

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**THE PUBLIC INTEREST LEGAL
FOUNDATION**
PLAINTIFF

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CIVIL ACTION NO. 4:18-CV-00981

v.

**ANN HARRIS BENNETT, IN HER OFFICIAL
CAPACITY AS VOTER REGISTRAR
FOR HARRIS COUNTY**
DEFENDANT

**DEFENDANT’S REPLY TO PLAINTIFF’S RESPONSE
TO DEFENDANT’S MOTION TO DISMISS, DOC. 16**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

NOW COMES, Ann Harris Bennett, in her capacity as Harris County Tax Assessor-Collector and Voter Registrar, and files her Reply to Plaintiff’s Response to Defendant’s Motion to Dismiss and respectfully shows the Court as follows:

- 1. VR Bennett’s Motion to Dismiss, Doc. 12, should be granted because PILF’s request for records falls outside the scope of the NVRA, PILF’s mission is inconsistent with the purpose of the NVRA, PILF’s general interest in promoting election integrity is not sufficient for standing, and, frustration of an organization’s goals is not enough to confer standing.**
 - A. The Court should grant VR Bennett’s Motion to Dismiss because PILF’s request for records falls outside the scope of the NVRA.**

PILF’s attempt to expand the right of access in Section 20507(i) to a category the Act does not regulate would illogically interpret the NVRA as providing wholesale access to any voter records under the guise that such records relate to a program of list maintenance. PILF is urging this Court to read the statute so broadly as to cause an odd result. “When the literal reading of a statutory term compels an odd result, this Court searches beyond the bare text for other evidence of congressional intent. A careful review of the regulatory scheme prior to

FACA's enactment and that statute's legislative history strongly suggests that Congress did not intend that the term 'utilized' apply to the Justice Department's use of the ABA Committee." *See Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440 (1989). Congressional intent behind the NVRA was to increase voter turnout on the premise that government should be proactive when it comes to promoting democracy. *See* 139 Cong. Rec. E17-03, 139 Cong. Rec. E17-03, E18, 1993 WL 1172.

The NVRA is not intended to serve as a tool to investigate alleged voter fraud and does not permit public inspection of records merely because they may assist in identifying persons who may be ineligible to vote. PILF urges an unreasonably broad reading of the Act in order to achieve an absurd, anti-NVRA result. PILF proves this point in its misplaced reliance on *ACRU v. Philadelphia City Commissioners*, 872 F. 3d 175 (3d Cir. 2017), where **ACRU, represented by PILF**, sought disclosure of list maintenance documents identifying the number of ineligible voters removed from Philadelphia's voter rolls due to their criminal conviction. *ACRU*, 872 F. 3d 175. The Court took issue with the ACRU's gross misrepresentation of the plain language of the NVRA. Like PILF's claims against VR Bennett, the ACRU put forth an incomplete and misleading characterization of the NVRA's requirements. The Third Circuit affirmed dismissal of ACRU's claims, concluding that a plain reading of the statute indicates election officials are permitted but not required to remove individuals ineligible to vote under state law due to criminal conviction. *ACRU*, 872 F. 3d at 183. The legislative history and text of the NVRA indicate this statute was intended "as a shield to protect the right to vote, not as a sword to pierce it." *Id.* at 182.

B. VR Bennett’s Motion to Dismiss should be granted because PILF’s mission is inconsistent with the purpose of the NVRA and not within the zone of interests protected by the statute.

PILF’s interests are directly at odds with the interests sought to be protected by the NVRA. PILF fails to satisfy the “person aggrieved” standard because PILF’s express goals and mission are not within the “zone of interests” protected by the NVRA. Doc. 1, ¶¶ 28,52-58. Stated another way, the NVRA does not regulate the category of information PILF seeks to make public— citizenship of voters is not a zone of interest regulated by the Act. *See FEC v. Akins*, 524 US 11 (1998). PILF’s plans to “educate the public regarding noncitizen registration and voting in Harris County” and “encourage remedial efforts” by meeting with election officials to “craft and propose remedial solutions” (Doc. 1, ¶¶54-58) do not align with the history, purpose or explicit language of the NVRA. PILF’s failure to describe any activities they have previously engaged in or attempted to engage in related to advancing the goals of the NVRA in Texas or Harris County further weakens their position. Doc. 1, ¶¶52-70. Unlike *Project Vote*, PILF cannot articulate a real threat to its mission or an irreparable injury related to the denial of its records request. Doc. 1-3.

Denial of access to any and all records a person or group requests by way of one statute or another is *not* all it takes to confer standing for an informational injury. PILF points out the informational injuries addressed in *Judicial Watch v. King*, *FEC v. Akins*, and *Center for Biological Diversity v. BP*, yet overlooks the facts distinguishing these cases: the requested records in each case plausibly fell within the purposes or “zone of interest” of the statute at issue. Doc. 16, pgs. 6-8. For example, the Center for Biological Diversity, an environmental organization with thousands of members living in the Gulf of Mexico region, had standing to bring a claim under the Emergency Planning and Community Right-to-Know Act for the

EPCRA's failure to submit written emergency notice reports required under the Act, after the Deepwater Horizon explosion. The Center provided affidavits from members detailing their concerns about breathing air or ingesting water exposed to the substances released in the explosion and asking for the reports, as clearly required under the "Right-to-Know" Act. *Center for Biological Diversity, Inc. v. BP America Production Co.*, 704 F.3d 413, 428-430 (5th Cir. 2013).

PILF's "informational injury" argument hinges on PILF's proposition that "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" means any category of voting related records PILF chooses to request. This theory is wrong, not supported by the case law and would lead to an absurd and damaging result. For example, in their internet "paper", PILF names people who were allegedly not citizens, allegedly registered to vote, and later asked their election administrators to remove them from the voter rolls. PILF names their county and provides the information as to whether that person seeks to become naturalized. PILF purposely exposes these people to harassment and who knows what else. Requiring public disclosure of the records PILF seeks would disserve the public interest by revealing private information about Harris County registrants' citizenship status. Under the doctrine of common-law privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668, 685 (Tex. 1976).

In *Public Citizen* the Supreme Court held that "refusal to permit appellants to scrutinize the ABA Committee's activities **to the extent FACA allows** constitutes a sufficiently distinct injury to provide standing to sue." (*emphasis added*) *Pub. Citizen v. U.S. Dept. of Justice*, 491

U.S. 440, 449. The phrase “to the extent FACA allows” indicates the Court’s expectation that a plaintiff’s claimed injury in this context be plausibly connected to the parameters of the Act. By comparison, PILF seeks to scrutinize records far beyond the extent the NVRA allows—the statute does not regulate list maintenance activities related to citizenship of voters so the type of records PILF seeks from VR Bennett are not subject to public disclosure.

C. VR Bennett’s Motion to Dismiss should be granted because frustration of an organization’s goals is not a sufficient injury to confer standing.

A serious flaw in PILF’s Complaint is PILF’s failure to adequately plead any injuries. PILF’s alleged injuries amount to nothing more than a frustration of its general interests in educating the public, encouraging remedial efforts, and crafting remedial solutions. Doc. 1, ¶¶54-58 and Doc. 3. Showing that an organization’s mission is in direct conflict with a defendant’s conduct is not sufficient to confer standing nor is “compiling statistical evidence, monitoring a State’s activities, and redirecting resources to litigation in response to actions or inactions of another party.” *See Fowler*, 178 F.3d at 358–59 and *Martinez-Rivera*, 166 F. Supp. 3d 779, 800. PILF claims its expenditure of money and time on this project is part of the injury but it’s clear from the pleadings and PILF’s website that PILF’s entire purpose is to engage in litigation and appear on Fox News. Doc. 1, ¶¶52-63. *See also* <https://publicinterestlegal.org/about-us/> and <https://publicinterestlegal.org/category/tv-and-radio-hits/>. Compare to *Fowler* and other NVRA cases where organizational standing was established because the organization devoted its operational resources counteracting one of the areas in which the appellees allegedly failed to implement the NVRA. *Id.* at 361. Under Fifth Circuit standards, PILF’s abstract plans to engage in research and monitoring activities in Harris County (Doc. 1, ¶¶28, 52-60) are insufficient grounds for Article III standing.

2. VR Bennett’s Motion to Dismiss should be granted because PILF’s legal conclusions do not state a valid claim for relief under the NVRA.

The National Voter Registration Act (“NVRA”) does not require public disclosure of the category of documents PILF seeks. 52 U.S.C. § 20507(i). The NVRA protects registered voters from improper removal from the rolls and places limited requirements on states to remove ineligible voters from the rolls. Once a person is officially registered to vote, a state may only remove them from the voting list if: the person dies, changes residence, asks to be removed from the list, or becomes ineligible under state law because of criminal conviction or mental incapacity. 52 U.S.C. § 20507. Subsection 20507(a)(4) does not create any obligation for a state to conduct a list maintenance program to remove the names of voters who may be ineligible due to lack of citizenship. Rather, Texas state law, including numerous election related statutes, governs the voter registrar’s activities on this issue— which is one reason why Harris County properly interpreted PILF’s request under the Texas Public Information Act.

It is clear that the records PILF seeks do not relate to the list maintenance programs implemented under Section 8 of the NVRA. PILF requests public disclosure of documents “regarding all registrants who were identified as potentially not satisfying the citizenship requirements for registration,” “documents and records of communication received by your office... requesting a removal or cancellation from the voter roll for any reason related to non-U.S. citizenship/ineligibility,” “documents and records of communication received by your office from jury selection officials...referencing individuals who claimed to be non-U.S. citizens when attempting to avoid serving a duty call,” and all communications to law enforcement agencies “regarding your list maintenance activities relating to #1 through 3 above.” Doc. 1, ¶¶32-33 and Doc. 1-1. Because the records sought by PILF are not part of Harris County’s list

maintenance obligations pursuant to the NVRA, they are not required to be publicly disclosed under the NVRA. VR Bennett's denial of PILF's request is not a violation of the NVRA and PILF is not a "party aggrieved by a violation" of the Act. 52 U.S.C. § 20510.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that this Court grant her Defendant's Motion to Dismiss, dismiss all claims against her, with prejudice, and award such other and further relief, at law or in equity, to which she may show herself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on June 1, 2018, in compliance with the Federal Rules of Civil Procedure on all parties of record:

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