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100 North Carson Street
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January 18, 2024

Via Electronic Mail

Thomas R. McCarthy
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Re: December 4, 2023 National Voter Registration Act Letter

Dear Mr. McCarthy:

We represent the Nevada Secretary of State. In his role, the Secretary ensures Nevada and its counties employ robust procedures for maintaining voter rolls in conjunction with the National Voter Registration Act (“NVRA”) and other applicable laws.

We write in response to your December 4, 2023 letter, in which you claim Nevada is not complying with the NVRA’s voter roll maintenance requirements, based on registration rates in eight Nevada counties.¹ Based on more accurate data and applicable laws, we strongly disagree with your claim.

If you have *specific* concerns related to Nevada’s NVRA maintenance requirements, please identify them so we can have an opportunity to respond accordingly. In the meantime, in the spirit of transparency and public confidence in Nevada’s electoral processes, we provide further response below.

I. Nevada’s List Maintenance Efforts

The Counties have reasonably maintained, and will continue to reasonably maintain, their voter rolls in compliance with federal and state law. Because the NVRA only requires general programs to remove voters who have changed address or died, this section focuses on those two categories of ineligible voters. This section also discusses activities Nevada has long had in the works

¹ Carson City, Churchill County, Clark County, Douglas County, Eureka County, Lyon County, Storey County, and Washoe County (the “Counties”).

for 2024 that clearly show Nevada takes list maintenance seriously. Please make no mistake, however; these are things Nevada already planned to do before receiving your letter and will continue implementing without delay.

A. Change-of-Residence Program

Pursuant to NRS 293.530, Nevada's counties ensure maintenance of their respective voter lists when a voter changes residence. Counties can "use any reliable and reasonable means . . . to determine whether a registered voter's current residence is other than that indicated on the voter's application to register to vote." NRS 293.530(1). This may include receiving Postal Service change-of-address information, identifying voters who have failed to vote in preceding elections, identifying voters whose sample or mail ballots are returned undeliverable, and conducting investigations of registration by census, house-to-house canvass, or any other method.

After identifying voters whose residences may have changed, the counties will then mail those voters a written notice with a postage guaranteed return postcard that has a space for the voter to write in his or her new address. NRS 293.530(1)(c)(1)-(2). If a voter returns the postcard with updated information, the county will correct the voter registration list. NRS 293.530(f). However, if a voter does not return the postcard within 33 days of its mailing, the county will designate the voter as inactive. NRS 293.530(1)(d), (g). And if an inactive voter fails to vote for two general elections after the mailing of the notice and postcard, the county will cancel the voter's registration. NRS 293.530(1)(c)(4).

Nevada has three elections scheduled for 2024: a presidential preference primary election on February 6, 2024; a primary election on June 11, 2024; and a general election on November 5, 2024. There is also a party-run caucus scheduled for February 8, 2024. Each of these triggers the 90-day period when a state is prohibited from systematically removing the names of certain ineligible voters. *See* 52 U.S.C. § 20507(c)(2); 52 U.S.C. § 20502(1), (2); 52 U.S.C. § 30101(1), (3).

As a result, the soonest Nevada's counties would be able to practicably initiate the NRS 293.530 registration cancellation process again is between the June 2024 primary election and the November 2024 general election. And they will in fact be doing so. The counties will send the statutory notices and return

postcards to all voters for which any sample or mail ballot from the February 2024 presidential preference primary and June 2024 primary elections is returned undeliverable. This is a highly reasonable method of identifying voters who may have moved because sample² and mail³ ballots are sent to virtually all active registered Nevada voters. If a voter does not return a postcard within 33 days of its mailing, his or her registration will be inactivated before the November 2024 general election, and the voter's registration will be cancelled if she or he does not vote in the next two general elections following the mailing of the notice and postcard.

B. Deceased Voters Program

The Nevada Secretary of State has entered into an agreement with the Nevada Registrar of Vital Statistics to match information in the Vital Statistics database to the voter registration list. NRS 293.675(7). Daily during the workweek, the Secretary of State compares the Vital Statistics' records against the registration list. *Id.* The Secretary of State then sends the counties a list of individuals in their respective counties identified as deceased, and the counties then act on them on a routine basis.

C. Nevada Is Enhancing its Voter Registration System

During Nevada's 81st legislative session, a bill was passed (Assembly Bill 422) that required the state move to a top-down voter registration system from a bottom-up system; this type of system is widely considered a best practice for maintaining accurate voter rolls. In the interest of ensuring that Nevada's elections are conducted as securely and accessibly as possible, Secretary Aguilar requested \$30 million from the governor and state legislature to deploy this system in advance of the 2024 primary and general elections. The Voter Registration and Election Management Solution ("VREMS") has an anticipated initial implementation date of April 1, 2024. VREMS will establish a single, central platform at the state level, which will transmit data to the counties. This system will expedite the identification of individuals who have moved within

² Sample ballots are sent to all active registered Nevada voters, except those who elect to receive them by electronic means or who registered less than 20 days before the election. NRS 293.565(4)-(5), (7).

³ Mail ballots are sent to all active registered Nevada voters, except those who have specifically opted out of receiving one or who registered less than 14 days before the election. NRS 293.269911.

Nevada's counties and result in more efficient list maintenance. VREMS will be in use when the counties complete the statutory notice and return postcard process between the June 2024 primary election and the November 2024 general election.

D. Nevada Will Continue its Collaborative Work

Nevada is a founding member of the bipartisan Electronic Registration Information Center ("ERIC") and will continue collaborating with ERIC. ERIC is the foremost cooperative tool for states to maintain accurate voter registration lists. Through ERIC, Nevada receives reports identifying inaccurate or out-of-date voter registration records, deceased voters, and possible illegal voting. ERIC uses data received from its members (24 states and Washington D.C.), including state motor vehicle department data, and official federal death and Postal Service change-of-address data. The counties are sent relevant data from ERIC, and act on it to complement their other list maintenance activities.

ERIC is an important and powerful resource for voter list maintenance. Regrettably, ERIC has been the target of misleading attacks, resulting in the withdrawal of nine states. This has created a profound gap in those states' abilities to maintain their voter rolls, with attempted alternatives lacking ERIC's effectiveness.⁴ We are not aware of you sending a similar letter to any of those states.

II. Data Shows that Nevada Is Complying with the NVRA's List Maintenance Requirements

A. The Letter's Analysis Is Highly Flawed

As explained below, registration rates are not an appropriate basis for determining whether a state is complying with the NVRA. Yet the *sole* basis for your allegation of non-compliance with the NVRA is a statistical analysis of registration rates that relies on incomparable data. You contend that the Counties have voter registration rates between 23 and 49 percent higher than the State's registration rates. You rely on data from the U.S. Census Bureau's

⁴ See, e.g., Miles Park, *Republican states swore off a voting tool. Now they're scrambling to recreate it*, NPR, <https://www.npr.org/2023/10/20/1207142433/eric-investigation-follow-up-voter-data-election-integrity> (Oct. 20, 2023).

Current Population Survey (“CPS”) to say that Nevada had a registration rate of 65.1% in 2022. And you rely on data from an entirely different survey, the 2017-2021 5-Year Citizen Voting Age Population (“CVAP”), to provide the denominator for your calculation of the current registration rates in the Counties. This is comparing apples to orangutans.

The CPS voter registration rates are crude estimates based on historical recall, obtained through personal or telephone interview, intended for an entirely different purpose.⁵ As if relying on self-report and memory were not bad enough, respondents generally also reported on the registration status of other members of the household.⁶ People often do not know their own voter registration status, let alone the status of others in their household. However, the accuracy of this data relies on individuals accurately reporting the historical registration status of every member of their household. Adding to this, the survey data is obtained from approximately 54,000 households *nationwide*.⁷ While we were unable to identify the precise number of Nevada households surveyed, based on Nevada’s 2023 population ranking of 32 among the 50 states, with less than 1% of the U.S. population,⁸ it stands to reason that fewer than 1,000 Nevada households were surveyed. The CPS is a national surveillance survey, which can provide *national-level* data for monitoring trends *within the survey over time*. There is nothing to suggest it was intended, or powered, to provide *accurate or precise state-level* registration rates. And yet, you apply these rates as if they were absolute truth. It defies credulity that a survey conducted for an entirely different purpose, with a necessarily inaccurate recall-based measure of registration and a necessarily imprecise sample estimate of registration, forms a cornerstone of your analysis.

The errors of the analysis are further compounded because it purports to compare the CPS data to the 2017-2021 CVAP data. The CVAP data is based on

⁵ U.S. Census Bureau, Methodology, <https://www.census.gov/programs-surveys/cps/technical-documentation/methodology.html>.

⁶ *Id.*

⁷ U.S. Census Bureau, Current Population Survey, November 2022 Voting Supplement File, Technical Documentation CPS—22, <https://www2.census.gov/programs-surveys/cps/tech-docs/cpsnov22.pdf> at 2-1.

⁸ See U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia and Puerto Rico: April 1, 2020 to July 1, 2023, <https://www2.census.gov/programs-surveys/popest/tables/2020-2023/state/totals/NST-EST2023-POP.xlsx>.

the 2017-2021 5-Year American Community Survey (“ACS”).⁹ You offer no explanation for why the two datasets would be compatible for shared analyses. Moreover, the ACS population data “significantly underestimate[s] the population.” *Bellitto v. Snipes*, 935 F.3d 1192, 1208 (11th Cir. 2019). It “takes data drawn from the preceding five years and estimates the midpoint of the data.” *Id.* The 2021 five-year data, therefore, estimates the population at the middle of 2019. *See id.* Nevada has a substantially growing population,¹⁰ and use of the ACS data does not account for growth since 2019. *See id.* The ACS data further excludes many individuals who may be eligible voters but do not reside in a county for the entire year, such as military personnel and college students. *Id.* Because of these problems with the ACS, the Eleventh Circuit upheld a district court’s decision which concluded that calculations using ACS data in a similar NVRA challenge were misleading. *Id.* at 1208. Your calculations, based on a comparison of CPS to ACS data, are equally, if not more, misleading.

B. The Best Available Data Shows that Nevada Is Appropriately Maintaining its Voter Rolls

We maintain that no currently available dataset would provide an adequate comparison for determining whether registration rates and the actual eligible voting population are mismatched. But to the extent you feel the need to rely on U.S. Census Bureau data, we are confused that you have ignored the more current 1-year CVAP data, which the U.S. Election Assistance Commission (“EAC”) relies on in calculating registration rates. While not a perfect comparison, it is at least comparing apples to another fruit: oranges.

⁹ U.S. Census Bureau, Citizen Voting Age Population (CVAP Special Tabulation From the 2017-2021 5-Year American Community Survey (ACS)), https://www2.census.gov/programs-surveys/decennial/rdo/technical-documentation/special-tabulation/CVAP_2017-2021_ACS_documentation_v1.pdf, at 1.

¹⁰ *Compare, e.g.*, U.S. Census Bureau, Nevada 2019 Citizen Voting-Age Population, <https://data.census.gov/tables/ACS/DT1Y2019.B29001?q=B29&g=040XX00US32&d=ACS%201-Year%20Estimates%20Detailed%20Tables> (estimating Nevada’s voting population to be 2,111,932 in 2019) with U.S. Census Bureau, Nevada 2022 Citizen Voting-Age Population, <https://data.census.gov/tables/ACS/DT1Y2022.B29001?q=B29&g=040XX00US32&d=ACS%201-Year%20Estimates%20Detailed%20Tables> (estimating Nevada’s voting population to be 2,227,239 in 2022).

As shown by the EAC in the Election Administration and Voting Survey 2022 Comprehensive Report,¹¹ released in June 2023, Nevada’s active voter registration rate has been consistently below the national average. This is in line with the EAC’s data showing Nevada’s generally above-average confirmation notice mailing and removal action rates.¹²

Jurisdiction	Year	Active Regs. (% of CVAP)	Confirmation Notices Sent (% of Active Voters)	Voters Removed (% of Registered Voters)
Nevada	2022	83.9%	22.0%	18.0%
	2020	86.9%	19.7%	7.7%
	2018	77.0%	16.6%	11.1%
U.S.	2022	85.4%	13.7%	8.5%
	2020	88.1%	14.3%	8.2%
	2018	82.5%	11.6%	8.2%

The 2022 1-Year CVAP data also supports the conclusion that Nevada has continued its reasonable list maintenance activities. Although it is a year behind, compared to the active registrations in Nevada identified as of December 1, 2023, the statewide active registration rate is 85.7%.¹³ This contrasts with the statewide 90.2% registration rate compared to the 2021 5-Year CVAP data. Based on your selection of Counties targeted in your letter, it appears you believe that an 86.5% registration rate is acceptable. Because the Counties account for 93.9% of the citizen voting age population based on the 2021 5-Year CVAP data, it seems likely that using more up-to-date numbers would put the Counties below your 86.5% threshold.

¹¹ EAC, Election Administration and Voting Survey 2022 Comprehensive Report, https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf.

¹² Table data is taken from *id.* at 164, 166, 182-83 188-89; EAC, Election Administration and Voting Survey 2020 Comprehensive Report, https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf at 159-60, 165-66; EAC, Election Administration and Voting Survey 2018 Comprehensive Report, https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf at 79, 83.

¹³ *Compare* U.S. Census Bureau, Nevada 2022 Citizen Voting-Age Population, <https://data.census.gov/tables/ACS/DT1Y2022.B29001?q=B29&g=040XX00US32&d=ACS%201-Year%20Estimates%20Detailed%20Tables> (estimating Nevada’s voting population to be 2,227,239 in 2022) with Office of Nevada Secretary of State, Voter Registration Statistics (Dec. 1, 2023), <https://www.nvsos.gov/sos/home/showpublisheddocument/12583/638374697749430000> (identifying 1,907,794 active registrants).

It has not escaped our notice that you have sent similar letters to certain states, but not to other states with far higher active registration rates compared to the 1-Year CVAP data.¹⁴¹⁵

III. The NVRA's Requirements and Limitations

The “NVRA was intended as a shield to protect the right to vote, not as a sword to pierce it.” *Am. Civil Rights Union v. Philadelphia City Comm’rs*, 872 F.3d 175, 182 (3d Cir. 2017). Nevada, like any other state, wants a high voter registration rate and voting rating from every eligible citizen to ensure government by the people, for the people. Under the NVRA, voters may only be removed from the voter rolls for limited reasons, and as a result, the NVRA itself is “partly responsible” for high voter registration rates. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 192 (2008). Consequently, a high voter registration rate alone, even one based on reliable numbers, is not a basis to conclude that a state is not adequately maintaining its voter rolls.

A. The NVRA's List Maintenance Requirements Are Narrow

The NVRA sharply limits a state's ability to remove voters from its rolls. States may only remove voters (1) at the voter's request; (2) if a voter becomes ineligible under state law “by reason of criminal conviction or mental incapacity”; (3) if the voter died; or (4) if the voter changed residence. 52 U.S.C. § 20507(a)(3)-(4). To promote voter roll maintenance, the NVRA requires that states conduct a general program that makes “a reasonable effort to remove voters who become ineligible on account of death or change of residence.” *Bellitto*, 935 F.3d at 1195; 52 U.S.C. § 20507(a)(4). Any general program to remove voters must be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965,” and may not be based solely on a voter's failure to vote. 52 U.S.C. § 20507(b)(1)-(2).

Because removal is only mandatory for voters who have moved and deceased voters, this response focuses only on those two categories.

¹⁴ See EAC, Election Administration and Voting Survey 2022 Comprehensive Report, https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf at 162-65.

¹⁵ As described below, because you are contemplating litigation, we ask you and your clients to preserve records relating to, among other things, the decision to target specific states.

1. Program to Remove Voters Based on Change of Residence

The NVRA identifies two paths a state may follow for removing voters who have changed residence.

First, a state may meet the reasonable efforts requirement by taking specified steps in connection with registrants whose addresses may have changed based on change-of-address information supplied by the Postal Service (“NCOA Process”). 52 U.S.C. § 20507(c)(1). For registrants that have moved within the same jurisdiction, a registrar can change the registration records to the new address and send a notice of change to the registrant for the registrant to verify or correct the address information. 52 U.S.C. § 20507(c)(1)(B)(i). For registrants that have moved to a different jurisdiction, the registrar can remove the registrant’s name if the registrant confirms the out-of-jurisdiction move in writing. 52 U.S.C. § 20507(d)(1)(A). The registrar can also send a notice to the registrant for the registrant to state their current address, and if the registrant does not respond and does not appear to vote in the next two federal general elections, the registrar can remove the name of the registrant. 52 U.S.C. § 20507(d)(1)(A)(B).

Second, states can use methods other than the NCOA Process to identify voters who may have moved out of the jurisdiction. 52 U.S.C. § 20507(d); *see also* U.S. Dep’t of Justice, The National Voter Registration Act of 1993 (NVRA), Questions and Answers, No. 36, <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>. For instance, a state can identify voters who may have moved because they have failed to vote. *See id.*; *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1846-47 (2018). A state will then follow the NCOA Process’s notice process for those who move to a new jurisdiction to remove ineligible voters. 52 U.S.C. § 20507(d).

2. Program to Remove Deceased Voters

“[F]or voters who become ineligible because of death, . . . reliance on reliable death records, such as state health department records and the Social Security Death Index, to identify and remove deceased voters constitutes a reasonable effort.” *Bellitto*, 935 F.3d at 1205. A “state is not required to exhaust

all available methods for identifying deceased voters; it need only use reasonably reliable information to identify and remove such voters.” *Id.*

B. Registration Rates Do Not Indicate Non-Compliance with the NVRA

While the NVRA requires states to conduct a general program that makes a reasonable effort to remove voters who become ineligible based on death or change of residence, the NVRA does not provide a numerical threshold to establish compliance or lack thereof. Use of registration rates alone does not demonstrate a failure to comply with the NVRA; registration rates may far exceed the eligible voting pool without any violation. This is true for several reasons.

First, the NCOA Process creates a safe harbor for compliance with the NVRA’s requirement of a general program to remove voters who have become ineligible due to a change of address. *Bellitto*, 935 F.3d at 1203. If a state uses the NCOA Process, it meets the NVRA’s minimum statutory requirements with respect to voters who have moved. *Id.* at 1203-04. The NCOA Process is sufficient even though it may not lead to the immediate removal of some ineligible voters. In fact, “[a]s many as 40 percent of people who move do not inform the Postal Service.” *Id.* at 1204 (quoting *Husted*, 138 S. Ct. at 1840). Thus, under the NVRA, a substantial number of voters who have moved out of the jurisdiction may properly remain on the voter rolls.

Second, the NVRA only requires states to remove voters based on a change of address or death. *Bellitto*, 935 F.3d at 1195; 52 U.S.C. § 20507(a)(4). Thus, under the NVRA, voters who are ineligible may properly remain on the voter rolls, resulting in higher registration numbers.

Third, the NVRA prohibits a state from removing certain ineligible voters through its general removal program during the 90-day period before a federal primary and general election. 52 U.S.C. § 20507(c)(2)(A). This can result in higher registration numbers because a state would be unable to systematically remove voters through its general programs, while new voters are still able to register. *See Bellitto*, 935 F.3d at 1208.

Taken together, the NVRA's statutory scheme reflects that active registration rates may properly be significantly higher than the actual pool of eligible, registered voters. Your reliance on registration rates to claim the Counties are violating the NVRA is misplaced.

IV. Your Letter Does Not Meet the Requirements for Adequate Notice

You purport to satisfy the NVRA's pre-litigation written notice requirement through your letter. *See* 52 U.S.C. § 20510(b)(1)-(2). The purpose of the notice letter is to allow a state an opportunity to cure the violation. *See Ass'n of Comm. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) ("Congress structured the notice requirement in such a way that notice would provide states in violation of the [NVRA] an opportunity to attempt compliance before facing litigation.").

Your letter is inadequate. You have not plausibly alleged any violation, *see Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1044 (9th Cir. 2015), and your vague assertions fail to provide "an opportunity to attempt compliance," *see Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014). As discussed above, the data provided is insufficient and does not establish a plausible violation of the NVRA. Moreover, you have not explained how the Counties' processes are supposedly insufficient. As detailed in this letter, the Counties' processes are robust, and the state will continue to implement list maintenance activities before the 2024 general election. If you have any specific, actionable concerns, please identify them.

V. Preservation of Records

Finally, because you are threatening litigation, we ask that you and your clients preserve, at a minimum, all documents and records concerning:

- Communications with any state and/or county concerning its voter list maintenance.
- The selection of states and/or counties to send a letter to and/or to bring a lawsuit against based on allegations of non-compliance with the NVRA's voter list maintenance requirements.

- How the data was selected for this demand letter and what considerations, if any, were made for alternative data.
- Communications with other entities regarding the NVRA.
- Fundraising to send any letter and/or bring any lawsuit based on allegations of non-compliance with the NVRA's voter list maintenance requirements.
- Participating in any potential lawsuit based on allegations of non-compliance with the NVRA's voter list maintenance requirements.

We hope that this response provides you with adequate information and that you will not pursue litigation. If you have questions or would like to discuss NVRA compliance further, please let us know. Nevada prides itself on its secure, accessible, and transparent election processes, and we would be happy to educate you further on the good work our state and counties perform tirelessly.

Sincerely,

/s/ Laena St-Jules

Laena St-Jules

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