COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE 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. **AMICUS CURIAE BRIEF**

COMMONWEALTH OF KENTUCKY
STATE BOARD OF ELECTIONS, et al.

and

COMMONWEALTH OF KENTUCKY
SECRETARY OF STATE, TREY GRAYSON RESPONDENTS

* * * * *

Come now the Kentucky League of Women Voters, Project Vote, and Common Cause of Kentucky and hereby submits as amicus curiae in the above styled action the following memorandum of law in support of Petition for Declaration of Rights:

INTRODUCTION

The question presented in this case is whether cancelling voter registrations on the basis of a database matching project among several states was in accordance with Kentucky's Voter Registration statutes, KRS Chapter 116. The Respondents submit Kentucky's participation in this pilot database matching project was authorized by both KRS Chapter 116 and the National Voter Registration Act, 42 USC § 1973 gg-6. The legitimacy of these voter registration purges, will necessarily be determined by interpretation, application, and interplay of these state and federal statutes.

STATEMENT OF FACTS

The relevant facts are not in dispute. In late 2005, and early 2006, Kentucky, South Carolina, and Tennessee participated in a pilot project whereby the three states compared their voter registration databases to determine if any entries among the respective databases matched. The states agreed that for matched entries the registrations of those with other than the most recent registration date would be cancelled.

The states compared a computer file from their voter registration databases formated to include specific fields of data: state, social security number, gender, birth date, last name, first name, middle initial, date registered, and date last voted. South Caroline performed the actual matching by running the computer files prepared by each state through a matching program. The results provided by South Carolina were then again analyzed electronically by Kentucky. Though the matching program was written to identify only these entries where there was an "exact match" Kentucky uncovered discrepancies between the database matches identified by South Carolina, and when subsequently analyzed by Kentucky.

In short, an electronic database of registered voters was created in each of the states from original source material. A computer program was developed to "read" the databases to identify "matches," and these were then culled, again, through the application of a computer program. Finally, three (3) steps removed from any original documentation, a registered voter, without notice of any kind, and within thirty-five (35) days of an election, was purged of his or her voter registration because that individual purportedly had a voter registration date in another state later than his or her voter registration date in Kentucky.

ARGUMENT

The central issue in this case is whether the voter purge program based upon database matching of various states' voter registration databases is the equivalent of a request by a voter to be removed from the registration books under KRS 116.0452 (3)(a); or whether such a program constitutes a voter registration purge program under KRS 116.112. Because Kentucky's statute must conform to the standards set forth in the National Voter Registration Act (NVRA) under 42 USC §1973 gg-6, an analysis of that statute is necessary.

I. National Voter Registration Act Does Not Specifically Authorize Database Matching As A Basis To Cancel Registration.

A. The purpose of the National Voter Registration Act is to promote the exercise of the fundamental right to vote.

The NVRA was passed in 1993 "in an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements." ACORN v. Miller, 129 F.3d 833, 835 (6th Cir., 1977). The act also sets limits on the removal of registrants from the voter registration rolls. Bell v. Marinko, 367 F.3d 588, 591 (6th Cir., 2004). Quite simply, the NVRA "is designed to make it easier to register to vote in federal elections." ACORN v. Edgar, 56 F.3d 791, 792 (7th Cir., 1995).

"One of the NVRA's central purposes was to dramatically expand opportunities for voter registration and to insure that once registered, voters could not be removed from the registration rolls by failure to vote or because they had changed addresses." Welker v. Clarke, 239 F.3d 596, 598-99 (3rd Cir., 2001). "The NVRA strictly limits the removal of voters based upon 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. The NVRA went even further by also requiring the implementation of 'fail safe' voting procedures to insure voters would not be removed from registration rolls due to clerical errors or the voters own failure to re-register at a new address." 239 F.3d at 599.

The method by which the NVRA seeks to make it easier is by setting the floor, not the ceiling on what a state can and cannot do in regard to voter registration. Charles H. Wesley Education Foundation, Inc. v. Cox, 408 F.3d 1349, 1353 (11th Cir., 2005); Gonzalez v. Arizona, 435 F.Supp. 2d 997 (D. Ariz. 2006), Bell v. Marinko, supra. In resolving a challenge from voters who were removed from registration rolls by application of an Ohio statute which defined the residence of a married individual as where the family resides, the Sixth Circuit in Bell held the NVRA was not violated because "Ohio is free to take reasonable steps, as have other states, to see that all applicants for registration to vote actually fulfill the requirement of bonafide residence." 367 F.3d at 592. Accordingly, unless a state ignores a specific prohibition or mandate set forth in the NVRA, a state is free to act.

B. The NVRA Only Permits Voter Purges With Adequate Safeguards.

Under the NVRA, a state may remove the name of the registrant from the official list of eligible voters for federal elections only for the following reasons: at the registrant's request, for criminal conviction or mental incapacity as provided by state law, or under a general program to remove the ineligible voters as a result of death of the registrant or the change in the residence of the registrant. 42 USC § 1973 gg-6 (a)(3) and (4). The NVRA further provides that any general program under 1973 gg-6 (a)(4)(B) to remove a voter for change of residence must comply with subsections (b), (c), and (d). Specifically the program must be uniform, non-discriminatory, and in compliance with the Voting Rights Act of 1965 and no voter can be removed merely for

failing to vote. In addition, the voter removal program may meet the reasonable efforts requirements of 1973 gg-6 (a)(4) if it relies upon change of address information supplied by the Postal Service, and specified notice is set to any registrant who has moved out of the jurisdiction. In addition, any such program must be completed not less than ninety (90) prior to the date of a primary general election for federal office. If the removal is at the request of the registrant, by reason of criminal conviction or mental incapacity, or death of the registrant, removal during the ninety (90) day time frame is not specifically precluded.

These provisions of the NVRA reveal Congressional concern for adequate safeguards to prevent eligible voters from being improperly purged from registration. Congress specifically limited the reasons a voter may be purged. Of these reasons, knowledge of the removal by the voter is obvious (at the voter's request or by reason of criminal conviction), irrelevant (death or mental incapacity) or notice within specific time constraints is required (change of address.)

"It is a fundamental canon of statutory construction that the words of a statute must be read in their statutory context and with a view to their place in the overall statutory scheme." Davis v. Michigan Department of Treasury, 489 US 803, 809 (1989). "In expounding a statute we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy." United States v. Heirs of Boisdore, 49 US 113 (1850).

The language of the statue is written in singular terms. It is designed to protect the individual registrant. A pefect example is in 1973 gg-6 (b)(2)(A) which specifies that notification from "the individual" to the applicable registrar must be "in person or in writing." The Respondents' reliance upon 1973 gg-6 (a)(3)(A) "at the request of the registrant" must be

viewed within this context of concern for the rights and knowledge of the individual voter. The Respondents opine that a database match is the equivalent to "the request of the registrant." The term "at the request of the registrant," in light of the overall structure and approach of 1973 gg-6, refers to a specific request by a registrant to the state. Since the state, under the statute, would act "at the request of the registrant," then the request must be ascertainable from an individualized, verifiable document provided to that state, not because a computer program identifies a database match.

The Respondents in this case are in reality using secondary records of voter registration to establish that a voter is no longer eligible due to change of residence to which the provision of 1973 gg-6 (4)(B) must apply. Indeed, database matching in this case is much more akin to change of address information provided by the Postal Service than it is to a direct request by a registrant. The information Respondents obtained was not a primary record obtained from the registrant. It was not even an individualized record of a registrant at all. The Respondents had to go looking for the information by searching all records just to try to find some indication that a voter might have moved to Tennessee or South Carolina after registering in Kentucky. The information was gleaned from an analysis of an analysis comparing databases. The initial analysis was performed by a computer program reviewing multiple records stored on a computer. These records on the computer were created by inputting information received from primary source documents, none of which were provided or reviewed. This secondary analysis of the secondary records is no more reliable the change of address information supplied by the Postal Service for which the NVRA requires "fail safe" procedures. (Notice with confirmation or two (2) federal elections without voting after notice.) It is certainly not like the direct request from an

individual either in person or in writing that is required under 1973 gg-6 (b)(2) and (d)(A).

Further, the discrepancies discovered by the Respondents in the database matches also highlight the inherent unreliability of such a secondary process based on secondary records. Filed herewith as Appendix A is a analysis of September 15, 2005 Voter Fraud Report submitted to the New Jersey Attorney General prepared by the Brennan Center for Justice, which discusses the problems inherent in database matching. Even though this Report did not deal with database matching using social security numbers, as was done in this case, the Respondents' own analysis showed false matches where records did not match on social security numbers, though the initial computer program ran to identify the matches identified them as matches. Database matching simply does not provide the inherent reliability demanded by the NVRA in conducting voter purges. No individualized request by the registrants is identified on the database match, these registrants are not notified and source records are not revealed. The analysis is performed on a secondary record. The end result is voters are disenfranchised without the opportunity to discover they have been disenfranchised. This is precisely what the NVRA is designed to prevent.

The Respondents attempt to bolster their opinion that database match is indeed "at the request of the registrant" by relying on an opinion letter from the U.S. Election Assistance Commission (EAC) dated May 11, 2006. The Respondents did not rely upon this letter in developing and implementing its voter purge program in this case because it was not issued until after the voter purges had already been performed April 10 and 11, 2006. The letter did, however, conclude "that the NVRA allows a state to remove a voter based on electronic information that the voter registered to vote in another jurisdiction without additional

documentation or confirmation." As a basis for its opinion the EAC quotes the legislative history: "A 'request' by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change of address notice through the drivers license process that updates the voter registration."

"A court appropriately may refer to a statute's legislative history to resolve statutory ambiguity." Toibb v. Radloff, 501 US 157 (1991). The statute here is not ambiguous. It only permits removal from the registration roles "at the request" of a voter; not based on circumstantial evidence that may reveal a "request." There is always a danger of reading more into the legislative history than is there. As Justice Scalia stated in Wisconsin Public Intervenor v. Mortier, 501 US 597, 617 (1991) (concurrence) "Their only mistake was failing to recognize how unreliable Committee Reports are – not only as a genuine indicator of Congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not."

At the time of this legislative history, the possibility of database matching of a state's voter registration list was not contemplated. Very few, two (2) or three (3), states had electronic voter registration databases at that time (Kentucky was one).[1] The information which the state would have received as a result of a registrant registering in another jurisdiction at that time would be the individual cancellation notices referred to in that same letter in the excerpt from "Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches and Examples, produced by the Federal Election Commission." (The EAC is the successor to the

[1] In fact, the requirement for a computerized statewide voter registration list was not enacted until 2002 with the passage of the Help America Vote Act, 42 USC § 15483, some nine (9) years subsequent to the legislative history and the voter guides cited by the EAC.

Federal Election Commission in regard to the NVRA). The FEC, in referencing the cancellation notices, included the caveat "Registors might want to have, or at least have access to, the registrant's original signature on such notices." Contrast this to the "fishing" of all records looking for matches. Even if the language "at the request" were held to be ambiguous, the legislative history quoted here only serves to heighten, not resolve the purported ambiguity. Can it be seriously concluded that this legislative history discussing a "request" by a registrant was contemplating database matching? The quoted history appears to be discussing primary records. Nothing in the NVRA or the FEC guide gives any indication that Congress intended wholesale matching of a person's name and identifying information is the equivalent of request by a registrant.

The NVRA simply does not authorize the removing of a voter without notice if a state determines that the voter's name and identifying information matches the name and identifying information of a voter in another state. The NVRA simply does not address the issue of database matching.

Notwithstanding the EAC's ex post facto opinion, the issue remains whether the language "at the request of the registrant" can be twisted to include a database match. To so render this phrase to include this kind of process is contrary to the intent and purpose of the NVRA and its measured approach to limiting the grounds upon which registrants may be purged and the process which must be followed when purges are performed systematically. Comparing databases through the use of a computer program is a systematic purge. It is a general program to remove the name of ineligible voters. All records have to be searched to identify potential offending records. It is removing those voters by reason of a change in residence because all the match

provides is evidence of a change in voter eligibility based on change of residence. Systematic means, in this context, methodical in procedure or plan. Database matching is a systematic approach. It could not work otherwise. It is not an individualized approach such as contemplated by the term "request of the registrant." Because it is a systematic process, it would require notice and confirmation in writing or lack of voting for two (2) years by the registrant.

Database matching is not an individualized cancellation notice where the registrars have the registrant's original signature on such notices. It is not an individualized request by a registrant. Respondents are inferring a request on the basis of evidence gathered by other than reviewing a particular request. The Respondents have come up with a system which they allege, to a certain degree of accuracy, differentiates between those records as compiled on the database which would be, under their approach, a request by the registrant, and those records which would not be such a request by the registrant. A database match by itself is not the appropriate verification contemplated under the NVRA.

II. KRS Chapter 116 Does Not Authorize Database Matching As A Basis For Removing A Registrant From The Official List Of Eligible Voters.

A. Even If The NVRA Would Allow Database Matching To Be A Basis For Removing A Registrant From The Official List Of Eligible Voters, Kentucky Law May Still Prohibit It.

Nothing in the NVRA specifically mandates or prohibits the use of database matching. Accordingly, database matching, if used as a basis to remove registrants from the official list of eligible voters, must therefore be either evidence of "a request of the registrant" or as part of a general program to remove ineligible voters by reason of change in the residence of the registrant. Regardless, how an individual state handles the issues of database matching is a

decision for the state to make, provided it is uniform, nondiscriminatory, in compliance with the Voting Rights Act of 1965 and does not result in the removal of a name of any person from the official list of voters registered to vote by reason of the person's failure to vote.

Further, because the NVRA is the floor and not the ceiling, states are free to enact procedures, processes, and protections greater than that required by the NVRA. See, Bell v. Marinko, 367 F.3d 588 (6th Cir., 2004) which upheld Ohio's definition of residence for married eligible voters. See also ACORN v. Edgar, 56 F.3d 791 (7th Cir., 1995) which denied an injunction which required the State of Illinois "to do even more than the 'motor voter' law requires." Even EAC's May 11, 2006 letter only concluded the NVRA would allow a state to use database matching in the manner in which the Respondents have in this case. The proposition that the NVRA may allow a state to do something, does not mean the state must allow it or that, in this case, Kentucky would allow it.

The Kentucky statutes in this case do not precisely mirror the NVRA. Specifically, while KRS 116.0452 provides for the same reasons to remove a registrant from registration as does the NVRA, under KRS 116.112, the term "or other sources" appears in regard to the entities providing change of address information though that term appears nowhere in the NVRA. Indeed, Kentucky may add such additional language because the NVRA provision on voter removal programs, 1973 gg-6 (c)(1) uses the precatory word "may" instead of the mandatory word "shall." See Maryland Green Party v. Maryland Board of Elections, 832 A.2d 214-44 (Md. 2003). Adding "other sources" does not make the Kentucky statute noncompliant. Similarly, states are accorded flexibility as to what evidence would constitute "upon a request of the voter" under KRS 116.045 (3)(a). Accordingly, the opinion of the EAC of what the NVRA would

allow in its view of the Election Guide published by the FEC and the NVRA's legislative history is not binding upon this Court's interpretation of Kentucky law, notwithstanding that Kentucky law is modeled upon and is compliant with the NVRA.

B. Database Matching Of Voter Registration Records Is A Systematic Voter Registration Purge Program To Identify Voters Whose Addresses Have Changed.

KRS 116.112 sets forth the procedures which must be followed in a voter registration purge program. As stated above in regard to the NVRA, a database matching program is nothing if it is not systematic. It mechanically and systematically identifies voters to be removed. These voters were removed without notice. The information upon which Kentucky relied was not primary source material. The information upon which Kentucky relied was not individual records which were verified. Rather, it was simply a list of matches. The information relied on did not contain any specific request of any specific voter. The conclusory inference is that because these names matched after running a computer program on separately complied databases, then these matches represent the same person, and therefore, a primary record must exist signed by that voter. The Respondents conclude then the match should be construed to be a request. To the contrary, the match only provides the inference of request, not the evidence of the request itself.

Accordingly, the program followed in this case should fall under KRS 116.112 (1). As discussed above, the information gathered by the Respondents in this case has no more validity than the information supplied by the United States Postal Service. The information gathered is secondary, it is not primary. The information gathered is subject to error in that it is three (3) steps removed from any original documentation. In the compilation of the database, errors may

have occurred. In running the program designed to compare the databases, errors might have occurred. Indeed, as has been shown in this case, errors did occur. In running the program to identify the purges, errors may have occurred. Accordingly, the protections set forth in KRS 116.112 should apply.

CONCLUSION

Database matching does not have the reliability inherent in the term "request of the voter." The request of the voter has to be a direct request, not an indirect request inferred through a database match. A database match is clearly, by any rational definition, "a program the purpose of which is to systematically remove names of ineligible voters from the registration records." Because of the inherent chance of error, because of the systematic approach which is used, and because of the reliance on secondary instead of primary records, KRS 116.112 is the appropriate and applicable statute. Accordingly, the Respondents failed to comply and the purge was performed in violation of state law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Amicus Curiae Brief has been served by regular United States mail, with the proper postage affixed thereto, and by facsimile on

Kathryn H. Dunnigan, General Counsel, State Board of Election, 140 Walnut Street, Frankfort, KY 40601-3240, facsimile (502) 573-4369; Secretary of State, Trey Grayson, 700 Capitol Avenue, Suite 148, Frankfort, KY 40601, facsimile (502) 564-5687; Gregory D. Stumbo, Attorney General, Robert S. Jones, Jennifer Black Hans, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601, facsimile (502) 564-2894, this ____ day of September, 2006.

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