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*at New York University School of Law*



Indiana State Conference NAACP



May 25, 2017

BY U.S. MAIL AND EMAIL

Hon. Connie Lawson  
Indiana Secretary of State  
200 W. Washington Street, Room 201  
Indianapolis, IN 46204

Re: Indiana's Non-Compliance with Section 8 of the National Voter Registration Act

Dear Secretary Lawson,

We write pursuant to 52 U.S.C. § 20510(b) on behalf of the Indiana State Conference of the NAACP, Service Employees International Union and its members, the Brennan Center for Justice at NYU School of Law, and persons similarly situated to notify you that SB 442, which directs Indiana election officials to immediately remove from registration lists voters identified as having registered in another state by an interstate crosscheck program, violates Section 8 of the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. § 20507. This matter takes on particular urgency given that SB 442, which was signed into law on April 13, 2017, is scheduled to take effect on July 1, 2017.

The NVRA establishes clear requirements states must meet before removing a voter from the registration rolls on the grounds that he or she has moved from one jurisdiction to another. Before such an individual can be removed from the registration rolls, a voter who has not confirmed the move must (i) receive a formal notice, in writing, that the voter’s address needs to be confirmed; and (ii) be given the opportunity to respond to the notice or demonstrate continued residency by voting. Read literally, SB 442 violates these requirements by, among other things, using the Kansas-administered Interstate Voter Registration Crosscheck (“Crosscheck”) to identify voters who allegedly have moved and registered in another state and removing them without the notice, response opportunity, and waiting period required by federal law. In addition, the NVRA requires that the mechanism used to identify voters who are ineligible must be reasonable, uniform and nondiscriminatory.

As Indiana's chief election official, you are responsible for the State's compliance with the NVRA. We seek confirmation that you will take any and all steps necessary to ensure that election officials are complying with all legally required protections in connection with the selection and removal of voters from Indiana's voter rolls. As always, we are ready to work with your office to enable Indiana to conduct responsible voter list maintenance practices and protect the rights of its voters.

### **The NVRA Protects Voters from Wrongful Registration Cancellation**

The NVRA, also known as "motor-voter," was enacted in 1993 to improve voter registration and list maintenance procedures nationwide. Section 8 of the law protects eligible voters against wrongful removal from the voter rolls in two pertinent ways: *First*, voters believed to have moved must be given notice and a response period before cancellation can take place. *Second*, list maintenance programs must be reasonable, uniform, and non-discriminatory.

#### **A. Notice and Waiting Period Must be Provided**

Section 8 of the NVRA provides specific protections against immediate removal from the rolls where a voter has not directly confirmed the change of address. The NVRA expressly mandates that the following procedure must be used to confirm a voter's address before removal from the rolls:

[a] postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration . . . . If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.<sup>1</sup>

Election officials may not subsequently remove a voter based on change of address unless the voter either confirms the move or:

(i) has failed to respond to [an address confirmation] notice; and (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's

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<sup>1</sup> 52 U.S.C. § 20507(d)(2).

address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.<sup>2</sup>

**B. List Maintenance Must be Reasonable, Uniform, and Nondiscriminatory**

The NVRA instructs states to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters.”<sup>3</sup> NVRA further mandates that any such program “shall be uniform [and] nondiscriminatory.”<sup>4</sup>

**As Enacted, SB 442 Will Result in Multiple NVRA Violations**

As amended by SB 442, the Indiana Code will now deny voters the notice, response opportunity and waiting period required by federal law, and expose them to removal based on a list maintenance procedure that is not reasonable, uniform, or nondiscriminatory.

**A. SB 442 Does Not Guarantee Notice, Response Opportunity and a Waiting Period Before Removal**

SB 442 provides for the immediate removal of a voter based on change of residence, in violation of Section 8 of the NVRA. SB 442 sets forth that Indiana “shall provide data from the statewide voter registration list without cost to the Kansas Secretary of State to permit the comparison of voter registration data in [Crosscheck].”<sup>5</sup> Following receipt of this information, “if the first name, last name, and date of birth of the Indiana voter is identical to the first name, last name, and date of birth of the voter registered in the other state,” subject only to the county voter registration office reviewing the information provided by the state, “the county voter registration office shall cancel the voter registration of that voter.”<sup>6</sup>

In violation of NVRA, SB 442 thus expressly fails to require county election officials to send any confirmation or notice to the voter, await any response, or wait two federal elections before removal.<sup>7</sup>

**B. Indiana’s Use of Crosscheck is Not Reasonable, Uniform, or Nondiscriminatory**

Various sister states’ experiences with Crosscheck establish that it does not provide a reliable method for identifying voters who have moved and that even where such a voter is properly identified, the name and date of birth fields that establish a match by Crosscheck are insufficient identifiers upon which to base voter roll removal.

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<sup>2</sup> 52 U.S.C. § 20507(d).

<sup>3</sup> 52 U.S.C. § 20507(a)(4).

<sup>4</sup> 52 U.S.C. § 20507(b)(1).

<sup>5</sup> See SB 442 § 15(d).

<sup>6</sup> SB 442 § 15(d)-(e).

<sup>7</sup> Prior to SB 442, the Indiana Code provided for immediate removal only if the individual authorized the cancellation of any previous registration when they registered in another state. Otherwise, the statute provided that election officials were to send an “address confirmation card” to the voter.

Indeed, Crosscheck has yielded significant numbers of wrongful removals. By way of example, in Virginia, prior to a statewide 2013 election, the state instructed county officials to review and cancel approximately 57,000 voter records based on a match using Crosscheck. Local officials soon discovered error rates as high as 17 percent. In some cases, Crosscheck identified individuals as having moved from Virginia to another state, when in fact the opposite was true. Nevertheless, nearly 40,000 voters were ultimately removed.<sup>8</sup> These reliability issues have caused a number of states to evaluate their participation in Crosscheck. Florida, Oregon, and Washington each withdrew their participation in recent years. A spokesperson for the Oregon Secretary of State confirmed that they did so “because the data [they] received was unreliable.”<sup>9</sup> It is also notable that studies suggest that Crosscheck may disproportionately flag minority voters.<sup>10</sup>

Moreover, the match provided by Crosscheck is only based on the use of first name, last name, and date of birth. These are insufficient data fields to avoid a significant number of “false positive” voters being identified improperly for removal.<sup>11</sup> As detailed in a 2012 Brennan Center report, “in a group of 180 [people], it is more likely than not that two will share the same birth date, including year of birth.”<sup>12</sup> In 2012, Florida Governor Rick Scott reported that he was, himself, previously incorrectly purged from the voter rolls because an individual with the same first name, last name, and date of birth died.<sup>13</sup>

SB 442 does not require state election officials to investigate whether the match established through the use of Crosscheck is accurate; instead, they are directed to forward information to local election officials based on a name and date-of-birth match. Such usage violates the NVRA’s prohibition against arbitrary, unreasonable and discriminatory removals.

### **Immediate Steps are Needed to Avoid Violations of the NVRA**

We welcome the opportunity to work with your office to develop a plan to bring resolution this issue and ensure the state meets its obligations under the NVRA prior to SB 442’s effective date of July 1, 2017. To ensure that Indiana is complying with the NVRA, we seek:

- 1) A written representation that neither state nor local election administrators will remove voters based on Crosscheck unless they have confirmed their change of

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<sup>8</sup> See Jonathan Brater, Brennan Center for Justice, *Virginia Offers Lessons for Voter List Maintenance*, November 25, 2013, <https://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance>.

<sup>9</sup> Jon Greenberg & Amy Sherman, *Florida no longer part of controversial national voter project*, MIAMI HERALD, Apr. 11, 2014, <http://miamiherald.typepad.com/nakedpolitics/2014/04/florida-no-longer-part-of-controversial-national-voter-data-project.html>.

<sup>10</sup> Greg Palast, *The GOP’s Stealth War on Voters*, ROLLING STONE, Aug. 24, 2016, <http://www.rollingstone.com/politics/features/the-gops-stealth-war-against-voters-w435890>.

<sup>11</sup> See Myrna Pérez, BRENNAN CENTER FOR JUSTICE, VOTER PURGES 21-24, <http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf>.

<sup>12</sup> *Id.* at 23. Indeed, Kansas Secretary of State Kris Kobach, whose office administers Crosscheck, told a journalist that “federal law prohibits” removing a voter on the sole basis of a database match. Greg Palast, *The GOP’s Stealth War on Voters*, ROLLING STONE, Aug. 24, 2016, <http://www.rollingstone.com/politics/features/the-gops-stealth-war-against-voters-w435890>.

<sup>13</sup> Lloyd Dunkelberger, *Elections officials told Rick Scott he was dead and couldn’t vote*, June 14, 2012, <http://politics.heraldtribune.com/2012/06/14/scott-mistakenly-declared-dead-on-voting-rolls/>.

- residence in writing or have failed to respond to an address confirmation notice and failed to vote in two consecutive federal elections following the mailing of the notice;
- 2) Any and all documents explaining the protocols or processes state and local election officials were required to undertake before removing a voter believed to have moved prior to the enactment of SB 442, and the way in which those protocols were modified after the enactment of SB 442;
  - 3) An audit of Crosscheck to assess the reliability and usefulness of the program's data for identifying and removing potentially ineligible voters;
  - 4) Any and all documents or instructions provided to local election officials by the Secretary of State regarding Crosscheck and the use of Crosscheck data;
  - 5) Records and communications regarding:
    - a. Indiana's participation in Crosscheck, including the memorandum of understanding between Indiana and Kansas, and any subsequent revisions;
    - b. Implementation of SB 442.

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This letter serves as notification pursuant to 52 U.S.C. § 20510(b) that Indiana is in violation of Section 8 of the National Voter Registration Act. Thank you for your attention to this matter. Please contact Myrna Pérez at (646) 292-8329 or [myrna.perez@nyu.edu](mailto:myrna.perez@nyu.edu) for further discussion.

Sincerely,

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