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,
Defendant – Appellee,

ELECTRONIC REGISTRATION INFORMATION CENTER, INC.,
Movant – Appellee.

On Appeal from the U.S. District Court for the Western District of Michigan, Case No. 1:21-cv-929 (Hon. Jane M. Beckering)

Brief of Proposed Amicus Curiae Judicial Watch, Inc. in Support of Plaintiff-Appellant Public Interest Legal Foundation and Reversal

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June 4, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 6 Cir. R. 26.1, Sixth Circuit Rule 26.1, counsel for amicus curiae Judicial Watch, Inc., certifies it is not a subsidiary or affiliate of any publicly owned corporation not named in the appeal, and that Judicial Watch, Inc. is neither controlled by, nor is under common control with a publicly owned corporation. Counsel further certifies that no publicly owned corporation or its affiliate, not a party to this appeal, has a substantial financial interest in the outcome of this litigation.

June 4, 2024 *s/ Russ Nobile*

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INTERESTS AND AUTHORITY OF AMICUS CURIAE [1]

Judicial Watch, Inc. ("Judicial Watch" or "amicus") files this amicus curiae brief under authority of Federal Rule of Appellate Procedure 29(a) in support of Public Interest Legal Foundation ("Appellant") and urges this Court to reverse the judgment of the district court.

Judicial Watch, Inc. is a non-partisan, public interest organization headquartered in Washington, DC. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch monitors and investigates government and other agencies nationwide through public records laws, such as the Freedom of Information Act, 5 U.S.C. § 552, and the public inspection provisions of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20507(i).

In 2012, Judicial Watch began its election integrity work, primarily enforcing the integrity provisions of the NVRA through its private right of action. Judicial Watch has obtained numerous state and county settlement agreements or consent

[1] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus curiae or its counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Fed. R. App. P. 29(a)(2), Judicial Watch sought and obtained the consent of all parties prior to the filing of this brief.

decrees that brought jurisdictions from California to Kentucky to New York further into compliance with Section 8 of the NVRA. *See, e.g., Judicial Watch v. Grimes*, No. 17-94 (E.D. Ky. 2017) (ECF No. 39) (Consent Decree entered against the Commonwealth of Kentucky to enforce the NVRA); *Judicial Watch v. Logan*, No. 17-8948 (C.D. Cal. 2017) (settlement with Los Angeles County and the State of California to settle alleged NVRA violations); *Judicial Watch v. Griswold*, No. 20-2992 (Colorado NVRA settlement); *Judicial Watch v. Pennsylvania Sec. of State*, No. 20-708 (M.D. Pa. 2020) (Pennsylvania NVRA settlement). Judicial Watch has also filed numerous amicus curiae briefs regarding the proper interpretation and application of Section 8 of the NVRA. *See, e.g.*, *A. Philip Randolph Inst. v. Husted*, No. 16-3746 (6th Cir. 2016) (Dkt. No. 37) (Brief of Amicus Curiae Judicial Watch); *Public Interest Legal Found. v. Schmidt*, No. 23-1590 (3d Cir. 2023) (Dkt. No. 48).

In the last ten years, no public or private organization has obtained more statewide settlement agreements or consent decrees against chief state election officials for violations of the list maintenance provisions of Section 8(a)(4) of the NVRA. As part of its enforcement efforts, Judicial Watch also routinely requests public records of voter registration activities in various states under Section 8(i) of the NVRA, and has sued on its own behalf and on behalf of others to enforce it. *Judicial Watch v. Lamone*, 399 F. Supp. 3d 425 (D. Md. 2019); *Illinois Conservative Union v. Illinois*, 2021 U.S. Dist. LEXIS 102543 (N.D. Ill. June 1, 2021). In the

course of these efforts, Judicial Watch has garnered a substantial amount of practical experience as to how to assess a jurisdiction's efforts and claims regarding its NVRA responsibilities. *See Judicial Watch*, 399 F. Supp. 3d at 445 ("Organizations such as Judicial Watch … have the resources and expertise [concerning the NVRA] that few individuals can marshal."). This experience can be helpful here.

For the reasons set forth below, Judicial Watch respectfully requests that this Court reverse the judgment of the district court.

SUMMARY OF ARGUMENT

The list maintenance provisions of the National Voter Registration Act of 1993 mandate that "each State shall … conduct a general program that makes a reasonable effort to remove … from the official lists of eligible voters" the names of voters who have become ineligible by reason of death or a change of residence. 52 U.S.C. § 20507(a)(4). This brief focuses on whether Michigan conducts a general program that makes a reasonable effort to remove voters ineligible by reason of death. Despite substantial evidence showing that Defendant-Appellee did not have a program that satisfied the NVRA, including evidence developed by the Plaintiff-Appellant and confirmed by the State's own independent Auditor General, the district court ruled that there was no genuine question of material fact as to whether its program made a "reasonable effort" to remove deceased voters.

Rather than restricting its analysis, as it should have on a motion for summary judgment, to whether a genuine issue of material fact existed, the district court proceeded to assess the weight the evidence, and to resolve conflicts between the evidence and claims presented by the parties. Most egregiously, the district court discounted the magnitude and significance of strong evidence that tens of thousands of deceased registrants were present on Michigan's voter rolls. This evidence was based directly on admissions by Michigan's own Auditor General, which, in turn, largely corroborated Plaintiff-Appellant's own study concerning the issue. In discounting this evidence, the district court improperly credited an analysis from one of Appellee-Defendant's internal analysts that disputed—though only in part—the total number of deceased voters on the rolls. The evidence developed by Plaintiff-Appellant and the testimony provided by Michigan's Auditor General should have been enough to at least raise a genuine issue of material question requiring trial as to whether Appellee-Defendant's program constituted the "reasonable effort" necessary under the NVRA. This is especially so given that Plaintiff-Appellant's study only canvassed a subset of the registration records, and given that some of the deceased registrants appear to have been registered for decades after their deaths. But the district court ruled otherwise on the basis of factual determinations that should not have been made on a motion for summary judgment.

Further, in determining that the facts established that Michigan's program was reasonable, the district court wrongly focused on registrations Michigan had removed, and not on the registrations it had failed to remove. In supporting its use of publicly available data to make this argument, moreover, the district court cited, and misapprehended, a prior case involving Judicial Watch and the undersigned counsel, which actually established the *unreliability* of such public data.

Amicus Judicial Watch regularly engages in private enforcement of the NVRA, including the NVRA's requirement that states conduct a general program that makes a reasonable effort to remove voters ineligible by reason of death, not the change of residence requirement. Judicial Watch respectfully submits that the district court erred in granting summary judgment by making factual determinations where the facts supported the Plaintiff-Appellant or, at a minimum, where reasonable triers of fact could have disagreed about their import. Accordingly, the decision below granting Defendant-Appellee's summary judgment should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DECIDING ISSUES OF FACT THAT SHOULD HAVE BEEN DECIDED AT TRIAL.

Because the NVRA's standard incorporates a reasonableness criterion, it is inherently ill-suited to summary disposition. "[I]n reviewing summary

judgment decisions this Court has observed that certain substantive elements, like reasonableness … are so fact bound that they should normally be reserved for the jury 'unless there is only one reasonable determination possible' based on the evidence produced by the parties." *Snyder v. Kohl's Dep't Stores, Inc*., 580 Fed. Appx. 458, 461-62 (6th Cir. 2014) (unpublished, available on Lexis and Westlaw) (collecting cases); *see*, *e.g.*, *Niemi v. NHK Spring Co., Ltd*., 543 F.3d 294, 301 (6th Cir. 2008) (the reasonableness of efforts to maintain secrecy of a trade secret "ordinarily represents a question for the jury" and "only in an extreme case can what is a 'reasonable' precaution be determined as a matter of law") (citations omitted).[2]

A. The District Court Erred by Failing to Appreciate the Significance of the Fact that Michigan's Auditor-General Admitted Finding 20,000 to 30,000 Apparently Deceased Registrants on the Rolls.

Without a doubt the district court's most serious error was its disparaging treatment of a crucial admission by Michigan's Auditor General that, when attempting to locate deceased voters by conducting a "death match for active voters"

[2] The only circuit to address the question of reasonableness in the NVRA context did so on a well-developed factual record following a full bench trial, not on summary judgment. *Bellitto v. Snipes*, 935 F.3d 1192, 1197 (11th Cir. 2019) (citing trial involving "extensive testimony about registration rates, list-maintenance tools … and citizen complaints … dueling experts testif[ying] in considerable detail … [and] thousands of pages of documentary evidence," leading to "a lengthy opinion, making extensive findings of fact and conclusions of law").

in the Qualified Voter File, he found "twenty to thirty thousand on the initial match." Dkt. No. 21 (Appellant's Opening Brief) at 37-38[3] (citing Exhibit A, R. 133-2, Page ID # 2714, and Deposition Transcript, R. 133-3, Page ID # 2798). This range roughly corroborates a study by Plaintiff-Appellant finding at least 27,000 "likely deceased registrants." Dkt No. 21 at 5 (citing Exhibit 6, R. 1-6, Page ID # 52).

It is well-settled that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Indeed, a court "impermissibly invades the province of the jury it if it attempts to 'resolve[] issues of credibility and other conflicting evidence.'" *Snyder*, 580 Fed. Appx. at 461 (citation omitted).

Yet the district court did precisely that when, even as it assumed the truth of the number of deceased registrants, it argued that the *magnitude* of this number was not significant. Agreeing with Defendant-Appellee, the court observed that "the 27,000 'potentially deceased' voters … would comprise approximately 0.3 percent of the total number of registered voters in Michigan," and found that "[e]ven if all the voters on PILF's list were *actually* deceased, that number of deceased voters would simply not be unreasonable in a state the size of Michigan." *Pub. Int. Legal*

[3] All citations are to the page numbers assigned to a document by ECF, not internal pagination.

Found. v. Benson, Case No. 1:21-cv-929, 2024 U.S. Dist. LEXIS 47840 at *32 (W.D. Mich. Mar. 1, 2024) (R. 180, Page ID # 3657). The court responded to the Auditor General's admission regarding 20,000 to 30,000 deceased registrants with Defendant-Appellee's point "that 'there is no dispute that the final audit report included *no finding* concerning the number of deceased registered voters.'" *Id*. at *30 n.11 (R. 180, Page ID # 3656). The court then credited the factual contention by "MDOS analyst Talsma" that Plaintiff-Appellant's estimate was 8,000 registrations too high. *Id*. at *33 (R. 180, Page ID # 3658).

With each of these arguments and the associated findings, the district court engaged in "weigh[ing] the evidence and determin[ing] the truth of the matter" (*Anderson*, 477 U.S. at 249) and "resolv[ing] issues of credibility and other conflicting evidence." *Snyder*, 580 Fed. Appx. at 461 (cleaned up). This was impermissible at the summary judgment stage, and a crucial error in that the court was making factual determinations about what were probably the most important facts in the lawsuit.

With regard to the significance of the admitted tens of thousands of deceased voters still on the rolls, moreover, the district court unquestionably got the issue wrong. To begin with, note that the number of deaths in any jurisdiction is relatively quite small. By one typical estimate from a government website, the age-adjusted death rate by state in the United States ranges from about 574 (or 0.574%) to about

986 (0.986%) per 100,000, with a national rate of about 748 per 100,000 (0.748%).[4] Comparing the subset of these deaths that are removed from voter registrations to such large numbers as a state's voting-age population or, alternately, its total registered voters, as the district court does (*see Benson*, 2024 U.S. Dist. LEXIS 47840 at *32 (R. 180, Page ID # 3657)) yields a practically meaningless comparison. But a useful estimate can be based on the court's observation that "in 2020, 2021, and 2022, there were more than 110,000 deaths in Michigan each year." *Id.* at *8 (R. 180, Page ID # 3641). That is the proper comparator. Comparing the 20,000 to 30,000 Michigan voters initially found by the Auditor General to be deceased to these 110,000 yearly deaths suggests that a number equal to somewhere between 18% to 27% of the number of Michigan residents who die every year are still on its voter rolls. Not to put too fine a point on it, for an NVRA practitioner this is a substantial, even a startling number. It at least raises an issue of material fact requiring trial about Defendant-Appellee's NVRA compliance.

The fact that the final Auditor General's report did not include a finding regarding a *specific* number of deceased registrants (*id.* at *30 n.11 (R. 180, Page ID # 3656)) does not in any way contradict the Auditor General's admissions in his

[4] U.S. Dept. of Health & Human Services, Nat. Inst. Of Health, Health Outcomes: Mortality-Table, All Causes of Death, available at https://bit.ly/4bKi1uW (last visited June 4, 2024).

sworn testimony about the *range* he found when he performed a death match for active voters. And even if the MSDOS' testimony is credited as persuasive (*id.* at *33 (R. 180, Page ID # 3658)—which should not happen at the summary judgment stage—the fact that the number of deceased registrants is perhaps 8,000 lower does not negate the fact that tens of thousands of deceased registrants are on the rolls.

Indeed, Plaintiff-Appellant provides additional reasons to believe that the number of deceased registrants is even higher than its initial study found, when it notes that the study was based on a *subset* of the Qualified Voter File. Dkt. No. 21 at 36. Moreover, Plaintiff-Appellant made the observation, apparently not noticed by the district court, that some of the apparently deceased registrants were registered "for more than two decades after death." *Id*. This fact particularly suggests that the number of deceased registrants on the rolls *is not simply a byproduct of the normal rhythms or vagaries of processing death records*. Even if dead voters are not removed immediately, they should not languish on the rolls for decades.[5]

[5] In the analysis produced post-discovery, ECF 149-11, Defendant-Appellee's analyst noted that 4,921 of the allegedly deceased voters identified by Plaintiff-Appellant were scheduled for "cancellation in either 2025 of 2027." *Id*. at ¶¶ 2. The purpose of this claim is unclear. If it is to show the program for removing deceased voters is making a "reasonable effort," it fails. It shows instead that the program missed timely removing 4,921 voters and is dependent on other programs mandated by the NVRA to remove (many years later) deceased registrants.

There is clearly a triable issue of material fact concerning whether the number of deceased registrants on Michigan's vote rolls establishes the State's non-compliance with the NVRA.

B. The District Court Erred by Assuming that the Aggregate Number of Deceased Voters Allegedly Removed by Michigan Shows Its Compliance With the NVRA.

A related issue where the district court impermissibly weighed and resolved conflicting fact evidence concerned its finding that, while Michigan "ranked tenth in the United States in voting-age population," it removed the fifth most "total number of registrations based on death" in 2022. *Benson*, 2024 U.S. Dist. LEXIS 47840 at *6, *13, *32 (R. 180, Page ID # 3640, 3644, 3657). Granting summary judgment as a matter of law to Defendant-Appellee on this basis is fundamentally misguided. Judicial Watch has by now sent scores of letters over many years to jurisdictions believed to be failing to comply with the NVRA. Virtually every jurisdiction that has ever replied to such a letter has taken the time to point out all of the registrations it *removed* during a two-year cycle measured by the Election Assistance Commission (EAC).[6] But many of these same states later tacitly or explicitly conceded NVRA liability.

[6] In June of each odd-numbered year, the EAC is required by law to report to Congress its findings related to state voter registration practices. 52 U.S.C. § 20508(a)(3). Federal regulations require states to provide various kinds of data to

They do so because a state's NVRA compliance or non-compliance does not depend only on the registrations it *has* removed during a two-year measuring period. It depends at least as much on the registrations the state *failed* to remove. Consider Michigan. Suppose that the state alternately failed to remove either (a) 1,000, (b) 2,000, (c) 4,000, or (d) 27,000 deceased registrants. Surely these different facts could lead to different litigation outcomes, even if in each case the State were assumed to have actually removed the same aggregate number of deceased registrants.

The district court cited *Judicial Watch, Inc. v. Penn.*, 524 F. Supp. 3d 399 (M.D. Pa. 2021) for the proposition that "public records, including data from the EAC, [can] 'effectively torpedo' a plaintiff's theory that officials are failing to fulfill their list-maintenance obligations." *Benson*, 2024 U.S. Dist. LEXIS 47840 at *32-33 (R. 180, Page ID # 3657). This citation is ironic, because that case perfectly illustrates the risks of relying on such public records. Judicial Watch was the plaintiff in that case and the undersigned were its counsel. Initial data—which Judicial Watch repeatedly asked the defendant to confirm or deny (*see Judicial Watch, Inc. v. Penn.*, No. 20-708 (M.D. Pa. 2020), ECF No. 1-2 at 4, ECF No. 1-3 at 4, ECF No. 1-4 at 4, ECF No. 1-6 at 3)—suggested that the number of registrants removed in a two-year

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the EAC for use in this biennial report, including the numbers of active and inactive registered voters in the last two federal elections, and the numbers of registrations removed from the rolls any reason between those elections. 11 C.F.R. § 9428.7(b)(1), (2), (5).

period for having changed residence were "absurdly small," namely, "eight in Bucks County, five in Chester County, and four in Delaware County." *Judicial Watch*, 524 F. Supp. 3d at 402. Having not received a satisfactory response, a complaint was filed in April 2020. *Id*. at 403. However, "the public records on which Judicial Watch relie[d]" were revised in July 2020. *Id*. at 406. Stated differently, the Pennsylvania defendants submitted completely new data to the EAC, which had already made its NVRA report to Congress. The revised numbers showed that the original data, which the defendants themselves had collected and certified to the EAC as true, was not merely wrong, but was spectacularly, exponentially wrong. The new data showed that the numbers of registrants removed for changing residence were 15,714 in Bucks County, 11,519 in Chester County, and 20, 968 in Delaware County. *Id*.[7]

Pennsylvania is not the only state to have revised its prior submissions. Last year, Delaware, Hawaii, West Virginia, and Wisconsin submitted revised data to the EAC, including (for Delaware and Hawaii) voter removal numbers. *See* "Errata Note: 2022 EAVS Comprehensive Report and Accompanying Dataset," Election Assistance Commission, Dec. 18, 2023, available at https://www.eac.gov/research-and-

[7] While the new data led to dismissal of the claims against Bucks, Chester, and Delaware Counties, Judicial Watch amended the complaint to identify other Pennsylvania counties who were non-compliant based on the restated data, and ultimately settled the case when the state conceded in court documents that it had substantially increase its list maintenance removals. *See Judicial Watch, Inc. v. Penn.*, No. 20-708 (M.D. Pa. 2020) (ECF Nos. 78, 163).

data/studies-and-reports. Publicly available data like that published by the EAC certainly can be used to show plausible violations of the NVRA to survive a motion to dismiss. *See Judicial Watch v. Griswold*, 554 F. Supp. 3d 1091, 1107-08 (D. Colo. 2021). To prevail on a fact-based motion or at trial, however, that data must be confirmed by admissions from the relevant jurisdiction, or otherwise corroborated—exactly as Plaintiff-Appellant did in this case with its data concerning deceased registrants.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

June 4, 2024

Respectfully submitted,

s/ Russ Nobile

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per Microsoft Word count, the brief contains 3,310 words excluding tables and certificates.

June 4, 2024 *s/ Russ Nobile*

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. I certify that the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

June 4, 2024 *s/ Russ Nobile*