



June 9, 2017

*Via certified mail*

The Honorable Connie Lawson  
Indiana Secretary of State  
Office of the Indiana Secretary of State  
200 W. Washington St., Room 201  
Indianapolis, IN 46204

**Re: *Non-Compliance with Section 8 of the National Voter Registration Act***

Dear Secretary Lawson,

We write on behalf of Common Cause Indiana, their respective members, and other Indiana voters to notify you that Indiana Code (“Ind. Code”) § 3-7-38.2-5(d), as amended by Senate Enrolled Act No. 442 (“SB 442”) (effective July 1, 2017), violates Section 8 of the National Voter Registration Act of 1993 (“NVRA”).<sup>1</sup>

Following SB 442, Indiana will automatically cancel the registrations of voters identified by the Interstate Voter Registration Crosscheck Program (“Crosscheck”). This violates the NVRA’s Section 8, which prohibits states from removing voters from the voter rolls except in certain specified circumstances, and then only pursuant to specific procedures.<sup>2</sup> Further, Indiana’s reliance on Crosscheck to trigger change-of-address removal procedures may violate Section 8’s requirement that a state’s list maintenance procedures be “reasonable” and based on *reliable* information that a voter has moved.<sup>3</sup>

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<sup>1</sup> 52 U.S.C. § 20507.

<sup>2</sup> 52 U.S.C. § 20507(a)(3), (4), (c)(1), (d)(1).

<sup>3</sup> 52 U.S.C. §§ 20507(a)(4), (c)(1), (d)(1).

We urge you, as Indiana’s chief election official, to take immediate steps to bring Indiana into compliance with federal law.

## **I. Section 8’s Requirements.**

Section 8 of the NVRA expressly prohibits removing the name of a registrant from the voter roll except “at the request of the registrant,” “as provided by State law by reason of criminal conviction or mental incapacity,” upon the death of the registrant, or when the voter changes residence and that change has been confirmed in accordance with specific procedural requirements.<sup>4</sup> Any removal procedures that a state institutes based on a voter’s change of residence must constitute a “*reasonable* effort to remove the name of ineligible voters.”<sup>5</sup>

In particular, the NVRA permits a state to remove individuals from the voter registration rolls based on a change in residence only: (i) when the voters themselves provide written confirmation that they have moved outside the jurisdiction in which they are registered, or (ii) when reliable second-hand information, such as the United States Postal Service’s National Change of Address system (“NCOA”) or an analogous source, indicates the voters may have changed address, and then only after the state complies with confirmation notice procedure and the two-general-elections waiting period in 52 U.S.C. § 20507(d)(2).<sup>6</sup> Without a reliable basis for believing a voter has moved, the confirmation procedure of Section 8(d)(2) is inapplicable, and removal of the voter violates Section 8(b).

## **II. Ind. Code § 3-7-38.2-5(d) Violates Section 8.**

Under current Indiana law, the Election Division annually provides Indiana’s statewide voter registration list (the “IN Registration List”) to the Kansas Secretary of State, in order to compare the IN Registration List to the registration data of all other states participating in Crosscheck.<sup>7</sup> Within 30 days of a determination that an Indiana voter has an “identical . . . first name, last name and date of birth of the voter registered in the other state[.]” the NVRA official must provide the appropriate county voter registration office with the name of the registrant (and any other information obtained).<sup>8</sup>

County voter registration offices must then “determine” whether each individual identified in the NVRA official’s report: (i) “is the same individual who is a registered voter of the county” (a “matched voter”), (ii) “registered to vote in another state on a date following the date that voter registered in Indiana,” and (iii) “authorized the cancellation of any previous registration.”<sup>9</sup> If a matched voter has not authorized cancellation, then the county voter registration office “shall send an address confirmation notice[.]”<sup>10</sup>

SB 442 fundamentally alters these procedures and instead requires county voter registration offices to cancel a “matched voter’s” registration outright—without either the voter’s

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<sup>4</sup> 52 U.S.C. § 20507(a), (c), (d).

<sup>5</sup> 52 U.S.C. § 20507(a), (c), (d) (emphasis added).

<sup>6</sup> *Id.* at § 20507(d)(1)(B).

<sup>7</sup> Ind. Code § 3-7-38.2-5(d).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Ind. Code § 3-7-38.2-5(e).

authorization or the requisite notice and waiting period. This automatic cancellation, based solely on a database match, is entirely outside the permissible causes for immediate cancellation under the NVRA.<sup>11</sup> In addition, even if Crosscheck provided *reliable* information that a voter has changed residence (it doesn't – see below), counties still would have to comply with Section 8(d)'s notice and waiting-period procedures. SB 442 specifically eliminates these requirements. The result is that Indiana will deprive these Americans their right to vote without confirming they have, in fact, moved, or without even giving them notice of a pending cancellation. There can be no other interpretation of the meaning or intent behind Indiana's alteration of the language in Ind. Code § 3-7-38.2-5.<sup>12</sup> This practice unquestionably will violate the NVRA.

There is also a more fundamental issue with Indiana's use of Crosscheck. In order for a list maintenance program based on change of address to constitute a "reasonable effort" under the NVRA, it must "be based upon objective and *reliable* information of potential ineligibility due to a change of residence that is independent of the registrant's voting history."<sup>13</sup> Congress highlighted NCOA data in the NVRA to exemplify the type of reasonable, reliable and objective evidence a state could use to initiate voter removal based on change of address.<sup>14</sup> If a state uses another methodology based on different data, it must be equally as reliable.<sup>15</sup>

We suspect the manner in which Indiana uses matches generated by Crosscheck is unreliable. NCOA data is self-reported by voters, including their previous and new addresses (which, coupled with their names, provides a highly reliable indicator the person has moved). By contrast, Crosscheck uses first names, last names, and dates of birth to identify voters who may be registered in another state. Because many voters share first names, last names, and dates of birth, Crosscheck data is unreliable at determining a change of address.<sup>16</sup> A recent statistical

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<sup>11</sup> See 52 U.S.C. § 20507(a), (c), (d).

<sup>12</sup> Project Vote and Common Cause explained these problematic effects of SB 442 in a January 25, 2017 letter to State Senator Greg Walker and in testimony before the House Committee on Elections and Apportionment on March 15, 2017. Yet, this provision was not changed. Letter from Michelle Kanter Cohen, Election Counsel, Project Vote & Julia Vaughn, Policy Director, Common Cause Indiana, to State Senator Greg Walker (Jan. 25, 2017), available at [http://www.projectvote.org/wp-content/uploads/letter\\_on\\_in\\_sb\\_442\\_012517.pdf](http://www.projectvote.org/wp-content/uploads/letter_on_in_sb_442_012517.pdf). See also, SB 442 Fiscal Impact Statement, Leg. Services Agency, Office of Fiscal and Management Analysis (Jan. 17, 2017), available at <http://in-proxy.openstates.org/2017/fiscal-notes/SB0442.01.INTR/SB0442.01.INTR.FN002>.

<sup>13</sup> Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants at 12, *APRI v. Ohio*, 838 F.3d 699 (6th Cir. 2016) (No. 16-3746) (emphasis added); see Statement of Interest of the United States at 15-18, *Common Cause v. Kemp*, No. 16-cv-452 (N.D. Ga. Mar. 3, 2016), ECF No. 19, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/CommonCauseGeorgia-DOJ-StatementOfInterest05042016.pdf>; Dep't of Justice, The National Voter Registration Act of 1993 (NVRA) Questions and Answers at ¶¶ 34 (Sept. 1, 2016), <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> ("A State can only remove the name of a person from the voter registration list on grounds of change of residence upon . . . *reliable second-hand information* indicating a change of address outside of the jurisdiction from a source such as the NCOA program . . .") (emphasis added).

<sup>14</sup> 52 U.S.C. § 20507(c); see *Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001) ("[T]he NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using *reliable* information from *government agencies* such as the Postal Service's change of address records.") (emphasis added).

<sup>15</sup> See S. Rep. No. 103-6, at 19 (1993) ("The Committee strongly encourages all States to implement the NCOA program . . . Jurisdictions which choose not to use the NCOA program should implement another *reasonable program* which is designed to meet the requirements of the bill[.]" ) (emphasis added).

<sup>16</sup> The Birthday Paradox is a well-known quirk 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

study concluded that 487 out of 884 “double voters” in New Jersey were most likely different individuals.<sup>17</sup> Another study found that Crosscheck’s standard procedure would eliminate the registrations of about 200 unique, legitimate voters for every one registration that could be used to cast a double vote.<sup>18</sup> Even the Crosscheck Participation Guide admits that “a significant number of apparent double votes are false positives and not double votes.”<sup>19</sup> Indeed, several states already have ceased using Crosscheck, with at least one publicly attributing the move to Crosscheck’s unreliability.<sup>20</sup> Indiana’s use of this unreliable data from Crosscheck to remove voters does not constitute a “reasonable effort” to maintain accurate voter rolls, in violation of Section 8 of the NVRA. It appears from the records your office has produced to us that Indiana builds “confidence” in matches through an arbitrary point system without regard to information that weighs *against* a match. For example, based on Indiana’s use of Crosscheck, two voting records could have different middle names or different suffixes, and still be treated as belonging to the same person, potentially leading to the removal of an eligible and validly registered Indiana voter.

To the extent our understanding of Indiana’s use of Crosscheck is inaccurate or incomplete, we would welcome further explanation of the steps Indiana takes to ensure eligible voters identified through the Crosscheck program are not removed from the voter rolls in error.

### III. Conclusion.

As Indiana’s chief election official, it is your duty to ensure Indiana complies with the NVRA and to protect Indiana’s citizens from being unlawfully stripped of their right to vote.

This letter serves as notice pursuant to 52 U.S.C. § 20510(b) of Indiana’s past, ongoing, and planned violations of Section 8 of the NVRA. We are willing to work cooperatively with you to assist with developing a plan that will quickly bring the state into compliance with the NVRA’s requirements. We look forward to receiving your response to this letter, including a timeline and plan for achieving and sustaining compliance with the NVRA in Indiana. If, however, you fail to take steps to remedy the state’s violation of the NVRA within 90 days, we shall seek redress from the courts.

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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>17</sup> Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem* 120 7 Election L.J. 111 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=997888](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997888). While New Jersey does not participate in Crosscheck, all the “double voters” were found by matching first name, last name, and birthdate in a process similar to that of Crosscheck.

<sup>18</sup> Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (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>19</sup> 2014 Participation Guide 5, Interstate Voter Registration Data Crosscheck (Dec. 201), [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>20</sup> Greg Palast, *The GOP’s Stealth War Against Voters*, Rolling Stone (Aug. 24, 2016), <http://www.rollingstone.com/politics/features/the-gops-stealth-war-against-voters-w435890>; Jon Greenberg and Amy Sherman, *Florida No Longer Part of Controversial National Voter Data Project*, Miami Herald (Apr. 11, 2014), <http://miamiherald.typepad.com/nakedpolitics/2014/04/florida-no-longer-part-of-controversial-national-voter-data-project.html>.

Should you have any questions or concerns, please feel free to contact Sophia Lakin, Staff Attorney at the ACLU Voting Rights Project, at (212) 519-7836.

Sincerely,



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