[DATE]

[NAME]
[TITLE]
[EMAIL]

RE:

Dear [COUNTY ELECTION OFFICIAL]:

On behalf of the undersigned non-partisan voting rights organizations, we write to urge you to comply with Texas law by rejecting third-party challenges to Texas voter registrations that are not supported by the statutory "personal knowledge" requirement for such challenges set forth in Texas Election Code ("TEC") Section 16.092(2).

Recently, we have seen an uptick in third-party challenges in which individuals are claiming to have used United States Postal Service change-of-address information to identify the voter registrations of voters they believe no longer reside at the address at which they are registered to vote.[2] [."] Under the Texas Election Code, challenges to a voter's registration may only be considered if supported by the "*personal knowledge* of the voter desiring to challenge the registration" regarding "a specific qualification that the challenged voter has not met." Tex. Elec. Code § 16.092(2) (emphasis added). That standard excludes challenges based on speculation, guesswork, and second-hand information—only firsthand observation or experience is sufficient to constitute "personal knowledge." As discussed below, a challenge that is only based on USPS change-of-address data, or similar commercial vendor data, is not a proper challenge under the Election Code. It therefore cannot trigger further action, and your office must reject it pursuant to Texas and Federal law. Pursuit of such a challenge based on third-party information not only is improper under Texas law but also may violate federal legal protections for voters.

A. Texas law requires challenges to be based on personal knowledge, which requires firsthand experience or observation. Guessing, speculation, or reliance on information from third parties is *not* personal knowledge.

Under Texas law, to properly challenge another voter's registration, the challenger must file a sworn statement with the county registrar, declaring that they have "personal knowledge" that the challenged voter registration does not meet "a specific qualification for registration." Tex. Elec. Code § 16.092(2). As discussed below, the state legislature added this personal knowledge requirement in 2003 specifically to prevent voter challenges based on incomplete and

2 ." Protect Democracy, *Unraveling the Rise of Mass Voter Challenges*, June 2024, https://protectdemocracy.org/work/voter-challenges/ (last accessed July 18, 2024).

dubious declarations. The law is clear that without *personal knowledge* that another individual is not correctly registered, a challenger cannot properly move to have a voter disqualified. The plain language of the Texas Election Code, coupled with case law and legislative history, demonstrates that personal knowledge requires concrete *firsthand* knowledge or experience, not mere speculation or hearsay.

The plain meaning of "personal knowledge" makes clear that a voter seeking the disqualification of another voter must have direct, firsthand information about the qualification that the challenged voter allegedly does not meet. Black's Law Dictionary defines "personal knowledge" as "knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said."*Knowledge*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "personal knowledge"). As applicable to Texas's requirements for third party challenges to voter registration, this definition of "personal knowledge" means that a challenger cannot base their challenge solely on the word of a third party or a third-party database.

Even before Section 16.092 was amended to specify that it requires "personal knowledge," the Election Code required a "sworn statement" to challenge voter registrations, which inherently requires personal knowledge. As a federal district judge observed in 2000 in *Curtis v. Smith*, 121 F. Supp. 2d 1056 (E.D. Tex. 2000), even under the older version of Section 16.092, a challenger's "sworn statement, or affidavit, is required to be based on personal knowledge, and not merely on information and belief." *Id.* at 1056–58.

In 2003, the Texas legislature passed Senate Bill 196 ("S.B. 196"), which explicitly added this personal knowledge requirement to Election Code Section 16.092. S.B. 196, 78th Leg., (Tex. 2003). SB 196 clarified that the statute was not intended to allow any individual voter to challenge voter registrations without firsthand knowledge, and in fact was intended to preclude challenges that lack "real evidence or demonstrated personal knowledge," and to only allow challenges to proceed "with just causeElecs. Comm. Rep., S.B. 196, 78th Leg., (Tex. 2003). In the Elections Committee report for S.B. 196, the background and purpose for the amendment were described as follows:

> Under current law, a person can challenge the registration of a voter without providing any knowledge of the person being challenged. Likewise, they can challenge the voter without giving a specific qualification for registration that the challenged voter has not met based on personal knowledge. This allows many voters to be disqualified from voting without any real evidence or

> demonstrated personal knowledge of a violation. . . . Senate Bill 196 institutes procedures to ensure that a voter's right to vote is only challenged with just cause.

Elecs. Comm. Rep., S.B. 196, 78th Leg., (Tex. 2003). Additionally, the Senate Research Center noted in its analysis for S.B. 196 that, under the then-existing version of Section 16.092, "there [were] no requirements to include specifics about why [a] challenger believe[d] a particular voter [was] not qualified to be registered." Tex. S. Rsch. Ctr. An., S.B. 196, 78th Leg., (Tex. 2003). The Senate Research Center stated that the purpose of S.B. 196 was to update Section 16.092 so that a challenger's statement would "be based upon specific knowledge of each challenged voter's specific lack of qualifications." *Id.* It is clear from the legislative history that the purpose of the personal knowledge requirement is to prevent challenges absent "just cause" based on "real evidence or demonstrated personal knowledge," to protect voters' access to the ballot--and that speculative assertions not grounded in personal knowledge are, by contrast, not enough for a challenge.

This is consistent with how courts have addressed personal knowledge requirements in other contexts. Courts routinely hold that "the mere recitation that [an] affidavit is based on personal knowledge is inadequate if the affidavit does not positively show a basis for the knowledge." *Valenzuela v. State & Cnty. Mut. Fire Ins. Co.*, 317 S.W.3d 550, 552–53 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *see also, e.g.*, *Rogers v. RREF II CB Acquisitions, LLC*, 533 S.W.3d 419, 428–29 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.); *Lawrence Marshall Dealerships v. Meltzer*, No. 14-07-00920-CV, 2009 WL 136908, at *4 (Tex. App.—Houston [14th Dist.] Jan. 20, 2009, no pet.).

Likewise, the Secretary of State ("the Secretary"), in an advisory opinion, has interpreted the "personal knowledge" requirement stringently and in accordance with the definition in Black's Law Dictionary. The Secretary has previously explained that personal knowledge might be established based on a combination of knowing firsthand "from experience and observation" a voter's registration address and knowing firsthand "from experience and observation"--of both that address and the voter's actual residence–that the registration address does not meet the legal definition of a residence under the Election Code. Tex. Sec'y of State, Election Law Op. RP-1 (Oct. 10, 2018) at 5.[1] The Secretary has further explained that this would require that the individual with personal knowledge had "been to both [the] address where voters were alleged to actually reside and . . . where voters were listed as residing in voter registration records," and "could testify that the voters whose eligibility was being challenged did not live, reside, sleep, or

1 https://www.sos.state.tx.us/elections/elo/rp-1.pdf.

stay" at the registration address. *Id.* at 4 (citing *Willett v. Cole*, 249 S.W.3d 585, 592 (Tex. App.--Waco 2008) (cleaned up).

B. The use of change-of-address databases by third-parties is not sufficient to constitute personal knowledge for a voter challenge.

Many recent challenges to voter registration purport to rely on USPS change-of-address data. However, use of such data does not constitute personal knowledge for several reasons, including:

- **Purpose and Limitations**: USPS change-of-address data is designed for mail forwarding purposes and not for verifying residency for voter registration. It is secondhand information that relies on the self-reporting of individuals who may have various reasons for changing their address that do not necessarily correlate with their registration residency status. For instance, a person might file a change-of-address form to have their mail sent to a summer home while on vacation, yet still be legally domiciled at their primary residence. Or a college student may change their address to have mail forwarded to their dormitory during the school year but still consider their parent's home their permanent residence and intend to return there during breaks and after graduation.

- **Inaccuracies and Outdated Information:** USPS change-of-address data can be outdated or incorrect due to delays in processing or errors in submission. If someone moves temporarily, such as a businessperson on an extended assignment or a family spending several months in a different state for personal reasons, they might file a change-of-address form. The USPS data may still reflect the temporary address long after the person has returned to their original residence. Reliance on this data can therefore lead to incorrect assumptions about a voter's residency status, causing eligible voters to be wrongfully challenged and potentially disenfranchised.
- **Commercial Vendor Issues:** Many recent challenges do not indicate how or when the challenger accessed purported USPS change-of-address data. USPS National Change of Address data is extremely expensive, and it is unlikely that individuals challenging voter registrations are each purchasing data licenses. More likely, they are accessing some unidentified commercial or organizational database. When USPS data is supplied by commercial vendors, there is an additional layer of potential error. These vendors may not update their databases as frequently as USPS does, leading to further inaccuracies. The process of data aggregation and resale can introduce errors that make the information

United States Post Office, *NCOA licensing fees*, https://postalpro.usps.com/Licensing_Fees (accessed July 5, 2024).

> less reliable. For example, a vendor might not promptly reflect address changes or could merge data incorrectly, leading to challenges based on incorrect addresses. Such commercial data lacks reliability, and, because it is based on the work of a third party, it is hearsay and–like USPS data itself–cannot be considered the personal knowledge of a would-be challenger.

The use of USPS change-of-address data thus cannot meet the standard for "personal knowledge." This is consistent with the Secretary's analysis in the 2018 advisory opinion on this topic. In an example described by the Secretary, a voter's registration could be challenged in an election contest via witnesses with firsthand knowledge of the actual residence at which the voter resided and firsthand experience visiting the location itself to know that that address is a location with no known associated living quarters, where the voter did not "live, reside, sleep, or stay." *Id.* at 4 (citing *Willet v. Cole*, 249 S.W. 3d 585, 592 (Tex. App. - Waco 2008). Under such circumstances, by comparing the voter's own statement of their residency address with personally known facts about both that location and the voter's actual residence, an individual challenging another's voter registration could assert that the voter's claimed residency does not meet the requirements of the Election Code. Even such assertions as these, based on firsthand observation, still require caution though. *See* Election Law Op. RP-1 at 5-6 (explaining how the Secretary determines residency and that "the presumption is in favor of the voter's own assessment of the facts and his or her intent," and it is "not [the Secretary's] opinion that a voter could never, for example, reside at a church."); Tex. Elec. Code § 13.002 (when registering to vote, "if the residence has no address, [include] the address at which the applicant receives mail and a concise description of the location of the applicant's residence.").

However, using change-of-address information acquired from USPS or a third party is entirely dissimilar from a situation where the challenger has personally observed the voter's actual residence and the address of registration. A listing in a change-of-address database (a) is not determinative of that person's legal residency; (b) is not in any way the equivalent of a first-hand statement by that voter that they have changed their legal residence; and (c) where used by an individual to challenge a voter registration, necessarily relies on hearsay rather than personal knowledge. Further, as discussed above, reliance on information from a third party that was originally acquired from USPS involves an additional level of hearsay. Consequently, reliance on USPS or commercial change-of-address data cannot form the basis for "personal knowledge" of "a specific qualification for registration that the challenged voter has not met" and is improper under Texas law. Tex. Election Code § 16.092(2). This is for good reason: given the significant probability of inaccuracies and incorrect assumptions, reliance on such data would risk leading to

Tex. Sec'y of State, Election Law Op. RP-1 (Oct. 10, 2018), https://www.sos.state.tx.us/elections/elo/rp-1.pdf.

the wrongful disqualification of eligible voters.

C. State law therefore requires your office to reject voter challenges not based on "personal knowledge," including those based on USPS or commercial database information.

The use of USPS or commercial database information does not qualify as "personal knowledge" under Texas law. This fact indicates that mass voter registration challenges based on address should be viewed with skepticism. It is highly unlikely that voter registration challengers have "personal knowledge" as to who resides at hundreds or thousands of addresses. Under the law, they must have *personal knowledge* as to whether a particular voter resides at a particular address for voter registration purposes in order to properly assert a challenge.

Accordingly, as part of the County's duty to strictly construe the Texas Election Code, you and your office must reject challenges to voters' registrations based on unreliable and incomplete affidavits unsupported by "personal knowledge," as required by the Election Code. If you or your office have suspended voters based on challenges like the ones described in this letter, your office should immediately review the suspension list and reinstate registrations suspended based on improper challenges. Upon receipt of any challenge–including but not limited to any mass challenge–election officials should review the submitted affidavits, declarations, and related records to see if the challenge is based solely on third-party information, such as USPS change-of-address or commercial database information. If so, the challenges must be rejected in their entirety; any challenge that is based solely on third-party records is necessarily based on *secondhand* knowledge, and is thus an improper basis for initiating a challenge under Texas Election Code Section 16.092. Relying on such sources carries a high risk of wrongfully suspending eligible voters. Any voter registration challenge that is not demonstrably based on firsthand personal knowledge must, under state law, be disregarded by the county voter registrar's office.

Additionally, the First, Fourteenth, and Fifteenth Amendments to the U.S. Constitution prohibit government officials from burdening the right to vote without justification.[2] Any decision to require a voter to cast a provisional ballot on the basis of a frivolous voter challenge imposes a burden on that voter's right to vote that is not supported by any legitimate justification, and may therefore violate the U.S. Constitution.

2 *See Burdick v. Takushi*, 504 U.S. 48 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate' against 'the precise interest put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

The federal Voting Rights Act (VRA) also prohibits voting prerequisites, standards, practices, or procedures, including challenges to voter eligibility and voter purges, that have a racially discriminatory intent or a racially discriminatory result.[3] Mass challenges to voter eligibility have long been a tactic to suppress political participation, especially of Black voters and other voters of color.[4] Accordingly, if your office acts on frivolous mass challenges to voter eligibility, such as by requiring challenged voters to cast provisional ballots—particularly where you have no knowledge of how or why the challenged voters were targeted, or cannot determine that the challenges are good faith and nonfrivolous—you may be in violation of the VRA.

Finally, the National Voter Registration Act (NVRA) prohibits the systematic removal of voters from the rolls on the grounds of change of residence within 90 days of a federal election.[5] This date is rapidly approaching for the November 2024 general election: it is August 7, 2024. In addition, the NVRA prohibits denying a regular ballot to a voter based on an alleged change in residence unless and until the statute's specific notice procedures have been followed. Therefore, systematic removals of voters from the rolls on the basis of mass challenges may violate the NVRA.

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Thank you for your work ensuring accessible and fair elections and considering the information in this letter. Should you have any questions or would like to discuss this matter further, please feel free to contact the undersigned organizations below.

Sincerely,

Zachary Dolling
Senior Supervising Attorney, Voting Rights
Texas Civil Rights Project

3 *See* 52 U.S.C. § 10301.

4 Jonathan Brater, *Voter Purges: The Risks in 2018*, Brennan Center 1, 1-2 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voter_Purges_The_Risks_in_2018.pdf ; *see also* Laughlin McDonald, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 1, 52-54 (2003) (describing the historical origins of Georgia's voter challenge laws).

5 *See* 52 U.S.C. § 20507(c)(2)(A) ("A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters."). A process that could effectuate mass removals is systematic. *See N. Carolina State Conference of NAACP*, No. 1:16-CV-1274, 2018 WL 3748172 (concluding that counties that sustained mass challenges also violated the NVRA's 90-day provision).

52 U.S.C. 20507(a)(4), (d), (e).

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