UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

v

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

Defendant.

No. 1:21-cv-00929

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DEFENDANT'S REPLY BRIEF IN SUPPORT OF PARTIAL MOTION TO DISMISS

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ARGUMENT

The pending motion for partial dismissal articulated particular deficiencies with Plaintiff Public Interest Legal Foundation's (PILF) claims—specifically PILF's legal standing to bring the claim and the legal sufficiency of the allegations. In its response brief, however, PILF repeatedly makes *ad hominem* attacks on Defendant Secretary Benson for "malfeasance," (ECF No. 16, Pl's Resp, PageID.182), that she is "not concerned by allegations of tens of thousands of deceased registrants," (*id.*), and that she has somehow decided "to bury her head in the sand." (*Id.*, PageID.185). None of that is true, and the Secretary is very much capable of both taking her responsibilities seriously *and* questioning the legal sufficiency of PILF's complaint. Regardless, such attacks are not a substitute for a legal argument, and PILF has failed either to show that it has standing or that it has stated a claim that the State of Michigan failed to maintain a "general program that makes a reasonable effort to remove the names of ineligible voter from officials lists of eligible voters by reason of. . . the death of the registrant." 52 U.S.C. § 20507(a)(4)(A).

I. Because PILF has not established that it has standing, this Court lacks jurisdiction over its claims in Count I of the Complaint.

The premise to PILF's response on the issue of standing appears to be that it satisfied the notice requirement because it sent letters stating that the Secretary was in violation of NVRA—thus providing "notice"—and that it has organizational standing because it performed some action after providing the notice that it asserts was a "diversion" of resources it might have used in another state. However,

neither argument addresses the deficiencies argued in the Secretary's motion, and instead they amount to nothing more than a repetition of the allegations of the complaint that the Secretary had already argued were insufficient. For those reasons and the reasons that follow, these arguments fail and the motion should be granted.

A. PILF's claimed "notice" to the Secretary was insufficient to satisfy the pre-requisite for asserting a private cause of action.

As stated in the Secretary's earlier brief, the Sixth Circuit has held that the sufficiency of notice is evaluated in light of the purpose of this requirement—to provide the states, "an opportunity to attempt compliance before facing litigation." *Ass'n of Cmty. Orgs. For Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). PILF's response relies entirely on its September 18, 2020 letter as satisfying its requirement to provide notice as a predicate to a private action under NVRA. (ECF No. 16, PageID.171-172)("The Foundation's September 18, 2020 Notice Letter did just that.") But that letter is attached to the complaint[1], and it provides almost no useful information upon which the Secretary could act to cure any supposed deficiency before a lawsuit might be filed. (ECF No.1-4, PageID.48-50.) It states only that PILF's own analysis had shown there were "potentially more than 34,000 deceased individuals with an active registration in the State of Michigan at that time." (ECF No.1-4, PageID.49) The letter did not provide the names of the

[1] In ruling on a motion under Rule 12(b)(6), a court may consider the Complaint and any documents attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein. *Bassett v. NCAA,* 528 F.3d 426, 430 (6th Cir. 2008).

individuals, or the matching criteria PILF had used to determine that active registrants might be deceased. Only after the Secretary responded (contrary to PILF's assertion of disinterest) did PILF provide the Secretary with a spreadsheet with the voter ID numbers for 34,000 individuals, but did not provide any of the requested matching criteria. Simply put, PILF refused to provide information about how it determined that these individuals were "potentially deceased," and thus offered no opportunity for the Secretary to determine whether PILF's findings were accurate. Inexplicably, PILF has still not provided its matching criteria—even in response to this motion.

To illustrate the deficiency of PILF's notice, it might be useful to consider the following hypothetical. If we assume that another, different organization (not PILF) simply pulled 50,000 names randomly from Michigan's QVF and wrote a similar "notice" letter that—based upon its own undisclosed criteria—it believed all 50,000 individuals were deceased and that Michigan was in "violation" of NVRA, such a letter would be indistinguishable on its face from PILF's September 18, 2020 letter but no governmental entity could possibly correct any claimed "violation" with the information provided. PILF's argument—if accepted—would render the notice requirement meaningless. The Sixth Circuit's holding in *Miller* requires more than vague, unsupported assertions for notice to be considered sufficient. *Miller*, 129 F.3d at 838.

PILF's Response even cites to a Western District of Texas case that states that a notice was sufficient where it provided, "enough information to diagnose the

problem." *Am Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 795 (W.D. Tex. 2015). But here, PILF simply did not provide any information that would have been sufficient to diagnose any problem. PILF's notice thus fails the standard set by the case it cited in support of its position.

PILF next refers to the decision in *Daunt v. Benson*, Case 1:20-cv-00522 (Nov. 3, 2020) (Tr. at 15:22-16:3, PageID.375-376) as supporting its position, but the argument appears to entirely miss the Court's point in that decision. The Court in *Daunt* stated only that a notice letter was not required to identify specific flaws in the state's program. *Id.* But—importantly—the Court also recognized the following simple point: "I think it is incumbent on the plaintiff to say, "**Here is why I think there's a problem** and why I don't think whatever program you are using, if any, is up to the task." *Id.* (Emphasis added). Here, the information that would have described the problem was the matching criteria, which PILF refused to provide. Moreover, the matching criteria was not something that PILF would have needed to expend any additional effort to obtain—indeed, by necessity, it should have *already had such information in its possession*, since the expert it claims to have hired would had to have used that information to develop any kind of cogent "analysis." PILF's failure to provide that information makes their attempted "notice" deficient and, frankly, PILF's refusal to provide the matching criteria makes no sense if its objective was to have the State fix a problem.

PILF's response also includes the curious argument that the information it provided must have been sufficient because the Bureau of Elections staff was able

to perform a random sample of voter ID's from PILF's spreadsheet which determined that the voters had been cancelled as deceased. (ECF No.16, PageID.174.) In other words, the Secretary attempted to find out if there was a problem and found instead the voters had already been cancelled. But after being informed that its spreadsheet included people who had already been removed through list maintenance, PILF has still not provided the matching criteria upon which it based its conclusion that thousands of dead voters remained on the official lists so that the Secretary could review their methodology and confirm the existence of a problem. PILF's position is as frustrating as it is incomprehensible—if it has information that might show a flaw in Michigan's system, why not provide that information? Instead, what PILF has presented is the equivalent of a "snipe hunt"—a game in which an adult tells children that an elusive (and imaginary) creature is hiding somewhere in a field and that they need to search carefully for it. Just like in a snipe hunt, PILF is holding back essential information while asking the Michigan Secretary of State to chase shadows.

PILF's September 18, 2020 letter failed to provide simple information that it had in its possession that would have allowed the Secretary of State to diagnose any alleged problem with Michigan's program for removing deceased voters from official lists. As such, PILF's letter was deficient and failed to provide the notice required by 52 U.S.C. § 20510(b)(1). As a result, PILF has failed to establish the pre-requisites to filing a private right of action, and it lacks standing to proceed.

B. PILF has failed to establish that it has suffered an injury in fact.

In its response, PILF argues that it has been injured because it has spent funds reviewing and analyzing Michigan's voter rolls in order to determine if the state had removed the "potentially deceased" registrants it had identified. (ECF No.16, PageID.177.) PILF's argument about the supposed "diversion of resources," however, is simply unsupported by law or PILF's allegations.

First, an organizational Plaintiff has to show a concrete, particularized, and actual or imminent injury that is fairly traceable to the defendant's challenged conduct, and likely to be redressed by a favorable judgment. *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540, 1547-48 (2016). PILF has not explained how it has been harmed by the State of Michigan's deceased voter removal program. PILF has not articulated any activity in which it engages that has been obstructed or restrained by the Secretary of State's actions. Instead, it relies on its assertion that the "injury" it sustained was because it decided to investigate Michigan's voter lists, and incurred costs as a result. The expenditure of funds to conduct an investigation it was not otherwise required to undertake does not rise to an "injury" that would support standing. If PILF had expended such funds and found no errors in Michigan's program, PILF would certainly not have standing to bring an action claiming an injury. The result of PILF's investigation cannot retroactively turn the investigation into an injury under a claim that "if the state were not doing anything wrong, we would not have had to find out if you were doing anything wrong." Similarly, PILF's subsequent efforts to see if the State had "corrected" their claimed

issue are self-fulfilling when the State had asked PILF for information it refused to provide—the matching criteria.

Moreover, PILF does not point to any actual or imminent injury in the future. PILF has failed outright to point to any actual future injury. As the Sixth Circuit held in *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020), PILF "can no more spend its way into standing based on speculative fears of future harm than an individual can." See also *Online Merchs. Guild v. Cameron,* 995 F.3d 540, 548 (6th Cir. 2021)(Court's holding in *Shelby* was that the "speculative nature" of plaintiff organization's fears that voting irregularities would occur in an upcoming election were insufficient to establish standing, and only "certainly impending" future harms can constitute an injury in fact where injunctive relief is sought.) Here, PILF has not identified any imminent future injury that would necessitate declaratory or injunctive relief. *Shelby*, 947 F.3d at 982.

PILF argues *Online Merchs. Guild* should offer more guidance than *Shelby*, but PILF's reliance on *Online Merchs. Guild* is misplaced. In that case, the Sixth Circuit recognized that, "To establish direct standing to sue in its own right, an organizational plaintiff…must demonstrate that the 'purportedly illegal action increases the resources the group must devote to programs **independent of its suit challenging the action**.'" *Online Merchs. Guild*, 995 F.3d at 547. But the only expenses identified by PILF are those directly related to this suit—that is, the costs incurred in developing the analysis upon which it bases the entirety of its

claim that Michigan has violated NVRA. PILF has not identified any other programs to which it has had to increase the expenditure of resources.

Simply put, what would PILF have done differently? It strains credulity to assume—even if Michigan had removed all of the 35,000 "potentially deceased" voters in PILF's spreadsheet based solely on PILF's assurance (which would likely have violated NVRA and other legal protections)—that PILF would have stopped investigating whether Michigan was adequately maintaining its voter lists, or that it would simply believe any assurances from Michigan that it need not monitor Michigan in the future. PILF alleges that such investigations—and related litigation—are its mission. (ECF No.1, ¶3, PageID.2.) For resources to be "diverted" it would require that the resources be spent elsewhere in the absence of any violation. Likewise, a favorable ruling from the Court will not mean that PILF will not investigate or monitor Michigan's voter registry in the future. PILF has not demonstrated any actual or imminent injury or that a favorable ruling will provide it with relief that would obviate future expenditures. PILF does not have standing in its organizational capacity as to Count I, and that claim should be dismissed.

II. Even if PILF had standing, its allegations fail to establish a claim that the State of Michigan does not have a general program that makes a reasonable effort to remove deceased registrants.

PILF's response does not appear to dispute that Michigan has a program to remove deceased voters. It's contention instead is that some number of deceased persons have not been detected and removed. But, again, NVRA does not require a perfect program—only a "**general program** that makes **a reasonable effort** to

remove the names of ineligible voter from officials lists of eligible voters by reason of. . . the death of the registrant." 52 U.S.C. § 20507(a)(4)(A).

Thus, the only pertinent legal question is whether Michigan's program makes a reasonable effort to remove deceased voters from its official lists. PILF's allegations—and the arguments in its Response to this motion—fail to show otherwise. PILF's complaint admits that Michigan law requires the Secretary of State to use information from United States Social Security Administration's death master file and to—at least once a month—update the qualified voter file to cancel the registration of any elector determined to be deceased. (ECF No.1, ¶17, PageID.5.) Furthermore, PILF admits that the Election Manual published by the Secretary provides that local election officials are also authorized to cancel a voter's registration when the clerk receives information that a voter has died—including notifications from QVF, death notices in the newspaper, and the clerk's personal knowledge. (ECF No.1, ¶23, PageID.6-7.)

PILF"s allegations, however, fail to state how this program is unreasonable, relying entirely on its own analysis and its conclusion that there are large numbers of deceased voters who remain registered. Because it has reached this conclusion, PILF reasons that Michigan's program *must* be unreasonable or else PILF would not have concluded that there were so many dead voters. PILF's tautological allegations, however, fail to meet minimum pleading requirements.

Courts—and defendants—are not required to draw a plaintiff's inferences and accept their conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *Aldana v.*

Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005). PILF's complaint is woefully deficient as to *how* it reached its conclusions, and it is devoid of explanation for how Michigan could have detected the "potentially deceased" voters using any resources at its disposal. For that matter, PILF's Complaint does not even allege the identity of any single voter who has died and was not removed from the QVF. Instead, PILF alleges only that it hired a data analytics expert who "cross-referenced" partial voter information with commercial credit report agencies and other databases in order to reach an initial conclusion about the voter's full date of birth, and then—relying on assumptions about the voter's date of birth—concluded that a person with that name and date of birth was in the Social Security Administration death index. (ECF No.1, ¶30-31, PageID.8-9.)

The problem, of course, is that the expert's analysis—as alleged—is not based on the information kept by the Secretary of State, but instead is based on their analysts' conclusions about who a voter in the QVF *might* be. In short, all PILF alleges is that a person with a particular name and date of birth has died—it cannot show that the same person is listed as a voter in Michigan's QVF. PILF might believe they are, but it simply does not know. Indeed, PILF appears to recognize this limitation and uses the phrase "potentially deceased" instead of alleging something more concrete, and while PILF's "care in making assertions" is appropriate, it nonetheless highlights the limitations of PILF's analysis—despite the organization's subjective confidence in its own conclusions. (See ECF No.16, PageID.178-179.) PILF's allegations fail to show *one* voter in the QVF who has died

and has not been removed from the list of eligible voters. Instead, PILF has a list of people it thinks might be dead. There is a significant difference between the two. Regardless, in the absence of any demonstrated inaccuracy of the QVF, PILF's allegations are simply inadequate to show that the State of Michigan's program—which *does* use the actual dates of birth of a voter—is unreasonable. Indeed, Michigan's program is similar to the one used by Florida and found by the Eleventh Circuit to be reasonable. *Bellitto v. Snipes*, 935 F.3d 1192, 1203-1205 (11th Cir. 2019)("[A] jurisdiction's reliance on reliable death records, such as state health department records and the Social Security Death Index, to identify and remove deceased voters constitutes a reasonable effort.") As the Eleventh Circuit held, "The state is not required to exhaust all available methods for identifying deceased voters; it need only use reasonably reliable information to identify and remove such voters." *Id.* Michigan is entitled to rely on reliable death records, and is not required to scour credit reports to identify "potentially deceased" voters.

PILF's allegations are all the more inadequate in the face of its refusal to provide the criteria it used to match a voter in the QVF to a person who has died. Putting aside the fact that such information was explicitly requested, and that such information—if accurate—could have avoided the need for litigation, the methodology used by PILF's expert is essential to any assessment of the reasonableness of PILF's process, and thereby the reasonableness of Michigan's program in comparison. Instead, all PILF has alleged is a conclusion that there *might* be deceased persons remaining on the official lists of voters. That is simply

not enough to state a claim that Michigan's list maintenance program is so unreasonable as to violate federal requirements under NVRA.

Lastly, PILF's reliance on *Voter Integrity Project NC, Inc. v. Wake County Bd. of Elections*, 301 F. Supp 3d 612, 618-619 (E.D. N.C. 2017) is misplaced and that case has little application here. First, as a district court case from another circuit, it offers—at best—persuasive authority and does not control here. Second, its persuasive weight is significantly reduced by the critical factual differences—in that case, the allegations were that census and juror excuse information kept by the county (i.e., a "readily available tool") could be used to identify ineligible voters. 301 F. Supp. 3d at 619. No such facts are present here, and PILF does not allege that the Secretary of State has any additional information in its possession or control. Rather, PILF appears to assert that the Secretary should use additional tools that she does not currently possess. Third and finally, even in the North Carolina case, the court recognized that the fact that the county board did not use a "'readily available tool' does not mean in and of itself" that the county board's list maintenance methods were unreasonable, and the court stated only that it would consider that allegation along with other allegations to determine whether the plaintiff had stated a claim under NVRA. *Id*. But there are no other factual allegations supporting PILF's claim under NVRA here—just it's own analysis using data and resources that the Secretary does not use, and is not required to use. See *Bellitto*, 935 F.3d at 1203-1205. And, again, the Secretary does not keep or maintain credits reports, or obituaries, or pictures of gravestones—which

distinguishes this case from the census and juror excuse information upon which the North Carolina District Court based its decision. 301 F. Supp. 3d at 620.

PILF's allegations that the Secretary's list maintenance programs are unreasonable simply fail to state a claim, and they should be dismissed under Fed. R. Civ. Proc. 12(b)(6).

CONCLUSION AND RELIEF REQUESTED

For these reasons, and the reasons stated more fully in her earlier brief, Secretary of State Jocelyn Benson respectfully requests that this Honorable Court enter an Order dismissing Count I of Plaintiff's complaint in its entirety and with prejudice, together with any other relief that the Court determines to be appropriate under the circumstances.

Respectfully submitted,

s/Erik A. Grill

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Dated: February 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2022, 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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