

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JUDICIAL WATCH, INC.,	:	
	:	
Plaintiff,	:	
	:	No. 1:20-CV-0708
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, et al.,	:	(JUDGE CONNER)
	:	
Defendants.	:	

**DEFENDANTS LUZERNE COUNTY COUNCIL, TIM MCGINLEY
AND SHELBY WATCHILLA’S BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS**

Defendants Luzerne County Council, Tim McGinley and Shelby Watchilla (collectively, “Luzerne County Defendants”), by their undersigned counsel, hereby submit the instant Brief in support of their Motion to Dismiss (the “Motion”) the First Amended Complaint filed by Plaintiff Judicial Watch, Inc. (“Judicial Watch”).

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Judicial Watch commenced this action on or about April 29, 2020 against the Commonwealth of Pennsylvania, Kathy Boockvar in her official capacity as the Secretary of the Commonwealth of Pennsylvania,¹ and various election

¹ Acting Secretary of the Commonwealth of Pennsylvania Veronica Degraffenreid was substituted as a defendant for former Secretary Boockvar. (See

officials and entities from Bucks County, Chester County, and Delaware County (“Original County Defendants”). (See Doc. 1, generally). Commonwealth Defendants answered the Complaint, (see Doc. 33, generally), whereas Original County Defendants moved to dismiss the Complaint. (See Doc. 35, generally). Original County Defendants’ motion to dismiss was granted and the claims against them were dismissed without prejudice. (See Docs. 57-58, generally).

Judicial Watch ultimately filed its First Amended Complaint on November 8, 2021. (See Doc. 85, generally). Commonwealth Defendants are again named as parties. (See id. at ¶¶ 5-6). Original County Defendants have been removed from the amended pleading, however, and replaced with agencies and officials from Luzerne County, Cumberland County, Washington County, Indiana County, and Carbon County (collectively, where appropriate, “New County Defendants”). (See id. at ¶¶ 7-21).

As alleged in the First Amended Complaint, Judicial Watch is a not-for-profit educational organization that describes its mission as promoting transparency, integrity and accountability in government and fidelity to the rule of law. (See id. at ¶¶ 4, 31). Over recent years, Judicial Watch has commenced a “nationwide program to monitor state and local election officials’ compliance”

Doc. 57, 2 n.1). The Commonwealth and Acting Secretary Degraffenreid are collectively referred to as “Commonwealth Defendants”.

with the requirements of the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. §§ 20501 *et seq.* (*Id.* at ¶ 35).

In June 2019, the United States Election Assistance Commission (“EAC”) published its biennial report to Congress as required by law. (*See id.* at ¶ 36). Federal regulations require states to provide various kinds of data to the EAC for use in this report. (*See id.* at ¶ 30). Included in the information provided to the EAC is “the numbers of active and inactive registered voters in the last two federal elections, and the numbers of registrations removed from the rolls for any reason between those elections.” (*Id.*). Along with the biennial report, the EAC published the responses it received to its voter registration survey, the Election Administration and Voting Survey (“EAVS”), which are provided directly to the EAC by the states in consultation with their county and local officials. (*See id.* at ¶ 37).

Judicial Watch avers that it has access to four (4) years of data concerning Defendants’ compliance with the NVRA. (*See id.* at ¶ 41). Turning to the last two EAC Surveys, Question A9e asked jurisdictions to report the number of registrations removed where the reason was “failure to respond to notice sent and failure to vote in two most recent federal elections.” (*See id.* at ¶ 42). Judicial Watch asserts that “[i]f a jurisdiction removes few or no registration records belonging to electors who fail to respond to an address confirmation notice and fail

to vote in two consecutive federal elections, that jurisdiction is not complying with Section 8(d)(1)(B) of the NVRA.” (Id. at ¶ 43).

With respect to Luzerne County Defendants, Judicial watch alleges that Luzerne County has a total of 219,675 voter registrations, that it removed 61 registrations pursuant to Section 8(d)(1)(B) from 2018 to 2020, and that it removed 96 registrations from 2016 to 2018. (See id. at ¶ 44). Judicial Watch concludes that it is “not possible as a practical matter” for Luzerne County to comply with the NVRA while removing this number of registrations. (Id. at ¶ 50).

For comparison purposes, Judicial Watch points to Lackawanna County, which, while having fewer total voter registrations than Luzerne County, removed 11,597 registrations pursuant to Section 8(d)(1)(B) of the NVRA from November 2016 through November 2020. (See id. at ¶ 52). Likewise, Clinton County, with a total of 22,110 voter registrations, removed 2,034 registrations under Section 8(d)(1)(B) between November 2016 and November 2020. (See id. at ¶ 53).

On April 22, 2021, Judicial Watch sent a notice-of-violation letter to Commonwealth Defendants setting forth a range of purported violations by the Commonwealth and twenty-seven (27) identified counties, (see id. at ¶ 73), one of which was Luzerne County. (See Doc. 75, Ex. “1”). On May 3, 2021, Judicial Watch sent notice-of-violation letters directly to each of the twenty-seven (27) counties referenced in the April 22, 2021 letter. (See Doc. 85, ¶ 77). Luzerne

County allegedly never responded to the notice letter sent by Judicial Watch. (See id. at ¶ 78).

Judicial Watch goes on to acknowledge that “Luzerne County was publicly reported to have removed over 17,000 registrations on or about June 1, 2021, about four weeks after it received the notice-of-violation letter. The article expressly stated that the removals were made ‘in response to a litigation threat’ by Judicial Watch. The article also noted that a similar program had not been completed since 2012.” (Id. at ¶ 79 (internal citation omitted)). The article cited in Paragraph 79 of the First Amended Complaint additionally states:

“Luzerne County’s voter registration dropped by about 8% Wednesday due to a purging of inactive voters who did not cast ballots in at least two federal elections.”

“On the issue of purging, a total 17,420 voters had their registrations cancelled due to inactivity, Morgan said. This lowers the county’s registration from a state-reported 220,492 on June 14 to a new 203,072. With this more realistic figure, the 56,720 ballots cast in the recent primary actually equated to a turnout of 28% instead of the previous 25.7% based on the old voter count.”

“Morgan said he worked with the Pennsylvania Department of State to identify voters who should be purged. Based on state guidance, he removed the 17,420 because they had not voted for at least five years prior to November 2018 - or since, he said.”

“Impacted voters had been informed of their inactive status in 2018, although it’s unclear why they had not

been purged years ago, Morgan said. He believes most of the voters had relocated and failed to notify the county.”

<https://www.timesleader.com/news/1497069/luzerne-county-drops-17420-voters> (last visited December 20, 2021).² In its own words, Judicial Watch characterizes the action by Luzerne County as “**possible voluntary compliance**” with the requirements of the NVRA. (Doc. 85, ¶ 80)(emphasis added).³

Next, Judicial Watch pleads that it and its members lawfully registered to vote in Luzerne County, Cumberland County, Washington County, Indiana County, and Carbon County have suffered injuries as a result of Defendants’ failure to comply with their NVRA voter list maintenance obligations. (See id. at ¶¶ 81-88).

Based on the foregoing allegations, Judicial Watch’s First Amended Complaint contains a single Count against all Defendants for a violation of Section 8(a)(4) of the NVRA, 52 U.S.C. § 20507(a)(4). (See id. at Count I). Specifically,

² Although not also cited in the First Amended Complaint, thousands of additional voters were notified in July 2021 of possible removal because they moved and did not inform the election bureau. See <https://www.timesleader.com/news/1514651/luzerne-county-continuing-inactive-voter-registration-purge> (last visited December 21, 2021).

³ Despite openly acknowledging that Luzerne County Defendants -- at the absolute minimum -- attempted to cure the violations alleged in its May 3, 2021 letter to Luzerne County, Judicial Watch offers the legal conclusion that Luzerne County Defendants’ “possible voluntary compliance does not moot the claims against it.” (Doc. 85, ¶ 80). As explained in the text below, this analysis is flawed. See infra Part III.B.

Defendants are alleged to have failed to fulfill their obligations under Section 8(a)(4) to conduct a general program that makes a reasonable effort to cancel the registrations of registrants who are ineligible to vote in Pennsylvania's federal elections. (See id. at ¶ 95). Judicial Watch further avers that it provided statutory notice to all Defendants in accordance with 52 U.S.C. § 20510(b)(1). (See id. at ¶ 94). As relief, Judicial watch seeks: (1) a declaration that Defendants are in violation of Section 8(a)(4) of the NVRA; (2) a permanent injunction enjoining Defendants from violating Section 8(a)(4) of the NVRA; (3) an order mandating Defendants to develop and implement a general program that makes reasonable effort to remove the registrations of ineligible registrants from the voter rolls of the parties; and (4) an order requiring Defendants to pay Judicial Watch's attorney's fees and litigation costs and expenses. (See id. at Prayer for Relief).

Luzerne County Defendants moved to dismiss the First Amended Complaint for failure to state a claim. (See Motion, generally). In accordance with Middle District of Pennsylvania Local Rule 7.5, the instant brief is submitted in support of the Motion.

II. QUESTION PRESENTED

1. Does the First Amended Complaint fail to state a claim against Luzerne County Defendants?

Suggested Answer: **Yes.**

III. ARGUMENT

A. Motion To Dismiss Standard.

A motion to dismiss for failure to state a claim is authorized by Federal Rule of Civil Procedure 12(b)(6), see Fed. R. Civ. P. 12(b)(6), and the sufficiency of a complaint is governed by the “pleading regime” set forth by the Supreme Court in Iqbal and Twombly. Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016)(citing Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

B. Judicial Watch Does Not Plead A Viable Claim Against The Luzerne County Defendants.

The sole claim advanced by Judicial Watch in the First Amended Complaint is based on all Defendants’ alleged violations of their list-maintenance obligations under the NVRA. (See Doc. 85, generally). With respect to the Luzerne County Defendants, however, Judicial Watch lacks statutory standing and therefore fails to state a claim upon which relief can be granted. (See id., generally).⁴

This Court has previously detailed the background and purposes of the NVRA, so the Luzerne County Defendants will not repeat those provisions at

⁴ A motion to dismiss for lack of statutory standing is brought under Rule 12(b)(6). See, e.g., Humphrey v. GlaxoSmithKline PLC, 905 F.3d 694, 701 (3d Cir. 2018); Maiden Creek Assoc., LP v. United States Dep’t of Transp., 823 F.3d 184, 189 n.1 (3d Cir. 2016); accord Public Interest Legal Found. v. Boockvar, 370 F. Supp. 3d 449, 454 n.3 (M.D. Pa. 2019).

length. (See Doc. 57, 8-9). Pertinent to the instant motion, however, is Section 8 of the NVRA. See 52 U.S.C. § 20507. The NVRA prohibits the removal of a name from the official list of eligible voters except: “(A) at the request of the registrant; (B) as provided by State law, by reason of criminal conviction or mental incapacity; or (C) as provided under paragraph (4)[.]” Id. at § 20507(a)(3). Section 8(a)(4) requires states to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters” following: “(A) the death of the registrant; or (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d)[.]” Id. at § 20507(a)(4).

The thrust of Judicial Watch’s claim here is that the New County Defendants failed to comply with their obligations under Section 8(d)(1) of the NVRA, (see Doc. 85, ¶¶ 42-51), which states:

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in

an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

52 U.S.C. § 20507(d)(1).

The NVRA, by its own terms, provides for a private right of action. See 52 U.S.C. § 20510(b). The private right of action authorized by the NVRA, however, is not unlimited. See id. To the contrary, the NVRA requires a person aggrieved by a violation of the NVRA to “provide written notice of the violation to the chief election official of the State involved.” 52 U.S.C. § 20510(b)(1). Here, Judicial Watch alleges that such written notice was provide to the Luzerne County Defendants by letter dated May 3, 2021. (See Doc. 85, ¶¶ 77, 94).

But, unless the alleged violation occurred within 30 days before the date of an election for Federal office, notice of the alleged statutory violation alone is not the only prerequisite to a private suit under the NVRA. See 52 U.S.C. § 20510(b)(2)-(3); National Council of La Raza v. Cegavske, 800 F.3d 1032, 1042 (9th Cir. 2015). Indeed,

[i]f the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.

52 U.S.C. § 20510(b)(2). The New County Defendants were entitled to a 90 day window to cure any list-maintenance violations under the NVRA, see id., and Judicial Watch does not dispute that this was the applicable cure period. (See Doc. 78, 2 (acknowledging that it could only maintain suit against the New County Defendants after 90 days passed from the notice letters); Doc. 75, Ex. “2” (letter to Armstrong County providing 90 days to correct NVRA violation)).

The basic, fundamental defect with respect to the claim against the Luzerne County Defendants, however, is that the facts pled by Judicial Watch confirm that Luzerne County cured the alleged list-maintenance violation within approximately four weeks after having received the notice-of-violation letter. (See Doc. 85, ¶ 79)(emphasis added). While Judicial Watch alleges that Luzerne County Defendants “never responded to the notice letters sent to them”, (Doc. 85, ¶ 78), there is nothing in the NVRA that obligated Luzerne County to respond directly to Judicial Watch; what was statutorily required, instead, was a correction of the violation within 90 days. See 52 U.S.C. § 20510(b)(2). And Judicial Watch pleads just that: Luzerne County, within thirty (30) days of the notice-of-violation letter, “removed over 17,000 registrations” “‘in response to a litigation threat’ by Judicial Watch.” (Doc. 85, ¶ 79). Judicial Watch does not provide a single allegation suggesting that this cure was inadequate, deficient in any way, or somehow failed to correct the NVRA violation at issue. (See id., generally). To the contrary,

Luzerne County's removal of over 17,000 registrations was deemed by Judicial Watch as "possible voluntary compliance" with the NVRA within the statutorily prescribed cure period applicable here. (Id. at ¶ 80).

The NVRA is clear that "[w]hen notice is required, the complainant may file suit only if the violation is not corrected within 90 days from the notice." Judicial Watch, Inc. v. Griswold, - - - F. Supp. 3d - - -, 2021 WL 3631309, at *8 (D. Colo. 2021)(citing 52 U.S.C. § 20510(b)(2)). As this Court said before in this case, "[t]he purpose of the NVRA's notice requirement is to provide states an opportunity to attempt compliance before facing litigation." (Doc. 57, 16 (citation, quotations, and internal alteration omitted)). This is reflected in the legislative history of the NVRA. See Cromwell v. Kobach, 199 F. Supp. 3d 1292, 1310 (D. Kan. 2016)(citing S. Rep. 103-6, at 21 (1993)("An essential element of an effective civil enforcement program is a requirement for notice of any complaint regarding its implementation to the appropriate election officials together with a process for its administrative resolution before legal action may be commenced.")).

With respect to the Luzerne County Defendants, Judicial Watch pleads that, in response to the pre-litigation notice, over 17,000 registrations were removed. (See Doc. 85, ¶ 79). In other words, Luzerne County is alleged to have made "more than an empty gesture" and represents the "sort of compliance attempt" that renders dismissal of an NVRA claim appropriate. Georgia State Conference of

N.A.A.C.P. v. Kemp, 841 F. Supp. 2d 1320, 1336 (N.D. Ga. 2012). Because Luzerne County cured the violation set forth in the May 3, 2021 notice letter, Judicial Watch lacks statutory standing and fails to state a claim upon which relief can be granted against Luzerne County Defendants. See, e.g., Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283, 1296 (N.D. Ga. 2020)(failure to comply with notice provision deprives plaintiff of statutory standing under the NVRA).

Judicial Watch, however, attempts to save its claim against Luzerne County Defendants by citing to Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) and pleading that Luzerne County's compliance with the NVRA does not moot the claims against it. (See Doc. 85, ¶ 80). Judicial Watch fails to recognize the critical distinction between pre-complaint compliance and post-complaint compliance. See Friends of the Earth, 528 U.S. at 174-75. Indeed, in Friends of the Earth, the Court explained that, under the Clean Water Act, "citizens lack statutory standing under § 505(a) to sue for violations that have ceased by the time the complaint is filed." Id. at 175 (emphasis added). In fact, the Supreme Court there summarized its decision to reverse the Court of Appeals as follows:

The appellate court erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, albeit after commencement of the litigation, has come into compliance. **In directing**

dismissal of the suit on grounds of mootness, the Court of Appeals incorrectly conflated our case law on initial standing to bring suit, see, e.g., Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), with our case law on postcommencement mootness, see, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982).

Id. at 173-74 (emphasis added).

Judicial Watch's own allegations indicate the Luzerne County Defendants came into compliance with the NVRA **before** litigation was commenced against them. (See Doc. 85, ¶ 79). As the Supreme Court explained in Friends of the Earth, "if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." Friends of the Earth, 528 U.S. at 191 (citing Steel Co., 523 U.S. at 109 ("the mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced")). On these allegations, then, Judicial Watch lacks standing to maintain this suit against the Luzerne County Defendants. See id. at 187-88 ("Steel Co. established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit. We specifically noted in that case that there was no allegation in the complaint of any continuing or imminent violation, and that no basis for such an allegation appeared to exist."). The mootness doctrine is not implicated here. Count I of the First Amended

Complaint should be dismissed with prejudice as to the Luzerne County Defendants.

IV. CONCLUSION

For any or all of the foregoing reasons, the Luzerne County Defendants' Motion to Dismiss should be granted and Count I against Luzerne County Council, Tim McGinley and Shelby Watchilla should be dismissed with prejudice.

Respectfully submitted,

/s/John G. Dean

John G. Dean
ELLIOTT GREENLEAF, P.C.
15 Public Square, Suite 310
Wilkes-Barre, PA 18701
(570) 371-5290

Attorney for Defendants Luzerne
County Council, Tim McGinley and
Shelby Watchilla

DATED: March 16, 2022

CERTIFICATE OF SERVICE

I, JOHN G. DEAN, hereby certify that I have caused to be served on this day a true and correct copy of Luzerne County Defendants' Brief in Support of Motion to Dismiss via ECF on all counsel of record.

DATED: March 16, 2022

/s/John G. Dean

John G. Dean