

PUBLIC INTEREST

— LEGAL FOUNDATION —

12/12/2018

Via Electronic and Certified Mail

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RE: Notice of violation of NVRA and request for inspection of records

Dear Commissioner Piper:

I am writing on behalf of the Public Interest Legal Foundation (“PILF”) to notify your office that the Virginia Department of Elections is not in compliance with Section 8 of the National Voter Registration Act of 1993 (“NVRA”). The NVRA requires states, including Virginia, to maintain accurate and current registration rolls using procedures that are “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.” 52 U.S.C. § 20507(b)(1).

Virginia has removed and continues to remove valid citizen registrants from the rolls after declaring those registrants noncitizens. Moreover, Virginia has removed valid citizens from the rolls after first receiving evidence subject to the penalty of perjury that those improperly removed are indeed citizens. To add insult to injury, Virginia produces public records detailing citizens who have been removed as noncitizens and entitling each document page “declared non-citizen.” Virginia’s unlawful removal practices have harmed not only Virginia voters, but also PILF, which has relied, to its detriment, on Virginia’s inaccurately-maintained records.

Virginia’s program for removing ineligible noncitizens from its registration rolls violates Section 8 of the NVRA because it results in the removal of eligible citizens and erroneously brands those citizens as “non-citizens” on public, state-created list maintenance records.

It is our hope that your office will work quickly towards full compliance with the NVRA by ensuring that citizens are not removed from Virginia’s registration rolls through the Commonwealth’s program to remove noncitizens and that you will take all necessary steps to ensure that citizens are not erroneously declared noncitizens on state-created list maintenance records. To the extent that Virginia state law or procedures impair your ability to keep valid citizen registrants on the rolls, those procedures appear to be non-uniform and discriminatory—

either to particular protected classes, including those who do not speak English as a primary language—or not in compliance with the Voting Rights Act or the NVRA.

To monitor Virginia’s compliance with the NVRA and other federal and state statutes, PILF requests, pursuant to 52 U.S.C. § 20507(i), the opportunity to inspect records related to Virginia’s noncitizen removal program.

I. Virginia’s Program for Removing Ineligible Noncitizens Results in the Removal of Eligible Citizens.

Congress enacted the NVRA to “increase the number of eligible *citizens* who register to vote” while at the same time “ensur[ing] that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b)(1), (4) (emphasis added).

As part of its program to ensure accurate and current registration rolls, Virginia requires the Department of Motor Vehicles to “furnish monthly to the Department of Elections a complete list of all persons who have indicated a noncitizen status to the Department of Motor Vehicles” in obtaining a driver’s license or similar credential. Va. Code. § 24.2-410.1(B). The Department of Elections must then transmit that list to general registrars, *id.*, who are then required to mail a notice to each listed person with instructions to submit a sworn statement affirming his or her citizenship, and cancel the registration of each person who fails to respond with the required affirmation within 14 days. Va. Code. § 24.2-427(B1).

Virginia is also statutorily required to participate in the Systematic Alien Verification for Entitlements Program (“SAVE Program”) as part of its list maintenance program. *See* Va. Code § 24.2-404(A)(4), (E). Each general registrar is required to “cancel the registration of . . . all persons known by him not to be United States citizens by reason of reports from . . . the Department of Elections based on information received from the [SAVE Program].” Va. Code § 24.2-427(B). Each person identified as a noncitizen through the SAVE Program must receive a notice of cancellation and a chance to affirm his citizenship prior to cancellation. Va. Code § 24.2-427(B1).

According to allegations made in connection with federal litigation, Virginia’s noncitizen removal program has resulted in the erroneous removal of eligible citizens and consequently, the creation and maintenance of public, state-created list maintenance records that erroneously label those citizens as noncitizens. *See* Complaint (Doc. 1), *League of United Latin American Citizens – Richmond Region Counsel 4614 v. Public Interest Legal Foundation*, No. 1:18cv423 (E.D. Va., filed April 12, 2018).

The Department’s failure to comply with the NVRA is the true source of these allegations and the cause of injury to PILF.

PILF relied upon the Department’s list maintenance records to publish reports discussing Virginia’s compliance with state and federal voting rights laws and identifying potential voter fraud occurring in the Commonwealth. Before publishing these reports, PILF had no way of verifying the accuracy of the government-created list maintenance records provided by the Department and registrars of cities and counties across Virginia without contacting each of the voters named—conduct that likely would have been characterized as threatening and intimidating. PILF, like all members of the public, is entitled to rely on the presumption that the

Department is actually complying with its obligation under the NVRA to conduct lawful voter-removal programs and to maintain records that accurately reflect the circumstances of each voter's removal from the registry. To the extent that the Department's list maintenance records contained incorrect information, it was due to the Department's improper removal of citizens from the voter rolls and inaccurate record-keeping and document production, in violation of the NVRA.

The Department's unlawful activities have subjected PILF to federal litigation brought by a group of plaintiffs who allege that PILF's publication of the reports violated federal voting rights laws and defamed them by falsely asserting that they were noncitizens who committed felony voter fraud by registering to vote and/or voting. If these plaintiffs are successful against PILF, it will be because PILF relied upon the Department's representations concerning the removal of noncitizens from its voter rolls.

The Department's violations of the NVRA have harmed and will continue to harm PILF by impairing its essential and core mission of fostering compliance with federal election laws, promoting election integrity, and ensuring that only eligible citizens are registered on the voter rolls. Furthermore, the Department's violations of the NVRA have chilled PILF's free-speech rights under the First Amendment. Specifically, PILF has been unable to advocate for election integrity and the rights of eligible citizens to be included on the voter rolls because the Department's improper removal of citizens from the voter rolls created the confusion that led to the litigation cited above.

II. Virginia's Program for Removing Ineligible Noncitizens Violates the NVRA.

The NVRA requires all list maintenance procedures to "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1). Virginia's removal program violates this mandate because it results in the removal of eligible citizens. Virginia's program also runs contrary to a primary purpose of the NVRA, namely to "enhance the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C. § 20501(b)(1). Moreover, it appears that no minority language materials are utilized in the Motor Voter process or notice and affirmation process that led to the cancellation of a variety of citizens improperly, even in jurisdictions covered by Section 203 of the Voting Rights Act. *See* 52 U.S.C. § 10503.

In 2012, the Department of Justice sued the State of Florida under the NVRA to enjoin its program for identifying and removing noncitizen registrants. The Department of Justice alleged that Florida's procedures were "inaccurate and unreliable, and therefore violate Section 8(b)(1) of the NVRA, which requires that any such program be 'uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.'" Complaint ¶ 26 (Doc. 2), *United States v. Florida*, No. 4:12cv285 (N.D. Fla., filed June 6, 2012).

The federal court in the Northern District of Florida agreed that Florida's program likely "ran afoul" of the NVRA's prohibition on non-uniform and discriminatory removal procedures, because, in part, the "record indicate[d] that the Secretary's program identified many properly registered citizens as potential noncitizens." *United States v. Florida*, 870 F. Supp. 2d 1346, 1350 (N.D. Fla. 2012). According to the court, "A program that accurately identifies noncitizens

who are registered to vote without unnecessarily challenging citizens could meet the requirement of uniformity and nondiscrimination.” *Id.* at 1351.

According to allegations made in federal litigation, Virginia’s noncitizen removal program does not accurately identify noncitizens and unnecessarily challenges citizens to affirm their citizenship. Virginia’s program therefore violates the NVRA’s uniformity and nondiscrimination requirements, as well as the NVRA’s purpose of “enhanc[ing] the participation of eligible citizens as voters in elections for Federal office.” 52 U.S.C. § 20501(b)(1).

That Virginia is violating the NVRA in this instance of course does not mean that Virginia cannot remove individuals from the rolls who are ineligible to vote based on lack of citizenship, provided that the procedures used are uniform, non-discriminatory, and in compliance with the NVRA and the Voting Rights Act of 1965.

III. Requested Records

The NVRA requires your office to make available for public inspection “all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i).

Pursuant to Section 20507, I request that your office reproduce or provide the opportunity to inspect the following:

1. Documents and records received from the Virginia Department of Motor Vehicles concerning all persons who indicated a noncitizen status to the Virginia Department of Motor Vehicles from January 1, 2008 to present. *See* Va. Code § 24.2-410.1(B).
2. Documents and records transmitted by your office to general registrars concerning all persons who indicated a noncitizen status through interactions with the Virginia Department of Motor Vehicles from January 1, 2008 to present. *See* Va. Code § 24.2-410.1(B).
3. Documents and records used to compile or create the “list of all persons who have indicated a noncitizen status to the Department of Motor Vehicles,” as described in Va. Code § 24.2-410.1(B), from January 1, 2008 to present.
4. Documents and records received by your office from the Systematic Alien Verification for Entitlements Program (“SAVE Program”) concerning persons identified as actual or potential non-United States citizens, from January 1, 2008 to present. *See* Va. Code § 24.2-404(A)(4), (E).
5. Documents and records transmitted by your office to general registrars concerning persons identified as actual or potential non-United States citizens based on information received from the SAVE Program from January 1, 2008 to present. *See* Va. Code § 24.2-427(B) (describing “reports from . . . the Department of Elections based on information receive from the . . . SAVE Program”).
6. All documents and records concerning non-English language materials, including mailed notices and citizenship affirmation forms, sent to registered voters whose registrations were cancelled under the designation “Declared Non-Citizen.”

7. All documents and records concerning non-English materials used in the voter registration process of any registered voter who was cancelled under the designation “Declared Non-Citizen.”

If you wish to dispense with a public inspection and provide copies of these records instead, please send them to following address:

32 E. Washington Street
Suite 1675
Indianapolis, IN 46204

IV. Notice of Violation

Virginia is engaged in continuing violations of the NVRA. As Virginia’s chief election official, you are responsible for ensuring compliance with the NVRA.

The NVRA permits private parties like PILF to initiate a lawsuit to enforce the requirements of the NVRA. 52 U.S.C. § 20510(b). This letter serves as the statutory notice to your office that is required prior to the commencement of any such lawsuit. For any lawsuits initiated by a private party, an award of attorney’s fees, expenses and costs incurred are available under 52 U.S.C. § 20510(c).

We are prepared to meet with you or your office to discuss remedies and plans to bring Virginia into compliance with the NVRA. Should you need to contact me regarding this request, please contact me via email at lchurchwell@publicinterestlegal.org.

Sincerely,



Logan Churchwell
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