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

PUBLIC INTEREST LEGAL FOUNDATION, *Plaintiff*, v. ANN HARRIS BENNETT, in her official capacity as voter registrar for Harris County, Texas, *Defendant*.	)	Civil Action No. 4:18-cv-00981

PUBLIC INTEREST LEGAL FOUNDATION'S RESPONSE IN OPPOSITION TO DEFENDANT ANN HARRIS BENNETT'S OBJECTIONS TO THE MEMORANDUM AND RECOMMENDATION DENYING DEFENDANT'S MOTION TO DISMISS (DOC. 45)

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Pursuant to Federal Rule of Civil Procedure 72(b)(2) and this Court's Order (Doc. 46), Plaintiff Public Interest Legal Foundation (the "Foundation") hereby responds to Defendant Ann Harris Bennett's Objections (Doc. 45) to the Memorandum and Recommendation of the Honorable United States Judge Frances H. Stacy (Doc. 42). The Foundation respectfully requests that this Court adopt Judge Stacy's recommendation denying the motion to dismiss (Doc. 23).

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

This is a case for declaratory and injunctive relief under the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. §§ 20501-20511. The governing law requires election officials to "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) (the "Public Disclosure Provision").

On June 13, 2018, the Foundation filed its First Amended Complaint (Doc. 21), in which the Foundation alleged that Defendant Ann Harris Bennett, Voter Registrar for Harris County, Texas ("VR Bennett"), is in violation of the Public Disclosure Provision due to her refusal to permit access to records that federal law entitles the Foundation to inspect and photocopy. On June 27, 2018, VR Bennett moved to dismiss the First Amended Complaint (Doc. 23.)

On February 6, 2019, Judge Stacy recommended that VR Bennett's Motion to Dismiss be denied, finding that the Foundation has standing and has alleged a plausible claim for relief under the NVRA. (Doc. 42, hereafter, the "Recommendation.") On February 20, 2019, VR Bennett filed Objections to the Recommendation. (Doc. 45.)

On February 22, 2019, this Court ordered the Foundation to respond to VR Bennett's Objections, specifically, VR Bennett's arguments regarding *Am. Civil Rights Union v. Martinez-Rivera*, 166 F.Supp.3d 779 (W.D. Tex. 2015). (Doc. 46.) The Foundation responds as follows.

STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT

The Court must decide whether Judge Stacy correctly held (1) that the Foundation has sufficiently alleged an informational injury, upon which the Foundation has standing, and (2) that the Foundation plausibly alleged a claim under the NVRA's Public Disclosure Provision (Doc. 42 at 7.)

APPLICABLE LAW

I. 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).

II. 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 person may "provide written notice of the violation to the chief election official of the State involved." 52 U.S.C. § 20510(b)(1). "If the violation is not corrected" within 20 or 90 days, depending on the amount of time until the next federal election, "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).

SUMMARY OF THE ARGUMENT

The Court ordered the Foundation to address "how its First Amended Complaint satisfies the Court's concern over the factors set out in *Martinez-Rivera* and/or why it need not satisfy those factors because its First Amended Complaint survives a traditional standing analysis

without complying."[1] (Doc. 46.) In response, the Foundation states that the standing analysis in *Martinez-Rivera* is irrelevant to the Foundation's claims because the Supreme Court has already held that "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). Plaintiffs in such cases "need show [no] more than that they sought and were denied specific agency records." *Public Citizen v. United States DOJ*, 491 U.S. 440, 449 (1989).

Judge Harmon's earlier ruling (Doc. 20) dismissing the Complaint for lack of standing erroneously applied *ACRU v. Martinez-Rivera's* standing analysis for a violation of the NVRA's list maintenance obligations—a claim the Foundation has *never* pursued—rather than the analysis for the "public records" violation the Foundation did pursue.

Magistrate Judge Stacy, however, correctly cited and relied upon the relevant and binding Supreme Court precedent, *Public Citizen v. United States DOJ* and its progeny, when she refused to apply *Martinez-Rivera* and denied VR Bennett's motion. For the reasons that follow, this Court should adopt the Judge Stacy's recommendation denying the motion.

ARGUMENT

I. Judge Stacy Correctly Determined that the Foundation Has Standing under *Public Citizen v. Department of Justice* and Its Progeny.

A. The Foundation Has Alleged a Violation of the Public Records Disclosure Mandate of the NVRA and Compliance with the NVRA's Private-Right-of-Action Provision.

VR Bennett repeats her unfounded claim that the Foundation "has not provided proof of the statutory notice letter to which it vaguely makes reference in the Amended Complaint." (Doc. 45 at 3 n.2.) However, the Foundation's allegations are not vague, but are unequivocally stated:

[1] The Foundation has previously addressed all of VR Bennett's arguments in its motion to dismiss briefing (Docs. 16, 26) and in support of its motion for summary judgment (Doc. 34).

> As required by the NVRA's private-right-of-action provision, 52 U.S.C. § 20510(b)(1), the Foundation provided written notice to Texas' chief election officer—the Secretary of State of Texas—of Defendant Bennett's violation of the NVRA's Public Disclosure Provision. Exhibit F at 2.

(Doc. 21 at ¶ 24.) Exhibit F—which was filed with the Original *and* Amended Complaint—is the statutory notice letter to which the Foundation refers. As alleged, that letter was sent to VR Bennett, the Attorney General of Texas, and the Texas Secretary of State. (Doc. 21-6 at 2.) Therefore, the pre-litigation notice required by the NVRA was properly given. *See Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, No. 5:16-CV-683-BR, 2017 U.S. Dist. LEXIS 23565, at *10 n.4 (E.D.N.C. Feb. 21, 2017).

The Foundation's statutory notice letter was unequivocal also in its purpose and intent:

> [T]his letter serves as statutory notice to Harris County, required by 52 U.S.C. § 20510(b) prior to the commencement of any lawsuit in order to enforce provisions of Section 8 of the NVRA, 52 U.S.C. § 20507(i), for failure to grant inspection of the requested records.
>
> **The Harris County Voter Registrar is hereby notified that it now faces federal litigation should it continue to deny access to requested records in its possession.**

(Doc. 21-6 at 2 (emphasis in original).)

VR Bennett's NVRA violation occurred on January 4, 2018 (Doc. 21 at ¶ 20; Doc. 42 at 6), within 120 days of Texas's March 6, 2018 federal primary election.[2] VR Bennett had 20 days to correct the violation, 52 U.S.C. 20510(b)(2), but failed to do so. Instead, VR Bennett filed a petition in state court, seeking to withhold the records requested by the Foundation. (Doc. 21 at ¶ 27.) On March 29, 2018—50 days after the 20-day curative period had lapsed—the Foundation filed this action, as permitted by the NVRA. 52 U.S.C. § 20510(b)(2).

[2] https://www.sos.state.tx.us/elections/voter/2018-important-election-dates.shtml (last accessed March 4, 2019).

Judge Stacy correctly acknowledged the sufficiency of the Foundation's allegations with respect to the request and notice. (Doc. 42 at 6-7.) VR Bennett's complaints should be overruled.

B. The Foundation Has Alleged An Informational Injury-in-Fact.

i. *Martinez-Rivera* Does Not Govern the Standing Inquiry for Public Records Claims under the NVRA.

Judge Stacy prudently observed that Section 20507 of the NVRA includes, in part, two distinct provisions—the List Maintenance Provision and the Public Disclosure Provision. (Doc. 42 at 4-5.) The List Maintenance Provision governs the registration and cancellation of voters, *e.g.*, 52 U.S.C. §§ 20507(b); 20507(a)(4)(A)-(B), or what is commonly referred to as list maintenance activity. The Public Disclosure Provision, on the other hand, acts like a freedom of information law that provides for public disclosure and photocopying of records concerning those list maintenance activities. 52 U.S.C. § 20507(i)(1).

Judge Stacy also prudently observed that "the Court in *Martinez-Rivera* only considered whether there was standing under the list maintenance provisions of § 20507(b), the public disclosure claims under § 20507(i) having been already dismissed by the parties." (Doc. 42 at 6 n.1 (emphasis in original).) Indeed, the *Martinez-Rivera* Court explicitly noted that no claim under the NVRA's Public Disclosure Provision had been presented to it for consideration. 166 F.Supp.3d at 785 n.2. The court's opinion is thus limited to consideration of the plaintiff's "alleg[ation] that the Defendant violated the National Voter Registration Act … by failing to make a reasonable effort to *conduct voter list maintenance programs*." *Id*. at 784-85 (emphasis added). Accordingly, *Martinez-Rivera* articulates no more than the type of allegations sufficient to plead an injury under the NVRA's List Maintenance Provision.

As Judge Stacy recognized, the Foundation's "First Amended Verified Complaint makes it clear that it is not bringing a claim under the list maintenance provisions of § 20507(b)." (Doc.

42 at 6 n.1.) The "Amended Complaint does not mention subsection (b), nor does it seek any relief pursuant to subsection (b). Instead, PILF's declaratory and injunctive relief claim(s) in this case are based entirely on subsection (i) – the public disclosure provision –and Defendant's alleged failure and refusal to comply therewith." (Doc. 42 at 5.) Therefore, as the Recommendation explains, the Foundation's claim is not governed by *Martinez-Rivera*, but is governed by the standard of public records cases, including *FEC v. Akins*, which holds that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." 524 U.S. 11, 21 (1998).

To the Foundation's knowledge, every court to confront the standing inquiry under the NVRA's Public Records Provision has applied the principles of *Akins*. *See Project Vote/Voting for Am., Inc. v. Long*, 752 F.Supp.2d 697, 703-04 (E.D. Va. 2010); *Judicial Watch, Inc. v. King*, 993 F.Supp.2d 919, 923 (S.D. Ind. 2012); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 708 n.57 (S.D. Miss. 2014). VR Bennett does not identify a single instance to the contrary. Judge Stacy appropriately distinguished between the cases dealing with public records claims and the list maintenance claim in *Martinez-Rivera* (Doc. 42 at 5-6, 6 n.1), correctly concluding that the former control the standing inquiry in this action.

ii. The Foundation Has Sufficiently Alleged an Informational Injury Caused by Denial to Information that Must be Publicly Disclosed Pursuant to a Statute.

Judge Stacy correctly held that "[b]ecause this case deals with the public disclosure provisions of the NVRA, and nothing else, PILF's standing is based on whether it made a proper request for information." (Doc. 42 at 5.) Judge Stacy relies on a string of relevant and controlling authorities, including the Supreme Court's decisions in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) and *FEC v. Akins*, 524 U.S. 11 (1998), which recognize that the injury pleaded by the Foundation—an informational injury—is sufficiently concrete and particularized

to support standing. Because "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute," *Akins*, 524 U.S. at 21, plaintiffs "need show [no] more than that they sought and were denied specific agency records." *Public Citizen*, 491 U.S. at 449. *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549-50 (2016). As Judge Stacy explained, the Foundation alleges that it sought and was denied specific list maintenance records and therefore the "allegations are sufficient to establish an informational injury, upon which PILF has standing in this case." (Doc. 42 at 5-6.)

VR Bennett mischaracterizes the Foundation's asserted injury as a "bare procedural violation" of the Public Disclosure Provision unaccompanied by any additional injury. (Doc. 45 at 5.) In VR Bennett's view, the Foundation must plead an injury *separate and apart* from the informational injury caused by the denial of the requested records. (*Id*.) This, however, is not the law, as the Supreme Court recently confirmed:

> Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified. See *Federal Election Comm'n v. Akins*, 524 U. S. 11, 20-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (confirming that a group of voters' "inability to obtain information" that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

Spokeo, 136 S. Ct. at 1549-50.

VR Bennett's erroneous view that a plaintiff must allege a *second injury* was also expressly rejected in *Project Vote*. (Doc. 42 at 5-6.) In *Project Vote*, a non-profit organization asked the General Registrar for Norfolk, Virginia to make certain voter registration records available for public inspection pursuant to the NVRA's Public Disclosure Provision. 752

F.Supp.2d at 698-99. Like VR Bennett, the General Registrar denied access to the requested records. *Id*. at 699-700. Accordingly, the plaintiff filed an action alleging that the defendants' refusal to permit inspection violated the NVRA. *Id*. at 700. Defendants moved to dismiss, arguing, in part, that the plaintiff "ha[d] not suffered an 'injury in fact.'" *Id*.

The court recognized the alleged harm was limited to the "direct informational injury" caused by "defendants' refusal to allow access to the Requested Records, to which [the plaintiff] was purportedly entitled under the NVRA." *Id*. at 702 (emphasis in original). The court rejected the defendants' attempt to characterize plaintiff's injury as one stemming from the defendants' list maintenance activities. *Id*. Rather, the court reiterated, "[t]he focus of the plaintiff's claim is the denial of access to the Requested Records by the defendants." *Id*. at 702 n.6. The plaintiff, like the Foundation, did not allege any harm separate and apart from the informational injury caused by a denial of inspection rights. None was alleged because none was necessary.

Most significantly, the court emphasized that the plaintiff's reason for wanting to inspect the requested records was irrelevant to the injury-in-fact inquiry: "In any event, the plaintiff's particular motivation in seeking the Requested Records *is irrelevant* to whether it has suffered an injury in fact for standing purposes." *Id*. at 702 n.6 (citing *EPA v. Mink*, 410 U.S. 73, 86 (1973) (need for information sought under FOIA is irrelevant for standing purposes) (emphasis added)).

The court described what constitutes a properly pleaded informational injury:

> For 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.

Id. at 702. The court concluded that "the plaintiff's alleged informational injury is sufficient to survive a motion to dismiss for lack of standing." *Id*. at 703-04.

> In this case at bar, as in *Public Citizen* and *Akins*, the NVRA provides a public right to information. There is no dispute that the plaintiff has been unable to obtain the

> Requested Records, which, *in its view of the law*, the NVRA requires the defendants to make publicly available. Moreover, the NVRA specifically provides a private right of action to any person who is aggrieved by a violation of the Public Disclosure Provision. *See* 42 U.S.C. § 1973gg-9(b)(1). Therefore, the plaintiff's alleged informational injury is sufficient to survive a motion to dismiss for lack of standing.

Id. (emphasis added.)

Indeed, not only should VR Bennett's Objections be overruled, the Foundation's right to the records is not a close call. The plaintiff in *Project Vote* won summary judgment and the right to obtain the requested records. *Project Vote/Voting for Am., Inc. v. Long*, 813 F.Supp.2d 738 (E.D. Va. 2011). The Fourth Circuit affirmed the grant of summary judgment for the plaintiff Project Vote. *Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012).

As in *Project Vote*, the Foundation alleges—and VR Bennett does not dispute—that "the plaintiff has been unable to obtain the Requested Records," *Project Vote*, 752 F.2d at 703. (Doc. 21, ¶¶ 10-29.) The Foundation further alleges that it complied with the prerequisites necessary to invoke the NVRA's private-right-of-action provision, 52 U.S.C. § 20510(b). (Doc. 21 ¶¶ 23-24, 32.) Accordingly, the Foundation's "alleged informational injury is sufficient to survive a motion to dismiss for lack of standing." *Project Vote*, 752 F.2d at 704; *see also Judicial Watch*, 993 F.Supp.2d at 92; *True the Vote*, 43 F.Supp.3d at 708 n.57.

II. The Foundation Has Alleged a Plausible Claim for Relief under the NVRA.

Congress made it plain and unambiguous that the NVRA permits inspection of all records related to any assessment of eligibility for registration and voting. Records related to eligibility concern "whether persons belong on the lists of eligible voters, thus ensuring the accuracy of those lists." *Project Vote*, 752 F.Supp.2d at 703. Records related to such assessments are, quintessentially, those concerning "programs and activities" designed to "ensur[e] the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1). The requested records

fall squarely within the NVRA's broad disclosure command because they concern determinations based on a central eligibility criteria—citizenship.

To adopt VR Bennett's narrow interpretation of the Public Disclosure Provision would allow election officials to conceal records related to their decision to wipe the names of eligible voters from the rolls and declare them ineligible, unless the decision to cancel the registration related to death or residency. (Doc. 45 at 16.) All of the other touchstones of eligibility would be hidden from disclosure under VR Bennett's version of the NVRA. This would include cancellations for purported felon status, age, registration duplication, mental incapacitation, parole status, pardon status, supervised release, validity of registration address, or all of the other facts affecting eligibility under Texas Election Code §§ 11.001, 11.002, 11.004 and 11.005. Congress required transparency as a matter of federal law. Records related to why someone is added to the list of eligible voters or why someone is stripped of their right to vote are subject to public inspection and duplication, and VR Bennett's position is contrary to explicit federal law.

The Foundation alleges that that the requested records fall within the scope of the NVRA's Public Disclosure Provision and that VR Bennett has refused to make them available for inspection and photocopying as required by law. (*E.g.*, Doc. 21 ¶¶ 28, 30.) As Judge Stacy held, the Foundation "has alleged a plausible claim under the public disclosure provisions of § 20507(i)." (Doc. 42 at 7 (citing *Judicial Watch, Inc. v. Lamone*, Civil Action No. ELH-17-2006, 2018 WL 2564 720 (D. Md. June 4, 2018) and *Project Vote*, 752 F.Supp.2d at 702).)

CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that this Court overrule Defendant's Objections (Doc. 45) and adopt the Recommendation (Doc. 42) denying VR Bennett's Motion to Dismiss (Doc. 23).

Dated: March 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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