

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

The PUBLIC INTEREST LEGAL)	
FOUNDATION,)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. 4:18-cv-00981
)	
ANN HARRIS BENNETT, in her official)	
capacity as Voter Registrar for Harris County,)	
Texas,)	
)	
<i>Defendant.</i>)	
_____)	

**PUBLIC INTEREST LEGAL FOUNDATION’S
REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION**

The Public Interest Legal Foundation (“Foundation”), by counsel, respectfully submits the following reply memorandum of points and authorities in support of its Motion for Preliminary Injunction filed on March 29, 2018.

I. The Registrar’s Filing in State Court Is Unrelated to this Case.

The case filed by the Defendant Harris County Voter Registrar Ann Harris Bennett (“VR Bennet”) against the Attorney General of Texas in state civil district court is not related to this case. As demonstrated by the facts and records before the Court here, which have been attested to under oath in the Verified Complaint, at no time did the Foundation make a request for inspection of VR Bennett under the Texas Public Information Act, Tex. Gov’t Code Ann. §§ 552.001 et seq. Accordingly, there is no Texas Public Information Act request pending to be reviewed by the Texas Attorney General or by any Texas state court, as there must be in order to invoke jurisdiction under Tex. Gov’t Code Ann. §§ 552.306 and 552.324. Indeed, VR Bennett misrepresented to both the Texas Attorney General and the Texas civil district court that the

Foundation's requests had been made under the Texas Public Information Act and failed to inform either of them that the requests had been made under the National Voter Registration Act ("NVRA"). As a result, the case filed by VR Bennett in state court is without a factual basis as required by Texas law. This case should not be stayed pending VR Bennett's fabricated state court claims, which have nothing to do with any requests made by the Foundation.

II. The NVRA's Disclosure Provision Reaches All Records Related to List Maintenance.

Notably, while listing the requirements for obtaining a preliminary injunction, VR Bennett does not address these requirements or provide any arguments against the Foundation's presentation in its motion. Instead, VR Bennett focuses exclusively on her argument regarding the scope of the inspection provision of the NVRA. 52 U.S.C. § 20507(i)(1) ("Public Disclosure Provision").

Yet, the Defendant provides no authority whatsoever to support her claim that list maintenance records involving noncitizen registrations are somehow exempt from the Public Disclosure Provision. First, the plain language of the Provision states that VR Bennett "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). Second, the NVRA does not enumerate or prescribe specific list maintenance activities. Rather, it creates a general obligation to conduct reasonable list maintenance to ensure accuracy and currency. These list maintenance programs may certainly include ultimate eligibility requirements such as whether to approve a registration. *Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1348 (11th Cir. 2014) ("[W]e emphasize that our interpretation of the 90 Day Provision does not in any way handcuff a state from using its resources to ensure that non-citizens are not listed in the voter rolls.") If they do, those list

maintenance activities are subject to disclosure.¹ The NVRA does not expressly exclude list maintenance related to citizenship. Where it does speak to the scope of records within reach of the NVRA, it says “all.”

Against the absence of any authority supporting VR Bennett’s position, the Foundation has provided authority supporting the requirement that all list maintenance records are subject to public inspection under the NVRA. Notably, in the *Project Vote* case in the Fourth Circuit, the plaintiff sought to inspect initial voter registration forms. *Project Vote v. Long*, 682 F.3d 331, 332 (4th Cir. 2012). The state objected that initial registration forms were not part of list maintenance programs or activities. *Id.* at 335. The Fourth Circuit disagreed and held that these records, which did not concern any specific list maintenance activity, were subject to disclosure. *Project Vote*, 682 F.3d 331 at 337. The Fourth Circuit noted that “the use of the word ‘all’ [as a modifier] suggests an expansive meaning because ‘all’ is a term of great breadth.” *Id.* at 336. VR Bennett’s argument runs directly contrary to the *Project Vote* case, as voter registrations are not a component of any “enumerated” list maintenance activities. VR Bennett’s argument acknowledges this. The plaintiff in *Project Vote* sought records “specifically related to voter registration programs, not list maintenance programs.” (Dkt. 13 ¶ 11.) Nevertheless, the Fourth Circuit held that the documents must be open to inspection all the same. This decision strongly supports, rather than opposes, the Foundation’s case here.

VR Bennett conducts list maintenance to remove the registrations of noncitizens from the lists of eligible voters. (See Dkt. 1 at 8-9, ¶¶ 23-27.) It is beyond dispute that these activities concern the accuracy and currency of the rolls as it is illegal for noncitizens to be registered to

¹ The contours of what specific list maintenance procedures are prescribed or proscribed under the NVRA are not relevant to the question of whether the records related to actual permissible list maintenance that is in fact taking place are subject to disclosure.

vote under state and federal law. A list of eligible voters that contains noncitizens is neither accurate nor current. Therefore, whatever records exist that are related to these activities are subject to public inspection.

VR Bennett cites the case *American Civil Right Union v. Philadelphia City Commissioners*, 872 F. 3d 174 (3rd Cir. 2017), in support of her position that the scope of the Public Disclosure Provision only extends to records related to list maintenance activities that are expressly mandated elsewhere in the NVRA. (Dkt. 13 ¶ 10.) But that case does not support this assertion. That was not a case about the Public Disclosure Provision. The Public Disclosure Provision and the list maintenance provisions that were at issue in *Philadelphia* are entirely distinct parts of the NVRA. The former requires transparency of records, while the latter imposes obligations on election administrators to keep lists of eligible voters accurate and current. They have different functions, obligations, and have a different scope. The *Philadelphia* case did not treat the question of the scope of the Public Disclosure Provision at all. Instead, it held that the NVRA permits, but does not require, states to engage in list maintenance regarding felons who are ineligible to vote under state law. *Philadelphia*, 872 F.3d at 187. The *Philadelphia* case does not, however, support the position that, if a state did choose to perform list maintenance for ineligible felons, records related to that list maintenance would not be subject to the Public Disclosure Provision.

III. The Foundation Has Established That a Preliminary Injunction Should Issue.

The Plaintiff's standing is clear. The Foundation has alleged facts supporting the harms it has and will continue to suffer by VR Bennett's continued violation of her inspection obligations under the Public Disclosure Provision. The information requested is necessary for the Foundation to carry out its mission, an integral part of which involves disseminating information

about compliance by state and local officials with federal election statutes like the NVRA, as well as taking action—including legal action—to urge and compel election officials to maintain clean registration rolls. (Dkt. 1 ¶¶ 5, 28, 55.) “[A] plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain the information which must be publicly disclosed pursuant to a statute.” *FEC v. Akins*, 524 U.S. 11, 21 (1998).

VR Bennett’s actions are preventing the Foundation from carrying out these core, organizational activities in advance of November’s election. The Foundation’s mission and activities have been recognized by the Internal Revenue Service as serving the public and tax exempt. The integrity of elections and the violation of election laws is of paramount interest and concern to the public. *See Project Vote*, 682 F.3d 331 at 339. The Foundation needs a preliminary injunction here because more is at stake than simply being denied its statutory right to information, which is sufficient to establish standing. Because of the proximity of the November election, the Foundation will be prevented from carrying out its mission without the information.

Inspection of the list maintenance activities conducted by VR Bennett related to noncitizens would not cause her to violate Section 62.113 of the Texas Government Code in any way. The Foundation is not asking VR Bennett to use any list for any purpose. The Public Disclosure Provision requires VR Bennett to make available for public inspection its list maintenance records, including those records related to list maintenance conducted under Sections 16.0332 and 18.068 of the Texas Election Code. Whatever a registrar does “[a]fter the registrar receives” a list of purported noncitizens according to Texas list maintenance procedures is properly subject to inspection under the NVRA. Section 62.113, on its face, says nothing whatsoever regarding the public disclosure of the list maintenance activities conducted by VR

Bennett after receiving the list. Even if it did, the Public Disclosure Provision would render any conflicting state law inoperative.

The Foundation has established that the records requested under the NVRA are subject to disclosure. VR Bennett has pointed to no authority indicating any applicable exception to the broad language of 52 U.S.C. § 20507(i). Instead, she has refused to comply with the Public Disclosure Provision. As a result, this case is ripe for judicial review.

The Foundation respectfully requests preliminary injunctive relief. The Foundation has established likelihood of success on the merits because the requested records are related to the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of the rolls. The Foundation has pled facts showing that it will suffer irreparable harm absent injunctive relief, as the plain language of the inspection provision contemplates compliance within a certain time period so that the information can be used effectively. The balance of equities favors the Foundation, as VR Bennett cannot point to any authority supporting her position. And finally, public disclosure of list maintenance records, including those related to noncitizen registrations, is in the public interest.

Dated: May 10, 2018

Respectfully submitted,

For the Plaintiff Public Interest Legal Foundation:

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† *Admitted Pro Hac Vice*
* *Pro Hac Vice application filed*
‡ *Pro Hac Vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2018, I caused the foregoing to be filed with the United States District Court for the Southern District of Texas via the Court's CM/ECF system, which will serve all registered users.

Dated: May 10, 2018

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