



February 4, 2019

The Honorable David Whitley
Texas Secretary of State
Elections Division
P.O. Box 12060
Austin, TX 78711-2060

Re: Non-Compliance with Section 8 of the National Voter Registration Act

Dear Secretary Whitley,

We write pursuant to 52 U.S.C. § 20510(b) on behalf of MOVE Texas Civic Fund, JOLT Initiative, the League of Women Voters of Texas, and the NAACP of Texas, and persons similarly situated, to notify you that your office's program of removing registered voters based on information obtained from the Texas Department of Public Safety ("DPS"), which you claim is evidence that these registrants are non-U.S. citizens, violates Section 8 of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20507.

The NVRA establishes clear requirements states must meet in the administration of voter registration, including in undertaking any voter registration list maintenance program or activity. In particular, states have an obligation to ensure that eligible applicants who submit a complete voter registration application are registered to vote, and that any list maintenance program or activity is uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301 *et seq.* Your office's program, which is described in your press release dated January 25, 2019 entitled *Secretary Whitley Issues Advisory On Voter Registration List Maintenance Activity* and your Election Advisory 2019-02 ("Advisory"), violates those requirements by directing valid registrants to be removed from the rolls for impermissible reasons, targeting and unfairly discriminating against voters who are naturalized citizens of the United States, failing to treat voters in a uniform manner, and imposing a qualification or prerequisite to voting in a manner which results in a denial or abridgement of the right to vote on account of race or color.

Although purportedly aimed at removing non-citizens, the program is dangerously overbroad. Many if not all of the individuals targeted are likely eligible non-U.S.-born citizens. Indeed, your office has confirmed that some individuals who have already been threatened with removal are in fact citizens. Based on the program's flawed methodology, these eligible citizens—who have made the effort to register and vote—are subjected to a requirement to

provide documentary proof of their citizenship or face removal from the official list of voters, in violation of the NVRA. Under the program, that requirement is not imposed on voters born in the United States. Thus, the program imposes this post-registration documentary proof of citizenship requirement in a manner that discriminates against foreign born citizens—in Texas, mainly Latino and Asian citizens—in violation of both the NVRA and the VRA. Moreover, because of the ad hoc guidance your office has given to county election administrators and varying timing and approaches counties have taken in acting on the information, the program is not uniform in its treatment of eligible U.S. citizen voters, as the NVRA requires.

I. The Advisory

The procedures outlined in the Advisory for purportedly investigating citizenship and for carrying out what amounts to a mass purge are woefully inadequate to ensure that only ineligible individuals are removed from the voter rolls. The Advisory explains that your office compiled this list of what you call “Possible Non U.S. Citizens” by relying on documents that Texans submitted to DPS “indicating the person is not a citizen of the United States *at the time the person obtained a Driver License or Personal Identification Card*” (emphasis added). Using such a data set to review the *current* citizenship status of anyone is inherently flawed because it fails to account for individuals who became naturalized citizens and registered to vote *at any point after having obtained or renewed their driver license or personal identification card*. Under Texas law and DPS regulations, individuals are required to provide updated proof of their immigration status only when they renew Driver Licenses and ID Cards. Given that Texas Driver Licenses and ID Cards do not expire for a full six years after they are issued, the odds are quite high that your list of purported non-citizens includes tens of thousands of people who are now US citizens entitled to vote. Each year, between 52,000 and 63,000 Texans become naturalized citizens, and the vast majority of them are people of color. Thus, the odds are quite high that a significant percentage of Texans on your list of purported non-citizens are people who are now U.S. citizens entitled to vote.

Individuals identified through this flawed process are then sent a *Notice of Examination for Citizenship (Proof of Citizenship)* letter. The letter, which is in English and Spanish but none of the many other languages spoken by naturalized citizens in Texas, requires these individuals to respond by providing one of three specified citizenship documents within 30 days. If they do not respond or cannot provide one of the specified documents, their voter registration will be cancelled. This includes voters who are sent letters that are lost in the mail or returned as undeliverable with no forwarding address (because, for example, they may have moved residence since they last voted). It also includes voters who may have low English and Spanish language proficiency and may not understand what response is required.

II. The Program Outlined in the Advisory Violates Section 8 of the NVRA

The NVRA was enacted in 1993 to increase the number of eligible citizens who register and vote by making voter registration more accessible and improving list-maintenance procedures nationwide. Section 8 of the NVRA sets out requirements with respect to the administration of voter registration and protects registered voters against wrongful removal from

voter rolls.

Section 8 protects duly registered voters from improper removal by requiring states to “ensure that any eligible applicant is registered to vote” within certain prescribed time periods after submitting a valid voter registration form and mandating that, once the voter is on the rolls, the state “shall not remove” that voter except in a few limited circumstances: at the request of the registrant; by reason of criminal conviction or mental incapacity as provided by state law; or pursuant to a general program of voters list maintenance that makes a reasonable effort to remove voters who become ineligible due to death or a change in residence. 52 U.S.C. § 20507(a). It also mandates that any program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll be uniform, non-discriminatory and in compliance with the VRA. 52 U.S.C. § 20507(b)(1). Your program violates these requirements in the following ways.

A. The Program Violates 52 U.S.C. § 20507(a)

Eligible voters who are swept up by the purge your office has set in motion will be removed not because they have requested removal, died, been convicted of a felony, been adjudicated mentally incompetent, or changed residence, but because they were predictably mis-identified as non-citizens. Your program therefore violates the NVRA’s restriction on the removal of eligible, registered voters. Indeed, the procedures outlined in the Advisory, which call for matching DPS information with Texas’s statewide voter registration database to identify potential non-U.S. citizens, virtually guarantee that many duly registered voters who are naturalized citizens will be erroneously identified as non-citizens. Like all eligible, registered voters in Texas, each of these naturalized citizens previously submitted a voter registration application requiring the voter’s signature under penalty of perjury affirming their U.S. citizenship. These individuals will then be removed from the rolls unless they come forward and provide documentary proof of their citizenship. This violates the obligation on Texas to ensure that eligible applicants who submit valid registration forms are registered to vote and are removed only for one of the statutorily-specified reasons.

Failure to provide citizenship documentation is not one of the permissible grounds for removal of a duly registered voter. And while the NVRA undoubtedly permits a state to remove non-citizens who have somehow become registered to vote, it does not permit an overbroad program such as the one outlined in the Advisory that will inevitably sweep in significant numbers of eligible citizens. The program thus violates Section 8 of the NVRA by directing removal of duly registered voters on an impermissible basis.

B. Texas’s Program Is Nonuniform and Discriminatory

The program set forth in the Advisory is discriminatory by both design and effect, and it is being implemented by counties in an arbitrary and non-uniform manner. It therefore violates NVRA Section 8(b)(1)’s requirement that all list-maintenance programs be uniform and non-discriminatory.

The Advisory instructs county voter registrars and election officials that they have a “choice” to either send a *Notice of Examination for Citizenship (Proof of Citizenship)* letter after performing some form of (unspecified) investigation, thereby starting the 30-day countdown clock leading to cancellation, or take no action on the voter record by simply closing a given registrant’s case as resolved. No guidance is provided for either conducting the investigation or determining whether to send a letter or take no further action. The lack of guidance or standards for how counties should make this “choice” will inevitably lead to arbitrary decision-making. Indeed, it already has. Some counties took the Advisory’s assertion that the information in the list was “actionable” at face value and began sending out investigation letters to every individual on the list immediately after receiving it, with no further investigation. Others have taken no action with respect to any of the individuals on the list. Moreover, notwithstanding the references in the Advisory to county officials having a “choice,” some county voter registrars and election officials understood the Advisory to mean that they were *required* to send *Notice of Examination for Citizenship (Proof of Citizenship)* letters to registered voters identified as potential non-U.S. citizens (with or without any further investigation), and have already taken action on this basis. Additionally, we understand that some counties have been instructed to remove certain individuals from the list of voters flagged as possible non-citizens, but no official announcement or advisory has been issued formally amending the Advisory. Based on the standardless procedures laid out in the Advisory and the unofficial modifications to the program, counties are taking a range of different actions to implement—or not to implement—the program.

Aggravating state’s inconsistent and arbitrary implementation of the program across counties is its disparate treatment of registered voters based on their naturalization status. Due to the flaws in the underlying data used to generate the list, the program will impose a requirement to provide documentary proof of citizenship on many eligible naturalized citizens in order to maintain their voter registration status. Specifically, it affects only those registered voters who provided information to DPS indicating that they were not citizens of the United States at the time of obtaining a Driver License or Personal Identification Card. No U.S. born citizen would ever have provided such information to DPS. The program thus does not impose the same requirements on registered voters who are citizens of the United States by birth as it does on registered voters who are naturalized citizens.

The program thus permits an eligible voter identified as a potential non-U.S. citizen in one county to be treated differently than a voter in similar circumstances in another, and it mandates differential treatment of naturalized and native-born citizens, in violation of the NVRA’s requirement that list-maintenance programs be uniform and nondiscriminatory.

C. Texas’s Program Does Not Comply With the VRA

In targeting naturalized citizens—the vast majority of whom in Texas are racial and ethnic minorities—the program discriminates against voters of color. The program requires duly registered members of these protected classes to produce documentary proof of citizenship to maintain their valid registrations in circumstances where, due to socioeconomic factors and a history of official discrimination (among other social and historical conditions), those voters have lower rates of possession of documentary proof of citizenship and greater obstacles to

obtaining such proof. The burden on these protected minorities voters thus interacts with social and historical conditions that currently produce, and have in the past produced, discrimination against them.

The burdens imposed on these voters under your program therefore amount to a qualification or prerequisite to voting imposed in a manner which will likely result in a denial or abridgement of the right to vote on account of race or color in contravention of Section 2 of the VRA. *See* 52 U.S.C. § 10301(a). That violation of the VRA amounts to an independent violation of the Section 8(b)(1) of the NVRA.

III. Violation of NVRA's Public Records Provision (52 U.S.C. § 20507(i))

In addition to violating the NVRA by setting in motion a mass purge of naturalized citizens, your office has refused to disclose, and has directed counties to refuse to disclose, information required to be provided under Section 8(i) of the NVRA. Specifically, your office has refused to turn over the lists of voters you identified as "Possible Non U.S. Citizens" that you provided to counties. In addition, you have instructed counties that they need not produce the individual lists they received or the letters they have sent to registered voters, and several counties have accordingly refused to produce these materials in response to public records requests.

Section 8(i) requires that states keep and make available "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i). The lists of voters to be investigated pursuant to the Advisory plainly fall under this public records provision. As such, the only information you and the counties are permitted to withhold is information about the voter registration agency at which these individuals registered. *Id.* Accordingly, your refusal to disclose these records and your advice to the counties that they may refuse to disclose these records is a violation of Section 8(i) of the NVRA.

IV. Notice Under § 8 of the NVRA

As the chief election official in Texas, you are responsible for Texas's compliance with Section 8 of the NVRA. If the violations are not remedied, eligible voters will face significant burdens and may well lose their right to vote. Therefore, we demand that you withdraw the Advisory and instruct County voter registrars and election officials not to cancel any voter's registration based on the procedures it outlines or based on the lists your office provided. We further demand that you make available the lists of voters your office provided to the counties and that you issue guidance to the counties that they must turn over their lists, letters, and any other documents related to their implementation of the purge program.

This letter serves as notice of the violations under 52 U.S.C. § 20510(b). If you do not take action to correct these violations within 90 days of the date of this letter, MOVE Texas Civic Fund, JOLT Initiative, the League of Women Voters of Texas, and the Texas NAACP may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect

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to violations of the NVRA.

Please contact Beth Stevens of the Texas Civil Rights Project at (512) 474-5073 or beth@texascivilrightsproject.org should you have any questions about this letter or the information it contains. In addition, please send copies of the documents we have requested under the NVRA to the Texas Civil Rights Project at the address below.

Sincerely,



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