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## Non-Citizens on Colorado's Voting Roles: Problems and Solutions.

*August 16, 2012*

*"We should be unfaithful to ourselves if we should ever lose sight of the danger to our liberties if anything partial or extraneous should infect the purity of our free, fair, virtuous, and independent elections."-John Adams*

**Key Findings:**

- Colorado has non-citizens registered to vote and taking part in state elections.
  - Colorado identified 3,903 registered voters whose citizenship status is in question.
  - An additional 430 Colorado voters identified themselves as ineligible to vote because of citizenship requirements.
  - The true scope of the problem is unknown.
- Many non-citizens have not intentionally broken the law.
- The majority of these voters registered during the course of routine business at the Division of Motor Vehicles, voter registration drives, or through mail-in or online registration.
- With the cooperation of the federal government and the state legislature, options are available to improve the accuracy of Colorado's election process.

**Introduction.**

Evidence collected by the Secretary of State's office shows that non-citizens have both registered to vote for -- and voted in -- Colorado's elections. Current evidence shows the true extent of this problem is unknown. This paper reviews the negative effect of this problem on election integrity and recent efforts by the Colorado Secretary of State to address the issue and ensure maximum accuracy of the state's voter registration database. Additionally, this paper examines the vulnerabilities that allowed ineligible voters to register and offers recommendations to ensure an accurate voter database and to prevent ineligible registrations in the future.

## A. Colorado has a porous voter registration system that allows non-citizens to register to vote and to vote.

### *1. Colorado does not verify citizenship.*

To register to vote in Colorado, one must be a resident of the state, 18 years old on the date of the election, and a citizen of the United States.[1] But to demonstrate citizenship, a voter need only affirm his or her citizenship on a voter registration form. In other words, Colorado (like other states) relies on an "honor system" and makes no effort to verify citizenship, either before or after registration. No proof is required to validate the status indicated on a registration form. Individuals can register to vote at a driver's license office, state public assistance office, county office, private voter registration drive, or even online (with a valid driver's license or state identification), none of which verify citizenship.

### *2. Federal law increases the likelihood of mistakes in voter registration.*

Under the National Voter Registration Act ("NVRA," and commonly known as "Motor-voter"), states must provide an opportunity to register to anyone submitting an application for a motor vehicle license[2] or seeking public assistance or disability services.[3] Colorado is a national leader in implementing the NVRA and in 2011 alone over 47,000 people registered to vote in state public assistance agencies.[4]

While Colorado is proud of these results, the system nonetheless increases the likelihood of error in our voter rolls. Legal aliens can easily register when they obtain driver's licenses or apply for public assistance services, without any warning that they are ineligible to register. The lack of a warning stems, in part, because federal law prohibits any government employee from "mak[ing] any statement to an applicant or tak[ing] any action the purpose or effect of which is to discourage the applicant from registering to vote."[5] And at least one court has held that the NVRA *prohibits* states from requiring proof of citizenship in order to register to vote.[6]

This process makes it easy for non-citizens to register, often times by mistake. A non-citizen with limited English language ability may not fully understand a voter registration form, may receive no guidance from an attendant, and might feel obligated to fill out a form that has been placed in front of her. And even if the person truthfully states she is not a citizen, county employees sometimes register that person anyway. In fact much evidence points to this type of

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[1] Section 1-2-101(1)(a), C.R.S. (2011).
[2] 42 U.S.C. § 1973gg-2(a)(1) (2006).
[3] *Id.* § 1973gg-5(a)(2)(A)-(B) (2006).
[4] NVRA Agency-Based Voter Registration in Colorado, Colorado Secretary of State, May 2012, p. 9, available from http://www.sos.state.co.us/pubs/elections/NVRA/files/2011NVRAYearEndReport.pdf
[5] *Id.* § 1973gg-5(a)(5)(C) (2006).
[6] See *Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012) (en banc)

mistake. As discussed below, the Secretary of State's office has collected many examples of non-citizens who affirmed that they were *not* U.S. Citizens on their voter registration form, yet were nonetheless registered to vote. And an analysis conducted by the Brennan Center for Justice concluded that in instances of voter fraud perpetrated by non-citizens, the common theme was that the voters were unaware that they violated the law.[7]

*3. Colorado has non-citizens on its voter rolls.*

The Secretary of State's office collected many examples of non-citizens on Colorado's voter registration rolls. This evidence is similar to experiences in other states as well.

*a. Voter self-identification as non-citizens.*

During the past four years in Colorado at least 430 non-citizens registered to vote and later voluntarily withdrew their registration, or were registered to vote even after stating they were *not* a citizen on a voter registration form.[8] The examples include:

- A Canadian citizen legally present in Colorado for work purposes submitted a letter stating that he had previously declined to be registered to vote and yet subsequently began to receive ballots in the mail. He was forced to submit a Withdrawal of Voter Registration form.[9]

- A woman from Vietnam registered to vote, listing her county as "Vietnam." After voting in three elections between 2003 and 2011, she was removed from the voter rolls when she again affirmed her non-citizenship when applying to be an election judge.[10] The same woman registered again in 2011. Next to the question "Are you a citizen of the United States?" she indicated "No" and wrote "Not yet." She then indicated on the same form her interest in being an election judge.[11]

- A man wrote the Jefferson County election officials, apologized for registering as a voter, and asked to be removed from the voter rolls because he was not a citizen and didn't know he couldn't be registered. He listed his return address in Hood River, Oregon. A subsequent investigation of his voter record indicated that he had voted in 2008.[12]

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[7] Levitt, Justin, "The Truth About Voter Fraud," Brennan Center for Justice, New York University School of Law, 2007, p. 18
[8] Colorado Elections Division
[9] See Appendix 1
[10] See Appendix 2
[11] See Appendix 3
[12] See Appendix 4

*b. Analysis of jail records.*

In a separate effort to analyze this issue, the Secretary of State's office recently gathered and analyzed records of county jail inmates in eight counties.[13] These prisoners were potentially subject to deportation because of an illegal immigration status or a visa violation following a database check and personal interview by federal immigration authorities.[14] The Secretary's office identified 153 of these prisoners --potentially illegal aliens-- as currently or previously registered to vote. Of this group, 29 are currently active voters. Additional research is ongoing to evaluate the actual citizenship status of these individuals.

*c. Comparison to driver's license rolls*

The Secretary of State's office previously conducted an investigation, published on March 8, 2011, titled "Comparison of Colorado's Voter Rolls with Department of Revenue Non-Citizen Records." For this study, researchers developed a methodology to identify potential non-citizen voters by comparing Department of Revenue records involving Division of Motor Vehicle transactions to the state's voter registration database. Researchers focused on individuals who obtained a driver's license or state identification card with non-citizen documentation, such as an employment authorization document, a permanent resident card (green card), or an INS arrival/departure record. The report concluded that there is a strong probability that non-citizens are registered to vote in Colorado:

- 106 individuals presented the Department of Revenue with a non-citizen document after the date they registered to vote.

- A permanent resident card (green card) holder must generally wait three to five years before applying for citizenship. Data in this study only went back to 2006, so at least some green card holders would not have been naturalized in that time.

- Individuals in possession of an employment authorization form or an INS arrival/departure record would have to first obtain a green card and then complete the mandatory three-to-five year wait before becoming citizens, making their road to naturalization even longer.

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[13] Adams, Arapahoe, Boulder, Denver, Douglas, Jefferson, Mesa, and Weld. Broomfield, El Paso and Pueblo counties refused to provide information.

[14] This is commonly referred to as an "ICE hold," which is a request by U.S. Customs and Immigration Enforcement (ICE) to a local law enforcement authority to continue holding an individual suspected of violating federal immigration law and thus possibly deportable until the suspect can be transferred to ICE's custody.

- Ongoing analysis since the publication of this report resulted in a current list of 3,903 registered voters who obtained state identification with non-citizen documents.

The report further concluded that some of the voters in question might have become citizens since the Department of Revenue transaction, but their status could not be conclusively determined absent a comparison to federal government alien databases.

*d. Personal stories protected by attorney-client relationship*

Verbal statements from immigration attorneys also corroborate examples of non-citizens on the voter rolls. Although details are unavailable due to attorney-client privileges, researchers learned that:

- The client of a Colorado immigration attorney interested in applying for citizenship reported receiving a general election ballot by mail in 2008. The individual was completely unaware that he was registered to vote and worried about the implication of being involved in voter fraud on his prospects for naturalization. He did not vote.

- A woman had held a green card for 15 years and wished to apply for citizenship. While responding to a standard question in the naturalization process, the women not only admitted to voting regularly in the past, but also claimed to have served as an election judge in Colorado during the 2008 general election.[15]

*e. Experience in other states*

Experiences in other states corroborate the evidence collected by the Secretary of State's office.

North Carolina used a similar process as Colorado to compare DMV data to voter registration rolls and arrived at a similar conclusion about non-citizen registration. The North Carolina DMV records all driver's licenses that are issued to non-citizens under the status of "legal presence." After conducting a crosscheck of the North Carolina DMV data with North Carolina Board of Elections data, state officials determined that a number of "legal presence" documents were used as the basis for registering to vote. After initially contacting the voters in question and asking them to verify their citizenship, the state appealed to the Department of Homeland Security for assistance with verifying the immigration statuses of those in question.

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[15] These examples were disclosed confidentially by a Colorado immigration attorney.

In other states, the participation of non-citizen voters is more apparent. Two notable examples of non-citizen participation in elections include contested races in California and Missouri.

In 1996, the results of a California congressional race between incumbent Congressman Bob Dornan and challenger Loretta Sanchez led to an investigation by the U.S. House Committee on Oversight and Government Reform. Initially, Sanchez won the election by 979 votes and Dornan challenged the result. Examining the Immigration and Naturalization Service database, the House investigation found 624 invalid votes cast by non-citizens as well as 124 invalid absentee ballots. While this result gave Sanchez a margin of victory of 231 votes, the Oversight Committee commented in its analysis of the race that the presence of non-citizen voters probably suggested the presence of illegal immigrant voters as well whose presence was not reflected in INS records. Similarly, the California Secretary of State complained that the INS refused to do a review of the entire registration database in Orange County, which may have shown additional illegal voters.[16] Widespread doubt over the election results continued after certification.

In a primary election for the Missouri House of Representatives in 2010, J.J. Rizzo defeated Will Royster by one vote amid charges of voter fraud and other irregularities. A member of the Somali Foundation reportedly spent the entire day at the polls bringing in groups of Somalis who could not understand English, offering them instruction on who to vote for, and in some cases even signed for them in the poll book. Testimony from one of the election judges admitted that the Somalis were registered to vote, however their citizenship was questionable given that a basic understanding of English is required for citizenship.[17]

**B. Non-citizen voters undermine election integrity and risk severe legal consequences.**

*1. Non-citizen registration compromises election integrity.*

Legitimate representative government requires an electoral system that creates confidence in the results. Suspicions over the outcome of close elections lead voters to question the integrity of the entire election process and the legitimacy of their leaders.

Overall, Colorado has 2,231,315 registered, active voters. Adding inactive voters increases the rolls to 3,424,409.[18] To date, the Secretary identified 430 individuals who voluntarily removed themselves from the voter rolls, another 153 jailed individuals who were at one point registered to vote, and 3,903 individuals who used non-citizen documentation to obtain

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[16] Von Spakovsky, Hans A., "The Threat of Non-Citizen Voting," The Heritage Foundation, Legal Memorandum No. 28, 2008, p. 3

[17] http://www.americanthinker.com/2010/09/sneak_preview_the_hijacking_of.html

[18] 2012 End of Month Voter Registration Status, Colorado Elections Division, June 2012

a driver's license or state ID. As discussed below, this number may only be a fraction of overall non-citizens, but it at least provides some perspective.

Although small in comparison to the state's population, non-citizen voters can have a dramatic impact on elections, illustrated in the California and Missouri examples discussed previously. Close elections are not uncommon in Colorado, and close elections can be reversed by small changes. The following table lists recent examples of very close state elections that could have been affected by small voting shifts:

| Year | Office | Margin of Victory[19] |
|---|---|---|
| 2000 | State Board of Education | 90 votes |
| 2000 | State House District 17 | 110 votes |
| 2000 | State House District 23 | 287 votes |
| 2000 | State House District 60 | 91 votes |
| 2002 | U.S. Congressional District 7 | 121 votes |
| 2002 | State Senate District 20 | 187 votes |
| 2002 | State House District 18 | 112 votes |
| 2002 | State House District 30 | 133 votes |
| 2004 | State House District 23 | 48 votes |
| 2006 | State House District 27 | 111 votes |
| 2008 | State Senate District 26 | 81 votes |
| 2010 | State House District 29 | 197 votes |
| 2010 | State House District 31 | 298 votes |
| 2010 | State House District 33 | 271 votes |
| 2010 | State House District 34 | 297 votes |

[19] http://www.sos.state.co.us/pubs/elections/Results/Archives.html

| | | |
|---|---|---|
| 2010 | State House District 50 | 269 votes |

There is no evidence that the results of these elections were affected by non-citizen participation. But the close margins illustrate that critical races can be affected by small numbers, and thus vigilance is critical.

Ineligible voters must be prevented from taking part in an election because once illegal votes occur undoing the election result is a nearly-impossible task, a problem also seen in other states. In 2004, the gubernatorial election in Washington State between Christine Gregiore and Dino Rossi was decided in Gregiore's favor by a margin of 129 votes after a machine recount and a manual recount. Subsequently, the Rossi campaign presented evidence that approximately 1,183 illegal votes were cast by non-citizens, felons, and the deceased. A state judge ruled that even though Rossi provided ample evidence showing 1,183 illegal voters, the court refused to change the result because it could not determine which candidate gained from the illegal votes. The court also denied a request for a complete re-vote.

*2. Non-citizens often unknowingly face serious legal consequences.*

Colorado's failure to take reasonable steps to protect voter rolls hurts legal aliens in the state. Evidence shows that many non-citizens do not intend to break the law, but instead register because they do not understand what they are doing, they mistakenly believe that they may vote, or they do not realize they are registered. Even those who unintentionally violate the law face real consequences. These include felony charges and the possibility of deportation, which affect a non-citizen's ability to apply for naturalization, pursue educational opportunities, or legally work.

Those who willfully violate the law face more severe penalties. Falsely identifying oneself as a citizen on a government form is a felony that could include the penalty of deportation.[20] Submitting false information to an elections division carries a federal penalty of up to five years in prison.[21] Colorado law states that any person participating in an election where he or she is ineligible to vote is guilty of a class 5 felony.[22]

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[20] "Elections: Additional Data That Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists," Government Accountability Office Report GAO-05-478, June 2005, p. 17

[21] Donsanto, Craig, and Nancy Simmons, "Federal Prosecution of Election Offenses," Seventh Edition, Department of Justice, May 2007, p. 67

[22] Section 1-13-704.5, C.R.S. (2011)

## C. Colorado works to keep voter rolls accurate, but still lacks the tools to fully assess or remedy the problem.

As the state's chief election officer, the Secretary of State has the legal obligation to supervise the conduct of elections and enforce federal and state election law.[23] Because United States citizenship is one of the prerequisites for voter registration,[24] this obligation extends to enforcing citizenship requirements. Nonetheless, the Secretary of State's office has limited statutory authority to fulfill these obligations.

### *1. Current practices to ensure election integrity do not directly address citizenship requirements.*

The Secretary of State's office works diligently to ensure election integrity and the accuracy of the voter registration database by utilizing several available resources:

- The state prison system shares records with the Secretary of State's office in order to remove convicted felons from the registration rolls.

- Names are removed from the registration rolls after an official declaration of death from the Department of Health.

- Voters are required to show a valid form of identification when voting for the first time.

To address the question of citizenship, the Colorado Elections Division conducts a monthly analysis in which they cross-check data provided by the Colorado Department of Revenue (CDOR) against the state's database of registered voters. The information identifies individuals who applied for a driver's license or state ID with non-citizen documents, such as a green card, an employment authorization document, or an INS arrival/departure record. Using tight matching criteria, at least 3,903 registered voters showed non-citizen documents to obtain a driver's license or state ID. At least 1,544 voted a minimum of one time over the last several years.[25] The numbers might be even higher, because some driver's license applicants used non-citizenship documents to obtain a license in another state, and then used that out of state license to obtain a Colorado license.

The registration sources for the individuals in question vary, but 75% came from a small number of sources.

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[23] Section 1-1-107, C.R.S. (2011)
[24] Section 1-2-101(1)(a), C.R.S. (2011)
[25] Colorado Elections Division

| Source of Registration | Number Registered | Percentage |
|---|---|---|
| DMV/Department of Revenue | 772 | 20% |
| Other NVRA Designated Office | 103 | 3% |
| Mail-in Registration | 936 | 24% |
| Online/Email/Fax | 545 | 14% |
| Voter Registration Drives | 528 | 14% |

The data compiled by analyzing CDOR records is not proof that the individuals in question are non-citizens, because some may have become citizens after the driver's license transaction. But Colorado's inability to confirm the status of potential non-citizen voters prevents election officials from ensuring the accuracy the voter rolls, or from determining the impact on close races.

2. *Colorado recently gained access to some federal immigration data, but more resources are needed.*

In order to answer the questions surrounding some voters' citizenship status, the Secretary of State sought help from the Department of Homeland Security ("DHS"), as authorized by federal law. While there is no national database that tracks citizenship status explicitly, some federal information would be useful in assessing the accuracy of the current voter registration rolls.

The Secretary of State began by requesting access to the DHS Systematic Alien Verification for Entitlements ("SAVE") database. The SAVE database is used to verify that a person possesses the immigration status indicated on their documents or that the immigration information provided during a transaction for government benefits or with a licensing agency is accurate. In other words, the database verifies that non-citizen documents are valid. In July 2012, after a threat of legal action to gain access to the SAVE database, DHS agreed to facilitate Colorado's efforts in validating the voter registration rolls.

Colorado requested access to federal jury lists in March 2011 to collect the names of jurors who had identified themselves as non-citizens. According to a federal report from the Government Accountability Office, federal courts draw their jury lists from voter rolls.[26] Many times, jurors recuse themselves on the grounds that they are not U.S. citizens. Reliable data

[26] "Elections: Additional Data That Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists," Government Accountability Office, Report GAO-05-478, June 2005, p. 41

regarding the percentage of non-citizens on these jury lists does not exist, but some court districts estimate the number at around 1%.[27] According to other research, the number of jurors who recuse themselves due to non-citizenship is between one and three percent.[28] Regardless of the true proportion, access to this information would be helpful in identifying individuals registered to vote who are not citizens. The U.S. District Court for the District of Colorado refused to provide information about juror recusals.[29]

The Law Enforcement Support Center ("LESC"), another federal immigration database maintained by the Department of Homeland Security, would also be helpful. It is "a single national point of contact that provides timely customs information and immigration status and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity."[30] While intended as a law enforcement tool, LESC contains additional information about the immigration status of individuals who cannot easily prove citizenship. It can also provide information on jailed prisoners and other groups of non-citizens who might not be represented in the SAVE database.

### D. Additional steps can prevent non-citizens from registering to vote and maintain voter roll accuracy.

Two additional approaches can fix the problem of non-citizen registration and ensure election integrity. First, the Secretary should remove non-citizen voters after comparing the voter rolls to other sources of citizenship information and confirming an individual's status. Second, the state should prevent registration by ineligible people in the first place.

#### *1. Proof of citizenship to register to vote.*

Colorado should consider requiring proof of citizenship when registering to vote. As noted earlier, much of the problem of non-citizen voting results from the fact that the voter registration system is porous and requires no verification of a person's eligibility to vote. In 2001, the bipartisan National Commission on Federal Election Reform, Chaired by former Presidents Gerald Ford and Jimmy Carter, wrote that "Inability to verify citizenship is a weakness in every state's voter registration system. The problem is not hypothetical. Non-citizens do vote, albeit illegally. We therefore recommend that a specific enforceable affirmation

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[27] "Elections: Additional Data That Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists," Government Accountability Office, Report GAO-05-478, June 2005, p. 42

[28] Von Spakovsky, Hans A., "The Threat of Non-Citizen Voting," The Heritage Foundation, Legal Memorandum No. 28, 2008, p. 1

[29] See Appendix 5

[30] http://www.ice.gov/lesc/

of citizenship be included in all voter registration applications."[31] In the last year, 17 states introduced legislation requiring proof of citizenship, such as a birth certificate, to register to vote. Alabama, Tennessee, and Kansas recently joined Arizona and Georgia as being states that passed laws to protect the integrity of their voter registration rolls through this method.

Following a recent decision from the Ninth Circuit[32] it is uncertain to what extent states can protect their voter rolls through this method. Accordingly, Colorado should immediately begin other methods for maintaining the accuracy of voter rolls, and assess the results of other states' efforts.

2. *The Secretary of State should obtain access to Colorado sources of non-citizenship information.*

Various state and local government agencies in Colorado maintain information about non-citizens. For example, potential jurors must recuse themselves if they are non-citizens, and state district courts maintain this information. Likewise, county and state jails maintain information about potential illegal aliens. The state should establish protocols to allow the Secretary of State to regularly review such information and compare it to the voter rolls, in order to identify potential non-citizens.

3. *The Secretary of State's office should obtain access to federal sources of non-citizenship information, including additional databases at the Department of Homeland Security.*

The Department of Homeland Security SAVE system can help verify the eligibility of suspected non-citizens, but it has limitations. The system validates the legitimacy of non-citizen documentation. It can also determine if a legal alien has become a naturalized citizen, and it can determine if a non-citizen's legal authorization has expired. In all instances, the non-citizen must first have applied for – and received – authorization to reside in the United States.

The LESC database would also be a great benefit in validating voter registration rolls and should be sought by the Secretary of State. Because the Secretary of State is charged with enforcing election law, and violations of election law are crimes, using LESC to help verify citizenship information is not outside the original intent of the database. Further, DHS is obligated to provide assistance in these matters. Federal law states that the Department of Homeland Security "...shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the

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[31] "To Assure Pride and Confidence in the Electoral Process," Report of the National Commission on Federal Election Reform, August 2001, p. 33

[32] See *Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012) (en banc)

requested verification or status information."[33] Accessing both SAVE and LESC will create a more comprehensive method for determining citizenship status.

Other federal databases also contain information about non-citizens. For example, access to Social Security databases will help determine citizenship status, because the Social Security Administration issues social security numbers to both citizens and non-citizens for the purpose of federal income tax withholding. Indeed, this information, along with data from the Department of Homeland Security, forms the foundation of the E-Verify system frequently used to determine eligibility to work in the United States. Although current federal law does not require the Social Security Administration to share this information with state election officials, Congress can mandate that the SSA share this information, if necessary.

4. *The Secretary of State should remove non-citizens from the voting rolls in a manner that meet constitutional due-process standards.*

When removing non-citizens from the voting rolls, all care must be taken to ensure the state does not remove eligible voters. Accordingly, the procedure should be similar to processes already in place for deaths and felony convictions.

Under 1-2-302(3.5) C.R.S., the Secretary of State must reconcile death records and felony conviction records with the electronic voter registration database and to make necessary cancellations in the database. Likewise, Colorado Revised Statutes Section 1-2-602 and Section 1-2-606 describe the requirement for the Secretary of State to forward the names of deceased voters or convicted felons to county clerks and for the clerks to cancel their voter registration. The state legislature should add a paragraph to each section of the statute mandating the same requirement for ineligibility due to non-citizenship.

Because citizenship status information is contained in multiple databases, the Secretary should take additional steps not applicable to deaths and felony convictions. One possible approach follows: After comparing voter rolls to sources of non-citizenship information, the Secretary of State should directly contact suspected non-citizens by mail in order to give them an opportunity to either voluntarily withdraw from the voter rolls or provide proof of citizenship. For those who do not respond, either the Secretary of State or county clerk and recorders should again contact non-respondents and give them an opportunity to be heard. Unless evidence (such as documentation or credible testimony) at the hearing shows otherwise, the voter should then be removed from the voter rolls. At that point, the voter can re-apply to vote, but must provide proof of citizenship.

This approach meets due process concerns, as well as NVRA requirements, which do not prohibit the removal of non-citizens from voter rolls within 90 days before a primary or general election.[34]

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[33] 8 U.S.C. § 1373(c)

5. *Colorado should adopt an alternate format for non-citizen driver's licenses and state ID cards.*

Fully 20% of the transactions involving non-citizen documents originate through a DMV/Department of Revenue transaction. Registration by non-citizens could therefore be greatly reduced if the state adopted a "non-citizen" driver's license for legal aliens. This would still be a standard Colorado driver's license, but would be a different color or contain a distinguishing mark or unique design. This non-citizen ID would be a convenient way to identify ineligible voters, and if used as identification by a first time voter at the polls would prevent voting by non-citizens who registered accidently through a voter registration drive, through the mail, or online.

6. *The Secretary of State's office should invest time and effort in educational outreach on this issue.*

Evidence shows that non-citizens are woefully unaware of the requirements for voter registration. The Secretary of State's office can better ensure legitimate elections by educating new registrants, checking agency and county processes to reduce error, and mandating that voter registration drives also educate new registrants about Colorado's voting requirements. This can be accomplished through educational videos, mailing programs, media campaigns, and website publications.

**Conclusion**

The current voter registration system is inadequate to keep ineligible voters, particularly non-citizens, from registering and voting. Although sufficient evidence shows a problem in Colorado, the state does not have the tools to determine the actual number of non-citizens registered to vote. By taking steps to validate the current registration database and prevent the registration of ineligible individuals in the future, Colorado can protect both the integrity of the elections process and the aspirations of legal aliens living and working in our state.

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[34] 42 U.S.C. § 1973gg-6(c)(2)(A) (2006).
United States v. Florida, 2012 U.S. Dist. LEXIS 101253 (N.D. Fla. June 28, 2012)

**Appendices:**

1. Withdrawal of Voter Registration (Canadian citizen)
2. Voter registration form (Vietnamese citizen)
3. Voter registration form (Vietnamese citizen)
4. Withdrawal of Voter Registration (Hood River, Oregon)
5. Letter from U.S. District Court for the District of Colorado
6. Correspondence between Colorado and U.S. Department of Homeland Security

To whom it may concern

Appendix 1

**RE: Registered and Withdrawal of Voter Registration History**

When I first moved to Colorado from [redacted] Canada and being employed by a Colorado based company [redacted] on a NAFTA TN Work Permit I went to get a Colorado Drivers License.

When I was applying for this license the DMV clerk asked me if I wanted to register to vote. I indicted to her that I was not a US citizen and thought that 1. I would not be legible to vote and 2. I did not think it was right that I should be able to vote being a non-US citizen. I do recall that we had quite the discussion on this subject.

I do not recall the exact details but I do think that this clerk did register me to vote even after what I thought was a logical argument on my part as to why I should not be registered. I only suspected this registration had occurred after a period of time when I started getting election ballots in the mail.

Just to be clear on this – I have never voted in any election process while living in the USA. I knew that this would be fundamentally wrong if not actually legally wrong.

On June 05, 1012 I received another official Election Bailot (enclosed unopened) in the Mail which prompted me to call the Douglas County Clerk & Recorder's Office. I confirmed that I was indeed registered and inquired as to the process of withdrawing my registration.

I was directed to the State of Colorado elections web site by a clerk in the Douglas County Clerk's office which is where I have filled out the Withdrawal Form (attached).

I do think that the whole process has a problem or had a problem at the time I applied for my License and that is the DMV clerk did not fully understand eligibility for voting.

If I do decide to apply for a permanent USA residence status in the future then I would anticipate applying to be a legal eligible voter at that time.

Best regards,

Larkspur, CO 80118

[redacted]

**WARNING: It is a Class 1 misdemeanor to swear or affirm falsely as to your qualifications to register to vote.**

VOTER REGISTRATION

I _____ hereby decline to register to vote. (Declination information is confidential).

***DO NOT COMPLETE THE REST OF THIS SECTION UNLESS YOU ARE REGISTERING TO VOTE.***

| | | | | |
|---|---|---|---|---|
| Name [redacted] | | | Sex: ☐ M ☒ F | Citizen by: ☐ Birth ☐ Naturalization |
| Date of Birth [redacted]948 | Social Security Number *(optional)* [redacted] | | | Political Affiliation: ☐ Republican ☐ Democrat ☐ Unaffiliated ☒ Other |
| Colorado Residence Address [redacted] | | County VIET NAM | Former Voter Registration Address | County |
| City COLORADO SPRINGS | State | ZIP Code 80907 | City | State / ZIP Code |
| Current Mailing Address [redacted] | | County ~~VIET NAM~~ EL PASO | Former Name | |
| City COLORADO SPRINGS | State | ZIP Code 80916 | | |

SEP 22 2003
EL PASO COUNTY
ELECTION DEPT

I _____ do solemnly affirm that I am a citizen of the United States and that on the date of the next electio
I shall have attained the age of 18 years, and shall have resided in the state of Colorado at least 30 days and in my precinct at least 30 days before th
election. I further affirm that the present address I listed herein is my sole legal place of residence and that I claim no other place as my legal residence

| | | |
|---|---|---|
| Voter Registration Applicant Signature [redacted] | Date [redacted]2003 | Phone Number *(optional)* [redacted] |

Appendix 2

# Colorado Voter Registration Form

For office use only
Voter ID Number: _____
Date Stamp:

RECEIVED
APR 21 2011

Fill out all fields marked with an asterisk (*). Follow the instructions for other fields. If you do not provide all of the required information, your application to register to vote will not be complete

**Your eligibility to vote**

Are you a citizen of the United States?* Yes ☐ No ☒ Not yet (will be)

Will you be at least 18 years of age on or before the next Election Day?* Yes ☐ No ☐

If you answered "No" to either of the above questions, do not complete this form.

PERMANENT RESIDE

**Your name**

Last name* [redacted] First name* [redacted] Middle name [redacted]

If you are currently registered to vote with a different name, what is that name? _____

gency-Bi
Registrati

**Your identifying information**

Your birthdate* (MM/DD/YYYY) [redacted]1948 Your gender* Female ☒ Male ☐

**You must select one of the following and provide the requested information***

☐ I have a valid Colorado Driver's License or Colorado ID card (issued by the Dept. of Revenue) and that number is _____

☐ I have not been issued a Colorado Driver's License or ID card, but I have a Social Security Number & the last 4 digits are [redacted]

☐ I do not have a Colorado Driver's License, ID card, or a Social Security Number.

**Your contact information**

**Your home address**

Street address (No P.O. Boxes)* [redacted] Apt. or Unit [redacted] City or Town* COLORADO SPRINGS ZIP Code* CO 80907 Colorado County COLORADO

When did you move to this address?* (MM/DD/YYYY) _____

**Address where you receive your mail (required if different from your home address)**

Mailing address [redacted] Apt. or Unit [redacted] City or Town COLORADO SPRINGS State CO 80907 ZIP Code COLORADO S

**Your former address**

If you are changing your registration to a new address, you must provide the address where you were formerly registered to vote.

Street address (No P.O. Boxes) _____ Apt. or Unit _____ City or Town _____ State _____ ZIP Code _____

**Your phone number and email**

Area code [redacted] Phone number [redacted] Email address [redacted]

**Select or change your political party affiliation**

Select only one. (Required if you want to vote in a party's Primary Election or participate in a party caucus).

American Constitution ☐ Democratic ☐ Green ☐ Libertarian ☐ Republican ☐ Unity ☐ Unaffiliated

**Voting by mail - Do you wish to be designated as a permanent mail-in voter?**

APR 21 2011
EPC ELE REC'D

☒ Yes, I want to be a permanent mail-in voter and automatically receive a mail-in ballot for all applicable elections.

☐ No, I do not want to be a permanent mail-in voter and if my name is on the permanent mail-in list I want it removed.

☐ No, but I would like a mail-in ballot for this year's statewide elections.

If you want your mail-in ballot sent to an address that differs from the home or mailing address you listed above, you will need to fill out a separate Mail-in Ballot Application

**Helping with elections**

I would like to be an election judge or poll worker. Yes ☒ No ☐

**Sign or mark below**

**Warning:** It is a crime to swear falsely as to your qualifications to register to vote.

A violation of the self-affirmation, of which you are about to make, is a criminal act under Colorado law and

**Self-Affirmation:** I do solemnly affirm that I am a citizen of the United States and that on the date of the election I will be a resident of the state of Colorado at least 30 days and in my present precinct at least 30 days before the election. I further affirm that I have read and understand the qualifications to register to vote and that I claim no other place as my legal residence. I am aware that I can only legally vote in one place. I understand that registering to vote in Colorado for income tax and motor vehicle registration and operation.

Appendix 3

Sign here [redacted] APRIL 16 - 2011

Signature or Mark* Date* Witness Signature Date

(If you are registering for a Mail-in Ballot and are unable to sign, you must make a mark and a witness to the mark must sign here).

SOS Application [illegible] [Sections 1-2-204, 1-2-501, 1-5-10]

JEFFERSON COUNTY
ELECTIONS
MAY 10 2010

Appendix 4

May 3, 2010

Department Election,

Please cancel my voters registration. My name [redacted]
born on [redacted]

My reason for this request is I'm trying to become a U.S. Citizen and I didn't know that I couldn't vote or be registered to vote.

I'm in need of your approval to grant my request. I am sorry about what I did.

If possible I need proof of your approval that you allowed me to be taken off . I apologize for not know once again.

Here is some more information to get in contact with me
[redacted] or [redacted] Hood River, Oregon 97031 or [redacted]

Thank You,

[redacted]

Appendix 5

COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
OFFICE OF THE CLERK

Alfred A. Arraj
United States Courthouse
901 19th Street
Denver, Colorado 80294
www.cod.uscourts.gov

Gregory C. Langham
*Clerk*

Phone: (303) 844-3433
Fax: (303) 335-2040

March 24, 2011

Received by
MAR 25 2011
Secretary of State

The Honorable Scott Gessler,
Secretary of State
Colorado Department of State
1700 Broadway,
Denver, CO 80290

Re: **Request to the United States District Court for a Non-Citizen Report**

Dear Mr. Gessler:

Recently the Jury Administrator of the U.S. District Court received a request from your office to explore whether the court could periodically provide a Non-Citizens Report. This report would be a listing of individuals who have identified themselves as not being citizens of the United States, derived from the responses of those individuals to the District Court's Juror Qualification Questionnaire which is served on potential jurors as part of the jury summons process.

After thorough consideration of your request, the U.S. District Court has come to the conclusion that the Juror Qualification Questionnaire, when completed by a potential juror, is a document that is for the Court's use only. The questionnaire's sole purpose is to allow the Court to determine whether potential jurors are qualified to serve as federal trial court jurors.

Accordingly, on behalf of the U.S. District Court for the District of Colorado, I must respectfully decline your request.

Very Truly Yours,

Gregory C. Langham
Clerk of the Court

cc: Chief Judge Wiley Y. Daniel, United States District Court
Mr. Michael Hagihara, Colorado Department of State

**STATE OF COLORADO**
**Department of State**
1700 Broadway
Suite 270
Denver, CO 80290

**Scott Gessler**
**Secretary of State**

**Judd Choate**
**Director, Elections Division**

July 28, 2011

Appendix 6

VIA EMAIL

U.S. Immigration and Customs Enforcement
Office of the Chief Counsel
Attn: Corina Almeida
12445 East Caley Avenue
Centennial, CO 80011

RE: Colorado statewide voter registration system maintenance

Dear Ms. Almeida:

Please accept this letter as a formal request that your office assist the Colorado Department of State to verify the citizenship status of certain registrants currently listed on Colorado's voter rolls.

The Colorado Department of State recently compared the list of registered Colorado electors to those who provided a noncitizen document to the Colorado Department of Motor Vehicles during a driver's license transaction. This comparison yielded 1,427 registrants who provided an I-551, EADS, or I-94 card. The Department cannot verify the citizenship status of the 1,427 registrants because this office does not have access to citizenship records. Accordingly the Department requests that U.S. Immigration and Customs Enforcement verify the citizenship or immigration status of the 1,427 names.

The Department respectfully submits this request under 8 U.S.C. § 1373(c), which states that your office:

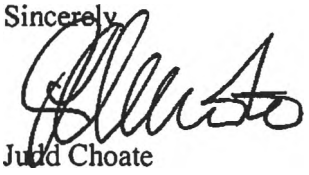
> "...shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

For a request to fall under § 1373 the requestor must 1) be a Federal, State or local government agency, and 2) be authorized to request the information. The Colorado Department of State meets both requirements. Under 42 U.S.C. § 15483, and Colo. Rev. Stat. §§ 1-2-301 and 302, the Department is required to maintain the statewide voter registration database. This obligation includes removal of those persons ineligible to vote in federal or state elections. Further, Colo. Rev. Stat. § 1-1-107(b) authorizes the Secretary of State to "enforce the provisions of [the election] code." One aspect of this code is that Colo. Rev. Stat. § 1-2-101(1)(a) only

allows United States citizens to register to vote. Therefore, to enforce federal and state statutes, the Colorado Department of State needs to know the citizenship status of the registrants in question. Please contact this office to set up a process to exchange the appropriate information.

If you have any questions please contact me at 303-894-2200 ext 6301.

Sincerely,



Judd Choate
Director, Division of Elections

**U.S. Department of Homeland Security**
Immigration and Customs Enforcement

Office of the Chief Counsel

*12445 E. Caley Avenue*
*Centennial, CO 80111-6432*

August 5, 2011

VIA EMAIL

Judd Choate, Director
Division of Elections
State of Colorado
Department of State
1700 Broadway
Suite 270
Denver, CO 80290

RE: Colorado statewide voter registration system maintenance

Dear Mr. Choate:

The Department of Homeland Security (DHS) U.S. Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor received your letter dated July 28, 2011. Your letter stated that you compared a list of registered Colorado electors who provided a "noncitizen document" to the Colorado Department of Motor Vehicles during a driver's license transaction. That comparison showed that 1, 427 registrants provided a permanent resident card (I-551), employment authorization document or Arrival/Departure Form (I-94). You requested ICE's assistance to verify the citizenship status of those 1,427 registrants currently listed on Colorado's voter rolls.

Please be advised that ICE does not maintain citizenship records. The DHS component responsible for determining citizenship is U.S. Citizenship and Immigration Services (USCIS), and USCIS maintains the citizenship records you want searched. Therefore, we have taken the liberty and forwarded your request to Alissar Khoury Rahi, Deputy Chief, SAVE Program, USCIS Verification Division. Mr. Rahi can be reached at (202) 443-0174.

Thank you for your inquiry.

Very truly yours,

Corina E. Almeida
Chief Counsel
Denver, CO

**STATE OF COLORADO**
**Department of State**
1700 Broadway
Suite 270
Denver, CO 80290

**Scott Gessler**
**Secretary of State**

**Judd Choate**
**Director, Elections Division**

August 8, 2011

VIA EMAIL

U.S. Citizenship and Immigration Services
Verification Division
Attn: Alissar Khoury Rahi
alissar.rahi@dhs.gov

RE: Colorado statewide voter registration system maintenance

Dear Ms. Rahi:

Please accept this letter as a formal request that your office assist the Colorado Department of State to verify the citizenship status of certain registrants currently listed on Colorado's voter rolls.

The Colorado Department of State recently compared the list of registered Colorado electors to those who provided a noncitizen document to the Colorado Department of Motor Vehicles during a driver's license transaction. This comparison yielded 1,427 registrants who provided an I-551, EADS, or I-94 card. The Department cannot verify the citizenship status of the 1,427 registrants because this office does not have access to citizenship records. Accordingly the Department requests that U.S. Citizenship and Immigration Services verify the citizenship or immigration status of the 1,427 names.

The Department respectfully submits this request under 8 U.S.C. § 1373(c), which states that your office:

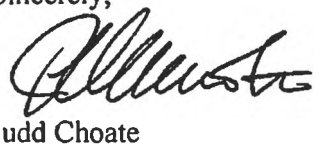
> "...shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

For a request to fall under § 1373 the requestor must 1) be a Federal, State or local government agency, and 2) be authorized to request the information. The Colorado Department of State meets both requirements. Under 42 U.S.C. § 15483, and Colo. Rev. Stat. §§ 1-2-301 and 302, the Department is required to maintain the statewide voter registration database. This obligation includes removal of those persons ineligible to vote in federal or state elections. Further, Colo. Rev. Stat. § 1-1-107(b) authorizes the Secretary of State to "enforce the provisions of [the election] code." One aspect of this code is that Colo. Rev. Stat. § 1-2-101(1)(a) only allows United States citizens to register to vote. Therefore, to enforce federal and state statutes,

the Colorado Department of State needs to know the citizenship status of the registrants in question. Please contact this office to set up a process to exchange the appropriate information.

If you have any questions please contact me at 303-894-2200 ext 6301.

Sincerely,



Judd Choate
Director, Division of Elections

**STATE OF COLORADO**
**Department of State**
1700 Broadway
Suite 270
Denver, CO 80290

**Scott Gessler**
**Secretary of State**

**Suzanne Staiert**
**Deputy Secretary of State**

March 8, 2012

Secretary Janet Napolitano
Department of Homeland Security
U.S. Department of Homeland Security
Washington, D.C. 20528

RE: Colorado statewide voter registration system integrity

Dear Secretary Napolitano:

As the state's Chief Election Officer, the Colorado Secretary of State is responsible for ensuring the integrity of Colorado elections. One important aspect of this duty is to maintain the statewide voter registration database and ensure clean voting rolls.

Last year, my office compared the list of registered Colorado electors to those who provided a non-citizen document to the Colorado Department of Motor Vehicles during a driver's license transaction. This comparison yielded 1,427 registered voters who provided an I-551, EADS, or I-94 card. We cannot verify the citizenship status of these registrants because this office does not have access to citizenship records. Since we ran the initial analysis, the number has grown to over 2,000 registered voters who have presented non-citizen documents during a driver's license transaction.

Our office lacks the tools to determine whether the individuals who presented non-citizen documents in the recent past became U.S. citizens either before they registered to vote or are current U.S. citizens. It is imperative to the integrity of Colorado elections that we ensure only U.S. citizens are registered to vote and voting in our elections.

Therefore, I respectfully submit this request under 8 U.S.C. § 1373(c), which states that your office:

> "...shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

For a request to fall under § 1373 the requestor must 1) be a Federal, State or local government agency, and 2) be authorized to request the information. The Colorado Department of State meets both requirements. Under 42 U.S.C. § 15483, and Colo. Rev. Stat. §§ 1-2-301 and 302, the Department is required to maintain the statewide voter registration database. This obligation includes removing anyone ineligible to vote in federal or state elections. Further, Colo. Rev. Stat.

§ 1-1-107(b) authorizes the Secretary of State to "enforce the provisions of [the election] code." One aspect of this code is that Colo. Rev. Stat. § 1-2-101(1)(a) only allows United States citizens to register to vote. Therefore, to enforce federal and state statutes, the Colorado Department of State needs to know the citizenship status of the registrants in question.

This letter is our third written attempt to obtain assistance from the Department of Homeland Security to verify the citizenship status of certain registrants currently listed on Colorado's voter rolls. My office first requested this information from U.S. Immigration and Customs Enforcement in July, 2011. We were told ICE was not the custodian of the records in question and we were referred to U.S. Citizenship and Immigration Services. Discussions with USCIS broke down in November, 2011. At that time, we were told that USCIS could not provide the information we had requested because "it is against long standing policy to conduct verifications when only name and birthdate are available."

As we indicated at the time, our records include minimum matching criteria to determine the citizenship status of the individuals in question. For each of the records, we have name, date of birth, and a nine digit number we understand to be an alien registration number.

I am writing to you now as our previous attempts to gain assistance from various offices within the Department of Homeland Security have not been successful. Much of the feedback we have received to date, when we have been able to get feedback, has revolved around database capabilities and possible technological constraints. My office stands ready and willing to overcome any technology or database obstacles to fulfilling this request.

As noted, the integrity of our elections is the foundation of our system of government. We seek the assistance of the Department of Homeland Security in taking this most basic step to ensure only eligible individuals are registered and voting in our elections. Thank you for your consideration and attention to this request. Please feel free to contact my office if you have any questions or need any additional information in order to respond to our request.

Sincerely,

Scott Gessler
Secretary of State

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
*Office of the Director*
Washington, DC 20529

U.S. Citizenship and Immigration Services

MAY 10 2012

The Honorable Scott Gessler
Secretary of State
State of Colorado
Denver, CO 80290

Dear Secretary Gessler:

Thank you for your March 8, 2012 letter to the Department of Homeland Security (DHS) seeking DHS's assistance in verifying the citizenship of certain registered Colorado voters. Your letter has been referred to U.S. Citizenship and Immigration Services (USCIS) for response.

Through the Systematic Alien Verification for Entitlements (SAVE) Program, USCIS provides authorized federal, state, or local agencies with a means to verify the current immigration status of individuals. During previous discussions with USCIS, you offered only the name and date of birth of the registrants. This information alone is not sufficient to ensure accurate information as to immigration status.

However, your letter indicates that your office has now determined that it may have alien registration numbers for the registered voters whose citizenship your office seeks to verify. While this additional information may facilitate the use of SAVE for this verification purpose, we must further assess serious legal and operational issues that remain before we can make a determination on your request. Accordingly, we are unable to enter into a SAVE Memorandum of Agreement at this time.

Thank you again for your letter. Once we complete our assessment, we will provide an updated response to your request.

Sincerely,

Alejandro N. Mayorkas
Director

JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney General

DANIEL D. DOMENICO
Solicitor General

**STATE OF COLORADO**
**DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 7th Floor
Denver, Colorado 80203
Phone (303) 866-4500

TO: The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security

FROM: John W. Suthers
Attorney General
State of Colorado

DATE: July 3, 2012

RE: State of Colorado Request for Memorandum of Understanding to Verify Citizenship of Individuals Registered to Vote in Colorado

This Memorandum and cover letter renews and reiterates our effort to cooperate with the Department of Homeland Security ("DHS") in an expeditious manner to develop a Memorandum of Understanding ("MOU") to share citizenship information to assist in our efforts to verify the accuracy of Colorado's voter rolls. We are in receipt of your Department's May 10, 2012 letter declining to enter an MOU with the State of Colorado. That letter, however, supplied no specific legal justification for the declination. We are interested, as we know you are also, in enabling Colorado to remove any question about the citizenship status of registrants on our voting rolls. We thank you in advance for your consideration of our request and look forward to working with your staff to resolve this situation no later than July 9, 2012.

We have discussed this subject with other states, many of whom are copied on the cover letter. They have expressed sincere interest in also cooperating with DHS to obtain access to its databases in advance of the general election in November, 2012. We are not, however, requesting an MOU on their behalf. Rather, we want to ensure you are informed about the serious nature of the multi-state interest in the legality of elections so that you may consider our request for an MOU in the proper context.

The possibility of non-citizens on Colorado's voter rolls has received significant public attention here. The ability to confirm citizenship of those on our voter rolls will help restore faith in the integrity of our elections. Public confidence in the integrity of elections is vital to a functioning representative democracy.

1. **The Secretary of State has a legal obligation to address evidence that non-citizens are registered to vote in Colorado.**

As Colorado's Chief Election Officer, the Colorado Secretary of State is responsible for ensuring the integrity of elections. Of course, the Secretary works closely with the county clerks and other election officials in carrying out his duties. One important aspect of this duty is to maintain the statewide voter registration database and ensure that voting rolls include only persons who may legally vote. These rolls are regularly reviewed for their accuracy as required by law. This is important to make certain that illegal votes do not disenfranchise votes cast legally. Our goal is to ensure the integrity of our elections by confirming the accuracy of our voting rolls. To do so, we must act on credible information suggesting that certain registered voters are not illegally registered.

Last year, the Secretary of State's office compared the list of registered Colorado electors to those who provided a non-citizen document to the Colorado Department of Motor Vehicles during a driver's license transaction. This initial comparison produced 1,427 registered voters who provided documents such as permanent resident cards (I-551), employment authorization documents (EADS), or Arrival/Departure Forms (I-94). We have continued analyzing the data and the number is growing, with over 5,000 registered voters who have presented non-citizen documents during a driver's license transaction. The 5,000 registered voters include approximately 2,000 voters who have voted.[1]

Additionally, Colorado's statewide voter registration system identifies 430 people who registered or attempted to register to vote, and who voluntarily self-identified themselves as non-citizens. A particularly egregious example occurred in 2003 when a woman registered to vote in El Paso County, Colorado, notwithstanding having identified herself as a non-citizen. Despite not being entitled to vote, she later voted at her polling place as part of the 2003 November election, the 2004 Primary election, the 2004 General election, and the 2006 Primary election. Following return of undeliverable mail in 2007, the county clerk deemed her an inactive voter. In 2011, she re-submitted a completed voter registration form, even indicating she wanted to permanently receive absentee mail ballots and serve as an election judge. Under the section asking, "Are you a citizen of the United States?" she checked the "No" box and even scribbled "Not yet" beside the question.

The Secretary has a duty to act on this information and resolve any issues that question the legitimacy of Colorado elections. Yet the Secretary lacks adequate tools to further investigate and resolve this problem without your immediate assistance. And while he might be able to act on egregious cases where registrants admit they are non-citizens, the Secretary wishes to remove any doubt about these individuals before considering his options. As you know, the federal government—in particular your agency—is solely responsible for maintaining citizenship information. *See, Arizona. v. United States*, No. 11–182, slip op. at 7 (U.S. June 25, 2012).

---

[1] Our March 8 letter to you cited 2,000 such cases. That number was a set of individuals who presented a non-citizen document, are registered to vote, and have voted.

**2. The Secretary of State's office has attempted to obtain citizenship information from DHS for one year.**

**A. July 28, 2011—The Secretary of State first requested assistance from Immigration and Customs Enforcement.**

The Secretary of State first requested cooperation from the Office of the Chief Counsel in our local Immigration and Customs Enforcement (ICE) office. The letter explained the comparison of voter rolls with Department of Motor Vehicle data that brought into question the citizenship of individuals registered to vote in Colorado. The analysis raised the concern that approximately 1,500 persons may have mistakenly registered to vote or may even have intended to illegally register. ICE responded by letter on August 8, 2011, redirecting the request to U.S. Citizenship and Immigration Services (USCIS), another agency of DHS.

**B. August 8, 2011—The Secretary's office sent a separate letter to USCIS renewing Colorado's request for assistance.**

Following the August 8 letter, Secretary Gessler's office engaged in unsuccessful discussions with USCIS to exchange information and reach an agreement for assistance. Those discussions were not fruitful because USCIS said in November 2011 that our requests for assistance could not be accommodated in light of database "operational issues" and there existed a "long-standing policy [against conducting] verifications when only name and birth date are available." We have never been provided any such written policy and are unable to locate such a policy ourselves. Further, it is our understanding that many immigration checks are conducted by law enforcement using information in the possession of DHS based solely on name and date of birth information. Voter fraud is undoubtedly a law enforcement issue though the Secretary has refrained from making any criminal referrals. It even appears DHS agrees information in certain databases, like the Systematic Alien Verification for Entitlements (SAVE) database, should be made available for voter registration purposes.[2] Regardless, USCIS staff became unresponsive when the Secretary's office attempted to work toward a resolution of the "operational issues."

**C. March 8, 2012—The Secretary's office sent another letter directed to you, again seeking assistance in obtaining citizenship information.**

Four more months passed as the Secretary's office worked with members of Congress to make contact with someone at DHS that could assist on this important issue. At the request of the DHS Office of Intergovernmental Affairs, on March 8, 2012 Secretary Gessler again renewed his request for assistance by letter directed to you. The request remained the

[2] *See* Privacy Impact Assessment for the Systematic Alien Verification for Entitlements (SAVE) Program, DHS/USCIS/PIA-006 Section 2.1 (August 26, 2011).

same: a plea for assistance to verify citizenship of individuals on the voter rolls who had presented non-citizen documents to the DMV.

One significant change occurred in the interim—we alerted you that the number of persons with suspect registrations was growing. In light of the impasse that occurred in November 2011, the letter also offered to share any information we have, including the name, date of birth, and the nine-digit alien registration number of individuals on the list. This additional information was offered specifically to address concerns expressed by USCIS that minimum matching criteria are important to reduce the possibility of false positives. The letter also reiterated our State's strong interest to work with DHS cooperatively to resolve any technological constraints or database capabilities that might hinder our request.

**D. May 10, 2012—USCIS Director Mayorkas declined to enter into an MOU, leaving no path toward a solution to Colorado's situation.**

After a three month-delay, on May 10, 2012, USCIS Director Mayorkas finally responded. Despite our offer to not only provide alien registration numbers but to cooperate with DHS to address any database operational needs, he inexplicably stated that, "While this additional information ***may*** facilitate the use of SAVE for this verification purpose, ***we must further assess serious legal and operational issues that remain before we can make a determination on your request.***" Based on these unexplained "serious legal and operational issues," Director Mayorkas declined to enter an MOU with the State of Colorado.

The May 10 response left no indication about how we could obtain citizenship information. The letter lacked any specifics on the legal, systemic, or other impediments; lacked any suggestion of a cooperative way to move forward together; and was completely open-ended. After nearly a year of attempts to cooperatively work with your Department, Director Mayorkas' response was extremely disappointing.

A deputy attorney general in my office also attempted to engage your department and the Department of Justice to gain a better understanding of the specific legal and operational concerns, but to no avail. We have yet to receive any specifics about how to proceed expeditiously. As you know, the general election will occur on November 6, 2012. Time is of the essence.

**3. DHS exclusively maintains information that can resolve suspicions over registered voters and restore trust in the integrity of Colorado elections.**

It is our understanding that DHS maintains several different databases housing non-citizen information. Each was built for a specific purpose and is used in different ways. In our efforts to obtain citizenship information to verify the accuracy of our voter rolls, we have been directed to focus on two: (1) the Systematic Alien Verification for Entitlements (SAVE) program and (2) the Law Enforcement Support Center (LESC) database. Unfortunately, your office has issued conflicting information about which is most appropriate for our purposes.

Apparently, LESC "is the single national point of contact that provides timely immigration status and identity information and real-time assistance to local, state, and federal law enforcement agencies on aliens suspected, arrested, or convicted of criminal activity."[3] ICE wrote that "having reviewed the issue you have described, we believe Colorado would be better served by verifying the immigration status of its voters through the [SAVE] program. In fact, DHS has encouraged customer agencies to use SAVE for any legal purpose, including background investigations and voter registration. Please note that U.S. Citizenship and Immigration Services (USCIS), not ICE, handles all inquiries about the immigration status of individuals seeking government benefits through the SAVE program." *Id.*

LESC may be the most appropriate database for Colorado to obtain the information needed to maintain Colorado's voter rolls. Federal and Colorado law charges the Secretary of State with maintaining the accuracy of the statewide voter registration database.[4] Further, Colorado law authorizes the Secretary to "enforce the provisions of [the election] code."[5] There are several provisions of Colorado law—based on the type of infraction an individual may engage in—that can be criminally charged. One such example is Colo. Rev. Stat. § 1-13-704.5, *Voting by persons not entitled to vote*, which states that any person "voting in any election provided by law knowing that he or she is not entitled to vote in such election commits a class 5 felony." Such criminal violations would clearly qualify for use of the LESC process. The Attorney General's office has jurisdiction to investigate and prosecute such infractions based on credible information provided by the Secretary of State, though no investigations have occurred to date because it is our preference to verify the accuracy of our voter rolls without involving criminal law enforcement resources.

Other states have been able to resolve questions of voter citizenship through cooperation with ICE. During a September 21, 2011 press conference, Maine Secretary of State Charlie Summers outlined his office's work with the local ICE office to investigate voters who presented non-citizen documents at the DMV. Through discussions with the Nebraska Secretary of State's office, we also learned that its local ICE office investigated the citizenship status of individuals who presented non-citizen documents during a DMV transaction—ostensibly using the LESC database administered by ICE. These examples stand in stark contrast to the response Colorado received in August 2011 from our local ICE office, declining to work toward a solution and deflecting any responsibility in the matter toward USCIS.

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[3] *See* DHS White Paper (undated) sent to U.S. Committee on House Administration staff member Karin Moore on November 4, 2011, from Kate Christensen Mills, ICE Deputy Assistant Director, Office of Congressional Relations. Ms. Moore had inquired about DHS databases at the request of the Colorado Secretary of State's office.

[4] 42 U.S.C. § 15483; Colo. Rev. Stat. §§ 1-1-107, 1-2-101, 301 and 302.

[5] Colo. Rev. Stat. § 1-1-107(b)

Separately, the SAVE database seems to also offer a solution to Colorado's analysis of possible non-citizens on the voter rolls. The SAVE program has been described as "an inter-governmental initiative designed to aid benefit-granting agencies in determining an applicant's immigration status, thereby ensuring that only entitled applicants receive federal, state and local public benefits and licenses."[6]

It has been explained to us that the SAVE program has limitations. We acknowledge that the information in the SAVE database is largely based on documents provided when an immigrant applies for a driver's license; thus, a fraudulent document used by an individual to obtain driving credentials may not be discovered through SAVE checks because SAVE merely verifies the status as it relates to the document and not the actual person.

But SAVE seems particularly well suited to address some cases of potential non-citizens on Colorado's voter rolls. Colorado's analysis compared individuals who presented non-citizen documents during a DMV transaction with individuals registered to vote. From our understanding—which includes the use of SAVE to verify immigration documents for our notary public program—SAVE contains information on individuals and documents for all legal non-citizens. Therefore, any individual who at one time presented a non-citizen document would be included in the SAVE program. So SAVE seems like the most logical database to help resolve any questions about individuals who at one time presented non-citizen documents but are currently registered to vote.

We believe many individuals who presented non-citizen documents in the past may have become citizens and are thus properly registered to vote. Access to citizenship information would allow us to confirm this belief and ensure their lawful participation in the election process. And Colorado already has access to the SAVE database for other purposes. A SAVE terminal is already available to the Secretary of State to verify the status of public notaries. If the SAVE program can lawfully be used for this ministerial task, it surely should be made available to verify the right of a citizen to vote. Colorado also uses the SAVE database for issuing driver's licenses, for individuals claiming Medicaid, and for our state's Indigent Care Program. It should be a simple process to modify the state's MOU to enable queries for voter purposes if there is any credible doubt surrounding an individual's right to vote.

A cooperative agreement that provides the Secretary of State's office with access to citizenship information will help restore faith in the integrity of elections here in Colorado. Public confidence is integral to our elections because citizens are more likely to participate if they believe the election results reflect the true will of the people. Public policy is better crafted by lawmakers with a clear mandate from the electorate—a mandate issued without any questions about its validity.

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[6] Electronic mail from Ms. Cheryl Grant, SAVE Program, Verification Division, USCIS, to Mr. Don Wright, North Carolina State Board of Elections General Counsel, dated May 10, 2011.

4. **Federal law requires DHS to provide citizenship information to the Colorado Secretary of State so that the Secretary can maintain the statewide voter registration database and enforce the state election code.**

It is well established that the states cannot make citizenship determinations. The states and the federal government, however, are required to engage in a cooperative manner on all immigration issues. Congress addressed this issue by requiring an exchange of information between the states and DHS when it passed the requirement found in 8 U.S.C. § 1373(c).

This statute requires your office to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c). Even according to legal analysis done by your office, this language creates "an affirmative duty to respond to ... requests." *See Arizona Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036, 1060 (D. Ariz. 2008), *aff'd*, 544 F.3d 976, *amended and superseded on denial of rehearing*, 558 F.3d 856, *petition for cert. filed*, 2009 WL 2251297; *see also* 3A Am. Jur. 2d Aliens and Citizens § 11 ("The federal immigration bureau is required to respond to an inquiry by a federal, state or local government agency....").[7] This interpretation is consistent with the apparent Congressional intent that there be no impediment to the flow of information because "[t]he conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended."1 H.R. Conf. Rep. No. 104-725, at 383 (1996), U.S. Code Congr. & Admin News 1996, pp. 2183, 2771. "The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS." *Id.*

Our understanding, apparently shared by your department, was recently reiterated by the Supreme Court in its opinion in *Arizona v. United States.*[8] "Congress has made clear that no formal agreement or special training needs to be in place for state officers to 'communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States.' 8 U. S. C. §1357(g)(10)(A). And **Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or**

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[7] *See* DHS White Paper (undated) sent to U.S. Committee on House Administration staff member Karin Moore on November 4, 2011, from Kate Christensen Mills, ICE Deputy Assistant Director, Office of Congressional Relations.

[8] *Arizona v. United States.* No. 11–182 (U.S. June 25, 2012).

**immigration status**. *See* § 1373(c) [further citations omitted]."[9] While the Supreme Court was addressing a specific Arizona statute, the mandatory nature of Section 1373(c) is applied to DHS broadly to include requests for "any individual within the jurisdiction of the [State or local] agency for **any purpose authorized by law**."

The Secretary has met all requirements for accessing information under § 1373(c). Secretary Gessler is the proper agent of the State as the elected official charged with ensuring the integrity of the state's elections. Under 42 U.S.C. § 15483, and Colo. Rev. Stat. §§ 1-2-301 and 302, Secretary Gessler must maintain the master list of registered electors "in a manner that ensures that... the names of voters who are not registered or who are not eligible to vote are removed from the computerized statewide voter registration list..." Colo. Rev. Stat. § 1-2-302(1.5)(b). This provision places a dual responsibility on the Secretary. He must facilitate removal of names of persons who are not eligible to vote and it gives him the authority, in fact requires him, to seek out the information. This obligation satisfies the second prong of § 1373(c). Further, Colo. Rev. Stat. § 1-1-107(b) authorizes the Secretary of State to "enforce the provisions of [the election] code." One aspect of this code is Colo. Rev. Stat. § 1-2-101(l)(a) that only allows United States citizens to register to vote. Thus, our request is unquestionably designed to lawfully verify the citizenship of some 2,000 individuals within the jurisdiction of the State of Colorado and the United States for the purpose of ensuring legal participation in the November 2012 election.

**5. The concern about non-citizens on the voter rolls is not isolated to Colorado—several other states have indicated similar concerns. But the federal government's response to these concerns has been confusing and contradictory, leaving no clear path forward for Colorado to act.**

Several states have conducted similar comparisons of voter rolls with DMV non-citizen data. Yet the ability to resolve the findings of these comparisons has been varied. There seems to be an uneven application of policy across the states, leaving Colorado with no clear path forward to resolve its predicament.

North Carolina moved forward with removing individuals from their voter rolls without confirmation of citizenship status from DHS. This state requested and received pre-clearance from the U.S. Department of Justice (DOJ) because it contains counties covered by Section 5 of the Voting Rights Acts. North Carolina sent letters to individuals on its voter

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[9] *Id.*, slip op. at 20. Two of the three dissenting Justices also agreed that DHS must provide immigration information when queried by a state for a legitimate purpose. *See* Thomas, J., dissenting, p 2 (federal law imposes an "affirmative obligation" to respond to immigration queries pursuant to §1373(c)); Alito, J., dissenting, p. 3 ("And while these provisions preserve the authority of state and local officers to seek immigration status information from the Federal Government, another federal statute, §1373(c), requires that the Federal Government respond to any such inquiries 'by providing the requested verification or status information.'").

rolls who had at one time presented non-citizen documents at the DMV. If the letters were not returned with proof of citizenship, North Carolina removed the individuals from the voter rolls.

We are aware that Michigan has requested assistance from DHS in verifying citizenship of individuals on its voter rolls and has likewise been unable to agree to an MOU with DHS. A December 5, 2011 letter from USCIS to Michigan Secretary of State Ruth Johnson stated, "The SAVE Program requires all participating agencies to provide numeric identifiers and biographic information found on immigration-related documents, such as a Certificate of Naturalization, to process verifications related to applicable federal and state voter registration laws." This further confuses our own attempts to receive assistance as Secretary Gessler has offered to provide your Department with numeric identifiers and biographic information for individuals who presented non-citizen documents in Colorado.

As noted above, Nebraska and Maine have apparently been able to obtain cooperation with a DHS agency when they encountered evidence of potential non-citizens on their voter rolls.

Colorado is unaware of any legal impediment to gaining access to DHS's information and to ensuring DHS's continued assistance to the states. If such an impediment exists, it has never been articulated to us or to any other state that we are aware. To the contrary, some states have been able to gain assistance yet we cannot identify any way to distinguish our situation from theirs. And if DHS is cooperating with other states, we certainly would expect the same commitment to our requests for assistance. In situations with states that have not been able to gain assistance, the only hurdles seem to focus on purely logistical issues, sometimes referred to as "operational issues," which we have offered repeatedly to overcome.

**6. Colorado is not burdened by the other legal questions surrounding this issue, but time is running out to resolve this matter before the National Voter Registration Act deadline prior to the November election.**

Other states—particularly Florida—received a great deal of media attention in its efforts to seek citizenship information for individuals on the voter rolls. In light of this, we think it appropriate to explain why Colorado's request is not burdened by the legal questions that must be faced in Florida.

Most prominently, there is no jurisdiction in Colorado that is subject to the Voting Rights Act (VRA) oversight under Section 5 or any other enforcement action brought by the DOJ. Also, DOJ has recently filed a complaint against the State of Florida to enforce Section 8 of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg-6. According to DOJ, Florida has engaged in "systematically removing the names of ineligible voters from the official lists of eligible voters" within 90 days of an election for Federal office. 42 U.S.C. § 1973gg-6(c)(2)(A). The complaint alleges that this is an express violation of the NVRA. The court, however, disagreed, holding recently that "the NVRA does not require a state to allow a

noncitizen to vote just because the state did not catch the error more than 90 days in advance." *United States v. Florida*, No. 12-cv-285, slip op. at 9 (N.D. Fla. June 28, 2012).

In any event, the NVRA 90-day restriction does not apply to Colorado until August 8, 2012. In fact, we are unaware of any concerns from DOJ regarding how Colorado's elections have been administered. This is unsurprising, as Colorado follows the letter and spirit of the law in each and every election. Nonetheless, Colorado is sympathetic to Florida's plight as we understand they—like us—sought access to immigration information for more than one year before the recent lawsuits were filed. It is unfortunate that Florida is in the predicament of being subject to a Department of Justice Civil Rights Section enforcement action in part because it appears the parties could not cooperate with one another.

Colorado is proud of our efforts to comply with State and Federal laws to ensure the full participation of all its citizens to exercise their right to vote. For example, Colorado has made great strides in its NVRA compliance. Recently, Project Vote's election counsel Teresa James said, "Project Vote congratulates in particular the Office of the Secretary of State in Colorado for providing the leadership, training, and performance monitoring necessary to ensure that the NVRA is implemented fairly and effectively." Secretary Gessler continues to work with Colorado Governor John Hickenlooper and his cabinet to facilitate better delivery of voter services through his public assistance agencies.

In addition, Secretary Gessler also works with the Pew Center on behalf of the states as a founding member of the Electronic Registration Information Center (ERIC). The project aims to improve the accuracy of voter registration systems throughout the country while inviting greater voter participation. This project begins its inaugural year in 2012. And Colorado is piloting cutting edge technology to provide ballot-on-demand access for military and overseas voters this year, going above and beyond statutory requirements to serve these voters.

7. **We again request your timely assistance to enter into an MOU so that we can resolve this longstanding issue before the November election, with a response requested by July 9, 2012.**

As noted above, the integrity of our elections is the foundation of our system of government. We request to enter a formal MOU with the DHS, ICE and/or USCIS to obtain immigration information that will enable our compliance with federal and state laws as described above.

Given the immense attention paid to this issue recently, with dueling lawsuits between Florida and the federal government, there can be no doubt but that a great deal of work and analysis has been focused on how to legally work with the states on this issue. And this does not include the months of work we have engaged in with your department. DHS (perhaps with assistance from DOJ) must have at its fingertips all the legal and operational information necessary to quickly address our appeal. Therefore, we respectively

request to hear back from you or your designee **no later than close of business on July 9, 2012.** Please contact Deputy Attorney General David Blake with a response or any questions. Mr. Blake can be reached at (303) 866-5792 or david.blake@state.co.us.

In any response, we need confirmation that an agency within your Department will work aggressively to agree to an MOU no later than July 20, 2012. This will ensure we have at least two weeks to run the checks, process the results, make notifications and remove names, if any, from the voter registration lists and guarantee we avoid any questions about the applicability of the 90-day requirements under the NVRA.[10] In order to assist our discussions, we have attached a draft MOU to this memorandum for your consideration. Further, we have also attached the list of persons identified during our comparison with DMV roles and request its immediate review and response on the status of each individual – even, if possible, in anticipation of a formal MOU.

We look forward to working with your Department to meet the required deadlines though we acknowledge it is unfortunate that this issue requires such expedited consideration. We know you agree with our primary interest of guaranteeing legal voters their ability to cast a ballot in the general election. We are equally confident that you will agree more than a year of back and forth between our agencies is an unacceptable way to process such an important issue. If we do not hear from you in a timely manner, we will consider any and all other options legally available to us to ensure our compliance with federal and state mandates.

We thank you in advance for your consideration and cooperation.

CC: The Honorable Eric H. Holder
U.S. Attorney General

Mr. Thomas E. Perez
Assistant Attorney General
U.S. Department of Justice Civil Rights Division

Mr. Alejandro Mayorkas
Director
U.S. Citizenship and Immigration Services

Mr. John Morton
Director
U.S. Immigration and Customs Enforcement

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[10] While the Secretary may be able to take efforts to remove noncitizens from the voting rolls even within the NVRA 90-day window, *United States v. Florida*, No. 12-cv-285, slip op. at 9 (N.D. Fla. June 28, 2012), he wishes to take action outside the 90-day window to remove all doubt about the appropriateness of his actions.