



**Judicial
Watch®**
*Because no one
is above the law!*

April 11, 2017

VIA USPS CERTIFIED MAIL AND EMAIL

The Honorable Peter S. Kosinski
The Honorable Douglas A. Kellner
Co-Chairs, New York State Board of Elections
Department of Elections
40 North Pearl Street,
Suite 5
Albany, New York 12207-2729

Re: Violations of Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507

Dear Co-Chair Kosinski and Co-Chair Kellner:

We write to bring your attention to violations of Section 8 of the National Voter Registration Act (“NVRA”) in Nassau County, New York. From public records obtained, Nassau County has more total registered voters than adult citizens over the age of 18 as calculated by the U.S. Census Bureau’s 2011-2015 American Community Survey. This is strong circumstantial evidence that Nassau County is not conducting reasonable voter registration record maintenance as mandated under the NVRA.

NVRA Section 8 requires states to do reasonable list maintenance so as to maintain accurate lists of eligible voters for use in conducting federal elections.¹ As you may know, Congress enacted Section 8 of the NVRA to protect the integrity of the electoral process. Allowing the names of ineligible voters to remain on the voting rolls harms the integrity of the electoral process and undermines voter confidence in the legitimacy of elections. As the U.S. Supreme Court has stated, “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”²

This letter serves as statutory notice that Judicial Watch will bring a lawsuit against your office if you do not take specific actions to correct these violations of Section 8 within 90 days. In addition, by this letter we are asking you to produce certain records to us which you are

¹ In New York, responsibility to coordinate statewide NVRA Section 8 compliance lies with the State Board of Elections. See NY CLS Elec. § 3-100; 52 U.S.C. § 20509.

² *Crawford et al. v. Marion County Election Board*, 553 US 181, 197 (2008).

required to make available under Section 8(i) of the NVRA.³ We hope that litigation will not be necessary to enforce either of these claims.

Judicial Watch is a non-profit organization that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. As part of its mission, Judicial Watch is committed to the private enforcement of the NVRA, and we regularly commence and litigate NVRA lawsuits. *See Judicial Watch and True the Vote v. Husted*, Civil Action No. 2:12-cv-00792 (S.D. Oh.); *Judicial Watch, et. al v. King*, Case No. 1:12-cv-00800 (S.D. Ind.).

As the top election official in New York, it is your responsibility under federal law to coordinate New York's statewide effort to conduct a program that reasonably ensures the lists of eligible voters are accurate. The following information explains how we determined that your state is in violation of NVRA Section 8 and the remedial steps you now must take to comply with the law.

1. Nassau County Has More Total Registered Voters Than Citizen Voting Age Population.

Based on our review of 2014 Election Assistance Commission (EAC) data, the 2011-2015 U.S. Census Bureau's American Community Survey, and the November 2014 and 2016 active and inactive voter registration records, Nassau County is failing to comply with the voter registration list maintenance requirements of Section 8 of the NVRA. For example, a comparison of the five-year American Community Survey conducted by the U.S. Census Bureau and 2014 EAC data shows there were more total registered voters than there were adult citizens over the age of 18 living in Nassau County (registration rate 104%).

This situation in Nassau County has, if anything, gotten worse since the publication of that report. A comparison of the November 2016 total voter registration records of Nassau County obtained from your website with the 2011-2015 U.S. Census Bureau's American Community Survey data shows that there are now 109% more total registered voters than adult citizens over the age of 18.

Your failure to maintain accurate, up-to-date voter registration lists has created the risk that the 2018 federal elections will lack the integrity required by federal law and by the expectations of New York citizens, and will therefore undermine public confidence in the electoral process.

2. The NVRA Requires You to Undertake Reasonable Efforts to Maintain Accurate Lists of Eligible Registered Voters

Under Section 8 of the NVRA, New York is required to undertake a uniform, nondiscriminatory voter registration list maintenance program that complies with the Voting

³ 52 U.S.C. § 20507(i).

Rights Act of 1965.⁴ Specifically, Section 8 requires states to make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters due to (A) “the death of the registrant” or (B) “a change in the residence of the registrant” to a place outside the jurisdiction in which he or she is registered.⁵ Section 8 also requires states to ensure noncitizens are not registered to vote.⁶

The list maintenance obligations of Section 8 of the NVRA were elaborated upon by the Help America Vote Act (“HAVA”), which requires states to “ensure that voter registration records in the State are accurate and updated regularly” and undertake a “system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.”⁷ HAVA also requires each state to coordinate its computerized statewide voter registration list with state agency death records.⁸ Finally, HAVA requires all states to remove convicted felons from the voter rolls if felons cannot vote under state law.⁹

As the chief state election official for New York, you are required to lead and direct voter list maintenance efforts in your state, and you must conduct an active oversight program to monitor local county election officials’ list maintenance activities.¹⁰ If your oversight reveals that counties have failed to adequately execute list maintenance tasks, you must either change the state’s program to ensure county compliance, or assume direct responsibility over the failing counties’ list maintenance tasks.¹¹

3. Failure to Comply with NVRA Subjects You to Lawsuits and Financial Costs

In passing the NVRA, Congress authorized a private right of action to enforce the provisions of the NVRA, including Section 8. Accordingly, Judicial Watch and others may bring a lawsuit against you under the NVRA if you fail to correct these violations within 90 days of your receipt of this letter.¹² You are receiving this letter because you are the designated chief state election official under the NVRA.

⁴ 52 U.S.C. § 20507(b)(1).

⁵ 52 U.S.C. § 20507(a)(4).

⁶ *U.S. v. Florida*, 870 F. Supp. 2d 1346, 1351 (N.D. Fla. 2012) (“For noncitizens, the state’s duty is to maintain an accurate voting list . . . A state can and should . . . block[] a noncitizen from registering in the first place”).

⁷ 52 U.S.C. §§ 21083(a)(4) and 21083(a)(4)(A).

⁸ 52 U.S.C. § 21083(a)(2)(A)(ii)(II).

⁹ 52 U.S.C. § 21083(a)(2)(A)(ii) and (ii)(I).

¹⁰ *U.S. v. Missouri*, 535 F.3d 844, 850-851 (8th Cir. 2008).

¹¹ *U.S. v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008).

¹² 52 U.S.C. § 20510(b)(2).

Congress also authorized awards of attorney's fees, including litigation expenses and costs, to the prevailing party.¹³ Consequently, if we initiate a lawsuit under the NVRA and the court finds you in violation, you will be responsible for paying our attorneys' fees, costs, and litigation expenses.

4. Avoiding Litigation

In order to avoid litigation, we hope you will promptly initiate efforts to comply with Section 8 so that no lawsuit will be necessary. We ask you to please respond to this letter in writing no later than 45 days from today informing us of the compliance steps you are taking. Specifically, we ask you to: (1) conduct or implement a systematic, uniform, nondiscriminatory program to remove from the list of eligible voters the names of persons who have become ineligible to vote by reason of a change in residence; and (2) conduct or implement additional routine measures to remove from the list of eligible voters the names of persons who have become ineligible to vote by reason of death, change in residence, or a disqualifying criminal conviction, and to remove noncitizens who have registered to vote unlawfully.

When you respond to this letter, please identify all the steps you are taking or plan to take in detail, and advise us of the results of those efforts or the target implementation date for each activity or program you will be undertaking. If you plan to begin taking new steps in 2017 to comply with your obligations, please outline them to us in your response, providing specific dates for completion of each activity. In order to avoid litigation, we may seek certain reasonable assurances that New York will affirmatively undertake the steps outlined, up to and including the execution of a settlement agreement between you and Judicial Watch. You may wish to consult Judicial Watch's recent settlement agreement with the State of Ohio for examples of certain activities which tend to show compliance with NVRA Section 8.¹⁴ You should also evaluate whether your office is communicating and coordinating effectively for list maintenance purposes with the various federal, state, and local entities listed immediately below in Section 5 of this letter.

5. Production of Records

Finally, pursuant to your obligations under the NVRA,¹⁵ please make available to us all pertinent records concerning "the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency" of New York's official eligible voter lists during the past 2 years. Please include these records with your response to this letter. These records should include, but are not limited to:

¹³ 52 U.S.C. § 20510(c).

¹⁴ A copy of the Settlement Agreement between Judicial Watch and Ohio is available at <http://www.judicialwatch.org/wp-content/uploads/2014/01/01-14-Ohio-Voter-Rolls-Settlement.pdf>.

¹⁵ 52 U.S.C. § 20507(i).

1. Copies of the most recent voter registration database from Nassau County, New York, including fields indicating name, date of birth, home address, most recent voter activity, and active or inactive status.
2. Copies of all email or other communications internal to the office of the New York State Board of Elections, including any of its divisions, bureaus, offices, third party agents, or contractors, (hereinafter, collectively “State Board of Elections”) relating to the maintenance of accurate and current voter rolls.
3. Copies of all email or other communications between the State Board of Elections and all New York County Voter Registration Officials concerning:
 - a. Instructions to the counties concerning their general list maintenance practices and obligations;
 - b. Instructions to the counties for the removal of specific noncitizens and deceased, relocated, or convicted persons identified by the State Board of Elections; and
 - c. Notices to the counties concerning any failure to comply with their voter list maintenance obligations under New York’s program.
4. Copies of all email or other communications between the State Board of Elections and the New York State Department of Health, the New York State Department of Corrections, the New York Department of Motor Vehicles, and the New York State Judiciary concerning obtaining information about deceased, relocated, convicted, or noncitizen registered voters for the purpose of updating New York’s voter registration lists.
5. Copies of all email or other communications between the State Board of Elections and the U.S. Attorney(s) for New York, the U.S. District Court for New York, the U.S. Social Security Administration, the U.S. Postal Service, the U.S. Citizenship and Immigration Services, and the U.S. Department of Homeland Security concerning the National Change of Address database, the Systematic Alien Verification for Entitlements database, or any other means of obtaining information about deceased, relocated, convicted, or noncitizen registered voters for the purpose of updating New York’s voter registration lists.
6. Copies of all email or other communications between the State Board of Elections and the Interstate Voter Registration Cross-Check Program, the Electronic Registration Information Center, the National Association for Public Health Statistics and Information Systems, and any other U.S. State concerning obtaining information about deceased or relocated registered voters for the purpose of updating New York’s voter registration lists.

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If you do not produce these records within 45 days, or if you fail to otherwise advise us that you are making them available to us at specified times and locations, you will be deemed to be in violation of the NVRA and subject to litigation.

* * * * *

We hope our concerns can be resolved amicably. However, if we believe you do not intend to correct the above-identified problems, a federal lawsuit seeking declaratory and injunctive relief against you may be necessary. We look forward to receiving your prompt response.

Sincerely,

JUDICIAL WATCH, INC.



Thomas J. Fitton
President

By: U.S. Postal Service Certified Mail and Email

cc: Robert D. Popper, Esq., Judicial Watch; Hon. Andrew J. Spano, New York State Board of Elections Commissioner; Hon. Gregory P. Peterson, New York State Board of Elections Commissioner; Todd D. Valentine, New York State Board of Elections Co-Executive Director; Robert A. Brehm, New York State Board of Elections Co-Executive Director; David J. Gugerty, Nassau County Democratic Commissioner; Louis G. Savinetti, Nassau County Republican Commissioner