ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION Tennessee

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION

CLC ADVANCING DEMOCRACY THROUGH LAW

FAIR ELECTIONS CENTER

May 9, 2019

Via U.S. Mail and E-mail

Hon. Tre Hargett, Secretary of State
312 Rosa L. Parks Ave., 7th Fl.
Nashville, TN 37243
tennessee.elections@tn.gov

Coordinator of Elections Mark Goins
312 Rosa L. Parks Ave., 7th Fl.
Nashville, TN 37243
tennessee.elections@tn.gov

Re: Violation of the National Voter Registration Act, 52 U.S.C. §§ 20501, 20505, 20507

Dear Secretary Hargett and Mr. Goins:

On behalf of our clients, League of Women Voters of Tennessee, American Muslim Advisory Council, Mid-South Peace & Justice Center, Rock the Vote, and Spread the Vote, as well as other similarly situated organizations, we write pursuant to 52 U.S.C. § 20510(b) to notify you that House Bill 1079–Senate Bill 971 (2019), as enacted ("the Law"), violates the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. §§ 20501–20510, in several respects. Specifically, the Law impedes the proper exercise of federal law by imposing undue and unjustified restrictions and burdens on community-based voter registration activity and undermining multiple specific directives of the NVRA. The voter registration restrictions conflict with and are therefore preempted by the NVRA.[1]

The NVRA's general purpose is to facilitate voter registration, and Congress expressly intended for private groups and individuals to play an active role. As such, the NVRA explicitly promotes organized voter registration drives by requiring Tennessee to make federal and state registration forms available to non-governmental entities for that purpose. 52 U.S.C. §§ 20501(b), 20505; *see also* S. Rep. No. 103-6 (1993). Indeed, Section 4(b) of the NVRA notes that these forms must be made "available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." 52 U.S.C. § 20505(b). The Law frustrates the ability of Plaintiffs and other civic organizations to facilitate voter registration in the manner contemplated by the NVRA by deterring groups and individuals from engaging in voter registration activities, and therefore violates the NVRA.

[1] We do not allege that the provisions of Sections 3, 4, 5, or 8 of the Law violate the NVRA.

The Law Establishes Burdensome and Restrictive Regulations for Voter Registration Drive Activity

The Law imposes a number of restrictions and burdens on community-based voter registration activity. It imposes criminal penalties upon those who "conduct" voter registration drives should they fail to comply with a host of burdensome regulations. Organizations and individuals who intend to conduct a voter registration drive must pre-register each drive with the state, ensure that every participant in the drive complete training provided by the state, submit a sworn statement regarding compliance with state law before each drive, and make a disclaimer along with any public communication by an organization regarding voter registration status, as well as make disclaimers and disclosures in connection with voter registration websites and lookups. The Law also imposes substantial civil fines for the submission of "incomplete" forms while at the same time requiring those conducting voter registration drives to submit each form they collect within 10 days,[2] without any exceptions to the 10-day deadline for extenuating circumstances.

Moreover, at every turn, the requirements of the Law are vague and overbroad, such that the regulated individuals and organizations do not know which provisions apply to them.

Frustration of Statutory Purpose

The first-listed statutory purpose of the NVRA is "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1). The second-listed purpose is "to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." *Id*. § 20501(b)(2). In enacting the NVRA, Congress found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id*. § 20501(a)(3).

One method by which the NVRA works to increase voter registration and ensure voter participation in elections is to explicitly promote organized voter registration programs like those engaged in by our clients. *See League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1163 (N.D. Fla. 2012) ("[T]he NVRA encourages voter-registration drives; the NVRA requires a state to accept voter-registration applications collected at such a drive and mailed in to a voter-registration office; the NVRA gives a voter-registration organization like each of the plaintiffs here a 'legally protected interest' in seeing that this is done."). It does so by requiring that states accept, use, and distribute both the federal form and any form developed by the state for use in registration drives. 52 U.S.C. § 20505(a)(1) (requiring that each state "accept and use the mail voter registration application form prescribed by the [Election Assistance Commission] pursuant to section 20508(a)(2) of this title for the registration of voters in elections for Federal office"); *id.* § 20505(b) (requiring state to make mail voter registration forms "available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs").

The voter registration provisions of the Law, taken as a whole—that is, the Law's pre-registration, training, affirmation, disclaimer, and information-retention provisions, in conjunction with its

[2] Forms containing only a name or initial are exempted, per Section 2-2-143(b).

steep civil and criminal penalties[3]—inhibit these activities because they "have the practical effect of preventing an organization from conducting a [voter registration] drive, collecting applications, and mailing them in." *League of Women Voters of Fla.*, 863 F. Supp. 2d at 1163. As such, the Law creates an unfair and irrational burden on our clients' ability to engage in "legally protected" voter registration activity. *Id.*; *see also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) ("[I]t is clear that the Foundation's right to conduct voter registration drives is a legally protected interest."). Because the voter registration drive restrictions established by the Law conflict with the NVRA, they are preempted. *See Arizona v. Inter-Tribal Council of Arizona*, 570 U.S. 1, 14–15 (2013); *see also Cox*, 408 F.3d at 1354 ("By requiring the states to accept mail-in forms, the [NVRA] does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates.").

Lack of Uniformity Under Section 8(b)

Under Section 8(b) of the NVRA, "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1). Voter registration regulations that differentiate between "paid" and "unpaid" drives violate the NVRA's uniformity and nondiscrimination requirement. *See Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006) (finding that regulations imposed only on those paid for conducting voter registration were facially non-uniform and discriminatory, in violation of the NVRA). In *Project Vote*, the court invalidated a law requiring that individuals paid to engage in voter registration activity "pre-register with the Secretary of State, undergo an 'online-only' Internet training program, and submit an affirmation for each batch of voter registration forms returned" because the law "[was]—on its face—not a uniform and non-discriminatory attempt to protect the integrity of the electoral process." *Id.* at 703.

The Law similarly purports to treat unpaid and paid voter registration drives differently. Specifically, Sections 2-2-142 and 2-2-143 enacted by the Law do not apply "to individuals who are not paid to collect voter registration applications or to organizations that are not paid to collect voter registration applications and that use only unpaid volunteers to collect voter registration applications." It does so even through these individuals and organizations would, under the Law, already be prohibited from paying per voter registration form collected. Thus, the Law violates Section 8(b) of the NVRA because it is not a uniform and nondiscriminatory program or activity to protect the integrity of the electoral process.

Further, the Law violates the NVRA's uniformity requirements because it is vague. It does not define the meaning of "paid" or "unpaid" for purposes of individuals and organizations conducting voter registration and is unclear whether "individuals" who work for an organization must complete the pre-registration requirement. Because it does not clearly provide notice as to which organizations and individuals are subject to it its terms, the Law gives rise to the risk that different county elections officials will provide varying interpretations of the Law's application, leading to a non-uniform program or activity in violation of the NVRA.

[3] Additional provisions of the Law may violate the NVRA, and additional NVRA violations may be revealed through further review and implementation of this Law.

Rules Regarding "Incomplete" Applications

The penalty provisions for submission of incomplete applications in Section 2-2-143 of the Law frustrate the NVRA's requirement that all applicants receive notice of the disposition of their applications. 52 U.S.C. § 20507(a)(2) ("In the administration of voter registration for elections for Federal office, each State shall . . . require the appropriate State election official to send notice to each applicant of the disposition of the application"). This provision clearly contemplates that the State, not community-based voter registration drive organizers, should make determinations about which registration forms will be accepted or rejected.

But the severe penalties for turning in "incomplete" applications create a perverse incentive for both organizations and individuals to withhold "incomplete" applications rather than turn them in. This, in turn, prevents election officials from notifying applicants that their applications are incomplete, or otherwise notifying them of their disposition. These perverse incentives not only frustrate the NVRA's notification provision, but also its purpose of ensuring accurate and current voter registration rolls. Thus, the penalties for submission of incomplete applications are preempted by the NVRA.

Potential Effective Prohibition on Uses of Federal Form by Registration Drives

Finally, to the extent that the Law makes it effectively impossible to use the federal voter registration form nationally, it conflicts with the NVRA and is preempted. The NVRA requires that States accept, use, and distribute the National Mail Voter Registration Form (the "federal form") for use in registration drives. Many organizations use the federal form to assist Tennessee residents outside the state of Tennessee in registering to vote. This includes facilitating voter registration for Tennessee residents who attend out-of-state schools, sporting events, or concerts, or who simply encounter a voter registration drive while in another state.

To the extent that the training and registration requirements purport to apply to organizations and individuals facilitating out-of-state voter registration, the Law effectively precludes such activity. Preventing the use of the federal form in this context frustrates the NVRA's express purposes and the statutory right to conduct nationwide registration drives using the federal form, and thus is preempted. *See* 52 U.S.C. § 20505; H. R. Rep. No. 103–9 at 10 (1993) ("Uniform mail forms will permit voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events.").

As intended by Congress, the state must allow registration drives to use the federal form nationwide to facilitate broad voter registration efforts.

As noted above, the purpose of the NVRA's requirement that states accept, use, and distribute federal forms is to create a single federal form that organized registration drives can use to facilitate voter registration. *See also* S. Rep. 103–6 ("Mail registration provides a convenient method for reaching out to eligible voters."). The additional disclaimer and disclosure requirements of Section 2-2-145 frustrate this goal by disallowing voter registration organizing that relies solely on distribution and collection of the federal form. Instead, organizations must create additional

written materials to supplement the federal form and provide the mandated disclaimers and disclosures. Thus, the Law's disclaimer and disclosure requirements are preempted by the NVRA.

This letter serves as notice pursuant to 52 U.S.C. § 20510(b). Please contact us immediately to discuss these concerns. If you do not remedy these violations, we intend to exercise our statutory right to seek relief in court under 52 U.S.C. § 20510.

Sincerely,
/s/ Thomas H. Castelli

Sophia Lin Lakin
Theresa J. Lee
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
slakin@aclu.org
tlee@aclu.org

Sarah Brannon*
Davin Rosborough
American Civil Liberties Union Foundation
915 15th Street, 6th Floor
Washington, DC 20005
Tel.: (202) 544-1681
sbrannon@aclu.org
drosborough@aclu.org
*not admitted in DC; DC practice limited to federal court only

Bill Harbison
Hunter Branstetter
Sherrard Roe Voigt & Harbison
150 3rd Avenue South, Suite 1100
Nashville, TN 37301
Tel.: (615) 742-4200
bharbison@srvhlaw.com
hbranstetter@srvhlaw.com

Thomas H. Castelli
Legal Director
Mandy Floyd
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Tel.: 615-320-7142
tcastelli@aclu-tn.org
mfloyd@aclu-tn.org

Danielle Lang
Urja Mittal
Campaign Legal Center
1101 L Street NW, Suite 400
Washington, DC 20005
Tel.: (202) 736-2200
dlang@campaignlegal.org
umittal@campaignlegal.org

Michelle Kanter Cohen
Jon Sherman
Fair Elections Center
1825 K Street NW, Suite 450
Washington, DC 20006
Tel.: (202) 331-0114
mkantercohen@fairelectionscenter.org
jsherman@fairelectionscenter.org