



**Judicial
Watch**[®]
*Because no one
is above the law!*

April 11, 2017

VIA USPS CERTIFIED MAIL AND EMAIL

The Honorable John H. Merrill
Office of the Alabama Secretary of State
Elections Division
State Capitol Building - Suite E-208
600 Dexter Avenue
Montgomery, Alabama 36130

Re: Violations of Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507

Dear Secretary Merrill:

We write to bring your attention to violations of Section 8 of the National Voter Registration Act (“NVRA”) in Alabama. From public records obtained, ten (10) counties in Alabama have more total registered voters than adult citizens over the age of 18 living in that county as calculated by the U.S. Census Bureau’s 2011-2015 American Community Survey. This is strong circumstantial evidence that these Alabama counties are not conducting reasonable voter registration record maintenance as mandated under the NVRA.

NVRA Section 8 requires states to do reasonable list maintenance so as to maintain accurate lists of eligible voters for use in conducting federal elections.¹ As you may know, Congress enacted Section 8 of the NVRA to protect the integrity of the electoral process. Allowing the names of ineligible voters to remain on the voting rolls harms the integrity of the electoral process and undermines voter confidence in the legitimacy of elections. As the U.S. Supreme Court has stated, “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”²

This letter serves as statutory notice that Judicial Watch will bring a lawsuit against your office if you do not take specific actions to correct these violations of Section 8 within 90 days. In addition, by this letter we are asking you to produce certain records to us which you are required to make available under Section 8(i) of the NVRA.³ We hope that litigation will not be necessary to enforce either of these claims.

¹ In Alabama, responsibility to coordinate statewide NVRA Section 8 compliance lies with the Secretary of State’s Office. See Ala. Code § 17-1-3; 52 U.S.C. § 20509.

² *Crawford et al. v. Marion County Election Board*, 553 US 181, 197 (2008).

³ 52 U.S.C. § 20507(i).

Judicial Watch is a non-profit organization that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. As part of its mission, Judicial Watch is committed to the private enforcement of the NVRA, and we regularly commence and litigate NVRA lawsuits. *See Judicial Watch and True the Vote v. Husted*, Civil Action No. 2:12-cv-00792 (S.D. Oh.); *Judicial Watch, et. al v. King*, Case No. 1:12-cv-00800 (S.D. Ind.).

As the top election official in Alabama, it is your responsibility under federal law to coordinate Alabama's statewide effort to conduct a program that reasonably ensures the lists of eligible voters are accurate. The following information explains how we determined that your state is in violation of NVRA Section 8 and the remedial steps you now must take to comply with the law.

1. Ten Alabama Counties Have More Total Registered Voters Than Citizen Voting Age Population.

Based on our review of 2014 Election Assistance Commission (EAC) data, the 2011-2015 U.S. Census Bureau's American Community Survey, and the November 2014 and 2016 Alabama total voter registration records, Alabama is failing to comply with the voter registration list maintenance requirements of Section 8 of the NVRA. For example, a comparison of the five-year American Community Survey conducted by the U.S. Census Bureau and 2014 EAC data shows there were more total registered voters than there were adult citizens over the age of 18 living in each of the following 10 counties: Choctaw (registration rate 101%), Conecuh (101%), Greene (108%), Hale (104%), Lowndes (122%), Macon (106%), Marengo (103%), Perry (109%), Washington (103%), and Wilcox (108%).

This situation in Alabama has, if anything, gotten worse since the publication of that report. A comparison of the 2016 total voter registration records of these 10 counties obtained from your website with the 2011-2015 U.S. Census Bureau's American Community Survey data shows that this trend has either stayed constant or has increased. The data shows that all 10 counties have increased their total voter registrants over citizen voting age population by a greater percentage than the rate in 2014, thus only adding to the disparity. Further, each county still has more total voter registrants than citizens eligible to vote, even accounting for the U.S. Census Bureau's margin of error.

Your failure to maintain accurate, up-to-date voter registration lists has created the risk that the 2018 federal elections will lack the integrity required by federal law and by the expectations of Alabama citizens, and will therefore undermine public confidence in the electoral process.

2. The NVRA Requires You to Undertake Reasonable Efforts to Maintain Accurate Lists of Eligible Registered Voters

Under Section 8 of the NVRA, Alabama is required to undertake a uniform, nondiscriminatory voter registration list maintenance program that complies with the Voting Rights Act of 1965.⁴ Specifically, Section 8 requires states to make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters due to (A) “the death of the registrant” or (B) “a change in the residence of the registrant” to a place outside the jurisdiction in which he or she is registered.⁵ Section 8 also requires states to ensure noncitizens are not registered to vote.⁶

The list maintenance obligations of Section 8 of the NVRA were elaborated upon by the Help America Vote Act (“HAVA”), which requires states to “ensure that voter registration records in the State are accurate and updated regularly” and undertake a “system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.”⁷ HAVA also requires each state to coordinate its computerized statewide voter registration list with state agency death records.⁸ Finally, HAVA requires all states to remove convicted felons from the voter rolls if felons cannot vote under state law.⁹

As the chief state election official for Alabama, you are required to lead and direct voter list maintenance efforts in your state, and you must conduct an active oversight program to monitor local county election officials’ list maintenance activities.¹⁰ If your oversight reveals that counties have failed to adequately execute list maintenance tasks, you must either change the state’s program to ensure county compliance, or assume direct responsibility over the failing counties’ list maintenance tasks.¹¹

3. Failure to Comply with NVRA Subjects You to Lawsuits and Financial Costs

In passing the NVRA, Congress authorized a private right of action to enforce the provisions of the NVRA, including Section 8. Accordingly, Judicial Watch and others may bring a lawsuit against you under the NVRA if you fail to correct these violations within 90 days

⁴ 52 U.S.C. § 20507(b)(1).

⁵ 52 U.S.C. § 20507(a)(4).

⁶ *U.S. v. Florida*, 870 F. Supp. 2d 1346, 1351 (N.D. Fla. 2012) (“For noncitizens, the state’s duty is to maintain an accurate voting list . . . A state can and should . . . block[] a noncitizen from registering in the first place”).

⁷ 52 U.S.C. §§ 21083(a)(4) and 21083(a)(4)(A).

⁸ 52 U.S.C. § 21083(a)(2)(A)(ii)(II).

⁹ 52 U.S.C. § 21083(a)(2)(A)(ii) and (ii)(I).

¹⁰ *U.S. v. Missouri*, 535 F.3d 844, 850-851 (8th Cir. 2008).

¹¹ *U.S. v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008).

of your receipt of this letter.¹² You are receiving this letter because you are the designated chief state election official under the NVRA.

Congress also authorized awards of attorney's fees, including litigation expenses and costs, to the prevailing party.¹³ Consequently, if we initiate a lawsuit under the NVRA and the court finds you in violation, you will be responsible for paying our attorneys' fees, costs, and litigation expenses.

4. Avoiding Litigation

In order to avoid litigation, we hope you will promptly initiate efforts to comply with Section 8 so that no lawsuit will be necessary. We ask you to please respond to this letter in writing no later than 45 days from today informing us of the compliance steps you are taking. Specifically, we ask you to: (1) conduct or implement a systematic, uniform, nondiscriminatory program to remove from the list of eligible voters the names of persons who have become ineligible to vote by reason of a change in residence; and (2) conduct or implement additional routine measures to remove from the list of eligible voters the names of persons who have become ineligible to vote by reason of death, change in residence, or a disqualifying criminal conviction, and to remove noncitizens who have registered to vote unlawfully.

When you respond to this letter, please identify all the steps you are taking or plan to take in detail, and advise us of the results of those efforts or the target implementation date for each activity or program you will be undertaking. If you plan to begin taking new steps in 2017 to comply with your obligations, please outline them to us in your response, providing specific dates for completion of each activity. In order to avoid litigation, we may seek certain reasonable assurances that Alabama will affirmatively undertake the steps outlined, up to and including the execution of a settlement agreement between you and Judicial Watch. You may wish to consult Judicial Watch's recent settlement agreement with the State of Ohio for examples of certain activities which tend to show compliance with NVRA Section 8.¹⁴ You should also evaluate whether your office is communicating and coordinating effectively for list maintenance purposes with the various federal, state, and local entities listed immediately below in Section 5 of this letter.

5. Production of Records

Finally, pursuant to your obligations under the NVRA,¹⁵ please make available to us all pertinent records concerning "the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency" of Alabama's official eligible voter lists during

¹² 52 U.S.C. § 20510(b)(2).

¹³ 52 U.S.C. § 20510(c).

¹⁴ A copy of the Settlement Agreement between Judicial Watch and Ohio is available at <http://www.judicialwatch.org/wp-content/uploads/2014/01/01-14-Ohio-Voter-Rolls-Settlement.pdf>.

¹⁵ 52 U.S.C. § 20507(i).

the past 2 years. Please include these records with your response to this letter. These records should include, but are not limited to:

1. Copies of the most recent voter registration database from each Alabama county and city mentioned in this letter, including fields indicating name, date of birth, home address, most recent voter activity, and active or inactive status.
2. Copies of all email or other communications internal to the office of the Alabama Secretary of State, including any of its divisions, bureaus, offices, third party agents, or contractors, (hereinafter, collectively “Secretary’s Office”) relating to the maintenance of accurate and current voter rolls.
3. Copies of all email or other communications between the Secretary’s Office and all Alabama County voter registration officials concerning:
 - a. Instructions to the counties concerning their general list maintenance practices and obligations;
 - b. Instructions to the counties for the removal of specific noncitizens and deceased, relocated, or convicted persons identified by the Secretary’s Office; and
 - c. Notices to the counties concerning any failure to comply with their voter list maintenance obligations under Alabama’s program.
4. Copies of all email or other communications between the Secretary’s Office and the Alabama State Department of Health, the Alabama State Department of Corrections, the Alabama Department of Motor Vehicles, and the Alabama State Judiciary concerning obtaining information about deceased, relocated, convicted, or noncitizen registered voters for the purpose of updating Alabama’s voter registration lists.
5. Copies of all email or other communications between the Secretary’s Office and the U.S. Attorney(s) for Alabama, the U.S. District Court for Alabama, the U.S. Social Security Administration, the U.S. Postal Service, the U.S. Citizenship and Immigration Services, and the U.S. Department of Homeland Security concerning the National Change of Address database, the Systematic Alien Verification for Entitlements database, or any other means of obtaining information about deceased, relocated, convicted, or noncitizen registered voters for the purpose of updating Alabama’s voter registration lists.
6. Copies of all email or other communications between the Secretary’s Office and the Interstate Voter Registration Cross-Check Program, the Electronic Registration Information Center, the National Association for Public Health Statistics and Information Systems, and any other U.S. State concerning obtaining information about deceased or relocated registered voters for the purpose of updating Alabama’s voter registration lists.

Thomas J. Fitton
April 11, 2017
Page | 6

If you do not produce these records within 45 days, or if you fail to otherwise advise us that you are making them available to us at specified times and locations, you will be deemed to be in violation of the NVRA and subject to litigation.

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We hope our concerns can be resolved amicably. However, if we believe you do not intend to correct the above-identified problems, a federal lawsuit seeking declaratory and injunctive relief against you may be necessary. We look forward to receiving your prompt response.

Sincerely,

JUDICIAL WATCH, INC.



Thomas J. Fitton
President

By: U.S. Postal Service Certified Mail and Email

cc: Robert D. Popper, Esq., Judicial Watch; Choctaw County Board of Registrars; Conecuh County Board of Registrars; Greene County Board of Registrars; Hale County Board of Registrars; Lowndes County Board of Registrars; Macon County Board of Registrars; Marengo County Board of Registrars; Perry County Board of Registrars; Washington County Board of Registrars; Wilcox County Board of Registrars