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

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S FIRST MOTION FOR SUMMARY JUDGMENT

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Plaintiff Public Interest Legal Foundation (the "Foundation"), by and through counsel, hereby replies to Defendant VR Bennett's response to the Foundation's Motion for Summary Judgment. (Doc. 52.)

SUMMARY OF THE ARGUMENT

VR Bennett neither disputes the Foundation's Statement of Undisputed Facts nor offers her own set of disputed facts. VR Bennett thus concedes that there are no genuine disputes concerning material facts and that this case may be resolved on summary judgment. The question for this Court is therefore purely legal and straightforward: must VR Bennett make "all records" concerning her list maintenance activities available for public inspection, as the NVRA requires? 52 U.S.C. § 20507(i)(1). The answer to that question is "yes."

The Foundation's records requests are not unlimited, as VR Bennett would have this Court believe. An honest reading of the request makes clear that the Foundation seeks only records related to VR Bennett's list maintenance activities, namely, her determinations of whether a registrant or applicant possesses a fundamental eligibility criteria to be on the list of eligible voters—citizenship. Tex. Elec. Code § 11.002(a)(2). Such records may include voter registration forms detailing responses to citizenship questions, Tex. Elec. Code § 13.002(c); letters from registered voters requesting cancellation from the rolls, Tex. Elec. Code § 16.0331; list maintenance notice mailings sent to potentially ineligible registrants, Tex. Elec. Code § 16.0332(a), Tex. Elec. Code § 16.033(b); responses to those notices, Tex. Elec. Code § 16.033(f), Tex. Elec. Code § 16.0332(c); records showing non-U.S. citizenship as the reason for cancellation, Tex. Elec. Code § 16.034; Tex. Elec. Code § 16.036(c)(2); and, other identifiable records or information showing registrants who were identified as not meeting the requirements for citizenship, Tex. Gov. Code § 62.113(a)-(b).

"The National Voter Registration Act (NVRA) is premised on the assumption that citizenship is one of the requirements for eligibility to vote." *Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1344 (11th Cir. 2014). Evaluating the eligibility of voters on the basis of citizenship status (or for any reason whatsoever)—and the attendant action of cancelling ineligible registrations—determines "whether persons belong on the lists of eligible voters, thus ensuring the accuracy of those lists." *Project Vote/Voting for Am., Inc. v. Long*, 752 F.Supp.2d 697, 703 (E.D. Va. 2010) ("*Project Vote*"). Who is and is not eligible to be included on the official list of voters is the *sine qua non* of "activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" under 52 U.S.C. § 20507(i)(1). The relevant statutory language being clear and unambiguous, judicial inquiry is complete. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

VR Bennett advances an interpretation of the NVRA that would permit election officials to conceal records related to their decisions 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. VR Bennett's proffered interpretation is absurd, illogical, and contrary to both the text and intent of the NVRA. Congress required transparency in the list maintenance process. The Public Disclosure Provision was designed to allow the public to monitor "the state of the voter rolls and the adequacy of election officials' list maintenance programs." *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018). VR Bennett's interpretation renders that goal impossible. "Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections." *Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331, 339-40 (4th Cir.

2012). VR Bennett asks this Court to rewrite the NVRA because she does not like what it requires.

Nor may VR Bennett decide who is and is not eligible to inspect list maintenance records based on whether she aligns with the requester's perceived ideological viewpoint. (Doc. 52 at 22-23.) VR Bennett's accusations about how the Foundation intends to use the requested information are both unfounded and irrelevant. Congress did not attach ideological tests to public inspection rights under the NVRA. (Doc. 52 at 16.) The right to physically inspect VR Bennett's list maintenance records belongs to all members of the public, regardless of their views, religion, race or political affiliation.

VR Bennett cannot overcome the plain and unambiguous language of the NVRA. VR Bennett's arguments in her Response are contrary to the NVRA's text, the intent of Congress, and every other court decision on the issue. Accordingly, because the Foundation has established that the requested records are covered by the NVRA's Public Disclosure Provision, and because the Foundation is statutorily entitled to access and photocopy those records, this Court should enter judgment in the Foundation's favor.

ARGUMENT

I. VR Bennett Concedes the Absence of Factual Disputes.

VR Bennett did not provide a separate Statement of Disputed Facts or otherwise respond to the Foundation's enumerated undisputed facts (Doc. 34 at 7-8.) She therefore concedes that there are no genuine disputes regarding material facts and that this case is ripe for resolution on summary judgment. Fed. R. Civ. P. 56(c)(1) (requiring citations to the record).

II. Neither the Language, Context, nor Intent of the NVRA Supports VR Bennett's Position that the Public Disclosure Provision is Limited to Records Concerning Death and Relocation.

VR Bennett argues that the NVRA "confers a limited opportunity to inspect records relating to state programs established to purge the names of voters who have died or changed residence." (Doc. 52 at 5.) This Court should reject this interpretation for at least three reasons.

First, VR Bennett's interpretation violates established principles of statutory construction. "[I}f the language is unambiguous on its face, then the first canon is also the last: judicial inquiry is complete." *Germain*, 503 U.S. at 254. The language of the Public Disclosure Provision is unambiguous on its face: "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). The courts that have interpreted this language have interpreted it broadly and to mean what it says. *See Project Vote*, 752 F. Supp. 2d at 705-712; *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 719-710 (S.D. Miss. 2014) (footnotes omitted). Neither the word "death" nor "change in residency" appears in the Public Disclosure Provision. Had Congress intended to limit the Public Disclosure Provision as VR Bennett claims, it would have done so. However, "Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, VR Bennett's contextual arguments are self-defeating. Without any support whatsoever, VR Bennett contends that Congress intended the phrase "programs and activities," as used in the Public Disclosure Provision, to refer to "the programs and activities intended by Congress in sections 20507(a)(4), (b), and (c)." (Doc. 52 at 12.) Even if that were true—which it is not—it would support the Foundation's position, not the death-and-residency limitation advanced by VR Bennett.

It is notable that only Section 8(a)(4) mentions death and residency. Sections 8(b) and (c) are expansive, referring, respectively, to "*any* state program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office" and "*any* program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." (Emphasis added). Under VR Bennett's own interpretation, the Public Disclosure Provision would encompass *any* program or activity conducted for list maintenance purposes even if limited to the programs referenced in Sections 8(b) and (c)—including activities related to cancellations based on citizenship. *See Arcia*, 772 F.3d at 1344 (interpreting NVRA Section 8(c)(2)(A) to govern programs to remove noncitizen registrants).

What the context shows is that Congress intended each use of the word "program" or "activity" to stand alone, modified only by the preceding or succeeding language, unless explicitly modified by another subsection of the NVRA. Indeed, on at least 27 occasions in Section 8, Congress refers to another section of the NVRA, another subsection of Section 8, or another statute. In other words, Congress knew how to modify the NVRA's requirements by reference when it wanted to. *See* 52 U.S.C. § 20507(i)(2) (requiring disclosure of the names and addresses of "all persons to whom notices described in *subsection (d)(2)* are sent") (emphasis added). Yet Congress chose not to limit the Public Disclosure Provision by reference to any other provision of the law. Instead, it designed the law for maximum transparency, requiring disclosure of "all records" concerning list maintenance programs and activities.

American Civil Rights Union v. Philadelphia City Comm'rs, 872 F.3d 175 (3d Cir. 2017) ("*ACRU*") does not support the narrow interpretation of the Public Disclosure Provision urged by VR Bennett. (Dkt. 52 at 13-14.) The Public Disclosure Provision was not before the Third

Circuit at all as the plaintiff's request had been satisfied while the case was pending below. *Am. Civil Rights Union v. Phila. City Comm'rs*, No. 16-1507, 2016 U.S. Dist. LEXIS 122052, at *5 (E.D. Pa. Sep. 9, 2016) ("Plaintiff, however, now states that its records requests have been satisfied and does not contest the Motion to Dismiss as to Count I."). Instead, *ACRU* addressed a discrete and unresolved question of list maintenance—"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. Beyond these factual differences, the Third Circuit's analysis of the statute before it undermines VR Bennett's argument:

> By its terms, the mandatory language in [the list maintenance provisions] 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).

Here, 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 the statutory construction principle on which *ACRU* relied in its analysis 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.

Third, limiting the universe of public records to those concerning death and change in residency would frustrate Congress's stated purposes of "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are

maintained." 52 U.S.C. § 20501(b)(3)-(4). To further these goals, Congress made the voter list maintenance records of election officials subject to public inspection. *Bellitto*, 2018 U.S. Dist. LEXIS 103617, at *12-13 (explaining that the Public Disclosure Provision "convey[s] Congress's intention that the public should be monitoring the state of the voter rolls and the adequacy of election officials' list maintenance programs."); *True the Vote*, 43 F. Supp. 3d at 721 ("The NVRA Public Disclosure Provision is one means of ensuring compliance with the NVRA's stated goals. By opening up voter registration records for inspection, the Public Disclosure Provision shines a light on States' voter registration activities and practices.")

VR Bennett pays only lip service to the NVRA's stated goals (Doc. 52 at 21-22), casting them aside in favor of an interpretation that hides her list maintenance activities from public view. To adopt VR Bennett's interpretation of the Public Disclosure Provision would allow election officials to conceal records concerning every facet of eligibility not related to death and residency. Records related to a decision not to register an applicant would be shielded from public view. Decisions to cancel an active voter registration would be hidden from public view unless it was explicitly for death or relocation. Hence, a Harris County voter who did not die, did not move, but yet was improperly cancelled by VR Bennet would be barred from reviewing list maintenance records that led to her improper cancellation. This is precisely the sort of behavior that Congress intended to make transparent, but VR Bennett believes she is allowed to hide.

"The NVRA, by its terms and structure, is designed to ensure that eligible applicants in fact are registered *and* that ineligible registrants are removed from the States' official voter lists." *True the Vote*, 43 F. Supp. 3d at 720 (emphasis added). Evaluating the eligibility of voters on the basis of citizenship status (or for any reason whatsoever)—and the attendant action of cancelling ineligible registrations—squarely falls within the NVRA's broad disclosure command.

III. Texas Law Does Not Limit Disclosure of the Requested Records.

A. The Requested Records are Subject to Disclosure According to the Attorney General of Texas.

More than one year ago, VR Bennett initiated a state court proceeding against the Attorney General of Texas seeking to shield the requested records from disclosure under Texas law. *Ann Harris Bennett v. Honorable Ken Paxton*, Cause No. D-1-GN-18-001583 (459th District, Travis County March 29, 2018). The Foundation maintains that the 459th District Court lacks jurisdiction to hear VR Bennett's dispute and that the dispute otherwise has no bearing on this action. *See infra* III.B. However, the Foundation refers the Court to the Attorney General's Original Answer filed in response to VR Bennett's Petition, wherein the Attorney General asks the court to declare the records requested by the Foundation be subject to disclosure:

> Defendant Ken Paxton, Attorney General of Texas, respectfully asks the Court, upon final hearing of this lawsuit, to enter a final judgment declaring the information at issue *to be subject to disclosure* and orders that Plaintiff Ann Harris Bennett take nothing by reason of her suit and that all costs of litigation, including court costs, be adjudged against Plaintiff.

Defendant's Original Answer, *Ann Harris Bennett v. Honorable Ken Paxton*, Cause No. D-1-GN-18-001583 (459th District, Travis County, filed April 16, 2018) (emphasis added).[1]

It is reasonable to conclude that the Attorney General of Texas disagrees with VR Bennett's position that state law precludes disclosure of the requested list maintenance records under the NVRA.[2] It is also reasonable to conclude that the Attorney General—with whom enforcement of

[1] For convenience, the Foundation has attached a copy of the Attorney General's Original Answer as Exhibit 1 to this memorandum.

[2] VR Bennett cites to a portion of the Attorney General of Texas's Decision Letter of March 15, 2018, in which the Attorney General discusses disclosure of completed juror questionnaires. (Doc. 3 n.1.) This portion of the Attorney General's letter is of limited or no use for at least two

Texas law is entrusted—does not agree with VR Bennett's belief that disclosure of the list compiled under Texas Government Code Section 62.113 constitutes a criminal offense, when disclosed pursuant to the requirements of the NVRA. (Doc. 52 at 4.)

B. The NVRA Supersedes Inconsistent State Law Under the Supremacy Clause of the Constitution.

Even if the Attorney General did not consent to disclosure, it would not change the result. VR Bennett's state court action cannot have any bearing on this action because the NVRA supersedes and pre-empts state law under the Constitution's Supremacy Clause. *ACORN v. Edgar*, 880 F. Supp. 1215, 1222 (N.D. Ill. 1995) ("[D]eclar[ing] that all provisions of Illinois law or regulations that conflict with the [National Voter Registration] Act are pre-empted by the [National Voter Registration] Act."); *Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738, 743 (E.D. Va. 2011) ("[T]o the extent that any Virginia law, rule, or regulation forecloses disclosure of completed voter registration applications with the voters' SSNs redacted, the court FINDS that it is preempted by the NVRA."). Virginia made similar arguments in *Project Vote* and they were summarily rejected under the Supremacy Clause by both the District Court as well as the Fourth Circuit.

IV. The Mandatory Disclosures in Section 8(i)(2) Provide a Floor for Disclosure, Not a Ceiling.

Section 8(i)(2) provides,

> The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

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reasons: (1) the Attorney General's opinion is limited to consideration of Texas state law, rather than the NVRA; and (2) the Attorney General's opinion precedes his Original Answer in the 459th District Court, in which he asks the court "to declare the information at issue to be subject to disclosure." Exhibit 1.

According to VR Bennett, the phrase "shall include" is language of limitation, rather than illustration, and therefore the records described in Section 8(i)(2) are the *only* records that must be disclosed under the NVRA. (Doc. 52 at 20.) This argument was squarely addressed and firmly rejected in *Project Vote*:

> Appellants' interpretation, under which only the documents described in Section 8(i)(2) must be disclosed, is incorrect for several reasons. First, the statute clearly states that "*all records*" falling under Section 8(i)(1) must be publicly disclosed, not just those explicitly listed in Section 8(i)(2). 42 U.S.C. § 1973gg-6(i)(1) (emphasis added). Moreover, as the district court recognized at the motion to dismiss hearing, the term "shall include" sets "a floor, not a ceiling." J.A. 223. Courts have repeatedly indicated that "shall include" is not equivalent to "limited to." *See, e.g., Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 338 (4th Cir. 2005) (stating that the language "shall include" is "not exhaustive," and merely indicates that the listed items, "among others," are covered by the relevant provision); *see also Samantar v. Yousuf*, 130 S. Ct. 2278, 2287, 176 L. Ed. 2d 1047 (2010); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7, 100 S. Ct. 328, 62 L. Ed. 2d 225 (1979). Because Section 8(i)(2) merely describes a specific set of records that must be maintained—and not an exclusive list—it does not shield completed voter registration applications from Section 8(i)(1)'s public disclosure mandate.

Project Vote, 682 F.3d at 337. VR Bennett's argument should be rejected for the same reasons. *DIRECTV Inc. v. Budden*, 420 F.3d 521, 527 (5th Cir. 2005) ("the word 'includes' is usually a term of enlargement, and not of limitation").[3]

V. Congress Carefully Balanced the Need for Transparency and Accountability with the Need for Privacy.

The Public Disclosure Provisions expressly "identifies the information which Congress specifically wished to keep confidential." *Project Vote*, 752 F. Supp. 2d at 710. Such confidential information is limited to "records relate[d] to a declination to register to vote or to the identity of

[3] Furthermore, VR Bennett's theory on this point is undermined by her position that the Public Disclosure Provision is limited to records concerning death and relocation. Indeed, the records described in Section 8(i)(2) have nothing to do with cancellations for reason of death.

a voter registration agency through which any particular voter is registered." 52 U.S.C. § 20507(i)(1). The NVRA contains no other exceptions. *Project Vote*, 682 F.3d at 336.

By declining to exempt other information from disclosure, Congress intended that certain information on voter registration forms be made public as a means to further the purposes of the NVRA. Confronting a similar challenge to disclosure of registrant information, the Fourth Circuit prudently recognized,

> It is self-evident that disclosure will assist the identification of both error and fraud in the preparation and maintenance of voter rolls. State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. Without such transparency, public confidence in the essential workings of democracy will suffer.

Project Vote, 682 F.3d at 339. The Court continued, "It is not the province of this court, however, to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting NVRA Section 8(i)(1). *Id*.

It is not only the policy of Congress that voter information be public, it is the policy of the State of Texas. The Texas Secretary of State's office allows anyone to request a voter registration list through a simple request form. The publicly available voter registration list includes first, middle, and last names, dates of birth, gender, permanent address, and mailing address of those individuals on the list. Voter Registration Public Information Request Form at 4-5, *available at* https://www.sos.state.tx.us/elections/forms/pi.pdf. The only stated limitation on the use of that information is for advertising or promotion of commercial products or services." *Id*. at 4.

Neither the NVRA nor Texas law prohibits the release of voter data as VR Bennett claims. However, consistent with *Project Vote*, the Foundation has agreed to the redaction of Social Security numbers in records responsive to its request. (Doc. 1-3 at 2.)

VI. The Records Preservation Requirements of the Civil Rights Act of 1960 Have No Bearing on the Records Subject to Disclosure under the NVRA.

The records preservation requirements of the Civil Rights Act of 1960 ("CRA") have no bearing on the Foundation's request under the NVRA. (Doc. 52 at 23-24.) The records provisions of the CRA and the NVRA are designed to hold election officials accountable. It makes sense then that the NVRA might allow the public to inspect of some of the same records the CRA requires election officials to make available to the Attorney General. Indeed, Congress intended that the NVRA's private-right-of-action provision would "'encourage enforcement by so-called 'private attorneys general.'" *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 364 (5th Cir. 1999) (quoting *Bennett v. Spear*, 520 U.S. 154, 157 (1997)). The two statutes can easily work in harmony to preserve the right to vote. Enforcing the requirements of the NVRA's Public Disclosure Provision as written would further the intent of Congress, not render the CRA records-retention requirement superfluous, as VR Bennett claims. (Doc. 52 at 23.)[4]

CONCLUSION

There being no genuine dispute regarding material facts, the Foundation respectfully requests that the Court enter summary judgment in its favor on Count I of its First Amended Verified Complaint against VR Bennett and declare her in violation of 52 U.S.C. § 20507(i) for

[4] The scope of the CRA's records-retention requirement is broader than the Public Disclosure Provision on its face. Whereas the Public Disclosure Provision is limited to records concerning list maintenance activities, the CRA requires election officials to preserve "all records and papers . . . relating to any application, registration, payment of poll tax, or other act requisite to voting in such election." 52 U.S.C. § 20701.

failure to allow inspection of the requested records. The Foundation also respectfully requests that the Court enter an injunction requiring VR Bennett to provide inspection or disclosure of all records requested by the Foundation.

Dated: April 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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