ACLU Pennsylvania

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION

October 28, 2024

By email

Bedford County Board of Elections
c/o Dean Crabtree
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RE: Improper Mass Challenges to Mail Voters in Pennsylvania

Dear Dean Crabtree,

Over the last week, we have learned that certain counties in Pennsylvania have received mass-produced challenges to qualified voters who applied for and were approved for mail ballots in the November 2024 election. These challenges are based on matching voter information with data from the U.S. Postal Service National Change of Address ("NCOA") database—a process that is prone to error among other reasons because of the lack of sufficient matching criteria. Moreover, even if a voter is found on the NCOA list, that fact alone cannot be used to distinguish between a voter's plan to temporarily relocate for school, military service, or other purposes, and an intent to permanently change their residence. As you know, the only basis for challenging a mail ballot applicant is that the applicant "is not a qualified elector," 25 P.S. § 3150.12b(a)(2). These mass-produced challenges categorically cannot support any such determination.

We caution you that taking any action to deem a voter ineligible or to prevent their ballot from being opened and counted based on such mass challenges on the eve of the November 5, 2024 election would violate federal and state law, including Section 8 of the National Voter Registration Act ("NVRA"). Among other protections, Section 8(c) of the NVRA imposes a 90-day quiet period before each federal election, during which systematic efforts to remove registrants from the list of eligible voters (*i.e.*, non-individualized processes based on database matches like the challenges at issue) are expressly forbidden. And Section 8(d) forbids the disqualification of a voter based on any purported change in residence without completing a required, multi-year notice process.

The proper course of action for any county receiving these challenges is to reject them as insufficient. A challenge based solely on a possible match with the NCOA database categorically does not meet the challenger's burden to demonstrate that the voter is not qualified, particularly given that all of the challenged voters applied for mail ballots, personally attested to their qualifications, and had their qualifications confirmed by their county board. Counties should formally dismiss or deny the challenges as quickly as possible to minimize any delay or disruption to the canvassing process.

If your county has received these mass-generated challenges, we would appreciate it if you could let us know at the email address provided at the end of this letter. At a minimum, we ask you to advise the Department of State of your receipt of such challenges.

A more detailed analysis follows. If you have any questions about this issue, please do not hesitate to reach out to us.

I. The Mass Voter Challenges Are Facially Deficient

Beginning on or about October 24, 2024, and with the 2024 general election less than two weeks away, certain persons in Pennsylvania began batch-filing hundreds of cookie-cutter challenges to the eligibility of Pennsylvania mail ballot voters—*i.e.*, registered voters who applied for a mail ballot, who swore and affirmed as part of that application process that they were qualified to vote in Pennsylvania, and whose mail ballot applications were approved by their county board of elections based on a determination that they were in fact qualified.

As of the date of this letter, we are aware of hundreds of challenges being submitted to officials across at least three counties. Thousands more similar challenges could be submitted by the applicable deadline, which is November 1, 2024.

The challenges appear to be virtually identical in format and content, with the exception of the voter's name, SURE identification number, address, and county. Based on the information we have obtained thus far, the challenges appear to have been mass-produced from a database using a "mail merge" function. Each one asserts that the challenged voter is not eligible because the voter allegedly was matched to a person who at some point supposedly "filed a permanent change of address" with the U.S. Postal Service with an out of state address. The challenges also assert that the challenged voter was mailed a letter at the out-of-state address asking the voter to de-register in Pennsylvania if they have moved using a form enclosed with the letter.

The only valid basis for a challenge to a mail ballot application is that the applicant "is not a qualified elector." 25 P.S. 3150.12b(a)(2). The burden of proof to demonstrate that the challenged voter is not a qualified elector is on the challenger. Challenges are meant to be brought by individual electors based on individualized information about particular circumstances, personally known to the challenger, that render the challenged voter actually ineligible. These mass-generated challenges are prima facie insufficient and should be summarily rejected out of hand.

A purported match to a record in the NCOA database is facially insufficient to support a challenge to a voter's qualifications for multiple reasons.

For one, based on the information we have learned thus far, it appears that the challengers conducted their match using data that is stale and contains a significant number of errors and false matches. Indeed, any computerized data matching process like the one it appears these challengers are using will result in mistakes and data mismatches. For example, if two voters with the same name are registered at the same address, and only one of those voters moves, both voters can wind up on a potential challenge list. Additionally, if two voters are distinguished only by a suffix or prefix (Jr., Sr., etc.), and that suffix or prefix is missing from either the voter file or the NCOA database, a voter's registration could match a move record for a different voter. And the data matching that is possible between the voter records in the SURE database available to the public and the NCOA list is limited because it can only use names, address and birth dates—more definitive information such as driver's license and social security numbers are not available to be part of the process.

And even if the matching was sufficient to establish that the challenged voter is in fact the person on the NCOA database, the challenges would still be fatally, fundamentally flawed. "Change of address" forms are filed with the U.S. Postal Service for purposes of mail forwarding. According to instructions from the USPS, a "permanent" designation means that the mail-forwarding is intended to be in effect for more than *six months*.[1] Thus, the filing of a change of address in no way indicates that the voter has in fact moved "to another state with the intention of making such state his permanent residence." 25 Pa. Stat. Ann. § 2814(e). With respect to residence for purposes of voter qualification, a person who moves out of state "for temporary purposes only, with the intention of returning," is not considered to have lost their residence. 25 P.S.§ 2814(b). Consistent with that, and as an example, persons who leave the state due to military or national service, or in order to study at an "institution of higher learning" do not lose their residency even if absent for long periods. 25 P.S. § 2813.

A voter's presence in the NCOA database, without more, cannot establish a change in their *domicile*. Under Pennsylvania law, a voter's legal residence is their domicile, which is "where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *In re Stabile*, 348 Pa. 587, 591, 36 A.2d 451, 453 (Pa. 1944). That is certainly true where, as in the case of the challenged voters, the voters have affirmatively requested a mail ballot, attested to their qualifications to vote in the election, and had their qualifications checked already during the mail ballot approval process. Moreover, to the extent that the challengers mailed a letter and form to the challenged voter, asking the voter to de-register in Pennsylvania if they have moved, and the voter elected not to

[1] U.S. Postal Service, *Official USPS Change-of-Address* ("Are you planning on returning to your old address in six months or less? Selecting "Yes" will classify your Change-of-Address as Temporary. Selecting "No" will classify your Change-of-Address as Permanent."), https://moversguide.usps.com/mgo (last visited Oct. 25, 2024)

do so, that is additional evidence that the voter has *not* intended to abandon their Pennsylvania residence. Accordingly, these mass-generated challenges should be dismissed as deficient.

The Election Code suggests that mail ballot application challenges be disposed of at a hearing, which must occur no later than November 8. 25 P.S. § 3148.6(g)(5). The Code also provides that the challenged voters should be given notice of the hearing if possible. *Id.* We recommend that the county boards of elections either summarily reject the challenges as invalid , or swiftly calendar such a hearing before Election Day in order to dismiss the mass-generated challenges as prima facie insufficient. (Of course, if challenges are levied against voters based on inaccurate information, or in instances where the voter has already removed themselves from the rolls, the challenges may be dismissed on those bases as well.)

As explained below, any county that proceeds to give legitimate consideration to these invalid challenges, especially without notifying voters and allowing them to be heard, will be in violation of federal as well as state law.

II. The Federal NVRA Prohibits the Processing of the Mass Challenges

Through the NVRA, Congress "dramatically expand[ed] opportunities for voter registration and [ensured] that, once registered, voters could not be removed from the registration rolls by a failure to vote or because they had changed addresses." *Welker v. Clarke*, 239 F.3d 596, 598–99 (3d Cir. 2001). The NVRA contains specific provisions that expressly limit the circumstances under which any registered voter may be deemed ineligible based on residency and removed from the list of eligible voters, which is precisely what these mass-produced challenges seek.

a. Section 8(c)

Section 8(c)(2)(A) of the NVRA requires that election officials "complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official list of eligible voters." 52 U.S.C. § 20507(c)(2)(A). The NVRA makes clear that there are only three narrow exceptions during this "quiet period" 90 days before a Federal Election: 1) if the individual expressly requests to be removed, 2) if state law determines that the individual is ineligible to vote on account of a criminal conviction or mental incapacity, or 3) if the individual has died. 52 U.S.C. § 20507(c)(2)(B) (specifically enumerating the exceptions to the 90-day prohibition).

A program is systematic if it lacks "the requisite individualized inquiry required for challenges made within 90 days of a federal election." *Majority Forward v. Ben Hill County Board of Elections,* 512 F. Supp. 3d 1354, 1369–70 (M.D. Ga. 2021); *see also, e.g.*, Order, *Virginia Coalition for Immigrant Rights v. Beals*, No. 24-2071 (4th Cir. Oct. 27, 2024) ("A process is systematic if it uses a 'mass computerized data-matching process' to identify and confirm names for removal without 'individualized information or investigation.'" (quoting *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014)). Mass challenges by third-

parties that seek to deem registrants ineligible based on data retrieved from the NCOA, if acted upon, constitute a "systematic" removal of voters that cannot legally occur within the 90 days prior to a federal election. *E.g.*, *Majority Forward*, 512 F. Supp. 3d at 1355 ("Here, the challenge to thousands of voters less than a month prior to the Runoff Elections-after in person early voting had begun in the state-appears to be the type of "systematic" removal prohibited by the NVRA."); *N. Carolina State Conf. of the NAACP v. N. Carolina State Bd. of Elections*, No. 1:16-CV-1274, 2016 WL 6581284, at *5 (M.D.N.C. Nov. 4, 2016) ("[T]here is little question that the County Boards' process of allowing third parties to challenge hundreds and, in Cumberland County, thousands of voters within 90 days before the 2016 General Election constitutes the type of 'systematic' removal prohibited by the NVRA."); *see also Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1081 (D. Mont. 2008) ("[U]sing change-of-address information to purge voter rolls less than 90 days before an election creates an unacceptable risk that eligible voters will be denied the right to vote.").

Notably, the U.S. Department of Justice ("DOJ") has warned that the exact scenario currently unfolding in Pennsylvania is unlawful. According to DOJ guidance, the 90-day deadline "applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process." U.S. Department of Justice, *Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507* 4 (Sept. 2024) (emphasis added), https://www.justice.gov/crt/media/1366561/dl. "[O]nce an election for federal office is less than 90 days away, processing and removals based on systematic list maintenance must cease." *Id.*

Given that the election is on November 5, 2024, any systematic process whose purpose or effect is to deem voters ineligible must occur and been completed by August 7, 2024. The challenges at issue, the earliest of which was received on or about October 24, 2024, are within the restricted window. Acting on these mass-generated challenges to render voters ineligible to vote less than two weeks before the election—especially with no notice to the voter and with no opportunity for the voter to re-register before Election Day—would be a clear violation of federal law.

b. Section 8(d)

Whereas Section 8(c) applies to systematic removals of voters for any reason within the 90-day "quiet period," Section 8(d) of the NVRA applies to any attempt at any time to remove a voter based on a change in residence in particular, whether the process is systematic or individualized.

Section 8(d) sets out the *exclusive* way that a voter can be removed from the rolls for a purported change of address. *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 767 (2018). It commands that a "State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence" except in two specific circumstances. First, a voter may be removed based on a change in residence if the voter "confirms in writing that the registrant has changed residence to a place

outside the registrar's jurisdiction in which the registrant is registered." 52 U.S.C. § 20507(d)(1)(A). Second, a voter may be removed based on a change of residence if they fail to respond to a statutorily specified notice mailed by the registering jurisdiction and also do not vote in two successive federal elections after the mailing of the notice. 52 U.S.C. §§ 20507(d)(1)(B), (2). Thus, absent direct confirmation from the voter that their permanent residence has changed and they wish to be removed from the rolls, a voter's eligibility may not be removed based on a change in residence unless that voter has failed to timely respond to an NVRA-compliant notice letter *and* failed to cast a ballot for two federal elections.

Relying exclusively on purported third-party NCOA data-matching to deem a voter ineligible on residency grounds, without adhering to the multi-election notice process, would directly violate the clear text of Section 8(d). As the Supreme Court recognized in *Husted*, an NCOA change-of-address record, even when combined with the voter's failure to respond to the state's notice regarding their change of address, is merely "*some evidence*—but by no means conclusive proof—that the voter has moved." 584 U.S. at 763. "Instead, the voter's name is kept on the list for a period covering two general elections for federal office (usually about four years)," and "[o]nly if the registrant fails to vote during that period and does not otherwise confirm that he or she still lives in the district . . . may the registrant's name be removed." *Id.*

Consistent with the statutory text and *Husted*, Department of Justice guidance explains that submission of a change of address filing to the U.S. Postal Service, or a person's presence in the NCOA database, does not constitute the requisite written confirmation that the registrant has "changed residence" for purpose of a request for removal from the voter rolls pursuant to 52 U.S.C. § 20507(d)(1)(A). Such written confirmation "requires first-hand action by a registrant." U.S. DOJ, *Voter Registration List Maintenance*, *supra* at 3. "Information submitted by a third party does not constitute a 'removal at the request of the registrant'" within the meaning of the statute. *Id.*

Rather, if state actors wish to use the NCOA database to deem voters ineligible based on changes in residence, they may do so only "after satisfying all requirements of the Section 8(d) notice process," *i.e.*, the mailing of a statutorily specified notice and related materials, followed by a multi-year waiting period. U.S. DOJ, *Voter Registration List Maintenance*, *supra* at 2, 4-5.

Here, the challenged voters did not submit any written request to be removed from the voter rolls; *to the contrary*, they recently submitted mail ballot applications attesting to their qualification to vote in Pennsylvania and their desire to vote a mail ballot. Nor did the challenged voters receive the requisite statutorily specified notice under the NVRA.

Acting on these mass-generated challenges to render voters ineligible based on residency without following the exclusive procedures set forth in the NVRA would be a clear violation of federal law.

III. Conclusion

Any action with respect to these election-eve mass-generated voter challenges other than their swift rejection or dismissal is directly contrary to both Pennsylvania and federal law. The legal deficiencies noted above are by no means exclusive, and refusing to count a qualified voter's ballot based on these illegitimate mass-generated challenges may also violate voters' rights under the Voting Rights Act, anti-discrimination provisions in the NVRA, and the U.S. and Pennsylvania Constitutions.

We ask that the challenges be swiftly rejected or dismissed so as to avoid unnecessary litigation and expense. Any indication that a county intends to pursue some other course will be treated as an imminent violation of state and federal law and the rights of Pennsylvania voters.

We also would greatly appreciate, in the event, if you would immediately inform us if you receive any challenges of the nature described above. If you intend to process any such challenges, we ask that you provide the list of voters who are being challenged and the date(s) of any hearing(s). And, at a minimum, we strongly encourage you to notify the Pennsylvania Department of State.

To the extent that you have any questions regarding any of the above, we would be happy to meet and discuss at your earliest convenience. You may contact us directly or email vote@aclupa.org.

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