April 20, 2017

Maryland State Board of Elections
151 West St., Suite 200
Annapolis, MD 21401

Re: National Voter Registration Act

Dear Chairman McManus and Members of the Board:

You recently received a letter ("Notice Letter") from Judicial Watch threatening to sue the State of Maryland for purported violations of Section 8 of the National Voter Registration Act ("NVRA"), unless you take action to remove or force Montgomery County to remove from your voting rolls what Judicial Watch deems invalid voter registration records. In advance of the State Board's meeting on April 20, 2017, Project Vote and Demos write to express our grave concern that Judicial Watch's letter would urge you to take actions that would themselves violate the NVRA, and to correct a number of misstatements and omissions in Judicial Watch's Notice Letter.

Project Vote is a national, nonpartisan, nonprofit organization founded on the belief that an organized, diverse electorate is the key to a better America. Demos is a national nonpartisan public policy organization that works for an America where we all have an equal say in our democracy and an equal chance in our economy.

Contrary to the tenor of Judicial Watch's letter, the purpose of the NVRA is *not* to *remove* voters from voter rolls. Indeed, the first purpose Congress highlighted for the NVRA is to "*increase* the number of eligible citizens who register to vote." 52 U.S.C. §§ 20501(b)(1) (emphasis added). As the Third Circuit Court of Appeals has explained,

> [o]ne of the NVRA's central purposes was to dramatically expand opportunities for voter registration and to ensure that, once registered, voters could not be removed from the registration rolls by a failure to vote or because they had changed addresses. To achieve this purpose, the NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using reliable information from government agencies….

Welker v. Clarke, 239 F.3d 596, 598–99 (3d Cir. 2001).

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 Project Vote and Demos 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. Hastily crafting additional removal programs based on unsupported allegations of illegality made without regard to the state's existing procedures, however, is likely to lead to violations of the NVRA and, more importantly, to the disenfranchisement of eligible and properly registered voters.

I. Judicial Watch's Demands to Avoid Litigation Are Not Required by the NVRA.

Judicial Watch demands, without regard to the state's existing procedures, that Maryland quickly take unspecified actions to remove a number of registered voters from the rolls, or else risk litigation. However, maintaining voter rolls in compliance with the NVRA requires careful attention. The NVRA allows certain actions while prohibiting others. First, the NVRA does not require rushed adoption and completion of any removal efforts prior to any particular election. This is evident from the fact that the NVRA's provisions on change-of-address prohibit removals in many instances for at least two federal elections after a State has sent the registrant a required notice. *See, e.g.,* 52 U.S.C. § 20507(d)(1)(B). Second, the NVRA does not require the State to undertake a particular systematic program—it merely requires a "a reasonable effort" pursuant to a "general program" of list maintenance that can, for example, be based on Postal Service change-of-address information. *See* 52 U.S.C. § 20507(c)(1). Third, the NVRA requires this reasonable effort only with respect to those who have died or have changed residence. 52 U.S.C. § 20507(a)(4). For example, it permits, but does not require, States to make an effort to remove those with criminal convictions. *See* 52 U.S.C. §20507(b). States can choose to allow those with criminal convictions to remain eligible to vote, and if the States make them ineligible, it is up to the States to determine what effort they will make to remove them from the rolls. Similarly, the NVRA does not require that States target specific efforts toward removing "noncitizens" from voter rolls. Finally, as discussed below, the NVRA prohibits any systematic program to remove ineligible voters within 90 days of a federal election, including primaries, special elections, and runoffs.

II. The NVRA Prohibits Removal of Registrants Except for a Few Enumerated Reasons and Affirmatively Requires Little State Action Regarding Voter Removal.

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. They do so in order to reduce the chance that citizens eligible to vote will be removed from the rolls. For example, the NVRA states that "the name of a registrant *may not be removed* from the official list of eligible voters *except*" 1) if the registrant requests he or she be removed, 2) in accordance

with State law regarding eligibility in cases of criminal convictions or mental incapacity, 3) where the registrant has died, or 4) where the registrant's residence has changed. 52 U.S.C. §§ 20507(a)(3)(A)-(C); (4)(A)-(B) (emphasis added).

A. The State May Not Remove Voters for Change of Residence Until the Voter Confirms the Change or Until a Sufficient Waiting Period Has Elapsed.

Judicial Watch incorrectly claims that merely having more voters on the rolls than eligible voters is strong evidence that a county is not reasonably maintaining the voter registration lists. *Id.* § 20507(a)(4). This interpretation turns the NVRA on its head. When a registrant is thought to have changed residence, the law explicitly prohibits the removal of the voter's name from the rolls unless the voter has confirmed the residence change in writing *or* until after a sufficient waiting period has elapsed. Specifically, the NVRA provides that "a State *shall not remove* the name of a registrant . . . on the grounds that the registrant has changed residence unless" (*i*) he or she "confirms in writing" that he or she has changed residence to one outside the election official's jurisdiction, or (*ii*) he or she has failed to respond to an address-change confirmation notice *and* has failed to vote in an election in a time period running from the date of the notice to the day after the second consecutive federal general election thereafter. *Id.* § 20507(d)(1) (emphasis added). This means that the State must, in some circumstances, wait *more than two years* after sending the statutorily required notice to the registrant before taking any action to remove the registrant from the voter rolls, unless the voter confirms the address change in writing.

B. The Affirmative Requirement to Remove Is Narrow and, in Fulfilling It, the State Cannot Violate the Other Requirements of the NVRA

Contrary to the suggestion in Judicial Watch's Notice Letter, the only affirmative obligation the NVRA imposes on a State with respect to removal of registrants from the voter rolls is to "conduct a general program that makes a *reasonable effort*" to remove the names of ineligible voters who have 1) died or 2) changed residence. *See id.* § 20507(a)(4) (emphasis added). A program conducted under this provision to remove voters who have changed address must comply with the NVRA's other requirements. *Id.*

C. For Registrants Who Have Moved, the State Can Use Change-of-Address Information From the U.S. Postal Service But Must Still Comply with the NVRA's Notice Provisions.

The NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence is to begin with Postal Service change-of-address forms. The NVRA provides that "[a] State may meet the requirement" to conduct a general program to remove the names of registrants whose residence has changed if it

uses "change-of-address information supplied by the Postal Service." *Id*. § 20507(c)(1)(A); *see also Welker*, 239 F.3d at 598–99.

Moreover, even when the State has received change-of-address information from the Postal Service, and even when the information indicates that individuals have moved out of the jurisdiction, the NVRA prohibits States from simply removing these individuals. The State still must comply with the explicit notice provisions that serve to ensure voters are not improperly removed from the voter rolls. 52 U.S.C. § 20507(d)(2). Indeed, the entire section of the law cited by Judicial Watch—Section 20507—imposes restrictions on the reasonable effort the State may undertake to remove voters, including explicit restrictions on how the State must implement the required "general program" to remove registrants whose residence has changed:

- *First*, if it appears the registrant has moved *within* the same jurisdiction in which he or she is already registered to vote, the election official is to "change[] the registration records to show the new address and send[] the registrant a notice . . . by which the registrant may verify or correct the address information." *Id.* § 20507(c)(1)(B)(i). The obligation is to correct the voter registration list, not to remove the voter from the list.

- *Second*, if it appears based on reliable second-hand information, such as information received through the Postal Service's National Change of Address program, that the voter has moved *outside* the election official's jurisdiction, the NVRA sets forth specific notice requirements intended to verify the data from the Postal Service. *See id.* § 20507(c)(1)(B)(ii). The notice must inform the registrant that if she or he has in fact remained in the jurisdiction (either at the previous address or a new one), despite the data from the Postal Service, she or he must return a postage pre-paid card at least 30 days before the next election (or up to a shorter period of time before the next election, as established by State law). *See id.* § 20507(d)(2)(A). If the card is not returned, the registrant "may" be required to provide affirmation or confirmation of residence in order to vote in the next two consecutive general federal elections, but the registrant *may not* be removed from the list of registered voters.[1] *See id.* The State may remove the registrant from the voter rolls only after sending such a notice and after two consecutive federal general elections have passed during which the voter has not voted. *See id.* The notice must also inform the registrant about how he or she may continue to be eligible to vote if he or she has in fact moved outside the jurisdiction.

[1] Even if a registrant moves and fails to respond to the notice, the NVRA requires that he or she be allowed to vote, if the registrant still resides in the same jurisdiction. *Id.* § 20507(e).

These strict requirements make sense as a means to effectuate Congress's "concern that [removal] programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing."[2]

Given these restrictions on the State's ability to simply remove the name of voters from the voter rolls when it suspects the voter has changed residences, there will often be voters on the voter registration list who have moved and are in the process of being removed. It is therefore unsurprising to find that there are more names on the voter rolls in a jurisdiction than there are eligible citizens (indeed, given the high mobility of the American workforce, it would be surprising if there were not in at least some instances), and Judicial Watch's assertion that Maryland or Montgomery County is "failing to comply" with the NVRA merely because the county allegedly has more registered voters than adult citizens, based on American Community Survey data, is simply wrong. As one court explained, "The NVRA makes it inevitable that voter registration lists will be inflated because of its requirement that States wait to remove a voter's name who has not responded to an [NVRA Section] 8(d)(2) notice until that voter fails to vote in two successive federal elections." *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *4 n.7 (W.D. Mo. Apr. 13, 2007), *aff'd in part, rev'd in part and remanded*, 535 F.3d 844 (8th Cir. 2008). The information Judicial Watch points to is not evidence of a lack of NVRA compliance.

D. Certain Activities Urged By Judicial Watch As So-Called Compliance Have Been Found to *Violate* the NVRA.

Judicial Watch points to its settlement agreement with Ohio as an example of appropriate list maintenance. But Judicial Watch fails to acknowledge that activities agreed to in the settlement were recently held to *violate* the NVRA, specifically, its practice of targeting registered voters who did not vote for two years with confirmation mailings beginning the removal process. *Compare A. Philip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016), *pet. for cert. filed* No, 16-980 (Feb. 3, 2017), *with True the Vote et al. v. Husted,* Settlement Agreement ¶ 2(i) (Jan. 10, 2014), *available at* http://www.judicialwatch.org/document-archive/01-14-ohio-voter-rolls-settlement/. The State Board should exercise extreme caution where activities urged by Judicial Watch as so-called compliance have in fact been held to violate the NVRA's protections for eligible registered voters who simply choose not to vote. In 2016, thousands of otherwise-disenfranchised eligible voters cast ballots that were counted because of the Sixth Circuit's decision in *A. Philip Randolph Institute v. Husted*, which held that Ohio's process for targeting and removing them violated the NVRA.

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

Further, any list-maintenance program must be completed ninety days before any federal election. The NVRA prohibits States from conducting any program "the purpose

[2] H. Rep. No. 103-9, at 15, *reprinted in* 1993 U.S.C.C.A.N. 105.

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—including the period preceding a primary, special, or runoff election. 52 U.S.C. § 20507(c)(2); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014). Any removal of voters for alleged ineligibility during this ninety-day period must be based "upon individualized information or investigation."[3] *Arcia*, 772 F.3d at 1344. Under the NVRA's clear requirements, then, the removal of *any* names from the voter rolls within ninety days of a federal election must be based on specific, individualized information.

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

In addition to the NVRA, Judicial Watch cites to the State's responsibilities under the Help America Vote Act ("HAVA"). HAVA requires that States maintain a computerized list of all registered voters statewide. Similar to the NVRA, it also requires that States perform list maintenance "that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 21083(a)(2)(A); (a)(4). But nothing requires those reasonable efforts to include actions prohibited by the NVRA. On the contrary, HAVA specifically provides that a person may not be removed pursuant to a reasonable list-maintenance effort except "in accordance with the provisions of the [NVRA]," *id.* § 21083(a)(2)(A); (a)(4)(A), and such effort must also include "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters," *id.* § 21083(a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

IV. Production of Records

Project Vote and Demos request that all records provided to Judicial Watch pursuant to its April 11, 2017 letter also be provided to us. We also request any written response from the State Board to Judicial Watch's Notice Letter, and any further correspondence between Maryland and Judicial Watch relating to alleged violations of or compliance with the NVRA. In addition, Project Vote and Demos request that you provide records concerning any plans or procedures for list maintenance that you are currently conducting or instructing local election authorities to conduct that are not already included in the above request.

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Judicial Watch is urging Maryland to take actions that would likely violate the NVRA, or at minimum are not required by it. Project Vote and Demos are deeply concerned about maintaining access to the polls for all of Maryland's voters, in keeping

[3] 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." *Arcia*, 772 F.3d at 1349. 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. *Id.*

with the requirements of the NVRA, and we would be happy to discuss the issues raised in this letter if further information or background would be helpful to you.

Sincerely,

Stuart C. Naifeh
Senior Counsel
Demos
80 Broad St, 4th Floor
New York, NY 10004
(212) 633-1405
snaifeh@demo.org

Cameron A. Bell
Legal Fellow
Demos
80 Broad St, 4th Floor
New York, NY 10004
(212) 485-6023
cbell@demos.org

Michelle E. Kanter Cohen
Election Counsel
Project Vote
1420 K Street NW
Suite 700
Washington, DC 20005
(202) 546-4173
mkantercohen@projectvote.org