



September 30, 2024

VIA EMAIL

Dear Pennsylvania County Boards of Election:

Campaign Legal Center (CLC) writes to provide you with information regarding how Boards and their staffs, including District Election Boards, can properly adjudicate frivolous challenges to voter eligibility under 25 Pa.C.S.A. §§ 1329, 1203(h)-(i) and 25 P.S. § 3053 to minimize the burden on election administration and protect the rights of voters, including important guidance on limitations imposed by federal law.¹ Such guidance will help to limit the disruption of frivolous challenges to election administration and protect Pennsylvania 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 mass eligibility challenges during the upcoming election, which have become increasingly common throughout the country.²

Mass eligibility challenges organized by partisan challengers and submitted with insufficient evidence risk disenfranchising eligible voters and causing unnecessary disruption to the orderly administration of the 2024 elections. We recognize that many election offices have lost their most experienced officials because of threats and

¹ This letter is not legal advice; it is intended to present a summary of relevant Pennsylvania and federal law.

² 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>.

volatility in the wake of the 2020 election and that this will be the first presidential election for new staff. We hope this letter will assist you as you provide guidance to your staff and volunteers regarding the rules for voter challenges and their responsibilities in dismissing challenges without cause, allowing your office to ensure a fair and orderly election, safeguard voters from intimidation, and minimize administrative disruption.

In recent election cycles, partisan actors have relied on faulty databases to bring hundreds of thousands of challenges to voter eligibility across the nation.³ 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.⁴ 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.⁵ As a result, mass challenge lists almost always include significant numbers of eligible voters who should not be removed from the rolls.⁶

To mitigate the potential harms to both voters and election administrators caused by baseless mass challenges, CLC provides the election law summary below to support your development of uniform processes for adjudicating voter eligibility challenges, in compliance with the following requirements of Pennsylvania and federal law.

I. Legal Requirements and Guardrails

As you know, both federal and Pennsylvania law provide robust protection against arbitrary and discriminatory treatment, 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 such federal and state laws, as well as the U.S. Constitution. **As such, all Boards of Election have the responsibility and discretion to protect Pennsylvania voters from baseless and discriminatory challenges and ensure that the adjudication of all voter challenges complies with both state and federal law.**

A. The National Voter Registration Act and the U.S. Constitution Require Uniform and Nondiscriminatory Standards in Voter List Maintenance.

The U.S. Constitution and federal law require that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter

³ 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 Justice (Sept. 5, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-antidemocracy-tool>.

⁴ See Sanders & Clapman, *supra* note 3.

⁵ See *id.*

⁶ See *id.*

eligibility challenges.⁷ 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.⁸ 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[.]”⁹ including “any list maintenance activity based on third party submissions.”¹⁰ 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.”¹¹ **Since Pennsylvania already conducts uniform nondiscriminatory list maintenance activities annually, letters or other actions taken on the basis of third-party submissions where the county is unable to verify the methods used to create the data, may subject the county to the risk of violating federal law.**

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.¹² 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.”¹³

For that reason, **sustaining mass challenges to voters’ registration would likely violate the NVRA’s prohibition on the “systematic” removal of voters from the rolls within 90 days of a federal election.**¹⁴

Local 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, Pennsylvania’s voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the U.S. Constitution.¹⁵

B. Removals Based on Change of Address Are Strictly Limited

The NVRA also strictly regulates the process for removing a registered voter from the voter registration rolls based on suspected change of address, including when such

⁷ 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).

⁸ *Id.* at 107.

⁹ 52 U.S.C. § 20507(b).

¹⁰ DOJ Guidance at 3.

¹¹ *Id.*

¹² 52 U.S.C. § 20507(b)(1).

¹³ DOJ Guidance at 4.

¹⁴ 52 U.S.C. § 20507(c)(2)(A).

¹⁵ *Bush*, 531 U.S. at 104-05.

removals are triggered by mass voter eligibility challenges.¹⁶ 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.¹⁷ The United States Department of Justice has cautioned that “[a] third-party submission—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.”¹⁸ 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.¹⁹

C. Racially Discriminatory Challenges are Prohibited

Organized challengers frequently target voters from historically disenfranchised communities in an attempt to intimidate or deter members of those communities from voting.²⁰ Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment²¹ and Section 2 of the Voting Rights Act²² 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.”²³ Because these are often the exact groups targeted by discriminatory challenges, clerks and other local elections officials should consider carefully whether acting upon mass challenges brought before them would have the effect of unlawfully disadvantaging voters because of their race.

D. Mass Challenges May Constitute Voter Intimidation

Baseless mass challenges to voter eligibility could constitute voter intimidation if such challenges are made to deter eligible citizens—including members of historically disenfranchised groups—from voting. Such voter intimidation is illegal under both federal and Pennsylvania law.

¹⁶ See 52 U.S.C. § 20507(b); DOJ Guidance at 4-6.

¹⁷ 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).

¹⁸ DOJ Guidance at 4.

¹⁹ *Id.* at 4-5.

²⁰ See, e.g., Nicolas Riley, Brennan Ctr. for Just., *Voter Challenges* 11-13 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.

²¹ U.S. Const. amend XIV, § 1.

²² 52 U.S.C. 10301.

²³ 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>.

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.²⁴ 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.”²⁵ 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).²⁶ 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).²⁷ 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.²⁸

Similarly, Pennsylvania law criminalizes the use of force, violence or restraint, threat or infliction of injury, damage, harm, or loss, and other intimidation or coercion practices meant “to induce or compel [a] person to vote or refrain from voting at any election, or to vote or refrain from voting for or against any particular person.”²⁹ Individuals who intimidate voters in this manner can be fined up to \$5,000 and face up to two years in prison.³⁰

To that end, each county and district election board should review their duties and responsibilities to maintain peaceful and orderly polling places and ensure that election officials are prepared to exercise their authority to remove any challengers who fail to abide by state and/or federal law prohibiting voter intimidation. County and district election boards should not hesitate to refer incidents of voter intimidation, including repeated impermissible voter challenges orchestrated by partisan outside groups, to the Pennsylvania Attorney General’s Office³¹ and U.S. Department of Justice (DOJ).³²

II. Requirements for Voter Challenges in Pennsylvania

²⁴ 18 U.S.C. § 594.

²⁵ 52 U.S.C. § 10307(b).

²⁶ 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).

²⁷ 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 at 3 (Sept. 2024), <https://www.justice.gov/crt/media/1366561/dl> [hereinafter “DOJ Guidance”].

²⁸ 42 U.S.C. § 1985(3).

²⁹ 25 P.S. § 3547.

³⁰ *Id.*

³¹ Voter intimidation can be reported to the Pennsylvania Attorney General’s Office at <https://www.attorneygeneral.gov/voting-complaint/>.

³² The DOJ Civil Rights Division 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>.

As you know, Pennsylvania law permits three distinct types of challenges: (1) to a voter's registration; (2) to a voter's mail ballot or application for a mail ballot before Election Day; and (3) to a voter's identity or continued residence on Election Day. Every such challenge must meet all elements required by Pennsylvania law. Those that do not must be rejected.

A. Limitations on Challenges to Voter Registration

A challenge to an individual's registration to vote may only be made by registration commissioners, registration staff, or qualified voters from the same municipality, who must submit a challenge affidavit setting out all the information required by statute.³³ The challenged voter must be given an opportunity to respond to the challenge with a sworn or affirmed written statement and provide evidence that he or she is eligible to register and vote.³⁴

If the challenged voter establishes their eligibility to be registered to the commission's satisfaction, they must remain registered.³⁵ Individuals whose registrations are canceled may appeal the decision to the applicable state trial court up to seven days before an election – which this year, is Tuesday, October 29.³⁶

Because Pennsylvania law requires a challenger to individually set out the basis for a challenge in an affidavit, challenges submitted in bulk in the form of a spreadsheet or other data set without individualized affidavits are facially insufficient and should be rejected.³⁷

And, as detailed above, the adjudication of a challenge to a voter's registration must comply with the requirements of the National Voter Registration Act.

B. Limitations on Challenges to Mail Ballot Eligibility

Individuals seeking to challenge a county election board's decision approving an application for a mail ballot may do so only on the basis that the applicant is not a qualified elector.³⁸ A challenge to mail ballot eligibility made on any other basis is invalid.

Any challenge to a voter's mail ballot eligibility made after 5 p.m. on November 1, 2024—the Friday before Election Day—must also be rejected as

³³ See 25 Pa.C.S.A. § 1329(a)-(b).

³⁴ *Id.* § 1329(c).

³⁵ *Id.* § 1329(d). As explained above, any cancellation must also comply with the National Voter Registration Act, 52 U.S.C. § 20507, which prohibits the systematic removal of voters within 90 days of an election.

³⁶ *Id.* § 1602(a)(2), (b).

³⁷ See 25 Pa.C.S.A. § 1329(b) (requiring challengers to submit a form detailing the reason for the challenge).

³⁸ 25 P.S. §§ 3146.2b(c), 3150.12b(a).

untimely.³⁹ Any person challenging a mail ballot or an application for a mail ballot must also make a \$10 cash deposit for each challenge with the county board, to be refunded only if the challenge is sustained or if the challenge is withdrawn within five days after the election.⁴⁰

The county board must give notice of the hearing “where possible” to all voters whose mail ballot eligibility is challenged, as well as to every challenger.⁴¹ The hearing must take place no later than the Friday after Election Day, which this year is November 8, 2024.⁴² The challenged voter has a right to appear at that hearing, and any testimony presented by the challenger or challenged voter must become part of the record of the hearing.⁴³ **When adjudicating a challenge, the burden is on the challenger to prove his or her allegations by a preponderance of the evidence.**⁴⁴

The county election board’s decision to “uphold or dismiss any challenge” may be reviewed by the county court of common pleas.⁴⁵ Any appeal of a challenge decision by the board must be filed within two days of the board’s decision.⁴⁶ After all challenges have been resolved, any ballots “finally determined to be valid” must be counted with the remainder of the county’s votes.⁴⁷

C. Limitations on Challenges to Election Day and Provisional Ballots

Only district election officials, election overseers, poll watchers, and voters who are lawfully present in the polling place may challenge a voter’s ballot cast in-person on Election Day.⁴⁸ **Election Day challenges may only be made on two bases: the voter’s identity or continued residence.**⁴⁹ A voter’s identity may also be deemed challenged if district election officials determine that the voter’s signature does not match the signature in the district voting register.⁵⁰ No challenges are permitted on

³⁹ *Id.*

⁴⁰ *Id.* § 3146.8(f).

⁴¹ *Id.* § 3146.8(g)(5). The county board must maintain all mail ballots that have been challenged—whether due to challenges to the ballot applications or to the ballots themselves—unopened in a secure, sealed container in the board’s custody until it fixes a time and place for a formal hearing to consider all challenges.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *See Appeal of Petrucci*, 38 Pa. D. & C. 2d 675, 677 (Pa Ct. Com. Pl. 1965) (“The burden of proof is upon the challenger . . . Absent such proof, the ballot shall be sustained.”).

⁴⁵ 25 P.S. § 3146.8(g)(6).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* § 3050(d).

⁴⁹ *Id.* Challenges can also be based on noncompliance with certain procedural rules for casting a ballot. *Id.* In addition, the Election Code contains a provision for challenging a ballot based on the voter’s giving or a receiving a bribe in exchange for a vote. *Id.* § 3051. Such challenge may be made only by an election official or eligible voter and is decided by district election officers. *Id.* A voter accused of violating this anti-bribery provision may rebut the accusation with a written affidavit. *Id.*

⁵⁰ *Id.* § 3050(a.3).

other voter eligibility requirements at the polling place. When challenged, a voter “shall produce at least one qualified elector of the election district as a witness, who shall make affidavit of his identity or continued residence in the election district.”⁵¹

However, guidance issued by the Commonwealth makes clear that **before requiring the challenged voter to produce a witness, the judge of elections must determine if the challenge is “based on actual evidence and rests on a good faith belief that the challenged voter is not who they say they are or [does not] live in the voting district.”**⁵²

The same guidance notes that **challenges based on race, ethnicity, or other protected traits are unlawful are not permitted.**⁵³ If the challenge proceeds and the voter produces a witness and signs an affidavit, they are entitled to vote a regular ballot.⁵⁴ Otherwise, the voter may cast a provisional ballot.⁵⁵

Whether a provisional ballot is ultimately counted is determined after Election Day. Within seven days of Election Day, the county election board must hold an initial examination of the provisional ballot envelopes to determine whether the individual who submitted each provisional ballot was eligible to vote.⁵⁶ Representatives of the candidates and political parties participating in the election may monitor this process and lodge formal challenges to the county election board’s determination as to a particular provisional ballot.⁵⁷ Within seven days of a provisional ballot challenge, the county election board must hold a hearing to determine whether each challenged provisional ballot should be counted.⁵⁸ As with hearings for adjudicating challenges to mail ballot eligibility, the board must provide notice and an opportunity for the challenged voter to appear and present evidence of their eligibility to vote.⁵⁹ The board’s decisions on provisional ballot challenges are subject to the same appeal procedures as well.⁶⁰

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By ensuring compliance with the processes, requirements, and limitations of Pennsylvania’s voter challenge laws, Boards of Election can mitigate the potential

⁵¹ *Id.* § 3050(d).

⁵² *Guidance on Rules in Effect at the Polling Place on Election Day*, 8 Pa. Dept. State (Sept. 23, 2024), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-dos-guidance-rules-atthepollingplace-on-electionday-2.0.pdf>.

⁵³ *Id.* at 9. As explained above, federal law also prohibits discriminatory challenges made on the basis of race, ethnicity, or other protected class.

⁵⁴ *See id.* at 8; 25 P.S. § 3050(d); *Voters Rights in Effect at the Polling Places on Election Days*, Pa. Att’y Gen., <https://www.attorneygeneral.gov/resources/voting> [Hereinafter Att’y Gen. Guidance]

⁵⁵ *See* 25 P.S. § 3050(a.2)-(a.4), (d); Att’y Gen. Guidance.

⁵⁶ *Id.* § 3050(a.4)(4).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

harm and disruption caused by frivolous voter eligibility challenges. Our hope is that this summary of the relevant law should help you to prepare proactively to develop written procedures and policies for adjudicating such challenges and train your staff, volunteers, and district election officials on the requirements of Pennsylvania 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 Pennsylvanians' freedom to vote.

Sincerely,

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