October 13, 2008

Via facsimile and email

Mr. Mike Coffman
Secretary of State
Colorado Department of State
1700 Broadway
Denver, CO 80290

Re: Potential disenfranchisement of voters whose registration forms do not contain an unnecessary checkmark

Dear Secretary of State Coffman,

We write to urge you immediately to modify your policy regarding voter registration forms that are complete but for the voter's failure to place a checkmark in an unnecessary box. Your current policy of treating these registration applications as "incomplete" has the potential to disenfranchise as many as ten thousand Colorado voters.

In accordance with the Help America Vote Act of 2002 ("HAVA"), the Colorado voter registration form asks voters to provide a state-issued identifying number—either a Driver's License or Department of Revenue identification number. If the applicant does not have either number, she is asked to provide the last four digits of her Social Security Number.[1] The problem arises when a voter provides her Social Security digits but does not check a box to affirmatively indicate that she lacks the requested state-issued numbers. It is our understanding that Colorado is not processing these applications as complete even though they include all the information necessary to establish a voter's eligibility.

<u>The Policy Unfairly and Unnecessarily Penalizes Thousands of Eligible Voters Based on a Technicality</u>

We understand that to date thousands of applications have been affected by this policy and designated "incomplete." This number will likely increase substantially over the next two weeks before the deadline for election officials to process voter registration applications.

The refusal to accept voter registration forms that lack these checkmarks unfairly penalizes eligible voters based on a paperwork formality. The checkbox at issue has nothing to do with voter eligibility. Nor is a missing checkmark indicative of an incomplete application. The most logical reading of an application without state-issued identifying numbers but with Social Security digits is that the applicant either does not have a state-issued number, or did not understand that supplying it was required. There is therefore no reason, and certainly no federal mandate, to reject these applications or treat them as incomplete.[2]

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[1] *See* 42 U.S.C. § 15483(b); Colo. Rev. Stat. § 1-2-204(f)(5).

Although it is true that HAVA and Colorado law create a preferred hierarchy of identifying numbers, there is no legal requirement for voters to check a box or even expressly indicate that they do not have state-issued identifying numbers.[3] In other words, election officials are not legally required to treat applications missing the checkmark any differently from those that have it, let alone downgrade them to "incomplete" status. Other states do not use a similar check box in this manner, and for good reason. Requiring a checkmark excludes legitimate voters for technical errors or omissions without at all improving election security.

The Policy Is Inconsistent With Federal Law

Treating applications without checkmarks as incomplete is inconsistent with both the National Voter Registration Act of 1993 (the "NVRA" or the Motor Voter law) and Section 1971 of the Voting Rights Act. The NVRA mandates that state voter registration forms "may require *only* such identifying information (including the signature of the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."[4] The checkmark at issue here is not necessary either to assess eligibility or to administer the voter registration process.

If the "incomplete" designation results in voters not being registered or in provisional ballots not being counted, it would also violate Section 1971 of the Voting Rights Act. That section provides:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.[5]

This provision was "designed to eliminate practices that could encumber an individual's ability to register to vote" by prohibiting officials from inhibiting voter registration based on trivial clerical errors made on government paperwork.[6] The failure to include a checkmark is an immaterial paperwork error. In short, federal law prohibits states from penalizing voters who do not check such a box by rejecting their voter registration forms or refusing to count their ballots.

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[2] To the extent that Colo. Rev. Stat. § 1-2-204 and Election Rule 2.6.3 require an affirmative checkmark, Colorado puts a greater burden on registrants than that permitted by federal law, as discussed below.

[3] County clerks can easily search the Department of Revenue database to find out whether voters who provided Social Security digits also have state-issued identification numbers, in which case clerks should add this information to the registration forms themselves.

[4] 42 U.S.C. § 1973gg-7(b)(1) (emphasis added); see id. 1973gg-4(a)(2) (state form must meet "all of the criteria stated in section 1973gg-7(b)").

[5] 42 U.S.C. § 1971(a)(2)(B).

[6] *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004).

Moreover, there is no election administration reason to treat the applications in question as incomplete. To the extent that the affected voters do not have a state-issued identifying number, the application contains all the information required by federal and Colorado law. To the extent that the affected voters who listed their Social Security digits also have a state-issued identification number, it is unfair, unnecessary, and likely unconstitutional to deprive them of the franchise simply for this reason. First, all the current Colorado voter registration forms do not indicate that failing to check the box related to driver's license and state identification numbers is grounds for outright rejection of the form. And not all registration forms are identical, — some do not contain this check box or in any way require a voter to affirmatively indicate that they do not have a state issued identification number. Second, most of these allegedly "incomplete" applications were submitted in good faith by third party voter registration drives ("VRDs"). As you are aware, state law requires all VRDs to receive comprehensive training and strictly to follow procedures outlined in the official Voter Registration Drive Training Packet.[7] Yet this packet is conspicuously silent on the issue of state-issued identifying numbers. The packet does not say that all voters must provide state-issued identifying numbers if they have them, nor does it communicate the repercussions of providing Social Security digits but leaving the checkbox empty.[8] Penalizing voters registered through VRDs who were following the procedures provided by your office is unfair and may deprive those voters of the franchise without due process of law.

The Failsafes are Insufficient

We understand that you have issued a rule that may allow voters to remedy "incomplete" applications up through the time of actual voting.[9] In the alternative, voters may of course cast provisional ballots at the polls.[10] Regarding the counting of provisional ballots, Election Rule 26.5.2 provides:

> if [a] designated election official receives a provisional ballot from a voter who registered to vote but had an incomplete or deficient voter registration application, and did not supply the required information at the time of registration, at any time prior to voting, or on the provisional ballot envelope, the provisional ballot shall not be counted. If the voter does supply the required information prior to or at the time of voting, then the provisional ballot may be counted.

Although in theory these rules provide failsafes for electors who submit "incomplete" applications, we are concerned that these backup mechanisms will not work for a substantial portion of affected voters. First, we are concerned that not everyone whose application is marked "incomplete" will be notified or given enough time to cure any defects before voting. This problem is compounded by the fact that in an effort to get through last-minute applications as quickly as possible, some election officials are

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[7] Colo. Rev. Stat. §§ 1-2-701-703.
[8] Signatories to this letter conducted several interviews with senior staff members of various independent registration drives, all of whom attended state-run training sessions and none of whom were told that a voter who lists a Social Security number but does not check the box in question would be designated "incomplete."
[9] Secretary of State Election Rule 2.6.3.
[10] Colo. Rev. Stat. § 1-8.5-101.

postponing processing "incomplete" applications by moving them to the bottom of their piles.

Second, Rule 26.5.2 does not expressly require election officials to count the provisional ballots cast by affected voters who supply the missing checkmark, but rather says that such ballots "may" be counted.

Third, we are concerned that county officials who do not add the names of affected voters into the statewide voter registration database (SCORE) will not be able to count the provisional ballots even if voters correct the missing checkmark at the polls. Under your rules, counties are not required to enter into the database the names of voters who did not include the checkmark on their applications, and we understand that some counties are in fact not entering these voters into the database. In those counties, it will be impossible to count provisional ballots cast by affected voters because there will be no way to readily identify them as qualified electors. Indeed, your rules actually prohibit election officials from reviewing the records necessary to determine that those voters have registered, and thereby preclude the counting of their provisional ballots. Specifically, Rule 26.4.4 limits the sources county officials may review in counting provisional ballots to (a) felony conviction records; (b) the statewide voter registration database, and (c) the DMV Motor Voter database. Under this rule, election officials cannot corroborate a voter's registration by, for example, looking at their original "incomplete" application. Therefore, if the affected voters are not entered into the voter registration database, their provisional ballots will not be counted.[11] In short, treating these applications as "incomplete" in the first instance creates the specter of thousands of provisional ballots that will never be counted.

Recommendations

In order to prevent widespread disenfranchisement of eligible voters, the following courses of action are necessary:

- Reverse your policy of treating these applications as "incomplete" and immediately register all voters whose applications were so designated. At the very least, all voters whose applications were marked "incomplete" must be added to the statewide voter registration database and be allowed to cast regular ballots if they provide the missing checkmark or other information at the polls.

- Modify the registration form and training packet to be clearer and bring them into compliance with federal law.

Further, we ask you to take the following additional courses of action:

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[11] Furthermore, if these forms are not entered into SCORE, there is no ability to verify the Social Security numbers these voters have provided. And, for counties that are entering all of these forms into SCORE, it is not clear if the provided Social Security numbers are currently being verified because these forms have been deemed "incomplete." The restrictions on what information can be consulted while evaluating provisional ballots do not appear to allow counties to verify Social Security numbers during that process. Unless the Social Security numbers of all these voters are verified beforehand, it seems very unlikely that their provisional ballots would be counted.

- Honor your current plan to send a letter to every voter whose application has been marked "incomplete." In this notice, voters should be informed how to best make sure their ballot will be counted. This will require multiple mailings since forms are continually being processed.

- Direct all county registrars to process "incomplete" applications with haste. It is our understanding that in an effort to get through last-minute applications as quickly as possible, some election officials are postponing processing these applications by moving them to the bottom of the pile. This delay may prevent voters from curing problems with their allegedly "incomplete" applications.

- Direct all county officials to allow voters to cure any problem with their identifying numbers by calling the registrar's office and providing supplemental information over the telephone. Requiring voters to come down to the office in person simply to check a box is unnecessarily burdensome.

- For early voting, which begins on October 20, instruct election officials to explain to voters whose registration is "incomplete" that if they are able to provide the necessary information on the spot, they can either contemporaneously cast a provisional ballot *or* return to the polls on Election Day and cast a regular ballot.

The right to vote is vital to our democracy and one of the most fundamental rights citizens enjoy. We respectfully request your immediate response to our inquiry. We would very much like to work with you in ensuring that all Colorado voters are able to participate in the upcoming election and have their ballots counted and will do everything in our power to achieve that goal. Please call us at (212) 998-6730 if you have any questions or if we can provide further assistance.

Sincerely,

Wendy Weiser and Jennifer Rosenberg, Brennan Center for Justice at NYU School of Law
Cathryn Hazouri and Mark Silverstein, ACLU of Colorado
Magda Herrera, Advancement Project
Jenny Flanagan, Colorado Common Cause
Sarah Brannon and Karen Neuman, Fair Elections Legal Network
Jonah Goldman, Lawyers' Committee for Civil Rights Under Law
Steven Ury, Service Employees International Union
Nina Perales, Mexican American Legal Defense and Education Fund

Cc: Governor Bill Ritter
        Deputy Secretary of State Bill Hobbs
        Director of Elections Wayne Munster
        Attorney General John Suthers
        All County Clerks