UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

v

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

Defendant.

No. 1:21-cv-00929

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DEFENDANT'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

I. PILF has not demonstrated the existence of any genuine dispute as to a material fact that would preclude summary judgment.

Although PILF's response argues that there are "factual disputes," it includes few actual disputes over facts, and none that concern material facts. More often, PILF merely contends that certain facts make Michigan's program for the removal of deceased registrants unreasonable. However, whether Michigan's program meets the NVRA requirement of a "reasonable effort" is a legal question, not a factual one that would preclude summary judgment.

PILF spends considerable time discussing the import and interpretation of the affidavits of Stuart Talsma attached to Defendant's motion. (ECF No. 168, PageID.3412-3414.) But PILF does not dispute Talsma's report of the current QVF status of the individuals previously identified by PILF as "potentially deceased," or introduce conflicting evidence. In short, Mr. Talsma's affidavits are uncontroverted.

Instead, PILF attached new affidavits from Mr. Logan and Mr. Block in which they claim to use Mr. Talsma's affidavits to calculate how long individuals were deceased before being removed. (See ECF No. 168, PageID.3413.) However, neither Mr. Logan nor Mr. Block clearly articulate exactly how they associated the voter ID numbers to a social security number so that they could compare the voter ID to the SSDI. Mr. Talsma's affidavits did not provide social security numbers—only voter ID numbers. Instead, it appears that Logan and Block relied on the same methodology used to create PILF's original lists—i.e., using consumer credit reports to obtain social security numbers and then using those social security numbers to

compare to the SSDI. (ECF No. 168-4, PageID.3464, ¶7.) The problem is that—as discussed in Defendant's earlier brief and her motion in limine—that methodology cannot be replicated by others and so is subject to considerable doubt. Even if a voter is shown as deceased in the QVF, it does not necessarily follow that the voter is the *same person* identified by PILF through consumer credit reports. PILF believes they are, but because its methodology (i.e., Block's process) is not capable of being replicated, no one can know for sure if they are. Simply put, Talsma's affidavits merely show the recent status of voters shown on PILF's first list, and Talsma's results do not validate PILF's methodology.

PILF then argues that the presence of persons apparently older than 100 years is "next to impossible." (ECF No. 168, PageID.3413.) PILF, however, fails to identify any federal or state law permitting the Defendant to presume a voter deceased after a certain age in order to remove the voter from Michigan's roll. Importantly, the NVRA was enacted, in part, "to increase the number of eligible voters" and to enhance participation in the electoral process. 52 U.S.C. § 20501(b). These purposes must be balanced against the equally important goals of protecting the integrity of the electoral process, and maintaining accurate and correct voter registration rolls, *id.*, but it is a balance.

PILF's argument also fails to account for a small number of "placeholder" dates of birth remaining in the QVF system. Between 2014 and 2018—during the time Ruth Johnson was Secretary of State—Michigan updated its QVF system to a newer "refreshed" version. (Ex 1, Talsma Dep, p 44 ln 14—p 45 ln 5; p 125 ln 16-

20.) The system was updated because the older system had become obsolete, and the database was rewritten to add new functions and implement a new data structure. (Ex 1, Talsma Dep, p 45 ln 6—p 46 ln 8.) But voter registrations from the old legacy system are still part of the database, which leads to some issues with the data. (Ex 1, Talsma Dep, p 46 ln 9-20.)

Prior to the migration to CARS and the newer QVF system, the then-existing database contained records with personal information that had been entered incorrectly, including some dates of birth. (Ex. 2, Belton Dep., p 96 ln 1-11.) For example, a date of birth that had been entered as "1823" could have been an error for 1923 or 1983 because of an error made in manually entering a voter's information. (Ex. 1, Talsma Dep, p 65 ln 15—p 66 ln 4; p 132 ln 13—p 133 ln 5.) Also, the date of birth field in the database is "non-nullable" and requires that some value be input even if the actual information is not known, and so a date like 1/1/1900 would be used as a placeholder indicating that the actual date was not known. (Ex 1, Talsma Dep, p 129 ln 1-13.) That incorrect information can only be corrected by accurate information provided by the individual to their local clerk or through a Secretary of State branch office transaction. (Ex 2, Belton Dep, p 96 ln 20-23.) If the correct date of birth can be ascertained through reconciliation with CARS, then it would be updated that way. (Ex 3, Brater Dep, p 40 ln 7-16.) Local clerks also have the ability to correct the date of birth. (Ex 3, Brater Dep, p 40 ln 7-16.) It is no longer possible to enter a voter registration without providing data

such as the date of birth, and so there will be no need for placeholder dates for registrations going forward. (Ex 3, Brater Dep, p 197 ln 8—p 198 ln 2.)

Next, PILF claims that it is "not reasonable" for some voters to be removed years after their alleged death, and that, "the NVRA offers a quicker path." (ECF No. 168, PageID.3413.) But "quicker" does not mean better or more accurate, and it does not mean "required by law." The NVRA requires only "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters…." 52 U.S.C. § 20507(a)(4)(A)-(B). The NVRA provides no specific timeframe by which a deceased voter must be removed. But more pointedly, the fact that 4,921 registrants are scheduled to be removed in 2025 or 2027 does not necessarily mean that those voters *are deceased*—merely that there is information that the voter no longer lives at the address, and they have up to two general elections in which to either vote or take some action to confirm their address. 52 U.S.C. §20507(d); see also Mich. Comp. Laws § 168.509aa(4).

In the next subheading, PILF claims that there are disputes as to whether Michigan complies with its laws. (ECF No. 168, PageID.3415-3416.) However, the only factual citation offered to support that claim is to page 11 of the report of Plaintiff's expert Scott Gessler, which PILF claims to dispute whether updates to the driver's license database are effective to update the QVF. But, looking at page 11 of Mr. Gessler's report, the only pertinent content appears in paragraph 31, which discusses the Auditor General recommendation—with which the Secretary agreed—to reconcile the entire driver file and the QVF on a quarterly basis. (ECF

No. 168-5, PageID.3479.) To the extent this statement is relevant, the Secretary does not dispute that it agreed with the Auditor General's recommendation and implemented it. Regardless, there is no question of fact as to whether Michigan complies with its own laws.

Next, PILF offers two subheadings of argument purporting that Michigan's program is unreasonable because it does not compare the QVF directly against the SSDI or Department of Health and Human Services death records, and instead compares those sources to CARS, the driver's license database, which is then used to update the QVF. (ECF No. 168, PageID.3417-3419.) The use of CARS is not disputed, and it is detailed extensively in sections C.1 and C.2 in the statement of facts of Defendant's brief in support of this motion. (ECF No. 149, PageID.3036-3040.) Once again, PILF has not identified any disputes of fact, but is instead using the report of its expert—Scott Gessler—to argue how Michigan's program could be operated differently. In so doing, PILF relies almost entirely on comparisons to how Mr. Gessler's own state performs its list maintenance when he was its secretary of state. PILF's response, however, offers no legal authority that requires Michigan to adopt another state's program in place of its own. Ultimately, all Gessler's report shows is different states can reach different conclusions as to how best to operate a general program for the removal of deceased registrants in their state.

Of note, PILF's response contends that Defendant "relies upon speculation from one of its employees as to what information CARS contains." (ECF No. 168, PageID.3418.) That is not an accurate description of the evidence offered by

Defendant in her motion, which included testimony from John Harris—the manager of the Driver Records Program Section of the Department of State. (Ex. 4, Harris Dep, p 16 ln 3-22.) Mr. Harris testified that CARS contains the names, addresses, full dates of birth, and last four digits of social security numbers for drivers and persons with state identification cards, and also that CARS contains social security numbers for the majority of drivers in Michigan. (Ex. 4, Harris Dep, p 25 ln 19—p 28 ln 3; p 30 ln 13-17; p 51 ln 19-23.) PILF has produced no evidence controverting his sworn testimony.

PILF next contends that Michigan's "reliance" on ERIC data is unreasonable. But, as discussed in Defendant's motion, ERIC is a relatively minor part of Michigan's program—a bi-monthly list of approximately 10 names—that serves as a means to identify deceased voters who do not have a driver's license or state ID in the CARS system. (Ex 3, Brater Dep, p 80 ln 25—p 81 ln 14.)

PILF then argues that the Defendant is not entitled to summary judgment because her department stopped processing deceased notices two weeks prior to an election. (ECF No. 168, PageID.3420.) This pause is not disputed, but PILF offers no authority showing that a temporary pause in removing deceased registrants *while conducting an election* would be somehow prohibited, let alone unreasonable the under NVRA.

Next in its response, PILF argues that Defendant has not provided evidence that local clerks are following the process for removing deceased registrants. Respectfully, PILF has it backwards. In her motion, Defendant cited evidence in

the record concerning the removal of deceased registrants by local clerks, including the fact that between 20-30% of cancellations of deceased voters between 2019 and 2022 were entered by local clerks. (ECF No. 149, PageID.3041-3042; ECF No. 149, PageID.3041-3042.) As the non-moving party, PILF bears the burden to come forward with affirmative evidence to demonstrate the existence of a question of fact, and it has failed to offer anything to show that local clerks are *not* performing their duties. *Anderson v. Liberty Lobby, LLC*, 477 U.S. 242, 257 (1986).

Lastly, PILF's response argues that an "unjustifiable number" of deceased registrants makes the entire program unreasonable. In this portion of its argument, PILF discusses audits performed by the Michigan Auditor General. (ECF No. 168, PageID.3426-3427.) The audits and audit reports are not disputed, and the published reports already contain the Secretary's responses to the findings. But PILF's response also discusses testimony about testing performed by the Auditor General concerning the number of deceased registrants in the QVF and PILF attempts to use this testimony to bolster its own findings. PILF's citation to the deposition transcript, however, acknowledges that the audit manager did not remember exactly how many deceased registrants they found, and so PILF is relying in large measure on its own interpretation of the audit working papers it obtained after the deposition. (ECF No. 168, PageID.3427.) Regardless, there is no dispute that the final audit report included no finding concerning the number of deceased registered voters. While there could be a difference of opinion about the

weight the audit working papers should be given in this circumstance, there is no question of fact here that would preclude summary judgment.

PILF's response next turns to the report of its expert, Mr. Block, and claims that there are "questions of fact" because Defendant disputes his findings. That is simply not a correct statement of Defendant's argument or the law. While it is true that Defendant challenges the *admissibility* of Mr. Block's report and testimony for reasons already presented to the Court, that does not equate to a question of fact that precludes summary judgment. The admissibility of expert opinion is a question of law.[1] See e.g. *Cook v. American S.S. Co.*, 513 F.3d 733, 738 (6th Cir. 1995).

PILF also claims that Defendant's experts "cannot dispute" Mr. Block's findings. This is a curious framing of facts, since—as stated in Defendant's earlier brief—both Professor Katz and Professor Herron each reviewed Block's report and were *unable to replicate* Block's results. (ECF No. 168, PageID.3048.) (See also ECF No. 121-4, Katz Report, P ageID.2378-2382, p 2-6; ECF No. 121-5, Herron Report, PageID.2397, p 4 ¶10; PageID.2435-2437, p 42-44, ¶134-137.) That is not the same thing as agreeing with Block's results. But again, this goes to the admissibility of Block's opinion, and is not a dispute of fact that precludes summary judgment. As stated in Defendant's earlier motion, there are over 8.2 million registered voters in the state of Michigan, of which the 27,275 in PILF's October 5,

[1] PILF's response does not dispute the Defendant's recitation of Mr. Block's testimony concerning his knowledge, skill, training, experience, or education.

2020 list of "potentially deceased" voters would comprise less than 0.3 % of the total number of voters. So, even if Block were correct (though there is good reason for doubt), his findings would not require the conclusion that Michigan's program for removing deceased registrants is unreasonable, and his opinions do not create a genuine dispute as to material fact.

Finally, PILF takes issue with Professor Herron's review of states neighboring Michigan and points out that Minnesota and Wisconsin are exempt from NVRA. Again, this is not a dispute of fact. The comparison to neighboring states merely demonstrates that Michigan's program is much the same as other states and is not an outlier in its methodology. Whether Minnesota and Wisconsin are governed by NVRA says little about whether their programs are unreasonable. Those programs might well still satisfy NVRA requirements and—to the extent they are similar to Michigan—they most likely would be found reasonable.

II. PILF has not been prevented from conducting discovery.

As detailed more fully in Defendant's contemporaneous response to PILF's motion for discovery under Rule 56(d) (ECF No. 174, PageID.3535-3566), PILF has not been prevented from conducting discovery. Discovery in this case ran from October, 2022 through the end of July, 2023—a span of over nine months. During that time, PILF conducted nine depositions and issued five sets of requests for production of documents, three sets of interrogatories, and one set of requests to admit. PILF's argument here is based on this Court denying its motions to take the depositions of Secretary Benson herself, of a representative of the ERIC organization, and a second deposition of Stuart Talsma. The Court has already

heard PILF's arguments about whether these depositions were appropriate, and it has rejected these arguments. (ECF No. 162, PageID.3296.) PILF offers no explanation of what has changed since the Court's orders, or how any of these depositions would affect its arguments opposing summary judgment. PILF has not shown that additional discovery is appropriate or necessary before deciding Defendant's motion.

III. Michigan conducts a general program that makes a reasonable effort to remove the names of ineligible voters from its official list of eligible voters, and Defendant is entitled to judgment in her favor.

PILF's entire legal argument regarding Michigan's removal program consists of efforts to distinguish this case from *Bellitto v. Snipes,* 935 F.3d 1192, 1205-1205 (11th Cir., 2019) and *Public Interest Legal Foundation v. Boockvar*, 495 F. Supp. 3d 354, 356-357 (M.D. Penn., Oct. 20, 2020). While PILF is certainly entitled to attempt to distinguish precedent that is contrary to its arguments, the problem is that PILF offers no legal authority to apply in their place. PILF simply offers no argument about what a "reasonable effort" means under NVRA.

But more importantly, PILF's arguments distinguishing *Bellitto* and *Boockvar* are unpersuasive. First, PILF notes that the cases are out-of-circuit and do not concern motions for summary judgment. (ECF No. 168, PageID.3435.) But Defendant's brief made no secret that *Bellitto* is an Eleventh Circuit opinion and that *Boockvar* is from the Middle District of Pennsylvania. It is true that these cases are not binding upon this Court, but Defendant can find no cases where the Sixth Circuit considered what constitutes a "reasonable effort" under the NVRA.

On information and belief, *Bellitto* and *Boockvar* are the only federal courts to address this issue, and so discussion of their holdings is appropriate here. Also, it is not significant that the cases were not before the courts for summary judgment under Rule 56. They are not being offered for analysis of the summary judgment standard, but rather what standard ought to be applied to the "reasonable effort" requirement of the NVRA.

PILF also argues that *Bellitto* somehow supports its position because, there, the district court had earlier denied summary judgment. Obviously, the specific facts presented to the district court would be pertinent to its decision on the summary judgment motion. An examination of the district court's order denying summary judgment shows that the court concluded that there was a question of fact regarding the seemingly high registration rates in one county. *Bellitto v. Snipes,* 302 F. Supp. 3d 1335, 1357 (S.D. Fla., 2017). No such evidence has been presented here. Regardless, the utility of the Eleventh Circuit's opinion is not how it weighed evidence on summary judgment, but instead its legal analysis of what constitutes a "reasonable effort" under the statute. *Bellitto*, 935 F.3d at 1205. But, if PILF wishes to scrutinize the lower court holdings preceding the Eleventh Circuit's opinion, it may also be worth observing the district court's conclusions of law following the bench trial, where it concluded:

> The use of the phrase "reasonable effort" necessarily implies that states are not obligated to continually scour their voter rolls to ensure that every ineligible voter is removed at the earliest possible moment permitted by law. Nor are states required to make use of every available source of change-of-address or death information as part of such "reasonable efforts." They must simply rely on reasonably valid

> and comprehensive sources of such information, such as the United States Postal Service's ("USPS") National Change of Address ("NCOA") system, which contains all forwarding addresses submitted to the postal service by individuals who move, and state death records, which contain death certificates for the vast majority of residents who have died. The NVRA's "reasonable effort" requirement must be construed in light of the NVRA's goal of ensuring that once registered, eligible voters remain on the rolls and are not erroneously removed. Thus, states may not remove a voter based solely on a claim by a private party that the person is no longer eligible.

Bellitto v. Snipes, No. 16-cv-61474-BLOOM/Valle, 2018 U.S. Dist. LEXIS 103617, *16 (S.D. Flo. Mar. 30, 2018).

Here, both the law and facts support a determination that Michigan's process for removing deceased registrants is "reasonable," and strikes an appropriate balance between maintaining accurate rolls and ensuring that eligible voters are not wrongly struck from the rolls.

IV. 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, Defendant is entitled judgment in her favor as to Count II.

In its third argument heading, PILF argues that its standing is "law of the case" and need not be reviewed. That is not a correct statement of the law. The Sixth Circuit has previously rejected the argument of a party's reliance on "law of the case" to establish standing. *Nat'l Air Traffic Controllers Ass'n v. Sec'y of the DOT*, 654 F.3d 654, 660 (6th Cir. 2011) ("No previous court's decision can compel that we find standing now that the members NATCA has identified no longer suffer an injury in fact"). Further, the Supreme Court has long recognized that because federal courts are under an independent obligation to examine their own

jurisdiction—of which "standing is perhaps the most important" jurisdictional doctrine—a court must reexamine the issue of standing whenever it is in doubt. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231(1990) (overruled in part on other grounds by *City of Littleton v. Z.J. Gifts D-4, L.L.C.,* 541 U.S. 774 (2004)).

Also, the Supreme Court's opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) recognized that a plaintiff's burden to demonstrate standing changes at each stage of the case, and while general factual allegations suffice at the pleading stage, a plaintiff cannot rely on allegations in response to a motion for summary judgment and, "must set forth by affidavit or other evidence specific facts[.]" But here, PILF has failed to point to any evidence supporting its claim to informational injury or downstream consequences. PILF has simply failed to demonstrate how the failure to obtain the requested information caused any actual, concrete harm.

PILF's response does not address the Defendant's arguments concerning specific categories of documents in their motion. Instead, PILF relies on general statements that it is entitled broadly to "all documents," without contending with any of the limiting constructions recognized by federal courts in the decisions cited by Defendant in her brief. Also, it should not escape attention that PILF fails entirely to identify a single record open to inspection under the NVRA that it has not already been provided by the Defendant. There is no longer anything for PILF to obtain, and so Count II is moot.

Lastly, the additional arguments made by the Defendant in her response to PILF's motion for summary judgment as to Count II apply with equal measure in reply to PILF's response here. (ECF No. 166, PageID.3349-3362.) Those arguments are incorporated by reference here pursuant to Fed. R. Civ. P. 10(c).

CONCLUSION AND RELIEF REQUESTED

For these reasons, and the reasons stated in the earlier briefs, there is no genuine issue of material fact, and Defendant Secretary of State Jocelyn Benson 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,

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Dated: November 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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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