

ANALYSIS

VOTER PURGES: THE RISKS IN 2018

by Jonathan Brater†

Introduction

Voter purges — the often controversial practice of removing voters from registration lists in order to keep them up to date — are poised to be one of the biggest threats to the ballot in 2018. Activist groups and some state officials have mounted alarming campaigns to purge voters without adequate safeguards. If successful, these efforts could lead to a massive number of eligible, registered voters losing their right to cast a ballot this fall.

Properly done, efforts to clean up voter rolls are important for election integrity and efficiency. Done carelessly or hastily, such efforts are prone to error, the effects of which are borne by voters who may show up to vote only to find their names missing from the list.

Many of the voter purge efforts examined by the Brennan Center for Justice here not only risk disenfranchisement, but also run afoul of federal legal requirements. These efforts point to a decentralized, hard-to-trace mode of voter suppression — one that is perhaps less sweeping than voter ID, proof-of-citizenship, and similar legislation enacted by 23 states over the last decade. But the effect of voter purges can be equally devastating.

One example? In 2016, Arkansas' secretary of

state sent county clerks the names of more than 50,000 people who were supposedly ineligible to vote because of felony convictions. Those county clerks began to remove voters without any notice. The state later discovered the purge list was riddled with errors: It included at least 4,000 people who did not have felony convictions.¹ And among those on the list who once had a disqualifying conviction, up to 60 percent of those individuals were Americans who were eligible to vote because they had their voting rights restored back to them.²

The Arkansas incident also illustrates the confusion arising from many state laws that disenfranchise persons with past criminal convictions. Nationally, **more than 6 million Americans cannot vote** because of a past felony conviction. Up to 4.7 million of them have been released from incarceration and are living and working in their communities. In Arkansas, voting rights are not restored until the terms of the sentence are complete, including prison, parole, and probation. In this case, it appears that thousands of individuals who had met those conditions and had their rights restored were still removed.

Counties scrambled to fix the mistakes right before a school board race and weeks before the presidential election, but clerks admitted they

would have a hard time restoring all the voters to the rolls in time. “There’s an old saying that you can’t unring a bell, and that’s where we are,” said one official, Pulaski County Clerk Larry Crane.³

In 2014 and 2015, the Brooklyn Board of Elections purged more than 110,000 voters who had not voted since 2008, and another 100,000 who had supposedly changed their addresses. There was no public announcement that this would be done. Some of those voters were given a paltry three weeks’ notice before removal,⁴ and thousands of voters showed up at the 2016 primary elections and discovered that their names were missing from the rolls. After a lawsuit, the Board of Elections restored registration records — but by that point, the voters had missed their opportunity to cast a ballot in the primary.

A decade ago, the Brennan Center published the first comprehensive examination of voter purges.⁵ We found a patchwork of inconsistent, error-prone practices for removing voters from the rolls. These problematic purges have occurred for a variety of reasons. Election officials depend on unreliable sources to determine that individuals are no longer eligible to vote, use poor methodology to compare the voter registration list with sources of potentially ineligible individuals, conduct voter removal without notice, or fail to provide appropriate protections to voters before removing them.

There is reason to believe problems will be especially acute and widespread in 2018. Here are four voter purge vulnerabilities to watch out for this year.

1. “Challenge Purges” and Other Misuse of Challenger Laws

Most states have “challenger” laws allowing officials, or even private parties, to question voters’ eligibility at the polls on Election Day.⁶ These

laws are designed to apply to a different set of circumstances than the laws governing purges, but are sometimes being used in their stead.

Under federal law, states may not conduct large-scale, systematic purges of the voter rolls within 90 days of a federal election.⁷ This buffer, Congress found, is needed to detect and correct the inevitable errors that arise from mass purges.

Challenger laws, on the other hand, operate much closer to elections without this safeguard. Traditionally, they have been used to target voters *individually* as they seek to vote rather than to delete large numbers of voter registrations at the same time.

Recently, election officials and outside agitators have attempted to blur these lines by issuing batch challenges to a large pool of voters all at once. They have been helped by laws in at least fifteen states that allow challenges not only to *voting*, but also to *registration*, before the election even occurs.⁸ Challenger laws were already troublesome to those voters who were challenged individually, but now they’re being exploited to conduct what is, in effect, a mass purge.

A purge of this variety can both be an end-run around federal protections against wrongful removals and, like with most purges, be difficult to detect until it is too late. This risk is not hypothetical: High-profile attempts to use challenger laws to accomplish “challenge purges” have been exposed before each of the last few elections.

Just before the 2012 election, former Colorado Secretary of State Scott Gessler tried to use challenge procedures to remove alleged non-citizens from the voter rolls.⁹ A large-scale removal would have violated the federal 90-day buffer.¹⁰ Instead, Gessler sent letters to 4,000 voters (most of whom turned out to be citizens) threatening to challenge their registrations. Under Colorado law, challenges can be issued up

to 60 days before an election, and a hearing can occur 30 days after that.¹¹ Effectively, then, Gessler was trying to systematically purge voters from the rolls as close as 30 days before the election. Gessler, after much public criticism, retreated from these efforts.¹²

Former Iowa Secretary of State Matt Schultz tried a similar tactic until he was blocked by a state court.¹³ In 2013, a judge rebuffed his first try to purge suspected noncitizens using federal immigration data (again, most turned out to be citizens).¹⁴ Schultz then attempted to send the names of suspected noncitizens to county officials so they could challenge the voters' qualifications themselves. Voters identified as noncitizens, based on unreliable information, would be forced to "show their papers" or else be challenged by election officials, with no restriction on removals within 90 days of an election. In March 2014, less than three months before the primary election, a court blocked Schultz's challenge scheme. The court found Schultz did not have authority to create a new voter removal program simply by calling it a challenge.¹⁵

In other states, officials have used challenges on an ad hoc basis, but in large numbers. For example, prior to a 2015 state election, Hancock County, Georgia challenged 174 of the city of Sparta's 988 voters. Almost all the challenged voters were African Americans, alleged court filings.¹⁶ The county eventually settled a lawsuit over their actions, agreeing they had failed to consider federal law.¹⁷

The 2016 election brought an even more brazen "challenge purge." In North Carolina, individuals used challenge laws to try to knock large groups of voters off registration lists under the guise of promoting "election integrity." In a technique similar to voter caging, these individuals claimed that they had sent mail to voters, and were challenging the eligibility of those whose

mailing was returned as undeliverable. This was the only evidence they used to make their case. But, instead of questioning voters at the polls on Election Day, these individuals went a step further and challenged the voters' registrations, trying to remove the identified voters from the rolls. The challengers were temporarily successful: only weeks before the 2016 election, they got 6,700 voters purged from the rolls — including a disproportionately high number of African Americans.¹⁸ A federal court ultimately reversed the removals,¹⁹ but the statutory provision²⁰ that was used to purge voters still remains on the books to this day, even though the judge in the case called it "insane."²¹

In the past, activists and political operatives have taken advantage of challenger laws to conduct "voter caging." The term refers to mail cages at post offices: caging involves sending mass mailers out to registered voters, and challenging voters at the polls if mail sent to their address was returned as undeliverable.¹ **Caging operations have intimidated voters and led to chaos at the polls.** Operations to challenge registrations, however, present the additional danger that voters will show up to the polls not to find their vote challenged, but instead to find out that they cannot vote because they have been deleted from the rolls altogether.

2. New Potential for "Noncitizen" Voter Purges

There is a substantial threat that some election officials will initiate purges of suspected noncitizens this year. Without any evidence of a problem, the president²² and like-minded allies have raised the specter of noncitizen voting since the 2016 election. This creates a political incentive to hunt for noncitizen voters on the rolls. In the past, these types of efforts have threatened to disenfranchise many eligible voters.

One notorious example was Florida's 2012

purge. The secretary of state initially reported that a cross-reference of the voter rolls with driver's license data showed up to 180,000 noncitizens were registered in the state. State officials then compiled a list of more than 2,600 voters for counties to purge, right before the federal election that year. The program was ultimately blocked by a federal court.²³ As it turned out, upon further examination only 85 individuals were found appropriate for removal on the grounds that they were noncitizens²⁴ (and only one was actually charged for voting²⁵).

Florida's experience is illustrative of a broader problem with noncitizen voter purges. The state relied on its driver's license database to create a purge list, but DMV records are unreliable for this purpose. A noncitizen could get a driver's license in 2014, become a U.S. citizen in 2015, and register to vote in 2016 — not at all an unusual occurrence given that state driver's licenses last many years without requiring renewal.²⁶

In almost all instances, initial estimates of noncitizens on voter registration rolls based on DMV lists prove vastly inflated. In Colorado, the secretary of state claimed he had a list of 3,900 noncitizens that he later ended up dropping to 141.²⁷ In Iowa, 3,500 supposed noncitizens, who Secretary of State Matt Schultz also wanted to challenge, became 248,²⁸ and in Michigan, 4,000 individuals became 600.²⁹

This year, though, could present a unique problem: DHS Secretary Kirstjen Nielsen has made clear that the agency will help states “concerned that those who are not [eligible] from an immigration perspective” to check those records, although she has not offered specifics.³⁰

In the past, states' access to federal immigration information has been limited to use of the Systematic Alien Verification for Entitlements (SAVE) program. SAVE works as follows: The user submits a name and an Alien Registra-

tion Number (for example, for someone who showed a Green Card when getting a driver's license). SAVE then attempts to verify the person's current immigration status by checking that record against multiple federal immigration lists. When using SAVE, there are mandatory subsequent steps to verify the information.³¹

Of course, SAVE can sometimes actually be helpful in proving individual voters are eligible. For example, when Colorado ran suspected noncitizens' names through SAVE, 88 percent were found to be citizens.³²

Experience has shown, however, that the required subsequent verification steps are important in avoiding error when using SAVE. For one, the SAVE database is incomplete because native-born citizens (and undocumented noncitizens) are not in SAVE. Also, using SAVE is vulnerable to the same problems that plague other large-scale database matching attempts, like out-of-date source lists and poor matching criteria.

The worry is that Secretary Nielsen's comments, which provided no bounds or limits on data access, are an indicator that states will have the ability in the future to directly access the DHS lists outside of SAVE. This would have all the problems of the initial cross-reference attempts using SAVE, but without the subsequent verification steps that are required when using SAVE.

3. Interstate Crosschecking is Posing New Threats

This year, there are new reasons for concern over efforts to purge the voter rolls using the Interstate Voter Registration Crosscheck (“Crosscheck”) program. Crosscheck contains records for 26 states and nearly 100 million voters.³³

Sharing voter data across state lines is not new, but there are problems with Crosscheck that

should cause concern. First, Crosscheck data is inaccurate. It is supposed to tell election officials when someone moved *from* their state, but sometimes does the opposite. More than 2,500 voters whom Crosscheck said left Iowa prior to 2012 voted in the state that year.³⁴ One voter purged from Virginia’s rolls because Crosscheck said he moved to South Carolina had actually moved *from* South Carolina *to* Virginia.³⁵

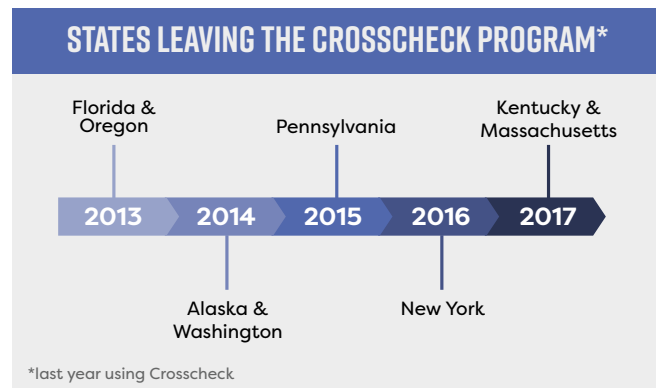
Under Crosscheck, it’s easy to confuse two different individuals as the same person. Crosscheck can create a match if only the first name, last name, and date of birth are the same. Shared names and birthdates are extremely common, making this an insufficient and imprecise method of identifying potentially ineligible voters. In a group of more than 180 people, it is more likely than not that two people will have the exact same date, month, and year of birth.³⁶ In the past, the Crosscheck system has even listed men with different middle initials — “Robert Wendell Brown” and “Robert B. Brown” — as the same person.³⁷

A recent study estimated that only 0.5 to 2.7 percent of nearly 800,000 Crosscheck double-vote “matches” represented actual double votes.³⁸ A review of 1,483 pairings in Iowa with the same name and birthdate found that 99.5 percent had *different* social security numbers, so they clearly were not the same person.³⁹ In 2017, Virginia found that more than 250,000 out of 350,000 Crosscheck “potential matches” were inaccurate after checking more data.⁴⁰ Crosscheck confused an Idaho voter for another man in Arizona, even though he had never set foot in the state.⁴¹ The list goes on.

To top it off, Crosscheck data is not secure. In-divisible Chicago, an advocacy group, discovered that program administrators sent Crosscheck passwords in unsecured emails to more than 80 recipients.⁴² The passwords are simple

and infrequently changed.⁴³ This risks access to or even manipulation of data for nearly 100 million registered voters at a time when foreign actors are actively seeking this information.⁴⁴ Florida just announced that it accidentally disclosed nearly 1,000 voters’ partial social security numbers that had previously been provided to Crosscheck.⁴⁵ Inspiring even less confidence, Kansas, which administers the Crosscheck program, disclosed personal data for thousands of state employees.⁴⁶

Unsurprisingly, many states are re-evaluating their use of the program. Illinois has announced⁴⁷ it will delay sending data to Crosscheck and is considering leaving the program altogether, joining a number of states that have already done so. Oregon left “because the data ... was unreliable”⁴⁸ and officials elsewhere have voiced similar concerns.



Nonetheless, new states are joining the program. Alabama first sent data to Crosscheck in 2016,⁴⁹ and New Hampshire joined the next year.⁵⁰ This is a concern because significant Crosscheck problems have occurred when states receive Crosscheck data for the first time. When state or local officials first get the data, they may not understand that it is unreliable or that further checks are needed before removing voters. In 2013 state elections, Virginia found error rates as high as 17 percent when it removed 40,000 voters during its initial use of the program.⁵¹ The next year, Ada County, Idaho, used the pro-

gram for the first time and removed 765 people without prior notice. Many voters pointed out errors, and counties scrambled to restore registrations.⁵²

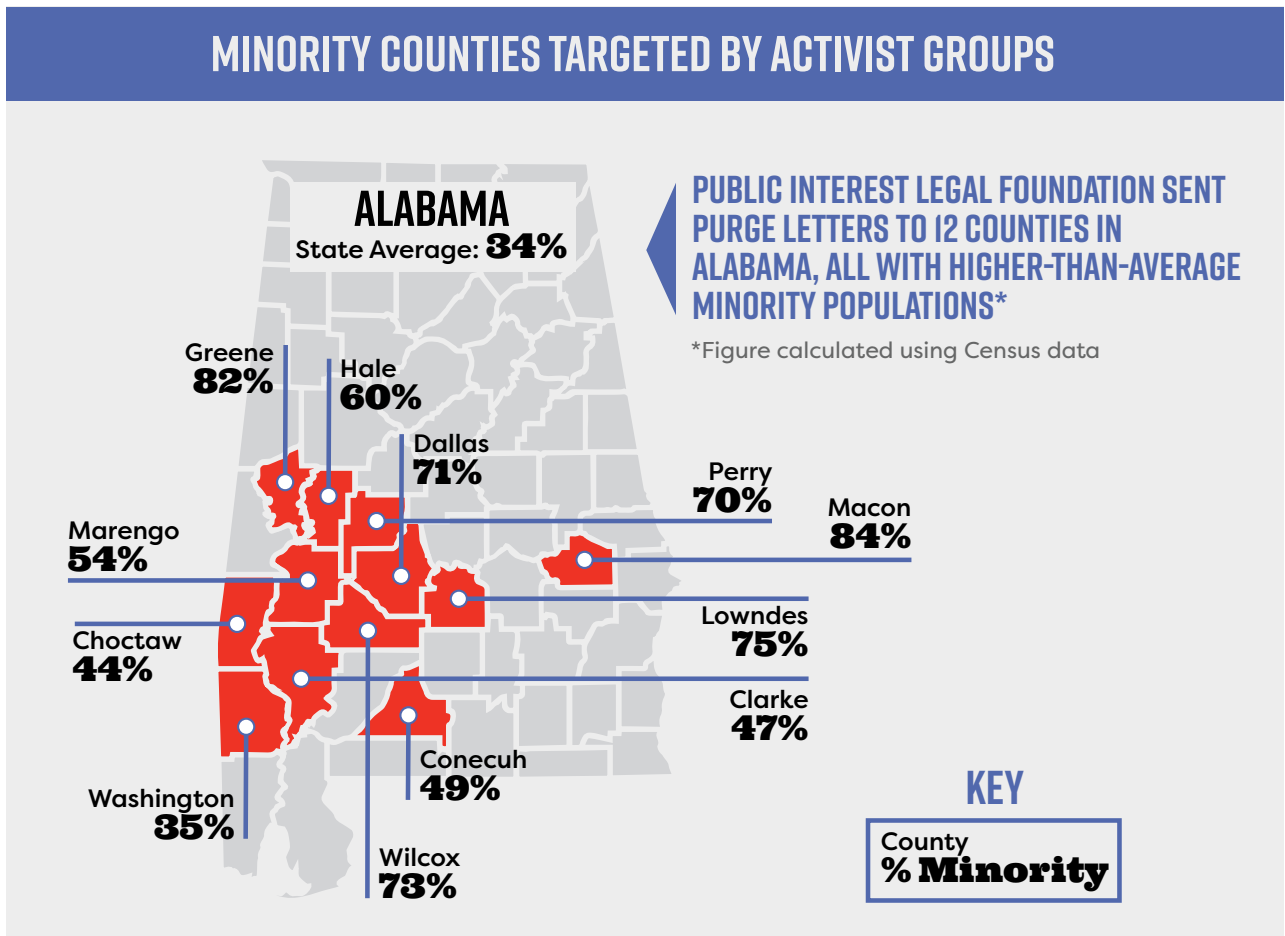
In other states, 2018 could mark the first time that voters who were flagged by Crosscheck several years ago will actually be removed. Federal law allows states to begin a multi-year removal process for voters flagged as potentially ineligible.⁵³ States first send voters a notification in the mail. If the voter does not respond, and does not vote in the next two federal elections, the voter can be removed. So, the effects of problematic matches that occurred four or five years ago could first materialize this election — in 2013 and 2014, six states joined Crosscheck.⁵⁴

Meanwhile, Indiana passed a law in 2017 that allows voters to be removed *immediately* based

on a Crosscheck match. Previously, the state removed voters only after notice, then waiting two even-year elections, as required by federal law.⁵⁵ This illustrates the danger posed by the program. If Crosscheck erroneously lists an Indiana voter as having registered in another state, that voter could be purged right away.

4. “Voter Fraud Vigilantes” and the Trump Administration are Pressuring States

Voter fraud alarmists are increasingly focusing their efforts on the registration rolls. In recent years, organizations such as the American Civil Rights Union (ACRU), Judicial Watch, Public Interest Legal Foundation (PILF), and True the Vote have both threatened and filed lawsuits seeking to institute more aggressive purge practices.



These groups have targeted more than 250 jurisdictions in 2017 alone, and more than 400 jurisdictions across the country since 2014.⁵⁶ The most strident attempts to force purges often focus on minority counties.⁵⁷ Some of the counties contacted have limited resources to defend themselves.⁵⁸

In some cases, these groups have convinced or forced jurisdictions to implement voter removal practices that are problematic. In one high-profile example, Judicial Watch sued Ohio for not purging aggressively enough, and the parties eventually agreed to expand a purge of voters who did not vote or otherwise respond to an election mailing in three federal elections. Under the settlement, Ohio agreed to send a letter initiating the purge on an annual basis. Previously, Ohio had sent the mailing every other year. The Supreme Court is currently weighing whether this new policy of Ohio's, which has purged hundreds of thousands from the rolls, is lawful.⁵⁹

Two counties in Texas agreed to a similar purge practice after being sued by ACURU. Those jurisdictions said they would initiate removals for voters who had not cast ballots in the last two elections. They also agreed to obtain lists of persons with felony convictions and purge them from the voter rolls no more than five days before elections. The specific requirement that voters be removed so close to an election is problematic because it would leave little or no time to correct errors.⁶⁰

These groups frequently have dubious bases for their legal claims. They justify targeting jurisdictions by making a rudimentary comparison between census data and voter lists. When scrutinized, the groups' conclusions usually do not hold up.⁶¹ Moreover, in at least two cases, the groups were rebuked by courts for misrepresenting laws or purge practices.⁶²

Another threat looms as well. In June 2017, the Department of Justice quietly demanded that 44 states provide detailed information on how they maintain voter registration lists.⁶³ Observers noted that this could be a prelude to legal action to force states to conduct purges. A former head of the DOJ's Civil Rights Division called the mass request for information "virtually unprecedented."⁶⁴ DOJ could be actively pressuring more states to purge the rolls.

The letter is concerning, and hearkens back to a troubling effort from the Bush Administration in the mid-2000's when DOJ pressured U.S. Attorneys to sue states over failing to purge their voter rolls aggressively enough.⁶⁵ The Department used their power to put eligible voters at risk, rather than protect voters against disenfranchisement as the federal voting laws they invoked were originally designed to do.

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Although many problems that have persisted with purges for more than a decade remain the same, new threats are emerging in 2018. Those wishing to purge the rolls, whether they be elected officials or private parties, are finding increasingly inventive ways to do so, such as abuse of challenger laws. The politicization of noncitizen voting and immigration in general provides an incentive to hunt for noncitizens on the rolls in a dangerous way, possibly with an assist from DHS. In some states, Crosscheck errors could present themselves for the first time this year, and all across the country, there is increased pressure on states and localities to purge the rolls, whether brought by individual fraud vigilantes or the Trump Administration itself. Voters, civic groups, and election officials must remain alert and guard against these threats in 2018.

Endnotes

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- 53 52 U.S.C. § 20507.
- 54 Georgia, Idaho, Nevada, Ohio, South Carolina, and West Virginia. In addition to these states, Alaska, Florida, Indiana, Oregon, Virginia, and Washington also joined in this period, but the circumstances of the use of the program have since changed.
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- 56 PILF contacted 248 jurisdictions in September 2017 alone. Brennan Center for Justice, “Civil Rights Groups Launch National Effort to Combat Alarming Voter Purge Attempt,” news release, November 22, 2017, <https://www.brennancenter.org/press-release/civil-rights-groups-launch-national-effort-combat-alarming-voter-purge-attempt>. PILF and likeminded organizations have contacted numerous other jurisdictions before and after that batch of letters.
- 57 Of thirteen counties targeted by Judicial Watch in Alabama in 2017, or sued in Texas by ACRU in recent years, nine had higher minority populations than the state average. ACRU’s only lawsuit in Pennsylvania targeted Philadelphia (65 percent minority compared to 22 percent state-wide), and its only lawsuit in Florida targeted Broward County (61 percent vs. 44 percent). Judicial Watch singled out Los Angeles (73 percent) in a lawsuit filed in California (62 percent). Meanwhile, although Public Interest Legal Foundation sent letters far and wide, in several states a large percentage of the counties they targeted had higher minority populations than the state average, including Alabama (12/12), Louisiana (2/2), Mississippi (17/19) and New York (4/6). Minority population derived from inverse of “Not Hispanic or Latino, Percent White Alone,” U.S. Census Bureau, American Community Survey 2015 5-year Estimate, T. 14, “Hispanic or Latino by Race.”
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- 60 *See, e.g.*, Consent Decree, *Am. Civ. Rights Union v. Jefferson Davis County Comm’n*, No. 2:13-cv-87-KS-MTP (S.D. Miss Oct. 18, 2013), <http://www.theacru.org/wordpress/wp-content/uploads/2013/10/Signed-Decree.pdf>.
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- 62 One court said ACRU “grossly misrepresented the plain language” of a statute and issued an order to show cause why sanctions should not issue. Memorandum of Sept. 9, 2016, *Am. Civ. Rights Union v. Philadelphia City Commissioners*, No. 16-1506, E.D. Pa (Filed April. 4, 2016), <http://ia601200.us.archive.org/7/items/gov.uscourts.paed.515819/gov.uscourts.paed.515819.30.0.pdf>. Another dismissed a lawsuit filed by the Virginia Voters’ Alliance and said the group could refile “Only after conducting an appropriate pre-filing investigation.” Demos, “Victory in Virginia as Federal Judge Dismisses Voter Purge Case,” news release, June 20, 2016, <http://www.demos.org/press-release/victory-virginia-federal-judge-dismisses-vot>

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- 64 Vanita Gupta, “The Voter Purges Are Coming,” editorial, *The New York Times*, July 19, 2017, <https://www.nytimes.com/2017/07/19/opinion/donald-trump-voting-rights-purge.html>.
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