



**WRITTEN STATEMENT OF  
DALE HO  
DIRECTOR, VOTING RIGHTS PROJECT  
AMERICAN CIVIL LIBERTIES UNION**

**For a Hearing on**

**State Voter Registration List Maintenance**

**Submitted to the U.S. House Committee on Administration**

**October 25, 2017**

## Introduction

Chairman Harper, Ranking Member Brady, and Members of the Committee, thank you for the opportunity to testify before you today.

My name is Dale Ho, and I am the Director of the American Civil Liberties Union (ACLU) Voting Rights Project. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the Constitution and laws of the United States. With approximately 1.6 million members, activists, and supporters, the ACLU is a nationwide organization that advances its mission of defending the principles of liberty and equality embodied in our Constitution and civil rights laws. The ACLU's Voting Rights Project, established in 1965, has filed more than 300 lawsuits to enforce the provisions of our country's voting laws and constitution, including the Voting Rights Act of 1965 and the National Voter Registration Act of 1993. And through our People Power platform, the ACLU recently launched a fifty-state campaign to protect and expand access to the ballot nationwide.

In my capacity as Director of the ACLU's Voting Rights Project, I supervise the ACLU's voting rights litigation and advocacy work nationwide. My work focuses on ensuring access to the franchise on equal terms for all Americans. My current cases include *Husted v. A. Philip Randolph Institute*, a voter list maintenance case pending before the U.S. Supreme Court; and *Fish v. Kobach*, a case concerning onerous and unnecessary documentation requirements for voter registration in the State of Kansas. In addition to my work at the ACLU, I also serve as an adjunct professor at NYU School of Law and Brooklyn Law School. I am widely published on voting rights in law reviews including the *Harvard Civil Rights-Civil Liberties Law Review* and the *Yale Law Journal Forum* (forthcoming).

I want to thank you for holding this hearing today on voter list maintenance. As Chief Justice John Roberts recently wrote, “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders.”<sup>1</sup> The right to vote is frequently described as the right that is preservative of all others.<sup>2</sup> All of our rights as Americans are protected by our right to vote. We are not truly free without self-government, which entails a vibrant participatory democracy in which every American's voice can be heard.

It is particularly gratifying for me to appear before you today at the same time that Speaker Ryan is holding a ceremony in Emancipation Hall to present a Congressional Gold Medal to Filipino veterans of World War II. I was supposed to be attending that ceremony on behalf of my grandfather, Raymundo Seña Estacion, who served in the United States Army Forces in the Far East, and survived the Bataan Death March during the Japanese occupation of

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<sup>1</sup> *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014). See also *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

<sup>2</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

the Philippines. After the war, he was stationed for a time at Fort Sill in Oklahoma. He died at the age of 27; I never had the opportunity to meet him. But his service to our country—in defense of a democracy in which he himself could not participate—is a reminder to me of just how precious the right to vote is.

My written statement today will focus on two threats to the integrity of voter lists:

- (1) Improper list maintenance practices that have resulted in wrongful purges of eligible voters;
- (2) Efforts during the 2016 Election to compromise electronic voter registration lists by hacking.

### **I. Improper List Maintenance Practices**

Everyone agrees that proper maintenance of voter lists is a critical component of elections integrity. But what often gets lost is that voter list accuracy entails not only removing ineligible registrants, but also ensuring that eligible voters are not erroneously purged from the rolls. Two basic principles should therefore govern list-maintenance activities: accuracy; and adequate notice to voters. With respect to accuracy, list maintenance practices must be based on information that correctly identifies voters who have become ineligible—for example, due to death or a change in residence—since registering to vote. With respect to notice, voters targeted for removal must be given notice consistent with the requirements of the NVRA, with adequate time to contest their removal before an election takes place.

Unfortunately, the failure to adhere to these principles has frequently resulted in eligible voters being taken off the voter rolls through no fault of their own. States and counties around the country have sometimes engaged in overzealous, sloppy, and/or poorly-timed list maintenance practices that have resulted in the erroneous removal of eligible voters from the rolls. Such purges have often occurred too close to an election to permit corrective action, with voters sometimes not learning that they have been purged until they appear at the polls to vote on Election Day.

At least three problems frequently plague voter purge programs (well-intentioned or otherwise): (1) inaccurate underlying data, which mistakenly identify legitimate registrants as ineligible; and (2) unreliable matching protocols, which confuse eligible registrants for others who are not eligible to vote; and (3) inappropriate timing, which fails to give registrants sufficient opportunity to contest their removal prior to an election. As I explain below, efforts to compare voter registration lists among states using systems like the Interstate Voter Registration Crosscheck program, or to compare voter lists to federal databases like the Department of Homeland Security's Systematic Alien Verification for Entitlements, have all suffered from these flaws, and have resulted in the wrongful designation of properly-registered voters for removal from the rolls.

## A. Background – The National Voter Registration Act (NVRA)

The National Voter Registration Act of 1993 (NVRA)<sup>3</sup> establishes a national framework for voter registration and voter list maintenance for federal elections. It is sometimes referred to as the “motor-voter” law, thanks to its most famous provision, which requires states to provide voter registration services through Department of Motor Vehicle offices.<sup>4</sup>

Section 8 of the NVRA requires states to maintain and update their voter registration lists, and protects registered voters against removal from the rolls.<sup>5</sup> In particular, Section 8 requires states to “conduct a general program that makes a reasonable effort to remove the name of ineligible voters” due to the registrant’s death or change in residence.<sup>6</sup> According to the Election Assistance Commission, between 2014 and 2016 16.7 million people (8.8 percent of all eligible voters) were removed from voting rolls through list maintenance practices.<sup>7</sup>

A central purpose of the statute is “to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction.”<sup>8</sup> The statute therefore places strict limits as to reasons, timing and procedures for removal of registrants. Under Section 8, there are five specific circumstances under which a properly-registered voter may be removed from a voter registration list: when an individual has passed away, moved out of the jurisdiction, has been judged mentally incapacitated, has been convicted of a crime resulting in the loss of the right to vote, or requests to be removed.<sup>9</sup> The statute also prescribes the timing of removal of voters (prohibiting programs that systematically remove voters from the rolls within 90 days of a federal election),<sup>10</sup> and establishes mandatory procedures that must be followed before removing voters whom the state determines may have moved—namely, requiring states to send a notice to such voters, and then, if the voter does not return the notice, waiting a period of two general federal elections before removing them from the rolls.<sup>11</sup>

These safeguards are critical to voter list integrity. In enacting the NVRA, Congress expressed the “concern[] that [voter list-maintenance] programs can be abused and may result in

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<sup>3</sup> 52 U.S.C. § 20501, *et seq.*

<sup>4</sup> 52 U.S.C. § 20504.

<sup>5</sup> “Any State program or activity” to “ensure[] the maintenance of an accurate and current voter registration roll . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote.” 52 U.S.C. §20507(b)(2).

<sup>6</sup> 52 U.S.C. § 20507(a)(4).

<sup>7</sup> U.S. Election Assistance Comm’n, *The Election Administration and Voting Survey 2016 Comprehensive Rep.*, to the 115th Cong. at 47 (2016), [https://www.eac.gov/assets/1/6/2016\\_EAVS\\_Comprehensive\\_Report.pdf](https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf). This was an increase of 1.9 million individuals compared to the same length of time in 2012 and 2014.

<sup>8</sup> S. Rep. No. 103-6, at 19 (1993).

<sup>9</sup> 52 U.S.C. § 20507(a)(3)-(4).

<sup>10</sup> 52 U.S.C. § 20507(c)(2).

<sup>11</sup> 52 U.S.C. § 20507(d).

the elimination of names of voters from the rolls solely due to their failure to respond to a mailing.”<sup>12</sup> Inaccurate purge programs may result in “persons who are legitimately registered” not being included on the rolls,<sup>13</sup> which not only risks disenfranchisement, but also “unnecessarily places additional burdens on the registration system because persons who [were] legitimately registered must be processed all over again.”<sup>14</sup>

A few examples of erroneous and/or unlawful purges include:

**Florida.** In 2000, Florida wrongly purged nearly 12,000 voters as a result of inaccurate matching criteria that led the state to misidentify these voters as ineligible felons. Utilizing a criminal conviction database, the state purged voters whose last name matched 80% of the letters of an individual with a criminal conviction—a highly inaccurate database matching protocol.<sup>15</sup> Undeterred by that debacle, in 2004 Florida once again attempted to remove 48,000 eligible voters from the rolls for being “suspected felons”<sup>16</sup>—a purge that erroneously included thousands of individuals who had their voting rights restored under Florida law, and which disproportionately affected African-American voters. Under pressure from civil rights groups Florida ordered officials to stop using flawed list to perform a voter purge.<sup>17</sup>

**Mississippi.** In 2008, just days before the March primary elections, approximately 10,000 voters were purged in Madison County, based on jury summonses and voter ID cards that were not delivered by the post office.<sup>18</sup> Among those removed from the rolls were David Landrum, a Republican candidate for Mississippi’s third congressional district,<sup>19</sup> and his wife Jill.<sup>20</sup> Mississippi Secretary of State Delbert Hosemann noted that the purge was illegal because it was conducted within 90 days of a federal election; his staff had to work overtime to ensure that these voters were reinstated prior to the election.

**Ohio.** In a case currently pending before the U.S. Supreme Court, the ACLU and our co-counsel Dēmos are challenging a process used by Ohio that targets voters for removal if they

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<sup>12</sup> H.R. Rep. No. 103-9 (1993), at 15.

<sup>13</sup> S. Rep. No. 103-6 (1993), at 18.

<sup>14</sup> *Id.*

<sup>15</sup> Myrna Perez, Brennan Center for Justice, *Voter Purges* at 3 (2008) <https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf>, citing Adam C. Smith, *No Telling if Voter Rolls are Ready for 2004*, St. Petersburg Times, Dec. 21, 2003, [http://www.sptimes.com/2003/12/21/State/No\\_telling\\_if\\_voter\\_r.shtml](http://www.sptimes.com/2003/12/21/State/No_telling_if_voter_r.shtml).

<sup>16</sup> Ford Fessenden, *Florida List for Purges of Voters Proves Flawed*, N.Y. Times, July 10, 2004, <http://www.nytimes.com/2004/07/10/us/florida-list-for-purge-of-voters-proves-flawed.html>.

<sup>17</sup> *Florida Scraps Flawed Felon Voting List*, Associated Press, USA Today, July 10, 2004, [https://usatoday30.usatoday.com/news/nation/2004-07-10-felons-vote-fla\\_x.htm](https://usatoday30.usatoday.com/news/nation/2004-07-10-felons-vote-fla_x.htm).

<sup>18</sup> Kandiss Crone, *Hosemann: Voter Purge Violated Federal Law*, MS News Now <http://www.msnewsnow.com/story/7973229/hosemann-voter-purge-violated-federal-law> (last visited Oct. 22, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> Ann Ellis Simmons, *More on Madison Purge*, Miss. Third Cong. D. Blog (Mar. 6, 2008), <http://missthirddistrict.blogspot.com/2008/03/more-on-madison-purge.html>.

have failed to vote during a two-year period, based on the presumption that failing to participate in a single federal election constitutes evidence that a voter may have moved to another county, or out-of-state. That is a highly dubious proposition, as more than half of registered voters typically fail to vote in midterm elections.<sup>21</sup> Our client in the case, Navy veteran Larry Harmon, voted in the 2008 election, but like millions of Americans around the country, he opted not to vote in the 2010 midterms.<sup>22</sup> When Mr. Harmon tried to vote in the 2015 Ohio state elections, he arrived at the polls only to discover that his registration had been canceled pursuant to Ohio's purge process, even though he had continuously lived and filed taxes at the same address for 17 years.<sup>23</sup> With the support of the Department of Justice, Dēmos and the ACLU of Ohio litigated this case last year in the U.S. Court of Appeals for the Sixth Circuit, which issued a decision halting the practice.<sup>24</sup> As a result, more than 7,500 voters who had been purged had their votes counted in the 2016 election; without that decision, their ballots would have been tossed, and these voters would have been disenfranchised.

The case will be heard in Supreme Court on November 8. In sudden reversal, however, the Department of Justice—which, for more than 20 years had consistently maintained that such purges based on non-voting are illegal, through both Democratic and Republican administrations—has switched sides. Citing the recent change in administration, DOJ has now filed a brief on the side of Ohio,<sup>25</sup> and will be arguing that Ohio's purge—which the Department less than one year ago said was illegal—is actually permitted under federal law.

## **B. The Improper Use of Federal Databases for Voter List Maintenance**

Despite the dubious record of aggressive purging efforts, proponents of more active list-maintenance practices often suggest comparing state voter lists to federal databases to identify registrants who are deceased or are noncitizens. In theory, such databases could provide states with a means of identifying deceased registrants who should no longer be on the rolls, or ineligible individuals who should never have been registered in the first place. In practice, however, efforts to match federal databases against state voter rolls only underscore that such efforts frequently result in the removal of legitimate voters due to incomplete, erroneous, or out-of-date data, and poor database matching techniques. All too often, the result has been the production of false positives that misidentify registrants as ineligible to vote.

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<sup>21</sup> U.S. Elections Project, *1980-2014 Nov. Gen. Election*, <https://docs.google.com/spreadsheets/d/1or-N33CpOZYQ1UfZo0h8yGPSyz0Db-xjmZOXg3VJi-Q/edit#gid=1670431880> (last visited Oct. 22, 2017).

<sup>22</sup> Harmon Decl. at ¶ 6, *A. Philip Randolph Institute v. Husted*, No. 2:16-cv-303 (S.D. Ohio, Apr. 7, 2016), ECF No. 9-4.

<sup>23</sup> *Id.* at ¶¶ 7-12.

<sup>24</sup> *A. Philip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016).

<sup>25</sup> Jessie Balmert, *Trump's Justice Department reverses Obama's stance on Ohio's voter purge*, USA Today, Aug. 8, 2017, <https://www.usatoday.com/story/news/politics/onpolitics/2017/08/08/trumps-justice-department-reverses-obamas-stance-ohios-voter-purge/548983001/>.

## 1. *The Department of Homeland Security Systematic Alien Verification for Entitlements (SAVE) Database*

One federal database sometimes referenced as a source of citizenship information is the Department of Homeland Security's Systematic Alien Verification for Entitlements ("SAVE") database. The SAVE system is used to verify immigration status when an individual interacts with the state, for example, while applying for a driver's license.<sup>26</sup> SAVE relies on records from various agency databases, all of which feed into a central system run by the United States Citizenship and Immigration Services (USCIS),<sup>27</sup> to confirm that immigration information provided by an individual is correct at the time it is provided.

It is critically important to recognize what SAVE is *not*. SAVE "does not include a comprehensive and definitive listing of U.S. citizens."<sup>28</sup> Moreover, even for those noncitizens that are listed in the SAVE database, the program's data are not systematically updated to reflect changes in immigration status.<sup>29</sup> Consequently, SAVE offers nothing more than a snapshot of an individual's status in the US immigration system at a certain moment in time—and that status can, and often does, change over time.

For this reason, DHS has cautioned against relying heavily on SAVE data to verify citizenship and confirm voter eligibility.<sup>30</sup> Improper use of SAVE data for voter list maintenance could, for example, disenfranchise eligible citizens<sup>31</sup> who have become naturalized citizens since their entry in the SAVE database. Individuals with the same birthdate and name as non-citizens in the SAVE system are also vulnerable to wrongful removal<sup>32</sup> from voter

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<sup>26</sup> Office of Inspector Gen., Dep't of Homeland Sec., OIG-12-125, U.S. Citizenship and Immigration Services Systematic Alien Verification for Entitlements Program Issues 4 (Sept. 2012), [http://www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-125\\_Sep12.pdf](http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-125_Sep12.pdf).

<sup>27</sup> *See id.*

<sup>28</sup> *See* Letter from Thomas E. Perez to Ken Detzner, Fla. Sec. of State, dated June 11, 2012 at 3, <https://assets.documentcloud.org/documents/805150/us-dep-of-justice-save-letter-1.pdf>.

<sup>29</sup> Immigration Policy Council, Fact Sheet, *Using the Systematic Alien Verification for Entitlements (SAVE) Program for Voter Eligibility Verification* at 3, Am. Immigration Council (Aug. 2012), <https://www.americanimmigrationcouncil.org/sites/default/files/research/usingthesaveprogramsforvotereligibilityverification.pdf>.

<sup>30</sup> Amy Sherman, *Trump's Commission vice chair Kris Kobach says Immigration data not bounced against voter rolls*, PolitiFact, May 23, 2017, <http://www.politifact.com/florida/statements/2017/may/23/kris-kobach/trumps-election-commission-chair-kris-kobach-says-/>. *See also* Memorandum, Dep't of Homeland Security, Agreement Between the Dep't of Homeland Security, U.S. Citizenship and Immigration Services, and Fla. Dep't of State/Division of Elections State or Local Government Agency, 12 (Aug. 14, 2012), <https://www.documentcloud.org/documents/805148-moa-dhs-fl-1.html>.

<sup>31</sup> In 2015, over 730,000 people became naturalized U.S. citizens. *See* Dep't of Homeland Security Office of Immigration Statistics, *Table 20. Petitions for Naturalized Filed, Persons Naturalized, And Petitions For Naturalization Denied: Fiscal Years 1907-2015* (Dec. 15, 2016), <https://www.dhs.gov/immigration-statistics/yearbook/2015/table20>.

<sup>32</sup> When Colorado used SAVE data to identify noncitizen voters in 2012, the State sent citizenship confirmation letters to 3,903 registered voters confirming immigration status. Further checks, found that 141 of the 3,903

registration lists. In other words, using the SAVE database for voter registration may result in the purging of legitimate voters due to out-of-date information or mistaken identity. Indeed, two states that have attempted to use SAVE for voter registration purposes have seen those efforts declared unlawful by courts.

*a. Florida's Use of SAVE*

Florida's experience provides a cautionary tale. In 2012, Florida officials launched an aggressive campaign to remove purported noncitizens from the state's voter rolls. As part of these efforts, the state filed a lawsuit against the federal government to obtain access to the SAVE database. That effort was met with serious objections from the Department of Justice, which, among other things warned that information in the SAVE database was often out-of-date, and would often not account for the fact that many individuals listed as noncitizens in SAVE have since that time naturalized.<sup>33</sup> In ultimately agreeing to grant Florida access to SAVE, DHS warned about potential inaccuracies in SAVE, and attached a Fact Sheet stating that "[t]he inability of the SAVE Program to verify [an individual's] citizenship does not necessarily mean that [the individual is] not a citizen of the United States and [is] ineligible to vote."<sup>34</sup>

In its efforts to identify noncitizens, Florida officials initially stated that "nearly 200,000 registered voters may not be U.S. citizens."<sup>35</sup> Upon review, however, that numbers shrunk dramatically, with the Secretary of State's office sending a list of 2,700 possible non-citizens on the voter rolls to county election supervisors for verification,<sup>36</sup> instructing local officials to notify all individuals identified by the State as possible noncitizens, and to require them to provide proof of citizenship within 30 days or be removed from the voting rolls.

But even the 2,700 figure quickly collapsed under scrutiny. After diverting resources away from improving election administration and lawful voter registration, officials determined the number of ineligible voters was not 2,700, but actually less than one-tenth of that number (or fewer than 200 people<sup>37</sup>). Reports vary, but PolitiFact was ultimately able to confirm that a total

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individuals were noncitizens – or .004 percent of all Colorado voters – and 35 of those 141 had voted. However the number may be fewer than 35, as the Denver Clerk's Office subsequently found documentation validating the citizenship of 8 of the 35 individuals in question. *Voter fraud probe fizzles*, The Associated Press, Tampa Bay Online, Sep. 25, 2012, <http://www.tbo.com/news/voter-fraud-probe-fizzles-511998>.

<sup>33</sup> See *United States v. Florida*, 870 F. Supp. 2d 1346, 1347-8 (N.D. Fla. 2012). (Noting the state's original plan to use DHS data to remove noncitizens from voter rolls had "major flaws," including wrongful purging of voters due to a "lag between naturalization" and updated individual immigration status in the database.)

<sup>34</sup> See DHS Memorandum of Agreement, *supra* note 30.

<sup>35</sup> Gary Fineout, *Nearly 200,000 Florida Voters May Not be Citizens*, NBC Miami, May 11, 2012, <http://www.nbcmiami.com/news/local/Nearly-200000-Florida-Voters-May-Not-Be-Citizens-151212725.html>

<sup>36</sup> See Rachel Weiner, *Florida's voter purge explained*, Wash. Post, June 18, 2012, [https://www.washingtonpost.com/blogs/the-fix/post/floridas-voter-purge-explained/2012/06/18/gJQAhvcNIV\\_blog.html?utm\\_term=.f9e1842173a2](https://www.washingtonpost.com/blogs/the-fix/post/floridas-voter-purge-explained/2012/06/18/gJQAhvcNIV_blog.html?utm_term=.f9e1842173a2).

<sup>37</sup> See Weiner, *supra* note 36.



of only 85 noncitizens were removed from the rolls as a result of these efforts,<sup>38</sup> in a state of more than 11 million voters at the time<sup>39</sup> (or about 0.00077% of the registered voters in the State). The upshot is that thousands of U.S. citizens were wrongfully designated as noncitizens and threatened with removal from the rolls. One such voter was Brooklyn-born Bill Internicola, a World War II veteran who fought at the Battle of the Bulge.<sup>40</sup> An analysis conducted by the Miami Herald indicated that 87% of those identified by the state as noncitizens on the rolls were minorities and 58% were Hispanic.<sup>41</sup>

Litigation ensued over Florida's attempts to use SAVE. The U.S. Court of Appeals for the Eleventh Circuit,<sup>42</sup> after noting that the SAVE database matching results were "far from perfect,"<sup>43</sup> held that voters in Florida "face a realistic danger of being [wrongfully] identified in the Secretary's removal programs because of their names or status as naturalized citizens," given the "foreseeable risk of false positives and mismatches based on user errors, problems with the data-matching process, flaws in the underlying databases, and similarities in names and birthdates."<sup>44</sup> The State was ultimately ordered to discontinue its purge based on the use of SAVE data.

#### *b. Iowa's Use of SAVE*

Iowa's experience was similar. In 2013, then-Iowa Secretary of State Matt Schultz announced that his office had reached an agreement with DHS to access the SAVE database, with the intention of comparing SAVE information to Iowa voting registration records.<sup>45</sup> Secretary of State Schultz's plans for a voter purge based on SAVE data were challenged by the ACLU of Iowa and the League of United Latin American Citizens in Iowa state court, arguing that the purge "exceeded his statutory authority" and created "a substantial risk of erroneously depriving qualified voters in Iowa their fundamental right to vote."<sup>46</sup> The court ultimately

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<sup>38</sup>See Amy Sherman, *Homeland Security warned that the SAVE database is not foolproof way to verify the voter rolls, LWV says*, PolitiFact: Florida, Oct. 30, 2013, <http://www.politifact.com/florida/statements/2013/oct/30/league-women-voters-florida/league-women-voters-says-homeland-security-warned-/>.

<sup>39</sup> See Weiner, *supra* note 36.

<sup>40</sup> Marc Caputo, *How Rick Scott's noncitizen voter purge started small and then blew up*, Miami Herald, June 12, 2012, <http://www.miamiherald.com/news/politics-government/article1940542.html>.

<sup>41</sup> *58 percent of voters targeted in noncitizen hunt are Hispanic. Whites, GOP least likely to face purge*, Miami Herald (May 13, 2012), <http://miamiherald.typepad.com/nakedpolitics/2012/05/58-percent-of-voters-targeted-in-noncitizen-hunt-are-hispanic-whites-gop-least-likely-to-face-purge.html>.

<sup>42</sup> *Arcia v. Florida Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014).

<sup>43</sup> *Id.* at 1339.

<sup>44</sup> *Id.* at 1342.

<sup>45</sup> *Iowa voting records to be compared to federal database*, KCCI Des Moines, Aug. 14, 2013, <http://www.kcci.com/article/iowa-voting-records-to-be-compared-to-federal-database/6882792>.

<sup>46</sup> First Am. Pet. ¶¶ 22-23, *ACLU of Iowa v. Schultz*, Case No. CV 9311, (Dist. Ct. Polk Cty. Aug. 8, 2012), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/2012-08-08firstamendedpetitionforjudicialreview.pdf>.

agreed, blocking the purge, and finding that it “would chill the right to vote and cause irreparable harm.”<sup>47</sup> The office of the Iowa Secretary of State eventually abandoned an appeal of that ruling,<sup>48</sup> effectively conceding that Iowa’s efforts to use SAVE data to purge the voter rolls were unlawful and ending those efforts.

*c. Evidence of Noncitizen Registration*

States have engaged in these ill-fated efforts to use SAVE to ferret out supposed noncitizens on the voter rolls, despite the fact that there is simply no evidence that hordes of noncitizens are streaming to the polls. State-wide investigations in Minnesota, New Mexico, North Carolina, Ohio and Iowa all unearthed minimal instances of non-citizen voting.<sup>49</sup> A 2016 New York Times survey of election officials and law-enforcement in 49 states and Washington, D.C. found just two possible instances of noncitizens voting—out of 137.7 million voters nationwide.<sup>50</sup>

Federal courts have reached similar conclusions about the infrequency of noncitizen registration and voting. The U.S. Court of Appeals for the Tenth Circuit, in an opinion by George W. Bush appointee Judge Jerome Holmes, found last year that the “assertion that the ‘number of aliens on the voter rolls is likely to be in the hundreds, if not thousands’ is pure speculation.”<sup>51</sup> Similarly, the full (en banc) U.S. Court of Appeals for the Fifth Circuit, in an opinion by George W. Bush appointee Judge Catharina Haynes, found that “undocumented immigrants are unlikely to vote as they try to avoid contact with government agents for fear of being deported.”<sup>52</sup>

In sum, the suggestion that states should use the SAVE database more expansively for voter registration purposes is worse than a solution in search of a problem—it is a problem in itself, insofar as efforts to use SAVE in this manner have frequently resulted in the misidentification of eligible voters as noncitizens. While there may be limited circumstances in which SAVE contains more up-to-date information concerning immigration status than is currently available in a state’s own databases, SAVE should not be viewed as a panacea. And given past experiences of states that have attempted to use SAVE as a basis for purging their

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<sup>47</sup> *Id.*, Ord. on Mot. for Review on the Merits at 5 (Dist. Ct. Polk County Nov. 12, 2013), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/RulingforMotionforReview11-12-13.pdf>.

<sup>48</sup> Jason Noble, *Controversial Iowa voter rules will not take effect*, Des Moines Register, Mar. 13, 2015, <http://www.desmoinesregister.com/story/news/politics/2015/03/13/voter-registration-lawsuit-resolved-rules-invalidated/70280104/>.

<sup>49</sup> *Analysis: Noncitizen voting is vanishingly rare*, Brennan Center for Justice (Jan. 25, 2016), <http://www.brennancenter.org/analysis/analysis-noncitizen-voting-vanishingly-rare>

<sup>50</sup> Michael Wines, *All This Talk of Voter Fraud? Across U.S., Officials Found Next to None*, N.Y. Times (Dec. 18, 2016), [https://www.nytimes.com/2016/12/18/us/voter-fraud.html?\\_r=0](https://www.nytimes.com/2016/12/18/us/voter-fraud.html?_r=0)

<sup>52</sup> *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

<sup>52</sup> *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

voter rolls, proposals to use SAVE more broadly in this manner should be viewed with skepticism.

## 2. *Social Security Administration Data*

States and counties have sometimes sought to use data from the Social Security Administration (SSA) to identify registrants who have died. Like efforts to use the SAVE database, these programs should be viewed with skepticism. For example, in 2012, Texas purported to identify 68,000 registered voters as possibly deceased, based on a match to SSA records. But the matching protocols used were highly inaccurate, as Texas officials “repeatedly and mistakenly matched active longtime Texas voters to deceased strangers across the country.”<sup>53</sup> One such voter targeted for removal was James Harris Jr., a U.S. Air Force veteran in Harris County who had voted in every presidential election since the Nixon era, but who was mistaken for a James Harris who lived in Arkansas, and who had passed away in 1996.<sup>54</sup> An investigation by the Houston Chronicle concluded that “voters living in legislative districts with high percentages of Hispanics or African-Americans were more likely to be listed as ‘dead’ than others statewide. In fact, voters in eight heavily minority districts in Dallas, Houston, El Paso and Brownsville were twice as likely to be targeted as voters statewide.”<sup>55</sup>

### **C. The Error-Ridden Interstate Voter Registration Crosscheck System**

Advocates of more aggressive purging of voter rolls sometimes propose comparing registration lists among states in an attempt to identify voters who may have moved and/or who may be registered in more than one state. Examining state data with address information to find people who have moved can be a useful practice, if it’s done accurately. A reliable system that automatically updates voter rolls when people move is an innovative way both to maintain the accuracy rolls and to help voters stay registered when moving without having to deal with unnecessary bureaucratic headaches. For example, ten states<sup>56</sup>—most recently Illinois<sup>57</sup>—have adopted automatic voter registration systems that enroll unregistered people and update already-registered voters’ address information when they interact with state agencies like the DMV. Oregon was the first state to adopt automatic registration, and experienced “a 4.1 percent increase in turnout, one of the largest increases between 2012 and 2016 among eligible voters of

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<sup>53</sup> Lise Olsen, Texas’ voter purge made repeated errors, Chron.com, Nov. 2, 2012, <http://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php>

<sup>54</sup> *See id.*

<sup>55</sup> *Id.*

<sup>56</sup> Nat’l Conference of State Legislatures, Automatic Voter Registration, Aug. 31, 2017, <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>.

<sup>57</sup> Sophia Tareen, *Illinois Governor signs automatic voter registration law*, State Register-Journal, Aug. 28, 2017, <http://www.sj-r.com/news/20170828/illinois-governor-signs-automatic-voter-registration-law>.

any state,” with one preliminary analysis suggesting that automatic registration “accounted for over a quarter of that increase.”<sup>58</sup>

A number of states, however, have joined the Interstate Voter Registration Crosscheck system, a program administered by Kansas Secretary of State Kris Kobach—which is not the type of reliable system that I am describing. Crosscheck purports to compare voter registration rolls in multiple states, in order to identify possible instances of double registration or double voting. Approximately 30 states currently participate in Crosscheck.<sup>59</sup> These states upload basic voter data from their voter registration databases to a server run by the Kansas Secretary of State, which then runs a comparison of the data across the member states in an attempt to find voters who may be registered in more than one state.

The Crosscheck system is highly inaccurate. The Crosscheck user manual specifically states that “a significant number of apparent double votes are false positives and not double votes.”<sup>60</sup> That is an understatement. A recent study by a team of researchers at Stanford, Harvard, the University of Pennsylvania, and Microsoft found that using Crosscheck to purge the voter rolls in one state would “impede 200 legal votes” for “every double vote prevented.”<sup>61</sup> In other words, the system incorrectly flags people as potential double voters more than 99% of the time because of false positives resulting from poor matching protocols.

Part of the problem with Crosscheck is that it treats registrations as a “match” using just three data points: first name, last name, and date of birth.<sup>62</sup> But these Crosscheck “matches” are highly unreliable, because of data entry errors and the fact that many voters share names and birthdates.<sup>63</sup> Nevertheless, all of these “matches” are then provided to each member state as “apparent duplicate registration[s]”<sup>64</sup>—even where other voter registration data compiled by

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<sup>58</sup> Robert Griffin & Paul Gronke, *More states are registering voters automatically. Here’s how that affects voting*, Wash. Post, June 16, 2017, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/16/more-states-are-registering-voters-automatically-heres-how-that-affects-voting/?utm\\_term=.5c2d90254c20](https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/16/more-states-are-registering-voters-automatically-heres-how-that-affects-voting/?utm_term=.5c2d90254c20).

<sup>59</sup> Rep. Keith Esau, Kansas, *Interstate Voter Registration Crosscheck Program* at 10 (June 15, 2017), [http://www.ncsl.org/Portals/1/Documents/Elections/Kansas\\_VR\\_Crosscheck\\_Program.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Kansas_VR_Crosscheck_Program.pdf).

<sup>60</sup> *Interstate Voter Registration Data Crosscheck 2014 Participation Guide* (“Interstate Crosscheck 2014 Participation Guide”) at 5, Wa. Office of the Sec’y of State (Dec. 2013) [https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/weekly/Documents/Participation%20Guide%20with%20Comments.pdf](https://wei.sos.wa.gov/agency/osos/en/press_and_research/weekly/Documents/Participation%20Guide%20with%20Comments.pdf).

<sup>61</sup> Sharad Goel *et al.*, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* 33 (Harv. U., Working Paper, Jan. 13, 2017), <http://scholar.harvard.edu/morse/publications/one-person-one-vote-estimating-prevalence-double-voting-us-presidential-elections>.

<sup>62</sup> *Interstate Crosscheck 2014 Participation Guide* at 5.

<sup>63</sup> The Birthday Paradox is a well-known phenomenon of probability theory. In a random group of 23 people, there is a 50 percent chance that two people have the same birthday; with 70 people, there’s a 99.9 percent chance that two share a birthday. See *Bring Science Home, Probability and the Birthday Paradox*, Scientific American (March 29, 2012), <https://www.scientificamerican.com/article/bring-science-home-probability-birthday-paradox/>.

<sup>64</sup> *Interstate Crosscheck 2014 Participation Guide* at 4.

Crosscheck, such as middle names and social security numbers, make clear that the “matched” registration records *do not correspond to the same person*.

But even in the supposed cases of double votes that are not the result of false positive matches, former Kansas state elections director admitted in an email that most of these cases are the result not of fraud but of data entry errors: “[i]n a majority of cases of apparent double votes, in the end they do not turn out to be real double votes due to poll worker errors, mis-assignment of voter history, voters signing the wrong lines in poll books, etc.”<sup>65</sup>

Nevertheless, proponents of Crosscheck frequently tout these higher numbers of “potential” matches. For example, a recent presentation to the National Conference of State Legislatures by Kansas State Representative Keith Easau states that Crosscheck found over 5 million “potential” double registrants in 2016,<sup>66</sup> without acknowledging the extremely high rate of false positives generated by the system. I can think of no purpose for that omission other than to create the false impression that the problem of double registration is far worse than it actually is.

Unsurprisingly, states and counties that have used information from Crosscheck in order to purge their voter rolls have ended up wrongfully purging legitimately registered voters. For example, in 2014, Ada County Idaho ended up having to reinstate more than 750 voters wrongfully removed from the rolls based on faulty information from the Crosscheck.<sup>67</sup> Incidents like these have rightfully engendered substantial skepticism about Crosscheck’s utility. Explaining Minnesota’s decision not to join Crosscheck, Minnesota Secretary of State Steve Simon stated that “[a]fter looking at the data,” his office determined that “there is an unacceptably high risk of false positives.” Numerous states, including Florida, Oregon, and Washington, have therefore dropped out of Crosscheck.<sup>68</sup> Tony Green, spokesman for the Oregon Secretary of State explained, “We left because the data we received was unreliable.”<sup>69</sup>

I should also note that, by aggregating sensitive voter data from dozens of states, Crosscheck also raises substantial data privacy concerns. The Illinois Board of Elections, for

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<sup>65</sup> Ari Berman, *Trump Election Commissioner’s Voter Database Is a Ripe Target for Hackers: Kris Kobach calls the program a model for the country. It has major security problems*, Mother Jones, Oct. 23, 2017, <http://www.motherjones.com/politics/2017/10/trump-election-commissioners-voter-database-is-a-ripe-target-for-hackers/>.

<sup>66</sup> See Esau, *supra* note 59 at 16.

<sup>67</sup> Jacquelyn Powell, *Ada County wrongly strips more than 750 voter registrations*, IdahoNews.com, Aug. 28, 2014, <http://idahonews.com/news/truth-squad/ada-county-wrongly-strips-more-than-750-voter-registrations>.

<sup>68</sup> Christopher Ingraham, *This anti-voter-fraud program gets it wrong over 99 percent of the time. The GOP wants to take it nationwide.*, Wash. Post: Wonkblog (July 20, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nationwide/?utm\\_term=.5afbd53a75c7](https://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nationwide/?utm_term=.5afbd53a75c7)

<sup>69</sup> Jon Greenberg & Amy Sherman, *Florida no longer part of controversial national voter data project*, Miami Herald: Naked Politics (Apr. 11, 2014), <http://miamiherald.typepad.com/nakedpolitics/2014/04/florida-no-longer-part-of-controversial-national-voter-data-project.html>

example, recently inadvertently disclosed documents containing passwords that are used to access Crosscheck data; and although it appears that these passwords are no longer in use, the documents revealed that Crosscheck passwords are sometimes disseminated via email to dozens of people at a time—a risky practice that could permit unauthorized access to large stockpiles of sensitive voter registration data.<sup>70</sup>

In sum, the Crosscheck system is highly inaccurate, and an improper basis for voter list maintenance programs. Worse, it gathers massive amounts of private voter data under what appear to be extremely lax cybersecurity protocols, raising concerns about voter list integrity for all the wrong reasons. And, given how Crosscheck has been used as a propaganda tool to fan unwarranted fears about massive numbers of duplicate registrations, its contributions to voter confidence and elections integrity are decidedly negative.

#### **D. Recent DOJ Activity Regarding Voter List Maintenance**

Despite the poor track record of aggressive list-maintenance programs, there are indications that the Department of Justice is seeking to encourage more voter purges. On June 28, DOJ sent letters to state election officials in all 44 states covered by the NVRA, asking for information concerning their voter list maintenance practices.<sup>71</sup> Vanita Gupta, former head of the Civil Rights Division at DOJ, described this dragnet for information as “virtually unprecedented.”<sup>72</sup> David Becker, a former senior litigator with the Voting Section in the Civil Rights Division, and now Executive Director the Center for Election Innovation & Research, stated,

In the quarter-century since passage of the NVRA, of which I spent seven years as a DOJ lawyer enforcing the NVRA, among other laws, I do not know of the DOJ conducting any other broad-based fishing expedition into list maintenance compliance, whether during Democratic or Republican administrations.<sup>73</sup>

This highly unusual request from DOJ is troubling in two respects.

First, part of what is so unusual about this blanket request is that it seeks information about only one part of the NVRA—the list-maintenance provisions—without any regard to the

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<sup>70</sup> See Berman, *supra* note 65; Rich Miller, *Accidental (and apparently harmless) password leak could prompt move away from Crosscheck program*, Capitol Fax.com, Oct. 19, 2017, <https://capitolfax.com/2017/10/19/accidental-and-apparently-harmless-password-leak-could-prompt-move-away-from-crosscheck-program/>.

<sup>71</sup> See, e.g., Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep’t of Justice, Civil Rights Div. to Kim Westbrook Strach, June 28, 2017, available at <https://www.documentcloud.org/documents/3881855-Correspondence-DOJ-Letter-06282017.html>.

<sup>72</sup> Vanita Gupta, *The Voter Purges Are Coming*, N.Y. Times, July 19, 2017, <https://www.nytimes.com/2017/07/19/opinion/donald-trump-voting-rights-purge.html?smid=tw-share&r=1>.

<sup>73</sup> David Becker, *Why Wednesday’s ‘Election Integrity’ Actions Should Be Watched By States*, Route Fifty (June 29, 2017), <http://www.routefifty.com/management/2017/06/trump-election-integrity-commission-state-voter-data/139107/>.

NVRA's other provisions, such as those requiring states to provide voter registration services at public assistance offices.<sup>74</sup> It thus appears that the Civil Rights Division may be reorienting its focus away from its historical mission of ensuring that voters have access. As Sam Bagenstos, who served as the Principal Deputy Assistant Attorney General for Civil Rights from 2009 until 2011, stated, DOJ appears to be "laying the groundwork to file lawsuits against states that, in their view, aren't kicking enough people off of the rolls,"<sup>75</sup> potentially at the cost of abandoning the Civil Rights Division's work to ensure that voter registration opportunities are available to all Americans in accordance with federal law.

Second, the timing of the request is highly suspect, as it was sent on the same day as an infamous letter from Kris Kobach, in his capacity as Vice-Chair of the Presidential Commission of Election Integrity, demanding the voter rolls from all 50 states. This unprecedented request to amass the personal data of every registered voter in America was widely condemned, with 44 states refusing to comply in whole or in part with the request.<sup>76</sup> Mississippi Secretary of State Hosemann, famously responded by suggesting that the Commission go "jump in the Gulf of Mexico."<sup>77</sup>

As former Acting Assistant Attorney General Gupta stated, there are "serious concerns about the potential coordination between the Pence-Kobach commission and government agencies, including the Justice Department."<sup>78</sup> The possibility that DOJ could be working with the Commission is troubling on multiple levels. Recently-disclosed documents suggest that the Commission's purpose has been, even prior to its inception, a sham designed to gin up a false narrative to justify changes to the NVRA.

Some background is helpful. In 2013, in his role as Kansas Secretary of State, Kobach began enforcing a "documentary proof of citizenship requirement" for voter registration, making Kansas one of only two states nationwide to implement such a requirement. Under the law, a voter registration applicant is required to show a document like a birth certificate or a passport when registering to vote. This requirement is much more onerous than it may initially sound. It makes registration drives impossible; burdens voters (like students) without easy access to documents; and inevitably requires many voters to pay a government fee—the price of a birth

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<sup>74</sup> See 52 U.S.C. § 20506.

<sup>75</sup> Sam Levine, *This DOJ Letter May Be More Alarming Than Trump Commission's Request For Voter Data*, Huffington Post, July 5, 2017, [https://www.huffingtonpost.com/entry/department-of-justice-voter-purge\\_us\\_595d22b1e4b0da2c7326c38b](https://www.huffingtonpost.com/entry/department-of-justice-voter-purge_us_595d22b1e4b0da2c7326c38b).

<sup>76</sup> See Liz Stark & Grace Hauck, *Forty-four states and DC have refused to give certain voter information to Trump commission*, CNN, July 5, 2017, <http://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html>.

<sup>77</sup> *Id.*

<sup>78</sup> Sam Levine, *New Document Shows Inner Workings Of Trump's Voter Fraud Probe*, Huffington Post, Oct. 3, 2017, [https://www.huffingtonpost.com/entry/trump-voter-fraud-probe\\_us\\_59d2a80ee4b0f962988957f5](https://www.huffingtonpost.com/entry/trump-voter-fraud-probe_us_59d2a80ee4b0f962988957f5).

certificate, which in some states can be as much as \$50<sup>79</sup>—in order to register to vote. In its first three years, Kansas’ documentation requirements blocked more than 35,000 registrations, approximately 14% of all new voter registration applications in that period; approximately 44% of these applications were from individuals under the age of 30.<sup>80</sup>

In a case in which I am lead counsel, the ACLU, representing the League of Women Voters of Kansas and individual voters whose applications had been blocked, sued to block the law under the NVRA. In a decision last year, the U.S. Court of Appeals for the Tenth Circuit preliminarily blocked the requirement for motor-voter applicants.<sup>81</sup> In a unanimous decision, the Court found that the Kansas law caused a “mass denial of a fundamental constitutional right.”<sup>82</sup> The NVRA had thus provided a critical bulwark against voter suppression in Kansas.

Recently-released documents in the litigation, however, indicate that Secretary Kobach proceeded to draft amendments to the NVRA that would grant him authority to demand citizenship documents from voter registration applicants.<sup>83</sup> And the day after the election, Secretary Kobach sent an email to the Trump transition team stating that he had already “started [drafting] amendments to the NVRA” regarding “proof of citizenship.”<sup>84</sup> Two weeks later, Secretary Kobach then met with president-elect Trump during the transition, bringing with him an infamous memo that referenced amending the NVRA “to promote proof of citizenship requirements.”<sup>85</sup> After that meeting, president-elect Trump tweeted that illegal votes had supposedly cost him the popular vote,<sup>86</sup> and went on to name Secretary Kobach the vice-chair of his Election Integrity Commission.

These plans have not been shared transparently with the public. Secretary Kobach was ultimately fined \$1,000 by a federal court for improperly attempting to conceal documents concerning these plans, with the court finding that he had engaged in “deceptive conduct” and made “patently misleading representations to the court.”<sup>87</sup> Now that these documents have been

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<sup>79</sup> See *Why Order from Vital Check?*, VitalChek.com, <https://www.vitalchek.com/> (last visited Oct. 23, 2017).

<sup>80</sup> See Expert Rep. of Michael McDonald at 2-3, *Fish v. Kobach*, No. 2:16-cv-02105-JAR-JPO (D. Kan. Feb. 26, 2016), ECF No. 20-1.

<sup>81</sup> *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016).

<sup>82</sup> *Id.* at 755.

<sup>83</sup> Bryan Lowry and Hunter Woodall, *Unsealed documents show Kobach urged Trump to change federal voting law*, Kansas City Star, Oct. 5, 2017, <http://www.kansascity.com/news/politics-government/article177327621.html> .

<sup>84</sup> Christopher Ingraham, *Vice chair of Trump’s voter fraud commission wants to change federal law to add new requirements for voting, email shows*, Wash. Post: Wonkblog, July 17, 2017, [https://www.washingtonpost.com/news/wonk/wp/2017/07/17/vice-chair-of-trumps-voter-fraud-commission-wants-to-change-federal-law-to-make-it-harder-to-vote-email-shows/?utm\\_term=.55071bb5c2f8](https://www.washingtonpost.com/news/wonk/wp/2017/07/17/vice-chair-of-trumps-voter-fraud-commission-wants-to-change-federal-law-to-make-it-harder-to-vote-email-shows/?utm_term=.55071bb5c2f8).

<sup>85</sup> Lowry and Woodall, *supra* note 83.

<sup>86</sup> Donald Trump, Twitter, Nov. 27, 2016, <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=en>.

<sup>87</sup> See Ord. at 4, 7, *Fish v. Kobach*, Case 2:16-cv-02105-JAR-JPO, (D. Kan. June 23, 2017), ECF 355.



made public, it is reasonable to conclude that—notwithstanding repeated public pronouncements that the Commission has no preordained results—its true purpose has been, from the beginning, not to enhance elections “integrity,” but rather to eviscerate the NVRA and permit states to impose documentation requirements for voter registration that have been absolutely devastating in Kansas.

This lack of transparency, however, continues. Members of the Commission and/or Commission staff appear to have made plans and coordinated with other government agencies in possible violation of federal transparency requirements. The next meeting of the Commission has apparently been scheduled for December, but several Commissioners were not even aware of that fact until speaking with a journalist last weekend;<sup>88</sup> two have even “sent letters to commission staff complaining about a lack of information about the panel’s agenda and demanding answers about its activities.”<sup>89</sup>

In sum, the possibility that DOJ’s list maintenance activities may be carried out in coordination with a Commission whose activities to date have been highly suspect is cause for concern.

#### **E. Comparisons of Population Figures and Numbers of Registered Voters**

Advocates of more aggressive purges sometimes point to statistics that purport to show that the number of registered voters in a particular county exceeds the population of voting-eligible adults. These allegations vary in terms of the specifics, but two broad points are warranted here.

First, such statistics should be viewed with extreme caution, as there are reasons to believe that they rely on inaccurate data—with respect to both the number of registered voters and the size of the relevant population in a county. For example, PolitiFact recently examined a claim by the Public Interest Legal Foundation (PILF) that Bryan County, Georgia, supposedly had “corrupted voter rolls because it had more voters registered than the eligible population in the county,” and rated this assertion as “False,” noting that PILF’s count of registered voters in the county included “inactive” voters—that is, registrants who are in process of being removed from the rolls, but whose removal has not yet been completed in accordance with the NVRA’s requirement that, after sending a notice to voters that their registrations will be canceled, states must wait two general federal election cycles before completing that removal process.<sup>90</sup> In other words, the registration numbers used by organizations like PILF are inflated because they

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<sup>88</sup> See Jessica Huseman, Twitter, Oct. 21, 2017, <https://twitter.com/JessicaHuseman/status/921754606014746624>.

<sup>89</sup> Associated Press, *Trump’s secretive voter fraud panel is keeping own members in the dark*, The Guardian, Oct. 22, 2017, [https://www.theguardian.com/us-news/2017/oct/22/trumps-secretive-voter-panel-is-keeping-own-members-in-the-dark?CMP=share\\_btn\\_tw](https://www.theguardian.com/us-news/2017/oct/22/trumps-secretive-voter-panel-is-keeping-own-members-in-the-dark?CMP=share_btn_tw).

<sup>90</sup> Jon Greenberg, *Anti-vote fraud group levels false charge of corrupted voter rolls*, PolitiFact, Oct. 4, 2017, <http://www.politifact.com/georgia/statements/2017/oct/04/public-interest-legal-foundation/anti-vote-fraud-group-levels-false-charge-corrupte/>.

include voters *whose registrations have already been targeted for removal*, and which are in the process of being removed in accordance with federal legal requirements.

The population figures used in such calculations should also be taken with a grain of salt. They sometimes rely on Census Bureau estimates of the population rather than an actual enumeration, meaning that they are *estimates* with a margin of error, rather than a hard count<sup>91</sup>; and such estimates can often be unreliable for small counties. Moreover, the Census Bureau also generally counts people as residents of a place based on the fact that they are physically located there most of the time—but as any college student, member of the military, or Congressperson can tell you, the place that you sleep is not necessarily the same place that you call home and where you are properly registered to vote.<sup>92</sup> For these reasons and others, assertions that a particular county has more voters than eligible citizens should be viewed with caution.

Second, even taking these statistics at face value, they are not necessarily indicators of fraud or wrongful activity. Voter registration is administered at the state and local levels, and we live in a highly mobile society. The fact that a person is registered to vote in more than one state is almost always a reflection of those two simple facts rather than any sort of malfeasance. Indeed, several members of President Trump’s cabinet, inner circle, and family—including Treasury Secretary Steven Mnuchin, former adviser Steve Bannon; former press secretary Sean Spicer; his son-in-law Jared Kushner; and his daughter Tiffany Trump—were all registered to vote in more than one state last year.<sup>93</sup> Ultimately, the mere existence of some deadwood on the rolls is not by itself evidence of fraud.

The bottom line is that there is no evidence of substantial fraud arising from inflated voter rolls. Speaker Ryan has stated that he’s seen “no evidence” of rampant voter fraud during the 2016 election.<sup>94</sup> U.S. Election Assistance Commissioner, Republican Matthew Masterson has stated that the 2016 election “had integrity. It was extremely well administered.... The process was secure.”<sup>95</sup> And, during recount litigation in Michigan, even the President’s own

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<sup>91</sup> See Justin Levitt, *Comparing registered voters and CVAP*, Election Law Blog, Oct. 5, 2017, <http://electionlawblog.org/?p=95240>.

<sup>92</sup> See *id.*

<sup>93</sup> Erin, McCann, *Who Is Registered to Vote in Two States? Some in Trump’s Inner Circle*, N.Y. Times, Jan., 27, 2017, <https://www.nytimes.com/2017/01/27/us/politics/trump-cabinet-family-voter-registration.html>.

<sup>94</sup> Scott Wong, “Ryan: ‘No evidence’ of mass voter fraud as Trump claimed,” The Hill, Jan. 24, 2017, <http://thehill.com/homenews/house/315844-ryan-no-evidence-of-mass-voter-fraud-as-trump-claimed>.

<sup>95</sup> Dave Levinthal, *President Trump Says Voter Fraud Is a Huge Problem. A Top Republican Election Official Disagrees*, TIME, April 13, 2017, [http://time.com/4736959/voter-fraud-trump-matthew-masterson/?xid=time\\_socialflow\\_twitter](http://time.com/4736959/voter-fraud-trump-matthew-masterson/?xid=time_socialflow_twitter).

legal team told a court that “all available evidence suggests that the 2016 general election was not tainted by fraud or mistake.”<sup>96</sup>

Given the absence of any evidence of a widespread problem of elections fraud—resulting from supposedly inflated rolls or otherwise—it is reasonable to ask whether the focus on culling the voter rolls is misplaced, particularly given our demonstrated experience of overzealous voter removal programs. The greatest threat to voter list accuracy—and thus, to elections integrity—is not the phantom specter of fraudsters voting en masse in the names of illegitimate registrants, but rather the very real pattern of wrongfully purging legitimately-registered eligible voters from the rolls.

## II. The Security of Electronic State Voting Rolls

Although cybersecurity is not my area of expertise, I would be remiss if I did not note that there is potentially one additional threat to voter list integrity that bears mentioning: hacking. While there is no evidence indicating that vote totals from the 2016 election were unlawfully altered in any way, there is a general consensus that foreign actors, including those associated with Russia, made attempts to compromise state voter registration systems during the 2016 election.<sup>97</sup> Reporting from multiple news outlets places the number of states that were targeted between 21 and 39, based on those with direct knowledge of the U.S. investigation into the matter and reports from the Department of Homeland Security (DHS).<sup>98</sup> According to former top Obama Administration officials, the “number of actual successful intrusions, where Russian agents gained sufficient access to attempt to alter, delete or download and information, was ‘less than a dozen.’”<sup>99</sup>

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<sup>96</sup> Philip Bump, *Reminder: In an anti-recount filing, Trump’s lawyers said the election was “not tainted by fraud or mistake”*, Wash. Post, Jan. 25 2017, [https://www.washingtonpost.com/news/the-fix/wp/2016/12/05/in-an-anti-recount-filing-trumps-lawyers-say-the-election-was-not-tainted-by-fraud-or-mistake/?utm\\_term=.b7f98e66afc2](https://www.washingtonpost.com/news/the-fix/wp/2016/12/05/in-an-anti-recount-filing-trumps-lawyers-say-the-election-was-not-tainted-by-fraud-or-mistake/?utm_term=.b7f98e66afc2).

<sup>97</sup> Michael Riley, *Russian Cyber Hacks on U.S. Electoral System Far Wider Than Previously Known*, Bloomberg Politics, June 13, 2017, <https://www.bloomberg.com/news/articles/2017-06-13/russian-breach-of-39-states-threatens-future-u-s-elections>; Massimo Calabresi, *Election Hackers Altered Voter Rolls, Stole Private Data, Officials Say*, TIME, June 22, 2017, <http://time.com/4828306/russian-hacking-election-widespread-private-data/>; Sari Horwitz, Ellen Nakashima, and Matea Gold, *DHS tells states about Russian hacking during 2016 election*, Wash. Post, Sept. 22, 2017, [https://www.washingtonpost.com/world/national-security/dhs-tells-states-about-russian-hacking-during-2016-election/2017/09/22/fd263a2c-9fe2-11e7-8ea1-ed975285475e\\_story.html?utm\\_term=.63c137753b12](https://www.washingtonpost.com/world/national-security/dhs-tells-states-about-russian-hacking-during-2016-election/2017/09/22/fd263a2c-9fe2-11e7-8ea1-ed975285475e_story.html?utm_term=.63c137753b12).

<sup>98</sup> According to DHS the targeted states include: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Minnesota, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington, and Wisconsin. Sam Levine, *States Accuse DHS of Giving Them Bad Information About Russian Hacking*, Huffington Post, Sept. 28, 2017, [https://www.huffingtonpost.com/entry/dhs-russia-hacking\\_us\\_59cd0da3e4b0e005cc57235d](https://www.huffingtonpost.com/entry/dhs-russia-hacking_us_59cd0da3e4b0e005cc57235d).

<sup>99</sup> Calabresi, *supra* note 97.

Six states and territories have publicly reported being the victims of confirmed or suspected foreign cyber-attacks. This includes Arizona<sup>100</sup>, Florida<sup>101</sup>, Illinois, Mississippi, and Washington<sup>102</sup>. In Mississippi, Secretary of State Hosemann stated that the state had over 5,000 hacking attempts in August 2016 and 4,000 attempts in September 2016.<sup>103</sup> Illinois also reported that 90,000 records containing drivers license numbers, 25% of which contained the last four digits of a voter's Social Security number, were stolen by Russian-affiliated actors.<sup>104</sup> Two additional jurisdictions, Riverside County, California<sup>105</sup> and South Carolina<sup>106</sup>, reported that they were victims of confirmed or suspected cyberattacks, but it is unknown the origin of the attack, whether foreign or domestic. It remains unclear from reporting what, if any, information was obtained.

In response to hacking attempts, states across the country have taken steps to upgrade and secure voting system databases and machines, and to address other potential vulnerabilities. Delaware, for example, is moving its voter registration list off the state's mainframe computer and replacing old electronic voting systems that do not leave a paper record. Other states, including Colorado and Rhode Island will verify election results through an advanced statistical analysis called a "risk-limiting audit." West Virginia is adding a cybersecurity expert to its

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<sup>100</sup> Jeff Pegues, *After hack, Arizona working to keep its elections database secure*, CBS News, Oct. 13, 2016, <https://www.cbsnews.com/news/after-hack-arizona-working-to-keep-its-elections-database-secure/>; Ellen Nakashima, *Russian hackers targeted Arizona election system*, Wash. Post, Aug. 29, 2016, [https://www.washingtonpost.com/world/national-security/fbi-is-investigating-foreign-hacks-of-state-election-systems/2016/08/29/6e758ff4-6e00-11e6-8365-b19e428a975e\\_story.html?utm\\_term=.1b743c7a90fc](https://www.washingtonpost.com/world/national-security/fbi-is-investigating-foreign-hacks-of-state-election-systems/2016/08/29/6e758ff4-6e00-11e6-8365-b19e428a975e_story.html?utm_term=.1b743c7a90fc).

<sup>101</sup> Kristen M. Clarke, Michael Auslen, & Steve Bousquet, *FBI warns election officials that hackers tried to break into Florida voting system*, Tampa Bay Times, Sept. 30, 2016, <http://www.tampabay.com/news/politics/stateroundup/fbi-warns-election-officials-that-hackers-tried-to-break-into-florida/2296035>; Rebecca Ballhaus, Erica Orden, & Valeria Bauerlein, *State Officials to Testify on Possible Russian Involvement in 2016 Election*, WSJ, June 18, 2017, <https://www.wsj.com/articles/state-officials-to-testify-on-possible-russian-involvement-in-2016-election-1497787201>.

<sup>102</sup> Matt Markovich, *State protecting voter registration database from hackers*, KOMONews, Sept. 29, 2016, <http://komonews.com/news/local/state-safeguarding-voter-registration-databases-before-november-election>; Abraham Epton and John Ryan, *Hackers target Washington election systems*, KUOW, Sep. 30, 2016, <http://kuow.org/post/hackers-target-washington-election-systems>.

<sup>103</sup> Patsy R. Brumfield, *Anti-hacking security boosted on state voting systems*, Mississippi Today, Oct. 3, 2016, <https://mississippitoday.org/2016/10/03/anti-hacking-security-boosted-on-mississippi-voting-systems/>.

<sup>104</sup> Calabresi, *supra* note 97.

<sup>105</sup> Jacob Preal, *DA confirms hackers are culprit of voter registration changes*, Valley News, June 10, 2016, <http://myvalleynews.com/most-relevant/voting-irregularities-disenfranchises-many-riverside-county/>; John Sepulvado, *DA: Hackers Penetrated Voter Registrations in 2016 Through State's Election Site*, KQED, July 21, 2017, <https://www.kqed.org/news/2017/07/21/hackers-penetrated-voter-registrations-in-2016-through-states-election-site>

<sup>106</sup> Nathaniel Cary, *How safe is your vote?*, Greenville Online, Oct. 22, 2016, <http://www.greenvilleonline.com/story/news/politics/elections/2016/10/22/how-safe-your-vote/92554584/>; Alexa Corse, *South Carolina May Prove a Microcosm of U.S. Election Hacking Efforts*, WSJ, July 16, 2017, <https://www.wsj.com/articles/south-carolina-may-prove-a-microcosm-of-u-s-election-hacking-efforts-1500202806>.

elections office.<sup>107</sup> And, at the federal level, the U.S. Election Assistance Commission has issued voluntary voting system guidelines for securing voting systems, including voter registration lists.<sup>108</sup>

Additional changes can be made at both the federal and state level to put in place safeguards to further secure voter registration lists and protect against efforts to compromise voter registration systems. At the federal level, providing grant funding to states and localities to improve election infrastructure in order to prevent against cybersecurity vulnerabilities is one proposed solution.<sup>109</sup> Any grant funding programs must come with adequate safeguards to protect against privacy concerns arising from information sharing programs.

At the state and local level, the Brennan Center for Justice has developed a list of recommendations that have been endorsed by cybersecurity and election experts.<sup>110</sup> These recommendations include:

- Implementing regular state audits and threat assessments of voter registration systems; and upgrading and replacing antiquated IT infrastructure, including database software and operating systems.<sup>111</sup>
- Adopting general security best practices, including limiting employee access to registration systems, running frequent scans of databases to monitor and identify abnormal or potentially fraudulent activity, and conducting regular random audits of the registration lists themselves.<sup>112</sup>
- Developing contingency plans for a successful hack, which could allow for the quick recovery of data so that, in the event of a cyberattack, voters are still able to register and cast a ballot.<sup>113</sup> Contingency plans for Election Day could include having backups of voter registration lists on hand in paper form; and where

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<sup>107</sup> Michael Wines, *Wary of Hackers, States Move to Upgrade Voting Systems*, N.Y. Times, Oct. 14, 2017, <https://www.nytimes.com/2017/10/14/us/voting-russians-hacking-states-.html>.

<sup>108</sup> *Voluntary Voting System Guidelines*, U.S. Election Assistance Comm'n, <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines/> (last visited Oct. 22, 2017).

<sup>109</sup> Lawrence Norden and Ian Vandewalker, Brennan Center for Justice, *Securing Elections from Foreign Interference* (2017), [https://www.brennancenter.org/sites/default/files/publications/Securing\\_Elections\\_From\\_Foreign\\_Interference\\_1.pdf](https://www.brennancenter.org/sites/default/files/publications/Securing_Elections_From_Foreign_Interference_1.pdf).

<sup>110</sup> *Id.* at 14-21.

<sup>111</sup> *Id.* at 17.

<sup>112</sup> *Id.* at 20.

<sup>113</sup> *Id.*

electronic poll books are used, having paper poll book backups readily available.<sup>114</sup>

Encouraging the development and implementation of best practices along these lines will go a long way in ensuring that voter registration lists remain secure and not result in the denial of the right to vote as a result of a compromised voter registration list.

### **Conclusion**

We face threats to the integrity of our voter rolls from overly aggressive purges that wrongfully remove legitimate voters from the rolls, and possibly from inadequate cyber-security systems that leave our voter registration systems vulnerable to hacking.

Ultimately, however, the greatest threat to our democracy arises from the failure to respect the voice of the electorate. All too often, this disrespect stems from a refusal to accept the basic legitimacy of political opponents, on the assumption that their electoral support comes not from actual voters, but rather must be the result of fraud or corruption. It is that sort of fundamental unwillingness to accept the judgment of the democratic process that underpins comments like the President's false assertion that three to five million illegal votes cost him the popular vote—when there is not a shred of evidence indicating anything other than what we all know: that he lost the popular vote by almost three million ballots. There is perhaps nothing more damaging to the spirit of civic engagement than specious allegations of fraud, which convey the message to voters that their votes don't matter because the system is irrevocably corrupt. Such assertions do a disservice to men and women like my grandfather, who risked their lives to defend our democracy.

When we disagree, we are supposed to try to convince the electorate through debate and persuasion. That's how democracy is supposed to work. If instead we give up on that and try to shift the rules of the game to ensure our preferred results, we will have lost faith in our democratic system. When falsehoods are used to justify unnecessary restrictions on the franchise or overzealous purges that kick legitimate voters off of the rolls, the damage to our democracy is irreparable. Because even if such measures do not affect the outcome of an election, disenfranchising a single citizen translates to denying one of our fellow Americans of the most fundamental right that we have in our democracy.

We have one of the lowest turnout rates in the western world.<sup>115</sup> Our democracy is more representative, responsive, and accountable, when more rather than fewer Americans participate. We should be working together to do everything we can to build a strong, vibrant, and inclusive democracy.

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<sup>114</sup> *Id.* at 21.

<sup>115</sup> Drew DeSilver, *U.S. trails most developed countries in voter turnout*, Pew Research Center, May 15, 2017, <http://www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/>.

I thank you again for the opportunity to testify before you, and look forward to answering any questions that you have.