



VIA EMAIL

December 14, 2017

John Merrill
Secretary of State
Executive Division
600 Dexter Ave S- 105,
Montgomery, AL 36130

Jim Davis
Deputy Attorney General
Section Chief, Constitutional Defense Section
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130

Re: Issues Concerning the Special Election

Dear Mr. Merrill and Mr. Davis:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we are writing to alert you to three issues that were brought to our attention during the December 12, 2017, Special Election. Although we observed and received reports of many other problems, those detailed below are time-sensitive, and we request concrete action in response to each of these issues.

I. Mobile County Poll Workers Requiring Voters to Present Identification with an Address that Matches State Voter Registration Records

First, we received reports that poll workers in Mobile County denied people the right to vote or improperly forced voters to cast provisional ballots when they presented a photo ID with an address that did not match their registration record. As you are well aware, Alabama's Photo ID Law does not require a voter to present a photo ID with an address that matches the voter rolls to cast a regular ballot. Many of the acceptable IDs do not even have addresses listed on them (*e.g.*, a U.S. Passport, U.S. Military ID, Federal Government Employee ID, or Alabama college or university ID).¹ By creating this extralegal requirement, Alabama election officials may have

¹ See Ala. Code § 17-9-30(a)(1)-(7) (listing the acceptable types of photo identification).



arbitrarily infringed on the right of citizens to vote in violation of the U.S. Constitution² and, to the extent this practice had a disparate impact, Section 2 of the Voting Rights Act (“VRA”).³ We are aware that on Tuesday, local attorneys relayed these reports to Mr. Davis. We understand that Mr. Davis contacted Secretary Merrill’s office, who in turn, contacted the Mobile County Probate Judge to address the reports. Although this outreach may have cured the misapplication of the Photo ID Law for the remainder of Election Day, we are concerned about the voters who were incorrectly forced to cast a provisional ballot earlier in the day. To address this problem, we ask that your office immediately contact the Mobile County Probate Judge and ensure that he counts provisional ballots cast by voters who were erroneously told that they did not have acceptable ID because of an address mismatch. These voters should not have to return to the board of registrars to perfect their provisional ballots in order for their votes to be counted.⁴

II. Misapplication of Inactive Voter List Procedures

We also observed and received reports of widespread improper application of the Alabama inactive voter procedures. The Secretary of State’s process for identifying purported “inactive” voters resulted in widespread voter confusion.⁵ On December 12, LDF spoke to numerous voters who were alarmed to discover at the polls that they were on the inactive list despite having voted in recent elections, some as recently as the November 2016 election.

Troublingly, many Alabamians on the inactive voter list were denied the right to cast a regular ballot in contravention of Alabama law and the Secretary’s guidance, which state that “inactive voter registration status means that *a voter is able to vote as a normal voter* on election day but they will also be asked to update their voter registration information when they visit the polls on elections.”⁶ LDF volunteers received reports or spoke to dozens of “inactive” voters in

² See *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”).

³ *U.S. v. Berks County*, 277 F. Supp. 2d 570, 576 (E.D. Pa. 2003) (holding that a poll worker’s imposition of extralegal voter identification requirements violated Section 2); *Harris v. Siegelman*, 695 F. Supp. 517, 525 (M.D. Ala. 1988) (finding that poll worker harassment and intimidation of black voters violates Section 2).

⁴ See Ala. Code. § 17-10-2 (detailing the steps voters must take to cure a provisional ballot).

⁵ Mike Cason, *Some Mobile Voters Delayed by ID Address Questions*, ALABAMA MEDIA GROUP, http://www.al.com/news/index.ssf/2017/12/some_mobile_voters_face_delays.html. Michael Edison Hayden, *Alabama Senate Election Tainted as Rights Group Allege Voter Suppression in Black Neighborhoods*, NEWSWEEK (Dec. 12, 2017, 6:15PM), <http://www.newsweek.com/alabama-senate-election-allegations-voter-suppression-black-neighborhoods-746190>.

⁶ Ala. Sec’y of State, *Inactive Voters – Voter Record Refresh Information*, <http://sos.alabama.gov/newsroom/inactive-voters-voter-record-refresh-information> (emphasis added); see also Ala. Code § 17-4-9 (noting that an inactive voter “shall be permitted to vote provided the voter completes a voter reidentification form”).



Montgomery County, Houston County, and elsewhere who were directed to cast provisional ballots on election day. These voters should have been allowed to cast a regular ballot after completing a Re-Identification Form. However, poll workers did not provide the form or wrongly told some voters that unless two poll workers could positively identify them, they would be required to cast a provisional ballot. In some instances, voters on the inactive list were denied a ballot altogether and barred from voting. LDF volunteers informed one poll worker that the inactive voter procedures were being wrongly applied, but the poll worker refused to change his approach. If true, the State's actions may have violated the National Voter Registration Act's ("NVRA") requirement that voter roll maintenance must not result in the removal of a voter who has voted in at least one of the last two federal general elections.⁷ Additionally, if any voters were turned away by election officials for any reason without being offered a provisional ballot, such a situation would constitute a violation of the Help America Vote Act ("HAVA").⁸

We ask that the Secretary publicly provide information and guidance about what steps these voters can take to ensure their provisional ballots are counted before Friday, December 15.

III. Poll Workers Requiring Voters to Answer Immaterial Questions Before Allowing Them to Cast a Vote

Third, even where "inactive" voters were given the opportunity to reidentify, we are concerned that voters were required to answer immaterial questions on the Voter's Re-identification/Update Form ("Re-Identification Form") before they could cast a ballot. Such a requirement would conflict with the VRA. Under the VRA, no election official "may deny the right of any individual to vote in any election because of an error or omission" on a voting record if that error or omission "is not material" in determining whether the individual is qualified to vote. 52 U.S.C. § 10101(a)(2)(B). "This provision was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters."⁹

⁷ 52 U.S.C. § 20507(b)(2)(B).

⁸ 52 U.S.C. § 21082 (a).

⁹ *Schwier v. Cox*, 340 F. 3d 1284, 1294 (11th Cir. 2003); *see also United States v. Atkins*, 323 F. 2d 733, 737 (5th Cir. 1963) (discussing Alabama's discriminatory abuse of such voter registration requirements); *Alabama v. United States*, 304 F.2d 583, 588-87 (5th Cir.) *aff'd per curiam*, 371 U.S. 37 (1962) (same).



In possible violation of the VRA, the Re-Identification Form requires voters to disclose their birth county to cast a ballot.¹⁰ Information relating to a voter's place of birth is immaterial to determining her voting eligibility.¹¹ While some information requested on the Re-Identification Form such as the voter's full name, date of birth, home address, and citizenship might be material or relevant, questions that request information on a voter's place of birth, driver's license number, social security number, mailing address, race, and/or sex are irrelevant to deciding a person's eligibility to vote.¹² Furthermore, the NVRA's procedures for voters who do not return a mailer sent by a state as part of voter roll list maintenance require only that the voter affirm his or her address.¹³ If poll workers refused to accept Re-Identification Forms where voters did not supply additional immaterial information, then they unlawfully turned voters away or denied them regular ballots.

We would welcome a conversation with you to discuss how the Re-Identification Form can be amended to comply with the VRA. The Re-Identification Form should be revised to remove any requests for immaterial information or make clear that the requested information is not used to determine a voter's eligibility. In the meantime, we request that you reach out to probate judges and poll workers across the State to determine whether poll workers were requiring this immaterial information and share your findings with the public.

* * *

Because the deadline to perfect a provisional ballot is this Friday, December 15, at 5:00 p.m., we ask that you respond to this request **in writing** by no later **Thursday, December 14, at 7:00 p.m.**

¹⁰ Anna Claire Vollers, *Alabaster Woman Suspects Voter Suppression at Polls Today*, SLATE (Dec. 12, 2017, 7:29PM),

http://www.al.com/news/index.ssf/2017/12/alabaster_woman_suspects_voter.html#incart_river_home_pop.

¹¹ For ease of reference, this is question eleven on the Re-Identification Form.

¹² *Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006) (affirming the lower court's finding that "Georgia cannot mandate disclosure of [Social Security Numbers] because such information is not 'material' to a voter registration system under [] the Voting Rights Act.").

¹³ 52 U.S.C. § 20507(e).



We thank you for your attention to these important issues, and look forward to hearing from you soon.

Regards,

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