

By E-mail

October 24, 2014

North Carolina State Board of Elections
Joshua B. Howard, Chairman
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Dear Board Member:

We write on behalf of Project Vote, Demos, Fair Elections Legal Network, American Civil Liberties Union, NALEO Educational Fund, Southern Coalition for Social Justice, and Action NC to express our deep concern about the way in which the State Board of Elections is identifying and potentially removing voters who it alleges are noncitizens. To protect eligible voters, the National Voter Registration Act of 1993 (NVRA) strictly limits the timing of programs to systematically remove ineligible people from the voter roll, as explained below. The NVRA also contains other requirements regarding list maintenance activities in order to further protect eligible voters.

List maintenance is, of course, important. Up-to-date and complete voter lists reflecting all eligible voters are beneficial. But list maintenance must be accurate and consistent with state and federal law to avoid putting legitimate voters at risk. While our organizations are not opposed to reasonable efforts to remove ineligible voters from the rolls, those efforts must be carried out in accordance with the NVRA and without risking removal of eligible voters from the voter registration list.

I. The State Is Prohibited from Conducting Systematic Removals of Voters in the Ninety-Day Period Prior to a Federal Election.

The NVRA prohibits North Carolina from conducting any program “the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters” during the ninety-day period preceding an election. 52 U.S.C. § 20507(c)(2).¹ The U.S. Court of Appeals for the Eleventh Circuit recently interpreted this prohibition to broadly apply to “any program”—not merely ones aimed at removing “voters who have moved.”² In fact, the Court rejected efforts by Florida to systematically remove alleged noncitizens from the voter rolls during the 90-day period pursuant to this provision.³ The very procedure at issue in *Arcia* involved the Florida Secretary of State’s attempt to remove voters from the rolls based on an

¹ As of Sept. 1, 2014, codification of the NVRA has moved from Title 42 to Title 52 of the United States Code.

² See *Arcia v. Fla. Sec’y of State*, 746 F.3d 1273, 1286 (11th Cir. Apr. 1, 2014).

³ *Id.* at 1281-82, 1286.

initial comparison between the voter rolls and drivers' license information, and a subsequent comparison of those results with information contained in the Systematic Alien Verification for Entitlements (SAVE) system, followed by mailing of notices to registered voters.⁴

The purpose of this strict time limit is to protect eligible voters close to an election. As the Eleventh Circuit recognized:

Eligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote. This is why the 90 Day Provision strikes a careful balance: It permits systematic removal programs at any time *except* for the 90 days before an election because that is when the risk of disfranchising eligible voters is the greatest.⁵

II. Any List Maintenance Program Must Comply with the NVRA's Voter Protections.

The NVRA also requires “[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll” to be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 *et seq.*) [now 52 U.S.C. § 10301 *et seq.*].” 52 U.S.C. § 20507(b). We have grave concerns regarding the accuracy and uniformity of the process currently in use in North Carolina to identify alleged noncitizens. As an initial matter, it appears that your procedures have been applied selectively only to some voters.

Further, use of SAVE to identify registered voters as alleged noncitizens is fraught with potential for error due to the list matching processes required to use SAVE.⁶ For example, if matches between DMV data and the voter roll are made using only name and birthdate, there is a strong potential for false positive matches.⁷ A SAVE check premised on a false positive match could not actually provide any information about whether the registrant is or is not a citizen.

The information contained in SAVE is also inaccurate and incomplete. SAVE does not contain information on citizens born in the United States and thus cannot provide information on any voters other than naturalized citizens (and some derived citizens, which are individuals who acquired U.S. citizenship by virtue of their parents' naturalization while they were minors),⁸ whose information may be collected in SAVE. SAVE cannot verify derived citizens unless they

⁴ See *id.* at 1277, 1282.

⁵ *Id.* at 1284.

⁶ Because information contained in SAVE can only be used by entering an immigration-specific numeric identifier such as an “alien number” or “A-number” to query the system, in order to obtain the information necessary to query SAVE for information regarding citizenship, a match must be conducted between the voter roll and the DMV data.

⁷ See generally Michael P. McDonald and Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L. J. 111 (2008).

⁸ Derived citizenship is “citizenship conveyed to children through the naturalization of parents or, under certain circumstances, to foreign-born children adopted by U.S. citizen parents, provided certain conditions are met.” U.S. Citizenship and Immig. Servs., Glossary: Derivative Citizenship, <http://www.uscis.gov/tools/glossary/derivative-citizenship> (last visited Sept. 12, 2014).

applied for Certificates of Citizenship.⁹ However, a person who automatically obtains citizenship, including a derived citizen, is not legally required to file an Application for Certificate of Citizenship, a costly and time-consuming document.¹⁰

Documentation from Department of Homeland Security, U.S. Citizenship and Immigration Services (DHS-USCIS), which administers SAVE, confirms these inaccuracies. The State Board of Elections' September 2013 agreement with DHS-USCIS ("DHS-NCSBOE MOA") to use SAVE indicates that "[t]he inability of the SAVE Program to verify [a person's] citizenship does not necessarily mean that [the person is] not a citizen of the United States and [is] ineligible to vote."¹¹ The MOA further acknowledges that the information in SAVE may need to be corrected. It requires users to:

[p]rovide all registrants who do not verify as a citizen under the terms of the MOA with adequate written notice that their citizenship could not be verified and the information necessary to contact DHS-USCIS...so that such individuals may obtain a copy of their Naturalization Certificate or Certificate of Citizenship or correct their records in a timely manner, if necessary.

The MOA also requires the State Board of Elections to "[p]rovide all registrants who are not verified as citizens based solely or in part on the SAVE response with the opportunity...to contact DHS-USCIS to correct their records prior to a final decision, if necessary."¹² By requiring these safeguards, DHS-USCIS acknowledges that errors exist in the information SAVE provides, and further, it contemplates that individuals often require time to obtain copies of documentation.¹³ At this late date, there is clearly no time before the general election for voters to obtain such documents.¹⁴

We therefore request that you *do not remove* any registrant from the official list of eligible voters on the ground that the registrant has failed to provide documentation of citizenship. We further request that you *immediately restore* to the official list of eligible voters

⁹ Fact Sheet, Attachment to DHS-NCSBOE MOA (Sept. 2013) ("the SAVE Program can only verify naturalized or derived citizens, to the extent that a derived citizen received an official determination on citizenship by USCIS.")

¹⁰ See U.S. Citizenship and Immig. Servs. Policy Manual, vol. 12, pt. H, ch. 4 (D.) *available at* <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter4.html>. Indeed, Colorado's experience with SAVE demonstrates some of these errors: district attorneys in several Colorado districts reported that voters who became U.S. citizens as minors when their parents were naturalized, and then subsequently registered to vote, were caught up in the sweep, despite that they were eligible to vote. See Charles Ashby, *The Gessler 155, Zero Prosecutions of People Secretary of State Says Voted Illegally*, Grand Junction Sentinel (Nov. 16, 2013), <http://www.gjsentinel.com/news/articles/the-gessler-155-zero-prosecutions-so-far-of-people>; see also Erica Meltzer, *Boulder County DA Stan Garnett Clears All 17 Suspected Illegal Voters*, Boulder Daily Camera (Aug. 14, 2013), http://www.dailycamera.com/news/boulder/ci_23864751/boulder-da-stan-garnett-clears-illegal-voters-gessler.

¹¹ Fact Sheet, Attachment to DHS-NCSBOE MOA, at 1.

¹² DHS-NCSBOE MOA at 5.

¹³ See *id.*

¹⁴ The Charlotte, North Carolina USCIS field office is currently processing Applications for Certification of Citizenship made in February of 2014. U.S. Citizenship and Immig. Servs., USCIS Processing Time Info. for the Charlotte Field Office, Form N-600, Posted Oct. 7, 2014, <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (select: Charlotte, NC Field Office, Processing Times) (last visited Oct. 22, 2014).

any registrant who has already been so removed. We further request that you send a letter informing all individuals to whom citizenship notices have already been sent that as long as they meet the eligibility requirements to vote, they will be able to vote, regardless of whether they provide documentary evidence of citizenship.

III. Production of Records

Pursuant to Section 8(i) of the National Voter Registration Act, 52 U.S.C. § 20507(i), and North Carolina's public records law, N.C. G.S. § 132-1, we request that you provide us with the following public records for inspection:

1. A list of all registered voters whose voter registration record has been flagged or identified in any way as an alleged noncitizen based on a comparison of voter registration information with DMV data and/or SAVE data in 2014, including the following information about each such registrant:
 - a. Full name
 - b. Date of birth
 - c. Address
 - d. North Carolina-assigned voter identification number
 - e. Race and ethnicity, if available
 - f. Registration date
 - g. Current registration status (e.g., active, inactive, cancelled, flagged, etc.)
 - h. Registration status at the time of the flag (e.g., active, inactive, cancelled, etc.)
 - i. The date any correspondence regarding citizenship was sent or is planned to be sent to the registrant

2. A list of all registered voters who were sent, or have been identified to be sent in the future, a notice regarding their citizenship based on a comparison of voter registration information with DMV data and/or SAVE data in 2014, including but not limited to the list of 145 individuals identified in press reports, and including the following information about each such registrant:
 - a. Full name
 - b. Date of birth
 - c. Address
 - d. North Carolina-assigned voter identification number
 - e. Race and ethnicity, if available
 - f. Registration date
 - g. Current registration status (e.g., active, inactive, cancelled, flagged, etc.)
 - h. Registration status at the time of identification as an alleged noncitizen (e.g., active, inactive, cancelled, etc.)
 - i. The date any correspondence regarding citizenship was sent or is planned to be sent to the registrant

3. A list of all persons removed from the official list of eligible voters in 2014 due to citizenship status, including the following information about each such person:
 - a. Full name

- b. Date of birth
 - c. Address
 - d. North Carolina-assigned voter identification number
 - e. Race and ethnicity, if available
 - f. Registration date
 - g. Removal date
 - h. Reason removed
 - i. The date any correspondence regarding citizenship was sent to the person
4. Any and all correspondence received from, or notes regarding communications with, the persons identified in Nos. 1-3 above;
 5. The template or templates for any correspondence sent or planned to be sent to the persons identified in Nos. 1-3 above;
 6. The current statewide official list of all eligible voters, including both active voters and inactive voters;
 7. Any and all documents, directives, or guidance indicating the “matching” procedure that was used to determine whether an individual with a DACA or other noncitizen license or state ID card was on the voter roll, including what fields were required to identify a “match” or “potential match”;
 8. All documents evidencing the procedures followed by state or local election officials to determine whether a registered voter was sent or will be sent a notice regarding their voter registration eligibility on the basis of citizenship;
 9. Any and all directives, guidance, or other documents provided to county election boards regarding voters identified by the State Board of Elections or the Department of Motor Vehicles as potential noncitizens, including but not limited to any instructions to be provided to precinct officials for use during voting; and
 10. Any and all documents received from or provided to the North Carolina Voter Integrity Project and NC Fire.

We prefer to receive these records in an electronic format. Please note that these records are being requested for a noncommercial purpose.

Our organizations are deeply concerned about maintaining access to the polls for all of North Carolina’s voters in keeping with the requirements of the NVRA. If you have any questions, please feel free to contact us. Thank you.

Sincerely,

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