

February 14, 2018

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable Kirstjen Nielsen
Secretary
U.S. Department of Homeland Security
(Attn: Office of Infrastructure Protection)
801 Nebraska Ave NW
Washington, DC 20016

John M. Gore
Acting Assistant Attorney General
Civil Rights Division (Attn: Voting Section)
U.S. Department of Justice
Room 7254 - NWB
950 Pennsylvania Ave., N. W.
Washington, DC 20530

COMPLAINT: CALIFORNIA'S FAILURE TO MAINTAIN ACCURATE VOTER ROLLS

Dear Attorney General Sessions, Secretary Nielsen, and Mr. Gore:

Landmark submits that the State of California is engaging in a systematic policy of willful blindness in failing to ensure ineligible, noncitizens are kept off voter rolls. Its inaction is in direct contravention to its duties under the National Voter Registration Act ("NVRA").¹

As the U.S. Supreme Court has stated:

Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic

¹ 52 U.S.C. § 20507(a)(4).

*process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.*²

Voter eligibility under federal law requires U.S. citizenship.³ The California Constitution and Elections Code, likewise, require U.S. citizenship to be eligible to vote.⁴ California ignores each of these federal and state requirements. In fact, California facilitates, if not openly encourages, noncitizen voter registration and, through its malfeasance, undermines confidence in the election process. It requires public assistance agencies to register anyone to vote, but prohibits those agencies from taking steps to ensure voter eligibility. State employees face legal repercussions if they inquire as to the citizenship status of applicants. State employees also send voter registration applications to the Secretary of State even when ineligibility is known or suspected. The Secretary of State accepts these registrations and does nothing to ensure eligibility. State law also prohibits the Secretary from using available information as a cross-check for voter eligibility.

Landmark Legal Foundation (“Landmark”) requests that your offices investigate immediately the State of California’s failure to take reasonable steps to ensure its voter rolls are accurate. Evidence obtained by Landmark and presented in this complaint suggests there are potentially thousands of noncitizens on voter rolls with little to no action taken by the state to solve the issue.

States are obligated under the NVRA to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters.”⁵ California fails to engage in any “reasonable efforts” to ensure ineligible voters, specifically noncitizens, are not placed on voter rolls. Once placed on the voter rolls, California does nothing to identify and then remove noncitizens. As California has abrogated its duty to ensure its voter rolls are accurate, it is incumbent upon the federal government to investigate the allegations set forth in this complaint. The U.S. Department of Justice and the U.S. Department of Homeland Security should then bring a civil action to prohibit this illegal activity and to compel California to develop and implement necessary protocols to ensure its voter rolls are free from noncitizens.

The evidence presented in this complaint indicates that noncitizens, when registering for social services, complete and file voter registration applications. These applications are sent to relevant registrars and individuals are placed on voter rolls. California fails in three crucial respects:

1. It does nothing to prevent noncitizens from completing voter registration applications.
2. It fails to institute necessary controls to identify and remove these individuals.

² *Purcell v. Gonzalez*, 549 U.S. 1 at 4 (2006).

³ 18 U.S.C. § 611.

⁴ Cal. Const. Art. II, § 2; Cal. Elec. Code § 2000(a).

⁵ 52 U.S.C. § 20507(a)(4).

3. It refuses to use data it has collected through issuing driver's licenses to noncitizens as cross-check data for voter eligibility confirmation.

The state's voter rolls most likely contain the names of thousands of noncitizens and California refuses to take even the most rudimentary of steps to remedy the situation. The structure of California's registration system makes it impossible to determine the exact number of noncitizens on the voter rolls. Thousands of individuals are placed on voter rolls every year and the state has no controls to identify and remove those individuals who may be ineligible because of their status as noncitizens.

Social Services Agencies Register Thousands of Individuals to Vote Annually

The State of California administers a massive network of social services that provide health and welfare benefits to millions of people. Under the National Voter Registration Act, California offers voter registration services at these social service agencies as well as at motor vehicle offices. The state directs its workers at these offices not to screen applicant's citizenship status.

Federal law requires states to adopt measures "to ensure that accurate and current voter registration rolls are maintained."⁶ California must therefore remove the names of ineligible voters from the voter rolls. California's Constitution requires that to be eligible to vote an individual must be a United States citizen, 18 years of age, and a California resident.⁷ Therefore, noncitizens registering to vote violate both federal law and the California Constitution.

When enrolling for social services, individuals can also register to vote and are not required to provide any proof of citizenship. California law specifies that an individual "may prove that he or she is a citizen by his or her certification under penalty of perjury on the affidavit of registration."⁸ Such a certification is sufficient evidence of citizenship for voting.⁹ Thus, the state relies only on the word of the individual to certify citizenship for voting purposes. There is no verification of citizenship status and the state does nothing to determine whether it has abetted the registration of noncitizens.

Millions of noncitizens are enrolled in social services programs. The potential for improper voter registration by noncitizens is massive. In April 2017, for example, 4,527 voter registration applications were completed and submitted from public assistance agencies.¹⁰ Other than an attestation from the applicant, California has no controls in place to ensure noncitizens are not completing these applications and being placed on the voter rolls.

⁶ 52 U.S.C. § 20501(b)(4).

⁷ Cal. Const, Art. II § 2.

⁸ Cal Elec Code § 2111.

⁹ Cal Elec Code § 2112.

¹⁰ Exhibit 1, April 2017 Secretary of State NVRA Reports by County and Category, Non-DMV Voter Registration Agencies: Monthly Totals by County and Category.

In 2014, Medi-Cal, California's Medicaid health system, classified nearly 2 million individuals as noncitizens.¹¹ This represented 17.4% of Medi-Cal.¹² Any of the individuals who have enrolled in Medi-Cal (and are over 18 years of age) or any other social service program could be on the voter rolls.

California Fails to Use Any Safeguards to Ensure Noncitizens Are Excluded from Voter Rolls.

Landmark submitted a public records act request to the California Secretary of State seeking records relating to practices and procedures used by California's Department of Elections to identify and purge voter registrations submitted by noncitizens.¹³ Landmark requested copies of any written policies or procedures adopted and followed by the Secretary of State's Elections Division to confirm citizenship status.¹⁴ The request also sought copies of internal policies reflecting internal controls used by California to ensure noncitizens are not improperly placed on the voter rolls.¹⁵ Finally, Landmark's request sought any records reflecting audits or reviews scheduled by the Elections Division of voter registration.¹⁶

The Secretary of State produced no records in response to Landmark's request. In response, it stated that voter rolls and voter registration maintenance "is handled by each individual county through the VoteCal system" and thus it neither possessed nor used any policies or procedures to confirm that names appearing on California voter rolls were citizens.¹⁷ The Secretary also stated that it possessed no records documenting internal controls or audits used by California to ensure noncitizens are not placed on voter rolls.¹⁸

California has at its disposal an instrument it can use to identify and purge the names of noncitizens on its voter rolls – the data it has collected through issuing "AB 60" driver's licenses. Assembly Bill ("AB") 60 requires the California DMV to issue drivers licenses to any applicant who cannot provide proof of legal presence in the United States.¹⁹ The DMV has issued close to one million driver's licenses to noncitizens and has collected the names and addresses of these individuals.²⁰ The Secretary should use this data as a cross-check to voter registrations. If a name and address of an individual who has been issued an AB 60 license appear on his/her respective jurisdiction's voter roll, responsible parties can act to remove the non-citizen from the rolls.

¹¹ Exhibit 2, Medi-Cal Statistical Brief, "Medi-Cal's Non-Citizen Population." October 2015. Available at <http://www.dhcs.ca.gov>.

¹² Id.

¹³ Exhibit 3, Landmark Legal Foundation Public Records Act Request, June 14, 2017.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Exhibit 4, California Secretary of State Response to Landmark Public Records Act Request, July 13, 2017.

¹⁸ Id.

¹⁹ CA Veh. Code Sec. 12801.9

²⁰ Exhibit 5, "Undocumented immigrant driver's licenses near milestone in California." Alexei Koseff, Sacramento Bee, July 26, 2017. Available at <http://sacebee.com>.

Secretary of State Alex Padilla, however, refuses to release this information to county registrars and refuses to direct his Department of Elections to take any steps to cross-check the AB 60 data with current registration lists. California has at its disposal a tool for ensuring its voter lists are accurate and up-to-date. It refuses to use this tool and appears to be indifferent to the probability that state agencies are engaging in activities that place noncitizens on voter rolls.

California's Secretary of State Directs State Employees Not to Screen for Citizenship.

Beyond taking any measures to ensure that noncitizens are kept off the voter rolls, the state may facilitate their placement on registration lists. The California Secretary of State's ("SOS") office is responsible for training the various social service agencies that also conduct voter registration. These agencies include public assistance agencies and state-funded agencies that serve persons with disabilities. Training materials used by the SOS specify that public officials who register individuals to vote at National Voting Registration Act (NVRA) agencies are not to screen for voter registration eligibility.²¹ Any individual, for example who enrolls in social services such as Medicaid, is encouraged to complete a voter registration application. These agencies do not require officials to determine whether the individual is a citizen, whether the individual is a felon or whether the individual is over 18 years of age, before encouraging individuals to complete voter registration applications.²² Training materials distributed by the Secretary of State suggest that officials working at these agencies are directed not to screen for voter registration eligibility.²³ These training materials specify that it is the responsibility of county election officials to screen and reject applications from ineligible individuals not the officials at state social service agencies.²⁴

Failure to conduct any screening raises the significant probability that noncitizens enrolling in state sponsored benefit programs are also completing and submitting voter registration forms.

Recent Instances of Noncitizens Voting Establish the Immediacy of This Issue.

This problem is not speculative. A Mexican national, living in Sacramento and using a deceased individual's identity, reportedly illegally voted in five elections. In October, a federal grand jury indicted Gustavo Araujo Lerma for identify theft, conspiracy to commit unlawful procurement of citizenship and illegal voting.²⁵

In Philadelphia during the 2016 general election, a "glitch" in the voter registration system allowed noncitizens to register "at kiosks when they applied or renewed for driver's

²¹ Exhibit 6, National Voter Registration Act and Senate Bill 35, Training for County Election Officials, p. 43. Available at www.sos.ca.gov.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Exhibit 7, Stephen Frank, "Mexican man charged with using fake ID, voting in elections for 25 years!" October 30, 2017, available at <http://www.capoliticalreview.com/capoliticalnewsandviews/mexican-man-charged-with-using-fake-id-voting-in-elections-for-25-years/>.

licenses or registrations.”²⁶ Pennsylvania has been unable to determine how many noncitizens might have registered to vote.²⁷ It is highly probable that similar violations are occurring in California.

While there are many instances of willfully fraudulent non-citizen registration and voting, e.g. *Kimani v. Holder*,²⁸ even accidental or inadvertent voter registration is also commonplace.²⁹ In such cases, noncitizens allege that they have received improper or unhelpful advice from state workers during registration. In *Keathley v. Holder*, improperly trained state workers led to a corruption of the voter rolls:

[W]hen registering to drive and vote, Keathley contends that she represented herself to be a citizen of the Philippines, presenting both her Philippine passport and her K-3 visa. Neither the IJ nor the BIA determined whether Keathley is telling the truth about this. ...[W]hile Kimani checked a box on the driver's-license form claiming U.S. citizenship, Keathley contends that she left that box unchecked until the state official who superintended the process—an official knowing that she is not a citizen—asked her if she would like to vote. Keathley says that she answered "yes". The box asserting U.S. citizenship ended up checked; Keathley says that she does not remember whether she checked the box or the state employee did so.³⁰

These are just several examples of the pitfalls that arise when a state has failed to take steps to ensure noncitizens are not placed on the voter rolls.

At the state level, California takes no action to ensure the millions of noncitizens who are enrolled in state social services programs are not placed on the voter rolls. It makes no effort to perform audits or checks to develop procedures to either identify or purge noncitizens that are on voter rolls. It fails to share data it has gathered from issuing AB 60 licenses with election officials to ensure accurate voter rolls.

California's refusal to take simple steps to ensure the accuracy of the voter rolls conflicts with its legal obligations under the NVRA. The Justice Department and the Department of Homeland Security should begin immediate investigations into the extent of California's NVRA violations, using the full investigatory and remedial authority available to each department.

Thank you for your attention to this important matter.

Respectfully submitted,

²⁶ Exhibit 8, Chris Breenan, "Glitch let ineligible immigrants vote in Philly elections, officials say." September 20, 2017, available at <http://www.philly.com/philly/news/politics/city/philly-voter-fraud-trump-immigrants-registration-commissioners-penn-dot-20170920.html>.

²⁷ *Id.*

²⁸ 695 F.3d 666 (6th Cir. 2012)

²⁹ See *Fitzpatrick v. Sessions*, 847 F.3d 913 (7th Cir. 2017); *Keathley v. Holder*, 696 F.3d 644 (6th Cir. 2012).

³⁰ Exhibit 9, "Immigrant Who Voted Illegally on Road to Becoming a U.S. Citizen." August 26, 2010, available at <http://www.foxnews.com/us/2010/08/26/immigrant-voted-illegally-seeks-citizen-dhss-help.html>.



Richard P. Hutchison
President
Landmark Legal Foundation
3100 Broadway
Suite 1210
Kansas City, MO 64111

Michael J. O'Neill
Assistant General Counsel
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

CC:

Election Assistance Commission
California Secretary of State Alex Padilla