

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PUBLIC INTEREST LEGAL
FOUNDATION,

No. 1:21-cv-00929

Plaintiff,

HON. JANE M. BECKERING

v

JOCELYN BENSON, in her official capacity
as Michigan Secretary of State,

Defendant.

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**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether PILF is not entitled to summary judgment as to Count 2 where PILF lacks standing to bring its claim for the disclosure of voting records and where PILF was not entitled to all of the records sought?
2. Whether PILF is not entitled to a permanent injunction where the terms of the proposed injunction are too vague to be enforced?

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COUNTER-STATEMENT OF FACTS

In its brief in support of summary judgment, PILF identifies what it describes as “facts” that “are not in dispute.” (ECF No. 154, PageID.3212.) In response, Defendant Benson states the following:

1. Paragraph 1 is a statement of law, not fact.
2. Paragraph 2 is a statement of law, not fact.
3. Defendant does not have sufficient information to confirm that PILF may accurately be considered a non-partisan organization, and so cannot honestly stipulate to such a statement. Defendant does admit that PILF claims to be non-partisan. Regardless, this statement is not material to the determination of PILF’s motion.
4. Defendant cannot confirm whether PILF has “dedicated significant time and resources” to any project involving Michigan. Regardless, this statement is not material to the determination of PILF’s motion, which only addressed Count II of the complaint.
5. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself. Regardless, this statement is not material to the determination of PILF’s motion, which only addressed Count II of the complaint.
6. Defendant does not deny that PILF sent the letter cited in this paragraph, but the statement that Michigan was “in violation of the NVRA” is a legal conclusion that Defendant disputes. Regardless, this statement is not material to the determination of PILF’s motion, which only addressed Count II of the complaint.

7. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself. Regardless, this statement is not material to the determination of PILF's motion, which only addressed Count II of the complaint.

8. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself. Regardless, this statement is not material to the determination of PILF's motion, which only addressed Count II of the complaint.

9. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself. Further, as addressed in Defendant's argument below, not all the documents requested in PILF's letter may be subject to inspection under NVRA.

10. As addressed in Defendant's argument below, not all the documents requested in PILF's letter may be subject to inspection under NVRA.

11. Admitted.

12. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself.

13. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself. Further, PILF's summary of the e-mail is incomplete and misleading. On December 17, 2020, Bureau of Elections staff responded to PILF, stating that the Department had not agreed to the date chosen by PILF, and that the building was closed to the public due to the then-ongoing pandemic. (ECF No. 1-10, PageID.65-66.)

14. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself.

15. Paragraph 15 is a statement of law, not fact. However, Defendant does not dispute that March 18, 2021 is 90 days after December 18, 2020.

16. Defendant does not deny that PILF sent the letter cited in this paragraph, but the document speaks for itself. Regardless, this statement is not material to the determination of PILF's motion, which only addressed Count II of the complaint.

17. Defendant does not dispute the statement of Director Brater, but—as discussed in Defendant's own motion for summary judgment—the description of QVF and CARS provided in this paragraph is significantly incomplete. Regardless, this statement is not material to the determination of PILF's motion, which only addressed Count II of the complaint.

18. Defendant does not dispute that it receives information from the SSA, but this paragraph summarizes two interrogatories into a single sentence in such a way as to be incomplete and potentially misleading. The interrogatory responses speak for themselves.

19. Defendant does not dispute that it uses deceased reports from SSA to update CARS, which then updates corresponding records in the QVF. However, this paragraph summarizes Defendant's interrogatory response into a single sentence in such a way as to be incomplete and potentially misleading. The interrogatory responses speak for themselves.

20. Defendant does not dispute that it receives “information” from MDHHS, but this paragraph summarizes multiple interrogatories into a single sentence in such a way as to be incomplete and potentially misleading. The interrogatory responses speak for themselves.

21. Paragraph 21 misstates the Defendant’s interrogatory response and states that Defendant receives information from the public “through CARS.” That is not correct. In response to Interrogatory #1, Defendant stated: “Third, members of the public may send information into the Department which would lead to a cancellation. An immediate family member may send a death certificate in. Upon receipt, the Department will manually review and mark the individual as deceased in CARS, if applicable. The information will transfer into the QVF in the same manner as described above.” (Pl’s Exhibit D, ECF No. 154-5, PageID.3257-3259, p 2.)

22. Defendant does not dispute the statements of the Department’s 30(b)(6) representatives, but PILF’s summary of the testimony differs slightly and is inferior to a quotation of the actual testimony.

23. Defendant does not dispute the statements of the Department’s 30(b)(6) representatives, but PILF’s summary of the testimony differs slightly and is inferior to a quotation of the actual testimony.

24. Defendant does not dispute the statement of Director Brater, but PILF’s summary of his testimony differs slightly and is inferior to a quotation of the actual

testimony. Regardless, this statement is not material to the determination of PILF's motion, which only addressed Count II of the complaint.

25. Paragraph 25 is incomplete and potentially misleading. What Director Brater said was that "The Bureau might also assist the clerk **as needed, if requested.**" (Emphasis added). (ECF No. 154-4, PageID.3250.)

In addition, Defendant maintains that Plaintiff's statement of facts is incomplete. Defendant offers the following facts to provide additional information and context.

On December 11, 2020, PILF sent a letter to the Secretary of State requesting that it be permitted to inspect four broad categories of records:

1. Data files your office has received from the federal Social Security Administration listing deceased individuals.
2. Any records relating to the cancellation of deceased registrants from the Qualified Voter File ("QVF"), including but not limited to reports that have or can be generated from Michigan's QVF.
3. Any records relating to the investigation of potentially deceased registrants who are listed on the QVF, including but not limited to correspondence between your office and local election officials.
4. All records and correspondence regarding your use of the Electronic Registration Information Center to conduct voter roll list maintenance.

(ECF No. 1-9, PageID.63-64.) PILF cited 52 U.S.C. §20507(i)(l) as the legal basis for its requests, which provides for inspection of records pertaining to, "the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters."

On December 16, 2020, PILF sent an e-mail declaring that its representative would visit MDOS offices on December 18, 2020—two days later—to inspect "voter

roll maintenance records.” (ECF No. 1-10, PageID.65-66.) On December 17, 2020, Bureau of Elections staff responded, stating that the Department had not agreed to the date chosen by PILF, and that the building was closed to the public due to the then-ongoing pandemic. (ECF No. 1-10, PageID.65-66.) On December 18, 2020, PILF sent a letter stating that the Secretary of State was in “violation” of the NVRA for failing to permit inspection of documents. (ECF No. 1-11, PageID.67-68.) On January 13, 2021, PILF sent another letter stating that Michigan had violated the NVRA by failing to allow PILF to inspect documents. (ECF No. 1-13, PageID.72-73.)

A. Kinds of documents kept by MDOS concerning list maintenance that may be subject to inspection under NVRA.

The QVF can be queried to run a list of voter registration information that contains the voter’s name, the year of birth, and the date of registration. (MDOS Dep, p 144 ln 3–p 145 ln 2, ECF No. 149-5, PageID.3123.) In addition, there is a “voter history file,” which has general information about each individual voter, including whether they have voted in an election (indicated by a yes or no), whether they have voted absentee (also indicated by a yes or no), and the address history of that voter. (*Id.*) Concerning cancellations, QVF can also create reports that detail the voter’s status, such as whether they are active, if they’re in verify or challenge status, or if they are already cancelled for some reason, such as being deceased. (*Id.*) In response to Request to Produce #14, Defendant produced to Plaintiff all reports from the QVF showing registrants who were cancelled as deceased from 2016 to the time of the request. (ECF No. 149-12 PageID.3183.)

MDOS also issues guidance on its website and through correspondence regarding processes and procedures for list maintenance activities such as cancellations. (MDOS Dep, p 148 ln 9–p 149 ln 5, ECF No. 149-5, PageID.3124.) Defendant has produced these kinds of documents in response to Requests to Produce 1 (“Documents relating to the Defendant’s procedures and practices as to registrants who are or may be deceased”), 2 (“Communications with any local, state, or federal entity related to the 2020 or 2021 Deceased Registrant Lists, this litigation, and/or the subject matter thereof”) 10 (“The manual, handbook, or any other written or electronic documents that outline any processes for maintaining the Qualified Voter File”), 11 (“Training documents relating to voter list maintenance, including all information contained within the Michigan Elections eLearning Center Information”), and 16 (“All communications to or from local election clerks concerning the removal of registrants from the Qualified Voter File on the basis that the registrant is deceased.”) (ECF No. 149-13, PageID.3189-3191; ECF No. 149-12, PageID.3181, 3183-3184.)

B. Other events occurring contemporaneous with PILF’s requests.

The months leading up to and following the November 2020 election were a historically frantic time for the State of Michigan and the Bureau of Elections in particular, as explained by Director Brater:

Q: What other things were going on in October and September of 2020?

A. Well, there was the lead-up to the presidential election, the state -- there -- in fact, it was ongoing already because absentee ballots were already being mailed out, which was a much higher factor in that election than other elections because of the Covid 19 pandemic. We

were also working to help jurisdictions run, you know, get through their elections because of problems related to Covid, staff members getting sick, polling locations becoming unavailable. So there were a number of emergencies and crises that were ongoing in the lead-up to the 2020 election.

Q. Similarly, were there other things going on in November of 2020 after election day?

A. Yes.

Q. What kinds of things were going on after election day?

A. Well, there were a -- first of all, I mean, the -- the counting of ballots didn't come -- become complete until sometime, I think, on Thursday after Election Day because of the high volume of absentee ballots, perhaps Friday, even.

And the post-election canvas process, which happens at the county level and on the state level, was much more eventful than in prior elections because of attempts to prevent the certification of the election.

There were a high volume of lawsuits being filed. There was a high volume of false information being made about the election and about election officials that needed to be responded to. And then the -- the pandemic was still ongoing as well, of course.

Q. So the -- the other things you've just discussed here, would it be fair to say those were taking a considerable amount of the Bureau's resources?

A. Yes.

Q. All right. How would you describe the availability of the Bureau's resources during this time as opposed to any other time since you've been at the Bureau as Director of Elections?

A. I would say that was the time at which our resources were the most depleted.

(Brater Dep, p 201 ln 23–p 202 ln 12, ECF No. 149-2, PageID.3082-3083.)

Beginning on the night of the November 3, 2020, election, the Bureau of Elections started receiving hundreds—if not thousands—of telephone calls and e-mails.

(MDOS Dep, p 183 ln 13–p 184 ln 7, ECF No. 149-5, PageID.3125.) Phone lines were shut down due to the volume of calls, including threats of violence. (*Id.*). The Bureau’s offices were closed to the public due to bomb threats, and staff were not even allowed in the building. (MDOS Dep, p 184 ln 8-15, ECF No. 149-5, PageID.3125.) There were also a significant number of lawsuits filed immediately following the election. (MDOS Dep, p 184 ln 16-20, ECF No. 149-5, PageID.3125.) The Board of State Canvassers met on November 23, 2020, to certify the results of the election and, due to the volume of threats, the Board was required to meet in an undisclosed location. (MDOS Dep, p 184 ln 21–p 185 ln 11, ECF No. 149-5, PageID.3125.) In addition, the state legislature sent subpoenas to MDOS requesting tens of thousands of pages of election-related documents. (MDOS Dep, p 185 ln 12-16, ECF No. 149-5, PageID.3125.) Bureau staff were also receiving threats against them personally and were under police protection. (MDOS Dep, p 186 ln 6-14, ECF No. 1459-5, PageID.3126.) Bureau staff were not allowed back into their offices until February of 2021. (MDOS Dep, p 190 ln 13-22, ECF No. 149-5, PageID.3127.)

ARGUMENT

- I. **Because PILF lacks standing to bring its claim for the disclosure of voting records, and where there is no genuine issue of material fact that PILF was not entitled to all of the records sought, the Defendant is entitled judgment in her favor as to Count II.**

The NVRA provides in 52 U.S.C. §20507(i)(1) that states will “make available for public inspection . . . all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official

lists of eligible voters.” “A person who is aggrieved by a violation of [the NVRA] may provide written notice of the violation to the chief election official of the State involved” and may file suit for injunctive relief if the violation goes uncorrected. 52 U.S.C. § 20510(b)(1)-(2). In Count II of its complaint, PILF alleges a violation of this section and seeks injunctive relief. (ECF No. 1, PageID.18-20.)

A. PILF lacks standing to bring suit for a violation of NVRA’s disclosure provisions where it has failed to demonstrate an actual injury.

In its brief supporting its motion to dismiss, Defendant raised PILF’s lack of standing. (ECF No. 11, PageID.93-130.) This Court rejected that argument in its opinion and order. (ECF No. 35, PageID.384-408.) Defendant renews its argument on the basis of the Fifth Circuit’s subsequent decision in *Campaign Legal Ctr. v. Scott*, 49 F.4th 931 (5th Cir. 2022).

In that case, the Fifth Circuit reversed the district court’s injunction requiring the State of Texas to produce documents after determining that the plaintiffs lacked standing to bring a claim under NVRA’s public disclosure provision. *Campaign Legal Ctr*, 49 F.4th at 932-933. The plaintiffs based their standing on three theories: (1) as a “civic engagement organization,” they had standing to request records under the NVRA; (2) that there was a “downstream injury” to them with respect to the public not having visibility into how Texas is keeping its voter lists; and (3) there is a “downstream injury” with respect to the public not having visibility into “properly registered Texans being discriminated against and burdened in their right to vote.” *Id.* at 936. The Court rejected those arguments and held that the plaintiffs had failed to demonstrate an actual injury.

The Court observed that the second and third arguments raised only injuries to the *public* and “Texas voters” in general. *Id.* Citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337-42 (2016) and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021), the Court focused instead on whether the plaintiffs had shown an actual injury caused by not receiving the requested documents:

Even if Plaintiffs had a right to the records sought, an issue we do not reach, they have not established an injury in fact. *See Spokeo*, 578 U.S. at 341, 136 S. Ct. at 1549. *Spokeo* implied and *TransUnion* held that “under Article III, an injury in law is not an injury in fact.” *TransUnion*, 141 S. Ct. at 2205.

* * *

As this court recently observed, *TransUnion* rejected “the proposition that ‘a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.’” *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, ___ F.4th ___, 2022 U.S. App. LEXIS 22649, 2022 WL 3355249, at *4 (5th Cir. Aug. 15, 2022) (quoting *TransUnion*, 141 S. Ct. at 2205). [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.* (quoting *Spokeo*, 578 U.S. at 341, 136 S. Ct. at 1549) (emphasis added).

Campaign Legal Ctr, 49 F.4th at 936-37. Pointedly, the plaintiffs in *Campaign Legal Ctr* were relying on “informational injury” based simply on not having the records they requested. *Id.*

That is *precisely* the same injury claimed by PILF here:

The Foundation has suffered an informational injury as a direct result of Defendant’s violation of Section 8 of NVRA because the Foundation does not have the data and records requested. The NVRA confers upon the Foundation the right to information, and by denying that information to the Foundation, the Defendants have caused a concrete injury to the Plaintiff. This violation also prevents the Foundation from engaging in its research, educational, and remedial activities.

(ECF 1, Complaint, PageID.19, ¶71.)

In *Dickson v. Direct Energy, LP*, 69 F.4th 338, 343 (6th Cir, 2023), the Sixth Circuit—citing *Spokeo* and *TransUnion*—similarly recognized that “a concrete harm is one that is real and not abstract” and “a mere procedural violation of a statutory right does not amount to a concrete injury.” The Court further held that Courts “must interrogate the concreteness requirement ‘even in the context of a[n alleged] statutory violation.” Although the Sixth Circuit also recognized that the existence of a statutory cause of action could “elevate” what would otherwise be legally inadequate “*de facto* injuries,” even then the injuries must “‘exist’ in the real world.” *Id.* (quoting *TransUnion*, 131 S.Ct. at 2205).

Here, just as in *CLC*, PILF has failed to demonstrate any concrete and particularized injury caused by the alleged violation of NVRA’s disclosure provision. Absent any actual harm to it from not obtaining the requested information about the “administration” of Michigan’s program for removing deceased voters, PILF has no cognizable injury in fact and lacks standing to bring this claim—even if there were a violation of the statute. PILF’s claim in Count II must be dismissed.

B. PILF is or was not entitled to inspect all the documents it sought in its December 11, 2020, letter.

Again, the NVRA provides that states will “make available for public inspection . . . all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. §20507(i)(1).

Here, the Defendant does not dispute that PILF made a request on December 11, 2020, to inspect records. (ECF No. 1-9, PageID.63-64.) Also, the Defendant acknowledges that at least some of the categories of records requested would be subject to inspection under the NVRA, and that the documents were not provided prior to the filing of this lawsuit. The facts discussed earlier—the chaotic aftermath of the November 2020 general election—provide an explanation for the Defendant’s inability to respond to PILF’s request. Simply put, PILF was demanding to see documents at an historically bad time for the Michigan Bureau of Elections.

However, that does not make PILF’s December 11, 2020, letter a blank check for the production of everything it sought. In its request to inspect records, PILF sought four broad categories of records:

1. Data files your office has received from the federal Social Security Administration listing deceased individuals.
2. Any records relating to the cancellation of deceased registrants from the Qualified Voter File (“QVF”), including but not limited to reports that have or can be generated from Michigan’s QVF.
3. Any records relating to the investigation of potentially deceased registrants who are listed on the QVF, including but not limited to correspondence between your office and local election officials.
4. All records and correspondence regarding your use of the Electronic Registration Information Center to conduct voter roll list maintenance.

(ECF No. 1-9, PageID.63-64.) It is far from clear that all the documents described in that letter are actually records subject to disclosure under the NVRA.

The NVRA requires the states to make available for public inspection “all records concerning the implementation of programs and activities conducted *for the purpose of ensuring the accuracy and currency of official lists of eligible voters. . .*”

52 U.S.C. § 20507(i)(1) (emphasis added). The Sixth Circuit has not yet had cause to examine the scope of subsection 20507(i)(1), and courts in other circuits have so far only recognized that “records” subject to inspection under this subsection of NVRA include voter registration lists, applications for voter registration, and other records related to the accuracy of official lists of eligible voters. *Public Interest Legal Foundation, Inc. v. Way*, 2022 U.S. Dist. LEXIS 204083 at *15 (D. New Jersey, Nov. 9, 2022) (collecting cases). In *Way*, the New Jersey District Court also concluded that Voter Modules—which the court described as “the instruction manual for computer software”—was not a record subject to inspection under NVRA. *Id.* at *14-20.

Also, in *Public Interest Legal Foundation, Inc. v N.C. State Bd. Of Elections*, 996 F.3d 257, 264 (4th Cir. 2021), the Fourth Circuit held that while NVRA’s disclosure provision was broad, the term “all records” in the statute, “does not encompass any relevant record from any source whatsoever, but must be read in conjunction with the various statutes enacted by Congress to protect the privacy of individuals and confidential information held by certain governmental agencies.”

Ultimately, the language of the NVRA is subject to basic principles of statutory interpretation. In interpreting statutes, the initial inquiry is whether the statute has a “plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). “The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the

intentions of its drafters.” *Somberg v. Utica Cmty. Schs*, 908 F.3d 162, 179 (6th Cir. 2018) (internal quotations omitted). Looking at PILF’s requests, they go beyond “records of programs” and seek to extend what might be obtained under the NVRA.

1. SSA data files

PILF’s request for “data files” from the SSA does not neatly fall within the scope of “records” under subsection 20507(i)(1). A data file received from the SSA is not a voter registration list and is not a record “related to the accuracy of official list of registered voters.” Instead, a data file is just that—data. That data is then used to create the record—in this case, Michigan’s official list of voters. The distinction is subtle, but significant—the “record” is Michigan’s QVF, as updated through the information from CARS. Moreover, the SSA files are subject to their own statutory privileges and protections that must be read in concert with the NVRA. *PILF*, 996 F.3d at 264. These files include social security numbers, names, and dates of birth. (MDOS Dep, p 49 ln 16—p 50 ln 23, ECF 149-5, PageID.3110-3111.)

2. QVF records and reports

Next, PILF sought, “Any records relating to the cancellation of deceased registrants from the Qualified Voter File (“QVF”), including but not limited to reports that have or can be generated from Michigan’s QVF.” Notably, this request did not seek a specific report that existed, and specifically included a request for reports that “can be generated” from the QVF. As stated even in PILF’s statement of facts, the QVF can be used to run “various” reports. It was and remains entirely unclear exactly what PILF was requesting. Nonetheless, PILF acknowledges in its

motion that it has already received a report of registrants who have been cancelled in response to Request for Production No. 14. (ECF No. 154, PageID.3222.)

3. Investigation records and correspondence with local election officials.

Third, PILF requested, “Any records relating to the investigation of potentially deceased registrants who are listed on the QVF, including but not limited to correspondence between your office and local election officials.” As noted in the statement of facts above, Director Brater’s testimony was that the Bureau would assist clerks *if requested*. Thus, in order for Defendant to respond to such a request, the Bureau must be provided some idea of who made such a request in order for Defendant’s staff to even begin to search for anything that might be responsive.

PILF points to an allegation in its complaint concerning the City of Detroit having provided the “State of Michigan” with deceased registrant data provided by PILF. (ECF No. 154, PageID.3223.) But PILF’s letter requesting inspection under the NVRA did not reference the City of Detroit, or the declaration of George Azzouz on which PILF’s complaint allegations would later be based. PILF’s letter, in fact, made no reference to any local jurisdiction or election official by name.

Regardless, PILF’s Request to Produce #16 requested, “All communications to or from local election clerks concerning the removal of registrants from the Qualified Voter File on the basis that the registrant is deceased.” (ECF No. 149-12, PageID.3183-3184.) While Defendant objected on the grounds that the request was vague and overbroad because failed to identify any custodians or search terms,

Defendant referred to responsive documents it had already produced. (*Id.*) PILF's request to produce also failed to provide any time frame in which to look for records. Michigan has 83 county clerks, 280 city clerks and 1,240 township clerks.¹ PILF did not subsequently attempt to narrow its request to address any request. Now, in a motion for summary judgment, PILF is insisting that there must be more responsive documents. However, PILF failed to follow through on discovery to verify that claim.

Nonetheless, a review of the material already provided to PILF demonstrates that the Defendant has already provided documents concerning PILF's letters and lawsuit with the City of Detroit concerning deceased registrants. Attached as Exhibit A are 38 pages of letters and e-mails containing the phrase "City of Detroit" that concern PILF's lists and deceased registrants. PILF's brief makes no mention of these documents or even that PILF has already received material on this topic. So, when PILF argues in its brief that it has received "zero" records, it is not clear that PILF has fully reviewed the discovery materials the Defendant has already produced.

4. ERIC records and correspondence.

Last, PILF requested "All records and correspondence regarding your use of the Electronic Registration Information Center to conduct voter roll list maintenance."

¹ <https://www.michigan.gov/sos/elections/voting/voters/special-topics/michigans-elections-system-structure-overview>. (Last accessed 10/27/2023).

Like the “data files” requested above, “correspondence” with ERIC is not a record of “a program and activity conducted” for list maintenance purposes. 52 U.S.C. §20507(i)(1). Further, ERIC’s deceased reports are subject to LADMF restrictions, as discussed in the Defendant’s response to PILF’s motion to compel. (ECF 118, PageID.2105-2159). Defendant incorporates by reference here the facts and arguments from that response brief. Fed. R. Civ. P. 10(c). While PILF’s motion to compel was ultimately granted, the ability of the documents to be produced through discovery (with some redactions the added security of a protective order) does not negate the legal restrictions imposed on LADMF records. Defendant had a legitimate and good faith basis to assert that the documents were protected by federal law and producing them without a court order would have potentially exposed Defendant to liability and penalties.

C. PILF’s request for injunctive relief is no longer redressable where it has obtained all available documents through discovery.

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990)). Federal courts have a continuing duty to ensure that they adjudicate only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *McPherson v. Mich. High School Athletic Ass’n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc).

If “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,” then the case is moot and the court has no jurisdiction. *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). A “live” controversy is one that “persists in ‘definite and concrete’ form even after intervening events have made some change in the parties’ circumstances.” *Mosely v. Hairson*, 920 F.2d 409, 414 (6th Cir. 1990) (citing *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) (“The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.”) (internal quotation marks and citation omitted). In other words, a case is moot where the court lacks “the ability to give meaningful relief[.]” *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019).

With respect to Count II of Plaintiff’s Complaint, the Defendant has already provided PILF with voluminous documents in discovery that exhaustively detail its list maintenance program, and it is not evident that the Defendant is in possession of any additional documents subject to public inspection under NVRA. The last point of any real contention was the production of ERIC deceased reports, which was resolved by the Court with its August 31, 2023 Order. (ECF 139, PageID.2924.) Upon information and belief, PILF is now in possession of all responsive records of Michigan’s list maintenance activities. Notably, PILF’s motion fails to identify any specific document that is subject to inspection under NVRA that has not been produced by Defendant. Because an injunction is no longer required for Plaintiff to

obtain the requested documents, there is no meaningful relief to be granted and PILF's claim is now moot.

II. A permanent injunction is unnecessary and inappropriate.

In the Sixth Circuit, “a plaintiff seeking a permanent injunction must demonstrate that it has suffered irreparable injury, there is no adequate remedy at law, that, considering the balance of hardships between the plaintiff and defendant, remedy in equity is warranted, and that it is in the public interest to issue an injunction.” *Audi AG v. D’Amato*, 469 F.3d 534, 550 (6th Cir. 2006) (quoting *eBay Inc., et al v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Under Fed. R. Civ. Proc. 65(d)(1), every injunction order must (1) state the reasons why it was issued, (2) state its terms specifically, and (3) describe in reasonable detail—without reference to the complaint or other document—the act or acts restrained or required.

Here, it should be noted that PILF's motion similarly makes no explicit request for permanent injunctive relief of any kind, and instead makes a general request for “judgment as a matter of law.” (ECF No. 153, PageID.3204). More importantly, the Complaint also makes no reference to or request for a permanent injunction. (ECF No. 1, PageID.19-20). Instead, the complaint requests only a judgment, “Ordering Defendant to allow inspection of records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of Michigan’s official lists of eligible voters.” (ECF No. 1, PageID.19.) This language essentially repeats the requirements of 50 U.S.C. § 20507(i)—except that PILF's language neglects to include statutory exception for

records relating to a declination to register to vote or the identity of a voter registration agency through which a particular voter registered.

PILF argues that it has suffered “irreparable injury” through a claimed “informational injury” and lost opportunity to urge election officials to take remedial measures. (ECF No. 3226-3227.) PILF cites to *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998), but fails to reconcile that with the more recent decision from the Supreme Court in *Spokeo, Inc. and TransUnion*. In addition, PILF fails entirely to support this claim with admissible evidence of virtually any kind and does not even attempt to cite any record supporting this argument. PILF does not identify any particular election officials that it would have “urged” to take any identifiable remedial measure, other than the Secretary, who bears the principal burden of list maintenance. Mich. Comp. Laws §§ 168.509n, 168.509o.

Even in the declaration of Logan Churchwell attached to PILF’s brief, he states only, “The Foundation has dedicated significant time and resources to evaluating the accuracy of Michigan’s voter roll and offering Defendant assistance with her voter list maintenance obligations. The Foundation communicates with election officials about problems or defects found in list maintenance practices and about way to improve those practices.” (ECF No. 1, PageID.3235.) Even putting aside the obvious vagueness of this statement, it is merely a statement of PILF’s general objectives, and it offers absolutely no evidence or support for any “informational injury” or lost opportunity purportedly caused by the Defendant’s

lack of response to its request to inspect records. PILF has simply not demonstrated any irreparable injury that would support a permanent injunction.

PILF next argues that there is somehow a danger of recurring violation because Defendant produced documents through discovery after this lawsuit was initiated. It is not entirely clear to Defendant how its compliance with discovery in any way demonstrates its unreasonableness, or the need for a permanent injunction. Regardless, to the extent that Plaintiff complains that Defendant raised legal objections to some of its requests, that only highlights that there was a legitimate and good-faith belief that PILF was not entitled to all the documents it sought. It is not clear how a permanent injunction would avoid that in the future, unless PILF is seeking an injunction that would prohibit the Defendant or any subsequent Secretary of State from raising new legal objections to any of PILF's future requests. Such an injunction, however, would raise obvious due process concerns, and in any event PILF cites no authority supporting or authorizing such a restraint.

This also demonstrates a considerable problem with the scope of any injunction under Rule 65(d)(1), which requires that the Court's order state its terms specifically and describe in reasonable detail—without reference to the complaint or other document—the act or acts restrained or required. Here, PILF's motion does not even specifically state the terms of the injunction it seeks. It is not entirely clear what acts PILF wants restrained or required—other than a generalized demand that Defendant comply with the NVRA.

But Defendant does not require a permanent injunction to be told to comply with the law. Any declaration issued by this Court as to the scope of NVRA's inspection requirement would be binding upon Defendant as to any of the requests made by PILF in this lawsuit about this one request in 2020. There simply is no likelihood that any of these issues will recur in the future following a determination by the Court. PILF's request for a permanent injunction must be denied.

CONCLUSION AND RELIEF REQUESTED

For these reasons, there is no genuine issue of material fact, and Defendant Secretary of State is entitled to judgment in her favor as a matter of law, together with any other relief that the Court determines to be appropriate under the circumstances.

Respectfully submitted,

DANA NESSEL
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s/Erik A. Grill

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Dated: October 30, 2023

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

s/*Erik A. Grill*
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