

BRENNAN CENTER FOR JUSTICE

September 1, 2022

Dear County Board of Elections & Registration,

We understand that you may have been presented with one or more mass challenges to the eligibility of voters in your county based on incomplete and unreliable data. Activists in Georgia have levied challenges against at least 25,500 voter registrations in no fewer than eight counties this year, over 90% of which have been rejected.¹ On behalf of the Brennan Center for Justice at NYU School of Law,² we write to urge you to deny any similar mass challenges brought by private citizens or groups in your county in advance of the November 8, 2022, elections.³ Failure to do so could expose the 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

For the sake of brevity, this letter does not purport to explain all the ways in which the data presented by the challengers is unreliable. We understand that challengers have generated their lists by one of several tactics, including but not limited to: (1) comparing the county's voter rolls to the National Change of Address Registry ("NCOA") to identify voters who allegedly moved out of state⁴; (2) comparing addresses on Department of Driver Services ("DDS") records with property data provided by county Boards of Tax Assessors ("Tax Assessor list"), the website public.schneidercorp.com, or public maps services;⁵ or (3) knocking on doors and asking residents for their registration information to compare against the county's rolls.⁶ As described below, each of these methods produces lists that are insufficiently reliable as a basis for removing voters from the rolls.

¹ Jim Denery, *Capitol Recap: High Suicide Rate, Rats among Troubles Cited at Atlanta Penitentiary*, Atlanta Journal-Constitution (July 29, 2022), <https://www.ajc.com/politics/capitol-recap-high-suicide-rate-rats-among-troubles-cited-at-atlanta-penitentiary/Y24YOTTZSJGIXAO7OV5CCBZ7CY/>.

² The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice.

³ Co-signatories to this letter endorse its contents but are not represented by the Brennan Center for Justice.

⁴ Karyl Asta, email message to Tori Silas, et al., July 22, 2022.

⁵ *Elections Special Called Meeting 7.20.22*, Earth Channel, July 20, 2022, Video File, accessed August 4, 2022, <https://viewer.earthchannel.com/PlayerController.aspx?PGD=gwinetcoga&eID=969>.

⁶ *Id.*; *Board of Registration and Elections Scheduled Meeting August 11, 2022*, August 11, 2022, Meeting Agenda, accessed August 15, 2022, <https://www.dekalbcountyga.gov/sites/default/files/users/user3597/Board%20Materials%202022-08-11%20Final.pdf>.

Additionally, the source of the voter rolls reportedly used in these comparisons—the website voteref.com—is unreliable.⁷

First, comparing NCOA Registry data with county lists leads to incomplete or incorrect information. As an initial matter, challengers did not provide NCOA forms in their submission, so it is impossible to tell whether the person purportedly living in a different state is a Georgia voter who has moved out of state or is a different person with the same name.⁸ Comparing only the first and last names on two lists, for example, risks false matches. Voter files submitted by challengers in at least some instances do not provide voter birthdays, meaning comparing those files alone will generate false positives.⁹

A 2012 purge in Texas demonstrates how faulty matching between lists disenfranchises voters on a large scale. Texas officials removed 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.¹⁰ Texas changed its policy after settling litigation based on the bad purge.

Second, analyzing voter records against property data is an unreliable approach. In a recent hearing, a challenger purported to compare addresses from DDS records with publicly available property information such as from the Tax Assessor list, qPublic website, or public maps service (such as Google Maps).¹¹ The challenger’s allegation is that public records do not show an address matching the voter’s, so the registration must be fraudulent.¹² Often, however, these are typographical errors in transcribing a voter’s address into the DDS system—something that should be corrected but not a valid justification for removing a voter from the rolls. Removing voters because the address on their driver registration is not visible on the Tax Assessor list, qPublic website, or Google Maps is thus a recipe more for removing eligible voters than for catching improper registrations. Data taken from the qPublic website is especially unreliable as the website homepage contains a disclaimer denouncing any warranty of “accuracy, quality, or completeness.”¹³

⁷ Hunter Riggall, *Cobb Board of Elections Punts on Voter Registration Challenges*, Yahoo! (July 12, 2022), <https://www.yahoo.com/video/cobb-board-elections-punts-voter-223700420.html>.

⁸ Asta email, July 22, 2022.

⁹ *Id.*

¹⁰ Lise Olsen, *Texas’ voter purge made repeated errors*, Chron, (Nov. 2, 2012), www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php.

¹¹ *Elections Special Called Meeting 7.20.22*.

¹² *Id.*

¹³ qPublic.net, Schneider Geospatial, accessed August 31, 2022, <https://qpublic.schneidercorp.com/>.

Third, reliance on the self-reported results of knocking on doors, also known as canvassing, is also a deeply flawed method of verification. There are myriad reasons besides improper registrations why someone may give information that differs from what the canvasser views on the voter rolls. Eligible voters may give incomplete answers because they are intimidated by someone showing up at their door asking personal questions and may even give false information to avoid being tracked by vigilantes.¹⁴ Canvassers are not getting a full and accurate picture as a result.

An investigation of similar door-to-door efforts in Lancaster County, Pennsylvania, earlier this year showed that such surveys—among other problems—overstate the confidence of the answers (such as claiming an irregularity when someone does not know the exact number of registered voters at the address); fail to account for people who moved recently; and are inconsistent in what questions surveyors ask. When questioned by reporters, the CEO of the group conducting the Lancaster County canvassing admitted that their results were “flawed.”¹⁵ That challengers here rely on the same tactics to gather information means that the challenges are predicated on evidence that is incomplete, unverified, and sometimes incorrect.

Finally, challengers reportedly rely on voter rolls published by the Voter Reference Foundation (“VoteRef”) to identify voters who have allegedly moved out of state.¹⁶ Problematically, VoteRef data does not include a voter’s date of birth, which is a critical matching criterion to determine if two registrants are the same person. VoteRef data is also only accurate as of its publication date and does not reflect recent updates.¹⁷

¹⁴ Both voters and elections experts have described door-to-door questioning as an “intimidating” tactic that does not lead to credible data. Miles Parks, *The Election Denial Movement is Now Going Door to Door*, NPR (July 21, 2022), <https://www.npr.org/2022/07/21/1107023599/colorado-canvassing-election-integrity-plan>; the Department of Justice, in a letter to a state legislature, expressed concern that such canvassing would “have a significant intimidating effect on qualified voters that can deter them from seeking to vote in the future.” Pamela S. Karlan, letter to the Honorable Karen Fann, et al., May 5, 2021, accessible at <https://www.justice.gov/crt/case-document/file/1424586/download>.

¹⁵ Carter Walker, *Audit the Vote Gave Us Its Canvassing Data to Check the Results. It Was Riddled with Errors*, Lancaster Online (May 8, 2022), https://lancasteronline.com/news/politics/audit-the-vote-gave-us-its-canvassing-data-to-check-the-results-it-was-riddled/article_8f0a6c2a-cd6e-11ec-9f73-b3e07fd7b64b.html.

¹⁶ Riggall, *Cobb Board of Elections Punts on Voter Registration Challenges*.

¹⁷ VoteRef’s publication of Georgia’s voter rolls is accessible at https://voteref.com/voters?state_name=Georgia. While it is not apparent on what date that data was collected, reporting suggests VoteRef published it before March 7, 2022, and it is not clear if it has been updated since that date. Megan O’Matz, *Billionaire-Backed Group Enlists Trump-Supporting Citizens to Hunt for Voter Fraud Using Discredited Techniques*, ProPublica (March 7, 2022), <https://www.propublica.org/article/voter-ref-foundation>.

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. Ga. Code § 21-2-230(b).¹⁸ 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).

This threshold is not met because of the unreliability of the data that the challengers have presented. They are operating based on matching voter lists with address records, property data, or self-reported voter canvassing, processes demonstrated to generate false positives consistently. They also fail to explain how any conclusion about a particular voter was reached, which is necessary to prove probable cause as to every voter they challenge.

There are many reasons why a voter might change their address on the NCOA form and still remain an eligible voter in the county. For example, a student who attends college out of state but intends to return home after the completion of his studies may elect 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 Georgia. Some voters may have temporarily left the county to care for a sick relative.

Removing voters on incomplete information without fully establishing probable cause has disenfranchised eligible voters in Fulton County this year. For example, this Board reportedly removed Tracy Taylor, an eligible voter who is homeless, from the rolls because she listed her address as a post office.¹⁹ County policy allows for voters experiencing homelessness to submit any address near where they stay and can receive mail.²⁰ Taylor was one of 280 voters removed in a single day—the systematic removal of those voters alone suggests the Board could not have adequately looked into each case nor followed the NVRA-mandated process of checking the NCOA list and sending notices. Taylor’s removal shows that when counties rely on the weak matching criteria used by the challengers, it creates an unacceptable risk to eligible voters of being removed from the pollbooks without the establishment of probable cause.

¹⁸ Ga. Code § 21-2-229 also pertains to voter challenges. It places the burden of proof on the challenger. Ga. Code. § 21-2-229(c). While § 229 does not expressly create a probable cause standard, it is clear that the standard in that section must be at least as stringent as the probable cause standard in § 230. Section 230 contemplates challenges to a single ballot whereas § 229 covers challenges to a voter’s eligibility to register to vote or remain on the voter rolls. As the remedy for a § 229 challenge—denial of registration or removal from the rolls—also denies a voter the right to vote, the standard of proof in § 229 cannot be lower than that in § 230.

¹⁹ Denery, *Capitol Recap: High Suicide Rate, Rats among Troubles Cited at Atlanta Penitentiary*.

²⁰ Stephannie Stokes, *How to Register to Vote in Georgia When You’re Homeless*, WABE (February 24, 2020), <https://www.wabe.org/how-to-register-to-vote-in-georgia-when-youre-homeless/>.

There are also many reasons why a door-to-door survey may produce misleading results. The person answering the door may make a mistake in responding to questions, such as a child not knowing the full legal names of voters living there. The person may not want to give their family members' or their own information out of fear of being approached in their homes. Reliance on voluntary self-reporting creates unrepresentative data as many respondents will not answer the door or the questions. Not only is the data untrustworthy, but officially sanctioning it will encourage future efforts that are likely to result in eligible citizens feeling intimidated and subsequently declining to register or vote out of fear of reprisals.²¹ As such, the resulting information is not trustworthy enough to create probable cause.

As these examples make clear, the unsubstantiated challenges do not establish probable cause that any of the voters they list have moved their *permanent* residence outside of the county. That the challengers target hundreds, if not thousands, of voters at the same time confirms a reliance on surface level data without the necessary investigation to rule out false positives. Accepting challenges on this data is likely to disenfranchise many eligible voters.

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

If sustained, these mass challenges—premised on unsound data analysis—could violate the NVRA for at least two reasons.

Prior Notice and Waiting Period Requirement

First, these mass challenges, if sustained, could amount to an unlawful purge of the voter rolls based on a change of residence. Under § 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 the challengers cannot avoid the requirements of the NVRA, specifically 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.

²¹ *See* Parks, *The Election Denial Movement is Now Going Door to Door*; Karlan, letter to the Honorable Karen Fann, et al., May 5, 2021.

The alleged appearance of county voters on third party databases such as the NCOA Registry or apparent discrepancies between DDS records and the Tax Assessor’s list, the qPublic website, or a public map 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. 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 canceling a voter’s registration. The statute directs that a state satisfies 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. Relying on DDS comparisons creates the same problem because that does not prove that a person has registered with an address where they do not live; the more likely explanation in any case is that there is a typo in the DDS system.

Alleged responses from residents given to private citizen canvassers similarly cannot be seen as a request or written confirmation of change in residence. Challengers allege that the people they spoke with are different people from those on the voter rolls; this means that in many instances, canvassers did not even speak with the person whose registration they contested. Again, removal from the rolls on these grounds requires use of the notice-and-waiting procedure prescribed by the NVRA.

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 Enft*, No. 1:16-CV-1274, 2018 WL 3748172, at *4 (M.D.N.C. Aug. 7, 2018). Sustaining these challenges would likewise result in an NVRA violation.

90-Day Prohibition on Systematic Removals

Second, the upcoming midterm elections will occur on November 8, 2022. The NVRA prohibits 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 effectuate mass removals based on database-matching 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).

The 90-day threshold passed on August 10, 2022, 90 days before the midterms. Any removal of numerous voters from the rolls at this point could violate the NVRA.

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).

Approving these mass challenges would require you to hold hundreds or thousands of 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 the county to a halt.

V. Georgia Law Requires the Board to Hold Swift Individualized Hearings and Does Not Permit the Board to Place Voters into a Provisional Voting Status

Georgia law codifies the steps, timelines, and remedies the Board must follow for voter challenges. These provisions dictate that while the Board may reject a challenge at any time, it must hold an individualized hearing before taking any action against a voter. They do not authorize the Board to put voters into provisional status pending a resolution of the challenge.

Upon the filing of a challenge, the Board must provide notice to the challenged voter within 10 business days and hold a hearing on the challenge within 3 to 10 days of service of the notice. Ga. Code § 21-2-229(b). The law is also clear that at this hearing the burden of proof rests entirely on the person making the challenge, who must “prove that the person being challenged is not qualified to remain on the list of electors.” *Id.* § 21-2-229(c). In other words, the challenger must prove on an individual-by-individual basis that a voter is not qualified to vote before the Board may take an action that affects the voter. For the reasons discussed above, merely checking names against address lists or self-reporting canvassing results do not meet this burden.

On the other hand, the statute does not require the Board to take any steps before *rejecting* a challenge. This distinction is no surprise. Due process demands a hearing before a right—such as the right to vote—is taken away. But no such process is owed where no right is at stake and there is no right to win a challenge to voter eligibility. Indeed, that is why the burden of proof rests with the challenger. If the Board makes an initial determination that the evidence is insufficient to establish conclusively that the challenged voter is not qualified to vote, the Board satisfies its legal obligations. It may reject the challenge immediately in that circumstance. This Board appropriately rejected challenges in a summary fashion in October 2021 when the challengers presented no evidence beyond name checks on the NCOA list.²² The DeKalb County Board rejected challenges to 1,113 names based on purported canvassing results in an August 11, 2022, meeting, noting that the challenger providing nothing more than reports of conversations did not meet the burden.²³

If the Board believes a challenge should proceed, however, the requirements of § 21-2-229 take effect. Importantly, the notice and hearing mandated by the statute must be individualized because, in addition to due process obligations, the statute also says the challenger must meet the burden as to each “person” being challenged. *Id.* § 21-2-229(c). The Board is thus not authorized to restrict the right to vote of dozens, hundreds, or thousands of voters simultaneously in a generalized hearing. The impossibility of holding so many hearings in a matter of weeks is another reason the Board should expeditiously apply its power to reject mass challenges brought on weak grounds.

After an individualized hearing, the Board may decide to uphold or reject a challenge against a voter. If the Board upholds the challenge, then the voter’s name “shall be . . . removed from the list of electors.” *Id.* § 21-2-229(d). The Board must notify the parties

²² *Approved Minutes, Board of Registration and Elections Special Called Meeting-October 21, 2021*, Fulton County, October 21, 2021, Meeting Minutes, accessed August 16, 2022, <https://fultoncountyga.gov/inside-fulton-county/fulton-county-departments/registration-and-elections/registration-and-elections-board/previous-meetings>.

²³ Logan C. Ritchie, *The DeKalb Elections Board Denied the Latest Voter Challenge – Here’s Why*, Decaturish (August 15, 2022), <https://decaturish.com/2022/08/the-dekalb-elections-board-denied-the-latest-voter-challenge-heres-why/>.

of its decision and the parties may appeal the decision to superior court. *Id.* § 21-2-229(d)–(e).

Critically, no component of the election code permits the Board to place voters into a provisional voting or “pending hearing” status. The statute is clear that the Board may not take any action against a voter before a hearing. If the Board is presented with insufficient evidence to sustain a challenge, the voter should remain on the rolls and be permitted to vote a regular ballot. The law does not contemplate half-measures—which harm potentially eligible voters—for a challenger who has not carried their burden.

Moreover, requiring a voter to cast a provisional ballot on the basis of an unsubstantiated challenge impermissibly shifts the burden of proof from the challenger to the voter, who would have to provide evidence of their right to vote for their ballot to count. That is contrary to the plain text of Georgia law, which requires 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.” *Id.* § 21-2-229(c).

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 continuing tremendous efforts to ensure safe and secure elections, it would be impossible to undertake the steps needed to comply with Georgia law, the NVRA, and due process before the November elections. Regardless of when a potential removal takes place, it is essential that it involves individualized inquiries based on reliable and complete information as full compliance with state law and the NVRA’s stringent requirements is mandatory before and after the 90-day period.

We strongly urge you to deny the mass challenges and will be monitoring the situation closely to protect the rights of all Georgia voters. We would be happy to speak with you further about the concerns outlined above at your earliest convenience.

Sincerely,



Andrew B. Garber, Counsel



Gowri Ramachandran, Counsel

Co-signatories

All Voting Is Local Georgia

American Civil Liberties Union of Georgia

Deep Center

Represent Georgia Institute, Inc.

Black Voters Matter Fund

CASA in Action

New Georgia Project

Southern Poverty Law Center