



WRITTEN STATEMENT OF  
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For a Hearing on

Voting Rights and Election Administration in America

Committee on House Administration

Hearing on October 17, 2019

Submitted on October 16, 2019

## Introduction

With approximately 3 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. 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. 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 (VRA) and the National Voter Registration Act of 1993 (NVRA).

In my capacity as Director of the ACLU's Voting Rights Project, I supervise the ACLU's voting rights litigation, which focuses on ensuring that all Americans have access to the franchise, and that everyone is represented equally in our political processes. In that capacity, I recently argued before the Supreme Court in *Department of Commerce v. State of New York*,<sup>1</sup> a case in which we successfully challenged the Administration's effort to add a citizenship question to the 2020 Census questionnaire, a move that would have had devastating consequences for the representation of communities of color across the United States. In addition to my work at the ACLU, I serve as an adjunct professor at NYU School of Law, and am widely published on voting rights issues, including in the *Yale Law Journal Forum* and the *Harvard Civil Rights-Civil Liberties Law Review*.

As I explained last month in testimony before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties,<sup>2</sup> the Supreme Court's decision in *Shelby County v. Holder*<sup>3</sup> unleashed a wave of voter suppression and other discriminatory voting laws unlike anything the country had seen in a generation.<sup>4</sup> Since *Shelby County* was decided, the ACLU has opened more than 60 new voting rights matters—including cases filed, amicus briefs, and investigations—and we currently have more than 30 active matters.<sup>5</sup> Between the 2012 and 2016 presidential elections alone, the ACLU and its affiliates won 15 voting rights victories protecting more than 5.6 million voters, in 12 states that

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<sup>1</sup> 139 S. Ct. 2551 (2019).

<sup>2</sup> See Written Statement Before the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, September 10, 2019, *available at* <https://docs.house.gov/meetings/JU/JU10/20190910/109895/HHRG-116-JU10-Wstate-HoD-20190910.pdf>.

<sup>3</sup> 570 U.S. 529 (2013).

<sup>4</sup> See Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 Yale L.J. Forum 799 (2018).

<sup>5</sup> These numbers are based on a recent review of the ACLU's internal case management system.

collectively are home to 161 members of the House of Representatives and wield 185 votes in the Electoral College.<sup>6</sup>

Although the ACLU has been very successful in blocking discriminatory voting changes (with an overall success rate of more than 80% in cases brought under Section 2 of the Voting Rights Act (VRA) since *Shelby County*<sup>7</sup>), we currently lack the tools needed to stop discriminatory changes to voting laws *before* they taint an election. In ten recent ACLU Section 2 cases that resulted in favorable outcomes for our clients, **more than 350 federal, state, and local government officials were elected under regimes** that were later found by a court to be racially discriminatory, or which were later abandoned by the jurisdiction.<sup>8</sup> Our experience underscores the need for stronger voting rights protections that can address racial discrimination in voting before it happens.

**I. Restrictions on Voting Justified By False or Exaggerated Claims Concerning Non-Citizen Registration**

My testimony today will focus on one category of voter suppression tactics: unnecessary restrictions on registration and purges of eligible voters based on false or exaggerated assertions regarding noncitizens registering to vote.

As I explain below, some states have put obstacles directly in front of voter registration applicants by making the registration process itself more difficult, through onerous and unnecessary documentation requirements, creating a bureaucratic nightmare that has disenfranchised tens of thousands of voters in one state—Kansas—alone. Other states have attempted to identify noncitizens on their voter rolls, an unobjectionable goal, but one that is not served by using faulty database matching techniques and stale citizenship data. Such efforts have routinely produced false positives to the tune of tens of thousands of U.S. citizens misidentified as noncitizens and threatened with removal from the rolls. The disenfranchised are often voters of color. Meanwhile, from Kansas, to Florida, to Texas, to the Election Assistance Commission, elections officials who have pursued such policies have seen their claims about a purportedly widespread problem of noncitizen registration evaporate under the slightest scrutiny; and, more often than not, their efforts have resulted in professional embarrassment, often at considerable damage to their careers.

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<sup>6</sup> See Dale Ho, *Let People Vote: Our Fight for Your Right to Vote in This Election*, Nov. 3, 2016, available at <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/let-people-vote-our-fight-your-right-vote-election>.

<sup>7</sup> See Ho, *supra* note 2.

<sup>8</sup> See *id.*

## A. Onerous and Unnecessary Citizenship Documentation Requirements

### 1. Kansas

All states require voters to be citizens and require proof of citizenship to register to vote (for example, an attestation under penalty of perjury<sup>9</sup>), but in 2011, Kansas went further than that, enacting a requirement that voter registration applicants submit a copy of a legal document establishing U.S. citizenship, such as a birth certificate or a passport. In so doing, Kansas became the only state requiring a copy of a physical citizenship document in order to register to vote.<sup>10</sup>

Kansas's law went into effect in 2013, and the effects were devastating for voter registration in the state. By March 2016, after the law had been in effect for a little more than three years, a total of 30,732 voter registration applicants had been denied registration, representing "approximately 12% of the total voter registration applications submitted since the law was implemented."<sup>11</sup> It was as if one out of every eight voter registration applications were thrown in the trash. An analysis by political scientist Michael McDonald from the University of Florida determined that affected voters were disproportionately under the age of 30 (43.2% of rejected registration applicants) and unaffiliated with a political party (53.4% of rejected applicants).<sup>12</sup> And voter registration drives ground to a halt, as the League of Women Voters reported that, after the law went into effect, the number of completed registrations it collected from drives fell by 90%.<sup>13</sup>

The law affected a wide swath of voters, in varying ways. For some voters, the law was simply too onerous, as several of our clients either could not afford or could not locate their birth certificates in time to register before the 2014 midterm. One of our clients was Donna Bucci,

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<sup>9</sup> As the Tenth Circuit has noted, *see, Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016), Congress chose to rely on an attestation to establish eligibility for a wide range of federal programs. See, e.g., 7 U.S.C. § 2020(e)(2)(B)(v) (requiring state applications for Supplemental Nutrition Assistance Program aid be signed under penalty of perjury as to the truth of the information contained in the application and the citizenship or immigration status of household members); 26 U.S.C. § 6065 (requiring that any tax "return, declaration, statement, or other document" be "verified by a written declaration that it is made under the penalties of perjury"); 42 U.S.C. § 1395w-114(a)(3)(E)(iii)(I) (requiring "an attestation under penalty of perjury" as to assets for receipt of prescription drug plan subsidies); 42 U.S.C. § 1436a(d)(1)(a) (requiring an attestation of citizenship or "satisfactory immigration status" for the receipt of housing assistance).

<sup>10</sup> Three states have similar laws: Alabama, Arizona, and Georgia. Alabama and Georgia have never enforced their respective documentary proof-of-citizenship laws and have indicated no definitive plans to do so; Arizona's law is less stringent, and can be satisfied with a driver's license *number*, in lieu of a copy of a *document*. See A.R.S. § 16-166(F)(1).

<sup>11</sup> *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1068 (D. Kan. 2018).

<sup>12</sup> *Id.* at 1069.

<sup>13</sup> *Id.* at 1071.

who works a low-wage job as “a cook in [a] prison kitchen on the 3:00 a.m. to 12:00 p.m. shift,” does “not possess a copy of her birth certificate or a passport,” and “cannot afford the cost of a replacement birth certificate from Maryland,” which “would impact whether she could pay rent.”<sup>14</sup> She was unable to vote in the 2014 midterm. Another was Wayne Fish, who “works the overnight shift at an American Eagle distributor,” “was born on a decommissioned Air Force base in Illinois,” and who spent two years searching for his birth certificate until he found it in his deceased mother’s safe; he was unable to vote in the 2014 midterm.<sup>15</sup>

Others were disenfranchised because the law was a confusing, bureaucratic mess. Several of our other clients, including Tad Stricker and T.J. Boynton, actually showed documentary proof of citizenship at the time that they obtained their driver’s licenses and applied to register to vote, but were never registered because the state motor vehicle offices did not send elections officials their proof of citizenship documents along with their voter registration applications. Neither Mr. Stricker were Boynton were told that their registrations had been rejected until they went to vote on Election Day in the 2014 midterm, and by then it was too late.<sup>16</sup>

The ACLU challenged the law on several dimensions in a series of four different lawsuits. In the lead case, the U.S. Court of Appeals for the Tenth Circuit, in a 2016 preliminary injunction opinion by Judge Jerome Holmes, an appointee of George W. Bush, found that the law had caused a “mass denial of a fundamental constitutional right,” and partially blocked the law for the 2016 election.<sup>17</sup>

The case was then sent back to the district court so that then-Kansas Secretary of State Kris Kobach could mount a defense of the law, which he asserted was necessary to prevent noncitizens from registering to vote. Kobach—who famously and falsely claimed that Donald Trump had won the popular vote in 2016 (once all of the supposedly illegal votes were subtracted, of course<sup>18</sup>)—had championed the law to address what he claimed was an epidemic of noncitizen registration in Kansas numbering in the thousands. But when the case eventually went to trial in 2018, the evidence presented by Kansas showed that the law prevented more than 30,000 eligible Kansans from voting while doing nothing to promote election integrity. At the trial, Kansas’s own expert witness estimated that “more than 99% of the [30,000] individuals” whose registration applications were suspended for failure to provide DPOC “are United States citizens,” and the District Court found that his estimate as to the number of noncitizens on the suspense list was “statistically indistinguishable from zero.”<sup>19</sup>

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<sup>14</sup> *Id.* at 1075

<sup>15</sup> *Id.* at 1074-75.

<sup>16</sup> *Id.* at 1075-78.

<sup>17</sup> *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016).

<sup>18</sup> See Hunter Woodall, “Kris Kobach agrees with Donald Trump that ‘millions’ voted illegally but offers no evidence,” *Kansas City Star*, Nov. 30, 2016, available at <https://www.kansascity.com/news/politics-government/article117957143.html>.

<sup>19</sup> *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1092 (D. Kan. 2018).

Kansas also presented evidence from its own investigations showing that, “[a]t most,” a total of only 39 non-citizens became registered to vote in Kansas over the last 19 years—about two per year, or a total of approximately 0.002% of the registered voters in Kansas. And the state’s own records indicated that even this paltry handful of registrations could be “largely explained by administrative error, confusion, or mistake,” with noncitizens sometimes becoming inadvertently registered even when they affirmatively stated that they were noncitizens on their DMV applications (for example, by checking the Box “No” in response to the question “Are you a citizen?”).<sup>20</sup> While errors in a voter registration system should always be addressed, some mistakes are inevitable. To put these numbers in perspective, evidence at trial showed that the number of noncitizens registered to vote in Kansas was about one-tenth the number of registrants in Kansas who have dates of registration that precede their dates of birth (approximately 400 people total)—but no one has expressed concern about an epidemic of illegal registration by the unborn. Rather, everyone recognizes that in a state with 1.8 million voters, some administrative errors are inevitable.

U.S. District Judge Julie Robinson, another George W. Bush appointee and Chief Judge for the District of Kansas, ultimately issued a decision permanently blocking the law in its entirety prior to the 2018 midterm elections. But the trial revealed a disturbing pattern of lawlessness by then-Kansas Secretary of State Kris Kobach that merits briefly mentioning here. First, the court sanctioned Kobach for failing to disclose the existence of a relevant document in the litigation; Kansas taxpayers paid a \$1,000 fine for that omission.<sup>21</sup> Second, the court found that Kobach willfully “disobeyed th[e] Court’s preliminary injunction order,” by “fail[ing] to ensure that voter registration applicants covered by the preliminary injunction order became fully registered,” and “willfully failed to make sure that the county election officials were clearly and effectively trained to enforce this Court’s orders.”<sup>22</sup> The State of Kansas declined to appeal that ruling, and was forced to pay over \$26,000 in attorney’s fees for Kobach’s willful defiance of the law.<sup>23</sup>

Second, the court also found that, at trial, Kobach engaged in “a pattern and practice ... of flaunting disclosure and discovery rules that are designed to prevent prejudice and surprise at trial,” noting that “[i]t [wa]s not clear to the Court whether [Kobach] repeatedly failed to meet his disclosure obligations intentionally or due to his unfamiliarity with the federal rules,” and thus “impose[d] a CLE requirement of 6 hours for the 2018–2019 reporting year in addition to any other CLE education required by his law license.”<sup>24</sup> In my career, I have never in any other case witnessed conduct by opposing counsel that was so outrageous as to warrant imposition of continuing legal education courses.

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<sup>20</sup> *Id.* at 1102.

<sup>21</sup> *See Fish v. Kobach*, 267 F. Supp. 3d 1297, 1301 (D. Kan. 2017), *appeal dismissed*, No. 17-3161, 2017 WL 7065741 (10th Cir. Aug. 30, 2017).

<sup>22</sup> *Fish*, 309 F. Supp. 3d at 1168.

<sup>23</sup> *Fish v. Kobach*, No. 16-2105-JAR, 2018 WL 3647132, at \*8 (D. Kan. Aug. 1, 2018).

<sup>24</sup> *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1118–19 (D. Kan. 2018).

The case is now back on appeal in the Tenth Circuit, where I argued it last April. A final decision from the court is pending.

## 2. *The Election Assistance Commission*

Around the same time of the Kansas case, we also litigated a related case in the D.C. Circuit, *League of Women Voters v. Newby*.<sup>25</sup> The case grew out of the Supreme Court’s decision in *Arizona v. Inter-Tribal Council of Arizona* (“ITCA”),<sup>26</sup> which held that Arizona was prohibited from requiring individuals to submit documentary proof of citizenship when they apply to register to vote using the federal voter registration form unless approved by the U.S. Election Assistance Commission (“EAC”). After the Supreme Court’s decision in *ITCA* Arizona and Kansas submitted requests to the EAC to include an instruction to the federal voter registration form indicating that documentary proof of citizenship would be required to register to vote in those states. The EAC rejected those requests, in a formal decision finding that documentary proof of citizenship requirements were inconsistent with the purposes of the NVRA, and were not shown to be necessary by any evidence provided by the States.<sup>27</sup> Arizona and Kansas then filed a lawsuit seeking to direct the EAC to include the documentary proof of citizenship requirement in the federal form instructions for their states, but lost in the Tenth Circuit.<sup>28</sup>

Nevertheless, in 2016, then-new EAC Executive Director, Brian Newby—acting unilaterally and unlawfully without the approval of a majority of the EAC—sent letters to the secretaries of state of Alabama, Georgia, and Kansas stating, without explanation, that he would allow them to require documentary proof of citizenship.<sup>29</sup> Newby was a former local election official in Kansas and had been appointed to his local position by and had ties with then-Kansas Secretary of State, Kris Kobach; Newby had also publicly supported Kansas’ efforts to achieve a documentary proof of citizenship requirement.<sup>30</sup> The ACLU, representing private plaintiffs, along with the Lawyers’ Committee for Civil Rights Under Law, the Brennan Center for Justice, and Project Vote, filed suit against the EAC, arguing that Newby’s action was a violation of Administrative Procedure Act. The U.S. Court of Appeals for the D.C. Circuit agreed, finding that there was “a substantial risk that citizens will be disenfranchised in the present federal

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<sup>25</sup> 838 F.3d 1 (D.C. Cir. 2016).

<sup>26</sup> 570 U.S. 1 (2013).

<sup>27</sup> *League of Women Voters v. Newby*, Case No. 1:16-cv-00236, ECF No. 1, Complaint, at 2-3 (D.D.C. Feb. 12, 2016).

<sup>28</sup> See *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

<sup>29</sup> *League of Women Voters of the United States v. Newby*, 195 F. Supp. 3d 80 (D.D.C.).

<sup>30</sup> *League of Women Voters v. Newby*, Case No. 1:16-cv-00236, ECF No. 1, Complaint, at 3 (D.D.C. Feb. 12, 2016).

election cycle,” and preliminarily blocked the new documentary proof-of-citizenship registration instructions from coming into effect.<sup>31</sup>

Fortunately, Mr. Newby’s tenure as Executive Director of the EAC recently ended, amid reports of mismanagement, an “alienated and confused ... workforce,” “a staff exodus that included nine office directors,” and “concerns about self-dealing” over a proposed succession plan that would have given him a new role at the commission.<sup>32</sup>

## **B. Inaccurate Purges of Purported Non-Citizens**

It is often suggested that states should compare their voter lists to other databases containing information on citizenship to identify registrants who are noncitizens, and who should be removed from the rolls. In theory, such efforts could provide states with a means of identifying ineligible noncitizens who should never have been registered in the first place. In practice, however, such efforts have often resulted in the inaccurate flagging 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 noncitizens, ginning up inaccurate or exaggerated fears of noncitizen registration.

### *1. The Department of Homeland Security Systematic Alien Verification for Entitlements (SAVE) Database*<sup>33</sup>

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>34</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>35</sup> to confirm that immigration information provided by an individual is correct at the time it is provided.

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<sup>31</sup> *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12-13 (D.C. Cir. 2016).

<sup>32</sup> Eric Geller, “Key federal election agency parting ways with embattled top staffer,” *Politico*, Sept. 18, 2019, available at <https://www.politico.com/story/2019/09/18/election-assistance-commission-brian-newby-1501884>.

<sup>33</sup> The following description of inaccurate purges based on the SAVE database in Florida and Iowa is derived from previous testimony that I submitted to this Committee. See Dale Ho, Written Statement before the House Committee on Administration, Oct. 25, 2017, available at <https://www.aclu.org/other/written-statement-dale-ho-house-committee-administration-hearing-state-voter-registration-list>.

<sup>34</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>35</sup> See *id.*

It is critically important to recognize what SAVE is *not*. SAVE “does not include a comprehensive and definitive listing of U.S. citizens.”<sup>36</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>37</sup> Consequently, SAVE offers nothing more than a collection of snapshots of various individual’s respective statuses in the US immigration system at certain moments in time—and those statuses can, and often do, change.

For this reason, DHS has cautioned against relying heavily on SAVE data to verify citizenship and confirm voter eligibility.<sup>38</sup> Improper use of SAVE data for voter list maintenance could, for example, disenfranchise eligible citizens<sup>39</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>40</sup> from voter 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, several states that have attempted to use SAVE for voter registration purposes have seen those efforts declared unlawful by courts.

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<sup>36</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>37</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>38</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>39</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>40</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 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>.

a. *Florida*

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>41</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>42</sup>

In its efforts to identify noncitizens, Florida officials initially stated that "nearly 200,000 registered voters may not be U.S. citizens."<sup>43</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>44</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>45</sup>). Reports vary, but PolitiFact was ultimately able to confirm that a total of only 85 noncitizens were removed from the rolls as a result of these efforts,<sup>46</sup> in a state of

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<sup>41</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>42</sup> See DHS Memorandum of Agreement, *supra* note 38.

<sup>43</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>44</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>45</sup> See *id.*

<sup>46</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-/>.

more than 11 million voters at the time<sup>47</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>48</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>49</sup>

Litigation ensued over Florida's attempts to use SAVE. The U.S. Court of Appeals for the Eleventh Circuit,<sup>50</sup> after noting that the SAVE database matching results were "far from perfect,"<sup>51</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>52</sup> The State was ultimately ordered to discontinue its purge based on the use of SAVE data.

*b. Iowa*

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>53</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 [of] their fundamental right to vote."<sup>54</sup> The court ultimately agreed, blocking the purge, and finding that it "would chill the right to vote and cause irreparable

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<sup>47</sup> See Weiner, *supra* note 44.

<sup>48</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>49</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>50</sup> *Arcia v. Florida Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014).

<sup>51</sup> *Id.* at 1339.

<sup>52</sup> *Id.* at 1342.

<sup>53</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>54</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/2012-08-08firstamdeddpetitionforjudicialreview.pdf>.

harm.”<sup>55</sup> The office of the Iowa Secretary of State eventually abandoned an appeal of that ruling,<sup>56</sup> effectively conceding that Iowa’s efforts to use SAVE data to purge the voter rolls were unlawful and ending those efforts.

## 2. *Driver’s License Databases*

Another potential source of information about citizenship status can be found in state department of motor vehicle records, as driver’s license applicants frequently submit legal documents that indicate their citizenship status. In theory, accurate matching techniques that compare such driver’s license records to voter files could be used to identify noncitizens who have become registered to vote, and the ACLU has so noted in our Kansas litigation.<sup>57</sup> In practice, however, our experience has been that comparisons between DMV data and voter registration lists have produced more far more false positives than actual evidence of noncitizen registration, due to poor matching techniques and out-of-date information.

### a. *Texas*

In January of this year, the Attorney of General of Texas, Ken Paxton, tweeted alarming news: a “VOTER FRAUD ALERT,” claiming that nearly 100,000 registered voters in Texas had supposedly been identified as noncitizens, via a comparison to data held by the Texas Department of Public Safety, which maintains the state’s driver’s license records:



<sup>55</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>56</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>57</sup> *See Fish*, 309 F. Supp. 3d at 1105.

<sup>58</sup> Ken Paxton, Twitter, Jan. 25, 2019, available at <https://twitter.com/kenpaxtontx/status/1088898595653386240?lang=en>.

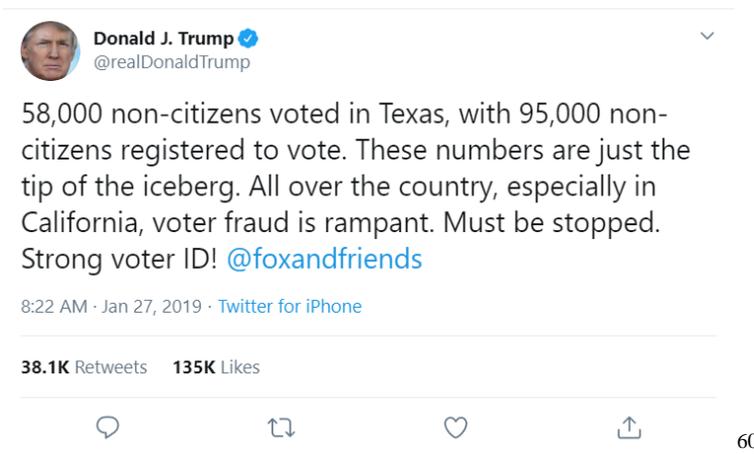
More than 78,000 people liked Paxton’s tweet.

Texas Governor Greg Abbott followed up by thanking Attorney General Paxton and the Texas Secretary of State for “uncovering and investigating this illegal vote registration”:



A screenshot of a tweet from Greg Abbott (@GregAbbott\_TX). The tweet text reads: "Thanks to Attorney General Paxton and the Secretary of State for uncovering and investigating this illegal vote registration. I support prosecution where appropriate. The State will work on legislation to safeguard against these illegal practices. #txlege #tcot". Below the tweet is a quote from Ken Paxton (@KenPaxtonTX) dated Jan 25: "VOTER FRAUD ALERT: The @TXsecofstate discovered approx 95,000 individuals identified by DPS as non-U.S. citizens have a matching voter registration record in TX, approx 58,000 of whom have voted in TX elections. Any illegal vote deprives Americans of their voice." The tweet from Greg Abbott shows 1.3K Retweets and 2.6K Likes, and is timestamped 4:57 PM · Jan 25, 2019 · Twitter for iPhone. The number 59 is visible in the bottom right corner of the screenshot.

Not to be outdone, the President was soon in on the act, claiming that 58,000 noncitizens had voted in Texas:



A screenshot of a tweet from Donald J. Trump (@realDonaldTrump). The tweet text reads: "58,000 non-citizens voted in Texas, with 95,000 non-citizens registered to vote. These numbers are just the tip of the iceberg. All over the country, especially in California, voter fraud is rampant. Must be stopped. Strong voter ID! @foxandfriends". The tweet is timestamped 8:22 AM · Jan 27, 2019 · Twitter for iPhone and shows 38.1K Retweets and 135K Likes. The number 60 is visible in the bottom right corner of the screenshot.

About 135,000 people liked the President’s tweet.

<sup>59</sup> Greg Abbott, Twitter, Jan. 25, 2019, *available at* [https://twitter.com/gregabbott\\_tx/status/1088918898643271680?lang=en](https://twitter.com/gregabbott_tx/status/1088918898643271680?lang=en).

<sup>60</sup> Donald J. Trump, Twitter, Jan. 27, 2019, *available at* <https://twitter.com/realDonaldTrump/status/1089513936435716096>.

But there was one problem: all of this was false. As reported by the Texas Tribune, within a week, after the list of supposed noncitizens who had registered to vote was disseminated to Texas counties, “the number of registered voters flagged by the state began to plummet” on just a cursory inspection, as many of the flagged registrants were *naturalized citizens* who had *already* confirmed their citizenship: “[i]n Harris County alone, the state’s flub translated to about 18,000 voters [out of approximately 30,000 flagged in the county] — about 60 percent of the original list — whose citizenship status shouldn’t have been questioned.”<sup>61</sup> After culling hundreds of duplicates from its list, Harris County was left with about 12,000 potential noncitizen registrants, but “[a]n audit of 150 names chosen at random yielded no noncitizens, so officials there declined to take further action.”<sup>62</sup>

A coalition of civil rights organizations, including MALDEF, the ACLU of Texas, the ACLU, and the Texas Civil Rights Project filed various lawsuits to stop the purging of voters based on the inaccurate match process, and just “[t]hree months after first questioning the citizenship status of almost 100,000 registered voters, the Texas Secretary of State has agreed to end a review of the voter rolls for supposed noncitizens that was flawed from the start.”<sup>63</sup> The settlement came only after a federal district court found that the Secretary of State had “created [a] mess,” and that Texas had engaged in “ham-handed and threatening correspondence” with voters who had been flagged, which, in the court’s view, “exemplifie[d] the power of government to strike fear and anxiety and to intimidate the least powerful among us.”<sup>64</sup> “The state [ended up] on the hook for \$450,000 in costs and attorney fees for the plaintiffs’ lawyers.”<sup>65</sup>

Secretary of State David Whitley ended up departing from office in disgrace.<sup>66</sup> But Texas Attorney General Paxton, Governor Abbott, or President Trump have never retracted their false statements on Twitter about a supposed epidemic of noncitizen voter registration in Texas.

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<sup>61</sup> Alex Ura, “‘Someone did not do their due diligence’: How an attempt to review Texas’ voter rolls turned into a debacle,” *Texas Tribune*, Feb. 1, 2019, available at <https://www.texastribune.org/2019/02/01/texas-citizenship-voter-roll-review-how-it-turned-boondoggle/>.

<sup>62</sup> Niraj Chokshi, “Federal Judge Halts ‘Ham-Handed’ Texas Voter Purge,” *New York Times*, Feb. 28, 2019, available at <https://www.nytimes.com/2019/02/28/us/texas-voter-rolls.html>.

<sup>63</sup> Alex Ura, “Texas will end its botched voter citizenship review and rescind its list of flagged voters,” *Texas Tribune*, April 26, 2019, available at <https://www.texastribune.org/2019/04/26/texas-voting-rights-groups-win-settlement-secretary-of-state/>.

<sup>64</sup> *Texas League of United Latin American Citizens v. Whitley*, Case No. 5:19-cv-00074-FB, ECF No. 61 at 1, 4 (W.D. Tex. Feb. 27, 2019).

<sup>65</sup> Ura, *supra* note 63.

<sup>66</sup> Alex Ura, “Texas Secretary of State David Whitley departs as legislative session ends,” *Texas Tribune*, May 27, 2019, available at <https://www.texastribune.org/2019/05/27/texas-secretary-state-david-whitley-forced-leave-office/>.

*b. Kansas, Again*

In our Kansas documentary proof of citizenship litigation described above, then-Kansas Secretary of State Kobach similarly relied on evidence of supposed noncitizen registration developed from driver's license data (while, bizarrely, simultaneously claiming that he could not use such data to ferret out noncitizen registration).

First, Kobach's office compared the Kansas voter rolls to a list of holders of temporary driver's licenses ("TDLs"), a type of license only available in Kansas to individuals who, at the time of their initial application, are temporary visitors from other countries. Kobach claimed to have identified 79 individuals who had either registered or who attempted to register to vote, who were TDL holders, but that number collapsed under scrutiny. As noted above, the court found that "many confirmed instances of noncitizen registration or attempted registration in Kansas were due to either applicant confusion or mistake."<sup>67</sup> Moreover, of the 79 TDL holders flagged by Kobach, only 14 of those individuals had actually registered to vote; the vast majority had submitted some type of application but were identified and rejected.<sup>68</sup> In a state of approximately 1.8 million registrants, only one of these 14 individuals had ever actually voted.<sup>69</sup> And the state's own expert witness at trial conceded that it was possible that some of these individuals may have naturalized before registering to vote, and "that a person is not necessarily a noncitizen simply by virtue of appearing in the TDL file."<sup>70</sup>

Next Kobach's expert witness conducted a telephone survey of 37 TDL holders—6 of whom stated that they were registered or had attempted to register to vote.<sup>71</sup> From that fraction—6 out of 37—Kobach's expert estimated that 16.5% of noncitizens in Kansas are registered to vote, a total of 18,000 noncitizens registered in the state.<sup>72</sup> Kobach described that number in his opening statement at the trial as the best estimate of noncitizen registration in Kansas. But that number also collapsed under minimal scrutiny. Besides the absurdly small sample size, which is obviously too small to draw scientifically valid statistical inferences, Kobach's own expert admitted that his sample of TDL holders may have included citizens. Moreover, a search in Kansas voter file—which includes every person who has submitted a registration form in the state, even those who apply but fail to become registered—revealed that none of these individuals had ever actually even applied to register to vote.<sup>73</sup> If anything, Kobach's survey of TDL holders suggested that there were *zero* noncitizens in Kansas who had even attempted to register to vote.

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<sup>67</sup> *See Fish v. Kobach*, 309 F. Supp. 3d 1048, 1103 (D. Kan. 2018)

<sup>68</sup> *See id.* at 1081.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 1089-90.

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

c. *Virginia*

In 2016 and 2017, the Public Interest Legal Foundation (“PILF”) published a pair of reports titled “Alien Invasion,” featuring a UFO on the cover, and hyping a problem of supposedly widespread noncitizen registration in Pennsylvania and Virginia. The reports “included names, phone numbers, addresses and Social Security numbers of individuals removed from voter rolls allegedly because they were noncitizens.”<sup>74</sup> Many of named individuals, however, turned out to be U.S. citizens. PILF was sued for defamation and voter intimidation, and discovery revealed that PILF “had in its possession internal emails among ... election officials raising concerns about how the records were being misrepresented,” as well as “other warnings about citizens being mislabeled as noncitizens.”<sup>75</sup> According to Protect Democracy and other groups who represented the plaintiffs, PILF was “aware th[at] people they identified in their report might be citizens,” but “ignored red flags,” including “warnings [that] came from Virginia election officials.”<sup>76</sup>

PILF ultimately settled the case. Under the terms of the settlement, PILF lawyer J. Christian Adams was required to “offer[] a written apology to ... four Virginia voters” whom PILF had falsely identified as noncitizens, and “also agreed to remove the personal information of the accused from the reports and add a statement to the front of them acknowledging that they falsely accused people of being noncitizens.”<sup>77</sup>

d. *The Administration’s Plans for the 2020 Census*

As we all know, the Supreme Court blocked the Trump Administration from adding a citizenship question to the 2020 Census questionnaire, concluding in an opinion by Chief Justice John Roberts that the Administration’s publicly-stated purpose of Voting Rights Act enforcement was a “contrived” “distraction.”<sup>78</sup> But it was worse than that. In fact, Commerce Secretary Wilbur Ross’s chief advisor on Census issues testified that the “first person” to suggest adding a citizenship question to the 2020 Census to the incoming Administration was the

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<sup>74</sup> Tierney Sneed, “Ex-Trump Voter Fraud Commissioner Settles Lawsuit Over ‘Alien Invasion’ Reports *Talking Points Memo*, July 17, 2019, available at <https://talkingpointsmemo.com/muckraker/trump-voter-fraud-comissioner-defamation-lawsuit-settled>.

<sup>75</sup> *Id.*

<sup>76</sup> Sam Levine, “Voter Fraud Activist Will Apologize To Citizens He Accused Of Being Illegal Voters,” *Huffington Post*, July 18, 2019, available at [https://www.huffpost.com/entry/j-christian-adams-pilf-settlement\\_n\\_5d309002e4b0419fd3298ee6](https://www.huffpost.com/entry/j-christian-adams-pilf-settlement_n_5d309002e4b0419fd3298ee6).

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

<sup>78</sup> *Department of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

recently-deceased Dr. Thomas Hofeller,<sup>79</sup> widely known as the “the Michelangelo of gerrymandering,”<sup>80</sup> who had described adding the question as the first step in a redistricting strategy that would be “advantageous to Republicans and Non-Hispanic Whites.”<sup>81</sup> In other words, the Administration’s actual purpose in adding a citizenship question to the Census was the diametric opposite of their stated reason: not to protect minority voting rights through better enforcement of the Voting Rights Act, but to dilute the political influence of voters of color.

Although the Court has blocked the question for the 2020 Census questionnaire, the Administration is moving forward with its plan to produce citizenship data that would facilitate gerrymandering efforts, collected through various administrative sources. Earlier this week, the AP reported that, as part of this effort, “[t]he U.S. Census Bureau is asking states for drivers’ license records that typically include citizenship data.”<sup>82</sup> Leaving aside the illicit—and apparently unconstitutional—discriminatory purpose behind this effort, there are serious questions about the accuracy of citizenship data culled from state motor vehicle records, as evidenced by the experiences in Texas, Kansas, and Virginia.

### **Conclusion**

In sum, claims about widespread noncitizen registration and voting have proven time and again to be largely unsubstantiated, grossly exaggerated, or sometimes downright false. Yet these claims have been used repeatedly to justify restrictions on registration and voting. There should be no doubt: election integrity is not served by these measures. To the contrary, such efforts have prevented tens of thousands from voting, threatened many more with removal from the rolls, and have undermined the American public’s confidence in our elections.

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

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<sup>79</sup> *New York v. Department of Commerce*, No. 18-CV-2921, ECF No. 595, NYIC Pls.’ Letter Mot. for an Order to Show Cause (“Show Cause Mot.”) at 1, No. 18-CV-2921 (S.D.N.Y. May 30, 2019).

<sup>80</sup> Michael Wines, “Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question,” N.Y. Times, May 30, 2019, *available at* <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

<sup>81</sup> *New York v. Department of Commerce*, No. 18-CV-2921, ECF No. 595-1, App. to NYIC Pls.’ Letter Mot. for an Order to Show Cause (“Show Cause App.”) Ex. D at 9 (PDF p. 63), (S.D.N.Y. May 30, 2019).

<sup>82</sup> “Census Bureau asks states for licenses that typically include citizenship data,” Associated Press, October 14, 2019, *available at* <https://www.cbsnews.com/news/census-bureau-asks-states-for-licenses-that-typically-include-citizenship-data/>.