

October 5, 2016

Carlos H. Cascos, Secretary of State  
Keith Ingram, Director of Elections  
Elections Division  
Office of the Secretary of State of Texas  
P.O. Box 12060  
Austin, Texas 78711-2060

Dear Secretary Cascos and Director Ingram,

We write to you, in our capacity as organizations concerned with protecting the rights of voters, to provide assistance in connection with your efforts to ensure an orderly general election free of voter discrimination and intimidation. As you prepare, we suspect you have been made aware of media reports about possible attempts to mobilize ballot security operations in Texas and elsewhere, including through the use of poll watchers and potentially others at the polls.<sup>1</sup> We are further concerned that some public statements by politicians appear to be calling for private citizens to take actions outside the normal poll-watching process, with potentially discriminatory or intimidating results.

We urge your office to issue special instructions and public-education materials on what conduct will be permissible at the polls by poll watchers and any other person showing up at the polls to do anything other than vote, in the upcoming election. We have been unable to identify materials on your website—recent instructions, guides, or otherwise—prominently and specifically responding to the heightened risk of illegal voter discrimination and intimidation committed by private citizens attempting to police the polls, and believe that special instructions would go a long way to protect the efficiency and integrity of the election.

To assist you in your efforts, we first review the federal and state legal framework that protects voters against discrimination and intimidation, including identifying specific limits on permissible conduct by officials and private citizens. We then request that the Elections Division take steps to educate election officials and the public about how the law limits what they can and cannot do. We conclude with additional precautionary steps that we recommend you take to ensure a fair election this year.

We very much appreciate the demands faced by election officials at this moment in the election season, and believe that undertaking the appropriate steps to deter and prevent private citizens from engaging in illegal and improper discrimination and

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<sup>1</sup> See, e.g., Joseph Weber, *Trump recruiting 'election observers' to scout for fraud*, FOX NEWS, Aug. 17, 2016, <http://www.foxnews.com/politics/2016/08/17/trump-recruiting-election-observers-to-scout-for-fraud.html>; Zachary Roth, *Trump Poll-Watching Plan Stirs Voter Intimidation Fears*, NBC NEWS, Aug. 15, 2016, <http://www.nbcnews.com/politics/2016-election/trump-poll-watching-plan-stirs-voter-intimidation-fears-n631261>.

intimidation at the polls will make it easier for election workers to do their job, and preempt situations like the reported voter intimidation in Harris County in 2010.<sup>2</sup>

## I. Legal Prohibitions Against Discriminatory and Intimidating Conduct

### a. Discrimination Against Voters

We first note that federal law prohibits discriminating against voters. Government officials are prohibited under the Voting Rights Act,<sup>3</sup> the U.S. Constitution,<sup>4</sup> and the Americans with Disabilities Act<sup>5</sup> from discriminating against voters in any way based on race, ethnicity, national origin, language, disability, or religion, or from allowing any discriminatory conduct by private actors to affect voters. Doing so can result in a prison sentence of five years, a fine of \$5,000, or both.<sup>6</sup> Courts have made clear that conduct even motivated only in part by impermissible reasons is prohibited,<sup>7</sup> and have gone so far as to prohibit challengers from polling places altogether where the risks of discriminatory challenges have warranted doing so.<sup>8</sup>

Moreover, Texas law prohibits discriminatory conduct towards voters, and requires that any pre-election challenges to voter eligibility be well grounded in personal knowledge.<sup>9</sup> Any challenge of voter eligibility can be made only by an elector of the challenged voter's county, and in writing via the required oath, before the registrar.<sup>10</sup> As you know, Texas does not provide for private citizens to challenge a voter's eligibility at the polls.<sup>11</sup> Therefore, anyone at the polls who is not voting, a state or federal official

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<sup>2</sup> Abby Rapoport, *The Battle of Harris County—A firsthand look at early voting in Houston and allegations of voter intimidation*, THE TEXAS OBSERVER, Nov. 1, 2010, available at <https://www.texasobserver.org/the-battle-of-harris-county/> (last visited Sept. 26, 2016).

<sup>3</sup> 52 U.S.C. §§ 10301, 10303(f)(2), 10503.

<sup>4</sup> U.S. Const. Amends. I, XIV, XV; *Cf.* *Smith v. Allwright*, 321 U.S. 649, 765 (1944) (“This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.” (citation omitted)).

<sup>5</sup> 42 U.S.C. § 12101 et seq.

<sup>6</sup> 52 U.S.C. § 10308.

<sup>7</sup> *See generally* *Democratic Nat’l Committee v. Republican Nat’l Committee*, 671 F. Supp. 2d 575 (D.N.J. 2009).

<sup>8</sup> *Spencer v. Blackwell*, 347 F. Supp. 2d 528 (S.D. Ohio 2004) (granting plaintiffs’ request to block all challengers from the polls, because otherwise the facts created a serious risk of state officials “discriminating against black voters ... on the basis of race”).

<sup>9</sup> *See* TEX. ELEC. CODE ANN. § 16.092.

<sup>10</sup> TEX. ELEC. CODE ANN. §§ 16.091-16.092.

<sup>11</sup> TEX. ELEC. CODE ANN. § 63.010, *repealed by* Act effective Jan. 1, 2004, ch. 1315, § 57(a).

with a legally recognized function to perform, or an appointed poll watcher, is a bystander and under Texas law may not be in the polling place.<sup>12</sup>

#### b. Intimidation of Voters

Private actors and government officials are prohibited by the Voting Rights Act from engaging in any efforts to intimidate, threaten, or coerce a voter to vote or not vote, or to vote for or against a particular candidate.<sup>13</sup> That prohibition applies even where there is no intentional discrimination.<sup>14</sup>

Texas law similarly prohibits harming or threatening to harm voters.<sup>15</sup> Similarly, poll watchers are not permitted to engage in disruptive behavior and may not converse with voters under any circumstances,<sup>16</sup> as your recently revised Poll Watcher's Guide notes,<sup>17</sup> nor may they "use a recording device for audio, visual, or audiovisual recording at any location of service."<sup>18</sup>

#### c. Other Prohibitions

Use of Police or Official Garb in Polling Places. The presence of law enforcement officials or poll watchers wearing official-seeming clothing in polling places for ballot security operations has been found to intimidate voters.<sup>19</sup> Additionally, Texas prohibits private citizens from possessing firearms in polling places.<sup>20</sup>

Conspiring to Interfere with Voters' Rights. Federal law prohibits any person from conspiring with others to deprive a voter of her right to vote or her right to vote free from discrimination or intimidation.<sup>21</sup> Violators can face up to 10 years in prison. Similarly,

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<sup>12</sup> TEX. ELEC. CODE ANN. § 61.001(a).

<sup>13</sup> 52 U.S.C. §§ 10101(b), 10307(b).

<sup>14</sup> *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 463 (N.D.N.Y. 2006).

<sup>15</sup> TEX. ELEC. CODE ANN. § 276.001; *see also* TEX. ELEC. CODE ANN. § 61.008 (unlawfully influencing voter).

<sup>16</sup> TEX. ELEC. CODE ANN. § 33.058 ("[A] watcher may not ... converse with a voter; or ... communicate in any manner with a voter regarding the election."); Elec. Law Op. No. JH-2 (1991) (election judges have authority to limit disruptive activity).

<sup>17</sup> SECRETARY OF STATE ELECTIONS DIVISION, POLL WATCHER'S GUIDE 2016, *available at* <http://www.sos.state.tx.us/elections/forms/pollwatchers-2016.pdf>.

<sup>18</sup> John Hannah, Jr., Secretary of State, Election Law Op. JH-2, Nov. 20, 1991, *available at* <http://www.sos.state.tx.us/elections/el/jh2.PDF>.

<sup>19</sup> *See, e.g.*, 52 U.S.C. § 10102 (prohibiting U.S. military officers from interfering in state elections); *Democratic Nat'l Committee v. Republican Nat'l Committee*, 671 F. Supp. 2d 575, 579-80, 610-13 (D.N.J. 2009) (finding presence of individuals in official-seeming attire intimidated voters).

<sup>20</sup> *See* TEX. PENAL CODE ANN. § 46.03(a)(2).

<sup>21</sup> 42 U.S.C. § 1985(3) (providing cause of action if "two or more persons ... conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of

election officials are prohibited from engaging in any conduct to deprive a person of her rights under the Voting Rights Act.<sup>22</sup> Texas law similarly prohibits conspiracies to intimidate or coerce voters.<sup>23</sup>

## II. Requested Election-Official Instructions and Public Education

### a. Inform All Relevant Parties as to Prohibited Conduct

Based on the important legal prohibitions discussed above, we strongly recommend that, in advance of the November 8th general election, all instructions, trainings, reference materials, and public-education materials disseminated to election officials, poll watchers, voters, and other private citizens who may show up at the polls for any purpose other than to vote, reflect the following:

- i. *Discrimination.* Discrimination against voters, whether by private citizens or election officials, is prohibited. In particular:
  - Election officials may not treat voters differently in any way based on race or other protected characteristics, including asking voters of only certain ethnic or racial groups to show ID, provide additional proof of a reasonable impediment to obtaining ID, or to answer questions to vote.
  - Election officials and private citizens may not challenge a person’s eligibility to vote based on the racial or ethnic makeup of a precinct or polling place. They also may not base challenges on mailings targeted at individuals living in precincts with large concentrations of minorities.
  - Registrars may not accept a private citizen’s challenge to a voter’s eligibility if the challenge was discriminatory, or based on unreliable information.
- ii. *Intimidation.* Private citizens, acting as poll watchers or otherwise, may not directly confront voters. They also may not use raised voices or insulting, offensive, or threatening language.
- iii. *Deceptive Practices.* It is unlawful to disseminate misleading information about elections, including flyers or other communications that purposely misstate the time and date of an election, where it will be held, and how voting will happen.
- iv. *Misuse of Law Enforcement.* Private citizens may not be at polling places dressed to appear like law enforcement officials or carrying firearms.
- v. *Conspiracy to Violate Voters’ Rights.* Private citizens may not assist others in discriminatory or intimidating conduct.

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the laws, or of equal privileges and immunities under the laws”); 8 U.S.C. §§ 241 & 242 (carrying penalties of fines and imprisonment up to ten years for conspiracies to intimidate a person); 52 U.S.C. § 10308(c).

<sup>22</sup> 52 U.S.C. §§ 10307(a) – (b), 10308 (a).

<sup>23</sup> TEX. PENAL CODE ANN. § 15.02.

b. Additional Helpful Precautions

Given the escalating rhetoric on these issues, we urge you to take the following additional steps to protect the rights of voters:

- Train poll workers specifically on what the rules are for private citizens observing the election, and how to deal with poll watchers and other private citizens appearing at the polls who disrupt the orderly functioning of elections through discriminatory or intimidating conduct, including photography or other recording.
- Post rules applicable to non-voters in polling places and on your website, in clear language, and educate the public on those rules, including, in particular, Texas's rule that poll watchers cannot talk to voters.
- Be prepared to protect polling places from disruptive or discriminatory behavior and ensure immediate removal of disruptors that could intimidate voters or deter them from exercising their rights.
- Be prepared to correct publicly any information disseminated that could mislead or intimidate voters with respect to voting, their right to vote, or the election.

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Beyond harming individual voters, improperly conducted ballot security operations can disrupt elections and cause longer lines, among other negative consequences. The Division's issuance of clear guidance will help ensure the orderly administration of the coming elections, and we hope you undertake the modest efforts we have suggested.

Respectfully submitted,

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