requirements. Rec. 45-62.

On August 18, 2017, Relators filed an answer, providing a general denial of Plaintiffs' claims. Supp. Rec. 1-3. They did not, at that time, file a Plea to the Jurisdiction or assert any sovereign immunity defense.

The Commission formally requested the data from the State on September 13, 2017, and Relators intended to turn over that data within 15 business days. Rec. 76-79, 128. Plaintiffs applied for a temporary restraining order ("TRO") on September 20, 2017. Rec. 80-105. In connection with Plaintiffs' TRO application, Plaintiffs' cybersecurity and counterterrorism expert explained the significant data security risks—and the resulting risk of irreparable harm to Plaintiffs—posed by Relators' planned disclosure to the Commission. Supp. Rec. 4-19.

The district court scheduled a hearing on the TRO for September 29, 2017. Appx. A at 1-2. Three days prior to the hearing, on September 26, 2017, Relators filed their PTJ—their first time advancing a sovereign immunity defense in this case. Rec. 106-169. Plaintiffs filed a response two days later, on September 28, 2017, explaining that (1) Texas statutes expressly waive immunity for this claim, *see City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 139 (Tex. App.—El Paso 2016) (concluding that Section 273.081 sets forth a "private right of action" "to enforce the Texas Election Code through injunctive relief") (emphasis omitted); and (2) the *ultra vires* exception to sovereign immunity applies because Relators' actions went beyond their authority as a matter of Texas law, *see, e.g.*, *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945). Rec. 172-83.

On September 29, 2017, the district court held the planned hearing on the TRO application, and heard argument regarding the PTJ. Appx. A at 1-2. At the hearing,

the court made clear that it would rule on the TRO within a few days, given the emergency need to do so, but did not provide a date certain by which it would resolve the PTJ. Appx. A at 2; Appx. C at 9-11.

On October 3, 2017, the court issued a TRO, Appx. C at 10, prohibiting Relators from turning over enumerated categories of sensitive voter data. Rec. 184-87. In issuing the TRO, the court explained that unless Relators are "immediately restrained" from turning over data, they will do so, and "[t]he injury resulting from such acts will be irreparable." Rec. 185. The court explained that,

> [i]f the private information contained in the Texas Computerized Voter Registration List is transmitted without appropriate safeguards, it is likely to become public. The public disclosure of this information without appropriate checks on its use may cause a variety of harms not readily susceptible to monetary measurement, including but not limited to the violation of Plaintiffs' privacy rights, their interests in avoiding commercial solicitation, chilling of their First Amendment rights, and the diminution of their efforts to encourage voting.

Id.

A district court's TRO can last only for fourteen days, and Texas rules require that "[e]very restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought." Tex. R. Civ. P. 680. Consistent with those parameters, the court set a hearing on the Application for Temporary Injunction for October 16, 2017. Rec. 187. Relators demanded an immediate ruling on their PTJ before that hearing, even though Relators had only filed it on September 26. On October 4, 2017, Relators wrote to the court asking for a ruling on the PTJ.

Appx. C at 9-10. Plaintiffs told Relators that they would consent to a hearing addressing the issues raised by the PTJ during the week of October 30, 2017, Appx. D at 15, but Relators insisted on a ruling before the upcoming hearing.

Ultimately, the district court indicated that it was not yet ready to rule on the PTJ. On October 4, eight days after Relators had filed their PTJ, the staff attorney for the court informed the parties that "[t]he Court has declined to rule on the plea to the jurisdiction without prejudice to consideration of the same at the time of the temporary injunction hearing (or at another time)." Appx. C at 9.

On October 10, just two weeks after Relators filed their PTJ, Relators filed this Petition for Writ of Mandamus.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO RULE ON RELATORS' PTJ WITHIN TWO WEEKS.

It is hornbook law that mandamus is "an extraordinary remedy, available only in limited circumstances." *In re Moffitt*, No. 07-13-0041, 2013 WL 625727, *1 (Tex. App.—Amarillo Feb. 20, 2013, orig. proceeding) (per curiam). Relators bear the "burden of establishing an abuse of discretion and … this burden is a heavy one." *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003, orig. proceeding). "A clear abuse of discretion [only] occurs when an action is 'so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'" *Id.* (quoting *CSR Ltd. v. Link,* 925 S.W.2d 591, 596 (Tex. 1996)). So to obtain relief, Relators "must show a clear right

to the relief sought, meaning that the relief sought must be clear and indisputable such that its merits are beyond dispute with nothing left to the exercise of discretion or judgment." *In re Tasby*, 120 S.W.3d 443, 444 (Tex. App.—Texarkana 2003) (internal quotation marks omitted); *see also Tharp*, 351 S.W.3d at 600 (same).

Relators cannot meet their burden here. First, Relators have not identified any authority indicating that mandamus is proper when a court takes a dispositive motion under submission for two weeks. And while Relators asserted that this case uniquely warrants mandamus relief after two weeks, they offered no proof for that claim, and the facts undercut their position. Second, there is nothing about Travis County's centralized assignment system that requires judges to issue rulings within two weeks. Third, Relators' contention that the court was required to rule on the PTJ before granting the TRO and setting the temporary injunction hearing is baseless and runs afoul of this Court's precedent.

A. Relators Have Not Established That The District Court Refused or Failed To Rule Within A Reasonable Time.

To "obtain mandamus relief compelling a trial court to rule on a properly filed motion, a relator must establish that the trial court (1) had a legal duty to rule on the motion; (2) was asked to rule on the motion; and (3) either refused or failed to rule on the motion within a reasonable time." *In re Smith*, No. 03-13-00519, 2013 WL 5272847, *1 (Tex. App.—Austin 2013); *see also In re Chavez*, 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding) ("[T]he court has a reasonable time

within which to perform [its] duty."). As an initial matter, Relators' argument that the district court refused to rule on the PTJ is baseless. The district court merely delayed ruling on the PTJ until "the time of the temporary injunction hearing"—then set for October 16—"(or [] another time)." Appx. C at 9. Taking a matter under submission is simply not the same thing as refusing to rule.

Relators' position that a "reasonable time" passed in this case two weeks after they filed their PTJ is likewise unsupportable. While the parties agree that no bright line rule exists to determine whether a reasonable period has lapsed, Relators have not cited a single case in which a party sought and received mandamus after so little time between the filing of a motion (let alone a dispositive PTJ) and refusal to rule. Plaintiffs found none, in this or any other court of appeals.

To the contrary, Texas case law consistently comes out against Relators. *See In re Urtado*, No. 03-15-00710, 2015 WL 7694867, *2 (Tex. App.—Austin Nov. 24, 2015, orig. proceeding) (noting that "three months does not ordinarily constitute an unreasonable length of time for a motion to remain pending"); *In re Halley*, No. 03-15-00310, 2015 WL 4448831, *2 & n.12 (Tex. App.—Austin July 14, 2015, orig. proceeding) (explaining that "a longer period of time is usually required to elapse" to merit mandamus than "four months or six months," and collecting cases); *In re Moore*, No. 10-15-00452, 2016 WL 192280, *2 (Tex. App.—Waco Jan. 14, 2016, orig. proceeding) ("[Petitioner] allegedly brought this matter to the attention of the

Respondent trial court judge on December 20, 2015 and filed his petition for writ of mandamus on December 31, 2015. [Petitioner's motion] has not been pending for a reasonable time…."); *In re Moffitt*, 2013 WL 625727, at *1 (refusing to find failure to rule after "five to six months" unreasonable in that case); *In re Garrett*, No. 07-09-0336, 2009 WL 3849918, *2 (Tex. App.—Amarillo Nov. 18, 2009) ("[T]he motions have been pending before the trial court for four and half and four months, respectively. Ordinarily, such a delay will not be considered unreasonable."); *In re Blakeney*, 254 S.W.3d 659, 662-63 (Tex. App.—Texarkana 2008, orig. proceeding) (finding the five-month delay there not unreasonable); *In re Gonzales*, No. 07-06-0324, 2006 WL 2588696, *3 (Tex. App.—Amarillo Sept. 6, 2006, orig. proceeding) ("Appellant's motion for judicial notice has been pending in the trial court for three months. We decline to hold that period of time constitutes an unreasonable delay."); *In re Villarreal*, 96 S.W.3d 708, 711 (Tex. App.—Amarillo 2003, orig. proceeding) (refusing to "hold that the district court's failure to act within approximately five months [was] unreasonable delay *per se*"); *Ex Parte Bates*, 65 S.W.3d 133, 136 (Tex. App.—Amarillo 2003, orig. proceeding) ("[I]t may well be that the lapse of *extended* periods of time could alone be sufficient to establish the unreasonableness of a court's delay. However, we cannot say that [six months from filing and seven weeks from bringing motions to court's attention] fall within that realm.").

That all the relevant precedent undermines Relators is no surprise. District courts, rather than this Court, must make the tough calls about how best to manage their dockets. *See Chavez*, 62 S.W.3d at 229 ("[A] trial court has great discretion over its docket. And, while it cannot opt to forever avoid hearing a motion, no litigant is entitled to a hearing at whatever time he may choose."). Indeed, in evaluating this Petition, this Court must consider "the state of the court's docket, and the existence of other judicial and administrative matters which must be addressed first." *Id*. That includes "the number of other cases, motions, or issues pending on the trial court's docket, the number of cases, motions, or issues which have pended on its docket longer than that at bar, the number of cases, motions, or issues pending on its docket that lawfully may be entitled to preferential settings, or the trial court's schedule." *Id.* And Relators, seeking an extraordinary writ, have "the obligation to provide [this Court] with evidence of the foregoing indicia (or the like) against which [this Court] could test the reasonableness of the court's supposed delay." *Id.*; *see also Villarreal*, 96 S.W.3d at 711 ("[T]he party requesting mandamus relief has the burden to provide us with a record sufficient to establish his right to same.").

Relators have failed to meet their burden. In this case, as in *Chavez*, Relators supplied this Court with no evidence regarding the volume of pending motions in the lower court, how long they had been pending, or the court's schedule. *See* 62 S.W.3d at 229. That was dispositive in *Chavez*: "Without such evidence, any attempt

to assess whether [the] court acted unreasonably in failing to address the motion within the two months it has supposedly pended, would be mere folly." *Id.*; *see also Garrett*, 2009 WL 3849918, at *2 (denying relief where "no evidence of the state of the trial court's docket is provided, and there is no evidence of whether the trial court must afford other judicial or administrative duties priority," because "[i]t is the burden of the party requesting relief to provide a record sufficient to establish [its] entitlement to mandamus relief"). It should also be dispositive here.[1]

In any event, the evidence regarding the district court's docket undermines Relators' position. According to the Judiciary's statistical reports, there were 17,523 active civil cases in Travis County as of August 31, 2016 (and ten judges to handle them). *See* Office of Ct. Admin., *Dist. Cts.: Activity by Cnty. Summary* (Sept. 1, 2015 to Aug. 31, 2016), at 13, *available at* http://www.txcourts.gov/media/1436602/4-district-activity-summary-by-county.pdf. Two thirds of the civil cases resolved that year took over three months; forty percent took at least one year. *See* Office of Ct. Admin., *Dist. Cts.: Age of Cases Disposed* (Sept. 1, 2015 to Aug. 31, 2016), at 8,

[1] Relators believe it is enough that "the trial court did not indicate a basis for its refusal to rule and there is no evidence that it was due to the court's docket," and that there is also no evidence "that other matters in the case take preceden[ce] over threshold jurisdictional issues." Relators' Br. 13. Both responses miss the mark. As to the former, *Relators* bear the burden to show that the delay was particularly unreasonable and inappropriate, *see Chavez*, 62 S.W.3d at 229; it is not the job of the court to provide a detailed justification in light of its heavy docket. As to the latter, the question is whether there are issues in *any* pending case that would merit preferential treatment when the court manages its docket, not whether there are any in this case. In any event, issues of temporary relief *do* come before rulings on a PTJ when necessary to prevent mootness. *See* Part I.C, *infra*.

available at http://www.txcourts.gov/media/1436606/6-district-age-of-cases.pdf. No wonder the district court did not believe that it could resolve this entire litigation just two weeks after Relators filed their first dispositive motion.[2]

Against all this, Relators respond that this Court and the Supreme Court have said that jurisdictional questions "must be decided at the 'earliest opportunity' and 'as soon as practicable,'" which (they say) required a ruling on this PTJ within two weeks of its filing. Relators' Br. 13 (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004)); *see also* Relators' Br. 9 (same). But Relators take *Miranda*'s language out of context. That case turned on whether a court "was required to examine the evidence on which the parties relied" in resolving a PTJ—not whether a PTJ had to be decided immediately. *Miranda*, 133 S.W.3d at 221. In resolving *that* distinct issue, the Court wrote, "When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination

[2] While these reports do not supply average times for resolution of dispositive pending motions, they confirm that appeals from such rulings certainly take longer than two weeks to resolve. The average time between submission and disposition in the courts of appeals was 1.8 months, and the average time from from oral argument to disposition in the Supreme Court was 157 days. *See* Office of Ct. Admin., *Annual Statistical Rep. for the Tex. Judiciary: Fiscal Year 2016*, at E5, E12, available at http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf. It is baffling that Relators thought the district court was required to rule within two weeks (or even three days). These figures also undermine Relators' claims that because (in their view) the case turns upon a pure question of law, it can be resolved rapidly. *See* Relators' Br. 14-15. That issues are legal does not make them easy or straightforward. The Texas Supreme Court and this Court deal primarily in legal issues, but plainly need not resolve all their cases and publish opinions within two weeks.

should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable." *Id.* at 227.[3] In other words, the Court reiterated that management of a case is best left to a court's "discretion," and that district courts should simply be mindful to act before allowing "a fuller development of the case" (which this court has not yet allowed, beyond addressing emergency temporary relief). *Id.* Nothing in *Miranda* even hints at a need for a ruling within two weeks—or says anything about what time is "reasonable" or "practicable" to decide hotly contested sovereign immunity issues.

B. Relators Have Not Established That Mandamus Is Warranted Just Because This Case Arises Out Of Travis County.

Perhaps cognizant of the fact that they cannot show a "reasonable time" has passed in two weeks, Relators argue that they need not even meet that test. Instead, Relators say, "the trial court's overt refusal to rule on the [PTJ], by itself, justifies mandamus relief—regardless of the amount of time the motion [w]as pending—

[3] Here, in fact, Plaintiffs are entitled to jurisdictional discovery, particularly as it relates to the *ultra vires* exception to immunity. Relators' contrary arguments lack merit. First, Relators' argument that Plaintiffs do not need discovery because "[t]hey have had three months to seek jurisdictional discovery, but they cannot show that they have sent a single discovery request," Relators' Br. at 15 n.4, makes no sense because Relators did not raise any jurisdictional issue until September 26, 2017. Second, Relators cite an exchange between the parties' counsel to support the contention that a deposition of Relator Keith Ingram "would not involve any jurisdictional issues." Br. at 17. But, in context, it is clear that Relators' counsel asked whether a deposition of Mr. Ingram would be "wide-ranging" or "tailored to the TI issues." Appx. D, at 19. In response, Plaintiffs' counsel stated that the deposition would be appropriately tailored (that is, it would not be wide-ranging). The question of jurisdictional discovery simply was not at issue in this exchange.

because judges have a ministerial duty to decide matters assigned to their court." Relators' Br. 9; *see also* Br. 10 (same). This position is radical and untenable.

Relators' theory that mandamus is proper no matter how much time passes is foreclosed by an unbroken line of appellate decisions. As discussed above, to obtain relief, "a relator must establish that the trial court … either refused or failed to rule on the motion *within a reasonable time*." *Smith*, 2013 WL 5272847 at *1 (emphasis added); *see also, e.g., In re Sarkissian*, 243 S.W.3d 860, 861 (Tex. App.—Waco 2008, orig. proceeding); *Blakeney*, 254 S.W.3d at 661; *In re Hearn*, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding); *Villarreal*, 96 S.W.3d at 711; *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). Relators' theory, which reads the "reasonable time" requirement out of the case law, is plainly improper.

Relators respond that regardless of the proper rule for most of the State, their position is warranted for cases in Travis County. The basis of their claim is that Travis County, unlike most counties, "operates a central docketing system which randomly assigns matters to available district judges." Relators' Br. 10. As a result, Relators say, "the trial court's refusal to rule on the Plea means that it is violating its duty to decide assigned matters. Instead, it is improperly passing that duty on to the next district court that is assigned this case…." *Id.* In other words, if a judge "considered and held a hearing" on a motion in Travis County, "but then expressly

refused to rule" on it, the motion would be reassigned and the judge would have necessarily violated his ministerial duty to rule. *Id.*

But the fact that this case arises out of Travis County does not change the law. The Court has repeatedly addressed similar mandamus petitions arising from Travis County, and each time reiterated that the motion must have been pending for a "reasonable time." *See, e.g.*, *In re Martin*, No. 03-17-00383, 2017 WL 3471076, *1 (Tex. App.—Austin 2017, orig. proceeding); *In re Heaney*, No. 03-16-00159, 2016 WL 1179087, *1 (Tex. App.—Austin 2016, orig. proceeding); *In re Nelson*, No. 03-16-00717, 2016 WL 6575242, *1 (Tex. App.—Austin 2016, orig. proceeding); *Smith*, 2013 WL 5272847, at *1; *In re Aekins*, No. 03-15-00004, 2015 WL 1143015, *1 (Tex. App.—Austin 2015, orig. proceeding); *In re Hernandez*, No. 03-13-00002, 2013 WL 238720, *1 (Tex. App.—Austin 2013, orig. proceeding). Relators' theory thus cannot be squared with this Court's precedents.

And there is a good reason this Court still applies the reasonable-time prong in Travis County: any other approach is inconceivable. Leaving aside the oddness of a rule where two weeks is unreasonable in Travis County but four months is fine in Williamson County, Relators' theory has no limiting principle. In Relators' world, no room exists to consider the judge's docket, so Relators would be free to demand a ruling no matter what other issues she has to resolve (and which get preference). Most shocking, without the reasonable-time prong, there is (by definition) no place

to consider how much time has passed. Although this Petition arrives two weeks after the hearing, Relators' theory would allow them (or others) to seek mandamus even minutes after a hearing ends. The Travis County court system did not impose such an unrealistic burden on its judges when it adopted the Central Docket system, and nothing in its rules requires immediate rulings after hearings. *See* Dist. Cts. of Travis Cnty., Tex., *Local R. of Civ. P. & R. of Decorum*, June 2, 2014.

Relators' final claims are passing strange. Doubling down on their view that the Central Docket necessarily imposes a duty to rule immediately, Relators argue that allowing the court below to defer this ruling will "forc[e] the State to expend taxpayer money rehearing and rearguing this same matter to the next district court assigned the case." Relators' Br. 11. Relators declare that the "practical effect" will be that "the State's sovereign immunity is 'effectively lost,'" Br. 11-12, and that there will be a risk of inconsistent judgments between the judge that rules on the temporary injunction application and the judge that addresses the PTJ, Br. 15-16. But those assertions lack a basis in law or fact. With respect to the first, sovereign immunity does not protect Relators from costs and burdens associated with arguing the sovereign immunity motion itself. With respect to the second, no special risk of inconsistent judgments exists. Instead, as in any other court system, an initial ruling in this suit is "law of the case," and a future judge cannot toss it aside. Relators' two fears are thus fanciful, and offer no basis to abolish the reasonable-time prong.

C. Relators Have Not Established That Mandamus Is Warranted Just Because This Court Addressed Necessary Temporary Relief.

Relators' argument that the court was required to rule on their PTJ prior to issuing a TRO and setting a temporary injunction hearing, *see* Relators' Br. 15 ("[I]t would be unreasonable to delay a ruling past the date of the temporary injunction hearing"), also fails. District courts are free to rule on motions for such temporary relief before resolving issues raised in a PTJ.

Indeed, that is the lesson of *In re Texas Association of Sports Officials*, No. 03-10-00029, 2010 WL 392342 (Tex. App.—Austin Feb. 5, 2010, orig. proceeding), which bears a striking resemblance to the case at bar. *Sports Officials* also involved a suit against a state entity for injunctive relief, a request for a TRO and temporary injunction, and a PTJ asserting sovereign immunity, and arose out of Travis County to boot. *Id.* at *1; *Univ. Interscholastic League v. Southwest Officials Ass'n, Inc.*, 319 S.W.3d 952 (Tex. App.—Austin 2010). In that case, the court granted a TRO (before the defendant had filed the PTJ), and then denied the PTJ. *Sports Officials*, 2010 WL 392342, at *1. The defendant filed an interlocutory appeal. While that appeal was pending, a procedural problem arose; the interlocutory appeal triggered an automatic stay which "prevent[ed] the trial court from extending the [TRO]." *Id.* The TRO was set to expire during the appeal's pendency, and "once the order expires … the UIL will be free to implement its plan to regulate sports officials, thereby rendering moot the underlying suit and the UIL's appeal." *Id*. Although courts

usually first address jurisdictional issues, "TASO [thus sought] a writ of injunction incorporating the terms of the [TRO], pending resolution of the UIL's interlocutory appeal." *Id.* As this Court held, tackling *temporary relief* before a jurisdictional issue (including sovereign immunity) was entirely proper: "This Court has authority to issue writs of injunction if necessary to enforce its own jurisdiction." *Id.* And so this Court granted the writ of injunction before it resolved the sovereign immunity issue at the heart of the appeal. *Id.*

The same result should obtain in this case. As in *Sports Officials*, the grant of a TRO and scheduling of a temporary injunction hearing were critical to protect the court's jurisdiction despite a pending PTJ. Relators planned to provide voter data to the Commission by October 4, 2017. As a result, *before Relators had filed a PTJ*, Plaintiffs sought a TRO to prevent Relators from turning over the voter data. After all, if the data is provided, the genie cannot be put back in the bottle: not only would Plaintiffs be irreparably injured, but the case would be largely moot. That Relators subsequently filed a PTJ did not render the TRO any less necessary. To prevent the case from becoming moot, the court could act to protect its jurisdiction. The same is true of the temporary injunction hearing, which the court had to set under Rule 680. *See* Tex. R. Civ. P. 680 ("Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought."). In other

words, the court did not go on to the merits of this case, but has taken only necessary and temporary actions to preserve its jurisdiction.

The merits of Relators' sovereign immunity defense are thus not before this Court in this original proceeding, and Plaintiffs reserve the right to respond to that defense at the appropriate time. In light of Relators' efforts to preview the merits, however, *see* Relators' Br. 14-15, it bears noting that their sovereign immunity defense fails. Relators have expressly waived immunity from Plaintiffs' claims. *See* Tex. Elec. Code § 273.081; *City of El Paso*, 505 S.W.3d at 139 (concluding that Section 273.081 sets forth a "private right of action" "to enforce the Texas Election Code through injunctive relief") (emphasis omitted). And, in any event, because Relators' actions violate Texas law, *see, e.g.*, Tex. Elec. Code § 18.066; Tex. Gov't Code § 552.101, the *ultra vires* exception to sovereign immunity applies. At a minimum, Plaintiffs are entitled to jurisdictional discovery—in particular, with respect to Relators' assertion that the *ultra vires* exception does not apply.

II. THIS COURT MUST AT LEAST PRESERVE ITS EXTENSION OF THE TRO, OR ALLOW THE DISTRICT COURT TO GRANT TEMPORARY RELIEF BEFORE IT RULES ON THE PTJ.

Relators' request for mandamus is not supported by any authority. It is, however, consistent with an effort to moot Plaintiffs' claims before any court has the opportunity consider the merits of those claims. Even if this Court believes that extraordinary relief is proper, this Court should act to protect its and the lower court's

jurisdiction to resolve this case. As explained above, Part I.C, *supra*, this Court can grant temporary relief where necessary. *See* Tex. Gov't Code Ann. § 22.221(a) (West 2004) ("Each court of appeals ... may issue … all other writs necessary to enforce the jurisdiction of the court."); *Sports Officials*, 2010 WL 392342, at *1 (same). As further detailed above, such temporary relief is necessary here, where Relators believe they have a duty to turn over voter data to the Commission, and where such an action would moot the case.

Relators' representations to this Court that they will not turn over data while the PTJ is pending (because the Commission has agreed to toll its request during that time) are insufficient. Although the Commission promised to toll its request for the voter data until there is a "*ruling*" on the PTJ, Appx. E at 23 (emphasis added), that means the Commission plans to renew its request even if the court (correctly) *denies* the PTJ. Whether by design or otherwise, that presents a serious dilemma under Texas's procedural rules. Once the district court rules on the PTJ, Relators will file an appeal. After they do so, Texas rules stay further proceedings in the district court. *Southwest Officials*, 319 S.W.3d at 955 n.4 ("An interlocutory appeal from an order denying a [PTJ] 'stays all other proceedings in the trial court pending resolution of the appeal.'") (quoting Tex. Civ. Prac. & Rem. Code § 51.014(b) (West 2008)). Once there is a stay, the court below can no longer issue a new order barring Relators from turning over the voter data, which they will do because that is what they believe state

law requires. But that, troublingly, will moot this case—before this Court resolves the immunity issue Relators will be appealing. In other words, regardless of whether the district court grants or denies the PTJ, there will be a "gap" in between the court's PTJ ruling and the appellate proceedings during which Relators will turn over the data and leave Plaintiffs irreparably harmed.

That is why a ruling granting or maintaining temporary relief is necessary *before* the lower court adjudicates the pending PTJ. If such an order predates a ruling on the PTJ, it would necessarily predate the automatic stay that flows from Relators' inevitable interlocutory appeal, and so would remain valid. In order to prevent such gaps, even if this Court grants Relators' petition it should either (1) maintain the TRO, or (2) permit the court below to hold a hearing on Plaintiffs' application for a temporary injunction and grant relief before ruling on the PTJ.

PRAYER

For these reasons, the Real Parties in Interest request that this Court deny Relators' Petition for Writ of Mandamus. In the alternative, they request that this Court maintain the TRO, or permit the court below to hold a hearing on Plaintiffs' application for a temporary injunction and grant relief before ruling on the PTJ.

Respectfully submitted,

LAW OFFICE OF CHARLES McGARRY
/s/ Charles W. McGarry
Charles W. McGarry, Esq.
Texas Bar No. 13610650
701 Commerce Street, Suite 400
Dallas, Texas 75202
(214) 748-0800
(214) 748-9449 fax
cmcgarry@ix.netcom.com

Myrna Pérez, Esq.
Maximillian Feldman, Esq.
Brennan Center for Justice
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310 phone
(212) 463-7308 fax
myrna.perez@nyu.edu
max.feldman@nyu.edu

(Admitted pro hac vice)

Daniel T. Donovan, Esq.
Susan M. Davies, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000 phone
(202) 879-5200 fax
daniel.donovan@kirkland.com
susan.davies@kirkland.com

(Pro hac vice applications forthcoming)

Michael A. Glick, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.

Washington, DC 20005
(202) 879-5000 phone
(202) 879-5200 fax
michael.glick@kirkland.com

Jeremy M. Feigenbaum, Esq.
J. Keith Kobylka, Esq.
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800 phone
(212) 446-4900 fax
jeremy.feigenbaum@kirkland.com
keith.kobylka@kirkland.com

(Admitted pro hac vice)

ATTORNEYS FOR REAL PARTIES IN INTEREST

MANDAMUS CERTIFICATION

Pursuant to Texas Rules of Appellate Procedure 52.3(j) and 52.4, I certify that I have reviewed this response and that every factual statement in the response is supported by competent evidence included in the appendix or record.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing response has been sent via ECF on this 23rd day of October, 2017 to the following attorney of record for Relators:

Esteban S.M. Soto
Assistant Attorney General
General Litigation Division
Office of the Attorney General
300 West 15th Street
Austin, TX 78701
Phone: 512-475-4054
Fax: 512-320-0667
Esteban.Soto@oag.texas.gov

In addition, this is to certify that a true and correct copy of the foregoing response has also been sent to Respondent via facsimile, (512) 854-9332, and by regular mail, on this 23rd day of October, 2017.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 5,571 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Charles W. McGarry
Charles W. McGarry

No. 03-17-00662-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AUSTIN, TEXAS

IN RE
ROLANDO PABLOS, SECRETARY OF STATE FOR THE STATE OF TEXAS AND KEITH INGRAM, TEXAS ELECTIONS DIVISION OF THE SECRETARY OF STATE,
RELATORS,

OPPOSITION TO PETITION FOR MANDAMUS

Original Proceeding to Cause No. D-1-GN-17-003451
Pending in the 98th Judicial District Court
Travis County, Texas,
Honorable Timothy Sulak, Presiding

RECORD INDEX[1]

1 The appendix is paginated on the bottom right corner with the Supp. Rec. prefix for clarity of viewing.

CAUSE NO. D-1-GN-17-003451

LEAGUE OF WOMEN VOTERS OF TEXAS, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) and RUTHANN GEER, *Plaintiff*	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
v.	§	
ROLANDO PABLOS, Secretary of State for the State of Texas, and KEITH INGRAM, Director, Texas Elections Division of the Secretary of State, *Defendant.*	§	98TH JUDICIAL DISTRICT

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants, Rolando Pablos, Secretary of State for the State of Texas, and Keith Ingram, Director, Texas Elections Division of the Secretary of State (collectively, "Defendants"), file this Original Answer and Affirmative Defenses in the above numbered and entitled cause, and would respectfully show the Court the following:

GENERAL DENIAL

Pursuant to Rule 92 of the Texas Rules of Civil Procedures, Defendants deny each and every allegation contained within Plaintiffs' Original Petition for Declaratory Relief and demand strict proof of all allegations, as required by law.

AFFIRMATIVE DEFENSES

1. Defendants assert the defense of sovereign immunity as to all of Plaintiffs' claims.

2. Defendants assert that the redundant remedies doctrine bars Plaintiffs' claims and requests for relief.

3. Defendants assert that this Court lacks jurisdiction over Plaintiffs' claims.

4. Defendants assert that Plaintiffs' claims should be dismissed to the extent they are moot or not ripe for adjudication.

5. Defendants reserve the right to raise additional affirmative defenses as they become apparent during the development of the case.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants pray that the Court deny all relief that the Plaintiffs request; that Plaintiffs take nothing by way of this suit; that all court costs be taxed against Plaintiffs; and for such other and further relief to which they may be entitled.

Date: August 18, 2017

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

ANGELA V. COLMENERO
Chief, General Litigation Division

/s/ *Esteban S.M. Soto*
ESTEBAN S.M. SOTO
State Bar No. 24052284
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 Fax
esteban.soto@oag.texas.gov
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing documents has been served on this the 18th day of August, 2017 on the following:

Charles W. McGarry
Texas Bar No. 13610650
701 Commerce Street, Suite 400
Dallas, Texas 75202
(214) 748-0800
(214) 748-9449 fax
cmcgarry@ix.netcom.com

Myrna Pérez, Esq.
Douglas Keith, Esq.
Brennan Center for Justice
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310 phone
(212) 463-7308 fax
myrna.perez@nyu.edu
wendy.weiser@nyu.edu
douglas.keith@nyu.edu
(Pending admission pro hac vice)

Daniel T. Donovan, Esq.
Susan M. Davies, Esq.
Michael A. Glick, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000 phone
(202) 879-5200 fax
daniel.donovan@kirkland.com
susan.davies@kirkland.com
michael.glick@kirkland.com
(*Pending admission pro hac vice)*
ATTORNEYS FOR PLAINTIFFS

/s/ Esteban Soto
ESTEBAN SOTO

No. D-1-GN-17-003451

LEAGUE OF WOMEN VOTERS OF TEXAS, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) and RUTHANN GEER,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	TRAVIS COUNTY, TEXAS
ROLANDO PABLOS, Secretary of State For the State of Texas, and KEITH INGRAM, Director, Texas Elections Division of the Secretary of State,	§	
Defendants.	§	98th JUDICIAL DISTRICT

SUPPLEMENT TO PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, the League of Women Voters of Texas, the Texas State Conference of the National Association for the Advancement of Colored People, and Ruthann Geer, hereby file this Supplement to their pending Application for an Temporary Restraining Order and Temporary Injunction in the above-captioned action.

I.

To their pending Application for an Temporary Restraining Order and Temporary Injunction, plaintiffs wish to add the attached sworn declaration of Joshua A. Geltzer, an expert in cybersecurity and counterterrorism law, policy and operations, and a Professor of Law at Georgetown University Law Center.

WHEREFORE, PREMISES CONSIDERED, plaintiffs request the following relief and judgment:

A. A temporary restraining order in favor of Plaintiffs and against the Defendants, and entry of a temporary injunction enjoining the Defendants, Secretary of State Rolando Pablos, and Keith Ingram, Director, Texas Elections Division, from providing the Voter List and any part thereof to the Commission, and to take all actions necessary to maintain the status quo ante pending a determination on the merits; and

B. Such other and further relief as the Court deems just in the premises.

Respectfully submitted,

LAW OFFICE OF CHARLES McGARRY

/s/ Charles W. McGarry
Charles W. McGarry
Texas Bar No. 13610650
701 Commerce Street, Suite 400
Dallas, Texas 75202
(214) 748-0800
(214) 748-9449 fax
cmcgarry@ix.netcom.com

Myrna Pérez, Esq.
Tomas Lopez, Esq.
Brennan Center for Justice
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310 phone
(212) 463-7308 fax
myrna.perez@nyu.edu
wendy.weiser@nyu.edu
tomas.lopez@nyu.edu
(Applications for admission pro hac vice forthcoming)

Daniel T. Donovan, Esq.
Susan M. Davies, Esq.
Michael A. Glick, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000 phone
(202) 879-5200 fax
daniel.donovan@kirkland.com
susan.davies@kirkland.com
michael.glick@kirkland.com
(Applications for admission pro hac vice forthcoming)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this instrument was delivered to the following attorney of record on this 29th day of September, 2017, in accordance with the Texas Rules of Civil Procedure:

Esteban S.M. Soto
Assistant Attorney General
General Litigation Division
Office of the Attorney General
300 West 15th Street
Austin, TX 78701
Phone: 512-475-4054
Fax: 512-320-0667
Esteban.Soto@oag.texas.gov

/s/ Charles W. McGarry
Charles W. McGarry

No. D-1-GN-17-003451

LEAGUE OF WOMEN VOTERS OF TEXAS, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) and RUTHANN GEER,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	TRAVIS COUNTY, TEXAS
ROLANDO PABLOS, Secretary of State For the State of Texas, and KEITH INGRAM, Director, Texas Elections Division of the Secretary of State,	§	
Defendants.	§	98th JUDICIAL DISTRICT

DECLARATION OF JOSHUA A. GELTZER IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

I, Joshua A. Geltzer, hereby declare the following under penalty of perjury:

1. I submit this declaration in support of Plaintiffs' Application for a Temporary Restraining Order and Temporary Injunction in the above-captioned matter.

2. I am an expert on cybersecurity and counterterrorism law, policy, and operations. I am currently employed as the founding Executive Director of the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center. I also serve as a Visiting Professor of Law at Georgetown, and as a fellow in the International Security Program at New America.

3. Previously, I served in a series of positions in the United States Government focused on national security. From 2015 to 2017, I served as Senior Director for Counterterrorism at the National Security Council. Before that, I served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice. In each of these roles, and especially in the latter two, my responsibilities included legal and policy issues associated with cybersecurity and the protection of sensitive information on computer networks. A true and correct copy of my curriculum vitae is attached hereto as Exhibit A.

4. In my opinion, Defendants' release of data from the Texas statewide computerized voter registration files to the Presidential Advisory Commission on Election Integrity without

requiring from the Commission any commitments for keeping that data secure would leave Texas voters' private information particularly appealing and vulnerable to hackers, including those acting in association with foreign powers. This is so for at least three reasons.

5. First, voter data has been, and continues to be, a particular target for hackers, meaning that the sharing of such data inherently raises cybersecurity risks not necessarily associated with other information. This is a consensus view among those in the field of cybersecurity and national security. For example, former Secretary of Homeland Security Michael Chertoff recently articulated this widely held assessment. A true and correct copy of Secretary Chertoff's column, downloaded from the *Washington Post* website, is attached hereto as Exhibit B.

6. Second, the holdings of Federal Government entities can represent a particularly attractive target for hacking because hackers previously have demonstrated such entities' security measures to be inadequate. I know this based on my experience working on cybersecurity matters in the Federal Government as well as based on public reporting of incidents, including the Federal Government's own public pronouncements, such as its acknowledgement in June 2015 that the Office of Personnel Management (OPM) had been successfully targeted in a data breach affecting the records of millions of individuals. In the absence of public commitments by the Commission to protect data provided to it, hackers will see the transfer of data to the Commission as an invitation to continue to exploit weaknesses.

7. Third, the vastness of the Commission's request and the Commission's apparent intent to aggregate the data provided in response to it—that is, the effort to acquire a huge amount of sensitive data and hold it in a single, high-profile place—increases cyber threats to the data. The Commission is attempting to collect data from every state in the nation and then centralize the data in a single repository managed by the Executive Office of the President. This centralization of data increases the appeal—and therefore the risk—of hacking by reducing the burden on hackers who seek to penetrate voter data systems. This is true even if some or all the same information could, at least in theory, be acquired in some other manner or from some other source(s), because amassing all of it in a single, high-profile, purportedly authoritative place materially heightens the appeal and payoff associated with hacking that one storage location.

8. Defendants could and should demand that the Commission undertake certain basic steps in order to protect Texas voters' data if it is to be shared with the Commission. Those steps include encryption of the data while in transit and in storage; the requirement of multi-factor authentication to access the data; restriction of access to a clearly defined and minimally necessary list of authorized individuals with separate user accounts; credible and independent audits of the database; and air-gapping of the database. A true and correct copy of a recent column in which two coauthors and I outline these five steps, downloaded from the *Hill* website, is attached hereto as Exhibit C.

9. In my opinion, if Defendants do not require the Commission to institute adequate protective measures, release of the data to the Commission will immediately invite privacy and security violations for Texans' whose data is shared. If the security of that data is compromised, the injuries that could befall Texans range from unwanted commercial solicitation, to personalized harassment, to identity theft, to attempts by foreign powers to meddle in the administration of elections held in the United States.

10. I would do my best to make myself available to the Court and the parties in the case to elaborate on the opinions stated herein.

My name is Joshua A. Geltzer; my date of birth is February 7, 1983; my office address is 600 New Jersey Avenue NW, Washington, D.C., 20001; and I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C., on the 28th day of September, 2017.

Joshua A. Geltzer

EXHIBIT A

JOSHUA A. GELTZER
2823 Q Street NW Washington, DC 20007 (917) 992-2600 JGeltzer@gmail.com

SELECTED EXPERIENCE

EXECUTIVE DIRECTOR AND VISITING PROFESSOR OF LAW, INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, GEORGETOWN UNIVERSITY LAW CENTER 2017-present
Building new institute to promote constitutional values through impact litigation, public education, and scholarship.

SENIOR DIRECTOR FOR COUNTERTERRORISM, NATIONAL SECURITY COUNCIL 2015-2017
Coordinated development of U.S. counterterrorism policy and advised White House leadership on terrorist threats.

DEPUTY LEGAL ADVISER TO THE NATIONAL SECURITY COUNCIL February-October 2015
Counseled NSC leadership on legal issues regarding counterterrorism, intelligence collection and cyber matters.

COUNSEL TO THE ASS'T ATTORNEY GENERAL FOR NAT'L SECURITY, DEPARTMENT OF JUSTICE 2013-2015
Advised DOJ leadership on global counterterrorism issues, FISA matters, and national security-related litigation.

LAW CLERK TO JUSTICE STEPHEN BREYER, U.S. SUPREME COURT 2012-2013
Analyzed petitions for certiorari; prepared the Justice for oral argument; and drafted opinions and memorandums.

LAW CLERK TO CHIEF JUDGE ALEX KOZINSKI, NINTH CIRCUIT COURT OF APPEALS 2011-2012
Wrote bench memos to prepare the Judge for oral arguments and assisted him with drafting opinions and orders.

EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D., May 2011; Olin Fellow, Yale Law School Center for Studies in Law, Economics, & Public Policy
Activities: *Yale Law Journal*, Editor-in-Chief; research assistant to Professors Akhil Amar and Amy Chua
Experience: Summer Law Clerk, Office of the Legal Adviser, Department of State
Summer Associate, Covington & Burling LLP
Summer Law Clerk, Counterterrorism Section, Department of Justice

KING'S COLLEGE LONDON, London, UK (Marshall Scholarship)
Ph.D., War Studies, 2008; M.A., International Relations, 2006 (awarded with distinction)
Dissertation: *Al-Qaeda as Audience: Signalling in U.S. Counter-terrorist Policy & the al-Qaeda World-view*
Activities: King's Postgraduate Conference, Chair; European Foreign Policy Conference, Editorial Director

PRINCETON UNIVERSITY, Princeton, NJ
A.B., Woodrow Wilson School of Public and International Affairs, 2005. GPA: 3.97
Honors: *Summa cum Laude*; Phi Beta Kappa; Senior with the Highest Academic Standing Award

SELECTED PUBLICATIONS

- "Of Suspension, Due Process, and Guantanamo," *Journal of Constitutional Law*, Vol. 14, No. 3 (2012).
- "Reconstructing the Republic: The Great Transition of the 1860s," with Amar & Worth, in *Transitions: Legal Change, Legal Meanings*, Austin Sarat, ed. (University of Alabama Press: 2012).
- "Asymmetric Strategies as Strategies of the Strong," with Breen, *Parameters*, Vol. 41, No. 1 (2011).
- "Taking Hand-Outs or Going It Alone," *Studies in Conflict & Terrorism*, Vol. 34, No. 2 (2011).
- "Decisions Detained: The Courts' Embrace of Complexity in Guantánamo-Related Litigation," *Berkeley Journal of International Law*, Vol. 29, No. 1 (2010).
- *U.S. Counter-Terrorism Strategy & al-Qaeda: Signalling & the Terrorist World-View* (Routledge: 2009).
- "The Non-Kinetic Aspects of Kinetic Efforts," in *Influence Warfare: How Terrorists & Governments Fight to Shape Perceptions in a War of Ideas*, James Forest, ed. (Praeger Security International: 2009).

MEMBERSHIPS

- Term Member, Council on Foreign Relations
- Fellow, American Bar Foundation
- Advisory Committee Member, American Bar Association Standing Committee on Law and National Security

SKILLS AND INTERESTS

Play rock guitar and classical violin. Enjoy baseball, hockey, literature, new restaurants, and travel.

EXHIBIT B

The Washington Post

Opinions

Trump's voter data request poses an unnoticed danger

By Michael Chertoff July 5

Michael Chertoff, U.S. homeland security secretary from 2005 to 2009, is executive chairman of the Chertoff Group, a security and risk-management advisory firm.

The Trump administration's Presidential Advisory Commission on Election Integrity is asking states for voter-registration data from as far back as 2006. This would include names, dates of birth, voting histories, party registrations and the last four digits of voters' Social Security numbers. The request has engendered controversy, to put it mildly, including refusals by many states and a caustic presidential tweet.

But whatever the political, legal and constitutional issues raised by this data request, one issue has barely been part of the public discussion: national security. If this sensitive data is to be collected and aggregated by the federal government, then the administration should honor its own recent cybersecurity executive order and ensure that the data is not stolen by hackers or insiders.

We know that voting information has been the target of hackers. News reports indicate that election-related systems in as many as 39 states were penetrated, focusing on campaign finance, registration and even personal data of the type being sought by the election integrity commission. Ironically, although many of these individual databases are vulnerable, there is some protection in the fact that U.S. voting systems are distributed among thousands of jurisdictions. As data-security experts will tell you, widespread distribution of individual data elements in multiple separate repositories is one way to reduce the vulnerability of the overall database.

That's why the commission's call to assemble all this voter data in federal hands raises the question: What is the plan to protect it? We know that a database of personal information from all voting Americans would be attractive not only to adversaries seeking to affect voting but to criminals who could use the identifying information as a wedge into identity theft. We also know that foreign intelligence agencies seek large databases on Americans for intelligence and counterintelligence purposes. That is why the theft of more than 20 million personnel files from the U.S. Office of Personnel Management and the hacking of more than half a billion Yahoo accounts were such troubling incidents.

Congress and the states need to be advised on how any data would be housed and where. Would it be encrypted? Who would have administrative access to the data, and what restrictions would be placed on its use? Would those granted access be

subject to security background investigations, and would their behavior be supervised to prevent the kind of insider theft that we saw with Edward Snowden or others who have released or sold sensitive data? What kinds of audit procedures would be in place? Finally, can the security risk of assembling so much tempting data in one place be mitigated by reducing and anonymizing the individual voter information being sought?

In May, President Trump signed the executive order on cybersecurity to instill tough security in federal offices that handle critical government data. That order is a commendable initiative to hold officials accountable for safeguarding sensitive personal information, such as voter information. The president's election integrity commission should live up to the president's own directive.

Read more on this issue:

Michael Waldman: Commission on 'election integrity' could instead restrict voting

The Post's View: Trump launches his opening voter suppression salvo

The Post's View: Trump's commission on voter fraud is, well, fraudulent

Fareed Zakaria: America must defend itself against the real national security menace

EXHIBIT C

Trump's voter fraud commissio must protect data from hacker

BY RAJESH DE, JOSHUA GELTZER AND MATTHEW OLSEN, OPINION CONTRIBUTORS - 08/24/17 05:00 PM EDT

© Getty Images

Many states have responded with alarm to the massive data call issued by the Presidential Advisory Commission on Election Integrity co-chaired by Vice President Mike Pence and Kansas Secretary of State Kris Kobach. State election officials have voiced concerns that the commission's real agenda is to generate support for election laws that suppress voter participation. Indeed, 21 states and the District of Columbia declined to provide any data in response to the commission's initial outreach, which a federal district judge made clear is merely a request, not a lawful demand.

Perhaps most colorfully, Mississippi's secretary of state responded to the request by saying that the commission "can go jump in the Gulf of Mexico and Mississippi is a great State to launch from." The commission's request for Social Security numbers was refused by none other than Secretary of State Kobach himself on Kansas's behalf. Even as many states reaffirm their refusals to provide any information, others are providing a considerable amount of data on their voters. And this raises an additional and significant concern about the commission's work: the lack of protection for this sensitive data.

As former Homeland Security Secretary Michael Chertoff has rightly emphasized, the ingestion and aggregation of this massive amount of massively sensitive information poses its own form of threat. It provides a single, seductive target for the many actors we now know are keen to manipulate and undermine confidence in our elections, as well as to gather detailed information on Americans for espionage purposes.

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VIEW ALL

So, as states consider what information to provide to the commission, they owe it to their voters and the sanctity of the elections our country's laws entrust them to administer to consider how that information should be handled once provided. Indeed, some state laws impose rules and requirements for accessing sensitive electoral data. Beyond that, and regardless of any state's particular laws, respect for America's voters and elections requires sensible protection of the data.

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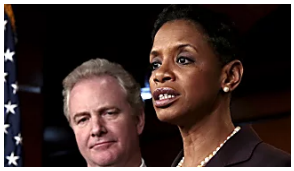
Drug Enforcement chief to step down: report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The Trump administration must take seriously the responsibility of safeguarding of the data its commission is requesting. Unfortunately, the administration deliberately moved the commission's "administrative home" from the U.S. Department of Defense, which had already designed a website to receive the data requested, to the Executive Office of the President, raising concerns that the move was designed to cloak the commission's work from transparency laws, since the Freedom of Information Act applies to virtually all departments and agencies across the federal government but not to the Executive Office of the President.

The Defense Department, of course, has at its disposal the resources and expertise of the National Security Agency and U.S. military in protecting the transmission of sensitive data, in stark contrast to the limited capacity of the White House Executive Office. That puts an even higher burden on the states to demand that the commission at least take certain basic cybersecurity steps if those states are to comply — voluntarily — with the commission's unprecedented data request. We urge at least five such steps.

First, the information should be encrypted, while in transit to and within the commission as well as when stored by it. Encrypted data, even if stolen, needs to be decrypted, an often insurmountable challenge even for governments. That's why encryption has become the norm for many email providers, messaging apps and hardware such as cell phones and laptops.

Second, multi-factor authentication should be required to access the data. This, too, is becoming common practice: If you don't already require your email provider to confirm that you're really you when logging in for the first time from a new computer or device, you're significantly risking the security of your email while sparing yourself ten seconds of minor inconvenience. The same should be required to access this sensitive data.

Third, access to the data should be restricted to a clearly defined minimally necessary list of authorized individuals with separate user accounts on a strict need-to-know basis. This minimizes the inherent vulnerability associated with every additional user and puts on notice every user that the circle of potential culprits is small if information leaks out. And, while passwords aren't a sufficient defense on their own, they should be complex and unique for authorized users.

Fourth, credible and independent cybersecurity audits of the commission's database should be conducted on a periodic basis, which in turns requires that the database be designed so that every access to it can be traced in order to facilitate such audits. Many cyber intrusions and exfiltrations occur for months or even years before they're noticed; but periodic audits can identify breaches and stop the bleeding far more quickly.

Fifth, the database should be "air-gapped," meaning it should be held on a segmented network not connected to the internet. This helps to insulate and thus protect the database. It also means that, when the commission's work is done, the data held there can and should be deleted with accompanying certification by the commission's co-chairs.

From a cybersecurity standpoint, it's simply a bad idea to put all of this sensitive information in one place. But if the administration is committed to gathering this data, then failing to take the steps outlined above is indefensible. In an era when the commission's database is a prime target for adversaries foreign and domestic keen to sabotage and distort our democratic system, protecting America's elections demands protecting American voters.

Rajesh De served as general counsel of the National Security Agency during the Obama administration. He now leads the cybersecurity and data security practice and co-leads the national security practice at Mayer Brown LLP, where he is a partner.

Joshua A. Geltzer served as senior director for counterterrorism and deputy legal advisor at the National Security Council during the Obama administration. He is now executive director and visiting professor of law at the Institute for Constitutional Advocacy and Protection at Georgetown University.

Matthew G. Olsen served as director of the National Counterterrorism Center during the Obama administration. He is now an adjunct senior fellow at the Center for a New American Security and co-founder of technology firm IronNet Cybersecurity.

The views expressed by contributors are their own and are not the views of The Hill.

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