

# Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

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Susan Beals  
Commissioner of Elections  
Virginia Department of Elections  
Washington Building  
1100 Bank Street, First Floor  
Richmond, VA 23219

Dear Ms. Beals:

As you are aware, the National Voter Registration Act (“NVRA”) requires States to maintain an accurate and current voter registration roll for elections for federal office. Based on our analysis, 101 Virginia counties and cities<sup>1</sup> are in violation of Section 8 of the NVRA. By comparing publicly available voter registration records with the U.S. Census Bureau’s 2017-2021 American Community Survey of citizen voting age population, we have determined that 43 counties and cities—Accomack, Albemarle, Arlington, Bedford, Charles City County, Chesterfield, Clarke, Craig, Culpeper, Fairfax, Fauquier, Frederick, Goochland, Hanover, Henrico, Highland, Isle of Wight, James City County, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Mathews, Nelson, New Kent, Northampton, Northumberland, Orange, Powhatan, Prince William, Rappahannock, Spotsylvania, Stafford, Surry, Warren, Alexandria City, Emporia City, Fairfax City, Falls Church City, Poquoson City, and Suffolk City—have more registered voters than adult citizens over the age of 18. Furthermore, we have identified 58 counties and cities that have voter registration rates that exceed 90 percent of adult citizens over the age of 18, a figure that far eclipses the voter registration rate nationwide in recent elections. This evidence demonstrates that counties and cities are not conducting appropriate list maintenance to ensure that the voter registration roll is accurate and current, as required by federal law.

Congress enacted the NVRA “to protect the integrity of the electoral process.” 52 U.S.C. §20501(b)(3). Specifically, it enacted Section 8 “to ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. §20501(b)(4). Retaining voter rolls bloated with ineligible voters harms the electoral process, heightens the risk of electoral fraud, and undermines public confidence in elections. After all, “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Section 8 of the NVRA obligates States to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters” due to death or change of residence. 52 U.S.C. §20507(a)(4). And as the U.S. Supreme Court has recently confirmed, “federal law makes this removal mandatory.” *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842 (2018).

This letter provides statutory notice that Carolyn Kirkland, Donn Smith, and Kim Hines, acting as registered Virginia voters with a substantial interest in secure elections, will bring a

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<sup>1</sup> As you are aware, the Commonwealth of Virginia is divided into 95 counties and 38 independent cities, which are considered county-equivalents for census purposes.

lawsuit against you and, if appropriate, against the counties and cities named in this letter, if you fail to take specific actions to correct these violations of Section 8 within the 90-day timeframe specified in federal law. Furthermore, while we hope to avoid litigation, we nonetheless formally request that the Virginia Department of Elections and the 101 counties and cities named in this letter, to the extent that they maintain separate records, take steps to preserve documents as required by Section 8(i) of the NVRA. 52 U.S.C. §20507(i)(1)-(2).

As the Commissioner of the Virginia Department of Elections, you are responsible for coordinating the required statewide list maintenance under the NVRA. The NVRA requires each State to “designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under” the law. 52 U.S.C. §20509. Virginia law designates the Commissioner of Elections as “the chief state election officer responsible for the coordination of state responsibilities under the National Voter Registration Act.” Va. Code §24.2-404.1. This letter explains how we concluded that Virginia and the 101 named counties and cities are violating Section 8 of the NVRA, and the curative steps needed to bring the State into compliance with the law and avoid litigation.

**I. The NVRA Protects Election Integrity by Requiring Reasonable Efforts Be Made to Maintain Accurate and Current Lists of Registered Voters.**

Virginia’s voter registration list maintenance program must be “uniform, non-discriminatory, and in compliance with the Voting Rights Act.” 52 U.S.C. §20507(b)(1). Section 8 requires that States “remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant” to outside of his or her current voting jurisdiction. 52 U.S.C. §20507(4)(A)-(B).

Additionally, the Help America Vote Act (“HAVA”) mandates that States adopt computerized statewide voter registration lists and maintain them “on a regular basis” in accordance with the NVRA. 52 U.S.C. §21083(a)(2)(A). States must “ensure that voter registration records in the State are accurate and are updated regularly,” a process which must include making a “reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.” 52 U.S.C. §21083(a)(4). HAVA’s list maintenance mandates include coordination with “State agency records on death” and “State agency records on felony status” to facilitate the removal of individuals who are deceased or rendered ineligible under State law due to felony conviction. 52 U.S.C. §21083(a)(2)(A)(ii)(I)-(II).

As the chief election official for Virginia, the responsibility rests with you to coordinate and oversee the list maintenance activities of county and city election officials. *See, e.g., Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014) (noting that “the NVRA’s centralization of responsibility counsels against . . . buck passing”); *U.S. v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (noting that a State or chief election official “may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted”); *see also, e.g., Va. Code* §§24.2-114, 24.2-404(A)(4), 24.2-404.3, 24.2-408 through -410.2 (setting forth requirements for the Virginia Department of Elections and registrars to conduct voting list maintenance activities).

**II. 43 Virginia Counties and Cities Have More Registered Voters Than Voting-Eligible Citizens, and 58 Others Have Suspiciously High Rates of Voter Registration.**

Based on data gathered from the U.S. Census Bureau's 2017-2021 American Community Survey and the most up-to-date count of registered voters available from the Virginia Department of Elections, Virginia is failing to meet its list maintenance obligations. Comparing the registered voter count to the 2017-2021 American Community Survey reveals that the following 43 counties and cities have greater than 100% voter registration: Accomack (104.1%), Albemarle (102.3%), Arlington (106.3%), Bedford (101.9%), Charles City County (101.6%), Chesterfield (104.6%), Clarke (106.6%), Craig (104.8%), Culpeper (100.3%), Fairfax (107.4%), Fauquier (107.3%), Frederick (104.2%), Goochland (108.8%), Hanover (104.9%), Henrico (102.5%), Highland (100.1%), Isle of Wight (105.2%), James City County (107.0%), King and Queen (100.1%), King George (100.8%), King William (105.0%), Lancaster (103.2%), Loudoun (113.5%), Louisa (102.4%), Mathews (103.9%), Nelson (100.1%), New Kent (108.8%), Northampton (105.4%), Northumberland (104.3%), Orange (102.8%), Powhatan (101.1%), Prince William (106.1%), Rappahannock (106.3%), Spotsylvania (105.5%), Stafford (105.2%), Surry (107.3%), Warren (101.2%), Alexandria City (104.1%), Emporia City (100.6%), Fairfax City (113.0%), Falls Church City (109.6%), Poquoson City (102.0%), and Suffolk City (103.6%).

In other words, there are more registered voters than eligible voters. This plainly shows that voter registration records are not being maintained. Meanwhile, 58 other jurisdictions across the State have more than 90% (in some cases, approaching 100%) of their citizen voting-age populations registered to vote: Alleghany (91.3%), Amelia (99.6%), Amherst (92.2%), Appomattox (98.9%), Augusta (90.6%), Bath (94.5%), Botetourt (98.6%), Campbell (95.5%), Caroline (99.1%), Carroll (91.4%), Charlotte (94.8%), Cumberland (96.3%), Dinwiddie (95.9%), Essex (97.8%), Floyd (96.0%), Fluvanna (98.6%), Franklin (92.0%), Giles (91.9%), Gloucester (99.7%), Greene (98.7%), Halifax (93.5%), Henry (90.6%), Madison (97.0%), Mecklenburg (95.7%), Middlesex (98.2%), Page (91.4%), Pittsylvania (93.4%), Roanoke (99.0%), Rockingham (91.9%), Russell (92.4%), Scott (92.4%), Shenandoah (96.7%), Southampton (91.9%), Washington (90.1%), Westmoreland (99.0%), Wythe (93.4%), York (99.0%), Bristol City (91.9%), Charlottesville City (96.2%), Chesapeake City (98.4%), Colonial Heights City (96.8%), Danville City (90.4%), Franklin City (98.5%), Fredericksburg City (95.0%), Hampton City (96.3%), Hopewell City (94.7%), Lynchburg City (92.5%), Manassas City (95.7%), Martinsville City (93.8%), Newport News City (92.6%), Petersburg City (94.7%), Portsmouth City (93.7%), Richmond City (91.6%), Roanoke City (90.7%), Staunton City (91.3%), Virginia Beach City (97.5%), Waynesboro City (94.8%), Winchester City (93.9%).

These voter registration rates are abnormally, or in the case of counties and cities with greater than 100% registration, impossibly, high. This constitutes strong evidence that Virginia's voter rolls are not being properly maintained. According to the U.S. Census Bureau, only 72.7% of the citizen voting-age population was registered nationwide in the November 2020 election. See U.S. Census Bureau, *Voting and Registration in the Election of November 2020*, Table 4a, *Reported Voting and Registration, for States: November 2020*, <https://perma.cc/7BUT-ZLDA>. Similarly, only 66.9% of the citizen voting-age population was registered nationwide in the November 2018 election. See U.S. Census Bureau, *Voting and Registration in the Election of November 2018*, Table 4a, *Reported Voting and Registration, for States: November 2018*,

<https://perma.cc/5WKB-E83G>; *see also* U.S. Census Bureau, *Historical Reported Voting Rates, Table A-3b, Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2018*, <https://perma.cc/92QM-77M6>. The U.S. Census Bureau further reported that Virginia's statewide voter registration rates for the 2020 and 2018 elections were 76% and 72% of the citizen voting-age population, respectively. *Id.* Thus, these 101 counties and cities are significant outliers, touting voter registration rates 17 to 46 percentage points higher than the national figures from 2020 and 2018, and 14 to 41 percentage points above the State figures for the same period. Discrepancies on this scale almost certainly cannot be attributed to above-average voter participation, but instead point to deficient list maintenance.

Virginia's failure to provide accurate voter rolls violates federal law, jeopardizes the integrity of the upcoming 2024 federal election, and signals to voters that elections in Virginia are not being properly safeguarded.

### III. Avoiding Litigation

The NVRA includes a private right of action, empowering any "person who is aggrieved by a violation" of the statute to bring a civil action in federal district court for declaratory or injunctive relief. 52 U.S.C. §20510(b)(1)-(2). If the violations we have identified are not corrected within 90 days of receipt of this letter, we will have no choice but to file a lawsuit. *See* 52 U.S.C. §20510(b)(2).

We hope to avoid litigation and would welcome immediate efforts by your office to bring Virginia into compliance with Section 8. We ask that you evaluate your current list maintenance procedures and protocols to identify the cause of the compliance failures discussed in this letter. We also ask that you modify your current list maintenance program to ensure that it is comprehensive, nondiscriminatory, and in compliance with federal law. Specifically, your list maintenance program must identify and remove the following categories of individuals from the official lists of eligible voters:

1. All persons who are ineligible to vote by reason of a change in residence;
2. Deceased individuals;
3. Persons who are presently incarcerated or have been convicted of a felony;
4. All other ineligible voters.

We also ask that you, and should they wish to respond separately, each named county and city, respond in writing within 45 days of the date of this letter. This response should fully describe the efforts, policies, and programs you are taking, or plan to undertake prior to the 2024 general election to bring Virginia into compliance with Section 8. This response should also note when you plan to begin and complete each specified measure and the results of any programs or activities you have already undertaken. We also ask you to advise us what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities with the federal, State, county, and city entities outlined below. Finally, we seek a description of the specific steps you intend to take to ensure routine and effective list maintenance on a continuing basis beyond the 2024 election. In order to avoid litigation, we may seek certain reasonable assurances that you will affirmatively undertake these efforts, including the execution of a settlement agreement.

Should you refuse to comply with Section 8 and thus necessitate legal action, you should be aware that the NVRA authorizes courts to award “reasonable attorney fees, including litigation expenses, and costs” to the prevailing party. 52 U.S.C. §20510(c). Therefore, if litigation ensues, you risk bearing the financial burden of the full cost of the litigation.

#### **IV. Preservation of Records**

We further ask that you take steps to preserve certain records as required under the NVRA, should they be needed in the future or for possible litigation. 52 U.S.C. §20507(i). These documents and records include, but are not limited to:

1. A copy of the most recent voter registration database for the Commonwealth of Virginia and for each named county and city, including pertinent information on each voter (name, date of birth, home address, voter activity, and active or inactive status);
2. Internal communications and emails of the Virginia Department of Elections’ office, applicable county and city boards of elections, and any divisions, bureaus, offices, third party agents, and contractors relating to voter list maintenance;
3. All emails or other communications between the Virginia Department of Elections and county and city elections officials concerning their list maintenance activities, their duties to maintain accurate and current lists, and any consequences arising from a failure to do so;
4. All email or other communications between the Virginia Department of Elections and any State or federal offices and agencies, in which the Virginia Department of Elections seeks or obtains information about registered voters who have moved, been convicted and imprisoned, died, or are otherwise ineligible, for use in list maintenance activities; and
5. All email or other communications between the Virginia Department of Elections and any other State, as well as email and communications with the Interstate Voter Registration Cross-Check Program, the Electronic Registration Information Center, the American Association of Motor Vehicle Authorities, and the National Association for Public Health Statistics and Information Systems, regarding obtaining information about voters who are deceased or who have moved for use in list maintenance activities.

We look forward to working with you in a productive fashion to ensure the accuracy and currency of Virginia’s voter rolls and to protect the integrity of its voting process. While we hope to avoid litigation, if we do not receive the requested response, and if Virginia fails to take the necessary curative steps to resolve the issues identified in this letter, you will be subject to a lawsuit seeking declaratory and injunctive relief.

We look forward to your response.

Sincerely,

/s/ Jason Torchinsky

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