

July 19, 2018

BY U.S. MAIL AND EMAIL

Hon. John H. Merrill
Alabama Secretary of State
Executive Division
State Capitol Building – Suite S-105
Montgomery, Alabama 36130
Email: John.Merrill@sos.alabama.gov

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

Dear Secretary Merrill,

We write pursuant to 52 U.S.C. § 20510(b) on behalf of the League of Women Voters of Alabama, the Alabama State Conference of the NAACP, and the Brennan Center for Justice at NYU School of Law to notify you that Alabama's policy, which instructs local 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.

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. Alabama's policy 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 Alabama'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 Alabama's voter rolls. We emphasize that we are ready to work with your office to support Alabama's efforts 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.¹

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 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.²

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

¹ 52 U.S.C. § 20507(d)(2).

² 52 U.S.C. § 20507(d).

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.”³ NVRA further mandates that any such program “shall be uniform [and] nondiscriminatory.”⁴

Alabama’s Policy Results in Multiple NVRA Violations

An email from Clay Helms, Supervisor of Voter Registration and Assistant Director of Elections in the Office of the Secretary of State, to County Registrars, dated December 1, 2016, and entitled “Interstate Crosscheck” (Hereinafter entitled “Interstate Crosscheck Instructions”), obtained through a public records request, purports to describe the process by which the Alabama Secretary of State’s Office sends Crosscheck data to county election officials, who in turn use the information to remove certain voters identified as ineligible by the Crosscheck program from the registration rolls. The process described in this email violates the NVRA by failing to provide voters the notice, response opportunity, and waiting period required by federal law, and exposes them to removal based on a list maintenance procedure that is not reasonable, uniform, or nondiscriminatory.

A. The Interstate Crosscheck Instructions Do Not Guarantee Notice, Response Opportunity and a Waiting Period Before Removal

The Interstate Crosscheck Instructions provide for the immediate removal of a voter based on change of residence, in violation of Section 8 of the NVRA. The instructions state, “our office has received information [from Crosscheck] that ... individuals ... have registered to vote in another state more recently than having registered in your county in Alabama. Please review the names specific to your county and take the action you would normally take as if you received notice directly from another state.”⁵ Alabama law separately provides that county boards of registrars who receive notice that an individual has registered in another jurisdiction “remove forthwith the name of such person from the list of qualified electors of the county of previous registration.”⁶ The Interstate Crosscheck Instructions make no mention of the NVRA and do not require county election officials to send any confirmation or notice to the voter, await any response, or wait two federal elections before removal.

B. Alabama’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.

³ 52 U.S.C. § 20507(a)(4).

⁴ 52 U.S.C. § 20507(b)(1).

⁵ See Clay Helms (Supervisor of Voter Registration, Office of Alabama Secretary of State), email to local registrars, December 1, 2016, attached.

⁶ Code of Ala. § 17-4-5. This provision provides for immediate removal from the registration list when a county receives information of registration from another county. It does not apply expressly to notification received from another state; however, given that the Interstate Crosscheck Instructions do not invoke the NVRA, we assume the state is not requiring counties to follow the NVRA notice and waiting period requirements at this time.

Indeed, Crosscheck has yielded significant numbers of wrongful removals. By way of example, in Virginia, prior to a statewide 2013 election, removed nearly 39,000 voter records using Crosscheck. The state instructed county officials to review and cancel 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.⁷ A 2017 study found that if applied nationwide, Crosscheck would “impede 300 legal votes for every double vote prevented.”⁸

These reliability issues have caused a number of states to evaluate their participation in Crosscheck. In recent years, at least eight states have left the program altogether and no longer share data with or receive data from Crosscheck, and seven more have stopped using it for voter list maintenance.⁹ A spokesperson for the Oregon Secretary of State confirmed that they did so “because the data [they] received was unreliable.”¹⁰ It is also notable that Crosscheck may disproportionately flag minority voters.¹¹

The Interstate Crosscheck Instructions do not require election officials to investigate whether the match established through the use of Crosscheck is accurate; instead, they are instructed to cancel voters if Crosscheck alone indicates the data matches. Such usage violates the NVRA’s prohibition against arbitrary, unreasonable and discriminatory removals.

C. A Federal Court Found Indiana’s Similar Practice Likely Violates the NVRA

A federal court recently issued a preliminary injunction against Indiana Senate Bill 442, a state statute providing for use of Crosscheck similar to Alabama’s practice. S.B. 442 provides for immediate removal of voters based on a Crosscheck match, as do the Alabama Interstate Crosscheck Instructions. The Court found that, among other things, the Indiana law likely violates the NVRA because it “removes the NVRA’s procedural safeguard required in particular cases of providing notice and a waiting period.”¹²

⁷ See Jim Nolan, “Chesterfield Registrar Delays Purge of Voter Rolls,” *Richmond Times-Dispatch*, October 9, 2013, http://www.richmond.com/news/local/chesterfield/chesterfield-registrar-delays-purge-of-voter-rolls/article_162e36b5-0be7-5dc8-af9f-48876a167b43.html; 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>.

⁸ Sharad Goel et al., “One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections” (working paper, Stanford University et al., 2017), 3, 26, <https://scholar.harvard.edu/files/morse/files/1p1v.pdf>.

⁹ See Aaron Sankin, “Crosscheck is ineffective and insecure. But states aren’t withdrawing,” *Reveal*, March 26, 2018, <https://www.revealnews.org/blog/crosscheck-is-ineffective-and-insecure-but-states-arent-withdrawing/>.

¹⁰ 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>.

¹¹ Non-White people are more likely to have common shared names. For instance, 16.3 percent of Hispanic people and 13 percent of Black people have one of the 10 most common surnames, compared to 4.5 percent of White people. Joshua Comenetz, “Frequently Occurring Surnames in the 2010 Census,” U.S. Census Bureau, October 2016, available at <https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf>.

¹² Order Granting Plaintiffs’ Motion for Preliminary Injunction, *Indiana NAACP et al. v. Lawson et al.*, No. 1:17-dv-02897-TWP-MPB (June 8, 2018), available at https://www.brennancenter.org/sites/default/files/legal-work/2018-06-18_Order_Granteeing_Plaintiffs%27_Motion_for_Preliminary_Injunction.PDF.

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 to ensure the state meets its obligations under the NVRA. To ensure that Alabama 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 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) An audit of Crosscheck to assess the reliability and usefulness of the program's data for identifying and removing potentially ineligible voters;
- 3) Any and all documents or instructions provided to local election officials by the Secretary of State regarding Crosscheck and the use of Crosscheck data;
- 4) Records and communications regarding:
 - a. Alabama's participation in Crosscheck, including the memorandum of understanding between Alabama and Kansas, and any subsequent revisions;
 - b. Alabama's use of the Crosscheck program to identify and remove voters from registration rolls, including the list of registered voters removed from the voter registration list through the use of the Crosscheck program.

This letter serves as notification pursuant to 52 U.S.C. § 20510(b) that Alabama is in violation of Section 8 of the National Voter Registration Act. Thank you for your attention to this matter. Please contact Jonathan Brater at (646) 292-8373 or jonathan.brater@nyu.edu for further discussion.

Sincerely,

Jonathan Brater, Counsel
Myrna Pérez, Director
Voting Rights and Elections Project
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Barbara Caddell

President, League of Women Voters of Alabama

Benard Simelton
President, Alabama State Conference of the NAACP

Cc:

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Montgomery, Alabama 36130

John C. Bennett, Deputy Chief of Staff / Press Secretary
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Attachment: Clay Helms (Supervisor of Voter Registration, Office of Alabama Secretary of State), email to local registrars, December 1, 2016.

Beal, Brent

From: Helms, Clay
Sent: Friday, April 27, 2018 2:34 PM
To: Beal, Brent
Subject: Interstate Crosscheck

From: Helms, Clay
Sent: Thursday, December 1, 2016 3:28:18 PM
To: BOR -- Greene
Subject: Interstate Crosscheck

Dear Registrars,

Pursuant to Section 17-4-38.1 of the Ala. Code, and without limitation, the State of Alabama, by and through the Secretary of State's Office, has an Agreement to strengthen voter roll integrity with the Chief State Election Officials of the States of Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia and West Virginia.

Based on this Agreement, our Office has received information that the individuals listed in the attachment have registered to vote in another state more recently than having registered in your county in Alabama. Please review the names specific to your county and take the action you would normally take as if you received notice directly from another state. Please begin working on the list for your county as soon as possible.

Thank you,

Clay Helms
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