AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letters sent by Public Interest Legal Foundation and Judicial Watch; and Open Records Request

Dear Secretary Kemp:

The ACLU of Georgia writes in response to a letter that was recently sent by the Public Interest Legal Foundation ("PILF") to six different Georgia counties (Bryan, Fayette, Marion, McIntosh, Lee, Oconee), which urges those counties to take actions that are likely to threaten the sacred and fundamental right to vote, as well as violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*[1] PILF's letter suggests that these counties must do more to purge voters from the rolls, stating—without proof—that those counties allegedly have more registered voters on the rolls than "eligible, living, citizen voters" residing in their jurisdiction. Judicial Watch also sent a letter earlier this year directly to your office, raising similar allegations concerning these six counties in addition to Columbia, DeKalb, Forsyth, and Fulton Counties.[2]

We warn you—and we urge you to warn these counties—that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of PILF and Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[3]

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[1] A copy of this letter is published at https://publicinterestlegal.org/files/Sample-2017-notice.pdf. A listing of counties which received this letter is published at https://publicinterestlegal.org/county-list-2017/.

[2] *See* http://www.judicialwatch.org/wp-content/uploads/2017/04/NVRA-Violation-letter-GA-2017.pdf.

[3] The "American Civil Rights Union" is not affiliated with the American Civil Liberties Union.

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because your office did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[4]

It would be similarly irresponsible, and likely illegal, for anyone to start purging voters based on unsupported claims by third-party organizations that these counties "ha[ve] significantly more voters on the registration rolls than it has eligible, living, citizen voters."

This letter: 1) addresses PILF's claim about the alleged number of eligible voters in these jurisdictions compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by PILF and Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that these counties "ha[ve] significantly more voters on the registration rolls than it has eligible, living, citizen voters"

PILF claims without evidence that these counties "ha[ve] significantly more voters on the registration rolls than it has eligible, living, citizen voters," and Judicial Watch makes a similar claim. It would be irresponsible for anyone to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, PILF relies on outdated data. It says that it relies on U.S. Census Bureau to determine the number of eligible, living, citizen voters in a county, but the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into a jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from a jurisdiction is small, it is irresponsible to

[4] *See* Letter from ACLU of Georgia to Secretary of State's Office, dated September 18, 2017, https://www.acluga.org/sites/default/files/letter_re_voter_purge_9-18-17.pdf.

draw conclusions about an entire county's population based on the responses of a few. Thus, for example, if only 2 people in one county responded to the survey and one person was an ineligible voter, it is irresponsible to conclude that only 50% of a county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of a jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[5] *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.

Lastly, Judicial Watch (though not PILF) cites 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, HAVA 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.* § (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.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

(continued on next page)

[5] 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.*

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letters submitted by PILF and Judicial Watch, including but not limited to communications between you and PILF, you and Judicial Watch, you and any county, amongst your employees, or you and anyone concerning any response to these letters.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to PILF's or Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Bryan County Board of Elections
151 S. College Street
Pembroke, GA 31321
cindyreynolds@bryan-county.org

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letters you recently received from Public Interest Legal Foundation; and Open Records Request

Dear Bryan County Board of Elections:

The ACLU of Georgia writes in response to a letter you recently received from the Public Interest Legal Foundation ("PILF"), which urges you take actions that are likely to threaten the sacred and fundamental right to vote, as well as violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*[1] PILF's letter suggests that you must do more to purge voters from the rolls, stating—without proof—that your county allegedly has more registered voters on the rolls than "eligible, living, citizen voters" residing in your jurisdiction. Judicial Watch sent a letter earlier this year to the Georgia Secretary of State, raising similar allegations concerning your county.[2]

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of PILF and Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in

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violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[3]

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[4]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters."

This letter: 1) addresses PILF's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by PILF and Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

PILF claims without evidence that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters," and Judicial Watch makes a similar claim. It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, PILF relies on outdated data. It says that it relies on U.S. Census Bureau to determine the number of eligible, living, citizen voters in your county, but the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person

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counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[5] *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.

Lastly, Judicial Watch (though not PILF) cites 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, HAVA 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.* § (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.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

[5] 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.*

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letters submitted by PILF and Judicial Watch, including but not limited to communications between you and PILF, you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to these letters.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to PILF's or Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

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September 27, 2017

Columbia County Board of Elections
P.O. Box 919
Evans, GA 30809
ngay@columbiacountyga.gov

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letter received from Judicial Watch; and Open Records Request

Dear Columbia County Board of Elections:

The ACLU of Georgia writes in response to a letter that was sent by Judicial Watch to the Georgia Secretary of State earlier this year identifying Columbia County as a county that must do more to purge its voters from the rolls because your county allegedly has "more total registered voters than there were adults over the age of 18."[1] These suggested actions threaten the sacred and fundamental right to vote and likely violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[2]

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The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[3]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that your county has allegedly "more total registered voters than there were adults over the age of 18."

This letter: 1) addresses Judicial Watch's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

Judicial Watch claims without evidence that your county has "more total registered voters than there were adults over the age of 18." It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, and as a preliminary matter, the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an

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ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[4] *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.

Lastly, Judicial Watch cites 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, HAVA 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.* § (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.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

(continued on next page)

[4] 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.*

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letter submitted by Judicial Watch, including but not limited to communications between you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to this letter.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

DeKalb County Registration & Elections
4380 Memorial Drive, Suite 300
Decatur, GA 30032
voterreg@dekalbcountyga.gov

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letter from Judicial Watch; and Open Records Request

Dear DeKalb County Registration & Elections:

The ACLU of Georgia writes in response to a letter that was sent by Judicial Watch to the Georgia Secretary of State earlier this year identifying DeKalb County as a county that must do more to purge its voters from the rolls because your county allegedly has "more total registered voters than there were adults over the age of 18."[1] These suggested actions threaten the sacred and fundamental right to vote and likely violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[2]

[1] *See* http://www.judicialwatch.org/wp-content/uploads/2017/04/NVRA-Violation-letter-GA-2017.pdf.

[2] The "American Civil Rights Union" is not affiliated with the American Civil Liberties Union.

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[3]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that your county has allegedly "more total registered voters than there were adults over the age of 18."

This letter: 1) addresses Judicial Watch's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

Judicial Watch claims without evidence that your county has "more total registered voters than there were adults over the age of 18." It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, and as a preliminary matter, the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an

[3] *See* Letter from ACLU of Georgia to Secretary of State's Office, dated September 18, 2017, https://www.acluga.org/sites/default/files/letter_re_voter_purge_9-18-17.pdf.

ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[4] *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.

Lastly, Judicial Watch cites 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, HAVA 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.* § (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.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

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[4] 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.*

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letter submitted by Judicial Watch, including but not limited to communications between you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to this letter.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Fayette County Elections & Voter Registration
Stonewall Administrative Complex
140 Stonewall Avenue West, Suite 208
Fayetteville, GA 30214
dhicks@fayettecountyga.gov

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letters you recently received from Public Interest Legal Foundation; and Open Records Request

Dear Fayette County Elections & Voter Registration:

The ACLU of Georgia writes in response to a letter you recently received from the Public Interest Legal Foundation ("PILF"), which urges you take actions that are likely to threaten the sacred and fundamental right to vote, as well as violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*[1] PILF's letter suggests that you must do more to purge voters from the rolls, stating—without proof—that your county allegedly has more registered voters on the rolls than "eligible, living, citizen voters" residing in your jurisdiction. Judicial Watch sent a letter earlier this year to the Georgia Secretary of State, raising similar allegations concerning your county.[2]

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of PILF and Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar

[1] A copy of this letter is published at https://publicinterestlegal.org/files/Sample-2017-notice.pdf. A listing of counties which received this letter is published at https://publicinterestlegal.org/county-list-2017/.

[2] *See* http://www.judicialwatch.org/wp-content/uploads/2017/04/NVRA-Violation-letter-GA-2017.pdf.

attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[3]

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[4]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters."

This letter: 1) addresses PILF's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by PILF and Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

PILF claims without evidence that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters," and Judicial Watch makes a similar claim. It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, PILF relies on outdated data. It says that it relies on U.S. Census Bureau to determine the number of eligible, living, citizen voters in your county, but the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

[3] The "American Civil Rights Union" is not affiliated with the American Civil Liberties Union.

[4] *See* Letter from ACLU of Georgia to Secretary of State's Office, dated September 18, 2017, https://www.acluga.org/sites/default/files/letter_re_voter_purge_9-18-17.pdf.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[5] *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.

Lastly, Judicial Watch (though not PILF) cites 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, HAVA 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.* § (a)(2)(A); (a)(4)(A), and such effort must also include "[s]afeguards to ensure that eligible voters are not removed in error

[5] 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.*

from the official list of eligible voters," *id.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letters submitted by PILF and Judicial Watch, including but not limited to communications between you and PILF, you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to these letters.

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Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to PILF's or Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

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Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Forsyth County Voter Registrations and Elections
110 E. Main Street, Suite 200
Cumming, GA 30040
voter@forsythco.com

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letter from Judicial Watch; and Open Records Request

Dear Forsyth County Voter Registrations and Elections:

The ACLU of Georgia writes in response to a letter that was sent by Judicial Watch to the Georgia Secretary of State earlier this year identifying Forsyth County as a county that must do more to purge its voters from the rolls because your county allegedly has "more total registered voters than there were adults over the age of 18."[1] These suggested actions threaten the sacred and fundamental right to vote and likely violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[2]

[1] *See* http://www.judicialwatch.org/wp-content/uploads/2017/04/NVRA-Violation-letter-GA-2017.pdf.

[2] The "American Civil Rights Union" is not affiliated with the American Civil Liberties Union.

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[3]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that your county has allegedly "more total registered voters than there were adults over the age of 18."

This letter: 1) addresses Judicial Watch's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

Judicial Watch claims without evidence that your county has "more total registered voters than there were adults over the age of 18." It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, and as a preliminary matter, the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an

[3] *See* Letter from ACLU of Georgia to Secretary of State's Office, dated September 18, 2017, https://www.acluga.org/sites/default/files/letter_re_voter_purge_9-18-17.pdf.

ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[4] *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.

Lastly, Judicial Watch cites 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, HAVA 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.* § (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.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

(continued on next page)

[4] 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.*

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letter submitted by Judicial Watch, including but not limited to communications between you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to this letter.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Fulton County Board of Registration and Elections
130 Peachtree St. SW, Suite 2186
Atlanta, GA 30303
Elections.VoterRegistration@FultonCountyGA.gov

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letter from Judicial Watch; and Open Records Request

Dear Fulton County Board of Registration and Elections:

The ACLU of Georgia writes in response to a letter that was sent by Judicial Watch to the Georgia Secretary of State earlier this year identifying Fulton County as a county that must do more to purge its voters from the rolls because your county allegedly has "more total registered voters than there were adults over the age of 18."[1] These suggested actions threaten the sacred and fundamental right to vote and likely violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[2]

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It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that your county has allegedly "more total registered voters than there were adults over the age of 18."

This letter: 1) addresses Judicial Watch's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

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And there are good reasons to demand actual proof to support this allegation.

First, and as a preliminary matter, the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an

[3] *See* Letter from ACLU of Georgia to Secretary of State's Office, dated September 18, 2017, https://www.acluga.org/sites/default/files/letter_re_voter_purge_9-18-17.pdf.

ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

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[4] 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.*

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Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Lee County Board of Elections & Registrations
Elections & Registrations Office
100 Starksville Avenue North, Suite C
Leesburg, GA 31763
vjohnson@lee.ga.us

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letters you recently received from Public Interest Legal Foundation; and Open Records Request

Dear Lee County Board of Elections & Registrations:

The ACLU of Georgia writes in response to a letter you recently received from the Public Interest Legal Foundation ("PILF"), which urges you take actions that are likely to threaten the sacred and fundamental right to vote, as well as violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*[1] PILF's letter suggests that you must do more to purge voters from the rolls, stating—without proof—that your county allegedly has more registered voters on the rolls than "eligible, living, citizen voters" residing in your jurisdiction. Judicial Watch sent a letter earlier this year to the Georgia Secretary of State, raising similar allegations concerning your county.[2]

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of PILF and Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar

[1] A copy of this letter is published at https://publicinterestlegal.org/files/Sample-2017-notice.pdf. A listing of counties which received this letter is published at https://publicinterestlegal.org/county-list-2017/.

[2] *See* http://www.judicialwatch.org/wp-content/uploads/2017/04/NVRA-Violation-letter-GA-2017.pdf.

attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[3]

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[4]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters."

This letter: 1) addresses PILF's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by PILF and Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

PILF claims without evidence that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters," and Judicial Watch makes a similar claim. It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, PILF relies on outdated data. It says that it relies on U.S. Census Bureau to determine the number of eligible, living, citizen voters in your county, but the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

[3] The "American Civil Rights Union" is not affiliated with the American Civil Liberties Union.

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Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[5] *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.

Lastly, Judicial Watch (though not PILF) cites 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, HAVA 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.* § (a)(2)(A); (a)(4)(A), and such effort must also include "[s]afeguards to ensure that eligible voters are not removed in error

[5] 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.*

from the official list of eligible voters," *id.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letters submitted by PILF and Judicial Watch, including but not limited to communications between you and PILF, you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to these letters.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to PILF's or Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Marion County Elections & Voter Registration
100 East Burkhalter Avenue
Buena Vista, GA 31803
marioncountyelect@gmail.com

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letters you recently received from Public Interest Legal Foundation; and Open Records Request

Dear Marion County Elections & Voter Registration:

The ACLU of Georgia writes in response to a letter you recently received from the Public Interest Legal Foundation ("PILF"), which urges you take actions that are likely to threaten the sacred and fundamental right to vote, as well as violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*[1] PILF's letter suggests that you must do more to purge voters from the rolls, stating—without proof—that your county allegedly has more registered voters on the rolls than "eligible, living, citizen voters" residing in your jurisdiction. Judicial Watch sent a letter earlier this year to the Georgia Secretary of State, raising similar allegations concerning your county.[2]

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of PILF and Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in

[1] A copy of this letter is published at https://publicinterestlegal.org/files/Sample-2017-notice.pdf. A listing of counties which received this letter is published at https://publicinterestlegal.org/county-list-2017/.

[2] *See* http://www.judicialwatch.org/wp-content/uploads/2017/04/NVRA-Violation-letter-GA-2017.pdf.

violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[3]

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[4]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters."

This letter: 1) addresses PILF's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by PILF and Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

PILF claims without evidence that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters," and Judicial Watch makes a similar claim. It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, PILF relies on outdated data. It says that it relies on U.S. Census Bureau to determine the number of eligible, living, citizen voters in your county, but the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person

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counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[5] *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.

Lastly, Judicial Watch (though not PILF) cites 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, HAVA 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.* § (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.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

[5] 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.*

III. Open Records Request

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> All communications related to the aforementioned letters submitted by PILF and Judicial Watch, including but not limited to communications between you and PILF, you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to these letters.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to PILF's or Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

McIntosh County Board of Elections
103 Jefferson Street
Darien, GA 31305
egale@darientel.com

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letters you recently received from Public Interest Legal Foundation; and Open Records Request

Dear McIntosh County Board of Elections:

The ACLU of Georgia writes in response to a letter you recently received from the Public Interest Legal Foundation ("PILF"), which urges you take actions that are likely to threaten the sacred and fundamental right to vote, as well as violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*[1] PILF's letter suggests that you must do more to purge voters from the rolls, stating—without proof—that your county allegedly has more registered voters on the rolls than "eligible, living, citizen voters" residing in your jurisdiction. Judicial Watch sent a letter earlier this year to the Georgia Secretary of State, raising similar allegations concerning your county.[2]

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of PILF and Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in

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The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[4]

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And there are good reasons to demand actual proof to support this allegation.

First, PILF relies on outdated data. It says that it relies on U.S. Census Bureau to determine the number of eligible, living, citizen voters in your county, but the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

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In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

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Second, 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.*

Third, the NVRA makes clear that one reasonable way a State may remove the names of registrants who have changed residence from one county to another 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. 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).

Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[5] *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.

Lastly, Judicial Watch (though not PILF) cites 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, HAVA 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.* § (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.* § (a)(4)(B). Thus, nothing in HAVA changes the protections afforded voters by the NVRA.

[5] 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.*

III. Open Records Request

Pursuant to the Georgia Open Records Act (O.C.G.A. § 50-18-70 et seq.), the American Civil Liberties Union Foundation of Georgia, Inc., respectfully requests access to inspect and copy the following public records prepared or received by you:

> All communications related to the aforementioned letters submitted by PILF and Judicial Watch, including but not limited to communications between you and PILF, you and Judicial Watch, you and the Secretary of State's Office, amongst your employees, or you and anyone concerning any response to these letters.

Pursuant to the Open Records Act (O.C.G.A. § 50-18-74), we request that you make these records available for our inspection within a reasonable time not to exceed three business days of your receipt of this request. Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt, pursuant to O.C.G.A. § 50-18-72(g). In addition, if our request is denied in whole or in part, the law requires your agency to justify all deletions by reference to exemptions of the Georgia Open Records Act, specifying code section, subsection, and paragraph. *See* O.C.G.A. § 50-18-72(h).

We request that you waive the copying fees. If your office does not maintain these public records, please let us know who does and include the proper custodian's name and address. To the extent that your office claims the right to withhold any record, or portion of any record, please describe each and every record or portion that is being withheld and the claimed reason for exemption, citing the exact language of the Open Records Act on which you rely.

Should your estimate of those fees exceed $10, please advise us of the costs before they are incurred. We would prefer electronic copies of the records whenever possible. However, we also seek a waiver of any and all possible charges because the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of whether their sacred and fundamental right to vote will be infringed upon by any response to PILF's or Judicial Watch's letters. *See* O.C.G.A. s 50-18-71(c). This information is not being sought for commercial purposes.

If any records are unavailable within three business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you have suggestions for tailoring this request so as to ensure a more expeditious but still meaningful response, we would be happy to consider them. We receive the right to appeal any decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia

AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

P.O. Box 77208 Atlanta, Georgia 30357 | 770-303-8111| info@acluga.org

September 27, 2017

Oconee County Board of Elections & Registration
P.O. Box 958
Watkinsville, GA 30677
phayes@oconee.ga.us

CC by email: Brian B. Kemp (c/o Cristina Correia, Esq.)
Office of Secretary of State
2 Martin Luther King Jr., Drive, SE
802 West Tower
Atlanta, GA 30334

Via Certified Mail and E-mail

Re: Warning concerning notice letters you recently received from Public Interest Legal Foundation; and Open Records Request

Dear Oconee County Board of Elections & Registration:

The ACLU of Georgia writes in response to a letter you recently received from the Public Interest Legal Foundation ("PILF"), which urges you take actions that are likely to threaten the sacred and fundamental right to vote, as well as violate the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*[1] PILF's letter suggests that you must do more to purge voters from the rolls, stating—without proof—that your county allegedly has more registered voters on the rolls than "eligible, living, citizen voters" residing in your jurisdiction. Judicial Watch sent a letter earlier this year to the Georgia Secretary of State, raising similar allegations concerning your county.[2]

We warn you that crafting any voter purge program based on unfounded allegations of illegality is itself likely to lead to violations of the NVRA, which contains strict prohibitions on when and under what circumstances a registered voter may be removed from the lists. Contrary to the suggestions of PILF and Judicial Watch, the NVRA is fiercely protective of the right to vote, and essentially requires jurisdictions to be sure that a voter is ineligible before removing them from the rolls. Just this week, the Third Circuit Court of Appeals shut down a similar attempt by a third-party organization to goad a jurisdiction into aggressively purging its voters in

[1] A copy of this letter is published at https://publicinterestlegal.org/files/Sample-2017-notice.pdf. A listing of counties which received this letter is published at https://publicinterestlegal.org/county-list-2017/.

[2] *See* http://www.judicialwatch.org/wp-content/uploads/2017/04/NVRA-Violation-letter-GA-2017.pdf.

violation of the NVRA. *See American Civil Rights Union v. Philadelphia City Comm'rs*, --- F.3d ----, 2017 WL 4228787 (3d Cir. Sept. 25, 2017).[3]

The sacred and fundamental right to vote cannot be at the mercy of flawed and error-ridden government databases and records. Just this year, nearly 159,930 registered voters were going to be illegally removed from the active voter rolls in violation of the NVRA because the Secretary of State did not have a system in place to distinguish between voters who moved within the same county and other movers. In addition, hundreds of registered Georgia voters were about to be disenfranchised on the absurd notion that they had moved simply because their names did not appear on a water bill.[4]

It would be similarly irresponsible, and likely illegal, for you to start purging voters based on unsupported claims by third-party organizations that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters."

This letter: 1) addresses PILF's claim about the alleged number of eligible voters in your jurisdiction compared to the number of registered voters; 2) summarizes the relevant provisions of the NVRA that must govern any list maintenance program; and 3) requests certain documents pursuant to the Open Records Act to monitor any response to the letters submitted by PILF and Judicial Watch.

I. It is irresponsible to act on the unsupported allegation that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters"

PILF claims without evidence that "your county has significantly more voters on the registration rolls than it has eligible, living, citizen voters," and Judicial Watch makes a similar claim. It would be irresponsible for you to automatically accept this unsubstantiated allegation about your voter lists or to premise any voter removal program based on this allegation.

And there are good reasons to demand actual proof to support this allegation.

First, PILF relies on outdated data. It says that it relies on U.S. Census Bureau to determine the number of eligible, living, citizen voters in your county, but the U.S. Census Bureau only performs its full count of every person in the jurisdiction every 10 years, so the last count is now seven years old, from 2010. Needless to say, the eligible voter population may have increased in the last seven years as people turn 18, move into your jurisdiction, become U.S. citizens, or finish serving the sentences of any disenfranchising felony conviction.

Second, Judicial Watch relies on unreliable data. Their letter claims to rely on "the 2011-2015 U.S. Census Bureau's American Community Survey," but unlike the full person-by-person

[3] The "American Civil Rights Union" is not affiliated with the American Civil Liberties Union.

[4] *See* Letter from ACLU of Georgia to Secretary of State's Office, dated September 18, 2017, https://www.acluga.org/sites/default/files/letter_re_voter_purge_9-18-17.pdf.

counting performed every 10 years, these intra-decade nationwide surveys only ask questions of a sample of the population. If the sample size from your jurisdiction is small, it is irresponsible to draw conclusions about your entire county's population based on the responses of a few. Thus, for example, if only 2 people in your county responded to the survey and one person was an ineligible voter, it is irresponsible to conclude that only 50% of your county's population consists of eligible voters.

Third, it is unclear whether the alleged number of registered voters includes "inactive" registered voters. Though Georgia has had a troubled pattern of prematurely shunting eligible voters into "inactive" status, the NVRA requires jurisdictions to keep voters on the rolls for a lengthy period of time even if there is a clear indication that they have moved. 52 U.S.C. § 20507.

In any event, having a large number of registered voters on the rolls is not unusual—indeed, the NVRA expressly contemplates it. Given the high mobility of the American workforce, higher mobility rates for people who are lower-income, and transient college student populations, it would be surprising if there were not in at least some instances where such voters remained on the rolls for a few years after they have moved. As noted above, the NVRA essentially requires that jurisdictions err on the side of protecting the right to vote, and to not remove voters unless they are certain that the voter is ineligible.

II. The NVRA strictly limits when and under what circumstances a registered voter may be removed from the rolls

Most of the specific provisions in the NVRA limit the circumstances in which states can remove individuals from the voter rolls. As a preliminary matter, 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). We summarize some of these requirements below.

First, the NVRA prohibits you from removing voters for suspected change of residence until the voter confirms the change or until a sufficient waiting period has elapsed—thus expressly contemplating that some voters who have moved out of your jurisdiction must remain on the rolls for some time. 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.

Second, 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.*

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Fourth, the NVRA prohibits States from conducting any program "the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" during the ninety-day period preceding a federal 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."[5] *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.

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Thank you for your prompt attention.

Sincerely,

Sean J. Young
Legal Director
ACLU of Georgia