

December 21, 2020



VIA EMAIL

To Georgia County Election Boards:

Thank you for the ongoing work you're doing toward our shared goal of carrying out the Senate runoff election in a way that complies with Georgia law and promotes faith in the outcome. Our organization, True the Vote, has worked in all 159 counties in the state to ensure that every legal vote counts and every illegal vote is discovered. Using databases including the U.S. Postal Service's National Change of Address file, we have assisted Georgia citizens with voter challenges in cases where there is probable cause to believe that the person has moved out of the county where they are registered.

We are aware that the ACLU and the Perkins-Coie law firm have provided several counties with misleading information about the voter challenges, and we want to correct the record, as well as assure that we will support the legal efforts of any county that follows Georgia law by reviewing the status of challenged voters.

Attached is a letter we requested from our General Counsel, Jim Bopp, with The Bopp Law Firm, to more fully detail the legal grounds support the elector challenges.

As our attorneys confirm through this correspondence, the elector challenges apply solely to eligibility to vote in the Jan. 5 runoff election. This process will not result in any voters being removed from the rolls, and will not deny the right to vote of any legal voter. A challenged voter can vote a challenged ballot, with that vote counted once eligibility is confirmed.

The challenges provided used the National Change of Address database, and were further refined through the use of other commercially available sources, to identify records that indicated a permanent change in residence. The challenges do demonstrate probable cause that a voter has moved away from the address at which they are registered to vote. Georgia hasn't crosschecked its rolls with the National Change of Address database since 2019. Given estimates that 11 percent of Americans move every year, there's high probably that many people are registered in Georgia at addresses where they no longer live. These elector challenges are a method provided for under Georgia to protect the integrity of the voter rolls.

It's prudent to carry out these challenges now. The failure of county election boards to comply with Georgia law and accept the challenges before them risks invalidating the runoff election, which would require another. We look forward to working with you to complete a successful election where every Georgian can have faith in the system and believe the outcome reflects the will of legal voters.

For America -

A handwritten signature in black ink, appearing to read 'C. Engelbrecht', written over a light blue horizontal line.

Catherine Engelbrecht  
True the Vote, Founder

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December 21, 2020

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Re: Challenge of elector eligibility to  
vote in Georgia, pursuant to O.C.G.A.  
§ 21-2-230

Dear Ms. Engelbrecht,

You have asked for advise regarding the recent elector challenges of the right to vote of certain electors in Georgia, based on True the Vote's recent discoveries regarding registered individuals, who may attempt to vote in the upcoming run-off election, who no longer live in either (1) their registered county or (2) in the state of Georgia.

As explained below, these challenges do not result in an automatic disqualification of the challenged elector, but triggers a statutory procedure where the county election board must take further steps to verify the challenged elector's current eligibility to vote in the run-off election.

***Challenges to Electors Voting***<sup>1</sup>

Under Georgia law:

[a]ny elector of the county or municipality may challenge the right of any other elector of the county or municipality, whose name appears on the list of electors, to vote in an election. Such challenge shall be in writing and specify distinctly the grounds of such challenge. Such challenge may be made at any time prior to the

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<sup>1</sup> Georgia law permits two distinctly different challenges to the ability of an ineligible elector to vote. First, the presence of the elector on the list of electors (called under federal law "voter registration lists") can be challenged under O.C.G.A. § 21-2-229. The current challenges are not brought under this section since the challenges do not question the challenged electors presence on the list of electors. Second, the eligibility of a registered elector to vote in a particular election can be challenged under O.C.G.A. § 21-2-230. The current challenges are brought under this section and only question the challenged elector's eligibility to vote in the run-off election and does not seek to have the elector removed from the registration list, which, as noted, is a separate and different challenge under Georgia law.

elector whose right to vote is being challenged voting at the elector's polling place or, if such elector cast an absentee ballot, prior to 5:00 P.M. on the day before the election; provided, however, that challenges to persons voting by absentee ballot in person at the office of the registrars or the absentee ballot clerk shall be made prior to such person's voting.

O.C.G.A. § 21-2-230(a).

In partnership with Georgia voters, True the Vote has filed 364,541 challenges in all of Georgia's 159 counties on December 18, 2020. In doing so, you complied with the requirements for a valid challenge of an electors right to vote in the run-off election.

***Required Board Response***

Georgia law requires that after the filing of such a challenge:

the board of registrars shall immediately consider such challenge and determine whether probable cause exists to sustain such challenge. If the registrars do not find probable cause, the challenge shall be denied. If the registrars find probable cause, the registrars shall notify the poll officers of the challenged elector's precinct or, if the challenged elector voted by absentee ballot, notify the poll officers at the absentee ballot precinct and, if practical, notify the challenged elector and afford such elector an opportunity to answer.

O.C.G.A. § 21-2-230(b).

These challenges are based on detailed research identifying 124,114 registered voters, who no longer reside in the county of record, and 240,427 voters, who no longer reside in the state of Georgia, according to the United States Postal Service National Change of Address ("NCOA") and other supporting commercial databases, and your research was performed uniformly across all counties, without regard to any demographic or voting history. As a result, probable cause exists here for such challenges and each county election board is required to fulfill their duties as detailed in O.C.G.A. § 21-2-230(c)-(I), to determine whether each challenged elector is currently eligible to vote in the run-off election. These required activities must be done before their votes are counted.<sup>2</sup>

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<sup>2</sup> Even when a challenge is successful under Section 230 and a challenged elector is deemed ineligible to vote in the run-off election, the elector will remain on the voter registration list and thereby eligible to vote in future elections.

***State Law Requiring Board Action Does Not Violate Federal Law***

It has been alleged by Democrat lawyers and their liberal allies, including Marc Elias and the ACLU Georgia,<sup>3</sup> that Section 230 violates federal law which regulates voter registration lists, the National Voter Registration Act (“NVRA”). This is not true.

First, O.C.G.A. § 21-2-230 governs challenging an elector’s right to vote in an particular election, not the elector’s eligibility to be on the voter registration list. And any remedy under Section 230 involves preventing an ineligible voter from voting in a specific election, here the run-off election, and does not involve the removal of a voter from the voter registration rolls or the cancellation of an individual’s voter registration.<sup>4</sup> *See Cook v. Board of Registrars of Randolph County*, 727 S.E.2d 478, 482 (2012) (making clear that while O.C.G.A. § 21-2-229 permits an elector “to challenge a person’s right to register to vote or to remain on the list of electors,” O.C.G.A. § 21-2-230 “grants an elector . . . the authority to challenge another elector’s right to vote in a particular election.”).

NVRA contains a provision which requires that “[a] State . . . 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,” 52 U.S.C.A. § 20507(c)(2)(A), and lays out specific guidance regarding the process for removing names from the voter rolls, *id.* at § 20507(d). However, these provisions are not at issue here since the Section 230 procedure does not involve “remov[ing] the names of ineligible voters from the official lists of eligible voters,” but, instead, questions their right to vote in a particular election.

Indeed, nothing in O.C.G.A. § 21-2-230 at all involves removal of any voter from the voter registration rolls, nor does it seek to cancel the registration of any challenged elector. As a result, none of the prohibitions or requirements under the NVRA are triggered here.

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<sup>3</sup> *See* Letter from Marc Elias to Kristi L. Royston (Dec. 18, 2020); Sean Young, ACLU Georgia, *Re: Mass Challenges to Voter Eligibility* (Dec. 18, 2020) (“*Mass Challenges*”).

<sup>4</sup> A separate code section governs these types of actions. *See* O.C.G.A. § 21-2-229 (providing that “[a]ny elector of a county or municipality may challenge the qualifications of any person applying to register to vote in the county or municipality and may challenge the qualifications of any elector of the county or municipality whose name appears on the list of electors[.]” “[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[.]” and that “[i]f the registrars uphold the challenge, the person’s application for registration shall be rejected or the person’s name removed from the list of electors, as appropriate.”).

Second, the arguments by Marc Elias and the ACLU Georgia involve provisions and challenges not at issue here and are thus unrelated.<sup>5</sup> For example, Mr. Elias argues that federal law prohibits Georgia from removing voters from the registration lists unless certain precautions are observed. However, as noted above, the challenges at issue do *not* seek to remove any voter from the voter registration rolls. So this is irrelevant.

Additionally, the cases cited involve provisions, laws, and facts completely unrelated to the challenges here, or failed to grant the relief alleged. *See, e.g., Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1339 (11th Cir. 2014) (finding that the Florida program was barred by the NVRA because it “was an attempt to systematically remove names from the voter rolls in violation of the 90 Day Provision”); *N. Carolina State Conference of NAACP v. Bipartisan Bd. of Elections & Ethics Enf’t*, No. 1:16CV1274, 2018 WL 3748172, at \*1 (M.D.N.C. Aug. 7, 2018) (enjoining the state from cancelling voter registrations within 90 days of the general election); *Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077 (D. Mont. 2008), as amended (Oct. 10, 2008) (refusing to grant a temporary restraining order after the Montana Democratic Party brought action arising out of roughly 6,000 challenges). None of the cited cases preclude the type of challenges at issue here—i.e. whether an elector is eligible to vote in a particular election.

As shown, county election board action is *required* under state law and federal law regulating voter registration lists are not applicable. Accordingly, the county boards must fulfill their duties under O.C.G.A. § 21-2-230.

***The National Change of Address System is undisputably a legally valid source of data to establish probable cause.***

Marc Elias and the ACLU Georgia assert that “analysis of the United States Postal Service’s National Change of Address (“NCOA”) database” fails to establish the probable cause necessary for challenges under O.C.G.A. § 21-2-230.<sup>6</sup> This is wrong as a matter of law.

First, Mr. Elias cites as legal authority two cases—neither of which address the question of probable cause—while ignoring nearly overwhelming authority, including recent United States Supreme Court cases, that establishes the NCOA as a legally sufficient basis for taking action.

Mr. Elias cites *Schmitz v. Fulton Cnty. Bd. of Registration & Elections*, 2020CV339337 (Super. Ct. Ga. Oct. 1, 2020)—a four-page summary dismissal without prejudice—which says nothing whatsoever about the NCOA or probable cause and *Black Voters Matter Fund v. Raffensperger* which did not claim that the NCOA failed to meet § 21-2-230’s probable cause standard, and the court did not raise the question, either. No. 1:20-CV-04869-SCJ (N.D. Ga. Dec.

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<sup>5</sup> See Letter from Marc Elias to Kristi L. Royston, p.2-3 (Dec. 18, 2020); *Mass Challenges* at p.1-2 (Dec. 18, 2020).

<sup>6</sup> See Letter from Marc Elias to Kristi L. Royston, p.1 (Dec. 18, 2020); *Mass Challenges* at p.2.

16, 2020).<sup>7</sup> Moreover, the court in *Black Voters Matter Fund* was not swayed by the claim, repeated here in Mr. Elias's letter, that the NCOA data is unreliable. *Id.* at 27-28.

The court in *Black Voters Matter Fund* found the opposite, that relying on NCOA information supplied by the USPS *itself answered the claim that voter registrations were wrongly cancelled.* *Id.* at \*27. By definition, a "safe harbor," such as the NCOA Process in the NVRA, is a process or procedure that is sufficient as a matter of law. Moreover, the court in *Black Voters Matter Fund* denied that any claimed discrepancies between plaintiffs' "accurate" voter address list and the NCOA list proved errors in the NCOA. *Id.* at 27-28 (any actual discrepancies were likely due to the timing of sampling the NCOA's rolling database). So *Black Voters Matter Fund* affirms the legal sufficiency of the NCOA as a matter of law to establish a factual bases that the elector has moved. The claim of Mr. Elias that this case says the opposite is inaccurate.

But most importantly, Mr. Elias and the ACLU Georgia ignore the recent United States Supreme Court case of *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1840 (2018) that affirmed the reliance of thirty six states on the NCOA for data in fulfilling the NVRA's obligation to remove from voter registration rolls the names of voters ineligible by reason of change in residence. The Court could not have been more unequivocal in its assessment in using the NCOA: "This procedure is undisputably lawful." *Id.* at 1840.<sup>8</sup>

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<sup>7</sup> Instead, the plaintiff argued that subsection (c)(1) of the NVRA (the "NCOA Process") should be construed to require Fulton County to use one of eighteen "NCOALink Full Service Provider Licensee of the USPS" in its NCOA Process. *Id.* at \*23, 25. The court disagreed, holding that the statutory language of the safe harbor provision is not ambiguous and plainly provided that the required data need not come from a particular type of licensee and that the data used by Fulton County's NCOA Process was "information supplied by the USPS," and met the requirements of NCOA Process. *Id.* at 25-26.

<sup>8</sup> Indeed, the Court in *Husted* recognized that the NCOA almost certainly *undercounts* registrants that have moved, and approved Ohio's "supplemental process" for identifying them: But because according to the Postal Service "[a]s many as 40 percent of people who move do not inform the Postal Service,"[footnote omitted] Ohio does not rely on this information alone. In its so-called Supplemental Process, Ohio "identif[ies] electors whose lack of voter activity indicates they may have moved." [record citation omitted] *Id.* at 1840.

In short, the NVRA allows other methods of identifying moved registrants, but *specifically identified* the NCOA as sufficiently accurate and reliable. *See id.* at 1847 ("Neither subsection (d) nor any other provision of the NVRA demands that a State have some particular quantum of evidence of a change of residence before sending a registrant a return card.").

***An election in Georgia in which ineligible voters have voted is subject to contest, and if the election is found invalid, a second election shall be held.***

If county election boards fail to do their duty under Georgia law to weed out ineligible voters now potentially identified in the current challenges and the results of the run-off election is cast into doubt, Georgia law would require that the run-off elections be invalidated and a second special election conducted.

The relevant standard for invalidating election results generally is that “the party contesting the election demonstrates an irregularity or illegality sufficient to change or place in doubt the result.” 26 Am. Jur. 2d Elections § 389 (quoting *Gore v. Harris*, 772 So.2d 1234 (Fla. 2000), *rev’d on other grounds*, *Bush v. Gore*, 531 U.S. 98 (2000)). “Ordinarily, an election may be contested only for matters that would impeach the fairness of the result.” *Id.* (citing *Duncan v. McMurray*, 249 S.W.2d 156 (Ky. 1952); *Appeal of Soucy*, 649 A.2d 60 (N.H. 1994); *Fielding v. South Carolina Election Com’n*, 408 S.E.2d 232 (S.C. 1991)). “An election will not be invalidated unless the party contesting the election demonstrates an irregularity or illegality sufficient to change or place in doubt the result.” *Id.* (citing *Middleton v. Smith*, 539 S.E.2d 163 (Ga. 2000)).

This generally recognized standard has been adopted in Georgia. O.C.G.A. § 21-2-522 (a result of an election may be contested on the grounds that “illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result”). *See generally*, *Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018); *Parham v. Stewart*, 308 Ga. 170 (2020). And if the election is invalidated in such a contest, the remedy is to invalidate the election and to schedule and hold another election.

Georgia law specifies that if a court in a contest determines that a “. . . runoff is so defective as to the nomination, office, or eligibility in contest as to place in doubt the result of the entire . . . runoff . . . such court shall declare the . . . runoff to be invalid . . . and shall call for a second . . . runoff to be conducted among all the same candidates who participated in the . . . runoff . . . and shall set the date for such second . . . runoff.” O.C.G.A. § 21-2-527.

The failure of county election boards to comply with Georgia law and act of the current challenges risk invalidation of the run-off elections.

***Conclusion***

It is our opinion that county election boards have a duty to fulfill their duties under O.C.G.A. § 21-2-230, to determine whether each challenged elector is eligible to vote in the run-off election.

In light of the threats from Mr. Elias and the ACLU Georgia, we understand that True the Vote is willing to provide representation to any county election board that suffers any sort of legal action for complying with the requirements of Georgia law regarding these challenges or that True the Vote is willing to file an amicus brief on their behalf—showing why any challenge by Democrat lawyers or their liberal allies has no legal merit, that the NVRA does not bar county

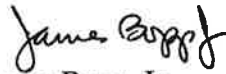
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election boards from complying with Georgia law, and that reliance on the NCOA is a legally sufficient basis for taking action.

We look forward to continuing to work with you to ensure that Georgia's elections are fair and lawful and that all eligible voters are entitled to vote.

Sincerely,

THE BOPP LAW FIRM, PC



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