



February 23, 2015

Via Email

Ms. Patty Hansen  
Coconino County Recorder  
110 East Cherry Avenue  
Flagstaff, AZ 86001-4696  
ccelelections@coconino.az.gov

Dear Ms. Hansen:

As you are aware, the Fair Elections Legal Network (FELN) and Project Vote have an ongoing project to examine the use of the Interstate Cross Check Program (“the Program”) across the country. Following the addition of a state to the Program, we have conducted outreach to election officials to ascertain the processes in place to utilize the list of potential “matches” in list maintenance activities. Following our outreach to your office, you requested that we provide any insight that we have gained based on this project. The following recommendations are for localities that wish to participate in the Program.

**Data Matching Programs**

It should be noted at the outset that both FELN and Project Vote are opposed to the use of the Program to conduct list maintenance activities. Our research and independent evidence has shown that the Program routinely misidentifies voters as having moved to another state.

The standard procedure for identifying a match in the Program compares only first name, last name, and date of birth. Statistical research demonstrates that many individuals share these data points, which increases the difficulty of precise list matching procedures. One prominent example that illustrates the difficulty of relying upon a match of minimum categories is the purging of Florida Governor Rick Scott from the voter rolls in 2006 due to a mistaken belief that he was dead. Another Rick Scott with the same date of birth died, resulting in a “match” of death records to Governor Scott’s voter record.<sup>1</sup>

Interstate matching programs in recent years have shown that as a result of these minimum standards and problems inherent to state-to-state matching, the inclusion of a voter on the Program’s “match” list is not conclusive evidence that a registration should be cancelled. Numerous states have had large numbers of voters who were incorrectly purged from their rolls following a “match” from the Program. Kansas, the jurisdiction which spearheads the Program, issued modified instructions in 2010 to ensure voters identified through their program were not illegally removed by local Kansas election officials after their potential National Voter

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<sup>1</sup> Lloyd Dunkelberger, *Elections Officials Told Rick Scott he was Dead and Couldn’t Vote*, Herald-Tribune (June 14, 2012), <http://politics.heraldtribune.com/2012/06/14/scott-mistakenly-declared-dead-on-voting-rolls/>.

Registration Act (NVRA) violations were brought to their attention.<sup>2</sup> More recently, Chesterfield County, Virginia, found a 17 percent error rate among active voters on their matches from the Program.<sup>3</sup> Additionally, Ada County, Idaho had to reinstate more than 750 voters due to a faulty match using only name and birthdate through the Program.<sup>4</sup>

As a result of the mounting evidence that the Program does not provide reliable information for voters who should be removed, numerous states have failed to utilize the data for list maintenance, such as Georgia, or have ended their participation in the Program. Florida, Oregon, and Washington have all recently left the Program, with a spokesperson for the Oregon Secretary of State's office stating, "We left because the data we received was unreliable."<sup>5</sup>

Careful examination of voter rolls to ensure accurate lists are a necessary and admirable goal, but it must be completed in a careful and thorough process to ensure the rights of voters are protected. In light of evidence showing the faulty nature of data from the Program, we recommend that any changes to Arizona's Election Procedures Manual include a disclaimer against using the data received as evidence warranting a voter's removal from the rolls.

We generally have concerns about errors inherent in state-to-state matching programs. However, these concerns are mitigated where the program requires numerous data fields to be matched, improving accuracy, and where it follows the NVRA's list maintenance removal notification process described below. One preferable alternative to the Program for election officials who believe they should compare voter lists across state lines may be the Electronic Registration Information Center, or ERIC. ERIC is governed and managed by states who choose to join, and was formed in 2012 with assistance from The Pew Charitable Trusts. ERIC participants are required to follow the NVRA as part of their processes. In addition to matching numerous data fields from multiple data sources, ERIC demands members to also take affirmative steps to identify and make registration available to eligible but unregistered persons. Nonetheless, when identifying voters for potential removal using matching techniques, states should exercise caution where their actions involve Americans' constitutionally-protected right to vote.

### **Applicable Law**

If the Program remains in use in Arizona, we recommend that the state alter its section regarding Duplicate Matches from other state records in the Arizona Election Procedures Manual to include both Kansas' recommended procedures for use of the Program and federal law.

Under Section 8(d) of the NVRA, 52 U.S.C. § 20507(d), there is no right to cancel a voter based on a match of any kind. That section provides two methods for canceling a registration based on change in residence: (A) the voter confirms in writing that he or she has changed residences

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<sup>2</sup> See Attachment.

<sup>3</sup> Jim Nolan, *Chesterfield Registrar Delays Purge of Voter Rolls*, Richmond Times-Dispatch (Oct. 9, 2013), [http://www.richmond.com/news/local/chesterfield/article\\_162e36b5-0be7-5dc8-af9f-48876a167b43.html](http://www.richmond.com/news/local/chesterfield/article_162e36b5-0be7-5dc8-af9f-48876a167b43.html).

<sup>4</sup> Cynthia Sewell, *Ada County Mistakenly Revokes 765 Voter Registrations*, Idaho Statesman (Aug. 29, 2014), [http://www.idahostatesman.com/2014/08/29/3346833\\_ada-mistakenly-revokes-765-voter.html?rh=1](http://www.idahostatesman.com/2014/08/29/3346833_ada-mistakenly-revokes-765-voter.html?rh=1).

<sup>5</sup> John Greenberg and Amy Sherman, *Florida No Longer Part of Controversial National Voter Data Project*, Miami Herald (April 11, 2014), <http://miamiherald.typepad.com/nakedpolitics/2014/04/florida-no-longer-part-of-controversial-national-voter-data-project.html>.

outside the jurisdiction, and (B) the voter has failed to respond to the forwardable confirmation notice described in subsection (2) of the section, and also has failed to vote in any election in a time period running from the date of the notice to the day *after* the second consecutive federal general election.

List matching projects including the Program do not constitute a confirmation from the voter in writing that they have moved.<sup>6</sup> At most, matches from the Program reflect the presence on a list of a registered person in one state at one time with the same last name, first name, and date of birth as a registered voter in Arizona. Therefore, FELN and Project Vote urge Arizona to formalize the NVRA notice and removal procedures in the Election Procedures Manual to ensure federal law is followed and eligible voters are not incorrectly purged.

According to the most recent research conducted by Project Vote and FELN, examples of states that use the Program to send out confirmation notices include Tennessee, Kansas, Virginia, and Iowa.

The procedures should also be clarified to be limited in time to the permissible period for systematic list maintenance under federal law. The NVRA also 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 an election. *Id.* § 20507(c)(2). Any removal of voters for alleged ineligibility during this 90-day period must be based “upon individualized information or investigation.”<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup>

This provision applies equally to all federal elections, including primaries, special elections, and runoffs.

## **Recommendations**

If Arizona continues to use the Program, it should be implemented in the following manner:

- “Matches” provided by the Program should be treated as a non-match if any field provided for the other state is not identical to the field in Arizona. For example, John L. Smith and John M. Smith should be treated as a non-match, and no further action should be taken on the record.

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<sup>6</sup> For example, after comparing lists with Tennessee and South Carolina in 2006 and removing 8,000 voters without notice, Kentucky was ordered by a court to restore all 8,000 voters to the rolls, because the matches did not amount to a request from the voter to be removed. *Commonwealth Atty. Gen. v. Commonwealth State Bd. of Elections*, Case No. 06-CI-610 (Ky. Franklin Cir. Ct. Oct. 2, 2006), *available at* [http://moritzlaw.osu.edu/electionlaw/litigation/documents/KY\\_Order.pdf](http://moritzlaw.osu.edu/electionlaw/litigation/documents/KY_Order.pdf).

<sup>7</sup> *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014) *rehearing en banc denied* No. 12-15738-EE (11th Cir. Dec. 4, 2014).

<sup>8</sup> *See id.* at 1348.

<sup>9</sup> *Id.* at 1343-1348.

- Due to the high likelihood of false positives, Arizona should not take further action in the absence of a match of the last four digits of the Social Security number.
- For remaining matches, the appropriate procedure would be to send to the last known address of the Arizona registered voter on the list a forwardable confirmation notice that meets the requirements of Section 8(d) of the NVRA.
- If the registered voter responds to the 8(d) notice, updates may be made consistent with the response.
- If the registered voter does not respond to the notice, the voter should not be cancelled until the person has both failed to respond and failed to vote in the time period running from the date of the notice to the day *after* the second consecutive federal general election.
- Recorders and the state must complete their use of the Program by 90 days prior to any federal election, including primaries, special elections, and runoffs.

Federal law recognizes and reflects the difficulty of systematic list maintenance activities and has provided protections to ensure eligible voters are protected from improper purging due to faulty data. Formalizing NVRA procedures in the Arizona Election Procedures Manual would ensure eligible voters in Arizona are not subject to improper removal or delay at the polling place due to incorrectly purged voters presenting to vote.

We look forward to reading the revised Election Procedures Manual and working with you to protect the rights of voters across Arizona.

Sincerely,



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Courtney Mills  
Staff Attorney  
Fair Elections Legal Network  
1825 K Street NW  
Suite 450  
Washington, D.C. 20006  
(202) 331-0114  
cmills@fairelectionsnetwork.com



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Michelle E. Kanter Cohen  
Election Counsel  
Project Vote  
805 15th Street NW  
Suite 250  
Washington, D.C. 20005  
(202) 546-4173 x 309  
mkantercohen@projectvote.org