No. 22-50692

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

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

APPELLANT'S REPLY BRIEF

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Introduction

Plaintiffs claim not to be bound by the binding Supreme Court precedent that *even the district court* applied to this case and fail to identify any record evidence supporting their asserted standing. Plaintiffs theorize no cognizable injury on the existing record because litigating speculative future claims on behalf of unidentified putative clients fails under this Court's precedent.

Alternatively, Plaintiffs' claim fails on the merits. Plaintiffs seek to obtain from the Secretary the identities of individuals registered to vote despite being potentially ineligible as noncitizens. The National Voter Registration Act of 1993 (NVRA) does not require such disclosure in the face of state- and federal-law protections maintaining the confidentiality of the information that Plaintiffs seek.

Finally, the NVRA's public-disclosure requirement, as read by Plaintiffs, commands State elections officials to produce records to private entities in any manner of Plaintiffs' choosing. This runs headlong into the anticommandeering doctrine. Plaintiffs cannot avoid this result by citing the Elections Clause, U.S. Const. art. I, § 4, cl. 1, because the NVRA's public-disclosure provisions do not regulate the time, place, or manner of holding an election.

Argument

I. Plaintiffs Lack Standing.

Plaintiffs do not dispute their burden to adduce evidence proving standing by a preponderance of the evidence. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561

(1992). Plaintiffs lack the required injury-in-fact: they have not "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). Absent standing, dismissal was required because the district court lacked subject-matter jurisdiction.

A. Merely asserting a legal injury under the NVRA is insufficient to establish an injury-in-fact.

Plaintiffs lack an injury-in-fact. *Contra* Resp.15-20. In 2021, the U.S. Supreme Court confirmed in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), that a plaintiff must show not only a *legal* injury, but also a concrete and particularized injury-in-fact. Plaintiffs contend that they "have standing because the NVRA grants them the right to obtain records related to list maintenance activities and Defendant has denied them those records." Resp.15. But that argument fails for several reasons.

First, Circuit precedent forecloses Plaintiffs' argument. Just last week, this Court applied *TransUnion* to reject similar reliance on mere allegations of a statutory violation to confer standing. "*TransUnion* is clear: A plaintiff always needs a concrete injury to bring suit, and injuries are concrete only if they bear a 'close relationship' to injuries that courts have traditionally recognized as concrete." *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, No. 21-50958, ___ F.4th ___, 2022 WL 3355249, at *3 (5th Cir. Aug. 15, 2022). *TransUnion* "forecloses" the theory that a bare statutory violation confers standing. *Id.* at *4. *TransUnion* "explicitly held that 'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Id.* (quoting *TransUnion*, 141 S. Ct. at 2205).

This Court may thus dismiss out of hand Plaintiffs' suggestion (at 19-20) to ignore *TransUnion*. Even the district court recognized that *TransUnion* applies, requiring Plaintiffs to show an injury-in-fact with adverse "downstream consequences" from the alleged lack of information. *TransUnion*, 141 S. Ct. at 2214; ROA.340. Moreover, *TransUnion*'s downstream-consequences requirement is not dicta. *TransUnion* is a standing case: the Supreme Court granted certiorari to consider whether certain class members "have Article III standing." *Id.* at 2203. And all federal courts "are under an independent obligation to examine their own jurisdiction," under which standing "is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Insofar as Plaintiffs suggest (at 19-20) that the failure of standing for lack of demonstrated downstream consequences in *TransUnion* reflected an alternative holding, "alternative holdings are binding precedent and not *obiter dicta*." *Ramos-Portillo v. Barr*, 919 F.3d 955, 962 n.5 (5th Cir. 2019). Regardless, this Court is "generally bound by Supreme Court dicta, especially when it is recent and detailed," as *TransUnion*'s analysis is here. *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (internal quotation marks omitted); *see also Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 n.1 (5th Cir. 2015).

Second, Plaintiffs are wrong that they "need not allege any additional harm" when "Congress creates a specific right to information by statute." Resp.16 (quoting *Spokeo*, 578 U.S. at 342). Circuit precedent forecloses this argument. *Perez* explained that, "[f]or Article III purposes, *Spokeo* never distinguished between substantive and procedural statutory rights." 2022 WL 3355249, at *4. "[R]egardless of whether a statutory right is procedural or substantive, *Spokeo* emphasized that 'Article III

standing requires a concrete injury *even in the context of a statutory violation*.'" *Id.* (emphasis added). So while Plaintiffs contend (at 19-20), that courts remain bound by pre-*TransUnion* case law, *Perez* confirms that such authority is "[not] . . . to the contrary." 2022 WL 3355249, at *4.

Third, Plaintiff's stale authority fails to account for *TransUnion* and invites a circuit split. Plaintiffs cite no post-*TransUnion* authority for their proposition that, to establish standing, they needed show only a "proper request for information" that "complied with the notice" provisions required by statute. Resp.17-18.

Plaintiffs' position conflicts with post-*TransUnion* authority confirming that "'[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III.'" *Laufer v. Looper*, 22 F.4th 871, 881 (10th Cir. 2022) (quoting *TransUnion*, 141 S. Ct. at 2214). The Tenth Circuit rejected a plaintiff's assertion of standing premised on the "depriv[ation] of information to which she is legally entitled" in light of *TransUnion*. *Id.* at 880 (citing *FEC v. Akins*, 524 U.S. 11 (1998); *Pub. Citizen v. U.S. DOJ*, 491 U.S. 440 (1989)). Even when a plaintiff claims to have "suffered an 'informational injury' of the sort recognized in *Public Citizen* and *Akins*," the upshot of *TransUnion* is that the plaintiff must *still* "demonstrate[] that the defendants' failure to provide that information caused her to suffer an injury in fact." *Laufer*, 22 F.4th at 880-81. Plaintiffs are wrong that they "'need not allege any additional harm'" under "the *Public Citizen-Akins-Spokeo* line of cases." Resp.20 (quoting *Spokeo*, 568 U.S. at 342). This Court should not create a circuit split.

Fourth, even if this Court were writing on a blank slate, Plaintiffs lack standing. The Supreme Court has "made it clear time and time again that an injury in fact

must be both concrete *and* particularized." *Spokeo*, 578 U.S. at 340. Concreteness depends not on whether an injury is "undifferentiated" and "generalized," but rather whether it "actually exist[s]" and is "real." *Id.* at 339-40 & n.7. Congress's judgment that a harm merits a legal remedy "may be 'instructive,'" but it does not establish a harm that is *concrete*. *TransUnion*, 141 S. Ct. at 2205.

Plaintiffs' alleged injuries are speculative, generalized grievances and are unrelated to traditional remediable harms. *See id.* at 2214. Plaintiffs have failed to identify harm other than a lack of information about voter-list maintenance. *See id.* at 2207. "[U]nharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law" and Congress "may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law." *Id.* at 2207 n.3. Thus, Plaintiffs' claim fails for want of subject-matter jurisdiction.

B. Plaintiffs fail to identify record evidence of standing, let alone cognizable real-world harm.

1. Plaintiffs lack record evidence proving standing.

Plaintiffs lack record evidence supporting their assertion of standing. As noted above, *TransUnion* dictates that an alleged violation of law is insufficient to create standing because "an injury in law is not an injury in fact." 141 S. Ct. at 2205. Suing to enforce "general conformance with the law" is an undifferentiated interest held by the public at large, not a basis for Article III standing. *Id.* at 2205-06; *see also Lujan*, 504 U.S. at 576-77. And because Article III further requires a *concrete* injury, *TransUnion* held that plaintiffs claiming informational injury must actually

demonstrate "'downstream consequences' from failing to receive the required information." 141 S. Ct. at 2214. Plaintiffs failed to do so here.

Plaintiffs failed to show that they "have been harmed." Resp.21. Although Plaintiffs maintain it was wrong to use *TransUnion*'s downstream-consequences requirement, Plaintiffs claim that the district court correctly identified two "harms": "preventing Plaintiffs from monitoring Texas's compliance with the NVRA" and "deny[ing] them the 'opportunity to identify eligible voters improperly flagged' by the [Secretary's] program." Resp.22 (quoting ROA.340). Both alleged harms fall under the Supreme Court's admonition that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Each also fails in its own right.

First, Plaintiffs identify no immediate harm to themselves, and "whether compliance with the NVRA would prevent future injury to others is irrelevant; plaintiffs seeking injunctive relief must show a continuing or threatened future injury to themselves." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019). Moreover, Plaintiffs' "compliance" theory reflects the sort of generalized interest in compliance with the law that is shared by the public at large, not one that is particularized as to Plaintiffs. *See id.* at 722 & n.24. Plaintiffs rely on speculative leaps from the Secretary's maintenance of voter rolls to Plaintiffs' own subjective concerns about "denying eligible voters the right to vote and unduly burdening naturalized voters." Resp.22-23. But to show a concrete injury, a plaintiff must allege an injury that actually exists, not one based on speculation. *Spokeo*, 578 U.S. at 340 ("When we have used the adjective

'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'"). Plaintiffs entirely fail to show what "downstream consequences" flow *to them* specifically, as opposed to the public at large. *TransUnion*, 141 S. Ct. at 2214.

Second, the NVRA does not task their organizations with "monitoring Defendant's list maintenance activities for compliance with the law." Resp.22 n.3. The NVRA's public-disclosure requirement reflects a generalized interest of the public. Precedent forecloses reliance on such undifferentiated public interests. *See Spokeo*, 578 U.S. at 339-40. Even when plaintiffs claim organizational standing, such bare allegations fail to confer standing because "[n]ot every diversion of resources to counteract [a] defendant's conduct . . . establishes an injury in fact." *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). Plaintiffs lack evidence that the Secretary has "concretely and 'perceptibly impaired' [Plaintiffs'] ability to carry out [their] purpose." *Id.* at 239. Nor can Plaintiffs prevail on their unsupported assertion (at 24) that the information would "assist Plaintiffs in determining whether the current program violates the law." Under *City of Kyle*—which Plaintiffs do not even cite—that is not the test. *See* Br.17-23. There is no injury-in-fact because, at most, Plaintiffs assert "a setback to [an] organization's abstract social interests." *City of Kyle*, 626 F.3d at 233 (citation omitted).

Even if Plaintiffs had identified a viable standing theory, they still fail to cite any supporting evidence. Plaintiffs identify only two instances of supposedly favorable "documentary evidence in the record." Resp.21. Neither withstands scrutiny. The first (at 22) includes a redacted spreadsheet of certain voter-registration records. *See* ROA.491-523. Even assuming this list reflects the sort of information about flagged

voters that Plaintiffs hope to obtain from the Secretary, information about *individual voters* is not evidence of any harm *to Plaintiffs*. The second (at 22-23) is merely the 2019 *Whitley* settlement agreement with the Secretary's office, to which Plaintiffs are not a party and in which appears no evidence that "Defendant has violated the 2019 Settlement Agreement." *See* ROA.467. *Clapper* forbids "manufacturing" standing from Plaintiffs' speculation of "non-imminent harm." 568 U.S. at 422.

Nodding at these defects, Plaintiffs claim (in a footnote) they seek to "fulfill their obligations to the clients they represented in *Whitley*, who are parties to the 2019 Settlement Agreement," and without the Secretary's records, "cannot advise their clients on their rights." Resp.23 n.4. But that fails because Plaintiffs adduced no evidence of "obligations" to as-yet-unnamed "clients." Plaintiffs say "the *Whitley* plaintiffs expressly reserved their rights and the rights of their counsel to seek additional information related to this program under the NVRA." Resp.23 n.4. But the citation provided (ROA.463) is merely the settlement's cover. Plaintiffs say "Plaintiffs' clients" from *Whitley* "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." The citation provided (ROA.473), which has no such statement, simply provides "[n]othing in this Agreement shall be construed to waive, release, or discharge any claim Plaintiffs have or may have in the future over any list maintenance procedure not explicitly described herein." Plaintiffs' speculative assertion of harm cites *no* evidence tying the 2019 *Whitley* settlement agreement to claims that "the 2021 List Maintenance Program continues to sweep in lawfully registered naturalized citizens." Resp.23.

2. Plaintiffs' argument fails under this Court's third-party standing precedent.

Even if Plaintiffs had adduced some evidence of downstream consequences and had also identified the sorts of harms required under *NAACP*, their asserted injury still would not be cognizable. Plaintiffs "cannot rest [their] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). As the Secretary has argued (at 17-18, 21-23), because Plaintiffs ultimately rely on asserting future legal claims on behalf of third parties, they cannot show standing. Merely wanting to bring legal claims on behalf of potential future litigants is insufficient to confer standing. *See Vote.Org v. Callanen*, 39 F.4th 297, 304 (5th Cir. 2022). Plaintiffs do not even cite *Vote.Org*.

Nor do Plaintiffs address the Secretary's argument (at 18, 22) that the NVRA itself precludes reliance on such third-party interests. The NVRA does not authorize third-party suits, 52 U.S.C. § 20510(b)(2) (authorizing "the aggrieved person," not third parties, to "bring a civil action"). Plaintiffs appear to concede (at 23 n.4) that they were not parties to the 2019 settlement involving suits over the Secretary's use of Texas Department of Public Safety (TDPS) records in the voter-registration review process. A plaintiff cannot show a sufficiently concrete injury based on the prospect of a "future attorney-client relationship." *Kowalski v. Tesmer*, 543 U.S. 125, 130-31 (2004). On this record, Plaintiffs' activities—purportedly on behalf of third-party voters who are capable of "protecting their own rights"—reflects "'no relationship at all.'" *Vote.Org*, 39 F.4th at 304 (quoting *Kowalski*, 543 U.S. at 130-31).

C. The proper remedy is dismissal for want of jurisdiction.

This Court should reject Plaintiffs' request (at 24-26) for a do-over. "As the party invoking federal jurisdiction," Plaintiffs bore "the burden of demonstrating that they have standing." *TransUnion*, 141 S. Ct. at 2207. That means "arguments in favor of standing, like all arguments in favor of jurisdiction, can be forfeited or waived." *Ctr. for Biological Diversity v. U.S. EPA*, 937 F.3d 533, 542 (5th Cir. 2019). But even if the Secretary had said nothing about standing, Plaintiffs were still required to prove the "irreducible constitutional minimum of standing" throughout every trial stage. *Lujan*, 504 U.S. at 560-61.

Here, the Secretary raised the lack of subject-matter jurisdiction in district court. ROA.93. It was not the Secretary's duty to rebut standing but rather Plaintiffs' duty to affirmatively prove it. *See TransUnion*, 141 S. Ct. at 2207. The Secretary properly raised Plaintiffs' lack of standing at trial. ROA.412-14. Only after the close of evidence did Plaintiffs suggest further evidentiary development. ROA.433-34. Contrary to Plaintiffs' assertion (at 25), the district court did not "decline[] to hear such evidence." ROA.450-51. Rather, when the Secretary objected to new evidentiary development, the district court merely encouraged the parties to confer and noted that there might be scheduling conflicts if the court were to permit an evidentiary hearing. ROA.451-52.

The proper remedy is to remand with instructions to dismiss for want of jurisdiction. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Heaton v. Monogram Credit Card Bank of Ga.*, 231 F.3d 994, 1000 (5th Cir. 2000). The Court should reject Plaintiffs' request (at 26) for remand to "present evidence of downstream

consequences." *TransUnion* was not a "new" standard and this Court is not the "first" court to require downstream consequences of alleged information injuries. Resp.26. As noted above, the Tenth Circuit has already imposed that requirement, and *even the district court* applied it. ROA.340. Plaintiffs chose to rely on the trial record and cannot now proceed otherwise. Br.19-20.

II. The NVRA Does Not Require the Ordered Disclosure.

A. Plaintiffs cannot overcome state- and federal-law protections over the information they seek.

1. Plaintiffs misunderstand investigative privilege. As the Secretary explained (at 23-32), the district court erred in requiring the Secretary to divulge information about an ongoing investigation. The parties agree that this Court recognizes an investigative privilege "where there is an 'ongoing criminal investigation.'" Resp.28 (quoting *In re U.S. DHS*, 459 F.3d 565, 569, 571 (5th Cir. 2006)). The questions are (a) whether (as Plaintiffs and the district court dispute) there is an "ongoing criminal investigation" and, if so, (b) whether (as the district court did not find but as Plaintiffs argue) the NVRA *sub silentio* abrogates investigative privileges. Plaintiffs fail on both counts.

a. Plaintiffs echo the erroneous view that there is no ongoing criminal investigation. Contrary to Plaintiffs' assertion, the Secretary's office has not "admitted that there is no ongoing criminal investigation into any of the individuals identified through his list maintenance program." Resp.27. The record reflects otherwise. *See* Br.28-31. As Plaintiffs acknowledge, "it is the responsibility of each county election official to review records sent to them through the [Secretary's] 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. "For many registrants that [the Secretary's office] identified, county officials have not yet updated the information in the [statewide voter-registration database] system or otherwise notified [the Secretary's office] about additional information they gathered." ROA.567. "Therefore, as of now, the [Secretary] has not yet referred any voter records from the initial dataset or weekly files to the Attorney General under Section 31.006(a) of the Texas Election Code." ROA.567. Consistent with section 31.006(b) of the Election Code, the Secretary "has treated the information as confidential" and "has shared the information only with government officials and only for investigative purposes." ROA.567.

Plaintiffs hardly attempt to defend the district court's logical flaw in equating a present lack of a *referral* to the Attorney General with the lack of an ongoing criminal *investigation*. *See* ROA.341-42; Br.29-30. Nor can Plaintiffs seriously defend the district court's error in faulting the Secretary for disclosing certain information to "county election officials." ROA.343. The uncontroverted evidence indicates that this was done "only for investigative purposes." ROA.567. And even if some local officials outside the Secretary's control disclosed certain information to third parties, Plaintiffs adduced no evidence that the information they seek "can be obtained through local election officials." ROA.343. Instead, Plaintiffs raise three counterarguments, each of which fails.

First, Plaintiffs contend (at 31-33) that the investigative privilege is "narrower" than the statutory basis for investigating certain election crimes, making referrals to

the Texas Attorney General, and maintaining the confidentiality of such information throughout that process. *See* Tex. Elec. Code § 31.006(a)-(b). The statute plainly speaks to an investigation by the Secretary into whether "there is reasonable cause to suspect that criminal conduct occurred" "in connection with an election." *Id.* § 31.006(a). Plaintiffs contend that the requested records "shed no light on any criminal investigation that may or may not be initiated at some later date." Resp.33. But that argument contravenes Texas law. Texas requires U.S. citizenship to register to vote and makes it an offense, with appropriate *mens rea*, to make a false statement on a voter-registration form or to vote despite being ineligible. Tex. Elec. Code §§ 13.001(a)(2), 13.007(a), 64.012(a)(1). The uncontroverted evidence shows that the Secretary depends on local elections officials to "determine whether an individual identified as a potential non-United States citizen is currently eligible for registration in their county" and to "determine whether an individual's voter registration should be cancelled." ROA.566-67. This process merely confirms that a criminal investigation under the statute may require coordination with county officials.

Second, Plaintiffs contend that investigative privilege cannot apply because the Secretary "did not instruct county officials to maintain the confidentiality of those records." Resp.33. That is a *non sequitur*. Consistent with the Secretary's obligations, the Secretary's office "has shared the information only with government officials and only for investigative purposes." ROA.567. Plaintiffs cite no authority attributing local officials' handling of those records to the Secretary, who does not control third-party county elections officials. Instead, Plaintiffs argue that no confidentiality attaches to the Secretary's records because "several counties have already

provided Plaintiffs with piecemeal components of these records." Resp.33. But Plaintiffs do not argue that they possess the key information they seek—the Secretary's lists of individuals flagged as registering to vote potentially without U.S. citizenship. And although Plaintiffs rely on a spreadsheet of limited registrant data obtained from certain county registrars, there is no evidence that the redaction of the remaining data was "added by Plaintiffs." Resp.33 (citing ROA.490-523 and representing "(redactions added by Plaintiffs)"). In any event, a discretionary disclosure during an investigation generally does not waive a privilege. *See, e.g.*, *ACLU v. Dep't of Def.*, 752 F. Supp. 2d 361, 372-73 (S.D.N.Y. 2010) (concluding that "discretionary disclosure does not constitute a waiver for the rest of the requested information"); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835-36 (D.C. Cir. 2001) (explaining that "releasing some photographs" does not mean government has waived its right to withhold other photographs). Unauthorized disclosures to third parties typically do not waive privileges either. *See, e.g.*, *Simmons v. U.S. DOJ*, 796 F.2d 709, 712 (4th Cir. 1986); *Lazardis v. U.S. Dep't of State*, 934 F. Supp. 2d 21, 35 (D.D.C. 2013).

Third, Plaintiffs argue (at 34) that, because U.S. citizenship may have since been confirmed for certain flagged individuals, the Secretary can no longer assert any investigative privilege. This argument misunderstands criminal investigations. The Secretary's uncontroverted record evidence indicated that maintaining confidentiality was necessary for "the integrity of the [Secretary]'s ongoing review of allegations of criminal conduct in connection with an election." ROA.567. "Requiring the [Secretary] to publicly release information about such allegations while our review

remains pending could inhibit the [Secretary']s ability to conduct a frank, comprehensive evaluation of the matter and, in certain instances, could discourage individuals from submitting election complaints to the [Secretary]." ROA.567. Even if U.S. citizenship may or may not have been later established for a given flagged individual, that does negate the possibility of criminal conduct at the time an individual voted (Tex. Elec. Code § 64.012(a)(1)) or registered to vote (*id.* § 13.007(a)).

Nor would such cherry-picking vitiate privilege. As in the FOIA context, Plaintiffs seek nonpublic information that risks revealing "a specific means of conducting surveillance" rather than "an application" of procedures to specific individuals. *Hamdan v. U.S. DOJ*, 797 F.3d 759, 777-78 (9th Cir. 2015); *see also Shapiro v. U.S. DOJ*, 893 F.3d 796, 800-01 (D.C. Cir. 2018) (protecting records from commercially available database because release would reveal how agency uses database and results it considers meaningful). Moreover, disclosing the "identity of suspects in discovery may cause irreparable harm to a citizen, who is not charged with an offense, and indeed, may never be charged for a violation of the law," *Wheeler v. Gabbay*, 40 Va. Cir. 551, 1994 WL 1031214, at *4 (Va. Cir. June 10, 1994), and risks putting his "reputation . . . at stake," *Cabrol v. Town of Youngsville*, 106 F.3d 101, 108 (5th Cir. 1997).

b. Plaintiffs argue, alternatively, that the NVRA abrogates investigative privilege. Resp.35-37. Not so. As the Secretary explained (at 25-28), Congress did not *sub silentio* abrogate state-law privileges and acted against a backdrop that intends to preserve *all* common-law privileges absent clear language to the contrary. Plaintiffs identify no such language. The district court declined to infer abrogation from the NVRA's text, which is silent as to the privilege. This Court should, too.

There is no "direct conflict" between the NVRA's public-disclosure requirements and investigative privileges under state law. Resp.35. Plaintiffs maintain that the Secretary's lists have a "purpose" that falls under the ambit of the NVRA's "shall make available" requirement. Resp.35-36 (quoting 52 U.S.C. § 20507(i)). Plaintiffs' argument contradicts the Supreme Court's recent confirmation that a similar common-law privilege could "not be held to have been abrogated or limited unless Congress has at least used clear statutory language." *FBI v. Fazaga*, 142 S. Ct. 1051, 1060-61 (2022). The NVRA is similarly silent on privileges, so it preserves common-law privileges. Br.25-28.

Moreover, Plaintiffs argue that "the need of the litigant" opposing the privilege outweighs "the harm to the government if the privilege is lifted." Resp.36 (quoting *In re U.S. DHS*, 459 F.3d. at 569-71). But Plaintiffs failed to make that record at trial. As discussed above, the only record evidence on this issue comes from the Secretary's office and demonstrates both the risk to a full and fair investigation into potential election offenses and the risk of harassment if the disputed information were publicly disclosed. ROA.566-57.

2. Ordering the Secretary to divulge the records also contravenes the federal Driver's Privacy Protection Act (DPPA). The DPPA protects the records Plaintiffs seeks about the flagged registrants from disclosure because they contain personal information obtained from TDPS. Br.32-34. Contrary to the district court's ruling, the DPPA exception to this prohibition for disclosure "in connection with" or "in anticipation of" litigation does not apply. In *Maracich v. Spears*, 570 U.S. 48 (2013), the Supreme Court declined to apply the exception the district court relied on outside

of the context of "steps that ensure the integrity and efficiency of an existing or imminent legal proceeding." *Id.* at 63. Plaintiffs contend that the records they seek "plainly" are in anticipation of litigation. Resp.43. But because there is no existing or imminent legal proceeding, Plaintiffs' efforts are not "in connection with" litigation, as they must be to qualify for the exception under *Maracich*, 570 U.S. at 62-63.

Alternatively, Plaintiffs argue that the DPPA applies only to TDPS and to *its* release of personal information about flagged registrants and not to other agency records that are "informed by [T]DPS data." Resp.40. But the records Plaintiffs seek are not simply "informed" by data from TDPS: they contain TDPS data about registrants that have been transferred to the Secretary. *See* ROA.565-66. On this record, Plaintiffs cannot argue (as they now do for the first time on appeal) that the information they seek about the flagged registrants is not personal information "'obtained by [TDPS] in connection with a motor vehicle record.'" Resp.40-41 (quoting 18 U.S.C. § 2721(a)(1)).

B. The NVRA provides for inspection and photocopying, not direct production via any electronic means of Plaintiffs' choosing.

The NVRA requires that certain records be "ma[d]e available for public inspection and, where available, photocopying at a reasonable cost," 52 U.S.C. § 20507(i)(1), even though other statutes show that Congress is familiar with email and other forms of electronic transfer, Br.34-37. Plaintiffs offer no serious response to the textual argument.

Plaintiffs never sought to "inspect" and "photocopy" the disputed records as the NVRA requires. The relevant inquiry into the meaning of the NVRA disclosure

provision "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality op.); *accord Christiana Trust v. Riddle*, 911 F.3d 799, 806 (5th Cir. 2018). Because the NVRA's silence about electronic transfer is unambiguous, this Court need look no further. And Plaintiffs receive no special dispensation from Congress's plain requirements merely because it suits Plaintiffs' insistence on an impermissible format (Resp.46-47) and their policy preferences (Resp.50).

III. If the NVRA Were Interpreted to Require Disclosure, Then Those Requirements Violate the Anticommandeering Doctrine.

Congress may entice state officials to effectuate federal laws, but it may not directly conscript State officers into federal service. *Murphy v. NCAA*, 138 S. Ct. 1461, 1475-77 (2018). That prohibition extends to imposing recordkeeping requirements on State officials. *Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022). Yet the NVRA public-disclosure provision nevertheless orders State officials to maintain and produce certain voting records to the public. 52 U.S.C. § 20507(i)(1).

Plaintiffs argue that decades of anticommandeering doctrine precedent, beginning with *Printz v. United States*, 521 U.S. 898 (1997), may be disregarded because the Elections Clause allegedly lets Congress order State officials to implement and enforce any regulation remotely connected to a federal election. Caselaw does not support their theory. Nor does the history of the Elections Clause.

A. Plaintiffs cannot square their view of the anticommandeering doctrine with Supreme Court precedent.

Plaintiffs offer no evidence that the Elections Clause permits Congress to regulate States' maintenance of their voter rolls. Instead, Plaintiffs (at 50-55) make the more ambitious argument that the Election Clause lets Congress command State officials to maintain and disclose on demand to private parties certain records under the NVRA. It does not. Br.38-48.

Printz's prohibition on direct conscription of State officials is unmistakable and Plaintiffs fail to seriously engage with the Secretary's brief. Plaintiffs' cases are unpersuasive even from the start, inasmuch as they were argued before (and therefore did not benefit from the insight of) *Printz* and its progeny. Instead, Plaintiffs contend that anticommandeering *cannot* apply to the Elections Clause because (1) congressional elections did not exist before ratification of the Constitution and, therefore, (2) there is no reserved power for States to regulate those elections under the Tenth Amendment. Resp.52. In *Murphy*, however, the Supreme Court indicated that the anticommandeering doctrine applies to *at least* those circumstances where the Tenth Amendment reserves legislative power to the States. 138 S. Ct. at 1476. The Tenth Amendment thus poses no *limitation* on applying the anticommandeering doctrine.

Nor does the Supreme Court's precedent authorize Plaintiffs' view of the Elections Clause as giving Congress limitless power over State elections officials. *Contra* Resp. 57-59 (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Ex parte Siebold*, 100 U.S. 371, 388-89 (1879)). Plaintiffs suggest (at 54) that federal regulation would "pre-empt conflicting state law." But *Murphy* confirms the anticommandeering

doctrine's "recognition" that Congress's authority is limited. 138 S. Ct. at 1476. At most, under the Elections Clause, Congress may "make or alter" State regulations of the "Times, Places and Manner" of some elections. U.S. Const. art. I, § 4, cl. 1. That clause is silent on Congress's ability to press State officials into service. Instead, the background anticommandeering principle limits Congress's power and serves as "one of the Constitution's structural safeguards of liberty." *Printz*, 521 U.S. at 921.

The United States, as amicus curiae, likewise relies on *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8-9 (2013), to support Plaintiffs' sweeping view of the Elections Clause. It reads that case to treat congressional power over the "Manner of holding Elections" as encompassing "regulations relating to registration." U.S.5 (cleaned up). But even to the debatable extent that view is a correct reading of *Inter Tribal*, that case does not authorize the intrusive remedy the district court ordered here. The NVRA's public-disclosure provision is not a regulation of registration. It does not govern who may register, nor does it specify when, where, or how registration is accomplished. It does not even control any part of the process for electing members of Congress. It simply (and unconstitutionally) orders state officials to maintain certain records related to voter registration and to disclose those records to the public under certain conditions. *See* 52 U.S.C. § 20507(i)(1).*

* The United States (at 7-8) references nineteenth-century federal laws that required States to hold congressional elections in single-member districts, run state and federal elections on the same day, and require pre-17th amendment legislatures to convene a joint session to elect U.S. senators. But those statutes have not been tested under *Printz*.

Alternatively, the United States argues that even if the anticommandeering doctrine applies, the public-disclosure requirement would not violate that principle. U.S.13. That is wrong. The NVRA flatly orders that a "State shall maintain . . . and shall make available "certain records. 52 U.S.C. § 20507(i)(1). This Court confirmed in *Brackeen* that Congress cannot command State officials to keep similar records. There, the Indian Child Welfare Act required that a State "maintain a record" of any Indian child placements under state law and make that record "available at any time" for inspection. 994 F.3d at 408 (cleaned up). Here, the NVRA language is similar: "Each State shall maintain for at least 2 years and shall make available for public inspection." 52 U.S.C. § 20507(i)(1). Nothing indicates that the NVRA should receive different treatment than Congress's power over Indian affairs, which the United States concedes "is subject to the anticommandeering doctrine." U.S.15. But if there were any doubt, as the United States acknowledges (at 15 n.9), the proper course is to "withhold decision until the Supreme Court resolves [*Brackeen*]."

The United States also argues that the Reconstruction Amendments provide the necessary source of congressional power. Neither the record nor the NVRA's legislative findings show that the public-disclosure provision is congruent and proportional to any likelihood of potential constitutional violations regarding registration. *See City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997); 52 U.S.C. § 20501(a). Without such "congruence and proportionality," the Reconstruction Amendments do not empower Congress to take action the Constitution does not otherwise permit. *City of Boerne*, 521 at 520. The United States also relies on *City of Rome v. United States*, 446 U.S. 156, 179 (1980), for the proposition that the Reconstruction

Amendments permit Congress to enforce their limitations "by appropriate legislation." U.S.13. But the United States offers no reason to believe *City of Rome* survived the Supreme Court's more-recent restrictions on congressional power.

In any event, these arguments fail because the putative sources of congressional authority over State elections officials do not match the actual dictates of the NVRA's public-disclosure provision. The NVRA goes far beyond regulating the State's relationship with the federal government concerning elections: Plaintiffs claim it *directly compels* the State to produce records on demand to private entities. The anticommandeering doctrine forbids this. *Printz*, 521 U.S. at 935. Supreme Court precedent likewise forecloses any defense of the NVRA's public-disclosure requirement as an outgrowth of "regulation[] relating to 'registration.'" Resp.59 (quoting *Inter Tribal*, 570 U.S. at 9). Plaintiffs note (at 59) that Congress passed the NVRA to achieve certain policy goals in the realm of voter registration. But the Necessary and Proper Clause does not authorize Congress to commandeer state officials. *See Printz*, 521 U.S. at 923-24.

B. The historical record forecloses Plaintiffs' reliance on the Elections Clause to avoid the unconstitutional commandeering.

Plaintiffs' arguments fare no better under the Election Clause's text and history. The text provides that the "Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1.

The Framers would have understood "manner" in the technical sense that the word had developed under British election law in the eighteenth century: procedures by which votes are registered, tallied, and reported on Election Day. Br.41. Every state constitution ratified between the start of the Revolutionary War and the start of the Convention adopted that limited definition. *E.g.*, Mass. Const. of 1780, ch. 1, § 2, arts. II, IV; Ga. Const. of 1777, art. XIII; N.C. Const. of 1776, art. XXXVII; N.J. Const. of 1776, art. VII; Md. Const. of 1776, pt. 2, arts. II-LIX; N.H. Const. of 1776.

Plaintiffs (at 61-62) thumb their dictionary past the word "manner" (the word in the Elections Clause) to its synonym "method," which can mean "performing several operations in such an order as is most convenient to attain some end." Plaintiffs speculate that the Framers must have used that more expansive definition. Nothing indicates that an esoteric usage of "method" was in fact the original public meaning of "manner." Plaintiffs merely note (at 62) that John Locke once used "method"—not even "manner"—their preferred way. Both the Supreme Court and this Court reject such unreliable guidance on original meaning. *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022); *JetPay Corp. v. IRS*, 26 F.4th 239, 241-42 (5th Cir. 2022).

Nor does history indicate that the Framers understood the "Manner of holding Elections" to include maintenance of voter-registration lists, let alone production to third-party plaintiffs. No State in 1787 required voter registration, and no State routinely reviewed its voter-registration lists for accuracy until recent decades. *See generally* Joseph Pratt Harris, Brookings Inst., Registration of Voters in the United States 65-92 (1929). Plaintiffs identify *nothing* in the volumes of the Convention

debates, state ratification debates, or related documents and correspondence hinting that *anyone* understood the "Manner of holding Elections" to capture more than the mechanics of voting on Election Day. *See* Br.42-47. Nor anything in the Federalist Papers. Or in the records of the first congressional elections.

Plaintiffs never demonstrate how "the historical record confirms that the Elections Clause applies to regulations of voter registration." Resp.56. Rather, Plaintiffs read the historical record as indicating that the Framers adopted an inherited British election-law model capacious enough to allow Congress to micromanage federal elections. But Plaintiffs misread the history. The founding generation quickly and uniformly *rejected* the British election model in one state constitutional convention after another during the decade before the Convention, and the States ratified the Constitution on the understanding that Congress would generally not interfere even with the *mechanics* of State regulation of elections. Br.41-47.

As the Secretary acknowledged (at 45-46), some Framers feared that the States could destroy Congress either by refusing to hold or sabotaging congressional elections. But an even greater number of Framers feared that an expansive Elections Clause would enable Congress to disenfranchise voters and eventually destroy the States. *E.g.*, 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 30 (1836) (Elliot's Debates); 3 *id.* at 9, 175-76; 4 *id.* at 52, 55. To secure ratification, Federalists explained that the "Manner of holding Elections" meant only the mechanics of voting itself. *E.g.*, 4 Elliot's Debates 53-54; 9 Doc. Hist. of the Ratification of the Const. 1071 (John P. Kaminski & Gaspare J. Saldano eds.); 10 *id.* 1260, 1290-95; 14 *id.* 279, 282. That view carried the day.

Contra Resp.63-64. Plaintiffs identify nothing indicating that voter registration crossed the mind of any Framer, let alone that Congress's "authority to promote uniform voter registration" was necessary for its self-preservation. Resp.65.

Conclusion

The Court should vacate the district court's judgment and remand with instructions to dismiss for want of jurisdiction or, alternatively, reverse and render judgment for Secretary Scott.

Respectfully submitted.

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On August 26, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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