



January 25, 2017

Via Email

State Senator Greg Walker
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Dear Senator Walker:

We write to inform you of a provision in SB 442 (Various Election matters) that is of concern because would require use of data shown to be unreliable to cancel voters in violation of federal law.

Among other provisions, SB 442 requires that if the voter is identified by the Interstate Crosscheck program administered by Kansas and the person registered to vote in another state on a date following the date the voter registered in Indiana, the registration must be canceled.¹

While reasonable list maintenance is important, this provision in particular is problematic because of its reliance on the unreliable Crosscheck program data and the failure to follow federal list maintenance requirements requiring notice and a waiting period if a person is believed to have moved but the registrar has no personal notification from the voter.

First, our research and independent evidence has shown that the Crosscheck Program routinely misidentifies voters as having moved to another state.

The standard procedure for identifying a match in Crosscheck compares only first name, last name, and date of birth. Statistical research demonstrates that many individuals share these data points, which increases the difficulty of precise list matching procedures. One prominent example that illustrates the difficulty of relying upon a match of too few categories is the purging of Florida Governor Rick Scott from the voter rolls in 2006 due to a mistaken belief that he was dead. Another Rick Scott with the same date of birth died, resulting in a “match” of death records to Governor Scott’s voter record.²

Interstate matching programs in recent years have shown that as a result of these minimum standards and problems inherent to state-to-state matching, the inclusion of a voter on the Crosscheck “match” list is not conclusive evidence that a registration should be cancelled. Numerous states have had large

¹ See Indiana 2017 SB 442, IN 442—LS 7379/DI 102, (page 10, lines 18-31).

² Lloyd Dunkelberger, *Elections Officials Told Rick Scott he was Dead and Couldn't Vote*, Herald-Tribune (June 14, 2012), <http://politics.heraldtribune.com/2012/06/14/scott-mistakenly-declared-dead-on-voting-rolls/>.

numbers of voters who were incorrectly purged from their rolls following a “match” from Crosscheck. For example, Ada County, Idaho had to reinstate more than 750 voters due to a faulty match using only name and birthdate through the Program.³ In addition, Chesterfield County, Virginia, found a 17 percent error rate among active voters on their matches from the Program.⁴

As a result of the mounting evidence that Crosscheck does not provide reliable information for voters who should be removed, numerous states have not utilized the data for list maintenance, such as Georgia, or have ended their participation in the program. Florida, Oregon, and Washington have all recently left Crosscheck, with a spokesperson for the Oregon Secretary of State’s office stating, “We left because the data we received was unreliable.”⁵

Careful examination of voter rolls to ensure accurate lists is a necessary and admirable goal, but it must be completed in a careful and thorough process to ensure the rights of voters are protected. In light of evidence showing the faulty nature of data from Crosscheck, Project Vote would not recommend its use.

The Provision Requiring Cancellation Based on Cross-Check Violates Federal Law

In any event, the provision in SB 442 modifying the use of Crosscheck program data should be modified because its current form does not comply with federal list maintenance law, specifically the National Voter Registration Act of 1993 (NVRA).

Under Section 8(d) of the NVRA, 52 U.S.C. § 20507(d), there is no right to cancel a voter based on a match of any kind. That section provides two methods for canceling a registration based on change in residence: (A) the voter confirms in writing that he or she has changed residences outside the jurisdiction, and (B) the voter has failed to respond to the forwardable confirmation notice described in subsection (2) of the section, and also has failed to vote in any election in a time period running from the date of the notice to the day *after* the second consecutive federal general election.

List matching projects including Crosscheck do not constitute a confirmation from the voter in writing that they have moved.⁶ At most, matches from Crosscheck reflect the presence on a list of a registered person in one state at one time with the same last name, first name, and date of birth as a registered voter in Indiana. Therefore, at most, Indiana could use the data to send out NVRA-

³ Cynthia Sewell, *Ada County Mistakenly Revokes 765 Voter Registrations*, Idaho Statesman (Aug. 29, 2014), http://www.idahostatesman.com/2014/08/29/3346833_ada-mistakenly-revokes-765-voter.html?rh=1.

⁴ Jim Nolan, *Chesterfield Registrar Delays Purge of Voter Rolls*, Richmond Times-Dispatch (Oct. 9, 2013), http://www.richmond.com/news/local/chesterfield/article_162e36b5-0be7-5dc8-af9f-48876a167b43.html.

⁵ John Greenberg and Amy Sherman, *Florida No Longer Part of Controversial National Voter Data Project*, Miami Herald (April 11, 2014), <http://miamiherald.typepad.com/nakedpolitics/2014/04/florida-no-longer-part-of-controversial-national-voter-data-project.html>.

⁶ For example, after comparing lists with Tennessee and South Carolina in 2006 and removing 8,000 voters without notice, Kentucky was ordered by a court to restore all 8,000 voters to the rolls, because the matches did not amount to a request from the voter to be removed. *Commonwealth Atty. Gen. v. Commonwealth State Bd. of Elections*, Case No. 06-CI-610 (Ky. Franklin Cir. Ct. Oct. 2, 2006), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/KY_Order.pdf.

compliant notices and start the waiting period laid out in Section 8(d), though for the reasons discussed above, the data would need to be examined and narrowed to avoid false positive matches.

Of course, any such procedures must be limited in time to the permissible period for systematic list maintenance under federal law. The NVRA also prohibits states 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. *Id.* § 20507(c)(2). Any removal of voters for alleged ineligibility during this 90-day period must be based “upon individualized information or investigation.”⁷ 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.”⁸ 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.⁹

This provision applies equally to all federal elections, including primaries, special elections, and runoffs.

Federal law recognizes and reflects the difficulty of systematic list maintenance activities and has provided protections to ensure eligible voters are protected from improper purging due to faulty data. Modifying the language in SB 442 regarding use of the Crosscheck program would ensure eligible voters in Indiana are not subject to improper removal or delay at the polling place due to incorrectly purged voters presenting to vote.

If you have any questions regarding these comments, please do not hesitate to contact us.

Sincerely,

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⁷ *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014) *rehearing en banc denied* No. 12-15738-EE (11th Cir. Dec. 4, 2014).

⁸ *See id.* at 1348.

⁹ *Id.* at 1343-1348.