

No. 24-1255

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PUBLIC INTEREST LEGAL FOUNDATION,
Plaintiff-Appellant,

v.

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

ELECTRONIC REGISTRATION INFORMATION CENTER, INC.
Movant-Appellee.

On Appeal from the United States District Court for the
Western District of Michigan before the Honorable Jane M. Beckering,
U.S. District Judge Case No. 1:21-cv-929

**BRIEF OF MOVANT-APPELLEE
ELECTRONIC REGISTRATION INFORMATION CENTER, INC.**

Robert A. Wiygul
Peter V. Keays
Hangley Aronchick Segal Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
rwiygul@hangley.com
pkeays@hangley.com

Dated: July 11, 2024

*Counsel for Movant-Appellee Electronic
Registration Information Center, Inc.*

CORPORATE DISCLOSURE

The Electronic Registration Information Center, Inc. (“ERIC”) is a Delaware corporation that has no parent company and is not owned, in whole or in part, by any publicly held corporation. ERIC is not a subsidiary or affiliate of any publicly owned corporation not named in this appeal. No publicly owned corporation or its affiliate, not a party to this appeal, has a substantial financial interest in the outcome of this litigation.

Dated: July 11, 2024

/s/ Robert A. Wiygul

Robert A. Wiygul

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ORAL ARGUMENT STATEMENT

ERIC does not seek oral argument. The District Court's Order granting ERIC's motion to quash was an ordinary and proper exercise of the District Court's discretion to resolve discovery disputes.

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I. INTRODUCTION

Plaintiff-Appellant Public Interest Legal Foundation (“PILF”) takes a kitchen-sink approach to its appeal. Not only does PILF contest the District Court’s entry of summary judgment in favor of Defendant-Appellee Secretary Benson (“Michigan”)—purporting to identify seven disputed issues of material fact—but it also challenges nearly every discovery order that did not go its way. Among those orders are rulings by the Magistrate Judge and District Judge (collectively, the “District Court”), each supported by thorough analysis, quashing the subpoena (“Subpoena”) PILF served on non-party Movant-Appellee Electronic Registration Information Center, Inc. (“ERIC”). This brief addresses only PILF’s challenge to these quashal orders.

Unfortunately, PILF’s brief presents a grossly distorted picture of both the law and facts relevant to its challenge. At the outset, PILF neglects to acknowledge the highly deferential standard of review applicable to discovery rulings, which requires appellants to demonstrate both that the District Court abused its substantial discretion and that the denial of discovery caused actual and substantial prejudice. PILF cannot carry this burden, not least because it does not even identify—let alone defend—the specific discovery requests in its Subpoena. That may be because the District Court found that PILF’s Subpoena was so “patently overbroad” as to suggest “potentially an abuse of [] process.” (Magistrate Judge

(“M.J.”) Decision, RE 108, Page ID # 1956-1957.) Far from showing this conclusion was an abuse of discretion, PILF entirely ignores it.

PILF attempts to re-write the Subpoena on appeal. Tacitly disavowing the myriad of other topics in the Subpoena, PILF now presses only one, arguing that the quashal orders were error because PILF was purportedly “entitled to discovery related to ERIC’s processing of deceased matches” (PILF Br. 40), *i.e.*, ERIC’s processes for creating the reports of likely deceased voters it has provided to Michigan. Here too, however, PILF fails to address the District Court’s reasoning and misstates the facts.

PILF’s cursory argument is couched solely in terms of relevance, but the District Court’s rulings were also grounded in considerations of proportionality and avoiding unnecessary burdens on a non-party with limited resources. In that regard, the District Court correctly recognized that PILF had significantly overstated ERIC’s role in Michigan’s list maintenance program. (ERIC cannot make any changes to Michigan’s voter-registration database, does not conduct list maintenance on behalf of Michigan or any other member, and is only one of several sources of information Michigan uses to identify deceased voters.) PILF repeats these overstatements in its appeal.

The record also belies PILF’s assertion that Michigan “has no understanding” of how ERIC’s deceased reports are created. (PILF Br. 34.) It is an

undisputed matter of public record that the reports identify individuals registered to vote in Michigan who also appear to be listed in the Social Security Administration's Death Master File. Significantly, PILF successfully moved to compel production of, and obtained from Michigan, copies of *all of the deceased reports ERIC has provided to Michigan*, which allow PILF to identify all of the individuals listed therein and, for each such individual, the specific data elements (*e.g.*, name and last four digits of social security number) supporting the conclusion that the voter-file and Social-Security-file records refer to the same person. PILF fails to identify any specific information it does not already have, other than the confidential and proprietary algorithm and technical software settings used in ERIC's automated matching process—which PILF has expressly disavowed seeking. Still less does PILF demonstrate the need for any such (unidentified) additional information.

In sum, PILF's arguments come nowhere near demonstrating that the District Court abused its substantial discretion in quashing the Subpoena, let alone showing that its rulings resulted in actual and substantial prejudice. There is no basis for disturbing the District Court's carefully considered discovery orders.

II. STATEMENT OF THE CASE

A. ERIC and Its Reports

Founded in 2012 by a bipartisan group of chief elections officials from seven states, ERIC is a non-profit, non-partisan membership organization governed exclusively by its members, which currently comprise 24 states (including Michigan) and the District of Columbia. (Hamlin Decl., RE 82, Page ID # 882-883; *see also* <https://ericstates.org/about/>.) ERIC’s mission is to provide its members with information that can help them maintain more accurate voter rolls, reach out to potentially eligible but unregistered voters, and detect possible illegal voting. (Hamlin Decl., RE 82, Page ID # 882, 885.)

In furtherance of that mission, ERIC uses data-matching technology to compare data provided by its members and data obtained from federal sources to provide its member jurisdictions with various reports at their request. (*Id.*, Page ID # 883.) By analyzing these multiple datasets, ERIC is able to identify inaccurate or out-of-date voter records that would not be detectable based solely on a review of the member’s own records. (*Id.*)

ERIC produces four “list maintenance reports,” including a “[d]eceased [r]eport” that identifies registered voters who appear to have died. (*Id.*, Page ID # 885.) ERIC prepares the deceased reports through a data-matching analysis that aims to match individuals listed in voter-registration data securely obtained from a

particular member jurisdiction with individuals listed in the Social Security Administration's Death Master File ("DMF"). (*Id.*, Page ID # 886.) ERIC's small staff—only three full-time employees—and budget are commensurate with these limited operations, *i.e.*, the secure comparison and analysis of data and the furnishing of reports to members. (*Id.*, Page ID # 884-885.)

The public record discloses extensive information about how ERIC generates its deceased reports. (*See id.*, Page ID # 885-890; *see also, e.g.*, <https://ericstates.org/faq/>.) Member states, such as Michigan, submit their data to ERIC at least once every 60 days. (Hamlin Decl., RE 82, Page ID # 886.) ERIC uses a proprietary "hashing" application to ensure the secure transfer of certain sensitive member data elements—including driver's license or state ID numbers, social security numbers, and dates of birth—from members to ERIC. (*Id.*, Page ID # 893-895.) ERIC also obtains from the federal government DMF data, including the name, date of birth, date of death, and social security number of individuals who have been reported as deceased to the Social Security Administration. (*Id.*, Page ID # 896.)

ERIC then inputs the member data and the DMF data into a sophisticated data-matching "entity resolution" software program for analysis. (*Id.*, Page ID # 887.) The program compares similar fields (*e.g.*, name, date of birth, and other identifiers) across the different data sets to identify instances—referred to as

“matches”—where multiple datasets contain information that appears to pertain to the same person. (*Id.*)

ERIC then generates the deceased report for a particular member state, *e.g.*, Michigan, by using an algorithm to analyze the relevant matches that ERIC’s customized software is continually identifying as ERIC receives updated data. (*Id.*, Page ID # 889.) The algorithm determines whether the member’s registration data may be outdated or inaccurate (in the case of the deceased reports, because the voter has died) and should therefore be included in the report.¹ (*Id.*)

Thus, the methodology that ERIC follows in generating its deceased reports is no mystery. Only certain technical details of ERIC’s processes—specifically, its hashing application, custom software settings, and proprietary algorithm—are sensitive and kept confidential. (*Id.*, Page ID # 889-890, 893-895.)

PILF’s brief misleadingly asserts that Michigan “has no understanding how ERIC” generates the deceased reports, citing an unsworn expert report attached to PILF’s summary judgment papers. (PILF Br. 34.) But the record makes clear that Michigan does understand that ERIC’s reports are a list of individuals in Michigan’s voter file who also appear to be listed in the Social Security Administration’s DMF. (Brater Dep., RE 86-1, Page ID # 1420; Belton Dep., RE

¹ Michigan receives a deceased report approximately once every two months. (Hamlin Decl., RE 82, Page ID # 887.)

86-1, Page ID # 1433-1434.) Indeed, Michigan’s discovery responses explained to PILF that, for each voter listed in a deceased report, the report identifies for Michigan “the level of voter match,” that is, the specific data elements (*e.g.*, name, date of birth, last four digits of the social security number) that ERIC matched between the member data and the DMF. (Def.’s Interr. Answers, RE 86-1, Page ID # 1427-1428.) What Michigan officials said they did not know was the “technical particulars” of ERIC’s data-matching software and algorithm. (Talsma Dep., RE 86-1, Page ID # 1441.)

Although ERIC has provided list maintenance reports since 2012, and Section 8 of the National Voter Registration Act (“NVRA”)—which contains the statutory provisions under which PILF filed this action against Michigan—has existed since 1993, *see* 52 U.S.C. § 20507, ERIC had never before been served with a subpoena or been a party to litigation. (Hamlin Decl., RE 82, Page ID # 896.)

B. PILF’s Targeting of ERIC

For many years, ERIC was not an object of political attention, let alone controversy. Recently, however, ERIC has become a target of disinformation campaigns that have sought to undermine trust in many routine aspects of election administration. Among other falsehoods, these campaigns have baselessly asserted that ERIC “is actually a left-wing vehicle” and a “Soros-backed operation.”

(*Washington Post* Article, RE 83-1, Page ID # 1537-1540.) Although ERIC has worked to dispel these myths, several states have announced their withdrawal from ERIC, citing some of these unfounded concerns. (Hamlin Decl., RE 82, Page ID # 895; Articles, RE 83-1, Page ID # 1542-1564.)

PILF has actively encouraged the skeptics. PILF's President, J. Christian Adams, has baselessly speculated that ERIC may "interface[e] all [its] data with ... [a] massive Democrat database organization" and has mused about "an effective replacement" of ERIC. (*Gateway Pundit* Article, RE 83-1, Page ID # 1568-1569; *Washington Times* Article, RE 83-1, Page ID # 1582.) Ken Blackwell, PILF's Treasurer (PILF Website, RE 83-1, Page ID # 1590), has encouraged ERIC members to withdraw from the organization, citing, without evidence, concerns about "compromised data" and "partisan funding" (America First Policy Institute Press Release, RE 83-1, Page ID # 1596). Cleta Mitchell, Chair of PILF's Board of Directors (PILF Website, RE 83-1, Page ID # 1589), has called ERIC a "very insidious organization" and also called on members to withdraw (Br. in Support of ERIC's Mot. to Quash, RE 81, Page ID # 866 (linking to recording)).

PILF has also sought to use state public records laws to obtain materials from ERIC. Although these requests were served outside of Michigan and independent of this litigation, they overlap with the requests PILF later served on ERIC in this case. (*Compare* PILF Florida Public Records Request, RE 82-1, Page

ID # 1031-1032, *with* Subpoena, Matters for Examination Nos. 4-5, 8, RE 83-2, Page ID # 1860.)

C. PILF's Lawsuit Against Michigan and Its Discovery Related to ERIC

1. PILF's Claims

PILF filed the underlying NVRA litigation against Michigan in late 2021. Count I of the Complaint argued that Michigan's program for removing deceased registrants from its voter rolls is unreasonable, in violation of the NVRA. (Complaint, RE 1, Page ID # 1-20.)² PILF primarily relied for this conclusion on its allegation that PILF had commissioned a third-party report purportedly identifying approximately 27,000 potentially deceased registrants on Michigan's voter rolls, and that Michigan had taken no action to rectify this situation. (*Id.*, Page ID # 8-15.) PILF's Complaint did not mention ERIC or its list maintenance reports. (*See id.*)

2. In Discovery, PILF Obtained Extensive Information About Michigan's List Maintenance Program and the Role of ERIC's Deceased Reports

After filing its Complaint, PILF conducted extensive discovery relating to Michigan's list maintenance program. The discovery record reveals that Michigan

² Count II of the Complaint, not at issue in this discovery dispute, alleges that Secretary Benson failed to allow PILF to inspect records and data concerning Michigan's list maintenance program. (*Id.*, Page ID # 18-19.)

election officials utilize a variety of tools to remove the names of deceased registrants from the state's voter rolls. (Benson Br. 12-20.) As explained in Secretary Benson's brief, these tools include, first and foremost, death records Michigan receives—completely independent of ERIC—from the Social Security Administration and the Michigan Department of Health and Human Services. (*Id.* at 13-14.) Michigan ingests these records into its driver-file database, and any resulting changes to a driver-file record are automatically imported into Michigan's voter file. (*Id.* at 14-17.)

ERIC's deceased reports, in contrast, play a relatively minor role in Michigan's list maintenance program. Contrary to PILF's persistently incorrect assertions, Michigan does not “delegate” or “outsource list maintenance” to ERIC. (PILF Br. 11, 34.) ERIC does not (and cannot) connect to the voter-registration database of, nor does it “perform list maintenance” for (*see* PILF Br. 34), *any* member. (Hamlin Decl., RE 82, Page ID # 887, 892.)

Indeed, ERIC's deceased reports constitute just one information source among many that Michigan uses to keep its voter rolls current. (Benson Br. 12-20; Def.'s Interr. Answers, RE 86-1, Page ID # 1424-1426.) And Michigan does not rely on the ERIC report uncritically; upon receiving a deceased report from ERIC, Michigan election officials manually review it and frequently undertake an independent investigation of the persons named therein—including a comparison

of the data in the ERIC report to the data in Michigan’s voter record, as well as, where appropriate, a review of obituaries—in determining whether to cancel voter registrations. (*Id.*; *see also* Clone Dep., RE 83-2, Page ID # 1812-1816; Belton Dep., RE 83-2, Page ID # 1823-1825.) In Michigan’s words, ERIC’s deceased reports play a “cleanup” role in Michigan’s overall list maintenance program. (Hr’g Tr., RE 108, Page ID # 1975.)

In its appellate brief, PILF leans heavily on testimony that ERIC’s deceased reports are Michigan’s only “systematic” means of identifying deceased Michigan registrants who lack a driver-file record, *i.e.*, who have never had either a driver’s license or state identification card. (PILF Br. 34.) But PILF ignores that local clerks, as explained in Michigan’s brief, also play an important role in identifying deceased persons in this category of registrants (and others). (Benson Br. 19-20.) And, significantly, PILF neglects to mention that individuals who lack a driver-file record³ represent an exceedingly tiny portion of Michigan’s voter file: According

³ Any person with a Michigan driver’s license or a Michigan state identification card, even if expired, has a record in Michigan’s driver-file database. (Harris Dep., RE 149-4, Page ID # 3095-3097; Mich. Dep’t of State Dep., RE 149-5, Page ID # 3115.)

to PILF's own expert, this group constitutes less than 1% of all registered voters. (Gessler Decl., RE 168-5, Page ID # 3480.)⁴

3. PILF Also Obtained All of the Deceased Reports ERIC Has Provided to Michigan

During discovery, PILF sought—and received—the deceased reports that ERIC has provided to Michigan. On October 7, 2022, PILF served a document request on Michigan asking it to produce “[r]ecords received from the Electronic Registration Information Center from 2018 to the present concerning registered voters identified as deceased or potentially deceased.” (Request for Production No. 8, RE 83-2, Page ID # 1795.) Michigan responded by agreeing to produce the ERIC deceased reports in its possession except for those reports created within the most recent three-year period. (Def.’s Br. in Opp. to Pls. Mot. to Compel, RE 118, Page ID # 2124.) As to the latter category, Michigan objected (as it believed it was obligated to do) that the more recent reports could not be produced to PILF without causing Michigan to violate federal data-privacy laws restricting disclosure of information contained in the Social Security Administration death records. (*See id.*) *See* 42 U.S.C. § 1306c; 15 C.F.R. § 1110.102.

⁴ PILF’s unsworn expert report states that there are 81,934 registered voters who lack any driver-file record, while Michigan’s voter rolls contain approximately 8.2 million registered voters. (*Id.*) *See also* Michigan Voter Information Center, Department of State, <https://mvic.sos.state.mi.us/VoterCount/Index> (last visited July 11, 2024) (there are currently more than 8.3 million registered Michigan voters).

On July 14, 2023—after an eight-month delay—PILF moved to compel Michigan to produce the more recent deceased reports. (PILF Mot. to Compel, RE 113, Page ID # 2018-2019.) (As explained below, rather than litigate Michigan’s objection, PILF had spent much of the intervening time trying to obtain these materials directly from ERIC.) The delay notwithstanding, PILF was successful in compelling production of the remaining deceased reports. On August 31, 2023, after briefing and a hearing, the Magistrate Judge substantially agreed with PILF’s position that the federal data-privacy laws cited by Michigan did not bar production of the ERIC deceased reports from the most recent three years. (Order, RE 139, Page ID # 2924.) The Magistrate Judge thus ordered Michigan to produce those with redactions of certain specific data fields protected by statute. (*Id.*) *See* 42 U.S.C. § 1306c(d). Notably, the Magistrate Judge’s order did *not* require redaction of the state-issued voter ID numbers of the individuals listed in the deceased reports; thus, even with the redactions, PILF is able to ascertain the identity of the individuals listed in ERIC’s deceased reports. (Hr’g Tr., RE 140, Page ID # 2929, 2931, 2933-2934.) PILF does not challenge the redactions here.

Michigan promptly produced the remaining deceased reports in compliance with the Magistrate Judge’s order.

D. PILF's Subpoena to ERIC

On March 3, 2023, PILF served ERIC with a document and deposition subpoena. (Subpoena, RE 83-2, Page ID # 1827-1834.) The subpoena principally sought documents and deposition testimony relating to ERIC's communications with Michigan, including the deceased reports that ERIC had provided to Michigan. (*Id.*)

As previewed above, the timing of this request is significant. As noted, PILF had sought the deceased reports from Michigan, but Michigan had objected to producing (and PILF had not yet moved to compel) the deceased reports created within the most recent three-year period. (*See supra* Section II.C.3.) In response to PILF's subpoena, ERIC timely served written objections to the document requests under Federal Rule of Civil Procedure 45(d)(2)(B). (Objections, RE 83-2, Page ID #1836-1844.) ERIC raised, *inter alia*, the same data-privacy objection that Michigan had already interposed. ERIC also noted that almost all the requested documents and information could be obtained from Michigan, a party to the lawsuit. (*Id.*) Indeed, ERIC noted that PILF already *had* requested many of the same documents from Michigan (*id.*), suggesting that PILF was seeking these materials from ERIC as an end-run around Michigan's objection.

PILF responded to these objections by withdrawing its initial subpoena and replacing it with one *significantly broader*. (Correspondence Attaching Subpoena,

RE 83-2, Page ID # 1854-1855, 1857-1864.) The second subpoena, dated March 30, 2023 (the “Subpoena” at issue here), expanded—and made more nebulous and less particularized—the pre-existing discovery requests. (Comparison of Requests in Two Subpoenas, RE 83-2, Page ID # 1866-1867.) The Subpoena also added a host of entirely new deposition topics “regarding ERIC’s origin, funding, purposes, bylaws, membership agreement, board, research advisory board, privacy and technology board, vendors, contractors, partners, et cetera.” (M.J. Decision, RE 108, Page ID # 1956; *see* Subpoena, RE 83-2, Page ID # 1860; Comparison of Requests in Two Subpoenas, RE 83-2, Page ID #1866.)

ERIC once again served timely objections to PILF’s document requests pursuant to Rule 45(d)(2)(B) (Objections, RE 83-2, Page ID # 1885-1894); it objected to the deposition topics in separate correspondence (Correspondence, RE 83-2, Page ID # 1869, 1878-1879). Although ERIC had proposed that PILF file a motion to compel if it wished to continue pursuing the discovery, *see* Fed. R. Civ. P. 45(d)(2)(B), PILF indicated that it would press forward with a deposition notwithstanding the pendency of ERIC’s objections to the document requests (and, therefore, without the requested documents).⁵ (Correspondence, RE 83-2, Page ID # 1846.)

⁵ In fact, PILF *never* moved to compel production of these documents at any point during the District Court proceedings. *See infra* note 9.

E. ERIC's Motion to Quash PILF's Subpoena

On April 18, 2023, ERIC moved to quash the Subpoena.⁶ ERIC pointed out that many of the Subpoena's requests—including the majority of the proposed deposition topics—bore no colorable relevance to any claim or defense in the underlying lawsuit. (Br. in Supp. of ERIC's Mot. to Quash, RE 81, Page ID # 874.)

ERIC also argued that the remaining few requests were, at minimum, disproportionate to the needs of the case and unduly burdensome to a non-party. (*See id.*, Page ID # 869-878.) This was particularly so because the deceased reports, which had the best claim to relevance and were at the core of the initial subpoena, were in Michigan's possession. *See, e.g., Bäumer v. Schmidt*, 423 F. Supp. 3d 393, 408-09 (E.D. Mich. 2019) (“[C]ourts ... have repeatedly denied motions to compel discovery and quashed subpoenas directed to non-parties where the discovery sought was obtainable from a party to the litigation.”). Indeed, Michigan had already produced some of the deceased reports that it had received from ERIC (and would subsequently produce the rest of them).

⁶ ERIC filed its motion to quash on April 18, 2023, in the U.S. District Court for the District of Delaware, as the Subpoena named Wilmington, Delaware as the place where compliance was required. *See Fed. R. Civ. P. 45(d)(3)(A)*. On May 22, 2023, the Magistrate Judge granted ERIC's motion to transfer the proceeding to the U.S. District Court for the Western District of Michigan. (Order, RE 87, Page ID # 1454.)

Additionally, as to the Subpoena’s vague requests relating to ERIC’s “processes,” the public record—including the record of this litigation—already contained copious, undisputed information about how ERIC’s deceased reports are created. (Hamlin Decl., RE 82, Page ID # 881-896; <https://ericstates.org>.) PILF failed to identify any additional specific information it needed, let alone *why* PILF needed that information, particularly given the extensive information it already possessed. (Br. in Supp. of ERIC’s Mot. to Quash, RE 81, Page ID #873-874; M.J. Decision, RE 108, Page ID # 1972-1973.) To the extent PILF sought to discover the technical settings that ERIC utilizes in its entity resolution matching software, or ERIC’s proprietary algorithm, ERIC noted that the Subpoena sought “confidential research, development, or commercial information” protected from discovery under Rule 45(d)(3)(B)(i). (Br. in Supp. of ERIC’s Mot. to Quash, RE 81, Page ID # 878-879.) In response, PILF clarified that it did not seek to discover these technical details. (PILF’s Resp. to ERIC’s Mot. to Quash, RE 94, Page ID # 1529; Hr’g Tr., RE 108, Page ID # 1974.)

On June 14, 2023, after briefing and oral argument, the Magistrate Judge issued an order granting ERIC’s motion. The Magistrate Judge explained that the Subpoena—in particular, the numerous deposition topics PILF added to the second version—was so “patently overbroad” as “to be potentially an abuse of [] process.” (M.J. Decision, RE 108, Page ID # 1956-1957.)

The Magistrate Judge further noted that, even if the court “were to determine that some portion of the information is relevant” to the subject matter of the litigation, it had to consider “proportionality” and the burden the discovery would impose on “a third party.” (*Id.*, Page ID # 1957, 1970.) In this regard, the Magistrate Judge did not dispute that the question of “how ERIC does its work” bore “potentially some relevancy” to Michigan’s list maintenance program. (*Id.*, Page ID # 1978.) The Magistrate Judge agreed, however, that PILF had failed to demonstrate that the discovery sought was proportional to the needs of the case.

For one thing, the court found as a factual matter that ERIC’s deceased reports were “only a small part of” Michigan’s list maintenance program. (*Id.*, Page ID # 1955.) In addition, PILF’s arguments for seeking discovery were speculative, because PILF—despite already having in its possession several of the deceased reports provided by ERIC to Michigan, as well as extensive information about Michigan’s processes and methods—could point to no indication that ERIC’s reports were unreliable. (*Id.*, Page ID # 1955-1956.) The court took note of PILF’s assertion that ERIC’s reports played a relatively more significant role in Michigan’s identification of deaths among “some small percentage of [registered voters] who are not in the [driver-file records].” (*Id.*, Page ID # 1979.) But PILF had identified nothing tending to show that there was any deficiency in Michigan’s, let alone ERIC’s, identification of deceased registrants in this group.

Indeed, when the court asked PILF to identify how many of the individuals on PILF's list of purported 27,000 potentially deceased registrants fell into this category, PILF had no answer. (*Id.*, Page ID # 1960-1961.) The Magistrate Judge also found that the Subpoena would impose a "substantial burden" on non-party ERIC. (*Id.*, Page ID # 1957.)

PILF appealed the Magistrate Judge's ruling to the District Judge. On October 30, 2023, after further briefing, the District Judge affirmed. (District Judge ("D.J.") Decision, RE 165, Page ID # 3325-3334.) Like the Magistrate Judge, the District Judge rested her decision not on relevance alone, but on a determination that the requested discovery from ERIC was not proportionate to the needs of the case, particularly in light of (1) the fact that PILF had already received ERIC's deceased reports directly from Michigan; (2) the relatively limited role that the deceased reports play in Michigan's list maintenance program; and (3) the burden the Subpoena would impose on a non-party. (*See id.*) On the final point, the District Judge agreed with the Magistrate Judge that PILF's subpoena was "patently overbroad," such that, even assuming *arguendo* that the discovery had some probative value, the undue burden on ERIC outweighed any purported marginal benefit to PILF. (*Id.*, Page ID # 3332-3334.)

F. Subsequent Proceedings

On October 2, 2023, Secretary Benson moved for summary judgment. PILF opposed, arguing both that disputed issues of material fact existed as to the reasonableness of Michigan’s list maintenance program, and also that PILF had been denied discovery that it purportedly needed. On the latter point, PILF filed on the same day as its summary judgment opposition a Rule 56(d) motion for additional discovery, seeking (among other items) the discovery from ERIC requested in the Subpoena. (Mot. for Discovery, RE 170, Page ID # 3517-3518.)

On March 1, 2024, the District Judge granted summary judgment to Secretary Benson and entered final judgment in her favor. (Opinion and Order, RE 180, Page ID # 3636-3666.) The District Judge simultaneously denied PILF’s Rule 56(d) motion. (*Id.*, Page ID # 3659-3660.) The District Judge observed that PILF’s motion “does not articulate any specific facts that [PILF] believes it will obtain from ... ERIC ... that would demonstrate the existence of a question of fact.” (*Id.*, Page ID # 3660.)

This appeal followed.

III. SUMMARY OF ARGUMENT

To succeed on its appeal of a discovery ruling, PILF has the burden to demonstrate not only that the District Court abused its substantial discretion, but

also that the District Court's error caused PILF to suffer actual and substantial prejudice. *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 642 (6th Cir. 2018).

PILF fails to carry either of these burdens. First, the District Court did not abuse its discretion in granting ERIC's motion to quash the subpoena. To the contrary, the quashal orders were eminently reasonable because, as the District Court explained: (1) the Subpoena was grossly overbroad, seeking unbounded testimony about ERIC's origin, funding, purposes, bylaws, membership agreement, board, research advisory board, privacy and technology board, vendors, contractors, partners, and more—a conclusion PILF's appellate brief does not acknowledge, let alone refute; and (2) even those of the Subpoena's requests that bore potentially some relevance to Michigan's list maintenance program were disproportionate to the needs of the case and unduly burdensome to a non-party, particularly in light of the extensive information about ERIC and its deceased reports that PILF had already obtained.

Second, PILF has not demonstrated actual and substantial prejudice from the District Court's discovery orders. PILF has never even articulated what specific information it expects to discover from ERIC that it does not already know, much less how that information would be material at the summary judgment stage.

IV. ARGUMENT

A. PILF Misstates the Applicable Standard of Review

PILF's brief acknowledges only the *de novo* standard of review applicable to orders granting summary judgment. (PILF Br. 16.) But appellate review of discovery orders, including orders to quash non-party subpoenas, is governed by a very different standard.

“It is well established that the scope of discovery is within the sound discretion of the trial court.” *Pittman*, 901 F.3d at 642 (quoting *Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993)) (reversing in part grant of summary judgment but nevertheless affirming district court's decision denying motion to compel). Accordingly, this Court reviews the discovery orders below for abuse of discretion. *Bormuth v. County of Jackson*, 870 F.3d 494, 534 (6th Cir. 2017). This is a “highly deferential” standard, *In re Flint Water Cases*, 63 F.4th 486, 497 (6th Cir. 2023), and one that is “not appellant-friendly,” *Bonner v. Triple-S Management Corp.*, 68 F.4th 677, 684 (1st Cir. 2023). An abuse of the District Court's discretion occurs only “when the reviewing court is left with a definite and firm conviction that the court below committed a clear error of judgment,” *Pittman*, 901 F.3d at 642 (quoting *Interactive Prods. Corp. v. a2z Mobile Office Sols., Inc.*, 326 F.3d 687, 700 (6th Cir. 2003)).

The District Court’s discretion is especially broad where, as here, the decisions below rest on determinations of proportionality and burden—rather than relevance alone. “It is now the power—and duty—of the district courts actively to manage discovery and to limit discovery that exceeds its proportional and proper bounds.” *Helena Agri-Enters., LLC v. Great Lakes Grain, LLC*, 988 F.3d 260, 273-74 (6th Cir. 2021) (internal quotation marks omitted). And “the district court is far better situated to pass on [such] matters” than an appellate court. *Searls v. Glasser*, 64 F.3d 1061, 1068 (7th Cir. 1995); accord *JP Morgan Chase Bank, N.A. v. DataTreasury Corp.*, 936 F.3d 251, 260 (5th Cir. 2019) (proportionality determinations are “the type of judgment call generally best left to the discretion of the district court” (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984))).

Independently, PILF has the burden to demonstrate prejudice from the District Court’s discovery ruling. “In addition to according substantial deference to the district court’s discovery decisions, appellate courts will not reverse a decision to limit discovery absent a clear showing that the denial of discovery resulted in actual and substantial prejudice to the complaining litigant.” *Pittman*, 901 F.3d at 642 (internal quotation marks omitted). At the summary judgment stage, this means that PILF must “demonstrate that the discovery sought would have precluded summary judgment.” *Stiltner v. Donini*, No. 20-4136, 2021 WL 5232339, at *3 (6th Cir. Aug. 9, 2021) (non-precedential).

Given an appellant's burden to demonstrate both an abuse of discretion and actual and substantial prejudice, an appellate court will not overturn a district court's discovery order "save under very unusual circumstances." 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2006 (3d ed.).

B. The District Court Did Not Abuse Its Discretion in Holding That the Subpoena Seeks Discovery That Is Disproportionate to the Needs of the Case and Unduly Burdensome to a Non-Party

A litigant's license to take discovery from non-parties under Federal Rule of Civil Procedure 45 is not unlimited. As with a discovery request directed to a party, the information sought must be relevant to the specific claims and defenses in the underlying lawsuit. Fed. R. Civ. P. 26(b)(1). And relevance alone is not enough: The requested discovery must also be "proportional to the needs of the case, considering ... whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1); *see Helena*, 988 F.3d at 273-74. Moreover, the rule against imposing an undue burden has particular bite when discovery is sought from a non-party. *See In re Modern Plastics Corp.*, 890 F.3d 244, 251 (6th Cir. 2018). Rule 45 goes so far as to *require* that a district court quash a subpoena where it fails to "take reasonable steps to avoid imposing undue burden or expense" on the non-party subject to the subpoena. Fed. R. Civ. P. 45(d)(1).

Here, the Magistrate Judge and District Judge properly quashed the Subpoena on the ground that the non-party discovery it demanded was not necessary or proportional to the underlying lawsuit, and that the Subpoena was overbroad and imposed an undue burden on non-party ERIC. Far from being an abuse of discretion, these decisions were eminently reasonable.

1. The Subpoena Was Properly Quashed Based on Its Gross Overbreadth

Tellingly, PILF’s brief on appeal does not quote or cite *any* of the Subpoena’s specific discovery requests. That is likely because most of the discovery requests in PILF’s subpoena—including the vast majority of the deposition topics—have no colorable relevance to any claim or defense in the underlying case. Rather than seek information that has anything to do with ERIC’s list maintenance reports, these requests instead seek discovery regarding “ERIC’s origin, funding, purposes, bylaws, membership agreement, board, research advisory board, privacy and technology board, vendors, contractors, partners, et cetera.”⁷ (M.J. Decision, RE 108, Page ID # 1956-1957.) Indeed, taken as a whole,

⁷ See Subpoena, RE 83-2, Page ID # 1860 (Matter for Examination No. 1 (“ERIC’s origins, funding, purpose, and capabilities.”); Matter for Examination No. 2 (“ERIC’s bylaws and membership agreement.”); Matter for Examination No. 3 (“ERIC’s past and present Board Members.”); Matter for Examination No. 4 (“ERIC’s Research Advisory Board.”); Matter for Examination No. 5 (“ERIC’s Privacy & Technology Advisory Board.”); Matter for Examination No. 7 (“ERIC’s vendors, contractors, and partners.”); Matter for Examination No. 8 (“ERIC’s relationship with the Center for Election Innovation and Research.”)).

the Subpoena seeks unbounded information about virtually anything touching ERIC.

As the Magistrate Judge held, these requests rendered the Subpoena “patently overbroad.” (*Id.*, Page ID # 1956-1957.) Indeed, the Magistrate Judge recognized that these requests are “so far outside the core of this case” as to suggest “potentially an abuse of the process before this Court” (*id.*, Page ID # 1957), noting that “*it’s difficult not to see this entire subpoena in light of that*” (*id.*, Page ID # 1956 (emphasis added)); *see also supra* Section II.B. The District Judge agreed. (D.J. Decision, RE 165, Page ID # 3334.)

Strikingly, PILF’s brief before this Court *does not even acknowledge these requests*, let alone attempt to defend them. Where PILF attempts in its brief to describe the contents of the Subpoena, it characterizes it as seeking “discovery related to ERIC’s processing of deceased matches for the Secretary.” (PILF Br. 40.) That description omits the entire category of requests identified in this section. The most charitable interpretation is that PILF concedes they were improper. But the effect of PILF’s brief is to grossly distort the breadth of PILF’s Subpoena by suggesting the requests were far narrower than what PILF actually demanded.

The Subpoena’s patent overbreadth provides a sufficient basis for this Court to affirm the order quashing the Subpoena. Where a subpoena is “so sweepingly overbroad, ... it should be quashed in its entirety.” *Va. Dep’t of Corr. v. Jordan*,

921 F.3d 180, 190 n.4 (4th Cir. 2019). This is true even if some information sought in an otherwise overbroad subpoena bears some potential relevance. *See, e.g., Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 255-56 (S.D. Ohio 2011) (granting motion to quash where subpoenas were “too broad,” even though certain requests were “not patently irrelevant”); *Bridgestone Americas, Inc. v. Int'l Bus. Mach. Corp.*, No. 13-1196, 2016 WL 11786198, at *4-8 (M.D. Tenn. May 16, 2016) (quashing subpoenas as overly broad and unduly burdensome despite some “potential relevance and admissibility”); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 612-13 (E.D. Va. 2008). “A nonparty should not have to do the work of tailoring a subpoena to what the requesting party needs; the requesting party should have done that before serving it.” *Jordan*, 921 F.3d at 190 n.4. And it is certainly not the responsibility of the District Court to salvage the Subpoena by re-writing it; as the Magistrate Judge suggested, doing so would only encourage “patently overbroad,” “abus[ive]” subpoenas of the sort PILF served here.

2. The District Court Properly Concluded That the Remaining Discovery Sought Was Disproportionate to the Needs of the Case

In any event, even putting aside the patently irrelevant requests above, the District Court was well within its discretion in declining to compel compliance with the remainder of the Subpoena. As for the requests seeking all

communications and information exchanged between ERIC and Michigan, including principally the deceased reports,⁸ the decisions below are not inconsistent with the notion that the deceased reports sought by PILF may be relevant to the subject matter of this litigation. (M.J. Decision, RE 108, Page ID # 1977; D.J. Decision, RE 165, Page ID # 3334.) But it is no longer the case “that relevance is enough” to establish discoverability. *Helena*, 988 F.3d at 274. In addition to relevance, district courts must also consider proportionality, weighing the benefit of the requested discovery against its costs, including the burden to be imposed on a non-party. *See id*; *Jordan*, 921 F.3d at 188-89. That is exactly what the Magistrate Judge and District Judge did. PILF offers no persuasive reasons why their conclusions were incorrect, much less an abuse of discretion.

On the benefit side of the ledger, the analysis must begin by asking what benefit PILF will receive by taking *additional* discovery, beyond what PILF already has in its possession. Although the first category of requests is overbroad

⁸ *See* Subpoena, RE 83-2, Page ID # 1860, 1864 (Request for Production No. 1 (“All records relating to the identification and/or removal of registrants who may be deceased on Michigan’s voter roll.”); Request for Production No. 2 (“All communications regarding the identification and/or removal of registrants who may be deceased on Michigan’s voter roll.”); Matter for Examination No. 9 (“Records and information provided by ERIC to the State of Michigan, including records relating to deceased registrants”); Matter for Examination No. 10 (“Records and information provided by the State of Michigan to ERIC, including records relating to deceased registrants.”); Matter for Examination No. 11 (“Other communications between ERIC the State of Michigan not included in Topics 9 and 10.”)).

on its face, seeking discovery of *all* “records,” “information,” or “communications” exchanged between ERIC and Michigan on any topic, there is no dispute that the core of what PILF sought in these requests is the deceased reports that ERIC provides to Michigan. Recall that, when the Magistrate Judge granted ERIC’s motion to quash, Michigan had produced only some of the deceased reports, specifically those more than three years old. But after subsequently prevailing on its motion to compel production of the more recent reports, PILF obtained from Michigan *all* the deceased reports that ERIC has provided to Michigan. *See supra* Section II.C.3. This crucial fact is buried on page fifty-three of PILF’s seventy-four-page brief.

By possessing these deceased reports, PILF has access to a wealth of information. PILF knows, for example, (1) how many deceased reports Michigan has received, (2) how often, and (3) how many names each contains. PILF can also ascertain the specific identities of the registrants listed on ERIC’s deceased reports (though their Voter ID numbers). PILF even knows, for each specific voter listed in a deceased report, which data field(s) (*e.g.*, name, date of birth, social security number) in the member data for the voter matched with the corresponding data field(s) in the DMF. (Def.’s Interr. Answers, RE 86-1, Page ID # 1427-1428.) PILF has no argument, then, that it required further discovery—much less from a non-party—regarding this “records” and “communications” category of requests.

Indeed, PILF effectively concedes this point: PILF's brief does not even acknowledge these requests, let alone continue to press them on appeal. That alone is dispositive.⁹ *See Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 624 (6th Cir. 2013) (“This court has consistently held that arguments not raised in a party’s opening brief, as well as arguments adverted to in only a perfunctory manner, are waived.”).

On the burden side, there are obvious costs to ERIC from having to comply with the Subpoena. Document Requests 1 and 2 are broad and nebulous, essentially seeking “[a]ll records” and “[a]ll communications” exchanged with anyone from 2019 to the present that somehow “relat[e]” to identifying deceased

⁹ More generally, PILF forfeited any claim to the documents it requested because it never filed a motion to overrule the objections ERIC timely served under Federal Rule 45(d)(2)(B). (Objections, RE 83-2, Page ID # 1887-1893.) *See* Fed. R. Civ. P. 45(d)(2)(B)(i)-(ii); 9 Moore’s Federal Practice – Civil § 45.41 [2][b] (“An objection ... presumptively excuses compliance, and the burden is shifted to the party serving the subpoena to bring a motion to compel the production or inspection.”); *see, e.g., Castoro v. Planet Fin. Grp. LLC*, No. 18-1566, 2018 WL 11466784, at *1 (M.D. Fla. Dec. 13, 2018); *Mobile Med. Int’l Corp. v. Advanced Mobile Hosp. Sys., Inc.*, No. 07-231, 2013 WL 6238631, at *1 n.1 (D. Vt. Dec. 3, 2013).

Notably, ERIC pointed out this deficiency in its brief opposing PILF’s appeal of the Magistrate Judge’s quashal order to the District Judge. (ERIC’s Br. in Opp. to PILF’s Appeal, RE 112, Page ID # 2005). Nonetheless, PILF never filed a motion to compel. *Cf., e.g., Atlantech, Inc. v. Am. Panel Corp.*, No. 11-50076, 2011 WL 2078222, at *2 (E.D. Mich. May 24, 2011) (where subpoenaed non-party had served objections to document requests, party opposing motion to quash filed cross-motion to compel production of documents). Because PILF’s Subpoena directed compliance in Delaware, such a motion to compel would have needed to be filed in the District of Delaware. *See* Fed. R. Civ. P. 45(d)(2)(B)(i).

registrants. Deposition Topics 9, 10, and 11 are even broader, as they are not even limited to information concerning deceased registrants. They are also vague and ambiguous, as they overlap substantially with the document requests and leave unclear what, if anything, PILF plans to depose ERIC about other than the documents themselves.¹⁰ Accordingly, it would be onerous to prepare a 30(b)(6) witness.

Also on the burden side of the ledger, the District Court properly considered ERIC's status as a non-party. *See Modern Plastics*, 890 F.3d at 251. "When discovery is sought from nonparties, ... its scope must be limited even more." *Jordan*, 921 F.3d at 188. "A more demanding variant of the proportionality analysis therefore applies when determining whether, under Rule 45, a subpoena issued against a nonparty 'subjects a person to undue burden' and must be quashed or modified." *Id.* (quoting Fed. R. Civ. P. 45(d)(3)(A)(iv)); *accord, e.g., Tolliver v. Abuelo's Int'l, LP*, No. 20-3790, 2021 WL 3188420, at *2-3 (S.D. Ohio July 28, 2021) ("[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."). The Magistrate Judge and District Judge thus properly considered ERIC's status as a

¹⁰ These deposition topics came with the footnote: "To be abundantly clear, these topics are not limited to or synonymous with the documents requested by this subpoena." (Subpoena, RE 83-2, Page ID # 1860.) But this footnote only rendered the scope of the topics *less* clear.

non-party in quashing the Subpoena. (See M.J. Decision, RE 108, Page ID # 1970; D.J. Decision, RE 165, Page ID # 3334.)

Most concerning of all, there is the enormous burden that would be imposed by the precedent PILF seeks to establish, whereby ERIC would be subject to similarly expansive discovery in every NVRA case filed against one of its members, to the same degree as if it were the defendant itself. That would create an unsustainable burden for ERIC—a small non-profit organization with limited resources and just three full-time employees (none of whom are lawyers). (Hamlin Decl., RE 82, Page ID # 884.)

The analysis is much the same for the Subpoena's sole remaining category of requests, which seek discovery regarding the "processes" used by ERIC in generating its reports.¹¹ The District Court acknowledged that "the process by which ERIC generated those [deceased] reports" is "potentially relevant." (M.J. Decision, RE 108, Page ID # 1971-1972.) The Magistrate Judge and District Judge quashed these requests on the grounds of proportionality and burden. Central to this analysis, as with the previous category of requests, was the fact that PILF

¹¹ Subpoena, RE 83-2, Page ID # 1860, 1864 (Request for Production No. 3 ("All agreements or contracts between ERIC and any third party regarding the identification of registrants who may be deceased on Michigan's voter roll."); Request for Production No. 4 ("All records describing ERIC's processes or procedures for identifying registrants who may be deceased."); Matter for Examination No. 6 ("ERIC's processes for identifying ineligible registrants, including deceased registrants.")).

already possessed extensive information about ERIC’s processes and methods, including, in particular, how its reports are created. *See supra* Sections II.A, II.C.2–3. PILF complains that it “had no access to what [ERIC’s] procedures were” (PILF Br. 49), but that is simply untrue. In fact, it is difficult to see what specific information remains for PILF to discover other than the confidential and proprietary details of ERIC’s data-matching technology (*e.g.*, ERIC’s proprietary algorithm and customized settings), which (a) are not discoverable, *see supra* Section II.E, and (b) PILF has expressly disclaimed seeking (PILF’s Resp. to ERIC’s Mot. to Quash, RE 94, Page ID # 1529; M.J. Decision, RE 108, Page ID # 1974). Nowhere in its brief does PILF identify what other information remains for it to discover.

Just as the Magistrate Judge and District Judge properly considered PILF’s failure to identify any particularized information it needed, they properly weighed the burdens described above to non-party ERIC from complying with PILF’s overbroad and vaguely-worded Subpoena. All of this was well within the discretion of the District Court.

PILF’s arguments on appeal ignore the proportionality analysis that the District Court actually undertook. First, PILF attempts to distort ERIC’s role in Michigan’s list maintenance program by characterizing ERIC as Secretary Benson’s “[a]gent” for list maintenance activities (PILF Br. 10) and stating that

Michigan “outsource[s]” its list maintenance obligations to ERIC (*id.* at 34, 59).

But the Magistrate Judge and the District Judge already rejected this same argument because it is factually wrong. *See supra* Section II.C.2.

Second, PILF notes that ERIC’s deceased reports constitute the only “direct” comparison between the entirety of Michigan’s voter file and the Social Security Administration’s death records (because Michigan’s comparison of the Social Security Administration death records it independently receives are filtered through Michigan’s driver-file records, which are then used to update the voter file). (PILF Br. 39.) But PILF has never articulated why this information—even assuming *arguendo* that it is relevant to the underlying lawsuit—needed to be supplemented by further discovery from ERIC. And, significantly, PILF has never identified how many, if any, of its 27,000 purportedly deceased registrants were individuals who did not have a motor vehicle record.

By failing to address the arguments that the Magistrate Judge and District Judge actually relied on, PILF has waived its claim of error, and this Court should affirm on that ground alone. Where “a plaintiff fails to address the district court’s reasoning in disposing of a claim ... [this Court] ha[s] deemed the claim forfeited.” *Scott v. First S. Nat’l Bank*, 936 F.3d 509, 522 (6th Cir. 2019). In *Scott*, as here, the appellants “failed to address the district court’s actual reason for dismissing their ... claim,” and “[i]nstead, ... only addressed [issues] which the district court

did not even address.” *Courser v. Mich. House of Representatives*, 831 F. App’x 161, 175 (6th Cir. 2020) (non-precedential) (discussing *Scott*, 936 F.3d at 522-23). This Court held that the *Scott* appellants had forfeited their appeal of that claim. *Scott*, 936 F.3d at 522. The same result should obtain here.

Finally, PILF argues that the Magistrate Judge applied the incorrect legal standard, purportedly by requiring PILF to demonstrate that ERIC’s reports were incorrect or unreliable before obtaining discovery. But this is yet another mischaracterization. As the District Judge observed—after PILF advanced this same, baseless argument below—the Magistrate Judge simply stated that she might have weighed the factors of relevance, burden, and proportionality differently had PILF identified a potential defect in ERIC’s methodology that required additional discovery to explore. (M.J. Decision, RE 108, Page ID # 1978; D.J. Decision, RE 165, Page ID # 3333.) Far from placing an inappropriate burden on PILF, this observation was a straightforward application of the rule that a subpoena should not be used for a fishing expedition. *See Superior Prod. P’ship v. Gordon Auto Body Parts Co., Ltd.*, 784 F.3d 311, 320-21 (6th Cir. 2015). PILF’s approach here—speculating that certain vaguely articulated discovery requests might bear on its claims, without providing any basis whatsoever to conclude they are likely to do so—is the hallmark of a fishing expedition. *See Schindewolf v. City of Brighton*, No. 14-12161, 2015 WL 13650762, at *2 (E.D. Mich. Feb. 4, 2015).

In its appellate brief, PILF asserts that it has now identified information indicating that ERIC's process is defective. (PILF Br. 40.) PILF's brief does not actually describe that purported information. But based on a citation, it appears that PILF is relying on an unsworn expert report PILF filed in opposition to Michigan's motion for summary judgment, opining that the deceased reports identify too few deceased registrants relative to the number of registrants who lack driver-file records. (Gessler Decl., RE 168-5, Page ID # 3483.) But this opinion is baseless.¹² Not only does it fail to account for registrations canceled by clerks, *see supra* Section II.C.2, but it also provides no evidence to suggest any deficiency with ERIC's data-matching process. Put differently, PILF's expert offers no evidence indicating that any different process, analyzing the same voter-file data, would reliably match a greater number of voters lacking driver-file records with DMF records.

C. PILF Has Not Demonstrated Actual and Substantial Prejudice

Even if PILF could demonstrate that the court below abused its discretion in granting ERIC's motion to quash (as it cannot), PILF certainly cannot demonstrate "actual and substantial prejudice" from the District Court's rulings. *See Pittman*,

¹² It is also procedurally deficient, as it was never offered to the District Court in conjunction with the motion-to-quash proceedings. Not to mention that an unsworn expert report is inadmissible. *Shaffer v. CSX Transp., Inc.*, 462 F. App'x 597, 601 n.2 (6th Cir. 2012) (citing *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 480-81, 488 (6th Cir. 2008)).

901 F.3d at 642. This Court has repeatedly underscored the “actual and substantial” requirement, emphasizing that “speculative or hypothetical” prejudice is not sufficient. *United States v. Carman*, No. 20-6103, 2022 WL 2236133, at *2-3 (6th Cir. June 22, 2022) (non-precedential). In other words, PILF must “demonstrate that the discovery sought would have precluded summary judgment.” *Stiltner*, 2021 WL 5232339, at *3.

PILF comes nowhere close to satisfying this requirement. Indeed, at no point in this long-running discovery dispute has PILF ever articulated what specific facts it expects to learn from ERIC that it does not already know, nor why any such facts would be material in the underlying dispute. It was for precisely this reason—*i.e.*, that PILF offered nothing more than unsupported speculation that it might learn unspecified new information that goes to the reliability of ERIC’s deceased reports—that the Magistrate Judge concluded that much of the Subpoena “appear[s] to be a fishing expedition.” (M.J. Decision, RE 108, Page ID # 1957.) And it was for the same reason that the District Judge, in denying PILF’s Rule 56(d) motion, observed that PILF “does not articulate any specific facts that it believes it will obtain from ... ERIC ... that would demonstrate the existence of a question of fact.” (Opinion and Order, RE 180, Page ID # 3660.)

PILF’s appellate arguments suffer from the same infirmity. PILF offers nothing more than sheer say-so that the Subpoena would have uncovered new

information about ERIC, without offering any specificity about what that information might have been or why PILF needed more information to test its claims against Michigan. If that assertion was insufficient below, then it is *a fortiori* insufficient now to satisfy the higher standard of actual and substantial prejudice. *Pittman*, 901 F.3d at 642. In other words, PILF now bears the burden not only to explain what facts it would have learned from ERIC had it obtained the requested discovery, but also to demonstrate that those facts would have been material to summary judgment. *See Stiltner*, 2021 WL 5232339, at *3. PILF comes nowhere close.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the orders of the Magistrate Judge and District Judge quashing PILF's subpoena.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: July 11, 2024

By: /s/ Robert A. Wiygul

Robert A. Wiygul

Peter V. Keays

One Logan Square, 27th Floor

Philadelphia, PA 19103

Telephone: (215) 568-6200

Email: rwiygul@hangleys.com

pkeays@hangleys.com

*Attorneys for Movant-Appellee Electronic
Registration Information Center, Inc.*

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 8,775 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: July 11, 2024

/s/ Robert A. Wiygul
Robert A. Wiygul

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2024, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all counsel of record.

Dated: July 11, 2024

/s/ Robert A. Wiygul
Robert A. Wiygul

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DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Record Entry	Description	Page Range
RE 1	PILF's Complaint	Page ID # 1-20
RE 80	ERIC's Motion to Quash Subpoena and for Protective Order and to Transfer Motion to U.S. District Court for the Western District of Michigan (Apr. 18, 2023)	Page ID # 854-856
RE 81	ERIC's Opening Brief in Support of Motion to Quash Subpoena and for Protective Order and to Transfer Motion to U.S. District Court for the Western District of Michigan (Apr. 18, 2023)	Page ID # 857-880
RE 82	Declaration of Shane Hamlin (Apr. 18, 2023)	Page ID # 881-896
RE 82-1	Ex. E to Hamlin Declaration: "Frequently Asked Question" Section of ERIC Website	Page ID # 948-954
RE 82-1	Ex. F to Hamlin Declaration: ERIC Technology and Security Overview	Page ID # 955-959
RE 82-1	Ex. G to Hamlin Declaration: Compilation of PILF's Letters to Sixteen ERIC Members Demanding ERIC Materials	Page ID # 960-989
RE 82-1	Ex. H to Hamlin Declaration: Compilation of ERIC Members' Responses to PILF's Demand Letters	Page ID # 990-1029
RE 82-1	Ex. I to Hamlin Declaration: PILF's Request to ERIC Invoking Florida Public Records Law	Page ID # 1030-1032
RE 83	Declaration of Robert A. Wiygul (Apr. 18, 2023)	Page ID # 1040-1045

Record Entry	Description	Page Range
RE 83-1	Ex. 1 to Wiygul Declaration: Amy Gardner, <i>Election deniers take aim at group that helps states maintain voter rolls</i> , WASH. POST, Mar. 6, 2023	Page ID # 1536-1540
RE 83-1	Ex. 2 to Wiygul Declaration: Peter Stone, <i>Key conservative group joins attacks on partnership that improves voter rolls</i> , GUARDIAN, Apr. 11, 2023	Page ID # 1541-1548
RE 83-1	Ex. 3 to Wiygul Declaration: Jessica Huseman, <i>These states officials praised ERIC for years before pulling out of the program</i> , Votebeat, Apr. 11, 2023	Page ID # 1549-1560
RE 83-1	Ex. 4 to Wiygul Declaration: Amy Gardner, <i>Ohio joins GOP-led states withdrawing from group that helps clean up voter rolls</i> , WASH. POST, Mar. 17, 2023	Page ID # 1561-1564
RE 83-1	Ex. 5 to Wiygul Declaration: Jim Hoft, <i>Who's "Cleaning" Our Voter Rolls? Soros Funded ERIC Is Now Used in 31 States</i> , Gateway Pundit, Jan. 20, 2022	Page ID # 1565-1579
RE 83-1	Ex. 6 to Wiygul Declaration: Stephen Dinan, <i>Red states flee bipartisan voter roll cleanup group, blame its left-wing election agenda</i> , WASH. TIMES, Mar. 22, 2023	Page ID # 1580-1586
RE 83-1	Ex. 7 to Wiygul Declaration: PILF's Website listing members of its Board of Directors	Page ID # 1587-1594
RE 83-1	Ex. 8 to Wiygul Declaration: America First Policy Institute Press Release (Mar. 22, 2023)	Page ID # 1595-1596

Record Entry	Description	Page Range
RE 83-2	Ex. 15 to Wiygul Declaration: PILF's First Set of Requests for Production of Documents to Secretary Benson (Oct. 7, 2022)	Page ID # 1789-1797
RE 83-2	Ex. 16 to Wiygul Declaration: Secretary Benson's Responses to PILF's First Set of Requests for Production of Documents (Nov. 14, 2022)	Page ID # 1798-1805
RE 83-2	Ex. 17 to Wiygul Declaration: Excerpts of Deposition of Rachel Rae Clone (Dec. 16, 2022)	Page ID # 1806-1816
RE 83-2	Ex. 18 to Wiygul Declaration: Excerpts of Deposition of Shelly Belton (Dec. 15, 2022)	Page ID # 1817-1825
RE 83-2	Ex. 19 to Wiygul Declaration: Initial (Since Superseded) Subpoena Served by PILF on ERIC (Mar. 2, 2023)	Page ID # 1826-1834
RE 83-2	Ex. 20 to Wiygul Declaration: ERIC's Responses and Objections to Subpoena Dated March 2, 2023 (Mar. 17, 2023)	Page ID # 1835-1844
RE 83-2	Ex. 21 to Wiygul Declaration: Correspondence Between ERIC's and PILF's Counsel (Mar. 24, 2023)	Page ID # 1845-1846
RE 83-2	Ex. 22 to Wiygul Declaration: Correspondence Between PILF's and ERIC's Counsel (Mar. 27, 2023)	Page ID # 1847-1849
RE 83-2	Ex. 24 to Wiygul Declaration: Correspondence Between PILF's and ERIC's Counsel Attaching Revised Subpoena (Mar. 30, 2023)	Page ID # 1853-1855

Record Entry	Description	Page Range
RE 83-2	Ex. 25 to Wiygul Declaration: Subpoena Dated March 30, 2023	Page ID # 1856-1864
RE 83-2	Ex. 26 to Wiygul Declaration: Comparison of Requests in Subpoenas Dated March 2, 2023, and March 30, 2023	Page ID # 1865-1867
RE 83-2	Ex. 27 to Wiygul Declaration: Correspondence Between ERIC's and PILF's Counsel (Mar. 31, 2023)	Page ID # 1868-1871
RE 83-2	Ex. 29 to Wiygul Declaration: Correspondence Between ERIC's and PILF's Counsel (Apr. 5, 2023)	Page ID # 1877-1883
RE 83-2	Ex. 30 to Wiygul Declaration: ERIC's Responses and Objections to Subpoena Dated March 30, 2023 (Apr. 14, 2023)	Page ID # 1884-1894
RE 86	Declaration of Kaylan L. Phillips (May 3, 2023)	Page ID # 1408-1409
RE 86-1	Ex. A to Phillips Declaration: Excerpts of Deposition of Jonathan Paul Brater (Apr. 19, 2023)	Page ID # 1410-1422
RE 86-1	Ex. B to Phillips Declaration: Michigan's Answers to PILF's First Set of Interrogatories (Feb. 9, 2023)	Page ID # 1423-1430
RE 86-1	Ex. C to Phillips Declaration: Excerpts of Deposition of Shelly Belton (Dec. 15, 2022)	Page ID # 1431-1434
RE 86-1	Ex. E to Phillips Declaration: Excerpts of Deposition of Stuart Matthew Talsma (Feb. 8, 2023)	Page ID # 1438-1441

Record Entry	Description	Page Range
RE 87	Order of Magistrate Judge Granting ERIC's Motion to Transfer Motion to U.S. District Court for the Western District of Michigan (May 22, 2023)	Page ID # 1454
RE 94	PILF's Response to ERIC's Motion to Quash Subpoena and for Protective Order (May 3, 2023)	Page ID # 1511-1535
RE 97	ERIC's Reply Brief in Further Support of Motion to Quash and for Protective Order (May 19, 2023)	Page ID # 1896-1935
RE 102	Order of Magistrate Judge Granting ERIC's Motion to Quash Subpoena and for Protective Order (June 14, 2023)	Page ID # 1940
RE 108	Transcript of Magistrate Judge's Hearing on ERIC's Motion to Quash Subpoena and for Protective Order (June 14, 2023)	Page ID # 1951-1982
RE 109	PILF's Brief in Support of Appeal of Order Granting Motion to Quash (June 28, 2023)	Page ID # 1985-1995
RE 112	ERIC's Brief in Opposition to PILF's Appeal of Order Granting Motion to Quash (July 12, 2023)	Page ID # 1997-2017
RE 113	PILF's Motion to Compel Discovery from Secretary Benson (July 14, 2023)	Page ID # 2018-2020
RE 114	PILF's Brief in Support of Motion to Compel Discovery from Secretary Benson (July 14, 2023)	Page ID # 2021-2098
RE 118	Secretary Benson's Brief in Opposition to PILF's Motion to Compel Discovery from Secretary Benson (July 28, 2023)	Page ID # 2105-2159

Record Entry	Description	Page Range
RE 132	PILF's Reply Brief in Further Support of Motion to Compel Discovery from Secretary Benson (Aug. 7, 2023)	Page ID # 2681-2691
RE 139	Order of Magistrate Judge Granting in Part and Denying in Part PILF's Motion to Compel Discovery from Secretary Benson (Aug. 31, 2023)	Page ID # 2924
RE 140	Transcript of Magistrate Judge's Hearing on PILF's Motion to Compel Discovery from Secretary Benson (Aug. 31, 2023)	Page ID # 2925-2946
RE 149	Secretary Benson's Brief in Support of Motion for Summary Judgment (Oct. 2, 2023)	Page ID # 3023-3070
RE 149-4	Ex. C to Secretary Benson's Brief: Excerpts of Deposition of John Harris (Feb. 9, 2023)	Page ID # 3092-3104
RE 149-5	Ex. D to Secretary Benson's Brief: Excerpts of Deposition of Michigan Department of State (Aug. 2, 2023)	Page ID # 3105-3128
RE 165	Memorandum Opinion and Order of District Court Affirming Magistrate Judge's Order Granting ERIC's Motion to Quash Subpoena and for Protective Order (Oct. 30, 2023)	Page ID # 3325-3334
RE 168	PILF's Response in Opposition to Secretary Benson's Motion for Summary Judgment (Oct. 30, 2023)	Page ID # 3406-3446
RE 168-5	Ex. D to PILF's Response: Gessler Declaration (May 10, 2023)	Page ID # 3468-3488

Record Entry	Description	Page Range
RE 170	PILF Motion for Discovery Under Fed. R. Civ. P. 56(d) (Oct. 30, 2023)	Page ID # 3517-3524
RE 172	PILF's Brief in Support of Motion for Discovery Under Fed. R. Civ. P. 56(d) (Oct. 31, 2023)	Page ID # 3527-3523
RE 180	Opinion and Order of District Judge Granting Summary Judgment in Secretary Benson's Favor and Denying PILF's Fed. R. Civ. P. 56(d) Motion (Mar. 1, 2024)	Page ID # 3636-3666
RE 182	PILF's Notice of Appeal (Mar. 26, 2024)	Page ID # 3668-3670

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