



May 2, 2023

Civil Rights Center  
U.S. Department of Labor  
200 Constitution Ave NW  
Room N-4123  
Washington, DC 20210

Dear Naomi Barry-Pérez:

The National Center for Law and Economic Justice (“NCLEJ”), New York Legal Assistance Group (“NYLAG”), and Make the Road New York submit this letter to the U.S. Department of Labor (“U.S. DOL”) regarding the failure of the New York State Department of Labor (“the Department” or “NYSDOL”) to provide meaningful access to critical Unemployment Insurance benefits to individuals with Limited English Proficiency (“LEP”), in violation of Title VI of the Civil Rights Act and other federal and state laws. The NYSDOL runs the Unemployment Insurance (“UI”) program in New York State and oversees the New York State Unemployment Appeal Board. As demonstrated by the three claimants in this complaint, and in the attached report on language access barriers to UI throughout the pandemic, U.S. DOL’s harmful violations have caused and continue to cause deep, and unequal, economic harm to LEP claimants, locking many out of access to the UI system.

## I. Background

New York State is among the most linguistically diverse states in the country, with more than 5.7 million people speaking a language other than English and 2.5 million New York residents who have Limited English Proficiency.<sup>1</sup> In New York City alone, residents speak approximately 800 languages, and 25% of the population (1.8 million people) are not proficient in English.<sup>2</sup>

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<sup>1</sup> See *Language Access Plan*, N.Y. State Dep’t of State (Aug. 1, 2021), [https://dos.ny.gov/system/files/documents/2022/02/dos-lap-2021\\_0.pdf#:~:text=The%20estimated%20total%20number%20of,individuals%20in%20New%20York%20State](https://dos.ny.gov/system/files/documents/2022/02/dos-lap-2021_0.pdf#:~:text=The%20estimated%20total%20number%20of,individuals%20in%20New%20York%20State).

<sup>2</sup> *NYC Planning: Language Access*, NYC Dep’t of City Plan., [www.worldatlas.com/articles/which-is-the-most-linguistically-diverse-city-in-the-world.html](https://www.nyc.gov/site/planning/about/language-access.page#:~:text=Nearly%20one%2Dhalf%20of%20all,persons%2C%20are%20not%20English%20Proficient; Benjamin Elisha Sawe, The World’s Most Linguistically Diverse City, World Atlas (July 30, 2018), <a href=) (“The residents of New York City speak more languages than those of any other city in the world at approximately 800 languages.”).

Title VI, as well as state and federal laws and guidance, require NSYDOL to ensure that LEP workers have equal and equitable access to UI benefits.<sup>3</sup> Since the COVID-19 pandemic, while many New Yorkers have struggled to get their UI benefits, LEP New Yorkers have faced unique obstacles that significantly delayed or denied altogether their ability to access UI. **These systematic barriers continue today.** As described below and in the attached report, the Department does not translate vital documents, including time-sensitive determinations and instructions about obtaining benefits, fraud notifications, overpayment notices and waivers, and other documents essential to securing UI benefits. In addition, New York State’s private identity verification system, ID.me, requires English language and technological literacy, preventing LEP workers from accessing UI benefits. As New York State’s comptroller recently noted, ID.me admits that its system disadvantages LEP and other marginalized workers.<sup>4</sup> As illustrated in the attached report, at every stage of the UI benefits process, LEP workers have been disregarded, disempowered, and discriminated against. These systematic barriers not only prevent those most in need of vital economic assistance from receiving it, but also violate Title VI of the Civil Rights Act of 1964 (“Title VI”) and its regulations at 28 C.F.R. § 42.405, the Workforce Innovation and Opportunity Act (“WIOA”), and N.Y. Exec. Law § 202-a.

We submit this complaint on behalf of three complainants to request that the United States Department of Labor investigate NYSDOL and require it to remediate its language access deficiencies impacting claimants and LEP claimants throughout the state. The goal of this complaint is to ensure equal access to UI benefits for LEP New Yorkers and to remedy and end the severe economic harms flowing from New York’s deep structural language access deficiencies. We attach the report we wrote over the last year based on interviews with dozens of complainants and advocates, *Designed to Exclude*, to illustrate the scope of these issues. In essence, while New York has lofty laws ostensibly protecting LEP workers, the NYSDOL openly flouts them, creating a wide gap between its legal obligations and its actual practice. We request that the United States Department of Labor:

- Require the NYSDOL, including the New York State Unemployment Insurance Appeals Board (“UIAB”), to provide equal access to LEP New Yorkers by providing competent and accurate translation of vital documents and quality interpretation;
- Remedy the named complainants’ injuries and harm stemming from NYSDOL’s failure to translate documents, including but not limited to reinstating any benefits not paid due to language access barriers;
- Engage with NCLEJ, NYLAG, Make the Road New York, and community partner groups in a full-fledged remedial process to address these structural deficiencies and provide meaningful language access to all New Yorkers;

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<sup>3</sup> 42 U.S.C. § 2000d. Executive Order 13166, issued by President Clinton in 2000, further clarifies the language access obligation of federally funded agencies, including state agencies receiving pass through dollars, under Title VI. See Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 16, 2000); 29 C.F.R. § 38.9; U.S. Dep’t of Labor, Emp. & Training Admin., *Unemployment Insurance Program Letter No. 02-16*, at 3 (May 11, 2020), [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_02-16\\_Change-1.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_02-16_Change-1.pdf); N.Y. Exec. Law § 202-a.

<sup>4</sup> Office of the State Comptroller; Div. of State Gov’t Accountability, *Controls and Management of the Unemployment Insurance System 15-16* (Nov. 15, 2022), <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2023-21s3.pdf>.

- Require NYSDOL to identify any individuals since the start of the COVID-19 pandemic who have been denied UI benefits or forced to pay an overpayment due to language access barriers, and reopen those claims rejected due to a lack of LEP;
- Require NYSDOL to ensure that ID.me immediately implements translation services for all documents and webpages, and offer customer support infrastructure in multiple languages for applicants, or replace ID.me with an alternative that adequately ensures LEP access;
- Create an ombudsman for language access that proactively engages in outreach to LEP community groups; and
- Conduct system testing during any modernization of the NYSDOL, including the UIAB, systems to ensure they are fully accessible to LEP claimants before launching these, in line with federal guidance outlined in Unemployment Insurance Letter 02-16.

## II. Complainants

As described in the attached report, *Designed to Exclude*, NYSDOL denied and delayed countless New Yorkers' UI benefits due to the lack of legally sufficient language access services. This complaint is brought on behalf of the LEP community and three specific individuals:

### a. Kevine Empadi

Kevine Empadi is a French-speaking Congolese immigrant who faced harsh consequences from the language access barriers imposed by the NYSDOL and its use of ID.me. The Department's failure to provide language access to Mr. Empadi caused him significant harm, including delayed loss of benefits to which he was legally entitled, which resulted in him losing his home, as well as severe physical and mental health consequences that continue to this day.

Mr. Empadi worked as a cleaner at John F. Kennedy Airport. In March 2020, he lost his job due to the pandemic. Mr. Empadi sought to apply for unemployment benefits through the NYSDOL website, but he only had the option to apply in English. Eventually Mr. Empadi's roommate, who spoke English, helped him fill out the form, and NYSDOL granted him benefits on March 30, 2020.

Mr. Empadi made several attempts to inform the Department that French was his primary language: he messaged them using his online UI account portal and contacted the Department on Twitter. In response to his portal messages, the Department responded with simplified English messages, making it clear that they understood that he was expressing limited English proficiency. Despite this understanding, every NYSDOL and ID.me document and online correspondence he received was in English only.

NYSDOL then twice terminated Mr. Empadi's benefits—which were his only income—without justification. First, in October 2020, NYSDOL suddenly cut off Mr. Empadi's benefits without any explanation. For weeks, Mr. Empadi spent hours on the phone every day trying to reach NYSDOL. He never reached anyone. He also tweeted at NYSDOL, and in response, the Department direct messaged him on Twitter in English, promising to follow up. They never did.

In February 2021, as he was beginning to struggle to pay his rent, NYSDOL restarted his benefits. Mr. Empadi has never understood what happened to cause a five-month gap in his unemployment benefits, because the Department never explained it to him in a language he could understand.

In April 2021, NYSDOL again suddenly terminated Mr. Empadi's benefits. The Department eventually sent him a letter in English. After getting translation assistance from a nonprofit organization, Mr. Empadi learned that the Department had flagged him as receiving veteran's benefits, which he had never requested or received, and they were withholding his benefits until he established his eligibility. NYSDOL directed Mr. Empadi to verify his identity with ID.me. ID.me sent Mr. Empadi instructions in English, which Mr. Empadi could not read. He called ID.me multiple times but could not reach anyone. Mr. Empadi eventually again got help with translation from a nonprofit organization and submitted multiple photos, his Social Security Card, Lawful Permanent Resident Card, and other documentation through the ID.me software. The ID.me software interface and the emails he received from their service were all in English.

It took approximately four months for ID.me to verify Mr. Empadi's identity and determine that he had been wrongly flagged for fraud and never received veteran's benefits.

This second interruption, so quickly on the heels of the first five-month gap, was a significant financial blow: Mr. Empadi could not pay his rent. He was evicted and had to move into a shelter. Mr. Empadi remains in that shelter as of March 2023. He cannot pay for transportation, and the food at the shelter makes him constantly ill. When he lost his apartment, he fell into a deep depression; his doctors are concerned about his mental health and his stress levels. His prior eviction is a significant barrier to getting an apartment, and without an apartment, he has struggled to find a full-time job.

The Department's language access failures have also impaired Mr. Empadi's ability to secure U.S. citizenship. Mr. Empadi owes taxes on his UI benefits for 2020 and 2021 because he did not know that he needed to pay those taxes. If Mr. Empadi had received the UI application in a language he understood, he would have selected the option to withhold part of his benefits. Because he had to rely on Google Translate and an untrained friend to translate, he did not understand that option and now must contend with a tax debt and yet another roadblock in his goal of citizenship.

b. Hector Ludena

NYSDOL subjected Hector Ludena, a Spanish speaker, to two serious language access barriers that prevented him from receiving his UI benefits. In 2021, Mr. Ludena left his job as an electrician because his employer unlawfully refused to pay him the required prevailing wage for his work on qualifying public works projects. Because his employer's violation of wage and hour laws constituted "good cause" for him to leave, Mr. Ludena was entitled to UI benefits.

Mr. Ludena applied for UI benefits and indicated his primary language was Spanish. However, the UI notices that NYSDOL sent him were either untranslated or left out critical

information. In late February 2022, the Department sent him a letter in English and an incorrect Spanish translation. The English version directed him to send his application materials to the NYSDOL prevailing wage board for an adjudication of his eligibility. The Spanish version listed the address of the wage board but did not include that instruction.

Because of improper translation, Mr. Ludena never sent his materials to the wage board. As a result, he was denied benefits and went to his hearing without a determination by the Department about his eligibility. The Administrative Law Judge (“ALJ”) had to decide whether Mr. Ludena was entitled to and wrongfully denied “prevailing wages” despite having no expertise in such determinations. In addition, the ALJ misunderstood the interpreter and dismissed him, requiring interpretation to stop mid-hearing, all of which resulted in specific interpretation issues with regard to critical facts. For example, during the hearing Mr. Ludena’s testimony around electronic-related work was translated into “pulling wires” which has a different meaning in Spanish versus English. As a result of these misinterpretations, the ALJ denied Mr. Ludena benefits. Had NYSDOL sent Mr. Ludena the notice about the NYSDOL prevailing wage board in Spanish, he would have received an appropriate eligibility determination that his work qualified him for the prevailing wage. And further, had Mr. Ludena received competent translation at his hearing, the ALJ likely would have found him eligible for benefits.

c. Hameeda Bano

In March 2020, Hameeda Bano, an immigrant and single mother from Pakistan whose primary languages are Urdu and Pashto, lost both of her jobs working as a teaching assistant and attempted to apply for UI benefits. At first she tried to call the Department, but she could not understand the English language automated system, which never offered her an option to switch to a language she could understand. She then tried the NSYDOL website, where she found the application but once again saw no option to access it in any language she could understand. She did her best with the application with her very limited English, but later learned that there were significant parts that she didn’t understand that she would have filled out differently: she didn’t see any place to inform the Department that her primary language was not English, and she wanted to tell the Department to withhold taxes from her benefits but could not find that option.

In May 2020, Ms. Bano was approved for benefits. The notification came via text message, in English, with no instructions for what to do next. She turned to her community, where a neighbor walked her through the process to certify her benefits online. She followed these instructions each week to the best of her ability. Soon after she began receiving benefits, one of her preschool jobs started calling her in for a few hours a week over Zoom. Ms. Bano, operating on the instructions her neighbor had given her, did not report these hours to the Department on her weekly certification because they did not constitute a full 8-hour day of work. There were no instructions or guidance in any other language informing her otherwise. If she had received or been able to access online instructions in a language she understood, or if she had access to an information line in a language she understood, Ms. Bano would have known that the reporting requirements actually mandated that she report those hours.

In September 2021, Ms. Bano secured full-time work at a new preschool, and ended her unemployment certification and benefits. But in October 2021, the Department sent her a notice, in English, notifying her of an overpayment and penalty for fraudulently misrepresenting claims, totaling \$29,473.75. She contested the notice and then attended a series of administrative hearings. At the first hearing, Ms. Bano informed the Administrative Law Judge that she did not speak English and needed an interpreter. Her declaration at that hearing gave the Department actual notice of her status as someone with limited English proficiency. Nevertheless, the Department continued to send Ms. Bano all communications in English only.

At the hearings the Department alleged that Ms. Bano had made a willful misrepresentation of her hours worked. She retained an attorney, and argued that the existence of the unemployment insurance handbook and the fact that its text, which was in English only, was linked to at the end of the English-only application Ms. Bano filled out, meant that she was responsible for understanding the instructions. Following her first hearing, the Department sent a paper copy of the handbook, in English only—despite the fact that they were on notice that she had limited English proficiency.

There were interpretation problems at the ALJ hearing, and Ms. Bano felt frustrated and disrespected. After the first hearing where she disclosed her need for an interpreter, subsequent hearings included a sworn-in Urdu interpreter. However, at her second hearing both Ms. Bano and her son Mr. Waleed Khan, who is fluent in English, noticed that the interpreter was not accurately interpreting her statements. Ms. Bano and her son tried to intervene with the interpreter and tell them not to edit or paraphrase her words, but the interpreter continued to do so. Ms. Bano tried to make the problem known to the Administrative Law Judge, who ignored her. When she got the transcript of her hearing, there were factual errors in her interpreted testimony.

In July 2022, after over 6 months of hearings, the ALJ found Ms. Bano did not make “factually false statements” or a “willful misrepresentation” of the number of hours she worked because she did not understand the instructions and handbook, and waived her overpayments and penalty. She applied for a waiver of her overpayment from the Department. The application was only in English, and her son assisted. Her application was granted.

Prior to approving her waiver, the Department had entered a notice of appeal on the reversal of fault by the ALJ and subsequently submitted an appeal statement arguing that her misrepresentations were willful and fraudulent, despite having approved her waiver in the interim. The Department to date has not rescinded the waiver, did not rescind its appeal to the UIAB, nor did it inform the UIAB that the waiver was granted. The UIAB overturned the ALJ’s decision, finding Ms. Bano responsible for knowing and understanding the contents of a handbook she had never seen, in a language she could not understand. The Department subsequently mailed Ms. Bano three sets of overpayment determinations in English only, upon which she requested a further ALJ hearing and for which the NYSDOL again mailed documents in English only. She filed a motion for reconsideration of the UIAB decision, which simultaneously reopened and affirmed the prior decision of the UIAB. The UIAB did not consider the arguments of Ms. Bano as properly before them as she did not appeal the ALJ decision or submit a reply statement to the Department appeal. However, none of the decisions

or correspondence from the UIAB were translated or accompanied by the required Notice of Important Document, affecting her ability to participate in the written appeal process. The UIAB further held, as it has in other similar cases, that Ms. Bano requiring an interpreter “does not establish that she was unable to understand the straightforward certification questions asked.” Ms. Bano is appealing the decision to the Appellate Division of the State Supreme Court.

Because of the failure to translate instructions and other documents, Ms. Bano is currently facing approximately \$19,659 in overpayment clawbacks, penalties, and fines. She has no savings or means to pay this sum. The hearings that she will be required to attend will disrupt her work schedule, costing her income and threatening her job security. She is a single mother who supports her son as he works to complete his engineering degree and MSME; the strain of the appeals process itself, much less the enormous fine assessed to her, has the potential to ruin her financially. Like Mr. Empadi, she also now faces a tax penalty because she did not understand the withholding options on the initial application. Ms. Bano’s health has suffered as a result of the Department’s actions, and her doctors are concerned about the effects of the stress on her physical and mental well-being.

One of the most frustrating parts of this experience for Ms. Bano is that she made all possible efforts to do everything right, in the face of a total lack of consideration or language access options, and the Department continues to treat her like a criminal, holding her responsible for its own failings to properly discharge its mandated duties.

### III. Legal Standards

By failing to provide equal access to unemployment for LEP claimants, the Department has violated the Title VI of the Civil Rights Act of 1964 and the Workforce Innovation and Opportunity Act.

#### a. Title VI Jurisdiction

Title VI prohibits discrimination on the basis of race, color, or national origin by any federally funded agency or program.<sup>5</sup> The specific program or activity charged with the discriminatory conduct need not be the one directly receiving federal financial assistance; receipt of federal funds by an agency creates a contractual obligation for that agency to comply with Title VI in all of its programs and activities.<sup>6</sup>

The Supreme Court made clear in *Lau v. Nichols*, 414 U.S. 563, 568 (1974) that the term “national origin” as used in the Civil Rights Act includes discrimination on the basis of

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<sup>5</sup> 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

<sup>6</sup> U.S. Dep’t of Just., *Title VI Legal Manual* 30 (Section V), <https://www.justice.gov/crt/fcs/T6manual5>. (“With regard to public institutions or private institutions that serve a public purpose, the ‘program or activity’ that Title VI covers encompasses the entire institution and not just the part of the institution that receives federal financial assistance. 42 U.S.C. § 2000d-4a. Moreover, the part of the program or activity that receives assistance can be, and often is, distinct from the part that engages in the allegedly discriminatory conduct.”) (last visited Apr. 13, 2023).

language.<sup>7</sup> Implementing guidance for Title VI further provides that oral interpretation or in-language services “should be provided at the time and place that avoids the effective denial or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person.”<sup>8</sup> Further, “the quality and accuracy of language services in a UI appeals hearing . . . must be extraordinarily high.”<sup>9</sup>

The NYSDOL is a recipient of U.S. Department of Labor funds from several grant programs, including the Unemployment Insurance program.<sup>10</sup> The Department’s receipt of these funds represents a contractual agreement to comply with Title VI in all of its operations.<sup>11</sup>

#### b. WIOA Jurisdiction

The Workforce Innovation and Opportunity Act (“WIOA”) prohibits any recipient of WIOA funds from discriminating based on “race, color, religion, sex . . . , national origin, age, disability, or political affiliation or belief.”<sup>12</sup> Any entity which receives financial assistance under WIOA Title I is considered to have contracted to comply with WIOA’s anti-discrimination provisions, and to be on notice regarding those obligations.<sup>13</sup> A recipient includes “[s]tate-level agencies that administer, or are financed in whole or in part with, WIOA Title I funds.”<sup>14</sup> As with Title VI, national origin discrimination under WIOA prohibits discrimination on the basis of English language proficiency. Specifically, WIOA states that “[i]n providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, a recipient must not, directly or through contractual, licensing, or other arrangements, discriminate on the basis of national origin, including limited English proficiency.”<sup>15</sup>

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<sup>7</sup> *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that the failure of a school system to provide non-English speaking Chinese students with English language instruction or to provide them with other adequate instructional procedures denied them a meaningful opportunity to participate in the public educational program and thus was a violation of Section 601 of the Civil Rights Act: “Discrimination is barred which has that effect even though no purposeful design is present . . . . It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents’ school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations.”).

<sup>8</sup> *Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 68 Fed. Reg. 32296, <https://www.federalregister.gov/documents/2003/05/29/03-13125/civil-rights-center-enforcement-of-title-vi-of-the-civil-rights-act-of-1964-policy-guidance-to> (last visited Apr. 13, 2023).

<sup>9</sup> *Id.*

<sup>10</sup> *Unemployment Insurance Grant Summary (In Progress)*, USASpending.gov, [https://www.usaspending.gov/award/ASST\\_NON\\_UI347322055A36\\_1630](https://www.usaspending.gov/award/ASST_NON_UI347322055A36_1630) (last visited Apr. 13, 2023).

<sup>11</sup> NYSDOL has long been on notice of its contractual obligations under Title VI and its language access obligations, and promulgates a language access plan. In *Pabon v. Levine*, 70 F.R.D. 674, 676 (S.D.N.Y. 1976), the court held that a Spanish-speaking plaintiff who received only English-language communications from the NYSDOL had stated a claim of discrimination under NYSDOL regulations “promulgated to effectuate section 601 as applied to federally assisted labor programs.” The court made clear that the New York State unemployment insurance program is required to comply with Title VI, and that compliance involves reasonable language access measures.

<sup>12</sup> 29 U.S.C. § 3248.

<sup>13</sup> *Ramirez v. Bd. of Rev., Dep’t of Lab.*, No. A-3755-16T4, 2018 WL 3189481, at \*2 (N.J. Super. Ct. App. Div. June 29, 2018) (failure of the New Jersey Department of Labor to adhere to WIOA LEP constitutes good cause to allow a late-filed appeal).

<sup>14</sup> 29 C.F.R. § 38.4(zz)(1).

<sup>15</sup> 29 C.F.R. § 38.9(a).



WIOA complaints may be directed to the U.S. Department of Labor based on past or present discrimination and/or retaliation for any of the protected categories, including “national origin (including limited English proficiency).”<sup>16</sup> If a violation is found, potential remedies include redress of the violation, make-whole relief for complainants, and training and outreach requirements for the violating party.<sup>17</sup>

NYSDOL is the recipient of WIOA Title I funds.<sup>18</sup> As a recipient of WIOA Title I funds, the Department is contractually obligated to comply with WIOA non-discrimination provisions. Further, WIOA guidance makes clear that UI programs are covered under WIOA.<sup>19</sup>

c. U.S. Department of Labor and Department of Justice Language Access Regulations and Guidance

U.S. DOL has promulgated regulations enumerating specific language access responsibilities under Title VI and WIOA.<sup>20</sup> Under these regulations, an agency must take reasonable steps to assess LEP individuals for language needs, provide accurate oral interpretation and written translation of hard copy and electronic materials, and conduct outreach.<sup>21</sup> The regulations provide that New York State is required to provide adequate notice that interpretation and translation is free of charge, and provided in a timely manner that ensures equal access and avoids delay or denial of any benefit.<sup>22</sup>

The agency must record the limited English proficiency and preferred language of each LEP claimant/beneficiary, and as soon as the agency is aware of the non-English preferred language, convey vital information in that language.<sup>23</sup> U.S. DOL has made clear that “UI agency staff should be trained to identify language access barriers and provide affected claimants alternative access options.”<sup>24</sup> The U.S. DOL has warned that agencies like NYSDOL that have shuttered all of its offices that can assist with UI applications, and moved primarily to web-based services, must be particularly sensitive to language access needs because “[a]s state UI agencies

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<sup>16</sup> 29 C.F.R. § 38.69(a)

<sup>17</sup> 29 C.F.R. § 38.90(b).

<sup>18</sup> *WIOA Youth/Adult/Dislocated Worked Formula Combined Grant Summary (In Progress)*, USASpending.gov, [https://www.usaspending.gov/award/ASST\\_NON\\_AA363362155A36\\_1630](https://www.usaspending.gov/award/ASST_NON_AA363362155A36_1630) (last visited April 13, 2023).

<sup>19</sup> 29 C.F.R. § 38.9, App. (“Unemployment insurance programs are recipients covered under this rule, and States must take reasonable steps to provide meaningful access to LEP individuals served or encountered in their unemployment insurance programs and activities.”).

<sup>20</sup> *Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 68 Fed. Reg. 32296, <https://www.federalregister.gov/documents/2003/05/29/03-13125/civil-rights-center-enforcement-of-title-vi-of-the-civil-rights-act-of-1964-policy-guidance-to> (last visited April 13, 2023).

<sup>21</sup> 29 C.F.R. § 38.9(b).

<sup>22</sup> 29 C.F.R. § 38.9(d).

<sup>23</sup> 29 C.F.R. § 38.9(h) (“[O]nce [an agency] becomes aware of the non-English preferred language of an LEP [claimant] . . . the [agency] must convey vital information in that language.”).

<sup>24</sup> U.S. Dep’t of Labor, Emp. & Training Admin., *Unemployment Insurance Program Letter No. 02-16*, at 10 (Oct. 1, 2015), [https://oui.doleta.gov/dmstree/uipl/uipl2k16/uipl\\_0216.pdf](https://oui.doleta.gov/dmstree/uipl/uipl2k16/uipl_0216.pdf); see also U.S. Dep’t of Labor, *Unemployment Insurance Program Letter No. 02-16, Change 1*, at 3-4 (May 11, 2020), [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_02-16\\_Change-1.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_02-16_Change-1.pdf).

move to almost exclusively website-driven services, there is an increased likelihood that LEP individuals will face barriers to accessing information and claims-related access in violation of Title VI and regulations.”<sup>25</sup> NYSDOL must afford adequate language access for LEP individuals in every program delivery avenue—electronic, in person, and telephonic—such that an individual may effectively “learn about, participate in, and/or access any . . . benefit [or] service” that NYSDOL provides. All language assistance services must be accurate, free of charge, and provided in a timely manner that ensures equal access and avoids delay or denial of any benefit.<sup>26</sup>

Where languages are spoken by a “significant number” of the population to be served, the state agency “must translate vital information in written materials into these languages and make the translations readily available in hard copy, upon request, or electronically such as on a Web site.”<sup>27</sup> Vital information includes all “information, whether written, oral or electronic, that is necessary for an individual to understand how to obtain any aid, benefit, service, and/or training; necessary for an individual to obtain any aid, benefit, service, and/or training; or required by law.”<sup>28</sup> In May 2020, U.S. DOL issued new guidance making clear that vital documents in the UI context includes applications for benefits, notices of rights and responsibilities, and communications requiring a response from the beneficiary or applicant.<sup>29</sup> Vital documents also include communications requiring a response from the beneficiary or applicant.<sup>30</sup>

In addition, where languages are not spoken by a significant portion of the population, the state agency must take reasonable steps to meet the particularized language needs of LEP individuals who seek to learn about, participate in, and access unemployment benefits.<sup>31</sup>

Under Department of Justice (“DOJ”) guidance, implementing agencies must utilize a fact-specific test to determine the extent of what “reasonable steps” entail for their language-access responsibilities. Agencies must examine the totality of the circumstances in light of four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or recipient; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity or service

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<sup>25</sup> U.S. Dep’t of Labor, *UIPL No. 02-16*, *supra* note 24, at 8. NYSDOL closed all offices from March 2020 through 2022. Currently, it has reopened some NYSDOL Career Centers, but according to the NYSDOL website and advocates, they do not assist with the UI application process. *See, e.g., Unemployment Insurance Contact*, N.Y. State Dep’t of Labor, <https://dol.ny.gov/unemployment-insurance-contact>.

<sup>26</sup> 29 C.F.R. § 38.9(d).

<sup>27</sup> 29 C.F.R. § 38.9(g)(1).

<sup>28</sup> 29 C.F.R. § 38.4(ttt).

<sup>29</sup> U.S. Dep’t of Labor, *UIPL No. 02-16, Change 1*, *supra* note 24, at 3-4. In addition, pursuant to 29 C.F.R. § 38.9(g)(3), all communications containing vital information must contain a “Babel notice,” which is defined as a statement “in multiple languages informing the reader that the communication contains vital information, and explaining how to access language services to have the contents of the communication provided in other languages.” 29 C.F.R. § 38.4(i).

<sup>30</sup> U.S. Dep’t of Labor, *UIPL No. 02-16*, *supra* note 24, at 9; U.S. Dep’t of Labor, *UIPL No. 02-16, Change 1*, *supra* note 24, at 3.

<sup>31</sup> 29 C.F.R. § 38.9(g)(2).

provided by the program to people's lives; and (4) the resources available to the recipient and costs.<sup>32</sup>

#### d. New York State Law

In addition to federal statutes and regulations, New York State has adopted and codified state language access policies that are designed to protect New York's LEP population. Under Executive Orders 26 and 26.1, and the recently enacted N.Y. Exec. Law § 202-a, each state agency is required to provide language access services to New York residents by:

- Translating vital documents into the top ten languages spoken by LEP residents of New York State, and top 12 languages effective July 1, 2022<sup>33</sup>;
- Providing interpretation for LEP individuals in their primary language with respect to the provision of services or benefits;
- Publishing a language access plan every two years that includes plans for ensuring compliance and progress since publication of the previous version; and
- Designating a language access coordinator with responsibility for collecting data on measures related to the provision of services.<sup>34</sup>

IV. NYSDOL has failed to take sufficient steps to ensure LEP access in light of DOJ's four factor test.

- a. The four factor test to ensure implementation of Title VI and WIOA counsel in favor of robust LEP protections.

As noted in section III.c above, NYSDOL must use a specific test to determine its obligations under Title VI and WIOA: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or recipient; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity or service provided by the program to people's lives; and (4) the resources available to the agency and costs.<sup>35</sup> U.S. DOL guidance provides that "the obligation to provide language services increases where the importance of the activity is greater."<sup>36</sup> Based on the scope and consistently inadequate quality of services that the Department offers LEP applicants, it appears

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<sup>32</sup> U.S. Dep't of Justice, *DOJ Recipient LEP Guidance (Section V)* (June 12, 2002), <https://www.justice.gov/crt/doj-final-lep-guidance-signed-6-12-02> (last visited April 13, 2023).

<sup>33</sup> New York's Executive Order 26, issued on October 6, 2011, established the first statewide language access plan and mandated language access for the top six most commonly-spoken languages. State of N.Y., Exec. Order 26 Statewide Language Access Policy (2011). Executive Order 26.1, issued on March 23, 2021, expanded this order to translation and interpretation services for the top ten most commonly spoken languages. State of N.Y., Executive Order 26.1 Statewide Language Access Policy (2021). In 2022, the New York State legislature passed a new law, N.Y. Exec. Law § 202-a, effective July 1, 2022, requiring state agencies to translate vital documents into the 12 most common non-English languages spoken by LEP individuals in the state and to publish their language access plans on their websites.

<sup>34</sup> N.Y. Exec. Order No. 26, *supra* note 33.

<sup>35</sup> *DOJ Recipient LEP Guidance*, *supra* note 32.

<sup>36</sup> U.S. Dep't of Labor Civil Rights Center, *Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 68 Fed. Reg. 32290-01.

that the Department has disregarded its Title VI obligations, and has not appropriately applied this test in violation of Title VI.

- i. The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or recipient

As of 2021, 2.5 million New Yorkers did not speak English as their primary language and had a limited ability to read, speak, write or understand English.<sup>37</sup> LEP speakers of the top ten non-English languages in New York State numbered over 2 million, more than 10% of the total population of the state.<sup>38</sup> Those languages are: Spanish, Chinese, Russian, Yiddish, Bengali, Korean, Haitian Creole, Italian, Arabic, and Polish. According to the 2020 Census, over 30% of New York residents reported that a non-English language was spoken in their home.<sup>39</sup>

In response to a Freedom of Information Law request, the Department reported that 9.45% of all UI claims filed between March 2020 and February 2022 were from people who indicated that they were non-English speakers.<sup>40</sup> According to NYSDOL's figures, 516,326 claims were filed by individuals who indicated they did not speak English, out of a total of 5,441,164 claims filed in that time period.<sup>41</sup> According to our investigation and interviews with workers and leading advocates, that number is an undercount, as many LEP workers could not find a formal option to select a language other than English in their application.<sup>42</sup> However even this potentially underestimated reporting suggests that the proportion of UI claims filed by LEP individuals is commensurate with the overall proportion of LEP speakers in the state. By any reasonable measure, it is clear that the Department should have assessed that there are a high number and proportion of LEP persons eligible and likely to be served by their unemployment insurance program when applying the Title VI test.

- ii. The frequency with which LEP individuals come in contact with the program

New York lost 2 million jobs at the height of the pandemic and recovery of those losses has remained low.<sup>43</sup> These losses have been borne disproportionately by New York's immigrant population: leading nonprofits serving immigrant communities reported that 75% of their clients had lost their jobs, including domestic workers, nail salon workers, and 95% of day laborers.<sup>44</sup>

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<sup>37</sup> *Office of Language Access*, N.Y. State Off. of Gen. Servs., <https://www.ny.gov/language-access-policy>.

<sup>38</sup> N.Y. Dep't of Labor, *Language Access Plan for Limited English Proficient Individuals* (Aug. 1, 2021) [hereinafter N.Y. Dep't of Labor, *Language Access Plan*], <https://dol.ny.gov/system/files/documents/2022/02/dol-lap-2021.pdf>.

<sup>39</sup> *Quick Facts: New York*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/NY/PST045221> (last visited April 13, 2023).

<sup>40</sup> NYSDOL FOIL Response to NCLEJ.

<sup>41</sup> *Id.*

<sup>42</sup> Anjana Malhotra, et al., Nat'l Ctr. for L. and Econ. Just., *Designed to Exclude: New York's Failure to Provide Compensation and Language Access to Unemployed Workers* (August 2022).

<sup>43</sup> Nick Reisman, *New York's Unemployment Rate Dropped in September*, Spectrum Local News (Oct. 20, 2022, 2:33 PM), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/10/20/new-york-s-unemployment-rate-dropped-in-september>.

<sup>44</sup> Sarah Amandolare et al., Ctr. for an Urb. Future, *Under Threat & Left Out: NYC'S Immigrants and the Coronavirus Crisis* (June 2020), <https://nycfuture.org/research/under-threat-and-left-out>.

And while those losses are no longer occurring at the same pace, neither have they been restored: New York City alone has had the “slowest recovery of any major metropolitan area.”<sup>45</sup> The recovery is also not equitable: in the first quarter of 2022, while white workers were unemployed at 3.6%, workers of color were unemployed at higher rates (6.3% for Latinx workers; 9.1% for Black workers; and 3.8% for Asian workers).<sup>46</sup>

Therefore, the Department should reasonably expect significant numbers of New Yorkers to continue to need access to UI services. Based on the previous proportion of LEP UI claimants (as discussed in i. above), the Department should reasonably expect at least 9-10% of those in need to have limited English proficiency and to need language access services.

iii. The nature and importance of the program, activity or service provided by the program to people’s lives

Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family. N.Y. Lab. Law § 501.

The unemployment insurance system provides a lifeline to workers, preventing job loss from leading to poverty, hunger, houselessness, family separation, incarceration, hospitalization, displacement, and death. “Unemployment Insurance means workers losing jobs can still put food on the table for their children and not have to cut back drastically.”<sup>47</sup>

The health of the U.S. economy and U.S. workers rests on, and cannot function without, the unemployment insurance program.<sup>48</sup> “According to the Congressional Budget Office, each dollar of UI benefits raises aggregate economic activity by \$1.10, and each million dollars of UI benefits increases employment by six jobs. . . . [T]his places UI benefits at the top of the list of policies that have the largest impact on the economy per dollar spent.”<sup>49</sup>

In addition, U.S. DOL guidance notes that “[d]ecisions by a federal, state, or local entity to make an activity compulsory, such as job training and/or job search certification in the

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<sup>45</sup> Nicole Hong, *In New York City, Pandemic Job Losses Linger*, N.Y. Times (Sept. 14, 2022), <https://www.nytimes.com/2022/09/14/nyregion/nyc-covid-job-losses.html>.

<sup>46</sup> Kyle K. Moore, *State Unemployment by Race and Ethnicity*, Econ. Pol’y Inst. (May 2022), <https://www.epi.org/indicators/state-unemployment-race-ethnicity/>.

<sup>47</sup> Michael Greenstone & Adam Looney, *The Importance of Unemployment Insurance for American Families and the Economy*, Brookings Inst. (Dec. 4, 2012), <https://www.brookings.edu/research/the-importance-of-unemployment-insurance-for-american-families-and-the-economy/>. In recognition of the vital role that unemployment plays in our social safety net, Congress enacted the largest expansion of unemployment benefits in U.S. history in response to the Covid-19 pandemic. Nat’l Emp. L. Project, *Unemployment Insurance Provisions in Coronavirus Aid, Relief, and Economic Security (CARES) Act* (Mar. 27, 2020), <https://www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act/>.

<sup>48</sup> Gabriel Chodorow-Reich & John Coglianesse, *Unemployment Insurance and Macroeconomic Stabilization*, in *Recession Ready: Fiscal Policies to Stabilize the American Economy* 154 (Heather Boushey et al. eds., 2019).

<sup>49</sup> Greenstone & Looney, *supra* note 47.

Unemployment Insurance program, can also serve as strong evidence of the program’s importance.”<sup>50</sup> Because many of the components of UI are mandatory for program recipients, their importance and the necessity of LEP access is heightened.

For individuals like Mr. Empadi, Mr. Ludena, and Ms. Bano—and thousands of other LEP workers—UI represents the difference between housing and homelessness; food and hunger; safety and danger, distress, and despair. UI was supposed to make it possible for Mr. Ludena to leave an exploitative job without ruination. UI was supposed to allow Mr. Empadi to keep his house, his financial stability, and his health while he got back on his feet after the pandemic closed his job down. UI was supposed to make it possible for communities to weather disasters like the pandemic and survive. The importance of UI to people’s lives is enshrined in our law and in our economic policy, and the Department is fully aware of the vital social role it plays.

iv. The resources available to the recipient and costs

There are abundant resources available to the Department to support language access services. On the federal level, the American Rescue Plan of 2021 earmarked over \$2 billion for UI improvement: “ARPA funding is designed to enable the department to both tackle short-term issues facing states and their UI systems and address long-term challenges by improving state processes and building IT systems that are safer, more accessible and more resilient in the event of future surges in claims.”<sup>51</sup> On the state level, New York recently allocated \$2 million to the establishment of an Office of Language Access, whose purview it is to expand and improve language access by state agencies.<sup>52</sup> Further, U.S. DOL awarded NYSDOL an equity grant to reach out to female workers, which is particularly important for LEP female workers like Ms. Bano who were unaware of UI and how to apply except for her community and neighbors.<sup>53</sup>

b. NYSDOL has failed to meet its burden under the four-factor test

Under the 4-prong test for language access services, the NYSDOL UI program and Appeals Board is in violation of Title VI. It is clear that from a fair application of this test, New York has a significant likelihood of at least 10% of claimants having limited English proficiency and has access to funds at the state and federal level specifically earmarked for improving its equitability and language access. The Department absolutely has the capacity and resources towards making vital information accurately and comprehensively available, but appears to have simply failed to do so on a systematic basis.

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<sup>50</sup> U.S. Dep’t of Labor Civil Rights Center, *Enforcement of Title VI of the Civil Rights Act of 1964; Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 68 Fed. Reg. 32295.

<sup>51</sup> Jon Jukuri, *Using ARPA to Modernize Unemployment Insurance*, Nat’l Conf. of State Legislatures (Jan. 10, 2022), <https://www.ncsl.org/research/labor-and-employment/using-arpa-to-modernize-unemployment-insurance-magazine2022.aspx>.

<sup>52</sup> *Governor Hochul Announces Launch of New ‘Office of Language Access’ to Oversee Codified and Expanded Statewide Language Access Policy*, N.Y. State.gov (October 3, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-launch-new-office-language-access-oversee-codified-and-expanded>.

<sup>53</sup> *Fostering Access, Rights and Equity (FARE) Grant*, N.Y. State Dep’t of Labor, <https://dol.ny.gov/fostering-access-rights-and-equity-fare-grant>.

- i. The Department is not translating vital documents and communication methods on a systemic basis.

The Department's failure to accurately and competently translate and interpret vital information for claimants like Mr. Empadi, Mr. Ludena, and Ms. Bano stemmed from two major sources: a failure to follow Title VI and its own stated policies and the inadequacy of those policies and practices to comply with Title VI and WOIA requirements in the first place.

Since the pandemic and through today, the UI system in New York is only virtual—online and by phone; there are no longer in-person services available to assist with any aspect of UI applications or verifications. The Department provides information through its website and paper/digital documents. These methods of communication are included under the Department's Language Access Plan<sup>54</sup>—meaning that the agency should provide both written translation of documents and oral interpretation services. However, the Department has failed to meet federal and state requirements in that Language Access Plan, and has also failed to follow the plan itself.

- ii. The Department's Language Access Plan and ostensible implementation is statutorily inadequate.

The Department's Language Access Plan, a policy document required by state and federal law, confirms its failure to translate critical documents.<sup>55</sup> As a matter of stated policy the Department does not translate key notices critical to accessing benefits into any language. These key documents include Notices of Determination to the Claimant and Claim for Benefits documents, impeding LEP workers from understanding the outcome of their applications, the basis for the Department's determinations, and how to appeal.<sup>56</sup> Nor does the Department translate fraud and immigration notifications into any language other than Spanish.<sup>57</sup> The Department also fails to translate requests for secondary verification, identification, Alien Employment Verification, Social Security requests or requests for work verification or entitlements into any languages other than English and Spanish.<sup>58</sup> Other key documents are not translated into New York's six, let alone 12, most commonly spoken languages as required by state law<sup>59</sup>, including eligibility instructions and the Monetary Benefit Form.<sup>60</sup> Further, the Department has openly admitted that it does not translate any notices to claimants eligible for overpayment recoupment waivers.<sup>61</sup>

Mr. Empadi's experiences are consistent with this widescale failure to translate documents vital to ensuring UI benefits. Mr. Empadi's notice of receipt of benefits, notice of cancellation of benefits, request for identification for his benefits re-determination proceeding,

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<sup>54</sup> N.Y. Dep't of Labor, *Language Access Plan*, *supra* note 38.

<sup>55</sup> *Id.*; N.Y. Exec. Law § 202-a.

<sup>56</sup> N.Y. Dep't of Labor, *Language Access Plan*, *supra* note 38, at 27, 29.

<sup>57</sup> *Id.* at 29–30.

<sup>58</sup> *Id.*

<sup>59</sup> N.Y. Exec. Law § 202-a.

<sup>60</sup> *Id.* at 17, 29-30.

<sup>61</sup> UI Overpayment Coalition meeting with NYSDOL, May, 27, 2022.

and notice of the outcome of his benefits re-determination process were all in English only. The Department has a duty to translate these vital documents, but made no effort to do so for Mr. Empadi and many other claimants as a matter of Department practice.<sup>62</sup> Similarly, NYSDOL's failure to correctly translate the vital instructions for Mr. Leduna's benefits paralleled that of countless claimants.<sup>63</sup>

The Department's failure to translate Ms. Bano's overpayment waiver notice, ALJ and Board notices, submissions and decisions, even after it had direct notice that she does not comprehend English, constitutes a violation of Title VI. Her experience is consistent with countless of other claimants—in how language access barriers resulted in overpayments, the appeals board made erroneous findings of fraud, and in how the Department is failing to translate applications for waivers.<sup>64</sup> As described above, NYSDOL has openly admitted that it does not translate fraud waiver applications into any other language other than English, effectively depriving LEP claimants from notice of this critical benefit.

iii. The Department fails to follow its own Language Access Plan.

Per U.S. DOL regulations, NYSDOL's obligation to provide translations of vital documents arises as soon as the Department has notice that the worker has limited English proficiency.<sup>65</sup> Despite this clear federal mandate, even when LEP workers identified their primary non-English language on their UI applications and Department policy required translation of the documents in question, the Department often sent them notices only in English.<sup>66</sup>

Even if a document was translated, workers and advocates stated that NYSDOL often only translated one sentence, such as the determination, without translating the reasoning.<sup>67</sup> The Legal Aid Society Paralegal Jacalyn Goldzweig Panitz described how decisions were sent to Spanish-speaking claimants in English, with only one sentence in Spanish disclosing the right to appeal.<sup>68</sup> But “with the rest of the decision in English,” her clients “had no way of understanding the context or making a decision.”<sup>69</sup>

Mr. Ludena's experiences demonstrate that Department translations were often inaccurate as well. His documents were ostensibly translated, but the translation contained such significant errors that he was not advised of a crucial component of the application process, leading to his denial of benefits.

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<sup>62</sup> See generally, Malhotra, et al., *supra* note 42, at 23-27.

<sup>63</sup> *Id.* at 26-27.

<sup>64</sup> See Malhotra, et al., at 22-23, 27-28, 43-45.

<sup>65</sup> 29 C.F.R. § 38.9(h) (“[O]nce [an agency] becomes aware of the non-English preferred language of an LEP [claimant] . . . the [agency] must convey vital information in that language.”).

<sup>66</sup> NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Legal Services Senior Paralegal Brito; NCLEJ Interview with Make the Road New York Staff Attorney Bransford.

<sup>67</sup> NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Senior Staff Attorney Salk.

<sup>68</sup> NCLEJ Interview with The Legal Aid Society Paralegal Jacalyn Goldzweig Panitz.

<sup>69</sup> *Id.*



LEP workers like Mr. Empadi also reported that the Department's online messaging system operated only in English, preventing them from following up on questions concerning eligibility, payment status, and other problems and delays with their benefits. Workers repeatedly described their difficulty using the messaging system to write to the Department in their primary language—for starters, none of the mandatory subject headings were translated, which meant that claimants more often than not selected a heading that did not correspond to their question or issue.<sup>70</sup> When Mr. Empadi informed the Department over this messaging system that he did not understand their English messages and needed to communicate in French, they continued to message him in English.

- iv. The consequences of the Department's failure to ensure language access were a systemic disadvantaging of LEP claimants.

When the Department sent important notices concerning benefit renewals and additional federal benefits only in English, or with inadequate and misleading translations, it prevented claimants from receiving all the benefits to which they were entitled.<sup>71</sup>

When Mr. Empadi applied for unemployment benefits, he was living in an apartment, job hunting, navigating his immigration proceedings, and working on building a life for himself. By the time the Department determined that his benefits had been canceled in error, he had lost his apartment; was living in a shelter; could not effectively job hunt without a place to live; had his immigration process interrupted by the confusion around his unemployment taxes; and was suffering from depression and physically ill due to the stress and pain of his experiences trying to navigate the unemployment process. He asserts that had he been able to contact a Department representative in French and receive notices in clear and competently translated French, he would not be unhoused or behind on his taxes. To this day, Mr. Empadi has not received the benefits he is owed from the period when they were suspended in error, much less any restitution for the wide-reaching harm that that suspension caused in his life.

Mr. Ludena appeared for his benefits hearing without a prevailing wage determination from the Department because of a mistranslated notice. English-proficient claimants who applied to the Department for benefits all received the information that they should request a prevailing wage determination ahead of their hearing; Mr. Ludena was not given that opportunity solely because he was a Spanish-speaker. Due to the lack of a prevailing wage determination and to the failure to properly implement translation procedures at his hearing, Mr. Ludena was denied benefits to which he was lawfully entitled.

Similarly, Ms. Bano has been facing severe mental and physical stress due to the burden of the overpayment clawbacks based on the Appeals Board finding of fault. The summary disregard by both the Department and the UIAB of her overpayment waiver approval for all of her benefits she had received constitutes a patent, direct violation of NYSDOL's Title VI obligations. A single, working-class mother, she now faces a debt she cannot afford.

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<sup>70</sup> NCLEJ Interview with Make the Road New York Staff Attorney Ward.

<sup>71</sup> NCLEJ Interview with VOLS Attorney Roseman; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

Other LEP claimants report that the lack of language access services directly led to their denial in other ways, as documented in the attached report. According to one client, “there are strict time limits with which you have to request a hearing . . . once you receive a notice, but if you couldn’t read the notice, that’s kind-of vitiated.”<sup>72</sup> Some vital correspondence, including monetary determinations and appeals, required a response within 30 days, but workers would miss the deadline because the notice was issued only in English.<sup>73</sup> By the time claimants found translators, they could not respond in time—especially if the request involved onerous requests for additional documentation.

The Department’s failure to translate vital notices and instructions also directly impacted workers’ ability to obtain or maintain their benefits.<sup>74</sup> For example, when an applicants’ UI claim is pending or delayed, the Department still requires workers to continue to certify for weekly benefits. Failure to certify and comply during the set timeframe results in a denial of benefits.<sup>75</sup> However, many LEP applicants did not understand this because the Department failed to translate the certification questions and instructions.<sup>76</sup>

These stories are striking, but they are by no means unusual. Many more claimants suffered the same interruptions and denials of their benefits, placing a disparate burden of stress, fear, financial loss, time and effort only on LEP New Yorkers due to their LEP status. The consequences of the Department’s failure to meet its language access responsibilities also made it impossible for many eligible workers to apply in the first place. As demonstrated in the attached report, one LEP worker described how he obtained pandemic unemployment assistance (“PUA”) with the help of a nonprofit, after which the Department contacted him in English and told him he was eligible for additional benefits.<sup>77</sup> However, he could not understand the documentation requirements, so he did not apply.<sup>78</sup>

v. ID.me is failing to translate vital documents and services.

As Mr. Empadi’s case underscores, the implementation of ID.me has exacerbated language access barriers. In February 2021, New York State purchased and implemented a new private identity verification system called ID.me, which according to advocates relies on

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<sup>72</sup> NCLEJ Interview with LSNYC Assistant Newman.

<sup>73</sup> NCLEJ Interview with Flushing Workers Center Organizer Ahn; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Attorney Salk; NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz; NCLEJ Interviews with Make the Road Staff Attorney Bransford and Staff Attorney Ward.

<sup>74</sup> NCLEJ Interview with Make the Road New York Staff Attorney Ward; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Legal Services Senior Paralegal Brito; NCLEJ Interview with MinKwon Center for Community Action Human Resources & Operations Specialist Lee.

<sup>75</sup> NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Legal Services Senior Paralegal Brito; NCLEJ Interview with The Legal Aid Society Paralegal Goldzweig Panitz.

<sup>76</sup> NCLEJ Interview with The Legal Aid Society Paralegal Stanton.

<sup>77</sup> NCLEJ Interview with Worker 3.

<sup>78</sup> *Id.*

troubling facial recognition software and has erroneously delayed or prevented countless eligible immigrant and LEP workers from receiving benefits.<sup>79</sup>

When Mr. Empadi's benefits were cancelled in April 2021, he was told that he would need to sign up for and submit documentation through ID.me for the investigation. When ID.me emailed him with instructions for how to sign up, the message was in English; he could not understand it. He followed up diligently and frequently with ID.me asking for help or a translation, and received no response. After a non-profit organization helped him understand what documentation he needed to submit to ID.me, and he did so, NYSDOL determined that he had not committed fraud and his benefits cancellation was in error. But the long interruption of benefits caused Mr. Empadi to lose his housing and destabilized his entire life.

Workers and community organizations similarly report that ID.me does not translate all notices and instructions in accordance with New York and federal law, imposes onerous evidentiary burdens on those flagged for alleged fraud, and significantly delays the resolution of fraud flags, leaving workers in extreme hardship without benefits for months.<sup>80</sup> Based on ID.me's verification process, NYSDOL has barred many eligible LEP workers from receiving UI, and many others abandoned their valid UI claims because they could not navigate ID.me's system.<sup>81</sup> Even as the Internal Revenue Service and other states limited their use of ID.me because of concerns about privacy, racial bias in its facial recognition software, and privatization of core government functions,<sup>82</sup> and as New York advocates have pressed similar concerns,<sup>83</sup> the Department continues to rely on ID.me.

According to workers and advocates, every UI applicant has to register with the ID.me system in order to obtain UI. ID.me provides identity verification through a process that captures, stores, and uses biometric data.<sup>84</sup> The primary identity verification process consists of "several automated checks to protect against identity fraud," but "some people—through no fault of their own—can't get past these checks."<sup>85</sup> These claimants must undergo "secondary

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<sup>79</sup> Malhotra, et al., *supra* note 42, at 29-36.

<sup>80</sup> NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; Email from LSNYC Senior Advocate Paralegal Amanda Wilkins (Aug. 5, 2021); NCLEJ Interview with Worker 6.

<sup>81</sup> *Id.*

<sup>82</sup> *Memorandum: IRS Plans to Transition Away from ID.me Facial Recognition*, U.S. Senate Comm. on Fin. (Feb. 7, 2022), <https://www.finance.senate.gov/memorandum-irs-plans-to-transition-away-from-idme-facial-recognition-?peek=fcMB%2FY2drRkQIoCjfhDHV6p736zs4Ara6x64u3vNjdgnd6a8>; Amy Sokolow, *Massachusetts Unemployment Office Plans to Drop Facial Recognition Technology in Coming Weeks*, Bos. Herald (Feb. 23, 2022), <https://www.bostonherald.com/2022/02/23/massachusetts-unemployment-office-plans-to-drop-facial-recognition-technology-in-coming-weeks/>; Natalie Alms, *IRS Backs Away from Facial Recognition Technology*, FCW (Feb. 7, 2022), <https://fcw.com/digital-government/2022/02/irs-backs-away-facial-recognition-technology/361674/>; Susan Miller, *States Reconsider Facial Recognition for ID Verification*, GCN (Feb. 24, 2022), <https://gcn.com/state-local/2022/02/states-reconsider-facial-recognition-id-verification/362418/>.

<sup>83</sup> See N.Y. Unemployment Ins. Coal., *Letter to NYSDOL Commissioner Roberta Reardon, NYS Department of Labor's Implementation of Claimant Identity Verification Through ID.me* (Dec. 3, 2021) (on file with NCLEJ).

<sup>84</sup> *Id.*; *Information about ID.Me*, N.Y. State Dep't of Labor, <https://dol.ny.gov/information-about-idme>.

<sup>85</sup> N.Y. State & ID.me, *Verify Your Identity on a Video Call*, <https://dol.ny.gov/system/files/documents/2021/04/id.me-verify-your-identity-on-video-call.pdf>.

verification” with a video referee.<sup>86</sup> Advocates assert that LEP and immigrant workers are often flagged for secondary verification because of the spelling of their names, immigration status, and low incomes.<sup>87</sup> Although NYSDOL claims that secondary verification “typically” takes less than 10 minutes, LEP workers like Mr. Empadi described the ID.me verification process taking months.<sup>88</sup> While ID.me purports to translate notifications, workers and advocates report never receiving a notification in their primary language.

For claims flagged by the NYSDOL as potentially fraudulent, NYSDOL immediately bars or freezes claimants’ benefits and has refused to speak to claimants until they complete ID.me’s identity verification process.<sup>89</sup> The Department represents that individuals selected for identity verification will have their benefits reinstated within 10–14 days,<sup>90</sup> but LEP claimants and advocates report that it takes far longer after they submit their documents—if claimants have their benefits reinstated at all.<sup>91</sup> And although federal guidance requires workers to receive notice of a fraud suspicion flag,<sup>92</sup> countless New Yorkers, and particularly LEP workers, have received none.<sup>93</sup>

While the Department and ID.me officials say that they translate fraud notifications, workers and advocates report that ID.me sends fraud notices in English only, and sometimes Spanish, despite claimants’ notification to the Department that they do not speak or understand English.<sup>94</sup> Several other critical components of ID.me are not translated into New York’s top

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<sup>86</sup> *See id.*

<sup>87</sup> NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interview with LSNYC Assistant Newman; NCLEJ Interview with MinKwon Center for Community Action Human Resources & Operations Specialist Lee.

<sup>88</sup> NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; Jennifer Lewke, *News10NBC Investigates: Many Struggle to Get Through ID.me Process*, News10NBC Rochester (July 28, 2022, 1:32 PM), <https://www.whec.com/archive/news10nbc-investigates-many-struggle-to-get-through-idme-process/> (“While 9 in 10 claimants can verify through our self-service flow in less than five minutes, those who need additional support are directed to an ID.me representative via video chat, typically in less than 10 minutes.”).

<sup>89</sup> N.Y. Dep’t of Labor (@NYSLabor), Twitter (Aug. 24, 2021, 12:01 PM), <https://twitter.com/nyslabor/status/1430198566035787784?lang=en> (“The @IDme process is not optional for claimants who are selected for identity verification. If selected for IDme, you will not receive benefits or be able to speak to an agent until your identity is verified & processed in 10–14 days.”).

<sup>90</sup> *Id.*

<sup>91</sup> NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

<sup>92</sup> U.S. Dep’t of Labor, Emp. & Training Admin., *Unemployment Insurance Program Letter No. 16-21* (Apr. 13, 2021), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=9141](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9141). Further, federal guidance is clear that workers must be fully notified and given a meaningful opportunity to contest any flag fraud.

<sup>93</sup> *See, e.g.*, NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell.

<sup>94</sup> NCLEJ Interview with Worker 6; NCLEJ Interview with LSNYC Senior Paralegal Brito; NCLEJ Interview with NYLAG Mobile Legal Help Center Volunteer Attorney Farrell; NCLEJ Interviews with Make the Road New York Staff Attorney Ward and Staff Attorney Bransford; NCLEJ Interview with MinKwon Center for Community Action Human Resources & Operations Specialist Lee; NCLEJ Interview with LSNYC Assistant Newman.

twelve languages.<sup>95</sup> The Department’s Language Access Plan confirms that fraud-related forms are only available in English and Spanish.<sup>96</sup> According to one advocate, “all [the notifications] came in English—even e-mail or text messages were all in English. It’s very strange because the application says “what is your preferred language” and every time I put Korean in, nothing comes in Korean, so why bother even asking about what language my preference is, if you’re not going to give that to my clients.”<sup>97</sup> The English-only notices created significant and unlawful barriers for many claimants to understand the problem, comply, and reinstate their benefits.

## V. Conclusion

For all of these reasons, Mr. Empadi, Mr. Ludena, and Ms. Bano seek a full review of their complaints, both on their behalf and on behalf of all similarly situated individuals, and seek to remedy these harms. In addition, the complainants request a systematic investigation and immediate action to bring NYSDOL into compliance with its Title VI and WIOA obligations. In light of the systemic nature of these violations, illustrated in the attached report, and the deep harm to LEP individuals, complainants request that NYSDOL reexamine denials and overpayments to all LEP workers, and immediately send all LEP claimants vital documents, including overpayment waiver applications, in their primary language. It is unjust, extremely harmful, and a blatant violation of Title VI that NYSDOL openly and flagrantly continues to subject LEP claimants to systematic barriers, delays, and exclusions to the New York State Unemployment Insurance program.

Sincerely,

NCLEJ  
Anjana Malhotra  
Leah Lotto  
Claudia Wilner

NYLAG  
Ciara Farrell  
Julia Russel  
Kate Fetrow

Make the Road New York  
Elizabeth Jordan  
Harold Solis

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<sup>95</sup> E-mail attachment from Loretta Hamilton, NYSDOL Interim Director of the Claimant Advocate Office, Sue Filburn, NYSDOL UI Division. and Laura Campion, NYSDOL General Counsel's Office, UI Coalition ID.me Issue Areas, March 15, 2022 (sent March 23, 2022) (on file with NCLEJ).

<sup>96</sup> See N.Y. Dep’t of Labor, *Language Access Plan*, *supra* note 38, at 29-30.

<sup>97</sup> NCLEJ Interview with MinKwon Center for Community Action Human Resources & Operations Specialist Lee.

Appendix

1. *Designed to Exclude: New York's Failure to Provide Compensation and Language Access to Unemployed Workers*
2. Ludena documents