

STATE OF INDIANA

INDIANA RECOUNT COMMISSION

IN THE MATTER OF THE PRIMARY ELECTION
FOR INDIANA STATE SENATE DISTRICT 23

PAULA K. COPENHAVER,
Petitioner,

v.

SPENCER R. DEERY,
Respondent.

**RESPONDENT'S MOTION IN OPPOSITION TO PETITIONER'S MOTION TO
SUBPOENA VOTERS FOR DEPOSITION AND REQUEST FOR PROTECTIVE ORDER**

Respondent Spencer R. Deery, by counsel, respectfully moves the Indiana Recount Commission ("Commission") to deny Petitioner's Motion to Subpoena Voters for Deposition ("Motion") filed on May 18, 2026 and, pursuant to the Commission's statutory authority, to enter a protective order. In support, Respondent states as follows:

INTRODUCTION

Petitioner filed her Verified Petition for Recount and Contest of Republican Nomination for Indiana State Senator for District 23 on May 18, 2026 ("Petition"). An election recount and contest, while commonly filed together, are two completely separate causes of action governed by separate guidelines, statutes, requirements and procedures. The Indiana State Recount Commission Guidelines for Conduct of an Election Recount and Contest as Amended May 15, 2026 ("Guidelines") defines a recount as "the determination by the State Recount Commission of the number of valid votes received by each candidate for the office subject to a recount." Pursuant to IC § 3-12-10-8 the Indiana State Board of Accounts "shall conduct any recount or other contest proceeding ordered by the state recount commission..."

An election recount is simply a subsequent tallying, by the audit teams of the Indiana State Board of Accounts, of the ballots within a specified race. The official tally is later presented to the Commission as the final and official vote total. Parties can "dispute" ballots during the recount process. Each disputed ballot must be identified and individually marked as

an exhibit. Here, the Petitioner would like to depose unknown individuals, only identified from social media, about their undisputed, anonymous ballots that have already been counted. There is no way to identify the specific ballot for each of the unknown individuals (Pet. Ex. A-N) listed in the Petition. There is no legal basis for random, unknown voters to be subjected to subpoenas for deposition as it relates to a recount, nor could their ballots be identified and voided (they are anonymous), which would, in turn, disallow the Commission to void an entire precinct under Indiana Code.

ARGUMENT

An election contest is pleaded differently from a recount as outlined in IC § 3-12-11-3(b). While in a recount the petitioner requests re-tallying of votes cast and/or the mechanics related to voting, a contest must show that the voting was so seriously flawed, it is impossible to determine who is the actual winner thereby justifying the extreme form of relief – a special election. A Petitioner must outline specific precincts and issues in the Petition for Contest that are the basis for the contest itself and support holding a subsequent special election. Simply put, it is a challenge to the final election results, in a given race, that a petitioner seeks to overturn. Because of the extreme remedy (special election) and unusual issues that could trigger a contest, the Indiana General Assembly codified the requirements to sustain an election contest challenge in IC § 3-12-11-3. Because of the Petitioner's failure to adequately state the basis for her contest, the Respondent has filed on this date, a Motion to Dismiss the Respondent's Contest of the primary results.

Because the contest and recount are two entirely different proceedings, the Petitioner's Motion, demanding the Commission issue subpoenas, must also be denied. The deposition testimony sought by Petitioner is completely irrelevant to the counting of ballots. As the Petitioner seeks the extraordinary step of compelling individual Indiana voters to submit to a post-election interrogation concerning their political affiliations, political activities, reasons for requesting a Republican primary ballot, and conduct in exercising the right to vote and as such information is irrelevant to the counting of ballots, the subpoenas should not be issued and Petitioner's Motion should be denied.

Although the Commission possesses statutory authority pursuant to IC § 3-12-10-5 to issue subpoenas and discovery orders, that authority exists to enable the Commission to decide

the statutory recount or contest properly before it. It does *not* create unlimited investigatory jurisdiction, and it does not permit a candidate to use compulsory process to determine, after the election, whether additional grounds for a contest might exist. On this basis, deposition testimony should not be utilized in the recount hearing.

Further, as regards the contest, the depositions also not be allowed by the Commission. The subpoenaed individuals are *assumed* to be registered voters who requested and received Republican primary ballots without challenge on election day. Republicans had the opportunity to mount a challenge on election day through challengers, etc. The time to challenge a voter's right to pull a Republican ballot was election day not post-election after being deposed. Petitioner now seeks to compel their testimony *after* the election and based solely upon alleged statements made online via social media. Petitioner is only able to identify these non-party voters by virtue of comments they purportedly made on social media. No other validation has been done to confirm the identity of the non-parties or if they actually exist. Instead, Petitioner now seeks to subpoena these unverified, innocent individuals to obtain testimony regarding their private vote on May 5, 2026, prior voting history and future voting intentions. Just because the Petitioner doesn't like the fact that she lost and read online comments that do not favor her, doesn't mean she has any right to now compel these strangers to a deposition.

Petitioner should not be permitted to use the Commission's subpoena power to abuse the process or conduct an open-ended fishing expedition to harass non-party voters. The Commission's ability to order discovery is to ascertain the valid vote totals from the Senate District 23 Primary Election. The Commission's power should not be used to harass or intimidate voters in an attempt to overturn an election.

Petitioner May Not Use the Contest or Recount Process as a Post-Election Investigation to Search for the Basis of Her Contest.

A verified election-contest and recount petition serves an essential function. It is supposed to identify the grounds upon which the party seeks to overturn or alter the certified result of an election and places the respondent and the tribunal on notice regarding the factual and legal basis of the challenge. Here, the Petitioner has failed to state a valid, factual basis for the underlying contest and seeking to depose non-party voters is simply an attempt to create that

basis. *See*, Respondent's Motion to dismiss filed this date. The Petitioner is attempting to shift her burden, to prove the basis of her Petition, onto the voters she wishes to depose.

The statutory requirements under IC § 3-12-11-3 would have little meaning if a Petitioner is simply able to file a petition based upon generalized suspicions and then use the Commission's compulsory discovery process to investigate individual voters until additional grounds for a contest are discovered.

The proper sequence is:

- 1. a contestant must timely allege a legally sufficient ground for contest and recount supported by the specific facts required by law;**
- 2. appropriate discovery may be sought concerning that properly asserted claim.**

Petitioner seeks to reverse that sequence by compelling voters to testify in order to determine whether their answers might furnish evidence supporting a challenge to their votes. The Commission should not authorize compulsory process for the purpose of discovering whether a claim exists.

A Voter's Political Label, Prior Primary History, Support for Candidates or Online Declaration of Such, Does Not by Itself Establish That the Voter Cannot Vote in the Opposing Party's Primary.

Indiana voters are not required to register their party affiliation nor does the state maintain a formal party registration database. Accordingly, an individual publicly discussing who they voted for or identifying their prior participation in a party's primary, or showing support for candidates associated with a particular party does not, standing alone, establish that the voter was legally ineligible to request a particular party's primary ballot in the election at issue.

Secondarily, and most importantly, these public discussions occurred online, during banter regarding political candidates. No one has been verified or determined to be who they say they are. Petitioner therefore cannot establish the relevance of intrusive voter depositions merely

by asserting that these particular unverified, presumably human being, voters have been associated with another political party.

The “crossover” voting, at the heart of the underlying Petition, is not illegal. There is no crime. There is no fraud. IC § 3-10-1-6 outlines who is eligible to vote in a particular Party’s primary election. It is based upon past voting tendencies and future intentions. There is nothing illegal or “invalid” about changing a Party primary preference at any time.

The Commission’s Discovery Power is Statutory and Must Be Exercised in Aid of the Contest and Recount Actually Before it.

The Commission’s discovery authority is not a grant of unlimited investigative jurisdiction.

The Commission’s compulsory process must remain connected to a legally sufficient and timely asserted ground for contest, which the Petitioner has failed to do. Discovery may be used to obtain evidence relevant to a claim properly before the Commission and it should not be used to investigate voters in an effort to create the Petitioner’s factual basis for the underlying Petition.

The Commission must therefore distinguish between:

- (1) discovery seeking evidence concerning a specific, timely pleaded factual allegation; and**
- (2) exploratory discovery seeking to determine whether facts might exist that could support a challenge not otherwise established.**

The subpoena requests at issue fall into the *second* category.

The Subpoena Requests Are Overbroad, Unduly Burdensome, and Intrude Upon Important Voter and Associational Interests and Rights to Privacy.

Compelling individual voters to appear for depositions after an election is materially different from ordinary discovery directed to a party during regular litigation. Petitioner’s proposed discovery request risks inquiry into constitutionally sensitive or protected matters involving political association, political beliefs, and voting conduct. The secrecy of the ballot and the freedom of political association should not be invaded merely because a losing candidate is in a desperate search for more votes and to be declared the winner.

The burden is particularly serious in this case because the subpoenaed voters are not even parties to this proceeding. They did not initiate this litigation and should not be compelled to defend their political affiliations or voting conduct. On the face of Petitioner's allegations based upon information and belief, there is no evidence that I.C. § 3-10-1-6 was violated. None of the alleged voters admitted to facts satisfying the elements necessary to establish criminal acts or violations of the Indiana Election Code. Voters are not and should not be a party to an election contest or recount unless there are specifically pled facts and acts that violate Indiana law or they willingly subject themselves to the litigation.

The Subpoena Requests Seek Speculative Testimony in an Attempt to Harass Voters

Petitioner bears the burden of proving entitlement to relief in the election contest. That burden cannot be shifted to individual voters by requiring them to appear and establish that their votes were lawful. The subpoenas effectively presume that the selected voters must explain or justify their participation in the Republican Primary.

Before subjecting an individual voter to a compulsory process, Petitioner should be required to identify specific, competent evidence establishing a genuine factual basis to contend that the particular voter violated any statute; election or otherwise.

Suspicion, hearsay, political labeling, prior voting history, or generalized allegations of "crossover voting" are insufficient to justify compelled post-election interrogation.

Subpoenas for Deposition Cannot be Used to Invade the Secret Ballot.

To the extent Petitioner seeks to ask any voter which candidate the voter selected or who the individual intends to vote for in the future, the inquiry should be prohibited. The secret ballot is a fundamental component of Indiana's election system. A voter should not be compelled through post-election discovery initiated by a losing candidate, to disclose the candidate for whom the voter voted or who he/she intends to ultimately support.

Even if the non-party voters publicly discussed their own voting preferences via an online forum, their right to privacy isn't somehow magically waived, particularly since none of the alleged voters have been properly or validly identified. Parties are not allowed to subpoena

unidentified, random citizens without further verification or justification to pull them into ongoing litigation. It is improper and unprecedented.

The Requested Discovery is Disproportionate to the Legitimate Needs of This Statutory Proceeding.

Open-ended depositions of individual, non-party voters would expand this proceeding into collateral investigations concerning political affiliation, intent, historical voting behavior, and potentially other personal matters. Such discovery would also create the possibility of further subpoenas, additional witnesses, collateral factual disputes, and individualized mini-trials concerning voters who are not parties to the proceeding.

The Commission's discovery authority should be exercised to facilitate resolution of the statutory contest and recount—not to create an expanding investigation into the electorate.

The Commission Should Enter a Strict Protective Order.

If the Commission does not deny the Motion for subpoenas in its entirety, Respondent respectfully requests a protective order that:

1. limits questioning to specifically identified facts directly relevant to a timely pleaded statutory ground of contest or recount;
2. prohibits inquiry into how the voter voted or how the voter intends to vote in the future;
3. prohibits inquiry into political beliefs, ideology, associations, contributions, or activities except to the extent the Commission first determines that a particular question is directly relevant under the governing statute;
4. prohibits questions based solely upon generalized partisan labels;
5. limits the duration and scope of each examination;
6. permits counsel for Respondent and other appropriate parties to attend and object;
7. preserves all objections concerning relevance, admissibility, privilege, constitutional protections, and the Commission's jurisdiction;
8. prohibits public disclosure of unnecessary personally identifying information; and
9. provides that no adverse inference may be drawn from a voter's invocation of any applicable privilege or protection;

10. That each subpoena advise the deponent of his/her right to have an attorney present at the deposition who can advocate for the deponent; and,
11. That each deponent has the right to move to quash the subpoena.

CONCLUSION

The Commission possesses statutory discovery authority, but that authority does not permit a Party to conduct an unlimited post-election investigation of innocent, non-party voters in the hopes of discovering additional grounds to challenge an election result. Particularly when the true identity of these supposed voters is unknown.

Petitioner has failed to establish a sufficient factual basis to compel non-party voters to submit to intrusive questioning concerning political affiliation, political association, voting conduct, or the exercise of the franchise. The burden that would be placed upon these voters overwhelmingly negates any minimal information that could be obtained by deposing them. Respondent therefore respectfully requests that the Commission:

- (1) deny Petitioner's Motion;
- (2) deny Petitioner's request to compel voter depositions or testimony;
- (3) alternatively, enter a protective order prohibiting all inquiry into how any voter voted and limiting any otherwise permitted inquiry to matters directly relevant to a specific, timely pleaded statutory ground of contest; and
- (4) grant all other just and proper relief.

Respectfully submitted,

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