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

PROJECT VOTE, INC.,	*	
	*	**Civil Action No.**
Plaintiff,	*	**1:16CV02445-WSD**
	*	
v.	*	
	*	
BRIAN KEMP, in his official capacity as Secretary of State and Chief Election Official for the State of Georgia,	*	
	*	
Defendant.	*	
	*	

DEFENDANT KEMP'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Plaintiff's numerous requests for voter registration information are beyond the scope of the NVRA's disclosure provision in two primary respects. First, Plaintiff's requests are not limited to the subject matter covered under the NVRA's disclosure provision. Although Plaintiff has attempted to obscure the breadth of their request in this litigation, what they truly seek, and what they have asked for multiple times is a copy of the voter registration database for the State of Georgia. Plaintiff's argument that the NVRA declares complete databases as public records is contrary not only on the plain language of the statute but also defies common

sense.[1] Second, Plaintiff's request is not limited to records maintained by Defendant's office. Instead, Plaintiff interprets the NVRA's public disclosure provision to permit any member of the public to coopt state information technology personnel and require them to create customized reports that have zero operational use to the agency and at no cost to the requestor. Plaintiff's complaint should be dismissed because the information Plaintiff seeks is either beyond the subject matter required disclosed by the NVRA or the information is not available, in the aggregate format Plaintiff seeks, in any records maintained by Defendant.[2]

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[1] A copy of the database is essentially a roadmap to the system. If that roadmap were public as Plaintiff argues it should be, the risk of malicious intrusion into the system would increase, the damage that any malicious intrusion could cause would increase because any actor would know how to manipulate data within the system, and the possibility of a sophisticated, difficult to trace intrusion would increase because it could be made to look like part of the system (which would not be possible if the database were not public).

[2] Plaintiff has suggested, for the first time in its second reply brief in support of a preliminary injunction, that it never said it wanted the voter information in an aggregated format. Doc. 33 at 12. Both the complaint and the numerous emails and correspondence between the parties prior to litigation clearly demonstrate that Plaintiff has consistently sought voter information in an aggregated format. *See* Doc. 1 at 17 n. 2 (describing *data fields* requested); Doc. 1 ¶ 45(2) (describing data requested for each voter record); Doc. 1 ¶ 55 (explaining that what Project Vote wanted was "the complete database file underlying the records . . .as well as instructions provided to programmers or other staff on how to construct the DDS and SSN matches" with the election database); Doc. 1-16 at 4-6 (seeking specific "data fields" for every voter or every canceled voter); Doc. 1-16 at 4 (taking the position that a PDF file that had been produced containing over 340 pages of tables was "not readable" and requesting the *same* diagram "in a native file format

I. The NVRA Requires Public Disclosure Only of a State's Voter Removal, i.e., List Maintenance, Activities.

The NVRA's public disclosure provision is limited to 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) (emphasis added).[3] The NVRA describes what it means by *programs and activities* elsewhere in the statute. The words "activity," "activities," "program," or "programs" appear seven (7) times in Sec. 8 of the NVRA.[4] 52 U.S.C. § 20507.

First, Sec. 8(a)(4) mandates that states "conduct a general *program* that makes a reasonable effort to remove the names of ineligible voters from the official

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compatible with a common diagramming software application"). Plaintiff has consistently sought aggregated data and the entire election database. There are over six million registered voters in Georgia; it defies all credibility to suggest that what Plaintiff has sought all along is six million *individual* voters' files.

[3] Notably, the section is titled "[p]ublic disclosure of voter registration *activities*" *not* voter registration records. *Id.* (emphasis added).

[4] Even when considering context beyond Section 8 of the NVRA to the entire statute, the words "activity," "activities," and "program" do not appear anywhere else in the NVRA. The word "programs" appears twice outside of Section 8 of the NVRA but in neither instance does it refer to election or registration "programs" of the state. *See* 52 U.S.C. § 20206 (designating "all offices in the State that provide State-funded programs . . . to persons with disabilities" as voter registration locations); and 52 U.S.C. § 20505(b) (requiring chief election official to make mail voter registration forms available to government and private entities, including making them available for "organized voter registration programs.").

lists of eligible voters by reason of -- (A) the death of the registrant; or (B) a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4) (emphasis added). Second, Sec. 8(b) mandates that a state's "program and activity to protect the integrity of the electoral process by ensuring the *maintenance* of an accurate and current voter registration roll" meet certain criteria. 52 U.S.C. § 20507(b) (emphasis added). The list maintenance program must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," and it must not result in the removal of a voter from the registration list for not voting, except under the specific exceptions included in statute. 52 U.S.C. § 20507(b)(1) and (2). The third, fourth, and fifth appearances of the word "programs" in Sec. 8 of the NVRA appears in Sec. 8(c) regarding "voter removal programs." 52 U.S.C. § 20507(c). The word "programs" appears in the heading. *Id.* The word "program" then appears both in Sec. 8(c)(1), regarding a voter removal program for voters with a change of address based on information supplied by the U.S. Postal Service (a "safe harbor" program for states), and in Sec. 8(c)(2)(A) prohibiting states from conducting "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible electors" within ninety (90) days of a federal election. Finally, Sec. 8(i), the disclosure provision, refers to both "activities" and "programs and activities" in

describing the nature of the records subject to inspection. In each of these instances the words "programs" and "activities" refer to list maintenance programs aimed at the removal of voters from registration lists and not to the initial registration or verification of voter information in a voter registration application.[5] "It is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *United States v. Chafin*, 808 F.3d 1263, 1271 (11th Cir. 2015) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). The Fourth Circuit's decision in *Project Vote v. Long*, 682 F.3d 331, 335 (4th Cir. 2012) failed to take into account how the terms "programs" and "activities" are used *in* the NVRA and instead applied the plain meaning of those words. But as explained above, these terms have a particular meaning within the context of the NVRA.

Here, the records subject to disclosure are those "concerning the implementation of *programs and activities*" conducted pursuant to Sec. 8 of the NVRA, i.e., list maintenance removal processes. 52 U.S.C. § 20507(i). The

[5] This reading is consistent with the statute's express requirement that state's must maintain "lists of names and addresses of all persons to whom notices described in subsection (d)(2) [confirmation postcards] are sent, and information concerning" responses to these mailings. 52 U.S.C. § 20507(i)(2). These records are among the list maintenance (i.e., removal) records subject to disclosure.

records requested by Plaintiff are not subject to disclosure pursuant to 52 U.S.C. § 20507(i) because they are not list maintenance records but instead relate to the registration, and verification of information during the registration process. *See* Doc. 32 at 12 (explaining that "the Requested Records relate to voter registration applicants who the Defendant rejected, canceled, or otherwise did not add to the voter roll.").[6]

II. The Public is *Not* Entitled to a Copy of Georgia's Election Database.

Even if this Court determines that the public disclosure provision in the NVRA encompasses more than list maintenance, i.e., removal records, and includes voter registration records, Plaintiff (like any member of the general public) is still not entitled to the voter registration database. First, Plaintiff's request is not limited even to voter registration records concerning the implementation of Defendant's voter registration activities. Second, Plaintiff's request is not limited to records maintained by Defendant's office. Third,

[6] As set out in Defendant's initial brief, the records subject to disclosure are lists from vital records used to removed voters due to death; lists of voters removed for change of address; lists of voters sent a confirmation postcard and a list of voters that are removed for failure to return the voter confirmation postcard and then fail to vote for two additional federal elections. For all of these programs and activities set out in Sec. 8 of the NVRA, cancelation from the voter list comes *after* a voter has already been placed on the list and has nothing to do with verifying information, pursuant to HAVA, to register in the first instance. Therefore, information like dates of registration, methods of registration, etc., are completely irrelevant.

providing a "copy" of an election database would put the security of the state's database at great risk.

A. Some of Plaintiff's Requests do Not Concern Even Defendant's Registration Activities.

Even if this Court holds that the "programs and activities" language in Sec. 8(i) of the NVRA includes the State's implementation of voter registration procedures, Plaintiff's request goes far beyond requesting records of the State's activities. Instead, Plaintiff seeks detailed information regarding each individual voter's record, regardless of whether it is information Defendant uses in any of its processes. As Defendant explained in his initial brief, Defendant does not register any voter, but rather county registrars are responsible for voter registration. O.C.G.A. §21-2-220(a); *see generally* Doc. 20-1 at 8. Even if the activities of county registrars are included within the disclosure, Plaintiff's request is still not limited to records pertaining to those activities. For instance, Plaintiff seeks the phone number for each "applicant[] and voter[]" in Defendant's election database. Doc. 33 at 11. Plaintiff seeks voter participation history. Doc. 1-16 at 5; Plaintiff seeks information on whether a non-government source collected the voter application. *Id.* Plaintiff seeks information on whether a local official made a status change to a voter registration or whether the change was the result of an automated system action. *Id.* at 6. Plaintiff fails to allege how these pieces of

information are 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." 52 U.S.C. § 20507(i)(1).

B. Plaintiff's Request is Broader Than the Records Maintained by Defendant.

Plaintiff's requests are also not limited to records maintained by Defendant. Plaintiff's requests fall under four (4) general categories.

First, Plaintiff requests information not maintained by Defendant's office. *See* Doc. 33 at 10 (describing three such requests).[7] Plaintiff alleges these records must be maintained for two years, citing the disclosure provision. *Id.* But the NVRA does not actually mandate that the state maintain *any* particular record of the type described by Plaintiff. Moreover, as the county registrars are the entities that register voters in Georgia, they would be the proper officials to maintain any voter registration records that might exist.

Second, Plaintiff requests information that can be ascertained only by review of an individual voter file in the state's electronic election database, but which cannot be extracted into a report *even with* additional programming efforts. *See* Doc. 33 at 6-7. Plaintiff maintains that it is entitled to any information within the

[7] Defendant uses this example simply as an illustration, being mindful that the current motion is a motion to dismiss.

state's electronic database, including data of when a particular entry was made in the database. Doc. 1-16 at 4. Plaintiff provides no caselaw to support this expansive view of the disclosure provision. The NVRA provides for the disclosure of records.[8] It does not allow Plaintiff (or any other member of the public) to demand that state personnel review records, ascertain specific facts from various pieces of data, and then build custom reports to provide the requestor with the answers to whatever questions they want answered.

Third, Plaintiff requests information contained in certain data fields in the state's electronic election database but which are not available through any of the reporting functions of the election database's software. Doc. 33 at 6-7. The inability for the election software to generate a report with the detailed information requested by Plaintiff, suggests strongly that such a report is not a "record concerning the implementation of [Defendant's] programs and activities." 52 U.S.C. § 20507(i). Importantly, Plaintiff's requests have consistently been framed in terms of a request for lists of voters along with particular data for each voter. *See* Doc. 1 at 17 n. 2 (describing data fields requested); Doc. 1-16 at 4-6 (identifying data fields). By definition, this is a request for an aggregated data file.

[8] Of course to fall within the disclosure provision, each individual piece of information would *also* have to be a "record concerning the implementation of [Defendant's] programs and activities." 52 U.S.C. § 20507(i).

Plaintiff does not want, and for good reason, six million individual voter records, whether in paper or PDF format. But *nothing* in the NVRA, or any other federal or state statute, permits members of the public to coop a state agency's IT personnel to create customized reports of the state's data whenever they want and free of charge. To suggest that Congress intended as much when they passed the NVRA is simply not credible. Congress took care to provide for reimbursement costs to the states for copying records. It is beyond all reason to suggest that at the same time Congress considered reimbursement for minor copying costs they approved a requirement that states spend thousands of dollars to extract pieces of data or information from individual voter files and create custom reports for *any member of the public* that asks.[9]

Fourth, Plaintiff seeks a copy of the election database itself. Doc. 1 ¶ 66; Doc. 1-15 at 7; *see also* Doc. 33 at 13 n. 6 (suggesting Defendant could simply give Plaintiff all of the data "tables" *and* "provide them with sufficient information regarding how the tables are linked," i.e., provide Plaintiff with the database). Plaintiff provides no authority whatsoever for its suggestion that the entire election database is a "record" subject to disclosure pursuant to the NVRA. To be clear,

[9] While Plaintiff asserts that it was Defendant that created its database and its limitations, that database is largely determined by federal law. HAVA sets out particular requirements for the state's election database. 52 U.S.C. § 21083(a).

much of the information in the database, although not all, is public under the Open Records Act (ORA). O.C.G.A. § 50-18-71. However, data open to inspection under the ORA is not necessarily a "record" subject to disclosure under the NVRA. As addressed above, the NVRA's disclosure provision is limited to those "records concerning the implementation of [Georgia's] programs and activities" in list maintenance. 52 U.S.C. § 20507(i). Moreover, that certain information in the database may be public under the ORA does not mean that the database *itself* is public under the ORA, or that the ORA requires a state agency to create a program to extract data from the database. Nothing in state law requires either of these. 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"); O.C.G.A. § 50-18-71(f) (providing that an agency is to produce electronic records "so long as such [export] commands or instructions can be executed using *existing* computer programs that the agency uses in the ordinary course of business to access, support, or otherwise manage the records or data"). Another significant distinction is that the NVRA has no express language permitting a state agency to charge the requestor the *costs* of producing whatever information is requested. Because of that distinction, Plaintiff has always insisted its request is pursuant only to the NVRA, and insisted further that Defendant expend whatever funds necessary to provide Plaintiff with customized

reports of voter registration information. Nothing in the NVRA suggests that Congress intended to make election databases open for public inspection. To argue, as Plaintiff does, that federal law requires that the state make election databases public while the federal government is considering naming election systems "critical infrastructure" that deserves the same cybersecurity protections as financial institutions and utility systems ignores the clear intent of the NVRA. *See* Julie Hirschfeld Davis, U.S. Seeks to Protect Voting System from Cyberattacks, New York Times, August 3, 2016.[10]

C. Copying the State Election Database Would Compromise the Security of the Database.

Defendant has addressed in his initial brief that the Help America Vote Act (HAVA) requires states to protect the integrity of the voter registration database and in fact requires states to protect from unauthorized access. 52 U.S.C. § 21083(a)(3). It is inconceivable that while enacting HAVA, and requiring that State's prohibit unauthorized access to the database, Congress *also* intended that each state's entire voter registration database become a public record under the NVRA.

[10] http://www.nytimes.com/2016/08/04/us/politics/us-seeks-to-protect-voting-system-against-cyberattacks.html?_r=0.

Recently, news events have confirmed the need to secure election databases from cyber threats. *See* Ellen Nakashima, Russian hackers targeted Arizona election system, Washington Post, August 29, 2016.[11] The U.S. Department of Homeland Security has announced a "Voting Infrastructure Cybersecurity Action Campaign," and recommends that "state officials [ ] focus on implementing existing recommendations from [Department of Commerce's National Institute for Standards and Technology] NIST and the [Election Administration Commission] EAC on securing election infrastructure."[12] The recommendations from the EAC include that access to the database be restricted and that "data provided to outside sources is *suppressed* to only contain the data necessary for that entity to perform its legally authorized functions." U.S. Election Assistance Commission, Checklist for Securing Voter Registration Data.[13] Providing Plaintiff with a copy of the election database is contrary to these recommendations.[14] The database is essentially a roadmap to the system. Making a copy

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[11] https://www.washingtonpost.com/world/national-security/fbi-is-investigating-foreign-hacks-of-state-election-systems/2016/08/29/6e758ff4-6e00-11e6-8365-b19e428a975e_story.html.

[12] https://www.dhs.gov/news/2016/08/15/readout-secretary-johnsons-call-state-election-officials-cybersecurity.

[13] http://www.eac.gov/assets/1/Documents/Checklist_Securing_VR_Data_FINAL_5.19.16.pdf.

[14] Plaintiff's request is not limited to the information contained in the database, but rather, includes the relationship of tables within the database. Doc. 33 at 13 n. 6;

of the database public, as Plaintiff requests, makes the system more vulnerable to malicious intrusion, makes detecting any intrusion more difficult, and allows any intruder to do more damage than he otherwise would.

III. To the Extent Plaintiffs Now Request Individual Voter Records, They Failed to Provide Statutory Notice of Their Request.

As Defendant set out in his initial brief, 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, for the first time in its second reply brief in support of a preliminary injunction, now contends that it never specified that it wanted the voting records of *six million* voters in an aggregate format.[15] As discussed above, Plaintiff's requests have consistently requested aggregated data. Plaintiff has framed its request in terms of *lists* of voters along with particular data for each voter. That is an aggregated format. To the extent Plaintiff now wants individual

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Doc. 1-16 at 4 (taking the position that a PDF file that had been produced containing over 340 pages of tables was "not readable" and requesting the *same* diagram "in a native file format compatible with a common diagramming software application").

[15] The list of canceled voters is slightly less than 600,000.

voter files for six million registered voters, or over 560,000 canceled voters, its claim is barred because Plaintiff *never* requested individual voter files.

CONCLUSION

For the foregoing reasons, and those discussed in Defendant's initial brief, Defendant prays that the Court dismiss Plaintiff's complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing Defendant's Brief in Support of Motion to Dismiss 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 Sept. 2, 2016, I electronically filed Defendant Brian Kemp's Reply Brief in Support of Motion to Dismiss using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: NONE

This 2nd day of September, 2016.

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