United States District Court
District of New Mexico

PUBLIC INTEREST LEGAL FOUNDATION, INC. *Plaintiff*, *v.* **MAGGIE TOULOUSE OLIVER,** in her official capacity as the Secretary of State for the State of New Mexico *Defendant*.	Case No. 1:23-cv-00169-MLG-JFR

Plaintiff Public Interest Legal Foundation's
Reply Memorandum in Support of Motion for Summary Judgment

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INTRODUCTION

The Secretary does not dispute that she charges $5,000 *each time* the public requests an *electronic copy* of the Voter File. Nor does she claim her Data Fees comply with the NVRA's reasonableness requirement. Nor could she. Under no standard is such an exorbitant, per-request fee "reasonable," especially where it forecloses access for a large portion of the public—a consequence the Secretary dismisses as unworthy of regard. (*See* ECF No. 39 at 20.) The right to examine and scrutinize the Secretary's activities belongs to everyone, not just the wealthy.

The NVRA is not silent on the questions before this Court, as the Secretary suggests. Congress expressly addressed the cost of public records in the NVRA's text, limiting those costs to "photocopying" charges, which must also be "reasonable." 52 U.S.C. § 20507(i)(1). Congress also expressly told us that the NVRA exists "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C § 20501(b)(3)-(4). Even if the NVRA tolerates some *actual* electronic reproduction costs, as one court has suggested, such costs must still be reasonable and must not stand as obstacles to the NVRA's purposes. The Data Fees fail all relevant standards and therefore cannot stand.

It does not take expert testimony to confirm what is self-evident: a $5,000 per-request fee is unreasonable and erodes the transparency Congress intended when it made *all* voter list maintenance records subject to public inspection. Judgment should enter for the Foundation.

ARGUMENT

I. The Court Must Address the NVRA's Scope and Should Conclude that the Voter File is Within It.

The Secretary is wrong when she argues that it is unnecessary to decide whether the Voter File is subject to disclosure under the NVRA. (ECF No. 39 at 6.) While this case is ultimately about preemption, the Court must first decide whether the Voter File is a record within

the NVRA's scope, because if it is not, the preemption issue is moot. In other words, to reach the cost issue (*i.e.*, the preemption issue), the Court must first decide whether the Voter File is subject to disclosure under the NVRA. *See Pub. Interest Legal Found., Inc. v. Bellows*, 588 F. Supp. 3d 124, 132 (D. Me. 2022) ("[A] state law regulating disclosure of a record not falling under the Public Disclosure Provision cannot plausibly be preempted by the NVRA.").

The Court should, of course, conclude that the Voter File is subject to disclosure under the NVRA. (*See* ECF No. 37 at 6-14.) Every court addressing this issue has so concluded (*id*. at 6-7), as has the United States (*id*. at 7). We can now add to this list the United States Court of Appeals for the First Circuit, which, after the Foundation filed its Motion, held that Maine's voter file is within the NVRA's reach. *Pub. Int. Legal Found., Inc. v. Bellows*, No. 23-1361, 2024 U.S. App. LEXIS 2416 (1st Cir. Feb. 2, 2024). Furthermore, by not substantively contesting the disclosure issue, the Secretary has effectively conceded it.

II. The NVRA Preempts New Mexico's Data Fees.

There is nothing "extreme"—as the Secretary puts it (ECF No. 39 at 1)—about the notion that Congress may preempt state regulation concerning voter registration. It is, rather, a feature of our country's Constitution. The Elections Clause gives Congress the power to alter or supplant state regulations concerning federal elections' "times, places, and manner," U.S. Const. Art. I, § 4, cl. 1, "'comprehensive words,' which 'embrace authority to provide a *complete code* for congressional elections,' including, as relevant here … regulations relating to 'registration.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (quoting *Smiley v. Holm*, 285 U. S. 355, 366 (1932)) (emphasis added). Congress's Election Clause power "'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are

inconsistent therewith.'" *Inter Tribal*, 570 U.S. at 9 (*Ex parte Siebold*, 100 U. S. 371, 392 (1880)). Simply put, "[w]hen Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Inter Tribal*, 570 U.S. at 14 (emphasis in original).

The NVRA is a valid exercise of Congress's Elections Clause powers. *See Inter Tribal*, 570 U.S. at 5, 7-9; *see also ACORN v. Edgar*, 880 F. Supp. 1215, 1220 (N.D. Ill. 1995) (explaining that Congress has the power to supplant state regulations and remarking, "That of course is precisely what Congress has done in the Act."); *Condon v. Reno*, 913 F. Supp. 946, 967 (D.S.C. 1995) ("Because it is constitutional, it (the NVRA) is the supreme law of the land and therefore, is binding upon the State of South Carolina."). Accordingly, Courts have regularly invalidated state laws that conflict with the NVRA. (ECF No. 37 at 21-22.) Most recently, the First Circuit invalidated a law that placed restrictions on the recipient's use of Maine's voter file. *Bellows*, 2024 U.S. App. LEXIS 2416, at *26-*39. The Secretary offers no compelling rebuttal to these established preemption principles, and the Data Fees should likewise be invalidated.

A. The NVRA Is Not Silent with Respect to Electronic Records or Their Costs.

The NVRA's text unambiguously requires disclosure of "all records" and permits costs for one thing: "photocopying." 52 U.S.C. § 20507(i)(1). The Secretary counters the plain text with two related arguments, neither of which has merit. The Secretary first reasons that because the NVRA does not specifically address *electronic* records, that the NVRA is "silent" about what states may charge for their production. (ECF No. 39 at 7, 10.) Not so. The NVRA requires disclosure of "all records," 52 U.S.C. § 20507(i)(1), which means exactly what it says—*all* records. *See Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012). ("[T]he use of the word 'all' [as a modifier] suggests an expansive meaning because 'all' is a

term of great breadth.") (citations omitted). Electronic records—like the New Mexico Voter File—are therefore subsumed by the phrase "all records."

Confronting a similar argument, the United States District Court for the Northern District of Georgia held that "records" as used in the NVRA includes "information in electronic form." *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1335-36 (N.D. Ga. 2016). The Court prudently reasoned, "Interpreting 'records' to exclude information contained within electronic databases also would allow States to circumvent their NVRA disclosure obligations simply by choosing to store information in a particular manner. Given the ubiquity and ease of electronic storage, this would effectively render Section 8(i) a nullity." *Id*. at 1336. Contrary to the Secretary's suggestion (ECF No. 39 at 10), the Court does not need to add anything to the NVRA's text to reach the same conclusion. Indeed, "all records" already includes the Voter File in electronic format, and interpreting "records" to exclude electronic records would allow states to circumvent the NVRA's cost limitations simply by choosing to store information in electronic format.

The Secretary similarly argues that because Congress did not expressly "prohibit" states from charging costs for electronic records, it must allow it. (ECF No. 39 at 7.) Not so. Under the "the long-honored rule of statutory construction, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of others)," Congress's inclusion of reasonable photocopying costs acts to exclude all other costs. *See United States v. Cardenas*, 864 F.2d 1528, 1534 (10th Cir. 1989) (holding that "transportation" of a firearm was not within the purview of federal legislation that used the phrase "uses or carries"). Accepting the Secretary's premise would mean states could charge requestors for every cost not expressly prohibited—which in this instance would mean *every cost*, because the NVRA does not expressly *prohibit* any cost. Such an outcome would not only render Congress's selection of "photocopying" meaningless, it would

grant states the ability to charge fees so high that the public disclosure requirement would itself be meaningless, a result that should plainly be avoided. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). What is reasonable, and consistent with accepted construction canons, is to read Congress's exclusive reference to "photocopying" to mean Congress intended to prohibit all other costs.

The Secretary's textual arguments are also glaringly inconsistent. The Secretary seems to accept the NVRA's "reasonable[ness]" limitation, while simultaneously asking the Court to ignore the word "photocopying." (*See* ECF No. 39 at 7-8.) Neither the Secretary or the Court can pick and choose from among a statute's words, giving effect to some words but not others.

B. The Relevant Field Is Voter List Maintenance Records, Not Election Administration.

The Secretary aims her field preemption arguments at strawmen, redefining the relevant field to broadly encompass "election administration" and the maintenance of "centralized voter files." (ECF No. 39 at 11-14.) To be sure, the NVRA and HAVA gave states some discretion in how to implement these statutes, and states do, in fact, vary in the ways they administer their elections and maintain their voter registration files. But none of that matters here because this case is not about election administration or computer maintenance. It is about permissible costs under NVRA Section 8(i)(1). The relevant field, then, is the records described by that section—*i.e.*, voter list maintenance records—and the relevant question is whether Congress intended to occupy that very narrow field. Congress did so intend. (ECF No. 37 at 17-18.)

Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183 (D.N.M. 2010) is not to the contrary. For starters, *Herrera* was not about voter list maintenance records, it was about laws governing third-party voter registration drives. *See id*. at 1188. As the Secretary

acknowledges, the relevant language of the NVRA expressly left room for additional "methods of voter registration provided for under State law." (ECF No. 39 at 9 (quoting *Herrera*, 690 F. Supp. 2d at 1225).) The Secretary reads the "reasonable cost" requirement as a similar invitation for state regulation. It is not. For starters, the Secretary again ignores the word "photocopying," which she may not do. Even in isolation, the "reasonable cost" requirement is not an invitation. It is an instruction to the states. It is a limit on their discretion to charge whatever they want for production of voter list maintenance records. Unlike *Herrera*, the NVRA's cost provision is designed to supplant state regulation, not work alongside it.[1]

The Secretary's other arguments are likewise flawed. The Secretary first claims that Congress could not have intended to preempt the field with respect to disclosure and cost of voter list maintenance records because "[t]he NVRA contains no provisions related to or referencing centralized voter rolls." (ECF No. 39 at 12.) Prior to the NVRA, there were virtually no federally mandated voter list maintenance requirements—except for, perhaps, more generally applicable civil rights laws, like the Voting Rights Act. Congress drafted the NVRA broadly in order to capture the States' varying and diverse list maintenance activities. Rather than list each record subject to disclosure, Congress wrote "all records," which includes the Vote File.

There is nothing inherently suspect about a broadly written statute, and "[a]s a general matter of statutory construction, a term in a statute is not ambiguous merely because it is broad in scope. In employing intentionally broad language, Congress avoids the necessity of spelling out in advance every contingency to which a statute could apply." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 310 (3d Cir. 2010) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)

[1] *Pub. Int. Legal Found., Inc. v. Way*, No. CV 22-02865 (FLW), 2022 WL 16834701 (D.N.J. Nov. 9, 2022) does not help the Secretary either. That case merely found that a state-specific "instruction manual for computer software" was not within the NVRA's scope. *Id.* at *15-*16. The holding did not involve preemption or costs.

("holding that the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'")).

It is therefore irrelevant whether statewide electronic voter files existed when the NVRA was passed. (ECF No. 39 at 15.) Congress wrote "all records," not "all records that exist at the time this Act takes effect." The Voter File exists now and is within the scope of statute's plain language. The Secretary's moment-in-time view of the NVRA would conceal scores of voter list maintenance from public view and scrutiny, simply because they are now maintained in a compilation or in electronic format. Congress did not intend such an absurd result.

Because the Public Disclosure Provision is unambiguous, there is no need to consult legislative history. *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *see also Pub. Interest Legal Found., Inc. v. Dahlstrom*, No. 1:22-cv-00001-SLG, 2023 U.S. Dist. LEXIS 86783, at *18 n.81 (D. Alaska May 17, 2023) (declining to consider the NVRA's legislative history because the NVRA's "text," and "object and policy" are "clear"). Yet even if considered, the legislative history the Secretary identifies changes nothing. No inference, much less a material or dispositive inference, can be drawn from the fact that no member of Congress complained about the cost of producing the voter file in electronic format. (ECF No. 39 at 14.)

C. The Data Fees Stand as Obstacles to Fulfillment of Congress's Full Objectives.

The Secretary's conflict preemption arguments also stray wide of the mark. The Secretary claims that the Data Fees do not conflict with the NVRA's goals because they promote cost "uniformity," and "help ensure access" to public records. (ECF No. 39 at 18-19.) For starters, the notion that a $5,000 per-request fee helps ensure access is irrational. Furthermore, the Foundation does not challenge any state law or policy that requires cost uniformity, so that

defense can be disregarded as well. To be clear: The Foundation has never asked for "preferential pricing," as the Secretary suggests. (ECF No. 39 at 20.)

More fundamentally, it would not matter if the Data Fees in fact furthered *other* state or federal objectives because no amount of good intentions can save a state law that plainly poses obstacles to Congress's explicitly articulated objectives. The First Circuit's decision in *Bellows* is instructive in this regard. There, the State of Maine argued that a state law prohibiting publication of voter file data is not preempted because the law furthers some of the NVRA's other objectives. *Bellows*, 2024 U.S. App. LEXIS 2416, at *34-35. "We are unpersuaded," the First Circuit responded.

> [E]ven if the Publication Ban does further the NVRA's objective of enhancing the participation of eligible citizens as voters, it nonetheless creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as stated in 52 U.S.C. § 20501(b)(1)-(4).

Id. at *35 (emphasis in original).

The Secretary is flat wrong when she argues that Congress did not intend for public oversight and scrutiny of voter list maintenance activities. (ECF No. 39 at 20.) That is exactly what Congress intended. (ECF No. 37 at 14-15); *see also, e.g.*, *Project Vote*, 682 F.3d at 339-40 ("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."). The oversight Congress intended is not possible in New Mexico due to the Data Fees.

The Secretary does not get a pass on complying with federal law because she thinks the Foundation, or any other requestor, can afford to pay her exorbitant price tag. (ECF No. 39 at 20.) Nor is she excused from compliance because she believes "average New Mexicans" are not "lamenting a lack of access to the voter file due to the fee schedule." (*Id*.) Federal law applies in New Mexico whether the Secretary thinks it should or not. And the Secretary's startling

disregard for her constituents' federal inspection rights, and her aversion to transparency, should give this Court additional reasons to grant permanent injunctive relief.

The Secretary is simply inventing things when she claims the Foundation is asking the Court to sanction "crowd sourced" monitoring. (ECF No. 39 at 20.) The Secretary provides no citation for this claim because none exists. The Foundation's actual intentions are described in the Affidavit of Logan Churchwell, which was filed contemporaneously with the Foundation's Motion for Summary Judgment. (ECF No. 37-1 ¶ 12.) These intended activities are all consistent with the intent of Congress. The Secretary does not dispute this testimony.

D. Expert Testimony Is Not Required to Demonstrate that the Data Fees are Not Photocopying Costs and Not Reasonable.

The Secretary claims the Foundation must offer expert testimony establishing "what a reasonable fee would be" in order to receive summary judgment. (ECF No. 39 at 21.) Not so. The Foundation's burden is to sufficiently demonstrate that the Data Fees violate the NVRA, because they are neither exclusively related to photocopying or reasonable. In neither case is expert testimony required.

The photocopying issue is easily resolved in the Foundation's favor because the Secretary has admitted that "the SERVIS Data Fees are not exclusively associated with the cost of photocopying the Voter File." (ECF No. 37-1 at 10-11 (Request for Admission No. 3).)

Even if the NVRA permits reasonable costs for electronic reproduction, the Court can conclude that the Data Fees are unreasonable without expert testimony. The Secretary does not dispute what the Data Fees are or that requestors must pay more than $5,000 each and every time they request an *electronic* copy of the Voter File. The Secretary does not dispute that she charges up to $1,100 per hour to process a request for the Voter File. (ECF No. 37 at 23 n.5.) The Secretary does not dispute that a *single* purchase of the Voter File would constitute nearly ten

percent of a New Mexican's household's yearly income. (*Id*. at 20.) It is self-evident that these costs effectively foreclose access to a large portion of the public, thereby undermining Congress's transparency and oversight goals. The Court is capable of reaching this conclusion without the assistance of an expert. *See, e.g., Gordon v. DH Pace Co.*, No. CIV 19-0031 JB\GJF, 2020 U.S. Dist. LEXIS 10525, at *3 (D.N.M. Jan. 22, 2020) ("Gordon did not need to provide an expert, because this breach is not a technical issue outside the common knowledge: the question is whether Wal-Mart was negligent in keeping its automatic door safe for invitees, and not the technicalities of how the door malfunctioned."). While other states' activities do not conclusively determine what is and is not "reasonable," the Foundation nevertheless shares that Pennsylvania —the fifth largest state by population—makes its entire voter file available for twenty dollars.[2]

The Secretary must introduce record evidence that demonstrates a triable issue of fact concerning the lawfulness of her Data Fees. She does not even claim that the Data Fees are reasonable under the NVRA, much less offer evidence that would support such a claim.

E. The Data Fees Are Unlawful Under All Relevant Standards.

The Secretary claims that if the Court finds the Data Fees are unlawful, it must rule that all electronic records must be reproduced for free. (ECF No. 39 at 21-22.) While the NVRA's text would support such a ruling, it is not the only standard the Foundation has advanced.

The United States District Court for the Middle District of Alabama has approved an "actual cost" standard for electronic records request. *Greater Birmingham Ministries v. Merrill*, No. 2:22cv205-MHT, 2022 U.S. Dist. LEXIS 181339, *18 (M.D. Ala. Oct. 4, 2022). Even under this standard, the costs imposed must still be "reasonable" and must "ensure that the purposes of the NVRA are not frustrated." *Id*. Even if this standard were applied here, the Data Fees would

[2] https://www.pavoterservices.pa.gov/pages/PurchasePAFullVoterExport.aspx?Langcode=en-US (last accessed Feb. 22, 2024).

fail it because they are not tethered to the actual cost of electronic reproduction and are not reasonable. (*See* ECF No. 37 at 22-23.) The Secretary does not contest these arguments.

III. The Secretary May Not Supplement the Record Through Unsworn Statements Made by Counsel in a Legal Memorandum, and, in any Event, May Not Condition Access on the Payment of Facilities Costs and Utility Bills.

The Foundation asked the Secretary via interrogatory to "[d]escribe the basis for each of the … SERVIS Data Fees, including the basis for each dollar amount charged[.]" (ECF No. 37-1 at 25.) The Secretary responded: "No current member of the SOS staff has any knowledge of the basis upon which this legacy schedule was implemented." (*Id.*) The Secretary now makes a half-hearted attempt to change her answer through counsel's statements in her memorandum, which point to the cost to maintain the voter file and keep the lights on.

Whether any of this is true does not matter, for at least three reasons. First, the Secretary cannot amend her interrogatory responses through counsel's statements in a legal memorandum. If the Secretary is saying that someone in the office suddenly does know the basis for the Data Fees, she had a duty to amend her interrogatory response and provide a full and complete explanation. *See* Fed. R. Civ. P. 26(e)(1). She did not do that and therefore cannot now rely on these unsworn statements to create a contested issue of fact.[3] Second, even in her memorandum, the Secretary does not actually say that overhead costs justify the Data Fees, and so their relevance here is zero, in any event. Third, even if the Secretary sufficiently amended her interrogatory response and claimed that the Data Fees are designed to recoup "SERVIS maintenance," "overhead," and "facilities" costs, it would not change the outcome because the Data Fees are still unreasonable and still pose obstacles to Congress's objectives.

[3] The Secretary claims, "PILF has not asked for the current calculations of costs or overhead justifying the data fees[.]" The Secretary is wrong. Interrogatory No. 1 asked the Secretary to "describe the basis" for the Data Fees "in effect at the time you provide your answer." (ECF No. 37-1 at 25.)

Missing from the Secretary's ledger are the millions of federal dollars New Mexico has received to fund and support election administration since 2003. According to the U.S. Election Assistance Commission, New Mexico has received more than $32 million in such federal funds, including more than $15 million in Section 251 funds,[4] which "support[] states efforts to comply with the requirements of HAVA Title III."[5] In other words, these funds support New Mexico's implementation of a computerized, statewide registration list. *See* 52 U.S.C. § 21083(a)(1)(A).

The NVRA's Public Disclosure Provision is no ordinary transparency law. Its unique and expansive scope is deliberate because it is designed to protect the right that is "preservative of all rights"—the right to vote. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Public Disclosure Provision "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." *Project Vote*, 682 F.3d at 334-35. To that end, Congress designed the Public Disclosure Provision to shed light on *all* activities that determine who belongs and who does not belong on the voter rolls. As one federal district court put it, 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. Accordingly, election officials must provide full public access to all records related to their list maintenance activities, including their voter rolls." *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018).

In response, the Secretary essentially says: If you want to know whether we're protecting your right to vote, you must help pay our electricity bill. The NVRA does not brook such things. (*See* ECF No. 37 at 19-22.)

[4] https://www.eac.gov/funding-levels-by-state (last accessed Feb. 29, 2024).
[5] https://www.eac.gov/grants/251-requirements (last accessed Feb. 29, 2024).

Dated: February 29, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2024, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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