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COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
DIVISION 1
CASE NO. 23-CI-00978
Electronically Filed

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CHRISTINE McLAUGHLIN**PLAINTIFF**

vs.

BOONE COUNTY CLERK
JUSTIN CRIGLER**DEFENDANT**

AMICUS CURIAE BRIEF OF THE KENTUCKY COUNTY CLERKS' ASSOCIATION

The Kentucky County Clerks' Association, through Counsel, tender this Amicus Curiae Brief.

I. The Secret Ballot in Kentucky is threatened by Plaintiff's Open Record Request

The right to cast a secret ballot is not merely a right preserved under Kentucky law, including in our Kentucky Constitution – it also takes on a federal constitutional dimension. *Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981). In *Anderson*, the Court explained that “[a]lthough the US Constitution does not specifically guarantee that a person has a right to a secret ballot, such a right has been recognized as one of the fundamental civil liberties of our democracy.” *Id.*, citing *Buckley v. Valeo*, 519 F.2d 821 (CA DC 1975) rev'd on other grounds 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *US v. Executive Committee of Democratic Party of Greene County, Alabama*, 254 F. Supp. 543, 546 (ND Ala 1966).

The Sixth Circuit explained that “[t]his principle takes on such significance because it safeguards the purity of our election process by eliminating the fear of scorn and ridicule, as well as lessening the evils of violence, intimidation, bribery and other corrupt practices which can be incumbent in non-secret elections.” *Id.*, citing *Detroit v. Rush*, 82 Mich. 532, 46 N.W. 951

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(1890). Thus, “[i]n order to protect the secrecy of the ballot, many states have enacted constitutional provisions dictating that all ballots must be cast under the cloak of complete privacy.” *Id.* “Kentucky is a state which has done so, and Section 147 of its Constitution provides in part: ‘... All elections by the people shall be by secret official ballot.’” *Id.*

And the Sixth Circuit in *Anderson* explained and analyzed Kentucky cases, which “demonstrate[d] Kentucky's concern with insuring that the integrity of secret ballots be maintained.” *Id.*, citing *Smith v. Jones*, 221 Ky. 546, 299 S.W. 170 (1927) (invalidating election because of failure to maintain partition); *Nall v. Tinsley*, 107 Ky. 441, 54 S.W. 187 (1899) (discussing secret ballot provisions); *Harrison v. Stroud*, 129 Ky. 193, 110 S.W. 828 (1908) (invalidation of election due to violation of secret ballot provision); *Glenn v. Gnau*, 251 Ky. 3, 64 S.W.2d 168 (1933).

Nall, incidentally, noted that, prior to the adoption of the present Kentucky Constitution, elections in Kentucky were held differently. 107 Ky. 441, 443; 54 S.W. 187. In *Nall*, Kentucky’s highest Court then explained the import and meaning of § 147:

Every freeman should be independent, and free from improper influences in the expression of his preference as to who should conduct the affairs of government, and as to the policies that should be adopted. If it is proper to obtain the assent of a freeman in such matters that assent should be the result of an honest judgment. He should be placed beyond reach of intimidation. The impression prevailed in the country that men and concerns employing large numbers of men used the great power which they possessed to control their employes in the exercise of an elective franchise. There was a fear that a system of bulldozing might be engaged in by such persons, which would result in the intimidation of honest employes, and thus force them to express the employer's judgment, and not their own Whether such a condition existed or not, it was thought wise by the makers of our Constitution to throw around all honest voters all the protection it was possible to give them, and the best method of doing so was believed to be the secret official ballot. Again, it was believed that bribery in elections could be checked. It was intended by the secret official ballot, to make the condition such that those who were disposed to corrupt the voters of the country could not tell for whom they had cast their ballots, thereby reducing the temptation to use money in elections for corrupt purposes.

...

On the other hand, the marking of the vote in seclusion reaches effectively another great class of evils, including violence and intimidation, improper influence, dictation by employers or organizations, the fear of ridicule and dislike, or of social or commercial injury,—all coercive influence of every sort depending on a knowledge of the voter's political action. Tumult and disorder at the polls, bargaining and trading of votes, and all questionable practices depending upon the knowledge gained, as the day goes on, of the drift of the contest,—it would hardly be necessary to argue in advance, even if England's experience did not prove it, that these practices, wherever they have prevailed, must disappear. In short, the secret ballot approaches these more or less elusive evils, not merely with the weak instrument of a penal clause for this and that offense, but with the effective methods of modern legislation. By compelling the dishonest man to mark his vote in secrecy, it renders it impossible for him to prove his dishonesty, and thus deprives him of the market for it. By compelling the honest man to vote in secrecy, it relieves him, not merely from the grosser forms of intimidation, but from more subtle and perhaps more pernicious coercion of every sort. By thus tending to eradicate corruption, and by giving effect to each man's innermost belief, it secures to the republic what at such a juncture is the thing vitally necessary to its health,—a free and honest expression of the convictions of every citizen."

Id.

The *Nall* Court then explained that:

Should a county clerk fail to furnish any kind of ballots for the use of the voters, and the regular officers of the election should open a poll and permit the electors to vote viva voce for the candidates of their choice, we certainly would hold that the election was invalid, because it was not in compliance with the law, but in disregard of it. The electors would not in any wise be responsible for the conduct of the clerk; still, their votes would not be counted. *Id.*

And the Court concluded that:

Exactly the same condition exists when ballots are printed on paper so thin that it can be seen from the back for whom the electors cast their votes. The officers of the election could see for whom they voted, and it would be practically viva voce voting, and the evils intended to be remedied by a secret official ballot would still remain with us. Such an election would be invalid. *Id.*

The point of all of this discussion is this: if it is possible, via an open record request, to reverse engineer how any particular ballot was cast, i.e. to tie it back to an individual voter, that violates the Kentucky (and federal) constitutional guaranties of a vote by secret ballot. It renders

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voters subject to “violence and intimidation, improper influence, dictation by employers or organizations, the fear of ridicule and dislike, or of social or commercial injury.” *Id.*

And, as it turns out, while it may be difficult, *it is* possible to reverse engineer how a particular voter voted, particularly in elections with low turnout. Cast ballots (which have bar codes) can be decoded, which would provide information to someone seeking to reverse engineer and determine how an individual cast his or her ballot. While the barcodes alone do not tie the voter to the ballot, the bar code reveals (with most common vendors): (i) date of the election; (ii) the style of the ballot (i.e. what races are being voted and precinct); (iii) the election type (General, Primary, Special). The ballot scanning machines are labeled and separated by Kentucky law by the types of voting; mail-in absentee, in-person excused absentee, in-person no excuse absentee (early voting), and Election Day.¹ The state also maintains who cast votes in each election, including the date they cast their vote and whether they voted early or cast an absentee ballot, and such voter turnout information *is available* via open record request via the County Clerk. In addition to bar coding, much of that information can be derived from a close inspection of the cast ballot itself, and cross-referencing that with already-available turnout information makes it possible to derive how a particular voter voted.

Take the Plaintiff’s Open Record Request. One of her requests involved the ballots cast at the Florence Elementary precinct, where 24 voters cast their ballots for the May, 2023 primary

¹ USENIX Journal of Election Technology and Systems (JETS) (2013), at p. 89 “—We develop new methods to analyze and decode ballot styles, from scans of only the voted ballots (without needing scans of blank ballots or other external information). We show how to rapidly identify the ballot style of each voted ballot, **how to reverse-engineer the structure of contests on the ballot**, and how to recognize precinct numbers and decode bar codes that identify the ballot style of each voted ballot.” Available at <https://www.usenix.org/sites/default/files/jets0101-complete.pdf> (last accessed 12/13/2023).

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election. It is likely that one or two voters a day cast votes in that precinct, during in person early voting, in advance of the primary, and the voter identities of the voters who did so can be discerned from turnout information (publicly available), and then cross-referenced with the ballot that reveals the date the vote was cast. That violates Kentucky's secret ballot requirements (as well as that voter's constitutional rights under both the federal and Kentucky Constitutions). It is true that the higher the turnout and the more voters that vote on a particular day, the more difficult it would be to reverse engineer a particular voter's ballot. But the fact that it is possible to so reverse-engineer a particular voter's vote (likely in the case of Florence Elementary precinct). And that possibility threatens federal and state constitutional rights of voters and thus prohibits the release of the information.

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II. The Kentucky Open Records Act and its exceptions that are applicable here

Assuming, *arguendo*, that cast ballots, in the possession of a county clerk, are "public records" within the definition of KRS 61.870(2) (explaining "public records" include "*all* books, papers, ... tapes, discs, diskettes, ... software, or other documentation regardless of physical form or characteristics, which are ... in the possession of or retained by a public agency"), generally, the Kentucky Open Records Act begins with the default presumption that public records are open to inspection or copying, unless an exemption applies. KRS 61.878 provides those exceptions.

Here, at least three exceptions are at issue. First, KRS 61.878(1)(a) provides an exception for "(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Second, KRS 61.878(1)(k) provides an exception for "(k) All public records or information the disclosure of which is prohibited by federal law or regulation or state law." Third, KRS 61.878(1)(l) provides

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an exception for “(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly...”

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- a. The violation of the secrecy of the ballot by disclosure of cast ballots invokes three exceptions to the Kentucky Open Records Act

As noted, both the United States Constitution, and Kentucky Constitution § 147 provide strong protections for the secret ballot. *Anderson*, 664 F.2d 600, 608.² And, as noted, Kentucky law has made clear that if third parties are able to derive or determine how a particular voted, the right to cast a secret ballot is violated. *Nall*, 107 Ky. 441, 443; 54 S.W. 187; *see, also*, KRS 118.025(1) (voting “shall be by secret paper ballot”).

That, in turn, makes disclosure to the Plaintiff of the ballots at issue a violation of personal privacy, triggering the exception in KRS 61.878(1)(a), as well as triggering the exceptions in KRS 61.878(1)(k), and KRS 61.878(1)(l), which provide exceptions where otherwise required by law.

- b. Other Kentucky statutory law also requires the ongoing sequestration and non-dissemination of cast ballots, subject to explicit statutory exceptions

Numerous statutory provisions are implicated by Plaintiff’s request. Broadly, KRS 117.135 provides that voting equipment³ “[b]e secured and locked by the county clerk to ensure that access is restricted to **only** members of the county board of elections or other persons as authorized by law.” (emphasis added). Similarly, KRS 117.195 requires that county clerks “retain the keys to all ballot boxes and ballot receptacles.” And, significantly, KRS 117.275(8)

² Violations of secret ballot requirements potentially expose Kentucky County Clerks to federal § 1983 liabilities, particularly with *Anderson* setting forth published case law on the subject.

³ This is defined broadly in KRS 117.001(19) as including “any physical component of a voting system.” And “voting system” is defined broadly in KRS 117.001(21)(a) as any “equipment ... used to” “count votes.”

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requires that all “voting equipment” be “properly boxed or securely covered and removed to a proper and secure place of storage,” while KRS 117.275(16) provides for 22 months of ballot retention, after which they “be destroyed in a manner to render them unreadable by the county board of elections if no contest or recount action has been filed.” The same is true with respect to KRS 118.385, which requires that the county clerk both “retain and preserve” ... “all records and papers relative to the voter returns for all the offices voted for in those precincts.”

Moreover, KRS 117.295 requires all voting equipment and ballot boxes to remain locked and under video surveillance for a period of thirty (30) days following an election, allowing access under only four narrow circumstances: (1) Upon the order of any court of competent jurisdiction, or judge thereof; (2) By direction of any legislative committee or board authorized and empowered to investigate and report upon contested elections; (3) By a county board of elections under the direction of the State Board of Elections pursuant to a risk-limiting audit; or (4) As required to conduct a recount under KRS 120.157.

KRS 117.0861 maintains that no person shall knowingly collect, gain possession of, deliver, or exercise control over a mail-in absentee ballot except for the voter themselves, an election official, USPS worker, or a designated assistant. KRS 117.087(5) lays out explicit instructions to ensure that, after any challenges, remaining absentee ballots are redistributed to ensure secrecy of the vote.

We would be remiss in not pointing out that state law gives the State Board of Elections broad authority to promulgate regulations on elections, KRS 117.027. Kentucky Administrative Regulations are implicated by Plaintiff’s request here. For example, 31 KAR 6:040, provides that every county board of election must have an equipment security plan, including to secure and store voting equipment (which includes ballot security).

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Perhaps most significantly, the General Assembly has defined felony offenses for persons who remove ballots from a secured box. KRS 119.115(3) provides that “[a]ny election official, or other person entrusted with the custody or control of any voting machine, voting equipment, or voting system shall be guilty of a Class D felony if he or she knowingly and intentionally: ... (b) Unlawfully opens a voting machine, voting equipment, or voting system; ... [or] (e) Removes ... any ballot.”

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Similarly, KRS 119.195 has several provisions that are at issue. First, KRS 119.195(3) provides that “[a]ny person who takes or removes in any manner, feloniously or with the consent or permission of the custodian, any official ballot from any place where it may lawfully be, or knowingly and willfully has in his possession or custody any such official ballot, except as an officer or custodian under the law or while within the polling place for the purpose of voting, and any custodian or officer who permits any official ballot to be removed or carried away from the place where it may lawfully be by any person other than the officer or custodian whose duty it is to receive it, shall be guilty of a Class C felony.”

Second, KRS 119.195(6) provides that “(6) [a]ny election officer who mutilates or tampers with any of the seals, or destroys or removes any official ballots required to be preserved, shall be guilty of a Class D felony.”

Third, KRS 119.195(7) provides that “[a]ny county clerk who knowingly and willfully opens any ballot box and removes any official ballot therefrom, or removes, destroys, or tampers with a ballot box and official ballots left in his care and custody, or permits any other person to do so, during the period the boxes are required to remain locked in his office, shall be guilty of a Class D felony.”

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Yet the Plaintiff's request would require the breaking of the seals, and the removal of the cast ballots, at least long enough to inspect them, all in contravention of the foregoing provisions.

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That, in turn, makes disclosure to the Plaintiff, which can only be done through accessing secured ballots, plain exceptions to the Kentucky Open Records Act under KRS 61.878(1)(k), and KRS 61.878(1)(l), which provide exceptions where otherwise required by law.

III. Conclusion

At one level, Plaintiff's apparent desire to double check that election returns are accurate (despite significant steps to ensure fair and free elections) – is understandable. The proper procedure, required by law, to verify the election results is to request a recount overseen by our Circuit Courts. This open records request circumvents the required process laid out in KRS 120.290, in turn, circumvents the Circuit Courts from their duly sworn duty. In recent elections, these recounts have provided overwhelming evidence that our election equipment in Kentucky is working as it should be and County Board of Elections are following the accuracy testing and inspection protocols. While some citizens would prefer to engage in their own election audit through an open records request, there are substantial risks.

Here, that request here comes at a number of significant, untenable, and unconstitutional downside costs. Perhaps the most significant cost, of course, is the ability to reverse engineer a cast ballot and identify a particular voter – something that presents an even higher degree of risk in (i) a primary (where turnout is lower than a general election) – which is the case here; and (ii) in a low turnout precinct (at least one of which is implicated by Plaintiff's request). And while Plaintiff's desire to review cast ballots may be laudable, it must yield to the rights of Kentucky voters, who have a federal and state constitutional right to cast a secret ballot, and to have their cast votes *remain* secret.

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If Kentucky voters know that their ballot may not, in fact, be secret – that others can learn who someone voted for – the entire point of having secret ballots would be defeated – and voters would be hesitant to cast ballots, knowing that they may be subject to reprisals for their political choices.

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At bottom, these policy choices between transparency and the significant and longstanding anti-corruption interest in the right to cast a secret ballot have been made – first by the voters in enacting § 147 of the Kentucky Constitution (which trumps any statutory provisions), and then by the General Assembly, in passing multiple statutes that provide for robust sequestration of these very ballots. There is no right to cast ballots under the Open Meetings Act.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have served all Counsel of record, via electronic mail, and ordinary U.S. mail, with a copy of the foregoing, this 14 day of December, 2023.

/s/Christopher Wiest
 Christopher Wiest (KBA 90725)

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