No. 24-6629

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff-Appellant

v.

SCOTT T. NAGO, IN HIS OFFICIAL CAPACITY AS THE CHIEF ELECTION OFFICER FOR THE STATE OF HAWAII,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Hawaii
No. 1:23-cv-00389-LEK-WRP
Hon. Leslie E. Kobayashi

RETRIEVED FROM DEMOCRACYDOCKET.COM

APPELLANT'S SUPLEMENTAL BRIEF

Joseph M. Nixon

Public Interest Legal
Foundation, Inc.
107 S. West Street, Suite 700
Alexandria, Virginia 22314
Tel: (703) 745-5870
Fax: (888) 815-5641

Attorney for Appellant
Public Interest Legal Foundation

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

An Informational Injury is Good Enough 2

TransUnion is not Controlling 5

The Fourth Circuit in *Laufer v. Naranda Hotels, LCC* Got it Right 7

The Third Circuit in *Pub. Int. Legal Found v. Sec'y of Pa.* Got it Wrong 8

Lower Courts Get it Right 9

The Foundation Has Organizational Standing 10

Though Unnecessary, the Foundation Alleged Additional Adverse Consequences Caused by the Informational Injury 11

CONCLUSION 13

CERTIFICATE OF SERVICE 15

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases **Page(s)**

FDA v. Alliance for Hippocratic Medicine,
602 U.S. 367 (2024) 2, 4

FEC v. Akins,
524 U.S. 11 (1989) 1,3-5, 13

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 2-9

Inland Empire Waterkeeper v. Corona Clay Co.,
17 F.4th 826 (9th Cir. 2021)..... ....1, 11

Jud. Watch, Inc. v. King,
993 F.Supp.2d 919 (S.D. Ind. 2012)..... 10

Laufer v. Naranda Hotels, LLC,
60 F.4th 156 (4th Cir. 2023) 7

Public Citizen v. Dept. of Justice,
491 U.S. 440, (1988) 1,3-10. 12

Pub. Int. Legal Found. v. *Sec'y of Pa.*,
136 F.4th 456 (3rd Cir. 2025)..... 8

Pub. Int. Legal Found. v. Bennett,
No. H-18-0981, 2019 U.S. Dist. LEXIS 39723 (S.D. Tex., Feb. 6, 2019) 10

Pub. Int. Legal Found., Inc. v. Wolfe,
No. 24-cv-285-jdp, 2024 U.S. Dist. LEXIS 216250
(W.D. Wis. Nov. 26, 2024) 13

Project Vote/Voting for Am., Inc. v. Long,
752 F. Supp. 2d 697 (E.D. Va., 2010) 10

TransUnion LLC v. Ramirez,
594 U.S. 413 (2021) 1, 5-10

Sheppard v. David Evans & Associates,
694 F.3d 1045 (9th Cir. 2012). 13

RETRIEVED FROM DEMOCRACYDOCKET.COM

Wilderness Society, Inc. v. Rey,
622 F.3d 1251 (9th Cir. 2010) 1, 11

Zivotofsky v. Sec'y of State,
444 F.3d 614 (D.C. Cir. 2006) 3

Statutes

52 U.S.C. § 20507(i)(1) 10

52 U.S.C. § 20510(b) 13

RETRIEVED FROM DEMOCRACYDOCKET.COM

INTRODUCTION

Public Interest Legal Foundation (the "Foundation") has Article III standing under Section 8(i)(1) of the National Voter Registration Act to assert an informational injury. The Foundation requested Hawaii's Chief Election Officer produce the statewide Voter File, Mr. Nago refused, the Foundation sent him written notice of the violation, then, after more than 90 days passed, sued. ER 25-27. The Foundation has standing to pursue its claim for an informational injury pursuant to *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 449 (1989); *Inland Empire Waterkeeper v. Corona Clay Co.,* 17 F.4th 826, 833 (9th Cir. 2021); and, *Wilderness Society, Inc. v. Rey*, 622 F.3d 1251, 1255 (9th Cir. 2010).

RETRIEVED FROM DEMOCRACYDOCKET.COM

To the extent required, the Foundation also pleaded it had suffered "down-stream consequences" or concrete injuries caused by Mr. Nago's failure to produce the statewide Voter File in paragraphs 55 through 63 of Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief, ER 254-55. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021).

The Foundation adequately alleged organizational standing. The pre-existing, core mission of the Foundation is "… to promote the integrity of elections nationwide through research, education, remedial programs,

and litigation." ER 240-41. The Foundation utilizes the NVRA Public Disclosure Provision and state and federal open records laws that require governmental records to be made available to the public. ER 240-41. With records and data compiled through these open records laws, the Foundation analyses the programs and activities of election officials to determine whether lawful efforts are being made to keep voter rolls current and accurate. ER 240-241. "The Foundation also uses records and data to disseminate reports, articles, blog and social media posts, and newsletters to advance the public education aspect of its organizational mission." ER 240-41 ¶ 3 (Plaintiff's First Amended Compliant for Declaratory and Injunctive Relief). *See FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 395-96 (2024); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Mr. Nago's failure to provide the statewide Voter File injured the Foundation's core mission.

RETRIEVED FROM DEMOCRACYDOCKET.COM

ARGUMENT

An Informational Injury is Good Enough.

The controlling standing framework originates with the federal Freedom of Information Act ("FOIA"). Thirty-six years ago, the Supreme Court confirmed that its "decisions interpreting the Freedom of Information Act have never suggested that those requesting information

under it need show more than that they sought and were denied specific agency records." *Public Citizen*, 491 U.S. at 449. "Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006) (citing *Public Citizen*, 491 U.S. at 449).

In *Public Citizen*, 491 U.S. at 446-47, the Supreme Court held that FOIA's standing framework applies to the Federal Advisory Committee Act ("FACA"), a law that, like the NVRA, contains a public disclosure requirement as part of a broader regulatory framework. Reciting the standing requirements in FOIA cases, the Supreme Court explained, "There is no reason for a different rule here." *Id*. at 449. "As when an agency denies requests for information under [FOIA], refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." *Id*.

In *Akins*, the Supreme Court held that FOIA's standing framework applies to the Federal Election Campaign Act of 1971 ("FECA"), a law that also contains a public disclosure requirement as part of a broader

RETRIEVED FROM DEMOCRACYDOCKET.COM

regulatory framework. 524 U.S. at 14-16. Citing *Public Citizen*, the Supreme Court explained, "[T]his Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id*. at 21 (citing *Public Citizen*, 491 U.S. at 449). Applying that standard to the case before it, the Court continued, "The 'injury in fact' that respondents have suffered consists of their inability to obtain information … that, on respondents' view of the law, the statute requires that [the subject of the FECA complaint] make public." *Id*. at 21. The *Akins* Court also cited *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), a Fair Housing Act case, in which the Supreme Court applied the same standard, concluding that the "deprivation of information about housing availability constitutes 'specific injury' permitting standing," *Akins*, 524 U.S. at 21.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Most recently, in *FDA v Alliance for Hippocratic Oath,* 602 U.S. 367 (2024), the Supreme Court discussed organizational standing and found the medical organizations' assertion of diversion of resources was not enough to claim a concrete injury. *Id* at 395. "[T]he associations have not claimed an informational injury, and in any event, the associations have not suggested the federal law requires FDA to disseminate such

information upon request by members of the public. Cf. *FEC v. Akins*, 524 U.S. 11 (1998)."

The Supreme Court's particular citation contrasting *Akin*s in this context reaffirms that an informational injury is sufficient for Article III standing.

Here, the Foundation has not pleaded or relied on diversion of resources to establish standing. The Foundation has pleaded it asked Mr. Nago to produce documents in his possession pursuant to the NVRA, which he denied. The Foundation also explained why the statewide Voter Roll was important to its core mission and work.

RETRIEVED FROM DEMOCRACYDOCKET.COM

***TransUnion* Is Not Controlling.**

TransUnion LLC v. Ramirez, 594 U.S. 413 (2021), did not involve a statutory right to receive information from a government agency. Instead, the plaintiffs in *TransUnion* sued a private credit reporting agency, TransUnion LLC, for violations of the Fair Credit Reporting Act ("FCRA"). *TransUnion*, 594 U.S. at 417-18. Among other differentiating features, the plaintiffs "complained about formatting defects in certain mailings sent to them by TransUnion." *Id.* at 418. The plaintiffs received all the information required by the FCRA, but received it in two separate mailings, when it should have been sent in one mailing. *See id.* at 440-441.

"In support of standing, the plaintiffs thus contend[ed] that the TransUnion mailings were formatted incorrectly and deprived them of their right to receive information in the format required by statute." *Id.* at 440.

The Court in *TransUnion* held that *Public Citizen* and *Akins* "do not control" because they "involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information." *Id.* at 441. "This case does not involve such a public-disclosure law." *Id.*

To be sure, *TransUnion* involved the FCRA, a law that regulates private parties, not the government. The injury in *TransUnion* was fundamentally different than with public disclosure and sunshine laws. "The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it *in the wrong format*." *Id.* (emphasis in original). Only after distinguishing *Public Citizen* and *Akins* as cases that "involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information," did the Supreme Court add, "[m]oreover, the plaintiffs have identified no 'downstream consequences' from failing to receive the required information." *Id.* at 442 (quotation omitted).

RETRIEVED FROM DEMOCRACYDOCKET.COM

The conclusion is this: where plaintiffs allege that they "failed to receive information" under a public disclosure or sunshine law, the standing inquiry is controlled by *Public Citizen* and *Akins*. Where plaintiffs allege that they received information but received it in the *wrong format*—as in *TransUnion*—plaintiffs must allege some additional harm caused by the formatting error. Only the latter is a "bare procedural violation," *id.* at 440, which requires plaintiffs to allege "downstream consequences," *id.* at 442.

The Fourth Circuit in *Laufer v. Naranda Hotels* Got It Right.

The Fourth Circuit in *Laufer v. Naranda Hotels* rejected the argument that Article III requires plaintiffs to demonstrate downstream consequences when they are denied public information. 60 F.4th 156, 172 (4th Cir. 2023). To the contrary, "*Havens Realty*, *Public Citizen*, and *Akins* are clear that a plaintiff need not show a use for the information being sought in order to establish an injury in fact in satisfaction of the first *Lujan* element." *Id.* "[T]he informational injuries in *Public Citizen* and *Akins* (the 'fail[ure] to receive *any* required information')" are distinguishable "from the purported informational injury [in *TransUnion*] (receipt of the required information '*in the wrong format*')." *Id.* at 170 (quoting *TransUnion*, 594 U.S. at 441) (first emphasis added). Therefore,

RETRIEVED FROM DEMOCRACYDOCKET.COM

"any use requirement is limited to the type of informational injury at issue in *TransUnion* and does not extend to the type of informational injury presented in *Public Citizen* and *Akins*." *Id.* at 170.

The Fourth Circuit correctly reasoned: "[A]lthough the plaintiffs in *Public Citizen* and *Akins* thereafter asserted uses for the information they sought, those asserted uses were not a factor in the *Public Citizen* and *Akins* Article III standing analyses." *Id.*at 172. This makes sense because any "use" requirement cannot coexist with the Supreme Court's standard: "[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Akins*, 524 U.S. at 21 (citing *Public Citizen*, 491 U.S. at 449).

RETRIEVED FROM DEMOCRACYDOCKET.COM

This case presents the type of informational injury at issue in *Public Citizen* and *Akins*—the failure to receive *any* required public information. When the Foundation failed to receive records under NVRA Section 8(i), the Foundation suffered an actionable informational injury.

The Third Circuit in *Pub. Int. Legal Found. v. Sec'y of Pa.* Got it Wrong.

The Third Circuit in *Public Int. Legal Found.* v. *Sec'y of Pa.*, 136 F.4th 456 (3rd Cir. 2025) essentially followed the dissent in *Akins,* not the majority. In *Akins*, the dissenting Justices argued that the plaintiffs must

show a logical nexus between their injury status and the claim asserted. *See Akins*, 524 U.S. at 21-22. The majority in *Akins* flatly rejected that framework, explaining that, "the 'logical nexus' inquiry is not relevant" where the statute protects plaintiffs from "failing to receive particular information[.]" *Id*. at 22. The same is true with the NVRA and therefore no "nexus" must be shown.

The NVRA is a public disclosure statute, meaning there is no requirement to show a "nexus" between the information requested and a downstream injury.

In the end, the Third Circuit misapplied *TransUnion*. *TransUnion* did not deal with a government sunshine law giving rise to an informational injury. Those courts who have required downstream damage to an informational injury based on a government sunshine law have misapplied *TransUnion*. The Court in *TransUnion* explicitly distinguished itself from *Akins* and *Public Citizen* to ensure following courts would not make the mistake the Third Circuit made. *See TransUnion*, 594 U.S. at 440.

Lower Courts Get It Right.

In following *Havens Realty, Akins* and *Public Citizen*, lower courts have applied FOIA's simple standing framework to the NVRA's Public

RETRIEVED FROM DEMOCRACYDOCKET.COM

Disclosure Provision, 52 U.S.C. § 20507(i)(1). For example, the Eastern District of Virginia explained that "[f]or a plaintiff to sufficiently allege an informational injury, it must first allege that the statute confers upon it an individual right to information, and then that the defendant caused a concrete injury to the plaintiff in violation of that right." *Project Vote/Voting for Am., Inc. v. Long,* 752 F. Supp. 2d 697, 702 (E.D. Va. 2010). Because "the NVRA provides a public right to information," *id*. at 703, and there is "no dispute that the plaintiff has been unable to obtain the [r]equested [r]ecords," "the plaintiff's alleged informational injury is sufficient to survive a motion to dismiss for lack of standing." *Id*. at 703-04. *See also, Pub. Int. Legal Found. v. Bennett*, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *8-10 (S.D. Tex., Feb. 6, 2019) (denying motion to dismiss), *adopted by Pub. Int. Legal Found., Inc. v. Bennett*, No. 4:18-CV-00981, 2019 U.S. Dist. LEXIS 38686 (S.D. Tex., Mar. 11, 2019); *Jud. Watch, Inc. v. King*, 993 F.Supp.2d 919, 923 (S.D. Ind. 2012) (citing *Akins*, 524 U.S. at 24-25); *Judicial Watch v. Griswold*, 2022 U.S. Dist. LEXIS 153290 (D. Colo. August 25, 2022).

RETRIEVED FROM DEMOCRACYDOCKET.COM

The Foundation Has Organizational Standing.

The Foundation's core mission is to "to promote the integrity of elections nationwide through research, education, remedial programs, and

litigation." ER 240. Using statewide voter files from many states and other documents available through state and federal open records laws, the Foundation does research and analysis to determine how and whether voter rolls are being kept current and accurate. ER 240-41. The Foundation uses this information to write reports, articles, blogs, and other media to inform the public of the results of this work. ER 240-41. This is exactly the type of core mission to which this court referred in *Inland Empire Waterkeeper v. Corona Clay Co.,* in deciding standing. 17 F.4th 826, 832 (9th Cir. 2021).[1] Without the statewide Voter File, the Foundation is stymied in its work.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Though Unnecessary, The Foundation Alleged Additional Adverse Consequences Caused by the Informational Injury.

To the extent the Foundation must allege "downstream consequences" stemming from its informational injury, the Foundation has done so. ER 240-42 ¶ 3; 252-52 ¶¶ 47-63.

[11] The Court also asked the parties to discuss *Wilderness Soc'y Inc., v. Rey*, 662 F.3rd 1251 (9th Cir. 2010). *Wilderness Soc'y* reaffirmed that an informational injury is an injury-in-fact and is sufficient for standing. *Id.* at 1258. The court held that a procedural injury, standing alone, cannot serve as an injury-in-fact. *Id.* at 1259. Here, the Foundation does not assert a procedural injury, but an informational injury.

First, the Foundation cannot evaluate and scrutinize Hawaii's voter list maintenance activities because Mr. Nago refuses to produce the requested records. ER 245. Mr. Nago's denial of the Foundation's request is a refusal to permit the Foundation to scrutinize Hawaii's list maintenance activities to the extent the NVRA allows. *See Public Citizen*, 491 U.S. at 449.

Second, Mr. Nago's actions are impairing the Foundation's educational programming. ER 254. The Foundation cannot speak about a matter of public interest, specifically, its "ability to educate the public about the state of Hawaii voter rolls and voter list maintenance activities." ER 254. The Foundation plausibly alleges that its ability to perform these educational functions is impaired because Mr. Nago is refusing to produce the requested records. ER 254. This injury would impact other organizations that rely on transparency of election documents.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Third, Mr. Nago's actions are frustrating, impeding and harming the Foundation's efforts to carry out its organizational mission and to determine whether Hawaii and other states are complying with state and federal voter list maintenance laws. ER 254-55. The Foundation cannot enforce the NVRA, as Congress intended when it gave the public a private

right of action. 52 U.S.C. § 20510(b). Again, the Foundation is not alone in protecting voting rights and relying on transparency rights to do so.

Fourth, the Mr. Nago's "actions are impairing the Foundation's institutional knowledge upon which it depends for its programming." ER 93-94. The Foundation must continually keep its institutional knowledge current and accurate so that it can operate efficiently, timely, and effectively, including for the purposes that Congress intended under the NVRA. ER 93-94. Institutional knowledge helps dictate where, when, and how [the Foundation] deploy[s] its resources. ER 93-94. By impairing the Foundation's institutional knowledge. Mr. Nago is thus impairing the Foundation's programming. ER 93-94.

RETRIEVED FROM DEMOCRACYDOCKET.COM

CONCLUSION

The Foundation's allegations concerning its mission, intended activities, and inability to engage in those activities are presumed true at this stage. *Sheppard v. David Evans & Associates,* 694 F.3d 1045, 1050 (9th Cir. 2012). Any claim that there is no "real-world harm" in failing to produce the statewide Voter Roll is contradicted by the NVRA's text and various court decisions on this issue. ER 27. *See Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 47 (1st Cir. 2024); *see also Pub. Int. Legal Found., Inc. v. Wolfe*, No. 24-cv-285-jdp, 2024 U.S. Dist. LEXIS 216250, at

*11 (W.D. Wis. Nov. 26, 2024) ("… the court concludes that the foundation has standing under Article III").

The Foundation has a ripe, informational injury because it was denied records to which it is entitled under federal law. The Foundation has organizational standing because its pre-existing core mission is to use statewide Voter File for its fundamental work. The Foundation has standing with or without the extra "consequences" requirement implied in *TransUnion* because the Foundation pleaded downstream, concrete injuries sufficient to comply with *TransUnion*.

Date: September 5, 2025

/s/ Joseph M Nixon

Joseph M. Nixon
Texas Bar #15244800
Federal Bar #1319
Noel H. Johnson
Wisconsin Bar #1068004
Public Interest Legal
Foundation, Inc. 107 S. West
Street Suite 700 Alexandria,
Virginia 22314
Tel: (703) 745-5870
Fax: (888) 815-5641
njohnson@PublicInterestLegal
.org
jnixon@publicinterestlegal.org

Attorneys for Appellant Public Interest Legal Foundation

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2025, I electronically filed the foregoing document using the Court's ECF system, which will serve this response on all parties.

/s/ Joseph M. Nixon

Joseph M. Nixon
Public Interest Legal Foundation, Inc.
107 S. West Street, Ste 700
Alexandria, VA 22314
(703) 745-5870
jnixon@publicinterestlegal.org

RETRIEVED FROM DEMOCRACYDOCKET.COM