

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

PROJECT VOTE, INC.,

Plaintiff,

v.

**BRIAN KEMP, in his official capacity as
Secretary of State and Chief Election
Official for the State of Georgia,**

Defendant.

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**Civil Action No.
1:16CV02445-WSD**

**DEFENDANT KEMP’S RESPONSE IN OPPOSITION TO
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

This Court should deny Plaintiff’s motion for a preliminary injunction. Defendant has previously addressed the lack of any emergency in this matter and Plaintiff has since withdrawn its earlier request for emergency consideration. Docs. 15 and 17. Plaintiff filed this lawsuit on July 6, 2016 and its motion for preliminary injunction on July 13, 2016. Docs. 1 and 12. Plaintiff seeks access to the statewide voter registration database. *Id.* Because the National Voter Registration Act (“NVRA”), 52 U.S.C. § 20507(i), does not require public inspection of the statewide voter registration database and because the Help America Vote Act (“HAVA”), 52 U.S.C. § 21083, actually *prohibits* public inspection, Plaintiff’s motion for preliminary injunction should be denied.

Statement of Facts

Plaintiff filed this action pursuant to the public disclosure provision of the NVRA, 52 U.S.C. § 20507(i), seeking an order directing Defendant to provide for public inspection the following:

- A. All records relating to voter registration applications that Defendant rejected, canceled, or otherwise did not add to the voter roll (*e.g.*, applicants who are pending verification) since July 6, 2013, including all records relating to the specific reason an applicant was rejected, canceled, or otherwise not added to the voter roll.
- B. Defendant's disclosure must include, but should not be limited to, the following:
 - i. Records reflecting whether a voter registration applicant was rejected canceled, or otherwise not added to the voter roll because of a non-match with information in the Georgia Department of Driver Services ("DDS") database or a non-match with information in the Social Security Administration ("SSA") database, and if so, which data field(s) resulted in the non-match.
 - ii. Records sufficiently explaining the specific reason an applicant was rejected, canceled, or otherwise not added to the voter roll, including records sufficiently explaining the meaning of any abbreviations or codes used to represent such reasons in Defendant's disclosure; and
 - iii. Records reflecting the algorithm or criteria by which information in a voter registration application is determined to match or not match information in the Georgia DDS or SSA database.

Doc. 1 at 4 and Doc. 12 at 2.

As an initial matter, voter registration in Georgia is conducted at the county level. O.C.G.A. § 21-2-220(a) (application for voter registration to be made with county registrar); O.C.G.A. § 21-2-221(e) (voter registration applications from DDS forwarded to county registrar); O.C.G.A. § 21-2-221.1(f) (voter registration applications from Department of Natural Resources forwarded to county registrar); O.C.G.A. § 21-2-221.2(d) (online voter registration applications forwarded to county registrars); O.C.G.A. § 21-2-222(i) (voter registration applications from public assistance offices forwarded to county registrars); and O.C.G.A. § 21-2-223 (mail voter registration applications forwarded to county registrars). The Secretary of State does *not* register voters, nor does Defendant maintain copies of voter registration applications and related records. D. Exh. 3 ¶ 3.

Secretary Kemp however, does have responsibility for maintaining the statewide centralized voter registration interactive *database*.¹ The software developed to maintain and currently manage the data is called ENET GVRs.² D. Exh. 1 ¶ 4. Utilizing this software, registrars from 159 counties access the database to add, cancel, and reject voter registration applications. D. Exh. 3 ¶ 5. As mandated by HAVA, the database is an interactive computerized system, not a

¹ In 2002 Congress enacted HAVA, 52 U.S.C. § 21083(a)(1)(A), requiring the implementation of a “single, uniform, official, centralized, interactive computerized statewide voter registration list.”

² This software system has been in operation since 2013. D. Exh. 3 ¶ 4.

static data file. Each voter's status within the database reflects the most recent information entered in each field. The ENET GVRS software also interfaces with software from the Division of Driver Services (DDS) to accept voter registration applications that have been processed through DDS. D. Exh. 3 ¶ 6. Finally, the software interfaces with an online internet application that permits online voter registration for persons who have either a Georgia driver's license or a Georgia identification card.³ *Id.* ¶ 7.

Each voter registration application entered into the ENET GRVS system is given a voter registration number. D. Exh. 3 ¶ 9. Each voter registration number has a voter status of one of the following: active, inactive, pending, rejected, or canceled. D. Exh. 3 ¶ 10. The information requested by Plaintiff relates to voter registration numbers (or applications) with a status of pending, rejected, and canceled.⁴ Doc. 1 at 4 and Doc. 12 at 2.

³ A Georgia driver's license or identification is needed to permit use of the voter's signature on that identification card as the signature on the registration application. *See* <https://registertovote.sos.ga.gov/GAOLVR/welcome.do#no-back-button>. If an applicant submits an online application and the applicant's name or other information does not match the driver license number provided, the application will not go through and the applicant will have to submit a paper application to the county instead.

⁴ Of course, since the database is a dynamic file, the voter status may not be the same from one day, or even one hour, to the next. It is ever changing as registrars and the system's interface with DDS constantly update voter files.

On April 3, 2015, Defendant's staff provided Plaintiff with an excel file containing data for 568,044 unique voter registration numbers,⁵ all with a March 8, 2015, status of canceled.⁶ D. Exh. 1 ¶12. The resulting file could not and cannot be generated through the ENET GVRS system. Rather, the third party vendor that both developed and maintains the state's database was contacted to assist in creating the analysis report. *Id.* ¶ 11. The file included the following fields:

- county code (this was a numeric code)
- registration number
- voter status (all reported as "C" for cancelled)
- cancelled date
- cancelled reason
- last name
- first name
- middle name
- house number
- street
- city
- zip
- birth year
- registration date
- race
- gender

D. Exh. 1 ¶ 15. The following additional information describing the "canceled reason" field was also included on a second worksheet of the excel file. *Id.* ¶ 16.

⁵ Since some of the files may be duplicate registrations they likely do not represent 568,044 voters who were actually canceled. D. Exh. 1 ¶ 16.

⁶ The file contained voters that were canceled from Oct. 12, 2012 through March 8, 2015 *and* had a canceled status on March 8, 2015.

- NGE No activity for 2 general election cycles
- DEC Deceased
- FLN Felon
- NVF Not Verified
- MST Moved out of state
- DUP Duplicate
- HER Hearing
- MOC Moved out of county
- VR Voter requested
- ERR Error
- REJ Not verified
- MIN Mentally incompetent
- NCZ Not a citizen
- DMO Duplicate merge
- MOV Moved out of state

Some of the “status reasons” are general in nature. For instance, a status of “HER” indicates that the voter’s qualifications were challenged and a hearing was held pursuant to O.C.G.A. § 21-2-228(e). However, the underlying reason for the challenge can only be ascertained by review of the individual voter’s record and documentation at the county level. D. Exh. 3 ¶¶ 13, 18. A status of “ERROR” could be anything the county clerk designated as an “ERROR.”⁷ *Id.*

Additionally, the data fields which relate to voter records in a “pending” status, such as fields indicating a mismatch with DDS or SSA databases, do not relate to these same records once the record is moved to either “active voter” or

⁷ Only 1,183 of the 568,044 voter records provided had a status reason of “ERROR.” D. Exh. 3 ¶ 19.

“canceled” status.⁸ D. Exh. 3 ¶¶ 21-22. While the underlying data is still in the record, the various mismatched data fields are not part of the “active voter” or “canceled voter” status. The statistics pertaining to the April 3, 2015 file are, in part, as follows:

- Spreadsheet included all “canceled” voters (568,044 records)
- Spreadsheet included info re canceled voters that:
 - 31,761 had a status reason of not verified, meaning no match with *either* DDS or SSA database
 - Could not tell whether mismatch was with DDS or SSA
 - Could not tell what specific piece of information did not match, i.e., the name, dob, driver license number, ssn, etc.
 - 1,183 had a status reason of error
 - 9,101 had a status reason of hearing
 - 798 had a status reason of rejected

Plaintiff was provided with the address for all voters on the list. D. Exh. 1 ¶ 15. Plaintiff’s complaint is premised on their alleged *need* for the specific reasons each of the voters in the 4 categories above were canceled. Doc. 1 at ¶¶ 5, 9 and Doc. 12 at 2. However, Plaintiff had each voter’s address and could have reached out to

⁸ States are required, pursuant to HAVA, to verify each voter’s information with the state motor vehicle database and SSA database. 52 U.S.C. § 21083(a)(5)(B).

any voter it believed was improperly removed. Nothing in the NVRA requires Defendant to maintain records in a particular format or detail simply because that is what Plaintiff deems it needs.

While not required under the NVRA, 52 U.S.C. § 20507(i),⁹ Defendant has expended significant financial and staff resources to provide Plaintiff a customized analysis report containing records for canceled¹⁰ and rejected voter registration applications from July 6, 2013 to July 18, 2016, and every voter registration application that was pending as of the morning of July 18, 2016.¹¹ D. Exh. 1 ¶¶ 5-6 (as amended by D. Exh. 3 ¶ 16). The new excel file consists of the following fields:

- registration number
- last name
- first name
- year of birth
- address
- mailing address

⁹ See Sec. I.A. pages 12-20 below.

¹⁰ As explained by Merritt Beaver, the July, 2016 file created by the third party vendor defined “canceled” as “canceled *plus* (1 of 11 status reason codes)” and therefore missed any record with a status of canceled but where the status reason code was something other than the 11 options in the ENET GVRS drop down menu. D. Exh. 3 ¶¶ 12-16. As noted above, registrars from all 159 Georgia counties enter data in the ENET GVRS system, and sometimes clerical errors occur at the county level.

¹¹ Like the March 8, 2015 file, the July 18, 2016 file is a snapshot of the database, and includes only voters with a canceled, rejected, or pending status on the morning of July 18, 2016.

- county name
- race
- gender
- status (canceled, rejected, or pending)
- status reason
- reason code
- date of cancelled
- action
- Last name match?
- First name match?
- DOB match?
- DL# match?
- SSN match?
- US citizen?
- SSA response code

D. Exh. 1 ¶ 5. For each record where the information on the application was inconsistent with either the DDS or SSA database, information is provided on which field(s) were inconsistent and whether the inconsistency was with the DDS or SSN database. *Id.* ¶ 5. Importantly, because the database is constantly updated, a voter may originally have a status of canceled due to a mismatch with DDS or SSA, but later, as information from other government agencies such as the Department of Corrections or Vital Records is added, that voter's status reason may get updated to "Felon," "Deceased," or other reasons. D. Exh. 3 ¶ 23. The information reported for each field, including status reason, is the *most recent* information added to the database for that field. It is not necessarily the *initial* reason the voter was canceled. Such is the nature of an interactive database.

ARGUMENT AND CITATION OF AUTHORITY

A preliminary injunction in advance of trial is an extraordinary measure. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In order to prevail on a motion for preliminary injunction, the movant must show: 1) a substantial likelihood of prevailing on the merits; 2) that the plaintiff will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and 4) that if issued, the injunction would not be adverse to the public interest.” *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988); *Levi Strauss and Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). A preliminary injunction is a drastic remedy “which should not be granted unless the movant clearly carries the burden of persuasion.” *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).¹² Plaintiff has the burden of establishing its entitlement to a preliminary injunction. *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1217 (11th Cir. 2009). Plaintiff’s motion for a preliminary injunction should be denied because it has not shown any of the

¹² In *Bonner v. Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

elements necessary to support its request for this extraordinary remedy. Plaintiff is unlikely to prevail on the merits of its claim because the NVRA does *not* require public inspection of the statewide voter registration database. Plaintiff's position is contrary to both the plain meaning of the statute and the legislative history. Moreover, HAVA expressly prohibits giving Plaintiff access to the statewide voter registration database. Additionally, because Plaintiff has already been provided the data it seeks, its motion for preliminary injunction is moot. Finally, because Plaintiff cannot prevail on the merits of its claim, there is no irreparable injury and any injunctive relief will have a severe burden on Defendant and be against the public's interest.

I. Plaintiff Has Not Shown a Substantial Likelihood of Success on the Merits.

The most important factor in deciding whether to grant or withhold a preliminary injunction is the consideration of a plaintiff's likelihood of succeeding on the merits, and a failure to meet this initial hurdle relieves a court from considering the remaining factors. *Church v. City of Huntsville*, 30 F.3d 1332, 1341-45 (11th Cir. 1994). Here, Plaintiff is not likely to succeed on the merits of its claim because its interpretation of the NVRA's public disclosure provision as requiring disclosure of a statewide voter registration database is prohibited by HAVA; is contrary to the plain meaning of the NVRA; and is contrary to

congressional intent. Moreover, Defendant has substantially complied with Plaintiff's request and therefore Plaintiff's motion for injunctive relief is moot.

A. Georgia's Statewide Voter Registration Database is Not a "Record" Subject to the Disclosure Provisions of the NVRA.

The NVRA, 52 U.S.C. § 20507(i) provides as follows:

(i) Public disclosure of voter registration activities.

(1) 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.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection [52 U.S.C. § 20507] (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.

52 U.S.C. § 20507(i) (emphasis added). Plaintiff contends that it is entitled to inspect the statewide voter registration database, and indeed, seeks a copy of the underlying "*Complete Database File*." Doc. 12-16 at 7 (emphasis added) (explaining that Plaintiff wants "to set up a query of [the State] database that could be run periodically at Project Vote's request"). While Plaintiff asserts that it has been denied access to *records*, both Plaintiff's complaint and preliminary

injunction motion fail to identify any document it was denied.¹³ Plaintiff's complaint is not about Defendant's supposed failure to disclose any available document, but rather about Defendant's refusal to allow Project Vote unfettered access to the statewide voter registration database. Throughout the Declaration of Plaintiff's general counsel, Brian W. Mellor, he refers to Project Vote's need for specific *information*, never identifying a document he believes contains the information. *See* Doc. 12-2 ¶ 22 (describing Defendant's earlier disclosure as non-compliant because it did not "provide sufficient information to allow Project Vote to understand the reasons why voter registration applications had been rejected"); ¶ 25 (describing the request as "including a specific request for *data* indicating whether applicants had used a Driver's License number or SSN") (emphasis added); ¶ 27 (explaining that Defendant's disclosure had been insufficient because it "did not include *data* specifically requested") (emphasis added); ¶ 31 (explaining that Plaintiff had discussed with Defendant how Defendant could "design a targeted query of the GVRS database that satisfied Project Vote's needs"); ¶ 33 (explaining that a lack of records describing *why* voters are removed or canceled from the voter list "makes it impossible for Project Vote to carry out a vital part of

¹³ Plaintiff does identify two documents in its brief in support of the preliminary injunction. Those two items are discussed at Sec. I.C., pages 21-23 below.

[its] mission”). In short, Plaintiff is seeking more than documents, it is seeking real-time access to the state’s voter registration database.

1. HAVA Prohibits Providing Plaintiff Access to the Statewide Voter Registration Database.

Plaintiff’s claim that they are entitled access to the statewide voter registration database is foreclosed by HAVA. 52 U.S.C. § 21083(a)(3). As noted above, in 2002, Congress first required states to maintain a centralized interactive computerized voter registration database. 52 U.S.C. § 21083(a)(1)(A). Through HAVA, Congress *requires* states to collect a voter applicant’s driver’s license number, and if not available, the last four digits of the applicant’s social security number.¹⁴ 52 U.S.C. § 21083(a)(5)(A)(i). Aware that creating a centralized statewide database with vast amounts of personal data created a security risk, Congress expressly required that states limit access to the database.

(3) Technological security of computerized list. The appropriate State or local official shall provide adequate technological security measures to *prevent the unauthorized access* to the computerized list established under this section.

¹⁴ Prior to HAVA only jurisdictions that required social security numbers for voter registration prior to passage of the 1974 Privacy Act were permitted to continue requiring social security numbers. Pub. L. 93-579, 88 Stat. 1896 (1974), 5 U.S.C. § 552a (note); *Schwier v. Cox*, 439 F.3d 1285, 1286 (2006).

52 U.S.C. § 21083(a)(3) (emphasis added). Plaintiff's contention that the NVRA's public disclosure provision entitles it unfettered access to a database created pursuant to HAVA is frivolous and should be denied.

2. The NVRA's Public Disclosure Provision Does Not Require Access to a Statewide Voter Registration Database.

Despite the express prohibition in HAVA, Plaintiff contends that because courts "routinely require that parties to litigation produce information contained in databases as part of the discovery process" data from the statewide voter registration database must be disclosed under the NVRA. Doc. 12-1 at 23. The records that must be disclosed pursuant to the NVRA are those contemplated by the statute, a statute enacted a decade *before* states were required to maintain a centralized statewide database. That information in a database may be relevant to a party's claims or defenses, and therefore discoverable in litigation, has absolutely nothing to do with whether the information is a record for purposes of the public disclosure provision in the NVRA. Nor is Plaintiff's citation to the Georgia Open Records Act ("ORA") helpful to their position. First, Plaintiff's claim is pursuant to the NVRA not the ORA. Second, the ORA does not require an agency to *create* programs to generate data in a particular format. O.C.G.A. § 50-18-71(b)(1)(A) (agencies not required to produce "records [that] did not exist at the time of the request").

Plaintiff's interpretation of the NVRA's public disclosure provision is contrary to the plain language of the statute and the rules of statutory construction. There are several rules of statutory construction the Court should bear in mind. The starting point in any case involving statutory construction is the language of the statute itself. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). The court assumes that Congress used the words in the statute as they are commonly and ordinarily understood and reads the statute to give full effect to each of its provisions. *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995) (per curiam). The court should not look at one word or term in isolation, but rather should consider the entire statutory context. *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994) (citations omitted). The court should only look beyond the plain language of a statute for evidence of congressional intent if the statutory language is ambiguous; applying the language according to its plain meaning would lead to an absurd result; or there is clear evidence of contrary legislative intent. *Iberiabank v. Beneva 41-I, LLC*, 701 F.3d 916, 924 (11th Cir. 2012). Here, Plaintiff's interpretation is both inconsistent with the plain language of the statute and contrary to congressional intent.

First, as noted above, the NVRA was enacted in 1993, nearly a decade prior to any federal requirement that state voter registration lists be centralized. Thus,

any suggestion that Congress intended to include state voter registration databases when it referred to “all records” in the NVRA is simply created of whole cloth. As noted, HAVA expressly *prohibits* public inspection of the database. 52 U.S.C. § 21083(a)(3).

Second, the types of records Congress made available for inspection and copying are those “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). “Thus, to be subject to disclosure under the NVRA, a record must ultimately concern activities geared towards ensuring that a State’s official list of voters is errorless and up-to-date.” *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 720 (S.D. Miss. 2014). More specifically, Congress intended that the records available for inspection were those list maintenance records related to change of addresses. Both the House and Senate Committee Reports preceding the NVRA describe the disclosure provision as follows:

Subsection (i) provides that each State shall maintain for two years all records concerning the implementation of programs and activities conducted *for the purpose of ensuring the accuracy and currency of addresses on the official list of eligible voters*. The records must be made available for public inspection and, where available, photocopying at reasonable costs. The records shall include lists of names and addresses of all persons to whom notices were sent and

information concerning whether or not each person has responded to the notice as of the date of inspection.

Provisions of this Act pertaining to voter registration programs require that information regarding a person's declination to register not be used for any purpose other than registration. There was also concern that information not be made public as to what voters registered at a particular agency, such as a welfare or unemployment office. Therefore, these records may not contain any information relating to a declination to register or the identity of a voter registration agency through which any particular voter is registered, or a list of those persons registered through a particular agency.

H.R. REP. NO. 103-9, at 19 (1993) (emphasis added); S. REP. NO. 103-6, at 35 (1993). These reports make clear that the disclosure provision was intended to provide transparency in the removal of voters from registration lists due to evidence of a change of address premised on a voter's inactivity in prior election(s). Congress was concerned about voters being removed from the registration lists solely for not voting and established a procedure for removal which includes a requirement that a voter first receive a postcard notification, described in Section 8(d), 52 U.S.C. § 20507(d), of the NVRA. For that reason, Congress expressly required documents be maintained with lists of voters who are sent the confirmation postcards and lists of those voters who respond. Defendant acknowledges that the Fourth Circuit has rejected the argument that the NVRA's disclosure provision is limited to records associated with a state's list maintenance procedures. *Project Vote/Voting for America v. Long*, 682 F.3d 331, 335 (4th Cir.

2012). Defendant respectfully submits that *Long* is contrary to congressional intent; however, even *Long* did not go as far as to extend the definition of “record” to include a statewide voter registration database.

Third, the NVRA requires that the records which are subject to disclosure must be “maintain[ed] for at least 2 years.” 52 U.S.C. § 20507(i)(1). The limitation on how long the “records” must be maintained is a clear indication that Congress did not intend “record” to mean “database,” Congress intended “record” to mean documents that can be destroyed after two years.

Fourth, the requirement that the records be available for photocopying suggests the “records” are documents capable of being copied, not a database or the data contained in a database. Similarly, that Congress included language permitting states to charge reasonable costs for photocopying, and made no similar provision for the much more significant costs incurred by states to provide “data” available for inspection in whatever format a member of the public chooses, is a clear indication that Congress never intended “data” to be considered a “record.”

The NVRA’s statutory language is clear; it mandates disclosure of certain “records,” not particular pieces of data formatted in a manner of Plaintiff’s choosing. Moreover, through HAVA, Congress has *prohibited* states from allowing public inspection of the statewide voter registration database. 52 U.S.C.

§ 21083 (a)(3). Plaintiff's motion for preliminary injunction, seeking access to the statewide voter registration database, should be denied.

B. Plaintiff's Motion for Preliminary Injunction, as it Relates to the Data Already Provided, is Moot.

“Article III of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting U.S. Const., Art. III, §2). “[I]t is incumbent upon [a] court to consider issues of mootness sua sponte.” *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1118 (11th Cir. 1995) (quoting *Pacific Ins. Co. v. General Development Corp.*, 28 F.3d 1093, 1096 (11th Cir. 1994)). “[M]ootness turns on whether an adversary relationship sufficient to sharpen presentation of issues exists.” *Dudley v. Stewart*, 724 F. 2d 1493, 1495 (11th Cir. 1984) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976)). Here, Plaintiff has already been provided with specific data identified in its motion for preliminary injunction. Doc. 12 at 2; D. Exh. 1 ¶¶ 5-7. Therefore, Plaintiff's request for preliminary injunctive relief, for that same data, is moot.

C. Plaintiff's New Request for Copies of Notices Sent to Voter Registrants Whose Applications Were Not Verified is Barred Because Plaintiff Failed to Provide Statutory Notice of the Violation.

The NVRA requires that an aggrieved party give notice of the specific violation to Defendant. *See* 52 U.S.C. § 20510(b). “[T]he purpose of the notice

requirement [is] to ‘provide states . . . an opportunity to attempt compliance before facing litigation.’” *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014) (quoting *Ass’n of Cmty. Orgs. for Reform Now (“ACORN”) v. Miller*, 129 F.3d 833, 838 (6th Cir. 2014)).

Plaintiff has asserted that “Project Vote requested [that copies of] the notices sent to ‘not verified’ voter registration applicants” be provided. Doc. 17 at 2. Plaintiff’s only citation supporting their assertion is to their *memorandum* in support of their preliminary injunction motion. Of course, their memorandum is not a request for documents, nor does the memorandum actually *request* the notices sent by county registrars to voter applicants. Rather, what the memorandum clearly indicates is that Plaintiff wants Defendant to create a report, or other data compilation, utilizing the data that is used to create the notices. Plaintiff contends that:

the ability to create such notices indicates that Defendant’s database includes specific information relating to the reason Defendant rejected, canceled, or otherwise did not add voter registration applicants to the voter roll, and that such records could be made available for public inspection.

Doc. 12-1 at 11-12. As addressed above, Defendant is not required to make the “database” available for inspection. Plaintiff has consistently sought access to Defendant’s database and has requested Defendant’s staff to *create* records custom

tailored to Plaintiff's preferences. However, to the extent that Plaintiff now suggests that what it really seeks is in fact copies of the notices sent to voters, Plaintiff has not provided Defendant with statutory notice, pursuant to 52 U.S.C. § 20510(b), of any county's alleged failure to disclose these notices.¹⁵ See Doc. 12-14, Plaintiff's July 6, 2015 Notice under 52 U.S.C. § 20510(b) ("Your office has failed to provide a complete *database file* underlying the above records and reports that contains all of the data fields your office has on file." (emphasis added)). Plaintiff's communications with Defendant's staff *after* it sent the July 6, 2015, written notice of alleged violations further supports the conclusion that what Plaintiff now seeks is a compilation of data, *not* copies of individual notices to voter applicants. See Doc. 12-16 at 4 (acknowledging receipt of information regarding structure of state's database and requesting "a list of all of the tables and fields contained in [the] database."); Doc. 12-16 at 5 (requesting call with Defendant's IT staff); Doc. 12 at 7 (discussing Plaintiff's request for the database file because it "needs certain data . . . including, but not limited to, *data* indicating whether rejected voter applicants with NVF status were rejected due to a non-

¹⁵ The R-1 and R-2 reports referenced in Plaintiff's memorandum are reports that were part of Defendant's *former* statewide registration database and software. D. Exh. 3 ¶ 24. That system is no longer in existence. *Id.* Therefore, Plaintiff's assertion that Defendant creates on a daily basis an R-1 and R-2 report, which allegedly includes the information Plaintiff seeks, is simply inaccurate. Doc. 12-1 at 9-11, 31.

match with DDS records or a non-match with SSN records, and which DDS or SSN fields were the cause of the mismatch.” (emphasis added)). Any suggestion by Plaintiff that what it really seeks are copies of tens of thousands of letters sent to voter applicants is without merit. More importantly, because Plaintiff has failed to put Defendant on notice, pursuant to 52 U.S.C. § 20510(b), any claim pursuant to 52 U.S.C. § 20507(i) for a failure to disclose notices sent to voter applicants is statutorily barred. Statutory notice is mandatory prior to filing suit. *Schedler*, 771 F.3d at 835; *Ga. State Conf. of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012).

II. Plaintiff Cannot Show Irreparable Harm Absent the Grant of a Preliminary Injunction.

Plaintiff has not shown that it will suffer irreparable harm if a preliminary injunction is not granted. “A showing of irreparable harm is the ‘*sine qua non*’ of injunctive relief.” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citations omitted). Here, Plaintiff contends that it needs access to the requested data so that Plaintiff may “exercise the oversight functions envisioned by the NVRA and to ensure all of Georgia’s voters may exercise their right to vote in the upcoming election.” Doc. 12-1 at 24. Plaintiff has had Defendant’s list of canceled voter applicants since April, 2015. Doc. 12-2 at 9. That list included each voter applicant’s address. D. Exh. 1 ¶ 15. Plaintiff has yet to identify a single

voter who was improperly removed or not added to the voter rolls. There is absolutely no evidence that any Georgia voter's right to register or vote will be harmed in any manner by the denial of a preliminary injunction.

Moreover, when a plaintiff has not shown a likelihood of success on the merits, claims for irreparable injury, even where based on an alleged constitutional injury, have no merit. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Here, as explained above, Plaintiff is not likely to succeed on its claim.

III. The Damage to the Defendant Outweighs Any Injury to Plaintiff.

On a motion for preliminary injunction, the plaintiff bears the burden of showing that the perceived injury outweighs the damages that the preliminary injunction might cause to the defendant. *Baker*, 856 F.2d at 169. "Only in rare instances is the issuance of a mandatory preliminary injunction proper." *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979). On a motion for an injunction the plaintiff bears the burden of showing that his perceived injuries outweigh the damage that the injunction might cause to the defendant. *Cate v. Oldham*, 707 F.2d 1176, 1185 (11th Cir. 1983). Here, Plaintiff has provided no evidence of actual harm; thus, the scale weighs heavily against the grant of this motion because

Defendant will be harmed if he is required to permit inspection of the statewide voter registration database.

IV. A Preliminary Injunction Would Not Serve the Public Interest.

A plaintiff also bears the burden of showing that the preliminary injunction would serve the public interest. *Baker*, 856 F.2d at 169. Here, the public interest weighs heavily against the issuance of an injunction. The voter registration database contains personal information for over six million voters. Congress has mandated that Defendant protect the security of that database. Voters' confidential information should not be open to public inspection, which is why Congress has statutorily forbidden exactly the relief that Plaintiff now seeks.

CONCLUSION

For the foregoing reasons, Defendant prays that the Court deny Plaintiff's motion for preliminary injunction.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

DENNIS R. DUNN 234098
Deputy Attorney General

RUSSELL D. WILLARD 760280
Senior Assistant Attorney General

/s/Cristina Correia

CRISTINA CORREIA 188620

Assistant Attorney General

ccorreia@law.ga.gov

JOSIAH B. HEIDT 104183

Assistant Attorney General

jheidt@law.ga.gov

Please address all
Communication to:
CRISTINA CORREIA
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-7063
Fax: 404-651-9325

CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing Defendant's Response to Plaintiffs' Motion for Preliminary Injunction was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

Certificate of Service

I hereby certify that on July 28, 2016, I electronically filed Defendant Brian Kemp's Brief in Opposition to Plaintiff's Motion for Preliminary Injunction using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

James Cobb
Timothy Brandon Waddell
Caplan Cobb LLP, Suite 2750
75 Fourteenth Street, NE
Atlanta, GA 30309

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

David E. Rhinesmith
David A. Young
Jonathan R. Ference-Burke
Nicole Durkin
Ropes & Gray, LLP-DC
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006

Michelle Kanter Cohen
Project Vote
1420 K. Street NW
Washington, D.C. 20005

John C. Ertman
ReBoul MacMurry Hewitt Maynard & Kristol
45 Rockefeller Plaza
New York, NY 10111

This 28th day of July, 2016.

/s/Cristina Correia
Cristina Correia 188620
Assistant Attorney General

EXHIBIT 1

This exhibit was previously submitted as Doc. 15-1.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

PROJECT VOTE, INC.,

Plaintiff,

v.

**BRIAN KEMP, in his official capacity as
Secretary of State and Chief Election
Official for the State of Georgia,**

Defendant.

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**Civil Action No.
1:16CV02445**

DECLARATION OF S. MERRIT BEAVER

I, S. Merritt Beaver, do hereby declare and state that the following facts are true and correct to the best of my knowledge, information and belief.

1.

I am over the age of 21 years and am in all ways competent to give testimony, suffering no physical or mental disabilities.

2.

I am aware of the fact that this declaration is being submitted in support of Secretary of State Brian Kemp's Brief in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction.

3.

I am the Chief Information Officer for the Office of the Secretary of State. I have held this position continuously since January, 2014.

4.

As Chief Information Officer I am familiar with the state's voter registration database and the ENET GVRS software utilized by this office and all Georgia election officials.

5.

At my request, the third party vendor that developed and maintains the statewide voter registration database, created a custom computer program that did not previously exist that allowed for the creation of an analysis report containing the following fields:

- registration number
- last name
- first name
- year of birth
- address
- mailing address
- county name

- race
- gender
- status
- status reason
- reason code
- date of cancelled
- action
- last name match?
- First name match?
- DOB match?
- DL# match?
- SSN match?
- US citizen?
- SSA response code

6.

The file described in paragraph 5 above consists of records for all voters classified as cancelled, rejected, or pending (as of the morning of July 18, 2016) in the statewide voter registration database since July 6, 2013, including all voter registration applicants who were never added to the active voter list.

7.

The file described in paragraph 5 above consists of records for 646,332 unique voter registration numbers.

8.

The file described in paragraph 5 above is not a report or record that may be generated using the ENET GVRS software utilized by this office and election officials around the state and the information contained in that file was not previously available through available record retrieval.

9.

The creation of the file described in paragraph 5 above could only be accomplished by writing a custom computer code that did not previously exist and is not part of the ENET GVRS application. Such programming is not necessary for any reports or records generated or utilized by the Secretary of State's Office.

10.

Approximately 64 man-hours of computer programming by the third party vendor were expended to create the file described in paragraph 5 above. That time does not include any of the time that I spent working with the vendor on the project.

11.

My office was involved in creating the analysis report provided to Project Vote on April 3, 2015. The report was created with support from the third party vendor that developed and maintains the statewide voter registration database.

12.

The report described above in paragraph 11 contained records for all voters with a “cancelled” status (as of the morning of March 8, 2015) in the statewide voter registration database since Oct. 12, 2012, including all voter registration applicants who were never added to the active voter list. The report contained records for 568,044 unique voter registration numbers.

13.

The report described above in paragraph 11 does not contain records for voters with a system status of “Reject” or “Pending.”

14.

The July 18, 2016 report described in paragraph 5 above does include voters with a system status of “reject” and there are only 220 such voters in that report.

15.

The report described above in paragraph 11 contained the following fields:

- county code (this was a numeric code)
- registration number
- voter status (all reported as “C” for cancelled)
- cancelled date
- cancelled reason
- last name
- first name
- middle name
- house number
- street
- city
- zip
- birth year
- registration date
- race
- gender

16.

The following codes and descriptions for the “cancelled reason” were included in the file.

- NGE No activity for 2 general election cycles
- DEC Deceased
- FLN Felon
- NVF Not Verified
- MST Moved out of state
- DUP Duplicate
- HER Hearing
- MOC Moved out of county
- VR Voter requested
- ERR Error
- REJ Not verified
- MIN Mentally incompetent
- NCZ Not a citizen
- DMO Duplicate merge
- MOV Moved out of state

17.

The report described above in paragraph 11 contained 1,184 records with a cancelled reason of "Error." For these files, determining the specific reason for the cancellation requires review of the individual voter file.

18.

The report described above in paragraph 11 contained 798 records with a cancelled reason of "REJ," or not verified. For these files, determining the specific reason for the cancellation requires review of the individual voter file.

19.

The report described above in paragraph 11 contained 31,761 records with a cancelled reason of "NVF," or not verified, meaning the applicants' information did not match information previously given to the Department of Driver Services or the Social Security Administration.

I declare under penalty of perjury under the laws of the United States of America, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

This 20th day of July, 2016.


S. MERRITT BEAVER
Chief Information Officer
Office of the Secretary of State

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PROJECT VOTE, INC.,

Plaintiff,

v.

BRIAN KEMP, in his official capacity as
Secretary of State and Chief Election
Official for the State of Georgia,

Defendant.

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Civil Action No.
1:16CV02445-WSD

SECOND DECLARATION OF S. MERRITT BEAVER

I, S. Merritt Beaver, do hereby declare and state that the following facts are true and correct to the best of my knowledge, information and belief.

1.

I am over the age of 21 years and am in all ways competent to give testimony, suffering no physical or mental disabilities.

2.

I am aware of the fact that this declaration is being submitted in support of Secretary of State Brian Kemp's Brief in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction. This is my second declaration in this matter.

3.

The Office of the Secretary of State does not maintain copies of voter registration applications.

4.

The current ENET GVRS system has been in use throughout Georgia since 2013. The database includes, among other things, a voter's social security number, driver license number, date of birth, address, voting history, race, and gender.

5.

County registrars are required to utilize the ENET GVRS software to add, cancel, reject, and update their county's voter registration records.

6.

The ENET GVRS software interfaces with software from the Division of Driver Services (DDS) to accept voter registration applications that have been processed through DDS.

7.

The ENET GVRS software interfaces with an online internet application that permits online voter registration for persons that have either a Georgia driver's license or a Georgia identification card.

8.

The vast majority of new voter registration applications are processed electronically; either through the Secretary of State's online voter registration application process or through the Division of Driver Services (DDS).

9.

Each voter registration application entered into the ENET GVRS system is given a voter registration number.

10.

Each voter registration number, or voter record, has a voter status of one of the following: active, inactive, pending, rejected, or canceled.

11.

Each record with a status of canceled *should* have a status reason of one of the following:

- NGE No activity for 2 general election cycles
- DEC Deceased
- FLN Felon
- NVF Not Verified
- MST Moved out of state
- DUP Duplicate
- HER Hearing
- MOC Moved out of county
- VR Voter requested
- ERR Error
- MIN Mentally incompetent

12.

Some canceled voters in the statewide database have a status of canceled and a status reason code other than one of the eleven codes described in paragraph 11 above. In particular, I have reviewed the April 3, 2015 file described in paragraph 11 of my first declaration and realized that the file includes voters with a status of canceled and a status reason of one of the following:

- NCZ Not a citizen
- DMO Duplicate merge
- MOV Moved out of state
- REJ Not verified

13.

The status reason code can be entered by the county registrars or it can be a system generated code. The system generated codes would all fall within the descriptions included in paragraph 11 above.

14.

Comparing the April 3, 2015 file with the July 18, 2016 file I now realize that the July 18, 2016 file does *not* include any voters with a status of canceled but with a reason code of something other than the 11 reasons identified in paragraph 11 above. The April 3, 2015 file only contained 835 voters with a canceled status and a reason code of something other than the 11 reasons identified in paragraph

11 above. More specifically, the April 3, 2015 file included the following voters with a status of canceled and the following reason codes:

- DMO (duplicate merge) = 1 voter (Note: proper code was DUP)
- MOV (moved out of state) = 1 voter (Note: proper code was MST)
- NCZ (non-citizen) = 35 voters
- REJ (non-verified) = 798 voters (Note: proper code was NVF)

15.

Both July 18, 2016 and the April 3, 2015 files were generated via requests to the third party vendor who manages the application and hardware off site of the SOS IT environment. The 2015 request was made by an employee that no longer works for SOS but was instructed to request a list of all Canceled voters in ENET GVRS. The 2016 request was made by me to the same third party vendor. The request this time was for a list of all Canceled, Rejected and Pending records in ENET GVRS. The actual analysis to develop the logic to extract the data and coding were done by the third party vendor.

16.

My first declaration in this matter, executed on July 20, 2016, stated that the July 18, 2016 file included “all voters classified as cancelled, rejected, or pending.” Doc. 15-1 ¶ 6. I now understand that statement is inaccurate, and that the July 18,

2016 file did not capture those few voters with a status of canceled and a reason code of something other than the 11 approved corresponding reasons. My statement in paragraph 6 of my first declaration (Doc. 15-1) should have read:

The filed described in paragraph 5 above consists of records for all voters classified as cancelled and having a status reason of one of the eleven approved reason codes, together with all rejected, and all pending voter applicants (as of the morning of July 18, 2016) in the statewide voter registration database since July 6, 2013, including all voter registration applicants who were never added to the active voter list. Voters with a status of cancelled, but with a status reason code other than those eleven options in the ENET GVRS drop down menu, are not included.

17.

Using the ENET GVRS software, an authorized user can pull up any voter record in the system and by review of that individual record ascertain the specific reasons provided for the cancellation.

18.

A status reason of Error, Hearing, and Rejected is a code entered by the county election official. In these instances, the only way to ascertain the underlying reason for the cancellation is to review the individual record and records retained at the county level.

19.

The April 3, 2015 excel file that was provided to Project Vote had 568,044 canceled voter registration numbers and only 1,183 of those had a canceled reason of Error.

20.

A canceled status reason of “Not Verified” can be either system generated or entered by a county user.

21.

When a voter applicant is in “pending” status, a status for applications where some information must be verified, the ENET GVRS software includes a table that provides information on whether the failure to verify was with the DDS or SSA database. It also provides information on what specific piece of data (name, dob, ss#, dl#, etc.) failed to verify.

22.

Once a voter applicant is moved from “pending” to “canceled” status, there is no table available in the ENET GVRS software that provides the same detailed information about the specific piece of data that did not verify as described in paragraph 21 above.

23.

The ENET GVRS system is an interactive computerized system. The data reflected in the July 18, 2016 and the April 3, 2015 files are only snapshots of the reported fields at the time the snapshot was taken. The fields reported are the most recent data for that single field and the fields do not *necessarily* all relate to the same action. In other words, a voter may be canceled for a failure to verify one piece of data, like a driver's license number, but sometime *after* the voter is already in a canceled status a vital record is entered into the database and that same voter may now have a status reason of deceased. The list is interactive and the report provides only the most recent entry in each field reported.

24.

The R-1 and R-2 reports referenced by Plaintiff and in Georgia's August 17, 2010 submission to the Department of Justice regarding the voter verification process, Doc. 12-3, are reports that were created under the predecessor computerized mainframe system for maintaining the statewide voter database. That system is no longer in existence.

25.

The July 18, 2016 report described in paragraph 5 of my first declaration included detailed information about the specific data that did not verify with either

the DDS or SSA database. The file also included information on whether the mismatch was with the DDS or SSA database.

I declare under penalty of perjury under the laws of the United States of America, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

This 28 day of July, 2016.

A handwritten signature in cursive script, appearing to read "S. Merritt Beaver", is written over a horizontal line.

S. MERRITT BEAVER
Chief Information Officer
Office of the Secretary of State