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 MOTION TO DISMISS

Plaintiff Public Interest Legal Foundation (the "Foundation") hereby files this response in opposition to the Motion to Dismiss filed by Defendant Ann Harris Bennett ("VR Bennett") (Dkt 12).

I. INTRODUCTION

This case is about transparency and the right to access information about government activities affecting the right to vote. The Foundation is not trying to circumvent Texas law, as VR Bennett claims. (Dkt. 12 at 2.) Rather, the Foundation is seeking to access information under federal law that Congress intended to be publicly available. As a matter of federal 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 VR Bennett's possession concerning activities designed to ensure the accuracy of Harris County's voter registration lists. VR Bennett concedes that a valid request was made and that she has denied the Foundation's request. (Dkt. 12 at 2.) The Foundation brings this action under the NVRA's private-right-of-action provision, 52 U.S.C. § 20510(b), to compel VR Bennett to allow inspection of the requested records.

Citizenship is the most fundamental element of eligibility to vote in American elections. Texas, like every other state, requires voters to be U.S. citizens to vote in state elections. Tex. Const. Art. 6, Sec. 2(a); Tex. Elec. Code § 11.002(a)(2). The reason is simple: only Americans should choose American leaders. Each time an ineligible registrant casts a ballot, whether by accident or willfully, a citizen is effectively disenfranchised.

VR Bennet makes no attempt to deny that noncitizens have registered and voted in Harris County or that her office has engaged in list maintenance activities to assess and remedy noncitizen participation in Harris County elections. (*See* Dkt. 1 at 8-9, ¶¶ 23-27.) Nor does VR Bennett deny that she is responsible for making her list maintenance records publicly available for inspection under the NVRA's Public Disclosure Provision. Pursuant to the NVRA, the

Foundation asked VR Bennett to make records concerning her activities available for public inspection.

VR Bennett concedes she denied the Foundation's request and is withholding the requested records. (Dkt. 12 at 2.) To justify her actions, VR Bennett urges this Court to ignore the plain language of the NVRA in order to shield VR Bennett's list maintenance activities from public scrutiny. The Foundation is not misrepresenting the Public Disclosure Provision. Rather, it is VR Bennett who conflates two completely different provisions of the NVRA when she argues that the Foundation's right to inspect is limited to records concerning registrants who have died or changed residence. (*See* Dkt. 12 at 13.) VR Bennett's position is contrary to the NVRA's text, the intent of Congress, and every court decision on the issue.

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 is suffering a clear informational injury as a direct result of VR Bennett's violations of the Public Disclosure Provision because VR Bennett is denying the Foundation its federal right to inspect list maintenance records. As an "aggrieved" party, the Foundation may invoke the NVRA's private-right-of-action provision to seek relief from VR Bennett's unlawful actions. *See* 52 U.S.C. § 20510(b).

For these reasons, VR Bennett's Motion to Dismiss should be denied.

II. ARGUMENT

A. Motion to Dismiss Standard

"Motions to dismiss are viewed with disfavor and are rarely granted." *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005). In deciding a motion to dismiss, the district court "accepts as true those well-pleaded factual allegations in the complaint." *Id*. 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).

B. Applicable Law

1. 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).

2. 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). 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).

C. VR Bennett's Motion to Dismiss Should Be Denied.

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

Supreme Court precedent forecloses VR Bennett's argument that the Foundation does not have standing. To establish standing in public-records cases, plaintiffs "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. 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 Supreme 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 federal court for the Eastern District of Virginia 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." *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 702 (E.D. Va. 2010).[1] As the court recognized, "the NVRA provides a public right to

[1] *Summary judgment granted in part by Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738 (E.D. Va. 2011), *affirmed by Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012).

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.

The federal court for the Southern District of Indiana reached the same conclusion in *Judicial Watch, Inc. v. King*, 993 F.Supp.2d 919 (S.D. Ind. 2012). In *Judicial Watch*, two non-profit groups similar to the Foundation filed an action against the State of Indiana, alleging two separate violations of the NVRA—(1) failure to remove the names of ineligible voters (the "List Maintenance Claim"), and (2) failure to make records available for public inspection in violation of the Public Disclosure Provision (the "Records Claim")—the same claim made here by the Foundation. 993 F.Supp.2d at 921. The defendants moved to dismiss, arguing that the plaintiffs lacked standing to assert their claims. *Id*. at 923.

Relying on *FEC v. Akins*, the court rejected even the possibility that the plaintiffs lacked standing to pursue their inspection rights under the Public Disclosure Provision: "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." *Judicial Watch*, 993 F.Supp.2d at 923 (citing *Akins*, 524 U.S. at 24-25)) (emphasis added).

The Fifth Circuit Court of Appeals accords. In *Center for Biological Diversity, Inc. v. BP American Production Company*, 704 F.3d 413 (5th Cir. 2013), the court addressed a public records requested under the Emergency Planning and Community Right-to Know Act ("EPCRA"). The EPCRA requires covered facilities to provide written notice of a release of certain extremely hazardous substances to emergency planning commissions in any state likely to be affected by the release. *Id*. at 429. These written notices "must be maintained by the state emergency response commission and must be made available to members of the general public."

Id. Like the NVRA, the EPCRA contains a private-right-of-action provision that "specifically authorizes 'any person' to commence an action against an owner or operator for failing to submit the written emergency follow-up notice." *Id*. (quoting 42 U.S.C. § 11046(a)(1)(A)(i)).

One of the plaintiffs alleged that the defendant violated the EPCRA's public-record requirement by failing to make its written notices available to the public. *Id*. Citing the holding in *FEC v. Akins*, the Fifth Circuit explained that the plaintiff's lack of access to the public notices "is the kind of concrete informational injury that the statute was designed to redress." *Id*. at 492-30 (citing *Akins*, 524 U.S. at 21 ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.")).

Akins and Public Citizen compel this Court to similarly reject Defendant's standing attack. Here, VR Bennett acknowledges that she denied the Foundation's request for records pursuant to the NVRA. The NVRA specifically provides a private right of action to any person who is aggrieved by a violation of the Public Disclosure Provision. *See Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999) ("*ACORN*") ("Congress intended the NVRA's private-right-of-action provision to eliminate prudential limitations on standing.") The informational injury suffered by the Foundation is precisely "the kind of concrete informational injury that the [NVRA] was designed to redress." *Ctr. For Biological Diversity*, 704 F.3d at 429. The Foundation therefore has standing to pursue its claims.

Contrary to VR Bennett's belief, the Foundation's standing does not depend on its plans to use the information it has requested. (Dkt. 12 at 12.) To be sure, the Foundation has plans to use the requested information and VR Bennett's actions are preventing the Foundation from pursuing those plans, (Dkt. 1 at 15-17, ¶¶ 52-58), thereby causing *additional* injury to the Foundation's organizational mission. However, those allegations are not necessary to establish

standing in a public-records case, as the aforementioned Supreme Court authority makes clear. Indeed, "[t]he actual or threatened injury required [for standing] may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The NVRA creates for the public—including the Foundation—a legal right to inspect *all* of VR Bennett's list maintenance records. 52 U.S.C. § 20507(i). VR Bennett has infringed upon those rights by denying the Foundation's inspection request. Congress conferred standing on any person "aggrieved" by such a violation of the NVRA via the NVRA's private-right-of-action provision, 52 U.S.C. § 20510(b). "[A] plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *FEC v. Akins*, 525 U.S. 11 (1998) and *Public Citizen v. DOJ*, 491 U.S. 440 (1989)) (emphasis in original). Instead, "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. The Foundation has been denied information "which must be publicly disclosed" pursuant to the NVRA, *id*., and therefore the Foundation has standing.[2]

It is beyond question that the Foundation's injuries are also "fairly traceable to the challenged action" and are "redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). VR Bennett admits she is withholding records requested under the NVRA's Public Disclosure Provision. The Foundation does not have the requested records

[2] VR Bennett's argument that the Public Disclosure Provision is limited to records that concern death and relocation, addressed *infra* Section II.C.2, has no bearing on the Foundation's standing because "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Where the merits of a case involve a question of statutory construction, the "district court has jurisdiction if the right of the [plaintiffs] to recover under their complaint will be sustained if the [applicable laws] are given one construction and will be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)).

because VR Bennett has refused to provide them to the Foundation. In short, VR Bennett's actions are the sole cause of the Foundation's information injury. It is axiomatic that a favorable ruling would redress that injury because it would compel VR Bennett to provide the requested records to the Foundation.

The Foundation is suffering an injury-in-fact because it has been denied records that must be made public under the NVRA. VR Bennett is the sole cause of that injury. This Court can and should redress the Foundation's injury by compelling VR Bennett to make the requested records available for public inspection, as the NVRA requires.

2. The NVRA's Public Disclosure Provision Requires Disclosure of "All Records," Not Only Records Concerning Death and Relocation.

Contrary to VR Bennett's assertion, the Foundation is not misrepresenting anything about the NVRA. On its face, the Public Disclosure Provision, codified at 52 U.S.C. § 20507(i)(1), 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." (Emphasis added). It is thus VR Bennett who is misrepresenting Public Disclosure Provision when she claims that the request records are "outside the scope of the NVRA." (Dkt. 12 at 13.)

VR Bennett conflates two completely different provisions of the NVRA when she argues that the Foundation's right to inspect list maintenance records does not reach records concerning eligibility determinations based on citizenship. (Dkt. 12 at 13.) VR Bennett 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). (*Id*.) Without support, VR Bennett

contends 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 13.) VR Bennett'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 Supreme Court instructs that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "[I]f the language is unambiguous on its face, then the first canon is also the last: judicial inquiry is complete." *Id*. at 254 (citations and quotations omitted). Yet nowhere in her Motion does VR Bennett recite the language of the statute governing the Foundation's request. 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 VR Bennett. The statutory language being clear and unambiguous, judicial inquiry should be complete.

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); *see also Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1336 (N.D. Ga. 2016) (same). 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 VR Bennett'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 thus broadly commands election officials to make records concerning all determinations of eligibility open to the public.

Other principles of statutory construction confirm the *Project Vote* court's conclusion. Despite VR Bennett 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 VR Bennett suggests, it would have done so. However, "Congress did not write the statute that way." *Id*. This Court should reject VR Bennett'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 the 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 VR Bennett'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 (emphasis added).

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*—and the statutory construction principle on which it relies—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 Third Circuit's decision in *ACRU* concerned an entirely different provision of the NVRA—the List Maintenance Provision. That the Third Circuit interpreted *that* provision of the NVRA contrary to the position advanced by the plaintiff in no way supports VR Bennett's interpretation of the provision applicable in this case—the Public Disclosure Provision. The Public Disclosure Provision unambiguously requires election officials to make available for inspection "all records" concerning the accuracy of the voter registration rolls. 52 U.S.C. § 20507(i)(1).

VR Bennett does not contest that her office 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. Indeed, she cannot do so. The Foundation's Complaint describes in detail Harris County's history with registration and voting by noncitizens, including the identification of thousands of registered voters who potentially lack eligibility to vote by reason of noncitizenship. (*See* Dkt. 1 at 8-9, ¶¶ 23-27.) VR Bennett's office has and continues to engage in "activities" concerning the "accuracy" of the registration lists. 52 U.S.C. § 20507(i)(1). Records concerning those activities and programs 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, VR Bennett cannot withhold the requested records.

Lastly, VR Bennett's interpretation produces an absurd result in that it would permit election officials to operate in secret in an area of constitutional 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 ACORN*, 178 F.3d at 364 (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)). VR Bennett proffers an interpretation of the Public Disclosure Provision that frustrates the statutes basic purpose and she dodges accountability when he shields the requested records from public view.

It is VR Bennett, not the Foundation, who presents a misleading interpretation of the NVRA's plain language. The text of the Public Disclosure Provision is clear: VR Bennett must

produce for public inspection "all records" related to her activities concerning the accuracy of the voter registration rolls. 52 U.S.C. § 20507(i)(1). Records related to VR Bennett's assessment of eligibility for reasons of noncitizenship squarely fall within this broad command, just as the original voter registration forms were found to be in *Project Vote*.

D. VR Bennett's Request for a Stay of the Proceedings Should Be Denied.

VR Bennett's request to stay these proceedings pending the resolution of her state court suit against the Attorney General (Dkt. 12 at 2), should be denied for at least three reasons.

First, the request should be denied because VR Bennett failed to make the request in accordance with the Local Rules of this Court. Local Rule 7.1 requires all motions to be "in writing," to "[i]nclude or be accompanied by authority," to "[b]e accompanied by a separate proposed order," and to "contain an averment that . . . [t]he movant has conferred with the respondent" about the disposition of the motion. M.D. Pa. L.R. 7.1(A)-(D). VR Bennett did not comply with any of these requirements. Instead, she shoehorned her stay request into one paragraph in her Motion to Dismiss. Accordingly, the request should be denied.

Second, the request should be denied because the 459th Civil District Court in Travis, Texas, lacks jurisdiction to hear VR Bennett's state court case. VR Bennett's state court case is premised on the erroneous assumption that the Foundation's request to inspect records was made pursuant to the Texas Public Information Act ("TPIA"). (*See* Dkt. 12-1 at 1.) The Foundation never made a request under the TPIA and repeatedly informed VR Bennett that its request was made pursuant to the NVRA. (Dkt. 1 at 10, 12, 14, ¶¶ 30, 37, 42.)

Section 552.324 of the TPIA permits a governmental body to seek declaratory relief from compliance with an open records decision by the Texas Attorney General issued under Section 552.306. The Attorney General has jurisdiction to issue declaratory judgments regarding the

applicability of the TPIA and to determine the validity of open records decisions issued pursuant to the TPIA. However, in order for jurisdiction to lie in state court, there must first be an actual request for information under the TPIA. Tex. Gov't Code § 552.221.

The TPIA request that forms the basis of the state court case was manufactured by VR Bennett in order to avoid compliance with the NVRA and shield the requested records from public view. Because no TPIA request exists, the 459th Civil District Court lacks jurisdiction and therefore there is no valid cause of action upon which to rest a request for a stay of these proceedings.

Third, even if the state court case is validly before the 459th Civil District Court, its resolution will not affect these proceedings because the NVRA supersedes the TPIA. "[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).

To the extent the Public Disclosure Provision has limits, they are confined to the NVRA. The NVRA "identifies the information which Congress specifically wished to keep confidential." *Long*, 752 F. Supp. 2d at 710 (E.D. Va. 2010). 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.S. § 20507(i)(1). These are the only exceptions relevant to the Foundation's request.

The exceptions upon which VR Bennett seeks to withhold records under the TPIA are superseded by the NVRA's broad command to make *all* list maintenance records available for

public inspection. Accordingly, VR Bennett's state court case cannot affect the Foundation's federal right to inspect records, and therefore a stay of these proceedings is unwarranted.

Dated: May 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2018, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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