



Sent via email

December 21, 2020

Forsyth County Board of Elections and Registration  
1201 Sawnee Drive  
Cumming, GA 30040

**Re: Baseless Mass Challenges to Voter Eligibility**

Dear Forsyth County Board of Elections and Registration and Director Smith:

The NAACP Legal Defense and Educational Fund, Inc., All Voting is Local Georgia, Georgia NAACP, Black Voters Matter Fund, the SPLC Action Fund, and the League of Women Voters of Georgia learned the Forsyth County Board of Elections and Registration (the “Board”) plans to convene a hearing on Tuesday, December 22, 2020, at 10:00 a.m. to consider mass voter eligibility challenges to Georgia voters submitted by True the Vote along with some Georgia residents. These challenges are baseless, untimely, and may be discriminatory. Accordingly, Forsyth County may violate federal and state law<sup>1</sup> if the Board does not reject these challenges. To avoid exposing the County to costly and time-consuming litigation, we urge you to reject these mass challenges and provide public assurances that Forsyth County voters will not have to answer these baseless charges as a precondition to exercise their voting rights.

**1. The Challenges Must Be Rejected Because They Are Baseless.**

The burden of proof for any voter challenge lies with the challenger.<sup>2</sup> But challenges filed by True the Vote in partnership with Georgia residents have fallen woefully short of their burden. The only evidence that is being produced to support these challenges appears to be voter registration data compared to National Change of Address (“NCOA”) data.<sup>3</sup> These types of comparisons are inaccurate and unreliable means to determine voter eligibility. A Georgia voter

<sup>1</sup> Letter from the Sean J. Young, Legal Director, ACLU of Georgia, to Georgia Elections Officials (Dec. 18, 2020) (describing similar potential violations of state and federal law).

<sup>2</sup> O.C.G.A. § 21-2-229(c).

<sup>3</sup> *True the Vote Partners with Georgians in Every County to Preemptively Challenge 364,541 Potentially Ineligible Voters*, True The Vote (Dec. 18, 2020), <https://truethevote.org/true-the-vote-partners-with-georgians-in-every-county-to-preemptively-challenge-364541-potentially-ineligible-voters/>.

may change their mailing address without impacting their voting eligibility—for example, someone who has temporarily moved to care for family during the coronavirus pandemic, or is a member of the armed services stationed out of state, and wishes to receive their mail temporarily at a location other than their permanent registration address.<sup>4</sup> NCOA data may also be inaccurate in other ways—for example, a change of address filed by one member of a household has been shown, on occasion, to appear in the NCOA database as a change of address for all members of the household.

In response to the same NCOA-based comparison being offered to support similar mass challenges in Cobb County, a county attorney explained that merely producing this comparison is insufficient evidence and cannot satisfy a challenger’s burden to establish probable cause to support a challenge.<sup>5</sup> And a member of the Cobb County Board of Elections concluded on the record that the Board therefore “lack[ed] evidence for proof” to establish probable cause.<sup>6</sup>

At the time of this letter’s transmission by email, we could not find any publication of the mass challenges, including a copy of the notice of the challenges.<sup>7</sup> We request that you provide this information on the Board’s website as soon as possible before tomorrow’s hearing.

## **2. The Challenges Must Be Rejected Because They Are Not Timely.**

Federal law prohibits schemes that could lead to voter registration removals during elections and provides protections against the use of unreliable or faulty data, such as the address information underlying these challenges, to improperly disenfranchise or disadvantage voters. The National Voter Registration Act (“NVRA”), for example, prohibits the use of any systematic voter removal process less than 90 days before an election.<sup>8</sup> Moreover, Georgia law prohibits list maintenance activities 90 days before federal elections.<sup>9</sup>

The NVRA also provides for an extensive, multi-year procedure for testing whether voters whose mailing addresses have changed, according to the National Change of Address database (“NCOA”), have in fact moved or only temporarily relocated.<sup>10</sup> As described above, this formal testing of NCOA changes is critical because solely relying on NCOA data to determine voter eligibility yields inaccurate results.

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<sup>4</sup> For a complete list of rules determining voter eligibility, see O.C.G.A. § 21-2-217.

<sup>5</sup> Jonathan Raymond, *Cobb County Election Board Denies Hearing for Challenges Against Thousands of Voters*, 11Alive (Dec. 18, 2020), <https://www.11alive.com/article/news/politics/elections/cobb-county-voter-challenge-details/85-3d7ff8c2-5e76-423d-8a65-3bb78ce10d82>.

<sup>6</sup> *Id.*

<sup>7</sup> The Cobb County Board of Elections provided the notice for two of the three mass voter challenges before its meeting on December 18, 2020. *Voter Lists CHALLENGED!*, Cobb County Board of Elections (Dec. 18, 2020), <https://www.cobbcounty.org/elections/news/voter-lists-challenged>.

<sup>8</sup> 52 U.S.C. § 20507(c)(2).

<sup>9</sup> O.C.G.A. § 21-2-234(i).

<sup>10</sup> 52 U.S.C. § 20507(d)(1).

### **3. The Challenges Must Be Rejected Because They May Be Racially Discriminatory and an Unlawful Form of Voter Intimidation.**

Mass voter challenges have long been a tactic to suppress political participation, especially of Black voters and other voters of colors.<sup>11</sup> The U.S. Constitution and several federal laws prohibit these types of discriminatory schemes to disenfranchise voters. Section 2 of the Voting Rights Act (“VRA”) prohibits voting standards, practices, or procedures, including challenges to voter eligibility and voter purges, that were enacted with a racially discriminatory intent or have a racially discriminatory result.<sup>12</sup> The Fourteenth and Fifteenth Amendments to the U.S. Constitution provide for the fundamental right to vote and also prohibit voting practices adopted with a discriminatory purpose.<sup>13</sup> Supreme Court precedent is clear that state or local government actors cannot intentionally disadvantage voters based on race, including by using race as a proxy for partisan objectives.<sup>14</sup> Accordingly, if the Board does not reject these challenges, it may be in violation of the U.S. Constitution and VRA.

The Ku Klux Klan Act of 1871 and Section 11(b) of the VRA protect against attempts to intimidate voters, including baseless or frivolous voter challenges.<sup>15</sup> The baseless evidence and the timing of these mass challenges may constitute an unlawful form of voter intimidation, especially for voters who are eligible to cast ballots in the runoff election but are temporarily residing out of their home county or out of state. It is therefore critical that the Board reject these challenges and issue a public statement that affirms voters will not have to answer baseless charges before exercising their right to vote.

\* \* \*

The Cobb County Board of Elections unanimously rejected a similar mass challenge on December 18, 2020, and we urge you to reject the challenge in Forsyth County as well. Our democracy requires free and open access to the sacred right to vote. Any effort to infringe or suppress that right undermines the legitimacy of our political system and must not be tolerated. For the reasons above, we urge you to reject these baseless mass challenges, which are lacking in integrity, unfounded in personal knowledge, and transparently designed to suppress voting rights.

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<sup>11</sup> Jonathan Brater, *Voter Purges: The Risks in 2018*, Brennan Center 1, 1-2 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Voter\\_Purges\\_The\\_Risks\\_in\\_2018.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Voter_Purges_The_Risks_in_2018.pdf); see also Laughlin McDonald, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 1, 52-54 (2003) (describing the historical origins of Georgia’s voter challenge laws).

<sup>12</sup> See 52 U.S.C. § 10301.

<sup>13</sup> U.S. Const. amends. XIV & XV.

<sup>14</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1473, n.7 (2017) (“the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics”) (citing to *Miller v. Johnson*, 515 U. S. 900, 914 (1995)); see also *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 222-23 (4th Cir. 2016).

<sup>15</sup> See 42 U.S.C. § 1985(3) (The Ku Klux Klan Act provides that “if two or more persons conspire” to prevent someone from voting “by force, intimidation, or threat,” then the victims of voter intimidation can sue the conspirators); 52 U.S.C. § 10307(b) (Section 11(b) of the VRA provides that “[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote”).

We welcome the chance to discuss our concerns more. If you have any questions, feel free to contact John Cusick at 917-858-2870 or by email at [jcusick@naacpldf.org](mailto:jcusick@naacpldf.org).

Sincerely,

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#### NAACP Legal Defense and Educational Fund, Inc. (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression.

#### All Voting Is Local

All Voting is Local works to eliminate needless and discriminatory barriers to voting before they happen, to build a democracy that works for us all. It is a collaborative campaign housed at The Leadership Conference Education Fund, in conjunction with the American Civil Liberties Union Foundation; the American Constitution Society; the Campaign Legal Center; and the Lawyers’ Committee for Civil Rights Under Law.

#### Georgia NAACP

The National Association for the Advancement of Colored People (NAACP) has had an unbroken presence in Georgia since 1917. The Georgia NAACP maintains a network of branches throughout Georgia, from cities to small rural counties. The Georgia NAACP has been the most effective and consistent advocates for African American civil rights in Georgia.

#### Black Voters Matter Fund

Black Voters Matter Fund works to increase power in marginalized, predominantly Black communities through effective voting and electoral organizing, and by supporting community based organizations working on a wide range of issues such as mass incarceration, gentrification, redistricting, food security, health care, education, environmental justice, and economic empowerment in 11 states.

#### SPLC Action Fund

The SPLC Action Fund is dedicated to fighting hate and bigotry and to seeking justice in our society. Using lobbying, grassroots organizing, and other forms of advocacy, the SPLC Action Fund works toward the day when the ideals of equal justice and equal opportunity will be a reality for everyone.

### League of Women Voters of Georgia

The League of Women Voters of Georgia is a nonpartisan political organization that envisions a democracy where every person has the desire, the right, the knowledge, and the confidence to participate. Since 1920, the League has been committed to engaging all citizens in the decisions that impact their lives. Formed from the movement that secured the right to vote for women, the centerpiece of the League's efforts remain to expand participation and give a voice to all Americans by engaging in both broad educational efforts as well as advocacy.