BRENNAN CENTER FOR JUSTICE

December 21, 2020

Muscogee County Board of Elections & Registration
3111 Citizens Way
Columbus, GA 31907

Dear Members of the Board of Elections & Registration and Director Borden,

On behalf of the Brennan Center for Justice at NYU School of Law, we write to urge you to promptly count any ballots cast by the 4,022 voters who are required to vote provisionally in response to the mass challenge that Ralph Russell, Jr. lodged against their qualifications to vote in the January 5, 2021 run-off elections.

The Board should have dismissed Mr. Russell's challenge, just as Cobb and Gwinnett Counties recently denied similar mass challenges filed there.

Muscogee County could face legal liability under federal and state law on numerous bases if the Board—presented with no further evidence to substantiate Mr. Russell's mass challenge—fails to count the challenged voters' ballots or requires that the voters respond to hearing notices in order to have their ballots counted in the runoff elections. We lay out merely a few of these grounds below as examples.

I. The Information Is Unreliable

Space does not permit us to lay out all the ways in which the data presented by Mr. Russell is unreliable.

Mr. Russell purports to compare Muscogee County's voter rolls to the National Change of Address ("NCOA") Registry to identify voters who allegedly moved out of state. But, critically, Mr. Russell failed to explain how he determined that the voters in the registration database are the same persons appearing in the NCOA Registry. If Mr. Russell compared only the first and last names on the two lists, for example, there would be a high likelihood of false matches. And he failed to provide *both* the voter's Muscogee County address as listed in the state database and the Muscogee 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 he submitted.

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.[1] Texas changed its policy after settling litigation based on the bad purge.

II. The Challenged Voters' Ballots Must be Counted Because The Evidence Is Not Sufficient To Uphold The Challenge

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). "Rumor, suspicion, speculation or conjecture is not sufficient to show probable cause." *Zimmerman v. State*, 131 Ga. App. 793, 794 (1974). The probable threshold is not met precisely because of the unreliability of the data that Mr. Russell presented.

The unsubstantiated excel file that Mr. Russell offered lacks 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 challenger is not presenting the whole picture.

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

There are many reasons why a voter might change their address with the Postal Service and still remain an eligible voter in Muscogee 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. Notably, a number of the addresses in the challenger's spreadsheet are near major universities, such as Auburn University in Alabama. Similarly, a member of the armed forces may be stationed outside of Georgia, but her permanent home remains in Muscogee County, Georgia. Our preliminary examination of the addresses in the challenger's spreadsheet indicate that the cities to which the NCOA registrants are forwarding their mail are located near military bases, with at least seventy-five expressly directed to military or diplomatic addresses. Finally, some voters may have temporarily

[1] 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.

left Muscogee County to care for a sick relative—which could occur with some frequency during a global pandemic.

As these examples make clear, the challenger's unsubstantiated spreadsheet does not even establish probable cause, much less carry his burden of proof to show that any of the voters he lists have moved their *permanent* residence outside of Muscogee County.

Because Mr. Russell's challenge does not satisfy the probable cause threshold, the challenge should have been denied at last week's probable cause hearing. However, having allowed the challenge to proceed, the challenged voters must be permitted to vote (with in-person voters receiving provisional ballots), their challenged ballots must be counted, and Mr. Russell's mass challenge must be rejected. *See* Ga. Code § 21-2-230(i).

Requiring voters to appear at a hearing or present evidence to rebut Mr. Russell's unsubstantiated and inadequately supported claims would place an undue burden on the voting rights of Muscogee County voters. Challenges under Ga. Code § 21-2-230 are subject to the same standards on appeal as those brought under Ga. Code § 21-2-229, which states that "[t]he burden shall be on the elector making the challenge to prove that the person being challenged is not qualified to remain on the list of electors." Provisional ballots should be presumed valid unless there is clear and convincing evidence that a voter was not eligible to vote. Mr. Russell's spreadsheet clearly does not meet this burden, and without more evidence, ballots cast by the challenged voters should be counted without requiring any further action or response on the part of voters.

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

If upheld, 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, this mass challenge, if upheld, 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. Russell 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").

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

The alleged appearance of 4,022 Muscogee County voters on the 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 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).

<u>90-Day Prohibition on Systematic Removals</u>

Second, with just fifteen 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, <u>not later than 90 days prior to the date of a primary or general election for Federal office</u>, 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).

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These are just a few of the ways in which sustaining this mass challenge and disenfranchising voters could violate federal and state law.

We therefore strongly urge you to promptly count, without further action on the part of the voters, any provisional ballots that are cast as a result of Mr. Russell's unfounded challenge, and to find that without more, the evidence he has submitted is not sufficient to remove any voter from the rolls in Muscogee County. We would be happy to speak with you further about the concerns outlined above at your earliest convenience.

Sincerely,

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