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

The PUBLIC INTEREST LEGAL FOUNDATION, *Plaintiff*,	)	
v.	)	Civil Action No. 4:18-cv-00981
ANN HARRIS BENNETT, in her official capacity as Voter Registrar for Harris County, Texas, *Defendant*.	)	
Serve: Ann Harris Bennett 1001 Preston St. Houston, Texas 77002	)	

PUBLIC INTEREST LEGAL FOUNDATION'S
MOTION FOR PRELMINARY INJUNCTION AND
MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Public Interest Legal Foundation (the "Foundation"), by counsel, respectfully moves for entry of a preliminary injunction and states as follows in support of its motion. The Foundation brings this motion for injunctive relief to compel the voter registrar of Harris County, Texas—Defendant Ann Harris Bennett—to (1) preserve all election list maintence records requested by the Foundation and (2) to fulfil her obligation under federal law to make voter registration list maintenance records available for public inspection.

The Foundation's right to inspect or receive the requested records is clear. The National Voter Registration Act of 1993 ("NVRA") requires election officials to "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"). Defendant Bennett has repeatedly denied the Foundation's request and brazenly ignored the federal basis for the Foundation's request. Instead, she has stated that she is denying the Foundation's access to the records under the Texas Public Information Act ("TPIA"), a law which has utterly no bearing on the Foundation's request or the power of the Defendant to conceal the election records. In the area of registration list maintenance records, the TPIA is superseded by the NVRA's Public Disclosure Provision and cannot be invoked to deny access to records sought by the Foundation. The Supremacy Clause makes this so. U.S. Const. Article VI, Clause 2.

The Foundation's need for relief to prevent irreparable injury is equally clear. 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. Verified Complaint ("VC") ¶¶ 5, 28, 55. Defendant Bennett's actions are preventing the Foundation from carrying these core, organizational activities in advance of November's election.

The list maintenance records requested by the Foundation concern registration and voting by noncitizens, who, by law, are ineligible to register and vote. The records thus touch on a matter of constitutional importance. Each time an alien casts a ballot, it cancels out the vote of an American citizen. Without the requested records, the Foundation—and the public—cannot learn the extent to which election officials are allowing ineligible noncitizens to participate in Harris County and statewide Texas elections. Only with that information can the Foundation take action to ensure only eligible Texans participate in future elections.

Election officials have a federal duty to maintain their registration rolls free of ineligible registrants. 52 U.S.C. § 20507(a). Congress intended that the general public would enforce this obligation when it is shirked by election officials. The NVRA makes private attorneys general out of groups like the Foundation by providing a private right of action to compel compliance with the inspection, maintenance, and other obligations in the statute. 52 U.S.C. § 20510(b). The NVRA's Public Disclosure Provision plays an integral role in the enforcement of the NVRA's list maintenance obligations. Congress made registration records subject to public inspection precisely so that the general public can know whether or not proper list maintence that only allows eligible registrants to vote is occurring. That cannot happen when election officials shield their records from public view.

The Foundation has concrete plans to use the records and information shielded by Defendant Bennett, even though the purposes for which a requesting party will use the information is irrelevant to the right to inspect list maintenance records. For nearly two years, foreign participation in our elections has captured the attention of government officials and the public alike. The issue has reached the highest levels in Texas, where Attorney General Paxton has launched an initiative designed to combat voter fraud prior to November's election, an initiative that includes specific measures designed to remedy the problem of registration and voting by noncitizens.[1] The information requested is thus vital to the current and ongoing debate surrounding this issue.

The Foundation plans to use the requested records to not only inform public debate, but to effect change at the administrative and legislative levels prior to the November election. These

[1] https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-significant-voter-fraud-initiative-and-offers-assistanc

plans include meeting with election officials, crafting and proposing remedial solutions, supporting best practices to ensure ineligible registrants are not being added to the rolls, and using the NVRA's private right of action provision to ensure only eligible Texans cast ballots in Harris County election in November.

But for meaningful remedies to have a chance, relief is needed now. Not granting access to the election records would harm the Foundation because of a federally mandated freeze on regular list maintence. See, 52 U.S.C. § 20507(c)(2)(A). Under federal law, any systematic action to clean the registration rolls of ineligible aliens must be completed ninety days prior to the November election, or by August 8, 2018. Any effort by the Foundation to urge or compel such action must necessarily be completed much sooner. The denial of access to the requested records prevents the Foundation from informing the public and taking necessary remedial action prior to November. The loss of that ability is irreparable.

Accordingly, the Foundation respectfully requests that this Court grant his motion for a preliminary injunction and (1) order Defendant Bennett to stay all record destruction schedules and preserve and not destroy all registration list maintenance records in her possession; (2) order Defendant Bennett to permit immediate inspection of the requested registration list maintenance records/.

II. APPLICABLE LAW

A. The NVRA's Public Disclosure Provision

Section 8 of the National Voter Registration Act ("NVRA") 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, 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) (hereafter, the "Public Disclosure Provision"). The courts that have interpreted this provision have construed its terms very broadly, explaining 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) (holding that completed voter registration applications are subject to public disclosure under NVRA) (internal citations and quotations omitted); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1336 (N.D. Ga. 2016) (same).

The Public Disclosure Provision has only two exceptions: records related to (1) "a declination to register to vote"; and (2) "the identity of a voter registration agency through which any particular voter is registered." 52 U.S.C. § 20507(i)(2). Neither exception is implicated here. No other records or information are exempt from disclosure.

B. The NVRA's Private Right of Action Provision.

The NVRA authorizes actions by private parties to enforce its provisions. 52 U.S.C. § 20510. To invoke this private right of action, an aggrieved party must "provide written notice of the violation to the chief election official of the State involved." 52 U.S.C. § 20510(b)(1). "[I]f the violation occurred within 120 days before the date of an election for Federal office" the offending party has 20 days to correct the violation. 52 U.S.C. § 20510(b)(2). "If the violation is not corrected" within 20 days, "the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation." *Id*.

III. FACTUAL BACKGROUND

A. Registration and Voting by Noncitizens in Harris County.

In 2006, then-Harris County Tax Assessor-Collector Paul Bettencourt testified before the U.S. Committee on House Administration that "illegal voting and registration by foreign nationals is difficult for my office to prevent without federal assistance." "You Don't Need Papers to Vote?" Non-Citizens Voting and ID Requirements in U.S. Elections: Hearing before the U.S. Committee on House Administration, June 22, 2006, Transcript at 67, 109th Cong., 2nd Sess.[2] His written and oral testimony described how his office is left largely in a reactionary posture when preventing against noncitizen participation.

Registrar Bettencourt asserted to Congress, "The extent of illegal voting by foreign citizens in my home county is impossible to determine, but we know that it has and will continue to occur." *Id*. The testimony added that at the time, "nearly 1 in 4" Harris County residents were born outside of the United States and 500,000 were noncitizens. *Id*. Bettencourt noted "as it now stands, we have no real way to stop foreign citizens from voting." *Id*. at 68. The Registrar also shared examples of foreign nationals from Norway and Brazil managing to register multiple times and cast ballots in federal elections—only to be discovered after the fact. *Id*. To Bettencourt's knowledge, his office was aware of several dozen more cases at the time of his federal testimony. *Id*.

In 2015, the Foundation submitted research on behalf of a client to the U.S. Supreme Court detailing a very small sample of 13 cases where individuals admitted to noncitizenship or refused to declare a status at all when apply for registration, yet were registered anyway. Brief of the

[2] *Available at* https://www.scribd.com/document/333272572/HOUSE-HEARING-109TH-CONGRESS-HEARING-ON-YOU-DON-T-NEED-PAPERS-TO-VOTE-NON-CITIZEN-VOTING-AND-ID-REQUIREMENTS-IN-U-S-ELECTIONS.

American Civil Rights Union as Amicus Curiae, *Kobach v. U.S. Election Assistance Commission*, No. 14-114, *available at* http://publicinterestlegal.org/files/Kobach-Amicus-Final.pdf.

Separately in 2015, then Harris County Tax Assessor-Collector Mike Sullivan offered testimony before the Texas House Elections Committee hearing and fielded specific questions regarding noncitizen voter participation in Harris County. House Bill 76, A Bill to Establish Online Voter Registration: Hearing before the Texas House Elections Committee, May 2, 2015, video beginning at 3:54:59, *available at* http://tlchouse.granicus.com/MediaPlayer.php?view_id =37&clip_id=10962. When asked if his office "ever discovered that someone registered is not an American citizen?" Sullivan replied, "Yes sir … We turn that over to the Harris County District Attorney's Office on a regular basis. **The last letter I signed had over 300 cases on it.**" *Id*. (emphasis added). He explained that such an effort occurred on a "monthly" basis typically containing cases in the "low hundreds" and confirmed in the affirmative that a sum of cases would amount in the "low thousands annually." *Id*. That records exist regarding the discovery of noncitizens on the active voter rolls by Harris County election officials is beyond dispute.

B. Denial of the Foundation's Request for Public Inspection.

On December 1, 2017, the Foundation wrote to Defendant Bennett, requesting that she reproduce or make available for inspection records "regarding all registrants who were identified as potentially not satisfying the citizenship requirements for registration" from the time period January 1, 2006 to the present (the "Notice Letter"). VC ¶ 30, Exhibit A. In all, the Notice Letter sought four categories of records, all of which "concern[ed] 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)—specifically, the registration and cancellation of noncitizens. VC ¶ 32. For reference, the Notice Letter provided specific examples of the types of

records sought, including "completed voter registration form[s]," and communications to and from registrants concerning the registrant's eligibility. The Foundation's Notice Letter stated unequivocally that the request was made pursuant to the NVRA's Public Disclosure Provision. VC ¶ 30. The Notice Letter offered to make arrangements for inspection or production of the requested records and provided contact information. VC ¶ 34.

On December 14, 2017, Assistant County Attorney Kristin Lee wrote to the Foundation on behalf of Defendant Bennett seeking clarification regarding the records requested in the Notice Letter (hereafter, the "Clarification Letter"). VC ¶ 36, Exhibit B. The Clarification Letter stated that the Foundation's request was being processed under the Texas Public Information Act, Tex. Gov't Code § 552.001 *et seq*. ("TPIA"), rather than the NVRA, and accordingly, certain responsive records would be withheld or redacted. *Id*. Ms. Lee explained that Defendant Bennet would seek permission from the Texas Attorney General in order to withhold those records. *See* VC, Exhibit B.

Importantly, the Clarification Letter further explained that the NVRA's Public Disclosure Provision *did not apply to Defendant Bennett*, but "applies to the States and limits the time period that certain records must be maintained to two years." *See* VC, Exhibit B. Defendant Bennett did not produce any of the requested records. VC ¶ 38. The Clarification Letter was squarely wrong on this point.

On December 18, 2017, the Foundation responded to Ms. Lee via letter (the "Clarification Response"). *See* VC ¶ 37. The Foundation again explained that its request was made pursuant to the NVRA's Public Disclosure Provision, not the TPIA, and that any exemptions found in Texas law were thus inapplicable to the Foundation's request.

No response or records were received from Defendant Bennett. Instead, on January 11, 2018, Ms. Lee, writing on behalf of Defendant Bennett, sought permission from the Texas Attorney General to deny the Foundation's request pursuant to exemptions found in the TPIA, explaining in her letter,

> We believe the requested information is not subject to disclosure under Section 552.101 of the Act in conjunction with Section 62.113 of the Texas Government Code, common-law privacy, and informer's privilege, and Section 552.108 of the Act, and any other applicable statutes or cases identified under the Act or other Texas law.

VC ¶ 41, Exhibit E.

Following Defendant Bennett's second denial of the request for records, the Foundation notified Defendant Bennett, through her counsel that she was in violation of the NVRA's Public Disclosure Provision (the "Violation Notice"). VC ¶ 42, Exhibit F. The Violation Notice informed Defendant Bennett—for a third time—that the Foundation's request was made pursuant to the NVRA's Public Disclosure Provision and provided her with legal authority regarding her office's obligations under the law.

As required by the NVRA's private right of action provision, 52 U.S.C. § 20510(b), the Violation Notice provided notice to Defendant Bennett that her office now faced a lawsuit for declaratory and injunctive relief for her failure to grant inspection of the requested records. A copy of the Violation Notice was sent to the Texas Secretary of State, as required by the NVRA. 52 U.S.C. § 20510(b)(1).

On March 15, 2018, the Foundation received a copy of an Attorney General's opinion, OR2018-0615, sent to Ms. Lee concerning the Foundation's request (the "AO"). The AO explained that certain responsive information was not subject to disclosure under the TPIA. The AO did not address or even mention the NVRA.

No further correspondence has been received from Defendant Bennett or her counsel.

IV. ARUGMENT AND AUTHORITIES

A. The Foundation's Claims Are Ripe.

After notice is given, the NVRA's private right of action provision allows a grace period for the offending party to cure the violation. When "the violation occur[s] within 120 days before the date of an election for Federal office," the curative period is 20 days from the date notice is given. 52 U.S.C. § 20510(b)(2).

The Foundation gave notice of the NVRA violation to Defendant Bennett on January 18, 2018. On March 6, 2018, Texas held its primary election for Federal office. *See* Tex. Elec. Code § 41.007(a). Because March 6, 2018 is within 120 days of January 18, 2018, Defendant Bennett's curative period ended on February 7, 2018. Defendant Bennett did not cure her NVRA violation by February 7, 2018, or any time thereafter. This case is now ripe for adjudication. 52 U.S.C. § 20510(b)(2).

B. Defendant Bennett Is Subject to the NVRA's Public Disclosure Provision

In the Clarification Letter, Ms. Less, counsel for Defendant Bennet, states that the NVRA's Public Disclosure Provision "applies to the States." To the Foundation's knowledge, no court interpreting the NVRA has agreed with Defendant Bennett's position. Instead, every court that has confronted the issue of whether local county election officials are subject to the obligations of the NVRA have ruled that that local election officials, including local election officials in Texas, are subject to the NVRA's mandates.

In *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779 (W.D. Tex. 2015), the defendant, a county voter registrar, argued that the only proper party to an action to enforce the NVRA in Texas is the Texas Secretary of State. *Id*. at 791-92. The court disagreed, holding that the county election officials in Texas "ha[ve] certain obligations under the NVRA as the

designated voter registrar and state official." *Id*. at 793. If a county election official "has failed to meet her obligations," an aggrieved party "can bring a civil suit against her." *Id*.

The same argument was made in *Voter Integrity Project NC, Inc. v. Wake Cty. Bd. of Elections*, No. 5:16-CV-683-BR, ___ F. Supp. 3d ___, 2017 U.S. Dist. LEXIS 23565, at *4 (E.D.N.C. Feb. 21, 2017), and the same result was reached. The defendant, a county board of elections, "argue[d] that because the mandates of the NVRA are directed to states, it, as a local government unit, is not a proper party." *Id*. Notwithstanding the NVRA's use of the term "State," the court rejected this argument, reasoning that because both local and state officials were legally responsible for carrying the NVRA's mandates, county election officials were proper parties in an action to enforce those mandates *Id*. at 5-9. The court explained: "[T]o the extent it maintains records concerning implementation of its list maintenance activities . . . [the Board of Elections] is required to make such records available for public inspection." *Id*. at *12 n.5

Bellitto v. Snipes accords. 221 F. Supp. 3d 1354 (S.D. Fla. 2016). There, the defendant, a county election official, contended that the "Plaintiffs can only file suit against the State of Florida or Florida's Secretary of State" to enforce the provisions of the NVRA, including the NVRA's Public Disclosure Provision. *Id*. at 1361. The court disagreed, holding that the defendant "like the Tax Assessor-Collector of Zavala County, Texas, has certain responsibilities under Florida law" and is therefore a proper party. *Id*. at 1362. With respect to the NVRA's Public Disclosure Provision, the court explained, "§ 20507(i) requires . . . that Defendant [county Supervisor of Elections] '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 . . . .'" (quoting 52 U.S.C. § 20507(i)) (emphasis in original).

This Court should reach the same conclusion as its sister courts. Under Texas law, a county election officials is responsible for the maintenance of local registration records. *See, e.g.*, Tex. Elec. Code, Title 2, Chapters 13-16. Defendant Bennett has made no claim to the contrary. Accordingly, she, as a local election official, is subject to the NVRA's Public Disclosure Provision.

C. The Foundation Is Entitled to a Preliminary Injunction

A preliminary injunction is warranted where the moving party establishes four factors: "(1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the injunction will result in irreparable injury, (3) the threatened injury outweighs any damage that the injunction may cause the opposing party, and (4) the injunction will not disserve the public interest." *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991). "The decision to grant or deny a preliminary injunction lies within the discretion of the district court." *Id*. The Foundation satisfies each factor.

1. The Foundation Is Substantially Likely to Succeed on the Merits.

a. The TPIA Is Superseded by the NVRA.

The Foundation is statutorily entitled to inspect the requested records, 52 U.S.C. § 20507(i), but has been denied the opportunity to do so. Defendant Bennett has not produced the requested records or otherwise offered to make them available for inspection. Instead, Defendant Bennett has ignored repeated reminders that the Foundation's request is made pursuant to the NVRA and has chosen to process the Foundation's request under the restrictive parameters of the TPIA.

With respect to the body of records covered by the NVRA's Public Disclosure Provision, the TPIA is wholly superseded: "[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." *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 710 (E.D. Va. 2010), *affirmed Project Vote / Voting for Am., Inc. v. 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.S. § 20507(i)(1). The NVRA contains no other exceptions. *Long*, 682 F.3d at 336.

b. The Requested Records Are Related to the Implementation of Programs and Activities Conducted for the Purpose of Ensuring the Accuracy and Currency of Official Lists of Eligible Voters.

So long as a record "concern[s] the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," it must be made available for public inspection under the NVRA's Public Disclosure Provision. As explained by the federal court in the Eastern District of Virginia, "records 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*. All of the records requested by the Foundation qualify for disclosure under this standard because they relate an "evalua[tion] of whether persons belong on the lists of eligible voters" *Id*.

The federal court in the Eastern District of Virginia correctly observed, "It is clear…that voter registration applications, perhaps more than other records, are relevant to carrying out voter registration procedures." *Id*. The scope of the Public Disclosure Provision encompasses "all

records" such that all registration data, list maintenance correspondence, and voting activity of cancelled noncitizen registrants would fall necessarily fall under the NVRA.

It is no less clear that the remaining requested records are relevant to carrying out voter registration procedures. Indeed, "records of communications … requesting removal or cancellations," and all related "records indicating maintenance actions undertaken," VC, Exhibit A, are quintessentially records that concern "the accuracy and currency of official lists of eligible voters," 52 U.S.C. § 20507(i).

Records received from district court clerks are no different. Each month, the Texas Election Code requires the district clerks of court to provide to voter registrars the name and address of all persons excused or disqualified from jury duty because the person is not a citizen of the United States. Tex. Gov't Code § 62.113. The purpose of this provision is to help facilitate removal of ineligible noncitizens from the registration lists. Section 16.0332 of the Texas Election Code requires election registrars to "deliver to each registered voter whose name appears on the list a written notice requiring the voter to submit to the registrar proof of United States citizenship." If the recipient fails to submit proof of citizenship within 30 days, the registrar must cancel the recipient's registration. Tex. Elec. Code § 16.0332(b). These records, too, are quintessentially records that concern "the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i).

The final category of records requested by the Foundation concerns communications to law enforcement officials regarding "list maintenance activities" related to the other categories of requested records. Because this request concerns communications about "list maintenance activities," it cannot be denied that it too concerns "the accuracy and currency of official lists of eligible voters," 52 U.S.C. § 20507(i).

2. The Foundation Will Suffer Irreparable Harm Absent Injunctive Relief.

An irreparable injury is one that is "actual and imminent" and "cannot be redressed by either an equitable or legal remedy following trial." *W. Ala. Quality of Life Coal. v. United States FHA*, 302 F. Supp. 2d 672, 683-84 (S.D. Tex. 2004) (citations and quotations omitted). "This element is met if [the moving party] can prove it is likely to suffer this type of harm before a trial on the merits." *Id*.

Absent relief, the Foundation is likely to suffer irreparable harm in two ways. First, the Foundation will suffer an informational injury, including the loss of opportunity to obtain in a timely fashion information vital to the current and ongoing debate surrounding foreign participation in our elections, including noncitizen registration and voting in Harris County. Second, the Foundation will suffer the loss of opportunity to take action—including legal action under the NVRA—to urge or compel election officials to institute measures to cancel the registrations of ineligible aliens and prevent new alien registrations prior to November's election.

Both of these injuries cannot be redressed if the Foundation is forced to seek relief at trial, for by the time such relief comes, the opportunity to act in advance of the upcoming election will have disappeared. Relief is therefore urgently needed.

a. Absent Relief, the Foundation Will Be Precluded From Obtaining in a Timely Fashion Information Vital to the Current and Ongoing Debate Regarding Foreign Participation in Our Elections.

"[P]ublic awareness of the government's actions is 'a structural necessity in a real democracy.'" *Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)). "Not only is public awareness a necessity, but so too is timely public awareness." *Id*. Because "stale information is of little value . . . [,]" *Payne Enters, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988), "the harm

in delaying disclosure is not necessarily redressed even if the information is provided at some later date," *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 319 (D.D.C. 2017) (citing *Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999)). For this reason, "the non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm; specifically, where the information is highly relevant to an ongoing and highly public matter." *Elec. Privacy Info. Ctr.*, 266 F. Supp. 3d at 319.

Wash. Post v. Dep't of Homeland Sec., 459 F. Supp. 2d 61, 74 (D.D.C. 2006), vacated and dismissed as moot by *Wash. Post v. Dep't of Homeland Sec.*, 2007 U.S. App. LEXIS 6682 (D.C. Cir., Feb. 27, 2007), is instructive in this regard. In that case, the plaintiff sought, via the Freedom of Information Act, records concerning visitors to the Vice President at the White House and the Vice President's home. *Id*. at 64. The plaintiff sought expedited processing of its request through a preliminary injunction on the grounds that "the information is of vital public interest for an upcoming congressional election." *Id*. at 74. The court agreed that delay in receipt of the requested information would likely cause the plaintiff irreparable harm:

> The plaintiff reasons that delay in the agency's processing of its FOIA request would "deprive the public of its ability to make its views known in a timely fashion either at the polls, by lobbyists or through other contacts with public officials." Because the urgency with which the plaintiff makes its FOIA request is predicated on a matter of current national debate, due to the impending election, a likelihood for irreparable harm exists if the plaintiff's FOIA request does not receive expedited treatment.

Id. at 74-75.

The same is true in this instance. The value of the requested records depends on their timely receipt. If the requested records are received by the Foundation following a trial on the merits they will have lost their value because they can no longer be used, or used effectively, to inform the public debate regarding the registration and voting of noncitizens in Harris County prior to the

November 2018 election. As in *Washington Post*, delay in receipt of the record will therefore likely cause the Foundation to suffer irreparable injury.

The Foundation's plans are neither speculative nor remote. Using records and data compiled through use of the NVRA's Public Disclosure Provision, the Foundation has produced written reports concerning the registration and voting activity of noncitizens.[3] VC ¶ 51-52. These reports have been disseminated to federal, state, and local election officials and to the public through media and press sources. Representatives of the Foundation have appeared on national television news programs discussing the inadequacies of state election systems in preventing aliens from registering and voting. By denying the Foundation access to the requested records Defendant Bennett has impaired and will impair the Foundation from disseminating information regarding noncitizen registration in Harris County and informing the public debate in advance of November's election.

b. Absent Relief, the Foundation Will Be Unable to Effectively Seek Remedial List Maintenance Measures in Advance of November's Election.

It is already well documented that aliens are registering and voting in Harris County. *Supra* Section III.A. It is thus clear that additional and timely measures are needed to ensure that only U.S. citizens are participating in Harris County's November election. Using the requested information, the Foundation plans to urge or compel Harris County election officials to institute

[3] *See* Public Interest Legal Foundation, Alien Invasion II: The Sequel to the Discovery and Cover-up of Non-citizen Registration and Voting in Virginia, May 29, 2017, available at https://publicinterestlegal.org/blog/alien-invasion-ii-sequel-discovery-cover-non-citizen-registration-voting-virginia/; Public Interest Legal Foundation, Garden State Gotcha, Sept. 11, 2017, *available at* https://publicinterestlegal.org/files/Garden-State-Gotcha_PILF.pdf. One such report concerns noncitizen registration and voting in Philadelphia, Pennsylvania. Public Interest Legal Foundation, Aliens & Felons: Thousands on the Voter Rolls in Philadelphia, October 4, 2016, available at https://publicinterestlegal.org/files/Philadelphia-Litigation-Report.pdf.

remedial measures designed to remove ineligible aliens from the registration rolls and prevent the registration of ineligible aliens in advance of November's election. These remedial plans include meeting with election officials, crafting and proposing remedial solutions, and using the NVRA's private right of action provision to enforce the NVRA's list maintenance mandates, which require local election officials to use "reasonable efforts" to keep the registration rolls free of ineligible registrants. *See* 52 U.S.C. § 20507(a).

Without timely receipt of the requested records, the Foundation cannot pursue, or pursue effectively, its remedial plans in Harris County in advance of November's election because the information shielded by Defendant Bennett is necessary to ascertain the problem in terms of scope, degree, and kind. The information will also reveal what current procedures are being used by Harris County officials to remove ineligible aliens and prevent new aliens from registering. Effective and informed action simply cannot be taken in the absence of this information.

To meaningfully pursue its plans, the Foundation not only needs the requested records, it needs them now. The NVRA includes a "freeze out" provision during which no systematic removal of ineligible registrants can occur. Election officials must "complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(c)(2). Any systematic action to clean the registration rolls of ineligible aliens must therefore be completed by August 8, 2018. Any effort by the Foundation to urge or compel such action must necessarily being much sooner, especially legal action.

The Foundation's plans are neither speculative nor remote. The Foundation has recently pursued legal action to enforce the NVRA's list maintenance requirements in Mississippi, Florida, North Carolina, and Texas. VC ¶ 55. The Foundation has urged election officials to take remedial

action outside the courtroom in countless other jurisdictions. *Id*. Without the requested records, the Foundation risks losing the opportunity to pursue its remedial plan in time for November's election. The loss of that opportunity is irreparable.

3. The Balance of Equities Favor Injunctive Relief.

The third element of the preliminary injunction inquiry is the "balancing of the equities" W. *Ala. Quality of Life Coal. v. United States FHA*, 302 F. Supp. 2d 672, 685 (S.D. Tex. 2004). Here, the court "must balance the hardships on each party of either granting or withholding the requested relief." *Id*.

The balance of hardships easily tips in the Foundation's favor because the most that would happen to Defendant Bennett if relief was granted is she would be forced to comply with federal law. Defendant Bennett has never asserted that the requested records are not records related to registration list maintenance. Rather, her resistance is rooted squarely in the TPIA, which, as explained, has no bearing on the Foundation's request.

On the other hand, the Foundation would face severe hardship if denied injunctive relief. Without timely receipt of the requested records, the Foundation will be unable to carry out its organizational mission in advance of November's election. As a result, the Foundation—and the public—will be kept in the dark regarding foreign participation in Harris County elections, and the Foundation will be inhibited from pursuing meaningful remedies to ensure only eligible Texans vote in November.

4. Public Disclosure of Alien Registration Records Is in the Public Interest.

The final element the court considers is "whether an injunction is in the public interest." *W. Ala. Quality of Life Coal. v. United States FHA*, 302 F. Supp. 2d 672, 685 (S.D. Tex. 2004). The court should answer this in the affirmative. It is rarely ever not in the public interest to enforce

the requirements of federal law. Furthermore, the NVRA's Public Disclosure Provision was designed to benefit the public by allowing them to monitor the activities of their local election officials. The public will benefit from disclosure of the information sought because it shows the extent to which noncitizens are participating in Harris County elections and will allow the public—and the Foundation—to urge corrective action in advance of November's election.

D. The Foundation Is Entitled to an Injunction to Prevent Destruction of Responsive Records.

The Foundation's Notice Letter requested records from the time period January 1, 2006 to the present. Under Texas law, election officials are required to retain various registration records for set periods of time, after which they may be destroyed. In some instances, this time period is as little as two years. *See* Tex. Elec. Code § 15.142(c) (requiring two-year retention of inactive voter certificate file).

The NVRA requires election officials to make available for public inspection "all records" in their possession that concern the accuracy of the registration lists. 52 U.S.C. § 20507(i). Because some records responsive to the Foundation's request might be eligible or become eligible for destruction under Texas law during the pendency of this action, the Foundation requests an order compelling Defendant Bennett stay all regularly scheduled record destruction schedules and preserve all records that might be responsive to the Foundation's request. Only with such an order can the Foundation ensure receipt of all requested documents.

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Respectfully submitted,

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