IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

JUDICIAL WATCH, INC., Plaintiff, v. COMMONWEALTH of PENNSYLVANIA, et al., Defendants.	Civ. Action No. 1:20-cv-00708-CCC (Judge Christopher C. Conner)

PLAINTIFF JUDICIAL WATCH'S REPLY IN SUPPORT OF ITS FIRST MOTION TO AMEND THE COMPLAINT

Plaintiff respectfully submits this reply brief in further support of its motion for leave to amend the complaint. Doc. 78.

INTRODUCTION AND FACTUAL BACKGROUND

In their opposition, Defendants assert that they corrected any noncompliance with the NVRA during the 90-day pre-suit waiting period prescribed by the statute. Doc. 80 at 5-6; *see* 52 U.S.C. § 20510(b)(2). They claim that, upon receiving Plaintiff's April 22, 2021 notice letter (Doc. 75-1), they started working with Pennsylvania counties "to remove outstanding inactive voters who had failed to return a confirmation notice and did not participate in the subsequent two consecutive federal elections." Doc. 80 at 5. Defendants also claim that a short letter sent by their counsel was sufficient to provide Plaintiff with "actual notice of the corrections." *Id.* at 6; *see* Doc. 80-2.

On the basis of these assertions, Defendants argue that a grant of leave to amend would be futile because (1) Plaintiff's new claims are "barred" because Defendants took advantage of what they view as a statutory right under the NVRA to cure their noncompliance before being sued, (2) Plaintiff's claims are moot because Defendants have corrected their NVRA violations, (3) Plaintiff's proposed amendment prejudices the Secretary by denying the aforesaid opportunity to cure noncompliance, and (4) Plaintiff's refusal to dismiss this lawsuit immediately after being notified that all problems had been corrected shows their "bad faith."

Defendants' arguments fail. As set forth in greater detail below, the NVRA does not require a pre-suit determination that Defendants have not "fixed their problems" before Plaintiff is allowed to sue. Further, given the standards governing this motion, there is no basis for considering the factual claims Defendants now make. Yet even if those statements were considered, *and were accepted as true*, this case would not be moot under the applicable law. Finally, it is preposterous to suggest that the two-page attorney's letter and a one-page chart from Defendants' counsel (which was, moreover, contradicted by its cited sources, and was off-point) should have prompted Plaintiff's counsel to voluntarily dismiss its lawsuit. It is even more preposterous to suggest that the failure to do so shows "bad faith." Defendants should take more care in making such accusations.

Before elaborating these arguments, it is necessary to clarify certain factual matters raised in and by Defendants' opposition, concerning both new facts and facts where Defendants' presentation is confused or simply incorrect. Accordingly, before proceeding to the argument, it is important to note the following:

1. Defendants now concede the validity of the most recent EAVS data, which confirms years of low removals and noncompliance with Section 8(d)(1)(B) of the NVRA. In their opposition, Defendants concede, albeit indirectly and in a footnote, that facts relied on to make critical allegations in the amended complaint are true. Specifically, Defendants admit that "the data submitted by the Department

of State to the EAC for the most recent EAVS survey … was valid when submitted," although they also assert that it is no longer current. Doc. 80 at 5 n.3. In other words, the data for 2018 to 2020 that Defendants sent to the EAC in March of this year—the same data Plaintiff obtained following a discovery dispute (*see* Doc. 79 at 10)—was "valid when submitted" to the EAC.

This admission effectively confirms some of the most startling allegations in the amended complaint. Relying on this data, and on the data for the preceding EAVS survey covering 2016 to 2018 (which State Defendants filed with their answer to the original complaint, *see* Doc. 33-1), the amended complaint alleges that, in the four years from November 2016 to November 2020, nine Pennsylvania counties removed only a handful, or close to zero, or zero registrations under Section 8(d)(1)(B) of the NVRA. Doc. 78-1, ¶¶ 44-49, 60. Another five counties removed equally low numbers of such ineligible registrations during the last two-year reporting cycle. *Id.*, ¶ 61; *see* Doc. 79 at 7-9 (discussing data).

All of these facts are now undisputed.

2. Defendants mischaracterize the factual allegations in the amended complaint. Defendants state that "the proposed amended complaint" claims that "the numbers of removals in 27 counties is low" and "that registration rates in four particular counties, Bucks, Chester, Delaware and Pike, are high (reiterating arguments already rejected by Judge Conner)." Doc. 80 at 4.

This is incorrect. The amended complaint includes only a subset of the allegations contained in the April 22, 2021 notice letter. In particular, the amended complaint does not mention Bucks, Chester, Delaware, or Pike Counties at all. Nor does it contain any allegations whatsoever regarding county "registration rates" (registered voters divided by citizen voting age population), which were a significant concern in the original complaint. *Compare* Doc. 1, ¶¶ 51-58. The amended complaint focuses instead on more direct evidence of a failure to comply with the NVRA, including Defendants' direct, public admissions to the EAC showing low removal numbers. Only five counties are named as defendants in the amended complaint. Only a few other counties are mentioned at all.

Defendants also incorrectly state that "Plaintiff alleges that the Secretary is, essentially, vicariously liable for these purported deficiencies" of the counties. To the contrary, the Secretary is directly—not vicariously—responsible "for coordination of State responsibilities under" the NVRA. 52 U.S.C. § 20509. The amended complaint alleges that she has failed to fulfill this duty. Doc. 78-1, ¶ 58.[1]

3. The July 16, 2021 letter from Defendants' counsel does not contradict the allegations in the amended complaint. Defendants rely on a July 16, 2021 letter

[1] Defendants also state that the April 22, 2021 notice letter was "the first notice letter of its kind issued directly to the Secretary." Doc. 80 at 4. This is incorrect. The Secretary was a direct addressee, and not merely copied, on each of the original notice letters. *See* Doc. 1-2 at 1, Doc. 1-3 at 1, Doc. 1-4 at 1.

from their counsel to show that they informed Plaintiff that they had corrected any issues with their NVRA compliance. Doc. 80-2. As discussed herein, this letter has no legal relevance, raises factual matters that should not be considered on this motion, and does not moot this lawsuit even if its assertions are true.

There is, however, another problem with the facts asserted in that letter that should not get lost in this discussion: they are consistent with the allegations in the amended complaint.[2] The letter claims that all counties identified in notice letters "have cancelled their two federal election inactive voters in accordance with Section 8(d)(1)(B)," and that the "attached chart … demonstrates the counties' compliance." Doc. 80-2 at 1. That chart purports to list "Continuous Inactive Voters" as of certain election days extending back to 2012. *Id*. at 3. Thus, the first column presumably lists current inactive voters whose statutory time period has not run. Every other column lists "0," presumably to show that every registration that was continuously inactive for *more than* two federal elections has been removed. *Id*.

But even if true, this data does not contradict the claim that no registrants have been removed in a particular county for a given period. Section 8(d) entails a lengthy process, whereby a county first identifies likely movers, then sends them notices, then tracks them as they fail to respond or vote for two to four years, and then

[2] The amended complaint expressly alleges that the data in the July 16, 2021 letter does not contradict its allegations. Doc. 78-1, ¶ 75. Defendants tacitly concede as much by submitting a further affidavit with their opposition. Doc. 80-3.

removes them from the rolls. This process can be mismanaged at a number of points, which can lead to having few inactive registrants to remove. Stated another way, it can both be true (1) that a county currently has no registrants on the rolls who were made inactive from, say, 2016 to 2020, *and* (2) that it removed no registrants during that period. Both facts are consistent with noncompliance.

ARGUMENT

I. The NVRA Does Not Bar a Lawsuit Simply Because a Jurisdiction Claims to Have Cured Its Noncompliance During the Notice Period.

Section 11 of the NVRA provides that a "person who is aggrieved by a violation" of the act ordinarily should provide written notice "to the chief election official of the State involved." 52 U.S.C. § 20510(b)(1). It also provides in relevant part that "[i]f the violation is not corrected within 90 days after receipt" of such a notice, "the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief." *Id.*, § 20510(b)(2). It is up to the "aggrieved persons" as potential plaintiffs to decide whether they believe that any actions taken have actually fixed the violations they identified. *See Delgado v. Galvin*, No. 12-cv-10872, 2014 U.S. Dist. LEXIS 33476, at *26 (D. Mass. March 14, 2014) (plaintiffs were entitled to file suit "because *they concluded* that the remedy the Defendants initially offered after the notice letter was not sufficient to resolve *what they believe* to be systemic flaws in the manner in which the NVRA is being implemented") (emphasis added); *Judicial Watch v. King*, 993 F. Supp. 2d 919, 922

(S.D. Ind. 2012) (notice is sufficient which, "read as a whole, makes it clear" that plaintiff "is asserting a violation of the NVRA and plans to initiate litigation if *its concerns* are not addressed in a timely manner") (emphasis added). Whether plaintiffs who do file a complaint are correct in their view of the facts and the law is, of course, determined in the subsequent litigation.

Defendants, however, interpret Section 11 to provide them with an affirmative right to some sort of pre-suit finding, or even a presumption, regarding their claim to have fixed all noticed violations during the 90-day notice period. In their view, a "person may not bring a private cause of action under the NVRA if the purported violations are corrected within 90 days of receiving a notice." Doc. 80 at 9. They then tacitly treat their *assertion* that "the Secretary corrected the issues identified within 90 days" as established *fact*. *Id.* at 11. They equate Plaintiff's failure to credit this assertion with a failure to comply with Section 11's notice requirement, suggesting, in essence, that it entails the same legal consequences as if Plaintiff never sent a notice letter at all. *Id.*

Defendants are not at all clear about how a claim to have corrected NVRA violations should be presented. Indeed, their reading of the statute raises a host of obvious, practical questions. Is such a determination decided on the pleadings? Or does it require an evidentiary hearing? Does the plaintiff, who has not yet had the benefit of any discovery, retain favorable presumptions at such a hearing? And

whatever the procedure or standards may be, by what logic is the July 16, 2021 letter from counsel enough to decide the question here?

Neither the NVRA nor its legislative history mentions such a hearing or procedure, or any of the other issues raised above. This is, no doubt, because they were never contemplated. The simple fact is that the limitation on private actions that Defendants suggest is not found anywhere in the NVRA. Rather, Defendants propose to rewrite the NVRA to include a new provision that they would prefer.

Defendants cite no case where potential plaintiffs were barred from filing suit because potential defendants announced they had corrected noticed violations of the NVRA. Plaintiff has found no such case. There is only one previous case where such an argument was even proposed, and it was rejected. In *Delgado*, the state defendants argued that the "NVRA's notice requirement serves to give the state an opportunity to cure any putative violations *before* facing litigation, and only if the specific violation identified by a plaintiff has not been cured." 2014 U.S. Dist. LEXIS 33476, at *22. In rejecting this argument, the district court observed that the notice "worked as it was intended to," giving the defendants an opportunity to comply, but allowing the plaintiffs to sue when the defendants proposed a remedy that "the Plaintiffs deemed inadequate to resolve their concerns." *Id.* at *23, *25. The court ultimately allowed the plaintiffs to amend their complaint. *Id.* at *29.

The NVRA does not bar Plaintiffs' amended complaint merely because Defendants claim to have corrected the noticed violations.

II. Neither the July 16, 2021 Letter nor the Marks Declaration Should Be Considered in Determining Whether the Proposed Amendment is Futile.

In assessing whether amendment is futile, the Court determines whether the amended complaint would survive a motion to dismiss. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 113 (3d. Cir. 2002). A complaint must allege facts stating "a claim to relief that is plausible on its face." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 319 (3d Cir. 2010) (citations and internal quotations omitted). This means that the Court is able to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994) (citation omitted). It "must also accept as true all reasonable inferences that may be drawn from the allegations, and view those facts and inferences in the light most favorable to the non-moving party." *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 716 (E.D. Pa. 2011) (citing, *inter alia*, *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 134 (3d Cir. 2010)). In determining motions to dismiss, courts "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605

F.3d 223, 230 (3d Cir. 2010) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc*., 998 F.2d 1192, 1196 (3d Cir. 1993)).

Defendants rely on two documents extraneous to the amended complaint. These should not be considered in determining whether it is subject to dismissal or whether amendment is futile. The first is the July 16, 2021 letter from Defendants' counsel. Doc. 80-2. The second is the declaration of Jonathan Marks. These documents were not attached to the amended complaint, nor was it "based upon" them—the Marks declaration in particular post-dated the amended complaint. Nor are these documents "published reports of administrative bodies," which could qualify them as "public records" for the purposes of a motion to dismiss. *Pension Benefit Guar. Corp.*, 998 F.2d at 1197.

If it is ever determined to be appropriate to consider these documents or the facts they allege, Plaintiff notes that it will have much to say in response to their content.[3] But under the standards governing the determination of this motion, a full factual exposition of the issues they raise is not appropriate.

III. Even If Defendants Have Cured the NVRA Violations Alleged in the Amended Complaint, Plaintiff's Case is Not Moot.

As set forth above, the Court should not consider the factual submissions

[3] For example, as the amended complaint alleges, the "data presented with the July 16, 2021 letter was … significantly inconsistent—often by multiples or by thousands of registrations—with public data sources, including a public data source referred to in that same letter." *Id*., ¶ 76.

offered by Defendants in determining whether amendment is futile. Yet even if the Court did consider that material, and if it accepted that Defendants and the counties removed significant numbers of ineligible registrants during the 90-day notice period after years of failing to do, the claims in this case would not be moot. Under the standards applying to the "voluntary cessation" of wrongful conduct, claims are not moot unless *Defendants* can show that it is absolutely clear that any unlawful activity is unlikely to recur. Defendants do not cite the applicable standard, let alone argue that they meet it—and they cannot meet it.

If a party "claims that some development has mooted the case, it bears '[t]he "heavy burden of persua[ding]" the court' that there is no longer a live controversy." *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305-06 (3d Cir. 2020) (citation omitted). When a party claims that its own voluntary conduct mooted the case, that burden is particularly high. In such circumstances, "[v]oluntary cessation" of unlawful activity "will moot a case only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 306 (quoting *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019)). Although "government officials are presumed to act in good faith," courts "have concluded that government actors must make a showing that they are entitled to such a presumption … *i.e.*, it remains the defendant's burden to show the conduct will not recur." *Roman v. Fed. Bureau of Prisons*, No. 3:15-CV-2247, 2016 U.S.

Dist. LEXIS 135434, at *33 (M.D. Pa. Sept. 30, 2016) (citations and internal quotations omitted). "A presumption of good faith," moreover, "cannot overcome a court's wariness of applying mootness under 'protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.'" *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (citing *U.S. v. W.T. Grant Co*., 345 U.S. 629, 632 n.5 (1953)).

Plaintiffs have alleged that for many years Defendants have failed to maintain a reasonable program as required by the NVRA. It is not "absolutely clear" that their noncompliance will not recur, particularly where Defendants freely admit that they only coordinated NVRA removals with the counties after receiving a notice letter from Plaintiff. *See Valdez v. Herrera*, No. 09-668 JCH/DJS, 2010 U.S. Dist. LEXIS 142209, at *26-*27 (D.N.M. Dec. 21, 2010) (rejecting defendant's argument that the case was moot due to compliance with the NVRA after filing suit when plaintiff "raised sufficient questions of fact regarding allegations of past noncompliance" and "years of widespread failure to implement Section 7 of the NVRA"), *aff'd on other grounds sub. nom.*, *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012).

It is also significant that Defendants refuse to admit previous noncompliance. In their brief opposing this amendment, Defendants assert that "the Secretary went above and beyond her statutory obligations" in working with counties to remove inactive registrations. Doc. 80 at 2. This implies, subtly but incorrectly, that she

was not *ordinarily* obligated to undertake such efforts. Defendants are more direct in communications with Plaintiff. Shortly after the July 16, 2021 letter, Defendants' counsel wrote that "we deny that any claim raised in this litigation was viable." *See* Ex. A, attached, at 2. Refusing to admit that years of low or no removals violates the NVRA weighs against finding that it is "absolutely clear" that list maintenance duties will not be neglected again once this case ends. *See McCormack*, 788 F.3d at 1025 (it was not "absolutely clear" that prosecutor who never repudiated challenged statute and did not believe prosecution was unlawful would not resume prosecution); *Hartnett*, 963 F.3d at 306 (courts are "skeptical of a claim of mootness when a defendant … maintains that its conduct was lawful all along") (citation omitted).

In addition, "an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack*, 788 F.3d at 1025 (citation omitted); *see Roman*, 2016 U.S. Dist. LEXIS 135434, at *34. This perfectly describes the Secretary's actions in working with the counties, and it suggests the ease with which she could abandon such efforts if this case were to end.

As a final point, Defendants are wrong to argue that no further redress is possible because the "Court cannot order that which has already been done." Doc. 80 at 13. Voter rolls require constant maintenance, as they are constantly becoming outdated as registrants die or move. The Court can provide for the monitoring of the Secretary's and the counties' efforts in this regard, and require reporting to the Court

and Plaintiff. As one example, the Court could order the Secretary to routinely undertake the efforts she claims to have undertaken here. *E.g.*, Doc. 80 at 5 (the Secretary "took action by investigating the issues raised and working with the identified 27 counties to remove outstanding inactive voters"). Consent decrees and agreements from other cases, which were previously submitted in this case, also illustrate the kinds of orders that could be issued. *See, e.g.*, Doc. 15-4, Doc. 15-5.

IV. The Remaining Factors Favor Granting Leave to Amend.

Defendants argue that the Secretary is prejudiced because filing the amended complaint would deny her the "opportunity to correct any perceived deficiencies before she is subject to litigation." Doc. 80 at 14. As discussed above at point I, there is no such right under the NVRA. The Secretary will not lose any right if the amended complaint is filed, so she will not be prejudiced.

As set forth in Plaintiff's motion papers, the question of bad faith in the context of a motion to amend concerns the Plaintiff's motives for not amending sooner. Doc. 79 at 14. Defendants, however, ignore the applicable law, arguing instead that Plaintiff is acting in bad faith by refusing to "withdraw the litigation" after being contacted by Defendants' counsel; by "pivot[ing] its theories, to include new defendants and time periods"; and by "acting in direct contradiction of the plain terms of a statute." Doc. 80 at 15.

All of this is manifestly incorrect. Counsel's 3-page letter, containing

unverified facts which are in any event consistent with the allegations in the complaint, provides no reasonable basis for withdrawing the complaint. Plaintiff is allowed by the federal rules to amend the complaint by "pivot[ing]" its theories, adding new defendants, and adding new time periods. And no court has ever read the "plain terms" of the NVRA in the way that Defendants propose.

The allegations of NVRA noncompliance in the amended complaint are strong, even exceptional. Under the standards applying to proposed amendments, Plaintiff respectfully submits that leave to amend should be granted.

CONCLUSION

Plaintiff's motion for leave to amend its complaint should be granted.

October 6, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically and served on counsel of record via the ECF system of the U.S. District Court for the Middle District of Pennsylvania.

October 6, 2021

/s Robert D. Popper
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