IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
SUPREME COURT BUILDING
ACCRA-HIGH STREET
A.D. 2020

CONSOLIDATED WRITS INVOKING THE ORIGINAL JURISDICTION OF THE SUPREME COURT
(RULE 45(1) OF C.I. 16)
[PURSUANT TO THE ORDER OF COURT GRANTED ON JUNE 19, 2020]

SUIT NO. J1/9/2020

BETWEEN

NATIONAL DEMOCRATIC CONGRESS (NDC)) PLAINTIFF
HOUSE NO. 12, ADAMA STREET
ADABRAKA, ACCRA.

AND

1. THE ATTORNEY-GENERAL
   MINISTRY OF JUSTICE
   MINISTRIES, ACCRA.
) DEFENDANTS
2. THE ELECTORAL COMMISSION OF GHANA
   NO. E. 199/2
   8TH AVENUE, RIDGE-ACCRA

SUIT NO. J1/12/2020

BETWEEN

MARK TAKYI-BANSON) PLAINTIFF
HOUSE NUMBER BN 34
BREMAN KOKOSO
ASIKUMA-ODOBEN-BRAKWA

AND

1. ELECTORAL COMMISSION OF GHANA
   NO. E 199/2
   8TH AVENUE, RIDGE-ACCRA

2. THE ATTORNEY-GENERAL) DEFENDANTS
MINISTRY OF JUSTICE
MINISTRIES-ACCRA

AMICUS BRIEF ON THE PUBLIC POLICY AND PUBLIC ADMINISTRATION QUESTIONS ON THE EXERCISE OF DISCRETION IN CIVIL IDENTIFICATION MATTERS & IN THE CONTEXT OF CONSTITUTIONAL RIGHTS ENFORCEMENT.

SUBMITTED ON BEHALF OF:

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PART 1: EXECUTIVE SUMMARY

A. INTEREST OF AMICUS CURIAE

1. The Amici Curiae: Imani Center for Policy and Education; Conservative Policy Research Centre; Alliance for Social Equity and Public Accountability and Institute for Liberty and Policy Innovation are registered civil society organizations duly registered under the laws of

the Republic of Ghana (hereinafter referred to as "Civil Society Leaders on Public Policy" or "Amicus").

2. Amicus have substantial interest in the issues here because they relate to protection of the right to vote, which is at the heart of our constitutional regime[1]. The underlisted organisations have been engaged in extensive advocacy in relation to the Electoral Commission's (the 1st Defendant in the substantive suit before the Court) conduct of the processes leading up to the December 7th, 2020 general elections. They have published extensively and conducted detailed and thorough research into many dimensions of the civil identification question. They have also become nationally regarded as leading interlocutors on the issues surrounding the Electoral Commission's decision to implement technical reforms and overhauls to the existing infrastructure and processes for the forthcoming elections, the identification and register design issues inclusive.

3. In Ghana's democratic practice, civil society organisations (CSOs) are a critical mouthpiece for large sections of the society that care about political governance, public administration and public policy. **In this capacity, civil society organisations have become major guardians of the constitutional regime.** Key members of the Amicus body are frequently invited by Government agencies, development partners and major interest groups around the country to share views and analyse perspectives on public policy and civil administrative matters. In the process of interacting with these interest groups, civil society organisations develop positions that are an amalgam of the perspectives of many important sections of society. In the past, civil society organisations, like the Center for Human Rights and Civil Liberties (CHURCIL), have contributed directly and substantially in assisting the Courts in their determinations of various questions of citizenship. Consequently, Amicus bring a rich mosaic of impressions of major factions in the nation's body politic to inform an expert public policy treatment of matters presently pending before this august Court.

[1] (Tehn Addy v Electoral Commissioner [1996-97] SCGLR 589 and Ahumah Ocansey v. Electoral Commission; Center for Human Rights and Civil Liberties (CHURCIL) v. Attorney-General [2010] SCGLR 575).

4. The Amicus' brief is structured into three parts: this Executive Summary, which outlines the legal positions that have been canvassed so far before this Court against the intent and actions of the 1st Defendant in this and related lawsuits and identifies gaps in the compendium of arguments before this esteemed Court. A detailed essay on Civil Identification undertakes a scholarly introspection into framings of the discretion question that we believe deserves highly detailed and careful deliberations by the Court. We conclude with a summary of how the scholarly exposition fuses with the canvassed legal arguments to distil a compelling set legal and public policy considerations that should greatly assist this esteemed Court in its evaluation of the competing claims before it.

B. SKETCH OF CURRENT LEGAL POSITIONS AGAINST THE ELECTORAL COMMISSION OF GHANA (1ST DEFENDANT IN SUIT #J1/9/2020 & 2ND DEFENDANT IN SUIT #J1/12/2020)

5. By article 42 of the Ghana Constitution, 1992, "[e]very citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda." Amicus is concerned that citizens who have registered to vote are being removed from the voters' register and being asked to re-register at a time when there is a global pandemic that heightens the likelihood that doing so will endanger the health of citizens, especially vulnerable individuals above the age of fifty years[2]. As the Center for Strategic & International Studies, a think tank, recently noted in a wide-ranging study: "If a country opts to move forward with its election during COVID-19, it runs the risk of spreading the virus throughout the country."[3] Unless absolutely necessary, an individual, especially a vulnerable individual, who is already on the voters' roll, should not be unreasonably compelled to take actions to re-register when doing so would increase risks to their health.

[2] Research by the United Nations supports these anxieties. See, for example: https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf

[3] Devermont, Judd. 2020. "Pandermic at the Polls". March 30th, 2020. Center for Strategic & International Studies.

6. Further, Amicus is concerned that because of global travel restrictions, tens of thousands of registered voters who are currently outside the country will not be able to come back home to engage in this proposed exercise, thereby disenfranchising them from partaking in the 2020 general elections. It would be recalled that the Government has shut the country's borders, and repatriations of citizens stranded overseas are only being offered from just a few countries, and at great cost[4]. Even more insidious, Amicus is concerned that the Commissioner has imposed restrictions on proof of citizenship that are not grounded in law and will further disenfranchise many citizens.

7. Legal scholars that Amicus has conferred with and advocates for the plaintiff side in various suits before this honourable Court have made various arguments that can be summed up as follows:

   (i) The current voters' register that has been used for various elections, including the recent region-creating referenda, should be maintained.

   (ii) The Commissioner should focus on registering qualified Ghanaians who are not on the register.

   (iii) Where the Commissioner adopts a new electoral system, it has a duty to migrate all registered voters to the new system.

   (iv) A registered voter has a right to remain registered. The Commissioner should have no power to delist a registered voter without her consent.

   (v) Citizenship is a juridical question. Neither the Electoral Commission of Ghana nor other citizens have any power to determine who is a citizen. Only the Courts can determine citizenship[5]**.** Parliament

[4] A fact acknowledged by the Minister of Foreign Affairs herself. Please see: https://allafrica.com/stories/202006180549.html

[5]Shalabi and Another v. The Attorney-General [1972] 1 GLR 259; Olympio v. Commissioner for the Interior, High Court, Accra, 30 July 1969, Unreported; Digested In (1970) C.C. 4

cannot seek to derogate from the clear intent of the Constitution through subsidiary legislation.

(vi) All government issued documents are entitled to a presumption of regularity. Thus, birth certificates, voter register cards, and other government identifications that are provided to citizens should create a presumption that the holder is a citizen.

(vii) The Electoral Commission of Ghana has no power to determine which government identification is acceptable to it to prove citizenship, and Parliament has neither jurisdiction nor residual power to grant that power.

(viii) The prior and existing voters' register has been displayed to the public for challenges to be made. It must be presumed to be regular.

8. The Constitutional precept which establishes the Electoral Commission of Ghana's freedom from control of any other authority in the "performance of its functions" has been widely misinterpreted. This precept applies to specific functions delegated to the Commission, which are clearly enumerated in the Constitutional provision. In performing some of those functions, situations arise where it cannot act alone and where absolute construal of "independence" must give way to policy pragmatism. It must, in those circumstances, cooperate with other state institutions in order to be able to effectively discharge its functions. These areas are: (a) Security (b) Finance (c) Medical and public health (when, for example, the Commission is ensuring that voters meet the psychiatric and psychological threshold in the Constitution to qualify to register); (d) civil identification (when affirming the age and nationality of the voter).

9. Just as Parliament has authority to oversee the appropriations of the Electoral Commission of Ghana in performing equally important tasks on grounds of fiscal prudence, various other bodies, such as the Births

& Deaths Registry, the National Identification Authority and the Registrar General have been empowered by law, and are specially competent, to handle matters of civil registers and identification. The Electoral Commission of Ghana cannot justify absolute independence in any of the matters which impinge on the exercise of its core functions of facilitating registration and voting.

C. GAPS IN COUNSELS' ANALYSIS SO FAR

10. While these arguments are compelling in Amicus' view, Amicus are motivated to make their own contributions because they believe that these arguments do not sufficiently delve into the issue of discretion purportedly being exercised by Parliament and the Electoral Commission of Ghana in this matter.

11. Furthermore, in the course of the various proceedings and argumentation, there has occurred a muddling of the differences between *legal identity authentication* and *citizenship attestation* in many of the submissions currently before the court. In authenticating legal identity, one is confronted with a very narrow margin of success. Out of the current population of Ghana (some 30 million odd persons), only one person carries any particular legal identity. Forensic strategies and complex security mechanisms are therefore critical to make sure that people are who they say they are. In the case of citizenship attestation within Ghana, the margin of success is, conversely, extremely large. According to national census data[6], with appropriate adjustments made for net migration and population growth, there are only 350,000 foreigners in Ghana, out of a population of 30 million people. The likelihood therefore that a person claiming to be a Ghanaian is not in fact Ghanaian is 1%. Because the identity authentication and citizenship attestation dimensions of civil registration have become fused in most civil identity registers and in their derivative instruments (such as identity cards), this vast gap in security and forensic requirements is often confused. To emphasise:

[6] Data available from the National Data Portal, accessible here: https://data.gov.gh/dataset/census-data-foreign-nationals

citizenship attestation requires a far lower standard of forensic authentication than identity verification due to much higher probability that a prima facie determination of citizenship would be correct versus a prima facie determination of identity.

12. The high margin of success in attesting to citizenship is reflected in the liberal adoption of witness testimony in many Ghanaian civil registration processes without any further measures. The Ghana Card and Voter Identification Card application processes both allow unverified witness testimony as evidence of citizenship. In fact, the proper conduct of voting requires anonymity thereby suggesting that legal identity is merely adjunct to the core requirement of citizenship attestation.

13. We note also that rigorous statistical analysis of the current voter roll reaffirms the conclusions drawn above because they underscore the typicality of Ghana's current voters' register from an international comparative perspective. The *ratio of registered voters to total population* (RV/TP) in Ghana is very close to 56%. If one adjusts for the number of deceased persons on the register (it is important to bear in mind, however, that due to biometrics, deceased persons are functionally removed anyway), the resultant ratio becomes 53%[7]. Curiously, some commentators continue to persist in claims that the current voters' register is bloated. A detailed comparative analysis of voter statistics from around the world suggests otherwise because it shows that the RV/TP ratio is influenced by the level of competitiveness in national politics, the urbanisation rate and urban population ratio, the degree of investment into the electoral system, and whether the voter ID card can be used for other identification purposes besides voting. A random sampling of countries based on this analysis, in this case

[7] We arrive at this conclusion by the following analysis: the death rate in Ghana is 7.7 per 1000 people (page 16 of the latest Ghana Mortality Report published by the Ghana Statistical Service, and available here: https://statsghana.gov.gh/gssmain/fileUpload/pressrelease/Mortality%20in%20Ghana.pdf). Since the last mass registration in 2012, the number of voting age persons who have died is 1.156 million (based on the age-specific death statistics). We then adjust this number to account for the number of voting age individuals that are registered).

merely using alphabetical order, is produced below to further illustrate the point:

Country	RV/TP
Algeria	55.81%
Angola	30.69%
Argentina	74.92%
Armenia	85.34%
Austria	71.06%
Azerbaijan	52.60%
Bangladesh	29.09%
Belarus	74.17%
Benin	47.15%
Bolivia	62.67%
Brazil	69.30%
Burkina Faso	26.39%
Burundi	43.00%

It would be observed from the table that the more a country's attributes align in one direction of the four variables listed above, the lower or higher its registered voter population to total population ratio would be. Consider that the ratio in the case of Benin is 47%, that of Mali 44.5% and that of Liberia 46%, whilst that of Burkina Faso is a mere 26% and that of Angola 30%. Countries closer in democratic and technocratic features to Ghana, like Tunisia and Cape Verde, record an impressive 60% and 66% respectively.

14. The consistency with which these statistical results play out under analysis suggest that the perception of citizenship attestation being a lower-risk activity from a general accuracy point of view is correct. Most voter registers around the world and in Africa reflect democratic and technocratic realities rather than the forensic and security measures deployed by their minders. For this reason, measures for citizenship attestation compared to legal identity authentication, tend to be ***liberal and maximalist*** in all well-functioning democracies. In most advanced

countries, any means of evidencing citizenship is acceptable. In many states in America, identity cards are not even a requirement. Analysis of these types of policy science issues, though highly germane to the matter at hand, has unfortunately not been sufficiently present in the current submissions made by various parties in various proceedings currently pending before this esteemed Court.

15. Wherefore, Amicus wish to be granted hearing to expound more on the submissions made in this executive summary and further elaborated below.

PART 2: THE DISCRETION QUESTION IN CIVIL IDENTIFICATION

D: THE DISCRETIONARY POWER

16. In an abstract to his thoughtful book on "discretionary powers", Oxford legal academic, and due process expert, Denis Galligan, observes as follows:

> "One noticeable feature of modern legal systems is the extent to which power is conferred upon government officials and agencies to be exercised at their discretion, *according to policy considerations*, rather than according to precise legal standards. (Emphasis ours)."[8]

17. We agree with Professor Galligan that "administrative discretion" is primarily a matter of sustaining public policy more so than can be justified by its contribution to maintaining the integrity of the legal system. However, there exists a canon of public policy standards too, and one that requires defence. In that regard, and even though we are addressing a Court of Law, indeed the highest in the land, our hope in submitting this brief is to examine the public policy merits of the way and manner in

[8] Galligan, Denis. 1986. Discretionary Powers: a Legal Study of Official Discretion. Clarendon Press

which the Electoral Commission of Ghana has chosen to exercise its administrative discretion to select only three forms of civil identification to include/exclude individuals who have an interest in registering for placement on the public electoral roll for the purpose of exercising their constitutional right to vote in the upcoming elections and future ones.

We do so not because we believe that legal arguments alone cannot unearth such public policy substance, but rather because, as far as we are concerned, in the interplay of constitutional law and administrative standards, public policy seems the obvious proving grounds. Whilst the Law seems clear enough as to the qualifications required to prove citizenship, it is in the operationalisation, that is to say in the mechanics of policy, that the rubber of law meets the rough tarmac of politics, culture and social dynamics.

E. CHOICE OF OPTIONS AS A TOOL OF DISCRETIONARY POWER

18. We agree with the Attorney-General in reducing the current public controversy with which this honourable Court is seised to the dimensions of discretionary bounds and constitutional limits. Accordingly, we quote verbatim this extract from paragraph 39 from its Statement of Case filed before this Honourable Court on April 9th, 2020 in a similar matter as the instance case in Suit No. J1/9/2020, National Democratic Congress v. Attorney-General & Electoral Commission (hereinafter referred to as "NDC case") at paragraph 23:

> "Indeed, as we have been at pains to point out above, that the Constitution does not specify which document(s) should be used by the 2nd defendant in the discharge of its duties under article 45(a) to compile and revise the register of voters at such periods as may be determined by law. This Court in the Abu Ramadan line of cases (which actually was the closest opportunity the Court had to spell rules for the 2nd defendant's article 45(a) function), in keeping with constitutional wisdom, rightly failed to specify any such document(s). The Court, quite clearly, left it to the independent discretion of the 2nd defendant."

We have faithfully reproduced the Attorney-General's bold submissions in order to express our unease very methodically.

19. In this brief, we shall be seeking to establish that there is a very strong need to distinguish among the exercise of discretion in technical regulatory matters, where general and sometimes even abstract principles must be distilled into practical guidance in order to cater to very specific contexts, such as in medicine or environmental protection; in social welfare matters, where the delivery of services by the State requires decisions on logistics and mechanics of infinite variety, rendering precise rules infeasible in many instances; and in those critical situations where the goal of discretion is to devolve responsibility to the administrative actor to take logical steps, that were not predetermined, for whatever reason, merely to facilitate and help give expression to rights guaranteed by the Constitution.

20. We respectfully argue that, in respect of the third category of discretionary power, the broad standards derived from fundamental legal philosophy: procedural fairness, stability in legal relations, due process, and rationality in decision-making, become so critical as to warrant heightened judicial interest in the choices and assaying criteria applied by administrative agencies when navigating practical tensions among individual rights, collective well-being, the sovereignty of the Republic, and the integrity of the constitutional order within which an agency operates. We assert that neither expediency nor administrative convenience are valid criteria when applying discretion in the third category.

21. To sustain our argument, we will borrow again from Prof. Galligan's discretionary powers model, in particular his four-part test in establishing where and when discretion dominates in the functioning of the State and in public law:
    I. Officialdom must be empowered to evaluate and choose options among means available to achieving a particular end;
    II. Officials must be empowered to set qualitative criteria for benchmarking those options against standard norms of legal acceptability;
    III. Officials must be empowered to reset the broad standards of weighing the options available if efficiency calls for it; and

IV. The authority for managing such variation in acceptable standards must be granted by law or widespread custom and usage.

22. Where discretion is properly assumed to prevail, the famous *Wednesbury*[9] test ushers us into consideration of the assays which may be applied to judge the quality of its application. Any discordance may create grounds for potential judicial review.

23. Our posture in this brief, however, is to first urge your Lordships to consider the *thresholds* of discretion, even before we venture to discuss the yardsticks for testing if, by virtue of claimed misapplication, judicial review rightly lies. In the instant case, we start by asking the simple question of *how much* discretion is truly given to the Electoral Commission of Ghana in the matter presently before you to:

(i) Determine which forms of civil identification are required or allowed in the process of determining citizenship.
(ii) Decide which forms of civil identification are suited for meeting, specifically, the citizenship bar in article 42 of the Constitution;
(iii) Impose an administrative preference among historically and widely used modes of civil identification for electoral and electoral-related matters;
(iv) Impose such a preference without specifying clear standards to justify the selection; and
(v) To vary the preferences at will without regard to prevailing norms of citizenship attestation within the broader society.

24. There have been developments that compel us to broaden this submission into discretion beyond the administrative to the legislative also. We must acknowledge as a preamble to our subsequent arguments that the discretion to *pick and choose* among different civil identification modes of verifying citizenship has, in line with the practice of the legislature for a while now, been fortified by legal regulations in the form of a constitutional instrument duly passed by the Parliament of Ghana (the

[9] Cf. The English case of Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223.

current one being Public Elections (Registration Of Voters) (Amendment) Regulations, 2020 (C.I. 126). Whilst such laws are, strictly speaking, regulations of the Electoral Commission, as a constitutional authority, Parliament's seeming acquiescence cannot be wholly ignored.

25. We note in our examination of this latest regulation, however, that it merely re-establishes the existence of the leeway granted by successive legislatures to the Electoral Commission of Ghana to determine which modes of civil identification it prefers. It does not address any of our threshold questions. It roots administrative fiat in law, minus any structures for guiding the exercise of the fiat.

F. **QUESTIONING THE BASIS OF INCLUSION & EXCLUSION**

26. CI 126 announces without much ceremony that as a consequence of its amendment of *Regulation 1* of the previous law, Public Elections (Registration Of Voters) Regulations, 2016 (C.I 91), the law of the land now requires of a person who applies to be registered as a voter to exercise her constitutionally guaranteed right to vote proof of possession of one of only the following documents:

    (i) A passport [curiously, not a Ghanaian Passport];
    (ii) A National Identification Card issued by the National Identification Authority; or
    (iii) A Voter Registration Identification Guarantee Form.

    Why these specific documents? What features of these particular modes of civil identification make them more practical, efficient, suitable, proper and/or secure than any others in providing a means to the end of verifying an individual's citizenship status and therefore eligibility for inclusion on the voter's roll? And what about other modes of civil identification disqualifies them from serving the same purpose?

27. It is here that the Electoral Commission of Ghana and its enablers in Parliament give strong cause to suspect that in claiming the discretion to be able to choose among different options available to it in executing its mandate to uphold the constitutional imperative of confining the right to vote only to the collective of Ghanaian citizens, it preferred to keep its decision-making inscrutable from the standpoint of clear standards.

We assert that formulating standards to guide in the selection of which documents and modes of identification suffice to meet the constitutional bar of citizenship would immediately expose the high threshold of any discretion granted the Electoral Commission of Ghana in this matter.

28. The right to citizenship has been defined in such clear terms in the Constitution and so amply clarified by statute that precious little by way of administrative discretion exists to formulate higher standards other than those reasonably allowed to support administrative efficiency and practicality.

29. The law, for instance, clearly states that a person married to a Ghanaian citizen can acquire citizenship through that route.[10] It clearly implies that such a person would be entitled to be registered to vote if they can present evidence of the naturalisation certificate issued pursuant to the acquisition of the marriage certificate by the appropriate authorities so enabled by law to so grant.

30. The law further clearly states that a person born before 1957 in Ghana, provided at least one parent was also born in Ghana, is a citizen by default[11]. Any set of documents that conclusively establishes a person as having been born in Ghana, even a hospital record, and that any of the person's parents were likewise born in Ghana, even a colonial passbook, should, by pure operation of law, entitle a person to register to vote. There are a number of similar circumstantial arrangements involving such areas as adoption, presidential declaration, and naturalisation through refugee programs that likewise construct a fairly broad span of documentary basis for asserting citizenship. By pure operation of the law, all these documentary mechanisms are suitable for asserting one's entitlement to vote. This indeed is the *maximalist* situation observed in much of the common law world.

31. It is against this background that we must examine the claims made by the Attorney-General in paragraph 39 of their statement of case in the NDC Case, which we hereby reproduce:

[10] See Section 10(2) of Citizenship Act, 2000 (Act 591)
[11] See Section 4 of Citizenship Act, 2000 (Act 591)

> "Thus, the Commission may specify in its regulations that a document produced under any statute (for instance, a passport, a driver's licence, national identification card, etc.) may be produced as evidence of identification for purposes of article 42, or will be the document(s) from which a register of voters may be compiled. The 2nd defendant may exclude any of these instruments too, if considered necessary by it, it may include an old voter registration card, or it may exclude same. That decision will be constitutionally valid, when taken in context of the factors spelt out herein."

32. The Attorney-General in one fell stroke of the pen introduces a regime of unbounded discretion, operable without need to meet any threshold of law, due process, or administrative standards. In this framing of the discretionary power, the electoral management bodies need not bother themselves with any research, consultation, technical evaluation or any of the deliberative mechanisms of *due process bureaucracy* in determining whether particular modes of identification have or lack certain features or attributes conformant with any clear standards of the citizenship verification element in the process of voter registration.

33. The legal reasoning being urged on this eminent Court by the Honourable Attorney-General poses the very grave risk of redefining citizenship to mean whatever the administrative or technical agency or body says that it is. This is because it places the exclusionary force of the Electoral Commission of Ghana's actions in choosing certain modes of civil identification and suppressing others outside any mechanism of evaluative judgement.

34. When in article 296(c) of the Constitution, the good book enjoins that: "[W]here the person or authority is not a judge or other judicial officer, there shall be published by **constitutional** instrument or statutory instrument, regulations that are not inconsistent with the provisions of this **Constitution** or that other law to govern the exercise of the discretionary power", the operative phrase is "to govern" not "to publish".

35. Parliament has consistently failed in its duty to scrutinise the administrative laws proposed by the Electoral Commission of Ghana in respect of civil identification by neglecting to require the inclusion of evaluative criteria based on which any mode of civil identification operating in Ghana to verify

citizenship in relation to some civic right, responsibility or privilege can be evaluated for sufficiency in meeting the constitutional bar of citizenship erected as one of the very few checks on the right to vote.

36. In the absence of such criteria, the Attorney-General urges us to accept that unbounded discretion is the only reasonable construction of the administrative power granted by law to the Electoral Commission of Ghana. We respectfully urge this eminent Court to reject such dubious reasoning. The only rational appreciation of Parliament's seeming reticence in exercising its oversight power over the Electoral Commission of Ghana in this manner is because the threshold of discretion in the matter of determining citizenship is high. Consequently, the amount of unregulated discretion that can be allowed to any institution that purports to involve itself in verifying citizenship as a prelude to some administrative action or determination, whether it is the Passport Office of the Ministry of Foreign Affairs, the Births & Deaths Registry, the Ghana Immigration Service, or the Ghana Investment Promotion Council, must be strictly circumscribed by the principle of necessity.

37. Moreover, the doctrine of necessity in situations where the legal framework for evaluative standards remain unclear must operate to circumscribe discretion by elevating the bar of when, where, why, and how discretion is warranted and in what amounts.

38. What then are the factors of necessity the Electoral Commission of Ghana can rely on to demand freedom to exercise discretion without the fetters of clear or constructive rules in deciding in favour of some modes of civil identification over others? What would be sound grounds for limiting rather than expanding the range of means through which citizens may establish their *bona fides* as citizens?

G. **THE CONSTRUCTION OF STANDARDS**

39. The Electoral Commission in its Statement of Case filed in the NDC Case does attempt to provide some rather feeble grounds. It is surprising that it tries at all since it shares the Attorney-General's view that its functional independence to carry out the tasks handed to it by the Constitution to

register voters insulates it from control of other constitutional actors and that this trite fact, curiously, also removes the burden to justify through rules encoded in subsidiary legislation the basis of its preferences in undertaking that task.

40. Derived from this strange reasoning, it is not surprising that the Electoral Commission of Ghana then proceeds to muddle the explanation of how it establishes the standards upon which it seeks to regulate the modes of civil identification in Ghana. Firstly, it asserts that it has both the authority and capacity, to evaluate the different instruments of civil identification in Ghana and determine which ones are likely to advance the cause of preventing unqualified registrants from breaching the constitution by nonetheless registering and voting. Secondly, it demonstrates that in exercising this authority it needs only address specific challenges to specific decisions to exclude specific instruments of identification. And, lastly, that it has fashioned some kind of "threshold of purity" regime based on which it continually evaluates modes of civil identification to keep track of their continuing conformance with its preferred attributes.

41. All these claims are made without a shred of evidence as to the existence of these administrative standards. In fact, the archival history of this eminent court tells us that these claims are afterthought computations meant to assuage the "anxious scrutiny" that the new regime of Wednesbury reasonableness in matters of human and civil rights has infused into judicial review concerning the invocation of different principles of necessity.

42. In previous appearances before this Court, the Electoral Commission of Ghana has sung very different tunes about its modus operandi in preserving the constitutional compliance of the very mode of civil identification it now seeks to eliminate from favour. In the Abu Ramadan line of cases[12], it argued for an elaborate sequence of administrative steps

12 See Consolidated Writs Nos. JII1112014 & JII9/2014 - *Abu Ramadan & Nimako (No.1) v. Electoral Commission & Attorney-General* (No.1); *Danso-Acheampong v. Electoral Commission & Attorney-General* (Consolidated) reported at [2013-2014] SCGLR 1654, ("Abu Ramadan (No.1)"); *Abu Ramadan & Nimako (No.2) v. Electoral Commission & Attorney-General* [2015-2016] 1 SCGLR 1 (simply referred to herein as ("Abu Ramadan No.2").

in which no single proof of citizenship is by itself conclusive. In its latest submissions it insists on the absolute sanctity of specific documents and even goes further to invent an ad hoc mechanism for evaluating fit.

43. The Electoral Commission of Ghana's actions outside the court shows that as late as June 2019, it was charging money, in the sum of GHS 5, to replace the voter identification cards of voters who were for one reason or another, including loss or theft, unable to locate their voter identification cards. Upon payment of the fee, the new card enabled such voters to exercise their franchise without any further examination of their nationality status. In December 2019, these voters, so empowered, cast their votes to install throughout this country an infrastructure of local governance, in furtherance of the constitutional goal of effective decentralisation. No doubt that all such voters have a reasonable expectation to be allowed to cast their votes with the same document in the upcoming 2020 elections. The principle here being that the presence of a name on the voter roll is the *prima facie* evidence of eligibility not the possession of the card per se, which can always be replaced by mere fees.

44. Whatever standards the Electoral Commission of Ghana says it currently wants to use in assaying the quality of particular modes of civic identification must thus have evolved in the three months between December 2019 and March 2020 when it approached Parliament to ratify its decision to vary its preference for particular modes of identification. Except that it cannot show any evidence of any serious technical developments during this period that warranted the change in posture. Thus, when pressed to justify the legal basis for this sudden epiphany by this Honourable Court, the Electoral Commission had to summon an extraordinary capacity for tracing the provenance of its voter identification card through successive generations dating back over a decade. This is the same card that for more than two decades, the Electoral Commission has helped to turn into an ambidextrous mode of civic identification in this country.

45. Through its nascent "forensic archaeology" capacity, the Electoral Commission of Ghana has, over a period of a few weeks, established that the voter identification card, which through its own diligent efforts has

attained the status of a premium identification instrument accepted by many other institutions in Ghana, ranging from banks to telecom companies, organisations with some of the strongest security standards in the country, is actually founded on less than pure air. It states in paragraph 8 of its Supplementary Statement of Case filed in the NDC case on 8 June 2020 before this Honourable Court that a previous incarnation of the card was issued out without proper checks on eligibility. Prospective registrants then used this card to acquire a second generation of cards which were themselves flawed because they belonged to a cohort of cards contaminated by the actions of some holders who had acquired them by providing as proof of eligibility another card impugned by this Court for failing to sufficiently confirm citizenship.

46. In the same vein, it describes a peculiar admixture of administrative failings of its own doing that rendered the production process of the voter identification card (voter ID card) as a mode of citizenship verification effectively useless. Presumably, these facts have only been revealed to it in the intervening few weeks between January 2020 and March 2020.

47. Whether or not the Electoral Commission of Ghana is aware, it has by its own submissions fashioned out a crude framework of standards by which we can evaluate the choices of modes of civil identification that it has made to date and which it shall make in the future. This is progress to the extent that it confirms the proper treatment of the discretionary power in matters of constitutional rights facilitation, which the mandate to compile a voter roll actually entails. That treatment is to the effect that clear, even if also broad, standards are warranted to guide the selection of options available to translate means to ends in fulfilling a constitutional mandate. It hardly needs spelling out that, for instance, were the Electoral Commission of Ghana to narrow the list of identification instruments down to only passports, the authentication scheme would fail. Were it to select only drivers' licenses, it would fail too because the capacity to drive is an extraneous variable in the calculus of citizenship determination. Were it to limit the options to only birth certificates it would be imposing a filter not allowed by law since people born overseas can be Ghanaian citizens. "Wide availability" and "sufficient inclusiveness" are thus ***constraining standards*** imposed by administrative rationality itself on the exercise of discretion to select among options

regardless whether or not the Electoral Commission chooses to formally codify such standards. An unbounded discretion to pick and choose however the Commission wishes is simply not viable in practice.

48. These types of implied and express standards once adumbrated, even in the oblique and circuitous manner that the Electoral Commission has done through its Supplementary Statement of Case presented to this Court in the NDC case, become contours around the exercise of the discretionary power and establishes the minimal threshold that must be attained before unregulated discretion becomes tenable. Unlike is the case in some other contexts wherein officials exercise discretion, for example in the context of regulatory oversight, when it comes to constitutional rights facilitation, the threshold of stability is elevated because the wrongful exercise of discretion directly undermines the constitutional values upon which this Republic is founded.

49. This court has had the opportunity over the years to pronounce on the nexus between administrative discretion and constitutional rights in several contexts, such as in the area of freedom of speech and media regulation[13]; freedom of worship and public funds/resources[14]; freedom of association[15] and freedom of assembly and public order management[16]. The settled jurisprudence of the court is consistent in holding that administrative convenience and expediency shall not be allowed to trump clear constitutional rights hard won by the citizens of this country to exercise in their individual capacities.

50. Where the exercise of administrative discretion, whether or not enabled by the legislature, will give rise to a *practice* of arbitrariness and procedural unfairness, this Court has never been coy about asserting its authority to bring official actions in line with the values and principles of

[13] Republic Vrs. Independent Media Corporation Of Ghana and Others (1996-97) SCGLR 258
[14] Bomfeh Vrs. Attorney General (J1/14/2017) [2019] GHASC 2 (23 January 2019)
[15] Mensima & Others v. Attorney-General [1996-97] SCGLR 676; New Patriotic Party v. Attorney-General (CIBA Case) [1996-97] SCGLR 929
[16] New Patriotic Party v Inspector-General of Police, Original jurisdiction, ILDC 2548 (GH 1993), [1993-94] 2 GLR 459 SC, 30th November 1993, Ghana; Supreme Court;

constitutionalism. At the heart of the public policy and administrative justice imperative is this judicial certainty.

H. **GRIEVOUS ARBITRARINESS**

51. The afterthought standards of civic identification *authentication* that the Electoral Commission of Ghana now seeks to enshrine through judicial precedent runs counter to the spirit of judicial certainty and, furthermore, fails the most basic of legal quality litmus tests. It is founded on a belief that general weaknesses in bureaucratic administration should be sufficient grounds to invalidate specific individual rights cast in constitutional stone. This is no different from saying that a registered person's right to cast their vote can be imperilled because of the failure of the setup of the administrative technology for verifying that they are the rightful holders of the profile corresponding to their identity in the electoral roll. This Honourable Court has had ample opportunity to review these kinds of arguments in the famous election petition case of 2013 -In The Matter Of A Petition Challenging The Validity Of The Election Of John Dramani Mahama As President Of The Republic Of Ghana Pursuant To The Presidential Election (J1/6/2013) [2013] GHASC 3 (29 August 2013)] - and in the Abu Ramadan line of cases and, on every occasion, your Lordships have emphatically rejected all of them. The settled jurisprudence of this Court is thus conclusively that because voting remains an individual constitutional right, bureaucratic expediency shall not be entertained if the outcome shall be the blanket decimation of the eligibility to vote and have that vote counted, or to exercise another similar democratic right.

52. The consistent reasoning of this court stands like a beacon on the hill of public policy. The standards of identification the Electoral Commission of Ghana seeks to introduce through the backdoor and apply retrospectively to those who have already satisfied its own earlier standards of eligibility to vote, and are now legally on the roll, on the other hand, have no internal consistency or validity. Were they to be applied, in the loose manner being specified, to the three forms of identification the Electoral Commission has succeeded in imposing through its new regulations, these identification methods too would not survive.

53. The fabricated standards establish a review mechanism involving the notion of a "chain of provenance". For a mode of civil identification to be considered prima facie evidence of citizenship, according to the philosophy being introduced by the Electoral Commission of Ghana, one must trace its chains of provenance, and if one can, even if speculatively, identify potential non-conformance with some previous legal standard at ***any point in the chain***, then, to borrow the Electoral Commission's metaphor, all the "fruits" of that mode of identification, including individual instantiations of that mode, must be considered invalidated.

54. It follows that were one to establish that a scheme exists to recruit registered voters to vouch for non-Ghanaians using the voter identification guarantee form or that officials of the National Identification Authority (NIA) have been found to have been compromised in their duties at some point in time and in some part of the country, as indeed have been reported at various times in the recent past[17], we must immediately cast doubt on not just some specific NIA cards or vouched-for voters, but on the whole class of identification documents and proceed to invalidate their past and future use as a mode of civil identification.

55. Furthermore, we must also ask which other line of identification documents may have emanated from their "poisoned roots" and invalidate them too. We humbly submit to this eminent court that these pseudo-standards, if your lordships ratify them into precedent, would usher in a new era of abject bureaucratic absurdity.

56. The standards that the Electoral Commission of Ghana itself has proposed for its exercise of discretion in selecting and deselecting modes of civic identification meet neither the reasonableness test nor the much broader principles of procedural fairness and due process in article 296 of the constitution. In Appendix IV of this brief, we have laid out how the proposed pseudo-standards create room for fatal doubt on the substantive

[17] https://www.peacefmonline.com/pages/local/social/201908/388193.php; https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-Card-NIA-still-battling-with-challenges-less-than-a-week-t;https://www.graphic.com.gh/news/general-news/ghana-news-challenges-rock-ghana-card-registration.html

conformance of all types of civic identification modes in this country with the constitutional requirement of citizenship as a *sine qua non* of the right to vote.

57. What is worse, the pseudo-standards operate in a manner that renders any decision-making regarding registration inherently arbitrary and structurally incoherent. In a particularly stark example, we note that in applying for a certified copy of entry in the Registry of Births, no specific document is absolutely required nor does the process entail any specific genealogical investigation to establish the citizenship of the applicant's parentage. Yet, due to the official status of the document, it is acceptable in obtaining the National Identification Card (Ghana Card), the putative ultimate proof of citizenship document in Ghana, as well as the Ghana Passport. The Ghana Card is, we must respectfully remind your Lordships, fully acceptable as proof of citizenship for the purpose of registering as a voter.

I. CHAIN OF PROVENANCE & ABSURDITY

58. Consequently, the same chain of provenance logic being relied upon to discredit the existing voter identification cards, in this alternate instance, serves to verify the nationality of the applicant to the satisfaction of the same authority that has renounced its own decades old system. Even if one may relax one's level of unease about the Ghana Card and the Certified Copy of Entry in the Register of Births because at the very least they are issued by agencies with the capacity to conduct, when necessary, the birth circumstances and genealogical research regarded as the gold standard in assaying Ghanaian citizenship under extant law, little room exists for doing same for the "guarantee forms" that are permitted instruments of identification in the obtainment of both the Ghana Card and the Voter ID card.

59. Here, no agency with the capacity to conduct any such investigation is involved. Through this form, two persons, with no official training or standing, claim knowledge of the nationality status of the prospective registrant and agree to "bear the consequences" if "it comes out as false". No process exists for weighing how these "guarantors" came to have this knowledge or belief. No law properly speaking regulates the civic duty imposed on these two individuals in the citizenship verification process. Being ordinary citizens, it goes without saying that they have no means at

their disposal to confirm what could well be the general hearsay in their circles about the nationality of the individual they are vouching for.

Compared to a trained official working in a civil identification agency issuing a testimonial instrument confirming the citizenship of an individual, even without sighting other documents, as the Electoral Commission of Ghana alleges happened in a number of cases during the issuance of previous generations of the voter ID cards under old laws (Public Elections (Registration of Voters) Regulations, 1995 (C.I. 12) and Public Elections (Registration Of Voters) Regulations 2012 (CI 72)), the guarantee form is a far inferior mode of identification. That this mode of identification will continue for the issuance of both the Ghana Card and the new voter ID cards reveals the fundamental incoherence of the "chain of provenance" logic.

60. Such random arbitrariness poisons the due process rationality of administrative actions, removes the presumption of regularity, and undermines the certainty of rights. Even if we give any credit to the Electoral Commission of Ghana's claimed interest in "continuous improvement" of the citizen identification authentication regime, we would argue that it misunderstands the division of labour in the administrative state.

61. Every individual who arrives asking to be registered knows whether or not she is a citizen of Ghana. Any individual who therefore attempts to register knowing full well that they are ineligible commits an offence and can be regarded as a person of fraudulent character. In the modern democratic state, Police forces and other security and intelligence organisations have been given a specific mandate to mount surveillance against crime, investigate its occurrence and to deter its perpetuators. We respectfully submit that the primary role of preventing the abuse of the liberal eligibility regime that exists in respect of citizenship in our developing country context, where the lack of resources prevents the establishment of effective births, deaths, and other civil administration systems, belongs to the security services.

62. These professed attempts by entities such as the Electoral Commission of Ghana and the National Identification Authority to implement what amounts to forensic strategies and security cordons, albeit of dubious quality and coherence, to keep criminals and fraudsters off the electoral roll suggest that the problems of fraud and criminal non-compliance are of considerable proportional significance, instead of an isolated and random nature. But that merely reinforces the argument that the security services are the best equipped to deal with the problem, as indeed would be the case if the concern was not about criminal evasion and non-compliance but forgery and fakery.

63. Indeed, a sizeable problem of forgery and faking of identity and nationality-attesting documents does exist in Ghana, as indeed it does elsewhere. This problem afflicts all known forms of civil identification. In the same way that it would be preposterous to suggest the invalidation of passports and NIA cards because of fake versions in circulation, more so when during registration no tool exists to conclusively authenticate any identity and nationality-attesting document presented, we respectfully submit that the class-wide invalidation of identity instruments cannot be a sustainable response to criminal evasion or fraud[18].

64. For our purpose of commenting on the public administration and public policy implications of these matters, we must alert your Lordships to the wide door of impunity that stands ready to be opened if such arbitrary, internally invalid and self-contradictory standards were to be endorsed by this court to govern the exercise of discretion by an administrative body in matters where it has the power to influence how citizens exercise their constitutional rights.

J. CHECKING THE CONDUCT OF THE COMMISSION

65. The Electoral Commission by the record of its actions over the years, some of which this Court has had occasion to examine, has shown a

[18] The newswires are replete with evidence of forged Ghanaian passports being used by non-Ghanaians to commit crimes at home and abroad. See, for instance: https://kuulpeeps.com/2020/01/nigerian-who-used-ghanaian-passport-in-1-million-scam-arrested/

strong tendency to elevate bureaucratic convenience above public policy. It commenced the series of actions that have culminated in this present controversy with a claim of technological obsolescence of its electoral technology systems. In many public statements it implored the nation to acquiesce to its demands to spend millions of dollars on new equipment as same was warranted to avoid the catastrophic collapse of its infrastructure. It suggested in numerous public statements that existing biographical and identification records shall not be touched by this overhaul[19]. As the debate progressed and its claims came under scrutiny, it altered its advocacy strategy to focus on a need for enhanced credibility of the voter register.

66. Having conclusively failed to prove that its technology infrastructure is obsolete, and indeed having been exposed widely in the press to have made many misleading statements and claims[20], the Electoral Commission has quickly assembled a new strategy to achieve the same end: legislative invalidation of the existing register, creating the grounds, therefore, of compiling a totally brand new register, which in turn necessitates the spending of millions of dollars of the nation's scarce resources on the acquisition of expensive equipment through shoddy procurement methods.[21]

67. We submit that had the Electoral Commission not found itself under the tight and probing scrutiny of the civil society organisations which we represent, these afterthought concerns about the credibility of the voter register requiring the invalidation of all 17 million voter ID cards would not have arisen.[22]

68. Having extensively dealt with the discretion question, we shall conclude this brief with some exposition on two matters that can shed further light

[19] https://cuts-accra.org/election-2020-should-the-ec-compile-a-new-electoral-register-independently-from-nia/
[20] Please see Appendix III for full media brief of the 2nd Defendant
[21] Please see Appendix I for a detailed account of these matters.
[22] See Appendix III for list of media citations illustrating the posture of the Second Defendant to the existing voter identification records until very recently.

on the conduct of electoral management bodies: comparative international practice and fiscal prudence.

PART 3: FUSION & CONCLUSION

K. FISCAL PRUDENCE

69. The Court's attention is respectfully drawn to the financial issues which so far have not been put before it in the proceedings. Based on our extensive analysis of data from multiple countries and from Ghana's own experience in issuing cards, we have concluded that a single card costs the nation approximately $0.25 to produce. In fact, the Electoral Commission charges nearly $1 to replace a lost or damaged card. The invalidation of the nearly 17 million extant cards so that fresh ones can be issued when the existing cards are in perfectly sound order and can be used both for registration and for confirmation purposes during exhibition and voting, implies a loss to the nation of between $4.25 million and $17 million dollars.

70. This situation is not an isolated incident. It reflects a general pattern of financial waste and fiscal imprudence in the Electoral Commission's conduct of its operations. It has spent more than $70 million dollars after the 2016 general elections to upgrade and refurbish election management systems based on an independent audit, that should support its functions beyond the organisation of the 2020 general elections yet it has in various communications refused to accept this solidly documented facts[23]. By its recent conduct, aspects of which we submit breach the procurement laws of the Republic, and will ultimately lead to the materialisation of considerable financial losses and risks to the Republic, the Electoral Commission has shown a consistent pattern of behaviour that runs counter to sound policy[24]. In appendix IV (a), we present evidence of biometric equipment procured only in 2018 that the Electoral Commission refused to acknowledge during its

[23] See detailed examination of procurement and inventory management 'malpractices' of the Electoral Commission, and its Vendors. Retrievable at: https://imaniafrica.org/2020/01/26/imani-moving-beyond-electoral-commissions-self-serving-vendors-posing-as-objective-experts/

[24] See a detailed examination of the financial cost and risks of the proposed new register by the Electoral Commission. Retrievable at: https://imaniafrica.org/2020/03/10/presentation-file-providing-graphical-evidence-to-counter-the-electoral-commissions-dangerous-untruths-about-biometric-verification-systems/

many public statements suggesting that all its equipment date from 2011 and therefore ought to be discarded. It is not surprising therefore that, the cost of election administration in Ghana compared to Africa, and other jurisdictions is incredibly high, as shown in appendix IV (b). The Court is urged to view the Electoral Commission's decision to discard the current voter ID cards as part of a broader attitude of administrative arbitrariness that should not be encouraged.

71. Some have argued that the Parliament of Ghana has scrutinised the Electoral Commission's budget and exercised due oversight and therefore that it would amount to an usurpation of Parliament's jurisdiction to venture into such matters. The truth, however, is that we have carefully perused the budgetary allocations and appropriations of the Electoral Commission for the 2020 fiscal year and are unable to find any justification for this wanton dissipation of public funds. It may be argued that this is a matter for the Auditor General and the relevant Parliamentary Committees to pick up again in due course. But where significant losses to the state is evident as a likely consequence of an action with which this august Court is seised, the Court may take the adverse collateral effects of the conduct being complained of into account when it considers the primary matter.

L. **INTERNATIONAL COMPARATIVE PRACTICE**

72. To better understand the interplay of civil identification systems and voting rights around the world, we have reviewed many scholarly treatises and technical reports on the subject. One such technical report is a research monograph commissioned by the Carter Center.[25] In the said document, it is established clearly that the overwhelming plurality of countries in Africa allow individuals to present any one of a wide range of types of ID cards or witness testimony in order to register to vote and to obtain a voter card. This approach may be referred to as the ***Maximalist Doctrine of Civil Identification*** in the context of constitutional rights enforcement.

[25] See The Carter Center. "Voter Identification Requirements and Public International Law: An Examination of Africa and Latin America," //www.cartercenter.org/resources/pdfs/peace/democracy/des/voter-identification-requirements.pdf

73. The doctrine derives squarely from International Law. In sum, existing international law provides the following guidance, as summarised by the Carter Center, on voter registration (and implicitly the voter identification) process:

(i) Any conditions which apply to voter registration and other electoral processes should be based on objective and reasonable criteria, and only reasonable restrictions may be applied;
(ii) Obstacles to registration should not be imposed;
(iii) There should be no discrimination in the law or the process on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, sexual orientation, physical ability, Birth, or other status;
(iv) There should be no "abusive interference" in the process;
(v) Steps should be taken to ensure that displaced persons can replace lost or destroyed identity documents that prove their citizenship;
(vi) States must take active measures to ensure citizens are able to vote, and must truly facilitate the process of registration, including the identification process;
(vii) Potential voters should have the ability to verify the accuracy of their personal data; and
(viii) An effective remedy for a violation for electoral rights should be available.

74. One of the cardinal instruments of the international regime of civil order, The International Covenant for Civil and Political Rights (ICCPR), a treaty to which Ghana is signatory, is also one of the world's leading charters of human rights generally, including voting rights. The ICCPR's article 25 states clearly that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and ***without <u>unreasonable</u> restrictions***:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot."

75. The UN Committee on Human Rights has prepared a General Comment on article 25 to strengthen the rights dimension of this provision, stating as follows:

> "Any conditions which apply to the exercise of the rights protected by article 25 should be based on ***objective and reasonable criteria***."

76. We agree wholeheartedly with the Carter Center's assessment that the Committee on Human Rights' Comment also establishes that article 25 means the following:

> "The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements."

Reasonableness is thus an international law standard in civil registration and voter identification matters.

77. In perhaps the most relevant part of the document, the Comment also prescribes as following:

> "States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed.
>
> Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community."

78. This is the context within which we must consider the great inconvenience posed by the recent actions of the Electoral Commission on the vast majority of marginalised and disadvantaged people in this country, especially those who are not openly known to support any of the two major parties and, therefore, lack the support those parties tend to render to their members in matters of voting and registration, including, as has been reported, paying for transportation for them and assisting in the search for guarantors[26].

79. It is critical to pay attention to the rights of domestic migrants, itinerant labourers and those in so called "settler communities", many of which are urban slums and rural outposts. The vast majority of these individuals do not have a passport, as they rarely travel outside the country. Many of them have not been fortunate to receive a Ghana Card from the National Identification Authority. Because they live among other strangers, who are rarely close relatives, in scattered temporary lodgings all over the country, their ability to both register through the guarantee window and comply with the law at the same time is heavily constrained since for the vast majority of these people finding someone who can vouch from personal knowledge that they know the circumstances of their birth is virtually impossible.

80. At any rate, with their current voter ID card, they have a definite right to register to cast their vote until successfully challenged. With the guarantee window, the right transmutes into a contingent one. First, they must find whoever guaranteed for them the first time around, even if, as is very likely the case, they have now moved from their original hometown to seek their fortune elsewhere among strangers. Second, the form in the schedule to the Constitutional Instrument requires an oath, which must be administered by a Commissioner of Oaths, placing another barrier that the prospective voter may not succeed in scaling as nothing obligates the Commissioner of Oaths to believe the attestation of the guarantor.

81. In short, for many poor people, room has been opened for mass disenfranchisement out of no fault of theirs at all. Let us compare the case in India, a country with characteristics very similar to ours, in fact, a

[26] Please see Appendix II for media reports on political parties supporting members during registration exercises.

common law country with which we share many public order features. We quote from a recent source to describe the state of affairs which pertain today in India in respect of similar matters:

> "In an attempt to ensure that legitimate voters are not prevented from casting their votes for want of identification, the Election Commission has said apart from the Electors Photo Identity Card (EPIC), voters will be able to use as many as 11 documents, including passports, the Aadhaar document (the relevant parts of which many Indians have snipped out and made into Aadhaar cards), driving licences, and PAN cards as proof of identification at polling booths. According to the Election Commission, as of 2014, more than 814 million people had been registered to vote in India."[27]

India is merely one of many countries in the common law world where civil registration and voter citizenship attestation remain liberal and maximalist. We believe that the facts are self-evident.

M. **CONCLUSION**

82. In this short brief, we have respectfully urged your Lordships to consider only four cardinal points:

(i) That the discretion of the Electoral Commission of Ghana in choosing among a range of identification instruments for the purpose of verifying the citizenship of prospective voters must be guided by clear and cogent standards of a legally acceptable nature and backed by **evidentiary, objective and reasonable** criteria.

(ii) That in its various submissions to the court, the 1st Defendant has admitted to the need for such standards but has exposed serious bad faith in constructing such standards in such a

[27] See: Election Commission of India; Systematic Voters Education & Electoral participation (SVEEP) Voter Guide; Lok Sabha Election 2019. Retrievable at: https://www.hindustantimes.com/lok-sabha-elections/lok-sabha-elections-2019-aadhaar-document-pan-card-passport-among-11-id-proofs-that-can-be-used-to-support-voter-slips/story-dvEJHupiD6q5sil5Y5XHyO.html.

dangerously incompetent manner that their application can only lead to absurdities that shall multiply over time.

(iii) That these absurd and unreasonable standards not only lead to contradictory effects and outcomes, but that they are also hugely costly fiscally and politically.

(iv) That allowing such fiscally and politically dangerous and profligate outcomes to obtain the backing of judicial precedent shall seriously undermine the quality of public administration and the cause of public policy in this country.

DATED AT 1STLAW, LEGAL PRACTITIONERS/CONSULTANTS, JERRON QUARSHIE BUILDING, H/NO. C28/1, CASTLE ROAD, ADABRAKA-ACCRA, THIS 19TH DAY JUNE, 2020.

_____

JOE ABOAGYE DEBRAH
SOLICITOR FOR APPLICANTS
LICENCE NO. eGAR 02974/20

THE REGISTRAR
SUPREME COURT
ACCRA

AND TO:

1. THE PLAINTIFF IN SUIT # J1/9/2020 OR ITS SOLICITOR, GODWIN KUDZO TAMEKLO ESQ., AYINE & FELLI LAW OFFICES, H/NO. C808/29, 1ST CLOSE LILY STREET, EAST LEGON, ACCRA

2. THE 1ST DEFENDANT IN SUIT #J1/9/2020 & 2ND DEFENDANT IN SUIT # J1/12/20202 OR ITS SOLICITOR, GODFRED DAME ESQ., DEP. ATTORNEY-GENERAL, ATTORNEY-GENERAL'S DEPT. MINISTRIES, ACCRA.

3. THE 2ND DEFENDANT IN SUIT # J1/9/20202 & 1ST DEFENDANT IN SUIT # J1/12/20202 OR ITS SOLICITORS JUSTIN AMENUVOR ESQ., AMENUVOR & ASSOCIATES, #8 NII ODARTEY OSRO STREET, KUKU HILL, FRONTLINE CAPITAL, ACCRA

4. THE PLAINTIFF IN SUIT # J1/12/2020 OR HIS SOLICITORS, COSMAS MWEYANG ANPENGNUO ESQ, BAYONG LAW CONSULT, FLAT NO. 23, OROKO AVENUE, KOKOMLEMLE-ACCRA.

AMICUS CURIAE'S LIST OF AUTHORITIES

A. CONSTITUTION OF GHANA, 1992

B. CASES

1. The English case of Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223.
2. In the Matter of A Petition Challenging The Validity Of The Election Of John Darmanin Mahama As President Of The Republic Of Ghana Pursuant To The Presidential Election (J1/6/2013) [2013] GHASC 3
3. Consolidated Writs Nos. JII1112014 & JII9/2014 - Abu Ramadan & Nimako (No.1) v. Electoral Commission & Attorney-General (No.1); Danso-Acheampong v. Electoral Commission & Attorney-General (Consolidated) [2013-2014] SCGLR 1654.
4. Abu Ramadan & Nimako (No.2) v. Electoral Commission & Attorney-General [2015-2016] 1 SCGLR 1
5. Republic Vs. Independent Media Corporation of Ghana and Others (1996-97) SCGLR 258
6. Bomfeh Vrs. Attorney-General (J1/14/2017) [2019] GHASC 2 (23 January 2019).
7. Mensima & Others v. Attorney-General [1996-97] SCGLR 676; New Patriotic Party v. Attorney-General (CIBA Case) [1996-97] SCGLR 929.
8. New Patriotic Party v Inspector-General of Police, Original jurisdiction, ILDC 2548 (GH 1993), [1993-94] 2 GLR 459 SC.
9. Shalabi and Another v. The Attorney-General [1972] 1 GLR 259.
10. Olympio v. Commissioner for the Interior, High Court, Accra, 30 July 1969, Unreported; Digested In (1970) C.C. 4

11. Tehn Addy v Electoral Commissioner [1996-97] SCGLR 589 and Ahumah Ocansey v. Electoral Commission;

12. Center for Human Rights and Civil Liberties (CHURCIL) v. Attorney-General [2010] SCGLR 575).

C. STATUTES

1. Citizenship Act, 2000 (Act 591)

D. CONSTITUTIONAL INSTRUMENTS

1. Public Elections (Registration of Voters) Regulations, 1995 (C.I. 12).
2. Public Elections (Registration of Voters) Regulations 2012 (CI 72).
3. Public Elections (Registration of Voters) Regulations, 2016 (C.I 91).
4. Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I. 126).

E. TEXTBOOKS & REPORTS

1. Galligan, Denis. 1986. Discretionary Powers: A Legal Study of Official Discretion. Clarendon Press.

2. The Carter Center. "Voter Identification Requirements and Public International Law: An Examination of Africa and Latin America" https://www.cartercenter.org/resources/pdfs/peace/democracy/des/voter-identification-requirements.pdf

APPENDIX I:

MEDIA CITATIONS OF BRIBERY AND EXTORTION IN GHANA CARD REGISTRATION PROCESS.

Date	Issue	URL
January 3, 2020.	NIA Boss admits to cases of extortion and bribery by registration staff	https://www.primenewsghana.com/general-news/nia-boss-admits-to-cases-of-extortion-and-bribery-by-staff-in-the-ghana-card-exercise-in-ashanti-region.html
December 23, 2019	Bribery allegations by Unit Committee member of Ahafo Ano South District	https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bribery-allegations-hit-Ghana-Card-registration-officials-cursed-822328
July 2, 2019	Multiple reports of bribery at various registration centres	https://citinewsroom.com/2019/07/adogla-writes-looks-like-the-ghana-card-registration-is-the-latest-ad-for-ghanaian-rot/?fbclid=IwAR37_IMHXT7e3Gw4XyEpkGPoTQkzo_P7Ikr2JA3_i4bcf4OIiaaWy2Lf3tw https://www.ghanaweb.com/GhanaHomePage/features/Looks-like-the-Ghana-Card-registration-is-the-latest-ad-for-Ghanaian-rot-759868

Appendix II:

MEDIA CITATIONS OF POLITICAL PARTIES PROVIDING SUPPORT TO THEIR MEMBERS DURING REGISTRATION EXERCISES

Date	Issue	URL
March 12, 2020.	Former General Secretary of the Christian Council allegation of major political parties transporting their members to registration centres.	https://www.ghanaianews.com/2020/03/12/npp-ndc-bus-people-to-engage-in-multiple-and-registration-of-minors-others-rev-opuni-frimpong/
April 28, 2016	Ashanti Regional Chairman of NPP allegations of NDC busing members to registration centres.	https://www.ghanaweb.com/GhanaHomePage/NewsArchive/NDC-busing-non-residents-to-registration-centers-NPP-434470
June 29, 2019	NDC and NPP sign an undertaking in the Asawase Constituency to bus 50 Senior High School Students to voter registration centres.	https://www.peacefmonline.com/pages/politics/politics/201906/385826.php

APPENDIX III:

MEDIA CITATIONS OF THE 1ST DEFENDANT IN SUPPORT OF THE EXISTING VOTERS REGISTER:

Date	Issue	URL	Claim
Dec. 19, 2019.	2nd Defendant praising the success of its organisation of the local government elections	https://www.graphic.com.gh/news/politics/ghana-news-success-of-local-polls-gives-us-confidence-ec-chair.html	"…pulling of the elections smoothly, and with negligible incidents of arrests, she said, cemented the EC's expectation of a freer, fairer and more resounding general election next year…"
Dec. 19, 2019.	2nd Defendant publicly defending cost of new register rather	https://www.theghanareport.com/ec-says-it-is-cheaper-to-compile-a-new-register-than-update-the-old-one/ https://allafrica.com/stories/202001140556.html	"…the cost of updating the obsolete data centre as proposed by the previous vendor was to have cost the Commission Fifteen Million United States Dollars ($15 million) exclusive of taxes. Today, the Commission is acquiring a new Data Centre at Six Million United States Dollars ($6 million) exclusive of taxes…"

Dec. 17, 2019.	2nd Defendant confirming the credibility of the current register prior to the organisation of the December 2019, district elections.	https://allafrica.com/stories/201912170497.html https://www.businessghana.com/site/news/politics/202675/EC-to-compile-new-register-for-2020-elections https://allafrica.com/stories/201912170497.html https://starrfm.com.gh/2019/12/voters-register-credible-but-over-stretched-ec/	"…the current register is credible but it has been stretched to a point where you don't want to take that same risk. We want to have something that is more credible…" "…the register that we are going to use for tomorrow's election (district-level election) is very credible. We have updated the register, we have exhibited the register and we have effected all the necessary corrections, so it is very credible; and the commission is in the process of changing the current register, going into 2020," he explained in response to a question at a press conference to shed light on the district-level election slated for today, December 17, 2019. "…the register is made up of names of all eligible voters who have been captured…"

June 13, 2020	2nd Defendant indicating publicly the need to disallow the use of the National Health Insurance Card as a means of voter identification.	https://www.graphic.com.gh/news/politics/ghana-news-ec-defends-new-register-insists-it-s-best-for-nation.html	"…the current register was not credible because it had been bloated with the names of foreign nationals due to the EC's acceptance of National Health Insurance Scheme (NHIS) cards for voter registration and the demise of about a million registered voters…"
January 9, 2020.	2nd Defendant indicating to media that the district level elections in December 2019 are not as controversial, a reason for which the current voters register was used.	https://www.graphic.com.gh/news/general-news/we-ll-compile-credible-register-ec.html	"..when it comes to DLEs, they are very difficult and stressful but not controversial and the tension is low,.." He indicated that the EC did not want any party to go into the general election, lose and come out with complaints against the commission.
September 27, 2019	2nd Defendant commenting on providing copies of voters register without indicating its inadequacy prior to the district elections in December 2019.	https://www.graphic.com.gh/news/politics/ec-to-hold-trio-elections-on-december-17.html	"It is a voluminous document and it takes time to put together these documents. We are doing it currently and by close of this week we will finish compiling and hand it over to the political parties,"

December 31, 2019	2nd Defendant indicating publicly the need to change IT infrastructure due to obsolescence and cost of maintenance.	https://www.graphic.com.gh/news/politics/election-2020-new-voters-register-new-biometric-voter-management-system-coming-electoral-commission.html	
	Press briefing of 2nd Defendant providing a justification of new voters register.	https://www.graphic.com.gh/images/pdfs/The%20Need%20for%20a%20New%20Register%20%20%20%20%20Press%20Conf.pdf	2nd defendant indicates a voter verification failure rate of below 0.7 percent – with a backup of manual verification, is sufficient for replacement of the entire voters register

APPENDIX IV (A): APPENDIX I: RECORDS OF PROCURED

3. Budget Sub-Programme Results Statement

The table indicates the main outputs, its indicators and projections by which the Service measures the performance of this sub-programme. The past data indicates actual performance whilst the projections are the Service's estimate of future performance.

Main Outputs	Output Indicator	Past Years		Projections			
		2017	2018	Budget Year 2019	Indicative Year 2020	Indicative Year 2021	Indicative Year 2022
Code book printed	Printed by	-	June 30th	-	June 30th	-	-
Printing of Voter's Register	Printed by	-	Oct. 30th	Oct. 30th	Oct. 30th	-	-
Programmers and Database Administrators trained	Number of Programmers and Database Administrators trained	14	-	5	-	-	-
Replacement of obsolete IT Equipment	Number of obsolete IT equipment replaced	-	50	50	-	-	-
BVR kit replaced	Number replaced	-	2000	1500	-	-	-
ICT training for staff	Completed by	-	March 30th	June 30th	-	-	-
Internet, WAN connectivity to EC offices across the country	Completed by	-	March 31st	March 30th	March 30th	-	-
Deploying of wireless connectivity to Headquarters and Regional offices installed.	Completed by	-	March 30th	-	-	-	-

3. Budget Sub-Programme Results Statement

The table indicates the main outputs, its indicators and projections by which the Service measures the performance of this sub-programme. The past data indicates actual performance whilst the projections are the Service's estimate of future performance.

Main Outputs	Output Indicator	Past Years		Projections			
		2016	2017	Budget Year 2018	Indicative Year 2019	Indicative Year 2020	Indicative Year 2021
Code book printed.	Printed by	June 30th	Nil	June 30th	Nil	Nil	Nil
Printing of Voter's Register	Printed by	July 30th	Nil	July 30th	July 30th	July 30th	July 30th
Programmers and Database Administrators trained	Number of Programmers and Database Administrators trained	Nil	14	Nil	Nil	Nil	Nil
Replacement of obsolete IT Equipment	Number of obsolete IT equipment replaced	300	Data center and accessories required	100	Nil	Nil	Nil
BVR kit replaced	Number replaced	500	Nil	Nil	Nil	Nil	Nil
ICT training for staff	Completed by	April 10th	Nil	March 30th	Nil	Nil	Nil
Internet, WAN connectivity to EC offices across the country	Completed by	March 31st	Nil	March 30th	Nil	Nil	Nil
Extension of Microsoft Share point to the - Headquarters - Regions, and - Districts completed	Completed by	March 31st	Nil	March 30th	Nil	Nil	Nil
Deploying of wireless connectivity to - Headquarters, and - Regional offices installed.	Completed by	March 30th	Nil	March 30th	Nil	Nil	Nil

APPENDIX IV (B): COMPARATIVE COST OF ELECTIONS ADMINISTRATION

Election administration costs, 2000 to date (ex 'special' elections)			
Regions, countries	**Election costs, USD market prices/capita**	**Election costs, USD market prices/elector**	**Election costs, USD market prices/voter**
United Kingdom, 2005	$ 2.10	$ 2.90	$ 4.80
United Kingdom, 2010	$ 2.80	$ 3.80	$ 5.80
United Kingdom, 2015	$ 2.90	$ 4.00	$ 6.10
United Kingdom, 2017	$ 2.80	$ 3.80	$ 5.60
W Europe, N America, Australasia (35 elections)	$ 4.10	$ 6.30	$ 8.70
E. Europe, L. America (5)	$ 4.30	$ 6.80	$ 15.50
Asia (19)	$ 0.80	$ 1.50	$ 2.30
Ghana, 2004	$ 1.20	$ 2.30	$ 2.70
Ghana, 2008	$ 6.40	$ 11.90	$ 17.10
Ghana, 2012	$ 8.20	$ 14.90	$ 18.70
Ghana, 2016	$ 9.60	$ 25.30	$ 17.10
Africa (47)	$ 4.40	$ 10.50	$ 19.40
Rest of the world (world -/- Africa) (59)	$ 1.60	$ 2.70	$ 4.10
World (106)	$ 2.10	$ 3.70	$ 5.80

Source: Civil Registration Centre for Development-CRC4D, February 2020