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June 12, 2018

Secretary of State Kris Kobach  
Chief of Elections for the State of Kansas  
Memorial Hall, 1<sup>st</sup> Floor  
120 SW 10<sup>th</sup>  
Topeka, KS 66612  
[sos@ks.gov](mailto:sos@ks.gov)

Dear Secretary Kobach,

I am addressing you in your capacity as Secretary of State, and therefore the chief elections official of Kansas under K.S.A. §25-2504, on behalf of civil rights attorney and Kansas citizen Robert Eye, and Greg Palast, a reporter covering voter suppression issues with Rolling Stone Magazine, Truthout.com, and the Palast Investigative Fund. Pursuant to Section 8 of the National Voter Registration Act, 52 U.S.C. §20507, I am requesting on their behalf access to records concerning Kansas' participation in the Interstate Voter Registration Crosscheck program. These records fall under the public disclosure provisions of the NVRA, since they concern registered voter list maintenance. Public access to information regarding how voter rolls are maintained, and the systems for removing individuals from those lists, are central components of the NVRA, which was passed in 1993 to better protect the right to vote - a right so fundamental that "other rights, even the most basic, are illusory if the right to vote is undermined" *Gallivan v. Walker*, 54 P. 3d 1069, 1081 (S. Ct. UT 2002).

**My request is not made pursuant to the Kansas Open Records Act.**

I submitted a request under the Kansas Open Records Act several months ago and have yet to receive either the records or a denial of such from Kansas election officials. As you well know, K.S.A. §45-218(d) requires a response no later than three (3) business days following the request, providing the requested records or a detailed explanation of the denial. While such a delay places Kansas elections officials out of compliance with the state's own public records statute, Kansas is furthermore out of compliance with the Federally-mandated provisions of the NVRA, which explicitly state that the information I have requested be made publicly available.

I am giving you 90 days' notice of Kansas' failure to provide the requested records under the NVRA, pursuant to 52 U.S.C. §20510(b). If these records are not produced within the notice period, I will be forced to file a lawsuit to remedy the violation. 52 U.S.C. § 20510(c) provides for the possible award of attorney fees, including litigation expenses and costs, to private parties.

### **I. My requests under the NVRA.**

On behalf of Kansas resident and civil rights attorney Robert Eye, and journalist Greg Palast, I am requesting the following documents:

1. The list of names, addresses, and birthdates, and dates of registration of voters in Kansas who were identified as being potentially registered in one of the other participating Interstate Voter Registration Crosscheck states in 2016 and 2017. I am seeking **original copies of the list provided by Crosscheck to the Elections Division** showing the name, address, birth date, and registration date of the voter with whom each Kansas voter was matched from another participating Crosscheck State. Please provide this information in an electronically-readable format, such as Microsoft Excel.
2. The list of names and addresses of all those purged or changed to inactive in 2016 and/or 2017 and the basis for each individual being removed from the voter rolls, most notably those who were removed due to their names being matched with out-of-state voters through the Crosscheck program. Please provide this information in an electronically-readable format, such as Microsoft Excel.

### **II. Kansas' responsibilities under Section 8 of the NVRA.**

Section 8 of the NVRA requires that activities undertaken by the state to maintain the accuracy of lists of registered voters be made available to the public:

*Public Disclosure of Voter Registration Activities.*

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made. 52 U.S.C. §20507(i)

The 1993 National Voter Registration Act was passed with an explicit mandate to all levels of government to expand and protect the voting rights of American citizens. “The Congress finds that-- (1) the right of citizens of the United States to vote is a fundamental right; (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right” (52 U.S.C. §20501). To that end, the exceptions listed above in Section 8 are intentionally narrow, excluding only:

- 1) Records related to a declination to register to vote, or
- 2) The identity of a voter registration agency through which any particular voter is registered. 52 U.S.C. §20507(i)(1)

It follows, therefore, that all other records related to programs and activities conducted to ensure the accuracy and currency of official lists of eligible voters *not* sheltered by these narrow exceptions be provided to the public pursuant to Section 8.

Since the NVRA’s passage, Courts have consistently affirmed this broad reading of Section 8. “This language embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies.” *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 334-35 (4th Cir. 2012) (holding that Virginia election officials were mandated under §20507 to disclose completed voter registration applications). “Public access to a broad scope of information that shows how a State makes voter eligibility determinations furthers these goals.” *Project Vote v. Kemp*, 208 F. Supp. 3d 1320, 1336 (N.D. Ga 2016) (holding that electronic records were properly considered in the scope of Section 8’s disclosure requirements).

### **III. Crosscheck is a voter registration list maintenance program.**

In 2005, the state of Kansas created the Interstate Voter Registration Crosscheck program, joined by three other member states. Your office runs the program – known simply as Crosscheck – with the purported goal of assisting states in administration of their voter lists, in particular updating lists to ensure currency. Once a year, Crosscheck collects the lists of registered voters from participating states, and then uses a simple matching formula – alarmingly simple – to identify potential matched voters between states, using only a few data points. In the majority of cases, voters are matched by only three points: first name, last name, and birth date.

Crosscheck has repeatedly come under criticism for the inaccuracy of the data it provides to participating states. (See Ingraham, *This Anti-Voter-Fraud Program Gets it Wrong Over 99 Percent of the Time. The GOP Wants to Take It Nationwide*, The Washington Post, July 20, 2017). Several states, including Florida, Oregon, and Washington, opted into Crosscheck only to withdraw after receiving unreliable data, and other states have indicated they intend to do the same (Kruesi, *Idaho to Reevaluate Participating in Voter “Crosscheck” Program*, Associated Press, November 14, 2017). Crosscheck’s methods also disproportionately target voters of color: Statistical analysis found that the name-matching procedure results in higher incidence of false positives connecting two distinct minority voters who share a common last name, since minorities are overrepresented in 85 of the 100 most common U.S. last names (see Greg Palast, *The GOP’s Stealth War on Voters*, Rolling Stone, August 24, 2016).

Crosscheck is precisely the kind of maintenance program Congress had in mind when it created the public disclosure provisions of the NVRA. Due to the potential for legitimate voters to be erroneously removed from the registered voter lists as a result of Crosscheck data – and the egregious impact such error could have on voters of color – it is of paramount importance that this data be released to the public to ensure that all of Kansas’ eligible voters remain so.

**IV. The records requested fall well within the public disclosure provisions of §20507(i).**

There is substantial legal precedent to support our request for the production of the above-listed documents.

In *Project Vote/Vote for Am. Inc. v. Long* 682 F.3d 331 (4th Cir. 2012), Project Vote requested records related to completed voter registration applications. In seeking to shield disclosure of the requested documents, Virginia election officials argued that the “‘programs and activities’ referred to in Section 8(i)(1) of the NVRA are programs and activities related to the purging of voters from the list of registered voters.” *Id.* at 335. The 4<sup>th</sup> Circuit Court disagreed, holding that “the plain language of Section 8(i)(1) does not allow us to treat its disclosure requirement as limited to voter removal records.” *Id.* Given that the records we seek *are*, in fact, voter removal records, the *Long* decision supports our claim that such information falls well within Section §20507(i)(1). The *Long* Court further emphasized the broad reach of Section 8(i)(1), noting,

“(T)he fact that [Section 8(i)(1)] very clearly requires that ‘all records be disclosed brings voter registration application materials within its reach.’ *Id.* at 707-08 (emphasis added) (citing *Project Vote* 752 F. Supp. 2d at 706). As this court has recognized, ‘the use of the word ‘all’ is a term of great breadth.’ *Nat’l Coal. For Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F. 3<sup>rd</sup>. 283, 290 (4<sup>th</sup> Cir. 1998).” *Id.* at 336.

The Mississippi Southern District Court has also upheld the inclusion of full voter roll lists within Section 8(i)(1) in its ruling in *True the Vote v. Hosemann*, 43 Supp. 3d 693 (S.D. Miss. 2014) . “Plaintiffs seek access to an unredacted copy of the Counties’ voter rolls (collectively, the ‘Voter Roll’). In Mississippi, the Voter Roll is ‘a complete list of all Mississippi voters in all status categories’: active, inactive, pending, purged, and rejected.” *Id.* at 723. There was no controversy between parties as to the disclosure of the Voting Roll, and the Court noted that it “likewise concludes that the Voter Roll is a ‘record’ and is the ‘official list[] of eligible voters’ under the NVRA Public Disclosure Provision.” *Id.*

In *Project Vote, Inc. v. Kemp*, the Georgia Northern District Court reiterated the importance of providing records showing the full *results* of the programs described in §20507(i)(1) (e.g. lists of those purged or moved to inactive status), not simply records describing the programs themselves: “Limiting the disclosure requirement to a set of general process implementation records without the production of records to show the results of the processes and activities put into place would hinder the public’s ability to ‘protect the integrity of the electoral process’ and to ensure voting regulation programs and activities are implemented in a way that accomplishes the purposes of the statute and are not executed in a manner that is ‘discriminatory and unfair.’” *Project Vote, Inc. v. Kemp*, 208 Supp. 3d 1320 (N.D. Ga 2016) at 1340.

It is clear that the NVRA requires the public disclosure of the information that we have requested regarding Crosscheck lists and those individuals who have been purged.

#### **V. The state is the ultimate authority in enforcing the NVRA.**

It is the state’s responsibility to maintain the lists regardless of whether counties might do the legwork to purge the lists or deactivate voters. See e.g. *United States v Louisiana* 196 F. Supp. 3d 612 (M.D. La 2016), where the Court stated: “Naturally read, the NVRA pegs LA as the entity responsible for its overall enforcement and compliance, assigning it ultimate liability even as it requires that one official be selected as the state’s administrator, as the Governor’s statement underscores.” *Id.* at 639.

In *Harkless v. Brunner*, 545 F. 3d 445 (6th Cir. 2008), the Court stated: “However, the entire Act, including other subsections, speaks in terms of state responsibilities; what is noticeably missing is any mention of county, municipal, or other local authorities. Indeed, Congress grafted

the NVRA onto the existing public assistance structure, under which the fifty states, *not their political subdivisions*, have the ultimate accountability.” *Id.* at 452 (emphasis added).

As Secretary of State, you are the ultimate authority in the state of Kansas for enforcing the NVRA, per K.S.A. §25-2504, and it therefore your responsibility to ensure the provision of records pursuant to its requirements.

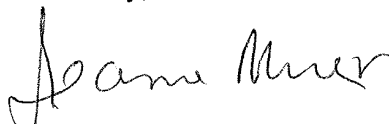
## **VI. Remedy**

The records I have requested are subject to disclosure by the provisions of the NVRA. Kansas is currently in violation of federal law by failing to provide the requested records. On behalf of the attorney Robert Eye, citizen of Kansas, and Greg Palast, reporter covering voter suppression issues with Rolling Stone, Truthout.com, and the Palast Investigative Fund, I pray you use your authority as the chief elections official for the state of Kansas to provide these records as soon as possible and maintain Kansas’ compliance with the NVRA.

The date of this letter marks the beginning of the 90-day window to remedy the error, pursuant to 52 U.S.C. §20510(b)(2), after which an aggrieved individual may bring a civil suit in the appropriate district court for relief. I sincerely hope this letter encourages you to use your authority to bring Kansas into compliance with the NVRA before that time, but if not I will be forced to pursue legal action to rectify this harm.

I look forward to hearing from your office soon regarding a plan of action to amend these violations.

Sincerely,



**Jeanne Mirer**

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CC: Attorney Robert Eye

Greg Palast