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; DĒMOS A NETWORK FOR IDEAS AND ACTION, LTD.,
Plaintiffs-Appellees,

v.

JOHN B. SCOTT IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,
Defendant-Appellant.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division
No. 1:22-cv-00092-LY

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CERTIFICATE OF INTERESTED PARTIES

1. No. 22-50867; *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; Dēmos A Network for Ideas and Action, Ltd. v. John B. Scott, in his official capacity as Texas Secretary of State*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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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. Plaintiffs-Appellees respectfully submit that oral argument will assist the Court's review on several issues raised in this appeal, including whether presenting a claim that a plaintiff has been denied information to which she is statutorily entitles under the National Voter Registration Act of 1993 (NVRA) demonstrates Article III standing, whether Defendant failed to comply with his obligations under the NVRA, and whether the anticommandeering doctrine applies to states' obligations under the Elections Clause.

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INTRODUCTION

This case is about whether the Public Disclosure Provision of the NVRA requires the Texas Secretary of State to produce records related to his efforts to maintain accurate voter registration rolls through a list maintenance program that attempts to identify potential non-US citizens who are registered to vote in Texas. These records would allow Plaintiffs to determine whether Texas's list maintenance program is accurately identifying non-U.S. citizens for removal them from the registration rolls, or whether it is wrongly identifying eligible naturalized U.S. citizens. Because these records are indisputably subject to the NVRA's Public Record Provision, the Court should affirm.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees ("Plaintiffs") filed their Complaint on February 1, 2022, alleging violations of the NVRA pursuant to 52 U.S.C. § 20501 *et seq.*, a claim for which Plaintiffs have proper standing. ROA.15. The district court possessed subject-matter jurisdiction under 28 U.S.C. § 1331. Plaintiffs moved for Preliminary Injunction and Consolidation with Trial on the Merits on March 7, 2022. ROA.99-122. On August 2, 2022, the district court issued a Mandatory Injunction and Final Judgment disposing of all parties' claims in this action. ROA.352-53. Defendant-Appellant ("Defendant") timely appealed on August 4, 2022. ROA.354. Jurisdiction is proper under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Plaintiffs have standing to bring a Section 8 NVRA claim against Defendant.
2. Whether Defendant violated Section 8 of the NVRA by refusing to make requested voter list maintenance records available for public inspection.
3. Whether Defendant must provide Plaintiffs with requested voter list maintenance records.

STATEMENT OF THE CASE

I. Legal Background

Congress enacted the NVRA to "increase the number of eligible citizens who register to vote," "enhance[] the participation of eligible citizens as voters," "protect the integrity of the electoral process," and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). Accurate and current voter rolls are integral to guaranteeing both that eligible voters are properly registered and ineligible voters are not. To ensure states properly maintain their voter rolls, the NVRA includes the following "Public Disclosure Provision":

> Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters . . . .

52 U.S.C. § 20507(i)(1). The Public Disclosure Provision regulates voter registration for federal elections by requiring the state to make its list maintenance activities transparent and subject to public oversight. This allows the public to monitor states' compliance with the NVRA, verify the

accuracy of states' voter rolls, and ensure that states' list maintenance activities are "uniform and nondiscriminatory." *Id.* 20507(b)(1).

II. The 2019 List Maintenance Program

In January 2019, the Texas Secretary of State's office issued Election Advisory 2019-02 ("Advisory"), ROA.459, announcing a voter registration list maintenance program that, while intended to identify and remove ineligible non-U.S. citizens on the voter rolls, in practice, instead targeted eligible naturalized U.S. citizens for removal. The program entailed matching the statewide voter registration database against records from the Department of Public Safety ("DPS") to identify registered voters who had, at any time in the past, provided DPS with documentation showing that the person was not a U.S. citizen, and (2) initiate their removal from the registration rolls by sending a notice letter to the voter indicating they were suspected of being a non-U.S. citizen. ROA.335. Specifically, county election officials were directed to cancel the voter registration of any individual who did not provide documentary proof of U.S. citizenship within thirty (30) days, or for whom the notice letter was returned undeliverable. ROA.459; ROA.335.

This process was fatally flawed because it relied on outdated data. *See Texas LULAC v. Whitley*, No. SA-19-CA-074-FB, 2019 WL 7938511 (W.D. Tex. Feb. 27, 2019). DPS records contain information related to a person's citizenship status at the time they obtain a state-issued driver's license or identification card. As such, the program captured tens of thousands of naturalized U.S. citizens who obtained driver's licenses or identification cards prior to naturalization but registered to vote after becoming U.S. citizens and targeted them for removal from the voter rolls unless they provided documentary proof of U.S. citizenship—a burden not imposed on native-born U.S. citizens. *Id.* at 1-2; *see also* ROA.335-36.

After then-Secretary Whitley announced the 2019 program, Plaintiffs challenged it in federal court on behalf of affected Texans—all of whom were naturalized U.S. citizens eligible to vote—and civic engagement organizations. The district court found that the program burdened naturalized U.S. citizens with "ham-handed and threatening correspondence from the state" while "[n]o native born Americans were subjected to such treatment," *Whitley*, 2019 WL 7938511 at *1-2, and ordered Secretary Whitley to pause the program, *id.* at *2. Shortly thereafter, Secretary Whitley entered into a global Settlement

Agreement ending the 2019 program and limiting Texas's future use of DPS citizenship data in list maintenance. ROA.463. Under the 2019 Settlement Agreement, the Texas Secretary of State is not allowed to use DPS records to initiate removal unless a person provided documentation showing non-U.S. citizenship to DPS *after* registering to vote. ROA.468 (codified at Tex. Elec. Code § 16.0332(a-1)).

III. The 2021 List Maintenance Program

Under the 2019 Settlement Agreement, Secretary Scott was obligated to inform Plaintiffs if his office relaunched its efforts to use DPS citizenship records for list maintenance purposes and to provide them with the number of voters identified as potential non-U.S. citizens at the start of any new program. ROA.469-70. In August 2021, Defendant notified Plaintiffs that he was restarting the program, purportedly in compliance with the Settlement Agreement ("2021 List Maintenance Program"). ROA.485. He further notified Plaintiffs that his office had identified 11,197 potential non-U.S. citizens out of the initial dataset of 2,030,985 registered voters matched against DPS records. ROA.485. In September 2022, Defendant notified Plaintiffs that his office had

identified 49 potential non-U.S. citizens out of 20,480 matches conducted during the first three weeks of the program. ROA.488.

On September 9, 2021, Defendant issued Election Advisory No. 2021-11 to election officials outlining the 2021 List Maintenance Program, including his plans to send voter records of flagged individuals to county officials on a weekly basis. ROA.571. Upon receiving those records, election officials are instructed to begin the process of removing the individuals from the rolls if they have "reason to believe that a person is no longer eligible[.]" ROA.572. Defendant instructs officials that it is his position that a voter's presence on the lists sent through the program provides a county with such reason. ROA.572. Nowhere in that advisory did Defendant advise election officials that these individuals were suspected of any crime or instruct election officials to maintain this information as confidential. ROA.571-73

As of January 14, 2022, only 278 of the over 11,000 voters flagged under the new program had been confirmed as non-U.S. citizens (less than 2.5%), ROA.89, but thousands have had their voter registrations cancelled, ROA.491-524. And the record demonstrates that the DPS matching program continues to flag eligible voters as potential non-U.S.

citizens. For example, in Tarrant County, of the 675 registered voters flagged by the 2021 List Maintenance as potential non-U.S. citizens, at least 119 had already been confirmed to be eligible voters by the time this lawsuit was filed. ROA.491-500; ROA.338. In Travis County, at least 93 of the 385 registered voters flagged by the 2021 List Maintenance Program had been confirmed to be U.S. citizens and Collin County had confirmed U.S. citizenship for at least 88 of its 302 flagged voters prior to this lawsuit being filed. ROA.503-14; ROA.517-23.

IV. Procedural History

Pursuant to the NVRA's Public Disclosure Provision, on August 27 and October 20, 2021, Plaintiffs sought lists of the 11,246 voters initially identified through the 2021 List Maintenance Program from Defendant. ROA.337.[1] Defendant denied the requests. Plaintiffs, after giving proper notice, filed suit. ROA.337.

After a bench trial, the district court found (1) that Plaintiffs, who duly requested the records under the NVRA to identify potential eligible

[1] Plaintiffs made similar requests to several counties for these records, including Tarrant, Travis, and Collin counties. Each of those counties provided the relevant records for the individuals identified in their counties under the 2021 program.

voters improperly flagged by the 2021 List Maintenance Program and to assess Defendant's compliance with the 2019 settlement have standing to seek the records in court; (2) the requested records are subject to the NVRA's Public Disclosure Provision; and (3) Defendant's failure to produce the records violated the NVRA. ROA.334. In so doing, the Court rejected Defendant's argument that the records could be withheld under a law enforcement privilege because the record demonstrated that Defendant had not referred any of the identified individuals for criminal investigation, and no such investigations were ongoing. ROA.343. The Court further found that the records were not shielded from disclosure under the Driver's Privacy Protection Act ("DPPA"), and that in the alternative the record demonstrated that Plaintiffs were nonetheless entitled to them under the DPPA's exemption for records sought in anticipation of litigation. ROA.344-45. The Court also found that Plaintiffs' request that the records be produced electronically constituted a request for public inspection under the NVRA. ROA.345-46. Finally, the Court found that the Public Disclosure Provision is a regulation of voter registration activity authorized by the Elections Clause, and thus does not violate the anticommandeering doctrine. ROA.348.

As such, the district court ordered that Defendant provide Plaintiffs with the names and voter identification numbers of the 11,247 voters identified by Defendant as potential non-citizens. ROA.352.[2] The order allows Defendant to "redact any portions of the personally identifying information that is redacted from the publicly available voter file." ROA.353.

[2] Defendant has already provided Plaintiffs with the remaining information ordered by the Court, including the only information obtained from DPS—the date upon which individuals purportedly provided DPS with documents indicating non-U.S. citizenship. *See* Final ROA.352.

SUMMARY OF ARGUMENT

There is no dispute in this case that Plaintiffs sought records that fall within the NVRA's Public Disclosure Provision. There is no dispute that Defendant refused to comply. And there is no dispute that Plaintiffs' have been denied information that Congress gave them a right to obtain under the NVRA. Under binding Supreme Court precedent, Plaintiffs have therefore suffered an injury that gives them standing to bring this suit. And even if Plaintiffs were required to show more—they are not—the record demonstrates that Plaintiffs will be harmed if they are denied information that would enable them to determine whether Defendant is accurately identifying non-U.S. citizens and removing them from the voter registration rolls, or whether he is improperly targeting naturalized U.S. citizens based on national origin. This is particularly so since the record demonstrates that Plaintiffs will use this information to advise their former clients as to their rights, if any, under the 2019 settlement agreement, if the records show that Defendant has failed to comply with the terms therein.

Defendant's attempts to prevent these records from coming to light lack any basis in law or fact. First, Defendant contends that the names

and voter ID numbers of registered voters identified through his list maintenance program for potential removal from the registration rolls are subject to a law enforcement investigative privilege. But he admits that none of the individuals whose records Plaintiffs seek have been referred for criminal investigation, and that their identification through the list maintenance program does not demonstrate either that they are, in fact, non-U.S. citizens, nor that they violated the law.

Second, Defendant invokes the Driver's Privacy Protection Act ("DPPA") as precluding from producing the names and ID numbers of registered voters. But the DPPA does not apply to non-drivers' license agencies like Defendant's office, and regardless the voter names and ID numbers are not DPS records whose production might otherwise be precluded under the DPPA. And notably, Defendant has already produced to Plaintiffs the only record he obtained from DPS—the date of the voters last visit to the agency. Finally, even if the DPPA applied, Plaintiffs would nonetheless be entitled to the information under the act's litigation privilege.

Third, Defendant contends that Plaintiffs are not entitled to electronic transmission of voter names and ID numbers under the

NVRA's Public Disclosure Provision. After abandoning his argument below that Plaintiffs' request for electronic transmission failed to comply with the notice requirement of the NVRA by omitting the words "public inspection," Defendant raises a new argument on appeal that electronic transmission of "sensitive" voter information may put that information at risk. But Defendant has already produced the bulk of the information Plaintiffs requested via electronic transmission, and has a regular practice of requiring any person who purchases the same "sensitive" voter information, and he admitted below that his objection to Plaintiffs request for electronic transmission would not actually prevent him from producing the requested records.

Defendant next asks this Court to overrule its own and Supreme Court precedent to hold that the Provision violates the anticommandeering doctrine. The NVRA is rooted in Congress's authority under the Elections Clause, which expressly authorizes it to direct states in the regulation of federal elections. Over a century of precedent—as well as abundant evidence of the original meaning—establish the Election Clause's breadth and inclusion of regulations of registration. The anticommandeering doctrine does not apply.

Defendant's arguments are refuted by the statutory and constitutional text, longstanding binding precedent, historical evidence, and, in many cases, common sense. This Court should affirm.

ARGUMENT

I. Plaintiffs Have Standing.

Plaintiffs have standing because the NVRA grants them the right to obtain records related to list maintenance activities and Defendant has denied them those records. Under binding Supreme Court precedent, this is all Plaintiffs are required to prove to show injury-in-fact, and they have done so here. But even if Plaintiffs were required to show more, they met their burden of proof at trial.

A. Plaintiffs Suffered an Injury in Fact.

"[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975)); *cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992);

id. at 580 (Kennedy, J., concurring in part and concurring in opinion) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

Where Congress creates a specific right to information by statute, a plaintiff denied that information "need not allege any additional harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016) (citing *Akins*, 524 U.S. at 21); *see also Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (finding that "refusal to permit appellants to scrutinize" records to the extent a statute allows "constitutes a sufficiently distinct injury to provide standing to sue"); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 583 F.3d 871, 873 (D.C. Cir. 2009) (finding "the injury requirement is obviously met" when "an agency[] refus[es] to disclose information that the act requires to be revealed"). Indeed, public disclosure laws are a "common example" of Congress creating standing by statute. *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 618 (D.C. Cir. 2006); *cf. Warth*, 422 U.S. at 514. Thus, it has long been settled that "[a]nyone whose request for specific information has been denied has standing to bring an action; the

requester's circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Zivitofsky*, 444 DF.3d at 617. The requester is injured "because he did not get what the statute entitled him to receive." *Id.*; *see also Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 766 (D.C. Cir. 2020) (*en banc*) ("[W]hen a person seeks to obtain information the government is required to disclose, the denial of the information is a concrete injury for standing purposes."); *cf. In re Committee on the Judiciary, U.S. House of Representatives*, 951 F.3d 589, 622 (D.C. Cir. 2020) (Rao, J., dissenting) ("Because [FOIA] created affirmative disclosure obligations, a plaintiff could establish an Article III injury by alleging a refusal to provide the required information.").

As such, it is unsurprising that courts have routinely "recognized that 'the NVRA provides a public right to information,'" *Ill. Conservative Union v. Illinois*, No. 20-CV-05542, 2021 WL 2206159 at *4 (N.D. Ill. June 1, 2021) (quoting *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 703 (E.D. Va. 2010)), and that "failure to provide access to this information thus constitutes a sufficiently particularized injury in

fact for standing purposes." *Id.* To establish standing for a violation of the NVRA's Public Disclosure Provision, a plaintiff must simply show she made "a proper request for information," *Pub. Int. Legal Found., Inc. v. Bennett*, No. 4:18-cv-00981, 2019 WL 1116193 at *3 (S.D. Tex. Feb. 6, 2019) *mem. and recommendation adopted* 2019 WL 1112228 at *1 (Mar. 11, 2019), and complied with the notice requirements set forth in 52 U.S.C. § 20510(b), s*ee Bellito v. Snipes*, 268 F. Supp. 3d 1328, 1332 (S.D. Fla. 2017) (explaining that "[t]his Court's jurisdiction, therefore, stems directly from § 20510(b), and Plaintiffs' standing to bring suit depends upon compliance with the statute").

Plaintiffs have done so here. The undisputed trial record shows that (1) Plaintiffs sought the requested records pursuant to the NVRA's Public Disclosure Provision, ROA.526; ROA.541; (2) Defendant refused to provide the requested records, ROA.545; and (3) Plaintiffs complied with the NVRA's notice requirements before filing suit, ROA.536; ROA.550; *see also* ROA.13 (filed February 1, 2022 after the notice period elapsed for both requests). These findings are not at issue on appeal. As such, Plaintiffs have standing to bring this suit, and the district court should be affirmed.

Defendant nonetheless contends that the Supreme Court overruled *Akins*, *Public Citizen*, and *Spokeo* through a single line of dicta in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021). Not so. In *TransUnion*, the Court rejected an *amicus* argument that the plaintiffs in that case—who did not assert or brief any informational injury and conceded that they had all the information they were entitled to by statute—had informational standing to seek damages against a credit reporting agency for incorrectly formatting required disclosures. *Id.* The Court explicitly found that the claim "was not controlled by *Akins* and *Public Citizen*" because "[t]he plaintiffs did not allege that they failed to receive any required information" and because *TransUnion* did not "involve[] denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information." *Id.*

Here, Plaintiffs' claim *is* controlled by *Akins* and *Public Citizen*; Plaintiffs *were* denied information Defendant was required to provide them under the public disclosure provision of the NVRA, which *does* "entitle[] all members of the public to certain information." *Id.* As such, they suffered "concrete, informational standing under several of [the Supreme Court's] precedents." *Id.*

After holding that the *Public Citizen-Akins-Spokeo* line of cases did not apply, the Court in *TransUnion* observed that the plaintiffs also lacked standing because they did not identify any "downstream consequences" from the informational injury they did not assert. *Id.* But "at no point" did the Court "suggest that it was changing the . . . inquiry" for standing for public disclosure law claims or "overruling all or part of" *Akins* and *Public Citizen* and the district court and this Court "remain bound" by those precedents. *Cochran v. SEC*, 20 F.4th 194, 206 n.11 (5th Cir. 2021) (*en banc*); *see also id.* ("As between the directly on-point decision[s]. . . and some other decision . . . [this court] must follow the former.) (*citing Agostini v. Felton*, 521 U.S. 203, 237 (1997)); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls.").

Because Plaintiffs must show only that they were denied "information which must be publicly disclosed pursuant to a statute," *Akins*, 524 U.S. at 21, and "need not allege any additional harm," *Spokeo*, 568 U.S. at 342, they satisfied their burden to prove standing.

B. Plaintiffs Proved Standing Even Under Defendant's Erroneous Theory.

Even assuming Plaintiffs must prove "downstream consequences" arising out of Defendant's refusal to comply with the NVRA, Defendant does not dispute that Plaintiffs have been harmed. Rather Defendant merely complains that Plaintiffs did not introduce direct evidence of the harms via declaration or testimony, which in Defendant's view caused Plaintiffs to forfeit any claim to standing. Appellant's Br. (hereinafter "Br.") at 20. Not so. Plaintiffs are only required to prove standing by "a preponderance of the evidence," *Environment Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020), and Plaintiffs easily clear that bar through documentary evidence in the record. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) (declining "to restrict[] a litigant to the presentation of direct evidence absent some affirmative directive in a statute); *see also id.* (finding that the "law makes no distinction between the weight or value to be given to either direct or circumstantial evidence" and the "conventional rule in civil litigation . . . requires a plaintiff to prove his case by a preponderance of the evidence, using direct or circumstantial evidence") (internal citations and quotation marks omitted). *Id.*

Based on substantial and undisputed record evidence, the district court correctly, and unremarkably, determined that it was more likely than not that Plaintiffs would in fact suffer the harms alleged in their complaint, namely preventing Plaintiffs from monitoring Texas's compliance with the NVRA and frustrating the NVRA's stated purpose of ensuring effective, accurate, and non-discriminatory maintenance of the voter registration rolls, because Defendant's refusal to produce records of the individuals identified under the list maintenance program would deny them the "opportunity to identify eligible voters improperly flagged" by the program. ROA.340; *see also* ROA.491-523.[3]

The record demonstrates that such information would also assist Plaintiffs in determining, on behalf of their clients and other affected Texas voters, whether Defendant has violated the 2019 Settlement Agreement, *see* ROA.467, and whether by intentionally targeting registered voters on the basis of national origin, Defendant is denying

[3] Defendant argues that Plaintiffs do not identify "an invasion of a legally protected interest . . . because Plaintiffs identify no right to compel the government to facilitate being sued" or "to the Secretary's investigatory process[.]" Br. at 18 (internal quotations and citation omitted). This is a strange assertion indeed since the NVRA's Public Disclosure Provision itself legally protects Plaintiffs' interest in monitoring Defendant's list maintenance activities for compliance with the law.

eligible voters the right to vote and unduly burdening naturalized voters.[4] Plaintiffs are "nonprofit organizations that litigate voting rights cases," Appellee's Emergency Mot. for Stay Pending Appeal Opposition at 5, and have a demonstrated history of bringing such cases *against Defendant*, including with respect to the same type of list maintenance activity at issue here. *See* ROA.467; ROA.335-36 (describing history of litigation and settlement agreement); *see also Whitley*, 2019 WL 7938511. And the undisputed record shows that the 2021 List Maintenance Program continues to sweep in lawfully registered naturalized citizens. *See*, *e.g.*, ROA.419-69; ROA.337-38. Defendant cannot seriously contend

[4] Defendant contends that Plaintiffs cannot show a sufficiently concrete injury arising out of the denial of information that "interferes with their ability to bring unknown legal claims on behalf of hypothetical future clients." Br. at 17. But the record shows that Plaintiffs are seeking this information, in part, to fulfill their obligations to the clients they represented in *Whitley*, who are parties to the 2019 Settlement Agreement. In the 2019 settlement, the *Whitley* Plaintiffs expressly reserved their rights and the rights of their counsel to seek additional information related to this program under the NVRA. ROA.463. Plaintiffs' clients also reserved their right, and their counsel's right, to file legal challenges to any renewed program targeting voters based on national origin using DPS data and to enforce the settlement agreement in federal court. ROA.473. If Plaintiffs are unable to obtain the information necessary to determine if Defendant has violated the Settlement Agreement, they cannot advise their clients on their rights pursuant to the same.

that identifying voters subject to removal from the rolls based on their national origin would not assist Plaintiffs in determining whether the current program violates the law. And the record evidence—including the history of litigation on this program—demonstrates that this is precisely what Plaintiffs intend to do with the records. The district court did not err, clearly or otherwise, in determining that Plaintiffs will suffer "downstream consequences" due to Defendant's violations of federal law.

Notwithstanding Defendant's misleading assertions, Plaintiffs neither declined to produce evidence of standing nor "forfeited" the argument below. *Cf.* Br. at 20. The parties fully briefed Plaintiffs' motion for a preliminary injunction and for consolidation with final judgment on the merits, and Defendant did not challenge Plaintiffs' standing. This is unsurprising since Plaintiffs had clearly established an injury based on the denial of information to which they are statutorily entitled pursuant to a public disclosure statute. *See supra*, Section I.A. At the beginning of the trial, the parties affirmed for the Court that the record was complete. Br. at 19; ROA.392. Only after this did Defendant contend for the first time that Plaintiffs lacked standing, based on his theory that *TransUnion* disrupted decades of precedent by holding for the first time

that public disclosure laws like the Freedom of Information Act ("FOIA") and the NVRA require an evidentiary showing of downstream consequences. ROA.413. Plaintiffs promptly offered to submit additional evidence or briefing if necessary, including by live testimony that day. *See* ROA.433; ROA.440-41. The court declined to hear such evidence, but acknowledged that, if necessary, additional evidence of standing could be presented by undertaking or affidavits, including over the objection of Defendant. ROA.450-51. That the court found additional evidence unnecessary to correctly determine that Plaintiffs' have standing does not mean that Plaintiffs' "did not pursue that avenue" but rather that the court declined to re-open the evidentiary record for a cumulative evidentiary showing. *Cf.* Br. at 19.

Finally, Plaintiffs' standing is not an issue that was "raised for the first time on appeal" such that it was waived below. Br. at 19-20. As the trial transcript, the court's Findings of Fact and Conclusions of Law, and the evidentiary record all demonstrate, Plaintiffs adequately proved standing at trial, including under Defendant's erroneous legal theory. *See supra.* Should this Court find otherwise, however, the prudent course would be to remand to the court below to allow Plaintiffs to prove injury

using evidence that conforms to the legal theory Defendant declined to raise until after the record was closed. Defendant has not identified any court that has applied *TransUnion* to require Plaintiffs alleging informational injury under a public disclosure statute such as FOIA or the NVRA to show more than that they were denied information to which they are statutorily entitled. Nor are Plaintiffs aware of any such case. If this Court is the first to so hold, Plaintiffs should have the opportunity to present evidence of downstream consequences. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1933-34 (2018) (announcing a new evidentiary standard for demonstrating Article III standing and remanding to the lower court to allow Plaintiffs to introduce evidence of their injury).

II. Defendant Must Produce the Records Under the NVRA.

The NVRA's Public Disclosure Provision requires Defendant to produce the names and voter ID numbers of registered voters that his office has identified for potential removal from the voter registration rolls through its list maintenance program. 52 U.S.C. § 20507(i)(1). Defendant does not seriously dispute this point. Instead, he argues that he is nonetheless entitled to withhold the records at issue here based on

purported privileges and privacy concerns. But none of the bases asserted by Defendant for withholding the requested records withstand scrutiny.

First, Defendant is not entitled to withhold such records subject to a purported law enforcement investigative privilege where he has admitted that there is no ongoing criminal investigation into any of the individuals identified through his list maintenance program. Second, to the extent any such privilege would apply to the requested records, it is pre-empted by the NVRA. Third requiring Defendant to produce these records here would be consistent, not conflict, with precedent set by other circuits. Fourth, the DPPA does not protect voter names and ID numbers contained in Texas's statewide voter registration list, and even if it did, Plaintiffs are nonetheless entitled to the records under the DPPA's exemption for investigation in anticipation of litigation. Finally, Plaintiffs are entitled to electronic production of the requested records.

A. The Law Enforcement Investigative Privilege Does Not Apply.

Defendant is not entitled to withhold records based on a purported investigative privilege when he has admitted that there are no ongoing criminal investigations into the individuals identified through his list maintenance program. This Court has recognized "a qualified privilege

protecting investigative files" only where there is an "ongoing criminal investigation." *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569, 571 (5th Cir. 2006) ("*DHS*"). Its application is predicated on "the disputed documents fall[ing] within the realm of the privilege." *Id.* Where, as here, there is no "ongoing criminal investigation" the privilege simply does not apply. *See Becker v. Tools & Metals, Inc.*, No. 3:05-CV-627-L, 2010 WL 11537569, at *3 (N.D. Tex. Nov. 19, 2010) (rejecting an expansion of the law enforcement privilege because the Fifth Circuit only "protects government files related to an ongoing *criminal* investigation"); *Fed. Trade Comm'n v. Liberty Supply Co.*, No. 4:15-CV-829, 2016 WL 4272706 at *5, *9 (E.D. Tex. Aug. 15, 2016) (same). The threshold query is simply whether the requested records are part of an ongoing criminal investigation. The record here makes plain they are not. But even if the records were subject to such a privilege, the NVRA pre-empts Defendant's assertion of it here. The Fourth Circuit precedent relied on by Defendant does not counsel otherwise.

1. There is No Ongoing Criminal Investigation.

The record below contains no evidence that Defendant's 2021 List Maintenance Program has served as a predicate for any criminal

investigation of any voter identified through the DPS matching program. Instead, the record demonstrates that the program purports to serve the unremarkable goal of maintaining Texas's voter rolls. First, as described by Defendant, Texas's 2021 List Maintenance Program is a "multistep, statutory process [that] *can* lead to cancellation of voter registrations . . . *by local officials only after their own review*." Br. at 3 (emphasis added). The Director of the Elections Division at the Texas Secretary of State's Office, Keith Ingram, testified to that effect in a declaration submitted by Defendant, explaining that the requested records were generated pursuant to a statutory process conducted for the purposes of voter list maintenance—*not* criminal investigation. *See* ROA.566 (citing Tex. Elec. Code § 16.0332 and Election Advisory 2021-11). Neither the code provision, nor the election advisory outlining the 2021 List Maintenance Program, suggests that the registrants identified by the process are subject to criminal investigation.

In fact, as Mr. Ingram admits, "[a] person's mere presence on the initial dataset or a weekly file does not by itself prove that the person is a non-citizen or that the person engaged in criminal conduct." ROA.566. And Mr. Ingram further confirms that Defendant has "not yet

determined whether any of the information received through the revised process warrants an investigation by the Attorney General," and consequently has not referred *a single individual* for such investigation. ROA.567. In contrast to Mr. Ingram's testimony that the requested records do not and have not triggered criminal investigations, they do trigger list maintenance activity whereby it is "the responsibility of each county election official to review records sent to them through the revised process and determine whether an individual identified as a potential non-U.S. citizen is currently eligible for registration in their county." ROA.566. To the extent these records are a part of any "review [that] is still in process," Br. at 29, it is being conducted by local election administrators—not law enforcement—for purposes of list maintenance, not criminal investigation.

Defendant nevertheless contends that although he has not yet made any referral—more than eleven months after these records were created—he *may* make such a referral at some unspecified future date, therefore creating a sort of "bifurcated criminal investigation" requiring confidentiality under Texas law. Br. at 29 (citing Tex. Elec. Code § 31.006(a)). This assertion is inapposite for three reasons.

First, Defendant's reliance on Texas election law to claim law enforcement investigative privilege both misunderstands privilege and misconstrues the relevant statute. As an initial matter, even if Section 31.006(a) of the Texas Election Code, upon which Defendant relies, covered the requested information—it does not, *see infra*—Defendant cannot use the election code to redefine the limited scope of the law enforcement investigative privilege. Br. at 30. That qualified privilege covers only "ongoing criminal investigations," *DHS*, 459 U.S. at 571, of which there are none.

But in any event, Section 31.006(a) provides Defendant no assistance. Section 31.006(a) states:

> 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. . . .

Tex. Elec. Code § 31.006(a). But here there is no "information indicating that criminal conduct in connection with an election has occurred." *Id.* at § 31.006(a). Instead, the records merely identify "*potential* non-United States citizens." ROA.567 ("A person's mere presence on the initial dataset or a weekly file does not by itself prove that the person is a non-

citizen or that the person engaged in criminal conduct."). Indeed, Defendant's own brief *does not even allege* that Defendant has "receiv[ed] or discover[ed] information indicating that criminal conduct in connection with an election has occurred," the necessary trigger for Section 31.006(a). Instead, he only argues that during this process he "may" discover such information. *See* Br. at 3-4. The records do not pertain to any "receiv[ed] or discover[ed]" information of the type requiring confidentiality under Section 31.006(b) and certainly do not fall under the narrower law enforcement privilege.[5]

Should Defendant decide to make any future referral to the Attorney General, his determination that the individual or individuals referred may have committed a crime—and any information underlying that determination—would not be disclosed by producing the entire list of individuals identified for potential removal from the voter rolls to Plaintiffs. Instead, the records will merely allow Plaintiffs to identify voters who have been flagged for potential removal by the counties as a

[5] Plaintiffs do not seek any records related to election complaints or allegations of criminal conduct and it is notable that in his declaration Mr. Ingram identifies no overlap between the requested lists and any complaints or allegations of criminal conduct the SOS may have received. ROA.565.

part of its systematic list maintenance efforts. Thus, while the requested records are critical to determine whether the list maintenance program is improperly targeting eligible naturalized U.S. citizens for removal, they shed no light on any criminal investigation that may or may not be initiated at some later date.

Second, despite Defendant's contention that it is "beyond dispute" that the requested information is "non-public" and "protected from disclosure" under state law, Br. at 31, the record indicates the opposite. At the inception of the list maintenance program, Defendant did not treat the list of voters identified therein as privileged or confidential but rather provided them to county election officials and instructed those officials to notify listed individuals that their registration status was under review. *See* ROA.571. In so doing, he did not instruct county officials to maintain the confidentiality of those records. ROA.571. As such, several counties have already provided Plaintiffs with piecemeal components of these records. ROA.490-523 (redactions added by Plaintiffs). Though Defendant attempts to sidestep these unhelpful facts, Br. at 30-31, the counties' production of subsets of the requested information lays bare that it is not confidential data related to an ongoing criminal

investigation, but rather commonplace list maintenance data available to election officials in all 254 counties.

Finally, under Defendant's theory that he can withhold these records in anticipation of some future investigation of one or more of these individuals, it is unclear when, if ever, the "ongoing investigation" would end. This is particularly so in cases where Defendant never makes a referral to the Attorney General. Many of the individuals identified as potential non-U.S. citizens through the 2021 List Maintenance Program have now had their citizenship verified by county officials, thereby confirming that no "criminal conduct in connection with the election" occurred. Tex. Elec. Code § 31.006(a). Any claim that those individuals are part of an ongoing criminal investigation is baseless, even under Defendant's own theory. *See DHS*, 459 F.3d at 571 ("[T]he law enforcement privilege is bounded by relevance and time constraints.") (citing *Am. Civil Liberties Union v. Finch*, 638 F.2d 1336, 1344 (5th Cir. Mar 1981) ("Even the files of active law enforcement agencies lose their privileges after particular investigations become complete.")).

2. The NVRA Pre-empts Any Assertion that Defendant Can Withhold the Records Under State Law.

Even assuming the investigative privilege or Texas's state law confidentiality provision applies to the list maintenance records at issue here, such state law provisions are pre-empted by the NVRA.[6] Both the Supreme Court and this Court have held that the NVRA preempts state law when the two conflict. *See Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 4 (2013); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 399 (5th Cir. 2013) (finding that the NVRA's public disclosure provision would preempt conflicting state law).

Any effort to eclipse the NVRA's Public Disclosure Provision in the shadow of potential criminal liability stemming from ordinary list maintenance activities brings the two into direct conflict. After all, the NVRA's Public Disclosure Provision covers list maintenance activities. 52 U.S.C. § 20507(i) ("Each state . . . shall make available for public

[6] Because the law enforcement investigative privilege does not preclude production when there is no ongoing criminal investigation, Defendant's focus on the district court's purported concession that the NVRA's text does not explicitly abrogate the law enforcement privilege is misplaced. Any "silence" on this point by the district court, Br. at 25-28, is appropriate because the law enforcement investigative privilege simply does not apply.

inspection . . . all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters."). Defendant's program here is entitled "List Maintenance Activity Involving Potential Non-United States Citizens." *See* ROA.571, and there is simply no evidence that it has any other purpose.

Further, "determining privilege is a particularistic and judgmental task of balancing the need of the litigant . . . against the harm to the government if the privilege is lifted," and the factors to which courts look in evaluating whether to override the investigative privilege weigh in Plaintiffs' favor. *See*, *DHS*, 459 F.3d. at 569-71 (listing factors courts use). Defendant has made no effort to explain how any government process or investigation would be harmed by disclosure of the requested fecords where county election administrators have already been directed to notify listed individuals that their registration status is under review. In fact, the records—pertaining to "people who *merely are suspected of a violation* without being part of an ongoing criminal investigation"—are precisely the type of documents this Court previewed as unlikely to be protected. *Id.* at 571. Following this Court's guidance, the district court

properly found that the requested records are not shielded from disclosure by any law enforcement investigative privilege.

3. The District Court's Ruling Does Not Conflict with Fourth Circuit Precedent.

Upholding the district court's ruling would not put this Court in conflict with the Fourth Circuit's decision in *Public Interest Legal Foundation, Inc. v. North Carolina State Board of Elections*, 996 F.3d 257 (4th Cir. 2021) ("*PILF*"). Despite Defendant's assertion to the contrary, plaintiffs in the two cases do not "seek similar information in the context of similar state-law requirements." Br. at 31.[7] Unlike here, the *PILF* plaintiffs sought documents that were related to "sealed criminal investigations" where the U.S. Attorney's Office had subpoenaed the State Board of Elections for registration records to be used in grand jury proceedings. *Id.* at 262, 266–67. Here, the record shows there are no criminal investigations at all, much less any that have been sealed, no

[7] While, as Defendant notes, North Carolina and Texas law do both require U.S. citizenship for voter registration and criminalize fraudulent voter registration, Br. at 32 n.2, that has no bearing on this Court's considerations in this case as it does not mitigate the significant factual differences between the two cases.

U.S. Attorney's Office is involved, and there are no related grand jury proceedings.

Given the ongoing criminal investigations at issue in *PILF,* the court there was concerned that some of the requested information could associate an individual with "alleged criminal activity." *Id.* at 267. Nonetheless, the court found that the NVRA's disclosure provisions were applicable and that risk of association with criminal activity "d[id] not render the requested documents affiliated with potential noncitizens immune from disclosure." *Id.* at 265, 267. Accordingly, the *PILF* court ordered the records be disclosed pursuant to the NVRA with a "system of redaction" to "advance these privacy interests while permitting the [plaintiff] to identify 'error and fraud' based on citizenship status in 'maintenance of voter rolls.'" *Id.* at 267–68. Plaintiffs' case for disclosure under the NVRA is far stronger here, where the record makes clear that there are no active criminal investigations underway.

Further, *PILF* does not support Defendant's blanket claim that non-disclosure is justified by the risk of reputational harm from disclosing information pertaining to the "SOS's ongoing *review into whether* to refer matters raising *potential* criminal concern to the

Attorney General." Br. at 32 (emphasis added). Rather, it supports balancing any privacy concerns against the public interest in oversight of voter roll programs under the NVRA. *See PILF*, 996 F.3d at 267–68. Applying a similar balancing test in the FOIA context, the D.C. Circuit found that privacy concerns of individuals involved in a grand jury proceeding favored withholding information only where the "*specific* information being withheld" was not tied to the public interest. *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Comm. v. U.S. Dep't of Just.*, 823 F.2d 574, 588 (D.C. Cir. 1987) (emphasis in original).

In contrast here, the identities of voters flagged for removal as potential non-U.S. citizens relate directly to evaluation of the legality of the 2021 List Maintenance Program and are of significant public interest. Plaintiffs are entitled to records sufficient to identify any errors in the 2021 List Maintenance Program. *See PILF*, 996 F.3d at 267–68.

B. The DPPA Does Not Preclude Production of Voter Names and ID Numbers.

The DPPA is no bar to disclosure of the voter names and ID numbers that the district court ordered Defendant to produce for two reasons: (1) the information to be disclosed is not covered by the DPPA;

and (2) the district court properly applied the DPPA's litigation exception.

First, the DPPA applies to DPS and its release of personal information in its records. It does not extend to all other agencies and agency records that are in some way informed by DPS data. *See Mattivi v. Russell*, No. Civ.A. 01-WM-533(BNB), 2002 WL 31949898 at *4 n.7 (D. Colo. Aug. 2, 2002) ("DPPA is limited to records issued by state departments of motor vehicles.") (citing *Atlas Transit, Inc. v. Korte*, 638 N.W.2d 625, 632–33 (Wis. App. 2001) (observing "that the DPPA does not prohibit the release of [names and commercial driver's license numbers] by" the Milwaukee Public Schools); *Davis v. Freedom of Information Comm'n,* 790 A.2d 1188, 1191–92 (Conn. Sup. Ct. 2001) (DPPA, by express terms, did not apply to office of tax assessor), *aff'd,* 787 A.2d 430 (2002)). The requested records are indisputably not DPS records but rather list maintenance records created and kept by Defendant. The DPPA does not apply.

Moreover, the information still to be disclosed here—the identities and voter ID numbers of the individuals targeted for removal based on national origin—is demonstrably not personal information "obtained by

[DPS] in connection with a motor vehicle record." 18 U.S.C. § 2721(a)(1). Voter ID numbers, assigned by Defendant for voter registration purposes, have no connection to DPS. Likewise, voter names are in the possession of Defendant through voter registration applications, not motor vehicle records. Defendant has already voluntarily disclosed the only part of the requested records that could conceivably be protected under the DPPA—the issuance date of a listed individual's current driver's license, personal identification, or election identification certificate and the date on which the individual provided DPS with citizenship documentation. *See* ROA.339. And the identities of voters in the voter file are routinely disclosed by Defendant, even when voters register to vote at DPS.[8] *See* ROA.435 (counsel for Defendant conceding "if the plaintiffs had requested just the entire voter file . . . it would be fine to release voters' names in that context."). And while the individuals identified in the records have ostensibly been singled out by Defendant based on some form of non-citizenship data obtained by DPS, none of the

[8] The fact that Defendant routinely discloses personal data of individuals they receive from DPS when those individuals register at DPS betrays Defendant's reliance on DPPA altogether.

records at issue disclose any specific citizenship or immigration status data for any individual.[9]

Second, to the extent the DPPA applies at all, the district court properly found that because Plaintiffs seek the records "to determine whether to sue to enforce the Settlement Agreement" or "bring an action alleging that Defendant's new program unlawfully burdens the rights of newly naturalized citizens," the "investigation in anticipation of litigation" exception to the DPPA applies. ROA.344-45. The district court's finding that Plaintiffs' record requests relate to their investigations in anticipation of litigation is a factual finding reviewed for clear error. Defendant cannot establish clear error. The record reflects a settlement agreement between Defendant and clients represented by Plaintiffs; that sharply regulated the list maintenance process to which

[9] While Defendant seeks to rely on *Pub. Int. Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 563 (M.D. Pa. 2019)—an out-of-circuit district court opinion that is out of step with other court interpretations of the DPPA—the district court in *Boockvar* has clarified that any DPPA protections solely permit redactions of specific personal data derived from a motor vehicle agency and "does not protect information derived from non-DMV sources even when that information is included in a record containing personal information obtained from DMV records." *Pub. Int. Legal Found. v. Chapman*, No. 1:19-CV-622, 2022 WL 986012 at *6 (M.D. Pa. Mar. 31, 2022).

these records relate; required Defendant to notify Plaintiffs of any resumption of the process and the number of records affected; and specifically reserved the rights of Plaintiffs and their clients to sue to enforce the settlement agreement in federal court or to "bring[] an action against Defendant of State if data, methodological, or other systemic limitations cause the lists generated by the procedures . . . to include registered voters who did not submit documents establishing non-U.S. citizenship to DPS after their date of voter registration." ROA.463-77. And as discussed above, the record evidence shows that Defendant's process is once again ensnaring a significant number of U.S. citizens. ROA.89; ROA.491.

The records are plainly sought as part of an "investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4). Defendant's reliance on *Maracich v. Spears*, 570 U.S. 48 (2013), lends him no support. In that case, the Supreme Court held that mass commercial solicitation of clients does not fall within that exception but explained that "'investigation in anticipation of litigation' is best understood to allow background research to determine whether there is a supportable theory for a complaint, a theory sufficient to avoid sanctions for filing a frivolous lawsuit, or to

locate witnesses for deposition or trial testimony." *Id*. at 63-64 (internal quotation marks omitted). Thus, while Defendant faults the district court for applying the exception where the records would be used to "determine[e] whether to sue," Br. at 34, that is exactly the type of use *Maracich* sanctions.[10]

C. Plaintiffs' Request for Electronic Records Constitutes a Request for Public Inspection.

Defendant argues that the district court erred in ordering electronic disclosure of the requested records. Br. at 34. But this argument is disingenuous at best. Defendant has made clear that, if the requested records must be disclosed at all, he will deliver them electronically, as is his practice for *all* voter file requests. *See* ROA.423 ("So, under the statute, I think we just need a request for public inspection rather than

[10] Defendant seems to argue that Plaintiffs were required to pre-but his invocation of the DPPA in their NVRA notice letter. *See* Br. at 34. Defendant cites no authority for this proposition, which finds no support in the statute or common sense. This proposition is particularly absurd since Defendant did not invoke the DPPA in an of the parties' pre-litigation correspondence. ROA.526-563. The NVRA notice requirement requires Plaintiffs to put the Defendant on notice of an alleged NVRA violation and give them an opportunity to cure. Plaintiffs undoubtedly met that requirement. Plaintiffs are not required to anticipate all of Defendant's potential defenses to disclosure and rebut them all prior to the filing of a complaint.

a request for e-mail and photo -- e-mail or FTP. Now, to be clear, we're not suggesting that this is the actual stumbling block in this case. If we didn't have the privacy concerns that we've talked about already . . ."); *see also* Voter Registration Public Information Request Form, Tex. Sec'y of State, https://www.sos.state.tx.us/elections/forms/pi.pdf. At no point during the parties' pre-litigation correspondence did Defendant object to Plaintiffs' requests on the grounds that they sought records in electronic format. ROA.526-63.[11] Indeed, after this case was filed, Defendant agreed to provide some of the data Plaintiffs requested, ROA.324-25, and he provided that data electronically. Defendant has never offered any form of public inspection or hard copy photocopying. Defendant's insistence that the district court erred in ordering disclosure by electronic means makes no sense in light of the record, which demonstrates that if Defendant must disclose these records, he will do so electronically. Defendant's objection fails because he has not offered the alternatives—

[11] Defendant argues that had Plaintiffs asked to inspect the records as required by statute, "the Secretary might (or might not) have made the information available on a laptop or in hardcopy at the Secretary's office." Br. at 37. This is false. At trial, Defendant's counsel conceded that they would not have made the information available in any format. ROA.421.

public inspection or photocopying—that he claims the statute encompasses.

During arguments at the bench trial, Defendant's counsel framed this objection largely as one about the adequacy of the NVRA notice, seeming to argue that Plaintiffs were required to parrot the statute by asking for "public inspection" or "photocopying" even though, as a practical matter, the records would be delivered electronically. ROA.420-25. Such a demand is absurd, and Defendant appears to abandon this argument on appeal. "Generally, issues not raised in . . . appellant's opening brief are considered abandoned." *Akuna Matata Invs., Ltd. v. Tex. Nom Ltd. P'ship*, 814 F.3d 277, 282 n.6 (5th Cir. 2016).

But, in any event, such an argument plainly fails. Plaintiffs' record requests cite the Public Disclosure Provision and identify the records requested. *See* ROA.527; *see also* ROA.542. Only thereafter did Plaintiffs provide a request for their preferred format: "Please provide the requested documents electronically by email . . . or FTP transfer if available." *Id.* Likewise, Plaintiffs' notice letter reiterated the documents requested and alleged that Defendant's absolute withholding of the records violated the NVRA. Nowhere did it mention a preferred format.

ROA.551. Plaintiffs' notice letter more than meets the NVRA's notice requirements. *See Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1348 (N.D. Ga. 2016) ("[C]ourts have found that an NVRA notice is sufficient if it 'sets forth the reasons for [the] conclusion' that a defendant failed to comply with the NVRA, and, when 'read as a whole, [it] makes it clear that [the plaintiff] is asserting a violation of the NVRA and plans to initiate litigation if its concerns are not addressed in a timely manner.'" (quoting *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 922 (S.D. Ind. 2012))).[12]

Finally, the district court was correct to reject Defendant's "cramped view of the Act's public-disclosure provision" and hold that the Public Disclosure Provision does, at least in these circumstances, encompass production of electronic records. ROA.345-46. The NVRA imposes no limit on the means by which Defendant should "make [records] available for public inspection." 52 U.S.C. § 20507(i). Defendant

[12] Defendant did not assert any potential security concerns around electronic transmission of "sensitive information" below, *cf.* Br. at 34-35, and his belated attempt to do so for the first time on appeal is foreclosed. *See State Indus. Prods. Corp. v. Beta Tech., Inc.*, 575 F.3d 450, 456 (5th Cir. 2009). Furthermore, it is belied by the fact that he has already produced much of the requested information electronically, and routinely transmits voter names and ID numbers via FTP. *See supra.*

provides no authority for his apparent position that making records "available for public inspection" can only ever mean requiring the public to come to a specific physical location to review the records.[13] Courts have routinely held—and the NVRA's inclusion of photocopying confirms—that public access to records includes the ability to copy records. *See, e.g., United States v. Munchel*, 567 F. Supp. 3d 9, 15-16 (D.D.C. 2021) ("The common law right of access has long encompassed the right to 'copy public records.'"); *United States v. Massino*, 356 F. Supp. 2d 227, 236 (E.D.N.Y.

[13] Defendant cites to two statutes that he contends represent "other instances when Congress has made information available to the public but clearly contemplated in-person review of the materials." Br. at 35-36 and n.3. But the Public Disclosure Provision does not "mirror" those statutes because it does not include language discussing hours or location for inspection and these citations to audits and tax records are not directly applicable. But even more telling, Defendant does not contend that agencies in those contexts have refused the public's access to electronic records or address whether courts have interpreted the scope of public disclosure required under those laws. A brief review suggests that in these contexts, too, copies are routinely provided, including electronically. *See, e.g., Tax Analysts v. I.R.S.*, No. 1:00CV02914(RMU), 2004 WL 2051361 (D.D.C. Aug. 9, 2004) ("IRS will make these eight rulings available for public inspection and provide copies of those eight rulings to plaintiff Tax Analysts[.]"); Internal Revenue Service, About Form 4506-A, Request for Copy of Exempt or Political Organization IRS Form and Form 4506-B, Request for Copy of Exempt Organization IRS Application or Letter, https://www.irs.gov/forms-pubs/about-form-4506-a (noting that many disclosed materials are "available in bulk download free of charge").

2005) ("Historically, courts have defined the right of access as incorporating both the right to inspect court materials and the right to copy them."); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) ("[I]t is necessary to bear in mind that generally the right to copy has been considered to be correlative to the right to inspect."). In this case, it is undisputed that such copies would be electronic.

The district court did not add anything to the statutory text; it properly interpreted what it means to make the records available in this context. Defendant concedes that the requested records are kept electronically and does not contest that these electronic records are covered by the Public Disclosure Provision. ROA.430-31; *see Kemp*, 208 F. Supp. 3d at 1336 ("'[R]ecords' for the purposes of [the NVRA][] include[es] information in electronic form."); ("Given the ubiquity and ease of electronic storage, [excluding electronic data from the Public Disclosure Provision] would effectively render [the Provision] a nullity." *Id.* (citing *United States v. Irey*, 612 F.3d 1160, 1221 n. 42 (11th Cir. 2010) (en banc)). The evidence at the bench trial established that electronic records are the only logical means to provide Plaintiffs with these records. ROA.345 ("At trial, Defendant's attorneys noted that Defendant

keeps the Records in an electronic database through a third-party vendor, so it is unclear to the court how Plaintiffs might 'inspect' or 'photocopy' such a database.").

It would be nonsensical for the NVRA's Public Disclosure to cover these records but only require their production in a format foreign to how they are kept. *Cf. Criden*, 648 F.2d at 823 (noting that, "[a]s copying techniques grew more sophisticated, the courts adjusted the common law right [to inspect] to include the right to copy public records by mechanical means"). Thus, courts have consistently presumed that "disclosure" under the NVRA requires the production of electronic records. *See, e.g.*, *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 724 (S.D. Miss. 2014) (concluding that Mississippi complied with the Public Disclosure Provision where it produced electronic voter records); *Kemp*, 208 F. Supp. 3d at 1352 (requiring Georgia to produce electronic voter records under NVRA).

III. The NVRA's Public Disclosure Provision Does Not Violate the Anticommandeering Doctrine.

Finally, the NVRA's public disclosure provision does not violate the anticommandeering doctrine because the anticommandeering principle simply does not apply to Congressional modification of a state's

obligations under the Elections Clause. Further, the Court should reject Defendant's request that it defy binding Supreme Court precedent in favor of his incorrect view of the historical meaning of the Elections Clause. The Clause's original public meaning, intent, and historical context confirms that it applies to voter registration.

A. The Anticommandeering Doctrine Does Not Apply to States' Obligations Under the Elections Clause.

The anti-commandeering doctrine does not apply to Congressional modifications of the states' obligations to hold and regulate federal elections under the Elections Clause, which are expressly limited by Congress's authority to "make or alter" state regulations. U.S. Const. art. 1, § 4, cl. 1. Because Congressional enactments pursuant to the Elections Clause only modify the states' existing obligations under the same, the anticommandeering principle does not apply.

Defendant's authority to regulate voter registration for federal elections stems from an explicit Constitutional delegation of power to the states, which is subject to express federal preemption—it is not a reserved power under the Tenth Amendment. *See Inter Tribal Council*, 570 U.S at 14-15 ("Unlike the States' historic police powers, the States' role in regulating congressional elections . . . has always existed subject

to the express qualification that it terminates according to federal law."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995) ("[T]he provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States[.]"). The anticommandeering doctrine does not apply to Congress's exercise of its authority under the Elections Clause—it applies only to exercises of its legislative power in areas that have been *reserved* for the States. *See Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1467 (2018) (defining the anticommandeering doctrine as the limit on Congress's authority to pre-empt state law beyond its "enumerated powers," in areas where "legislative power is reserved for the States" under the Tenth Amendment). As such, the doctrine does not apply to Congressional enactments under the Elections Clause, such as the NVRA.

The Public Disclosure Provision, like the rest of the NVRA, is a proper exercise of Congress's power under the Elections Clause, "to pre-empt state regulations governing" federal elections, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013), including laws related to voter registration, *id.* at 9 (*citing Smiley*, 285 U.S. 355, 366

(1932)). *See also Steen*, 732 F.3d at 399 ("under the Constitution's Election Clause, Congress may enact laws that preempt state election laws concerning federal elections."); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995).

Plaintiffs are unaware of any factual or legal basis for Defendant's assertion that the Public Disclosure Provision, which regulates state voter registration activities by ensuring they are transparent and open to the public, does not fall within Congress's enumerated authority under the Elections Clause. Indeed, the NVRA itself includes the Public Disclosure Provision under the heading "regulations with respect to the administration of voter registration." 52 U.S.C. § 20507. And, the Supreme Court has consistently recognized Congress's power to regulate elections, including with respect to registration, and including by requiring states to produce records for inspection, since at least 1879. *See Ex parte Siebold*, 100 U.S. 371, 388-89 (1879) (holding that Congress' power over congressional elections extends to enforcement, including the right "to examine [state officials] personally and inspect all their

proceedings and papers"); *see also id.* at 380 (describing the statutes subject to challenge in that proceeding, including a law requiring state officials to allow federal designees to "inspect and scrutinize such register of voters"); *see also Smiley*, 285 U.S. at 366 (finding Congress's authority under the Elections Clause "would be nugatory" absent the ability to enact procedural safeguards to enforce its regulations); *Inter Tribal Council*, 570 U.S. at 9 (quoting *Smiley*, 285 U.S. at 366, in finding that the Elections Clause embraces "regulations relating to 'registration'"). This Court has also explicitly held that the Public Disclosure Provision of the NVRA would pre-empt conflicting state law. *Steen*, 732 F.3d at 399 (considering whether Texas law prohibiting photocopying of voter registration forms was pre-empted by NVRA's public disclosure provision).

Finally, Defendant relies on *Branch v. Smith* for the proposition that the anticommandeering doctrine applies in the context of the Elections Clause. But the plurality opinion upon which Defendant relies explicitly rejected his anticommandeering theory, explaining that "in the context of Article I, § 4, cl. 1, such 'Regulations' are expressly allowed." *Branch v. Smith*, 538 U.S. 254, 280 (2003) (Scalia, J., joined by

Rehnquist, C.J., Kennedy, J., and Ginsburg, J.). Indeed, the *Branch* plurality found that statutes regulating state election laws under the Election Clause do not impose "mere statutory obligations" on the state officials, but rather "regulate (as the Constitution specifically permits) the manner in which a State is to fulfill its pre-existing constitutional obligations." *Id.* (plurality op.).

Other than *Branch*, which undermines rather than supports his claim, Defendant does not identify a single case applying the anticommandeering doctrine in the Elections Clause context. Instead, he criticizes the precedent supporting Plaintiffs as either too "recent," *see* ROA.253-54, or too "moribund," *see* Br. at 48, and asks this Court to disregard any case that predates *Printz v. United States*, 521 U.S. 898 (1997). Br. at 47. Plaintiffs are unaware of any temporal Goldilocks standard that allows Defendant or this Court to disregard binding Supreme Court precedent. *Cf. Cochran*, 20 F.4th at 206 n.11. Regardless, both *Inter Tribal,* which affirmed *Smiley*, and this Court's decision in *Steen* post-date *Printz*, and are binding here. Further, *Printz* is irrelevant because it applies to Congress's exercise of authority under the Commerce Clause, not the Elections Clause. *See supra.*

B. The Historical Record Confirms that the Elections Clause Applies to Regulations of Voter Registration.

To justify his request that this Court disregard the U.S. Supreme Court precedent that binds it, Defendant resorts to a revisionist history of the Elections Clause to argue that for nearly 150 years, the Court has got it wrong. On his telling, the Clause does not "mean what it says," *cf. Inter Tribal Council*, 570 U.S. at 15, but instead extends only to "the procedures by which *votes* are registered, tallied, and reported on Election Day," Br. at 41 (emphasis in original). But the Supreme Court has rejected this unduly narrow understanding of the Elections Clause for as long as it has had occasion to interpret it. And that is consistent with a proper understanding of founding era materials, which confirm that the Elections Clause grants Congress plenary authority to determine "*how* federal elections are held." *Inter Tribal Council*, 570 U.S. at 16 (emphasis in original). Congress's authority in that regard is "comprehensive," and empowers it to legislate as "necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366. To do so, Congress "unquestionably" has an interest in "protecting the integrity and reliability of the electoral process"—precisely the interests the

NVRA's non-disclosure provision serves. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191-92 (2008) (plurality opinion).

1. Under binding Supreme Court precedent, Congress has comprehensive authority to regulate the manner of federal elections.

The Supreme Court recognized the Election Clause's capacious breadth as early as 1879 when it explained that Congress, "if it [saw] fit, [could] assume the entire control and regulation of the election of representatives . . . and every other matter relating to the subject." *Ex parte Siebold*, 100 U.S. at 396. The "power of Congress" to regulate the manner of elections, it added, "is paramount, and may be exercised at any time, and to any extent which it deems expedient." *Id.* at 392. The Court expanded on the breadth of Congress's authority under the Clause in *Smiley*, deeming it so extensive that its opinion warrants excerpting extensively as well:

> [The Clause grants Congress] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, *registration*, supervision of voting, protection of voters, *prevention of fraud and corrupt practices*, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved . . . . All this is comprised in the subject of 'times, places and manner of

> holding elections,' and involves lawmaking in its essential features and most important aspect.

285 U.S. at 366 (emphasis added). The Court endorsed this reasoning most recently in *Inter Tribal Council*, where Justice Scalia explained that "[t]he Clause's substantive scope is broad," and approvingly quoted *Smiley* for the proposition that the Clause's "comprehensive words," include "regulations relating to 'registration.'" 570 U.S. at 8-9.

Defendant makes no serious attempt to reconcile his position with these precedents. Instead, he relies principally on the portion of a plurality decision in *Branch* which he admits a "majority of the Court declined to join." Br. at 42 n.7. He then reverts to *U.S. Term Limits*, but there the Court merely reaffirmed that states may not "evad[e] the dictates of the Qualifications Clauses." 514 U.S. at 835. Finally, he concedes that under *Inter Tribal Council*, Congress may set "regulations relating to registration," but then advances the inexplicable argument that requiring states "to maintain certain records *related to voter registration* and to disclose those records to the public"—his words—somehow does not *relate to registration*. Br. at 43 (quoting *Inter Tribal Council*, 570 U.S. at 9) (emphasis added).

That is wrong. It hardly requires explaining that the NVRA's Public Disclosure Provision, which Defendant concedes requires disclosing "records related to voter registration," Br. at 43, is a "regulation[] relating to 'registration,'" *Inter Tribal Council*, 570 U.S. at 9 (quoting *Smiley*, 285 U.S. at 366). After all, Congress passed the NVRA to "increase the number of eligible citizens who register to vote" in federal elections and to "protect the integrity of the electoral process." 52 U.S.C. § 20501. The Public Disclosure Provision serves these twin aims by (1) preventing "administrative chicanery, oversights, or inefficiencies" in voter registration from disenfranchising eligible voters and (2) "assist[ing] the identification of both error and fraud in the preparation and maintenance of voter rolls." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335, 339 (4th Cir. 2012). The public disclosure provision is thus squarely "related to registration" and within Congress's Elections Clause power under *Inter Tribal Council*.

2. Founding era sources confirm Congress's broad power to regulate the manner of elections.

Rather than engage with Supreme Court precedent, Defendant hangs his hat on a selective assembly of founding era sources which he believes show the Supreme Court has misunderstood the Clause's scope.

That argument, of course, can only be brought another day in a different court. But the Court's century-old understanding of the Clause reflects the original understanding as well. The Clause was meant to vest Congress with the ability to ensure its self-preservation by granting it broad authority over the conduct of federal elections.

Start with the Clause's original public meaning. As Defendant suggests, the original public meaning of the word "manner" in the Elections Clause was tantamount to the understanding of the same term under British and other Western European regimes. *See* Br. at 44. What Defendant omits, however, Br. at 41 (citing Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 11-12 (2010)), is that the "English, Scottish, and Irish sources used the phrase 'manner of election'" much more expansively than Defendant would like:

> it "encompass[ed] the times, places, and mechanics of voting; legislative districting; *provisions for registration lists*; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision,"

Natelson, *supra*, at 12 (emphasis added); *accord id.* at 44 ("manner" "conferred authority over voter registration" and various other election-related provisions). Calling upon states to provide voter registration lists

would thus have been a paradigmatic application of the Clause as originally understood.[14]

Founding era dictionaries only reinforce the point. Defendant may be right that "manner" and "method" were used interchangeably at the founding, Br. at 41, but that merely begs the question of defining "method." The only source Defendant provides offering such a definition is his citation to Professor Natelson, Br. at 41, who, as just discussed, offers a far more capacious definition of the term than Defendant admits, and who explained that the term squarely covered laws related to voter registration lists, Natelson, *supra*, at 12, 44.

What's more, Defendant's preferred dictionary defines "method" "in the largest sense," and explains that the term involves "performing several operations in such an order as is most convenient to attain some end." Samuel Johnson, A Dictionary of the English Language (1755), https://johnsonsdictionaryonline.com/views/search.php?term=method

[14] Defendant's protestation that "[n]o State required voters to register for any election at the time of the Convention" is unavailing. Br. at 43. As Madison explained, chartering the Elections Clause with "words of great latitude" was necessary because it "was impossible to foresee all the abuses that might be made [by states] of the discretionary power." Wilbourn E. Benton, 1787: *Drafting the U.S. Constitution* 647 (1986).

(first definition). By way of example, it refers to Locke's famous writings on "method[s]" of education, *id.* (third example), which, of course, were concerned with developing a pedagogical theory for educating the mind that extended far beyond the mechanics of operating a schoolhouse, *see generally* John Locke, *Some Thoughts Concerning Education* (1693). The Clause's original public meaning is thus far broader than Defendant contends.

The Clause's original purpose and historical context confirm that the Framers understood "manner" more broadly than Defendant. The animating philosophy behind the Clause was "that every government ought to contain in itself the means of its own preservation." The Federalist No. 59 (Alexander Hamilton); *see* Natelson, *supra*, at 35-35 (describing this as the "decisive argument" in state ratification debates); 3 Joseph Story, *Commentaries on the Constitution of the United States*, ch. 11 §§ 814, 823 (1833) (similar). Thus, Hamilton wrote, "[n]othing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." The Federalist No. 59. Indeed, the framers understood that reserving for Congress broad

powers to regulate elections was necessary to the very "permanence of the Union." Story, *supra*, at § 814. Thus, in "the only recorded speech of any length at the Convention on the Elections Clause"—where the clause met with little controversy—James Madison offered a generous interpretation of the Clause as containing "words of great latitude." Note, Kevin K. Green, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. Legis. 45, 51 (1996) (quoting 1 Wilbourn E. Benton, 1787: Drafting the U.S. Constitution 647 (1986)).[15]

Although "the Elections Clause was essentially uncontroversial at the 1787 Constitutional Convention," Note, Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021,

[15] Contrary to Appellants' suggestion, Madison did not view "manner" as limited only to procedures like "[w]hether the electors should vote by ballot or vivâ voce." Br. at 42-43. Madison's full quote reads: "The necessity of a general government supposes that the state legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices. . . . Whether the electors should vote by ballot, or vivâ voce, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district, —these, *and many other points*, would depend on the legislatures, and might materially affect the appointments." 5 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401 (1836) (emphasis added).

1031 (2005), Appellants correctly observe that antifederalist state ratifying conventions—who were "*opponents* of the Constitution"—greeted the Clause's grant of federal oversight with resistance, Br. at 44-45 (emphasis added). Antifederalists feared that Congress might abuse its authority under the Clause to entrench and expand its power by manipulating elections. *See* Natelson, *supra*, at 27-29; Greene, *supra*, at 1036. Federalists, of course, harbored the inverse fear that "state legislatures might run amok if left in unchecked control of federal elections." Natelson, *supra*, at 34. In the end, though, it was Hamilton's original argument that carried the day: the "Clause was needed to enable Congress to preserve its own existence." *Id.* at 35. Next to this, as Justice Story later recounted, the antifederalist "objections . . . to the provision [were] not sound, or tenable." Story, *supra*, at § 823. Thus, despite the antifederalists' objections, the numerous amendments they offered—and of which Appellants make hay—uniformly failed. *See* Greene, *supra*, at 1039; Green, *supra*, at 55-56; Story, *supra*, at § 825. As a result—and consistent with its original public meaning and Hamilton and Madison's explanations—the Clause was ultimately enacted with its broader scope preserved.

All told, the upshot of the historical record is that the Elections Clause was designed—and ratified—with the central aim of granting the federal government authority to control its own destiny by retaining broad authority over how to conduct federal elections. As the Convention delegates recognized, Story, *supra*, at § 823; Greene, *supra*, at 1032, and the Supreme Court has repeatedly affirmed, Congress's authority to promote uniform voter registration and prevent election fraud are necessary components of its power of self-preservation, *Smiley*, 285 U.S. at 366; *Ex parte Yarbrough*, 110 U.S. 651, 657, 661-63 (1884); *Inter Tribal Council*, 570 U.S. 1, 8–9. Indeed, the proposition that "a government whose essential character is republican . . . has no power by appropriate laws to secure this election from the influence . . . of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration." *Ex parte Yarbrough*, 110 U.S. at 657.

The NVRA was enacted to promote access and integrity in federal elections—two purposes central to Congress's plenary authority to dictate how federal elections are conducted. The Public Disclosure Provision vindicates those interests by preventing "both error and fraud" in the voter registration process. *See Long*, 682 F.3d at 339. Indeed, the

stated purpose of the lion's share of Section 8 plaintiffs is either to remedy registration errors[16] or reduce fraud,[17] demonstrating that the provision is serving its intended purpose. The non-disclosure provision thus falls squarely within the scope of the Election Clause's guarantee that Congress will retain the authority to regulate the "manner" of federal elections.

CONCLUSION

The Court should affirm the district court's final judgment.

Date: August 25, 2022

Respectfully submitted,

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[16] *See, e.g.*, *Long*, 682 F.3d at 333; *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1329 (N.D. Ga. 2016).

[17] *See, e.g.*, *PILF*, 996 F.3d at 259-60 (4th Cir. 2021); *Illinois Conservative Union v. Illinois*, No. 20 C 5542, 2021 WL 2206159, at *2 (N.D. Ill. June 1, 2021); *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 429 (D. Md. 2019); *Boockvar*, 431 F. Supp. 3d 553, 555 (M.D. Pa. 2019); *Am. Civil Rights Union v. Snipes*, No. 16-CV-61474, 2017 WL 5160158, at *1 (S.D. Fla. Mar. 27, 2017); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 705 (S.D. Miss. 2014).

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2022 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

/s/ *Danielle M. Lang*
Danielle M. Lang

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August 25, 2022

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No. 22-50692 Campaign Legal Center v. Scott
USDC No. 1:22-CV-92

Dear Ms. Lang,

We have determined that your brief is deficient (for the reasons cited below) and must be corrected **immediately**. We note that our Quality Control Program advised you of this deficiency when you filed the document.

A **Statement Regarding Oral Argument** is missing/misspelled or includes additional text, etc. A Statement of Oral Argument is required. See 5TH CIR. R. 28.2.3.

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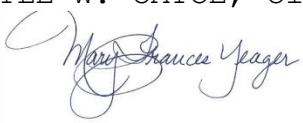

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No. 22-50692 Campaign Legal Center v. Scott
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Dear Ms. Lang,

We have determined that your brief is sufficient.

You must submit the 7 paper copies of your brief required by **5TH CIR. R.** 31.1 You must submit the 7 paper copies of your brief required by **5TH CIR. R.** 31.1 **via overnight delivery** pursuant to 5th Cir. ECF Filing Standard E.1.

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