

December 18, 2020

Cobb County Board of Elections & Registration  
PO Box 649  
Marietta, GA 30061-0649

Dear Members of the Cobb County Board of Elections & Registration,

On behalf of the Brennan Center for Justice at NYU School of Law, we write to urge you to do deny the mass challenges Jason Shepherd and Pamela Reardon have lodged against the qualifications of 16,024 and 3,618 voters, respectively, to vote in the January 5, 2021 run-off elections. Failure to do so could expose Cobb County to legal liability under federal and state law on numerous bases. We lay out merely a few of these grounds below as examples.

**I. The Information Is Unreliable**

Time does not permit us to lay out all the ways in which the data presented by the challengers is unreliable.

One sign that the challengers are using faulty methodologies is the fact that both purport to compare Cobb County's voter rolls against the NCOA Registry, yet they come up with wildly different data sets. Mr. Shepherd claims that 16,024 people have moved out of state, while Ms. Reardon claims that 3,618 Cobb County voters have left Georgia. Our initial analysis indicates that the challengers identify 18,754 unique voters on the Cobb County rolls, and only 888 names on their lists are the same. Ms. Reardon states that care was taken to remove military voters from her list, but the Georgia voter file does not identify UOCAVA voters and Ms. Reardon's list includes at least two addresses *at* military bases.

Critically, the challengers fail to explain how they determined that the voters in the registration database are the same persons appearing in the NCOA Registry. If Mr. Shepherd compared only the first and last names on the two lists, for example, there would be a high likelihood of false matches. And neither challenger provides *both* the voter's Cobb County address as listed in the state database and the Cobb County address provided on the NCOA form; thus, there is no evidence that these two addresses actually matched. In other words, there is no way to verify the information that the challengers submitted.

The Board cannot take this risk because faulty matching between lists disenfranchises voters. In 2012, Texas officials purged voters presumed to be dead, based on a comparison to the Social Security Administration’s Death Master File. Texas used weak matching criteria (e.g., first name, last name, and date of birth) to target voters without further investigation. On these grounds, James Harris, Jr., a living Texas voter (and Air Force veteran) was flagged for removal because he shared information with Arkansan “James Harris,” who died in 1996. According to one analysis, more than 68,000 of the 80,000 voters identified as possibly dead arose from weak matches.<sup>1</sup> Texas changed its policy after settling litigation based on the bad purge.

## **II. There Is No Probable Cause to Sustain These Mass Challenges**

The Board cannot sustain these challenges without finding probable cause and that threshold is not met here. Probable cause under Georgia law means the existence of such facts and circumstances that would create a reasonable belief that an accused person committed the act alleged. *See Adams v. Carlisle*, 278 Ga. App. 777, 782 (2006)

This threshold is not met precisely because of the unreliability of the data that the challengers have presented. The unsubstantiated excel files that Mr. Shepherd and Ms. Reardon have offered lack entire data fields from the Georgia voter file. And the information fails to demonstrate how any conclusion about a particular voter was reached. In other words, the information offered creates a reasonable belief *only* of the fact that the challengers are not presenting the whole picture.

Even if the challengers’ information accurately reflected NCOA forms submitted by Cobb County voters — which is unverifiable based on the data they presented — a voter’s change of address may reflect a temporary change that has no effect on the voter’s eligibility in Cobb County.

There are many reasons why a voter might change their address with the Postal Service and still remain an eligible voter in Cobb County. For example, a student who attends college out of state but intends to return home after the completion of his studies may file an NCOA form to receive mail at his school address during the semester. A member of the armed forces may be stationed outside of Georgia, but her permanent home remains in Cobb County, Georgia. In fact, our preliminary examination of the addresses in the challengers’ spreadsheets indicates that the cities to which the NCOA registrants are forwarding their mail are located near military bases; with at least thirty expressly directed to military and diplomatic addresses. Finally, some voters may have temporarily left Cobb County to care for a sick relative—which could occur with some frequency during a global pandemic.

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<sup>1</sup> Lise Olsen, *Texas’ voter purge made repeated errors*, Chron, (Nov. 2, 2012), <https://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php>.

As these examples make clear, the challengers’ unsubstantiated spreadsheets do not establish probable cause that any of the voters they list have moved their *permanent* residence outside of Cobb County.

To the contrary, our preliminary investigation indicates that many of the individuals on the challengers’ lists are active Georgia voters. For example, at least 2,203 voters on challengers’ lists voted *in person* in the 2020 general election. And we estimate that approximately three percent of voters on the challengers’ lists have requested that absentee ballots for the January runoffs be sent to an out-of-state address; in turn, 97 percent have not requested absentee ballots at all or have requested them to be sent to addresses in Georgia.<sup>2</sup> In other words, the *vast* majority of voters on the challengers’ lists — if they vote in the January runoffs — will do so from within Georgia.

### **III. These Mass Challenges Likely Violate the National Voter Registration Act**

If sustained, these mass challenges — premised on unsound data analysis — could violate the National Voter Registration Act (“NVRA”) for at least two reasons.

#### Prior Notice and Waiting Period Requirement

First, Mr. Shepherd and Ms. Reardon’s mass challenges, if sustained, could amount to an unlawful purge of the voter rolls based on a change of residence. Under Section 21-2-230 of the Georgia code, challenges to voter eligibility can result in the removal of voters from the list of electors. *See* Ga. Code §§ 21-2-230(g)–(i), 21-2-229. But Mr. Shepherd and Ms. Reardon cannot avoid the requirements of the NVRA by seeking to compel a systematic voter purge by another name.

The NVRA requires that one of three conditions be satisfied before removing a voter from the rolls due to a change in residence:

- (1) The voter has “request[ed]” to be removed;
- (2) The voter “confirm[ed] in writing” that he has changed residence; or
- (3) The voter failed to respond to a notice *and* failed to vote during the next two federal general election cycles after receiving the notice (“notice-and-waiting”).

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<sup>2</sup> The Brennan Center used the Excel files provided by the challengers to the Cobb County Elections Director, as well as the Georgia voter file dated November 2, 2020 for the preliminary analysis included in this letter. Because Ms. Reardon’s list did not include state voter identification numbers, we matched first, middle, and last names, and addresses from her list to those in the voter file. Using the voter file, voter history files, and absentee files, we were able to then determine each voter’s participation history and whether they requested an absentee ballot for next month’s runoff.

See 52 U.S.C. § 20507(a)(3), (d). None of these conditions have been met here.

The alleged appearance of 18,425 Cobb County voters on the National Change of Address (“NCOA”) Registry — a third-party database — does not constitute a request or a confirmation in writing from any of those voters. As a federal court has confirmed, “the request of the registrant” cannot be “twist[ed]” to encompass “indirect information from a third-party database.” *Common Cause Indiana v. Lawson*, 937 F.3d 944, 961 (7th Cir. 2019). Nor may the County “skip past” the requirement that the voter confirm the move in writing. *Id.* at 962. And there is no plausible argument that the County has provided notice *and* waited two federal election cycles here.

The NVRA expressly recognizes that NCOA information is not sufficient, on its own, to serve as the basis for cancelling a voter’s registration. The statute directs that a state would satisfy the NVRA’s requirements if it relies on “change-of-address information supplied by the Postal Service . . . to identify registrants whose addresses may have changed” **and** then “uses the notice procedure.” 52 U.S.C. § 20507(c)(1)(B). But a state may not rely on NCOA information *without* also providing notice and waiting two federal election cycles.

A federal court in North Carolina, when confronted with mass challenges that resulted in cancellations of voter registrations, found that the counties at issue “violated § 20507(d) of the NVRA in sustaining challenges to voter registrations based on change of residence . . . without complying with the prior notice and waiting period requirement.” *N. Carolina State Conference of NAACP v. Bipartisan Bd. of Elections & Ethics Enf’t*, No. 1:16-CV-1274, 2018 WL 3748172, at \*4 (M.D.N.C. Aug. 7, 2018).

#### 90-Day Prohibition on Systematic Removals

Second, with just 19 days before the January 5, 2021 runoff elections, these mass challenges could also violate the NVRA’s prohibition on the systematic removal of voters from the rolls on the grounds of change of residence within 90 days of a federal election. See 52 U.S.C. § 20507(c)(2)(A) (“A State shall 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 lists of eligible voters”) (emphasis added).

As the Eleventh Circuit has recognized, the NVRA “permits systematic removal programs at any time *except* for the 90 days before an election because that is when the risk of disfranchising eligible voters is the greatest.” *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014) (emphasis in original). A process that could effectively purge up to 18,425 Cobb County voters is indisputably systematic. See *N. Carolina State Conference of NAACP*, No. 1:16-CV-1274, 2018 WL 3748172 (concluding that counties that sustained mass challenges also violated the NVRA’s 90-day provision).

#### **IV. Sustaining These Challenges Without Individualized Hearings Would Violate State and Federal Due Process**

Georgia law and federal due process requirements demand that every challenged voter has the opportunity to answer the grounds of the challenge at an individualized hearing. *See* Ga. Code § 21-2-230(c) (providing a hearing for a challenged voter who seeks to vote in person) & (g) (providing a hearing for a challenged voter who seeks to vote absentee). The fundamental requirement of due process under the U.S. Constitution is that individuals be afforded the opportunity to be heard at a meaningful time and in a meaningful manner prior to being deprived of a governmental benefit. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). And when “the individual’s fundamental right to vote” is at stake, that interest “is therefore entitled to substantial weight.” *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018). Similarly, under Georgia’s constitution, “[d]ue process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Coker v. Moemeka*, 311 Ga. App. 105, 107 (2011) (quotation marks omitted).

In other words, approving Mr. Shepherd and Ms. Reardon’s challenges would require you to hold as many as 18,754 individual hearings to avoid violating due process. The challengers’ requests appear designed to either expose this Board to legal liability or to grind election administration in Cobb County to a halt.

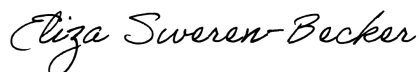
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These are just a few of the ways in which granting these challenge requests could violate federal and state law.

With due respect to the Board, and recognizing your tremendous effort over the last months to ensure safe and secure elections, it would be impossible to undertake the steps needed to avoid these violations by January 15, 2021, the Board’s certification deadline for the January runoffs. *See* Ga. Code § 21-2-493(k).

We strongly urge you to deny the challenges asserted by Mr. Shepherd and Ms. Reardon. We would be happy to speak with you further about the concerns outlined above at your earliest convenience.

Sincerely,



Eliza Sweren-Becker, Counsel



Gowri Ramachandran, Counsel

CC: Janine Eveler, Director, Cobb County Elections & Registration