COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 06-CI-00610

COMMONWEALTH OF KENTUCKY, PETITIONER
OFFICE OF THE ATTORNEY GENERAL
Ex rel. Gregory D. Stumbo in his official
Capacity as Attorney General of the
Commonwealth of Kentucky

v. **MOTION FOR SUMMARY JUDGMENT**

STATE BOARD OF ELECTIONS et. al.

And

SECRETARY OF STATE, TREY GRAYSON RESPONDENTS

* * * * * * * *

Comes the Petitioner, Commonwealth of Kentucky *ex rel.* Gregory D. Stumbo, in his capacity as Attorney General, and moves the Court pursuant to CR 56.01 for Summary Judgment in his favor granting a binding declaration of rights and enjoining the Respondents, the State Board of Elections and the Secretary of State, Trey Grayson, and all officers, agents, employees, members and any person in concert with them as follows:

A. That the "pilot project," as described in the Petition, constituted a voter registration purge program as described under KRS 116.112(1), and that the Respondents failed to comply with the requirements of KRS 116.112 when this purge was carried out by the Respondents.

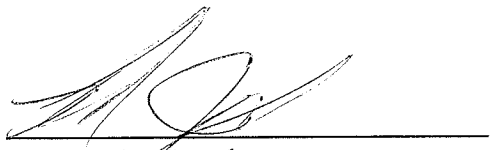
B. That the "pilot project" and the related voter purge were not carried out under the authority of the State Board of Elections, but instead at the sole direction of the Secretary of State, Trey Grayson, without authority, therefore, constitute

an illegal delegation of power by the Board as well as an *ultra vires* act by the Secretary of State.

C. That the Respondents are permanently ordered and compelled to return the voters purged under the "pilot project," as described in paragraphs A and B, to the active Voter Registration Data Base to be used for the November 7, 2006, regular election; or alternatively, to notify all affected voters and place their names on the inactive voter data base for two (2) federal election cycles.

D. The Respondents are permanently enjoined from conducting a purge of voters due to a change of residence without following the statutory requirements of KRS 116.112.

In support of this motion the Petitioner has attached and incorporates herein as if repeated verbatim a Memorandum in Support of Summary Judgment and the exhibits thereto.



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion for Summary Judgment along with the Memorandum in support thereof and related appendix and proposed order has been served upon the following, by mail, first-class, postage prepaid, on this the 21 day of August, 2006:

Hon. Kathryn H. Dunnigan
General Counsel
State Board of Elections
140 Walnut St.
Frankfort, Kentucky 40601

Secretary of State Trey Grayson
700 Capital Ave., Ste. 148
Frankfort, Kentucky 40601

Attorneys for Petitioner

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COMMONWEALTH OF KENTUCKY, PETITIONER
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Ex rel. Gregory D. Stumbo in his official
Capacity as Attorney General of the
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v. **MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

STATE BOARD OF ELECTIONS et. al.

And

SECRETARY OF STATE, TREY GRAYSON RESPONDENTS

* * * * * * * *

May it please the Court:

In support of its Motion for Summary Judgment seeking a binding declaration of rights and a permanent injunction requiring the State Board of Elections and Secretary of State, Trey Grayson, to reinstate the names of over 8,100 voters from Kentucky's Statewide Voter Registration Database, the Attorney General states as follows:

STATEMENT OF THE FACTS

On Monday, April 24, 2006, Secretary of State Trey Grayson announced that at his direction the State Board of Elections (sometimes "the Board") in conjunction with state administrators in South Carolina and Tennessee conducted a purge of voters based on a new project to match registrants who were listed on multiple state databases. *See* Press Release: *Kentucky Blazes Path in New Voter Fraud Prevention Technique* (April 24, 2006), Petitioner's Appendix ("Apx.") at Tab 1. Secretary Grayson explained that the

goal was to prevent voters from voting in elections in more than one state. However, the matches conducted with voter turnout data in South Carolina and Tennessee revealed that no voters registered in multiple states actually voted in Kentucky and another state. *Id.* Despite this, the Secretary of State stated in his press release that the absence of voter fraud would not slow down Kentucky's efforts to clean up the registration rolls. *Id.* The announcement indicated that additional purges based on state matching were planned. *Id.*

In response to a request by the Office of the Attorney General for records reflecting the Board's authority to conduct these purges, Sarah Ball Johnson, the Board's Executive Director stated in her response dated May 2, 2006 that "[t]he voters who were purged from the Voter Registration Database under the pilot program were purged pursuant to the State Board of Elections' authority granted by 42 U.S.C. 1973gg-6(d)(1)(A)." *Id.*, Apx. at Tab 2. The Executive Director also explained that the Board relied on its powers and duties under KRS 117.015(1) and 117.025(3) to conduct the purge. *Id.* Apx. at Tab 2.

The Board's Executive Director admitted during her deposition that the discretionary decision to participate in the "pilot project" through a compact with the states of South Carolina and Tennessee was made solely by the Chairman of the Board, Secretary of State Trey Grayson, without a motion or vote by the State Board of Elections. *See Deposition of Sarah Ball Johnson* at p. 26 and letter from the President of the National Association of State Election Directors ("NASED"), Linda Lamone, to the Commissioner of the Election Assistance Commission ("EAC"), Gracia Hillman, *Johnson Deposition* Exhibit E. The Board's Executive Director also admitted that the decision to purge the names of registered Kentucky voters from the statewide Voter

Registration Database based upon the results of the "pilot project" was also made solely by the Chairman of the Board, Secretary of State Trey Grayson, without a motion or vote by the State Board of Elections. *See Johnson* at p. 27.

The "pilot project" began on August 31, 2006, when Ms. Johnson participated in a telephone conference with representatives from the election commissions of South Carolina, Tennessee and Georgia. *See* Meeting Summary of August 31, 2005 meeting identified and produced in response to Petitioner's Interrogatory No. 16 (Respondent's Answers to Interrogatories and Request for Production, Apx. At Tab 3); *see also Johnson Deposition* at pp. 19-20, Exhibit E. During this telephone conference, representatives of Kentucky, Tennessee and South Carolina agreed to enter into a compact to exchange voter registration databases and conduct a program to match the names between the state databases. *Johnson Deposition* at p. 20. The matching program was to be conducted at South Carolina's facilities. *Id.* The states never drafted a formal written agreement memorializing the terms of the compact. *Id.*

On September 20, 2005, Chairman of the Board, Secretary Trey Grayson discussed with the Board the compact to participate in a matching of voter registration data with Tennessee and South Carolina "if the Election Assistance Commission would provide the money for the pilot project." *See* Minutes of Board, at p. 2. However, in Secretary of State's Response to Petitioner's Interrogatories Nos. 17 and 18 (see Apx. At Tab 3), it was conceded that no further communication between the Board and the EAC occurred, and "[e]ach state covered its own costs for this project...[no] funding was granted by any other sources."

Sometime after the August 31, 2005 telephone conference, Sarah Ball Johnson directed Fielding Hodgkin, a part-time, hourly information technology ("IT") consultant for the Board, to extract a copy of Kentucky's voter registration file to be given to South Carolina. *See Deposition of Fielding Hodgkin* at p. 9. Mr. Hodgkin explained that South Carolina decided which fields would be matched and requested a specific file format for the data, which was as follows: state code (i.e. KY), social security number (9 positions), gender, birth date, last name, first name, middle initial and date registered. *See Hodgkin Deposition* at pp. 10-12. In addition to these data fields, Mr. Hodgkin testified that the file format included "date last voted," a field that did not exist in Kentucky's Voter Registration Database. *Id.* at p. 12. Therefore, using a formula applied to Kentucky's voter history record in conjunction with relevant election dates, the "date last voted" was provided to South Carolina. *Id.* at p. 12. Finally, Mr. Hodgkins stated that the Board staff included data from the voter history portion of Kentucky's database and county code for use by the Board. *Id.* at p. 12. On November 18, 2005, the Board staff sent this CD-ROM to South Carolina's Election Commission via the United Postal Service. *See* Secretary of State's Response to Petitioner's Interrogatory No. 22. Apx. At Tab 3.

On March 22, 2006, the State Board of Elections received via electronic mail two (2) .zip files from South Carolina, containing the matching data between Kentucky and Tennessee (KYTN_Matched.zip) and between Kentucky and South Carolina (KYSC_Matched.zip). *Deposition of Kim Bagwell* at p. 14, Exhibits A and B. Upon receipt of the data, Fielding Hodgkin worked with Michael Goins, a contract employee and programmer with the Commonwealth's Office of Technology ("COT"), to write a program to match and remove the voters identified by South Carolina from the Statewide

Voter Registration Database. *See Deposition of Michael Goins* at pp. 14-16, *Deposition of Fielding Hodgkin* at p. 15. The program identified those voters who had a registration date in South Carolina or Tennessee that was "more current" than their Kentucky Registration. *See Hodgkins Deposition* at p. 15. The criteria for a "match" between the statewide Voter Registration Database and the data supplied by South Carolina and Tennessee were social security number, date of birth, last name, and registration date. *Id.* at p. 23. However, the program developed did not include a "match" based on the voting histories of the relevant registrants. *Id.* at p. 16.

Prior to executing the program written to purge the Kentucky Voter Registration Database, Mr. Hodgkin's tested Mr. Goin's matching program to see that it functioned correctly. *See Hodgkins Deposition* at p. 17. At that point Kentucky's program "kicked out" some voters identified by the match performed by South Carolina because they did not meet match criteria. This finding was later confirmed when the "scheduled run" of Kentucky's program took place to actually carry out the purge. *See Hodgkins Deposition* at p. 25.

The first "scheduled run" took place on April 10, 2006, when Mr. Hodgkin executed the program to delete the registrants whose records matched the data on the Kentucky-South Carolina data match. *See Hodgkins deposition* at p.22, Exhibit E. On April 11, 2006, Mr. Hodgkin executed the program to delete the registrants whose records matched the on the Kentucky-Tennessee data match. *Id.* Exhibit E. Activity reports were generated for both batch programs. *Id.* Exhibits B and Apx. at Tab 4. The program using Kentucky-South Carolina matched data returned 2,110 matched registrant records which were removed, and the Kentucky-Tennessee program returned 5,995

matched registrant records which were removed. *Id.* A total of 8,105 voter registration records were removed from the statewide Voter Registration Database between April 10 and April 11, 2006. Kentucky's matching program also revealed that 493 records returned by South Carolina as "matching" Kentucky's Voter Registration Database did not match using Kentucky's program (these records did not match on one of the five (5) criteria – social security number, last name, registration date, date of birth or county code). After the purge was completed through this "scheduled run," the Board conducted no further investigation into the residential status of the people who had been purged. *Johnson Deposition* at p. 28.

The report of the outcome of the matching described the results as follows:

South Carolina-Kentucky Match
2,142 match records received from SC
2,110 match records purged from current KY database
2-match records did not match current last name
16-match records did not match on ss#
14-match records did not match the current county registered

Tennessee-Kentucky Match
6,456 match records received from TN
5,995 match records purged from current KY database
10-match records did not match current last name
412-match records did not match on ss#
1-match records did not match on date registered
38-match records did not match on current county registered.
(Emphasis added) *Hodgkin Deposition,* Exhibit B. Apx. At Tab 4.

On April 18, 2006, Executive Director Sarah Ball Johnson updated the State Board of Elections that the purge had been completed. See Minutes of the Board at p. 2 and attachment "State Data Match Project." Apx. at Tab 5. Ms. Johnson had no knowledge the were any discrepancies between the matching done by South Carolina and that preformed by the State Board's IT personnel. *Deposition of Sarah Ball Johnson* at p.

45. Secretary of State Trey Grayson's press release, as described above, followed on April 24, 2006. Additionally, no motion was made nor votes taken by the Board to approve or ratify the actions of the Secretary of State and the Executive Director. *Deposition of Sarah Ball Johnson* at p. 27.

No notice was sent to the voter's that had been purged. *Deposition of Sarah Ball Johnson* at p. 29. Additionally, the voters purged were not placed on an inactive voter list within the Statewide Voter Registration Database from which the precinct rosters are created. *Johnson Deposition,* p. 32. Instead they were removed from the database in a manner which had the consequence of also removing their names from the precinct rosters which were distributed to the County Clerks for the May 16, 2006 primary election. The only way the purged voter could be identified by the County Clerks was to look in the "year-to-date history file" which tracks the day-to-day changes to the statewide database. *Deposition of Sarah Ball Johnson* at p. 50. *Deposition of Michael Goins* at pp. 10-13.

On May 5, 2006, the Office of the Attorney General filed a Petition seeking a Declaration of Rights and Injunctive Relief, to ensure that the May 16, 2006 primary elections were conducted in compliance with Kentucky law and that wrongfully purged voters would be ensured their right to vote. On May 15, 2006, the Court entered the parties' Agreed Order, which permitted voters appearing for the 2006 primary election, whose names had been removed pursuant to the April 10, 2006 and April 11, 2006 purges, to vote upon presenting proof of eligibility and signing an Oath of Voter card and pursuant to KRS 116.113(4) and subject to the procedures for challenging the qualifications of voters under KRS 117.245. *See* Agreed Order entered May 15, 2006.

According to the supplemental response to Interrogatories and requests for Production of Documents provided by the State Board of Elections 196 voters appeared and were permitted to vote in the manner described above. Apx. at Tab 6. The Attorney General's survey of 114 of the 120 County Clerks in Kentucky has revealed an additional 63 voters which were not accounted for in the State Board's disclosures. See letter dated August 18, 2006, Apx. at Tab 7.

On August 10, 2006, the Secretary of State issued a press release stating that on August 9, 2006 the State Board of Elections sent notice to all voters purged of April 10, 2006 and April 11, 2006. Apx at p.Tab 6. Because this occurred after discovery closed, the Attorney General has no proof all voters were notified, but neither is there a basis to deny the claim.

ARGUMENT

I. KENTUCKY STATE LAW CONTROLS PURGES FROM KENTUCKY'S VOTER REGISTRATION DATABASE

The 1994 Kentucky General Assembly, in regular session enacted SB 262, the purpose of which was to implement the requirements of the National Voter Registration Act of 1993 ("NVRA")[1], before the required effective date of January 1, 1995. *See* OAG 94-42 and letter from State Board of Elections requesting the same, *Apx.* at Tab 8. The enactment was the direct result of the NVRA, and in following Congress' mandate, the 1994 General Assembly adopted Congress' legislative intent. *Id.* Specifically, the purposes of the NVRA are:

[1] The NVRA was Congress' next step after the Voting Rights Act of 1965 ("VRA") to ensure the right of citizens of the United States their most fundamental right – the right to vote. Congress held that it was the shared duty of "the Federal, State, and local governments to promote the exercise of that right." 42 U.S.C. 1973gg(a).

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
(3) to protect the integrity of the electoral process; and
(4) to ensure that accurate and current voter registration rolls are maintained.
42 U.S.C. 1973gg(b).

To further these goals, SB 262 created and amended various sections of KRS Chapter 116, including providing procedures for conducting a purge of ineligible voters based on their change of address. KRS 116.112.

KRS 116.112 provides the sole legal authority for conducting a voter registration purge program in the Commonwealth of Kentucky for reasons other than death, incompetency or conviction of a felony. KRS 116.112 meets and exceeds the requirement that Kentucky "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of-- **(A)** the death of the registrant; or **(B)** a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section" as required under 42 U.S.C. § 1978gg-6(a)(4).

KRS 116.112(1) authorizes the State Board of Elections to conduct purges based upon "the change-of-address information supplied by the United States Postal Service through its licensees or *other sources* to identify voters whose addresses may have changed." (Emphasis supplied.) The statutory procedures for a purge of voters who have moved "to a different address not in the same county" are clearly set forth by the statute. KRS 116.112(3) requires the Board to send the voters address confirmation notices.

KRS 116.112(4) provides the following specific safeguard for registered voters:

> The state or county boards of elections shall not remove the name of a voter from the registration records on the ground that the voter has changed his residence unless the voter:
> (a) Confirms in writing that the voter has changed residence to a place outside the county; or
> (b) 1. Has failed to respond to the notice described in subsection (3) of this section; and
> 2. Has not voted or appeared to vote and, if necessary, correct the registration records of the voter's address in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

The statute also provides a legitimate means for the Board to maintain accurate voter registration records by establishing an inactive list of all voters who fail to respond to the notices. KRS 116.112(5). Voters on the "inactive voter list" are still registered and may vote upon appearing to vote in an election day during the relevant two (2) year election cycle and updating or correcting their address information, if necessary.

KRS 116.112(6) requires at a minimum that any systematic purge of voters be completed more than 90 days before a primary election. The 90-day requirement provided by Kentucky state law is not a mere formality. The evil the 90-day requirement seeks to prevent is any systematic striking of names from the statewide Voter Registration Database that does not allow wrongfully purged voters the opportunity to correct or challenge their removal in time to participate in the next election. Although other provisions of Kentucky law also safeguard against disenfranchising voters, *see e.g.* KRS 116.025 (providing means for voting for registered voters who change their place of residence while the registration books are closed) and KRS 116.113(4) (permitting a purged voter to file a protest with the county board of elections), the 90-day requirement for a systematic purge of the registration database provides a date certain following which Kentucky's Voter Registration Database may not be globally affected prior to an

election. Voter registration books do not close in Kentucky until approximately thirty (30) days before a primary or regular election. KRS 116.045(1). Therefore, the 90-day requirement provides voters who may be wrongfully purged a reasonable time in which to re-register without seeking formal legal remedies.

Moreover, Kentucky's 90-day requirement mirrors the language in the National Voter Registration Act of 1994 (as amended) ("NVRA") regarding the administration of state voter databases, which was specifically cited by the Board as authority for this pilot voter purge. 42 U.S.C. 1973gg-(6)(c)(2)(A) also requires a state to conduct a systematic purge not later than 90 days prior to the date of a primary or general election for Federal office. Unlike Kentucky's requirement, federal law does permit exceptions to the federal time requirement for the removal of names from active lists of voters based on the following: (1) upon the death of a registrant, (2) as provided by State law, by reason of the criminal conviction or mental incapacity of a registrant, or (3) at the request of the registrant that they be removed. Therefore, Kentucky's 90-day requirement comports with the minimum standards under federal law. Further, none of the exceptions provided above are at work here.

Other circumstances concerning this voter purge reinforce the need to safeguard the 90-day requirement. The Board has justified this action by claiming that a voter registered in another state is *per se* proof that the voter is not eligible to vote in Kentucky. That position completely overlooks the potential for mistaken identity, which is highly likely when dealing with more than 8,100 people. However, even more importantly it is factually incorrect. A voter registered in Kentucky could have moved to another state after the 2004 general election, registered to vote, and then moved back into Kentucky in

time to qualify to vote under Kentucky law, which does not presume a change of residence simply because they are *registered* in another state. KRS 116.035(3). Evidence from the May 16, 2006 primary compiled by the Board and the Office of the Attorney General reveals that approximately 259 voters fell into these categories during an election in which only 31% of the electorate turned out to vote. That projects to roughly a 10% error rate. (8,105 voters purged x .31 voter turnout = 2,512.85. 259 purged eligible voters ÷ 2,512.85 = 10.3% error.)

The NVRA was enacted to ensure the States provided minimum voter protections for Federal elections. Guaranteeing greater State protections does not produce an inconsistency with federal law so as to implicate preemption of a state statute. The NVRA creates a floor not a ceiling on voter registration procedures. *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005); *see also, Hancock v. Train*, 426 U.S. 167, 179-80, 96 S.Ct. 2006, 2012-13, 48 L.Ed.2d 555 (1976) ("[n]either the Supremacy Clause nor the Plenary Powers Clause bars all state regulation which may touch the activities of the Federal Government.").

In the NVRA mirrors the federal-state interaction in environmental law. As was held by the Sixth Circuit in *U.S. Azko Coatings of America, Inc.*, 949 F.2d 1409, 1454 (C.A. 6, 1991), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") sets only a floor, not a ceiling, for environmental protection. Those state laws which establish more stringent environmental standards are not preempted by CERCLA. See 42 U.S.C. § 9621(d)(2)(A). See also *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928,952 (9th Cir. 2002). A similar holding was reached in construing the provisions of the Resource Conservation and Recovery Acy (R.C.R.A.) by

the Fourth Circuit in *Safety-Kleen, Inc. (Pinewood) v. Wyche,* 274 F.3d 846,863 (4th Cir. 2001).

The crux of the Respondent's argument for applying federal law is that in balancing the need to protect voter registration against the state's right to conduct elections the Federal Government was also mandating the manner in which the states must police their voter rolls. In fact, the NVRA strikes a balance between voter rights and the state's interest in "cleaning up" their voter lists. It makes little sense to argue the Commonwealth of Kentucky needs to be told by the Federal Government how to best protect its interest. The General Assembly was elected to pass laws that protect the interests of the Commonwealth, not the Congress. In this case the General Assembly chose to pass SB 262, codified as KRS 116.112, which provided the citizens of Kentucky some very common sense protection for their voter registration. Because these protections meet and exceed those required by the NVRA they constitute the applicable law in this case.

II. THE RESPONDENTS' PURGE OF 8,105 PEOPLE FROM KENTUCKY'S VOTER REGISTRATION DATABASE VIOLATED KENTUCKY LAW.

A. The purge was conducted in an arbitrary and capricious manner.

This is not an appeal from a formal administrative adjudication. No hearing was held; no findings of fact were made. However, it is clear the Board acted on the factual findings produced by the "pilot project" and then concluded as a matter of law the facts justified removal of names from the Statewide Voter Registration Database. Central to the Respondent's justification for the purge is the belief that being registered to vote in another state cancels or otherwise invalidates a voter's registration in Kentucky. Because

this is incorrect as a matter of law, the administrative decision is reviewable by the Court. "An erroneous interpretation or application of the law is reviewable by the court which is not bound by an erroneous administrative interpretation no matter how long standing such an interpretation." *Camera Center, Inc. v. Revenue Cabinet,* 34 S.W.3d 39 (Ky. 2000).

Generally, one must only register and be a resident of Kentucky to be eligible to vote. KRS 116.025. Indeed, even if a person is no longer a resident of Kentucky he or she will be allowed to vote in Kentucky's presidential election if the change of residence occurred after the registration books closes. KRS 116.025(6). Residence is lost by moving to another state with the intent to stay there permanently, or by moving to another state and *voting there* even if the voter's intent is to return to Kentucky. KRS 116.035. Therefore, moving to another state and registering to vote without actually voting is not sufficient to change residence to another state if that person intends to return to Kentucky. This is consistent with KRS 117.245(1) which deems registration to vote in Kentucky only *prima facie* evidence of the right to vote and does not prevent a challenge to the voter's qualifications, i.e. residency.

However, even more importantly, Kentucky law does not provide for cancellation of a voter's registration or removal of a voter from the Statewide Voter Registration Database due to registration in another state. Only one statute allows the State Board of Elections to unilaterally remove a name from the voter registration records: KRS 116.113 which provides for removal upon notice of death, declaration of incompetency, or conviction of a felony. The statute which governs voters who have changed addresses, KRS 116.112, only allows removal when the voter 1) confirms a change of *residence* in

writing or 2) has not voted in two election cycles following receipt of notice the State Board has received information which appears to indicate the voter has moved. Otherwise, KRS 116.112 requires the State Board to keep voters who appear to have changed addresses in the registration records on an inactive voter list.

The Respondents have argued the language which allows removal upon confirmation in writing "that the voter has changed residence" allows for removal upon notice of registration to vote in another state. This reading of KRS 116.112(4)(a) is erroneous for two reasons. First, as discussed earlier, notice of registration in another state is not sufficient in itself to presume a change of *residence* as that term is defined by statute. The Board still lacks knowledge of whether the person intends to remain in the other state, or whether he or she has voted there. Hence, the facts available to the Board do not support a finding that residence has changed.

Second, a plain reading of KRS 116.112 reveals that the General Assembly intended the written notice to be directed to the State Board by the voter. KRS 116.112(1) presumes the State Board of Elections has obtained information from "other sources" that the voter's address has changed. This information is sufficient to allow the Board to send out notice, and if no response to the notice is received, place the person on the inactive voter list. KRS 116.112 (3) & (5). Therefore, when the statute speaks to confirmation in writing in subsection (4)(a) so as to allow immediate removal from the voter registration records it must mean from the voter, and not the "other sources" from which the information was first obtained by the State Board. Otherwise, there would be no need for the statute to provide for notice and the mechanism of an inactive voter list. The same information which justified sending notice placing a name on the inactive voter list would

also justify removal of the name from the voter registration entirely. In sum, the exception would eat up the rule, and voters could be purged without notice and opportunity to correct any error, the very situation the statute was drafted to prevent. All statutes are presumed to be enacted for the furtherance of a purpose on the part of the legislature and should be construed so as to accomplish that end rather than render them nugatory. *Reyes v. Hardin County*, 55 S.W.3d 337, 342 (Ky. 2001).

The simple fact is the voter registration databases of the states of South Carolina and Tennessee constitute "other sources to identify voters whose addresses may have changed" under KRS 116.112(1). As such, if it appears they contain the names of people who are also registered to vote in Kentucky, and the registration in South Carolina or Tennessee is more recent than the registration in Kentucky, then the State Board of Elections has a sufficient legal basis under KRS 116.112(1) and (3) to send those people a notice form. The State Board of Elections may also place those names on an inactive list for two election cycles. KRS 116.112(5). If the people placed on the inactive list don't vote or reply during the next two election cycles then their names may be removed from the registration records. KRS 116.112(4)(b). However, in no event can the State Board of Elections carry out a systematic removal of names of ineligible voters within 90 days of an election. KRS 116.112(6).

The State Board of Elections did not comply with any of these requirements. They carried out a systematic removal of names within 90 days of the May 16, 2006 primary. They did not place the names on an inactive list for two election cycles. They did not send notice to the people removed, and removals were carried out by the Board without receiving written confirmation of change of residence from the voter. All of these actions

were in violation of Kentucky law. Because they were carried out based upon an erroneous interpretation of the law, and the facts are insufficient to sustain the actions otherwise, these actions are arbitrary and capricious, and should be enjoined. That these facts are not contested justifies summary judgment in favor of the Attorney General.

B. Federal Law Does Not Contemplate, Permit Or Otherwise Provide Standards For An Interstate Compact To Systematically Purge State Voters Based On Matching Records Between State Voter Registration Databases

The Federal law upon which the Respondents' rely for authority, does not mandate or even suggest the use of database matching to determine the accuracy of voter registration rolls. Rather, when Congress passed the NVRA, few states even had centralized, statewide voter registration databases -- Kentucky being one of the exceptions. Therefore, Congress could not have even contemplated such a matching program. Rather, it was not until the 2002 passage of the Help America Vote Act ("HAVA"), which required every state to implement a uniform, regularly updated computerized statewide voter registration list, 42 U.S.C. § 15483(a), that such a program could have even been envisioned.

In fact, a federal district court in Washington recently held that the use of voter record database matching as a prerequisite to registration actually violates HAVA. *Washington Association of Churches v. Reed*, Case No. C06-0726RSM slip op.(W.D. Wa. August 1, 2006) (Order granting plaintiff's motion for preliminary injunctive relief and enjoining election officials from enforcing Washington's "matching statute" RCW 29A.08.107), Apx. 9. The district court specifically rejected the Washington Secretary of State's argument that the public interest in preventing voter fraud weighs against the

relief sought, finding that "the public interest weighs strongly in favor of letting every eligible resident...register and cast a vote." *Id.*

C. Because the Board of Elections did not approve terms and standards under which the "pilot program" and subsequent purge of voters would be carried out its authority was illegally delegated.

The Kentucky project was not the only interstate matching program contemplated last year. However, Secretary of State Trey Grayson and his counterparts in South Carolina and Tennessee were the only state officials to forge ahead with the proposal. A similar pilot project proposed as the "Northwest Region" pilot project did not occur, specifically because states participating in the project were very concerned that there were no uniform procedures to conduct such a program. Regarding its own assessment of an interstate consortium to share voter data and "match" records, the Oregon Secretary of State specifically advised the Election Assistance Commission ("EAC") that there were "a host of procedural questions" regarding matching and that "it would not be in the best interests of the country for one region, on its own, to pick a vendor and move ahead of the rest of the country without the active leadership of the EAC." See Apx. at Tab 10. Kentucky's Secretary of State had no such hesitancy, but rather forged ahead with an untested, unapproved pilot program.

As will be discussed at length in the following argument, neither Kentucky's involvement in the "pilot project", or the use of the findings of that project to purge voters from the Statewide Voter registration Database was approved by the State Board of Elections. No motion was ever made, and no vote was ever taken regarding either proposition. However, even if the necessary approval had been obtained, the procedure

followed by the Board's staff illegally delegated the Boards discretionary and quasi-judicial authority.

It is a well established principle that administrative bodies cannot delegate an authority or duty which can only be exercised by them. This means that although a board may delegate ministerial functions, in the absence of a statute permitting it, the board cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment. OAG 83-110, OAG 78-542, citing 73 C.J.S., *Public Administrative bodies and Procedure*, Section 57; *Calvert v. Allen County fiscal Court*, 252 Ky. 450, 67 S.W.2d 701(1934).

Parsing the distinction between ministerial functions and discretionary acts can prove difficult in practice because a board's staff often has more experience in the field the board regulates than the board members. In this circumstance, many board members will "take their cues" from board staff, whose direction the members trust. In turn, the staff becomes confident they know what the board will want to do regarding a particular issue and feel empowered to act; sometimes without seeking direction or approval from the board which they view as *pro forma*. The fact that it is understandable that the State Board of Elections fell into this trap does not excuse the result.

The actions of the State Board of elections in this case parallel closely the actions of the Workman's Compensation Board in the case of *W.M. Cissell Manufacturing Company v. Harris*, 609 S.W.2d 377 (Ky. App. 1980). In that case the Workman's Compensation Board obtained an OAG opinion saying that the Commissioner could designate a non member of the Board to draft and tender opinions to the Board so long as a Board member conducted a review of the case and the finding and recommendations

before it was presented to the full Board for approval. However, it was proven the staff attorney's proposed order was not reviewed by a Board member prior to the full board meeting, and further that the Board voted to adopt the proposed order without reviewing the record. In reversing the Board's order the Court of Appeals noted that the Board's approval of the proposed order did not cure the illegal delegation of discretion. The court noted:

> Part of the responsibility of any administrative agency confronted with a question of fact is to review and interpret the evidence in the light of existing law. Here, the Commissioner interpreted those facts for the Board.

By failing carry out this responsibility the Worker's Compensation Board made its decision lacking knowledge of important facts which were not found in the proposed order.

The parallels to the present facts are striking. The Secretary of State chose to get the State Board of Elections involved in a first of its kind multi-state voter database matching project. On those orders the Board's Executive Director made a single phone call which committed the Board to participate in a project which had no formal standards and for which no known formal standards existed. Board staff then provided officials in South Carolina information which included the voting histories which would have had to have been matched with voting histories in the other state to verify a change of *residence* under Kentucky law. Voting histories were not used by South Carolina's matching program. Nevertheless, staff of the State Board of Elections accepted South Carolina's matching data as the basis upon which they carried out Kentucky's matching and purge program. In executing Kentucky's program it was found that on the one criterion which should not have displayed any discrepancies, social security numbers, over 6.4% of the

matches South Carolina identified by comparing the Tennessee and Kentucky databases could not be verified. Finally, following execution of the purge program, the Board staff made no investigation into whether Kentucky residences had been removed from the voter database by that program.

Would the Board have made the decision to participate in the "pilot program" if it had known of the concerns which had been raised by other states about the lack of standards for such endeavors? Would the Board have allowed South Carolina to control the matching and designate the criteria to be matched? Would the Board have accepted the matching as sufficient to use for a purge knowing South Carolina chose not to match voting histories? Would the Board have accepted the results of the Kentucky-Tennessee matching if it knew of the discrepancies identified by the Board's staff? Would the Board have ordered an investigation into the results provided by the "pilot program" before using those results as a basis to purge Kentucky voters? No one knows the answers to these questions because none of these questions were ever put to the Board for a vote. However, even if consulted, the Board could only have authorized its staff to act based upon very clear criteria which left no room for discretion. Under no circumstances could the State Board of Elections delegate to its staff as well as the Board of Elections in another State the choice of matching criteria to be used, and by extension the criteria upon which Kentucky citizens would be removed Kentucky's voter rolls.

III. THE PILOT PROGRAM AND SUBSEQUENT PURGE OF 8,105 REGISTRANTS FROM KENTUCKY'S VOTER REGISTRATION DATABASE WAS CONDUCTED WITHOUT AUTHORITY FROM THE STATE BOARD OF ELECTIONS AND THUS CONSTITUTED AN *ULTRA VIRES* ACT.

The uncontested factual evidence demonstrates that Secretary Trey Grayson, acting without the authorization of the State Board of Elections, directed and approved

(1) the compact with the states of South Carolina and Tennessee to conduct a comparison of Kentucky's statewide Voter Registration Database with those other states and (2) to purge from Kentucky statewide Voter Registration Database over 8,100 registered voters based on the "matching" results from foregoing database comparisons. Such discretionary decisions are reserved by statute to the State Board of Elections, exclusively.

A. Secretary of State's Actions Violate State Election Law.

KRS 117.015(1) creates the State Board of Elections and its duties, including the supervision of registration and purgation of the voters within the state. KRS 117.015(1). KRS 117.015(2) provides that the Secretary of State of the Commonwealth "shall serve as the chairman of the state board and the chief election official for the Commonwealth." The Secretary of State serves on the Board along with six (6) members who are appointed on a bipartisan basis. KRS 117.015(2); *see also* 42 U.S.C. 1973gg-8 (requiring states to designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA].") Neither Kentucky or federal law authorize a single state official to take discretionary acts without prior authorization. *See Young v. Fordice*, 520 U.S. 273 (1997) (NVRA did not waive federal preclearance under the VRA for discretionary decision to implement new state registration system).

The Respondents arguments that the Secretary of State may make any decision that the Board may make by vote, would obviate the very need (and the statutory requirement) of a state board of elections.

B. Secretary of State's Actions Violate State Administrative Law.

The Respondents argue that merely by referencing the Secretary of State, KRS 117.015 somehow delegates the authority of the Board to the Secretary acting alone. This argument is contrary to law. As outlined in the prior argument, a board may not delegate functions or acts which are discretionary or quasi-judicial. The manner in which an administrative body must take action involving discretion and quasi-judicial functions is succinctly set forth at 73 C.J.S., *Public Administrative Law and Procedure*, Section 31 (2004). It states:

> Generally, an administrative agency, board, or commission should act as a body, and, in the absence of a statutory exception, can act officially only in or at a lawfully convened session, if the act is one requiring deliberation or the exercise of discretion or judgment.
>
> Except where authorized by statute, the powers and duties of an administrative body may not be exercised by individual members of the body, although constituting in numbers the majority of the body, and are not in themselves equivalent to formal action by the body as such.

Kentucky administrative law specifically requires a majority vote of a board before official action. KRS 446.050 (providing that "[w]ords giving authority to three (3) or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons.")

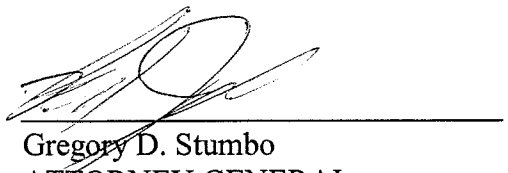
Actions by a governmental body must also comply with Kentucky's Open Meetings Act. KRS 61.805(3) identifies the nature of actions which must be taken in an open meeting of a public agency of the Commonwealth of Kentucky. Such "action taken" is defined as "a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body." The minutes of the State Board of Elections do not reflect that this ever occurred.

Secretary of State Trey Grayson did not possess the statutory authority to make such discretionary policy decisions without the authorization of the State Board of Elections. Therefore, Secretary of State's decision to form an interstate compact to compare and match sensitive voter registration data and to purge those voters whose records matched from Kentucky's voter rolls violated Kentucky law. Only a majority of the State Board of Elections has the authority to exercise that discretion by announcing that intent during a meeting attended by a quorum of its members. Because the purges that occurred on April 10 and April 11, 2006, were not approved or ratified by the Board they should be voided and the names of the purged voters restored to Kentucky statewide Voter Registration Database.

CONCLUSION

Summary Judgment shall be granted where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. In the present action the Attorney General has relied solely upon the documents and witnesses identified and produced by the Respondents for all material facts which support this motion for summary judgment. In doing so, no room has been left for the Respondents to dispute the facts set forth herein. Further, for the reasons set forth these facts entitle the Attorney General to the judgment and relief requested as a matter of law.

Respectfully submitted,



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