UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

No. 1:20-cv-00818

v

HON. HALA Y. JARBOU

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant.

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DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S BRIEF IN SUPPORT OF HER MOTION TO DISMISS

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Dated: October 15, 2020

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiff has failed to state a claim for a violation under the National Voter Registration Act?

STATEMENT OF FACTS

On September 23, 2019, Southfield City Clerk Sherikia Hawkins was charged with felonies based on her allegedly altering the Qualified Voter File (QVF) records of absent voters in the 2018 general election. (R. 1, Cmplt., ¶8-9, PageID.3.)[1] On September 26, 2019, Plaintiff Public Interest Legal Foundation (PILF) sent requests under the National Voter Registration Act (NVRA) and Michigan's Freedom of Information Act (FOIA) to the City of Southfield Clerk's office seeking records related to the criminal charges. (R. 1, Cmplt., ¶11, PageID.5.) The Clerk's office responded that it had transferred all its records to the prosecutors and that records were no longer in their possession. (R. 1, Cmplt., ¶12-14, PageID.5.)

Then, on March 5, 2020, PILF sent a request for records to Secretary Benson under the NVRA seeking the following documents pertaining to conduct by the City of Southfield City Clerk Sherika Hawkins:

> 1. All records concerning the 193 absent voters impacted by Clerk Hawkins' alleged alterations to their QVF records for the November 2018 General Election. This Request includes, but is not limited to,
>
> > a. all information contained on the list or record described by MCL § 168.760, including
> >
> > > i. "the name of the applicant and the address to which the ballot or ballots are to be sent";
> > >
> > > ii. "the date of receiving the application";

[1] Defendant Benson does not concede the accuracy or completeness of Plaintiff's factual allegations but will rely on them—as she must—for purposes of this motion under Fed. R. Civ. Proc. 12(b)(6).

> iii. "the date of mailing or delivering the ballot or ballots to such voter"; and,
>
> iv. "the date of receiving the ballot from such voter."
>
> b. copies of the absent ballot application submitted by each of the 193 voters. See MCL § 168.760 ("Applications and lists shall be open to public inspection at all reasonable hours."); and,
>
> c. copies of the absentee ballot return envelopes from each of the 193 voters.
>
> 2. Copies of all written communications, including emails, between your office and the City of Southfield City Clerk's Office for the time period between November 5, 2018 and the present concerning Clerk Hawkins' alleged conduct during the November 2018 election.
>
> 3. Copies of all written communications, including emails, between your office and the Oakland County Elections Division for the time period between November 5, 2018 and the present concerning Clerk Hawkins' alleged conduct during the November 2018 election.

(R. 1, Cmplt., ¶12-14, PageID.5; R. 1, Exhibit A, PageID.15-16.) On April 22, 2020, a representative of Secretary Benson responded to PILF, stating that its request for records was being denied because the records it sought were not required to be produced under the NVRA. (R. 1, Cmplt., Exhibit D, PageID.32-33.) The Secretary's response cited to the statute and relevant case law on the scope of the NVRA. On April 23, 2020, PILF sent a second letter to the Secretary of State, asking the Secretary to "reconsider." (R. 1, Cmplt., Exhibit E, PageID.34-35.) PILF filed this lawsuit on August 26, 2020.[2]

[2] PILF has also submitted a request for records to the Secretary of State under Michigan's FOIA. Upon information and belief, a response to that request is currently pending.

ARGUMENT

I. PILF has failed to state a claim against the Secretary of State for a violation of the National Voter Registration Act.

In the sole count of the complaint, Plaintiff Public Interest Legal Foundation (PILF) alleges that Secretary Benson violated the NVRA by failing to permit inspection of duplication of "list maintenance records." PILF seeks an order from this Court directing that the requested documents be provided to it, permanently enjoining the Secretary from denying "similar requests," and ordering the Secretary to pay its attorney fees.

But PILF's claims are not supported by the statute upon which it seeks to rely. Questions of statutory interpretation begin with the plain text of the statute. *Velez v. Cuyahoga Metro. Housing Auth.* 795 F.3d 578, 583 (6th Cir. 2015). If the plain language is unambiguous, the inquiry ends there. *Id.* (citing *Desert Palace, Inc. v.* Costa, 539 U.S. 90, 98; 123 S. Ct. 2148; 156 L. Ed. 2d 84 (2003)). The court must interpret statutes as a whole, "giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Mitchell v. Chapman*, 343 F.3d 811, 825 (6th Cir. 2003); see also *Smith v. United States*, 508 U.S. 223, 229; 113 S. Ct. 2050; 124 L. Ed. 2d 138 (1993) ("Language, of course, cannot be interpreted apart from context.") A court generally looks beyond the text of the statute in only two circumstances: where the statutory language is ambiguous, *Brilliance Audio, Inc. v. Haights Cross Comms., Inc.*, 474 F.3d 365, 371 (6th Cir. 2007), or where adherence to the statute's plain language would produce "absurd

results," *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543; 60 S. Ct. 1059; 84 L. Ed. 1345 (1940); see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527; 109 S. Ct. 1981; 104 L. Ed. 2d 557 (1989) (Scalia, J., concurring); *Sebelius v. Cloer*, 569 U.S. 369, 381; 133 S. Ct. 1886; 185 L. Ed. 2d 1003 (2013). In those circumstances, as noted in *Milner v. Department of Navy*, 562 U.S. 562, 572; 131 S. Ct. 1259; 179 L. Ed. 2d 268 (2011), courts may seek out "clear evidence of congressional intent" to "illuminate ambiguous text." *Milner*, 562 U.S. at 572.

Here, the basis of PILF's lawsuit is 52 U.S.C. § 20507(i), which provides as follows:

> (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)[3] 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.

(Emphasis added). Under 52 U.S.C. §20507(a)(4), the states are required to conduct "a general program" that makes a reasonable effort to remove the names of voters who—by reasons of death or change or residence—are ineligible.

[3] The reference to "notices" under 52 U.S.C. § 20507(d)(2) concern notices sent to voters before their name can be removed from the list of eligible voters.

The plain language of the statute is hardly ambiguous—the records for public inspection are those that concern the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. Although the Sixth Circuit does not appear to have had occasion to review the scope of record production under §20507(i), other federal courts have. In *Project Vote / Voting for Am., Inc. v. Long,* 682 F.3d 331, 335-36 (4th Cir. 2012), the Court held that voter registration applications are records of a "program or activity" conducted for the purpose of ensuring the accuracy and currency of official lists. Similarly, in *True the Vote v. Hosemann,* 43 F. Supp. 3d 693, 726 (S.D. Miss., 2014), the Court held that the NVRA public disclosure provisions covered records regarding the registration and removal of voters from the voter roll, and poll books did not fall within this category. The Court in *True the Vote* also held that absentee ballot applications and envelopes were records of *voting*—not of registration or removal—and were not covered by the NVRA. *Id.* at 727-728. Thus, the documents available for public inspection and duplication under the NVRA fall into a fairly narrow bandwidth of records: those which concern the implementation of programs and activities for registration and removal of voters conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.

However, PILF's request for records went far beyond this scope. Again, PILF sought:

> 1. All records concerning the 193 absent voters impacted by **Clerk Hawkins' alleged alterations to their QVF records** for the November 2018 General Election. This Request includes, but is not limited to,

> a. all information contained on the list or record described by MCL § 168.760, including
>
> > i. "the name of the applicant and **the address to which the ballot or ballots are to be sent**";
> >
> > ii. "the **date of receiving the application**";
> >
> > iii. "the **date of mailing or delivering the ballot** or ballots to such voter"; and,
> >
> > iv. "the **date of receiving the ballot from such voter**."
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> b. **copies of the absent ballot application** submitted by each of the 193 voters. See MCL § 168.760 ("Applications and lists shall be open to public inspection at all reasonable hours."); and,
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> c. **copies of the absentee ballot return envelopes** from each of the 193 voters.
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> 2. Copies of **all written communications, including emails**, between your office and the City of Southfield City Clerk's Office for the time period between November 5, 2018 and the present concerning Clerk Hawkins' alleged conduct during the November 2018 election.
>
> 3. Copies of **all written communications, including emails**, between your office and the Oakland County Elections Division for the time period between November 5, 2018 and the present concerning Clerk Hawkins' alleged conduct during the November 2018 election.

(Emphasis added).

PILF's request has little to do with "programs and activities which are conducted for the purpose of ensuring the accuracy and currency of official lists," and instead sought information concerning a criminal prosecution for election fraud. PILF is not seeking voter registration applications, or records concerning the removal of voters from official lists. Notably, their requests for *ballot* applications (such as those sought here by PILF) are not the same as voter registration applications, and so the request fails for reasons similar to those identified by the

court in *True the Vote*. 43 F. Supp. 3d at 727-728. As stated in PILF's complaint, the records alleged to have been altered by Clerk Hawkins are ballot summary sheets. (R. 1, Compl., ¶10, PageID.4.) These are records of votes—not registration records. Likewise, PILF's request for "correspondence" between the Secretary of State and local officials concerning Clerk Hawkins' alterations of ballot summaries or other election reports fall completely outside of the NVRA's scope. The NVRA simply does not apply to the records PILF sought, and PILF has failed to state a claim for which relief may be granted under Fed. R. Civ. Proc. 12(b)(6). Moreover, PILF's reliance on *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) is misplaced, as that case involved voter *registration* applications, which—notably—are not what PILF sought in its request. PILF has simply failed to demonstrate that the records they seek were related to any "program or activity" conducted "for the purpose of ensuring the accuracy and currency of the official lists of eligible voters." 52 U.S.C. § 20507(i)(1).

Further, even if PILF's request were narrowly construed as seeking only absent voter ballot applications—and if the NVRA applied to applications—PILF would still not be entitled to relief because such records are not kept by the Secretary of State. In Michigan, local clerks are responsible for mailing and receiving absent voter ballot applications. See e.g. Mich. Comp. Laws § 168.759. Also, the clerks are responsible for keeping the absent voter ballot return envelopes. See Mich. Comp. Laws § 168.765(4). And all of the information PILF seeks under

Mich. Comp. Laws § 168.760 is kept—under the express terms of that statute—by the city or township clerks.

Finally, there is a significant likelihood that PILF's claims will be moot by the time this Court decides this motion. At roughly the same time PILF sent their requests for records under NVRA, it also submitted a request for virtually the same documents under Michigan's FOIA. While the Secretary of State—in responding to the FOIA request—would still be limited to producing only the records maintained by the Secretary of State, it is the understanding of counsel that PILF will likely receive documents responsive to its FOIA requests that would render its requests under the NVRA moot.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendant Michigan Secretary of State Jocelyn Benson respectfully requests that this Honorable Court enter an Order dismissing the Complaint against her in its entirety and with prejudice.

Respectfully submitted,

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Dated: October 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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