No. 24-01255

United States Court of Appeals
for the
Sixth Circuit

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff-Appellant,

v.

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

Defendant-Appellee,

ELECTRONIC REGISTRATION INFORMATION CENTER, INC.,

Movant-Appellee.

On Appeal from the United States District Court for the Western District of Michigan, Case No. 1:21-cv-00929, Hon. Jane M. Beckering, U.S. District Judge

BRIEF OF CENTER FOR ELECTION CONFIDENCE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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RULE 26.1 DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, counsel for *Amicus Curiae* certifies that Center for Election Confidence is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly owned corporation or its affiliate, not a party to this appeal, that has a substantial financial interest in the outcome of this litigation.

/s/ D. Eric Lycan
David Eric Lycan

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INTEREST OF AMICUS CURIAE

Center for Election Confidence, Inc. (CEC) is a non-partisan, non-profit organization that promotes ethics, integrity, and professionalism in the electoral process.[1] CEC works to ensure that all citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election procedures and outcomes. To accomplish this, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files amicus briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration.

CEC tracks public confidence in election administration, and recent polls show substantial declines in confidence. A full 40 percent of American voters doubt the trustworthiness of our elections.[2] And those doubts are bipartisan—28 percent

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] *See Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct: Voters' evaluations of the 2020 election process*, Pew Res.

of Democrats and 81 percent of Republicans are not "very confident" that their 2022 votes were counted correctly.[3]

CEC believes that accurate voter rolls are the cornerstone of election integrity and public confidence in elections. Voters must trust that their registrations are accurately recorded in their state's registration system so that they can vote without difficulty. They must also trust that their state's registration system is accurately updated to remove the names of individuals who are deceased or otherwise ineligible to vote to protect elections from the misuse of those names, especially as remote voting (by mail and drop boxes) expands. According to the bipartisan Carter-Baker Commission, "registration lists lie at the root of most problems encountered in U.S. elections."[4] Voter rolls with "ineligible, duplicate, fictional, or deceased voters" are "an invitation to fraud." *Id.* And while election fraud is "difficult to measure" (because many cases go undetected, uninvestigated, or unprosecuted), "it occurs."

Ctr. (Nov. 20, 2020), https://tinyurl.com/2bkdn7up; R. Michael Alvarez et al., *Voter Confidence in the 2020 Presidential Election: Nationwide Survey Results*, Cal. Inst. Tech. 3 (Nov. 19, 2020), https://tinyurl.com/bdhd2nzu; Katherine Ognyanova et al., *The COVID States Project: A 50-State COVID-19 Survey, Report #29: Election Fairness and Trust in Institutions* (Dec. 2020), https://tinyurl.com/yc4unxfe.

[3] *See* SSRS, CNN Study Conducted June 13-July 13, 2022, at 4, https://tinyurl.com/47meubfu; Eli McKown-Dawson, *Voters' confidence in vote counting — before and after the 2022 congressional election*, YouGov (Jan. 9, 2023), https://tinyurl.com/ysjrunmd.

[4] Comm'n Fed. Election Reform, *Building Confidence in U.S. Elections* 10 (Sept. 2005), https://tinyurl.com/mdcef5h3.

Id. at 45. "In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." *Id.* at 18. And "the perception of possible fraud contributes to low confidence in the system." *Id.* In sum, the importance of accurate voter registration rolls simply cannot be gainsaid.

Yet, many states have not prioritized the resources and efforts needed to maintain up-to-date and accurate voter-registration lists. For example, California recently found 5 million inactive registrants on its voting rolls who had moved away or died.[5] The District of Columbia's voter rolls are so messy that 11 percent of ballots mailed to registrants in 2020 were returned as undeliverable.[6] Virginia recently discovered nearly 19,000 dead registrants on its voter rolls.[7] Nationwide, according to a 2012 study by the Pew Center on the States, 24 million voter registrations (one in eight) were invalid or contained significant inaccuracies, including 1.8 million registrations of deceased persons.[8] Many states simply have

[5] Susan Crabtree, *Calif. Begins Removing 5 Million Inactive Voters on Its Rolls*, Real Clear Politics (June 20, 2019), https://tinyurl.com/ysb3tuwu.

[6] Martin Austermuhle, *Data Errors Imperil D.C.'s Participation In Group That Cleans Up States' Voter Rolls*, DCist (Feb. 9, 2022), https://tinyurl.com/2ktr496m.

[7] Nick Iannelli, *Virginia discovers nearly 19,000 dead people on voter rolls*, WTOP News (Apr. 19, 2023), https://tinyurl.com/ms6y7w6c.

[8] *Inaccurate, Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade*, Pew Ctr. on the States 1 (Feb. 2012), https://tinyurl.com/38favmjr.

not devoted the proper resources or maintenance systems to make their roll-accuracy programs effective.

For these reasons, CEC has a keen interest in improving the accuracy of voter-registration lists and in the legal standard applicable to states' removal of deceased persons' names from those lists. CEC believes that inaccuracies in voter-registration systems should not be excused by a legal standard that forgives ineffectual but supposedly "good-enough-for-government-work" processes.

INTRODUCTION

Inverting Yoda's motto, the state of Michigan seems to believe that only trying matters—there is no do. But the federal voter-registration statutes are about results. The National Voter Registration Act of 1993 (NVRA) is designed to "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(4). If states do not maintain accurate and current voter rolls, the NVRA's purpose is not realized. To that end, the NVRA requires states to conduct a program that makes a "reasonable effort" to "remove the names" of deceased and other ineligible voters. *Id.* § 20507(a)(4).

Congress later supplemented the NVRA with the Help America Vote Act of 2002 (HAVA), which further advances the NVRA's objective of accurate and current voter rolls. HAVA requires states to create an election system that "ensure[s]" that voter rolls are "accurate" and "updated regularly." 52 U.S.C. § 21083(a)(4). This

language is unequivocal: the rolls must be accurate and regularly updated. Period. The election system, HAVA continues, must "includ[e]" a system of file maintenance that "makes a reasonable effort" to remove ineligible voters. The reasonable-effort requirement, therefore, is now embedded within a broader requirement to ensure accurate and regularly updated voter rolls—it does not supplant that broader requirement.

The reasonable-effort requirement, moreover, is itself ultimately about results. When the NVRA was enacted in 1993, "reasonable effort" was a legal term of art that brought with it a cluster of ideas, and it did not excuse demonstrable mistakes or objective failures to achieve intended results. The inclusion of "reasonable" ensures that states need not boil the ocean to immediately eliminate every single ineligible voter from their rolls. However, it does not mean that merely implementing a program to remove deceased voters itself satisfies the NVRA no matter how poorly the program performs and no matter the availability of more effective and cost-feasible alternative options. Perfunctory effort is not enough—states must do what they can, within reason, to actually rid voter rolls of ineligible voters.

Michigan has abjectly failed at that obligation. Both PILF and the Michigan Auditor General found that Michigan has failed to remove tens of thousands of deceased voters from its rolls. Many of these deceased voters, according to PILF's

uncontroverted evidence, remained on Michigan's rolls for decades after death. Michigan's voter rolls plainly are not "accurate and … updated regularly."

The district court responded by shrugging its shoulders. The court suggested that Michigan's poor performance is justified because it must also account for the NVRA's aim of increasing voter participation. But that aim is in no tension with PILF's lawsuit—removing deceased voters, needless to say, does not hinder lawful voter participation. The district court also repeatedly emphasized that Michigan need not achieve perfection. But that is a strawman—no one has ever said it must. The point, rather, is that Michigan has *tens of thousands* of deceased voters on its rolls and could adopt a more effective alternative program without undue hardship. The district court accepted these facts, as it was required to do on summary judgment, but concluded that the existence of tens of thousands of dead voters is no big deal in a state of Michigan's size. That is quite a statement from the federal judiciary in a country that tells its citizens that every vote matters. It is clear error that this Court should reverse.

CEC respectfully encourages this Court to adopt a doctrinal test that gives teeth to the federal statutes' requirements. At minimum, the reasonable-effort standard—to say nothing of HAVA's direct accuracy requirement—should mirror other reasonable-effort tests in statutes that require regulated entities to actually achieve the statute's ends unless cost prohibitive. The states should not be held to a

lower standard when carrying out the federal statutes' objective of accurate voter rolls.

ARGUMENT

I. FEDERAL LAW REQUIRES STATES TO TAKE ALL REASONABLE STEPS TOWARD ACCOMPLISHING VOTER-ROLL ACCURACY

This Court should not construe the NVRA and HAVA as establishing a toothless, "good-enough-for-government-work" standard that leaves unfulfilled the clear federal legal mandate, codified repeatedly by Congress, that states maintain accurate voter-registration lists. The statutes are not satisfied with effort alone—they demand that states "ensure" that voter-registration records "are accurate and are updated regularly." 52 U.S.C. § 21083(a)(4). And their file-maintenance systems must make "reasonable" effort to remove ineligible voters. *Id.*; § 20507(a)(4) (states must make a "reasonable effort" to "remove the names" of deceased voters). The term "reasonable effort" does not mean whatever effort an election official subjectively deems "good enough." Rather, it means that while states need not boil the ocean to immediately eradicate every inaccurate registration no matter the cost, they must take the objectively reasonable steps necessary to maintain accurate rolls.

The Supreme Court has explained that the NVRA has "two main objectives." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 761 (2018). One is "increasing voter registration." *Id.* The other, relevant here, is "removing ineligible persons

from the States' voter registration rolls." *Id.* That purpose, importantly, is codified in the United States Code. Statutory interpretation generally requires inferences about statutory purpose from what the text implies, which sometimes makes courts skeptical of invocations of purpose. After all, "statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution." *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 553 (2015) (Thomas, J., dissenting). But here the NVRA's purpose *did* go through bicameralism and presentment. The NVRA itself explains that it is intended to "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(4). This statement of purpose is an "indicator of meaning" that "sheds light" on the NVRA's other provisions. Antonin Scalia & Bryan A. Garner, Reading Law 217, 218 (2012).

HAVA drills home the NVRA's purpose. HAVA provides that state voter-registration systems "shall" include provisions to "ensure" that voter rolls are "accurate" and "updated regularly." 52 U.S.C. § 21083(a)(4). The word "shall" is "mandatory." Scalia & Garner, *Reading Law* 112. And there are no exceptions. HAVA's mandate, therefore, is accurate and regularly updated voter rolls. Remarkably, the district court never considered this provision in its analysis of Michigan's efforts.

HAVA further provides that the state voter-registration system must "includ[e] the following: (A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." 52 U.S.C. § 21083(a)(4). That specific requirement is in service of HAVA's broader requirement for accurate and regularly updated voter rolls; it does not supplant it. This is apparent from the word *includes*: "[t]he verb *to include* introduces examples, not an exhaustive list." Scalia & Garner, Reading Law 132; *see also, e.g.*, Black's Law Dictionary (11th ed. 2019) (defining *include* as "[t]o contain as a part of something"); *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"). For example, the state must also coordinate with "State agency records on death" and "State agency records on felony status" to facilitate the removal of ineligible felons and the deceased. 52 U.S.C. § 21083(a)(2)(A)(ii)(I)–(II). The reasonable-effort requirement, therefore, establishes one step a state must take—but not the only step—to satisfy the overarching accuracy requirement.

The NVRA contains its own reasonable-effort requirement, which—as an earlier-enacted provision—obviously does not supplant the HAVA accuracy requirement either. Whether HAVA creates a private right of action or not, HAVA informs the NVRA's objectives and reasonable-effort requirement. And the NVRA must be interpreted harmoniously with HAVA and its accuracy requirement. "The

provisions of a text should be interpreted in a way that renders them compatible," and the "imperative of harmony among provisions" is "more categorical than most" interpretive canons because "it is invariably true that intelligent drafters do not contradict themselves." Scalia & Garner, Reading Law 180; *see also, e.g.*, *Mellouli v. Lynch*, 575 U.S. 798, 809 (2015) ("Statutes should be interpreted 'as a symmetrical and coherent regulatory scheme.'").

The NVRA's reasonable-effort requirement, moreover, packs a real punch on its own. Although courts have struggled to calibrate the NVRA "reasonable effort" standard, *see Husted*, 534 at 778; *Bellitto v. Snipes*, 935 F.3d 1192 (11th Cir. 2019), the term finds guidance in analoguous statutes. Reasonableness and "reasonable effort" are specialized legal terms that had a great deal of embedded meaning when the NVRA was enacted. When Congress "employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 596 U.S. 740, 746 (2022) (cleaned). That is, a statutory term of art "adopt[s] the cluster of ideas that were attached to [the term]." *Id.* at 753. Here, several earlier-enacted statutes employed analogous reasonableness standards that have been developed through doctrinal law. They do not allow the regulated entity to invoke as a magic card for "reasonableness" any level of effort no matter how poor the results and no matter how feasible the more effective alternative options.

For example, the Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits employers from discriminating against employees on account of their military service and requires employers to take "reasonable efforts" to rehire, train, and requalify former employees after service in the U.S. military. 38 U.S.C. § 4313. USERRA defines "reasonable efforts" as "actions, including training provided by an employer, that do not place an undue hardship on the employer." *Id.* § 4303(10). And USERRA defines "undue hardship" as "actions taken by an employer … requiring significant difficulty or expense" relative to the employer's resources and size. *Id.* § 4303(16). This reasonable-efforts standard does not permit the employer to fail to adequately requalify service members for any reason other than significant difficulty or expense.

The Americans with Disabilities Act (ADA) is another example. The ADA prohibits employment discrimination based on an employee's disability. 42 U.S.C. § 12112(a). The ADA defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual" "unless" the employer "can demonstrate" that "the accommodation would impose an undue hardship." *Id.* § 12112(b)(5). Like USERRA, the ADA defines "undue hardship" as "an action requiring significant difficulty or expense." *Id.* § 12111(10). Under the ADA, if an "employee establishes that a reasonable accommodation is possible, then the employer bears the

burden of proving that the accommodation is unreasonable and imposes an 'undue hardship' on the employer." *Cehrs v. Ne. Ohio Alzheimer's Rsch. Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998). And "[i]f an employer cannot show that an accommodation unduly burdens it," then "there is no reason to deny the employee the accommodation." *Id.* at 782. Courts "place[] a significant burden on employers to accommodate an employee's injuries." *Rorrer v. City of Stow*, 743 F.3d 1025, 1044 (6th Cir. 2014). For example, they must "shift[] marginal duties to other employees who can easily perform them," *id.*; "allow[] modified work schedules," *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018); and grant "medical leave[s] of absence," *Cehrs*, 155 F.3d at 783.

While the NVRA does not define "reasonable effort," there is no reason that states should receive a more lenient standard under the federal voter-registration statutes. By reference to USERRA and the ADA, therefore, "reasonable" cannot mean that trying is enough—states must take all reasonable steps toward accomplishing the NVRA's objective. CEC urges this Court to treat obvious and extensive errors as evidence of inadequate list-maintenance efforts and then to look to see if improvements would impose any undue hardship upon the state.

II. A STATE HAS VIOLATED THE NVRA WHEN IT HAS TENS OF THOUSANDS OF DEAD REGISTRANTS ON ITS VOTER ROLLS AND A FEASIBLE ALTERNATIVE PROGRAM

It is undisputed that there are obvious and extensive errors in Michigan's voter list. In the district court PILF presented clear and objective evidence that Michigan's voter rolls included over 27,000 deceased individuals. *See* PILF Br. 5. That number substantially undercounts, moreover, because it was based not on a comprehensive study of all 8 million voter registrations but rather on a mere sample. *See id.* at 27. The actual number of deceased voters on Michigan's rolls, therefore, could be much higher.

Twenty-seven-thousand-plus dead-voter registrations is a staggering number in a country that tells its citizens that every vote matters. *See Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1204 (9th Cir. 2021) (Tashima, J., dissenting) (collecting sources for the proposition that "elections can be decided by a very small number of votes"). By any objective measure, the existence of tens of thousands of deceased registrants on a state's voter-registration list—many for several decades, PILF Br. 27—is evidence of an inaccurate voter roll.

PILF also presented credible evidence of patently reasonable measures that other states implement—and that Michigan could implement cost-effectively—to identify and remove the tens of thousands of deceased individuals currently on its rolls. Scott Gessler, a former chief election official for the state of Colorado,

explained numerous deficiencies in Michigan's system that likely have contributed to its poor performance. *See id.* at 24. For just one example, Gessler observed that Michigan does not have a procedure to remove as deceased registrants with "implausible" birthdates "such as a birthdate in 1823" (and these birthdates do not represent placeholder dates sometimes used by election officials in computerized data entry). *Id.* A state that does not remove 201-year-olds from its voter rolls, suffice it to say, could do more to ensure voter-roll accuracy. The district court never suggested that the common measures Gessler proposed are cost prohibitive.

The district court sided with Michigan anyway, but its reasoning is flawed.

First, the district court did not analyze whether Michigan could have prevented the errors in evidence through better, more effective measures used by other states. The court did not ask whether these measures would impose excessive cost or undue hardship on Michigan. Rather, the district court applied a baroque analysis concluding that Michigan satisfied the NVRA merely by having a system, however inadequate, to remove ineligible registrants and because it actually removed some number of such registrants. If all a state must do to win summary judgment is show that it has a system in place and has removed some number of ineligible registrants from the rolls, while ignoring tens of thousands of admitted mistakes, then the voter-list maintenance provisions in the NVRA and HAVA have little meaning at all.

Second, the district court attacked a strawman, repeatedly emphasizing that "the NVRA requires only a 'reasonable effort,' not a perfect effort." D. Ct. 24; *see also, e.g.*, *id.* at 23 ("The NVRA does not require states to immediately remove every voter who may have become ineligible."). Of course the NVRA does not require instant removal or perfection; no one has ever said it does. But that does not mean anything goes. To say that the existence of (possibly far more than) 27,000 dead voters indicates a severe problem is not to demand perfection. And that is especially true given that there are identified and feasible means for improvement.

Third, the district court treated the existence of 27,000-plus dead voters as no big deal because Michigan is a populous state. *See* D. Ct. 22 ("that number of deceased voters" is not "unreasonable in a state the size of Michigan"). As an initial matter, the district court's math is specious; it disregards that the number could be far higher than 27,000 because that number is drawn from a sample. And as discussed, even 27,000 dead voters is far too many in a country where every vote counts. *See* PILF, *Tracking Elections That Ended in Ties & Close Results*, publicinterestlegal.org/tied-elections/ (reporting hundreds of recent elections that ended in a tie or one-vote difference). The district court also suggested that Michigan is excused because it removes many dead people from its rolls, and according to contested data, more than many other states. *See* D. Ct. 22. But the voter-registration statutes do not permit inaccurate rolls so long as a state removes

many dead people or betters other states that may be even further out of compliance. That cannot be the objective legal standard, lest there be a race to bottom.

Fourth, the district court suggested that Michigan's poor performance is excusable because the voter-registration statutes' accuracy requirement is in tension with their objective to increase voter registration. *See id.* at 25 ("Importantly, … Congress passed the NVRA to not only protect election integrity and ensure accurate and current voter rolls but also establish procedures that increase voter participation. … List-maintenance programs must strike that same balance."). That is an infirm basis for decision. There is no "balance" to strike. The voter-registration statutes demand voter rolls that are filled with the names of eligible Americans who decided to register and devoid of those who are ineligible. Instituting a program that effectively removes the names of dead registrants from the voter rolls does nothing to prevent eligible voters from registering.

CONCLUSION

For the reasons set forth above, CEC urges this Court to reverse the district court's grant of summary judgment and remand with clear instructions to adjudge Michigan's voter-list maintenance efforts as inadequate and unreasonable.

June 4, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5). This brief contains 4,355 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, Times New Roman, in 14-point font using Microsoft Word.

Dated: June 4, 2024

/s/ D. Eric Lycan
David Eric Lycan

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 4, 2024, the Brief of *Amicus Curiae* Center for Election Confidence, was filed electronically through the appellate CM/ECF system with the Clerk of the Court, which will automatically send e-mail notification of such filing to all attorneys of record.

/s/ D. Eric Lycan
David Eric Lycan