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

PLAINTIFF-APPELLEES' OPPOSITION TO DEFENDANT-APPELLANT'S EMERGENCY MOTION FOR A STAY PENDING APPEAL OF PERMANENT INJUNCTION

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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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INTRODUCTION

In August of 2021, Defendant Secretary of State Scott relaunched a list maintenance program that relies on citizenship data obtained from Texas's driver's license agency—a practice that has historically targeted naturalized citizens. Plaintiffs, who represented clients who successfully sued over the prior iteration of this program, received notification of the program's relaunch pursuant to the terms of the settlement resolving those lawsuits. To confirm Defendant's new program complies with the settlement and does not discriminate against eligible naturalized U.S. citizens, Plaintiffs submitted records requests under the National Voter Registration Act ("NVRA") seeking the lists of voters identified through the new purge program. Defendant refused to provide these records.

This case presents the straightforward question of whether Plaintiffs are entitled to these records under the NVRA. They are. Further, Plaintiffs have not sought any sensitive data about these voters and the order below authorized Defendant to redact any personal data

not available in the public voter file. As such, Defendant's invocation of third-party privacy interests fails. The Court should deny the stay.

BACKGROUND

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). 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 enables the public to monitor states' compliance with the NVRA and ensure list

maintenance activities are "uniform and nondiscriminatory." *Id.* 20507(b)(1).

II. The 2019 Purge Program

In January 2019, the Texas Secretary of State's office announced a voter purge program that, while ostensibly aimed at identifying non-citizens on the rolls, in practice, targeted naturalized citizens. The program used data from the Department of Public Safety ("DPS") to (1) 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 unless they provided documentary proof of citizenship. ECF 55 at 2.

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), ECF 61 at 2. 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. *Id.* at 1-2; *see also* ECF 55 at 2-3.

After a series of lawsuits brought by Plaintiffs on behalf of affected Texans and civic engagement organizations, Defendant entered into a settlement ending the 2019 program and limiting Texas's future use of DPS citizenship data in list maintenance. ECF 50-1 at 9. Under the settlement, Defendant cannot use DPS records to initiate removal unless a person provided documentation showing non-U.S. citizenship to DPS *after* registering to vote. *Id.* (codified at Tex. Elec. Code § 16.0332(a-1)).

III. The 2021 Purge Program

In August 2021, Defendant notified Plaintiffs that he was restarting the purge program, purportedly in compliance with the settlement. ECF 50-1 at 31. Under the settlement, Defendant was required to inform Plaintiffs of the number of voters identified as potential non-U.S. citizens at the start of any new program. *Id.* at 9. As of mid-September 2021, Defendant informed Plaintiffs he had identified 11,246 potential non-U.S. citizens under the new program—11,197 out of

the initial dataset and 49 matches over the first three weeks of the program. *Id.* at 31, 34.

As of January 14, 2022, only 278 voters flagged under the new program had been confirmed to be non-U.S. citizens (less than 2.5%), ECF 17 at ¶ 34, but thousands have had their voter registrations cancelled. ECF 50-1 at 37-69.

IV. Procedural History

Pursuant to the NVRA's Public Disclosure Provision, Plaintiffs sought lists of the 11,246 voters initially identified through the new program. ECF 55 at 4. Defendant denied the requests. Plaintiffs, after giving proper notice, filed suit. *Id.*

After a bench trial, the district court found (1) that Plaintiffs have standing to seek the records; (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. ECF 55. The 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. ECF 56.[1] The order allows Defendant to "redact any portions of the personally identifying information that is redacted from the publicly available voter file." *Id.*

STANDARD OF REVIEW

In assessing whether to grant the "extraordinary remedy" of a stay, this Court considers: "(1) whether the applicant has made a strong showing of likelihood to succeed on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of a stay will substantially injure other interested parties; and (4) where the public interest lies." *Texas v. United States*, 40 F.4th 205, 215 (5th Cir. 2022) (internal citations omitted). Defendant's burden is a "substantial one," *id.*, because a stay is an "intrusion into the ordinary processes of administration and judicial review," and accordingly "is not a matter of right, even if irreparable injury might otherwise result," *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citations omitted).

[1] Defendant has already provided Plaintiffs with the remaining information ordered by the Court. *See* ECF 56 at 6 n.3, 17.

ARGUMENT

The Court should deny Defendant's Emergency Motion for a Stay Pending Appeal ("Mot.). He is unlikely to succeed on the merits of his appeal and the balance of the equities favors immediate disclosure of the relevant records to Plaintiffs.

I. Defendant is Unlikely to Succeed on Appeal.

Defendant is not likely to succeed on appeal because Plaintiffs have standing to seek the requested records and those records fall squarely within the NVRA's Public Disclosure Provision.

A. 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. But even if Plaintiffs were required to show more, they met their burden of proof.

1. Plaintiffs Suffered an Injury in Fact when Defendant Refused to Produce Information to which Plaintiffs are Statutorily Entitled.

"[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). Where Congress creates a specific right to information, a plaintiff denied that information "need not allege any additional harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 568 U.S. 330, 342 (2016); *see also Public Citizen v. DOJ*, 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").

Courts have routinely found that "the NVRA provides a public right to information," *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." *Ill. Conservative Union v. Illinois*, No. 20-cv-05524, 2021 WL 2206159 at *4 (N.D. Ill. June 1, 2021). To establish standing, a plaintiff must simply show she made "a proper request for information," *Public Interest Legal Foundation, 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 relevant notice provision.

The undisputed record shows that (1) Plaintiffs sought the requested records pursuant to the NVRA's Public Disclosure Provision, ECF 50-1 at 71, 87; (2) Defendant refused to provide the requested records, *id*. at 77, 91; and (3) Plaintiffs complied with the NVRA's notice requirements before filing suit, ECF 50-1 at 82, 96. As such, Plaintiffs have standing to bring this suit.

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—who did not assert or brief any informational injury and conceded that they had all the information they were entitled to—had informational standing to seek damages against a credit reporting agency for incorrectly-formatted 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 NVRA, which *is* "a public disclosure or sunshine law[] that entitle[s] 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 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.").

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 have satisfied their burden to prove standing.

2. 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. Defendant merely complains that Plaintiffs did not introduce direct evidence of the harms via declaration or testimony and therefore forfeit any claim to standing. Mot. at 14, 16. 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), Plaintiffs easily clear that bar through documentary evidence in the record.[2] *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").

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[2] Defendant's misleading assertions notwithstanding, Plaintiffs neither declined to produce evidence of standing, nor "forfeited" the argument below. *Cf.* Mot at 7, 14. After Defendant raised questions about Plaintiffs standing for the first time at trial, Plaintiffs promptly offered to submit additional evidence or briefing if necessary, including by live testimony that day. *See* Tr. at 46:10-15; Tr. at 53:24-54:3.

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, *see* ECF 1, ¶ 2, 50, because Defendant's refusal to produce records of the individuals identified under the voter purge program would deny them the "opportunity to identify eligible voters improperly flagged" by the purge program. ECF 55 at 7.

The undisputed record demonstrates that such information would also assist Plaintiffs in determining whether Defendant has violated the 2019 settlement, *see* ECF 50-1 at 8, and whether by intentionally targeting registered voters on the basis of national origin, Defendant is denying eligible voters the right to vote and unduly burdening naturalized voters. Plaintiffs are "nonprofit organizations that litigate voting rights cases," Mot. at 5, and have a demonstrated history of bringing such cases *against Defendant*, including *Whitley*. *See* ECF 50-1 at 8; ECF 55 at 2-3; *see also Whitley*, 2019 WL 7938511.[3] And the

[3] 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. ECF 50-1 at 20. Plaintiffs' clients also reserved their right, and their counsel's right, to file legal

undisputed evidence shows that the program continues to sweep in lawfully registered naturalized citizens. *See*, *e.g.*, ECF 50-1 at 36; ECF 55 at 4-5. Defendant cannot seriously contend that identifying voters subject to purge 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—supports a finding that this is more likely than not 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.

B. Defendant Is Unlikely to Succeed on the Merits.[4]

1. The Requested Records Are Not Exempt from the NVRA's Public Disclosure Requirements.

The district court correctly determined that Defendant is not entitled to withhold voter names and ID numbers under the law enforcement investigative privilege.

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challenges to any renewed program targeting voters based on national origin using DPS data and to enforce the settlement agreement in federal court. *Id*.

[4] Defendant contends his remaining arguments raise "serious legal question[s]," Mot. at 17-19. Presenting a serious legal question is

This Court has only applied investigative privilege 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)). The record shows there is no ongoing criminal investigation. The Director of the Elections Division, Keith Ingram, testified that Defendant has made no referrals for criminal investigation based on these records. *See* ECF 50-1 at 113. Mr. Ingram's declaration establishes that these are list maintenance records, not criminal investigation records, explaining that "[a] person's mere presence" on the requested records does not indicate "that the person engaged in criminal conduct." *Id.* At the very most, the requested documents pertain to "people who *merely are suspected of a violation* without being part of an ongoing criminal investigation," and are therefore not subject to investigative privilege. *In re U.S. Dep't of Homeland Sec.*, 459 F.3d at 571.

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sufficient for a stay in only a "limited subset of cases" where "the balance of equities weighs *heavily* in favor of granting a stay." *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020). As explained *infra*, the balance of equities here weighs in Plaintiffs' favor. In any event, Defendant fails to raise any serious legal questions, let alone meet his substantial burden to demonstrate a likelihood of success.

Nor has Defendant treated the requested records as privileged. *See* ECF 50-1 at 117. Rather, Defendant provided the records to county officials and instructed them to notify listed individuals that their registration status is under review—a far cry from a criminal investigation where the government prioritizes secrecy as it develops its case. Further, several counties provided Plaintiffs with piecemeal components of this data in response to open record requests. *See* ECF 50-1 at 37-69 (redactions added by Plaintiffs). The data requested is not confidential data related to an ongoing criminal investigation, but rather commonplace list maintenance data available to election officials in all 254 counties.

Defendant's reliance on *Public Interest Legal Foundation, Inc. v. N.C. Bd of Elec.* (*PILF*) is inapposite. *See* Mot. at 17 (citing 996 F.3d 257 (4th Cir. 2021) (*PILF*)). The *PILF* plaintiffs sought documents that were related to "sealed criminal investigations" where the United States Attorney's Office had subpoenaed the State Board of Elections for registration records to be used in grand jury proceedings. *PILF*, 996 F.3d at 262, 266–67. Here, there is *no* ongoing criminal investigation. And even in that extraordinary case, the Court held the criminal

investigations did "not render the requested documents affiliated with potential noncitizens immune from disclosure" under the NVRA, *id.* at 265, 267, but rather required 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' right to the records is far stronger here, where Defendant admits that there are no active criminal investigations underway.[5]

[5] The Secretary mentions in passing his assertion that the NVRA does not preempt state public records laws or the Driver's Privacy Prevention Act ("DPPA"). Mot. at 1. The Secretary did not invoke any public record disclosure exemptions under state law below, as such this argument is waived. *See Celanese Corp. v. Martin K. Eby Const. Co.*, 620 F.3d 529, 531 (5th Cir. 2010). Further, both the Supreme Court and this Court have held that the NVRA preempts state law when the two are in 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).

The DPPA's prohibition against *state motor vehicle departments'* disclosure of personal information similarly does not excuse Defendant of his NVRA obligations. Defendant has already voluntarily disclosed the only part of the requested records that comes from DPS, *see* ECF 55 at 6 n.3, 17. And voter names and voter ID numbers are routinely disclosed by the Secretary, even when registration occurs at DPS. *See infra* n.6; Tr. at 48:6-10. Finally, Plaintiffs are entitled to the Requested Records under the DPPA exception for "investigation in anticipation of litigation." 18 U.S.C.A. § 2721(b)(4).

2. Defendant's Refusal to Produce the Requested Records Violates the NVRA.

Defendant contends, unsupported by any authority, that "public inspection" under the NVRA does not include electronic transmission. Mot. at 17-18. But courts have consistently presumed that "disclosure" under the NVRA requires the production of the records at issue. *See, e.g.*, *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014) (finding disclosure satisfied by electronic production of the requested records); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1349 (N.D. Ga. 2016) (finding that "making available" required actual production of the requested records, including electronic records).[6]

Defendant concedes that the requested records are kept electronically. Tr. at 43:23-44:2. There is no reason why Defendant cannot produce records for inspection in the same manner they are kept in the usual course of business and produced in other contexts. *See supra*

[6] Defendant asserts, for the first time on appeal, an unsupported security concern regarding electronic transmission. Mot. at 6. Had the Secretary raised this below, Plaintiffs would have noted that his purported concerns are belied by his regular practice of mandating that such records be transmitted electronically, including by FTP as was requested here. *See, e.g.* Voter Registration Public Request Form, Tex. Sec'y of State, https://www.sos.state.tx.us/elections/forms/pi.pdf. Regardless, the argument is waived. *Celanese Corp.*, 620 F.3d at 531.

n.6. The NVRA imposes no limit on the means by which Defendant should make records available for inspection. 52 U.S.C. § 20507(i). In contrast, Defendant's reading of the statute would frustrate its stated purpose "of ensuring the accuracy and currency of official lists of eligible voters." *Id*. This unduly cramped view is not supported by any case law and is unlikely to be meritorious. *See* Tr. at 36:5-7 (Defendant's counsel conceding "we're not suggesting that this is the actual stumbling block in this case").

3. Defendant Is Unlikely to Succeed on His Anticommandeering Argument.

Finally, Defendant is not likely to succeed on his assertion that the NVRA's public disclosure provision violates the anticommandeering doctrine. The provision is a proper exercise of Congress's enumerated powers under the Elections Clause, "to pre-empt state regulations governing" federal elections, *Arizona v. Arizona Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8, (2013), including laws related to voter registration, *id.* at 9 (*citing Smiley v. Holm*, 285 U.S. 355, 366 (1932)). *See also 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).

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 Arizona Inter Tribal*, 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 applies only to exercises of legislative power in areas that have been reserved to 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.

Other than *Branch*, which undermines rather than supports his claim,[7] Defendant does not identify a single case applying the anticommandeering doctrine in the Elections Clause context. Instead, he criticizes the precedent supporting Plaintiffs as too "recent," *see* Def's Opp. to Mot. for Prelim Inj. at 11-12, ECF 27, or too "moribund," Mot. at 9. 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. Nor is Plaintiff aware of any factual or legal basis for Defendant's assertion that the Public Disclosure Provision, which regulates state registration activities by ensuring they are transparent, does not fall within Congress's enumerated authority under the Elections Clause. *Cf.* 52 U.S.C. § 20507 (imposing public disclosure as a "regulation[] with respect to the administration of voter registration."). Rather, the Supreme Court has consistently recognized Congress's power to regulate elections, including with respect to registration, and including by requiring states to produce

[7] 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." 538 U.S. 254, 280 (2003) (plurality op.).

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 includes the right "to examine [state officials] personally and inspect all their proceedings and paper"); *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); *Arizona Inter Tribal*, 570 U.S. at 9 *(quoting Smiley*, 285 U.S. at 366, in finding that the Elections Clause embraces "regulations relating to 'registration'"*)*.

Defendant does not raise a serious question and is unlikely to succeed on his assertion that the NVRA's Public Disclosure Provision violates the anticommandeering doctrine.

II. The Balance of Equities Weighs in Favor of Disclosure.

A. Defendant Cannot Establish Irreparable Harm.

Defendant's disclosure of voter names and ID numbers will not cause him irreparable harm, nor any injury that outweighs the harm to Plaintiffs and the public of continued obfuscation.

First, the presumption of irreparable harm in cases enjoining state statutes does not apply here. Plaintiffs do not challenge, and the district

court did not enjoin, any state statute. Defendant's reliance on cases involving challenges to state election statutes, *e.g.*, Mot. at 2, is inapposite.

While Defendant contends that disclosure would violate Texas Election Code § 31.006, that statute only covers documents "indicating that criminal conduct in connection with an election has occurred[.]" Tex. Elec. Code § 31.006(a). But Defendant has not referred *anyone* for criminal investigation based on these lists. *Id.* ¶ 12. Indeed, Director Ingram expressly rebutted any assertion that these documents indicate criminal conduct. ECF 27-1 ¶ 15 ("A person's mere presence on [list] does not by itself prove . . . that the person engaged in criminal conduct.").

Moreover, the statute does not provide any affirmative protection from disclosure under the NVRA; it merely withholds covered documents from designation as public information under Texas public records law. Tex. Elec. Code § 31.006(b). That is likely why Defendant *did not argue* below that Texas Election Code § 31.006 bars disclosure. *See* ECF 27 at

9-14. Any such argument here is waived. *See Celanese Corp.*, 620 F.3d at 531.

Second, the district court's order below is narrow and unexceptional; it does not require disclosure of "sensitive," "invasive," or "confidential," Mot. at 4-5, personal data. The *only* information to be disclosed are names and voter identification numbers. ECF 55 at 6 n.3, 17. Defendant routinely sells this information, along with other personally identifiable information in the voter file (including addresses and date of birth), to members of the public. *See* Tr. at 48:6-10; *see also supra* n.6. Therefore, the records at issue here are *already* available to the public. The only information Defendant is withholding is which registered voters he has targeted for removal based solely on national origin. In other words, the only data Defendant is concealing is the information the Public Disclosure Provision is aimed at bringing into the sunlight.

The record further belies Defendant's alleged concerns about privacy. Defendant sent the data to counties, asked them to act on it to begin the removal process. His advisory did not instruct counties to keep this list maintenance data confidential. As such, numerous counties

released the requested data at the county level to Plaintiffs. ECF 55 at 10. This Court should not allow Defendant to hold up a fig leaf of concern for the individuals targeted by his purge program to evade the public scrutiny that could protect those individuals from unlawful discrimination and removal from the rolls.[8]

Finally, Defendant attempts to bolster his equities argument by arguing that once the "cat is out of the bag," any "eventual victory on appeal would come too late to prevent harm." Mot. at 11. But, of course, any time a litigant is forced to comply with a court order pending appeal, the litigant will allege harm in the intervening period. And yet, a stay is an "extraordinary remedy," not granted as a matter of course.[9] Absent a stay, Defendant will not "effectively . . . be deprived of his right to appeal."

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[8] Defendant has not, and could not, put forward any evidence that Plaintiffs intend to use this information to harass, embarrass, or harm individuals targeted by this program. If this Court is inclined to grant Defendant any relief—it should not, *see supra*—that relief should be tailored to Defendant's alleged but unsubstantiated privacy concerns by ordering Plaintiffs not to disclose personally identifying information to third parties outside their control until this appeal is resolved.

[9] The attorney-client privilege cases Defendant relies upon do not support his position. Even in attorney-client privilege cases—where the irreparable harm of disclosure to a litigant is far more evident—relief is only available where the merits of the motion are "clear and indisputable." *In re E.E.O.C.,* 207 F. App'x 426, 429 (5th Cir. 2006).

Mot. at 2. If Defendant prevails in his appeal, he will still reap the benefit of a reversal of the district court's declaratory judgment and the ability to shield identical records from disclosure going forward.

B. Plaintiffs Will Be Substantially Harmed by a Stay.

Congress enacted the NVRA and the Public Disclosure Provision to ensure states maintain their voter rolls in "uniform, nondiscriminatory" ways. *See* 52 U.S.C. § 20507. For nearly a year, Defendant has denied Plaintiffs transparency into his list maintenance activities. A stay would perpetuate the Secretary's obstruction of public scrutiny and deny Plaintiffs the opportunity to determine why the DPS match mis-identifies naturalized citizens. *See supra* at 5.

Thousands of registrants have already been removed from the rolls under this program. If their removal was improper but Defendant's wrongdoing is left undiscovered and unremedied, they may unlawfully be denied their right to vote in the upcoming 2022 elections. Further, while the NVRA prohibits the Secretary from continuing his program at present, he is permitted to resume the program on November 9, 2022. *See* 52 U.S.C. § 20507(c). Plaintiffs require sufficient time to evaluate the accuracy of the Secretary's list maintenance activities before they

resume. A stay for the duration of a standard appeal timeline would further harm Plaintiffs and Texas voters by allowing the Secretary's voter purge program to continue without the transparency or oversight intended by the NVRA.

C. The Public Interest Favors Disclosure.

"The public interest is a uniquely important consideration in evaluating a request for [a stay]" under a public disclosure law. *In re Special Proceedings*, 840 F. Supp. 2d 370, 376 (D.D.C. 2012). In such cases, "the powerful public interest in disclosure renders a stay inappropriate." *WP Co. LLC v. U.S. Small Bus. Admin.*, No. CV 20-1240 (JEB), 2020 WL 6887623, at *3 (D.D.C. Nov. 24, 2020). Only with the requested records can the public conduct a "meaningful evaluation" of the 2021 Voter Purge Program, which has already affected the registration of thousands of potentially eligible voters. *Id*. Plaintiffs' concerns "are far from hypothetical." *Id*. They are based on the Secretary's past behavior and current reporting from county election officials and news outlets alike. *See, e.g.*, ECF 55 at 4-5. And, given the already considerable delay in public access to the records and the upcoming election cycle, the public need for these documents is urgent. Courts have repeatedly denied stays

of disclosure where the public interest in the records is time-sensitive. *See*, e.g., *Leadership Conf. on Civ. Rights v. Gonzales*, 421 F. Supp. 2d 104, 110 (D.D.C. 2006); *Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Grp.*, 230 F. Supp. 2d 12, 16 (D.D.C. 2002). Thus, "the overriding public interest against a stay — along with the harm that it would generate — renders such relief inappropriate here." *WP Co. LLC*, 2020 WL 6887623, at *3.

CONCLUSION

For the foregoing reasons, the Court should deny the stay.

Date: August 11, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 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*
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