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State of Hawaii

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PUBLIC INTEREST LEGAL
FOUNDATION, INC.

Plaintiff,

v.

SCOTT T. NAGO, in his official
capacity as the Chief Election
Officer for the State of Hawaii

Defendant.

Civil No.: 1:23-CV-00389-LEK-WRP

DEFENDANT'S REPLY IN SUPPORT
OF MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT FILED NOVEMBER 28,
2023 [ECF NO. 35]; CERTIFICATE OF
COMPLIANCE WITH WORD
LIMITATIONS; CERTIFICATE OF
SERVICE

HEARING:

DATE: February 16, 2024

TIME: 9:45 a.m.

JUDGE: Honorable Leslie E. Kobayashi

TRIAL: None set

**DEFENDANT'S REPLY IN SUPPORT OF MOTION
TO DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT FILED NOVEMBER 28, 2023 [ECF NO. 35]**

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I. INTRODUCTION

Plaintiff Public Interest Legal Foundation, Inc. (“Plaintiff”) seeks a broad interpretation of 52 U.S.C. § 20507(i) that encompasses all voter registration records and by extension the voter list that the counties provide to those with an election purpose. ECF No. 42 at PageID# 23-25. Defendant Scott T. Nago (“Defendant”) interprets the same statute as only applying to records that are associated with the voter removal process under the National Voting Rights Act (“NVRA”), such as those expressed in 52 U.S.C. § 20507(i)(2).

Hawaii Revised Statutes (“HRS”) § 11-97 and Hawaii Administrative Rules (“HAR”) § 3-177-160 already provide an avenue for the election purpose voter list that Plaintiff seeks. HAR § 3-177-160(e) provides a “non-exhaustive list of election or government purposes” and subsection (g) states that “[a] request for voter registration information that is not public under subsection (b) shall be in a form prescribed and provided by the chief election officer.” HAR § 3-177-160(e), (g). Plaintiff continues to claim a denial of information while failing to submit the requisite application form to the county clerks for the records it seeks.

Plaintiff’s opposition largely rests on a misinterpretation of the scope of 52 U.S.C. § 20507 and its standing argument also fails because Plaintiff has not shown an information injury. Further, the county clerks are necessary parties to this action because the relief and remedy that Plaintiff seeks will effectively

undercut the county clerks' duties and responsibilities under both state and federal law. *See True The Vote v. Hosemann*, 43 F. Supp. 3d 693, 712 (S.D. Miss. 2014).

II. FACTUAL BACKGROUND

It is undisputed that on April 6, 2023, Plaintiff sent a letter to Defendant citing 52 U.S.C. § 20507(i) and requesting that Defendant “reproduce or provide the opportunity to inspect . . . [a] current or most updated copy of the complete SVRS voter roll extract containing all data fields provided to requesters having a government or election purpose under H.R.S. § 11-97(a).” ECF No. 20-1 at PageID# 88.

Plaintiff did not specifically cite the type of records referenced in 52 U.S.C. § 20507(i)(2) related to the removal of voters as it did not ask for the list of names and addresses to whom voter removal notices under the National Voter Registration Act of 1993 (“NVRA”) were sent; the responses, if any, from those voters before they were eligible to be removed; or any similar information. ECF No. 20-1 at PageID# 88.

Similarly, there is no dispute that Defendant directed Plaintiff to the county clerks to address its request. ECF No. 20-2 at PageID# 91-93. Plaintiff also does not dispute that it never submitted the required application for such a request to the county clerks. ECF No. 42 at PageID# 21 (contending that “[s]ignificantly the Foundation cannot complete the requested forms because the Foundation’s purpose

for obtaining the voter list is outside Hawaii’s statutory and regulatory use restrictions”).

III. ARGUMENT

The text of 52 U.S.C. § 20507(i) is as follows:

(i) Public Disclosure of Voter Registration Activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, *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*, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) 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) (emphases added).

A. Plaintiff’s broad interpretation of 52 U.S.C. § 20507(i) is inconsistent with the intended purposes of the NVRA under 52 U.S.C. § 20501(b) and the recognized role of state law in the administration of elections.

The scope of 52 U.S.C. § 20507(i) is limited to “the purpose of *ensuring the accuracy and currency of official lists of eligible voters.*” *Id.* (emphasis added).

This language mirrors the text “*ensure that accurate and current voter registration rolls are maintained,*” which is one of the four explicit purposes of the NVRA, and

this equates with “*removing ineligible persons from the States’ voter registration rolls,*” which is one of the two main objectives of the NVRA as interpreted by the U.S. Supreme Court. *See* 52 U.S.C. § 20501(b); *Husted v. A. Philip Randolph Inst.*, 584 U.S. at 761 (citing § 2, 107 Stat. 77, 52 U.S.C. § 20501(b)).¹

In other words, when 52 U.S.C. § 20507(i)(1) references “all records concerning the accuracy and currency of official lists of official lists of eligible voters,” it is referring to “removing ineligible persons from the States’ voter registration rolls,” which is further clarified in the text of 52 U.S.C. § 20501(i)(2) referencing the removal of voters in 52 U.S.C. § 20507(d)(2) and its legislative history that focuses on the accuracy and currency of addresses. H.R. Rep. No. 103-9 at 19 (1993) and S. Rep. No. 103-6 at 35 (1993).

¹ The NVRA lists four purposes: (1) increasing the number of registered voters, (2) enhance participation of voters in elections; (3) “protect the integrity of the electoral process;” and (4) “*ensure that accurate and current voter registration rolls are maintained.*” 52 U.S.C. § 20501(b) (emphasis added).

However, the U.S. Supreme Court has equated these four purposes as reflecting two main objectives (i.e. increasing voter registration and *removing ineligible persons from the States’ voter registration rolls*).

The Act has two main objectives: increasing voter registration and *removing ineligible persons from the States’ voter registration rolls*.
See § 2, 107 Stat. 77, 52 U.S.C. § 20501(b).

Husted v. A. Philip Randolph Inst., 584 U.S. 756, 761 (2018) (emphasis added).

With respect to the implementation of these requirements regarding removing ineligible persons from the voter registration rolls by the county clerks within the State of Hawaii, HAR § 3-177-157 provides a rule that mirrors the NVRA's voter removal program and elaborates on various matters. *Compare* HAR § 3-177-157 *with* 52 U.S.C. § 20507. In essence, Hawaii's voter removal program involves a voter being sent a confirmation notice indicating there is an apparent issue with their registration and they are asked to respond. HAR § 3-177-157(c); *see also* 52 U.S.C. § 20507(c). If the voter does not respond and fails to vote "during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice," then they can be removed as a registered voter. HAR § 3-177-157(d); *see also* 52 U.S.C. § 20507(d). The justification to send the confirmation notice is based on objective evidence that indicates a voter may no longer reside in the jurisdiction and is therefore no longer eligible to vote. 52 U.S.C. § 20507(a)(4).

Defendant equates the records associated with this voter removal program with the "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). In contrast, Plaintiff appears to believe it encompasses everything concerning voter registration.

Defendant notes that none of Plaintiff's cited cases are binding on the Ninth Circuit. ECF No. 42 at PageID# 23-25. In fact, the only decision from a circuit court of appeals was *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012). However, it predates the NVRA cases of *Arizona Inter Tribal Council of Ariz., Inc.*, 570, U.S. 1, 9 (2013) and *Husted*, 584 U.S. at 761 (2018), discussing the relationship between state and federal election law, and the voter removal program and objectives of the NVRA, respectively. These cases are highly relevant, as the determination of the objectives of the NVRA are critical in determining the scope of what is meant by "the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" referenced in 52 U.S.C. § 20507(i)(1). Likewise, the discussion of the relationship between federal and state law is relevant in resolving whether the language of 52 U.S.C. § 20507(i) should be narrowly or broadly interpreted to necessitate the preemption of certain aspects of state law.

B. The overall language of 52 U.S.C. § 20507 gives a clear context for interpreting 52 U.S.C. § 20507(i) to be related to records concerning the removal of voters.

Starting with the language of the 52 U.S.C. § 20507(i), the most critical phrase is "ensuring the accuracy and currency of official lists of eligible voters" as the records are to be related to accomplishing that purpose. Given this, one naturally looks to see if the phrase is defined or clarified elsewhere in 52 U.S.C.

§ 20507. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”). Similarly, “Words that can have more than one meaning are given content, however, by their surroundings.” *Arizona Inter Tribal Council of Ariz., Inc.*, 570, U.S. 1, 9 (2013) (citation omitted).

The concept of “ensuring the maintenance of an accurate and current voter registration roll” is initially raised in 52 U.S.C. § 20507(b), with the caveat that the list maintenance “shall not result in the removal of the name of any person from the official list of voters registered to vote in an election or Federal office by reason of the person’s failure to vote.” 52 U.S.C. § 20507(b)(2). This subsection is immediately followed by 52 U.S.C. §§ 20507(c) and (d) concerning “voter removal programs” and “removal of names from voting rolls.”

As for the ostensibly broad term “program” in 52 U.S.C. § 20507(i), it is used five other times in 52 U.S.C. § 20507. Specifically, it is used in both 52 U.S.C. §§ 20507(a)(4) and (b), along with three times in 52 U.S.C. §§ 20507(c), and each time it is referring to the removal of voters from the rolls. In other words, the context in which the term “program” is used in 52 U.S.C. § 20507(i) leads to the conclusion it concerns the programs the statute specifically mentions.

Additionally, the term “activity” is used in 52 U.S.C. § 20507(b), in relation to a program or activity to ensure the maintenance of an accurate and current voter

registration roll that complies with the Voting Rights Act of 1965 and does not result in the removal of someone due to a failure to vote. With the above in mind, the examples in 52 U.S.C. § 20507(i)(2) are clearly consistent and reflective of what is meant by a “program” or “activity” to “ensur[e] the accuracy and currency of official lists of eligible voters” in 52 U.S.C. § 20507(i)(1) (i.e. the voter removal program).

Plaintiff’s First Amended Complaint fails to define what specific “program” its request was actually targeting. It appears that Plaintiff contends that everything associated with the official lists of eligible voters can be described as a “program” or “activity” concerned with the accuracy and currency of the official lists of eligible voters and that official lists of eligible voters themselves are “records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” However, if that is what Congress intended then it could have simply directly said the voter registration rolls and voter registration affidavits were public.

Moreover, such an intention would run counter to the first two purposes of the NVRA (i.e., increasing voter registration and enhancing participation of voters in elections), and the objective of “increasing voter registration” stated by the U.S. Supreme Court. 52 U.S.C. §§ 20501(b)(1), (2); *Husted*, 584 U.S. at 761.

Specifically, it would create a chilling effect for some in the public if the only way they could register or vote was to share confidential information in the form of the contents of their voter registration application, especially if there are no explicit provisions in the NVRA concerning whether any confidential information could be withheld in response to a records request. This Court should decline to adopt such broad interpretation of 52 U.S.C. § 20507(i).

C. Plaintiff does not have the requisite injury to support standing.

Contrary to Plaintiff's standing analysis, no informational injury has occurred because Plaintiff has *not* been denied disclosure of any information. *See Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 449 (1989) ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were *denied* specific agency records.") (emphasis added). As previously stated, Plaintiff was simply directed by Defendant to contact the respective county clerks. ECF No. 20-1 at PageID# 91-93. Plaintiff acknowledged the existence of a county application but disputed its ability to sign it. ECF No. 20-5 at PageID# 109; ECF No. 42 at PageID# 247. Any inconvenience caused to Plaintiff by having to fill out a standard form is minimal and does not equate to an outright denial of information.

Further, Plaintiff's position that it was denied the records upon the Defendant's direction to contact the respective county clerks is incorrect and was arguably waived. While Plaintiff initially sent a notice of violation letter, it subsequently contacted the county clerks. ECF Nos. 20 at Page ID# 77 and 20-3 at PageID# 94-97. Moreover, not only did Plaintiff contact several county clerks it did so by sending its representatives to Oahu, Kauai and Hawaii island *in person*. ECF No. 20 at PageID# 77. We have no knowledge as to whether Plaintiff attempted to contact the counties through far less expensive means such as a simple email or phone call. Subsequently, Plaintiff sent notice of violation letters to the County of Hawaii, City and County of Honolulu, and County of Kauai, each that included Defendant with the corresponding county clerk. ECF No. 35-7 at PageID# 189-197. Therefore, given its conduct, Plaintiff cannot now revert back to claiming that Defendant's direction to contact the county clerks was an outright denial of its records request.

Additionally, Plaintiff's argument that its "purpose for obtaining the voter list is outside Hawaii's statutory and regulatory use restrictions" is speculative and lacks merit. ECF No. 42 at PageID# at 247. HAR § 3-177-160(e) provides a "*non-exhaustive* list of election or government purposes" and subsection (g) states that "[a] request for voter registration information that is not public under subsection (b) shall be in a form prescribed and provided by the chief election

officer[.]” HAR § 3-177-160(e), (g) (emphasis added). Because Plaintiff has yet to submit its application for the requested information and Defendant has not denied its request, Plaintiff lacks the requisite injury sufficient to confer standing.

D. The county clerks are necessary parties to this action.

Plaintiff’s contention that the county clerks are not indispensable parties is apparently rooted in its disregard of the relevance of “what office manages voter registration or list maintenance duties” or “that the county clerks are ‘registrars’.” ECF No. 42 at PageID# at 251. The voter registration list is a document that is intertwined with the duties and responsibilities of the “registrar” under the NVRA. 52 U.S.C. § 20507 (e.g., there are approximately twenty references to a “registrar” or “registrar’s jurisdiction” throughout the statute). Additionally, it is intertwined with its duties and responsibilities under state law. HRS §§ 11-11 through -26.

While Plaintiff wishes to proceed solely against Defendant, Rule 19(a) of the Federal Rules of Civil Procedure necessitates the joinder of the county clerks because they are impacted by the resolution of the question of whether Defendant alone can adequately represent their interests in their absence.

In assessing an absent party’s necessity under Fed. R. Civ. P. 19(a), the question whether that party is adequately represented parallels the question whether a party’s interests are so inadequately represented by existing parties as to permit intervention of right under Fed. R. Civ. P. 24(a). Consequently, we will consider three factors in determining whether existing parties adequately represent the interests of the absent tribes: whether “the interests of a present party to the suit are such that it will undoubtedly make all” of the absent party’s

arguments; whether the party is "capable of and willing to make such arguments"; and whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect.

Shermoen v. U.S., 982 F.2d 1312, 1318 (9th Cir. 1992) (citing *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980)).

As to the first factor, Defendant cannot assume he will make all of the arguments the county clerks could make as Defendant does not perform their duties and functions under state and federal law. *See id.* Likewise, with regard to the second factor, given the distinct roles between the Defendant and the counties, state law would not appear to sanction Defendant taking on the clear statutory duties and responsibilities of the county clerks and the implied corresponding duty to protect them against any legal challenge. *See id.* Finally, with respect to the third factor, the county clerks would offer the necessary element of explaining how their "programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," which 52 U.S.C. § 20507 refers to, are reflected in the voter removal program and that in contrast the voter list itself does not constitute such a program or activity. *See id.*

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court grant his motion to dismiss or alternatively, motion for summary judgment.

DATED: Honolulu, Hawai‘i, February 2, 2024.

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