IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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; and DEMOS A NETWORK FOR IDEAS AND ACTION, LTD., Plaintiffs, v. JOHN B. SCOTT, in his official capacity as Secretary of State of the State of Texas, Defendant.	Civil Action No. 1:22-cv-00092

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR A STAY PENDING APPEAL

INTRODUCTION

Defendant Scott seeks to stay this Court's final judgment pending his appeal of the same. On August 4, 2022 Defendant Scott filed a notice of appeal. On August 8, 2022 he filed a motion with the Fifth Circuit seeking to stay this Court's final judgment pending his appeal, which Plaintiffs opposed on August 11, 2022. On August 12, 2022—immediately before Plaintiffs intended to file this brief—the Fifth Circuit issued an order carrying the motion with the case, granting an administrative stay, and ordering the case assigned to the next available oral argument panel. As such, this Court need not address the question of a stay.

If this Court does address Defendant's motion, it should be denied because Defendant is unlikely to succeed on his appeal and the balance of equities weighs in favor of Plaintiffs.

LEGAL STANDARD

In assessing whether to grant the "extraordinary remedy" of a stay, courts must consider: "(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).

I. Defendant Is Not Likely to Succeed on Appeal.

This Court correctly found that Defendant's failure to provide Plaintiffs with names and voter ID numbers of registered voters he has targeted for potential removal from the rolls based on national origin violates the NVRA. To avoid duplication, Plaintiffs incorporate by reference their

prior briefing on this issue, as well as the evidentiary record and trial transcript. ECF 20, 34, 50-1, 51.

Defendant contends he is likely to succeed on appeal because this Court erred in determining that Plaintiffs have standing. This argument was raised for the first time at trial, and briefed for the first time in Defendant's motion for a stay. As such, Plaintiffs address it again here.

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

A. 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*, thus this Court "remain[s] 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 . . . [courts] must follow the former."); *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 [lower courts] 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 have 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. 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 3. 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.[1] *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").

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 have a demonstrated history of bringing voting rights cases against Defendant, including *Whitley*. *See* ECF 50-1 at 8; ECF 55 at 2-3; *see also Whitley*, 2019 WL 7938511.[2] And the 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

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[1] 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.

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

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.

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, while Defendant contends that disclosure would "inhibit" the SOS's ability to comply with its obligations under 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 Defendant relies on 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). Finally, Defendant has asserted that releasing this information "could discourage individuals from submitting election complaints to the SOS," but does not explain how releasing the identities of individuals identified through a list maintenance matching process has any bearing on such individuals, and such speculative harms do not justify a stay.

Second, this Court's order is narrow and unexceptional; it does not require disclosure of sensitive or "confidential" personal data. *Cf.* Mot. at 6. 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. 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 NVRA's public disclosure provision explicitly brings into the sunlight.

The record further belies Defendant's alleged concerns about privacy and harassment. 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, and presumably would do the same for other requestors. 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.[3]

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 6. 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,"

[3] 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. His reliance on vague, conjectural, and unsubstantiated "concerns" that "some" unidentified individuals" "could" be subject to "possible harassment" does not justify a stay.

not granted as a matter of course.[4] Absent a stay, Defendant will not "effectively . . . be deprived of his right to appeal." Mot. at 6. 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. Further, although Defendant assert that disclosing the requested information

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

[4] 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).

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 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically (via CM/ECF) on August 12, 2022 and all counsel of record were served by CM/ECF.

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