No. 22-50692

In the United States Court of Appeals for the Fifth Circuit

CAMPAIGN LEGAL CENTER; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW; DEMOS A NETWORK FOR IDEAS AND ACTION, LIMITED,

Plaintiffs-Appellees,

v.

JOHN B. SCOTT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE STATE OF TEXAS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF FOR APPELLANT

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Certificate of Interested Persons

No. 22-50692

Campaign Legal Center; American Civil Liberties Union Foundation of Texas; Mexican American Legal Defense and Educational Fund, Inc.; Lawyers Committee for Civil Rights Under Law; Demos a Network for Ideas and Action, Limited,

Plaintiffs-Appellees,

v.

John B. Scott, in his official capacity as Secretary of the State of Texas,

Defendant-Appellant.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

/s/ Ari Cuenin
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Statement Regarding Oral Argument

This Court has scheduled oral argument for Tuesday, August 30, 2022, at 2:30 p.m. in New Orleans. Defendant-Appellant John B. Scott, the Texas Secretary of State, respectfully submits that oral argument will assist the Court's review on several important constitutional and statutory issues raised in this appeal, including whether presenting a claim under the National Voter Registration Act of 1993 (NVRA), by itself, satisfies a plaintiff's obligation to demonstrate Article III standing, the scope of the Secretary's obligations under the NVRA, and whether those obligations violate the anticommandeering doctrine.

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Introduction

The National Voter Registration Act of 1993 (NVRA) requires States to cross-check voter registrations against databases of information within the State to ensure that only eligible voters remain on voting rolls. Like other States, Texas identifies potentially ineligible voters by comparing voter-registration lists with lists of people who have identified themselves as non-citizens when applying for a state driver's license. Local officials then give those identified persons an opportunity to confirm that they are indeed eligible to vote.

Plaintiffs demanded that Texas Secretary of State John Scott transmit to them the confidential list of potential non-citizen registered voters. But at no time did Plaintiffs ever show evidence of a cognizable, downstream injury from their lack of this information. Moreover, they failed to show that the NVRA requires the Secretary to (1) disclose information that is protected by either state law-enforcement privileges or the federal Driver's Privacy Protection Act (DPPA), or (2) provide that potentially sensitive data in an electronic format that could be used or reproduced in a way that may be harmful to individual voters. And, even if the NVRA could be construed in such a way, Plaintiffs did not demonstrate how Congress can put state officials to such a task without running afoul of the anticommandeering doctrine. The district court erred in holding otherwise.

Statement of Jurisdiction

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331, but it lacked jurisdiction because Plaintiffs lack standing. Although this Court has jurisdiction over the district court's judgment under 28 U.S.C. § 1291, it should be limited to determining that the district court lacked jurisdiction. *See In re Transtexas Gas Corp.*, 303 F.3d 571, 576-77 (5th Cir. 2002).

Issues Presented

1. Do Plaintiffs lack standing?
2. Does the NVRA *sub silentio* abrogate confidentiality protections under state and federal law?
3. Does the NVRA provision requiring the State to make certain information "available for public inspection and, where available, photocopying" also require the Secretary of State to email those records to Plaintiffs?
4. If the NVRA requires the Secretary to divulge the information Plaintiffs seek, do those requirements violate the anticommandeering doctrine?

Statement of the Case

I. Statutory Background

A. Federal law permits Texans to register to vote at the same time they apply for or renew a Texas driver's license. *See* 52 U.S.C. § 20504. But federal law requires Texas to cross-check those registrations to ensure that it keeps only eligible voters on voting rolls. *See id.* § 20507. One requirement to be eligible to vote is U.S. citizenship. Tex. Elec. Code § 13.001(a)(2). Like other States, Texas identifies potentially ineligible voters by comparing voter-registration lists with lists of people who have

identified themselves as non-citizens when applying for a state driver's license. Local officials then give those identified persons an opportunity to confirm that they are indeed eligible to vote. During this process, it may be discovered that a voter has made a false statement on a voter-registration form or voted despite being ineligible. If done with the requisite *mens rea*, either act may be a crime. *Id.* §§ 13.007(a), 64.012(a)(1).

Defendant-Appellant John Scott, in his role as Texas Secretary of State, compiles a list of potentially ineligible voters as part of a statutory investigative process. This multistep, statutory process can lead to cancellation of voter registrations, but any cancellation is conducted by local officials only after their own review. *See id.* §§ 16.033, 16.0332(c); ROA.566.

That process begins with a periodic comparison of data held by the Texas Department of Public Safety (TDPS) against a state voter-registration list mandated under the NVRA and the Help America Vote Act of 2002. *See* Tex. Elec. Code § 16.0332(a-1); *see* ROA.565 (Declaration of Brian Keith Ingram). The "information in the existing statewide computerized voter registration list is compared against information" in TDPS's database periodically "to verify the accuracy of citizenship status information previously provided on voter registration applications." Tex. Elec. Code § 16.0332(a-1); *see* ROA.565.

Once this initial screen is complete, the Secretary's office sends local voter registrars the name of any registrant identified as potentially illegible to vote who is registered in the precinct. Each local registrar reviews these records and—if the *registrar* determines that the voter may be ineligible to vote—provides the registrant a written

notice that requires him or her to confirm eligibility to vote. Tex. Elec. Code §§ 16.033(a), .0332(a); *see* ROA.565-66.

B. Because providing false information on a voter registration form (or voting when one is ineligible) can be a crime, the Secretary may "receiv[e] or discover[] information" in this process "indicating that criminal conduct in connection with an election has occurred." Tex. Elec. Code § 31.006(a). Under those circumstances, if "the secretary of state determines that there is reasonable cause to suspect that criminal conduct occurred, the secretary shall promptly refer the information to the attorney general." *Id.* Texas law treats that information as confidential so long as an investigation is pending. *See id.* § 31.006(b). It remains nonpublic until "the secretary of state makes a determination that the information received does not warrant an investigation," or "if referred to the attorney general, the attorney general has completed the investigation or has made a determination that the information referred does not warrant an investigation." *Id.* § 31.006(b)(1)-(2).

II. Factual Background

As a result of previous litigation, a prior Secretary of State entered into a 2019 settlement agreement under which he was to provide notice before providing local registrars the name of registrants flagged as potentially ineligible to vote on the basis of lack of U.S. citizenship. ROA.336; *see* ROA.463-80 (settlement agreement in *Tex. LULAC v. Whitley*, No. SA-19-CA-074-FB (W.D. Tex. Apr. 26, 2019)). Secretary Scott duly provided notice to counsel in August and September 2021. ROA.336-37.

Plaintiffs made requests, and then demands under threat of litigation, for additional confidential information about two "list[s] of all . . . registrants [the Secretary

of State's] office identified as potential non-U.S. citizens." ROA.527; ROA.542. That request went beyond what the 2019 settlement agreement required. ROA.337. Consistent with information-privacy protections, Secretary Scott denied Plaintiffs' invasive information requests. ROA.337.

III. Procedural Background

A. Following through with their threats, plaintiffs filed this suit. They asserted that Secretary Scott's decision not to disclose the requested information violates the NVRA, ROA.26-27, and asked the district court to order the Secretary to disclose extensive confidential information about each named registrant. ROA.27. Further, rather than inspect and photocopy the information as contemplated by the NVRA, they demanded that this confidential information be transmitted via electronic format. ROA.27. Plaintiffs additionally asked the court to enter judgment in their favor. ROA.27.

B. Plaintiffs then filed a motion for a preliminary injunction consolidated with trial on the merits. ROA.99-119. Plaintiffs asserted that Secretary Scott must provide the requested records so they could check whether he is using stale data to discriminate against newly naturalized citizens. ROA.107-09. They asserted an injunction was merited because, in their view, the NVRA requires disclosure and preempts contrary state laws. ROA.110-15. Plaintiffs argued that they suffer irreparable injury without access to a welter of confidential personal information. ROA.116-17.

Secretary Scott responded that Plaintiffs' argument failed for at least three reasons. *First*, the NVRA does not require public disclosure of the records Plaintiffs seek because those records are part of an ongoing criminal investigation into whether

flagged registrants committed voter fraud. ROA.245-50. *Second*, the NVRA never mentions disclosing confidential registration records by electronic means in the way Plaintiffs demand. ROA.250-51. *Third*, if the NVRA counterfactually were to impose such a disclosure duty on the Secretary of State, that provision would be unconstitutional under the anticommandeering doctrine. ROA.251-54.

C. On May 9, 2022, the district court held a bench trial combining Plaintiffs' requests for an injunction and for a merits ruling. ROA.388. At trial, Plaintiffs adduced no evidence demonstrating that they were experiencing any real-world harm. *See* ROA.396. Plaintiffs instead argued that they were entitled to the information by statute and that contrary confidentiality protections were preempted. ROA.397-98. And they sought to overcome the anticommandeering doctrine by relying on authority largely predating the Supreme Court's seminal anticommandeering case, *Printz v. United States*, 521 U.S. 898, 935 (1997), and pointing to the Elections Clause of the U.S. Constitution. ROA.406-10, 426-27.

After the close of evidence, Secretary Scott alerted the district court that Plaintiffs had offered no proof of their standing. ROA.412. Specifically, he pointed to the lack of record evidence of "downstream consequences" caused by alleged lack of access to requested information as required by *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021).

In closing, Secretary Scott also reiterated the importance that Texas places on privacy rights during an ongoing investigation into whether individuals committed a crime relating to voter-registration fraud. ROA.414-15. These privacy concerns derive in part from investigative privilege and in part from the Secretary of State's

obligation under the federal Driver's Privacy Protection Act to prevent disclosure of personally identifying information obtained in connection with a motor-vehicle record. ROA.417.

D. After trial, the court entered findings of fact and conclusions of law. ROA.334-51. Regarding standing, the district court concluded that it "agree[d] with Plaintiffs that the evidence demonstrates a concrete 'informational injury' with 'downstream consequences,'" ROA.340 (citing *TransUnion*, 141 S. Ct. at 2214), but it identified no record evidence supporting that conclusion.

On the merits, the court concluded that the State could not withhold voter data based on investigative privilege or confidentiality concerns. The court reasoned (a) that there was no ongoing criminal investigation and (b) Plaintiffs fell under a litigation-based exception to the DPPA. ROA.341-45. The court interpreted the NVRA's provisions for inspection and photocopying of records to require transmission of sensitive information to Plaintiffs by email. ROA.345-46. And the court rejected the Secretary's anticommandeering-doctrine argument based on the view that Article I, Section 4 of the Constitution allows Congress to commandeer state officials for tasks related to the times, places, and manner of elections. ROA.346-48.

The court ordered the Secretary to release to Plaintiffs each flagged registrant's: (1) full name; (2) voter identification number; (3) date of voter registration application; (4) effective date of voter registration; (5) status of voter registration; (6) any prior voter-registration statuses and dates of changes in those statuses; (7) all voting history; (8) issuance date of current driver's license, personal identification, or election identification certificate; and (9) date on which each flagged registrant provided

TDPS with documentation indicating lawful presence but not U.S. citizenship, if known. ROA.350.

By separate order, on August 2, the district court entered a Mandatory Injunction and Final Judgment, which required Secretary Scott to compile and transmit to Plaintiffs all the above categories of information for 11,246 registered voters by August 16, 2022. ROA.352-53.

E. Secretary Scott immediately appealed the district court's Mandatory Injunction and Final Judgment. ROA.354. He also sought a stay pending appeal first in the district court, ROA.356-63, and then here. This Court granted an immediate administrative stay, carried the Secretary's stay motion with the case, and accelerated briefing and oral argument.

Summary of the Argument

I. The district court lacked jurisdiction because Plaintiffs did not adduce evidence at trial to establish standing to sue the Secretary in their own right for alleged violations of the NVRA. As the district court correctly noted in its findings of fact and conclusions of law, Plaintiffs bore the burden to demonstrate their standing, ROA.339, including an injury-in-fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The district court recognized that, in order to prove standing here, Plaintiffs needed to show that "the evidence demonstrates a concrete 'informational injury' with 'downstream consequences' sufficient to satisfy Article III's standing requirement." ROA.340 (quoting *TransUnion*, 141 S. Ct. at 2204-05).

But Plaintiffs failed establish a cognizable injury-in-fact because they did not adduce evidence of downstream consequences of their alleged informational injury as required by *TransUnion.* Specifically, *TransUnion* dictates that an alleged violation of law requiring information disclosure is insufficient to create standing because "an injury in law is not an injury in fact." *TransUnion*, 141 S. Ct. at 1241. That is why *TransUnion* held that plaintiffs claiming informational injury must actually demonstrate "'downstream consequences' from failing to receive the required information." *Id.*

The district court's order to the contrary was either legal error based on a misunderstanding of standing based on informational injury, or clearly erroneous because Plaintiffs proffered *no* evidence of a necessary element of their standing burden. The district court cited the "lack of opportunity for Plaintiffs to identify eligible voters improperly flagged in the database" for use in future lawsuits as a downstream consequence. ROA.340. But there is no evidence of that: not only did Plaintiffs fail to call any witnesses at trial, Plaintiffs also limited their evidence to exhibits attached to their preliminary-injunction briefing, which did not include declarations from any Plaintiff attempting to show a downstream injury-in-fact. Merely wanting to bring legal claims on behalf of potential future litigants is insufficient to confer standing. And a hypothetical attorney-client relationship for as-yet-unknown claims is not a concrete and particularized harm under Article III. Parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Consistent with existing precedent, this Court should vacate the district court's judgment and remand with instructions to dismiss for lack of subject-matter jurisdiction. Because this case proceeded to a bench trial, Plaintiffs could no longer rely on simple pleadings: they were required to *prove* each element of standing by a preponderance of the evidence. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020). Plaintiffs failed to do so and, without standing, the district court was without jurisdiction to consider Plaintiffs' claim. *See id.*

II. Even if Plaintiffs had standing, their claim would fail on the merits. The NVRA does not require the Secretary to disclose the information the district court ordered. And it does not contemplate that the Secretary will do so by electronic transmission.

A. Regarding the scope of production, the NVRA does not *sub silentio* abrogate investigative privileges and other privacy protections under state and federal law. The district court did not dispute that the NVRA was silent about States' ability to withhold information that is confidential under other sources of law. As relevant here, these include "a qualified privilege protecting investigative files in an ongoing criminal investigation," *In re U.S. DHS*, 459 F.3d 565, 569 (5th Cir. 2006), and protections established by the DPPA.

The district court mistakenly ruled that the Secretary's activities fall outside the investigative privilege based on a misunderstanding of Texas law about when there is an "ongoing criminal investigation." ROA.341. The district court relied on statements from Secretary of State personnel that "a person's mere presence in the records does not by itself prove that the person is a non-citizen or that the person

engaged in criminal conduct" and that the Secretary "has not yet referred any voter records . . . to the Attorney General." ROA.341-42 (cleaned up) (quoting ROA.567). But Texas law empowers the Secretary to take the first look into whether criminal activity may have occurred before referring potential violations to the Attorney General. *See* Tex. Elec. Code § 31.006(a). And Texas law protects information of potential illegal activity until (at the earliest) "the secretary of state makes a determination that the information received does not warrant an investigation" by the Attorney General. *Id.* § 31.006(b)(1). That the Secretary has not *yet* made a referral to the Attorney General does not mean that the Secretary *will not* make a referral or that an investigation is not ongoing under Texas's bifurcated investigation process.

As to the DPPA, federal law also protects the disputed records from disclosure. The DPPA broadly prevents disclosure of "personal information . . . about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a)(1). Because the records here rely on information from TDPS, the DPPA precludes the information from disclosure. The district court ruled otherwise, explaining that the DPPA permits a state to disclose a driver's personal information "[f]or use in connection with any Federal, State, or local court or agency . . . , including . . . investigation in anticipation of litigation." ROA.344 (quoting 18 U.S.C. § 2721(b)(4)). But in *Maracich v. Spears*, 570 U.S. 48 (2013), the U.S. Supreme Court declined to apply this exception outside the context of "steps that ensure the integrity and efficiency of an *existing* or *imminent* legal proceeding." *Id.* at 63 (emphasis added). Because the district court merely linked Plaintiffs' request for records to "determin[ing] whether to sue," Plaintiffs identify no existing or imminent legal

proceeding to avoid the DPPA. ROA.344. And in any case, any such exception was raised too late to help Plaintiffs.

B. Regarding the form of production, the district court next erred in ordering the Secretary to disclose the disputed records to Plaintiffs via email or file transfer protocol (FTP). ROA.345-46. Other statutes reflect that Congress is well aware of electronic transmission. Yet Congress specified that States are under a duty to "make available for public inspection and, where available, photocopying at a reasonable cost" certain records. 52 U.S.C. § 20507(i)(1). Thus, absent another legal impediment, Secretary Scott could likely make the information available through other means, but he did not violate the NVRA by declining to produce these records via email or FTP. Because Plaintiffs offered no evidence that they sought to obtain access to the information through the method the NVRA specifies, it was legal error to enjoin the Secretary of State to conduct an act that Congress never required.

III. If the NVRA were construed to require disclosing the disputed information (and particularly to allow either Plaintiffs or the federal courts to specify the means they find most convenient), then those requirements would unconstitutionally violate the anticommandeering doctrine. The anticommandeering doctrine prohibits the federal government from conscripting a State's officers. Because the NVRA flatly orders that a "State shall maintain . . . and shall make available" certain records, 52 U.S.C. § 20507(i)(1), that requirement would be unconstitutional if construed to mandate disclosure of the records to Plaintiffs as required here.

The district court's contrary ruling contravenes the Supreme Court's modern anticommandeering cases beginning with *Printz*. Nor could the district court avoid

this conclusion by pointing to the Elections Clause, U.S. Const. art. I, § 4, cl. 1, for two reasons. *First*, Plaintiffs allege a failure to comply with a statutory requirement governing public disclosure of information—not a statute regarding the times, places, and manner of elections, which are the only topics about which Congress may legislate under that Clause. *Second*, the Elections Clause cannot be read so far as to allow Congress to impose disclosure provisions that have nothing to do with the regulation of the time, place, or manner of holding an election.

Standard of Review

Because this appeal follows a bench trial, "findings of fact are reviewed for clear error and legal issues are reviewed de novo." *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir. 2011). "A finding is clearly erroneous if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this [C]ourt is convinced that the findings are against the preponderance of credible testimony." *Bd. of Trs. New Orleans Emp'rs Int'l Longshoremen's Ass'n v. Gabriel, Roeder, Smith & Co.*, 529 F.3d 506, 509 (5th Cir. 2008). Moreover, "the 'clearly erroneous' standard of review does not insulate factual findings premised upon an erroneous view of controlling legal principles." *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 395 (5th Cir. 1996).

ARGUMENT

The district court erred in granting relief for Plaintiffs. *First*, because Plaintiffs failed to offer any evidence of downstream consequences of any informational injury, they lacked standing, and the district court lacked subject-matter jurisdiction over Plaintiffs' NVRA claim. *Second*, the NVRA does not obligate the Secretary to publicly disclose confidential, privileged information regarding pending law-enforcement investigations, especially when the information threatens the privacy interests of the individuals involved. And it certainly does not obligate the Secretary to electronically transmit documents to Plaintiffs, which is the only form of disclosure Plaintiffs requested. The district court's contrary ruling misapplies the state-law investigative privilege, the federal DPPA, and the language of the NVRA itself. *Third*, to the extent the NVRA imposes these duties on the Secretary, it violates the anti-commandeering doctrine and is therefore unconstitutional.

I. Plaintiffs Lack Standing.

Plaintiffs do not dispute that it was their burden to adduce evidence proving standing by a preponderance of the evidence. *Lujan*, 504 U.S. at 561; *Env't Tex. Citizen Lobby*, 968 F.3d at 367. Nor do Plaintiffs dispute that, without such evidence of standing, the district court was without jurisdiction to consider their claim. *See Lujan*, 504 U.S. at 561. As Plaintiffs failed to do adduce the needed evidence and lack cognizable harm, the legal positions they took in district court are unavailing.

A. Plaintiffs failed to establish standing at trial.

1. As the party invoking federal jurisdiction, Plaintiffs bore the burden of establishing each element of standing at trial. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338

(2016) (citing *Lujan*, 504 U.S. at 560). To establish an injury-in-fact sufficient under Article III, plaintiffs must show they "suffered an invasion of a legally protected interest that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339.

At the pleading stage, Plaintiffs merely had to "allege facts," which when taken as true, would demonstrate each element of standing. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). That is, plaintiffs had to plead injury-in-fact, traceability, and redressability. *Lujan*, 504 U.S. at 561. These elements of standing are, however, "not mere pleading requirements" for the Secretary to rebut. *Id.* They are an "indispensable part of the plaintiff's case," and accordingly must be supported at each stage of litigation in the same manner as any other essential element of the case. *Id.* Once Plaintiffs proceeded to trial, they needed to *prove* that they satisfied the critical jurisdictional elements by a preponderance of the evidence. *See, e.g.*, *Env't Tex. Citizen Lobby, Inc.*, 968 F.3d at 367 (citing *Lujan*, 504 U.S. at 561); *Felch v. Transportes Lar-Mex SA de CV*, 92 F.3d 320, 326 (5th Cir. 1996); 13B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3531.15 (3d ed. 2022).

In the operative complaint, Plaintiffs invoked a legal theory sounding in denial of access to information as the basis for suing the Secretary. ROA.27. That legal theory generally tracks what the district court below (ROA.339) and the U.S. Supreme Court have deemed an "informational injury." *TransUnion*, 141 S. Ct. at 2214. But that bare legal theory alone is insufficient for establishing Article III jurisdiction. *Shrimpers & Fishermen of RGV v. Tex. Comm'n on Env'l Quality*, 968 F.3d 419, 425 (5th Cir. 2020) (per curiam). *TransUnion* dictates that an alleged violation of law

requiring disclosure of information is not sufficient to create standing because "an injury in law is not an injury in fact." 141 S. Ct. at 1241. Thus, *TransUnion* held that plaintiffs claiming informational injury must actually demonstrate "'downstream consequences' from failing to receive the required information." *Id.* This was no dictum. In *TransUnion*, the Supreme Court granted certiorari to consider "whether the 8,185 class members have Article III standing as to their three claims." *Id.* at 2203. And, even if it had not, federal courts "are under an independent obligation to examine their own jurisdiction," under which "standing is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (cleaned up).[1]

2. The district court recognized that this requirement of downstream consequences exists, ROA.340, and it recited that the "evidence" demonstrates that such downstream consequences exist here. ROA.340. But the district court identified no evidence backing its conclusory statement. For good reason: relying on the mere lack of the information itself, Plaintiffs never called any witnesses or offered any trial exhibits tending to show an injury—or anything else for that matter. Instead of offering trial evidence, Plaintiffs informed the trial court before trial that "the record [was]

[1] Even if there were other holdings in *TransUnion*, the Court held that plaintiffs lacked standing on grounds in addition to the absence of downstream consequences, and such "alternative holdings are binding precedent and not obiter dicta." *Ramos-Portillo v. Barr*, 919 F.3d 955, 962 n.5 (5th Cir. 2019). And in any event, this Court is "generally bound by Supreme Court dicta, especially when it is recent and detailed," as *TransUnion*'s analysis is here. *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (internal quotation marks omitted); *see also Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 n.1 (5th Cir. 2015).

complete" based on the exhibits the parties submitted in connection with the preliminary injunction. ROA.385. Those exhibits did not include declarations from any Plaintiff, much less a declaration establishing any downstream consequence that could show an injury-in-fact.

The most that Plaintiffs could do is speculate that withholding this information interferes with their ability to bring unknown legal claims on behalf of unknown hypothetical future clients. But Plaintiffs were not parties to the 2019 settlement involving suits over the Secretary's use of DPS records in the voter-registration review process, *see* ROA.464-65, and a plaintiff cannot show a sufficiently concrete injury based on the prospect of a "future attorney-client relationship with as yet unascertained" individuals, *Kowalski v. Tesmer*, 543 U.S. 125, 130-31 (2004). Moreover, wanting to bring legal claims on behalf of potential future litigants is insufficient to confer standing on the organization itself. *See, e.g.*, *Vote.Org v. Callanen*, 39 F.4th 297, 304 (5th Cir. 2022). And even if withholding this information has required Plaintiffs to divert resources they would prefer to spend elsewhere to finding potential clients, such bare allegations are insufficient to confer standing because "[n]ot every diversion of resources to counteract [a] defendant's conduct . . . establishes an injury in fact." *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). Plaintiffs entirely failed to adduce evidence that the Secretary has "concretely and perceptibly impaired" Plaintiffs' ability to carry out its purpose." *Id.* at 239 (internal quotation marks omitted).

Nor can Plaintiffs bring this claim based on the rights of their as-yet-to-be-identified future clients (as opposed to the organizations themselves). A plaintiff typically

"cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Plaintiffs have not demonstrated that their claims fall within the narrow exception to that rule, *see Vote.Org*, 39 F.4th at 303-04, and the NVRA does not authorize third-party suits, 52 U.S.C. § 20510(b)(2) (authorizing "the aggrieved person," not third parties, to "bring a civil action").

The district court nonetheless made a vague suggestion that Plaintiffs were harmed by a lack of "opportunity" to identify voters "improperly flagged in the [Secretary's] database." ROA.340. This reflects a misunderstanding of the law: to confer standing, an injury must "inva[de] . . . a legally protected interest," *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017), and have some connection to the right allegedly violated. *Lewis v. Casey*, 518 U.S. 343, 351 (1996). To the extent that the district court's vague conclusion is based on a belief that Plaintiffs are broadly interested in seeing Texas comply with the NVRA, such a generalized grievance does not prove "downstream consequences," *TransUnion*, 141 S. Ct. at 2214, and is not particularized enough to establish standing, *Stringer v. Whitley*, 942 F.3d 715, 722 & n.24 (5th Cir. 2019). To the extent that the district court's conclusion is an oblique reference to Plaintiffs' prior litigation, that does not show that Plaintiffs have "suffered an invasion of a legally protected interest," *Spokeo*, 578 U.S. at 339 (internal quotation marks omitted), because Plaintiffs identify no right to compel the government to facilitate being sued. And as Plaintiffs identify no "right" to the Secretary's investigatory process, there is no "relevant injury in fact." *Id.* at 353 n.4.

Even if Plaintiffs could frame the district court's legal conclusion as a finding, it would be clear error. "[T]he 'clearly erroneous' standard of review does not insulate

factual findings premised upon an erroneous view of controlling legal principles." *Johnson*, 95 F.3d at 395. Nor does it shield a ruling where, as here, the record lacks "substantial evidence to support it," or "the court misinterpreted the effect of the evidence." *Bd. of Trs.*, 529 F.3d at 509.

3. Plaintiffs had ample opportunity to identify evidence of a cognizable downstream consequence of their asserted informational injury. Plaintiffs were "given full opportunity to submit to the trial court that evidence which it thought was relevant to the determination" of its case, including standing. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219-20 (5th Cir. 1986). But plaintiffs did not take advantage of that opportunity. To the contrary, before trial, plaintiffs disclaimed the need to adduce additional evidence at trial. ROA.385 ("The Court: All right. And is the record complete? Do I have everything one way or the other in whatever form that you want the court to consider at the hearing on the 9th? Ms. Huling: You do, Your Honor.").

At trial, once the State pointed out Plaintiffs' lack of standing, Plaintiffs vaguely requested "a chance to brief or submit a declaration on" standing. ROA.433. But Plaintiffs did not pursue that avenue either. They could have requested the "[s]pecific findings under Rule 52(a)" of the Federal Rules of Civil Procedure establishing standing, which were "required to explain a judgment after a bench trial." *Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co.*, 520 F.3d 393, 402 (5th Cir. 2008). But Plaintiffs failed to do so.

It is now too late for Plaintiffs to identify new evidence or new standing theories. "Issues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest

injustice." *See, e.g.*, *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam) (cleaned up); 9C Wright & Miller, *supra*, § 2582. But standing is *not* purely a legal question, and "[w]ithout the requisite specifics, this [C]ourt would be speculating upon the facts," which "is something [it] cannot do." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 499 (5th Cir. 2007) (en banc). Therefore, "[a]rguments in favor of standing, like all arguments in favor of jurisdiction, can be forfeited or waived." *Ctr. for Biological Diversity v. U.S. EPA*, 937 F.3d 533, 542 (5th Cir. 2019); *State Indus. Prods. Corp. v. Beta Tech., Inc.*, 575 F.3d 450, 456 (5th Cir. 2009) (generally refusing to review arguments raised for the first time on appeal). And it is equally well-settled this Court will not consider arguments that Plaintiffs failed to raise in district court. *See, e.g.*, *In re Deepwater Horizon*, 814 F.3d 748, 752 (5th Cir. 2016) (per curiam).

Because Plaintiffs failed to establish Article III standing, the appropriate course is to remand with instructions to dismiss Plaintiffs' claim. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 354 (2006). Further opportunity to cure the standing defect would not be appropriate. Given *TransUnion*, this case presents no "unsettled kind of claim," the "contours and justiciability of which are unresolved" by the Supreme Court, that might militate toward giving Plaintiffs a second bite at the jurisdictional apple. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). The only step remaining is dismissal for lack of subject-matter jurisdiction.

B. Plaintiffs' counterarguments raised at trial do not confer standing.

At trial, Plaintiffs attempted to substitute three legal arguments about what informational injuries should require for evidence that such an injury occurred. *First*,

they argued that they have a statutory right to the registrant records they requested. ROA.433. *Second*, they contended that there is always a downstream injury because the general public allegedly does not have visibility into how Texas maintains its voter lists. ROA.433. *Third*, they hypothesized that a downstream injury exists because "properly registered Texans [may be] discriminated against and burdened in their right to vote" absent such "visibility." ROA.433. None of these three theories withstands scrutiny.

1. As to the first argument, even if Plaintiffs had a right to the information that they seek (they do not, *infra* II.A), such a statutory right to information may create a cause of action, but it does not itself create standing because it does not confer a concrete harm. *TransUnion*, 141 S. Ct. at 2205. That was the point behind the Supreme Court's statement in *TransUnion* that an alleged violation of law is not sufficient to create standing because "an injury in law is not an injury in fact." *Id.* And it is why *TransUnion* held that plaintiffs claiming informational injury must actually demonstrate "'downstream consequences' from failing to receive the required information." *Id.* at 2214. Plaintiffs failed to do so here.

2. As to the second argument, Plaintiffs put no evidence in the record that *anyone* lacks visibility into how Texas maintains the relevant voter lists. At the macro level, Texas submits detailed information about its voter list—and individual additions and deletions therefrom—to the federal Election Assistance Commission, which is made public record every two years. *See, e.g.*, U.S. Election Assistance Commission, *Election Administration and Voting Survey 2020 Comprehensive Report* 138-70 tbls.1-5 (2021). At the micro level, Plaintiffs already have access to at least some of

the information they are seeking. *See* ROA.343 (noting Plaintiff obtained some information from county sources); *see also* ROA.339 n.3 (noting Secretary Scott provided some information under reservation of challenge to Plaintiffs' claim). Plaintiffs failed to adduce evidence demonstrating that they lack visibility into data that they already have in their possession.

In any event, lacking "visibility" into another's confidential and sensitive information is not an injury-in-fact that either the Supreme Court or this Court ever expressly has recognized. Plaintiffs have no real-world "injury in fact." *Spokeo*, 578 U.S. at 353 n.4. If anything, providing such information to Plaintiffs may arguably "inva[de] . . . a legally protected interest" of a registrant whose information is disclosed. *Barber*, 860 F.3d 345 at 352; *see* 18 U.S.C. § 2721(a)(1). The most that a lack of data "visibility" to the *general public* would demonstrate is a *generalized injury*, which is insufficient to establish standing. *E.g.*, *Stringer*, 942 F.3d at 722. Plaintiffs anticipate that increased "visibility" will lead to future lawsuits, but they cannot bring this suit based on the alleged rights of third parties. As noted above, Plaintiffs do not invoke third-party standing, *see Vote.Org*, 39 F.4th at 303-04, and the NVRA would not authorize third-party standing under its statutory cause of action, 52 U.S.C. § 20510(b)(2).

3. Finally, Plaintiffs have adduced no record evidence that makes the logical leap that their third argument requires—*i.e.*, that because the public supposedly lacks "visibility" into Texas's voter-registration system, more voters will be victims of illegal discrimination. *No one* provided such testimony—much less evidence that such injuries were "downstream consequences" of an alleged violation of the

NVRA's public-disclosure provision. *TransUnion*, 141 S. Ct. at 2214. Even if there were such evidence, it would raise the same problems discussed above: lacking "visibility" is not a concrete injury, and Plaintiffs cannot sue over third-parties' voting rights. Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

II. The NVRA Does Not Require the Secretary of State to Disclose Confidential Information Protected Under State and Federal Law.

Assuming Plaintiffs had cleared these jurisdictional hurdles (and they did not), the district court's judgment is based on a misinterpretation of the NVRA's text. Congress did not, in requiring public access to certain information about how the State maintains its voter rolls, do away with both state- and federal-law protections given to sensitive data relating to either criminal investigations or drivers licenses. Nor did it provide Plaintiffs with the right to demand the information it *does* require disclosed to be provided in any format they see fit.

A. The NVRA does not *sub silentio* abrogate confidentiality protections.

As the Fourth Circuit recently explained, the NVRA does not "require automatic disclosure of all categories of documents," given the risk of "subjecting [identified individuals] to potential embarrassment or harassment." *Pub. Int. Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 266-67 (4th Cir. 2021). The district court erred first by ordering the Secretary to provide Plaintiffs with sensitive

records relating to persons who may be subject to ongoing civil or criminal investigations. *See* ROA.526-27; ROA.541-42.

The information Plaintiffs ultimately seek to obtain from the Secretary would reveal the identities of individuals registered to vote despite being potentially ineligible as noncitizens. ROA.567. As the Secretary's office has explained, ROA.567, local officials are still in the process of investigating and evaluating records of voter registrants, and non-citizens who register to vote may have committed criminal offenses related to making a false statement on a voter-registration application, Tex. Elec. Code § 13.007(a), and voting despite being ineligible, *id.* § 64.012(a)(1). The district court nonetheless ordered the Secretary to disclose information he believes may interfere with Texas's ability to meet its obligations to investigate and maintain the integrity of its voter rolls—and that may well lead to voters being harassed. ROA.565-67.

The NVRA does not require, and the district court did not find, that a State must abandon the confidentiality of sensitive information. Indeed, the NVRA is silent on that front and there is no indication that "Congress intended to abrogate" such protections "*sub silentio*." *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337-38 (1988). Plaintiffs are not entitled to the records because the Secretary properly asserted an investigative privilege during his ongoing investigation. Additionally, the federal DPPA protects the information, which incorporates information obtained "in connection with a motor vehicle record," 18 U.S.C. § 2721(a)(1), from public disclosure.

1. Disclosure is improper under investigative privilege.

The information Plaintiffs seek is protected from disclosure because it is part of the Secretary's ongoing investigation into voter-registration records that may reflect criminal violations of Texas election law. The investigative privilege protects information regarding law-enforcement investigations from public disclosure. Federal courts recognize the investigative privilege as a matter of common law, just as Texas courts "recognize [a] privilege in civil litigation for law enforcement investigation" under state law. *Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987) (orig. proceeding). This Court has held that an investigative privilege "protect[s] government documents relating to an ongoing criminal investigation," *In re U.S. DHS*, 459 F.3d at 569 n.2.

Although the lists Plaintiffs request are undisputedly part of a Secretary of State investigation into voter records, the district court required disclosure. This was error for at least two reasons: the NVRA did not displace investigative privilege, and the Secretary's investigatory actions are part of an ongoing investigation into individuals who potentially may have unlawfully registered to vote.

a. When enacting the NVRA, Congress did not displace all state-law confidentiality requirements. The district court conceded that the NVRA's text does not discuss whether a State may withhold voter data based on "investigative privilege or confidentiality concerns." ROA.341. This silence is significant.

As the Supreme Court recently reaffirmed, a "privilege should not be held to have been abrogated or limited unless Congress has at least used clear statutory language." *FBI v. Fazaga*, 142 S. Ct. 1051, 1060-61 (2022). Looking specifically at the

state-secrets doctrine, the Court held that the "absence of any statutory reference to the state secrets privilege" in the Foreign Intelligence Surveillance Act was "strong evidence that the availability of the privilege was not altered in any way." *Id.* at 1060. That rule applies to all common law privileges. *United States v. Danovaro*, 877 F.2d 583, 588 (7th Cir. 1989). And it is why, for example, everyone agrees "that the work-product doctrine does apply to IRS summonses" authorized under a broadly worded statute that does not mention privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981); *see also Day v. Johns Hopkins Health Sys. Corp.*, 907 F.3d 766, 775-76 (4th Cir. 2018) (holding RICO did not displace the witness litigation privilege because "common law immunities function as implied limits on congressional statutes, operative until they are expressly removed").

Because, as in *Fazaga*, the NVRA is silent on privileges, it preserves common-law privileges, including investigative privilege. Interpreting statutes to *sub silentio* abrogate such privileges would contradict the principle that "Congress legislates against the backdrop of the common law." *Comcast Corp. v. Nat'l Assoc. of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020). "[W]here a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident."' *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Here, there is no "clear" congressional intent "to alter the common law," Antonin Scalia & Bryan A. Garner, Reading Law 318 (2012) (emphasis omitted) (Presumption Against Change in Common Law); *see, e.g.*, *Halliburton, Inc. v. Admin.*

Rev. Bd., 771 F.3d 254, 266 (5th Cir. 2014) (per curiam) (interpreting a federal statute to be consistent with the "common-law background"), so no alteration occurred.

Privileges are no less applicable when someone demands records under a federal statute. *See, e.g.*, *Upjohn*, 449 U.S. at 397; *Danovaro*, 877 F.2d at 588. On the contrary, the investigative privilege provides more protection against statutory disclosures to the public at large than against discovery in ordinary litigation. "[S]ensitive information" that cannot be "broadcast[] . . . to the general populace" might be available through "court-supervised discovery" that makes "judicious use of protective orders." *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1343-44 (D.C. Cir. 1984). Even in the discovery context, however, "there ought to be a pretty strong presumption against lifting the [investigative] privilege." *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997).

The investigative privilege is a well-established common law protection, which "protects civil as well as criminal investigations." *United States v. Lockheed Martin Corp.*, No. 1:09-cv-324, 2011 WL 13228302, at *4 (S.D. Miss. Jan. 11, 2011); *accord In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). The privilege serves numerous important interests, including "prevent[ing] interference with investigations" and "safeguard[ing] the privacy of individuals under investigation." *In re U.S. DHS*, 459 F.3d at 569 n.1 (quoting *Tuite v. Henry*, 181 F.R.D. 175, 176-77 (D.D.C. 1998), *aff'd* 203 F.3d 53 (D.C. Cir. 1999)). The privilege allows government officials to decline to identify those suspected of violating the law. *See, e.g.*, *Lien v. City of San Diego*, No. 3:21-cv-224, 2022 WL 134896, at *3 (S.D. Cal. Jan. 14, 2022) (approving "application of the law enforcement investigatory privilege to the identity of the

suspect"). Disclosing the identity of a suspect can harm not only the investigation but also the suspect himself. "There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm." *Senate of P.R. ex rel. Judiciary Comm. v. U.S. DOJ*, 823 F.2d 574, 588 (D.C. Cir. 1987).

This Court should reject the district court's anemic view of investigative privilege, which has significant implication in future NVRA disputes. If Plaintiffs have a statutory right to the Secretary's lists, then virtually everyone else does, too. Given that the NVRA both requires that States maintain sensitive, personal information and contemplates wider disclosure, the investigative privilege should apply with special force.

b. The Secretary's actions are squarely covered by investigative privilege. As authorized by Texas law, the Secretary compiles lists of registrants identified as potential non-U.S. citizens and, depending on facts relating to individual registrants, may "receiv[e] or discover[] information indicating that criminal conduct in connection with an election has occurred." Tex. Elec. Code § 31.006(a). Texas law treats that information as confidential so long as an investigation is pending. *See id.* § 31.006(b). "If, after receiving or discovering information indicating that criminal conduct in connection with an election has occurred, the secretary of state determines that there is reasonable cause to suspect that criminal conduct occurred, the secretary shall promptly refer the information to the attorney general." *Id.* § 31.006(a). That information remains nonpublic until "the secretary of state makes a determination that the information received does not warrant an investigation," or

"if referred to the attorney general, the attorney general has completed the investigation or has made a determination that the information referred does not warrant an investigation." *Id.* § 31.006(b)(1)-(2). Because the Secretary of State's representative testified that review is still in process, ROA.567, the Secretary should not be required to divulge the information essential to a full and fair investigation.

c. The district court concluded otherwise based on a mistaken understanding of the role of the Secretary's referral process in any ongoing criminal investigations. ROA.341-42. Specifically, the court (at ROA.341-42) latched onto statements in a declaration from the Secretary's office that a "person's mere presence" on the lists does not indicate "that the person engaged in criminal conduct," and that the Secretary has not yet referred any voter records "to the Attorney General under Section 31.006(a) of the Texas Election Code." ROA.567. From these statements and this Court's ruling in *DHS*, 459 F.3d at 571, the court inferred that the records "do not relate to any 'ongoing criminal investigations,' but instead fall into the category of 'documents pertaining to . . . people who *merely are suspected of a violation*.'" ROA.342. The court also tried to buttress its ruling by noting that some counties have released some registrant records to Plaintiffs, and thereby (the district court concluded) have undercut any confidentiality concerns. ROA.343.

But the district court's logic fails on three counts. *First*, it misunderstands Texas law: just because the Secretary has not *yet* made a referral to the Texas Attorney General does not mean the Secretary *will not* make a referral. As relevant here, the Texas Legislature explicitly bifurcated criminal investigations into certain election-law violations into two interconnected components. The Secretary's initial portion

of the investigation determines whether "there is reasonable cause to suspect that criminal conduct occurred" and, if so, makes a referral to the Attorney General. Tex. Elec. Code. § 31.006(a).

Second, it misapplies *DHS*. *DHS* did not establish what constitutes an investigation for privilege purposes—let alone in the election-crime context of Section 31.006(a). The Court merely observed that "the law enforcement privilege is bounded by relevance and time constraints" and assumed that "[s]everal types of information probably would not be protected" under a "particularized assessment of the [disputed] document" on remand. *In re U.S. DHS*, 459 F.3d at 571. And it held that the privilege does not apply to information about "people who merely are suspected of a violation without being part of an ongoing criminal investigation." 459 F.3d at 571. But here, Texas law expressly provides that such records remain nonpublic until a determination that the "information received does not warrant an investigation" or, if referred, until the Attorney General "has completed the investigation" or determined that the "information referred does not warrant an investigation." *Id.* § 31.006(b). That is, the information is nonpublic *because there is an investigation.* As a result, the district court misconstrued *DHS*, 459 F.3d at 571, and this Court should reject Plaintiffs' attempt to narrow the investigative privilege without express congressional authorization. *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108.

Third, the court's reasoning that no privacy interests are at stake because some counties have released some registrant records to Plaintiffs is a *non sequitur*. ROA.341-43. The court stated that county officials from three Texas counties provided Plaintiffs with "identifying information for the suspected non-citizen voters,

including names, voter identification numbers, and, in the case of Tarrant County, voter addresses." ROA.343. Although the court reasoned that the Secretary could not claim privilege because "this information can be obtained through local election officials," ROA.343, it is beyond dispute that the information Plaintiffs seek is currently non-public and protected from disclosure by the Secretary consistent with state law. Indeed, the entire point of Plaintiffs' claim is that the Secretary alone possesses information linking specifically listed individuals with noncitizen status and potentially unlawful voter registration. Plaintiffs' ongoing NVRA challenge belies any argument that Plaintiffs already have or could independently obtain the disputed information.

d. If adopted, the district court's ruling would put this Court in conflict with the Fourth Circuit. Plaintiffs seek similar information in the context of similar state-law requirements as were at issue in *Public Interest Legal Foundation, Inc. v. North Carolina State Board of Elections*, 996 F.3d 257 (4th Cir. 2021). In that case, the plaintiffs' request "necessarily implicate[d] individuals who may have been or are currently under investigation for committing serious criminal offenses under state and federal law for registering to vote or for voting in an election as a noncitizen." *Id.* The court recognized that the disclosure of related information would not only interfere with the investigations but could also "unwarrantedly" associate an individual "with alleged criminal activity." *Id.* at 267 (quoting *Stern v. FBI*, 737 F.2d 84, 91-92 (D.C. Cir. 1984)). To accommodate those concerns, including the risk of "subjecting [identified individuals] to potential embarrassment or harassment" from being labeled as potential criminals, the Fourth Circuit instructed the district court to

exclude from disclosure the "identities and personal information of those subject to criminal investigations" and those identified as "'potentially' failing to satisfy the citizenship requirement but [who] later were exonerated." *Id.*

Plaintiffs sought the sort of information the Fourth Circuit held should not be disclosed. The Texas laws at issue here are nearly identical to North Carolina's.[2] And Plaintiffs requested two lists, both of which consist exclusively of "registrants [the Secretary of State's] office identified as potential non-U.S. citizens." ROA.527; ROA.542. The individuals on the list are part of SOS's ongoing review into whether to refer matters raising potential criminal concern to the Attorney General. *See* ROA.567. Because disclosing such information risks "subjecting [identified individuals] to potential embarrassment or harassment," this Court should reject Plaintiffs' attempt to uncover similar records by creating a circuit split. *Pub. Int. Legal Found.*, 996 F.3d at 266-67.

2. Disclosure is improper under the Driver's Privacy Protection Act.

Additionally, the DPPA foreclosed the disclosure ordered by the district court. That statute, which was enacted subsequent to the NVRA, generally prohibits the disclosure of "personal information . . . about any individual obtained by [a state] department [of motor vehicles] in connection with a motor vehicle record." 18

[2] *See N.C. Bd. of Elec.*, 996 F.3d at 259, 261-67 (discussing the North Carolina statutes); *compare* N.C. Gen. Stat. §§ 163-54, -55(a) (requiring United States citizenship for registration and voting), *with* Tex. Elec. Code § 13.001(a)(2) (same); *compare also* N.C. Gen. Stat. § 163-275(1) (criminalizing as a felony offense fraudulent voter registration), *with* Tex. Elec. Code § 13.007(a) (same).

U.S.C. § 2721(a)(1); *see also id.* § 2721(c). As a result, where implicated, the requirements of the DPPA displace any obligation that the NVRA might otherwise impose on the Secretary of State's office. *See Pub. Int. Legal Found.*, 996 F.3d at 259 ("excluding from disclosure" under the NVRA "information precluded from disclosure by . . . the Driver's Privacy Protection Act of 1994").

Plaintiffs' request implicates the DPPA. Plaintiffs seek information that the Department of Public Safety collected when the relevant individuals "were issued a new or renewed driver license or personal identification card." ROA.565; *see Pub. Int. Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 563 (M.D. Pa. 2019) (rejecting an argument "that citizenship status is not protected information" "[a]t this stage of the litigation"). The DDPA does not contain an exception for Plaintiffs.

The district court erroneously declined to apply the DPPA's protections. The court explained that the DPPA permits a state to disclose a driver's personal information "[f]or use in connection with any Federal, State, or local court or agency . . . , including . . . investigation in anticipation of litigation," which the district court found to extend here based on Plaintiffs' desire to use this information to investigate potential future lawsuits against the Secretary. ROA.344 (quoting 18 U.S.C. § 2721(b)(4)).

In *Maracich*, the U.S. Supreme Court declined to apply the anticipation-of-litigation exception outside the context of "steps that ensure the integrity and efficiency of an *existing* or *imminent* legal proceeding." 570 U.S. at 63 (emphasis added). A "broad interpretation" of what constitutes investigation "in connection with" litigation, the Court explained, would substantially undermine the DPPA's privacy

protection because "then all uses of personal information with a remote relation to litigation would be exempt under [Section 2721](b)(4)." *Id.* at 59-60. The Supreme Court thus held that an "attorney's solicitation of prospective clients falls outside of that limit." *Id.* at 61. The court below merely linked Plaintiffs' request for records to "determin[ing] whether to sue" the Secretary of State. ROA.344. There is no "existing or imminent legal proceeding" and thus no basis to avoid the DPPA. *Maracich*, 570 U.S. at 63.

In any event, the purported exception arose too late to help Plaintiffs. Their demands for records and notice to the Secretary said nothing about invoking any DPPA exception. *See* ROA.526-28; ROA.536-37; ROA.541-42; ROA.550-51. Because the DPPA facially prohibited disclosure, the Secretary had no notice that Plaintiffs claimed a right to information under the DPPA or that any DPPA exception applied. The Secretary cannot be faulted for not turning over information that federal law makes confidential, subject only to exceptions that no one invoked at the time.

B. The NVRA provides for inspection and photocopying, not e-mail distribution to Plaintiffs as the district court ordered.

Even if the NVRA required the Secretary to disclose some of the information at issue, it does not require disclosure in the form the district court has ordered. *See* ROA.345. The NVRA requires that certain records be "ma[d]e available for public inspection and, where available, photocopying at a reasonable cost." 52 U.S.C. § 20507(i)(1). But Plaintiffs never requested to "inspect" or "photocopy" records as required by the NVRA: they insisted that the Secretary transmit sensitive information electronically. Plaintiffs specifically requested that documents be transmitted

"electronically by email . . . or FTP transfer if available." ROA.527; ROA.542. Because the NVRA does not require the Secretary to provide the information in such a format—which risks making the information manipulable and transmittable for purposes not contemplated by Congress—the Secretary did not violate the NVRA by declining to comply with Plaintiffs' request.

The district court read the words "inspection" and "photocopy" in the NVRA to also mean sending by "email." ROA.345-46. But the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004); *accord Christiana Trust v. Riddle*, 911 F.3d 799, 806 (5th Cir. 2018). Here, Congress never imposed a duty on States to provide an electronic copy of records; it imposed a duty to "make available for public inspection and, where available, photocopying at a reasonable cost" certain records. 52 U.S.C. § 20507(i)(1). Where, as here, a statue's text is "plain and unambiguous, it must be given effect." *BMC Software, Inc. v. Comm'r Internal Revenue*, 780 F.3d 669, 674 (5th Cir. 2015). Because the NVRA's silence about electronic transfer is unambiguous, this Court need look no further.

The NVRA's silence on the question of electronic production is dispositive. "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past," but it is not the Court's role "to apply laws that have not yet been written." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984). Congress imposed a uniform requirement of "public inspection and, where available, photocopying at a reasonable cost." 52 U.S.C. § 20507(i)(1). This language mirrors other instances when Congress has

made information available to the public but clearly contemplated in-person review of the materials.[3] And Congress did not revisit the question when it enacted the Help America Vote Act of 2002, which required the adoption of "a single, uniform, official, centralized, interactive computerized statewide voter registration list"—even though the statute made sure many electronic records would exist. 52 U.S.C. § 21083(a)(1)(A).

The district court raised three points to buttress its view that Congress's expressed policy should give way to the march of progress. None has merit.

First, the district court pointed to an asserted need for "meaningful public disclosure." ROA.345. But this concern has to be read in the context of section 20507(i) of the NVRA, which requires public inspection and, where available, photocopying at a reasonable cost. 52 U.S.C. § 20507(i). Congress decided that these options provide meaningful disclosure. The district court's insertion of "meaningful" into the statutory text is improper as "[n]othing is to be added to what the text states or reasonably implies." Scalia & Garner, *supra*, at 93 (emphasis omitted); *accord Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A casus omissus does not justify judicial legislation."); *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function.").

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[3] *See, e.g.*, 26 U.S.C. § 6110(a) (IRS) ("[T]he text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe"); 42 U.S.C. § 10711(a)(3) (State Justice Institute) ("The report of the annual audit shall be filed with the Government Accountability Office and shall be available for public inspection during business hours at the principal office of the Institute.").

Second, the district court stated that, because the Secretary "keeps the Records in an electronic database," it was "unclear to the court" how Plaintiffs would "inspect" or "photocopy" such records. ROA.345. That lack of clarity arises, however, only because Plaintiffs did not ask to inspect the records as required by statute. Had they done so, the Secretary might (or might not) have made the information available on a laptop or in hardcopy at the Secretary's office. But Plaintiffs do not get to take advantage of their own failure to abide by the terms of the statute to impose new obligations on the Secretary.

Third, the district court mistakenly believed that courts "regularly presume" that the NVRA requires "electronic production." ROA.345. The district court (ROA.345-46) mustered only two nonbinding cases, neither of which supports that conclusion: *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1336 (N.D. Ga. 2016), and *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 724 (S.D. Miss. 2014). *Kemp* merely focused on costs associated with public inspection in addressing a claim by Georgia that it was unduly burdensome to make available certain records from a third-party database. 208 F. Supp. 3d at 1350. Likewise, there was no controversy over Mississippi's records in *True the Vote* because "True the Vote already ha[d] a copy of the Voter Roll." 43 F. Supp. 3d at 723-24. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). This Court should follow the NVRA's plain text, not these inapposite decisions.

III. If the NVRA Is Construed to Require the Ordered Disclosure, Those Requirements Violate the Anticommandeering Doctrine.

The Court should reject Plaintiffs (and the district court's) effort to impose new affirmative requirements on the Secretary regarding the preservation and disclosure of certain records never imposed by Congress because such requirements violate the anticommandeering doctrine. When the Framers split the atom of sovereignty in 1789, they did not give Congress carte blanche to impress State executives into service of federal aims. They instead decided "to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). The anticommandeering doctrine is "the expression of [that] fundamental structural decision incorporated into the Constitution." *Id.* And it prohibits Congress from "conscripting [a] State's officers," *Printz*, 521 U.S. at 935. The district court's overbroad interpretation of the NVRA—which imposes an affirmative duty on the Secretary to provide sensitive information about flagged registrants in any manner Plaintiffs see fit—runs directly afoul of that prohibition. And that fundamental violation of our founding charter is not justified by the Elections Clause.

A. Congress cannot conscript the Secretary to maintain and produce records under the NVRA.

As interpreted by the district court, the NVRA imposes an unconstitutional direct command on State officials. When the federal government wants to engage state officials in service of federal law, it can attempt to persuade them to do so voluntarily by offering additional funding or threatening to preempt state regulations. *See New York v. United States*, 505 U.S. 144, 166-68 (1992). Alternatively, the federal government can use its own officers to enforce federal law. *See Ex parte Siebold*, 100 U.S.

[10 Otto] 371, 386 (1879) (discussing "officers appointed by the State and national governments for superintending the election" and referring to the latter as "officers of the United States"). But the federal government cannot command the States or its officers to do its bidding. *Printz*, 521 U.S. at 935.

The NVRA's public-disclosure provision does not rest on any of the constitutional options the federal government has to obtain a State's compliance with Congress's preferred policy goals. Instead, it orders that a "State shall maintain . . . and shall make available" certain records. 52 U.S.C. § 20507(i)(1).

That is an unconstitutional direct command to a state executive, *see Printz*, 521 U.S. at 935, for the same reason this Court held that similar "recordkeeping requirements" in the Indian Child Welfare Act ("ICWA") would "unconstitutionally commandeer state actors," *Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022). ICWA provides that certain records "shall be maintained by the State" and "shall be made available at any time upon the request of the Secretary or the Indian child's tribe." 25 U.S.C. § 1915(e). The NVRA similarly provides that "[e]ach State shall maintain . . . and shall make available for public inspection" certain records. 52 U.S.C. § 20507(i)(1). It is similarly unconstitutional. As the Court just held, the principle that Congress may not directly command State officials holds just as true for statutory commands that State

executive officers keep certain records as it does for any other command. *Brackeen*, 994 F.3d at 268.[4]

B. The Elections Clause cannot excuse the improper commandeering.

The district court nevertheless reasoned that the anticommandeering principle does not apply here because the NVRA recordkeeping requirement should be deemed a "manner" regulation under the Elections Clause. ROA.347. In the district court's view, the Elections Clause is a trump card that permits Congress to commandeer state officials for tasks related not only to the times, places, and manner of elections, but also to the maintenance of accurate voter rolls. ROA.345-47; *see* U.S. Const. art. I, § 4, cl. 1. That conclusion, however, departs from the plain language (and ordinary understanding) of the Election Clause based on out-of-circuit caselaw largely predating the Supreme Court's modern line of anticommandeering cases starting with *Printz*. It should be reversed.

1. The Elections Clause does not permit Congress to commandeer States to do anything it chooses as long as elections are involved.

Plaintiffs' only claim is for an alleged statutory violation relating to disclosure of voter rolls—they do not allege that Texas has defaulted on any obligations under the times, places, and manner of holding *elections*. *See* ROA.26. The district court's

[4] To the extent the Court is concerned about the pending cert petition on its prior ruling regarding ICWA, such concern would counsel in favor of holding the appeal in abatement—not ruling for Plaintiffs. Once the information has been released, "the cat is out of the bag," and cannot be put back if the U.S. Supreme Court agrees (as it should) with this Court's ruling that ICWA unconstitutionally commandeers state actors. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.).

contrary ruling flouts the Constitution's text, is inconsistent with binding caselaw, and should be reversed.

a. The constitutional text provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Plaintiffs have never argued that the NVRA recordkeeping requirement is a time or place regulation, *cf.* ROA.286, and the Framers would have been startled to have been told that such recordkeeping relates to the "Manner of holding Elections."

In the founding era, the relevant definition of "Manner" was "method."[5] The word "manner" was used interchangeably with "mode."[6] The Framers would have understood "manner" in the technical sense that it had developed under British election laws during the lifetime of the older Framers: as the procedures by which *votes* are registered, tallied, and reported on Election Day. Nothing more, nothing less. *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 11-12 (2010). They and their American compatriots

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[5] *See* Samuel Johnson, A Dictionary of the English Language (1773), *available at* https://johnsonsdictionaryonline.com/1755/manner_ns (first definition: "Form; method"); Noah Webster, American Dictionary of the English Language (1828), *available at* https://webstersdictionary1828.com/Dictionary/manner (first definition: "Form; method; way of performing or executing").

[6] Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 2 The Founders' Constitution 252 (Philip B. Kurland & Ralph Lerner eds., 1987) (art. I, § 4, cl. 1, Doc. 7), *available at* https://press-pubs.uchicago.edu/founders/documents/a1_4_1s7.html.

also had adopted that very understanding of the "Manner of holding Elections" after the American Revolution when they organized elections under their respective state constitutions. *E.g.*, Mass. Const. of 1780, ch. 1, § 2, arts. II, IV; Ga. Const. of 1777, art. XIII; N.C. Const. of 1776, art. XXXVII; N.J. Const. of 1776, art. VII; Md. Const. of 1776, pt. 2, arts. II-LIX; N.H. Const. of 1776.

b. The U.S. Supreme Court has yet to fully explain the limits of the phrase "Manner of holding Elections" in the Election Clause. At least a plurality has distinguished between "a constitutional violation" and a "mere statutory requirement." *Branch v. Smith*, 538 U.S. 254, 280 (2003) (plurality op.). That plurality held that when a State commits a "constitutional violation" by "fail[ing] to provide for the election of the proper number of Representatives," a federal court "crafting its remedy" could "follow[] the 'Regulations' Congress prescribed" under its Times, Places and Manner Clause authority. *Id.* But even this theory does not approve commandeering state officials through a "mere statutory requirement," *id.*, such as the public-disclosure provision in this case.[7]

The Supreme Court has also indicated that the Framers understood the phrase to encompass the *procedures* for holding an election, such as "[w]hether the electors should vote by ballot or vivâ voce" and whether they "sh[oul]d all vote for all the

[7] A majority of the Court declined to join the relevant part of the *Branch* opinion. *See id.* at 285 (Stevens, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment) ("I do not join Parts III-B or IV."); *id.* at 292 (O'Connor, J., joined by Thomas, J., concurring in part and dissenting in part) ("I cannot join Part III or Part IV.").

representatives; or all in a district vote for a number allotted to the district." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995) (quoting James Madison's remarks during the constitutional convention). In *U.S. Term Limits*, the Court stated that the "power over the manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way." *Id.* (quoting statement from the North Carolina ratifying convention). Some precedent has treated congressional power over the "Manner of holding Elections" as encompassing a power over "regulations relating to registration." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 7, 9 (2013) (internal quotation marks omitted) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

But those statements do not authorize the intrusive remedy the district court ordered here. No State required voters to register for any election at the time of the Convention. *See generally* Joseph Pratt Harris, Brookings Inst., Registration of Voters in the United States 65-92 (1929). And the NVRA's public-disclosure provision is not a regulation of registration. It does not govern who may register, nor does it specify when, where, or how registration is accomplished. And it does not control any part of the process for electing members of Congress. It simply orders state officials to maintain certain records related to voter registration and to disclose those records to the public under certain conditions. *See* 52 U.S.C. § 20507(i)(1). Neither the constitutional text nor Supreme Court precedent permit that command.

c. History and context confirm the original public meaning of the Elections Clause, which does not authorize Congress to commandeer States to produce the type of information the district court ordered here. *See N.Y. State Rifle & Pistol*

Assoc., Inc. v. Bruen, 142 S. Ct. 2111, 2130-32 (2022); *New York*, 505 U.S. at 169-70, 176. Nothing in the history of the Elections Clause's drafting suggests that "Manner of holding Elections" had the original public meaning that the district court ascribed to it. Quite the contrary, the Elections Clause left almost untouched the States' reserved police power to regulate elections and extended that same police power (for all purposes relevant to this case) to the new congressional elections that first came into existence upon ratification of the Constitution.

When it initially emerged from the Committee on Detail, the Elections Clause gave the word "manner" the same scope that word had under British election law and under many extant state constitutions. *See* 2 The Records of the Federal Convention of 1787, at 165 (Max Farrand ed., 1911); 4 John Comyns, A Digest of the Laws of England 263-66 (4th ed. 1793); 5 *id.* 185-95, 6 *id.* 148, 166, 264, 275. When the committee proposed that language to the entire assembly of delegates, debates began on how further to narrow the provision to prevent congressional overreach. *See* 2 *id.* at 240. These debates became so heated that they "echoed from one end of the continent to the other" and individual ratifying conventions spent full days debating its meaning. 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 9 (1836) (Elliot's Debates); *see* 2 *id.* at 5-29 (Massachusetts convention spending six full days debating the clause). Far from the guarantee of liberty that Plaintiffs portray, Antifederalists suspected that the Elections Clause was a subterfuge to disenfranchise disfavored voters and predicted a parade of horribles that would eventually destroy the States. *E.g.*, 2 Elliot's Debates 30 (2d ed. 1836); 3 *id.* at 175-76; 4 *id.* at 52, 55; 4 Doc. Hist. of the Ratification of the

Const. 304-05 (John P. Kaminski & Gaspare J. Saladino eds.); 14 *id.* at 240-42, 297-302; 15 *id.* at 23, 296-99; 17 *id.* at 310, 410, 413. A generation later, Justice Story remembered how opponents of the Constitution "assailed" the Clause with "uncommon zeal and virulence." 3 Joseph Story, Commentaries on the Constitution of the United States, ch. 11 § 813 (1883).

Leading Federalists reassured that the "Manner of holding Elections" in the Clause retained the narrow sense it had under preexisting British and state regimes. Tench Coxe calmed lingering fears in Pennsylvania by assuring his fellow delegates that the word "manner" vested in Congress only the power "of prescribing merely the circumstances under which the elections shall be holden [sic.]" 20 Doc. Hist. of the Ratification of the Const. 1139, 1145. Roger Sherman and Timothy Pickering echoed this view in Connecticut and South Carolina. 14 *id.* at 196-97, 386, 388. So did Madison and Hamilton in the conventions and in the Federalist Papers. *E.g.*, 3 Elliot's Debates 408 (Madison); The Federalist No. 60, at 172 (Hamilton).

The records of the state ratifying conventions do not suggest that any participant conceived of the "Manner of holding Elections" under the Elections Clause as encompassing anything other than the mechanics of casting and recording votes on Election Day. Instead, Hamilton explained that it was a defense against a form of state sabotage seen under the Articles of Confederation whereby States had intermittently refused to send representatives to Congress to deprive that body of a quorum and thus prevent it from legislating. The Federalist No. 59, at 166-67 (Hamilton), at 362-63; *see* Story, *supra*, ch. 11, §§ 814-24; Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 168-69 (1996); Pauline Maier,

Ratification: The People Debate the Constitution 1787-1788, at 197, 265 (2010). James Iredell and James McHenry repeated this view in the North Carolina and Maryland conventions. 14 Doc. Hist. of the Ratification of the Const. 279, 282; 4 Elliot's Debates 53-54. Madison and George Mason sounded the same note in Virginia in response to Patrick Henry's ruminations that Congress would use the Election Clause to enslave all Americans. 10 Doc. Hist. of the Ratification of the Const. 1260, 1290-95; 9 *id.* at 1071.

The state ratifying conventions were satisfied with the Federalist construction of "manner," which quieted their worries about a despotic Congress. *See also Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). Seven of the conventions—including Massachusetts, New York, and Virginia—tasked their representatives to the First Congress with expending as much political capital as needed to ensure the Elections Clause reflected the limited scope that Federalists had accorded to it. 2 Elliot's Debates 177-78 (Massachusetts); 3 *id.* at 661 (Virginia); 4 *id.* at 249 (North Carolina); 18 Doc. Hist. of the Ratification of the Const. 71-72 (South Carolina); 18 *id.* at 187-88 (New Hampshire); Ratification of the Constitution by the State of New York (July 26, 1788); Ratification of the Constitution by the State of Rhode Island (May 29, 1790).

Once the Constitution had been ratified, the States enacted laws for congressional elections as the Elections Clause mandates. There, too, was there no indication that the "Manner of holding Elections" extended beyond the mechanics of vote casting and counting on Election Day. First was Connecticut, which interpreted the relevant constitutional language to only require it to determine how local constables

and justices of the peace were to tally and record votes. 2 Doc. Hist. of the First Fed. Elections, 1788-1790, at 24-25 (Gordon DenBoer ed., 1984). Two weeks later, Delaware followed with an interpretation that the Clause required a regulation for how voters were to tick their ballots. 2 *id.* at 69-71. The following month, Maryland, Virginia, and New Jersey adopted a similar understanding in congressional election laws. 2 *id.* at 136, 293; 3 *id.* at 14-18. So did Georgia, New York, and the Carolinas the following year. 2 *id.* at 456-58; 3 *id.* at 263-64, 271, 286-87, 361-64; 4 *id.* at 305, 342, 348, 352. This history cannot be squared with the view that Congress can micromanage States to the extent contemplated by the district court, just because the issue happens to touch on something to do with voting.

2. The district court should not have departed from the Constitution's text based any authority that predates *Printz*.

The district court nonetheless concluded that the Elections Clause trumped the nondelegation doctrine based on three cases: *ACORN v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997), *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995), and *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). *See* ROA.346-47. *Wilson* and *Edgar* were decided before—and therefore without the benefit of—*Printz*. *Miller*, which the Sixth Circuit decided shortly after *Printz*, was argued while *Printz* was pending and does not cite *Printz*. *See Miller*, 129 F.3d at 833. Although earlier authority may have hinted that the anticommandeering analysis is more complicated when a court construes federal election statutes, *Printz*'s prohibition on direct conscription of State officials is unmistakable. Cases that do not address this watershed case

provide no reason to depart from the Framers' intentional choice not to authorize commandeering under the Elections Clause.

It is no answer to say Congress enacted public-disclosure requirements "[i]n order to enforce compliance with" the NVRA's substantive regulations regarding registration. ROA.14. The Necessary and Proper Clause does not authorize Congress to commandeer state officials. *See Printz*, 521 U.S. at 923-24. Nor does Section 5 of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 5 (authorizing Congress "to enforce, by appropriate legislation"). Neither the record nor the NVRA's legislative findings show that the public-disclosure provision is congruent and proportional to any likelihood of potential constitutional violations regarding registration. *See id.* at 519-20; 52 U.S.C. § 20501(a). And without such "congruence and proportionality," the Fourteenth Amendment does not empower Congress to take action not otherwise permitted by the Constitution. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

The NVRA recordkeeping requirement is thus a statutory command to which the anticommandeering doctrine retains its full force. The district court erred in relying on moribund out-of-circuit cases indicating (incorrectly) that the recordkeeping requirement arises under the Elections Clause.

Conclusion

This Court should vacate the district court's judgment and remand with instructions to dismiss for lack of jurisdiction. Alternatively, the Court should reverse and render judgment for Secretary Scott.

Respectfully submitted.

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Certificate of Service

On August 18, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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