



January 26, 2022

James A. Kus
County Clerk/Registrar of Voters
Fresno County
2221 Kern Street
Fresno, CA 93721
Transmitted by email

**Re: Judicial Watch November 16, 2021 Letter
Records Request Pursuant to 52 U.S.C. § 20507(i) & Cal. Gov. Code § 6250 et seq**

Dear Mr. Kus:

On behalf of the undersigned voting rights organizations, we write both to express concern and offer assistance regarding a recent letter, sent to you by Judicial Watch, threatening your county with legal action for purported violations of Section 8 of the National Voter Registration Act (“NVRA”) with respect to “list maintenance” activities. We also request all records provided to Judicial Watch in response to its letter and all records related to any list maintenance activities your office has conducted in response to the letter.

As you know as an election administrator, regular and responsible list maintenance is of course important to accurate voter registration rolls. However, Judicial Watch has an unfortunate history of using flawed methodology and threats of litigation in attempts to force jurisdictions to aggressively purge voter registration rolls.¹ Any such purge in your jurisdiction—particularly absent safeguards such as additional voter contacts—would risk

¹ For example, at the end of 2019, Judicial Watch sent similar NVRA notice letters to 19 local jurisdictions across the country, based on a rudimentary comparison between U.S. Census Bureau data and county election statistics purporting to show that voter registration rates were unrealistically high. This deeply flawed methodology was rejected as “misleading” by the U.S. Court of Appeals for the Eleventh Circuit. *Bellitto v. Snipes*, 935 F.3d 1192, 1208 (11th Cir. 2019).

disenfranchising eligible voters and may itself violate Section 8 of the NVRA, which mandates important protections for voters as states and localities perform their list maintenance activities.

Judicial Watch's 2021 letter to Fresno County is one of 18 nearly identical letters sent to jurisdictions in California, New York, Oregon, Illinois, and Arkansas.² While Judicial Watch's letter purports to identify an NVRA violation based solely on small numbers of reported removals under *one category* in the Election Assistance Commission's Election Administration and Voting Survey (EAVS), we write to remind you that states are only required to conduct a "reasonable" list maintenance program. And states have considerable leeway in determining the best means to do so. 52 U.S.C. § 20507(a)(4); *see also Bellitto*, 935 F.3d at 1205 ("While the statute requires a general program of list maintenance that makes a 'reasonable effort' to remove voters who become ineligible because of change of residence or death, it does not define what a 'reasonable effort' entails.").

We are concerned that Judicial Watch's letter could be intended to bully or induce your county and others into undertaking action to institute unnecessary and potentially unlawful voter purge programs that could result in the removal of eligible voters from the rolls. We are also concerned that such voter purge programs may have a disproportionate effect on African Americans, Latinos, Asian Americans, students, voters with disabilities, military voters, and other marginalized communities.

The primary purpose behind the NVRA is to "*increase* the number of eligible citizens who register to vote." 52 U.S.C. §§ 20501(b)(1) (emphasis added). The NVRA further seeks to "enhance[] the participation of eligible citizens as voters." 52 U.S.C. §§ 20501(b)(2). This critical federal law sets forth a framework that allows states to conduct responsible list maintenance activities while promoting those purposes. The NVRA framework includes procedures that would reduce the chance that citizens eligible to vote will be removed from the rolls. For example, the NVRA restricts who can be removed and on what grounds, requires notice and a waiting period before certain removals, and blocks certain removals during the period before an election. *See* 52 U.S.C. § 20507.

Even if your office concludes that additional list maintenance activity under the NVRA is permissible and appropriate, we urge you to take additional precautions to mitigate harm to voters. A voter's non-response to a notice from your office and lack of voting activity for two election cycles is a poor proxy for ineligibility to vote.³ And removals on this basis have disproportionately affected voters with disabilities, veterans, students, minorities, and low-income voters. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1864 (2018). Your office can mitigate the potential disenfranchisement of these voters by engaging in additional attempts to communicate with them prior to their removal. In doing so, your office should

² *See* Judicial Watch, November 2021 NVRA Letters, <https://www.judicialwatch.org/documents/tags/november-2021-nvra-letters/page/2/>.

³ *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1856, 201 L. Ed. 2d 141 (2018) (Breyer, J., dissenting) ("Very few registered voters move outside of their county of registration. But many registered voters fail to vote. Most registered voters who fail to vote also fail to respond to the State's 'last chance' notice. And the number of registered voters who both fail to vote and fail to respond to the 'last chance' notice exceeds the number of registered voters who move outside of their county each year.").

attempt to reach voters by email and phone, in addition to traditional mail. Such direct contacts are more likely to succeed than traditional mail notifications.⁴

Accordingly, we offer our assistance to Fresno County in its efforts to maintain clean and accurate voter rolls in a lawful and equitable manner. Please do not hesitate to reach out to us at the contact information listed below if we can be of service.

RECORDS REQUEST

Finally, pursuant to 52 U.S.C. § 20507(i) and Cal. Gov. Code § 6250 et seq, we formally request that all records provided to Judicial Watch in connection with its 2021 NVRA notice letter, all correspondence with Judicial Watch concerning the issues raised in its letter, and all correspondence with the California Secretary of State's office related to the Judicial Watch 2021 NVRA notice letter be provided to us. We also request all records pertaining to any changes to list maintenance activities related to Judicial Watch's NVRA notice letter, including lists of voters, if any, who were removed from the rolls. Please send the documents to Lori Shellenberger, Consulting Counsel, at lshellenberger@mac.com. If there are any associated fees, please let us know in advance.

Localities should always be thoughtful and careful when performing list maintenance activities. Efforts that are too aggressive or undertaken without basis risk violating federal law and disenfranchising eligible voters. We stand at the ready to assist you to uphold federal law and protect the voting rights of the eligible citizens in your jurisdiction.

Respectfully submitted,

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ACLU Foundation of Northern California
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Common Cause and California Common Cause
Fair Elections Center
Lawyers' Committee for Civil Rights Under Law
League of Women Voters of California

⁴ See, e.g., Signature Matching and Mail Ballots: Safeguards to Ensure That Every Vote Counts, Campaign Legal Center (Sept. 16, 2020), <https://campaignlegal.org/update/signature-matching-and-mail-ballots-safeguards-ensure-every-vote-counts> (explaining that phone communications are far more successful than mail in confirming mismatched signatures on mail-in ballots).

Cc: Dr. Shirley N. Weber
California Secretary of State

Steve Reyes
Chief Counsel
California Secretary of State