Testimony on SB 271, February 18, 2021
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Testimony to the Senate Education Health and Environment Committee

I am here today to state my support for SB 271, because SB 271 addresses the serious problem that currently exists in Maryland related to ballot segregation and ballot secrecy.

1. Background

From 2004-2014, all voters in Maryland used the same ballot approach: the Diebold Accuvote DRE (Direct Recording Electronic) machines. While critics complained that the machines lacked a paper trail, voters with and without disabilities all used the exact same voting machine, which was an ideal situation. In the 2016, 2018, and 2020 elections, Maryland used a two-tier approach for in-person voting. Voters primarily used the optical scan paper ballots, however, voters with print-related disabilities, unable to use the optical scan paper ballots, instead used the ExpressVote ballot marking device (BMD). The ExpressVote creates a ballot size and format which is 4.5 x 14 inches (known as the "skinny ballot"), and only lists the candidates selected. The standard optical scan paper ballot in Maryland is closer to legal paper size, and lists all candidates, not only those for whom votes were cast.

If all voters (voters with disabilities and those without) use the same BMD, or the BMD marks up a ballot that is identical in size and content to the hand-marked optical scan ballot being used by voters without disabilities, there is no potential segregation of ballots or threat to secrecy of the ballot, as all ballots are identical, exist in large quantities, and are counted together. **This is not the case in Maryland**. If the size and content for the BMD ballots and the hand-marked ballots are not identical, then it is especially important that large quantities of voters use the BMD which creates the "skinny ballot." This would be the only way to ensure that BMD-marked ballots cannot be identified to be ballots only from people with disabilities.

2. What the law requires

In 2013, the Administrator of the State Board of Elections (SBE) asked the Maryland Attorney General to issue a statement on the meaning of the term "segregated ballot" within Maryland election law.[1] The Attorney General indicated that "the ballots cast by voters with disabilities could not be identified as such during the process of casting,

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[1] Maryland Attorney General (2013). Election Law: Voting Systems-Statutory Construction-Requirement that Voting Systems Not Create a "Segregated Ballot" for Voters with Disabilities. Available at: http://www.marylandattorneygeneral.gov/Opinions%20Documents/2013/98OAG152.pdf

counting, and, if necessary, re-counting the paper ballots cast in an election."[1] According to the Attorney General, there are only three ways to meet this statutory requirement:

1. "SBE may require all voters to use a voting system that is accessible to voters with disabilities."

2. "SBE may certify an accessible voting system that generates a ballot that is formally identical to those ballots cast by non-disabled voters so long as all ballots are cast, counted, and stored together."

3. "The statute permits SBE to certify an accessible voting system that generates a non-identical ballot, so long as voting procedures are implemented to ensure that non-disabled voters use the accessible system as well and do so in sufficient numbers to prevent the resulting ballots from being identified as having been cast by voters with disabilities."[1]

3. The problem

The way that Maryland has implemented the use of the ExpressVote ballot marking device has led to two problems:

1. If very few ballots are cast using the ExpressVote BMD, it is possible to identify that all of the ballots came from voters with print-related disabilities, and the ballots may potentially be segregated and/or treated differently. For instance, for the 2020 general election, for Election Day in-person voting, the number of precincts which had less than 5 ballots cast using ExpressVote was an estimated 160 precincts across Maryland.

2. If only one or two ballots are cast in a polling place using the ExpressVote, it may be possible to re-identify the ballots to individual voters, causing a loss of ballot secrecy. According to data sets provided to me by the Maryland State Board of Elections, in the 2018 general election, there were 22 precincts in Maryland where only one ballot was cast using ExpressVote, in the 2018 primary election, there were 40 precincts where only one ballot was cast using ExpressVote, and in the 2016 general election, there were 34 precincts that had only one ballot cast using ExpressVote (SBE was not able to provide a data set from the 2016 primary election). Preliminary data analysis from the 2020 general election shows that for Election Day in-person voting, there were 32 precincts that had only one ballot cast using ExpressVote. This is clearly not within the requirements set out by the Attorney General's office, which I described in the previous section.

4. My data collection on this topic

My research involving the 19 other states (and the District of Columbia) which used the ExpressVote ballot marking device in 2018, was published in the December 2019 issue of

the *Election Law Journal: Rules, Politics, and Policy* [2]. During March-May 2018, I placed a series of phone calls to election officials in the 19 other states (and the District of Columbia) which use the ExpressVote ballot marking device, to learn more about how they handled the potential problems of the unique "skinny ballot" shape of the ExpressVote ballot. If the state had 5 or more jurisdictions which used ExpressVote, I spoke with state election officials. If a state had less than 5 jurisdictions which used ExpressVote, I spoke directly with election officials in each of the jurisdictions. The responses to the phone calls by election officials described a series of 7 policy options on a continuum. These policies from 2018 describe who is allowed to, who is requested to, or who is encouraged to use the ExpressVote BMD. These 7 policies are listed in terms of the likely percentages of votes cast using ExpressVote (from least to greatest), along with nicknames that I created to describe the policy:

1. ("Paper required") Unless they appear to have a disability, voters in that state or jurisdiction are not given the option to use ExpressVote (e.g. Portage County, OH).

2. ("Paper encouraged") Voters in that state or jurisdiction are encouraged to use a paper ballot, but if they ask to use the ExpressVote, they are allowed to do so (e.g. Iowa and Wisconsin).

3. ("Paper encouraged unless there is a wait") Voters in that state or jurisdiction without disabilities are directed to use the paper ballot (non-neutral), unless there is a long wait for paper ballots, in which case voters are directed to use ExpressVote (e.g. Knox County, OH).

4. ("Neutral") Voters in that state or jurisdiction are told that they have a choice of paper or electronic ballot, in a neutral way (e.g. Kansas).

5. ("Neutral unless there is a wait") Voters in that state or jurisdiction are told that they have a choice of paper or electronic ballot, in a neutral way, but when lines are long at the polling place for paper ballots, polling workers then switch and encourage voters without disabilities to use the ExpressVote machines (e.g. Washington DC).

6. ("BMD Encouraged") Voters in that state or jurisdiction are encouraged to use the ExpressVote device, and only get paper ballots upon request (e.g. West Virginia, and Hardin and McNairy Counties, TN).

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[2] Lazar, J. (2019). Segregated Ballots for Voters With Disabilities? An Analysis of Policies and Use of the ExpressVote Ballot Marking Device. *Election Law Journal: Rules, Politics, and Policy,18*(4)*,* 309-322.

7. ("BMD Required") Voters in that state or jurisdiction are required to utilize ExpressVote unless they are using a provisional ballot or an absentee ballot. In this case, there is no issue of the non-standard shape of the ExpressVote ballot, since there are no equivalent paper ballots (e.g. Carson City, Nevada, Wilson County, Tennessee, and Kaufmann County, Texas).

The ballot secrecy and ballot segregation problems that exist in Maryland did not exist in most other jurisdictions nationwide in 2018 when this data was collected, because voters in other states are using the ExpressVote BMD in large numbers. In these jurisdictions, voters are given the neutral option to vote using ExpressVote, are encouraged to vote using ExpressVote, or are only allowed to vote using ExpressVote.

Furthermore, many jurisdictions have policies in place to increase the number of ExpressVote ballots at each precinct by encouraging poll workers to vote using ExpressVote. For instance, in Iowa, Maine, and Michigan, as well as Bloomington IL in 2018, poll workers were encouraged to use ExpressVote to personally vote. There is an additional benefit here: by using ExpressVote for their personal vote, the poll workers also learn how ExpressVote works, and can then assist voters who want to use it.

Maryland is not currently using any of these approaches to increase the number of voters who vote using the ExpressVote BMD.

5. Why I support SB 271

The current implementation of voting in Maryland clearly does not meet the statutory requirement, as described by the Maryland Attorney General. We currently have a segregated ballot in Maryland, and for some voters in Maryland who have print-related disabilities, they have been denied access to a secret ballot. Other jurisdictions around the country who use the ExpressVote BMD (as described in earlier sections of my testimony), have used it in ways which do not lead to a segregated ballot. However, the Maryland State Board of Elections continues to implement voting policies which create a segregated ballot. SB 271 would clearly eliminate these practices, with the current text of the bill:

"A BALLOT CAST BY A VOTER WITH A DISABILITY MAY NOT BE SET APART OR DISTINGUISHABLE, IN SIZE AND FORM, FROM A BALLOT CAST BY A VOTER WITHOUT A DISABILITY."

I enthusiastically support SB 271 because it would end the practice of segregated ballots in the state of Maryland.

Dr. Jonathan Lazar is a Professor in the College of Information Studies (iSchool) at the University of Maryland. At the University of Maryland, Dr. Lazar is the incoming director of the Trace Research and Development Center, the nation's oldest research center on technology and disability, and is a faculty member in the Human-Computer Interaction Lab. Dr. Lazar joined the iSchool in 2019, after 19 years as a Professor of Computer and Information Sciences at Towson University, where he served as director of the information systems program for 14 years. Dr. Lazar has authored or edited 12 books, including Research Methods in Human-Computer Interaction (2nd edition, co-authored with Heidi Feng and Harry Hochheiser), Ensuring Digital Accessibility Through Process and Policy (co-authored with Dan Goldstein and Anne Taylor), and Disability, Human Rights, and Information Technology (co-edited with Michael Stein). He has published over 140 refereed articles in journals, conference proceedings, and edited books, and has been granted two US patents for his work on accessible web-based security features for blind users. He frequently serves as an adviser to government agencies and regularly provides testimony at federal and state levels, and multiple US federal regulations cite his research publications. Dr. Lazar has recently been honored with the 2020 ACM SIGACCESS Award for Outstanding Contributions to Computing and Accessibility, the 2017 University System of Maryland Board of Regents Award for Excellence in Research, and the 2016 ACM SIGCHI Social Impact Award, given annually to an individual who has promoted the application of human-computer interaction research to pressing societal needs.

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