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February 26, 2019

Adam Bitter
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Sent via electronic mail

Re: Notice of Violation of National Voter Registration Act Public Records Requirement, 52 U.S.C. § 20507(i)(1)

Dear Mr. Bitter:

On February 1, 2019, I submitted a request for documents pursuant to the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20507(i)(1), on behalf of my clients Texas LULAC, LULAC, and Julie Hilberg. In response, you indicated that you intended to process my clients' request pursuant to the Texas Public Information Act. Since then, your office and the Office of the Attorney General have sent a number of letters, some nearly completely redacted, asserting various exceptions to Texas's open records statute.[1]

But my clients' request was pursuant to federal law, not state law, and the NVRA does not permit your office to withhold documents from public scrutiny on the basis of exceptions to a Texas statute my clients did not invoke. The NVRA requires you to produce "all records concerning the implementation of programs and activities

[1] The Texas Department of Public Safety ("DPS") did not submit any arguments to the Office of the Attorney General contending any of the documents it had provided to the Secretary of State were exempt from disclosure under the Texas Public Information Act within ten days of receiving notice of my clients' request on February 15, 2019. So even if state law applied (it does not), the Attorney General must presume that DPS has no interest in withholding any of the records responsive to my clients' request. *See* Tex. Gov't Code § 552.302.

conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," 52 U.S.C. § 20507(i)(1), with two enumerated exceptions not applicable to my request, *see id.*; *see also Project Vote/Vote for America, Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (noting that the NVRA public records provision must be accorded "great breadth" (internal quotation marks omitted)). To the extent various exceptions to Texas's statute would permit you to withhold documents that the NVRA requires you to produce, those state law exceptions are preempted by the NVRA. As the Fifth Circuit has explained, "[u]nder the Constitution's Elections Clause, Congress may enact laws that preempt state election laws concerning federal elections. When it does, the federal legislation renders any conflicting state laws inoperative." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 399 (5th Cir. 2013) (citations omitted); *see also Voting for Am., Inc. v. Andrade*, 488 Fed. App'x 890, 896 (5th Cir. 2012). Moreover, as the Supreme Court has held, states enjoy no presumption against preemption in Elections Clause cases, *see Arizona v. Intertribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256-57 (2013), rather the Elections Clause "simply [ ] mean[s] what it says," *id.*[2]

You may not withhold records the NVRA requires you to produce. This letter constitutes notice pursuant to 52 U.S.C. § 20510(b) that your processing of my clients' NVRA public records request pursuant to Texas state law, and the withholding of documents pursuant to Texas state law, violates 52 U.S.C. § 20507(i)(1). If that violation is not corrected within 90 days, my clients will seek declaratory or injunctive relief to remedy the violation.

Sincerely,

/s/ Mark P. Gaber

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[2] The Open Records Division of the Texas Attorney General's office has previously recognized that federal laws requiring access to public records preempt any contrary provisions of the Texas Public Information Act. *See* Public Records Opinion Letter, Paige Lay to Kristen Lee (Sept. 1, 2016), https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2016/pdf/or201619860.pdf.