

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

VOTER REFERENCE
FOUNDATION, LLC,

Plaintiff,

v.

ALBERT SCHMIDT, in his official
capacity as Secretary of the
Commonwealth,

Defendant.

No. 1:24-cv-294

Judge Christopher C. Conner

**DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF
UNCONTROVERTED FACTS**

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Pursuant to Local Rule 56.1, Defendant Al Schmidt respectfully submits the following Response to Plaintiff Voter Reference Foundation's Statement of Uncontroverted Facts (ECF 35):

I. Voter Reference Foundation & VoteRef.com

1. Undisputed that VRF identifies itself as such, and states its mission as such.

2. Undisputed.

3. Undisputed that VRF identifies its mission as such.

4. Undisputed.

5. Undisputed.

6. Undisputed that VRF's website allows users to check the listed information for individuals whose records VRF has published on its website. Disputed that this process leads to the correction of errors in state voter registration records in any substantial way.

7. Undisputed except as to any implied legal conclusion that the Secretary of the Commonwealth has the statutory authority to correct voter information based on third-party reports.

8. Undisputed.

9. Undisputed.

10. Undisputed.

11. Undisputed.

12. Undisputed.

13. Undisputed that this is VRF's stated purpose in operating the website. Disputed, in that this paragraph contains legal conclusions and mischaracterizes testimony. Further disputed, in that VRF does not provide the data only to "U.S. citizens." Rather, the restriction that VRF's website is "only for viewing in the United States by United States citizens" can be evaded by use of a virtual private network connection simulating a U.S. location, and VRF makes no actual attempts to verify the citizenship status of its users. VRF has never taken action to enforce its terms of service, which a user need not even read before accepting. Exh. B to Defendant's Statement of Undisputed Material Facts (Doc. 38) ("S.F.") (Swoboda Dep. Tr.) 50–53, 43–44, 46–48.

14. Undisputed, in that this summarizes testimony of VRF's witness. Disputed, in that the assertion as to what is "hard" or "cost prohibitive" for members of the public is an unverifiable opinion.

15. Undisputed, in that this summarizes the testimony of Deputy Secretary Marks. Disputed, in that the assertion as to what is “hard” for members of the public to use is an unverifiable opinion.

16. Undisputed, in that this summarizes the testimony of Deputy Secretary Marks.

17. Undisputed that VRF’s website presents voter data and certain additional information. Disputed, in that the assertion as to what is “easily reviewable” is an unverifiable opinion.

18. Undisputed that this is VRF’s stated intent. Disputed to extent that VRF asserts legal conclusions as to the purpose of the NVRA.

19. Undisputed.

II. The Defendant Secretary of State

20. Undisputed, except that Secretary of the Commonwealth is an appointed, rather than elected, office. 71 P.S. § 67.1(d)(1).

21. Undisputed in that this summarizes testimony of Deputy Secretary Marks, but this statement is ultimately a legal conclusion.

III. The Secretary Maintains and Controls Pennsylvania Voter Data in the SURE Database

22. Undisputed.

23. Undisputed, in that this summarizes testimony of Deputy Secretary Marks, but this statement is ultimately a legal conclusion.

24. Undisputed.

25. Undisputed. By way of further response, the online tool described will confirm the voter registration information of an individual voter only upon entry of biographical information that precisely matches that person's entry in SURE.

IV. Pennsylvania uses the SURE database to maintain the accuracy and currency of its rolls, as reflected in the data in SURE and the FVE

26. Undisputed, in that this accurately quotes the text of the statute.

27. Undisputed.

28. Disputed in part as a mischaracterization of testimony. By way of further answer, voter status is determined by records reflecting determinations of county registration commissions that are maintained in SURE. *See* Exh. A to Defendant's Statement of Undisputed Material Facts (Doc. 38) ("S.F.") (Marks Dep. Tr.) 36:2–11.

29. Undisputed.

30. Undisputed.

31. Undisputed.

32. Undisputed to the extent a county registration commission is made aware of such move. By way of further response, a voter permanently moving out of state would have his or her voter record marked as cancelled.

33. Undisputed.

34. Disputed to extent this mischaracterizes testimony. Exh. A (Marks Dep. Tr.) 23:10–24 (testifying that county voter registration commissions are responsible for maintaining the accuracy of voter records and that the Department of State has a role in facilitating such activities).

35. Undisputed.

36. Undisputed.

37. Undisputed.

38. Undisputed.

39. Undisputed.

40. Undisputed.

41. Undisputed.

42. Undisputed.

43. Undisputed.

44. Undisputed.

45. Undisputed.

46. Undisputed.

47. Undisputed.

48. Undisputed.

49. Undisputed.

50. Undisputed.

51. Undisputed.

52. Undisputed.

53. Undisputed.

54. Undisputed.

V. The Secretary does not genuinely contest that the FVE is a “record” which must be made available under the NVRA

55. Disputed in that this mischaracterizes the cited testimony of Deputy Secretary Marks, who did not testify that “crowdsource[ing]” correction of voting errors is a permissible purpose. Exh. A (Marks Dep. Tr.) 64:17–65:3 (“I believe you can certainly make a strong argument that this

is related to elections, political activities, or law enforcement. I'll note, though, it's—you know, we're here because of the publication aspect of this.”).

56. Undisputed.

57. Undisputed.

58. Undisputed.

59. Undisputed.

60. Undisputed, in that this quotes testimony of Deputy Secretary Marks. Disputed to the extent this paragraph asserts any legal conclusions.

61. Undisputed.

VI. Pennsylvania's current regulation of voter data

62. Undisputed.

63. Undisputed.

64. Undisputed.

65. Undisputed.

66. Undisputed.

67. Undisputed.

68. Undisputed.

69. Undisputed.

70. Undisputed.

71. Undisputed.

72. Undisputed.

73. Undisputed.

VII. The “Internet Sharing Ban”

74. Undisputed.

75. Undisputed.

76. Undisputed.

77. Disputed to the extent this mischaracterizes Deputy Secretary Marks’ testimony and takes it out of context. Exh. A (Marks Dep. Tr.) 92:2–96:14.

78. Disputed to the extent this mischaracterizes Deputy Secretary Marks’ testimony and takes it out of context. Exh. A (Marks Dep. Tr.) 92:2–96:14.

79. Undisputed that this is possible.

80. Undisputed that this is possible.

81. Disputed to the extent this mischaracterizes Deputy Secretary Marks' testimony and takes it out of context. Exh. A (Marks Dep. Tr.) 92:2–96:14.

82. Undisputed that the Secretary does not monitor the use of voter data by requestors. By way of further answer, to the extent the Secretary is alerted of the misuse of such data, the Secretary will take appropriate action. Exh. A (Marks Dep. Tr.) 116:6–19; Exh. M (Letter from Department of State Chief Counsel Timothy E. Gates to Restoration, Inc.'s Doug Truax (Jan. 21, 2022)).

VIII. VRF Obtains Pennsylvania Voter Data in 2021 and Publishes it on VoteRef.com

83. Undisputed.

84. Undisputed only that VRF reached out to the Department. Any implication that the Department was aware at that time that VRF was planning to post voter information on its website is disputed and mischaracterizes the cited testimony. Exh. A (Marks Dep. Tr.) 114:23–115:22.

85. Undisputed.

86. Undisputed that the data was made available for free on VRF's website, and that a user had to click a button agreeing to VRF's terms of service before accessing the data.

87. Undisputed.

88. Undisputed.

89. Undisputed that VRF states that it "is careful" not to not post data for voters in protected status. Disputed that VRF has consistently complied with this assertion. *See* Exh. W (complaint that information is not promptly removed from VRF's website, VRF Doc. 411).

90. Undisputed that VRF does not post voter data for some judges and law enforcement officials. Disputed that VRF's efforts comprehensively identify and remove these listings before publication. *See, e.g.*, Exh. X (correspondence from protected voters requesting removal of posted voter information).

91. Undisputed that voters must click "I Agree" before accessing data on VRF's website. By way of further response, internet search sites such as Google index VRF's website, allowing a user to reach data published by VRF without accepting the terms of service. *See* Exh. Y

(correspondence from voters whose data posted by VRF is returned in internet search queries and caches).

92. Undisputed that this is VRF's stated intent.

93. Undisputed.

94. Undisputed. By way of further response, a user can use a virtual private network to attempt to evade these geographic limitations. Exh. B to Defendant's Statement of Facts (Swoboda Dep. Tr. 47–48).

95. Undisputed that VRF uses other vendors. Disputed that VRF's website is "as secure as possible."

96. Undisputed.

97. Undisputed.

98. Undisputed.

99. Undisputed as to VRF's stated justification for not removing cancelled voters.

100. Undisputed.

101. Undisputed. By way of further answer, there exist various reasons as to why such numbers will not always be consistent and a

discrepancy in such numbers is not an indication of any shortcoming in list maintenance.

102. Undisputed.

103. Undisputed.

104. Undisputed.

105. Undisputed.

106. Undisputed.

107. Undisputed.

IX. The Secretary Sends a Takedown Letter to VRF

108. Undisputed.

109. Undisputed. By way of further answer, the Secretary was not immediately aware that this data was posted and did not become aware until October of 2021. Exh. A (Marks Dep. Tr.) 121:4–122:8.

110. Undisputed.

111. Undisputed.

112. Undisputed.

113. Undisputed.

114. Undisputed.

115. Undisputed.

116. Undisputed.

X. VRF Makes Additional NVRA Requests for Voter Data to the Secretary

117. Undisputed.

118. Undisputed.

119. Undisputed as to the contents of the request. The Secretary disputes the legal conclusion that the internet prohibition violates VRF's First Amendment rights.

120. Undisputed only as to the contents of the request. The Secretary disputes the legal conclusion that the internet prohibition violates VRF's First Amendment rights.

121. Undisputed.

122. Undisputed.

123. Undisputed.

124. Undisputed.

125. Undisputed. By way of further answer, the letter speaks for itself and required VRF to complete the affirmation as provided by the Department.

126. Undisputed. By way of further answer, the letter speaks for itself.

127. Undisputed. By way of further answer, the letter speaks for itself.

128. Undisputed that VRF sent the Secretary a second request for the FVE. Disputed in that the prior request did not mention the NVRA.

129. Undisputed.

130. Undisputed.

131. Undisputed.

132. Undisputed as to what the letter stated. Any conclusions of law are denied.

133. Undisputed as to what the letter stated. Any conclusions of law are denied.

134. Undisputed as to what the letter stated. Any conclusions of law are denied.

135. Undisputed.

136. Undisputed.

137. Undisputed.

138. Undisputed. By way of further answer, the letter speaks for itself.

139. Undisputed as to what the letter stated. Any conclusions of law are denied .

140. Undisputed as to what the letter stated. Any conclusions of law are denied .

141. Undisputed as to what the letter stated. Any conclusions of law are denied.

142. Undisputed.

143. Undisputed.

XI. The Internet Sharing Ban Severely Burdens VRF's First Amendment Rights

144. Disputed, as this statement is a conclusion of law.

145. Disputed to the extent this statement is a conclusion of law. Further disputed in that the assertion as to VRF's ability to "effectively speak in furtherance of its mission" is an unverifiable opinion.

146. Disputed to the extent this statement is a conclusion of law. Further disputed in that this statement contains unverifiable assertions of opinion.

147. Undisputed that VRF wishes to post Pennsylvania voter data on the internet. Disputed in that VRF's assertion that publishing voter data on the internet is "far more effective" is an unverifiable statement of opinion.

148. Undisputed that there is a cost to print and mail paper copies of voter data.

149. Undisputed only that VRF's website does not currently have Pennsylvania voter data. By way of further response, VRF did previously publish Pennsylvania voter data posted on the internet. The additional averments of this paragraph constitute legal conclusions which are denied.

XII. The Secretary Has Not Demonstrated Any Compelling and Narrowly-Tailored State Interest to Justify the Internet Sharing Ban

150. Undisputed that the Secretary does not monitor the use of voter data by requestors. Disputed in that, to the extent the Secretary is alerted of the misuse of such data, the Secretary will take appropriate action. Exh. A (Marks Dep. Tr.) 116:6–19.

151. Disputed as mischaracterizing the testimony of Deputy Secretary Marks and taking it out of context. Exh. A (Marks Dep. Tr.) 98:7–99:23.

152. Undisputed. By way of further response, numerous Pennsylvania voters contacted VRF based on the concern that their information listed on the VRF website would be used for purposes of stalking and harassment. *See, e.g.*, Exs. I, V to Defendant’s Statement of Facts at 322–379.

153. Undisputed. By way of further response, numerous Pennsylvania voters contacted VRF based on the concern that their information listed on the VRF website would be used for improper purposes. *See, e.g.*, Exs. I, V to Defendant’s Statement of Facts at 322, 377–379.

154. Undisputed. By way of further response, numerous Pennsylvania voters contacted VRF based on the concern that their information listed on the VRF website would be used for purposes of stalking and harassment and at least one Pennsylvania voter contacted VRF and expressed an intent to cancel her voter registration to avoid being listed on

VRF's website. *See, e.g.*, Exs. I, V to Defendant's Statement of Facts at 322, 377–379.

155. Undisputed. By way of further response, at least one Pennsylvania voter contacted VRF and expressed an intent to cancel her voter registration to avoid being listed on VRF's website. *See, e.g.*, Exs. I, V to Defendant's Statement of Facts at 322, 377–379.

156. Undisputed.

157. Disputed as mischaracterizing Deputy Secretary Marks' testimony. Exh. A (Marks Dep. Tr.) 92:2–96:14.

158. Disputed to the extent this mischaracterizes Deputy Secretary Marks' testimony and takes it out of context. Exh. A (Marks Dep. Tr.) 92:2–96:14. By way of further answer, Deputy Secretary Marks testified as to his "broad understanding" that "there are organizations that have subscription services that their clients use." Exh. A (Marks Dep. Tr.) 92:22–93:20.

159. Disputed to the extent this mischaracterizes Deputy Secretary Marks' testimony and takes it out of context. Exh. A (Marks Dep. Tr.) 92:2–96:14. By way of further answer, Deputy Secretary Marks

testified as to his “broad understanding” that “there are organizations that have subscription services that their clients use.” Exh. A (Marks Dep. Tr.) 92:22–93:20.

160. Disputed to the extent this mischaracterizes Deputy Secretary Marks’ testimony and takes it out of context. Exh. A (Marks Dep. Tr.) 92:2–96:14. By way of further answer, Deputy Secretary Marks testified as to his “broad understanding” that “there are organizations that have subscription services that their clients use.” Exh. A (Marks Dep. Tr.) 92:22–93:20.

161. Disputed to the extent this mischaracterizes Deputy Secretary Marks’ testimony and takes it out of context. Exh. A (Marks Dep. Tr.) 92:2–96:14. By way of further answer, Deputy Secretary Marks testified that there is a “distinction” between accessing data by “logging into a database through a subscriber account” and having such data available on the publicly-accessible internet. Exh. A (Marks Dep. Tr.) 96: 1–14.

162. Undisputed.

163. Undisputed.

164. Undisputed.

165. Undisputed.

XIII. VRF's Future Plans Involving New Mexico [sic] Data

166. Undisputed.

167. Undisputed.

168. Undisputed.

January 10, 2024

Respectfully submitted,

/s Amelia J. Goodrich

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CERTIFICATE OF SERVICE

I hereby certify that I filed the above document using the Court's CM/ECF system. Service will be accomplished on all counsel of record through the CM/ECF system.

Dated: January 10, 2024

/s Michael J. Fischer

Michael J. Fischer

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