E-FILED
Monday, 20 September, 2021 04:54:14 PM
Clerk, U.S. District Court, ILCD

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD, ILLINOIS**

| | | |
|---|---|---|
| PUBLIC INTEREST LEGAL FOUNDATION, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| -vs- | ) | 20-cv-3190-SEM-TSH |
| | ) | |
| STEVE SANDVOSS, in his official Capacity as Executive Director of the Illinois State Board of Elections, KYLE THOMAS, in his official capacity as Director of Voting Systems and Registration, CHERYL HOBSON in her Official capacity as Deputy Director of Voting and Registration, and the ILLINOIS STATE BOARD OF ELECTION, | ) | |
| | ) | |
| Defendants. | ) | |



**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

NOW COME Defendants, BERNADETTE MATTHEWS,[1] KYLE THOMAS, CHERYL HOBSON, and ILLINOIS STATE BOARD OF ELECTIONS,[2] by and through their attorney, Kwame Raoul, Attorney General for the State of Illinois, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby submit this memorandum of law in support of their motion for summary judgment.

## INTRODUCTION

This lawsuit is an attempt by the Indiana-based public interest group, Public Interest Law Foundation, to force Defendants to produce documents to which it is not entitled. Specifically, Plaintiff seeks an electronic copy of Illinois' statewide voter registration list and claims that it is

[1] Bernadette Matthews is the Acting Executive Director of the Illinois State Board of Elections, and therefore is automatically substituted for former Executive Director Steve Sandvoss. Fed. R. Civ. Pro. 25(d).

[2] Defendants Kyle Thomas, Cheryl Hobson, and Illinois State Board of Elections filed a joint motion to dismiss on October 5, 2020. (Doc. 9). The motion is currently pending before the Court.

entitled to the list pursuant to Section 8(i) of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20507(i)(1). However, the NVRA only provides for access to records concerning the implementation of "programs and activities" carried out to maintain the accuracy of voter registration lists. *See* 52 U.S.C. § 20507(i)(1).

Plaintiff requests that this court declare Defendants violated the NVRA by not allowing it to "inspect and copy the list maintenance data and voter registration list."[3] (Doc. 1, Prayer for Relief, ¶ 1). Plaintiff further seeks a declaratory judgment that Section 8(i) preempts any restriction contained in 10 ILCS 5/1A-25 that prevents Plaintiff from inspecting and copying list maintenance data and the statewide voter restriction list. (Doc. 1, Prayer for Relief, ¶ 2). Plaintiff asks this Court to order Defendants to produce the statewide list maintenance data and voter registration list and permanently enjoin Defendants from denying requests to inspect similar list maintenance data attached to voter registration lists in the future. (Doc. 1, Prayer for Relief, ¶¶ 3-4).

Defendants seek summary judgment because disclosure of the voter registration list Plaintiff seeks is not mandated by the NVRA. This case presents a simple question of statutory interpretation. Does NVRA require the disclosure of voter registration lists? The answer is an unequivocal "no." The plain and unambiguous language of Section 8(i) of the NVRA only applies to "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," not voter registration lists. *See* 52 U.S.C. § 20507(i)(1). Thus, Plaintiff has not shown a violation of the NVRA. Moreover, because the voter registration list is not a "record" to be disclosed pursuant to Section 8(i), Section 1A-25 of the Illinois Election Code, which limits disclosure of the state's voter



[3] Although Plaintiff also alleges that Defendants failed to allow Plaintiff to inspect and copy the "requested list maintenance data" the letters attached to Plaintiff's complaint reveal that Plaintiff specifically requested the voter registration list; therefore, this alleged fact should not be considered by the Court. See Fed. R. Civ. Pro. 56(e).

registration list, is not preempted by the NVRA. Further, the State Board of Elections (SBE) is entitled to summary judgment because, absent a voluntary waiver or congressional override, it cannot be sued in federal court due to the state's sovereign immunity under the Eleventh Amendment. Finally, Defendants Thomas and Hobson are entitled to summary judgment since they are not proper parties to this litigation. Thus, summary judgment is warranted.

## BACKGROUND

One of the purposes of the NVRA is "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501 (West 2020). To that end, Section 8 of the NVRA specifically governs voter-registration procedures. *See id.* § 20507(a). Section 8 also regulates any state "program or activity" designed to "protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll." *Id.* § 20507(b) (West 2020). Such a "program or activity" must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," and generally may not remove registrants for failure to vote. *Id.* § 20507(b)(1), (2) (West 2020). Subsection 8(i) requires states to allow public inspection of "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." *Id.* § 20507(i)(1) (West 2020). Two categories of records are expressly excluded from disclosure: records related to an individual's declination to register and records identifying the agency where a voter registered. *Id.*



The SBE has "general supervision over the administration of the registration and election laws throughout the State," and has the authority to perform other duties as prescribed by law. ILL. CONST. art III, § 5; 10 ILCS 5/1A-1 (West 2020).

Section 1A-25 of the Illinois Election Code provides that a centralized statewide voter registration list "shall be created and maintained by the State Board of Elections as provided in

this section." 10 ILCS 5/1A-25 (West 2020). "The centralized statewide voter registration list shall be compiled from the voter registration data bases of each election authority in this State." 10 ILCS 5/1A-25(1) (West 2020). Section 1A-25 provides as follows:

> To protect the privacy and confidentiality of voter registration information, the disclosure of any portion of the centralized statewide voter registration list to any person or entity other than to a State or local political committee and other than to a governmental entity for a governmental purpose is specifically prohibited except as follows: (1) subject to security measures adopted by the State Board of Elections which, at a minimum, shall include the keeping of a catalog or database, available for public view, including the name, address, and telephone number of the person viewing the list as well as the time of that viewing, any person may view the list on a computer screen at the Springfield office of the State Board of Elections, during normal business hours other than during the 27 days before an election, but the person viewing the list under this exception may not print, duplicate, transmit, or alter the list; or (2) as may be required by an agreement the State Board of Elections has entered into with a multi-state voter registration list maintenance system.

10 ILCS 5/1A-25 (West 2020).



**UNDISPUTED MATERIAL FACTS**

1. On October 16, 2019, Plaintiff sent a letter to SBE's former Executive Director Steve Sandvoss stating it "would like to receive or purchase an electronic copy of the Illinois statewide voter registration list." (Doc. 1, ¶ 18; Doc. 1-4; Doc. 8, ¶ 18).

2. On October 29, 2019, the SBE's General Counsel notified Plaintiff via letter that Plaintiff was authorized "to participate in the 'public inspection' (52 U.S.C. § 20507(i)(1)) of Illinois voter registration information." (Doc. 1, ¶ 21; Doc. 1-5; Doc. 8, ¶ 21). The letter further stated that "any relevant information regarding Illinois list maintenance efforts" in the Board's possession would be made available." *Id*.

3. Plaintiff was invited to view the statewide voter registration list on a computer screen at the Illinois State Board of Elections' Springfield office. *Id*.

4. In subsequent correspondence, attached to Plaintiff's complaint, Plaintiff specifically noted that it wanted to review copies of the state's voter list. (Doc. 1-7).

5. On January 31, 2020, a representative of Plaintiff came to the SBE office in Springfield to inspect the voter registration list on a computer. (Doc. 1, ¶ 26; Doc. 8, ¶ 26).

6. Plaintiff admits that upon the arrival of its representative at the office, its representative was given access to the public access voter registration database, a searchable database of registered voters in Illinois. (Doc. 1, ¶ 27, Doc. 1-8, ¶¶ 4, 6).

7. Pursuant to the 10 ILCS 5/1A-25(4), Plaintiff was disallowed from printing, duplicating, transmitting, or altering the voter registration list. (Doc. 1, ¶ 27).

8. On February 21, 2020, Plaintiff sent a letter to Defendant Hobson, former Executive Director Sandvoss and Acting General Counsel asserting that when its representative came to the SBE Springfield office on January 31, 2020, she was not provided with the statewide voter registration list and was not allowed to retrieve a list using the database search parameters. (Doc. 1-9).

9. The February 21, 2020 letter states: "Additionally, I was not allowed to print or make copies of any information on the screen, nor was I allowed to copy or download voter registration list data onto my own electronic storage device." (Doc. 1-9).

10. The actual, entire centralized statewide voter registration list cannot be retrieved and viewed by the public on a one computer screen at the Springfield office of the SBE. (Doc. 22-1, ¶ 28).

11. The statewide database can be searched for a specific name or birthdate on the computer screen at the Springfield office but there is not a search option available that will retrieve the statewide voter registration list for viewing in its entirety on the computer screen at the Springfield office of the SBE. (Doc. 22-1, ¶ 30).

12. List maintenance activities that affect registration information include: documenting the registrant's status as active or inactive, documenting the registrant's status to ineligible, documenting the registrant's status to any other internal classification, documenting the registrant's name and birthdate, noting a registrant has a new address, documenting that the registrant has requested to be removed from the registration list, documentation that a confirmation card was sent to a registrant's address, and documentation in the registration record that a registrant was reported deceased. (Doc. 22-1, ¶¶ 8-14, 16, 18-19).

13. List maintenance activities are performed by local election authorities. (Ex. 1, Hobson Declaration, ¶ 6)

14. The centralized statewide voter registration list contains registration information maintained by local election officials. (Doc. 22-1, ¶ 22).

15. Defendant Hobson is the Deputy Director of Voting and Registration Systems, and she works in the Division of Voting and Registration Systems of SBE. (Ex. 1, Hobson Declaration, ¶ 3).

16. Hobson's job duties include assisting the Director of Voting and Registration Systems with projects, supervising staff, being involved with equipment testing, and maintaining and helping oversee the statewide voter registration system. (Ex. 1, Declaration, ¶ 4).

17. Defendant Hobson is not responsible for, nor does she have any authority to enforce the provisions of the NVRA. (Ex. 1, Hobson Declaration, ¶ 5).

18. Defendant Thomas works for SBE as its Director of its Voting and Registration Systems Division. (Ex. 2, Thomas Declaration, ¶ 3).

19. Defendant Thomas' job duties include coordinating, planning, implementing, and evaluating the voting system approval process; development and implementation of policy and

procedures of the statewide voter registration program; and administering the paperless voter online application system and the automatic voter registration program. He also function as a resource person to elected officials of all units of government, other governmental agencies, organizations, and the public. (Ex. 2, Thomas Declaration, ¶4).

20. Defendant Thomas does not have any authority to enforce the provisions of the NVRA. (Ex. 2, Thomas Declaration, ¶ 5).

21. The Division of Voting and Registration Systems, for which both Defendants Thomas and Hobson work (UMF 15 ¶¶ 15, 18), "is responsible for the statewide Illinois Voter Registration System" including "training and support of internal and external applications" related to that system. (Illinois State Board of Elections, Division of Voting and Registration Systems, https://www.elections.il.gov/AboutTheBoard/DivVotingAndRegistrationSystems.aspx?MID=25NH8xqBAV0%3d&T=637370054904902687 (last visited September 29, 2020).

22. The Division is "also responsible for all requests from registered political committees for computerized voter data," maintaining the "secure website where pre-election ballot request information is contained," and maintaining "the Public Voter Search stations in our Springfield office, which are accessible during normal business hours" subject to some exceptions. (*Id*.)

23. The Division is tasked with recommending for approval "voting systems for use in Illinois", preparing and conducting of "pre-election tests of voting systems", preparing "referenda profiles for each election", and analyzing "vote tabulation system computer operator logs from each regular election." (*Id*.).

## STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The movant bears the burden of establishing that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the movant meets this burden, the non-movant must set forth specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 252.

When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Caterpillar Inc. v. Estate of Lacefield-Cole*, 520 F. Supp. 2d 989, 994 (N.D. Ill. 2007) (citing *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 230 (7th Cir.1996)). However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Id.*



## ARGUMENT

### I. Section 8 (i) of the NVRA does not require disclosure of voter registration lists.

This Court's analysis of Plaintiff's claim should begin and end with a review of the plain language of Section 8(i) of the NVRA. It provides, in pertinent part, that each state shall maintain and make available for public inspection and where available, photocopying of "all records *concerning* the *implementation of programs and activities* conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters . . . ." 52 U.S.C. § 20507(i)(1)

(emphasis added). By Plaintiff's reading of the statute, the "records" that are required to be disclosed pursuant to the NVRA include a state's voter registration list. Plaintiff alleges Defendant violated the statute when it refused to give Plaintiff a copy of Illinois' voter registration list. Yet, the language of the NVRA simply does not lend itself to such a broad interpretation. Rather, the clear, unambiguous language of the statute does not include voter registration lists from the "records" to be disclosed and applies to "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of" voter registration lists. 52 U.S.C. § 20507(i)(1).

**A. Review of the plain language of Section 8(i) demonstrates the legislature's intent.**

The Supreme Court has noted that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)). The inquiry must end "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (internal quotations omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id*. at 341.

A review of the language of Section 8 of the NVRA provides a clear insight into Congress' intent. This Court must presume the "legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002). "Parties should not seek to amend [a] statute by appeal to the Judicial Branch." *Id*. at 462. The language in Section 8(i) could not be more plain and unambiguous: the "records" at issue in Section 8(i) are records involving the implementation of programs and activities conducted for ensuring the

accuracy and currency of voter registration lists, not the voter lists themselves. *See* 52 U.S.C. § 20507(i)(1).

**B. Plaintiff cannot add or remove language to the statute to suit its purposes.**

The interpretation in Section 8(i) put forth in Plaintiff's complaint, and in its motion for summary judgment, either attempts to read in the phrase "official list of eligible voters" where the legislature specifically chose to omit it, or to delete the phrase "programs and activities conducted for the purpose of ensuring accuracy and currency of official lists of eligible voters" in an effort to make Section 8(i) require the disclosure of *all records* related to voter registration. Either approach violates basic principles of statutory construction and ignores the deference afforded to lawmakers.

**1. If the legislature wanted voter registration lists to be disclosed pursuant to Section 8(i), it would have made its intention clear.**

Indeed, if Congress wanted states to disclose their voter registration lists, it would have said as much in the drafting of the statute. "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress did not shy away from phrases which describe voter registration lists elsewhere in Section 8. The phrases "voter registration roll," "official list of eligible voters," and "official list of voters" all appear in Section 8. *See* 52 U.S.C. §§ 20507(a)(3) ("official list of eligible voters"); § 20507 (a)(4) ("official list of eligible voters"); § 20507 (b)(2) ("voter registration roll," "official list of voters," "official list of eligible voters"); § 20507 (d)(1) ("official list of eligible voters"); § 20507 (d)(3) ("official list of eligible voters"); § 20507 (f) ("official list of eligible voters"). Notably, the phrase "official list of voters" also appears in the very *sentence* at issue here. 52 U.S.C. § 20507(i). If Congress wanted the "official list of eligible voters" to constitute a "record" subject to disclosure it would have said so explicitly.

Notably each time one of the "list of voters" phrases is used it is in the context of describing maintenance of the list: reasons for a voter's removal from the list are described, mandatory programs are discussed, and procedures for removal of voters are established. All of these instances separate the list (the final result) from the program implemented to maintain the list. Such is consistent with the language of Section 8(i).

Perhaps Congress did not expressly include the official list of voters in its definition of "records" because it would defy reason and logic to do so. Congress specifically required the disclosure of records "concerning the implementation of and activities" for voter list maintenance. There can be no dispute over the plain meaning of the term "concerning." Plaintiff agrees that Merriam-Webster's Dictionary defines the term "concerning" as "relating to" or "regarding."[4] Similarly the American Heritage Dictionary defines the term "concerning" as "in reference to."[5] Given these definitions, Plaintiff's interpretation of Section 8(i) makes little sense: States are to disclose *official lists of eligible voters* "relates to" or is "in reference to" programs to ensure the accuracy of *official lists of eligible voters*. Such a circular interpretation is not what the legislature intended. Rather than require disclosure of the lists themselves, Congress' use of the word "concerning" clearly indicates that the statute contemplates disclosure of records which "relate to" or "reference" voter registration list maintenance, but not the lists themselves.



**2. Plaintiff's interpretation of Section 8(i) renders most of the statute superfluous.**

Plaintiff cannot read into the statute what the legislature chose to omit, and it likewise cannot omit what the legislature chose to include. It is "a cardinal principle of statutory

[4] Definition of CONCERNING, Merriam-webster.com, https://www.merriam-webster.com/dictionary/concerning (last visited September 16, 2021).

[5] The American Heritage Dictionary entry: concerning Ahdictionary.com, https://ahdictionary.com/word/search.html?q=concerning (last visited Oct 3, 2020).

construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The phrase "programs and activities conducted for the purpose of ensuring accuracy and currency of official lists of eligible voters" does not cease to modify the phrase "all records" simply because it is more convenient for Plaintiff for Section 8(i) to provide for disclosure of all records related to voters. Rather, by referencing programs and activities which aid states in maintaining their voter registration lists, it is clear the legislature intended for the "records" required to be disclosed to be limited to voter registration list maintenance data and nothing else.

The example of a "record" in Section 8(i)(2) shows the legislature's intent to limit disclosures to the data used to implement voter list maintenance efforts:

> The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

52 U.S.C. § 20507(i)(2) (West 2020). Section (d)(1) prohibits states from removing individuals from official lists of eligible voters on the ground that the registrant changed addresses, unless the registrant (1) confirms in writing that the registrant has moved outside of the registrar's jurisdiction, or (2) has failed to respond to a notice sent to confirm the change of address and has not voted in an election during a certain period. 52 U.S.C. § 20507(d)(2). Pursuant to subsection 20507(d)(3), a voting registrar "shall correct an official list of eligible voters" in accordance with the information obtained in subsection 10507(d)(2).

It cannot be disputed that the removal of names from voting rolls as described in subsection (d)(2) and (d)(3) is a "program" or "activity" conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. 52 U.S.C.A. § 20507 (West 2020). Section 8(i)(2) uses the information gathered in the implementation of this "program" or "activity" as its one and

only example of a record. The obvious conclusion that can be drawn by the use of this example is that the legislature sought the disclosure of the list maintenance data, that is the data used to implement programs and activities which maintain voter registration lists, not the lists themselves. The legislature was interested in the disclosure in the data input, not the data output.

In addition to the program related to the removal of voters due to change of address, States are required to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" death. 52 U.S.C. § 20507(a)(4)(A) (West 2020). It is possible the information used to verify the death of a registrant such that his or her name could be removed from the voter list could fall within the definition of "records" but the voter registration list itself would not.

In addition to the general program of record maintenance required by Section 8, Illinois has regulations and programs which aid in maintaining an accurate and updated voter registration list, including, for example, automatic voter registration and the updating of voter addresses through the Secretary of State (10 ILCS 5/1A-16.1), an online voter registration program which is designed to "ensure the accuracy and integrity of voter registration applications" (10 ILCS 5/1A-16.5), review from local county clerks or board of election commissioners to prevent duplicate registrations (*see e.g.* 10 ILCS 5/1A-16.5 (i)), cross-referencing registration data with the United States Postal Service's National Change of Address database and designated automatic voter registration agencies several times throughout a calendar year (10 ILCS 5/1A-16.8). These programs help to determine whether a particular voter should or should not be on the voter registration list or whether the provided information about a particular voter is accurate. The records related to these programs bear on the sufficiency of Illinois' list maintenance program and would allow Plaintiff to determine whether that program meets the requirements of the NVRA. By

contrast, a list of registered voters does not disclose any substantive information about Illinois' list maintenance programs. The list is merely the final result of these programs. Thus, it is not required to be disclosed.

Defendant does not dispute Plaintiff is entitled to list maintenance data. Notably, as Plaintiff alleges in its Complaint, the former General Counsel of the State Board of Elections sent a letter prior to Plaintiff's arrival at the State Board of Elections' offices indicating that "any relevant information regarding Illinois list maintenance efforts in the possession of the [State Board of Elections] would be made available during our normal business hours." Doc. 1 at ¶ 21. Rather than request the information to which it is clearly entitled and which Defendant was willing to give, Plaintiff requested a voter registration list based on an interpretation of the statute which is inconsistent with the plain language of the statute. Plaintiff then brought this lawsuit and attempted to reframe its request as one for list maintenance records, as a way to expand the definition of Section 8(i). This Court should not be persuaded by these tactics.



**C. This is a case of first impression for this Court.**

This is a case of first impression for this Court, and Plaintiff cites no precedential cases in its complaint or summary judgment motion which support its broad interpretation of Section 8(i).

In its complaint, Plaintiff cites district that court opinions from Maryland and Mississippi to support its position that this Court must declare the voter registration list described in 10 ILCS 5/1A-25(4) needs to be disclosed under 52 U.S.C. § 20507(i). (Doc. 1, ¶ 35). "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709, n.6 (2011).

Plaintiff's reliance on the Maryland District Court case *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425 (D. Md. 2019) (*see* Doc. 1 at ¶ 35) should not persuade this Court to adopt Plaintiff's interpretation of Section 8(i). As a preliminary matter, the court in *Lamone* was bound by the Fourth Circuit's interpretation of Section 8(i) in *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 333 (4th Cir. 2012), discussed below. This Court has no such precedent.

Further, the court's reasoning in *Lamone* was based on an issue not presented here. In *Lamone*, the plaintiff sought copies of "the most recent voter registration list" for Montgomery County, Maryland. *Lamone*, 399 F. Supp. 3d 425 at 432. The plaintiff maintained it was entitled to the list pursuant to Section 8(i) of the NVRA. *Id.* 434. It argued that the voter registrations are "records" pursuant to the NVRA. A voter list, the plaintiff argued, is merely a compilation of voter registrations and thus, is also a "record." *Id.* at 438. The defendants countered that the voter list is not a compilation of voter registrations, but rather an index that describes some of the information available in voter registrations. *Id.* Arguments focused on the facts in the record. *see e.g, id.* The court concluded that "[t]he State's argument bottoms on the formal distinction between a voter list and the voter registrations from which a list is derived," and whether that distinction had legal significance. *Id.* at 439. The court based much of its analysis on Fourth Circuit Court's holding in *Project Vote* that individual voter applications are "records" pursuant to Section 8(i). The *Lamone* court considered the facts presented and concluded that individual voter registrations are similarly "records" under Section 8(i). *Id.* at 439. Then the court reasoned the plaintiff's request for a voter list was essentially the same as a request for individual voter registrations for each person in the county; thus, the court concluded, a voter list is a "record" pursuant to Section 8(i). *Id.* at 440-41.

The *Lamone* decision is not well-reasoned and therefore should not be followed by this Court. First, as discussed above, it was premised on a decision by the Fourth Circuit (finding that

individual voter registrations are records under 8(i)) that was wrongly decided and should not be followed by this Court. Second, the court took several unreasoned logical leaps from the Fourth Circuit's ruling to its conclusion that a voter list is subject to disclosure. Third, it simply dismisses the plain language arguments proffered by the defendants. *Id.* at 442. As in this case, the defendants in *Lamone* argued that if a "voter list" is a program or activity to ensure the accuracy of a "voter list," the statute is circular and nonsensical. The *Lamone* court rejected this, stating that defendants were "quibbling over semantics." *Id.* But semantics is the branch of linguistics concerned with meaning and the core principles of statutory construction exist to determine the meaning of a statute. The *Lamone* court simply dismissed the plain language of the statute and ignored the longstanding maxims of statutory interpretation which warn against reading into a statute that which does not exist and rendering words, phrases, and clauses superfluous. This Court should not follow the *Lamone* court's lead. It begs repeating that this Court must consider that "legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. at 461–62.



The district court's decision in *True the Vote v. Hoseman*, 43 F. Supp. 3d 693 (S.D. Miss. 2014), cited by Plaintiff (Doc. 1 at ¶ 35), is also inapplicable to the issue here. In that case, the plaintiffs sought certain unredacted voting records from an election, and the defendants refused claiming Mississippi law requires redaction of certain personal voter registrant information, including dates of birth, from the records. After interpreting the plain language of Section 8(i)(1), the district noted:

> to be subject to disclosure under the NVRA, a record must ultimately concern activities geared towards ensuring that a State's official list of voters is errorless and up-to-date. These activities generally relate to voter registration and removal, the processes by which a State updates its lists to ensure they reflect all eligible voters.

*True the Vote*, 43 F. Supp. 3d at 720. This supports Defendants' position here, not Plaintiff's, that section 8(i) NVRA applies to list maintenance records. Although the district court then concluded "the Voter Roll is a 'record' and is the 'official list[] of eligible voters' under the NVRA Public Disclosure Provision," that determination was based on the fact that the defendants were not contesting that the Mississippi Voter Roll was subject to disclosure under the NVRA. *True the Vote*, 42 F. Supp. at 723. Here, Defendants do dispute Plaintiff's interpretation that NVRA requires production of the voter registration list, and a district court's opinion in a case where this same issue was not contested sheds no light on the issues in this case.

Finally, Plaintiff's reliance on *Project Vote*, 682 F.3d 331, 334-335 (4th Cir. 2012) is misplaced. In that case, the Fourth Circuit was only presented with the narrow issue of whether the NVRA requires disclosure of voter registration *applications.* Here, Plaintiff has requested "an electronic copy of the Illinois statewide voter registration list." (Doc. 1-4). The Fourth Circuit held "completed voter registration *applications* are subject to disclosure under the NVRA, as they are unquestionably 'records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.'" *Project Vote*, 682 F.3d. at 340. The court did not address nor find voter registration lists are a record concerning the implementation of programs for ensuring the accuracy and currency of official eligible voter lists. Central to the Fourth District's opinion was the fact that Virginia law required the examination of voter registration applications to determine whether that person possesses the necessary qualifications. *Id.* at 335. It then concluded that this examination met Section 8(i)'s definition of being an activity to ensure the accuracy of the voter list, because that is the very purpose of the examination. Because the voter registration applications are the items being examined, the Fourth Circuit concluded that those records were required to be disclosed under

Section 8(i). However, in this case, there is no evidence that the *voter list* is examined to ensure the accuracy of the *voter list*. Rather, the list is the end result, not the means by which accuracy is obtained.

Thus, for all of the foregoing reasons, the plain and unambiguous language of Section 8(i) of the NVRA only applies to records involving the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of voters, and therefore, this Court should grant summary judgment in favor of Defendant.

## II. Because the NVRA does not mandate disclosure of voter registration lists, it does not preempt the Illinois state law provisions which govern access to the voter registration list.

In its complaint, Plaintiff alleges "[a]ny Illinois statute, regulation, practice or policy that conflicts with, overrides, or burdens the NVRA, a federal statute, is preempted and superseded under Art. VI, cl. 2, the Supremacy Clause and Art. I, § 4, cl.1, the Elections Clause, of the Constitution of the United States." (Compl. ¶ 39). It then states "Illinois's Restricted Access Law found in 10 ILCS 5/1A-25(4) is therefore preempted, invalid, and unenforceable." (Compl. ¶ 40).

Plaintiff's claim that 10 ILCS 5/1A-25(4) is preempted by 52 U.S.C. § 20507(i)(1) lacks merit.

There are three ways in which federal law may preempt state law: express preemption, field preemption, and conflict preemption. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). In *Gade*, the Supreme Court, in discussing the three types of preemption noted the following:

> Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands

> as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

*Gade*, 505 U.S. at 98 (Internal quotation marks and citations omitted). Here, the NVRA does not contain explicit pre-emptive language. *See* 52 U.S.C. § 20507(i)(1).

Nor does "field" preemption apply. It is clear that the regulation of elections, even of voter registration lists, is not a "field" that has been occupied by the federal government to the exclusion of the states. After all, the "Elections Clause" provides that "[t]he Time, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof;* but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Supreme Court has held the Elections Clause softens the presumption against pre-emption that applies in instances where Congress "legislate[s] in areas traditionally regulated by the States," because federal legislation pursuant to the Elections Clause "*necessarily* displaces some elements of a pre-existing legal regime erected by the States." *Arizona v. Inter-Tribal Counsel Ariz., Inc.*, 570 U.S. 1, 13-14 (2013). However, at the same time, the Supreme Court acknowledged that federal law displaces only "some element of a pre-existing legal regime erected by the States," not the legal regime as a whole. Indeed, the Supreme Court went so far as to characterize elections regulation as "an area of concurrent state and federal power." *Id.* at 14 n.6. This simply is not, in any way, an endorsement that the federal government has occupied the field of elections regulations.

Moreover, "conflict" preemption does not exist with 52 U.S.C. § 20507(i)(1) and 10 ILCS 5/1A-25. Plaintiff argues 52 U.S.C. § 20507(i)(1) is designed to ensure election officials are fulfilling their list maintenance duties and is available to any member of the public. (Compl. ¶ 16). Plaintiff also notes that in *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 334-35 (4th

Cir. 2012), the court stated 52 U.S.C. § 20507(i)(1) "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." (Compl. ¶ 17). However, Plaintiff presents no argument or evidence that 10 ILCS 5/1A-25 fails to ensure election officials are fulling their list maintenance duties or refuses to make the list available to any member of the public. Nor does Plaintiff present any evidence that 10 ILCS 5/1A-25 interferes with or sacrifices one's right to vote. To the contrary, Section 1A-25 of the Election Code explicitly provides "any person may view the list" subject to certain minimal regulations such as viewing it "on a computer screen at the Springfield office of the State Board of Elections, during normal business hours other than during the 27 days before an election" or any person may view the list "as may be required by an agreement the State Board of Elections has entered into with a multi-state voter registration list maintenance system." 10 ILCS 5/1A-25 (West 2020).



The party urging preemption must show there is a "direct conflict" between the state and federal; with no "direct conflict," the state-law is not preempted. *Wyeth v. Levine*, 555 U.S. 555, 593 (2009); *People of State of Ill. v. Kerr-McGee Chem. Corp.*, 677 F.2d 571, 578–79 (7th Cir. 1982) (noting preemption of the state's police power by a federal law cannot be assumed, but exists only if preemption was the clear and manifest purpose of the legislature or if there is a direct conflict between the federal and state law which cannot be reconciled). Here, Plaintiff to fails meet its burden of showing the federal and state law in this case directly conflict.

Thus, for any and all of the foregoing reasons, Plaintiff fails to meet its burden of showing Illinois' minimal limitations on access to voter registration lists are preempted by the NVRA.

**III. The SBE is entitled to summary judgment because barring voluntary waiver or congressional override it cannot be sued in federal court due to the State of Illinois' sovereign immunity under the Eleventh Amendment.**

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State." U.S. Const. amend. XI. While the Eleventh Amendment literally applies to bar suits against a state by citizens of another state, it has long been held that the amendment embodies principles of sovereign immunity which also bar suits against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Eleventh Amendment does not apply: (1) where Congress has abrogated the state's immunity from suit through an unequivocal expression of its intent to do so through a valid exercise of its power; (2) where a state has waived its immunity and consented to the suit; and (3) where the suit is one against a state official for prospective injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908); *Sonnleitner v. York*, 304 F. 3d 704, 717 (7th Cir. 2002). None of these exceptions apply to the Plaintiff's claims against SBE.



A state may "claim immunity from suit in federal court and may be dismissed from a litigation," (*Kroll v. Bd. of Trustees of Univ. of Illinois*, 934 F.2d 904, 907 (7th Cir. 1991)) absent voluntary waiver or valid congressional override. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985). For the purpose of sovereign immunity, "[s]tate agencies are treated the same as states." *Kroll*, 934 F.2d at 907; *see also Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 370 (7th Cir. 2010).

The State of Illinois has not affirmatively consented to suit in this matter, and Plaintiff has not so alleged. Further, Congress has not expressly overridden the state's immunity for the NVRA,

and Plaintiff has made no allegation of the same. Finally, SBE is not a state official against which Plaintiff is seeking injunctive relief.

The Supreme Court considers two factors "in order to determine whether Congress has abrogated the States' sovereign immunity: first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power . . . ." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (internal quotations omitted). This Court's analysis can begin and end at the first inquiry: Congress included no "clear legislative statement," *id.*, in the text of the NVRA which expresses an intent to abrogate the Eleventh Amendment. Thus, SBE is immune from this suit.

SBE is an agency of the State of Illinois, and is thus immune from suit. ILL. CONST. art. III, § 5; 10 ILCS 5/1A-1; *see also Kuna v. Illinois Bd. of Elections*, 821 F. Supp. 2d 1060, 1065 (S.D. Ill. 2011); *Smith v. Boyle*, 959 F. Supp. 982, 986 (C.D. Ill. 1997), *aff'd as modified*, 144 F.3d 1060 (7th Cir. 1998). As the state has not consented to suit in this matter and Congress has not overridden the state's immunity (and Plaintiff has not so alleged), SBE should be dismissed from this lawsuit. *See e.g. Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 564 (M.D. Pa. 2019) (dismissing Pennsylvania's Bureau of Commissions, Elections and Legislation from NVRA suit under Eleventh Amendment); *Condon v. Reno*, 913 F. Supp. 946, 959 (D.S.C. 1995) ("If the private plaintiffs in [one of the consolidated cases], were suing the state directly, they would be barred by the Eleventh Amendment.").

Further, the Eleventh Amendment's jurisdictional bar applies to suits against state agencies regardless of the nature of relief sought. *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are

asserted and prosecuted by an individual against a State"). That fact that Plaintiff seeks equitable relief does not preclude the application of the Eleventh amendment and SBE's dismissalfrom this suit. *Smith*, 959 F. Supp. at 986 ("Plaintiffs' argument that the Eleventh Amendment is inapplicable to the case at bar because they are seeking injunctive, rather than monetary, relief is not persuasive.").

## IV. Defendants Thomas and Hobson are entitled to summary judgment because they are not proper parties to this litigation.

The Court should also enter summary judgment in favor of Defendants Kyle Thomas and Cheryl Hobson because they are proper parties to this litigation. Both Thomas and Hobson work in the Division of Voting and Registration Systems. (UMF ¶¶ 15, 18; Ex. 1, Hobson Declaration, ¶ 16; Ex. 2, Thomas Declaration, ¶ 19). Hobson's job duties include assisting the Director of Voting and Registration Systems with projects, supervising staff, being involved with equipment testing, and maintaining and helping oversee the statewide voter registration system. (UFM ¶ 16; Ex. 1, Declaration, ¶ 4). Thomas' job duties include coordinating, planning, implementing, and evaluating the voting system approval process, administering development and implementation of policy and procedures of the statewide voter registration program, as well as administering the paperless voter online application system and the automatic voter registration program. He also functions as a resource person to elected officials of all units of government, other governmental agencies, organizations, and the public. (Ex. 2, Thomas Declaration, ¶4). Neither Thomas nor Hobson have any authority to enforce the provisions of the NVRA. (UMF ¶¶ 17, 20, Ex. 1, Hobson Declaration, ¶ 5; Ex. 2, Thomas Declaration, ¶ 5)

Plaintiff has not alleged or shown that either Thomas or Hobson has the power to enforce the NVRA or that either of these Defendant is responsible for the alleged harm suffered.

The Division of Voting and Registration Systems, for which both Defendants Thomas and Hobson work (UMF ¶¶ 15, 18), "is responsible for the statewide Illinois Voter Registration System" including "training and support of internal and external applications" related to that system. (UFM ¶ 21). The Division is "also responsible for all requests from registered political committees for computerized voter data," maintaining the "secure website where pre-election ballot request information is contained," and maintaining "the Public Voter Search stations in our Springfield office, which are accessible during normal business hours" subject to some exceptions. (UFM ¶ 22). The Division is tasked with recommending for approval "voting systems for use in Illinois", preparing and conducting of "pre-election tests of voting systems", preparing "referenda profiles for each election", and analyzing "vote tabulation system computer operator logs from each regular election." (UFM ¶ 23).

The Division is not responsible for enforcing the NVRA and/or ensuring state compliance with the disclosure provision of the NVRA; thus, the Division's employees, including Thomas and Hobson, are not the proper parties to a suit alleging lack of compliance with the NVRA. Accordingly, the Court should grant summary judgment in favor of Defendants Thomas and Hobson.



## CONCLUSION

Section 8(i) of the NVRA does not require disclosure of voter registration lists. Rather, by its plain and unambiguous language it only applies to "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1). Because the NVRA does not mandate disclosure of voter registration lists, it does not preempt the Illinois state-law provisions which govern access

to the voter registration list. Further, the SBE is entitled to sovereign immunity under the Eleventh Amendment. Finally, Defendants Thomas and Hobson are not proper parties to this litigation.

Therefore, for all of the reasons discussed above, Defendants Bernadette Matthews, Kyle Thomas, Cheryl Hobson, and Illinois State Board of Elections respectfully request the Court grant summary judgment in their favor on all claims pursuant to Fed. R. Civ. P. 56.

Respectfully submitted,

BERNADETTE MATTHEWS, KYLE THOMAS, CHERYL HOBSON, and ILLINOIS STATE BOARD OF ELECTIONS,

Defendants,

KWAME RAOUL, Attorney General,
State of Illinois,

Attorney for Defendants

By: s/Thomas R. Ewick
Thomas R. Ewick #6279084
Assistant Attorney General

Thomas R. Ewick #6279084
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62701
(217) 782-9026 Phone
(217) 524-5091 Fax
E-mail: Thomas.Ewick@ilag.gov
gls@ilag.gov

**CERTIFICATE OF COMPLIANCE WITH CDIL-LR 7.1(D)(5)**

Pursuant to CDIL-LR 7.1(D)(5) (incorporating the page and character limit set forth in CDIL-LR 7.1(B)(4)), the undersigned hereby certifies the Argument section of this memorandum does not contain more than 7,000 words or 45,000 characters. In making this certification, I relied upon the word count function of Microsoft Word that indicated the Argument section contains 5,400 words and 34,163 characters with spaces.

By: s/ Thomas R. Ewick
Assistant Attorney General

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF ILLINOIS**
**SPRINGFIELD, ILLINOIS**

| | | |
|---|---|---|
| PUBLIC INTEREST LEGAL FOUNDATION, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| -vs- | ) | 20-cv-3190-SEM-TSH |
| | ) | |
| STEVE SANDVOSS, in his official Capacity as Executive Director of the Illinois State Board of Elections, KYLE THOMAS, in his official capacity as Director of Voting Systems and Registration, CHERYL HOBSON in her Official capacity as Deputy Director of Voting and Registration, and the **ILLINOIS STATE BOARD OF ELECTION**, | ) | |
| | ) | |
| Defendants. | ) | |



## CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, the foregoing document, *Memorandum of Law in Support of Motion for Summary Judgment* was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kaylan Phillips Kphillips@publicinterestlegal.org
Christine Svenson christine@svensonlawoffices.com
Sue Becker sbecker@PublicInterestLegal.org

and I hereby certify that on the same date, I caused a copy of the foregoing document to be mailed by United States Postal Service, to the following non-registered participant: NONE

Respectfully submitted,

By: s/Thomas R. Ewick

Thomas R. Ewick #6279084
Assistant Attorney General
500 South Second Street
Springfield, IL 62701
(217) 782-9026 Phone
(217) 524-5091 Fax
E-mail: Thomas.Ewick@ilag.gov