



Millions to the Polls

PRACTICAL POLICIES TO FULFILL THE FREEDOM
TO VOTE FOR ALL AMERICANS

VOTER LIST MAINTENANCE
& WRONGFUL CHALLENGES
TO VOTER ELIGIBILITY

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VOTER LIST MAINTENANCE AND WRONGFUL CHALLENGES TO VOTER ELIGIBILITY

- States should ensure eligible voters can be added to state registration databases with fair, effective and uniform standards, and should only remove voters in compliance with the National Voter Registration Act and other applicable laws.
- Only election officials should be able to challenge the eligibility of a voter.
- When a voter is challenged, the burden of proof should fall on the challenger with a specific and timely adjudication process.

Eligible Americans should not have to overcome burdensome barriers to cast their ballots. Unfortunately, voters in recent elections have encountered wrongful challenges and intimidation, particularly in key battleground states and targeted counties. Voters have faced misguided attacks on their eligibility both before Election Day through improper voter list purges and also on Election Day through voter challenges, often targeted at voters of color. Unwarranted challenges to voters' eligibility can result in eligible voters being kicked off voter rolls and lead to problems at the polls for everyone seeking to cast a ballot by depleting resources, distracting election administrators and leading to longer lines for voters. Such activities present a real danger to the fair administration of elections and to the fundamental freedom to vote.

Maintaining up-to-date voter registration rolls is important to ensure an accurate list of eligible voters. When done properly, list maintenance procedures remove dead or ineligible voters from the voter rolls in compliance with federal law. However, sometimes purges of voter rolls are done in a way that targets certain populations and endangers the voting rights of our fellow Americans.

In 2012, Florida, for example, the governor and secretary used motor vehicle databases to compile lists of voters that allegedly might be non-citizens, and threatened to remove them from the rolls unless they could prove their citizenship. But these lists were criticized for having “limited and often-outdated citizenship information that carried a high risk of making lawful voters look like noncitizens.”¹ Initially the list had over 180,000 voters, and 87 percent of those targeted to have their registrations cancelled were people of color. Florida's county election supervisors were alarmed by the unreliable data used by the state, and refused to move forward with the purge. The Department of Justice filed suit to

block the purge as violating federal law.² A federal judge refused to block the purge, however.³

Also in 2012, in North Carolina a group called the Voter Integrity Project challenged thousands of voter registrations, claiming the people were dead. However, the election officials had to throw out many of the challenges because of the flawed data-matching practices used to generate the list. And hundreds of eligible, registered, North Carolina voters had to prove to the Board of Elections that they were still alive.⁴

Texas election officials were reported to have “repeatedly and mistakenly matched active longtime Texas voters to deceased strangers across the country . . . in an error-ridden effort to purge dead voters just weeks before the presidential election,” in 2012.⁵ Voters in legislative districts across Texas with heavy concentrations of Hispanics or African-Americans were more often targeted in that flawed purge effort, according to the Chronicle’s analysis of more than 68,000 voters identified as possibly dead.⁶

In conjunction with improper list purges, in recent years private groups have also increasingly attempted to police voter registrations. These activists have taken it upon themselves to challenge the validity of voter registrations, both before and on Election Day. State and nongovernmental challenges to voter registrations are on the rise and too often are based on faulty data. One method often used is called “voter caging.” Voter caging is the practice of sending non-forwardable mail to registered voters and using any returned mail as the basis for building lists of voters to challenge.⁷

There are real consequences when purges and mass challenges succeed in throwing thousands of eligible voters off the voter rolls. In 2004, the Ohio Republican Party challenged 35,000 newly registered voters just two weeks before the election.⁸ Most of those voters lived in urban, Democratic-leaning neighborhoods. The 35,000 names were identified through a classic caging operation with undelivered mail used as the basis of the challenge. Two voters and the Ohio Democratic Party filed suit, and the court stopped the purge, finding that the voters’ constitutional rights were endangered by the last minute challenges.

To protect the freedom to vote, voter eligibility should be challenged only under strictly defined circumstances and only by trained election officials. Yet, 39 states currently allow private citizens to challenge prospective voters in person on Election Day.⁹ Of these states, only 15 require polling place challengers to provide some documentation in support of the claim that the challenged voter is ineligible.¹⁰ Twenty-eight states allow private citizens to challenge registered voters before an election.¹¹ Of these states, only eight require challengers to produce any initial documentary evidence of a voter’s ineligibility beyond a brief written statement that alleges

disqualifying characteristics.¹²

The best state practices protect against unwarranted voter challenges. Alabama, Kansas, Oklahoma, and Wyoming all prohibit private citizens from challenging voters.¹³ Among the states that do allow private citizens to challenge voters, the best practices limit the circumstances in which a challenge can be issued, require some form of proof that the potential voter is ineligible to vote, and require decisions on eligibility to be made by trained officials.

For example, Kentucky only allows elections officials and designated individuals to challenge a voter.¹⁴ In addition, challengers must attend training and if they violate election laws, they may be required to leave the polling place and be prohibited from serving as challengers for five years. Challengers must sign an oath that states the reason for the challenge and the oath is then forwarded to the state and county attorney to determine whether anyone has voted illegally. Challenged voters can still cast a regular ballot if they sign a written oath that attests to their qualifications.

Only a registered voter that has been designated by the chair of the county committee of a political party named on the ballot may challenge a voter's identity or qualification in Missouri.¹⁵

Because Ohio experienced serious difficulties with challenges at the polls in 2004, it implemented a series of amendments to its procedures, including requiring that any challenge to a voter's eligibility must be made at least 20 days prior to an election, requiring a hearing before canceling a voter's registration, and granting election boards discretion over whether challenges are "facially sufficient" enough to hold a hearing in the first place.¹⁶ Moreover, returned mail and evidence from foreclosure proceedings are insufficient by themselves to warrant a challenge. Only election officials may challenge a voter on Election Day.¹⁷

Colorado law has some excellent provisions protecting voters from having their registrations improperly challenged. For example, it requires the challenge to be in writing accompanied by documentary evidence. Although Colorado allows individual voters to be challenged at the polls on Election Day, pre-Election Day challenges must be made 60 days before an election.¹⁸ Hearings are also required, which provides important protections for challenged voters.¹⁹ Critically, the challenger is required to appear and bears the burden of proving the allegations in the written challenge.²⁰ In Colorado, if voters are challenged on

Election Day then they have the right to vote a regular ballot after signing an affidavit.²¹

Nevada generally does a good job of protecting voters from improper pre-Election Day challenges.²² In Nevada, a voter may only challenge the registration status of another voter registered in the same precinct, which protects against widespread voter challenge campaigns.²³ Challenges must be made in writing, signed by the challenger, and must include grounds for the challenge based on the challengers personal knowledge.²⁴ Nevada's protections could be improved by requiring that the statements be made under oath and subject to penalties.

POLICY RECOMMENDATIONS

Voter Registration Database Maintenance

States and localities should ensure that their voter registration databases:

- Comply with the NVRA when maintaining voter registration lists, including the requirement that voters be kept on “inactive” status on the rolls for two federal election cycles.
- Use fair, effective, uniform, statewide matching protocols.
- States should not impose exact match standards, but rather employ substantial match standards.
- Ensure transparency about the process used for matching.
- Do not remove voters without verification, notification to the voter, and an opportunity for the voter to contest the removal.
- Provide access to confirm registration by phone or on the Internet.
- Ensure integrity of database technology.
- Do not reject registration on the basis of a mismatch with Social Security.
- Do not use Department of Motor Vehicle databases for citizenship verification.

Voter Challenges on and before Election Day

States and the federal government should work together to establish fair, uniform, and transparent standards and procedures for voter eligibility challenges. The guidelines should include stringent requirements on when a challenge can be made, only allow certain trained individuals, not any private citizen, to challenge a voter's eligibility, and documentation or

other proof that challenges the eligibility of a voter. In addition:

- Only election officials should be able to challenge the eligibility of a registered voter on Election Day.
- The challenger must retain the burden of proof to show by clear and convincing evidence that the registered voter is no longer eligible to vote.
- The challenger must provide documentary evidence supporting the specific grounds for the voter challenge.
- Challenges must be based on personal knowledge of the facts upon which the challenge is being made, and the challenger must sign an oath under penalty of perjury.
- Challenges must be in writing and include the basis for the challenge and the facts supporting the challenge.
- The grounds for challenge should be limited to citizenship, residency, identity, and age.
- Making frivolous challenges should be a misdemeanor.
- Jurisdictions should require a preliminary review of challenges to determine if the challenge has merit, before notifying the challenged voter. There must be sufficient grounds for a challenge before a registered voter is inconvenienced.
- Returned mail should not be considered prima facie evidence to sustain a challenge.
- A hearing must be held before a challenged registered voter is stricken from the voter rolls.
States must also establish fair, uniform, and transparent standards and procedures standards for adjudication of challenges.
- The burden of proof should fall on the challenger to prove a challenge is valid.
- States should also detail what forms of evidence are required to sustain a successful challenge and specifically exclude returned mail and evidence that a voter's home is in foreclosure should be considered sufficient.
- Jurisdictions should require challenges to be filed within a specific period of time before an election, which should be at least 60 or more days before an election.
- Filing frivolous challenges should be made a misdemeanor.²⁵
- Jurisdictions should consider requiring “preliminary” reviews of challenges to determine if the challenge is plausible before a hearing is held. ■

ENDNOTES

1. Liz Kennedy *et al.*, *Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges & Intimidation*, (Sep. 10, 2012), available at <http://www.demos.org/sites/default/files/publications/BulliesAtTheBallotBox-Final.pdf>.
2. *Ibid.*
3. *Judge Refuses to Block Florida Voter Purge*, Naplesnews.com (June 27, 2012), available at <http://www.naplesnews.com/news/2012/jun/27/judge-refuses-block-florida-voter-purge/>.
4. Tova Wang, *The Purges This Time*, (Nov. 21, 2012), available at <http://www.demos.org/blog/purges-time>.
5. *Ibid.*
6. *Ibid.*
7. Kennedy *et al.*, *Bullies at the Ballot Box*.
8. *Ibid.*
9. Alaska Statutes § 15.15.210; 10 Illinois Compiled Statutes 5/17-10; Arizona Revised Statutes (Annotated) § 16592(A); Arkansas Code (Annotated) § 7-5-312(H); Colorado Revised Statutes (Annotated) § 1-9-203; Connecticut General Statutes (Annotated) § 9-232c; Delaware Code (Annotated) Title 15, §§ 4936, 4937(C); Florida Statutes (Annotated) § 101.111; Hawaii Revised Statutes § 11-25(A); Idaho Code (Annotated) § 34-1111; Indiana Code (Annotated) § 3-10-1-9; Iowa Code (Annotated) §§ 49.79-80; Kentucky Revised Statutes (Annotated) § 117.245(2); Louisiana Revised Statutes (Annotated) § 18:565; Maine Revised Statutes (Annotated) Title 21-A, § 673; Maryland Code, Election Law, § 10312(C); Massachusetts General Laws (Annotated) Chapter 54, § 85a; Michigan Compiled Laws (Annotated) § 168.729; Minnesota Statutes (Annotated) § 204c.12(4); Mississippi Code (Annotated) § 23-15-571; Missouri Revised Statutes § 115.429(2); Montana Code (Annotated) § 13-13-301; Nebraska Revised Statutes (Annotated) §§ 32-927-932; New Hampshire Revised Statutes (Annotated) §§ 659:27, 659:27-A, 666:4; New Jersey Statutes (Annotated). §§ 19:7-1, 19:15-18.2; New Mexico Statutes (Annotated) § 1-12-20; New York Election Law §§ 8-504(1)-(2); Nevada Revised Statutes (Annotated) § 293.303(2); North Carolina General Statutes (Annotated) § 163-88; North Dakota Century Code (Annotated) § 16.1-05-06; 25 Pennsylvania Statutes (Annotated) §§ 3050(D), 3051, 296; Rhode Island General Laws (Annotated) § 17-19-22; South Carolina Code (Annotated) §§ 7-13-810, -830; South Dakota Codified Laws § 12-18-10; Tennessee Code (Annotated) § 2-7-123; Utah Code (Annotated) § 20a-3-105.5(2); Vermont Statutes (Annotated) Title 17 § 2564; Virginia Code (Annotated) § 24.2-651; Wisconsin Statutes (Annotated) § 6.925. Georgia allows challenges to be made on Election Day but only at the Board of Registrars' office. Georgia Code (Annotated) § 21-2-230.
10. Montana and North Carolina require the poll challenger to produce actual affirmative evidence of the voter's ineligibility. Montana Code (Annotated) § 13-13-301(1) and Montana Administrative Rules 44.3.2109(2); North Carolina General Statutes (Annotated) § 163-90.1(B) ("no challenge shall be sustained unless the challenge is substantiated by affirmative proof. In the absence of such proof, the presumption shall be that the voter is properly registered or affiliated"). Thirteen other states require the challenger to produce an affidavit but do not require any additional proof from the poll challenger beyond his or her word that the challenge is valid. Arkansas Code (Annotated) § 7-5-312(H); Colorado Revised Statutes § 1-9-202; Florida Statutes (Annotated) § 101.111(1); Indiana Code (Annotated) § 3-11-8-21; Iowa Code (Annotated) § 49.79; Kentucky Revised Statutes (Annotated) §§ 117.245(2) and 117.316(2); Maine Revised Statutes (Annotated) Title 21-A, § 673(1); Maryland Code Election Law, § 10-312; Minnesota Statutes (Annotated) § 204C.12(2); New Hampshire Revised Statutes (Annotated) § 659:27-A; New Jersey Statutes (Annotated) § 19:15-18.2; Nevada Revised Statutes (Annotated) § 293.303(1); Virginia Code (Annotated) § 24.2-651.
11. California Election Code § 14240(c); Colorado Revised Statutes (Annotated) § 1-9-101(1)(a); Montana Code (Annotated) § 13-13-301(1); Montana Administrative Rules 44.3.2109(2), available at <http://mtrules.org/gateway/ruleno.asp?RN=44.3.21099>; North Carolina General Statutes (Annotated) § 163-85(d); New York Election Law § 5-220(1) (requiring challengers to submit an affidavit identifying the reasons for the challenge as well as the factual basis and sources of information for his or her allegations); Rhode Island General Laws (Annotated) § 179.128; Utah Code (Annotated) § 20A-3-202.3(1); Washington Revised Code (Annotated) § 29A.08.810(3). Four other states' statutes require that pre-election challengers affirm that their claims are based on "personal knowledge" but, unlike the statutes identified above, do not require challengers to actually identify the source or basis of that knowledge. 10 Illinois Compiled Statutes (Annotated) 5/4-12; 10 Illinois Compiled Statutes (Annotated) 5/5-15; Minnesota Statutes (Annotated) § 201.195(1); Nevada Revised Statutes (Annotated) § 293.547(2); Texas Election Code (Annotated) § 16.092.—Several other states require pre-election challengers to submit a written statement identifying the grounds for contesting the voter's qualifications but these requirements are generally very limited in scope. As examples: Hawaii Revised Statutes § 11-25(a) ("The challenge shall be in writing, setting forth the grounds upon which it is based, and be signed by the person making the challenge"); Michigan Compiled Laws (Annotated) § 168.512; Wisconsin Statutes (Annotated) § 6.48(1)(A).
12. *Ibid.*
13. The Bazelon Center for Mental Health Law, *Voter Challenge Statutes by State*, (Aug. 2012), available at http://www.bazelon.org/LinkClick.aspx?fileticket=UJfitRL_MRK%3D&tabid=315.
14. *Ibid.*
15. Kennedy *et al.*, *Bullies at the Ballot Box*.
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*