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VIA FED EX

RE: REQUEST TO IMPLEMENT CROSSCHECK PROGRAM AT LOCAL LEVEL

Landmark Legal Foundation, on behalf of voters of the Commonwealth of Virginia, respectfully requests the State Board of Elections (“Board” or “SBE”) immediately implement the Interstate Voter Registration Crosscheck Program (“Crosscheck”) at the local level.

Implementing Crosscheck at the local level involves releasing to general registrars the names of voters in their respective jurisdictions who are registered in another state. This information will provide a critically important and effective tool for fulfilling the legal duty to ensure that only qualified voters are maintained on local voting lists.

Given the recent trend in numerous state and local races being settled by very narrow margins, it is imperative that registrars are given all available tools to protect against qualified voters having their votes diluted and to take reasonable steps to protect against voter fraud.

Crosscheck data has been an effective tool to ensure voter integrity in Virginia. As recently as 2013, the collaboration between the Board and the general registrars resulted in the removal of tens of thousands of improperly registered individuals from Virginia’s voter rolls.

That year, SBE provided a list of 57,293 registered voters to general registrars “with instructions

to review the list and take action based on the information available to them from the data report.” Exhibit 1, Virginia State Board of Elections, *Annual Report on Voter Registration List Maintenance Activities*, January 6, 2014, p. 13. Sharing data with registrars resulted in the removal of 38,870 improperly registered individuals by Election Day of 2013 with an ultimate total of 41,637 individuals removed by the end of 2013. *Id.* at 14.¹

By providing the data, the SBE will better meet its core function of maintaining and improving Virginia’s voter registration system. Registrars will have additional, important data that will be used to eliminate duplicate voter registration and, if necessary, cancel the registration of individuals no longer residing in the Commonwealth. Eliminating duplicate registration will aid in ensuring both the SBE and local registrars have taken every opportunity to preserve the integrity of the electoral process. Implementation of Crosscheck at the local level will also protect the rights of qualified citizens to vote and reduce the potential for voter dilution and fraud that would occur should non-citizens cast votes.

Sharing Crosscheck data with local registrars will not result in the improper invalidation of individuals registrations. Instead, it will merely provide additional, relevant data to local registrars who, in turn, will use the data to undertake the necessary steps to protect the accuracy of their voter rolls. When the Commonwealth engaged in this practice in 2013, all relevant parties utilized extensive protocols to protect voters. The registrars and the SBE can quickly implement these previously tested protocols to protect the rights of the duly registered citizens of the Commonwealth and ensure the integrity of the votes cast in the 2016 election.

¹ In 2013, the Federal District Court for the Eastern District of Virginia rejected the Democratic Party of Virginia’s challenge to the Commonwealth’s implementation of the Crosscheck program. *The Democratic Party of Virginia v. Virginia State Bd. of Elections*, 2013 U.S. Dist LEXIS 151713 (E.D. Va. 2013). A copy of the Court’s opinion is attached as Exhibit 2 to this Request. Relevant Declarations made in support of the Commonwealth in this case are also attached as Exhibits to this Request. Then-SBE Secretary Donald Palmer submitted a declaration in this challenge stating that 38,870 individuals were removed from voter rolls based on registration in another state after Virginia. (Exhibit 3, Declaration of Donald Palmer at ¶ 36, “Palmer Dec.”.)

It is thus imperative that local registrars receive this data as soon as practicable to begin the process of confirming the accuracy of their existing voter rolls.

Background and Legal Framework:

An individual does not have the right to vote in a state where he or she does not reside. *Democratic Party of Virginia v. Virginia State Bd. of Elections*, 2013 U.S. Dist. LEXIS 151713 (E.D. Va. 2013). Registrars are obligated, under Virginia law, to cancel the voter registration of individuals who are reported to be registered to vote outside the Commonwealth subsequent to his/her registration in Virginia. Va. Code § 24.2-427(B)(iv). The official report of registration in another state is treated as equal to a voluntary request for cancellation. *Id.* This treatment protects the voter from duplicate registration, a felony under Va. Code § 24.2-1004. A voter's registration may be cancelled at any time where the general registrar "discovers that the person is no longer entitled to be registered." Va. Code § 24.2-427(B). Should an individual disagree with the decision of a registrar, Virginia law provides he/she can administratively appeal said decision. Va. Code § 24.2-429. If unsatisfied with the decision of the registrar, the individual can appeal the ruling to the Circuit Court. Va. Code § 24.2-430. The deletion must be taken "no longer than 30 days after notification from the Department." Va. Code § 24.2-404(A)(4).

In addition to their obligations under the laws of the Commonwealth, the National Voter Registration Act ("NVRA") obligates general registrars to take an active role in ensuring their voter rolls are accurate and up-to-date. 52 U.S.C. § 20507(c). As registrars are tasked with utilizing a specified notice procedure for removing names from voter rolls, these are the individuals who are ultimately responsible for accurate and legitimate elections. 52 U.S.C. § 20507(d). As such, the SBE should not deny crucial information to the registrars that better empowers them to adhere to both their state and federal obligations.

Registrars are also tasked with keeping and preserving registration records. Va. Code. § 23.2-444. This entails taking affirmative steps to limit multiple jurisdiction registration and voting. Va. Code § 24.2-114. Finally, the Department of Elections (“Department”) requires general registrars to delete those individuals who are “no longer qualified to vote in the county or city where he is registered due to removal of his residence.” Va. Code Ann. § 24.2-404(4).

In the past, when the Board shared Crosscheck data, the registrars adhered to extensive protocols to ensure accuracy. In 2013, the Department provided each general registrar an Excel spreadsheet “listing the voters in their localities who were registered in another state.” (Exhibit 4, Declaration of Mathew Davis at ¶ 14, “Davis Dec.”.) After providing this spreadsheet, the Department directed registrars to “review the records for *possible* cancellation.” *Id.* (Emphasis added.) The Department did not direct the registrars to cancel voters appearing on the list. *Id.* at ¶ 15. Specifically, the “SBE did and does not cancel voter’s registrations based upon the Crosscheck list or similar lists.” *Id.* at ¶ 16.

Registrars utilized multiple safeguards to protect against improper voter cancellation. When a cancellation occurred, “each voter should have been issued a letter by the general registrar informing them of the cancellation and providing them with information on correcting the cancellation if it occurred in error.” *Id.* at ¶ 19. Should a voter whose registration had been cancelled appear to vote on election day, that voter would still be permitted to cast a provisional ballot which would be counted after review and verification by the electoral board. *Id.*

Lists provided to local registrars were not “purge lists” and efforts to characterize them as much were rejected by a federal court. See, *Democratic Party of Virginia v. Virginia State Board of Elections*, 2013 U.S. Dist. LEXIS 151713 (E.D. Va. 2013). Instead, these were a list of

individuals who, at the time when the data was compiled, appeared to be illegally registered in more than one state. Davis Dec. at ¶ 20.

The actual results of implementation of Crosscheck at the local level demonstrate the diligence under which the program was administered. Despite canceling over 38,000 voter registrations, the Secretary for the Board of Elections testified that he was “unaware of any case in which a disputed report of registration in another state required a hearing before a registrar or judicial correction.” Palmer Dec. at ¶ 38.

11,138 voters initially identified by Crosscheck remained on the voter rolls in 2013 because both the Department and the registrars determined that those individuals had not registered in another state subsequent to their registration in Virginia. Palmer Dec. at ¶ 36. Crosscheck thus served as a *starting point* for registrars *to initiate the process* of determining whether individuals who appear on their voter registration lists had registered to vote in another jurisdiction subsequent to their Virginia registration. The process ensured those individuals who had appeared on the Crosscheck lists but were still eligible to vote in the Commonwealth were not mistakenly removed.

The SBE and local registrars share the responsibility of protecting the legitimate state interest of preventing voter fraud. Maintaining accurate, reliable and up-to-date registration lists are a necessary to protect this interest. *Hoffman v. Maryland*, 928 F.2d 646, 649 (4th Cir. 1991). Statutes that obligate state authorities to protect the integrity of their voting lists are “a legitimate means by which the State can attempt to prevent voter fraud.” *Ortiz v. City of Philadelphia Office of the City Comm’rs Voter Registration Division*, 28 F.3d 306, 314 (3d Cir. 1994).

Virginia law directs general registrars to cancel the registration of individuals: (1) for whom notice has been received either signed by the voter from the registration official from

another jurisdiction where the voter has moved from the Commonwealth; or (2) for whom notice has been received either signed by the voter or from a registration official of another jurisdiction that the voter has registered to vote outside of Virginia, subsequent to registering in Virginia. Va. Code § 24.2-427(B). The Board, however, may attempt to justify *not* distributing Crosscheck data to general registrars by stating that this data does not arise directly from a “registration official of another jurisdiction” and, therefore, cannot serve as the basis for the registrars to cancel voter registrations. Two arguments refute this position.

First, as stated above, the Crosscheck data serves as **the starting point** for determining whether an individual has moved from the Commonwealth or has subsequently registered in another jurisdiction. In the past, registrars utilized extensive protocols to determine whether the individuals appearing on the Crosscheck lists continue to reside in their respective jurisdictions. Similar protocols can be used in the future should the Board release the data.

Second, the data provided to the Commonwealth from Crosscheck is provided by registration officials and therefore is valid data to be used in determining whether the general registrars should cancel relevant registrations. The original Memorandum of Understanding (“MOU”) between the states participating in the Crosscheck program specifies that data is sent from the “chief state election official.” Exhibit 5, *Memorandum of Understanding For Interstate Voter Registration Data Comparison*, December 2012. The “chief state election official” is indistinguishable from a “registration official of another jurisdiction.” Processed data returned to the states is therefore data that has been vetted by election officials – thus satisfying the requirements of Va. Code § 24.2-427(B).

Immediately Implementing Crosscheck At The Local Level Will Ensure Accuracy Of Registration Lists And Prevent Voter Fraud.

Sharing the most recent Crosscheck data will enable local registrars to begin the process of determining whether individuals on their voter rolls have registered in another jurisdiction subsequent to their registration in Virginia. Registrars can readily adopt the same protocols adhered to in the past which resulted in no formal challenges by those who were removed. If the Board releases the data by mid-September, the registrars will, presumably, have the time to properly vet their lists.

Consider the time frame by which the Department and registrars previously implemented Crosscheck. In late August of 2013, officials at the SBE “outlined the parameters of the Crosscheck program with instructions to a link where general registrars could download a list of records that needed to be reviewed for possible cancellation.” Palmer Dec. ¶ 23. If the Board released this data to registrars by September 8, the registrars would have the necessary time to complete their efforts prior to the close of voter registration.

Because the Commonwealth shared Crosscheck data as recently as 2013, there should be institutional memory between the Department and local registrars. In fact, in 2013 nine registrars submitted declarations supporting their use of Crosscheck data. *Democratic Party of Virginia v. Virginia State Bd. of Elections*, 2013 U.S. Dist. LEXIS 151713 (E.D. Va. 2013). If provided in a timely fashion, these officials could complete their review within the designated period before the November election.

Additionally, immediately disseminating Crosscheck data to registrars will protect against voter fraud and, by extension, voter dilution. Preventing individuals who are not citizens of the Commonwealth from voting protects those who are rightfully registered as “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Democratic Party of*

Virginia v. Virginia State Bd. of Elections, 2013 U.S. Dist. LEXIS 151713 (E.D. Va. 2013)
(citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

If the SBE acts immediately, it can properly disseminate Crosscheck data to local registrars. The registrars will, consistent with their duty under Virginia law, use this data to ensure any ineligible individuals are removed from voting lists prior to the November election.

Should the Board decide not to disseminate this data to registrars, Landmark, on behalf of citizens of the Commonwealth, may seek judicial remedies to compel the Board to act.

Thank you for your attention to this important matter.

Respectfully Submitted,



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Cc: Edgardo Cortes, Commissioner Department of Elections