

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JUDICIAL WATCH, INC.,	:	
	:	
Plaintiff	:	No. 1:20-CV-0708
	:	
v.	:	Judge Conner
	:	
COMMONWEALTH OF	:	Electronically Filed Document
PENNSYLVANIA, ACTING	:	<i>Complaint Filed 04/29/20</i>
SECRETARY VERONICA	:	
DEGRAFFENREID¹, BUCKS	:	
COUNTY COMMISSION, BUCKS	:	
COUNTY BOARD OF ELECTIONS,	:	
BUCKS COUNTY REGISTRATION	:	
COMMISSION, THOMAS FREITAG,	:	
CHESTER COUNTY COMMISSION,	:	
CHESTER COUNTY BOARD OF	:	
ELECTIONS, CHESTER COUNTY	:	
REGISTRATION COMMISSION,	:	
SANDRA BURKE, DELAWARE	:	
COUNTY COUNCIL, DELAWARE	:	
COUNTY BOARD OF ELECTIONS,	:	
DELAWARE COUNTY	:	
REGISTRATION COMMISSION <i>and</i>	:	
LAUREEN HAGAN,	:	
	:	
Defendants	:	
	:	
v.	:	
	:	
COMMON CAUSE PENNSYLVANIA	:	
<i>and</i> LEAGUE OF WOMEN VOTERS	:	
OF PENNSYLVANIA,	:	

¹ Secretary of the Commonwealth Kathy Boockvar resigned from office on February 5, 2021, and Acting Secretary Degraffenreid was appointed on February 8, 2021. In accordance with Federal Rule of Civil Procedure 25(d), Defendant Degraffenreid is “automatically substituted as a party” herein.

Intervenor Defendants :

**BRIEF IN SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

Defendant, Acting Secretary of the Commonwealth Veronica Degraffenreid, by and through her undersigned counsel, hereby submits this Brief in Support of her Motion for Judgment on the Pleadings, as follows.

I. INTRODUCTION

Plaintiff filed a Complaint that sets forth allegations challenging the Secretary's voter list maintenance practice on a statewide basis. At no time did Plaintiff give the Secretary the requisite statutory notice under the National Voting Rights Act (NVRA) relating to any supposed issues surrounding statewide list maintenance practices. Rather, Plaintiff sent three letters specific to Bucks, Chester and Delaware counties (and, even those notices are insufficient as to those counties). This Court, therefore, cannot adjudicate any "statewide" claims (or any claims relating to other counties). Moreover, Plaintiff's case is premised on incorrect numbers, which have since been publicly corrected. Judgment should, therefore, be entered in the Secretary's favor.

II. FACTUAL BACKGROUND

Judicial Watch alleges that on December 11, 2019, it sent letters to Bucks, Chester, and Delaware Counties and the Secretary of the Commonwealth of Pennsylvania, alleging that each of the three counties had failed to comply with

NVRA list maintenance requirements. *See* Complaint ¶ 59 & Exs. 1-3. According to these letters, Judicial Watch had concluded that each county had violated the requirement that it “conduct a general program that makes a reasonable effort to remove the names of ineligible voters” when that ineligibility arises from death or a change of address. 52 U.S.C. § 20507(a)(4). First, the letters stated, the Commonwealth had reported numbers in response to “survey question A9e” of its biennial report to the U.S. Election Assistance Commission (“EAC”) that, “if accurate,” would indicate a low number of a certain type of removal from each county’s registration lists. Second, the letters continued, the counties had “high registration rates.” *See* Complaint Exs. 1-3 at 2.

Judicial Watch’s letters contained little explanation of these allegations. Judicial Watch did not provide a copy of the “survey question A9e” data or the numbers it had compared to conclude that the counties had “high registration rates” and links in the letters’ footnotes went to deleted or inactive websites. *See* Complaint Exs. 1-3 at 2 n.4-5, Ex. 4 at 3 (“The websites cited in footnotes 4 and 5 of your letter are inactive, non-exist[e]nt, or simply are not what you describe them to be”). Nonetheless, Judicial Watch demanded that each county provide extensive documents and other information, and asserted that if it did not receive this information within two weeks, by December 25, 2019, it would deem that failure to be an “independent violation” of the NVRA. Complaint Exs. 1-3 at 3.

The letters were met with puzzlement, followed by compelling evidence that Judicial Watch was wrong. The Commonwealth sent links to the DOS Reports and told Judicial Watch that its figures were wrong. Complaint Ex. 9. Judicial Watch does not allege that it responded to the Commonwealth. If Judicial Watch had engaged in a meaningful dialogue with the Department of State, it would have learned that the data that it relied on to presume that there are violations was incorrect. The Department of State later updated the data with the EAC and these updated numbers reflect that the counties are engaging in robust list maintenance, with thousands of voters being removed from the rolls. The corrected information is attached to the Secretary's Answer. *See* Doc. 33.1.

Despite the fact that the Plaintiff only sent letters about the three defendant counties,² the Plaintiff has set forth allegations in the Complaint, challenging the Secretary's list maintenance program on a statewide basis, and those of other counties. For instance, the Plaintiff alleges that:

45. The numbers of removals in Pennsylvania pursuant to the procedures set forth in Section 8(d)(2) of the NVRA, which numbers the Commonwealth itself reported to the EAC, are absurdly low throughout Pennsylvania, ranging by county from a high of 72 down to zero.

46. The numbers of removals in Pennsylvania pursuant to the procedures set forth in Section 8(d)(2) of the NVRA, which

² Plaintiff did send a letter regarding Allegheny County, but Plaintiff has since resolved its issues with Allegheny County.

numbers the Commonwealth itself reported to the EAC, indicate a multi-year failure by the Commonwealth and Secretary Boockvar, the chief State election official, to comply with a core requirement of Section 8 of the NVRA.

47. Other Pennsylvania counties have confirmed that they have been delinquent in removing old, inactive registrations under Section 8(d)(2) of the NVRA. David Voye, Elections Manager for Allegheny County, stated in a televised report that “I would concede that we are behind in culling our rolls” and that it was an activity that had “been put on the back burner.” Under Threat Of Lawsuit, Allegheny Co. Purging 69,000 Inactive Voters From Rolls (CBS Case 1:20-cv-00708-CCC Document 1 Filed 04/29/20 Page 9 of 21 10 Pittsburgh, Jan. 14, 2020), available at <https://pittsburgh.cbslocal.com/2020/01/14/alleghenycounty-board-of-elections-voter-rolls/>.

...

49. Secretary Boockvar took no action regarding Allegheny County and defended its list maintenance practices as late as March 2020, despite the widely publicized admission by County officials of this multi-year failure to comply with Section 8 of the NVRA.

50. The Pennsylvania Department of State reports on its website that Pennsylvania still has over 800,000 inactive registrants on its voter rolls.

See Doc. 1, ¶¶ 45-50.

The pleadings and their exhibits make clear that a claim cannot be maintained against the Secretary due to lack of statutory notice regarding these

allegations. The Secretary has, thus, filed a Motion for Judgment on the Pleadings.

This brief is now submitted in support thereof.³

III. QUESTIONS PRESENTED

- A. Whether Plaintiff did not provide any notice, whatsoever, to the Secretary regarding statewide violations such that this Court does not have jurisdiction to adjudicate any such claims?

[Suggested Answer: YES]

- B. Whether Plaintiff did not provide any notice to the Secretary regarding a failure to provide records such that judgment should be entered in the Secretary's favor with respect to Count II?

[Suggested Answer: YES]

- C. Whether there is no actual controversy with respect to registration rates in Bucks, Chester and Delaware Counties?

[Suggested Answer: YES]

IV. ARGUMENT

Standard of Review

A party may move for judgment on the pleadings “[a]fter the pleadings are closed—but early enough not to delay trial.” Fed. R. Civ. P. 12(c). “The standard of review for a motion for judgment on the pleadings is identical to that of the motion to dismiss under Federal Rule 12(b)(6).” *Brautigam v. Fraley*, 684 F.Supp. 2d 589, 591 (M.D. Pa. 2010). “The only notable difference between these two

³ The County Defendants have filed a Motion to Dismiss for failure to state a claim, which remains pending.

standards is that the court, for a motion on the pleadings, reviews not only the complaint but also the answer and written instruments attached to the pleadings.” *Id.* In deciding a motion for judgment on the pleadings, the court ordinarily considers the pleadings and attached exhibits, undisputedly authentic documents attached to the motion for judgment on the pleadings if Plaintiff’s claims are based on the documents, and matters of public record. *Stewart v. Xrimz, LLC*, No. 3:10-CV-2147, 2001 WL 5878381, *1 (M.D. Pa. Nov. 23, 2011); *see also United States v. Cephalon, Inc.*, 159 F.Supp. 3d 550, 555 (E.D. Pa. 2016) (“The Court considers the pleadings and exhibits attached thereto, matters of public record and undisputedly authentic documents attached to the motion for judgment on the pleadings if plaintiffs’ claims are based on the documents.”).

A. Plaintiff did not provide any notice, whatsoever, to the Secretary regarding statewide violations depriving this Court of jurisdiction to adjudicate those claims.

The NVRA requires that “written notice” of a purported violation be provided “to the chief election official of the State involved,” and authorizes the commencement of litigation “[i]f the violation is not corrected within 90 days” of such notice.⁴ 52 U.S.C. § 20510(b)(1), (2). As this Court has explained, “[n]otice is

⁴ The application and length of the curative period depends on how many days prior to a federal election a purported NVRA violation occurs, 52 U.S.C.A. § 20510(b)(2)-(3); given the timing of the records requests and Judicial Watch’s initiation of this litigation, the relevant curative period here is 90 days.

a precondition to filing suit under the NVRA.” *Public Interest Legal Foundation v. Boockvar*, 370 F. Supp. 3d 449, 456-57 (M.D. Pa. 2019) (dismissing subsection 20507(i) claim for failure to provide notice of purported violation to Pennsylvania chief election official prior to filing suit). Failure to provide the proper notice under the statute deprives the Court of jurisdiction to adjudicate those claims. *See Bellitto v. Snipes*, 268 F. Supp.3d 1328, 1332 (S.D. Fla. 2017) (“[t]his Court’s jurisdiction, therefore, stems directly from § 20510(b), and Plaintiffs’ standing to bring suit depends upon compliance with the statute.”).

Notice is sufficient under Section 20510 “when it (1) sets forth the reasons that a defendant purportedly failed to comply with the NVRA, and (2) clearly communicates that a person is asserting a violation of the NVRA and intends to commence litigation if the violation is not timely addressed.” *Public Interest Legal Foundation*, 370 F. Supp.3d at 456-57. Put otherwise, “the pre-suit notice requirement [] is violation specific.” *Bellitto*, 268 F. Supp.3d at 1334 (dismissing subsection 20507(i) claim because plaintiff only sent defendant a single correspondence requesting documents under the NVRA and never notified defendant of purported NVRA violation after the request went unfulfilled); *Georgia State Conference of NAACP v. Kemp*, 841 F. Supp.2d 1320, 1335 (N.D. Ga. 2012) (dismissing plaintiff from NVRA suit because he failed to comply with notice requirement).

In this case, Plaintiff has set forth allegations in the Complaint indicating that the Secretary has failed to comply with the NVRA on a statewide basis, and in connection with counties outside of the three named in the letters. But, Plaintiff did not give the required statutory notice for these claims. Thus, those claims and theories cannot proceed against the Secretary. Indeed, in *Belitto*, the court confirmed that “[i]t is not enough that a potential NVRA defendant has general notice that an individual or organization believes it to be in violation of the NVRA before facing litigation.” *Belitto*, 268 F. Supp.3d at 1334 (citing *Judicial Watch, Inc. v. King*, 993 F.Supp.2d 919, 922 (S.D. Ind. 2012) (explaining that an NVRA notice is sufficient if it “sets forth the reasons for [the] conclusion” that a defendant failed to comply with the NVRA)). “Similarly, notice as to one potential NVRA violation is not the equivalent of notice as to all potential NVRA violations. Rather, a potential NVRA defendant must have notice of exactly what violation or violations have been alleged in order to have a meaningful opportunity to attempt complete compliance before facing litigation.” *Id.*

Plaintiff attaches three letters to its Complaint. *See* Complaint, Exhibits 1-3. The letter attached as Exhibit 1 is titled “**Re: Statutory Notice of Violations of 52 U.S.C. § 20507 in Bucks County**”; the letter attached as Exhibit 2 is titled “**Re: Statutory Notice of Violations of 52 U.S.C. § 20507 in Chester County**”; and, the letter attached as Exhibit 3 is titled “**Re: Statutory Notice of Violations of 52**

U.S.C. § 20507 in Delaware County". Each of those letters respectively complains about single digit numbers related to voters who changed their addresses, which numbers were garnered from the EAC Report. Particularly, Plaintiff states that the numbers are "absurdly low" regarding "registrants [who] failed to respond to an address confirmation notice and failed to vote in two consecutive federal elections." *Id.* The letters also note in passing that the registration rates in those counties are high. *Id.* None of the letters give notice of statewide violations, or of violations outside of the respective county targeted.

Because the Plaintiff failed to notify the Secretary regarding alleged statewide deficiencies, or deficiencies outside of the three counties to which the letters were sent, as required under the statute, this Court does not have jurisdiction over any such claims. Therefore, judgment should be entered in the Secretary's favor as to these claims.

B. Plaintiff did not provide any notice to the Secretary regarding a failure to provide records such that judgment should be entered in the Secretary's favor with respect to Count II.

The Secretary did not ignore Plaintiff's letters. Rather, she responded, and noted the high number of removals for each of the named counties. Plaintiff never replied or engaged in further dialogue with the Secretary. This includes having never mentioned a purported failure to provide records. A specific notice that the Secretary failed to provide records was especially necessary in this case because

the original requests for documents were directed at the counties. Because no notice was given to the Secretary regarding a purported failure to supply records, Count II cannot proceed against the Secretary. *See Bellitto*, 268 F. Supp.3d at 1334 (dismissing subsection 20507(i) claim because plaintiff only sent defendant a single correspondence requesting documents under the NVRA and never notified defendant of purported NVRA violation after the request went unfulfilled).

C. There is no actual controversy with respect to registration rates in Bucks, Chester and Delaware Counties.

Plaintiff wrote letters to Bucks, Chester and Delaware counties complaining of “absurdly low” numbers in connection with “registrants [who] failed to respond to an address confirmation notice and failed to vote in two consecutive federal elections.” The Plaintiff specifically cited numbers that it had obtained from the survey responses to the EAC. Those numbers turned out to be wrong, and have since been corrected.

As to Bucks County, Plaintiff wrote that “[t]he County reported removing only *eight* voter registrations in the last two-year reporting period on the grounds that the registrants failed to respond to an address confirmation notice and failed to vote in two consecutive federal elections. This is an absurdly low figure for a county of this size. If this figure is accurate, it establishes beyond any dispute that the County is not complying with the NVRA.” Complaint, Exhibit 1.

For Chester County, Plaintiff wrote that “[t]he County reported removing only *five* voter registrations in the last two-year reporting period on the grounds that the registrants failed to respond to an address confirmation notice and failed to vote in two consecutive federal elections. This is an absurdly low figure for a county of this size. If this figure is accurate, it establishes beyond any dispute that the County is not complying with the NVRA.” Complaint, Exhibit 2.

Finally, for Delaware County, Plaintiff wrote, “The County reported removing only *four* voter registrations in the last two-year reporting period on the grounds that the registrants failed to respond to an address confirmation notice and failed to vote in two consecutive federal elections. This is an absurdly low figure for a county of this size. If this figure is accurate, it establishes beyond any dispute that the County is not complying with the NVRA.” Complaint, Exhibit 3.

As Plaintiff was specifically informed by the Secretary, however, these numbers *were not* accurate. The Department of State erroneously listed incorrect numbers on its report to the EAC, which numbers were subsequently amended. The ERRATA sheet amending the numbers is attached as Exhibit 1 to the Secretary’s Answer. The amended survey response to question A9e reflects that 15,714 registrations had been removed in Bucks County during the most recent two-year reporting period; 11,519 registrations had been removed in Chester County during the most recent two-year reporting period; and, 20,968 registrations

had been removed in Delaware County during the most recent two-year reporting period.

Had the Plaintiff engaged in a meaningful dialogue with the Secretary, this misunderstanding could have been immediately resolved. The Plaintiff declined to engage in further discussion, however, and instead filed a lawsuit. The lawsuit is based upon a false premise, however, as confirmed by the Secretary's Answer and exhibit thereto. The numbers in those counties are not "absurdly low."

When using the correct numbers—those provided to the Plaintiff—the Plaintiff has no claim. Indeed, all that is left is Plaintiff's allegations that the registration rates in those counties seem high. But, that is insufficient to state a claim. There is no *per se* violation due to what may be perceived as a high registration rate. The NVRA does not set quotas or mandate that registration rates be at certain levels. Therefore, Plaintiff has failed to state a claim based upon "high registration rates."

In order for there to be a "case of actual controversy" in the constitutional sense, the controversy must be "one that is appropriate for judicial determination." *Wyatt, Virgin Islands, Inc.*, 385 F.3d 801, 806 (3d Cir. 2004). "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having *adverse* legal

interests.” *Id.* (emphasis added). “It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” (citing *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240, 57 S. Ct. 461 (1937)). The conflict between the parties must be ripe for judicial intervention; it cannot be “nebulous or contingent” but “must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.” *Id.* (citing *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S. Ct. 236, 97 L. Ed. 291 (1952)).

For the foregoing reasons, there is no actual controversy, such that this case is not justiciable because the premise of Plaintiff’s Complaint is false—that there are “absurdly low” numbers as reflected on the EAC survey—and because all that is left are hypothetical concerns.

V. CONCLUSION

For the foregoing reasons, this Honorable Court should grant the Secretary's Motion for Judgment on the Pleadings, and enter judgment in her favor.

Respectfully submitted,

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Date: March 4, 2021

CERTIFICATE OF SERVICE

I, Nicole J. Boland, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on March 4, 2021, I caused to be served a true and correct copy of the foregoing document to the following:

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