



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W

Demos

August 6, 2014

Via Certified Mail

The Honorable Ken Bennett
Arizona Secretary of State
1700 W. Washington Street, Fl. 7
Phoenix, AZ 85007-2808

Re: Compliance with Section 7 of the National Voter Registration Act

Dear Secretary Bennett:

We write on behalf of the League of Women Voters of Arizona (“the League”), the League of United Latin American Citizens (“LULAC”), persons eligible to register to vote whom they represent, and others similarly situated to notify you that the State of Arizona is not in compliance with Section 7 of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg-5. Section 7 requires states, including Arizona, to provide the opportunity to register to vote with public assistance applications, recertifications, renewals, and changes of address. We urge you, as the State’s chief election official, to take immediate steps, in conjunction with the Arizona Department of Economic Security (DES), Arizona Department of Health Services (DHS), and the Arizona Health Care Cost Containment System (AHCCCS), to bring the State of Arizona into compliance with Section 7.

Project Vote, Demos, and the Lawyers’ Committee for Civil Rights Under Law have ten years of experience in working with states to ensure compliance with the NVRA. We hope to work amicably with you to remedy Arizona’s non-compliance. However, we will pursue litigation if necessary.

I. The Requirements of the National Voter Registration Act of 1993

Section 7 of the NVRA requires Arizona public assistance offices to (i) distribute voter registration application forms; (ii) assist applicants in completing the voter registration forms; and (iii) accept completed voter registration application forms and forward them to the appropriate election official. *See* 42 U.S.C. § 1973gg-5(a)(4)(A). “Public assistance” offices include, at a minimum, offices in the state that administer the Supplemental Nutritional Assistance Program (“SNAP”), Medicaid, the Special Supplemental Food Program for Women, Infants, and Children (“WIC”), and Temporary Assistance for Needy Families (“TANF”). *See* H. R. Rep. No. 103-66, at 19 (1993) (Conf. Rep.); Department of Justice, The National Voter Registration Act of 1993 (NVRA): Questions and Answers, Q13, *available at* http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php. In Arizona, these programs are administered by DES, DHS, and AHCCCS.

More specifically, each office must (i) distribute a voter registration application form with each application for public assistance and with each recertification, renewal or change of address form (“covered transactions”), except as explained in the next paragraph; (ii) inquire in writing, through statutorily-prescribed language, whether the applicant would like to register to vote or change his or her voter registration address (“voter preference question”); (iii) provide in writing several statutorily-prescribed disclaimer statements, including notice that the decision whether to register or decline to register to vote will not affect the amount of public assistance provided by the agency; and (iv) provide assistance in completing the voter registration form to the same degree the agency provides assistance in completing its own forms, including assistance with providing information necessary to establish eligibility to register to vote. 42 U.S.C. § 1973gg-5(a)(6).

The NVRA also provides that public assistance offices must distribute a voter registration application to each public assistance applicant or client engaging in a covered transaction unless the applicant or client affirmatively declines to register to vote *in writing*. *Valdez v. Squier*, 676 F.3d 935, 945-47 (10th Cir. 2012) (citing 42 U.S.C. § 1973gg-5(a)(6)). To decline “in writing,” a client must affirmatively opt out by answering “no” in response to the voter preference question. *Id.* at 945-46 (“[A]n applicant’s failure to check either the ‘YES’ or ‘NO’ box on the voter declination form does not constitute a declination ‘in writing.’ . . . [The NVRA] requires an applicant to affirmatively, by way of writing, ‘opt out’ of receiving a voter registration form.”).

Public assistance offices must provide voter registration during each covered transaction, regardless of whether the transaction takes place in an agency office, over the Internet or via email, telephone, fax, or other remote means. *See Georgia State Conference of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1329 (N.D. Ga. 2012); *Ferrand v. Schedler*, 2012 WL 1570094, at *12 (E.D. La. 2012).

As the chief election official, you are ultimately responsible for the State’s compliance with the NVRA. *Harkless v. Brunner*, 545 F.3d 445, 451-53 (6th Cir. 2008); *Scott v. Schedler*, 2013 WL 264603, at *16 (E.D. La. 2013).

II. Arizona’s Settlement with the Department of Justice

We are aware that, in 2008, the Department of Justice (“DOJ”) and Arizona signed an out-of-court agreement. However, the agreement expired several years ago and, as discussed below, does not appear to have placed the State in compliance. For instance, while the agreement required DES to provide Arizonians applying online for benefits the opportunity to download a mail-in application for voter registration, it fails to provide a means for online applicants to request a voter registration form if they do not have a printer.

III. Arizona’s Non-Compliance with the NVRA

Project Vote, Demos, and the Lawyers’ Committee for Civil Rights Under Law recently completed a comprehensive investigation of Arizona’s compliance with Section 7 of the NVRA. The investigation included (1) analyzing voter registration and public assistance data, (2) speaking with public assistance clients and employees through field investigations, and (3)

examining public assistance agencies' forms, policies, and practices. Taken together, the evidence indicates that Arizona's public assistance offices are systematically failing to provide the voter registration services mandated by the NVRA. As described in greater detail below, our investigation indicates, *inter alia*, that public assistance agencies are failing to distribute voter registration applications when individuals leave the voter registration question blank on the declination and information form, when transactions are conducted remotely, and in connection with certain renewals and recertifications.

a. Voter Registration Data

According to data Arizona reported to the U.S. Election Assistance Commission, the number of voter registration applications originating from Arizona public assistance offices decreased precipitously between the 1999-2000 and 2011-2012 reporting periods, from 32,137 in 1999-2000¹ to just 15,224 in 2011-2012,² a reduction of over 50%. This decrease is particularly significant given that the number of initial food stamp applications through the SNAP program in Arizona during the same time frame has more than doubled, from 529,556 in 2004³ to over 1.2 million in 2012.⁴ In our experience, such a decrease in the face of rising caseloads is an important consideration and likely indicates systematic non-compliance.

Moreover, this decrease is not due to a lack of need for voter registration services. In fact, in 2012 (the most recent year for which data is available), only 52% of Arizona citizens earning an annual income of less than \$25,000 were registered to vote. Meanwhile, 76% of Arizona citizens earning an annual income of \$100,000 or more were registered to vote.⁵ In other words, there is a substantial voter registration gap between low-income and wealthy Arizona citizens, and only slightly more than half of low-income Arizona citizens are registered to vote.

b. Field Investigations at DES and WIC Offices

Our on-the-ground field investigations of public assistance offices provide further indication of ongoing violations of Section 7. We spoke with 134 DES clients who reported that they are eligible to vote and who were engaging in NVRA-covered transactions at eight offices in Pima, Pinal, and Maricopa Counties. Twenty-six of these clients did not decline to register in writing (i.e. they did not check "no" in response to the voter preference question) but did not receive a voter registration application, in violation of Section 7. Four of the clients who did not answer the voter preference question remembered seeing it and reported leaving it blank, while another

¹ U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1999-2000* (June 2001), Table 2 page 1, available at <http://www.eac.gov/assets/1/AssetManager/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%201999-2000.pdf>

² U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012* (June 2013), Table 2a page 41, available at http://www.eac.gov/assets/1/Documents/EAC_NVRA%20Report_lowres.pdf

³ U.S. Department of Agriculture, Food and Nutrition Services, Program Accountability Division, *Food Stamp Program State Activity Report, 2004* (Feb. 2006).

⁴ U.S. Department of Agriculture, Food and Nutrition Services, *Supplemental Nutrition Assistance Program (SNAP), Annual State Level Data: 2009-2013; Average Monthly Persons Participating in 2012* (June 2014), available at <http://www.fns.usda.gov/sites/default/files/pdf/15SNAPpartPP.pdf>.

⁵ U.S. Census Bureau, Current Population Survey, Voting and Registration Supplement (2012).

22 clients did not remember seeing the question. Three of 134 clients surveyed responded “yes” to the voter preference question; one did not receive a voter registration application, and the other two did receive a voter registration application but were not offered assistance in completing the voter registration application.

Moreover, DES employees are not following the requirements of the NVRA. At each of the eight DES offices, we were told by an agency employee that a client has to ask for a voter registration form or check “yes” on the voter declaration form in order to receive a voter registration form.

We also interviewed 17 WIC clients who reported that they are eligible to vote and who were engaging in a NVRA-covered transaction. Seven of the clients reported that they did not see a written offer of voter registration and thus did not decline voter registration services in writing, and were not given a voter registration application, in violation of Section 7.

WIC agency employees also were not following the NVRA’s requirements. We spoke to agency employees at four WIC offices and were told at each office that a client has to ask for a voter registration form or check “yes” on the voter declaration form in order to receive a voter registration form.

Finally, in six of the eight DES offices, there were no signs visible informing clients that they could register to vote there. And none of the four WIC offices had a sign visible informing clients that they could register to vote there.

c. Agency Policies Violate the NVRA

Some of these violations appear to be the result of caseworkers complying with agency policies that instruct them to violate the NVRA. A review of the relevant agencies’ forms, policies, and practices also establishes numerous ongoing and continuous Section 7 violations, including but not limited to⁶:

AHCCCS Policies⁷

- Arizona Health Care Cost Containment System (AHCCCS) policy specifies that no further action is required if a customer does not answer the written voter registration

⁶ The policies addressed herein establish there are numerous on-going and continuous violations of Section 7 by public assistance agencies in Arizona, and on that basis this notice letter is intended to provide notice that Arizona’s public assistance agencies are broadly out of compliance with the requirements of Section 7. We have reviewed all the policies, forms and materials made available to us in response to public records requests and specifically identified all violations contained therein. But we may not have identified every specific compliance problem because we likely do not have access to all the relevant materials – your office and the agencies themselves are in a better position to determine the universe of relevant forms and problems and have a better understanding of the scope of all potential violations. We, therefore, reserve the right to specifically identify further details of compliance problems as they come to light.

⁷ As noted, AHCCCS policies and forms, as well as Health-e-Arizona Plus screenshots, were provided in response to a public records request. They include MA 1301.A, MA 1301.00.H, MA 1401.A, MA 1401.00.F, MA 1501.00.E, and MA 1502.A.

question. Thus, customers who leave the voter registration question blank are not being provided with a voter registration application.

- AHCCCS policy is to offer voter registration during change of address transactions only when the customer appears at an office to report the change. Even then, the policy is to ask whether the customer wishes to register and to document the answer in a computer system; there does not appear to be any written offer of voter registration or any provision establishing that the only time a voter registration application should *not* be distributed to an applicant during a covered transaction is if the applicant declines in writing.
- AHCCCS policy for renewals that occur by phone is to verbally ask whether the customer wishes to register to vote. There does not appear to be any written offer of voter registration. Again, although the NVRA requires agencies to offer voter registration unless the client declines in *writing*, AHCCCS policy seems to not be in compliance with this provision.
- For certain AHCCCS renewals, continued eligibility is determined based on information already known to the agency and an approval letter is sent. It does not appear that a written offer of voter registration or a voter registration application are included as part of this renewal process.
- Health-e-Arizona Plus, which is operated by AHCCCS, asks whether the applicant would like to register to vote but does not include various NVRA-required statements. It also simply links applicants to the Secretary of State's website, where the applicant can register online or download a voter registration application. However, these options are only available to people who have a driver's license and/or a printer. This is an NVRA violation because some people will effectively not receive a voter registration application.

Department of Economic Security Policies⁸

- The Family Assistance Administration's (FAA) paper application for Nutrition Assistance, Cash Assistance, and Medical Assistance does not follow the NVRA's required language, and omits the required sentence "The decision whether to seek or accept help is yours."
- FAA policy indicates that applications submitted through Health-e-Arizona Plus are not subject to the DES policy and procedures for voter registration.
- The FAA Change Report form does not include an offer of voter registration or a voter registration application, and three FAA Flash Bulletins instruct employees to inquire about voter registration only when an address or name change is reported "in person" or "at the office."

Department of Health Policies⁹

- WIC clients are not given a voter registration application when they leave the voter registration question blank in the declination and information form as the policy is to

⁸ FAA forms and policies were obtained on the DES website and at <https://extranet.azdes.gov/faapolicymanual>. Relevant policies include FAA5.Y:02:F, and FAA6.Q:01:0:02, as well as FAA Flash Bulletin Broadcasts 11-24, 12-13, 12-28, 12-80, and 13-01.

⁹ WIC policies were obtained on the DHS website and include Policy Manual chapter 2 at pages 2-57 to 2-58 and 2-170 to 2-171, as well as a November 2010 WIC University Training Manual at pages 10-11.

- provide a voter registration form to WIC clients only if the individual “wants to register to vote.” The policy also instructs that if a client refuses to sign the written offer of voter registration, staff should circle “no” and sign the form to indicate that the person declined the opportunity to register. There is no signature requirement in the NVRA to obtain a voter registration application, and any offer of voter registration should include a voter registration application unless the customer declines in writing.
- The WIC voter registration policy specifies that an offer of voter registration must be completed with each application and transfer (including a change of address), but says nothing about renewals or recertifications.

d. Third-party Contractors

DES operates a program called “SNAP Partnership” with the Arizona Community Action Association and nearly 50 partner organizations.¹⁰ The purpose of this program is to engage community organizations in the process of SNAP enrollment. While organizations may participate in the partnership program at different levels, organizations that are “Full-Service Partners” are actively engaged in assisting with actual enrollment of individuals in Arizona in SNAP.¹¹ It is our understanding that these organizations contract with the State to provide assistance with completing SNAP applications and to help process SNAP applications, and receive reimbursements approved by DES for their enrollment work.¹² For example, in the first quarter of federal fiscal year 2014, SNAP Partners “assisted 11,351 households in applying for benefits online using HealthEArizona Plus” and “helped process 5,980 new applications.”¹³ It thus appears that these Full-Service Partners are an integral part of the process by which Arizona and DES provide public assistance services.

It is, however, our understanding that transactions conducted or assisted by the Full-Service Partners do not include the voter registration services required by the NVRA. This is a particularly crucial issue in Arizona because these organizations are encouraged to have households apply through Health-e-Arizona.¹⁴ As explained above, applications submitted through Health-e-Arizona are not subject to DES’ voter registration policy.

Arizona and DES have an obligation under the NVRA to provide voter registration as part of the covered public assistance transactions, regardless of whether the transaction is conducted by a state agency or is conducted in whole or in part by a Full-Service Partner. The NVRA’s voter registration requirements are not altered or diminished when a covered state involves

¹⁰ Arizona Community Action Association, “SNAP PARTNERSHIP,” <http://www.azcaa.org/partnerships/snap/>; Arizona Community Action Association, “SNAP Partners 2013-2014,” http://www.azcaa.org/wp-content/uploads/2014/03/FINAL_FFY14_SNAP-Partner-List.pdf. (last visited June 2014).

¹¹ See fn.10, slide 38.

¹² *Supplemental Nutrition Assistance (SNAP) Outreach Partnership: Application and Budget Training*, slide 51, available at <http://www.azcaa.org/wp-content/uploads/2014/04/Application-and-Budget-Training-FFY-2015-FINAL.pdf>; *The SNAP Partnership: The Supplemental Nutrition Assistance Program: Federal Fiscal Year 2015*, slide 54, available at http://www.azcaa.org/wp-content/uploads/2014/03/SNAP-Invite-Training_FY15_3.21.14.pdf.

¹³ See fn. 12, slide 37.

¹⁴ “FFY 15 SNAP Partnership Application” at 6, available at <http://azcaa.org/partnerships/snap/> (click “Federal Fiscal Year 2015 SNAP Partnership Application” to download the Word document).

nongovernmental entities in the process by which individuals apply for or recertify eligibility for public assistance benefits. See Department of Justice, The National Voter Registration Act of 1993 (NVRA): Questions and Answers, Q5, available at http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php. (“When a state contracts with a private entity to administer services in an agency that is required to offer voter registration, the ultimate responsibility for ensuring provision of voter registration services remains with the state, and the voter registration requirements under the NVRA remain the same.”).

In sum, you as Secretary of State and DES are responsible for ensuring that the voter registration services required by the NVRA are offered as part of SNAP applications and recertifications handled by the Full-Service Partners. This may involve writing voter registration requirements into third-party contracts and providing training to the Partners.

Finally, we note that if the Arizona public assistance agencies have contracts with other third-party organizations to provide assistance in completing applications and/or recertifications for any forms of public assistance, the State and its agencies similarly must ensure voter registration is offered in connection with the public assistance transactions.

IV. Conclusion

This letter serves as a notice letter pursuant to Section 11 of the NVRA, 42 U.S.C. § 1973gg-9(b), in an attempt to obtain compliance with the public assistance provisions of the NVRA without litigation. However, Section 11 provides that if corrective action is not taken after written notice is given, the aggrieved party may pursue litigation. Accordingly, we ask you, as Arizona’s chief election official, to act now to ensure that Arizona’s public assistance offices perform their federally-mandated responsibility to provide voter registration services.

The undersigned counsel are prepared to meet with you and other state officials, at your earliest convenience, to assist in your development of a comprehensive plan for compliance. Because elections are to be conducted later this year, we ask that you advise us promptly of your response.

Sincerely,

Sarah Brannon*
Sarah Brannon
Project Vote
805 15th Street NW
Suite 250
Washington, DC 20005
(202) 546-4173 x305

Stuart Naifeh
Stuart Naifeh
Demos
220 Fifth Ave.
2nd Floor
New York, NY 10001
(212) 633-1405

* Licensed to practice law only in Maryland.
Practice in DC is limited to federal courts.

Arusha Gordon

Daniel Pochoda

Arusha Gordon
Lawyers' Committee for
Civil Rights Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600, ext. 306

Daniel Pochoda
ACLU of Arizona
P.O. Box 17148
Phoenix, AZ 85011-0148
(602) 773-6003

cc: Clarence H. Carter
Director
Arizona Department of Economic Security
1717 W. Jefferson Street
Phoenix, AZ 85007

Tom Betlach
Director
Arizona Health Care Cost Containment System
801 E. Jefferson Street
MD 4100
Phoenix, AZ 85034

Will Humble
Director
Arizona Department of Health Services
150 N. 18th Ave.
Phoenix, AZ 85007