

BRENNAN
CENTER
FOR JUSTICE

at New York University School of Law



July 19, 2018

BY U.S. MAIL AND EMAIL

Hon. Matthew Dunlap
Maine Secretary of State
148 State House Station
Augusta, Maine 04333-0148
Email: sos.office@maine.gov

Re: Maine's Voter List Maintenance and Compliance with Section 8 of the National Voter Registration Act

Dear Secretary Dunlap,

Maine has a long legacy of leadership and best practices when it comes to the conduct of elections. We know you are proud of that legacy, and we share your commitment to voting practices that meet the needs of voters and legal requirements.

We write today pursuant to 52 U.S.C. § 20510(b) on behalf of the League of Women Voters of Maine and the Brennan Center for Justice at NYU School of Law to notify you that Maine's procedures for removing from registration lists voters identified as having registered in another state by an interstate crosscheck program are in violation of 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. While Maine is demonstrably taking extra measures to verify records identified by the Kansas-administered Interstate Voter Registration Crosscheck ("Crosscheck"), the state's procedures call for removing registrations without the notice, response opportunity, and waiting period required by federal law.

We know that you, as Maine's chief election official, are committed to following best practices and protecting the rights of voters. 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 Maine’s voter rolls. We emphasize that we are ready to work with your office to support Maine’s efforts to conduct responsible voter list maintenance practices.

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.

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

¹ 52 U.S.C. § 20507(d)(2).

² 52 U.S.C. § 20507(d).

Maine’s Policy Results in an NVRA Violation

A document entitled, “2017 Maine Crosscheck Data Review Plan,” (Hereafter “Review Plan”) obtained through a public records request, purports to describe the process by which the Maine Secretary of State’s office uses Crosscheck data to identify and remove from the rolls voters found to have duplicate registrations. The process described in this document violates the NVRA by failing to provide voters the notice, response opportunity and waiting period required by federal law.

The Review Plan provides for the removal of a voter based on change of residence, in violation of Section 8 of the NVRA. The plan sets forth that if Crosscheck indicates that certain voter information matches between state records, “if the matched data shows that the Maine voter record is older than the other state’s voting record, then the Maine record will be cancelled. No notice to the voter is required.”³

In violation of NVRA, the Review Plan fails to require election officials to send any confirmation or notice to the voter, await any response, or wait two federal elections before removal. Because we know that Crosscheck data is sometimes inaccurate, Maine’s procedure could result in the removal of a voters who are not actually ineligible—for example voters who moved to Maine, rather than away from Maine. A federal court recently issued a preliminary injunction against Indiana Senate Bill 442, a state statute providing for use of Crosscheck similar to that described in the Maine Review Plan.⁴

Using Crosscheck in a manner that could result in the removal of eligible voters without adequate notice puts Maine at risk of conducting list maintenance in a manner that is not reasonable, uniform, or nondiscriminatory.⁵ Indeed, other states have encountered high error rates when using Crosscheck, including Virginia, which found error rates as high as 17 percent.⁶

Steps Needed to Avoid Violation of the NVRA

We commend Maine’s efforts to maintain accurate voter registration rolls. Because of its data security and integrity issues, we have reservations about the continued use of Crosscheck for this purpose, and we would encourage you to explore other tools. 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. To ensure that Maine is complying with the NVRA, we seek:

³ See 2017 Maine Crosscheck Data Review Plan, attached.

⁴ 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.

⁵ 52 U.S.C. §§ 20507(a)(4), (b)(1).

⁶ 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>.

- 1) A written representation that neither state nor local election administrators will remove voters based on Crosscheck unless the voter has confirmed their change of residence in writing or 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 documents or instructions, aside from the 2017 Maine Crosscheck Data Review Plan, provided to local election officials regarding the use of Crosscheck data;
- 3) Records and communications regarding:
 - a. Maine's participation in Crosscheck, including the memorandum of understanding between Maine and Kansas, and any subsequent revisions;
 - b. Maine's experience with and use of the Crosscheck program to identify and remove voters from registration rolls, including the list of voters who were ultimately removed from the voter rolls after initially being identified by Crosscheck, as well as a list of voters identified as having voted in multiple states.

This letter serves as notification pursuant to 52 U.S.C. § 20510(b) that Maine 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,

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Jill Ward, President
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Cc:

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Attachment: 2017 Maine Crosscheck Data Review Plan

2017 Maine Crosscheck Data Review Plan

FN = first name

LN = last name

SSN = social security number; SSN4 = last four digits of social security number

DOB = date of birth

VPH = voter participation history

- Data files received from Crosscheck were parsed into 3 batches by SOS IS:
 - (1) **SSN4 definite match** (i.e., FN, LN, DOB and Last 4 SSN digits all match, meaning the records are a definite match and are for the same voters);
 - (2) **Need review to determine match** (i.e., FN, LN, DOB match, but there is neither a definite match nor a definite non-match of SSN4, because either or both state records do not have the SSN4; other voter record information will have to be reviewed in order to determine a match); and
 - (3) **SSN4 non-match** (i.e., FN, LN, DOB match, but the SSN4s are different, meaning the records are NOT a match and are for different voters)

- Order of priority for review and resolution:
 - (1) **SSN4 definite match** - these matched records between 2 state election office databases are treated the same as an individual notice from a state or local election official in one state to a state official or local jurisdiction in another state about a specific voter being registered in that state/local jurisdiction. If the matched data shows that the Maine voter record is older than the other state's voting record, then the Maine record will be cancelled. No notice to the voter is required
 - (2) **Need review to determine match** - the data provided in Crosscheck may show different middle names or middle initials that can be used to identify the record pair as a non-match, or the 2 states may have to share additional record information such as signatures or addresses of prior registration from the voter record files in order to determine whether the records are a match or a non-match. Once a match is determined, then the record data will be reviewed to decide which record is older and that record will be cancelled (by Maine or the other state as appropriate)
 - (3) **SSN4 non-match** - these pairs of voter records were verified to contain only non-matches of SSN4 - no further work needs to be done with these files

- Process for review and resolution for matched records:
 - **Step 1:** Data in Batches (1) and (2) were further parsed into separate files based on 11/8/16 voting history, as follows:
 - Y/Y (potentially voted in both states)
 - N/Y (didn't vote in Maine, voted in other state)
 - Y/N (voted in Maine, didn't vote in other state)
 - N/N (didn't vote in either state)
 - **Step 2A:** Senior staff reviews Batch 1 Y/Y matches to determine whether the Maine VPH (Voter Participation History) was assigned in error, by obtaining copies of Incoming Voter List pages, voter registration applications and absentee ballot materials, as applicable from CVR or the voter's municipality; if VPH cannot be deemed an error by a review of the records, the potential match will be submitted to the AG's Office for investigation; final determinations will be kept confidential until conclusion of investigation and prosecution if dual voting is confirmed; if the investigation shows the person did not vote in Maine, the VPH will be removed from the record, and will be documented manually on the Crosscheck list

- **Step 2B:** Senior staff reviews Batch 2 Y/Y match list after Step 2A is completed and:
 - eliminates non-matches based on different middle names or middle initials; then contacts the other states to compare signatures and other registration data to eliminate additional non-matches; results will be documented manually on the Crosscheck list
 - reviews any remaining possible matches as per Step 2A
 - **Step 3A:** Election staff reviews Batch 1 N/Y records to verify that the Maine record activity is older than that of the other state (this may occur concurrently with Steps 2A and B):
 - If yes, then the Maine record is marked in CVR as cancelled, and documented manually on the Crosscheck list
 - If no, then we will send a notification to the other state that their record is older and they can cancel their record (the Maine record will remain as an Active record)
 - **Step 3B:** After completing Step 3A, election staff reviews Batch 1 N/N list to determine whether the Maine record activity is older than that of the other state:
 - If yes, then the Maine record is marked in CVR as cancelled, and documented manually on the Crosscheck list
 - If no, then we will send a notification to the other state that their record is older and they can cancel their record (the Maine record will remain as an Active record)
 - **Step 3C:** After completing Step 3B, election staff reviews Batch 1 Y/N list to confirm whether the other state record activity is older than that of Maine:
 - If yes, then we will send a notification to the other state that their record is older and they can cancel their record (our record will remain as an Active record)
 - If no, then the Maine record is marked in CVR as cancelled, and documented manually on the Crosscheck list
 - **Step 4:** After completing Step 3C, if time permits, election staff will review possible matches on the 3 remaining Batch 2 lists (N/Y, N/N, Y/N), as per Step 2B (to determine the actual matches) and then as per Steps 3A through 3C.
- Create final report of Crosscheck matches and cancellation statistics, as well as time spent on Crosscheck project.