

June 29, 2021

Submitted electronically

Ad Hoc Committee – State Election Commission
House Legislative Oversight Committee
South Carolina House of Representatives
110 Blatt Building
Columbia, SC 29201
HCommLegOv@schouse.gov

Re: Civil Rights Considerations for Maintaining Voter Rolls

Dear Chair Newtown and Committee Members:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) thanks the Ad Hoc Committee – State Election Commission for the opportunity to submit this written testimony regarding the maintenance of voter rolls. As a nonprofit, nonpartisan civil-rights organization, our objective in doing so is to ensure that all voters in South Carolina, particularly Black voters and other voters of color, enjoy full, meaningful, and unburdened access to the fundamental right to vote, including the ability to register to vote and remain registered.

The United States Supreme Court has long described the right to vote as a fundamental right, because it is preservative of all other rights.¹ Voting is “the citizen’s link to his laws and government”² and “the essence of a democratic society.”³ If the right to vote is undermined, other rights “are illusory.”⁴ Thus, in a democracy, safeguarding the right to vote “is a fundamental matter.”⁵

Because only those South Carolinians who are registered to vote may participate in an election,⁶ actions undertaken by a state or local authority to remove voters from registration lists, if flawed or inaccurate, can be a harmful means of preventing eligible citizens from accessing the franchise.⁷ For decades after the end of Reconstruction, South Carolina and other Southern states used

¹ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

² *Evans v. Cornman*, 398 U.S. 419, 422 (1970).

³ *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

⁴ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁵ *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

⁶ S.C. Code § 7-5-110 (“No person shall be allowed to vote at any election unless he shall be registered as herein required.”). A South Carolinian must register at least thirty days before an election in order to be eligible to vote in that election. S.C. Code § 7-5-150.

⁷ See, e.g., *Toney v. White*, 488 F.2d 310, 312 (5th Cir. 1973) (“The racial discrimination in issue consisted of the Registrar purging the voter rolls in a manner directed at black voters but not at white voters.”).

restrictive registration laws and “selective purges,” among other methods, to deny voting rights to Black citizens.⁸ These methods were devastatingly effective—a 1892 South Carolina election law on voter registration, for example, “is estimated to have disfranchised 75 percent of South Carolina’s [B]lack voters.”⁹ Well into the 1960s, Black voter-registration applicants were beaten and harassed by law enforcement,¹⁰ forced to take impossible “series of tests on application form[s]” before registering to vote,¹¹ and, if registered, were targeted for “discriminatory purge[s].”¹²

Today, federal statutes and constitutional provisions, including the Voting Rights Act of 1965 (“VRA”), the National Voter Registration Act of 1993 (“NVRA”), and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, provide meaningful protection against both the “simple-minded modes of discrimination”¹³ that mark South Carolina’s history and more modern, “ingenious methods”¹⁴ of voting discrimination.

Section 2 of the VRA prohibits states from imposing any voting law, standard, or practice that produces discriminatory results or is motivated by discriminatory intent.¹⁵ Therefore, if a state’s list-maintenance standard or purge practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [B]lack and white voters to elect their preferred representatives,”¹⁶ it may violate Section 2.¹⁷

NVRA provides further protection. Any state that utilizes a discriminatory or non-uniform process to remove voters from its rolls may violate Section 8(b)(1) of that statute.¹⁸ This provision mandates that “[a]ny

⁸ H.R. Rep. 103-9, 2, 1993 U.S.C.C.A.N. 105, 106.

⁹ *Condon v. Reno*, 913 F. Supp. 946, 949 (D.S.C. 1995).

¹⁰ U.S. Cong., Senate Comm. on the Judiciary, *Voting Rights*, 89th Cong., 1st Sess., Part 2, at 1358, 1305 (1965).

¹¹ *Id.* at 1278, 1305, 1358, 1380, 1401, 1423, 1425, 1426, 1431, 1433, 1437, 1439.

¹² *Id.* at 1423.

¹³ *Gomillion v. Lightfoot*, 364 U.S. 339, 342, (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)) (“The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.”).

¹⁴ U.S. Congress, House Comm. on the Judiciary, *Voting Rights*, 89th Cong., 1st sess. (1965).

¹⁵ 52 U.S.C. § 10301(a).

¹⁶ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

¹⁷ See *Toney v. White*, 488 F.2d 310, 312 (5th Cir. 1973) (registrar’s unlawful purge of disproportionately Black voters violated Section 2); *Ortiz v. City of Phila. Off. of City Comm’rs Voter Reg. Divis.*, 824 F. Supp. 514 (E.D. Pa. 1993), *aff’d*, 28 F.3d 306 (3d Cir. 1994) (purges are “an episodic practice that could plausibly produce a discriminatory result in violation of the § 2”); see S. Rep. 97-417, 239, 1982 U.S.C.C.A.N. 177, 410.

¹⁸ See *United States v. Florida*, 870 F. Supp. 2d 1346, 1350–51 (N.D. Fla. 2012) (a discontinued Florida program to identify supposed non-citizen voters likely violated Section 8(b) because of its discriminatory impact on newly naturalized citizens); *Indiana State Conf. of NAACP v. Lawson*, 326 F. Supp. 3d 646, 662 (S.D. Ind. 2018), *aff’d sub nom. Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019) (an Indiana program to identify voters registered in two states for

State program or activity to protect the integrity of the electoral process” by maintaining the accuracy of voter rolls must “be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.”¹⁹ As memorialized in NVRA’s legislative record, Congress found “a long history” of states using list-maintenance procedures “to violate the basic rights of citizens” by removing eligible voters on discriminatory or unreliable grounds.²⁰ To combat this, Congress determined that state list-maintenance processes “must be structured to prevent abuse which has a disparate impact on minority communities”²¹ and “must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register.”²²

If a state’s purge laws or practices are intentionally discriminatory, they may also violate the Fourteenth and Fifteenth Amendments to the Constitution, which ban state action that is enacted or maintained with a racially discriminatory purpose.²³ In addition, voter purges or other list-maintenance activities that cause an unjustified burden on the right to vote may violate the First and Fourteenth Amendments.²⁴ Lastly, as a fundamental right, the right to vote is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.²⁵ Accordingly, any purge procedure that fails to provide constitutionally sufficient protections, or that creates an inappropriate risk of erroneous deprivation of the right to vote, may be held unconstitutional as a violation of procedural due process.²⁶

South Carolina and other states have previously attempted or implemented list-maintenance actions which threatened to violate these protections. In 2012, while South Carolina was pursuing litigation to attain preclearance of its Voter ID law, the State’s attorney general claimed that a

immediate removal “will likely fail to be uniform” because different state officials provided “differing guidance to county officials on how to determine whether a particular registered voter is a duplicate registered voter in a different state”).

¹⁹ 52 U.S.C. § 20507(b)(1).

²⁰ S. Rep No. 103–6, 103rd Cong., 1st Sess. (1993).

²¹ *Id.* at 18.

²² *Id.*

²³ U.S. Const. amend. XIV; U.S. Const. amend. XV; *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481–82 (1997); *Rogers v. Lodge*, 458 U.S. 613, 617, 625 (1982); *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016).

²⁴ See *Burdick v. Takushi*, 504 U.S. 428 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate’ against ‘the precise interest put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

²⁵ *E.g.*, *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 227 (M.D.N.C. 2020) (“The right to vote is a constitutionally protected liberty interest.”).

²⁶ See *Miller v. Blackwell*, 348 F. Supp. 2d 916, 919–20 (N.D. Ohio 2004); *cf. Martin v. Kemp*, 341 F. Supp. 3d 1326, 1340 (N.D. Ga. 2018).

review by the South Carolina Department of Motor Vehicles (“DMV”) had identified 953 people who had purportedly voted after their dates of death—including 207 such people in the 2010 general election alone.²⁷ These claims quickly garnered national media attention.²⁸ However, an investigation by the SEC found that the DMV’s claims were baseless, and that the issues identified were actually due to clerical errors by poll workers, poor data-matching by the DMV, or other benign factors.²⁹ There was no evidence of any form of voter fraud or other wrongdoing, and no indication that anyone had impersonated a deceased voter.³⁰ A subsequent investigation by the South Carolina Law Enforcement Division confirmed this conclusion.³¹

South Carolina’s “zombie voter” debacle illustrates the danger of basing purges on insufficiently reliable evidence, including driver’s license records—which are not intended for voter-roll maintenance and are unsuited for the purpose.³² Other states that have attempted purge actions using driver’s license records have encountered similar problems.³³

Regardless of the source of data used, moreover, no purge or other list-maintenance action should be based on incomplete evidence, such as a match of a voter’s name only. Such purges are particularly liable to produce discriminatory results.³⁴ This discriminatory effect occurs in part because Black,

²⁷ Glenn Kessler, *The case of ‘zombie’ voters in South Carolina*, Wash. Post (July 25, 2013), https://www.washingtonpost.com/blogs/fact-checker/post/the-case-of-zombie-voters-in-south-carolina/2013/07/24/86de3c64-f403-11e2-aa2e-4088616498b4_blog.html.

²⁸ *Id.*

²⁹ Letter from Marci Andino, Executive Director, South Carolina Election Commission, to Alan Wilson, Attorney General of South Carolina 1-2 (Feb. 2, 2012), <https://images2.americanprogress.org/campus/web/South%20Carolina%20Election%20Fraud%20Report.pdf>.

³⁰ S.C. Election Comm’n, *SEC Releases Findings on “Dead Voters” Investigation* (Feb. 23, 2012), <https://www.scvotes.gov/node/222>.

³¹ Corey Hutchins, *18 Months Later, S.C. Law Enforcement Closes Case on ‘Zombi Voters,’ Finds No Fraud* (July 3, 2013), https://www.postandcourier.com/free-times/blogs/18-months-later-s-c-law-enforcement-closes-case-on-zombie-voters-finds-no-fraud/article_4e14d7ec-5a08-5c3b-9d9e-d2ae2e918af7.html.

³² *See, e.g., Georgia Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1259–60 (N.D. Ga. 2018) (explaining unsuitability of driver’s license data as a source of information about voters’ citizenship status).

³³ *See, e.g., Texas LULAC v. Whitley*, No. CV SA-19-CA-074-FB, 2019 WL 7938511, at *1–*2 (W.D. Tex. Feb. 27, 2019) (discussing Texas’s unlawful attempt to purge nearly 100,000 naturalized-citizen voters from the rolls based on outdated driver’s license data); *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1348 (11th Cir. 2014) (holding that the Florida Secretary of State’s actions in flagging naturalized-citizen voters for removal based on motor-vehicle agency data “were in violation of the 90 Day Provision of the NVRA”); *United States v. Florida*, 870 F. Supp. 2d 1346, 1350–51 (N.D. Fla. 2012) (observing that the initial version of the Secretary’s program likely also violated Section 8(b) of the NVRA); *see also Georgia Coal. for People’s Agenda*, 347 F. at 1260 (enjoining Georgia’s “Exact Match” program, which reported erroneous results based on its incorporation of outdated driver’s license identification records).

³⁴ Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote* 7 & n. 1, Brennan Center for Justice (2018), <https://www.brennancenter.org/sites/default/files/2019->

Latino, and Asian American voters are more likely than white voters to have a common last name.³⁵ According to the Census Bureau, for example, 16.3% of Latino people, 13.4% of Asian people, and 13% of Black people share one of the 10 most common surnames in the United States, as compared to only 4.5% of white people.³⁶

* * *

In light of these considerations, any future list-maintenance procedure or purge practice that South Carolina may undertake should, at a minimum: (1) use uniform and non-discriminatory methods and sources; (2) rely on accurate data and complete matching criteria; (3) incorporate constitutionally sufficient protections against erroneous purging; and (4) carefully assess and address the racial impact of any proposed purge action to prevent discriminatory results. Reliance on driver's license data or incomplete matching criteria, such as names only, should especially be avoided.

Any changes to the South Carolina Election Commission's current list-maintenance procedures that this Committee may recommend should be calibrated not to repeat or extend the harms of the past, but to protect and expand access to the right to vote for future generations. For this reason, we also urge the Committee to adopt the positive reforms proposed in the testimony submitted for this hearing by the League of Women Voters of South Carolina.

If you have any questions, please feel free to contact Steven Lance at (347) 947-0522 or by email at slance@naacpldf.org.

Sincerely,

/s/ Steven Lance

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08/Report Purges Growing Threat.pdf; Lisa Olsen, *Texas' voter purge made repeated errors*, Houston Chron. (Nov. 2, 2012), <https://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php>; Bethania Palma, *Indiana State Officials Accused of Violating Court Order by Improperly Purging Voters*, Snopes (Oct. 18, 2018), <https://www.snopes.com/news/2018/10/15/indiana-state-officials-accused-violating-court-order-improperly-purging-voters/>.

³⁵ Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote* 7 & n. 1, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

³⁶ Joshua Comenetz, *Frequently Occurring Surnames in the 2010 Census* 7, U.S. Census Bureau, (October 2016) <https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf>

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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. LDF has been fully separate from the National Association for the Advancement of Colored People (“NAACP”) since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.