



September 30, 2024

VIA EMAIL

Dear Ohio Election Officials:

Campaign Legal Center (CLC) writes to provide you with information and recommendations regarding how Ohio's county boards of elections and precinct election officials can best adjudicate frivolous challenges to voter eligibility to minimize the burden on election administrators and protect the rights of voters, including important guidance on limitations imposed by federal law.<sup>1</sup> Such guidance will help to limit the disruption of frivolous challenges to election administration and protect Ohio voters from harassment and intimidation.

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis, and public education. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive, and accountable government. Consistent with that mission, we have worked with election officials across the nation to improve their administrative policies, protect the freedom to vote of citizens within their jurisdictions, and strengthen the democratic process.

To that end, CLC is concerned about the potential for frivolous mass eligibility challenges during the upcoming election, which have become increasingly common throughout the country.<sup>2</sup> In recent election cycles, partisan actors have relied on faulty databases to bring hundreds of thousands of challenges to voter eligibility across the nation.<sup>3</sup> These databases attempt to match voter registration records with publicly available information, but that information is almost always incomplete or out of date, making the database matches unreliable.<sup>4</sup> They also often improperly flag registered voters with the same name as ineligible individuals, voters who are temporarily staying in another place but remain qualified at the address at which they are registered, and households where some but not all residents have moved.<sup>5</sup> As a result, mass challenge lists almost always include significant numbers of eligible voters who should not be removed from the rolls.<sup>6</sup>

Mass eligibility challenges organized by partisan challengers and submitted with insufficient evidence risk disenfranchising eligible voters and causing unnecessary

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<sup>1</sup> This letter is not legal advice; it is intended to present a summary of relevant Ohio and federal law.

<sup>2</sup> See, e.g., Alexandra Berzon & Nick Corasaniti, *Trump's Allies Ramp Up Campaign Targeting Voter Rolls*, N.Y. Times (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html> (noting the recent wave of voter eligibility challenges in states such as Georgia, Michigan, and Nevada); David Gilbert, *Election Deniers are Ramping Up Efforts to Disenfranchise Voters*, Wired (Jul. 31, 2024), <https://www.wired.com/story/election-deniers-efforts-disenfranchise-voters>.

<sup>3</sup> See Robyn Sanders & Alice Clapman, *Protections Against Mass Challenges*, Brennan Ctr. for Just. (July 17, 2024), <https://www.brennancenter.org/our-work/research-reports/protections-against-mass-challenges-voter-eligibility>. One common database is Eagle AI, which experts have criticized for its frequent identification of eligible voters as ineligible. See Alice Clapman & Andrew Garber, *A New Antidemocracy Tool*, Brennan Ctr. for Just. (Sept. 5, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-antidemocracy-tool>.

<sup>4</sup> See Sanders & Clapman, *supra*, note 3.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

disruption to the orderly administration of the 2024 elections.<sup>7</sup> We recognize that many election offices have lost their most experienced officials because of threats and volatility in the wake of the 2020 election and that this will be the first presidential election for new staff. CLC is concerned about precinct election officials who may not be properly trained on how to address such eligibility challenges, which could cause needless confusion at polling locations, particularly with a large number of new and first-time poll workers this year.<sup>8</sup> We hope this letter will assist county boards as they provide guidance to their staff and volunteers regarding the rules for voter challenges and their responsibilities in dismissing challenges lodged without cause, allowing county election offices to ensure a fair and orderly election and safeguard voters from intimidation.

To mitigate the potential harms to both voters and county boards of elections caused by baseless or otherwise improper challenges, and to eliminate the potential for confusion at the polls, CLC provides the election law summary below for county boards to make sure they are apprised of the law regarding challenges, and to ensure that it is properly communicated to polling location managers. The Secretary of State's *Election Official Manual* provides a comprehensive explanation of these laws and procedures,<sup>9</sup> and this letter aims to highlight those areas that are of particular relevance to concerns about voter eligibility challenges.

## **I. Challenges to Voter Eligibility**

As you are likely aware, there are two avenues for challenges to voter eligibility under Ohio election law: a challenge to the right to vote made by any registered voter prior to the election, and a challenge to the right to vote made by a precinct election official at the polls.<sup>10</sup> Such challenges are subject to various limitations, which we have detailed further below.

### **A. Pre-election challenges by any registered voter**

The timeframe for pre-election challenges by any registered voter ends no later than 30 days prior to an election, which is October 6, 2024 for this year's general election.<sup>11</sup> These challenges must be filed with the relevant county board of election either in person or by mail.<sup>12</sup> **If county boards of elections receive any such challenges after October 6, 2024, they should be rejected as untimely and invalid.**

After a challenge is filed under this section, the board is required to review its own records "promptly."<sup>13</sup> If the challenger is not a valid Ohio voter, the claim must be denied.<sup>14</sup> The challenger must use Secretary of State Form 257 to state the reason for the challenge, and the form can only be accepted if the challenger affirms under penalty of election falsification that the challenge is true based on personal knowledge, information, or belief; otherwise, the challenge must also be denied.<sup>15</sup> Making a knowingly false statement on the challenge form is a felony and can subject the challenger to incarceration and fines.<sup>16</sup>

If the board has sufficient records to decide the challenge based on the board's records alone, the county's board of elections is required to immediately vote to grant or deny

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<sup>7</sup> See Alan Miller, *More than 2,000 people could be removed from Licking County voter rolls, 'Election Integrity Network' offers help with cleanup*, Reporting Project (June 12, 2022), <https://www.thereportingproject.org/more-than-2000-people-could-be-removed-from-licking-county-voter-rolls-election-integrity-network-offers-help-with-cleanup>.

<sup>8</sup> See Kennedy Chase, *Poll workers in need for the primary election*, Spectrum News 1 (Feb. 20, 2024), <https://spectrumnews1.com/oh/columbus/news/2024/02/20/poll-workers-needed-election-primary>.

<sup>9</sup> *Election Official Manual*, Ohio Sec'y of State (Dec. 20, 2023), [https://www.ohiosos.gov/globalassets/elections/directives/2023/eom/eom\\_fullversion\\_2023-12.pdf](https://www.ohiosos.gov/globalassets/elections/directives/2023/eom/eom_fullversion_2023-12.pdf).

<sup>10</sup> Ohio Rev. Code Ann. §§ 3503.24; 3505.20.

<sup>11</sup> *Id.* § 3503.24(A).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See *Election Official Manual*, *supra* note 9, at 131.

<sup>15</sup> Ohio Rev. Code Ann. § 3503.24(A). See *Election Official Manual*, *supra* note 9, at 130.

<sup>16</sup> See Ohio Rev. Code Ann. §§ 3503.24(A), 3599.36 (defining election falsification), 2929.14 (setting terms of incarceration for felony sentences).

the challenge.<sup>17</sup> If the director and the deputy director review the challenge and believe that, “even if proven to be true, the reasons alleged would not be sufficient to grant the challenge,” the challenge must be denied.<sup>18</sup> If the director and deputy director disagree, it must be decided by a vote of the board.<sup>19</sup>

According to guidance from the Secretary of State, **several common grounds for mass challenges are, on their own, insufficient bases for granting a challenge.** These insufficient grounds include: (1) returned mail, including mail sent by election officials or by private individuals, or a change of address on file in the USPS’s NCOA database, (2) evidence of a foreclosure action, (3) and the voter’s confirmation status being listed as “inactive” or “active-confirmation” in the Statewide Voter Registration Database.<sup>20</sup> **Challenges made on these bases alone must be summarily rejected.**

If the board is not able to determine the challenge based on its records alone, the director must set a time and date for a hearing before the board.<sup>21</sup> The hearing must be held and the decision on the challenge made within 10 days of the challenge being received.<sup>22</sup>

**The challenged voter must be notified by the director in writing of the time and date of the hearing, as well as their right to appear and testify, to call witnesses, and be represented by counsel.**<sup>23</sup> The Secretary of State has instructed that this notice must be sent by first class mail no later than 6 days prior to the hearing.<sup>24</sup>

The board must issue subpoenas to witnesses to appear and testify at the request of the challenged voter, the challenger, or any board member.<sup>25</sup> All witnesses must testify under oath.<sup>26</sup> The board must make a decision immediately following the hearing, and the challenged voter’s name must remain on the rolls if the challenge is denied.<sup>27</sup> If the challenge is granted, the voter must be removed from the list.<sup>28</sup> If the notice mailed to the challenged voter was not returned undeliverable and the person did not show up to the hearing in person, the board must notify the challenged voter of their removal by mail.<sup>29</sup>

#### B. Challenges at polling places by precinct election officials

The second way in which a registered voter’s eligibility to vote may be challenged is by a precinct election official at the polling location on the day of voting.<sup>30</sup> Such challenges may *only* be raised by a precinct election official who believes that a voter is ineligible.<sup>31</sup> **Any challenge to a registered voter’s eligibility at a polling location on Election Day or during early voting that is made by anyone other than a precinct election official should be rejected as not permitted under Ohio election law.**<sup>32</sup>

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<sup>17</sup> *Id.* § 3503.24(B).

<sup>18</sup> *Election Official Manual, supra* note 9, at 131.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 132.

<sup>21</sup> Ohio Rev. Code Ann. § 3503.24(B); *see Election Official Manual, supra* note 9, at 131.

<sup>22</sup> Ohio Rev. Code Ann. § 3503.24(B).

<sup>23</sup> *Id.*

<sup>24</sup> *See Election Official Manual, supra* note 9, at 131.

<sup>25</sup> *Id.*; *see also* Ohio Rev. Code Ann. § 3503.24(B).

<sup>26</sup> *Election Official Manual, supra* note 9, at 132.

<sup>27</sup> Ohio Rev. Code Ann. § 3503.24(B); *see Election Official Manual, supra* note 9, at 132.

<sup>28</sup> Ohio Rev. Code Ann. § 3503.24(C); *see Election Official Manual, supra* note 9, at 132.

<sup>29</sup> *Id.*

<sup>30</sup> Ohio Rev. Code Ann. § 3505.20.

<sup>31</sup> *See id.*; *Election Official Manual, supra* note 9, at 272-75. As you know, precinct election officials are appointed by the board of elections, and there are typically four precinct election officials per precinct. Ohio Rev. Code Ann. § 3501.22(A)(1). No more than half of the precinct election officials may be of the same political party. *Id.* One precinct election official of the dominant political party is designated by the Board as the voting location manager. *Id.* Only these properly appointed precinct election officials may challenge the eligibility of a voter by following the official form; observers may not do so. *Election Official Manual, supra* note 9, at 272-75.

<sup>32</sup> *See id.*

If a voter's eligibility is properly challenged by a precinct election official, but the board of elections has already ruled on the question presented in the challenge as a result of a challenge filed at least 30 days prior to the election, the ruling of the board is final.<sup>33</sup> If there has been no prior ruling on the question presented in the challenge by a precinct election official, the voting location manager shall evaluate the challenge using the following legal process.<sup>34</sup>

There are four bases on which a precinct election official may challenge the eligibility of a person registered to vote: A) citizenship; B) Ohio residency; C) precinct residency; and D) age.<sup>35</sup> **Challenges made on any other ground are invalid on their face and must be summarily rejected.**<sup>36</sup>

For each ground on which a voter's eligibility can be challenged, the law provides a series of questions that the voting location manager must ask the challenged voter.<sup>37</sup> The challenged voter should also be directed to fill out an Affidavit Oath Examination of Person Challenged (Form 10-U).<sup>38</sup> **If the challenged voter fills out Form 10-U and the voter's answers on that form indicate that they are eligible to vote, they are entitled to vote a regular ballot.**<sup>39</sup> A challenged voter may only be required to vote a provisional ballot if a majority of precinct election officials is unable to determine the challenged voter's eligibility or the voter refuses to fill out Form 10-U.<sup>40</sup>

Voters challenged on the basis of citizenship cannot be required to present additional documentation of their U.S. citizenship beyond the affirmation in Form 10-U, nor may election officials ask the challenged voter where they were born or whether they were born a U.S. citizen or later naturalized.<sup>41</sup>

If the challenged voter is at the incorrect polling location, the precinct election officials must direct them to the correct polling location.<sup>42</sup> If the voter refuses to go to the appropriate polling location or the precinct officials cannot determine the correct location, the person should be given a provisional ballot.<sup>43</sup>

If the challenged voter cannot answer the questions that are asked or refuses to sign their name to the form offered by the location manager, they should be given a provisional ballot.<sup>44</sup>

As you are aware, and as the Election Official Manual makes clear, the circumstances in which a voter's eligibility may be challenged at a polling location are limited, the ability to challenge is restricted to precinct election officials, and the bar for determining that a voter is ineligible is high.

## II. Other Legal Requirements

As you know, both federal and Ohio law provide robust protection against voter intimidation and other forms of infringement on the fundamental right to vote. The process for responding to voter challenges—especially those conducted in bulk—must therefore comply with all federal and state laws, as well as the U.S. Constitution. As such, all Ohio election officials have the responsibility to protect Ohio voters from

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<sup>33</sup> Ohio Rev. Code Ann. § 3505.20.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; see also *Election Official Manual*, *supra* note 9, at 272.

<sup>36</sup> *See id.*

<sup>37</sup> *See* Ohio Rev. Code Ann. § 3505.20.

<sup>38</sup> Ohio Sec'y of State, *Form No. 10-U Prescribed by Secretary of State (08-17)*, <https://www.ohiosos.gov/globalassets/elections/forms/10-U.pdf>.

<sup>39</sup> *Id.* § 3505.181(C)(2); *Election Official Manual*, *supra* note 9, at 272. This determination is made by a majority vote of precinct election officials. *Id.*

<sup>40</sup> Ohio Rev. Code Ann. § 3505.181(C)(2); *Election Official Manual*, *supra* note 9, at 272.

<sup>41</sup> *See* *Boustani v. Blackwell*, 460 F.Supp. 2d 822, 827 (N.D. Ohio 2006) (finding Ohio Rev. Code § 3505.20(A)(2)-(4) invalid and barring their enforcement because they violate the First and Fourteenth Amendments of the U.S. by imposing an undue burden on the fundamental right to vote and giving disparate treatment to naturalized U.S. citizens).

<sup>42</sup> Ohio Rev. Code Ann. § 3505.181(C)(1).

<sup>43</sup> *Id.* § 3505.181(C)(2).

<sup>44</sup> *Id.*

baseless and discriminatory challenges and ensure that the adjudication of all voter challenges complies with both state and federal law.

#### A. Racially Discriminatory Challenges

Organized challengers frequently target voters from historically disenfranchised communities in an attempt to intimidate or deter members of those communities from voting.<sup>45</sup> Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment<sup>46</sup> and Section 2 of the Voting Rights Act<sup>47</sup> prohibit the use of voting practices that result in citizens being denied equal access to the democratic process on account of “race, color, or membership in a language minority group.”<sup>48</sup> Because these are often the exact groups targeted by mass challenges, clerks and other local elections officials should consider carefully whether granting mass challenges brought before them would have the effect of unlawfully disadvantaging voters because of their race.

#### B. Voter Intimidation

Baseless mass challenges to voter eligibility could constitute voter intimidation, because such challenges are often made in bad faith to deter eligible citizens—including members of historically disenfranchised groups—from voting. Such voter intimidation is illegal under both federal and Ohio law.

Federal law provides that anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote” in a federal election has committed a federal crime.<sup>49</sup> Additionally, several federal statutes impose civil liability for voter intimidation. Section 11(b) of the Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or aiding any person to vote or attempt to vote.”<sup>50</sup> In 2016, a federal court determined that voter challenges that intentionally target geographic areas with a large percentage of racial or ethnic minorities and that had the purpose or effect of deterring qualified members of those minority groups from voting violated a court order in a case involving claims under Section 11(b).<sup>51</sup> Further, the U.S. Department of Justice has cautioned that challenges made with the intention of or that have the effect of intimidating a reasonable voter can violate Section 11(b).<sup>52</sup> And the Ku Klux Klan Act of 1871 makes it unlawful for “two or more persons to conspire to prevent by force, intimidation, or threat,” any voter from casting a ballot for the candidate of their choice.<sup>53</sup>

Similarly, Ohio law criminalizes the use of “force, fraud, or other improper means, [to] obtain or attempt to obtain possession of the ballots, ballot boxes, or pollbooks,” “recklessly destroy[ing] any property used in the conduct of elections,” any “[a]ttempt to intimidate an election officer or prevent an election official from performing the official’s duties,” or “loiter[ing] in or about a registration or polling place during registration or the casting and counting of ballots so as to hinder, delay, or interfere with the conduct of the registration or election.”<sup>54</sup> Accordingly, election officials should

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<sup>45</sup> See, e.g., Nicolas Riley, *Voter Challenges*, Brennan Ctr. for Just., 11-12 (2012), [https://www.brennancenter.org/sites/default/files/legacy/publications/Voter\\_Challengers.pdf](https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf).

<sup>46</sup> U.S. Const. amend XIV, § 1.

<sup>47</sup> 52 U.S.C. 10301.

<sup>48</sup> See U.S. Dept. of Justice, *Guidance Under Section 2 of the Voting Rights Act*, 52 U.S.C. § 10301, for Redistricting and Methods of Electing Government Bodies (Sept. 1, 2021), <https://www.justice.gov/opa/press-release/file/1429486/download>.

<sup>49</sup> 18 U.S.C. § 594

<sup>50</sup> 52 U.S.C. § 10307(b)

<sup>51</sup> See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. CV 81-03876, 2016 WL 6584915, at \*2 (D.N.J. Nov. 5, 2016).

<sup>52</sup> See *Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act*, 52 U.S.C. § 20507, U.S. Dept. of Justice (Sept. 2024), <https://www.justice.gov/crt/media/1366561/dl> [hereinafter “DOJ Guidance”].

<sup>53</sup> 42 U.S.C. § 1985(3).

<sup>54</sup> Ohio Rev. Code Ann. § 3599.24.

be aware that challenges at polling locations by persons other than precinct election officials, may be considered voter intimidation in violation of federal and Ohio law.

To that end, we encourage you and the county boards of election to review the relevant laws and standards defining voter intimidation and promptly report any incidents of voter intimidation to the Ohio Attorney General's Office and the U.S. Department of Justice (DOJ).<sup>55</sup>

### C. Uniform and Nondiscriminatory Standards

The U.S. Constitution and federal law require that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter eligibility challenges.<sup>56</sup> Under the U.S. Constitution, counties in the same state are prohibited from “us[ing] varying standards to determine what [i]s a legal vote” when processing ballots in presidential elections.<sup>57</sup> Similarly, the National Voter Registration Act (NVRA) mandates that any voter registration list maintenance activity be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act[.]”<sup>58</sup> including “any list maintenance activity based on third party submissions.”<sup>59</sup> The U.S. Department of Justice has advised that numerous list maintenance methods commonly used in mass voter eligibility challenges might violate the NVRA, including “comparing voter files to outdated or inaccurate records or databases, taking action that erroneously affects a particular class of voters (such as newly naturalized citizens), or matching records based solely on first name, last name, and date of birth.”<sup>60</sup>

The NVRA further mandates that election officials may not “systematically remove” ineligible voters from voter registration rolls within 90 days preceding an election for federal office.<sup>61</sup> According to the U.S. Department of Justice, this restriction “applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process.”<sup>62</sup>

Ohio election officials should work to eliminate any meaningful divergence in the standards and processes used to evaluate voter challenges in different municipalities and replace them with uniform standards and processes. By doing so, Ohio's voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the U.S. Constitution.<sup>63</sup>

### D. Removals Based on Change of Address

The NVRA strictly regulates the process for removing a registered voter from the voter registration rolls based on suspected change of address, including when removals are triggered by mass voter eligibility challenges.<sup>64</sup> Election officials may only remove a voter from the list of registered voters based on change in residence when: (1) the voter confirms in writing that they have moved outside of the jurisdiction; or (2) election officials have satisfied the process outlined in Section 8(d)(2) of the NVRA.<sup>65</sup> The United States Department of Justice has cautioned that “[a] third-party submission—

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<sup>55</sup> The DOJ Civil Rights Division Voting Section can be reached at 800-253-3931, and voter intimidation reports can be submitted online at <https://civilrights.justice.gov/report>. More information on DOJ's resources to protect voting access can be found at <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote>.

<sup>56</sup> See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (finding that the lack of uniform standards across counties for when to count a ballot violates the Constitution's Equal Protection Clause).

<sup>57</sup> *Id.* at 107.

<sup>58</sup> 52 U.S.C. § 20507(b).

<sup>59</sup> DOJ Guidance at 3.

<sup>60</sup> *Id.*

<sup>61</sup> 52 U.S.C. § 20507(b)(1).

<sup>62</sup> DOJ Guidance at 4.

<sup>63</sup> *Bush*, 531 U.S. at 104-05.

<sup>64</sup> See 52 U.S.C. § 20507(b); DOJ Guidance at 4-6.

<sup>65</sup> See 52 U.S.C. § 20507(b)-(d); DOJ Guidance at 4. The DOJ Guidance also provides detailed information on the requirements of Section 8(d)(2). Election officials may only remove a voter under Section 8(d)(2) of the NVRA if that voter: (1) does not vote in any election between the date the notice was sent and the second general election following the notice; and (2) does not respond to the notice. 52 U.S.C. § 20507(d)(2).

such as a submission of another individual’s information via an online portal or a challenge based solely on public database information—is not confirmation by the registrant of a change of address.”<sup>66</sup> Consequently, **removing individuals from the list of registered voters due to suspected change of address on the basis of mass voter eligibility challenges alone likely violates the NVRA.**<sup>67</sup>

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By ensuring compliance with the processes, requirements, and limitations of Ohio’s voter challenge laws, you can mitigate the potential harm and disruption caused by frivolous voter eligibility challenges. Our hope is that this summary of the relevant law will help you to prepare proactively to develop written procedures and policies for adjudicating such challenges and train your staff, volunteers, and election inspectors on the requirements of Ohio and federal law applicable to voter eligibility challenges.

Please do not hesitate to reach out with any questions. We stand ready to assist you in upholding federal and state law and protecting Ohians’ freedom to vote.

Sincerely,

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<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.* at 4-5.