BRENNAN
CENTER
FOR JUSTICE

December 21, 2020

Dear Members of the County Board of Elections & Registration,

We understand that you may have been presented with one or more mass challenges to the eligibility of hundreds, if not thousands, of voters in your County based on incomplete and unreliable data. Indeed, Cobb and Gwinnett Counties recently rejected several such mass challenges because they were not sufficiently supported by facts. On behalf of the Brennan Center for Justice at NYU School of Law, we write to urge you to similarly deny these mass voter challenges. Failure to do so could expose your 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

Space does not permit us to lay out all the ways in which the data presented by the challengers is unreliable.

The challengers purport to compare the County's voter rolls to the National Change of Address ("NCOA") Registry to identify voters who allegedly moved out of state. But, critically, the challengers fail to explain how they determined that the voters in the registration database are the same persons appearing in the NCOA Registry. If the challenger compared only the first and last names on the two lists, for example, there would be a high likelihood of false matches. And the challengers fail to provide *both* the voter's County address as listed in the state database and the County address provided on the NCOA form; thus, there is no evidence that these two addresses actually matched. In other words, there is no way to verify the information that the challengers submitted.

The Board cannot take this risk because faulty matching between lists disenfranchises voters. In 2012, Texas officials purged 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.[1] Texas changed its policy after settling litigation based on the bad purge.

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. 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). The probable cause threshold is not met precisely because of the unreliability of the data that the challengers have presented.

The unsubstantiated excel files that challengers have offered lack entire data fields from the Georgia voter file. And the information fails to demonstrate how any conclusion about a particular voter was reached. In other words, the information offered creates a reasonable belief *only* of the fact that the challengers are not presenting the whole picture.

Even if the challengers' information accurately reflected NCOA forms submitted by County voters — which is unverifiable based on the data they presented — a voter's change of address may reflect a temporary change that has no effect on the voter's eligibility in the County.

There are many reasons why a voter might change their address with the Postal Service 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 file an NCOA form 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. Finally, some voters may have temporarily left the County to care for a sick relative—which could occur with some frequency during a global pandemic.

As these examples make clear, the challengers' unsubstantiated spreadsheets do not establish probable cause that any of the voters they list have moved their *permanent* residence outside of the County.

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

If sustained, these mass challenges — premised on unsound data analysis — could violate the National Voter Registration Act ("NVRA") for at least two reasons.

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[1] Lise Olsen, *Texas' voter purge made repeated errors*, Chron, (Nov. 2, 2012), https://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php.

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 Section 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 challengers cannot avoid the requirements of the NVRA by seeking to compel a systematic voter purge by another name.

The NVRA requires 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.

The alleged appearance of County voters on the NCOA Registry — a third-party database — 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 that the voter confirm the move in writing. *Id.* at 962. And 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 cancelling a voter's registration. The statute directs that a state would satisfy 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.

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 Enf't*, No. 1:16-CV-1274, 2018 WL 3748172, at *4 (M.D.N.C. Aug. 7, 2018).

90-Day Prohibition on Systematic Removals

Second, with just fifteen days before the January 5, 2021 runoff elections, these mass challenges could also violate the NVRA's prohibition on 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 effectively purge numerous voters in the County 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).

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).

In other words, approving these mass challenges would require you to hold numerous 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.

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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 tremendous effort over the last months to ensure safe and secure elections, it would be impossible to undertake the steps needed to avoid these violations by January 15, 2021, the Board's certification deadline for the January runoffs. *See* Ga. Code § 21-2-493(k).

We strongly urge you to deny the mass challenges before you and we 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,

Eliza Sweren-Becker

Eliza Sweren-Becker, Counsel

Gowri Ramachandran

Gowri Ramachandran, Counsel