



ACLU of San Diego &
Imperial Counties
P.O. Box 87131
San Diego, CA 92138
Telephone: 619-398-4183

March 5, 2014

The Honorable Debra Bowen
California Secretary of State
1500 11th Street
Sacramento, CA 95814
lowell.finley@sos.ca.gov

Via email; original to follow by Federal Express overnight mail

Re: Covered California and National Voter Registration Act Non-Compliance

Dear Secretary Bowen:

On behalf of the League of Women Voters of California, Young Invincibles, Jamie Serb, Marco Rodriguez, Trisha Ton-nu, Evan Hearnberger, and other persons and organizations similarly situated,¹ we write to provide formal notice that the California Health Benefit Exchange, now known as and referred to hereafter as Covered California, is not offering voter registration to public assistance applicants and clients as required by the National Voter Registration Act of 1993, 42 U.S.C. section 1973gg et seq. (“NVRA”). Section 7 of the NVRA establishes clear obligations on the part of public assistance agencies to provide voter registration services.

The NVRA includes a private right of action in the event that a state fails to correct its non-compliance after its chief election official has received due notice. 42 U.S.C. § 1973gg-9(b). We urge you, as the State’s chief election official, to take immediate steps to ensure that Covered California is brought into compliance with the NVRA and that voter registration services required by the NVRA are provided to every individual who applied from October 1, 2013 forward.

Under the NVRA, “offices in the state that provide public assistance” must be designated as voter registration agencies. 42 U.S.C. § 1973gg-5(a)(2)(A). Covered California was established in September 2010 to implement the Patient Protection and Affordable Care Act (ACA). A.B. 1602, Chapter 655 (Cal. 2010); S.B. 900, Chapter 659 (Cal. 2010). Covered California consists of two insurance marketplaces, one for small employers and one for individuals. In the individual

¹ This includes without limitation eligible California voters who have engaged or will engage in covered transactions but who have been or will be deprived of opportunities to register to vote or denied registration services or assistance due to Covered California’s failure to comply with the NVRA, as outlined herein.

marketplace, applicants can apply by a “single, streamlined application” for Medi-Cal coverage² and health insurance subsidies, both of which are public assistance programs. Accordingly, on May 15, 2013, four and a half months before Covered California began accepting applications from consumers, you designated Covered California as a voter registration agency. California Secretary of State Declaration, May 15, 2013.³

Covered California has been operating and allowing individuals to apply for both Medi-Cal and health insurance subsidies since October 1, 2013. To date, more than 3.5 million Californians have applied through Covered California’s individual marketplace without being offered the voter registration services that the NVRA requires.⁴

As a voter registration agency, Covered California must: (i) distribute voter registration application forms; (ii) provide assistance in completing the voter registration application forms; and (iii) accept completed voter registration application forms and forward them to the appropriate election official. 42 U.S.C. § 1973gg-5(a)(4)(A).

Specifically, during each application, recertification, renewal and change of address transaction (collectively, “covered transactions”), Covered California must distribute voter registration application forms to all applicants and clients unless the individual applicant or client affirmatively opts out of voter registration by declining “in writing” to register to vote. 42 U.S.C. § 1973gg-5(a)(6)(A); *Valdez v. Squier*, 676 F.3d 935, 947 (10th Cir. 2012) (holding that an applicant’s failure to answer the declination form does not constitute a declination in writing); *see also* Cal. Elec. Code § 2403(c). Covered California also must provide clients and applicants written documentation (a “voter preference form” or “declination form”) that: (i) includes the question “If you are not registered to vote where you live now, would you like to apply to register to vote here today?” (“the voter preference question”) with “yes” and “no” checkboxes; and (ii) includes several statutorily required disclaimers, including, among others, that the decision to register or to decline to register to vote will not affect the amount of public assistance provided by the agency. 42 U.S.C. § 1973gg-5(a)(6)(B). Finally, Covered California must provide assistance in completing the voter registration application forms to the same degree that it provides assistance in completing its own forms. 42 U.S.C. § 1973gg-5(a)(6)(C).

As required by the ACA, 42 U.S.C. section 18083, subdivision (b)(1)(A)(ii), Covered California is currently accepting health benefits applications through at least four different application processes: (i) a website, known as the California Healthcare Eligibility, Enrollment and Retention System (CalHEERS), which accepts online applications directly from consumers; (ii) a

² The Medi-Cal program operates numerous public assistance programs, including Medicaid and CHIP. *See* <http://www.medi-cal.ca.gov>.

³ Available at: <http://www.sos.ca.gov/elections/nvra/correspondence/pdf/sos-letter-to-chbe-lee-5152013.pdf> (retrieved February 26, 2014).

⁴ According to Covered California, between October 1, 2013 and January 31, 2014, it processed 2,742,691 applications for individuals determined eligible for health benefits through a qualified health plan and an additional 877,000 applications for individuals who it determined likely eligible for Medi-Cal. Covered California Board Meeting, Executive Director’s Report at slide 5 (February 20, 2014), at http://www.healthexchange.ca.gov/BoardMeetings/Documents/February%202014/PPT%20-%20Executive%20Director%27s%20Report_February%202014.pdf (retrieved February 26, 2014).

paper application, which can be printed by the consumer and submitted by mail; (iii) phone service centers, which are staffed by trained employees to accept applications by phone; and (iv) in-person enrollment being conducted by over four thousand certified enrollment counselors (hereafter referred to as “CECs”) and over eleven thousand certified insurance agents, all of whom have been trained and certified by Covered California and are using either paper applications, CalHEERS, or a combination of both.⁵ The NVRA requires that voter registration services be provided to all applicants regardless of which application process is used. *See Ferrand v. Schedler*, No. 2:11-cv-00926-JTM-JCW, 2012 WL 1570094, at *9 (E.D. La. May 3, 2012) (“[Section 7’s] plain language makes clear that voter registration must be offered to clients and applicants with ‘each’ covered transaction, including remote transactions.”); *Georgia State Conference of the NAACP v. Kemp*, 841 F.3d 1320, 1331 (N.D. Ga. 2012) (voter registration must be provided during remote transactions).

The failure of Covered California to undertake obligations required by the state’s NVRA implementing law further evidences Covered California’s violation of the NVRA. California law specifically requires voter registration agencies to allow online applicants to both submit an electronic voter preference form and submit an electronic voter registration application via California’s online voter registration system (COVR). Cal. Elec. Code § 2408(a). Additionally, under California Elections Code section 2406(a), Covered California must: (i) notify county elections officials of the Covered California enrollment centers or agents (“enrollment entities”) in their counties; (ii) designate a Covered California employee who is responsible for ensuring compliance with the NVRA and applicable state law; (iii) ensure enrollment entities request voter registration application forms from appropriate county elections officials; (iv) ensure each enrollment entity has voter preference forms and voter registration application forms in all languages required by the federal Voting Rights Act (42 U.S.C. § 1973aa-1a; 42 U.S.C. § 1973 b(f)(4)); and (v) ensure each employee who provides voter registration services completes an annual training based on training materials prepared by your office. Other than designating its Deputy Director of External Affairs as an interim NVRA coordinator, Covered California has utterly failed to undertake its obligations under the state’s NVRA-implementing law.

Covered California received substantial notice of its responsibility to provide voter registration services under the NVRA. Since at least May 2013, Covered California has been in ongoing communications with the ACLU of California Voting Rights Project and your office about the specific voter registration services that all voter registration agencies must provide to the public. Yet when Covered California launched on October 1, 2013, the required voter registration services were not incorporated into any of the four application processes and to date none of the required voter registration services are being provided:

⁵ As of February 20, 2014, Covered California had certified 4,447 enrollment counselors and 11,069 insurance agents. Covered California Board Meeting, Executive Director’s Report, at slide 30 (February 20, 2014), at http://www.healthexchange.ca.gov/BoardMeetings/Documents/February%2020,%202014/PPT%20-%20Executive%20Director%27s%20Report_February%2020,%202014.pdf (retrieved February 26, 2014).

- There is no NVRA-compliant offer of voter registration in the online application.
- Neither a voter preference form nor a voter registration application form is included in the paper application.
- Voter registration is not offered to telephone applicants.
- Covered California has not ensured that CECs or insurance agents are offering NVRA-compliant voter registration in-person.
- Voter registration is not being offered when a Covered California applicant or client reports a change of address.

Additionally, voter registration has not been incorporated into training for CECs or insurance agents and service center staff were not trained or informed of their voter registration obligations. Thus, none of these individuals are currently providing the requisite level of assistance for voter registration. *See* 42 U.S.C. § 1973gg-5(a)(6)(C).

After repeated attempts to persuade Covered California to come into compliance with the NVRA, on November 14, 2013, the ACLU of California Voting Rights Project, the ACLU National Voting Rights Project, Demos, and Project Vote sent a letter to Covered California requesting that it fully comply with its NVRA obligations by December 16, 2013, or face potential legal consequences, including a private right of action.

In response, on November 26, 2013, Covered California fully acknowledged its federal and state law obligations as a voter registration agency under the NVRA, but did not provide a plan by which NVRA voter registration services would be provided to all applicants. Among other things, Covered California did not address the incorporation of voter registration into paper applications, phone applications, in-person applications, or mail applications. Moreover, while Covered California offered that it had imbedded a link to COVR in various spots on its website, these links are not part of the online application process as required by the NVRA, and most consumers are unlikely to see the links to COVR unless they affirmatively dig through the website for information about services other than health benefits.

Since the exchange of letters in November, there have been two meetings between your office, the ACLU of California Voting Rights Project, and staff at Covered California to discuss the steps Covered California could take to ensure that all applicants who have not received voter registration services from it are offered voter registration before the May 19, 2014 voter registration deadline for the June 3, 2014 primary, and the steps it could take to fully implement the NVRA. Although Covered California had indicated an interest in sending a retroactive mailing to applicants that would include a letter and a voter registration card, in the most recent meeting on February 18, 2014, Covered California made it clear that it had no intention of sending such a mailing to all applicants. In addition, Covered California shared that it had no concrete plan in place for providing prospective, NVRA-compliant voter registration services through the online application, through the paper or in-person application process, or through its telephone service centers, or for change of address transactions. Moreover, Covered California has no plan for voter registration training for CECs, certified insurance agents or service center

staff. Finally, Covered California has stated no plans to offer the NVRA required voter registration services to all individuals renewing or recertifying their coverage once the renewal application process starts later this year.

In sum, Covered California's current and ongoing violations of the NVRA are, at a minimum, as follows:

- Consumers applying directly through the CalHEERS website are not offered an online version of the voter preference form in the application where all applicants would see it; nor is there a system for distributing voter registration applications, such as providing a link to COVR within the application to applicants who wish to register to vote;⁶
- Paper applications do not include voter preference forms or voter registration application forms;
- Consumers applying by phone through a service center are not offered voter registration services, nor are they mailed a voter registration application form, a voter preference form, or offered assistance with registering to vote;
- Covered California is not ensuring that all CECs or certified insurance agents provide a voter preference form, a voter registration application form, or otherwise aid in voter registration during covered transactions, regardless of whether they are using paper applications, CalHEERS, or a combination of both;
- Voter registration services are not being offered when a Covered California applicant or client reports a change of address;
- None of Covered California's employees, agents or contractors have received training on voter registration, nor are they providing assistance with voter registration equivalent to the assistance being provided with Covered California's applications.

Covered California must immediately address its non-compliance with the NVRA and its obligation to provide voter registration services to every applicant who has applied or will apply from October 1, 2013 forward. To date more than 3.5 million people have applied for healthcare coverage through Covered California and Covered California has not taken the steps required to ensure that each of those applicants has been offered the opportunity to register to vote as required by law. Furthermore, Covered California's violations of the NVRA are ongoing and will persist, as Covered California has expressed no plans or intention of addressing NVRA compliance issues in a manner that will ensure that the required voter registration services are provided to all applicants.

⁶ In order to be NVRA compliant, COVR must be fully accessible, including being a valid means of voter registration to people who do not have a driver's license, state-issued identification, and do not have means to print, sign and mail the voter registration affidavit. *See Scott v. Schedler*, 2013 WL 264603, at *12, *25-26 (E.D. La. 2013) (holding that link to an online voter registration system violates the NVRA unless there is also a method to mail voter registration applications because the online system was not accessible to people without state-issued identification). COVR, therefore, must contain a means by which a voter registration application is mailed when necessary; otherwise, Covered California cannot satisfy its distribution obligations simply by providing a link to COVR.

As you know, the undersigned value our ongoing and positive collaboration with your office to bring other California state agencies into compliance with the NVRA. We remain available to work cooperatively with your office and with Covered California to develop an effective plan for bringing Covered California into full compliance with the NVRA. However, as stated above, this letter serves as notice pursuant to 42 U.S.C. section 1973gg-9(b).

Covered California is currently committing the ongoing NVRA violations described herein. Because the violations are occurring within 120 days of the upcoming June 3, 2014 primary, which includes contests for 53 federal congressional seats and is thus a federal election, the applicable statutory notice period is 20 days. 42 U.S.C. § 1973gg-9(b)(2). If Covered California's NVRA violations have not been fully cured by the end of the statutory 20-day waiting period, it may be necessary to pursue a legal remedy to ensure that eligible Californians are afforded the opportunity to register to vote as required by the NVRA and state implementing legislation.

Thank you and we look forward to working with you.

Sincerely,



Lori Shellenberger
Director, California Voting Rights Project
ACLU Foundation of San Diego and Imperial Counties

Lisa Danetz
Legal Director
Dēmos

Sarah Brannon
Director, Public Agency Voter Registration Program
Project Vote

Dale Ho
Director, Voting Rights Project
ACLU Foundation

Cc:

Peter Lee
Executive Director
Covered California
560 J Street, Suite 290
Sacramento, CA 95814