

STATE OF MICHIGAN

IN THE 2B DISTRICT COURT FOR HILLSDALE COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN

v.

No. 24-0497 FY

STEFANIE LAMBERT JUNTILLA,

Defendant.

_____ /

THE PEOPLE OF THE STATE OF MICHIGAN,

v.

No. 24-0498 FY

STEPHANIE SCOTT,

Defendant.

_____ /

PRELIMINARY EXAMINATION (CONTINUED)

Hillsdale, Michigan - Friday, July 11, 2025

Before Honorable Megan R.M. Stiverson

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1 Hillsdale, Michigan

2 Friday, July 11, 2025 - 9:06 a.m.

3 THE COURT: Good morning. You may be seated.

4 All right. So, standing room only.

5 A little housekeeping this morning. We do not
6 have any operational public bathrooms in the courthouse
7 currently other than the one right there in the back.
8 You'll have to go over to the county office building two
9 blocks that way behind you or one block over to the
10 Circuit Court. You can feel free to use this bathroom if
11 it's an emergency, but just so you're aware, those walls
12 are not airtight or soundproof.

13 All right. File 240497 and 240498, Stefanie
14 Lynn Juntilla, Stephanie Scott both are present today.

15 I also have Mr. Cunningham present on behalf of
16 the Attorney General's office.

17 And I have Mr. Kurt Olsen present today
18 appearing pro hac vice with permission from the Court.

19 Thank you, sir.

20 MR. OLSEN: Thank you, Your Honor.

21 You gentleman feel free to sit down and make
22 yourselves comfortable.

23 Are there any preliminary matters before we get
24 started?

25 Just as another housekeeping point, we had left

1 off with cross-examination of Mr. Brater. I did adjourn
2 this to allow him to be able to get here in person so you
3 could have in-person cross-examination, and I believe, did
4 I see him here?

5 MR. CUNNINGHAM: Yes.

6 THE COURT: So, he is here in person, and I
7 believe we're ready to proceed.

8 Any preliminary matters from you, sir?

9 MR. CUNNINGHAM: Nothing from the People.

10 THE COURT: From you, Mr. Olsen?

11 MR. OLSEN: Your Honor, one housekeeping measure

12 --

13 THE COURT: Yes, sir.

14 MR. OLSEN: -- there is an issue with Ms.
15 Lambert appearing in another proceeding today.

16 THE COURT: Yes.

17 MR. OLSEN: And I think trying to work out if
18 that can be done by Zoom. I think you were informed of
19 that yesterday.

20 THE COURT: Yes. So, I did receive a -- well,
21 my court administrator received a message from the court
22 administrator in a different county asking what time we
23 anticipated being done to allow for enough time for you to
24 appear. I indicated that I would be willing to end the
25 preliminary examination around 1:00 p.m. for driving

1 purposes. I don't want you to have to speed. And if you
2 were able to work it out via Zoom, that would be even
3 better, but I'll leave that between you and that
4 particular judge up there.

5 MR. OLSEN: I think it's a fluid situation right
6 now.

7 THE COURT: Okay.

8 MR. OLSEN: So, we'll keep Your Honor updated.

9 THE COURT: You'll just keep me posted?

10 MR. OLSEN: Yes, Your Honor.

11 THE COURT: All right. Perfect.

12 MR. OLSEN: And the other housekeeping measure
13 is we have a witness who can appear by Zoom at 1:00. It
14 will be a very short examination, but he was subpoenaed,
15 but not available to be here in person today.

16 THE COURT: All right.

17 Were you aware of that witness, Mr. Cunningham?

18 MR. CUNNINGHAM: No, I was not, Your Honor, but
19 I really have no objections. He has a right to have all
20 his witnesses --

21 THE COURT: Absolutely.

22 MR. CUNNINGHAM: -- I have no problems with it.

23 THE COURT: Excellent. So, it's like no
24 problem, sir.

25 MR. OLSEN: Okay.

1 THE COURT: All right.

2 MR. OLSEN: Thank you, Your Honor.

3 THE COURT: Did you have something, Ms.

4 Juntilla?

5 MS. JUNTILLA: Your Honor, I was just going to

6 state that it's our preference -- we have an out of town

7 witness here as well -- to work as long as we can today.

8 And so, we are going to see if we can appear by Zoom at

9 the 4:00 p.m. hearing.

10 THE COURT: If that's granted, you guys just let

11 me know.

12 THE DEFENDANT: Thank you, Judge.

13 THE COURT: All right.

14 With that being said, are you ready to begin

15 cross-examination?

16 MR. OLSEN: Yes, Your Honor.

17 THE COURT: All right. Can we get Mr. Brater,

18 please.

19 MR. OLSEN: Your Honor, I have one question.

20 THE COURT: Sir.

21 MR. OLSEN: Do you mind if I sit while I'm

22 examining just because of all the papers?

23 THE COURT: Not at all.

24 So, it's, as you can tell, it's very small.

25 It's more of a hearing room than a courtroom. Feel free

1 to move around as you wish. Sit, stand, and if you need
2 to approach, you don't necessarily have to ask.

3 I also have all of the admitted exhibits right
4 here, so if anybody needs to reference them, you feel free
5 to just come up and grab them.

6 MR. OLSEN: Thank you, Your Honor.

7 THE COURT: Good morning, Mr. Brater.

8 MR. BRADER: Morning.

9 THE COURT: It's been a while since I saw you,
10 so I'm going to swear you in again.

11 Can you raise your right hand.

12 Do you swear or affirm that the testimony you're
13 about to give is the truth the whole truth and nothing but
14 the truth so help you, God?

15 MR. BRATER: I do.

16 JONATHON BRATER

17 (At 9:10 a.m., duly sworn; testifies as follows)

18 THE COURT: And you can put your hand down.

19 Would you state your full name, spelling your
20 last?

21 THE WITNESS: Johnathon Brater, B-R-A-T-E-R.

22 THE COURT: Thank you.

23 Mr. Olsen, cross-examination. Your witness.

24 MR. OLSEN: Thank you.

25 Good morning, Mr. Brater.

CROSS-EXAMINATION

BY MR. OLSEN:

Q. You are the director of the Michigan Bureau of Elections, correct?

A. Yes.

Q. And as part of your responsibilities as the director of the BOE -- can we call it the BOE?

A. Yes.

Q. You are responsible for enforcement and oversight of Michigan Election law, correct?

A. Yes.

Q. You are a lawyer, correct?

A. I am a lawyer. I am not licensed to practice in Michigan.

Q. How long have you been a lawyer?

A. Since 2012.

Q. Where did you go to law school?

A. University of Michigan Law School.

Q. Before becoming director of the BOE, you testified at the last hearing held here, on December 18th, that you were involved in federal litigation at the Brennan Center, do you recall that?

A. Yes.

Q. What type of cases did you work on there?

A. Mostly cases involving election law, so cases involving voter registration requirements, cases involving other

1 election laws in various states.

2 Q. Did you ever work anywhere else as a lawyer before going
3 to the Brennan Center?

4 A. No.

5 Q. Would you say it's pretty standard for a company to -- a
6 company or person to retain a lawyer to help with legal
7 issues or investigations that implicate legal issues?

8 A. Yes.

9 Q. Is it pretty standard for an expert in the particular
10 issues that involve a legal matter to be brought in by the
11 attorney to help with an investigation?

12 A. If necessary, yes.

13 Q. As the director of the BOE, have you ever sought legal
14 advice from a private counsel to work on work related
15 issues?

16 A. There was one -- typically our counsel comes from the
17 Department of the Attorney General. I think there may
18 have been one case early on where the Secretary of State
19 may have had a separate counsel, but I believe they had to
20 get approved by the Department of the Attorney General.

21 Q. So, a lawyer's required, of course, to maintain
22 confidentiality of the information it obtains pursuant to
23 its representation, correct?

24 A. Generally, lawyers are required to follow whatever the
25 legal or ethical requirements would be for

1 confidentiality.

2 Q. And is it your experience that if an expert is brought in
3 to assist with an investigation by the lawyer, that that
4 expert also maintains confidentiality?

5 A. In my experience with the experts that's I've worked with,
6 that has been the case.

7 Q. So, given that you had testified that you're responsible
8 for the enforcement and oversight of election laws, do you
9 keep your -- make yourself knowledgeable about Michigan
10 election law, correct?

11 A. Yes.

12 Q. Okay. And do you also keep yourself apprised of federal
13 election laws?

14 A. Yes.

15 Q. In connection with your duties, have you learned of the
16 phrase interpretive rules in connection with the rules
17 issued by you and the Secretary of State?

18 A. I'm familiar with that phrase, yes.

19 Q. What's your understanding of that?

20 A. Well, generally, I believe it refers to, you know, using
21 the term rule would be a rule that was made under --
22 pursuant to the Administrative Procedures Act that
23 interprets the Michigan -- or that interprets a statute,
24 which could include the Michigan election law.

25 Q. Do you have an understanding whether or not interpretive

1 rules have the force of law? In other words, if they're a
2 binding legal obligation?

3 A. My understanding is that would. I mean I'm not an expert
4 on the Administrative Procedures Act, but my understanding
5 is that an interpretive rule, when applied, that the
6 application of interpretive rule would include the force
7 of law, yes.

8 Q. Okay. Are you familiar with the case entitled O'Halloran
9 v Secretary of State?

10 A. Yes.

11 Q. And that case was ruled on by the Michigan Supreme Court,
12 correct?

13 A. Yes.

14 Q. You were a defendant in that case, correct?

15 A. Yes.

16 Q. Okay. Are you aware that the Michigan Supreme Court --
17 strike that.

18 Did you participate in any of the briefing or
19 arguments that were made in that case?

20 A. I reviewed the briefs that were submitted in the case, so
21 yes.

22 Q. And did you read the opinions issued in that case by the
23 Court of Appeals and the Supreme Court?

24 A. Yes.

25 Q. When's the last time you read them?

1 A. I reviewed part of the O'Halloran case yesterday. I
2 didn't read the whole thing, but I read the whole thing
3 probably several months ago. I can't remember exactly
4 when.

5 Q. But you said you read the O'Halloran case yesterday?

6 A. Parts of it, yeah.

7 Q. Is that the Supreme Court decision?

8 A. Yes.

9 Q. And are you aware that the Michigan Supreme Court ruled
10 that interpretive rules do not have the force of law?

11 A. That may be the case. Again, I'm not an expert on the
12 Administrative Procedures Act.

13 Q. But you are a lawyer?

14 A. Yes.

15 Q. And you do make yourself aware, as part of your duties, to
16 enforce Michigan election law about what the law states,
17 correct?

18 A. Yes.

19 Q. Okay. And part of the law states that for laws to have
20 the force of the rules that are issued to have the force
21 of law, that they go through the Administrative Procedures
22 Act, correct?

23 A. If it's something that's necessary that goes through to --
24 should go through the administrative procedure act, yes,
25 it would need to go through the administrative procedure

1 act process.

2 Q. And the Michigan Supreme Court ruled in O'Halloran that
3 law -- rules that have not gone through the Administrative
4 Procedures Act do not have the force of law. Do you
5 understand that?

6 A. Well, that case was involving specific -- specific
7 instructions related to challengers. So, in the context
8 of that case, my understanding is that the Court
9 determined that to be binding, they would have to go
10 through the Administrative Procedures Act.

11 MS. JUNTILLA: Your Honor, would the Court be so
12 kind as to let us know the exhibit that we left off with
13 for Defense exhibit?

14 THE COURT: You are on Defense Exhibit 4.

15 MS. JUNTILLA: So, this would be labeled 4 or 5?

16 THE COURT: You are on 4, labeled 4. I have 1
17 through 3 right here.

18 MS. JUNTILLA: Thank you, Your Honor.

19 THE COURT: You're welcome.

20 MR. OLSEN: May I approach, Your Honor.

21 THE COURT: You may.

22 MR. OLSEN: Mr. Brater, I'm handing you what has
23 been marked for identification as Defendant's Exhibit 4.
24 It's a copy of the opinion in O'Halloran v Secretary of
25 State.

1 (At 9:18 p.m., Defense Exhibit 4 Marked)

2 BY MR. OLSEN:

3 Q. Is this the opinion that you said you reviewed yesterday?

4 A. Yeah. Again, parts of it, yes.

5 Q. I'd like to turn your attention to -- you'll see there are
6 pages numbers marked at the top right hand corner, do you
7 see that -- of the document?

8 A. Yes.

9 Q. So, if you would turn to page 18 of 59, which is the
10 section of the opinion that is the syllabus, and it's item
11 number 4 in the syllabus?

12 A. Okay.

13 Q. Are you with me?

14 A. Yes.

15 Q. You see where it says, "The APA provides a formal process
16 that an agency must follow to promulgate a rule that has
17 the force and effect of law." You see that?

18 A. Yes.

19 Q. That doesn't qualify a rule to a particular issue. That's
20 a general statement of the law, correct?

21 A. Yes, I agree.

22 Q. If you go down about halfway in that paragraph, there's a
23 sentence to the right that begins, "Thus". Are you with
24 me?

25 A. Yep.

1 Q. You see where it says,

2 "Thus, when a statute does not require
3 rule making for its interpretation, an agency
4 may choose to issue 'interpretive rules',
5 which would fall under the MCL 24.207 (h) rule
6 making exception as policy statements that
7 give guidance but do not have the force and
8 effect of law. An interpretive rule is any
9 rule an agency issues without exercising
10 delegated legislative power to make law
11 through rules, i.e., those that interpret any
12 apply provisions of the statute under which an
13 agency operates. The violation of which does
14 not result in a sanction."

15 Do you see that?

16 A. Yes.

17 Q. "Stated differently, an interpretive statement lacks the
18 force and effect of law because it is the underlying
19 statute that determines how an entity must act, i.e., that
20 alters the rights and imposes obligations." You see that?

21 A. Yes.

22 Q. Do you understand what the Court is saying there?

23 A. I believe so, yes.

24 Q. And what's your understanding?

25 A. Well, so there's certain situations where in order for a

1 rule to have the force and effect of law, the agency has
2 to promulgate the formal rule. There are several
3 exceptions to the rules. One of the ones they mentioned
4 here is 24207H, which lists several other types of things
5 that an agency might do, which is referred to here as a
6 interpretive rule. And it's saying that those aren't --
7 that those would be -- include policy statements that are
8 giving guidance rather than having the force and effect of
9 law.

10 Q. And the Court ruled that any statement, or any rule,
11 rather, that did not go through the Administrative
12 Procedures Act does not have the force of law, correct?

13 A. I think, applied to "rule", I think that's right, yes.

14 Q. Okay. And these are rules that are issued by the
15 Secretary of State, or you, as the director of the BOE,
16 correct?

17 A. That -- yes, the Bureau of Elections does issue rules.

18 Q. And the Court further ruled that rules that are issued by
19 you, that have not gone through the Administrative
20 Procedures Act and therefore do not have the force of law,
21 do not result in a sanction for violating them, correct?

22 A. Correct. Rules would not -- that didn't go through the
23 APA would not result in a sanction, yes.

24 Q. Okay. So, there's no criminal liability that attaches
25 when a rule that has not gone through the Administrative

1 Procedures Act is not followed, correct?

2 A. The Court says, does not result in a sanction.

3 Q. In your mind, as a lawyer responsible for enforcing
4 Michigan election law, that not resulting in a sanction
5 means no criminal liability?

6 A. I would think that criminal liability would be a type of
7 sanction. I'm not sure that it would apply, but I'm
8 hesitant to speculate as to all the possible results of a
9 violation beyond what's in this opinion.

10 Q. Sir, if you would turn to where it says at the top right
11 hand corner, page 33 of 59.

12 And this is getting into the opinion. And I
13 want to direct your attention to the second paragraph,
14 which is a block quote where it states, "Interpretive
15 rules are". You see that?

16 A. Yes.

17 Q. States,

18 "Interpretive rules are basically those
19 that interpret and apply the provisions of the
20 statute under which the agency operates. No
21 sanction attaches to the violation of an
22 interpretive rule as such. The sanction
23 attaches to the violation of the statute which
24 the rules merely interprets. Interpretive
25 rules state the interpretation of ambiguous or

1 doubtful statutory language which must be
2 followed by the agency unless and until the
3 statute is otherwise authoritatively
4 interpreted by the Courts."

5 Do you see that?

6 A. Yes, it says which must be followed. Or, yeah. You said
7 -- it says, "...which will be followed." I think you said,
8 "...which must be followed. " But otherwise, yeah.

9 Q. So, what the Court is saying there is that it's the
10 statute that matters if a criminal sanction or liability
11 is going to apply, correct?

12 A. The Court is saying that the statute is what would apply
13 to the sanction, yeah.

14 Q. So, if there's no violation of the statute, the expressed
15 language of the statute, there can be no criminal
16 liability if an interpretive rule is not followed,
17 correct?

18 A. It says attached to the violation of the statute.

19 Q. So, is that -- am I correct?

20 A. Well, I mean you added some words there. But what the
21 Court says is, the sanction attached to the violation of
22 the statute.

23 Q. Sir, continuing on. Do you see where it says headnote 15
24 down that page on the left hand side?

25 A. Yes.

1 Q. About halfway down the opinion reads,
2 "And it is worth reiterating that 'an
3 interpretative statement that goes beyond the
4 scope of the law may be challenged what it is
5 in a judicial proceeding. An interpretation
6 not supported by the enabling act is an
7 invalid interpretation, not a rule.'"

8 Do you see that?

9 A. Yes.

10 Q. So, does that mean if you issue a rule that is not
11 consistent with Michigan election statutes that it is --
12 it's an invalid rule, correct?

13 A. I would agree that if the Bureau of Elections or another
14 agency issued a rule that was contrary to the underlying
15 statute, that that would be invalid. I would agree with
16 that, yeah.

17 Q. Well, it also -- it goes a little bit more than just
18 contradiction. Doesn't the Court say if the
19 interpretative statement goes beyond the scope of the law?

20 A. Yeah, it says, "...that goes beyond the scope of the law may
21 be challenged."

22 Q. So, it's not just if the rule contradicts the statute. If
23 it goes beyond the statute, correct?

24 A. Well, it says that if it goes beyond the scope of the law,
25 it may be challenged, but specifically, in terms of what

1 it refers to as an invalid interpretation, it says an
2 interpretation not supported by the enabling act is an
3 invalid interpretation.

4 Q. If a rule can be challenged because it goes beyond the
5 scope of the act, that means there's an ambiguity in the
6 rule, correct, vis-a-vis, the statute?

7 A. I mean the Court doesn't use the word ambiguity. What the
8 Court says is it may be challenged.

9 Q. Well, in your mind do you think if something subject to
10 challenge that there's some ambiguity?

11 A. Well, sometimes the challenge might be whether or not it's
12 ambiguous. I'm hesitant, again, to add anything to what
13 the Supreme Court has said here, which is that it may be
14 challenged.

15 MR. CUNNINGHAM: Your Honor, at this point I
16 think I have to object to this whole line of questioning.
17 We're talking about argument here. When the testimony's
18 in, he can make all his arguments, but this is, you know,
19 trying to make his arguments at this point while we have
20 witness testimony.

21 THE COURT: So, is this a relevancy objection?

22 MR. CUNNINGHAM: Yes.

23 THE COURT: Sir.

24 MR. OLSEN: Well, Your Honor, he read the
25 opinion yesterday, so it clearly was important for today's

1 testimony. But also, given that Mr. Brater is responsible
2 for the enforcement and oversight of Michigan election
3 law, the law that is set by the Michigan Supreme Court is
4 directly relevant, particularly given the issues in this
5 criminal proceedings are the rules that he issued that had
6 not gone through the APA for which they're charging my
7 clients with crimes for not following.

8 THE COURT: Correct.

9 Go ahead, Mr. Cunningham.

10 MR. CUNNINGHAM: That's argument, Your Honor.
11 That's completely argument.

12 THE COURT: It is. I think that the line of
13 questioning began appropriately, Mr. Olsen, but you
14 elicited the testimony, I believe, that you were intending
15 to elicit. And from this point on, I'm certainly happy to
16 hear that in argument, but I also have read O'Halloran,
17 and was interested in the answers provided by Mr. Brater,
18 and I can assess that at the time of making decision. So,
19 I'll sustain the objection and just ask that we start
20 moving on a bit.

21 MR. OLSEN: Yes, Your Honor.

22
23 THE COURT: Thank you.

24 BY MR. OLSEN:

25 Q. Mr. Brater, as the director of the BOE, you had the

1 ability to set in motion criminal proceedings against
2 election officials, correct?

3 A. I can refer information that I believe may be criminal to
4 the appropriate investigators.

5 Q. So, you can set in motion criminal proceedings?

6 A. Well, I don't know that I would agree that I can set them
7 in motion. I mean somebody who actually has authority to
8 determine whether there's probable cause would need to
9 actually --

10 THE COURT: Can you file a complaint if you
11 believe that something was violated?

12 THE WITNESS: I can contact the Department of
13 Attorney General.

14 THE COURT: Okay. So, you're not filing the
15 complaint. You making a contact that you believe there
16 may have been some type of violation, and they implement
17 an investigation?

18 THE WITNESS: I believe that's correct, yes.

19 THE COURT: Go ahead, sir.

20 BY MR. OLSEN:

21 Q. Mr. Brater, you'd agree that it's critical that any legal
22 authority you cite for your authority to issue binding
23 orders upon election officials that that authority you
24 cite be accurate?

25 MR. CUNNINGHAM: Objection to relevance, Your

1 Honor.

2 All those legal decisions are made by the
3 Attorney General, not by the person who actually -- not by
4 the person who starts an investigation.

5 THE COURT: Mr. Olsen.

6 MR. OLSEN: Two points, Your Honor.

7 THE COURT: Yes, sir.

8 MR. OLSEN: First, he has testified that he is
9 responsible for the enforcement and oversight of Michigan
10 election law. He, in letters, has threatened my clients
11 with criminal penalties if his orders are not followed.
12 This is also impeachment. So, he is the one who has
13 raised, through their correspondence with my client, Ms.
14 Stephanie Scott, that she's in violation of the law. And
15 my question is simply, before he starts threatening
16 somebody, an elected official, with criminal penalties, he
17 should understand and make sure that he's accurate within
18 his ability to make such threats.

19 THE COURT: Mr. Cunningham.

20 MR. CUNNINGHAM: There's statutory that says he
21 is the authority to supervise clerks in the conducting of
22 the election. Pursuant to that statutory authority, there
23 is a criminal statute that says, a rule, which we're not
24 talking about here, or an instruction, if there was a
25 violation of the instruction. It's in violation of the

1 law. He has every right under a statute to instruct
2 clerks how they should proceed.

3 THE COURT: I'm going to overrule the objection.
4 You can continue.

5 MR. OLSEN: Thank you, Your Honor.

6 BY MR. OLSEN:

7 Q. Do you make yourself aware of new developments in the law
8 that affect any rule or orders you may issue?

9 A. Yes.

10 Q. And new developments can impact whether or not -- new
11 developments in the law could impact whether or not any
12 rule or order you issue is a lawful order, correct?

13 A. Yes.

14 Q. You understand that criminal charges against an election
15 official -- against anybody -- as opposed to a civil case,
16 threaten the freedom of an individual, correct? They can
17 be put in jail for years?

18 A. Depending on the charge, yes, that can happen.

19 Q. So, before you threaten criminal penalties on election
20 officials, do you have anybody -- as you've done in
21 letters with Ms. Scott, do you have any -- anybody review
22 the letters threatening criminal penalties before they go
23 out?

24 A. Well, I don't agree with your characterization of the
25 letters as threatening. The letters do -- when a letter

1 includes an instruction on a supervisory authority of the
2 Secretary of State, which I can exercise, the letters
3 typically advise the individual that willfully failing to
4 follow lawful instruction is a crime under Michigan
5 election law. Otherwise, I, and others involved in the
6 drafting of the letters, will review the underlying
7 statutes or administrative rules that are being cited to,
8 as best we can, insure that they're being characterized
9 accurately in the letter.

10 Q. Mr. Brater, do you have a process before you send out
11 memos or letters to clerks in general, in Michigan,
12 that's, you know, to have somebody, other legal
13 departments review them before they go out?

14 A. Yes.

15 Q. Could you describe that for me, please?

16 A. Well, it depends on the complexity of the letter or the
17 memorandum, but typically ones that are -- certainly ones
18 that are more in-depth would involve review by the
19 Department of Attorney General before they're sent out.

20 Q. Is that a set process that occurs every time, or is it
21 discretion, what you decide to send a draft letter or
22 memorandum out?

23 A. I would say it's discretionary. It depends on whether I
24 think or whether my colleagues at the Bureau of Elections
25 think that there's something, you know, either that is --

1 requires some additional review or that is an issue that
2 we haven't already discussed before might require the
3 Attorney General to review.

4 Q. Okay. Township clerks are elected officials, correct?

5 A. Yes.

6 Q. Okay. They are constitutional officers in their own
7 right, correct?

8 A. I would agree with that, yes.

9 Q. Okay. They're not employees of the Bureau of Elections or
10 the Secretary of State, correct?

11 A. That's correct.

12 Q. The Michigan legislature, in fact, has enacted specific
13 legislation regarding the removal of township clerks,
14 correct?

15 A. I believe there is a provision in the consolidated laws
16 regarding this.

17 MR. OLSEN: May I approach, Your Honor?

18 THE COURT: You may.

19 Just for housekeeping purposes, did you want to
20 admit Defendant's 4, that being the O'Halloran case?

21 MR. OLSEN: Yes, Your Honor.

22 THE COURT: Was that --

23 MR. CUNNINGHAM: No objection.

24 THE COURT: Okay. It's admitted.

25 (At 9:36 a.m., Defense Exhibit 4 Admitted)

1 BY MR. OLSEN:

2 Q. Mr. Brater, I'm handing you what has been marked for
3 identification as Defendant's Exhibit 5. It's a copy of
4 the statute MCL 168.369 entitled removal of township
5 officer; grounds; service of charges; hearing; and effect
6 of removal. Do you see that?

7 A. Yes.

8 (At 9:36 a.m., Defense Exhibit 5 Marked)

9 BY MR. OLSEN:

10 Q. Are you familiar with this statute?

11 A. Yes.

12 Q. Do you see where, at the top, it says, "The Governor shall
13 remove a township officer chosen by the electors of any
14 township"?

15 A. Yes.

16 Q. And do you see that the statute sets forth a process for
17 information to come to the Governor's attention regarding
18 any recorded malfeasance or misconduct by an election --
19 or a township clerk?

20 A. I would agree with that characterization, yes.

21 Q. There's no provision in here for the -- for you, or the
22 Secretary of State, to remove a township officer -- clerk,
23 correct?

24 A. That's correct.

25 Q. Okay. Mr. Brater, with respect to the directives that you

1 issued to Clerk Scott that are at issue in this criminal
2 proceeding, you're not claiming that Ms. Scott failed to
3 preform her obligation to preserve election records in
4 accordance with Michigan and federal law, are you?

5 A. Well, the letter that I sent her -- the letters I sent
6 back in 2021 had to do with -- they had to do with logic
7 and accuracy testing, signing certificates for logic and
8 accuracy testing, and for allowing preventative
9 maintenance of voting equipment, and I believe for using
10 voting equipment as required by the Michigan election law.
11 That's what was in the letters. I don't believe those
12 letters dealt with preserving records.

13 Q. Okay. So, you're not claiming that Clerk Scott failed to
14 fulfill her obligations to preserve election records,
15 correct?

16 A. I don't know whether or not she did that.

17 Q. Okay. But you're not claiming that, are you?

18 A. No.

19 Q. Okay. And you're not claiming that Ms. Scott committed
20 voter fraud in any election, correct?

21 MR. CUNNINGHAM: I'm going to object, Your
22 Honor. That's not his role. He doesn't have any
23 knowledge here. He's not the one that brings the charges.

24 THE COURT: Sir.

25 MR. OLSEN: Your Honor, I'm framing the issues

1 as to exactly what he is claiming Ms. Scott did and -- in
2 his letters. And I want to set forth that she -- he's not
3 claiming that she violated her obligations, or the
4 fulfillment of her duties with respect to preserving
5 records, or that this case is not about voter fraud.

6 THE COURT: Mr. Olsen, do you -- you have the
7 copies of the letters, the People's exhibits that were
8 admitted, correct?

9 MR. OLSEN: Yes, Your Honor.

10 THE COURT: Can you limit your questions to Mr.
11 Brater in terms of what he believes may have done wrong to
12 the letters in terms of this line of questioning.

13 MR. OLSEN: Yeah. I'm almost done. I'm just
14 kind of going through a list right now. I wanted to make
15 sure that the Court was aware, the public is aware that
16 this is not a case about a failure to fulfill an
17 obligation to preserve records.

18 THE COURT: I believe he's answered that part.

19 MR. OLSEN: And then it's not a case that Clerk
20 Scott somehow committed voter fraud performance --

21 THE COURT: I think you can ask him whether or
22 not he reported that.

23 MR. OLSEN: Okay.

24 THE COURT: Go ahead.

25 So, I'll sustain in part.

1 BY MR. OLSEN:

2 Q. Mr. Brater, did you have any finding that Ms. Scott
3 committed some type of voter fraud?

4 A. No.

5 Q. You mentioned the logic and accuracy test?

6 A. Yes.

7 Q. You are aware that Ms. Scott scheduled the logic and
8 accuracy test, correct?

9 A. In her response to one of my letters, I believe Ms. Scott
10 indicated that the test had been scheduled, yes.

11 Q. Do you recall that -- do you know who Abe Dane is?

12 A. Yes.

13 Q. And Abe Dane is the county clerk or deputy clerk?

14 A. He is the Hillsdale County Clerk. At the time that I sent
15 the letters, he was the deputy clerk, I believe, is his
16 title.

17 Q. Mr. Brater, I've just handed you what has been marked for
18 identification as --

19 MR. CUNNINGHAM: May I see it, please?

20 MR. OLSEN: -- Defendant's Exhibit --

21 THE COURT: Do you have a copy for Mr.
22 Cunningham?

23 MR. OLSEN: Yeah, I do.

24 THE COURT: Did you find it necessary to have
25 five admitted, which is the statute? I certainly can take

1 notice of that.

2 MR. OLSEN: Your Honor, we just request you take
3 judicial notice.

4 THE COURT: Yeah, I'm aware of 168.369, so
5 noted.

6 So, this would be -- do you already have this
7 marked as 6?

8 MR. OLSEN: I did.

9 THE COURT: Okay. That's fine. We'll just skip
10 over 5. This will be Defendant's Exhibit 6.

11 BY MR. OLSEN:

12 Q. Mr. Brater, you've been handed what has been marked for
13 identification as Defendant's Exhibit 6. It's an email
14 from Mr. Dane to you dated September 20, '21.

15 Have you seen this email before, sir?

16 A. I must have. If it was sent to me, I'm sure I read it.

17 (At 9:42 a.m., Defense Exhibit 6 Marked)

18 BY MR. OLSEN:

19 Q. Does this appear to be a true and accurate copy of that
20 email?

21 A. Yes.

22 Q. Do you see where it says, "Good afternoon, Mr. Brater."
23 And Mr. Dane continues, "I wanted to let you know that I
24 was able to get a public accuracy date out of the Adam's
25 Township clerk for October 27th." Do you see that?

1 A. Yes.

2 Q. So, Mr. Dane -- when he's talking about a public accuracy
3 date out of the Adam's Township clerk, is it your
4 understanding that he's referring to a test date for the
5 logic and accuracy test?

6 A. The public, yeah. The public logic and accuracy test, I
7 believe, is what that's referring to there.

8 Q. Is there any other logic and accuracy test under the --
9 under Michigan law than a public?

10 A. Clerks perform preliminary testing prior to the public
11 accuracy test.

12 Q. Is that required by statute?

13 A. I believe it is in the administrative rule, but I don't
14 believe the specific term, preliminary testing, is in the
15 Michigan election law.

16 Q. Is there any other test other than the public logic and
17 accuracy test that's required under Michigan law to be
18 performed?

19 A. I believe that the Michigan election law specifically
20 refers to the public accuracy test.

21 Q. You mentioned -- what is -- you mentioned signing the
22 certificate of the logic and accuracy test, do you recall
23 that?

24 A. Yes.

25 Q. When is the certificate signed?

1 A. Upon completion of the test.

2 Q. Okay. Is it a successful completion of the test or just
3 that the test was done, like a participation?

4 A. The administrative rules lay out the process that the
5 test, you know, under which the test is done. So, the
6 certificates would be signed upon that process being
7 completed as laid out and the election law and then in the
8 administrative rule.

9 Q. So, but the test would have to be successful, correct, in
10 order to be signed off on?

11 A. Yes. I mean I think that if there was anything that were
12 uncovered during the testing then -- I'm not actually sure
13 whether you would sign something at that point and then go
14 back and retest or if you would not sign anything and then
15 come back and test. But you would need to complete the
16 process, certainly, before you would sign the
17 certificates.

18 Q. Yeah. And I mean is it fair to say -- well, first of all,
19 if the logic and accuracy test is failed, that equipment
20 cannot be used in an election until whatever defect that
21 caused that failure is fixed, right?

22 A. Yes.

23 Q. Okay. So, you're not suggesting that a clerk agreed in
24 advance to sign a certificate regarding the logic and
25 accuracy test without knowing whether the machines even

1 passed?

2 A. The -- what I was suggesting is that the clerk needs to
3 agree that they will follow the legal process, which is to
4 conduct the test and then require -- and then signed the
5 required certificates.

6 Q. Upon successful completion of the test, correct?

7 A. Well, I mean the required certificates, you know, that
8 would imply you were going to complete the test and then
9 upon the complete of the test, you would sign the
10 certificates.

11 Q. So, you're not -- you're not ordering here, with this
12 case, Ms. Clark (sic) to agree to sign a certificate
13 without even knowing if the equipment passed the logic
14 and accuracy test. It's predicated on passing it before
15 you sign it, right?

16 A. So, yeah. I mean you said Ms. Clark. I believe --

17 THE COURT: Ms. Scott.

18 THE WITNESS: -- you're referring to Ms. Scott.
19 Is that -- yeah.

20 So, the -- no, I mean the assumption would be
21 that you would conduct the test, as required by the
22 election law and the administrative rules, and then upon
23 completing that process, you're agreeing that you will do
24 that, and then you're agreeing that upon completing that
25 process you would sign the certificates as required by

1 law.

2 BY MR. OLSEN:

3 Q. Do you consider yourself an authority on electronic voting
4 systems used in Michigan?

5 A. I would say that I'm an authority on the legal
6 requirements in the process. I'm not a technical expert
7 in terms of the construction or the technology involving
8 those machines.

9 Q. So, would you consider yourself an authority on what type
10 of election data is retained within various components of
11 the election systems used in Michigan?

12 A. I mean, again, in so far as the legal requirements are
13 concerned, yes, but again, I'm not a technical expert, so
14 I don't have any detailed knowledge of the technical
15 mechanisms by which these devices function.

16 Q. So, putting aside the technical mechanisms by the way
17 these devices function, is it fair to say that the
18 machines record certain election records, correct?

19 A. The voting system as a whole, makes a record of the
20 ballots that are tabulated.

21 Q. And there are other records that -- there are other
22 election records that are retained on various components
23 of the election system, correct?

24 A. When you say the election system, I'm not sure exactly
25 what you mean.

1 Q. Let's talk about a tabulator. Do you understand what a
2 tabulator is?

3 A. Yes.

4 Q. Do you understand -- are you knowledgeable of every single
5 election record that is required to be preserved under
6 state and federal law that resides on a tabulator?

7 A. I mean, again, I couldn't tell you at a detailed,
8 technical level in terms of like file types and things
9 like that, but as far as what needs to be required in
10 terms of the records, when the ballot's tabulated, and the
11 programming used, I'm generally familiar with what needs
12 to be retained.

13 Q. So, you're generally familiar with what needs to be
14 retained?

15 A. Yeah. I mean, again, I'm not -- I don't claim to be an
16 expert on how the equipment functions at a detailed,
17 technical level; however, I am aware of the records that
18 are retained following the election.

19 Q. Do you consider yourself an authority on whether
20 preventative maintenance performed on tabulators would
21 impact election records that are retained on a tabulator?

22 A. Again, at a legal and policy level, yes, and not at a --
23 again, I'm not a technical expert on the inner workings of
24 complex electronic equipment.

25 Q. So, you don't know whether certain preventative

1 maintenance procedures might erase or otherwise delete
2 election records that reside on a tabulator?

3 A. Well, the records that are retained are not kept on the
4 tabulator; they're kept on the removeable devices that go
5 into the tabulator, so that's the way that we retain
6 election results in Michigan.

7 Q. Mr. Brater, did you give interrogatory responses in the
8 county -- Antrim County litigation regarding elections?

9 A. Which case are you referring to there?

10 Q. Bill Bailey v Antrim County.

11 A. I don't remember specifically whether it was interrogatory
12 responses, but the Department of State was involved in
13 that case.

14 Q. Do you recall giving an interrogatory response where you
15 stated that you would have --

16 MR. CUNNINGHAM: I'm going to object.

17 Counsel here is trying to impeach with
18 inconsistent statement, the process would be to show the
19 statement to the witness first and allow them opportunity
20 to review and then question them on it. There'd be no
21 other basis to offer prior testimony except for an
22 inconsistent statement.

23 THE COURT: Response.

24 MR. OLSEN: Your Honor, I don't think there's
25 any requirement to show the actual statement. I'm asking

1 if he recalls making such a statement.

2 THE COURT: I'll allow you to ask him if he
3 recalls. I think if he doesn't and you plan on
4 impeachment, you clearly know you have to show it to him
5 at that point in time to refresh his memory.

6 MR. OLSEN: Yes, Your Honor.

7 THE COURT: All right. I'll sustain the
8 objection.

9 BY MR. OLSEN:

10 Q. Do you recall responding to an interrogatory in Bailey v
11 Antrim County that would -- you'd have to ask the
12 manufacturer to determine what data's retained on election
13 components?

14 A. I don't remember that specific response.

15 Q. Mr. Brater, I'm handing you what has been marked for
16 identification as Defendant's Exhibit 7.

17 It is the contract with Hart InterCivic
18 regarding the election system at issue in this proceeding.

19 Have you seen this document before, sir?

20 A. Yes.

21 (At 9:53 a.m. Defense Exhibit 7 Marked)

22 BY MR. OLSEN:

23 Q. Do you have any reason to doubt that this is a true and
24 accurate copy of this contract?

25 A. No.

1 MR. CUNNINGHAM: I'm sorry. What number was
2 that?

3 MR. OLSEN: Seven.

4 MR. CUNNINGHAM: Seven, thank you.

5 BY MR. OLSEN:

6 Q. Mr. Brater, I'd like you to direct your attention to page
7 77 of this document. The page numbers are listed --

8 MR. CUNNINGHAM: Can it be admitted first,
9 please.

10 MR. OLSEN: Well, I was going to ask him about
11 it and then move to admit it at the end.

12 THE COURT: Do you have any objection to the
13 admission?

14 MR. CUNNINGHAM: Well, I object to reading from
15 it unless it's in evidence. I mean it's not appropriate,
16 I think, to go into the contents of something that's not
17 in evidence already.

18 THE COURT: So, did you have an objection to it,
19 Mr. Cunningham?

20 MR. CUNNINGHAM: Well, that would be the
21 objection. That it's not in evidence and since he's not -
22 - it's not in evidence, the contents of it should not be -
23 -

24 THE COURT: Sir.

25 MR. OLSEN: I'll move to admit, Your Honor.

1 THE COURT: Objection?

2 MR. CUNNINGHAM: No objection.

3 THE COURT: Seven's admitted.

4 THE COURT: While we're there, did you want Abe

5 Dean's letter, which was 6, admitted officially as well?

6 MR. OLSEN: Yes, Your Honor.

7 THE COURT: Any objection to that, Mr.

8 Cunningham?

9 MR. CUNNINGHAM: No.

10 THE COURT: 6 and 7 will be admitted.

11 (At 9:54 a.m., Defense Exhibits 6 and 7

12 Admitted)

13 BY MR. OLSEN:

14 Q. Sir, I'd like to direct your attention at the bottom of

15 page 77 where the section entitled 1.1824?

16 A. Okay.

17 Q. Do you see where it says, "The tabulator shall be capable

18 of retaining a record of each voted ballot in a way that

19 protects each voters' privacy."?

20 A. Yes.

21 Q. Okay. So, do you see any information in this requirement

22 that the -- that that information is wiped out of the

23 tabulator or removed from the tabulator?

24 A. When you say that information, I don't really understand

25 what you mean by that.

1 Q. Where it says, "The tabulator shall be capable or
2 retaining a record of each voted ballot." Do you see
3 that?

4 A. Yes.

5 Q. And I believe you testified earlier that the tabulator
6 doesn't retain information? If I was mistaken, please
7 correct me.

8 A. What I said was the way that we retain the information
9 from election to election is on the removeable device.

10 Q. Are you testifying that the tabulator does not retain a
11 record of each voted ballot?

12 A. No, I'm not saying that.

13 Q. Okay. So, you don't have any reason to disagree that the
14 tabulators used at issued in this litigation retain a
15 record of each voted ballot?

16 A. Well, I mean, again, the way that we retain and store the
17 record is on the removable drive, the V drive. Whether
18 there is some other copy of the information on the
19 tabulator, I'm not -- I'm not claiming that that may not
20 happen. I'm just saying the way that we restore -- the
21 way that we retain it is on the removable drive.

22 Q. Okay. But -- so you're not saying that the tabulator
23 doesn't retain election records, correct?

24 A. It might have data on it. I don't know that in terms of
25 election records, again, what we retain as an election

1 record is on the removeable device, the V drive.

2 Q. Well, is a record of each voted ballot an election record?

3 A. I would say that the record of the -- the record of the

4 ballots as tabulated would be a record -- or the recording

5 of the ballots, the tabulator would be a record, yes.

6 Q. That's retained on the tabulator?

7 A. Well, it's retained. I mean when you use the word retain,

8 I mean the --

9 Q. I'm using the word in the contract?

10 A. So, the contract -- the contract says, "The tabulator

11 shall be capable of retaining a record of each voted out."

12 That's what the contract says.

13 Q. Okay. Is it your testimony that the tabulator at issue in

14 this litigation does not retain a record of each voted ballot?

15 A. No, I'm not saying that.

16 Q. You see, moving down, it says, "CVRs are stored in random

17 order."?

18 A. Yes.

19 Q. What is a CVR?

20 A. Cast vote record.

21 Q. And what's a cast vote record?

22 A. Generally, it's the individual record of how each ballot

23 was recorded and, you know, how each ballot was counted by

24 the tabulator.

25 Q. It's the sequence in which ballots are processed by the

1 tabulator along with the ballot record data, correct?

2 A. The -- I mean the cast vote record, I know, refers to the

3 how the ballot was tabulated. As far as the sequence is

4 concerned, that's randomized, so I don't know that it

5 would necessarily include the sequence. There may --

6 initially, obviously the ballots are tabulated in

7 sequence, but I'm not sure what, in terms, of that

8 sequence is stored.

9 Q. Okay. A cast vote record is an election record, correct?

10 A. Yes. I agree with that, yes.

11 Q. And do you see where it says, "Our CVRs are stored in

12 random order."?

13 A. Yes.

14 Q. And that means stored on the tabulator, correct?

15 A. It means stored in -- I mean in the context of this

16 contract, it means it's stored. Certainly, it would be

17 stored on a V drive removeable memory device. There may

18 also be a copy of it on the tabulator itself.

19 Q. So, you have no reason to dispute that the tabulator also

20 stores the cast vote record?

21 A. It might also temporarily be on the tabulator, yeah.

22 Q. Well, when you say it might temporarily be on the

23 tabulator, would it be temporary because somebody deletes

24 the data?

25 A. Well, tabulators are reused for each election, so the, you

1 know, they are not -- the information that is on a
2 tabulator does not stay in the tabulator forever. When
3 you put a new drive in for each election, it's the V
4 drive, the removeable drive, that has the information that
5 is permanently retained. So, there may be some other
6 information that's temporarily on the tabulator, but it
7 does not stay on there forever.

8 Q. Is the V drive that you referred to the only memory device
9 for a tabulator, the removeable V drive?

10 A. I'm not sure that I have enough technical knowledge to say
11 if it's the only memory device. What I know is it is the
12 device that is used in Michigan to retain the records and
13 the programming for the tabulator.

14 Q. So, you're just not sure?

15 A. I don't have the technical expertise to know what
16 constitutes a memory device to say that that's the only
17 thing on the tabulator that's a memory device.

18 Q. If you -- do you understand what VeriScan scan means in
19 the context, if you look at the bottom?

20 A. Yes.

21 Q. And what does VeriScan scan?

22 A. That is the tabulator.

23 Q. Okay. That's not the removeable device, correct?

24 A. I think here VeriScan scan is specifically referring to
25 the tabulator.

1 Q. Okay. Not the removeable device?

2 A. Yes, I believe so.

3 Q. Okay. And do you see where it says VeriScan has the
4 memory capacity to store 9,999 ballots?

5 A. Yes.

6 Q. So, that's data that the tabulator has the capability to
7 store an election record which includes 9,999 ballots,
8 correct?

9 A. Well, it says it has the memory capacity to store 9,999
10 ballots, that's what the contract says.

11 Q. Do you have any reason to doubt that the tabulators used -
12 - or the tabulator that was used at issue in this
13 proceeding stored ballots as specified in the contract?

14 A. Do I have any reason to think it stored ballots, is that -
15 -

16 Q. No, that it did not store ballots?

17 A. No, I have no reason to think that.

18 THE COURT: You already admitted it.

19 MR. OLSEN: Yeah, I thought so.

20 Thank you, Your Honor.

21 Your Honor, I don't believe the affidavit of
22 probable cause has been admitted in this proceeding
23 before. I don't see it on the list here. I just wanted
24 to make sure.

25 THE COURT: It was discussed and admitted in

1 pretrial motions that were ruled on over in the Circuit
2 Court. It has not been admitted as an exhibit, I don't
3 believe, in the case in chief here. I'm looking through
4 the People's exhibits. I have a memorandum. I have
5 attestation of records. I have a number of letters.

6 No, it has not.

7 Thank you, sir.

8 BY MR. OLSEN:

9 Q. Mr. Brater, you've been handed what has been marked for
10 identification as Defendant's Exhibit 8. It's a copy of
11 the affidavit of probable cause in this matter.

12 Have you reviewed this document before?

13 A. Yes.

14 (At 10:04 a.m., Defense Exhibit 8 Marked)

15 BY MR. OLSEN:

16 Q. When's the last time?

17 A. Yesterday.

18 Q. Did you review it -- strike that.

19 Does this appear to be a true and accurate copy
20 of affidavit of probable cause?

21 A. Yes.

22 MR. OLSEN: Your Honor, we would move to admit
23 this exhibit.

24 THE COURT: Any objection, Mr. Cunningham?

25 MR. CUNNINGHAM: If I could have one second

1 here. I think I do have an objection.

2 All right. Your Honor, I have reviewed it. I
3 have no objection.

4 THE COURT: Admitted. That's Defendant's 8.

5 (At 10:05 a.m., Defense Exhibit 8 Admitted)

6 BY MR. OLSEN:

7 Q. You said you reviewed this affidavit of probable cause
8 last night?

9 A. Yesterday.

10 Q. Yesterday. How many times have you reviewed it?

11 A. I believe twice.

12 Q. Okay. Did you review it before Detective Krauss
13 (phonetic) signed and swore to it?

14 A. No.

15 Q. Did you speak with anyone about the affidavit of probable
16 cause before Detective Krauss signed and swore to it?

17 A. Not that I can remember.

18 Q. Sir, one of the issues in this proceeding is whether the
19 orders you gave to clerks in general, including Clerk
20 Scott, were "lawful orders" --

21 MR. CUNNINGHAM: I'm going to object. There's
22 no testimony that he gave any orders. He talked about him
23 didn't give any instructions but I don't think that his
24 testimony was clearly that it was an instruction made
25 pursuant to the statutory authority.

1 THE COURT: I believe his objection is regarding
2 a concern that you mischaracterized a word in the order.

3 MR. OLSEN: I'll use the word instruction, Your
4 Honor.

5 THE COURT: Perfect. We'll replace that. If
6 you could strike order with instruction.

7 BY MR. OLSEN:

8 Q. Let me just repeat the question, Mr. Brater.

9 One of the issues in this probable cause
10 proceeding is whether you gave instructions to clerks, and
11 including Clerk Scott, which where lawful, the violation
12 of which would be the crime under MCL 168.931(g), correct?

13 A. I believe that section says that a willful violation of a
14 lawful instruction or the willful failure to comply.
15 Literally, what the statute says is an individual shall
16 not willfully fail to perform a duty imposed upon the
17 individual by this act or disobey a lawful instruction or
18 order of the Secretary of State as chief election officer.

19 Q. You would agree that any instruction that you would issue
20 would have to be lawful under this statute in order for
21 there to be a violation?

22 A. Yes.

23 Q. Okay. And if a court found that your instructions were
24 not lawful, then there would not be probable cause of a
25 crime based on Clerk Scott not following that instruction,

1 correct?

2 MR. CUNNINGHAM: Objection, Your Honor. He's
3 calling for a legal conclusion, and that's your decision.

4 THE COURT: Response, Mr. Olsen.

5 MR. OLSEN: Your Honor, again, Mr. Brater has
6 testified that he's responsible for the enforcement and
7 oversight of Michigan election law. I think it's
8 perfectly appropriate --

9 THE COURT: Are you referring specifically to
10 count six, election law: failure to perform duty?

11 MR. OLSEN: Yes, Your Honor, that's --

12 THE COURT: Which is a misdemeanor that doesn't
13 require a probable cause showing at a felony level here
14 for preliminary examination purposes or are you believing
15 that that potentially goes into the common law offense
16 under count four felony as well?

17 MR. OLSEN: It potentially goes into the --

18 THE COURT: Okay.

19 MR. OLSEN: -- count four as well.

20 THE COURT: I'll allow you to continue, but I do
21 agree with Mr. Cunningham that we were getting into the
22 realm of legal conclusions. I think you can rephrase the
23 question for his purposes based off the knowledge that
24 he's already testified to.

25 MR. OLSEN: Okay.

1 BY MR. OLSEN:

2 Q. Mr. Brater, again, you're responsible for the enforcement
3 of Michigan election law?

4 A. Yes.

5 Q. And would you agree that any instruction you give that is
6 not lawful would not result in a penalty or criminal
7 liability for a failure to follow that instruction if it's
8 not lawful?

9 A. I would certainly agree that under this specific section,
10 931(1)(g), that it would not violate that section if an
11 individual did not -- follow an instruction if that
12 instruction was not lawful, I would agree.

13 Q. Okay. So, you pointed at that specific statute. Can you
14 think of any Michigan law that would result in criminal
15 liability for not following an instruction that's not
16 lawful?

17 A. No.

18 Q. Do you consider yourself knowledgeable about what
19 constitutes a lawful instruction or order of the Secretary
20 of State as referred to in MCL 168.931?

21 MR. CUNNINGHAM: Again, Your Honor, I object.
22 He's asking this witness to make legal decisions.

23 THE COURT: Response, Mr. Olsen.

24 MR. OLSEN: Your Honor, again, he's testified
25 he's not only responsible for enforcement of Michigan

1 election law, but he, in letters to Clerk Scott,
2 highlighted that any violation of her order -- his
3 instruction would result in a criminal --

4 THE COURT: I agree. I'm going to allow it.
5 Specifically, in People's Exhibit 5 it says, "This
6 directive remains in effect until further notice. Be
7 advised that willfully failing to comply with a lawful
8 order from the Secretary of State is a misdemeanor." And
9 he lists the statute.

10 You can continue.

11 MR. OLSEN: Thank you, Your Honor.

12 BY MR. OLSEN:

13 Q. Let me repeat the question, Mr. Brater.

14 Do you consider yourself knowledgeable about
15 what constitutes a lawful instruction or order of the
16 Secretary of State as stated in MCL 168.931?

17 A. Yes.

18 Q. Okay. Is it your contention that any instruction or order
19 you give to a township clerk related to the election
20 process is mandatory and that your instruction or order is
21 valid law that must be followed?

22 A. Any instruction that I give pursuant to my authority under
23 the Michigan election law, which derives from the
24 Secretary of State's authority under the Michigan election
25 law, any instruction that is lawful, they would be

1 mandatory for them to follow that instruction.

2 Q. Yeah. So, you qualified that any instruction that's
3 lawful. My question to you is, is any instruction that
4 you give to an election official like Clerk Scott lawful
5 such that the violation or the failure to follow would
6 result in criminal liability?

7 A. In my opinion, as far as I know, yes. Obviously, I'm not
8 the ultimate authority on what is lawful. There's ways to
9 challenge that. So, I can't tell you for the entire legal
10 system of the state of Michigan, but as far as I'm
11 concerned, I do my best to ensure that my instructions are
12 lawful.

13 Q. Earlier, when we began, we talked about the O'Halloran
14 case, correct?

15 A. Yes.

16 Q. In which you were a Defendant?

17 A. Yes.

18 Q. And in O'Halloran, didn't the Michigan Supreme Court
19 specifically rule that a instruction or order that had not
20 gone through the Administrative Procedures Act was invalid
21 and not lawful?

22 A. I don't believe that that was the specific wording of that
23 case.

24 MR. OLSEN: Let's go back and review it again.
25 If you would pull out that case.

1 MR. CUNNINGHAM: Could someone please refer me
2 to the portion that talks about instructions?

3 MR. OLSEN: Well, the statute uses instruction
4 or order, I believe. So, it seems that those two are used
5 interchangeably to the extent -- let me -- can I just ask
6 the question.

7 THE COURT: Which statute -- to which statute
8 are you referring?

9 Is that what you're asking for clarification on?

10 MR. CUNNINGHAM: I was asking for clarification.
11 He's talking about specific language in an opinion. I
12 just asked him that he direct my attention to that
13 language so I know what he's talking about.

14 THE COURT: All right. Do you have a copy of
15 the O'Halloran case in front of you?

16 MR. CUNNINGHAM: No, I don't.

17 THE COURT: Did you have another copy of that
18 for Mr. Cunningham?

19 You did provide me a curtesy copy.

20 Thank you.

21 MR. CUNNINGHAM: Thank you, Your Honor.

22 MS. JUNTILLA: Your Honor, could we have one
23 moment?

24 THE COURT: Sure.

25 MR. OLSEN: Just a moment, Your Honor.

1 THE COURT: Not a recess, just a moment? Great.

2 MR. OLSEN: One minute.

3 THE COURT: No problem.

4 MS. JUNTILLA: Your Honor, I would actually,
5 while we're looking for a document, love the opportunity
6 to use the restroom.

7 THE COURT: Looks like --

8 MR. OLSEN: Could we take a short recess, Your
9 Honor?

10 THE COURT: We can. We can take a quick -- how
11 about five minutes. Thank you.

12 MR. OLSEN: Thank you, Your Honor.

13 (At 10:14 a.m., break in proceedings)

14 (At 10:22 a.m., proceedings resume)

15 THE COURT: All right. We will go back on the
16 record.

17 Mr. Olsen, did you guys have the opportunity to
18 find what you were looking for?

19 MR. OLSEN: Yes, Your Honor.

20 THE COURT: Okay. You can continue.

21 BY MR. OLSEN:

22 Q. Mr. Brater, I handed you back the opinion in O'Halloran v
23 Secretary of State by the Michigan Supreme Court. Do you
24 have that in front of you?

25 A. I've got it, yep.

1 Q. Turn to the page at the top right hand corner, page 18 of
2 59. And that has the syllabus section four that we
3 discussed at the outset of this proceeding this morning?

4 A. Yes.

5 Q. And we talked about that begins with the APA provides a
6 formal process that an agency must follow to promulgate a
7 rule that has the force and effect of law, correct? Do
8 you see that?

9 A. Yep.

10 Q. And do you see how -- you recall we earlier talked about
11 interpretive rules that do not go through the APA, but
12 those rules do not result in a sanction and do not have
13 the force of law, you see that?

14 A. Yes, I remember that discussion.

15 Q. Okay. So, would you agree that a rule issued by you that
16 does not go through the APA does not have the force of law
17 -- that's the underlying statute that matters, but your
18 rule that has not gone through the APA does not have the
19 force of law?

20 MR. CUNNINGHAM: I'm going to object, Your
21 Honor. This is beyond -- it's irrelevant here. He's
22 giving them instructions based upon a specific authority
23 of a specific statute. We're not talking about any rule
24 here. We're talking about an instruction given under a
25 specific statute by the director of elections pursuant to

1 the specific statutory authority to instruct and supervise
2 clerks in elections.

3 THE COURT: Mr. Olsen.

4 MR. OLSEN: Yes, Your Honor. And the Michigan
5 Supreme Court and other courts, which we will get into,
6 rejected the notion that the Secretary of State's
7 supervisory powers under 168.21, which I believe is what
8 Mr. Cunningham's referring to, gives a blanket authority
9 to issue binding rules that have the force of law. That
10 was actually specifically at issue in O'Halloran and in
11 the Jeneski opinion that we'll talk about.

12 THE COURT: And I agree with you. I'm going to
13 overrule the objection, but I'm also going to advise Mr.
14 Olsen. I believe that Mr. Brater has answered all of the
15 questions specifically regarding paragraph four on page
16 18. And I have this case in front of me. It is a Supreme
17 Court case, and I will be able to utilize that given the
18 weight that it is worth at the time of the decision. And
19 we're referring to those in terms of directives that he
20 had given in these letters he wrote in 2021. So, I would
21 definitely be interested in that line of questioning --

22 MR. OLSEN: Yes, Your Honor.

23 THE COURT: -- regarding the timeframes here as
24 well.

25 MR. OLSEN: Yes, Your Honor. The only reason I

1 went back to it is because he, in my opinion, I thought he
2 backtracked a little bit.

3 THE COURT: And if that is so, I will take that
4 into consideration, and I definitely have what his answers
5 were from earlier regarding same.

6 MR. OLSEN: Thank you, Your Honor. We'll move
7 on then.

8 THE COURT: Thank you.

9 BY MR. OLSEN:

10 Q. Mr. Brater, would you pull out the affidavit of probable
11 cause which has been admitted as Defendant's Exhibit 8?

12 A. Okay. Got it.

13 Q. And if you go to paragraph 20 of this document that is on
14 page eight?

15 A. Yep.

16 Q. Do you see where it begins with, "On October 15, 2021, the
17 director of elections sent a five page letter."?

18 A. Yes.

19 MR. OLSEN: Your Honor, I believe that that
20 letter has been previously admitted as People's Exhibit 4?

21 THE COURT: Correct.

22 MR. OLSEN: We have our --

23 THE COURT: You're welcome.

24 BY MR. OLSEN:

25 Q. Mr. Brater, I've just handed you People's Exhibit 4, which

1 is your letter of October 15th to Ms. Scott. Do you see
2 that?

3 A. Yes.

4 Q. When's the last time you reviewed this document?

5 A. Yesterday.

6 Q. Sir, I'd like to direct your attention to page five of the
7 letter.

8 Let me know when you're there?

9 A. I'm there.

10 Q. Okay. And on this page, you claimed that your authority
11 to issue mandatory orders to the township clerk, Ms.
12 Scott, stems from two statutes, 168.21 and 1.31(1)(a)(b)
13 (sic).

14 THE COURT: We have an objection.

15 MR. CUNNINGHAM: I want to object. It's not
16 what he's asserting. He had -- did not do this affidavit.
17 This is an AG investigator doing the affidavit.

18 THE COURT: I think he's referring to the
19 letter.

20 MR. OLSEN: I'm referring to the letter.

21 MR. CUNNINGHAM: Just the letter? No objection
22 then.

23 THE COURT: Okay. Withdrawn.

24 BY MR. OLSEN:

25 Q. Sir, you referred to two statutes as the basis for your

1 authority to issue mandatory orders, 168.21 and 168.31 (1)
2 (a) and (b), correct?

3 A. No.

4 Q. Well, just -- I'll get to the other one, but so far,
5 correct?

6 A. Two of the statutes that are cited here are the ones you
7 mentioned, yes.

8 Q. Okay. And then you also cite the case of Secretary of
9 State v Berrien County Board of Election Commissioners,
10 373 Michigan 526 (1964), correct?

11 A. Yes.

12 Q. Okay. And then you state that county clerks and boards of
13 commissioners are required to comply with the instructions
14 given by the Secretary of State, and that's right before -
15 - then you cite this -- the Secretary of State v Berrien
16 County Board of Election Commissioners, correct?

17 A. Yes.

18 Q. Okay. So, you're saying that this -- your instructions
19 are mandatory here?

20 A. This sentence explains that the instructions given by the
21 Secretary of State pursuant to the Secretary of State's
22 authority that, in this case, clerks and board
23 commissioners are required to comply with those
24 instructions.

25 Q. Okay. So, it's mandatory, is what your position is?

1 A. Yes.

2 Q. And the mandatory order carries with it -- strike that.

3 In order to be mandatory, are you saying that
4 these instructions were also lawful?

5 A. The letter doesn't specifically cite the other section 931
6 -- or at least that paragraph doesn't, but I think it's
7 fair to say that it's implied that the instructions are
8 lawful if they're mandatory.

9 Q. Okay. Do you see the three bullet points on the
10 directions that you're giving.

11 "In accordance with my authority under
12 Michigan election law, you are directed to --
13 and then you say -- permit Hart InterCivic
14 Inc. to perform preventative maintenance on
15 your voting equipment, conduct public accuracy
16 testing, and sign required certificates,
17 conduct all future elections in the Adams
18 Township using certified Hart InterCivic
19 voting equipment until such time as the
20 Hillsdale County Clerk chooses a different
21 certified voting system vendor."

22 Those are the three instructions that you say
23 are mandatory and lawful?

24 A. Yes.

25 Q. Okay. And do you see in the Defendant's Exhibit 8 at

1 paragraph 20, do you understand that Detective Krauss is
2 referring to People's Exhibit 4 as part of the basis of
3 probable cause?

4 A. I certainly agree that he is referring to this letter. As
5 far as the basis of probable cause, that's --

6 Q. Well --

7 A. -- I don't think I have the authority to make that kind of
8 determination.

9 Q. Well, if you read --

10 A. Yes, referring to this letter.

11 Q. Yeah. And so, if you read down at paragraph 20 at the
12 bottom of page eight where Detective Krauss states,
13 "Citing his authority regarding the supervision and
14 administration of election laws, the director of elections
15 order the court to --"?

16 A. Yes.

17 Q. Okay. And then it continues with that. It's the three
18 bullet points that you outline, correct?

19 A. Yes.

20 Q. And then Detective Krauss follows on if you go over to
21 page nine at the end of paragraph 20,

22 "...the letter clearly indicated that if
23 Clerk Scott did not fully comply by October
24 22, she would be ordered to refrain from --
25 should be administrating -- elections in Adams

1 Township. She was further advised that it was
2 a criminal offense to willfully fail to comply
3 with this lawful order."

4 Do you see that?

5 A. Yes.

6 Q. So, Detective Krauss is assuming that this is a lawful
7 order or that your -- correct?

8 A. He -- I mean he refers to it as this lawful order.

9 Q. Right. He's assuming it's a lawful order, correct?

10 A. I -- the letter says, "This lawful order." I -- beyond
11 that, I can't tell you what was in his head, but the
12 letter says, "...this lawful order."

13 Q. Okay. Did any of these orders, the three bullet points
14 that are also referred in the affidavit of probable cause,
15 did any of those instructions or orders go through the
16 Administrative Procedures Act?

17 A. The issuance of these specific instructions did not go
18 through the Administrative Procedures Act.

19 MR. OLSEN: Your Honor, I have a copy of the
20 statute that, rather than admit it as an exhibit, may I
21 just present it to you and to the witness?

22 THE COURT: Sure. Absolutely.

23 Mr. Cunningham, do you have a courtesy copy for
24 him?

25 MR. CUNNINGHAM: I do.

1 BY MR. OLSEN:

2 Q. Mr. Brater, I've just handed you a copy or a printout of
3 MCL section 168.31 entitled Secretary of State duties as
4 to election rules. Do you see that?

5 A. Yes.

6 Q. Are you familiar with this statute?

7 A. Yes.

8 Q. And in fact, you cited in People's Exhibit 4, the October
9 15th letter, as one of the basis for your authority?

10 A. Yes.

11 Q. Okay. Do you see -- and you also cite specifically 168.31
12 subsection (1)(a) and (b), do you see that?

13 A. Yes.

14 Q. Now, subsection (1)(a) reads in the statute, "The
15 Secretary of State shall do all of the following: subject
16 to subsection two, issue instructions and promulgate rules
17 pursuant to the Administrative Procedures Act of 1969."
18 You see that?

19 A. Yes.

20 Q. Okay. So, do you understand that that is requiring you to
21 submit issue, instructions, and promulgate rules pursuant
22 to the Administrative Procedures Act, at least that's what
23 it says, right?

24 A. That's what the statute says. "Issue instructions and
25 promulgate rules pursuant to the Administrative Procedures

1 Act."

2 Q. Okay. So -- and what year was that Administrative
3 Procedures Act?

4 A. This says act of 1969.

5 Q. And requiring the Secretary of State in the statute to
6 promulgate rules and instructions pursuant to the APA,
7 that's -- pursuant to the APA's a fairly significant
8 event, correct? Qualification in the statute.

9 A. You changed the words around there, but. So, issue
10 instructions and promulgate rules pursuant to the
11 Administrative Procedures Act, and your question is was it
12 significant event, I suppose it was.

13 Q. Well, it's an important requirement, correct?

14 A. Yes.

15 Q. Okay.

16 THE COURT: Is he done with People's 4?

17 MR. OLSEN: We may come back to it.

18 THE COURT: No problem.

19 BY MR. OLSEN:

20 Q. Mr. Brater, you've just been handed a document marked for
21 identification as Defendant's Exhibit 9. It's a copy of
22 the decision in Secretary of State v Berrien County Board
23 that you cite in your October 15th letter.

24 Have you read this decision before, sir?

25 A. Yes.

1 (At 10:39 a.m., Defense Exhibit 9 Marked)

2 BY MR. OLSEN:

3 Q. Okay. When's the last time you read it?

4 A. Many years ago.

5 Q. Okay. Did you read it before you cited it for authority
6 that county clerks and the boards of commissioners are
7 required to comply with instructions given by the
8 Secretary of State?

9 A. Yes. I mean that's language that appears in, I believe,
10 all the supervisor control letters that are sent. So, the
11 first time that was included, I would've read this.

12 Q. Okay. Did this, People's Exhibit 4, the October 15, 2021
13 letter. Did you send that up to the Michigan Attorney
14 General's office for review before you sent it to Clerk
15 Scott?

16 A. I don't remember.

17 Q. Would it have been your practice to send a letter like
18 this to the Michigan Attorney General's office for review
19 before sending it?

20 A. Well, as I discussed before, you know, whether we would
21 ask the Attorney General to review things, it would depend
22 on the complexity, whether it was something that we hadn't
23 already discussed, so I think this probably would be
24 something that I would ask the Attorney General's office
25 to review but I can't remember whether they did in this

1 case.

2 Q. Okay. Did you have any discussions with the Attorney
3 General's office regarding your authority to issue binding
4 instructions on township clerks before sending the
5 People's Exhibit 4 to Clerk Scott?

6 A. I don't remember whether or not I had that specific
7 discussion.

8 Q. The Berrien case was issued in 1964, right?

9 A. The Berrien case?

10 Q. The Berrien case, excuse me?

11 A. Yes.

12 Q. That's five years before the APA, correct?

13 A. It's five years before the Administrative Procedures Act
14 of 1969.

15 Q. Yeah. So, if you turn to Exhibit -- page five of six in
16 the top right hand corner of the opinion?

17 A. Okay.

18 Q. And if you go down to the bottom, do you see where it is -
19 - the opinion is citing 168.31?

20 A. You said on page five?

21 MR. OLSEN: Page five of six, top right hand
22 corner.

23 So, if you want to do the opinion, it's opinion
24 530.

25 May I approach, Your Honor?

1 THE COURT: You may.

2 THE WITNESS: Oh, I see.

3 MR. OLSEN: It's right here.

4 THE WITNESS: Yes. At the very bottom, yes.

5 BY MR. OLSEN:

6 Q. And you see where they're citing 168.31, correct?

7 A. Yes.

8 Q. And that's the statute that you cited in your letter of
9 People's Exhibit 4, correct?

10 A. Yes.

11 Q. Okay. Do you see where it says in quoting 168.31,

12 "The Secretary of State, in addition to
13 other powers and duties conferred upon him,
14 shall have the power, and it shall be his duty
15 -- and then continuing over -- to prepare
16 rules, regulations, instructions for the
17 conduct of elections and registration in
18 accordance with the laws of this state."

19 Do you see that?

20 A. Yes.

21 Q. There's nothing in there about the Administrative
22 Procedures Act being a requirement, is there?

23 A. No.

24 Q. Because this opinion was issued five years before the
25 Administrative Procedures Act, correct?

1 A. Again, it was issued five years before the Administrative
2 Procedures Act in 1969.

3 Q. And it was issued -- and since 1969, the legislature
4 amended 168.31 to add in the requirement that rules go
5 through the Administrative Procedures Act, correct?

6 A. It added the language that we discussed earlier, which is
7 promulgate rules pursuant to the Administrative Procedures
8 Act.

9 Q. Bingo. And so, the -- this opinion, Secretary of State v.
10 Berrien County, is not even relevant to your authority now
11 and it's citing an outdated statute because you admitted
12 that your rules did not go through the Administrative
13 Procedures Act. So, why are you citing a case that relies
14 on a statute that is out of date?

15 MR. CUNNINGHAM: Objection, Your Honor. It's
16 argumentative and misleading. And clearly the statute
17 itself talks about one of the things it can do is to issue
18 instructions, and then the second thing is to promulgate
19 rules. That's under subsection (a). But also, it has
20 additional authority under (b) to advise and direct local
21 officials to make proper methods of conducting elections.
22 So, I think counsel is misinterpreting, misstating, and
23 arguing.

24 THE COURT: Response.

25 MR. OLSEN: I'm not misinterpreting, Your Honor,

1 and I'm not arguing. He has been threatening clerks with
2 criminal penalties for violating a statute that is out of
3 date, that his authority is out of date. He's admitted
4 that the rules were not issued to the AP -- through the
5 Administrative Procedures Act. That's a change in the
6 law.

7 THE COURT: I think you're making argument.
8 However, I think it is appropriate for Mr. Brater to
9 answer the question as to whether or not he was aware that
10 what was being cited was old law.

11 BY MR. OLSEN:

12 Q. Mr. Brater, were you aware that what you were citing in
13 the Secretary of State v Berrien County was old law at the
14 time you sent this letter, People's Exhibit 4?

15 A. I don't remember -- I don't remember what I knew about the
16 sequence of events between this decision from 1964 and the
17 Administrative Procedures Act of 1969.

18 Q. Well, did you read 168.31, the current version of it,
19 before you sent your letter to Ms. Scott threatening her
20 with criminal penalties?

21 A. So, again, it advises on the fact that willfully failing
22 to follow lawful instruction has criminal penalties. I
23 reviewed 168.31 prior to sending that, yes.

24 Q. The current version?

25 A. Yes.

1 Q. Did -- when you reviewed that, did you appreciate that the
2 case you were citing relied on a -- well, first of all,
3 did you see the distinction when you read the current
4 version of 168.31 that it had a requirement to issue
5 instructions and rules pursuant to the Administrative
6 Procedures Act?

7 MR. CUNNINGHAM: Objection.

8 THE COURT: Basis?

9 MR. CUNNINGHAM: That's a misstatement, Your
10 Honor. The statute itself shows that it doesn't require,
11 the promulgation of rules. We have authorities, specific
12 authority under (1)(b) to advise and direct local
13 officials. That was separate from the promulgation of
14 rules. So, that's in the language of the statute.

15 THE COURT: He indicates you made a
16 misstatement, sir, Mr. Olsen. Response?

17 MR. OLSEN: The issue, because he refers to
18 subsection (g).

19 THE COURT: That what was referred to in the
20 letter?

21 MR. CUNNINGHAM: I believe --

22 THE COURT: I don't have it in front of me
23 anymore, so I can't see.

24 MR. CUNNINGHAM: -- (b) is what --

25 MR. OLSEN: No, no, I know. But I'm saying that

1 he, Mr. Brater, in his letter, referred to the misdemeanor
2 portion in 168.931 about lawful orders.

3 THE COURT: I'm going to overrule the objection.
4 You can continue.

5 If it was in that letter and he cited it, you
6 can ask questions about it.

7 BY MR. OLSEN:

8 Q. Were you aware at the time you sent People's Exhibit 4 to
9 Ms. Scott that the case you relied on for your authority
10 cited a statute that was out of date?

11 A. Again, I don't remember whether I thought about or was
12 aware of the timing of the 1964 case that's cited in that
13 letter and the Administrative Procedures Act of 1969 and
14 whatever subsequent changes were made to election law.

15 Q. You would agree with me, Mr. Brater, when we discussed the
16 O'Halloran case that a rule must go through the
17 Administrative Procedures Act in order to have a sanction
18 associated with failure to follow?

19 A. I believe we already discussed that at length --

20 THE COURT: I agree. He's answered. He said
21 yes, in the affirmative.

22 Asked and answered.

23 BY MR. OLSEN:

24 Q. Mr. Brater, I'm handing you what has been marked for
25 identification as Defendant's Exhibit 9. It's a copy of

1 the opinion in Jeneski --

2 THE COURT: Hold on a second, Mr. Olsen.

3 I have Secretary of State v. Berrien listed as
4 9.

5 Is that a -- and then did you want to move for
6 that admission?

7 MR. OLSEN: Yes, Your Honor.

8 THE COURT: Okay. And then, so can we mark
9 Jeneski as 10?

10 (At 10:52 a.m., Defense Exhibit 9 Admitted)

11 MR. OLSEN: Sure.

12 MR. CUNNINGHAM: This is 10?

13 THE COURT: Yes.

14 You can continue, sir.

15 MR. OLSEN: Mr. Brater, you've just been handed
16 what has been marked for identification as Defendant's
17 Exhibit 10. It's a copy of the opinion in Jeneski v.
18 Jocelyn Benson and yourself as the Defendants.

19 (At 10:50 a.m., Defense Exhibit 10 Marked)

20 BY MR. OLSEN:

21 Q. Are you familiar with this opinion --

22 A. Yes.

23 Q. -- Mr. Brater?

24 When's the last time that you read it?

25 A. I don't remember. Probably about a year ago.

1 Q. You're a defendant --

2 A. Maybe more recently. I don't remember exactly when I
3 reviewed it was.

4 Q. You're a defendant in this case, correct?

5 A. Yes.

6 Q. And do you have a recollection of what the issue was in
7 this case?

8 A. Yeah. I think there were multiple issues, as I recall.

9 Q. Was one of the issues a requirement issued by the
10 Secretary of State that clerks presume a signature on a
11 ballot application was legitimate?

12 A. No, I don't agree with that characterization of the issue.

13 Q. Okay. Let's read it. If you go to page three. Actually,
14 page four, excuse me, where it says plaintiff's complaint.

15 Do you see where in the first full
16 paragraph where it says, "The December 30,
17 2020, complaint alleges that the presumption
18 in favor in finding ballot signatures is
19 unlawful as is the directive to find any
20 redeeming qualities for signatures. They
21 contend that the presumption in the guidance
22 issued by Defendant Benson will allow invalid
23 votes to be counted."

24 Do you see that?

25 A. Sorry. What page are you on?

1 Q. Page four.

2 A. Okay. Yes. I see that language.

3 Q. Okay. And do you recall -- does this refresh your
4 recollection? Do you recall that the rule at issue here
5 was a rule issued by the Secretary of State requiring
6 clerks to presume the signature was valid?

7 A. Again, I don't think that's an accurate characterization
8 of the document.

9 Q. What do you think the issue was?

10 A. So, the document involved here was a -- it was a document
11 entitled procedures for signature verification, it's cited
12 at the top of page three. So, it was not a rule. It was
13 a guidance document that was submitted to clerks. And the
14 exact language is, that's cited here, at least in part is,
15 "...signature begins with a presumption that the signature
16 is valid." And then it also describes ways that clerks
17 are supposed to review the signature to determine if they
18 are questionable or if they -- if it's a signature that
19 sufficiently agrees with the signature on file. So,
20 that's different from what you said, which is, presume the
21 signature is valid. So, two different sentences.

22 Q. Well, the Court rejected your argument that what you
23 issued in this rule was mere guidance, didn't it?

24 A. The Court, as I recall, said that in order for the
25 document to be mandatory, the document on the signature

1 verification mandatory would have to be promulgated as a
2 rule.

3 Q. Correct. And the Court -- if you turn to page eight of
4 the opinion, please. Page eight at the bottom.

5 Do you see in the second full paragraph where
6 the Court states,

7 "As for whether the guidance or directive
8 at issue is a 'rule' subject to the APA, the
9 Court must look beyond the labels used by the
10 agency and make an independent determination
11 of whether the action taken by the agency was
12 permissible or whether it was an impermissible
13 rule that evaded the APA's requirements."

14 Do you see that?

15 A. Yes.

16 Q. Now, you, yourself said that the Court was -- viewed the
17 rule that you issued as mandatory, correct, and that was
18 the issue in the case, whether the rule was mandatory that
19 it must be followed?

20 A. That was one of the issues that that Court decided.

21 Q. Okay. And do you recall, since you were a defendant,
22 making the argument that you had permissive statutory
23 power to issue binding rules?

24 A. I don't remember what specific arguments were made.

25 Q. Okay. If you turn to page nine of the opinion. First

1 full paragraph down the middle. Do you see where it says
2 -- it states,

3 "Here, Defendant Benson points to MCL
4 168.31(a) as the source of her 'permissive
5 statutory power'. That statute provides that
6 the Secretary of State 'shall' issue
7 instruction and promulgate rules pursuant to
8 the Administrative Procedures Act of 1969",
9 continued on.

10 And then it states, "According to Defendant
11 Benson -- and you were also a Defendant, correct? You
12 were a defendant, too?

13 A. Yes.

14 Q. MCL 168.31 allows her to eschew the rule making process in
15 order to issue 'instructions' like the standards at
16 issue." Do you see that?

17 A. Yes.

18 Q. And the Court rejected your ability to issue binding
19 instructions because those instructions had not gone out
20 pursuant to the APA, correct?

21 A. The Court determined that this document could not be
22 considered instructions and be mandatory on clerks without
23 going through the APA.

24 Q. When you -- the Court said the mandatory rule that you
25 issued was unlawful because it had not gone through the

1 APA, correct?

2 A. I'm not sure whether those specific words appear in the
3 decision. What the Court determined, as I recall, is that
4 for this document to be mandatory for clerks to follow, it
5 needed to be promulgated as a rule under the APA.

6 Q. Well, you also argued in this case that if the Court were
7 to rule that way, that it would leave -- let's turn to
8 page 12, let's do that.

9 In the first full paragraph, you see where it
10 says "Defendants -- that includes you, correct? Correct?"

11 A. As I've said multiple times, I was a defendant in this --

12 Q. Yeah.

13 A. -- case.

14 Q. "...raised concerns that this Court's interpretation of MCL
15 168.31 (1)(a) would leave the term 'instructions' without
16 any practical effect." Without any practical effect means
17 that you are arguing it wouldn't be binding, correct? In
18 other words, you couldn't hold a clerk -- you couldn't
19 hold a clerk's feet to the fire and say you must do this
20 or else. Isn't that what without practical effect means
21 here? That's what you were arguing?

22 A. I think there's practical effects that are beyond that
23 specific one.

24 Q. Well, it continues on.

25 "According to defendants, this Court's

1 view would raise questions regarding whether
2 Defendant Benson could do anything when
3 advising and directing local election
4 officials as to the proper methods of
5 elections."

6 See that?

7 A. Yes.

8 Q. And the Court rejected that argument, didn't it?

9 A. Well, the Court disagreed -- according -- and again, the
10 Court disagrees with the premise the defendant's position
11 because regardless of what is permissible under 31 is
12 apparent that what occurred -- that which occurred here is
13 not permissible. So, again, the Court is describing this
14 specific document.

15 Q. Uh-huh. Well, it's describing your requirement to issue
16 rules in order for them to be binding through the
17 Administrative Procedures Act first, correct?

18 A. Again, when talking about what occurred here in this case,
19 this specific document, that's what the Court found.

20 Q. Well, that's only because the issue in front of the Court
21 was the presumption to declare rules as lawful or not if
22 they'd gone through the APA, correct?

23 Did the Court anywhere in this opinion say that
24 I'm only applying this, the application of 168.31's
25 requirement for APA only with respect to signature

1 validation?

2 A. I mean that's what the case was about. The Court, again,
3 said that which occurred here's not permissible. Here,
4 defendant issued a mandatory directive.

5 Q. Okay. So, well, let's go back to -- at page 12,
6 "Defendants raised concerns that this interpretation of
7 MCL 168.31(a) would leave the term instructions without
8 any practical effect." You see that? That's what you and
9 Secretary Benson were arguing? See. That's not limited
10 to instructions to presume signatures are valid. This is
11 a general concern that your instructions would be, in your
12 own words, left without any practical effect, correct?

13 A. So, again, the -- I mean, as the Court says, the
14 Defendants, which included me here, did raise concern that
15 a certain interpretation of the statute could leave and
16 determine instructions without any practical effect.

17 Q. And that interpretation of the statute is that you need to
18 issue rules and instructions through the APA because
19 according to Defendants, this Court's view would raise
20 questions whether -- raise questions regarding whether
21 Defendant Benson could do anything when advising or
22 directing local election officials as to the proper
23 methods of conducting elections.

24 There's no qualification in your argument there
25 that this only would apply to presuming signatures are

1 valid, is it? This is broad concern that instructions are
2 -- instructions, rules, orders, whatever you issue, that
3 don't go through the APA have any binding effect --

4 THE COURT: Are you asking him a question?

5 BY MR. OLSEN:

6 Q. Correct?

7 A. So, you're describing a concern that was raised, I assume,
8 in one of the briefs that was filed. So, that was a
9 concern that Defendants raised in the case.

10 Q. But you're a defendant?

11 A. Yes.

12 Q. So, this is a concern raised by you?

13 A. Yes.

14 Q. Okay. And this opinion is dated what, March 9th, if we go
15 to the back, I believe. March 9, 2021, correct?

16 A. Right. Yep.

17 Q. So, this opinion came out before you sent People's Exhibit
18 4, your October 15th letter, 2021, to Clerk Scott,
19 correct?

20 A. Yes.

21 Q. And this opinion calls into question your ability to issue
22 a binding instruction that has not gone through the APA,
23 correct?

24 A. Again, the actual opinion -- I mean you're now switching
25 from an argument that was raised in the brief to what the

1 Court's actual opinion was. As I said already, the
2 Court's opinion was about this specific document, which
3 was a signature verification standard document.

4 Q. But the Court's opinion is about that because that's the
5 only issue in front of it. But obviously court opinions
6 carry precedent. You're a lawyer, you know that, right?

7 A. I'm aware of that, yes.

8 Q. Yeah. So, you were concerned about the precedent that
9 this case would set, correct?

10 A. Yes.

11 Q. Yeah. And this opinion was issued prior to sending
12 People's Exhibit 4 to Clerk Scott seven months later,
13 right?

14 A. Yeah, about seven months later.

15 Q. Did you discuss the impact of this opinion with anybody
16 from the Attorney General's office before you sent
17 People's Exhibit 4 to Clerk Scott threatening her with
18 criminal penalties for not following your instructions
19 that had not gone through the APA?

20 A. So, again, the letter advised Ms. Scott about criminal
21 penalties. The -- I don't remember whether I discussed
22 with the Attorney General's office what impact, if any,
23 this decision would have on that letter.

24 Q. This decision impacts -- strike that.

25 THE COURT: Stricken.

1 MR. OLSEN: Your Honor, can I take just a very
2 short two minute break just to collect. Things got a
3 little bit out of whack here.

4 THE COURT: Yeah, that's fine.

5 I'm just going to stay right here.

6 We can just go off the record for a couple
7 minutes.

8 (At 11:05 a.m., break in proceedings)

9 (At 11:07 a.m., proceedings resume)

10 BY MR. OLSEN:

11 Q. Mr. Brater, did the Secretary of State or you appeal the
12 Jeneski decision?

13 A. I don't remember. I don't think so, but I don't remember.

14 THE COURT: Gentleman, while the Court is
15 certainly familiar with case law, this has been marked.
16 Would you like Jeneski entered as number 10?

17 MR. OLSEN: I would like that entered, Your
18 Honor.

19 THE COURT: Any objection?

20 MR. CUNNINGHAM: No objection.

21 THE COURT: It'll be admitted as 10.

22 (At 11:08 a.m., Exhibit 10 Admitted)

23 MR. OLSEN: Mr. Brater, I'm handing you what has
24 been marked for identification as Defendant's Exhibit 11.
25 It's a copy of the Court of Appeals decision in

1 O'Halloran.

2 (At 11:08 a.m., Exhibit 11 Marked)

3 BY MR. OLSEN:

4 Q. Have you read this decision before?

5 A. Yes.

6 Q. And you were a defendant in this case as well, right?

7 A. Yes.

8 Q. Did you participate in any of the arguments that were --
9 in developing any of the arguments and strategies
10 regarding the defense of this action?

11 A. Just familiarizing myself. Is this the same case that was
12 appealed with the Supreme Court, or is this --

13 Q. Yes. Yeah, it is the same case.

14 A. -- because I know there were multiple cases --

15 Q. Yeah.

16 A. -- at that point.

17 I reviewed draft briefs. I think your question
18 was strategy. I mean I don't know that I would -- could
19 say strategy per se, but I certainly reviewed drafts of
20 briefs in this case.

21 Q. And in O'Halloran, the issue was a manual that the
22 Secretary of State issued that had certain rules that
23 impacted, you know, what election inspectors and poll
24 watchers and the procedures by which they would have to
25 conduct themselves and also some credential requirement

1 form, correct?

2 A. Yes.

3 Q. And these were rules that the Secretary of State issued,
4 and the question was whether or not they were binding just
5 like in Jeneski. We talked about that before?

6 A. The document -- I believe that the -- this was challenging
7 the challenger manual, as I understand it.

8 Q. Correct.

9 A. That was not promulgated as a rule.

10 Q. Well, turn to page -- the question though isn't whether
11 those rules were binding, correct?

12 A. I believe that was one of the questions in that case,
13 yeah.

14 Q. And so, it's -- regardless of whether you what you label
15 it, the issue that the Courts in Jeneski and in O'Halloran
16 are looking at whether the instructions you gave carried
17 with them the force of law, i.e., they are binding and
18 must be followed, correct?

19 A. Yeah, within the context of an administrative rule, yes, I
20 agree with that.

21 Q. Well, within the context of any instruction you issue.
22 Whether an issue is whether it needs to go through the APA
23 to be binding, correct?

24 A. Yes, I mean whether an action needs to go through the APA
25 to be binding is a question that has been raised in

1 multiple lawsuits including this one.

2 Q. Yeah. And if you turn to -- the easy way is page nine of
3 19 at the top right hand corner, but it's page 302 of the
4 -- page 659 of the Michigan Appellate Report.

5 Let me know when you're there?

6 A. Uh-huh.

7 Q. Okay. You see under analysis?

8 A. Yes.

9 Q. It says there are two primary issues present in this case.
10 First, whether the challenged provisions in the manual are
11 consistent with Michigan election law or whether they are
12 in conflict with the statute and second, whether
13 Defendant's needed to promulgate those provisions even if
14 authorized by the statute by a formal rule as required by
15 the APA, which the manual was not. And then it continues,
16 "While a rule promulgated in accordance with the APA has
17 the force of law, citing the case, other pronouncements do
18 not." And then the Court continues. You see that?

19 A. Yes.

20 Q. And then I'd like to turn your attention to the portion of
21 the opinion, top page, top right hand corner where it says
22 page 12 of nine which is page 664 of the Michigan order?

23 A. Okay.

24 Q. And under the section it talks about rule making?

25 A. Okay.

1 Q. And do you see at page 665 a little over halfway down
2 where it says, "Defendant's argue that the challenge
3 instructions fall under the 'permissive statutory power'
4 exception to the definition of a rule set forth in MCL
5 24.207 J." Do you see that?

6 A. Yes.

7 Q. That's the same exception you argued in Jeneski, correct,
8 permissive statutory power?

9 A. I don't remember if that's the exact same argument that
10 was made.

11 Q. Well, do you recall when -- we can pull out the Jeneski
12 opinion. Would you have any reason to disagree that the
13 Jeneski opinion references your and the Secretary of
14 State's argument that permissive statutory power is an
15 exception to the APA?

16 MR. CUNNINGHAM: Again, Your Honor. I think we
17 keep getting into argument here. These are all things
18 being presented in argument. It's not testimony for the
19 record. He's making argument here as to --

20 THE COURT: Response.

21 MR. OLSEN: Yeah. Your Honor. I'm questioning
22 him on what his state of mind is in terms of the legal
23 basis of his authority before he threatens Clerk Scott
24 with criminal penalties.

25 MR. CUNNINGHAM: That's a question of law. It

1 doesn't matter what his state of mind was. The question
2 was, is it valid, and that's something for you to decide.

3 THE COURT: I am in agreement with Mr.
4 Cunningham at this point. I believe I've been provided
5 with a lot of information and testimony here including Mr.
6 Brater's opinion as to what he believed his authority was,
7 and I have all of these cases that I'll be considering
8 when making that.

9 So, I'll sustain the objection and just ask that
10 we move forward.

11 MR. OLSEN: Okay, Your Honor.

12 THE COURT: Thank you.

13 BY MR. OLSEN:

14 Q. This opinion was issued in 2023, correct?

15 A. I believe so, yes.

16 Q. And that's before the affidavit of probable cause was
17 signed by Detective Krauss, correct?

18 A. I don't remember the exact date that that was signed.

19 Q. Let's pull it out?

20 A. So, according to Exhibit 8, I believe. The signature --
21 well, the date here is -- I believe the date here is May
22 7, 2024.

23 A. So, the affidavit of probable cause was issued about a
24 year later, after this date?

25 A. Maybe six months would be closer, but it was after.

1 Q. Well, it was after. Did you ever seek to advise the
2 Attorney General or Detective Krauss that there were
3 questions in the law regarding your authority to issue
4 rules that had the force of law without first going
5 through the Administrative Procedures Act?

6 A. I don't remember ever having that discussion.

7 Q. The probable cause affidavit relies on the belief that
8 your instructions to Clerk Scott were mandatory and
9 lawful, correct?

10 MR. CUNNINGHAM: Again, Your Honor, I'm going to
11 object. The affidavit was done by a police officer and
12 presented to a judge. He doesn't have any knowledge as to
13 what the officer was thinking or the judge was thinking
14 when he signed it.

15 THE COURT: Yes.

16 MR. OLSEN: Your Honor, Mr. Brater is the one
17 who initiated this entire proceeding. He -- his view of
18 his authority -- he knows that charges are being brought.
19 If he knows that he doesn't have a basis to issue binding
20 instructions that carry with them a -- a criminal penalty,
21 you know, it's our -- we should be allowed to delve into
22 why didn't he tell Detective Krauss that, hey, there's a
23 question on the law here. There may not be probable
24 cause, the law has changed.

25 THE COURT: Sir.

1 MR. CUNNINGHAM: The question's on the law are
2 decided by the Attorney General who authorizes a warrant
3 and the judge who signs the affidavit.

4 THE COURT: Yeah, I agree. He's not going to be
5 able to answer any questions or I'm going to allow him to
6 talk about the affidavit. The person who swore to that
7 affidavit is the individual who believed that the
8 information provided in it was true and correct and we've
9 already had a ruling on this regarding the magistrate that
10 signed at that point in time over from the Circuit Court
11 at that point in time. I'm going to ask that you move on
12 at this point, sir.

13 MR. OLSEN: Yes, Your Honor.

14 THE COURT: Everything's fine. We have a fire
15 alarm that goes off every 30 minutes or so to remind me
16 I'm alive.

17 MR. OLSEN: Okay.

18 THE COURT: They took care of it.

19 BY MR. OLSEN:

20 Q. Mr. Brater, if you would pull out Defendant's Exhibit 8,
21 the probable cause affidavit?

22 A. Okay. Got it.

23 Q. And if you'd turn to paragraph 12?

24 A. Okay.

25 Q. Let me know when you're there?

1 A. Yep.

2 Q. Okay. And do you see that's referenced it states on
3 February 12, 2021, the Bureau of Elections advised county
4 clerks by memorandum that the security of the ballots and
5 election equipment regarding the 2020 general election was
6 being released. And that continues on talking about files
7 associated with the EPB pollbook, USB flash drive would be
8 -- must be deleted, correct?

9 A. Right.

10 MR. OLSEN: It's not -- I think that's an
11 exhibit. Yeah, it's -- may I have People's Exhibit 1?

12 THE COURT: You may.

13 MR. OLSEN: Do you need a copy?

14 MR. CUNNINGHAM: No, I have it. It's my
15 exhibit.

16 BY MR. OLSEN:

17 Q. Mr. Brater, I've just handed you People's Exhibit 1. It's
18 the February 12, 2021 memorandum issued by the Michigan
19 Bureau of Elections. Do you recall this document?

20 A. Yes.

21 Q. And so, that's -- do you agree that that memorandum is
22 what is being referenced in the probable cause affidavit
23 at paragraph 12?

24 A. Yes.

25 Q. Do you consider yourself knowledgeable about what data and

1 records constitute election records under Michigan law
2 that a clerk is obligated to preserve?

3 A. Yes, I would say that at the legal and policy level, I am.

4 Q. My hearing is not so good. I'm sorry. Could you say that
5 again?

6 A. Yes, at the legal and policy level, I am. And we
7 discussed something similar earlier, and I indicated that
8 I'm not a technical expert on the specific mechanisms by
9 which some of these things are -- operate electronically,
10 but as far as what's required to be retained from legal
11 and policy at the same point, yes.

12 Q. Do you know every single record from elections that is
13 required to be maintained under state and federal law?

14 A. I don't know that I could give you a complete exhaustive
15 list from memory. I mean there's many records associated
16 with an election, but generally I'm aware of the records
17 that need to be retained.

18 Q. Okay. When you issued this directive on February 12, '21
19 to delete the data on the EPB flashcard, did you go
20 through a list of to find records that must be retained
21 under state and federal law?

22 A. Not that I can remember.

23 MR. OLSEN: Your Honor, I have a copy of the
24 statute. Can we do the same procedure without --

25 THE COURT: Absolutely. Just name the statute.

1 Would you mind handing me some of the
2 Defendant's exhibits as well just so that Mr. Brater
3 doesn't knock his pile off.

4 THE WITNESS: They're all out of order here, so.

5 THE COURT: I can organize them up here.

6 THE WITNESS: Just be careful because --

7 MR. OLSEN: Wait a second. I want to make sure
8 I don't take one that you're using. Do you have Exhibit
9 4, these are the decisions --

10 THE WITNESS: This is --

11 MR. OLSEN: -- 4?

12 THE WITNESS: Yeah.

13 Just be careful because some of them have these
14 binder clips on them and they're not on there anymore. So
15 just --

16 THE COURT: I'll take care of it. Thank you.

17 BY MR. OLSEN:

18 Q. So, Mr. Brater, I've just handed you a copy of 168.11 --
19 811, excuse me.

20 A. I actually don't have that.

21 MR. OLSEN: I thought you did. My apologies.

22 Also going to do the same thing with the federal
23 statute, 52 USC 2701.

24 THE COURT: Noted.

25 Thank you, sir.

1 BY MR. OLSEN:

2 Q. Mr. Brater, have you had an opportunity to review the copy
3 of MCL 168.811 regarding the election returns, records,
4 applications, preservations destruction time?

5 Are you familiar with this?

6 A. Yes.

7 Q. And the same thing with 52 USC 2701, retention and
8 preservation of records?

9 A. Yes.

10 Q. Okay. And I'll direct your attention, so in the federal
11 statute, the document I handed to you, the first page is
12 the statute, the second page is the definition of an
13 officer of election that is referenced at the beginning of
14 the statute, every officer of election shall retain and
15 preserve. So, I've included that at the back. You see
16 that?

17 A. Yep.

18 Q. Okay. Just want to make sure.

19 Mr. Brater, are there any differences with
20 respect to how Michigan defines election records versus
21 the federal law records retention requirements?

22 A. Well, they don't use the exact same language. I mean, so
23 there are differences in terms of the wording.

24 Q. All right. Let me rephrase. Are there any differences in
25 the types of records that must be preserved under the 22

1 month retention period between state -- Michigan state law
2 and federal law?

3 A. I don't know that I could tell you that offhand. The
4 168.811 lists a number of specific records that are, you
5 know, Michigan specific records that would apply to
6 Michigan elections. And the federal law refers more
7 generally to records. So, it's possible there are some
8 records that are required to be retained under state law
9 that don't meet the federal definition, but I couldn't
10 tell you offhand if any meet that definition.

11 Q. What did you do to make sure you were complying with
12 168.811 and federal law 52 USC 2701 before you issued a
13 directive to delete the data on the EPP flash drive in
14 People's Exhibit 1?

15 A. Well, the Bureau of Elections circulates a retention
16 schedule that indicates the records that need to be
17 retained, that clerks are to review that. So, prior to --
18 that retention schedule in the records involved there was
19 available prior, not only to the February 12th document,
20 2021, but all the other versions of that document that
21 were sent out in the many years before that.

22 Q. Okay. Well, let's look at the federal statute, 52 USC --

23 A. Sorry. I'm just picking up this memo because it's a lot.
24 Okay.

25 Q. So, the federal code, 52 USC 2701, it says, "Every officer

1 of elections shall retain and preserve for a period of 22
2 months." And then it continues on, and it goes, "...all
3 records and papers which come into his possession relating
4 to any application, registration, payment of poll tax" on,
5 and on, and on. Do you see that?

6 A. Yes.

7 Q. So, every officer, that would mean you, correct -- that
8 would include you, I should say?

9 A. I would agree, yes. If there's any records that the
10 Bureau of Elections comes into possession of under this
11 law, that would apply to me.

12 Q. Yeah. And the officer of election, that's at the second
13 page.

14 "As used in this chapter, the term officer
15 of election means any person who, under the
16 color of any federal, state, commonwealth, or
17 local law, statute, ordinance, regulation --
18 continues on -- performs or is authorized to
19 perform any function, duty, or task."

20 And then it just -- I mean it's covering
21 the gamut, right, every officer. That means you --
22 it includes you, it also includes Clerk Scott,
23 correct?

24 A. I would agree that, you know, under the statute it would
25 apply to anyone who is authorized to perform that task --

1 it's laid out in the statute, so --

2 Q. Right. But it's not just one person, it's not just the
3 Secretary of State, it's every officer of election.
4 That's from the township clerk to the county clerk, to the
5 Secretary of State, to you issuing directions to delete --

6 MR. CUNNINGHAM: Your Honor, again, we're going
7 into argument. I mean his opinion as to what the statute
8 means isn't important. What the law means is a decision
9 for you to make. Counsel's free to make his argument.
10 You've already held that at the end of the testimony, you
11 would take written arguments and make the decision on
12 that. All this can be placed in written arguments.

13 THE COURT: Sir.

14 MR. OLSEN: Your Honor, he gave an instruction
15 to delete the EPB flashcard data in People's Exhibit 1.
16 I'm entitled to know whether this is a lawful order and
17 whether he took any steps before issuing that.

18 THE COURT: I think you're entitled to ask him
19 whether he thought that was a lawful order at the time
20 that he was giving that.

21 MR. OLSEN: And also that --

22 THE COURT: And then I'm going to take what the
23 actual law is and apply it.

24 MR. OLSEN: Yes, Your Honor. But I would also,
25 respectfully, Your Honor, I think I'm entitled to know

1 whether he did take any due diligence, which is his
2 obligation, before issuing People's Exhibit 1 to determine
3 whether that was a lawful order.

4 MR. CUNNINGHAM: I have no questions of him
5 asking that, did you do any -- that's what he was doing.

6 THE COURT: I think this can be handled by just
7 rephrasing how the line of questioning is going. Liberal
8 cross-examination, as you're aware, is certainly
9 allowable, and I let it go on for quite a bit in this
10 court. I think this is important information that's
11 coming out so if you could just rephrase to keep it on
12 target with things that he actually did so that he's not
13 speculating perhaps or trying to give a legal
14 interpretation that I will make.

15 MR. OLSEN: Yes, Your Honor.

16 THE COURT: Great.

17 BY MR. OLSEN:

18 Q. Mr. Brater, before issuing the directive to delete all EPB
19 flashcard data, did you understand that the law required
20 the clerks an independent duty to preserve data?

21 A. I understand that there are record retention requirements
22 that apply to clerks when I sent this -- when the Bureau
23 of Elections sent this memo.

24 Q. And you -- before issuing People's Exhibit 1, you
25 understood you were under a duty to ensure the

1 preservation of election records?

2 A. Yes.

3 Q. Okay. Do you see in both 168.811 and in the federal code,
4 it uses the phrase all records, you see that?

5 A. Yes.

6 Q. Okay.

7 A. Well, I mean in the state's statute it says --

8 Q. All election returns --

9 A. All election returns, but --

10 A. The word all appears in both.

11 Q. What is your understanding of the purpose of the 22 month
12 retention period mandated by state and federal law?

13 A. My understanding is that when the federal statute was
14 first enacted, which was in 1960, it was done because of
15 concerns that there would be efforts to suppress voting.
16 I mean I believe this is a civil rights act so some of the
17 concerns were about denial of the right to vote to racial
18 minorities. But in any case, that there may be some kind
19 of a legal conduct, whether it be voter suppression or
20 whether it be illegal voting and that this would require
21 officials to retain records in the event that I guess the
22 federal government wanted to investigate those violations.

23 Q. Well, I mean the purpose to that end is to be able to go
24 back and make sure that the election was fair and
25 accurate, correct? It was a period of time defined to

1 retain records that would allow an audit or an assertion
2 if there was questions about the election to be able to
3 have the data to look at that, right?

4 A. I mean it was to ensure that the records were retained. I
5 mean so I believe the concern was if there needed to be
6 some kind of investigation, that the records would be
7 there.

8 Q. To make sure that the election that took place was fair
9 and accurate, if there was a question, correct?

10 A. I mean I don't know if fair and accurate if the wording
11 that was used at the time, but again, I mean I think it
12 was part of the set of civil rights laws. So, I think the
13 main concern, as I understand it at that time, was about
14 suppression of voting rights for racial minorities, but
15 there could be other reasons why you might want to have
16 those records retained.

17 Q. Mr. Brater, I'm handing you another section of the
18 Michigan Code 168.932 --

19 THE COURT: Thank you.

20 BY MR. OLSEN:

21 Q. I'm not offering it as an exhibit, just to go through.
22 Are you familiar with this statute?

23 A. Yes.

24 Q. Do you -- turn to subsection (C), please, where it states,
25 "An inspector of an election, clerk, or other officer, or

1 person having custody of any record" and then just
2 continues on. And I want to go to the next page because
3 that's the pertinent point.

4 "Shall not willfully destroy, mutilate,
5 deface, falsify, or fraudulently remove, or
6 secret any of those items in all or part or
7 fraudulently make any entry, erasure or
8 alternation on any of those items."

9 Do you see that?

10 A. Yes.

11 Q. Do you understand that this statute is, in part,
12 prohibiting the erasure of election records?

13 A. Yes.

14 Q. Okay. Did you consider this statute before you issued
15 People's Exhibit 1 requiring the deletion of EPB pollbook
16 -- excuse me, EPB flashcard data?

17 A. I can't remember whether I looked at the statute
18 specifically.

19 Q. Do you see that the -- the EPB flashcard data is by
20 pollbook data, correct, at least in part?

21 A. Yes, some of it is -- some of it cannot be disclosed for
22 security and privacy reasons, but it's generally public
23 data?

24 Q. Right. I was -- but it's like a pollbook? I mean you
25 know what a poll list is, right?

1 A. Yes, that aspect of it is certainly public, yeah.

2 Q. And you see that 168.932(c) expressly includes pollbook as
3 one of the items prohibiting the erasure of?

4 A. Yes.

5 Q. Did you consider that, with that specific context, did you
6 consider that portion of the statute when you ordered the
7 deletion of the EPB flashcard?

8 A. Again, I don't remember if I looked at this statute
9 specifically prior to the Bureau sending this memo.

10 Q. Do you consider all of the data and programs -- everything
11 -- all the files that are on the EPB flashcard to be an
12 election record?

13 A. I would say certainly the files involving the individuals
14 who cast ballots or other information about, you know,
15 provisional ballots or anything of that nature would
16 certainly be a record. That's the court function of the
17 EPB is to record the names of individuals who voted. I,
18 again, I'm not a technical expert so I -- in terms of the
19 computer, all of the electronic aspects of what might be
20 on a flash drive, but as far as the records that relate to
21 the people who cast ballots, those would certainly be
22 election records.

23 Q. Okay. And both Michigan state law 168.811 and 52 USC 2701
24 require all election records to be retained, correct?

25 A. 52 USC says all records, I believe. And again, I think

1 811 says all returns.

2 Q. Okay. Is there a distinction in your mind with respect to
3 the data and files that are in the EPB flashcards?

4 A. Not that I'm aware of. I mean I can't say for sure
5 because there may be certain things that are contemplated
6 in state law that aren't part of the federal requirement,
7 but I'm not aware of any of those at the moment.

8 Q. So, were you aware of any of those when you issued an
9 instruction to the clerks to delete the EPB flashcards?

10 A. I'm not aware of any information that would be required to
11 be retained either under state or federal law that
12 would've been not retained by deleting those flashcards.

13 Q. So, you just don't know? When you issued this order, you
14 didn't know whether there were records on the -- election
15 records on the EPB flashcard that were required to be
16 maintained when you issued this order?

17 A. No, I didn't know. I think you're asking me about state -
18 - the difference between state and federal requirements.

19 Q. They both apply?

20 A. Right. But again, I don't know -- I don't remember
21 reviewing for any potential differences between the state
22 or federal retention requirements specifically before this
23 memorandum went out, is what I'm talking about.

24 Q. So, my clients are under criminal inditement in part
25 because she fulfilled an obligation to preserve election

1 records that you ordered deleted and you don't even know
2 whether you gave an illegal order?

3 A. No, that's not what I said.

4 Q. Well, it certainly seems like it. I mean that's the --
5 that's the implication. If you don't know what's on the
6 EPB flashcard that you're ordering to be deleted, whether
7 that is required to be preserved under state and/or
8 federal law, that's an unlawful order. In fact, you're
9 violating a law by ordering the destruction.

10 How can you --

11 THE COURT: You -- Okay. So, do you have a
12 question?

13 BY MR. OLSEN:

14 Q. How can you not -- don't you think it's your obligation to
15 know that before you issue an order to delete election
16 records or data?

17 A. I think my obligation is to ensure that the Bureau of
18 Elections provides appropriate instruction to the clerks
19 as to their responsibilities.

20 When it comes to the records involved here, that
21 included a retention schedule that lays out all the
22 information that needs to be retained and for how long.
23 It also includes training on how to use the electronic
24 pollbooks and post-election activities which includes
25 uploading the data from the electronic pollbook flash

1 drive to the Qualified Voter File, which must be done
2 before a copy of the data on it -- on the flash drive is
3 deleted. So, I believe that myself and the other staff at
4 the Bureau of Elections adequately reviewed that and
5 ensured that our instructions were accurate. Whether I
6 can remember at the time back in, you know, four years ago
7 whether I was aware of any differences between state and
8 federal law, I don't -- I just don't remember that.

9 MR. OLSEN: I'm going to object as
10 nonresponsive, Mr. Brater.

11 THE COURT: You asked if you believed it was his
12 obligation to know?

13 MR. OLSEN: Yeah. And that's a yes or no
14 question.

15 BY MR. OLSEN:

16 Q. Was it your obligation to know what's on the EPB flashcard
17 before you ordered the destruction, and whether or not any
18 of that -- all of that data was required to be preserved
19 under state and federal law?

20 A. I think it's my obligation to ensure that either myself or
21 somebody at Bureau of Elections with the expertise --

22 Q. Yes or no?

23 A. Well, again, I mean --

24 MR. CUNNINGHAM: Objection, Your Honor. He
25 doesn't have to --

1 THE COURT: Hold on a second.

2 MR. CUNNINGHAM: -- answer yes or no.

3 THE WITNESS: There are many --

4 THE COURT: Home on.

5 THE WITNESS: Sorry.

6 THE COURT: What was your objection?

7 MR. CUNNINGHAM: He doesn't have to answer yes

8 or no. He explained his answer, and that's what he was

9 trying to do.

10 THE COURT: Well, he can answer yes or no, and

11 then on redirect, you can go ahead and have him explain

12 what he meant.

13 So, yes or no?

14 Was it your obligation to know?

15 THE WITNESS: Yes, I would agree with that.

16 MR. OLSEN: Okay.

17 BY MR. OLSEN:

18 Q. And in fact, the law, 52 USC 2701, applies to you, right,

19 as well as Clerk Scott? We talked about that.

20 THE COURT: He already answered yes.

21 MR. OLSEN: Yep.

22 BY MR. OLSEN:

23 Q. And so, when you talk about -- you mention that a copy is

24 uploaded. Can you tell me where in 168.811 or 52 USC 2701

25 says that all -- except that a copy of the data may be

1 uploaded to the Secretary of State or some exception to
2 the word all?

3 A. These are very board statutes --

4 Q. Of course they are.

5 A. -- that refer to all sorts or records, so of course --

6 Q. Is there an exception?

7 A. -- 1960 Civil Rights Act that was passed before we used
8 computers would not refer to copies of the flash drives --

9 Q. Okay. Well, that's up to --

10 A. -- so that specific language doesn't --

11 Q. -- the legislature to -- Mr. Brater, I mean you're a
12 lawyer. You know that that's up to the legislature to
13 change the law if they want to change the law.

14 Right now, the law says -- and we talked about -
15 - I mean it's a standard paradigm in Michigan law and
16 elsewhere that the plain text of a statute is what
17 applies, correct? That's how you read it for plain
18 English. Doesn't all mean all?

19 A. So, the statute requires all records to be retained.
20 There're many different ways that records can be retained.
21 My understanding then and now is that the systems that we
22 have in place for record retention ensured that the
23 required records were kept after the election both under
24 federal and state law.

25 Q. Were all records maintained under the system you have?

1 A. As far as I understand it, yes.

2 Q. Okay. So, if you're ordering the deletion of data, how
3 does that comport with the word "all"?

4 A. Because again, sometimes copies of data need to be made
5 and the original equipment needs to be reused. So, you
6 can't -- it's just not possible to keep everything with
7 multiple copies because you need to reuse some of this
8 equipment from election to election and our requirements
9 reflect that.

10 Q. Well, let's talk about the EPB flashcard. Is it possible
11 to preserve the EPB flashcard?

12 A. It would be possible, yeah.

13 Q. And is there any, again, is there any exception in the
14 statute to the word "all"? Does it say you can make a
15 copy and preserve that but destroy the original?

16 A. Well, again, I mean the statute --

17 Q. Yes or no, Mr. Brater?

18 A. I mean well, the full statute, I mean it describes the --
19 what way -- if we're talking about the federal statute
20 here, it talks about the way that records can be retained,
21 it refers to records that come into possession regarding
22 application, registration, payment of poll tax. It says
23 that when required by law, such records and papers may be
24 delivered to another officer of election. So, there are
25 multiple ways in which the records can be retained as

1 contemplated in the federal law.

2 Q. You say that there are ways. Does it provide for the
3 application of copies of original data or election records
4 to be maintained but the originals destroyed?

5 A. It doesn't discuss that in detail. It says that --

6 Q. Thank you.

7 A. -- they can retain and preserve, that they can deliver
8 them to another officer of election and various other
9 things.

10 Q. And when you deliver them, that's original data, correct?

11 A. The statute says the records and papers may be delivered
12 to another officer of election.

13 Q. Where are you reading that?

14 A. 52 USC 2701.

15 Q. And is it your understanding that they're talking about
16 original source data being delivered to another officer of
17 election?

18 A. I believe it's talking about the record. I mean this is,
19 again, a statute from 1960 --

20 Q. So --

21 A. -- it says that the records and papers may be delivered to
22 another officer of election.

23 Q. Okay. Is it your -- you mentioned that data from the EPB
24 flashcard is uploaded to the Secretary of State. Do you
25 recall that?

1 A. To the Qualified Voter File.

2 Q. To the Qualified Voter File. Is every single item on the
3 EPB flashcard, is a hundred percent copied made of the
4 files and data on the EPB flashcard uploaded to the QVF?

5 A. As far as I know, any record would be uploaded that would
6 be required to be retained. As far as all of the
7 technical aspects of what is uploaded and whether it would
8 exactly match what's on the flash drive, I don't have the
9 technical knowledge to answer that question.

10 Q. Once the data is uploaded to the Qualified Voter File, it
11 would be removed from the chain of custody of the clerk,
12 correct, that possessed the EPB flashcard?

13 A. I'm not sure what you mean by remove from the chain of
14 custody.

15 Q. When you're deleting the flashcard, the data is uploaded
16 to the qualified voter, correct, that's what you're
17 ordered?

18 A. Right. So, it's been transferred to the --

19 Q. So, if there were any changes -- if there were any changes
20 made to that data after it was transferred because the
21 source data you've ordered deleted, there would be no way
22 to really tell, correct?

23 A. No, that's not correct.

24 Q. You could tell if there was every -- if anything was
25 changed?

1 A. Well, the clerk is required to print out a copy of the
2 paper pollbooks, so if any -- if there were any
3 differences in terms of voter records reflected in the
4 electronic copy, they'd be able to tell that by comparing
5 it to the paper copy that's retained by the --

6 Q. Is it your contention that the paper record that is
7 printed out from the EPB flashcard contains every single
8 election record that's on the Qualified Voter File that
9 was uploaded?

10 A. No, I'm saying -- I mean your question was -- your
11 question was would it be possible to tell if anything had
12 been changed, and it would be because you could compare it
13 to the paper record. There may be electronic elements of
14 the record that are retained at the state level in
15 addition to the paper copy pollbook that's retained at
16 local level. But in any case, it would be possible to
17 tell if any changes had been made.

18 Q. So, it's your testimony that any changes that were made to
19 the Qualified Voter File from the data uploaded would be
20 determined by the printout? That there's no -- nothing
21 hundred percent one for one copy?

22 A. Well, certainly as far as voter -- I mean -- people who
23 voted in the election and recorded in the pollbook
24 records, yes, that would be the case because they're all
25 reflected in a paper copy.

1 Q. But that's not if there were any changes or all changes,
2 that's with respect to one item, correct?

3 A. I'm not sure what other changes you're referring to. I
4 mean the pollbook tracks who voted in the election. So,
5 again, I mean there are other aspects of it that are
6 electronically stored, but the core functionality of the
7 tool that's to keep a record of who voted in the election,
8 who voted at that precinct, and all of that is retained on
9 the paper copy.

10 Q. Is who voted in the election the only record that's
11 required to be preserved?

12 A. No, there's other aspects such as the provisional ballot
13 report, which is uploaded, comments that are made by poll
14 workers which are on the printout. So, there's other
15 elements of that besides just the people who voted in the
16 election.

17 Q. So, the printout doesn't have all of the data that's on
18 the EPB flash drive, correct?

19 A. I mean there's electronic data on the EPB flashcard, which
20 obviously does not exist on a piece of paper, but the
21 paper has the records of the people who voted in that
22 precinct as well as comments and other information.

23 Q. You've said that you're not a technical expert on the data
24 that's retained on electronic files within the election
25 voting system, correct?

1 A. I can't tell you at a technical level, you know, the
2 elements of data files that are retained or stored. I
3 don't -- I don't have -- I'm not a computer programmer or
4 anything like that.

5 Q. Mr. Brater, turning back to People's Exhibit 1, this order
6 of deletion?

7 A. Okay.

8 Q. Do you see where you state in the section EP -- excuse me
9 E pollbook and flash drives, the EPB software and
10 associated files must be deleted unless a post-election
11 audit is planned but has not yet been completed or the
12 deletion of the data has been stayed by an order of a
13 court or Secretary of State. Do you see that?

14 A. Yes.

15 Q. Okay. Have you ever looked at the data on an EPB file?

16 A. Have I personally?

17 Q. Yeah.

18 A. Yes.

19 Q. Okay. Do you -- are you aware of -- so when you testified
20 earlier that you're not sure of all the, you know,
21 different aspects of the electronic data, is that still
22 correct? I mean do you know what's on there?

23 A. I know generally the records that are retained on there.
24 I don't know, again, at a technical level all of the --
25 electronic aspects of the software, and data file

1 elements, and things like that, but I know basically
2 what's on there.

3 Q. Okay. Can you explain why you would preserve all of the
4 data on the EPB flash drive if there's an audit currently
5 planned but not for the retention requirements of 22
6 months under both state and federal law?

7 A. Well, audits -- audits are -- include review by the Bureau
8 of Elections to -- or the county clerk, actually, in most
9 cases, but sometimes by the Bureau of Elections to
10 determine if the election was, you know, all the
11 procedures were followed, they're trained -- there're
12 training opportunities as well as reviews. So, my --
13 although I don't conduct audits myself, my understanding
14 is that the auditors might want to have that flash drive
15 there so that they could review it with the clerks that
16 are being audited.

17 Q. Don't you think that -- I mean if it's -- if you're going
18 to not delete this data if there's a post-election audit
19 planned, why would it be okay to delete it if an audit has
20 not been planned but the retention period of 22 months is
21 still open?

22 A. Well, and it's not deleted in the sense that it doesn't
23 exist anymore. It's being stored at the state level.
24 When you're doing an audit though, you're looking at what
25 the local jurisdiction did, how they performed the

1 election. So, I, again, I don't conduct these myself, but
2 I imagine it could be helpful to have that information on
3 site for purposes of the audit.

4 Q. Well, do you have any idea what a federal audit is?

5 A. Federal audit is a pretty board term. I'm not sure what
6 you mean by that.

7 Q. Well, you're talking -- I mean you're kind of narrowing
8 the scope of the audit that you refer to in People's
9 Exhibit 1 to something that was narrowly done if the state
10 wants to make sure the proper procedures were followed.
11 That doesn't -- I don't see that anywhere here. The point
12 is, is that you're saying don't delete the data if there's
13 an audit, and you also cite federal records retention
14 requirements. My point is, tell me how it makes sense to
15 delete records if -- to not delete records if there's an
16 audit planned as of February 12, 2021, but you have a 22
17 month retention period and it's okay to delete them.
18 Because, isn't the whole purpose of an audit to be able to
19 verify the accuracy of the data and the election?

20 A. One of the things that's done in a post-election audit is
21 to verify, for example, that, you know, there's a hand
22 count of the ballots to verify that they were tabulated
23 correctly, but the audit also involves a number of steps
24 that are very detailed that have to do with how the local
25 election official conducted the election. So, again, I'm

1 not -- I don't conduct these audits myself, but I could
2 see the benefit of having the local jurisdiction hang on
3 to their copy of the flash drive for purposes of the
4 audit. But, more broadly, the data is still being
5 preserved at the state level if it's needed for some other
6 purpose.

7 Q. Well, if the data's being preserved at the state level why
8 would you need to retain it for an audit?

9 A. Well, I mean I imagine it would be just more convenient
10 and easier for the local jurisdictions to hang onto it for
11 the purposes of the audit and to send it back from the
12 state level.

13 Q. Do you have any idea, like, if Congress or the Department
14 of Justice wanted to audit, if they would need to look at
15 the data that you ordered deleted?

16 A. I've never heard of Congress or the Department of Justice
17 auditing, so I can't really answer that question. But
18 again, all the data -- I mean the data, the records that
19 are required to be retained, as I understand it, would all
20 be retained for any investigation that needed to be done.

21 Q. As you understand it?

22 A. Yes.

23 Q. Okay. There's also -- there's also a reference here to if
24 the deletion of the data has been stayed by an order of
25 the court, correct?

1 A. Yes.

2 Q. And that's pretty broad. You could have -- a court could
3 order a stay to -- in other words, if there was an
4 election challenge, correct?

5 A. Sure, yeah.

6 Q. Yep. So, if you're saying to delete or -- excuse me -- to
7 not delete the data if there was an order of the court,
8 they couldn't include a stay of an election challenge.
9 What if a Court -- an election challenge arose after
10 February 12, 2021, the data would be deleted? I'm still --
11 -- how do you make this make sense?

12 A. I mean that's very hypothetical. If -- obviously if a
13 court orders a jurisdiction not to delete their copy of
14 the EPB drive, they should not do that because they'd be
15 violating court order. If the court order came after that
16 then some of the data would be held at the state level.

17 Q. Are you aware of everything that the Department of Justice
18 does in terms of investigations regarding an election,
19 would you be aware of those?

20 A. At all times, no, of course not.

21 Q. So, you wouldn't know whether the Department of Justice at
22 the time you issued this order to delete this data was
23 conducting an investigation?

24 A. I might or I might not.

25 MR. OLSEN: And would you know if -- strike

1 that.

2 Your Honor, it's noon. We've been going, I
3 think, for an hour and a half or so. Do you -- this is --
4 I could continue on. I just --

5 THE COURT: We're going to keep on going.

6 MR. OLSEN: Okay.

7 Your Honor, if I could get Defendant's Exhibit
8 3. It's Mr. Cotton's affidavit.

9 THE COURT: Defendant's Exhibit?

10 MR. OLSEN: Yes, Your Honor.

11 THE COURT: It's right here.

12 MR. OLSEN: Here's a copy of it.

13 THE COURT: No. Hold on. I just want to make
14 sure.

15 MR. OLSEN: Should be the affidavit of Mr.
16 Cotton.

17 Do you need a copy?

18 THE COURT: No, I'll just review when you're
19 done.

20 MR. OLSEN: Mr. Brater, I've just handed you
21 what has been admitted as Defendant's Exhibit 3. It's the
22 affidavit of Benjamin R. Cotton dated July 11, 2022.

23 (At 12:02 p.m., Exhibit 3 Marked)

24 BY MR. OLSEN:

25 Q. Have you seen this document before?

1 A. Yes.

2 Q. Okay. When's the last time you reviewed it?

3 A. Yesterday.

4 Q. Yesterday, okay. I'd like to turn your attention to

5 paragraph 22.

6 And you've seen this declaration before,

7 correct?

8 A. Yes.

9 Q. How many times have you reviewed it, many times?

10 A. Perhaps twice.

11 Q. Okay. If you turn to paragraph 22 on page 5.

12 You see where it says, "The EPB USB -- USB is

13 the flashcard, correct?

14 A. I assume that's what it means.

15 Q. -- "...contains data that is unique to that specific EPB USB

16 and to the equipment that the USB is plugged into. The

17 following items are not recorded anywhere else in the

18 night end reporting." Any of the same day voting data,

19 same day -- lists four items. Do you have any reason to

20 disagree with that conclusion?

21 A. I don't really understand what he's talking about, to be

22 honest with you.

23 Q. Well, that's different --

24 A. I don't know how --

25 Q. -- do you have any reason to disagree?

1 A. I mean I don't know how he could possibly know that
2 because unless he had access to the Qualified Voter File.

3 Q. I'm just asking you, yes or no --

4 A. So, I --

5 Q. -- do you have any basis to disagree with that conclusion
6 --

7 A. I --

8 Q. -- that there is unique data?

9 A. I'm not going to disagree with the technical assertions
10 that are being made by somebody who claims to be technical
11 expert on computer systems. What I'm saying is I don't
12 understand how he could possibly know is that they're not
13 recorded anywhere else unless he had access to the
14 Qualified Voter File.

15 Q. You can talk about that on direct. My question is very
16 simple. Do you have any disagreement and collusion unique
17 data on a specific EPB USB flashcard that you ordered to
18 be deleted?

19 A. So, again, I mean I think --

20 Q. Yes or no, Mr. Brater.

21 Q. Well, I mean as I explained, I don't understand how he can
22 know that this is the case. So, I suppose, to the extent
23 I have the technical capacity to disagree with it, I would
24 disagree with it because I don't understand how he could
25 possibly know this.

1 Q. Okay. Well, Mr. Cotton can come and testify as to how he
2 knows this --

3 THE COURT: He already did.

4 MR. OLSEN: Yeah. Oh, there you go.

5 BY MR. OLSEN:

6 Q. So, my question to you is yes or no, do you disagree that
7 there is unique data to the specific EPB flashcard that
8 Mr. Cotton refers to here that you ordered deleted?

9 A. Again, as I've already explained, I don't have the
10 technical expertise --

11 Q. Okay.

12 A. -- to --

13 THE COURT: For what it's worth, I think that's
14 the answer you're going to get.

15 BY MR. OLSEN:

16 Q. And the answer's no, right?

17 THE COURT: He answered it how he answered it.

18 MR. OLSEN: Okay.

19 BY MR. OLSEN:

20 Q. Paragraph 23. Mr. Cotton says,

21 "I have analyzed reports produced by the
22 Secretary of State for the preservation of
23 voting data and materials under the federal
24 statute and have determined that those reports
25 do not capture and preserve all the data

1 contained on the EPB USB. The following data
2 elements for the electronic pollbook and other
3 voting equipment used in the election are not
4 part of these reports."

5 And then it continues from A through V.

6 Same question. Do you have any basis to
7 disagree -- or do you have -- do you have any -- do you
8 disagree with the items that Mr. Cotton said are not on
9 any other reports issued by the Secretary of State?

10 A. Well, again, I don't have the technical capability to
11 assess whether these claims are accurate. These are very
12 detailed, technical terms that I'm not, you know,
13 qualified to evaluate.

14 Q. Okay.

15 THE COURT: So, he doesn't know.

16 MR. OLSEN: I know. And I'm just going to
17 continue.

18 BY MR. OLSEN:

19 Q. If you go to paragraph 24 where Mr. Cotton says, "The
20 following data fields for voter information from election
21 day are not part of the night end reports." And then he
22 continues A through J?

23 A. Okay.

24 Q. Do you have any basis to disagree with that conclusion?

25 A. I mean if he's -- if by night end reports he means the

1 paper printout. I mean I certainly agree that there's no
2 party I.D. there because we don't have party I.D. in
3 Michigan. So, that one, he's absolutely right. There's
4 no party I.D. The other information, I mean I don't
5 believe any of these information is on the paper
6 printouts, if that's what he's referring to as the night
7 end reports. But again, in terms of the -- if we're
8 talking about the digital copy that's stored, I don't have
9 the information to assess all of this.

10 Q. Okay. So, you just don't know?

11 THE COURT: Based off the information you have?

12 THE WITNESS: Based on just looking at this, I
13 don't know, Your Honor.

14 THE COURT: Okay.

15 BY MR. OLSEN:

16 Q. You see in paragraph 25 where Mr. Cotton states, "I've had
17 the opportunity to review FOIA documents produced by the
18 Secretary of State's office to Scott Augney (phonetic)."?

19 A. Yes.

20 Q. "These documents included the official vote totals for
21 Adams Township. Analysis of these official totals
22 revealed some significant deviations from the data
23 contained on the voting media at the local township
24 level." You understand when Mr. Cotton says the voting
25 media at the local township level, he's referring to the

1 EPB USB data?

2 A. On the voting media, actually, I'm not sure whether he's
3 referring now to the tabulator drive or to the electronic
4 pollbook drive. I'm not sure what he means.

5 Q. If you continue on where he lists out A through F,
6 discrepancies in what was reported at the Secretary of
7 State for Adams Township versus what is on the EPB flash
8 drive, Mr. Cotton notes that there were 1,362 votes on the
9 Adams -- recorded at the source of Adams Township but only
10 1,332 votes -- 30 less -- at the state records. Do you
11 see that?

12 A. Yes.

13 Q. And do you see, following on, Mr. Cotton says an
14 inspection of the data on the EPB flash drive and a
15 comparison to the state data shows that there are 79
16 unique names on the EPB flash drive for Adams Township
17 that are not listed on the state's official records and
18 that there are 64 names unique to the states' voter
19 records that are not on the EPB flash drive, township's
20 electronic pollbook record. Combination of these reported
21 discrepancies, documents and 11 and half percent
22 difference. And then Mr. Cotton says,

23 "Without the data contained on the EPB USB
24 data -- that's the flash drive -- there is no
25 manner by which these discrepancies could be

1 investigated and reconciled. The EPB USB data
2 is essential to any audit or reconciliation."

3 Do you have any reason to disagree with Mr.
4 Cotton's conclusion that the EPB USB data that you ordered
5 deleted is -- would be essential to any audit or
6 reconciliation of these discrepancies he identified?

7 A. Yes.

8 Q. What is that?

9 A. Well, I don't know exactly what he means by state records.
10 He never explains that here. But I have seen claims like
11 this before, and so I expect what he's doing is he is
12 comparing the votes that were recorded on election day at
13 the precincts that are stored both in Qualified Voter File
14 and also in paper printout and he's comparing that, most
15 likely, I expect, to a current -- what was then a current
16 snapshot of Qualified Voter File for Adams Township, the
17 people showing who are registered in Adams Township and
18 who were showing voting history. But the problem with
19 that is that the Qualified Voter File is always changing,
20 so if you just -- if you just try to compare the number of
21 people who lived and voted in a jurisdiction on a day in
22 the past with the number of people who currently live in
23 that jurisdiction and that voting history, it's always
24 going to be different because people are going to move in,
25 they're going to move out, they're going to die, so you're

1 comparing apples and oranges there. So, that's what I
2 expect is the discrepancy. But regardless, what the
3 actual discrepancy is, if there is one, you could still
4 compare that, you could still reconcile that by looking at
5 the data that was printed out on the paper pollbook and
6 also the electronic version of it that's sort of Qualified
7 Voter File and then doing individual reviews of voter
8 records, including records for people who have may have
9 moved in or out of Adams Township or whose records may
10 have been cancelled and you could determine what the cause
11 was for those differences.

12 Q. Well, Mr. Cotton is saying that there's a difference
13 between what the state reported on the Qualified Voter
14 File, correct?

15 A. I don't know. I mean he says state records. I suspect
16 that what he means is the Qualified Voter File --

17 Q. So, assume that it's the Qualified Voter File and there's
18 a discrepancy between what is reported at the township
19 level on the EPB USB versus what is reported at the state
20 level and the Qualified Voter File. If somebody
21 manipulated the records of the Qualified Voter File, Mr.
22 Cotton is saying without the EPB flashcard, you would have
23 no way to audit that change with simply the print out that
24 you said was done. Do you have any basis to disagree with
25 that?

1 A. Yes. Again, I mean the record is retained on election
2 night. There's also a copy that is stored at the state
3 level, and then there's also the Qualified Voter File
4 which, you know, changes to the Qualified Voter File can
5 be tracked and reviewed, so that could be determined based
6 on the review of the records in the format that they're
7 retained.

8 Q. Are -- is original source data the best evidence to use to
9 do an audit?

10 A. I don't know what you mean by original source data.

11 Q. Well, the EPB flashcard is -- contains original source
12 data. Do you understand that?

13 A. I -- that's a specific term that I don't believe exists in
14 the Michigan election law, perhaps it does, but not that I
15 can recall.

16 Q. Well, the Michigan election law requires all records to be
17 retained, right?

18 A. All records that are covered by the Michigan election law,
19 yes, need to be retained.

20 Q. And I believe you testified you had no reason to disagree
21 that the original source data on the EPB flashcard are
22 election records?

23 A. I don't remember -- I mean perhaps election source data is
24 the phrase you used in that question but in any case, the
25 data that is on the USB is an election record.

1 Q. Thank you. Do you have any reason to believe that Clerk
2 Scott thought she was complying with her obligation under
3 state and federal law to preserve election records?

4 MR. CUNNINGHAM: Objection --

5 THE COURT: You can't talk about what she
6 thinks. Can we talk about, perhaps, if she responded
7 specifically to him.

8 MR. OLSEN: Yes, Your Honor. I was asking him
9 if he had any reason to believe.

10 THE COURT: What she thinks.

11 Yeah, I'll sustain the objection.

12 BY MR. OLSEN:

13 Q. Mr. Brater, do you consider yourself knowledgeable about a
14 township clerk's obligation and authority to conduct an
15 investigation into the correctness of registration records
16 under Michigan statute 168.515?

17 A. I'm knowledgeable of that section of the election law.

18 Q. And the same question with Michigan statute 168.520, are
19 you knowledgeable?

20 A. I don't recall exactly what that section refers to. I'm
21 sure --

22 Q. 168.520 refers to illegal or fraudulent registration
23 township or city clerk powers and duties, continues on?

24 A. Okay.

25 Q. Are you familiar with that statute?

1 A. I've reviewed that statute, yes.

2 Q. Have you reviewed 168.515?

3 A. Yes.

4 Q. When's the last time?

5 A. I don't remember.

6 Q. What about 520, when's the last time you reviewed that?

7 A. I don't remember.

8 THE COURT: Thank you.

9 MR. OLSEN: Yes, Your Honor.

10 BY MR. OLSEN:

11 Q. Mr. Brater, I've just handed you two printouts, of one of
12 section 168.515, the Michigan code and the other, 168.520.
13 If you would turn your attention to 168.515.

14 A. Okay.

15 Q. Do you see where it says "the several township city and
16 village clerks may conduct a house to house canvas or use
17 such other means of checking the correctness of the
18 registration records as may seem expedient." Do you see
19 that?

20 A. Yes.

21 Q. Is there any language in this statute that limits what a
22 clerk deems expedient to determine the correctness of the
23 registration record?

24 A. Yes.

25 Q. Where?

1 A. The entirety of the balance of the Michigan election law.
2 There's all sorts of limitations on what clerks can do.

3 Q. In terms of checking the correctness of the registration
4 records, is there any limitation on what a clerk may do
5 that seems -- obviously -- is there any limitation in this
6 statute?

7 A. This section -- are you referring to this section of the
8 statute or the entire Michigan election law, I don't
9 understand.

10 Q. Well, what part of Michigan election law do you think
11 would qualify what a clerk -- this specific statute --
12 that a clerk can determine if the registration records are
13 correct by any means expedient?

14 A. Well, this section, as I understand it, as I read it,
15 gives the clerk the authority to use such means of
16 checking the correctness of registration records as may
17 seen expedient. So, they can do that, but they also have
18 to follow all the other sections of the Michigan election
19 law. So, they can't -- just because they think something
20 seems expedient doesn't mean that they can do it if it was
21 prohibited by another section of the law.

22 Q. Can you point to any section of the law that would
23 prohibit the clerk in the course of checking the
24 correction -- correctness of the registration record?

25 MR. CUNNINGHAM: Again, Your Honor, argument.

1 I'll be more than glad to point that out in my brief, but
2 this witness is beyond, and he's not giving testimony,
3 he's not given his opinion on the law.

4 THE COURT: Sir.

5 MR. OLSEN: Your Honor, Clerk Scott not only was
6 fulfilling her obligation to preserve records but there
7 will be testimony coming out that she was engaged in an
8 investigation to check the correctness of the registration
9 records for which, in addition to the obligation to
10 preserve records, keeping the electronic poll flashcard
11 data would be part of that investigation.

12 THE COURT: Mr. Cunningham, anything else?

13 MR. CUNNINGHAM: I'm sorry?

14 THE COURT: Anything else?

15 MR. CUNNINGHAM: No.

16 THE COURT: Okay. I'm going to sustain the
17 objection. I think you're -- we're getting into argument
18 here. I heard what I need to regarding his opinion and
19 assessment of what he believes, and I think you just
20 indicated yourself there might be some direct witness
21 testimony that will lend me better insight to same.

22 MR. OLSEN: Well, there are some factual
23 predicates, Your Honor, if I could just move briefly.

24 THE COURT: Yeah, if there's factual --

25 MR. OLSEN: Okay.

1 THE COURT: Yes.

2 BY MR. OLSEN:

3 Q. Does the statute, in your opinion, require the clerk to
4 first seek the permission of the Secretary of State to
5 initiate an investigation into the correctness of the
6 registration records?

7 A. You're referring to section 5.15?

8 Q. Yes.

9 A. This section does not require the clerk to get permission
10 from the Secretary of State to conduct a house to house
11 canvas, et cetera.

12 Q. Does the statute require the township clerk to inform you
13 before initiating an investigation into the correctness of
14 the registration records?

15 A. No.

16 MR. OLSEN: Okay. Mr. Brater, I've just handed
17 you what has been marked for identification as Defendant's
18 Exhibit 12. It's a news update issued by the Michigan
19 Bureau of Elections dated September 8, 2020.

20 (At 12:22 p.m., Defense Exhibit 12 Marked)

21 THE WITNESS: Okay.

22 BY MR. OLSEN:

23 Q. Is this -- do you recognize this news update?

24 A. Yes.

25 Q. Is this something you would've issued?

1 A. The Bureau of Elections would've issued it, yes.

2 Q. Okay. Would you have reviewed it before it went out?

3 A. Yes.

4 Q. Okay. Does this appear to be a true and accurate copy of
5 the new update that was issued on or about this date?

6 A. Yes.

7 MR. OLSEN: Okay.

8 Your Honor, we'd like to move to admit.

9 THE COURT: Any objection to Defendant's Exhibit

10 --

11 MR. CUNNINGHAM: No.

12 THE COURT: -- 12?

13 MR. CUNNINGHAM: What number was it again?

14 MR. OLSEN: Twelve.

15 THE COURT: Twelve.

16 MR. CUNNINGHAM: Thank you.

17 THE COURT: Admitted.

18 (At 12:22 p.m., Defense Exhibit 12 Admitted)

19 BY MR. OLSEN:

20 Q. Mr. Brater, do you see the reference to -- in the second
21 paragraph -- based on data received from ERIC?

22 A. Yes.

23 Q. Do you also have a role at ERIC, or did you?

24 A. Yes, I currently do.

25 Q. What is ERIC?

1 A. ERIC is the Electronic Registration Information Center.
2 It's a nonprofit that's comprised of member states that
3 share voting and driver's license data for the purpose of
4 identifying and canceling registration records that are no
5 longer valid, updating registration records, and also
6 sending voter registration mailers to individuals who are
7 eligible but not registered to vote.

8 Q. And what is your role at ERIC?

9 A. I'm the board of directors' representative for the State
10 of Michigan.

11 Q. Is that the only role with have with respect to ERIC?

12 A. Currently, yes.

13 Q. Did you have any prior roles at ERIC before that?

14 A. Yes.

15 Q. What was that?

16 A. I served on the executive committee for three or four
17 years. And then one of those years, I believe, 2023 to
18 2024, somewhere like that, I was the chair of the
19 executive committee.

20 Q. ERIC is a private entity, correct?

21 A. It's a private, nonprofit organization that's comprised of
22 government entities. So, it's -- I mean it would be -- I
23 believe its corporate form is private, but it's composed
24 of member states that are governmental units.

25 Q. But it's not a government organization, is it? It's not a

1 government agency?

2 A. Yes, I agree with that.

3 Q. Okay. And there are private, nongovernmental people
4 employed there, correct?

5 A. Yes.

6 Q. And does ERIC have access to the entire Qualified Voter
7 File of Michigan?

8 A. No.

9 Q. Do they have access at all to the Qualified Voter File of
10 Michigan?

11 A. They don't have direct access to Qualified Voter File.
12 They have access to reports that the State of Michigan
13 sends that are derived from the Qualified Voter File.

14 Q. So, they have access to the reports from the Qualified
15 Voter File. And does that qualify -- do those reports
16 from the Qualified Voter Files sent to ERIC contain
17 confidential information?

18 A. Yes, because it would include, I think, the full date of
19 birth. They also receive information from the driver
20 file, so that would contain additional information that
21 would not be disclosed to the public.

22 Q. That includes the driver's license number?

23 A. Right.

24 Q. Is there an NDA with ERIC to ensure the confidentiality of
25 that data?

1 A. There is a membership agreement and a -- and bylaws that
2 describe the way that information needs to be protected.
3 I don't know if there's something that specifically called
4 an NDA. I don't believe there is.

5 Q. But there's the equivalent? I mean they're under an
6 obligation of confidentiality with respect to that data?

7 A. Yes, I would agree with that.

8 Q. Do you see in Defendant's Exhibit 12 -- I'm going to go to
9 the paragraph on the first page where it says,

10 "Based on data received from ERIC, the
11 Bureau of Elections will be sending voter
12 registration mailers to approximately 700,000
13 individuals. These mailers will notify
14 Michigan residents of their voter registration
15 eligibility and offer options to register
16 online or return the inserted card to the
17 Secretary of State to be registered.
18 Registration will occur through driver
19 database. Clerks will not be mailed forms."

20 Do you see that?

21 A. Yes.

22 Q. Would it be -- why weren't clerks being mailed the forms
23 as well?

24 A. Well, the registrations involved here all belong to
25 individuals who have Michigan driver's licenses. So,

1 similar to other registrations that occur with individuals
2 with Michigan driver's licenses like Secretary of State
3 online voter registration transactions, or automatic voter
4 registration transactions, or even motor voter
5 transactions before automatic voter registration, those
6 are cases where the Secretary of State, the Department of
7 State already has the information needed to register them
8 conveniently. If voters prefer, they could mail it to
9 their clerk, but a much more efficient and accurate way to
10 do it would be to use the information that was provided by
11 the state.

12 Q. 700,000 you'd agree is a big number, right?

13 A. Yeah, I suppose. I mean it was not a surprising number to
14 me that there would be that many eligible but unregistered
15 individuals, but it's a fairly large number.

16 Q. Yeah. I mean what, two months before the election they're
17 mailing out 700,000 applications, correct?

18 A. Yeah.

19 Q. And do you think that mailing -- you'd agree that mailing
20 700,000 mailers for registration two months before the
21 election could cause some concerns about the accuracy of
22 the registration records, correct?

23 A. I suppose it could cause them. I don't think it would
24 cause them for somebody that was knowledgeable about the
25 nature of voter registration.

1 Q. Well, have you heard -- did you hear, I think it was last
2 month, it was reported that the FBI had found 20,000 paid
3 licenses by Chinese -- for -- sent by China? Did you see
4 those reports?

5 A. I remember seeing a report where something like that was
6 made up.

7 Q. So, if somebody has a fake license and they use that to
8 register, that would be a fraudulent registration, right?

9 A. Well, I mean it would certainly be a fraudulent use of the
10 driver's license. If they -- if they were eligible to
11 vote in Michigan, I suppose the registration itself -- I
12 guess the registration would be fraudulent, regardless if
13 they were including a driver data because the driver data
14 would be a false statement, so. But theoretically, you
15 could have a fraudulent driver's license and still be
16 eligible to vote.

17 Q. If it's -- if you register to vote with a fraudulent
18 driver's license, that registration record would be
19 incorrect, yes?

20 A. Yeah, it would include -- it would include I mean a fake
21 driver's license number in that case so that would be
22 problematic.

23 Q. Okay. The -- remember we talked about the Jeneski case
24 earlier?

25 A. Yes.

1 Q. And the issue -- one of the issues there -- the prime
2 issue there was the Secretary of State's order that
3 voters' signatures were to be presumed valid. Do you
4 recall that?

5 A. I, again, don't agree with your description as presumed
6 valid. I think the actual language of the guidance speaks
7 for itself, but I do remember that being separate to that
8 litigation.

9 Q. Okay. And one of the concerns in -- that was raised in
10 that complaint is that people who are not eligible to vote
11 would be able to cast a vote with that -- with that
12 signature verification requirement mandating that the
13 signature was presumed to be valid, you recall that?

14 A. I don't remember whether the issue was about voter
15 eligibility as much as identity. I think the concern was
16 that the person who was signing -- the concern would be
17 that if the signature did not match, and the person was
18 allowed to vote, there would be a concern that that was
19 not actually the person they claimed to be.

20 Q. Yeah. And of course, you do signature verification with
21 the registration process too, right? Isn't there a
22 matching of the signature when you file your registration?

23 A. Well, when you register to vote, there's not a signature
24 on file to match against, so no. I mean if you use your
25 driver's license then we are using all that information,

1 including a driver's license signature and adding it to
2 your voter record, but if you're registering for the first
3 time, there's not a signature matching because there's no
4 signature to match it against.

5 Q. Okay. So, somebody could submit a registration record
6 with a false signature?

7 A. They could attempt to do that.

8 Q. Yeah. And in fact, there are instances where that was
9 successful, correct, in Michigan?

10 A. I don't know what you mean by successful. I mean there
11 have been incidents where individuals have submitted voter
12 registration forms with the names of other individuals or
13 that weren't really them. I'm sure it's happened at some
14 point where a clerk has added to the voter rules, an
15 individual who, you know, was not eligible. But I'm not
16 sure what you mean by successful because when those things
17 are detected the activity is prosecuted and the
18 registration is cancelled.

19 Q. Mr. Brater, with respect to these 700,000 mailers that
20 were sent out, does that registration go straight into the
21 local clerk's QVF?

22 A. Well, it goes into the QVF, and the local clerk can see it
23 there.

24 Q. Were there jurisdiction?

25 A. Yes.

1 MR. OLSEN: Your Honor, can I take a two minute
2 break? Would that be okay?

3 THE COURT: It's 12:33. We're getting pretty
4 close. Let's take a two minute break, and then I'd also
5 like an update on where we are with your required
6 presence.

7 MS. JUNTILLA: Your Honor, I do have an update.
8 I do need to be in Oakland in person by 4:00 p.m.

9 THE COURT: Okay.

10 MS. JUNTILLA: So, I apologize. I know the
11 Court has this scheduled for today, but --

12 THE COURT: It's -- I -- it isn't your fault. I
13 was informed there was a conflict, and I -- if I were to
14 keep you here, I believe you'd be found in contempt of
15 court there, and I don't necessarily want you to get
16 arrested. And my understanding was that there is -- and
17 this was in preparation of an already set trial set for
18 next Monday in that county, potentially, is that correct?
19 That there are some dates? I don't know whether they're
20 going to go or not, but there is something scheduled.

21 MS. JUNTILLA: This was not scheduled until this
22 Wednesday, so this is a new date that was scheduled in
23 Oakland County.

24 THE COURT: Okay.

25 MS. JUNTILLA: But there's another question I

1 have for the Court that the Court might appreciate before
2 a break. And that would be Michigan Criminal Rule of
3 Procedure 6.005 that requires the Court to inquire as to a
4 conflict. Prior to today's testimony we had never heard
5 that the Attorney General's office was assisting in
6 preparation of the state agency's memos in emails, and we
7 learned that today from Mr. Brater's testimony.

8 And then I would draw the Court's attention to
9 page 41 of the transcript where the trooper testified that
10 he was in contact with the Attorney General's office in
11 preparation and investigation of this criminal matter.
12 And I would need to research this further, Your Honor, but
13 I know with the Flint water case that there was a conflict
14 wall as it pertained to civil advice potentially to an
15 agency and a criminal matter that's related. And I
16 believe that's why Mr. Scheutte appointed a private law
17 firm to handle portions of the Flint water case. So, this
18 is new, and I just thought the Court -- I wanted to bring
19 this to the Court's attention to ponder and see if the
20 Court needed to do anything as it relates to that.

21 MR. OLSEN: I think specifically, Your Honor,
22 Ms. Lambert is referring to the October 15, 2021 letter
23 that I believe Mr. Brater testified to that the state may
24 have reviewed before it went out.

25 THE COURT: Mr. Cunningham?

1 MR. CUNNINGHAM: I see no relevance to this at
2 all. I don't see any issues at all about contacts between
3 the officer and Ms. Haviland Clark (phonetic). That's
4 what the testimony was, that's part of her job. You know,
5 we get calls from police officers, and they ask, you know
6 (Indiscernible) all the time. Every prosecutor in the
7 state will tell you the same thing.

8 MS. JUNTILLA: That's not the issue I'm
9 highlighting for the Court. The issue is the preparation
10 of the memos that went to Ms. Scott from the Attorney
11 General's office. So --

12 THE COURT: Are you talking about the memos from
13 Mr. Brater?

14 MS. JUNTILLA: Yes. And so, he testified at the
15 very beginning of his testimony that he sought advice from
16 the Attorney General's office in preparation --

17 THE COURT: But I believe he was also
18 specifically asked for each letter, whether he sent those
19 for review, and I can take into consideration what his
20 answers were. So, I'll note any potential concerns you
21 have and if this case was one that was even to be bound
22 over, I think that that would be an issue to address at
23 that point in time. But for purposes of probable cause
24 determination on each of these charges, I'm going to take
25 the testimony for what I have and weigh it against the

1 other testimony that I have. If there's additional
2 information that you'd like admitted based off of some of
3 the information you gleaned, I think you're going to have
4 additional time to do that now because it doesn't look
5 likely that we're going to get through this examination
6 today.

7 MS. JUNTILLA: Thank you, Judge. I just wanted
8 to bring it to the Court's attention. Thank you.

9 THE COURT: Okay.

10 MS. JUNTILLA: Thank you.

11 MR. OLSEN: Thank you, Your Honor.

12 THE COURT: Did you need a couple more minutes
13 still or --

14 MR. OLSEN: No, we're good.

15 THE COURT: We'll continue then.

16 BY MR. OLSEN:

17 Q. Mr. Brater, turning back to 168.515?

18 A. Okay.

19 Q. Does that statute prohibit the township clerk from
20 retaining an attorney to assist in any determination as to
21 the correctness of the registration records?

22 MR. CUNNINGHAM: Objection, Your Honor. That's
23 calling for a legal opinion. And again, as an officer of
24 the court, I'll talk about the statutory requirements of a
25 clerk. The clerk's not an isolated incident in the

1 office, they're not king. They're subject to by other
2 statutes. They can only hire people with the consent of
3 the board. And that's statutory basis. He wouldn't know
4 this is argument.

5 THE COURT: Sir.

6 MR. OLSEN: Your Honor, again, as I stated
7 before, Mr. Brater has testified that he is responsible
8 for the enforcement and oversight of Michigan election
9 law, and so in that capacity I would like to get his
10 opinion on this matter.

11 THE COURT: Anything else, Mr. Cunningham?

12 MR. CUNNINGHAM: No.

13 THE COURT: I'll allow it on a limited basis.

14 THE WITNESS: I can answer, I think.

15 So, I don't see anything in 515 that prohibits
16 the use of an attorney as part of this process.

17 BY MR. OLSEN:

18 Q. Does the statute have anything in here that prohibits the
19 township clerk or her attorney from hiring an expert to
20 assist with determination of the correctness of the voter
21 registration records?

22 A. Well, if we're talking about reviewing the records
23 themselves, this section doesn't say that there any
24 prohibition on that. There are prohibitions in the
25 election law as to who, you know, how registration

1 information can be disclosed.

2 Q. Okay. And you yourself have just testified that
3 registration information is shared with the private party,
4 ERIC, correct?

5 A. The state of Michigan shares Qualified Voter File data
6 with ERIC.

7 Q. Do you have any basis to disagree that the data on the EPB
8 flashcard that you ordered deleted would be relevant to
9 checking the correctness of registration records?

10 A. I'm not sure how it would be relevant.

11 Q. Does the EPB flashcard contain the QVF?

12 A. It contains a snapshot of the individuals who are
13 registered in that jurisdiction on election day.

14 Q. So, those are registration records, right?

15 A. There are -- they're pollbook records that are derived
16 from registration records. The actual registration record
17 is in the Qualified Voter File.

18 Q. Okay. So, do you have any basis to disagree that if
19 you're checking the correctness of the registration
20 records, you might want to look at the data that's on the
21 EPB flashcard?

22 A. I'm not sure why you would. I mean you can determine the
23 registration record, the correctness of it, by looking at
24 the voters' record on the Qualified Voter File.

25 Q. Well, if you want to see if there were any changes made,

1 illegal changes or otherwise to the Qualified Voter File,
2 wouldn't you want to follow the chain that includes the
3 data that's on the EPB flashcard?

4 A. I mean the changes in the Qualified Voter File are tracked
5 so you can see them. If you did want to compare it to a
6 list of voters who voted on election day, you could do it
7 using the paper printout. But you can also just get the
8 information about the registration record from the
9 Qualified Voter File.

10 Q. Okay. But you're not testifying that the data on the EPB
11 flashcard would be irrelevant to checking the correctness
12 of the registration record, are you?

13 A. I can't see how it would be relevant, but I'm hesitant to
14 say definitively that EPB data generally is irrelevant. I
15 mean, again, you could check the paper printout if you
16 wanted to.

17 Q. But you could also check the data on the EPB flashcard,
18 too, right?

19 A. You could if you had it, yeah.

20 Q. Right. Mr. Brater, I'd like you to pull the 168.520.

21 A. Okay.

22 Q. First sentence of 520 reads,

23 "If a township or city clerk has knowledge
24 that there is probable, illegal, or fraudulent
25 registration in the township or city or in any

1 ward or precinct of the township or city, the
2 clerk has the power and duty to make a full
3 investigation of the facts concerning the
4 registration and to ascertain whether any name
5 has been illegally fraudulent -- illegally or
6 fraudulently registered."

7 Do you see that?

8 A. Yes.

9 Q. Is there any limit -- is there any limitation -- strike
10 that.

11 Does this -- 168.520 expressly gives the
12 township clerk the authority to commence an investigation
13 under these circumstances outlined here, correct?

14 A. Yes.

15 Q. Is there any requirement that the clerk notify the
16 Secretary of State before commencing that investigation?

17 A. No.

18 Q. Were you aware of any issues with Michigan's registration
19 system or the Qualified Voter File not recording
20 provisional ballots in the spring 2021 timeframe?

21 A. I can't remember. I'm not sure exactly what you mean, but
22 I can't remember whether there was a pending issue with
23 that.

24 Q. Were you aware of duplicate files within the QVF that were
25 found in the spring of 2021 in the Michigan QVF?

1 A. I'm not sure what you mean by duplicate files.

2 Q. Duplicate names, slightly changed, same name but slightly
3 changed in spelling or birthdate?

4 A. I -- not specifically in that timeframe, but I'm sure that
5 in the Qualified Voter File there are some duplicate
6 records.

7 Q. So, evidence of duplicate records with slight variations
8 in the same name but it's determined to be the same person
9 could be an indicator of an illegal or fraudulent
10 registration, correct?

11 A. It could be.

12 Q. If a voter notified a township clerk that her name was
13 misspelled in the registration record and the signature
14 that was on file used the incorrect spelling of her name
15 as well, would that be some evidence of an illegal or
16 fraudulent registration?

17 A. It could be, or it could just be an administrative error.

18 Q. But it could be evidence of an illegal or fraudulent
19 registration, right?

20 A. It could be.

21 Q. Continuing on with 520, the statute reads,

22 "A township or city clerk is authorized
23 and empowered to call upon the police
24 department of the city or sheriff of the
25 county in which the city is located, or both,

1 to assist in making the investigation. And
2 the police department and the sheriff are
3 required to render assistance if the clerk
4 makes a request for assistance and to furnish
5 the clerk at his or her request with all
6 available assistance in making the
7 investigation."

8 Do you see that?

9 A. Yes.

10 Q. Does this statute limit who she can call, does it exclude
11 anyone?

12 A. It doesn't list entities that cannot be contacted in this
13 section of the law. It does refer specifically to the
14 police department of the city or the sheriff of the
15 county, which certainly seems to contemplate that you
16 would call your police department or your sheriff, but
17 there's nothing in 520 that expressly says you cannot
18 contact other individuals.

19 Q. The statute continues on, "A township or city clerk is
20 further authorized and empowered if he or she considers it
21 necessary or advisable to appoint assistant examiners for
22 the purpose of the investigation." Do you see that?

23 A. Yes.

24 Q. Is assistant examiners, is that a phrase that is defined
25 in Michigan election code?

1 A. I don't know whether or not it is.

2 Q. At the last hearing on December 18th, Mr. Cunningham
3 raised an objection where he stated that that statement is
4 incorrect when Mr. Hartman discussed it and he stated --
5 let me get the transcript cite. It is 153-6-8 from the
6 transcript. His statement is incorrect, right, "No need
7 for a township clerk -- oh, wait a second. Excuse me.

8 Is there any requirements in this statute for
9 the clerk to get the approval by the township or county
10 board before appointing an examiner?

11 MR. CUNNINGHAM: Objection. The statute speaks
12 for itself, reads for itself and in view of the other
13 provisions of law, especially the ones that talk about
14 creating county clerks and township clerks and their
15 authority to hire people with the consent of the board.

16 THE COURT: Response.

17 MR. OLSEN: Your Honor, Mr. Cunningham made an
18 objection before that it required -- the statute required
19 the clerk to first get the approval of the county board
20 before she could retain an examiner, and I'm just asking
21 if that's -- if he knows --

22 THE COURT: I think that's an appropriate
23 question based off of the question he asked, but then
24 after that, let's move on.

25 THE WITNESS: So, the section 520, it says that

1 the services of the examiner must be approved by the clerk
2 and must be audited and paid by the township board or
3 legislative body of the city in the same manner as the
4 expenses of conducting elections okayed. So, the clerk,
5 under this section, approves the examiner. The township
6 board has a role in auditing and paying for the examiner.

7 BY MR. OLSEN:

8 Q. Right. It doesn't say must be audited. It just says
9 bills for services of the examiner must be approved by the
10 clerk and must be audited. So, if no bill is submitted,
11 there's nothing to audit, correct?

12 A. Well, bills for services must be audited and paid by the
13 township board, is what it says. So, this is referring to
14 the bills.

15 Q. No, it says must be approved by the clerk?

16 A. Right.

17 Q. And must be audited and paid by the township board, but
18 there's no requirement that a bill be submitted, correct?

19 A. Well, I mean if a bill is submitted, I mean -- I don't
20 totally understand your question. I think if a bill is
21 submitted it doesn't get audited.

22 Q. Well --

23 A. -- by the township board. If no bill were submitted, I
24 don't know that this would apply.

25 MR. OLSEN: Okay.

1 MR. CUNNINGHAM: And for the record, that was
2 not the specific statute that I was referring to in my
3 objection.

4 THE COURT: Noted.

5 BY MR. OLSEN:

6 Q. Would you agree that an investigation into the correctness
7 of registration records could entail looking into the
8 logging activity of election systems including the
9 tabulator where records are stored?

10 A. Again, I'm not sure why because you were talking about
11 registration. You would want to look at the registration
12 records as opposed to tabulator data, which has to do with
13 voting.

14 Q. Well, part of looking at the correctness of the
15 registration record would be to -- would include, wouldn't
16 it, if somebody who was illegally registered voted?

17 A. It might be relevant, but that information would be stored
18 in the voting records, not in the tabulator. The
19 tabulator doesn't tell you who the identity is of the
20 people who voted, it's secret. It would be very
21 problematic if you could determine that someone voted by
22 looking at the tabulator because then you'd be able to
23 discover how they voted.

24 Q. Is it -- is it your testimony that the QVF is not retained
25 on the tabulator though?

1 A. That's correct. There's no copy of the QVF on the
2 tabulator.

3 Q. Mr. Brater, could you please pull Defendant -- Defendant's
4 Exhibit 7. It's the contract with Hart?

5 THE COURT: I have them.

6 BY MR. OLSEN:

7 Q. Could you turn, Mr. -- to page 60, Mr. Brater, please?

8 A. Okay.

9 Q. And do you see the flow chart right there?

10 A. Yes.

11 Q. And do you see where it says county and local level?

12 A. Yes.

13 Q. And then it has, on the top left box, it has Michigan QVF?

14 A. Yes.

15 Q. And that flows to the election data V drive, USB media and
16 so forth?

17 A. There's an arrow pointing from the QVF to the data
18 management icon.

19 Q. Do you understand that that's the flow of the QVF file?

20 A. It's the flow of certain data from the QVF.

21 Q. Okay. And do you see that for precinct data, that
22 includes the flow to the precinct tabulator VeriScan?

23 A. Yes.

24 Q. Thank you.

25 Mr. Brater, another issue that you ordered Clerk

1 Scott to do was to perform maintenance on the township
2 tabulator, correct?

3 A. I think, specifically, I ordered her to permit maintenance
4 to be performed by the -- by Hart, but yes, I ordered that
5 maintenance be performed.

6 Q. Is there any statute that requires the vendor to perform
7 the maintenance on the tabulator by the township clerk?

8 A. There's not a statute that specifically requires that the
9 vendor perform the maintenance.

10 Q. Is there a rule that's gone through the APA that requires
11 that?

12 A. I don't believe that there's a promulgated -- I don't
13 recall anything in the promulgated rule that refers
14 specifically to maintenance in that way.

15 Q. Mr. Brater, I'm just going to hand you a copy. I'm not
16 going to move for admission, but it's the Michigan Admin
17 Code R 168.772.

18 Are you familiar with this provision?

19 A. Yes.

20 Q. Okay. And this is -- this isn't a statute, this is the
21 admin code, right?

22 A. Right.

23 Q. That means it's gone through the APA, the rule?

24 A. Yes.

25 Q. Okay. And so, at paragraph four do you see where it

1 states,

2 "Where the legislative body of a city,
3 township, or village provides for the purchase
4 and use of an electronic voting system, the
5 clerk of the city, township, or village shall
6 have custody of the devices and be responsible
7 for their maintenance repair in preparation
8 for elections."

9 Do you see that?

10 A. Yes.

11 Q. Okay. And this would apply to the -- to Clerk Scott,
12 correct, and her tabulator?

13 A. Yes.

14 Q. And so, Clerk Scott had custody, required to have custody
15 of the devices and then to be responsible for the
16 maintenance, repair, and preparation for elections,
17 correct?

18 A. Yes.

19 Q. And that's all it says?

20 A. That's all that this administrative rule says, yes.

21 Q. Yeah. And there is no other administrative rule that says
22 what exactly maintenance is supposed to mean, right?

23 A. I don't believe the maintenance is defined elsewhere, at
24 least as far as I can remember in the administrative
25 rules.

1 Q. Could you pull Defendant's Exhibit 7, please, the
2 contract?

3 A. Okay.

4 THE COURT: Do you still have 7?

5 THE WITNESS: I do, yes.

6 THE COURT: Okay.

7 BY MR. OLSEN:

8 Q. And go to page 31. You see subsection (B)?

9 A. Yes.

10 Q. Preventative maintenance, tabulators, accessible voting
11 system components only?

12 A. Uh-huh. Yes.

13 Q. And this would be the section that applies to the
14 tabulator for Adams Township that's at issue here,
15 correct?

16 A. This section certainly would apply. I don't know, there
17 may be others as well, in the contract, but this one
18 definitely applied.

19 Q. Okay. So, that's preventative maintenance, yes?

20 A. Yes.

21 Q. Go down to the chart, maintenance for the VeriScan, both
22 routine and preventative, do you see that?

23 A. Yes.

24 Q. And VeriScan is the tabulator that we're all talking about
25 here, right?

1 A. Yes.

2 Q. You see where the column it says, "Performed by."?

3 A. Yes.

4 Q. And then it continues on the next page if you go over to

5 38, you see that?

6 A. Thirty-eight. Page 38?

7 Q. Yes. Or no, excuse me, 32. I'm sorry.

8 A. Yes.

9 Q. Okay. Who performs the maintenance?

10 A. You're telling me --

11 Q. It says user, right?

12 A. The contract provides that the -- provides for the user to

13 be responsible for this maintenance.

14 Q. Well, no. It doesn't say responsible. It says performed

15 by, doesn't it?

16 A. Yes.

17 Q. Okay. So, each item for the preventative maintenance on

18 page 31 there's four there, it says user, and if you go

19 over to the next page, it says there's three, but there's

20 one user with contract -- contractor assistance as needed.

21 Is there any maintenance routine here that requires the

22 contractor to perform?

23 A. Not that I think that would require it to be done by the

24 contractor.

25 Q. Okay. So, your order for her to allow Hart InterCivic to

1 perform the maintenance, you can see here, is not required
2 by the contractor, right?

3 A. The contract does not specifically require the vendor
4 perform all of these maintenance.

5 Q. Actually, it expressly allows the user -- not even allows
6 -- it says, performed by the user, correct?

7 A. Yes.

8 Q. And in terms of the biannual maintenance -- biannual means
9 every two years, correct?

10 A. Yes.

11 Q. Is there any requirement for even biannual maintenance to
12 be performed before the then upcoming November 2021
13 election?

14 A. Well, it's on a two-year schedule so it may line up with
15 one election or another. This contract doesn't refer to
16 specific election dates.

17 Q. Would you have any reason to disagree that the term of the
18 contract for biannual maintenance would be the end of the
19 calendar year as opposed to before the then upcoming
20 November '21 election?

21 A. Yeah, I mean I think what's contemplated by every two
22 years is you're ensuring that equipment is being
23 maintained, serviced once every two years in anticipation
24 of upcoming elections. Typically, I mean the exact
25 schedules may vary, but typically, the goal there is to

1 ensure that the maintenance occurs before major elections
2 are conducted, so I mean I think it would -- that would be
3 actual schedule for how it's performed would probably
4 depend on the situation.

5 MR. OLSEN: Okay. Sir, on Defendant's Exhibit
6 7, if you would -- the pages are not numbered but it is
7 the third page from the back.

8 MR. CUNNINGHAM: Which?

9 MR. OLSEN: Defendant's Exhibit 7, the contract.

10 BY MR. OLSEN:

11 Q. Actually, if you go to the fourth page it should say
12 contract addendum?

13 A. Okay.

14 Q. Let me know when you're there?

15 A. Okay.

16 Q. You see contract addendum?

17 A. Yep.

18 Q. And if you turn the page, talks about statement of work
19 1.6(A) service and maintenance?

20 A. Okay.

21 Q. You see where it says warranty start date for the county
22 and all local jurisdictions within Hillsdale County shall
23 be December 27, 2019?

24 A. 2017 --

25 Q. Excuse me, 2017?

1 A. Yeah, I see that.

2 Q. So, two years from that date on the monthly would be
3 December 27, 2021, correct?

4 A. Two years from 2017 would be 2019 --

5 Q. Well, I'm saying --

6 A. -- two years from 2019 would be 2021.

7 Q. Every two years?

8 A. Yeah, right.

9 Q. So, the end date for that service period for biannual
10 maintenance, by contract, is not before the November '21
11 election, correct?

12 A. Yeah. I mean as I understand this language, that's the
13 date by which the maintenance is required to be performed
14 by the vendor under the contract terms.

15 Q. Okay. Well, we talked about who performs the maintenance.
16 That's just -- and the contract itself says for the
17 tabulator because this contract covers more than just the
18 tabulator, correct?

19 A. Yes.

20 Q. Okay. So, specifically, with respect to the tabulator at
21 page 30 to 31, it refers to the user unless there's one
22 aspect that the user requires assistance can perform the
23 maintenance, correct, we've talked about that?

24 A. Yeah. But it also -- the addendum also says that the
25 contract seems to contemplate the contract to providing

1 preventative maintenance.

2 Q. And then if you look at subsection five of this addendums
3 --

4 A. Uh-huh. Yep.

5 Q. -- where it states,

6 "All jurisdictions within Hillsdale County
7 shall have access to use, at no charge, the
8 statewide loaner pool of equipment maintained
9 in the contractor's office in Oakland County
10 or the nearest contractor's office,
11 whichever's closer."

12 Do you see that?

13 A. Yes.

14 Q. So, if for some reason a tabulator was taken from service,
15 there would be a loaner available to replace it for an
16 upcoming election, correct, by contract?

17 A. Yeah, as long as there was one available, they would have
18 access to it. They shall have access to the statewide
19 voter pool.

20 Q. And again, under the Michigan administrative rules, the
21 clerk is responsible for the custody and the maintenance
22 of the tabulator, right?

23 A. That's what the administrative rule says.

24 Q. Yeah. And -- and the title to the tabulator is owned by
25 who? Township, right?

1 A. That would depend on the contract, I believe, so I'm not a
2 hundred percent certain about that.

3 Q. Does the Secretary of State own title to the tabulator at
4 issue in this proceeding?

5 A. No.

6 Q. Okay.

7 A. But it may be the county, I just don't know --

8 Q. Okay.

9 A. -- whether it's the county or the jurisdiction.

10 Q. We can just clarify that, I believe. If we go to page
11 167.

12 Let me know when you're there, sir?

13 A. Okay.

14 Q. It's the license agreement?

15 A. Okay.

16 Q. Do you see that the clerk of Adams Township signed that?

17 A. Yes.

18 Q. Okay. So, that would indicate that it's the township that
19 owns -- has title to the tabulator, not the county?

20 A. I would expect so. I mean it says software license
21 agreement here. I don't see anything about the title in
22 this document, but I would expect that would be the case.

23 Q. Okay.

24 THE COURT: Mr. Olsen, it's about 1:10. Are you
25 getting close? I don't want your client to be late.

1 MS. JUNTILLA: Thank you, Your Honor. We're
2 okay until 1:30 if that's okay with the Court.

3 THE COURT: Absolutely.

4 MS. JUNTILLA: Thank you.

5 THE COURT: You send them a message that we may
6 be a little bit late today.

7 I have arraignments waiting. I usually start at
8 1:00, but they can hold on for a little bit.

9 MS. JUNTILLA: Thank you, Judge.

10 THE COURT: Do you need to take a quick break,
11 two minutes?

12 THE COURT: Sorry. My clerk needs to use the
13 restroom.

14 (At 1:10 p.m., break in proceedings)

15 (At 1:15 p.m., proceedings resume)

16 THE COURT: And we're were still on cross-
17 examination, Mr. Olsen.

18 MR. OLSEN: Yes, Your Honor.

19 BY MR. OLSEN:

20 Q. Mr. Brater, I've just handed you what's been marked for
21 identification as Defendant's Exhibit 12?

22 A. Yes.

23 Q. It's a letter dated May 20, 2021, to Kirk Brewster of
24 Cheboygan County. It has your name as the signature on
25 the back, do you see that?

1 A. Yes.

2 (At 1:16 p.m., Defense Exhibit 12 Marked)

3 BY MR. OLSEN:

4 Q. Does this appear to be a true and accurate copy of the
5 letter you sent to Clerk Brewster on or about May 2021?

6 A. Yes.

7 MR. OLSEN: Your Honor, we would move to admit
8 this exhibit.

9 MR. CUNNINGHAM: No objections.

10 THE COURT: Admitted. That's Defendant 12.

11 (At 1:16 p.m. Defense Exhibit 12 received.)

12 BY MR. OLSEN:

13 Q. Sir, in this letter, at the second paragraph, you state,
14 "Michigan law entrusts clerks with choosing and
15 maintaining their voting systems and does not provide any
16 authority for county commissions to take control of this
17 equipment." You see that?

18 A. Yes.

19 Q. Is that -- do you still stand by that statement?

20 A. Yeah, I don't see any authority for county commissions to
21 take control of equipment absent some court order or
22 something like that.

23 Q. Does it -- does Michigan law provide any authority for
24 anyone other than the entrusted clerks to take control of
25 their voting equipment other than through a court order?

1 A. I would say yes. I would say that the Michigan election
2 law provides for instances where supervisory control is
3 necessary and the Secretary of State or the Director of
4 Elections can direct that other election officials take
5 control of equipment to ensure that the election law's
6 followed.

7 Q. Okay. And are you referring to 168.21, your general
8 authority to supervise and direct?

9 A. Yes. As well as subsection 31 and 32 -- or section 31 and
10 32.

11 Q. 168.31?

12 A. Right.

13 Q. And as we've discussed, that gets into the whole APA rule
14 making process, correct?

15 A. The APA's referenced in that section, yes.

16 Q. In the -- if you turn the page -- what's going on here?
17 What was the purpose of this letter?

18 A. The Cheboygan County Board of Commissioners was apparently
19 attempting to have some third party entity get access to
20 the voting equipment in the county to conduct a "forensic
21 audit". And so, in light of that, this letter -- I sent
22 this letter to the clerk to clarify that she -- and the
23 clerks in the jurisdictions have control over the voting
24 equipment, not county commissions?

25 Q. And in fact, if you turn to the second page, last

1 paragraph, you state, "If you were or municipal clerks
2 choose to conduct additional reviews of your voting
3 systems, that is your prerogative."?

4 A. Yes, that's part of a paragraph at the end of the letter.

5 Q. Well, that -- part of the paragraph that you stated
6 continues on,

7 "However, as we advised in February 12,
8 2021, news update and our April 2021 email to
9 county clerks only election officials,
10 licensed vendors and accredited various system
11 test laboratories and should be granted access
12 to voting equipment."?

13 A. Yes, it does say that.

14 Q. So, you advised, there's no -- is there any rule that says
15 what the clerk can do with respect to the voting equipment
16 that they have custody or control?

17 A. Well, there's a variety of legal authorities that govern
18 that. There's the administrative rules, there's also the
19 Michigan election law provisions that lead to voting
20 equipment which include the sections that govern how
21 voting equipment is chosen and purchased and provides for
22 Secretary of State as well as clerks to contract with
23 election official -- to contract with vendors for that
24 equipment. It also provides for requirements about how
25 equipment is tested, approved, and certified. So, there's

1 a variety of legal authorities that apply to this set of
2 issues.

3 Q. Is there any statute or Michigan administrative rule
4 that's gone through the Administrative Procedures Act that
5 prohibits a clerk from bringing someone in to inspect the
6 township tabulator over which they have custody and title?

7 A. I would say that that that would violate, I mean, in
8 certain ways if a licensed individual wasn't doing it, it
9 would violate the provisions of the election law that
10 would provide for how voting equipment is approved,
11 tested, purchased and maintained, which include a process
12 that requires Secretary of State, in consultation with
13 election officials, to bid out contracts. The contracts
14 that are agreed to are part of that. And then there's
15 also requirements for the use of election equipment in
16 Michigan which require it to be tested and certified by
17 the board of state canvassers. So, to the extent that any
18 action would violate that set of laws, it would be
19 prohibited.

20 Q. Can you point to any statute or rule that would prohibit
21 an election clerk from bringing somebody in to examine
22 their voting equipment, that it would expressly prohibit
23 that?

24 A. I think I just did. I mean --

25 Q. I didn't hear any rule?

1 A. -- the sections of law that apply to how Michigan
2 purchases equipment, tests equipment, certifies equipment
3 for use place limitations on how that equipment can be
4 accessed.

5 Q. Which law?

6 A. It's -- there's several sections of the law. There's
7 section 37 with a couple of letter subsections, there's
8 section -- several in the 700's that refer to the process
9 by which election equipment is purchased and maintained.

10 Q. Okay. So, just because the section of law deals with how
11 something is purchased or how something is maintained, can
12 you point to any section in the law that would prohibit a
13 clerk from bringing in somebody to examine election
14 equipment, their election equipment that they have custody
15 and control over pursuant to 168.772 Michigan rule?

16 A. Yes, it would violate the requirements that are elsewhere
17 in the election law for how equipment is purchased,
18 tested, certified when that would be unlawful.

19 MR. OLSEN: I'm going to say my question one
20 more time. Is there any --

21 MR. CUNNINGHAM: Your Honor --

22 MR. OLSEN: -- because it's nonresponsive.

23 THE COURT: I think it is responsive. He
24 disagrees with where you're going with it. He says in his
25 opinion it violates the Michigan election law, which I can

1 read.

2 MR. OLSEN: Yes, Your Honor.

3 I'm simply asking him if there's any law that he
4 can point to that expressly prohibits, that's the only
5 question.

6 THE COURT: Are you aware of an expressed
7 prohibition that says an election clerk cannot bring
8 someone else in?

9 THE WITNESS: Not that I'm aware of, Your Honor.

10 THE COURT: There we go.

11 MR. OLSEN: Thank you, Your Honor.

12 I'm looking for a quick document right here in
13 the pile.

14 BY MR. OLSEN:

15 Q. Mr. Brater, earlier I handed you a copy of the code
16 168.932, do you have that in that stack?

17 A. Somewhere. Yep.

18 Q. Okay. Is there any provision in this statute that
19 requires -- is there any provision in that statute that
20 requires a VTSL (sic) lab, a court order, or licensed
21 vendor to access the tabulator?

22 A. A VSTL --

23 Q. Voting system --

24 A. Test laboratory.

25 Q. Yes.

1 A. That is not referenced expressly in this statute.

2 Q. None of those three? VTSL, court order or licensed
3 vendor?

4 A. No, none of those are referenced expressly in this
5 section.

6 MR. OLSEN: Your Honor, this is probably a good
7 point to stop.

8 THE COURT: Okay.

9 It is 1:26 p.m. I'm going to continue the
10 matter. I know Ms. Lambert needs to get out of here
11 immediately, but can I just ask that both attorneys stick
12 around briefly so that we can look at some potential
13 dates. And while we have Mr. Brater here, I don't know if
14 has access to a calendar, to speak with you, Mr.
15 Cunningham, and then we can perhaps figure out a day
16 before you guys leave.

17 MR. CUNNINGHAM: Thank you, Your Honor.

18 MS. JUNTILLA: Your Honor, I like to stay for
19 the date.

20 THE COURT: I was going to say that or either,
21 can your attorney, like, put you on speaker. I definitely
22 don't want you texting and driving, but.

23 MS. JUNTILLA: It's okay. I know we can do this
24 in the next few minutes.

25 THE COURT: Okay.

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MS. JUNTILLA: Thank you, Judge.

THE COURT: All right.

Court stands in recess.

(At 1:27 p.m., proceeding concluded for 7-11-25;
off the record)

1 STATE OF MICHIGAN

2 COUNTY OF WASHTENAW) ss.

3 I certify that this transcript is a complete, true, and
4 correct transcript to the best of my ability of the digital
5 proceedings in the case of People v. Stephanie Scott and
6 Stefanie Juntilla Lambert on July 11, 2025.

7 Digital proceedings were recorded and provided to this
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14 I also certify that I am not a relative or employee of the
15 parties involved and have no financial interest in this case.

16 DATED: July 23, 2025

17 *s/ Amy Shankleton-Novess*

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19

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