



VIA EMAIL

February 14, 2024

Meagan Wolf
Administrator
Wisconsin Elections Commission
201 W. Washington Avenue
Madison, WI 53703
Email: Meagan.Wolfe@wi.gov; elections@wi.gov
cc: brandon.hunzicker@wisconsin.gov

RE: Notice of NVRA Violation

Dear Administrator Wolfe:

Pursuant to 52 U.S.C. § 20510(b)(1), this letter serves as statutory notice to Wisconsin Election Commission (“WEC”) Administrator Meagan Wolfe, as Wisconsin’s chief election official,¹ that she and WEC are in violation of the National Voter Registration Act (“NVRA”) for failure to permit inspection and reproduction of public records in accordance with the NVRA terms, 52 U.S.C. § 20507(i)(1).

You are hereby notified that you now face federal litigation if the violation is not remedied in the time afforded by law.

Background

The National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. §§ 20501 *et seq.*, requires each state and the District of Columbia to 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) (“Public Records Provision”). For the reasons stated herein, this portion of the NVRA applies to Wisconsin.

On January 24, 2024, pursuant to the NVRA, the Foundation requested the following records from WEC:

1. A current or most updated copy (.CSV or .TXT formats) of the complete Wisconsin Official Registration List as described in Wis. Stat. § 6.36 containing all data fields except for operator’s license and/or last-four of Social Security number (Wis. Stat. §

¹ Wis. Stat. Ann. § 5.05(3g).

6.36(1)(a)(5)). Please include year of birth as opposed to the full birth date for each registrant (Wis. Stat. § 6.36(1)(a)(2)). The Foundation will pay a reproduction fee not to exceed cost of reproduction. *See* Wis. Stat. § 6.45(2) (describing fee imposed on candidates).

2. “Deceased Reports”² received from ERIC during the years 2020, 2021, 2022, and 2023.

On February 13, 2024, WEC responded to the request, stating, “Wisconsin is exempt from the NVRA under 52 U.S.C. s. 20503(b)(2), however, we are processing your request under Wisconsin’s public records law.”

Regarding Request No. 1 (Wisconsin Official Registration List), WEC directed the Foundation to the “online portal at <https://badgervoters.wi.gov>.” WEC explained further that “Wisconsin law requires the Commission to charge a fee for access to voter registration data,” namely, a “base fee of \$25” and “\$5 for every thousand records returned by the request.” Last, WEC explained, “Self-service request fees are capped at \$12,500.”

Regarding Request No. 2 (ERIC Reports), WEC stated, “We hope to provide a response to the second part of your request soon.”

Wisconsin’s NVRA Exemption is Ineffective Under Supreme Court Precedent

NVRA Section 20503(b)(2) provides that the NVRA does not apply to states that allowed for election-day registration continuously since August 1, 1994 (the “NVRA Exemption”). It is on this basis that WEC claims that “Wisconsin is exempt from the NVRA.”

In *Shelby Cty. v. Holder*, 570 U.S. 529 (2013), the Supreme Court of United States reaffirmed the principle of equal state sovereignty. The Court explained that with respect to a law that treats the states differently, “a statute’s “current burdens” must be justified by “current needs,” and any “disparate geographic coverage” must be “sufficiently related to the problem that it targets.” *Id.* at 550-51. The Court continued, “Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.” *Id.* at 553.

Wisconsin’s exemption from the NVRA’s Public Records Provision did not “make sense” in 1994 and it certainly does not “make sense in light of current conditions.” *Id.*

The NVRA’s 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.” *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018). “The NVRA Public Disclosure Provision is one means of ensuring compliance with the NVRA’s stated goals. By opening up voter registration records for

² An ERIC “Deceased Report” “identifies voters who may have died.” *See* ERIC Membership Agreement at Section 3(a)(i)(E) (page 15/PDF page 18), available at <https://ericstates.org/wp-content/uploads/documents/ERIC-Bylaw-MA-FINAL.pdf> (last accessed Feb. 14, 2024).

inspection, the Public Disclosure Provision shines a light on States’ voter registration activities and practices.” *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 721 (S.D. Miss. 2014).

Wisconsin has voter registration and performs voter list maintenance.³ Wisconsin is even part of an interstate compact that exists to “to assist states in improving the accuracy of America’s voter rolls and increasing access to voter registration for all eligible citizens.”⁴ That Wisconsin offers election-day registration has not relieved Wisconsin of the need—or desire—to implement programs and activities designed to keep the voter roll as accurate as possible. In fact, Wisconsin has enacted specific voter list maintenance procedures to address election-day registration. Wis. Stat. Ann. § 6.56(3). In short, the NVRA’s transparency and oversight goals apply equally in Wisconsin under “current conditions.” *Shelby Cty.*, 570 U.S. at 553.

Under the principles articulated in *Shelby Cty. v. Holder*, 570 U.S. 529 (2013), and other Supreme Court jurisprudence, Wisconsin’s exemption from the NVRA’s Public Disclosure Provision is no longer effective.

The Voter Roll is a Public Record Under the NVRA

To the Foundation’s knowledge, every court to address the question has found the voter roll, or a portion thereof, to be within the NVRA’s scope. *See, e.g., Pub. Int. Legal Found., Inc. v. Bellows*, No. 23-1361, 2024 U.S. App. LEXIS 2416 *22 (1st Cir. Feb. 2, 2024) (“Maine’s Voter File is a ‘record[] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters’ and is thus subject to disclosure under Section 8(i)(1).”). Wisconsin’s Official Registration List (Request No. 1) is likewise subject to disclosure under the NVRA.

Date of Birth Information is Public Information Under the NVRA

Wisconsin law exempts date-of-birth information from public disclosure.⁵ The NVRA, in contrast, requires public disclosure of “all records” concerning voter list maintenance, with just two narrow exceptions, neither of which applies here. 52 U.S.C. § 20507(i)(1). Date-of-birth information is therefore subject to disclosure under the NVRA. *See Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020) (holding that the plaintiff is entitled to date-of-birth information under NVRA).

The NVRA Limits Reproduction Costs to Reasonable Photocopying Charges

Congress addressed the cost of public records in the NVRA text, limiting those costs to “photocopying” charges, which must also be “reasonable.” 52 U.S.C. § 20507(i)(1). What the NVRA does *not* say is also important. Unlike other federal statutes, like the Freedom of Information Act, *see* 5 U.S.C. § 552(a)(4)(A)(i), the NVRA has no express language permitting a state agency to charge the requestor the costs of producing the requested records. The United States District Court for the Norther District of Georgia has explained that “[t]he absence of a

³ <https://elections.wi.gov/statistics-data/voter-list-maintenance> (last accessed Feb. 14, 2024).

⁴ ERIC FAQs, “What is ERIC?” <https://ericstates.org/faq/> (last accessed Feb. 14, 2024).

⁵ Wis. Stat. Ann. § 6.36(b)(1)(a).

cost provision in the public inspection provision of the NVRA—and its inclusion in other record disclosure laws—suggests Congress intended States to shoulder the burden” of producing records. *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1351 (N.D. Ga. 2016). Although the NVRA’s text does not support the application of an “actual cost” standard, another federal court has concluded that reproduction costs minimally “must be tethered to the actual costs [the state] incurs in producing responsive voter records.” *Greater Birmingham Ministries v. Merrill*, No. 2:22cv205-MHT, 2022 U.S. Dist. LEXIS 181339 at *18 (M.D. Ala. Oct. 4, 2022).

Wisconsin charges requestors 5 dollars per 1,000 records. At this rate, the cost of Wisconsin’s Official Registration List (Request No. 1) is the maximum allowable cost of \$12,500. Wisconsin’s fee structure contravenes the NVRA because Wisconsin’s fees are not exclusively related to photocopying and are not reasonable or tethered to the actual cost Wisconsin incurs in producing the Official Registration List.

Furthermore, Wisconsin’s fee structure discriminates against members of the public, including the Foundation. While the Foundation must pay \$12,500 to obtain the Official Registration List, candidates must pay only the “cost of reproduction.” Wis. Stat. Ann. § 6.45(2). Wisconsin’s exorbitant fee structure effectively forecloses access to a large segment of the population. Wisconsin’s fee structure is thus an obstacle to the accomplishment of the NVRA’s goals, and as such, it is preempted, invalid, and unenforceable. *See, e.g., Pub. Int. Legal Found., Inc. v. Bellows*, No. 23-1361, 2024 U.S. App. LEXIS 2416, at *29 (1st Cir. Feb. 2, 2024) (“Maine may not ‘condition[] that right . . . upon compliance with a rule . . . [that] is inconsistent in both purpose and effect with the remedial objectives of the [NVRA].’”).

The NVRA Preempts Conflicting State Laws

In addition to Wisconsin’s fee structure, any state law limiting disclosure of the requested records is inapplicable to the Foundation’s request because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution’s Elections and Supremacy Clauses. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 12-15, 133 S. Ct. 2247, 2255-57 (2013).

Opportunity to Cure

Failure to permit public inspection and reproduction of the requested records under the NVRA’s terms is a violation of federal law for which the NVRA provides a private right of action. 52 U.S.C. § 20510(b).

Administrator Wolfe is hereby notified that she and WEC are violating the NVRA and litigation may commence against them if the violations described herein are not cured within 20 days of the receipt of this letter. The curative period is 20 days because the violation is occurring within 120 days of Wisconsin’s April 2, 2024, Presidential Preference Primary,⁶ an election for federal office. *See* 52 U.S.C. § 20510(b)(2).

⁶<https://elections.wi.gov/sites/default/files/documents/Wisconsin%20Elections%20Commission%202024%20Calendar%20of%20Election%20Events%20%28Rvsd%20Nov9.2023%29.pdf> (last accessed Feb 14, 2024).

Administrator Wolfe and WEC can cure their violation by doing *all* of the following:

1. Produce an electronic copy of the most recent statewide Official Registration List containing all data fields described in Wis. Stat. § 6.36, except for operator's license and/or last-four of Social Security number;
2. In lieu of full date-of-birth information, produce year-of-birth information for each registrant included in the Official Registration List described in item number 1; and,
3. Charge a reproduction fee not to exceed the actual cost of reproduction.

For lawsuits initiated by a private party, an award of attorney's fees, expenses, and costs incurred is available under 52 U.S.C. § 20510(c). The Foundation was recently awarded attorney's fees and litigation expenses as the prevailing party in actions to enforce the NVRA's public inspection rights.⁷

If the violation described herein is not cured in the time afforded by law, we will have no choice but to pursue remedies in federal court.

Please contact me to arrange for secure transmission of the requested records, if necessary.

Thank you for your continued attention to this matter.

Sincerely,



Logan Churchwell
Research Director
Public Interest Legal Foundation

⁷ Doc. 97, *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-0981 (entered June 30, 2021).