United States District Court
Middle District of Pennsylvania
Harrisburg Division

The PUBLIC INTEREST LEGAL FOUNDATION *Plaintiff*, *v.* **ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and JONATHAN M. MARKS, in his official capacity as the Commissioner of the Bureau of Commissions, Elections, and Legislation** *Defendants*.	No. 1:18-cv-00463-CCC

Plaintiff Public Interest Legal Foundation's
Response in Opposition to Defendants' Motion to Dismiss

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Plaintiff Public Interest Legal Foundation (the "Foundation") hereby responds to the Motion to Dismiss filed by Defendants Torres and Marks (together, the "Secretary") (Dkts. 10 and 12).

SUMMARY OF THE ARGUMENT

This case is about transparency and the right to access information about government activities affecting the right to vote. The Foundation does not seek to "cancel voter registrations" as the Secretary claims (Dkt. 12 at 15.), or compel *any* action with respect to voter roll list maintenance. Rather, the Foundation seeks *only* access to information that Congress intended to be publicly available.

As a matter of law, the Foundation's right to inspect the requested information is clear. The National Voter Registration Act of 1993 ("NVRA") contains a broad and essential transparency mandate. Section 8 provides,

> Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, **all records** concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]

52 U.S.C. § 20507(i)(1) (emphasis added) (hereafter, the "Public Disclosure Provision").

Congress excepted only two types of records from this broad right of access, neither of which were requested by the Foundation: (1) "records relate[d] to a declination to register to vote" and (2) records related "to the identity of a voter

registration agency through which any particular voter is registered." *Id*. The Public Disclosure Provision contains no other limitations or exceptions.

Pursuant to the Public Disclosure Provision, the Foundation sought to inspect records in the Secretary's possession concerning activities designed to ensure the accuracy of the Commonwealth's voter registration lists. The Secretary concedes he has repeatedly denied the Foundation's requests. The Foundation brings this action under the NVRA's private-right-of-action provision, 52 U.S.C. § 20510(b), to compel the Secretary to allow inspection of the requested records.

The Secretary admits that noncitizens have registered and voted in Pennsylvania for decades. He further admits his office has engaged in activities to assess and remedy noncitizen participation in the Commonwealth's elections, including a review designed to identify noncitizens presently registered. Pursuant to the NVRA, the Foundation asked the Secretary to make records concerning his activities available for public inspection.

The Secretary concedes he denied the Foundation's request and is withholding the requested records. To justify his actions, the Secretary urges this Court ignore the plain language of the NVRA in order to shield the Secretary's list maintenance from public scrutiny. The Secretary's position is contrary to the NVRA's text, the intent of Congress, and every court decision on the issue.

The Secretary cites the irrelevant Driver's Privacy Protect Act. The Foundation does not seek driver's license records; it seeks voter list maintenance records. The NVRA was designed, in part, to foster voter registration through DMV offices. To interpret the NVRA to restrict access to any list maintenance record that can trace its heritage to the DMV would fully eradicate the public inspection rights enacted by Congress. Such an absurd result has been rejected by another federal court and should be rejected here.

The Foundation's standing is also clear. "[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). The Foundation suffered a clear informational injury as a direct result of the Secretary's violations of the Public Disclosure Provision because the Secretary denied the Foundation the records to which it is entitled under the law.

The Foundation has expended time and resources attempting to exercise its inspection rights under the NVRA—including two visits to the Secretary's office. On every occasion, the Secretary denied the Foundation access. The Secretary prevents the Foundation from carrying out its mission, an integral part of which involves disseminating information about compliance with statutes like the NVRA, as well as taking action—including legal action—to urge and compel election

officials to maintain accurate registration rolls. The Foundation is plainly "aggrieved" by the Secretary's actions. 52 U.S.C. § 20510(b)(1).

The Secretary's claim that he received insufficient notice prior to the commencement of this action is unfounded. The Foundation gave the Secretary and his counsel adequate written notice they would face litigation if they continued to deny the inspection request. Any suggestion that the Secretary lacked an opportunity to cure its violation is belied by the Secretary's own evidence, which unequivocally states, "[T]he Department [of State] does not agree that the NVRA entitles you to access the records you seek." (Dkt. 12 at 6; Dkt. 12-1.)

For these reasons, the Secretary's Motion to Dismiss should be denied.

ARGUMENT

I. Motion to Dismiss Standard

A complaint is sufficient if it pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). This Court is "required to accept all well-pleaded allegations in the complaint as true and to draw all reasonable inferences in favor of the non-moving party." *Rockefeller Ctr. Props. Sec. Litig. v. Rockefeller*, 311 F.3d 198, 215 (3d Cir. 2002).

II. Applicable Law

A. NVRA's Public Disclosure Provision

> Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, 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, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

52 U.S.C. § 20507(i)(1).

B. NVRA's Private Enforcement Provision

The NVRA authorizes private parties to enforce its provisions. 52 U.S.C. § 20510. To invoke this private right of action, an aggrieved may "provide written notice of the violation to the chief election official of the State involved." 52 U.S.C. § 20510(b)(1). The purpose of the notice provision is to provide the offending party an opportunity to cure the violation. *Condon v. Reno*, 913 F.Supp. 946, 960 (D.S.C. 1995). "If the violation is not corrected" within 20 or 90 days, "the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation." 52 U.S.C. § 20510(b)(2).

III. Four Sub-Classes of Records Sought

The Foundation sought inspection of four sub-classes of records, none of which have been provided. These requests—which are recited entirely in Exhibits H and I to the Complaint—included the following records:

1. Documents regarding all registrants who were cancelled for reasons of noncitizenship, including registration applications, voting history, and correspondence related to identification and removal. This request included all records and results (whether interim or final) related to the analysis conducted by the Secretary that matched registration records with PennDOT records to identify noncitizens presently registered to vote (the "Noncitizen Matching Analysis") (*see* Dkt. 1 at 63-66).

2. Documents regarding self-requests for cancellation for reason related to noncitizenship and related list maintenance actions taken.

3. Documents regarding individuals who claimed to be non-U.S. citizens when recusing themselves from jury duty and related list maintenance actions taken.

4. Communications regarding list maintenance activities related #1 through #3 above to law enforcement officials.

IV. The Secretary's Motion to Dismiss Should Be Denied.

A. The NVRA's Public Disclosure Provision is Not Limited to Records Concerning Death and Relocation.

Contrary to the Secretary's assertion, the Public Disclosure Provision is not a "limited opportunity to inspect records." (Dkt. 12 at 7.) Rather, it is a broad mandate, requiring public disclosure of "*all records*" concerning "programs and

activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1).

The Secretary conflates two completely different provisions of the NVRA when it argues that the Foundation's right to inspect is limited to records concerning registrants "who have died or changed residence," and therefore excludes records concerning registrants who potentially lack U.S. citizenship. (Dkt. 12 at 7-8.) The Secretary correctly notes that a *different* section of the NVRA—commonly known as the List Maintenance Provision—requires election officials to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters ... by reason of ... the death of the registrant ... or a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(A)-(B). Without support, the Secretary concludes that the Public Disclosure Provision is similarly limited to records concerning the removal of registrants by reason of death or change in residence. (Dkt. 12 at 10.) The Secretary's proffered interpretation of the NVRA is contrary to its text, the intent of Congress, and the relevant authority, and would produce an absurd result.

The starting point for any issue of statutory interpretation is of course the language of the statute itself. The text of the Public Disclosure Provision clearly states: "Each state… shall make available for public inspection ... *all records* concerning the implementation of *programs and activities* conducted for the

purpose of ensuring the *accuracy and currency* of official lists of eligible voters." 52 U.S.C. § 20507(i)(1) (emphasis added). On its face, the Public Disclosure Provision is expansive and does not contain the limitation urged by the Secretary.

Confronting a similar challenge, the Fourth Circuit Court of Appeals prudently observed that "the use of the word 'all' [as a modifier] suggests an expansive meaning because 'all' is a term of great breadth." *Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (citations omitted) (brackets in original). To the extent the Public Disclosure Provision has limits, they are confined to the NVRA, which "identifies the information which Congress specifically wished to keep confidential." *Project Vote/Voting for Am., Inc. v. Long*, 752 F.Supp.2d 697, 710 (E.D. Va. 2010*), affirmed Long,* 682 F.3d 331 (4th Cir. 2012). Such confidential information is limited to "records relate[d] to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered." 52 U.S.C. § 20507(i)(1). The NVRA contains no other exceptions. *Long,* 682 F.3d at 336.

The *Project Vote* court further undermined the Secretary's position, stating, "[R]ecords which relate to carrying out voter registration procedures are subject to the Public Disclosure Provision's requirements." *Long*, 752 F.Supp.2d at 707. "[V]oter registration procedures are the procedures by which [an election official] evaluates whether persons belong on the lists of eligible voters, thus ensuring the

accuracy of those lists." *Id*. The Public Disclosure Provision broadly commands election officials to make records concerning determinations of eligibility open to the public.

Other principles of statutory construction confirm the *Project Vote* court's conclusion. Despite the Secretary attempting to frame a limitation, neither the word "death" nor "change in residency" appears in the Public Disclosure Provision. "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Had Congress intended to limit the Public Disclosure Provision as the Secretary suggests, it would have done so. However, "Congress did not write the statute that way." *Id*. This Court should reject the Secretary's attempt to rewrite the Public Disclosure Provision in a way that Congress did not intend.

The Third Circuit's decision in *American Civil Rights Union v. Philadelphia City Comm'rs*, 872 F.3d 175 (3d Cir. 2017) ("*ACRU*") addressed the discrete question of "whether the NVRA requires the Philadelphia City Commissioners to purge the voter rolls of individuals who are currently incarcerated for a felony conviction." *Id*. at 181. The case addressed NVRA's List Maintenance Provision, not NVRA's Public Disclosure Provision at issue here. Relying on state eligibility

law, the Third Circuit answered that question in the negative and its reason for doing so actually compels this Court to reject the Secretary's argument:

> By its terms, the mandatory language in [the List Maintenance Provision] only applies to registrants who have died or moved away. Removal due to criminal conviction is not included on this list of mandatory purging, and *we will not amend the statute by reading that requirement into its text when Congress obviously chose not to do so*.

Id. at 182-83. Congress "chose not to" limit the Public Disclosure Provision to activities concerning registrants who have died or moved away. Instead, Congress chose to require public disclosure of "all records" concerning "programs and activities conducted *for the purpose of ensuring the accuracy and currency of official lists of eligible voters*." 52 U.S.C. § 20507(i)(1) (emphasis added). Limiting the Public Disclosure Provision to records concerning death and relocation would contravene *ACRU* because it would require this Court to "amend the statute by reading that requirement into its text when Congress obviously chose not to do so." *ACRU*, 872 F.3d at 182-83.

The Secretary does not contest that he has engaged in "programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," 52 U.S.C. § 20507(i)(1), with respect to registrants who might be ineligible for reasons of noncitizenship. The Secretary testified publicly that his office has already identified and analyzed over 1,100 registrants who self-reported their status as noncitizens to request removal from the

registration rolls. (Dkt. 1 at 15, ¶ 50.) The Foundation, relying on the plain language of the Public Disclosure Provision, requested these very records concerning list maintenance. Furthermore, the Secretary has conceded that his office is conducting list maintenance regarding noncitizens presently registered to vote: "The Department's ongoing effort includes expert analysis of the State Uniform Registry of Electors (SURE) database and PennDOT's driver license database." (Dkt. 1 at 16, ¶ 57.) As recently as April 5, 2018, a spokesman for Pennsylvania Governor Tom Wolf told the media that "the Department of State has hired an 'expert who is prudently reviewing' voter registrations with a goal of fixing '*inaccuracies* without disenfranchising legitimate voters.'"[1] (Emphasis added). The Secretary has thus conceded that his office has engaged in "activities" concerning the "accuracy" of the registration lists. 52 U.S.C. § 20507(i)(1). These records are subject to the Public Disclosure Provision. *See Long*, 752 F.Supp.2d at 707 (Records concerning an "evaluat[ion] [of] whether persons belong on the lists of eligible voters" are subject to the Public Disclosure Provision). Under any interpretation of the NVRA, the Secretary cannot withhold the records.

Lastly, the Secretary's interpretation produces an absurd result in that it would permit election officials to operate in secret in an area of constitutional

[1] http://www.philly.com/philly/opinion/editorials/ineligible-voters-immigrants-pa-motor-votor-20180405.html.

importance. Congress made *all* list maintenance records subject to public inspection precisely so that the general public can hold election officials accountable for their actions. See *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 364 (5th Cir. 1999) ("*ACORN*") (finding that the inclusion of a private right of action in the NVRA shows Congress's intent to "encourage enforcement by so-called 'private attorneys general'" (quoting *Bennett v. Spear*, 520 U.S. 154, 157 (1997)). The Secretary dodges accountability when he shields these records from public view.

The public enjoys a statutory right to learn of the Secretary's list maintenance activities. Records related to the Secretary's assessment of eligibility for reasons of noncitizenship squarely fall within the Secretary's obligation under the Public Disclosure Provision just as the original voter registration forms were found to be in *Long*.

B. The Driver's Privacy Protection Act Has No Relevancy to the Foundation's Claims.

The Secretary erroneously claims that the Foundation's request seeks "driver's license records" that are confidential under the Driver's Privacy Protection Act of 1994 ("DPPA"). (Dkt. 12 at 13.) The DPPA has nothing to do with registration list maintenance or this case. Indeed, the only known case to address this question head-on has rejected the Secretary's argument.

The Foundation's request sought four sub-classes of records, including voter registration forms, cancellation records, and communications with registrants and jury officials. The Secretary inappropriately lumps all of the Foundation's discrete requests into one motor vehicle category—as if the Foundation had asked for records only from the Pennsylvania Department of Transportation ("PennDOT"). The Foundation made no such request, and the Secretary cannot now rely on a statute that has nothing to do with the four sub-classes of records sought to avoid disclosure. Regardless, even those requested records that might trace their genesis to PennDOT are not subject to the DPPA, and even if they were, the DPPA authorizes their disclosure.

Nowhere in its requests does the Foundation ask to inspect a motor vehicle record covered by the DPPA. The Foundation requested records related to noncitizen registrants identified, in part, through information *obtained from PennDOT*. The Foundation seeks list maintenance records—which are public records—not motor vehicle records. Indeed, the Foundation alleges—and the Secretary does not deny—that the Secretary has been actively matching voter registration records with PennDOT records to identify noncitizens presently registered to vote. The DPPA protects motor vehicle records, not voter registration records.

The Secretary's argument was made and rejected in *Public Interest Legal Foundation v. Reed*, No. 16-cv-01375 (E.D. Va., filed Oct. 31, 2016) (Exhibit A). There, the Foundation made an NVRA request for records related to the cancellation of noncitizen registrants, including a cancellation list and copies of each cancelled registrant's registration application. *Id*., Complaint (Dkt. 1). The defendant, a local voter registrar, argued that the DPPA prohibited the disclosure of the requested list maintenance records because they contained information that was derived from records maintained by the department of motor vehicles. In a two-page order, the court rejected this argument:

> Defendant has moved to dismiss the Complaint on the grounds that the privacy provision of the Driver Privacy Protection Act … overrides the public disclosure provision of the NVRA under the circumstances of this case. The Court finds that the DPPA does not apply to the disclosure of the voter information requested by Plaintiff. Because Plaintiff has stated a plausible claim for declaratory and injunctive relief, it is hereby ORDERED that Defendant Susan Reed's Motion to Dismiss is DENIED.

Exhibit B at 1-2.

The decision in *Reed* is correct for several reasons. First, the requested records are *not motor vehicle records*; they are registration list maintenance records. Whatever their original purpose, records in the possession of the Secretary that are used "for the purpose of ensuring the accuracy and currency of official lists of eligible voters" are list maintenance records, which Congress intended to be public. 52 U.S.C. § 20507(i)(1).

The NVRA is known as "Motor Voter" because one of its primary purposes was to provide for voter registration at motor vehicle agencies. In fact, the NVRA requires that an application for a driver's license must "serve as an application for voter registration." 52 U.S.C. § 20504(a)(1). If the Secretary is actually arguing that any list maintenance record which can trace its heritage to any nexus with a state motor vehicle agency, it has reduced the point to the absurd. Accepting the Secretary's argument would prohibit the release of *any* information contained in a voter registration application submitted through a PennDOT office, including *the name* of any registered voter. It would thus fully eradicate the public inspection rights enacted by the NVRA, and the public nature of voter registration lists.

Second, the DPPA does not limit state election officials. Instead, the DPPA limits disclosure by a "State department of motor vehicles, and any officer, employee, or contractor thereof." 18 U.S.C. § 2721(a). The Secretary is not any of these things and therefore the express terms of the DPPA do not apply to him. *Davis v. Freedom of Info. Comm'n*, 47 Conn. Supp. 309, 315-16, 790 A.2d 1188, 1192 (2001) ("Neither the FDPPA nor § 14-10(d) ... apply by their express terms to the office of the tax assessor or to the motor vehicle grand list books. They apply only to the commissioner of motor vehicles and motor vehicle records.").

Third, as recognized by the Connecticut Supreme Court, the DPPA expressly permits the disclosure of DMV information "[f]or use by any

government agency ... in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1). In *Davis v. Freedom of Info. Comm'n*, the court relied on this permissible-use exception to hold that the DPPA does not apply to other government agencies that disclose personal information received from DMV in the course of their normal government functions. 259 Conn. 45, 55 (2001), *affirming Davis*, 47 Conn. Supp. at 319. The Pennsylvania Department of State is a government agency. Information disclosed to the Secretary can be used to carry out its functions, including its obligations under the NVRA and other federal and state laws.

This permissible-use exception is not limited to government agencies, but extends to "any private person or entity acting on behalf of" a government agency. 18 U.S.C. § 2721(b)(1). The Foundation is one such entity. Congress has cast NVRA plaintiffs in the role of "private attorneys general" through the NVRA's private-right-of-action provision. *ACORN*, 178 F.3d at 364. DPPA's permissible-use exception should thus apply with equal force to private entities pursuing a private right of action under the NVRA.

Fourth, even if the DPPA was relevant to the Foundation's requests, it would make no difference because citizenship status is not information protected by the

DPPA. DPPA explicitly lists the type of personal information protected by the Act from disclosure:

> "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information….

18 U.S.C. § 2725(3). Citizenship status is not among the types of information that DPPA protects. Therefore, even if the DPPA was relevant to list maintenance records in the possession of the Secretary—which it is not—it would not prevent disclosure of a registrant's citizenship status.

Lastly, even if pure motor vehicle records provided to state election officials may not be disclosed, records of derivative list maintenance activities certainly must be disclosed, particularly those related to the identification or cancellation of ineligible registrants. The Foundation sought four sub-classes of records, many of which go well beyond the discrete "INS Indicator" of which the Secretary primarily complains, including records related to the results (full or interim) of the Noncitizen Matching Analysis, records that would be created and used exclusively by the Secretary. The Secretary cannot hide behind one discrete piece of data to withhold the entirety of the requested records.

The NVRA became law in 1993. The DPPA became law in 1994. Courts "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

To accept the Secretary's argument is to find that Congress intended to obliterate the NVRA's Public Disclosure Provision just one year after it created it. Such a result is absurd and should be avoided.

Accepting the Secretary's extreme position would fundamentally reorder the political landscape of the Commonwealth and deny voter information to Legislators and other entities who have relied on it for decades or more. It is *reductio ad absurdum* if a registration record could never be disclosed to anyone if it contained the name of someone that once provided information to a motor vehicle agency pursuant to NVRA.[2]

C. The Foundation Has Standing.

1. The Foundation Has Suffered an Injury in Fact Because It Has Been Denied Access to Publicly Available Records.

Supreme Court precedent forecloses the Secretary's argument that the Foundation does not have standing. To establish standing in public-records cases, the plaintiff "need show [no] more than that they sought and were denied specific agency records." *Public Citizen v. United States Department of Justice*, 491 U.S.

[2] On preemption grounds, this Court can easily dispose of the Secretary's reliance on state statutes and case law that purport to make driving records confidential. (Dkt. 12 at 13-14.) "[R]egulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1879). The NVRA is no different. Where state law conflicts with the NVRA, the state law must "give way." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013).

440, 449 (1989). In *Public Citizen*, the plaintiff sought records pursuant to the Federal Advisory Committee Act ("FACA"). The Supreme Court held that FACA created a public right to information by requiring advisory committees to the executive branch of the federal government to make available to the public its minutes and records, with some exceptions. 491 U.S. at 446-47. The defendant asserted that the plaintiff did not "allege[] [an] injury sufficiently concrete and specific to confer standing." *Id*. at 448. The Supreme Court "reject[ed] these arguments." *Id*. at 449.

> As when an agency denies requests for information under the Freedom of Information Act, 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. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.

Id.

The Court reaffirmed the holding of *Public Citizen* in *FEC v. Akins*, 524 U.S. 11 (1998), explaining, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id*. at 21.

Relying on *Public Citizen* and *Akins*, the *Project Vote* court rejected a similar attack on an NVRA-plaintiff's standing, explaining that "[f]or a plaintiff to sufficiently allege an informational injury, it must first allege that the statute

confers upon it an individual right to information, and then that the defendant caused a concrete injury to the plaintiff in violation of that right." *Long*, 752 F.Supp.2d at 702. As the court recognized, "the NVRA provides a public right to information." *Id*. at 703. Where there is "no dispute that the plaintiff has been unable to obtain the [r]equested [r]ecords," "the plaintiff's alleged informational injury is sufficient to survive a motion to dismiss for lack of standing." *Id*. at 703-04. Other courts have ruled similarly. *Judicial Watch, Inc. v. King*, 993 F.Supp.2d 919, 923 (S.D. Ind. 2012) ("As noted above, the Plaintiffs assert two distinct violations of the NVRA. With regard to the Records Claim, the Defendants do not—and cannot—assert that the Plaintiffs lack standing." (citing *Akins*, 524 U.S. at 24-25)).

Here, the Secretary acknowledged denying the Foundation's records request. The NVRA specifically provides a private right of action to any person who is aggrieved by a violation of the Public Disclosure Provision. *See ACORN*, 178 F.3d at 365 ("Congress intended the NVRA's private-right-of-action provision to eliminate prudential limitations on standing.") Under the aforementioned Supreme Court authority, the Foundation has standing to pursue its claims.

Although the Foundation "need show [no] more than that they sought and were denied specific agency records," *Public Citizen*, 491 U.S. at 449, the Foundation has indeed shown more. The Foundation has incurred significant costs

attempting to access the requested records, including two visits to the Secretary's office. (Dkt. 1 at 71, 83 and 111.) The Secretary's denial has harmed the Foundation's organizational mission because the Foundation cannot assess, monitor, and attempt to remedy Secretary's list maintenance actions. (Dkt. 1 at 104-09.) These are injuries traceable to the Secretary's refusal to provide access to the requested records, and sufficient to established standing.

2. The Secretary Was Provided Sufficient Notice of the Violation and an Opportunity to Cure.

The Secretary claims that the Foundation does not allege that it provided notice to the Secretary of his violations of the NVRA. (Dkt. 12 at 17-18.) To the contrary, the Complaint specifically alleges that the Foundation complied with the NVRA's notice procedures. (Dkt. 1 at ¶¶ 97-98.)

By December 5, 2017, the Secretary had referred the Foundation's records request to his lawyers, who communicated with the Foundation on behalf of the Secretary. (Dkt. 1 at ¶¶ 81, 87; Exhibit B.) On December 20, 2017, Deputy Chief Counsel, Kathleen Kotula, emailed the Foundation a letter from Defendant Marks denying the Foundation's request. (Dkt. 12-1.) Timothy Gates, Chief Counsel for the Department of State, was copied on this email. (*See* Exhibit B.) Mr. Gates and Ms. Kotula are legal counsel for the Secretary. Speaking on behalf of the Secretary, Defendant Marks's letter stated, "[T]he Department does not agree that the NVRA entitles you to access the records you seek." (Dkt. 12-1.)

On December 20, 2017, the Foundation responded to the Secretary's counsel (and Defendant Marks), giving the Secretary notice that he was now in violation of the NVRA's Public Disclosure Provision. (Dkt. 1-10.) The Foundation's notice was also emailed to three separate Department of State email addresses—the contacts for (1) the Bureau of Commissions, Elections and Legislation (RA-BCEL@pa.gov), (2) the Statewide Uniform Registry of Elections (Ra-st-sure@pa.gov), and (3) the Department's Voter Registration division (ST-VOTERREG@pa.gov), all of which the Secretary oversees. (Dkt. 1-10; Exhibit B.) The evidence belies any suggestion that the Secretary did not receive notice.

The NVRA's notice provision is meant to provide an opportunity to cure the violation. *See, e.g.*, *Condon*, 913 F.Supp. at 960. The evidence contradicts the Secretary's claim of lack of opportunity to cure his violation. The statements transmitted through the Secretary's counsel were unequivocal: "[T]he Department does not agree that the NVRA entitles you to access the records you seek." (Dkt. 12-1.) The Secretary concedes he did not cure and does not intend to cure his violation of the NVRA. The Foundation provided the Secretary and his counsel sufficient notice under the NVRA. This Court should reject the Secretary's insincere attempt to escape jurisdiction.

Dated: April 18, 2018

Respectfully submitted,

For the Plaintiff Public Interest Legal Foundation:

Linda A. Kerns, Esquire
LAW OFFICES OF LINDA A. KERNS, LLC
1420 Locust Street – Suite 200
Philadelphia, PA 19102
PA Atty ID 84495
Tel: (215) 731-1400
Fax: (215) 701-4154
linda@lindakernslaw.com

/s/ Noel H. Johnson
J. Christian Adams (Va. Bar # 42543)*
Noel H. Johnson (Wis. Bar # 1068004)**
Attorneys for Public Interest Legal Foundation, Inc.
32 E. Washington St.
Ste. 1675
Indianapolis, IN 46204
Tel: (317) 203-5599
Fax: (888) 815-5641
adams@PublicInterestLegal.org
njohnson@PublicInterestLegal.org
** Pro Hac Vice application to be filed*
***Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(3)

I hereby certify that the foregoing memorandum is in compliance with Local Rule 7.8(b)(2). The brief contains 4,997 words as computed by the word-count feature of Microsoft Office Word.

/s/ Noel H. Johnson
Noel H. Johnson
njohnson@publicinterestlegal.org
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Noel H. Johnson
Noel H. Johnson
njohnson@publicinterestlegal.org
Counsel for Plaintiff