

March 7, 2017

Via certified mail

Todd D. Valentine and Robert A. Brehm
Co-Executive Directors
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207-2729

RE: *Compliance with Sections 5 and 8 of the National Voter Registration Act and Section 203 and 4(e) of the Voting Rights Act*

Dear Mr. Valentine and Mr. Brehm:

We write on behalf of VotoLatino, Hispanic Federation, MinKwon Center for Community Action (“MinKwon”), Chhaya Community Development Corporation (“Chhaya CDC”), persons eligible to register to vote that these organizations represent, William Towbin, and others similarly situated, to notify you that the State of New York is not in compliance with Section 5 of the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. § 20504 et seq. (“Section 5”), which requires States, including New York, to provide individuals with a meaningful opportunity to register to vote when they interact with the New York State Department of Motor Vehicles (“DMV”). Specifically, New York is systematically failing to ensure that a driver’s license or identification card application, renewal, or change of address transaction serves as a voter registration application or change of address in accordance with Section 5 of the NVRA. This letter serves as notice pursuant to 52 U.S.C. § 20510(b) of violations by New York of Section 5 of the NVRA.

New York is also violating Section 203 of the Voting Rights Act of 1965, as amended in 1970 and 1975, 52 U.S.C. § 10301 et seq. (“VRA”), which protects language minorities as well as limited English proficient (“LEP”) speakers, and requires covered states and political subdivisions, including jurisdictions in New York, to provide “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots” in certain languages other than English. *Id.* at § 10503(c). In addition, New York’s failure to provide such materials and information in the Spanish language constitutes a violation of section 4(e) of the Voting Rights Act of 1965, as amended in 1970. *Id.* at § 10303(e).

We are ready and eager to work with the New York State Board of Elections (“NYSBOE”) to help ensure that New York’s DMV offices are meeting their legal obligations. Dēmos and Project Vote each have ten years of experience in working with states across the country, either cooperatively or through litigation, to ensure compliance with the NVRA. LatinoJustice PRLDEF (LJP) and Asian American Legal Defense and Education Fund (AALDEF) have over four decades of experience working across the nation to engage communities and enforce the NVRA and VRA. We urge you, as the State’s chief election officials, to take advantage of our collective experience, and implement

immediate steps, in conjunction with the New York DMV, to bring the State into compliance with federal law.

I. Violations of Section 5 of the NVRA

A. The Requirements of Section 5 of the NVRA

Section 5 of the NVRA requires the DMV to provide individuals with an opportunity to register to vote whenever they apply for, renew, or change their address on a driver's license or state-issued identification ("ID") card. 52 U.S.C. § 20504(a)(1) & (d); *see also* 52 U.S.C. § 20502(3) (defining "motor vehicle driver's license" to "include[] any personal identification document issued by a State motor vehicle authority").

First, the NVRA mandates that state driver's license or ID card applications or renewal applications shall "serve as an application for voter registration ... unless the applicant fails to sign the voter registration application."¹ 52 U.S.C. § 20504(a)(1). A voter registration application "shall" be included as part of every application for a state driver's license or ID card. 52 U.S.C. § 20504(c)(1). As part of this application, the state may collect additional information necessary to register the individual to vote, but the voter registration portion of a driver's license or ID card application "may not require any information that duplicates information" included in other portions of the form, "other than a second signature" and an attestation of eligibility. *Id.* § 20504(c)(2). New York's NVRA implementing statute similarly requires that qualified individuals be able to "apply for registration...by application made simultaneously and integrated" with an application for a driver's license or ID card, or a renewal of the same. *See* N.Y. ELEC. LAW § 5-212.

Second, the NVRA requires that when an individual submits a change of address notification to the DMV, the state must update the individual's voting address "unless the [individual submitting the form] states ... that the change of address is not for voter registration purposes." 52 U.S.C. § 20504(d). In other words, Section 5 mandates that during a driver's license address change, an update of the voter registration address is the default option, and motor vehicle authorities must affect the update unless the voter affirmatively opts out of the update.

Third, the NVRA mandates that when an individual registers to vote or updates their voter registration through the DMV, this information must be "transmitted to the appropriate State election official" within 10 days or, in some cases, within five days.² *Id.* § 20504(e)(1). Finally, Section 8 of the NVRA, 52 U.S.C. § 20507(a)(2), requires the appropriate State election officials to send each applicant a notice of the disposition of their voter registration application.

¹ If a voter is already registered, their driver's license application or renewal "update[s] any previous voter registration[.]" 52 U.S.C. § 20504(a)(2).

² "If [the] application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance." *Id.* § 20504(e)(2).

B. New York's Violations of Section 5 of the NVRA

A report from the Civil Rights Bureau of the New York Office of the Attorney General ("OAG"), citing the experience of individuals who registered or updated their voter registration information at the New York DMV, demonstrates that the State is failing to comply with Section 5 of the NVRA. *See* NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, A REPORT ON VOTER ACCESS IN THE 2016 PRESIDENTIAL PRIMARY (December 2016) ("AG Report"). At a minimum, New York DMVs are (i) failing to meet their obligation to transmit voter registration information to county Board of Elections offices accurately and on time; and (ii) failing to offer NVRA-compliant voter registration services to individuals engaging in driver's license or ID card transactions online, including renewals and changes of address.³ These violations are detailed below.

1. Failure to Complete and Transmit Voter Registration Applications during Driver's License or ID Card Transactions

The New York DMV systematically fails to process voter registration applications or transmit them to state and county elections officials within the time limits required by the NVRA when customers indicate a desire to register. These failures have resulted in numerous individuals who registered (or updated their registration information) with the New York DMV, including Mr. Towbin, being deprived of their right to cast a ballot. When these individuals attempt to vote after submitting a voter registration application or update to the DMV, they find that their names did not appear on the voter registration rolls. Such individuals either then cannot vote or, like Mr. Towbin, have to vote provisionally by casting affidavit ballots, which impose an additional burden of time to complete the affidavit. They leave the polling location without confidence that their voices will be heard or that their votes will be counted in the election. Indeed, many of the individuals who have had to cast affidavit ballots have later learned that their votes were not counted.

2. Noncompliant Online Renewal Transactions

The New York DMV's website, DMV.NY.GOV, which allows individuals to remotely engage in license and ID card renewal⁴ or change of address transactions,⁵ does not comply with the requirements of Section 5. *See* New York Department of Motor Vehicles, Renew License or ID, <https://dmv.ny.gov> (last visited Jan. 24, 2017). The renewal system plainly does not function as an application to register to vote. Screenshots provided by the New York DMV on or around May 28, 2015 in response to a public records request demonstrate that customers are only offered a link to "register to vote or change [their] voter information online," and/or a downloadable, fillable voter registration form. This voter registration link is not integrated into the renewal transaction, but becomes available only *after* the transaction is already complete.

³ Further review, conducted in the context of litigation or otherwise, could reveal additional continuing NVRA violations.

⁴ New Yorkers may renew their driver's license or ID card here: <https://transact2.dmv.ny.gov/photodocrenewal/>.

⁵ New Yorkers may change their address through the "MyDMV" portal, available here: <https://dmv.ny.gov/mydmv/mydmv>.

In addition, the link takes the customer to the DMV's online voter registration portal,⁶ which is separate from the online driver's license and state ID system. Registering to vote through this portal requires an individual to provide the same information they provided during the DMV transaction, in violation of the NVRA.

Thus, the online application to renew a driver's license or ID card is not integrated with an application to register to vote and does not allow for a simultaneous driver's license and voter registration transaction. The DMV's failure to implement procedures by which each online renewal transaction simultaneously serves as an application to register to vote thus constitutes an ongoing NVRA violation.

3. Noncompliant Change of Address Transactions

The New York DMV website also does not comply with the requirements of Section 5 with respect to change of address transactions. Through the DMV website, an individual can change the address associated with the individual's driver's license or ID card, *see* New York Department of Motor Vehicles, Change address on license and registrations, <https://dmv.ny.gov/address-change/change-address-my-license-registrations> (last visited March 7 2017), but it does not appear that the customer's voter registration record is updated during such transactions. Instead, screenshots provided by the New York DMV in response to a public records request demonstrate that individuals are only offered a link to the NYSBOE website—and again, the link appears only *after* the individual has received a notification indicating their address has been successfully updated. Thus, instead of automatically updating the customer's address unless they affirmatively opt out, as the NVRA requires, the system requires the voter to take a separate additional affirmative action to click the link and then to download a voter registration application, complete the form with duplicative information, and then print, sign, and mail the application to their county board of elections.⁷

The DMV's failure to implement procedures by which each driver's license or ID card change of address simultaneously or automatically updates an individual's voter registration information thus constitutes an ongoing NVRA violation.

C. Impact of New York's Non-Compliance with Section 5

The AG Report confirms the existence and systemic nature of the violations described above, demonstrating their harmful impact on New York voters. Indeed, the DMV's errors in transmitting voter registration applications routinely result in eligible New Yorkers being denied their right to vote. The DMV's failure to transmit voter registration applications from covered transactions frustrates the efforts of VotoLatino, MinKwon and Chhaya CDC to ensure that all Latina/o/x and

⁶ The online voter registration portal is available here: <https://dmv.ny.gov/more-info/electronic-voter-registration-application>

⁷ To be clear, offering a link to the DMV's own online voter registration portal during online change of address transactions would also fail to satisfy Section 5(d) requirements under the NVRA, because it would still require voters to affirmatively re-register to have the address change applied to their voter registrations, rather than automatically updating the address unless the voter opts out.

Asian American New Yorkers can duly register and exercise their right to vote. It also harms the member organizations comprising Hispanic Federation, as well as the communities that Hispanic Federation serves in its voter registration, education, and outreach activities. These violations have clearly been ongoing and have real detrimental effects on all voters, as further reflected in the experience of our client, Mr. Towbin, who was disenfranchised by the DMV's failure to properly handle his voter registration information in the 2015 General Election.

1. Attorney General's Findings of Errors by the DMV in Transmitting Registration Information to Local Boards of Elections

The AG Report indicates that in the 2016 Presidential Primary Election, there were at least ten reported instances in which an individual had registered to vote or update their registration information with the DMV in a timely manner, yet the DMV failed to transmit the application to the appropriate local Board of Elections ("BOE"). The AG Report notes that transmission errors occur when the DMV fails to forward paper voter registration forms to the appropriate local BOE. *See id.* at 5. The AG Report further finds that these reported transmission errors are "representative of systemic errors affecting registrants across the state." *See id.* at 5. In other words, there is no reason to believe that the problems with the DMV's entry and transmission of voter registration applications and changes of address are limited to the DMV offices with which our client interacted.

The AG Report also concludes that "interrupted service on the DMV's online registration portal...led to delays in the transmission process...[and] may have prevented many voters from submitting their registrations." *Id.* at 6. This service gap occurred on March 25, 2016, the deadline to register to vote in the 2016 Presidential Primary, as "the online registration system received an unprecedentedly [sic] high volume of voters seeking to register." *Id.* The high traffic caused the online registration system to stall twice and then to ultimately go offline. *Id.* Insofar as the problems with the online voter registration system identified in the AG Report affected voters conducting online driver's license transactions, they further compound DMV's failures to comply with the NVRA during online renewal and change of address transactions.

2. Experience of a Qualified New Yorker Disenfranchised by New York's NVRA Violations

The experience of Mr. Towbin, who was forced to cast an affidavit ballot in the 2015 General Election, is representative of the experiences of individuals across New York who have been forced to cast affidavit ballots despite having timely registered or updated their registration information at a DMV office due to the state's NVRA violations, which have been ongoing since at least the 2015 General Election.

Mr. Towbin is a graduate student at Columbia University. Mr. Towbin moved to New York from Ohio in 2013. In October 2015, Mr. Towbin visited the DMV office in Atlantic Terminal, Brooklyn, New York to apply for an enhanced driver's license. Mr. Towbin had downloaded and completed Form Number MV-44EDL from the DMV's website, including the voter registration portion on the last page of the form, prior to a scheduled appointment at the DMV on October 1, 2015. Despite New York's obligation under the NVRA to provide voter registration opportunities to individuals

like Mr. Towbin applying for a driver's license, no one at the DMV asked Mr. Towbin if he wished to register to vote.

Mr. Towbin presented his completed MV-44EDL form to an intake DMV worker; she un-stapled the voter registration application portion of the form and returned it to Mr. Towbin. He recalls presenting this voter registration portion of the form to several DMV employees, each of whom returned this portion of the form to him without explanation. The first and only time that he was asked anything about voter registration was at the end of the transaction, when Mr. Towbin was asked to confirm that he was choosing not to register to vote. At that point, Mr. Towbin indicated that he wished to register to vote, and showed the DMV employee his completed voter registration application, which had been un-stapled and detached from the rest of his application materials. The DMV employee indicated that Mr. Towbin could not register to vote because the employee had already entered into the computer system that he had declined to register. Mr. Towbin asked the employee if he could fix this. The DMV employee indicated that he could enter Mr. Towbin's voter registration information, and that he would do so later. Mr. Towbin left the DMV with the impression that the DMV would take care of their mistake and that he would be registered to vote.

On Election Day in November 2015, Mr. Towbin went to cast a ballot at his polling place in Kings County, but was told by poll workers that his name did not appear on the voter rolls. When he said he would like to cast an affidavit ballot, a puzzled poll worker discouraged Mr. Towbin from voting by affidavit ballot. Mr. Towbin reiterated that he wanted to vote by affidavit ballot and then was allowed to do so. When he cast his affidavit ballot, poll staff told Mr. Towbin that he would receive more information about his affidavit ballot, including whether it had been counted, after the election and gave him a mail-in voter registration application. Subsequently, Mr. Towbin was informed by mail that his affidavit ballot was not counted. The document dated November 30, 2015, stated Mr. Towbin was "Not Registered," notwithstanding his diligent effort to register through the DMV.

3. Inconsistent Processing by Local Boards of Elections May Impact Disposition Notices

As noted above, Mr. Towbin's affidavit ballot was not counted because he was found to have been "Not Registered" by the local BOE. This situation is likely to have occurred because either the state DMV failed to transmit his voter registration application, in violation of Section 5, or the local BOE failed to send Mr. Towbin a disposition notice informing him that his voter registration application had been rejected, in violation of Section 8. As the AG Report concludes, local BOEs receive little instruction on how to handle missing information on voter registration forms and they are therefore afforded wide discretion on how to process voter registration applications. *See NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, A REPORT ON VOTER ACCESS IN THE 2016 PRESIDENTIAL PRIMARY (December 2016), at 7.* As such "[t]he wide variation in local BOE policies and procedures also led to inconsistencies across the state in registration processing." *Id.* at 7. The failure of local BOEs to properly process voter registration applications and send a notice to each applicant about the disposition of their voter registration constitutes a violation of Section 8 of the NVRA.

II. Violations of the Voting Rights Act's Minority Language Protections and Language Assistance Provisions

A. The Voting Rights Act's Protections for Voters who Speak Languages Other than English

Several provisions of the Voting Rights Act of 1965, as amended in 1970 and 1975, protect the rights of voters who speak languages other than English. The VRA's language provisions are critical to our democracy, as voters clearly "cannot cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself."⁸

Using exacting required formulas, the U.S. Census Bureau determines the Section 203-covered states and political subdivisions with large populations of people who speak languages other than English. Those covered jurisdictions must provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" in the covered languages. 52 U.S.C. § 10503(c).

Section 4(e) of the Voting Rights Act also protects "persons educated in American-flag schools in which the predominant classroom language was other than English" from discrimination in voting. *See id.* at § 10303(e). Under its provisions, Spanish-speaking citizens who attended school in Puerto Rico are guaranteed language assistance in voting and voter registration.⁹

B. New York's Violations of the Voting Rights Act and Section 8 of the National Voter Registration Act

New York is systematically failing to meet its obligations under the VRA to limited-English proficient ("LEP") voters. Several New York counties are covered under Section 203 for Spanish, Chinese, Korean, Bengali and other languages.¹⁰ This means that all voting materials, forms,

⁸ *Torres v. Sachs*, 381 F. Supp. 309, 312-13 (S.D.N.Y. 1974).

⁹ *See United States v. Orange County*, 12 Civ. 3071 (S.D.N.Y. April 18, 2012)(consent decree); New York State Attorney General Agreements with: Sullivan County BOE (Mar. 13, 2013); Schenectady County BOE (Sept. 13, 2012); Dutchess and Putnam County BOEs (Jan. 15, 2013); Ulster County BOE (Oct. 2, 2012); MOA with Dutchess County BOE (Jan. 10, 2013); MOA with Rockland County BOE (Sept. 4, 2012); MOA with Montgomery County BOE (April 12, 2013)(NYAG 4(e) agreements and MOAs available at: <https://ag.ny.gov/search-nys-oag>; *Ortiz v. NYS Board of Elections*, 75 Civ. 455 (W.D.N.Y. July 10, 1975) (holding that section 4(e) requires bilingual access to elections, bilingual ballots, and bilingual election materials, bilingual poll workers in election districts in which individuals of Puerto Rican birth or descent reside); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974) (requiring bilingual ballots under section 4(e) for all New York City elections); *Coalition for Education in District One v. Board of Elections*, 370 F. Supp. 42 (S.D.N.Y. 1974) (overturning school board election due to New York City's failure to provide adequate bilingual assistance to Puerto Rican voters, among other factors); *Lopez v. Dinkins*, 73 Civ. 695 (S.D.N.Y. Feb. 14, 1973) (ordering under Section 4(e) that ballots be printed in Spanish and assistance at the polls be provided in both Spanish and Chinese).

¹⁰ Bronx, Kings, Nassau, New York, Queens, Suffolk and Westchester counties are covered counties required to make voting materials and assistance available in Spanish as well as English; Kings, New York and Queens counties are required to make all voting materials and assistance available in Chinese as well as English; Queens county is also required to make all voting materials and assistance available in Korean, written language assistance in Bengali, and

information, and assistance available in those counties must be provided in the covered languages as well as English.

Individuals who engage in voter registration transactions through the New York DMV's online portal are being deprived of their rights under Section 203. Specifically, the DMV's MyDMV portal is available in English, but has not been adequately translated into Spanish, Chinese, Korean or Bengali—languages which are covered under Section 203 in at least one New York county. A link on the portal allows a user to view some materials on the DMV website through a machine translation system (specifically "Google Translate").¹¹ The resulting translations, however, are so inaccurate and confusing that they are incomprehensible to LEP native speakers of those covered languages and therefore do not satisfy the state's obligations under Section 203. Indeed, the New York State DMV website includes a "Disclaimer" stating that "Google Translate cannot translate all types of documents, and may not provide an exact translation. Anyone relying on information obtained from Google Translate does so at his or her own risk."¹² New York cannot disclaim its obligations under the Section 203, however. Worse, even when using "Google Translate," on the MyDMV website, when the user clicks the link to the New York State online voter registration portal via the MyDMV website, the online registration form appears in English only. At best, the translations make it very difficult for any limited-English proficient voter to comprehend how to register to vote in any covered language other than English.

Additionally, LEP individuals who conduct covered DMV transactions through self-service kiosks available in some DMV offices in covered jurisdictions are also unable to access required voter registration services and materials in their native language, because services through the kiosks are available only in English. New York's failure to provide these materials is a violation of its obligation under Section 203 to ensure that any voter registration forms and materials are available in covered languages in addition to English.

New York's failure to provide such materials in the Spanish language also violates the rights of members of communities served by VotoLatino, Hispanic Federation, MinKwon, and Chhaya CDC, in their voter education and outreach efforts, who are protected from discrimination under Section 4(e). *Id.* at § 10303(e). These individuals must be able to access voter registration services

oral language assistance in Bengali, Hindi and Punjabi as well as English, under Section 203 of the VRA. *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 FR 87532 (Effective Dec. 5, 2016), *available at* <https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203>. Please note that Asian Indian is not a language. The NYC Board of Elections hosted numerous meetings with an Asian Indian Advisory Group comprised of South Asian community-based organizations and ultimately determined that written language assistance would be provided in Bengali and oral language assistance would be provided in Bengali, Hindi and Punjabi.

¹¹ The New York State Department of Motor Vehicles website expressly disclaims liability for the accuracy of any translations. *See* New York State Department of Motor Vehicles (DMV) website Google Translate Disclaimer, <https://dmv.ny.gov/dmv/disclaimer> (last visited Mar. 7, 2017) (noting that anyone who relies on information obtained from Google Translate "does so at his or her own risk"). Explicitly placing the risk of mistranslation of information relating to voter registration on LEP voters arguably contravenes the state's obligations under Sections 203 and 4(e) of the VRA.

¹² *Id.*

and materials in Spanish, *even if they reside outside of jurisdictions covered by Section 203 of the Voting Rights Act.*

These violations of Section 4(e) and Section 203 of the VRA also constitute ongoing violations Section 8(b) of the NVRA, which requires state administer their voter rolls in a manner that is “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965”¹³

C. New York’s Failure to Provide Voter Registration Materials and Assistance in Languages Other than English Has a Discriminatory Impact in Violation of Section 2 of the Voting Rights Act

The disparate impact of the choice made here by the State of New York Board of Elections and the DMV to rely on Google Translate, and of its ongoing violations of Sections 203 and 4(e) and Section 8 of the NVRA, may also have a discriminatory effect on protected classes of language minority voters who may also be members of racial minority groups. Latina/o/x, Chinese, Korean, or Bengali U.S. citizens are voters who fall within protected classes of voters under Section 2 of the VRA,¹⁴ and the risk of harm in placing this clearly unequal burden preventing equal access to the fundamental right to vote on both members of language and racial minority groups is a risk that may also rise to the level of a Section 2 violation.

III. Conclusion

The State of New York, through the DMV, is engaged in continuing violations of Sections 5 and 8 of the NVRA and Sections 203 and 4(e) the VRA. These violations result in widespread deprivation of New Yorkers’ fundamental right to vote. As the executive directors of the State Board of Elections, which acts as New York’s chief election officer under the NVRA, you are responsible for ensuring that DMV offices are complying with the NVRA, and for providing members of protected language minority groups with both written materials and oral assistance in their native language. *See, e.g.,* N.Y ELEC. §§ 3-100, 3-102; N.Y ELEC. APP. § 6213.3.

New York must develop and implement procedures to ensure that the applications of individuals who choose to register to vote or update their voter registration through the DMV are placed on the list of eligible voters and are able to cast a regular ballot with the confidence that their vote will be counted. Further, New York must make sure that written materials relating to voter registration are provided to members of language minority groups in the covered languages, as required by Section 203 of the VRA.

We are prepared to meet with you and other state officials, at your earliest convenience, to discuss the problems identified in this letter and to assist in your development of a comprehensive plan that addresses them. In the absence of such a plan, we will have no alternative but to initiate

¹³ 52 U.S.C. § 20507(b)(1) (emphasis added).

¹⁴ 52 U.S.C. § 10301(a) (2006) (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).”).

Todd D. Valentine
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March 7, 2017

litigation at the conclusion of the waiting period provided for under the NVRA.

Sincerely,



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