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

PROJECT VOTE, INC.,	)	
Plaintiff,	)	**CIVIL ACTION NO. 1:16-cv-2445-WSD**
v.	)	
BRIAN KEMP, *In His Official Capacity as Georgia Secretary of State and Chief Election Official for the State of Georgia,*	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FOR LACK OF JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff Project Vote respectfully submits this brief in opposition to the second Motion to Dismiss filed by Defendant Brian Kemp on January 13, 2016. *See* Defendant's Brief in Support of Motion to Dismiss (ECF No. 50-1) (hereafter "Motion" or "Mot."). Far from establishing that this case is moot, Defendant's Motion shows the opposite: this case presents a live dispute over Defendant's compliance with the NVRA's Public Disclosure Provision, 52 U.S.C. § 20507(i)(1). Demonstrating this point, even as he argues the Court lacks jurisdiction to render a decision, Defendant asks this Court to do exactly that—specifically asking that this Court adopt Defendant's interpretation of the scope of the NVRA and what constitutes sufficient compliance as a matter of federal law and then hold that, based on that interpretation, he has complied. Mot. at 7-8. In other words, Defendant seeks an advisory opinion that would decide the very controversy before the Court in order to conclude, perversely, that the Court has no power in this case at all.

Defendant's Motion is not a mootness argument but an untimely request for summary judgment. He asks for a decision about the scope of NVRA obligations and his compliance therewith based on specific disputed factual contentions. As one key example, Defendant claims the provision of a computer terminal with

limited, proscribed access to NVRA-covered voter registration information is the "greatest possible disclosure" and is therefore sufficient as a matter of law. Notice to Court Regarding Disclosures at 1-2 (ECF No. 41). Project Vote disagrees on both counts—it is not apparent that such disclosure is sufficient to meaningfully comply with the NVRA and, even before reaching this question, Project Vote is entitled to test Defendant's factual claims about the feasibility of broader disclosure. In fact, common sense suggests that the records in Georgia's control in an *electronic* database could be provided *electronically*. Defendant's attempt to avoid this live controversy and short-circuit the discovery process by claiming mootness is meritless, and it should accordingly be denied.

I. BACKGROUND

A. Prior Proceedings

Over the course of two years, Project Vote engaged in protracted negotiations with the Defendant to make certain requested records available for inspection (the "Requested Records"). Complaint at 4-5 (ECF No. 1) (hereafter "Complaint" or "Compl."). When those negotiations failed, Project Vote filed this action seeking declaratory judgment and an injunction ordering that the Requested Records be made available for public inspection. Among other relief, Project Vote requested a permanent injunction and that the Court "retain jurisdiction over this

matter to . . . to otherwise monitor Defendant's compliance with any order from the Court and the NVRA, and to address any requests for sanctions and penalties for violations of any order from the Court or the NVRA." Compl. at 39-40.

On July 20, 2016, in response to the filing of this action, Defendant provided Project Vote with an electronic copy of certain requested voter registration information. That file was derived from Defendant's electronic database and contained certain information responsive to Project Vote's requests that was not previously made available. Defendant's Opp. to PI Motion ("Defendant's Opp.") at 6 (ECF No. 15).

On September 20, 2016 this Court granted Project Vote's Motion for a Preliminary Injunction and denied Defendant's motion to dismiss and Ordered Defendant to make certain voter registration data, that Defendant had not previously produced due to the claimed technical inability to extract the data from the state's election database, available to Plaintiff (ECF No. 38).

On October 4, 2016, Defendant filed a notice with the Court (the "Notice") claiming he had complied with this Court's Order. Defendant claimed that his provision of a public computer terminal with limited access to the eNet database fulfilled his obligations under the NVRA (ECF No. 41 at 1-2). The Notice also acknowledged that Defendant had not made all of the Requested Records

available, since "much of the information Plaintiff seeks is *not* maintained in a separate data field," and thus that Defendant has "no way of providing a digital file of the information." *Id.* at 2.

On October 6, 2016, William Bishop, a paralegal in the office of Caplan Cobb LLP, counsel to Project Vote in this matter, visited the Secretary of State's office and attempted to use the public access terminal. Declaration of William Bishop (hereafter "Bishop Decl.") ¶ 4 & Ex. A. A copy of Mr. Bishop's declaration and the exhibits attached thereto are attached as Exhibit 1 to this response. Bishop found that he could not run a general search or filter applicants. Bishop Decl. ¶ 5. Rather, Bishop could only search for individual applicants, one at a time. *Id.* ¶ 6; Ex. B. As a test-run, Bishop looked up his own voter information and that of specific persons Project Vote understood to be voter registration applicants in 2014. Bishop Decl. ¶ 6; Ex. C. Bishop could not conduct any analysis of the voter registration information provided, meaningfully sort the results by voter applicant, or return any results for more than one applicant at a time. Bishop Decl. ¶ 6.

B. Defendant's Latest Motion to Dismiss

Secretary Kemp has filed a second motion to dismiss this action, this time for lack of jurisdiction. In short, Defendant argues that by providing the ability to

view records for the entire State of Georgia just one record at a time, he has allowed ***inspection*** of "all records" to the full extent of the NVRA's Public Disclosure Provision (it does not). Defendant therefore concludes (wrongly) that, as a matter of law, this Court cannot possibly provide "further relief" and the case is moot. In support of the Motion, the Defendant's Chief Information Officer Merritt Beaver declares that a third-party vendor that had developed and maintained the statewide voter registration database has developed an application that "permits a user to view all voter registration data contained in eNet while still maintaining the confidentiality of certain information protected either by state or federal law." Declaration of Merritt Beaver (hereafter "Beaver Decl.") at 2 (ECF No. 50-2). Beaver further claims that the public terminal is "***intended*** as a permanent feature" and that "an individual inspecting the eNet database via the public terminal will have the same 'view' of the data as all state and county elections officials." *Id.* at 3 (emphasis added). Notably, neither Defendant's Motion, nor Mr. Beaver's declaration, nor any other material introduced by Defendant point to policy, guidelines, or any other formal statement from Defendant's office clarifying what information will be provided or made available going forward or making any guarantees about how long any such information will

continue to be provided.[1]

Thus, Secretary Kemp argues, "[b]y establishing a method by which members of the public may inspect all non-confidential voter registration data in the eNet system, Defendant has fully complied with the NVRA's public disclosure provision." Mot. at 4. Although on its face that is an argument on the merits of Plaintiff's claims while discovery is ongoing, Secretary Kemp concludes on the basis of it that "there is no further relief that this Court may provide" and thus that this Court lacks jurisdiction. *Id.*

ARGUMENT

I. DEFENDANT HAS NOT AND CANNOT ESTABLISH THAT THIS CASE IS MOOT

Defendant's Motion should be denied because he fails to establish the case is moot. Mootness requires Defendant to show the absence of an ongoing case and controversy, or that Project Vote is wholly unable to obtain further relief. Here, Defendant's own Motion shows that he asks this Court to resolve a live, justiciable

[1] It is unclear whether the eNet reports Defendant has provided are part of the material that he alleges will be "permanently . . . available to the public." It is also unclear whether the report that Defendant created and provided to Project Vote on July 20 in direct response to this litigation—which Defendant recognized was responsive to the NVRA requests (ECF No. 15) and which the Court relied on in ruling on the motion for preliminary injunction—will be made available at any future time. Discovery is necessary, at a minimum, to clarify such basic information concerning these disclosures of NVRA-covered voter registration information.

controversy—Defendant asserts mootness while asking this Court to make a ruling on the actual merits of the case, namely whether his provision of a computer terminal is sufficient to constitute compliance with the NVRA. *See* Mot. at 7-8. Whether what Defendant has provided is adequate under the NVRA is one key issue that ***remains*** in dispute. The case cannot be moot if the mootness depends on this Court resolving the ongoing controversy. *Cf.*, *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (noting "mootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so."). Moreover, Defendant fails to establish that his alleged cessation of noncompliance with the NVRA should moot this case or that Project Vote is not entitled to the permanent injunction or ongoing monitoring expressly sought in its Complaint (ECF No. 1). Indeed, Defendant simply avoids directly addressing those fatal flaws with his mootness argument altogether. Instead, Defendant's motion is a premature attempt at summary judgment poorly disguised as a motion to dismiss. It should be denied.[2]

[2] If this Court were inclined to grant Defendant's improperly disguised motion to dismiss, Plaintiff would expressly request that this Court defer ruling on the motion pursuant to Federal Rule of Civil Procedure 56(d) to permit it to complete the discovery necessary to demonstrate that the terminal is not adequate to comply with his obligations under the NVRA, that monitoring and guarantees of continued compliance are necessary, and that he is therefore not entitled to summary judgment. "[S]ummary judgment should not be granted until the party opposing

A. Project Vote Disputes the Sufficiency of Defendant's Compliance with the NVRA, Which Presents a Live and Ongoing Controversy

Defendant's Motion shows that there is an ongoing controversy, specifically as to whether Defendant's act of providing a computer terminal that allows review of one record at a time complies with the NVRA and whether additional relief is available. A case is moot when "it no longer presents a live controversy with respect to which the court can give meaningful relief" or when "the parties lack a legally cognizable interest in the outcome." *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993); *Fla. Ass'n of Rehabilitation Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1216 (11th Cir. 2000) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). A disagreement over the application and scope of a law presents such a live controversy, including a "disagreement as to the applicability of the NVRA." *See United States v. New York*, 700 F. Supp. 2d 186, 199 (N.D.N.Y. 2010). Indeed, a case is moot ***only*** if the party asserting mootness establishes "it is ***impossible*** for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (emphasis added) (internal

---

the motion has had an adequate opportunity for discovery." *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988).

quotations omitted). Simply arguing a disputed interpretation is no basis upon which to determine that a case is moot.

Indeed, far from establishing mootness, Defendant's Motion confirms that a justiciable controversy exists. The Defendant recognizes that whether his "*method of compliance*" is sufficient under the NVRA is an item in dispute. Mot. at 7. Rather than demonstrate mootness, Defendant attempts to address this point by rehashing the merits of his argument, which Project Vote plainly disputes. *Id.* More specifically, the Motion identifies the ongoing disagreement over the NVRA's "public inspection" requirements given the limited form in which Defendant is providing NVRA (some) covered information. *Id.* That such an ongoing disagreement about the proper statutory interpretation cannot serve as the basis for a finding of mootness is demonstrated by the very cases Defendant cites. Both *United States v. Feaster*, 798 F.3d 1374, 1378 (11th Cir. 2005) and *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999), relied on by Defendant, Mot. at 7-8, show such matters of interpretation to be questions on the merits. Neither case holds or even suggests that such an issue might be a basis for finding mootness. Even before turning to the substance of the disagreement (*see* Part II, below), the existence of a dispute regarding the sufficiency of Defendant's compliance with the Court's order and the adequacy of Defendant's actions under

the NVRA means this case is not moot.

In addition, Defendant has failed to address key elements of Project Vote's prayer for relief, including a permanent injunction that would be monitored by the Court. Compl. 39-40. A case is not moot where the plaintiff has not obtained "full and complete relief" of all of its claims. *Streeter v. Office of Douglas R. Burgess, LLC*, No. 107-CV-0097-WKW, 2008 WL 508456, at *2 n.1 (M.D. Ala. Feb. 21, 2008) (denying motion to dismiss on mootness grounds and observing that only an "offer of judgment for full and complete relief could in some instances render a plaintiff's claim moot in the Eleventh Circuit as several district courts have held or agreed" (internal quotation marks omitted)); *see also Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1166 (11th Cir. 2012). Again, even before considering the substance of Defendant's arguments, it is clear that a live controversy remains as to the relief Plaintiff seeks. The issue has not been rendered moot where Defendant ignores part of the relief requested and the Court has yet to consider or grant the same.

What is more, far from being rendered moot, the other relief that Plaintiff requests is all the more relevant because Defendant has yet to demonstrate the permanent nature of the limited steps he has taken. A premature dismissal of this case, as Defendant seeks, would enable him to once again deny Project Vote access

to the eNet database and associated NVRA-covered reports, which are essential for it to carry out its oversight function. Project Vote would be forced to once again initiate lengthy negotiations (as it did for years prior to this case) or re-litigate this action. Dismissal of a live controversy at this premature stage is not only improper, it would lead to the inefficient use of judicial and party resources.

B. Secretary Kemp's Actions Do Not Unambiguously Terminate His Offending Conduct.

Defendant's Motion also fails because he has not and cannot establish that voluntary cessation of the offending conduct amounts to an unambiguous and permanent end to the conduct identified in Plaintiff's complaint. A "'defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents*, 633 F.3d 1297, 1309 (11th Cir. 2011) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Were it otherwise, a party could evade a challenge simply by changing its practice at the initiation of litigation only to reinstate the practice after dismissal of the litigation for mootness. *Id.* at 1309.

Defendant's Motion attempts to rely on the rebuttable presumption that a government actor's "objectionable behavior will *not* recur." *Id.* at 1310 (citation omitted). That presumption only applies in the case of a "challenge to a

government policy that has been ***unambiguously*** terminated." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1285 (11th Cir. 2004) (emphasis added); *see, e.g.*, *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1337-38 (N.D. Ga. 2012) (where "the evidence tending to show cessation of the offending government conduct [was] not unambiguous," the Defendant is not entitled to any presumption against recurrence of the offending conduct).[3] To benefit from this presumption, "the government is – and always has been – required to justify [its] application." *Doe v. Wooten*, 747 F.3d 1317, 1323 (11th Cir. 2014). Furthermore, as demonstrated by Defendant's own citations, the instances in which it has been applied concern ***permanent*** changes in law or ordinance. Mot. at 4-5; *see, e.g.*, *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005) ("[City] completely revised and amended its zoning ordinances, changing entirely the provisions of their code that were the gravamen of this suit."); *Tanner Adver. Grp., LLC v. Fayette Cnty.*, 451 F.3d 777, 785 (11th Cir. 2006) (finding repeal of prior ordinance and enactment of new ordinance rendered issue moot).

[3] *See also United States v. Lousiana*, No. 3:11cv470, 2016 WL 4055648, at *19 (M.D. La. July 26, 2016) (finding an action was not moot where "the US has . . . presented much proof of noncompliance" that had not yet been adjudicated); *Nat'l Coalition for Students with Disabilities v. Taft*, No. 2:00cv1300, 2002 WL 31409443, at *6 (S.D. Ohio Aug. 2, 2002) (concluding that an issue was not moot because the state secretary "ha[d] not necessarily 'voluntarily ceased' the allegedly illegal conduct and "ha[d] persisted, in the context of this litigation, in his position that he need not comply with the NVRA.").

Here, Defendant has not shown that he is entitled to a presumption that his non-compliance with the NVRA has unambiguously and permanently ceased. The Declaration submitted by Mr. Beaver indicates that the public terminal is "intended" as a permanent feature. Beaver Decl. at 3. But mere intent, expressed in a Declaration of an employee, not even in Secretary Kemp's filing, let alone in any official communication by the Defendant, is not a final or official policy. *See Ga. State Conference*, 841 F. Supp. 2d at 1339. Indeed, the Motion indicates that "[a]ll voter registration records maintained by the Secretary of State, including all records stored in the statewide election database, are now available for inspection by Plaintiff," but makes no commitments to Plaintiff's statutory right of inspection in the future. *See* Mot. at 8-9 . Nor does Defendant present or point to any other public statement or duly enacted policy demonstrating a permanent change in conduct. Indeed, his position that his own voluntary decision to make available a public terminal with access to the eNet database unambiguously discharges his obligations under the NVRA suggests that the Defendant maintains a narrow view of his obligations. Defendant also fails explain or clarify the status and future disclosure of reports that he created and provided to Project Vote in direct response to the filing of this litigation (ECF No. 15 at 6).

Defendant's arguments implicate both the scope of the NVRA and this Court's orders requiring that he make NVRA-covered records available for inspection. Defendant's claimed voluntary cessation is not sufficient to moot this case.

II. PROJECT VOTE IS ENTITLED TO DISCOVERY TO TEST THE MERITS OF DEFENDANT'S CLAIMS OF COMPLIANCE

Project Vote is entitled to discovery in this case, including to prove that the Defendant's chosen method of compliance is insufficient to discharge his obligations under the Public Disclosure Provision. The (faulty) premise of Defendant's mootness argument is that, by making the eNet database accessible through a computer terminal, he has discharged his duties to make "all records" available for public inspection. However, "inspection" means to "view closely in critical appraisal." *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993) (defining "inspect"); *see also Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 57 (9th Cir. 1961) ("'[I]nspection' has a broader meaning then just looking."). Indeed, "inspect" and "copy" have been used concurrently to denote a broad right of access. *See, e.g.*, *Kennedy v. Lynd*, 306 F.2d 222, 227 (5th Cir. 1962) ("[T]he custodians' duty to retain and preserve and the Attorney General's right of inspection and copying extend as far back as the earliest date of any such record or paper . . . ."). Moreover, the NVRA's Public Disclosure Provision must be read in

conjunction with Georgia's obligations under the statute. *See, e.g.*, 52 U.S.C. § 20507(b) (requiring a state to maintain accurate and current voter registration rolls in a uniform and nondiscriminatory manner); *see generally Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1266 ("Well-established and soundly based rules of statutory construction require us to consider the provisions of [a section of the U.S. Code], and its language, in context."). The Public Disclosure Provision's requirement for "inspection," in other words, requires a meaningful inspection to "assist the identification of both error and fraud in the preparation and maintenance of voter rolls." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 339 (4th Cir. 2012).

An inspection that does not allow the public to actually review more than one record at a time, as Defendant provides here, is not sufficient. This is all the more true given that Defendant indisputably maintains its records in an electronic database that can provide electronic reports and that can be queried electronically to aggregate the information in it. As Mr. Bishop found, the computer terminal provided by the Defendant does not allow for general searches, nor can the user apply common database functions or even view multiple voters at once. Absent such access, the "inspection" provided by the State is not adequate to fulfill the oversight function envisioned by the NVRA because by viewing only one voter

applicant at a time Project Vote cannot feasibly conduct the analysis necessary to detect errors and omissions in the voter roll.

Defendant's response is that nothing can be done, as he has allegedly provided the "greatest possible disclosure" (ECF No. 41 at 2). This claim, however, rests upon Defendant's factual assertions about what Defendant's database—one that his office established and controls—can and cannot do. These are separate claims that Plaintiff has a right to test through discovery under the Rules of Civil Procedure. Defendant cannot foreclose a legal obligation (*e.g.*, his response under the NVRA) based on his own untested and unproven factual assertion (*e.g.*, the claimed "technical" limitations of his database). At various points in his Motion, Defendant asserts that the provision of information is not determined by his office's policies, but the "technical inability" of his database, Mot. at 1, and the specific records kept in that database, *id.* at 4, 6, 7. At a minimum, Project Vote is entitled to test Defendant's assertions through discovery and to determine if there is a feasible method through which more meaningful inspection can be readily achieved.

Defendant is seeking to circumvent his obligations under federal law by seeking summary judgment, before discovery, in the guise of a jurisdictional argument. Defendant's arguments fail. This case remains a live controversy, and

Project Vote is entitled to discovery to prove its cause and win additional relief.

CONCLUSION

Accordingly, Project Vote respectfully requests that the Court **DENY** Defendant's Motion to Dismiss for Lack of Jurisdiction.

DATED this 3rd day of March, 2017

Respectfully submitted,

/s/ James W. Cobb
James W. Cobb
T. Brandon Waddell
CAPLAN COBB
75 Fourteenth Street NE
Suite 2750
Atlanta, GA 30309
(404) 596-5600
jcobb@caplancobb.com

Attorneys for Plaintiff Project Vote, Inc.

(co-counsel listed on next page)

PROJECT VOTE, INC.
Michelle E. Kanter Cohen
(admitted *pro hac vice*)
1420 K Street NW
Suite 700
Washington, DC 20005
(202) 546-4173
mkantercohen@projectvote.org

ROPES & GRAY LLP
John C. Ertman (admitted *pro hac vice*)
1211 Avenue of the Americas
New York, NY 10036
(212) 596-9000
john.ertman@ropesgray.com

David E. Rhinesmith (admitted *pro hac vice*)
David A. Young (admitted *pro hac vice*)
2099 Pennsylvania Ave NW
Washington, DC 20006
(202) 508-4600
david.rhinesmith@ropesgray.com
david.young@ropesgray.com

Attorneys for Plaintiff Project Vote, Inc.

RULE 7.1 CERTIFICATION

I hereby certify that the foregoing Plaintiff's Opposition to Motion to Dismiss was prepared in accordance with the font and point selections approved by the court in Local Rule 5.1B.

Dated: March 3, 2017

/s/ James W. Cobb
James W. Cobb

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March 2017, I electronically filed the foregoing Plaintiff's Opposition to Motion to Dismiss under Local Rule 7.2(B) with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ James W. Cobb
James W. Cobb