IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

PUBLIC INTEREST LEGAL FOUNDATION, INC., Plaintiff, v. HOWARD M. KNAPP, in his official capacity as Executive Director of the South Carolina Election Commission, Defendant.	Case No.: 3:24-cv-01276-JFA

Defendant's Surreply and Reply

Howard M. Knapp, in his official capacity as Executive Director of the South Carolina Election Commission (SEC or Defendant),[1] responds to Plaintiff's most recent response and reply. PILF Resp. & Reply, ECF No. 30. As more fully set forth previously, *see* SEC Mem. in Resp. & Supp., ECF No. 29-1,[2] the Voter List is not a record covered by 52 U.S.C.A. § 20507(i)(1) (Section 8(i)(1)) of the National Voter Registration Act (NVRA),[3] but, even assuming that it is, the NVRA does not preempt the state law provisions pertinent to Plaintiff's information request. The SEC

[1] Because Knapp is named in his official capacity only, defendant will be identified as the SEC unless otherwise noted.

[2] SEC incorporates by reference the arguments contained in the SEC's Answer to the Complaint, ECF No. 18, as well as its memorandum in response and support, including the Affidavit of SEC Information Technology (IT) Manager Brian Leach (Leach Affidavit), *see* ECF Nos. 29, 29-1, & 29-2

[3] Stipulation of Facts ¶ 1, ECF No. 27, defines the document sought by Plaintiff as the "Statewide Voter Registration List." For purposes of brevity and preciseness, this Memorandum refers to this document as the "Voter List." *See also* SEC Mem. in Resp. & Supp. at 1, n.2, ECF No. 29-1. Contrary to PILF's suggestion, and whatever the terminology used, the SEC's position is that the Voter List is not a Section 8(i)(1) record based on the plain statutory language. *See id.* at 13-18.

respectfully contends that its motion for summary judgment should be granted and PILF's motion denied.

Standard

"When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Fusaro v. Howard*, 19 F.4th 357, 366 (4th Cir. 2021). "In considering each motion, [Courts] 'resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing that motion.'" *Defs. of Wildlife v. N. Carolina Dep't of Transp.*, 762 F.3d 374, 392–93 (4th Cir. 2014) (internal quotation marks omitted).

Argument

1. The SEC is entitled to summary judgment that the Voter List is not a Section 8(i)(1) record.

A. ***As a matter of law, the Voter List is not a Section 8(i)(1) record.***

Although PILF now attempts to contend otherwise, it is indisputable that it requested only the Voter List, *see* Complaint, ECF No. 1-1; Stipulation of Facts ¶¶ 1, 3, & 4, ECF No. 27 ¶¶ 1, 3, & 4, and did not request inspection or production of any other record.[4] But the uncontroverted affidavit of SEC IT Manager Brian Leach demonstrates that "[t]he SEC does not use the Voter List … (a) *to ensure the accuracy and currency of the official list of eligible voters*." Leach Aff. ¶ 18, ECF No. 29-2, (emphasis added). Mr. Leach further testified that "[t]he SEC does not use the Voter List … (b) to otherwise perform any responsibilities related to list maintenance; or (c) to otherwise perform any responsibilities related to voter registration." *Id.* To prevail over the

[4] *See, e.g., Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 677 (2010) (recognizing that parties are "bound by their factual stipulations"); *Jessup v. Barnes Grp., Inc.*, 23 F.4th 360, 365 (4th Cir. 2022) (holding that district courts have routinely recognized that a party is bound by the admissions within their pleadings).

SEC's summary judgment motion, PILF is obligated to "come forward with specific facts showing that there is a *genuine issue for trial*." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In doing so, PILF "must 'rely on more than conclusory allegations, mere speculation, [or] the building of one inference upon another ….'" *Est. of Alvarez by & through Galindo v. Rockefeller Found.*, 96 F.4th 686, 693 (4th Cir. 2024) (internal quotation marks omitted). That is, PILF must demonstrate that the Voter List that it asked for falls within the parameters of Section 8(i)(1). Because it did not do so, there is no genuine issue of material fact regarding the SEC's use of the Voter List and it is not a "record[ ] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." § 20507(i)(1). The SEC therefore is entitled to summary judgment.

B. *The Voter List is the only record at issue and how the SEC uses the Statewide Voter Registration Database is immaterial.*

Even though the only material facts relate to whether the Voter List itself is a Section 8(i)(1) record, *Johnson v. Robinette*, 105 F.4th 99, 113 (4th Cir. 2024), PILF goes on at length about records it *did not request*, describing requests for the "Statewide Voter Registration Database," PILF Resp. & Reply at 2, 4, & 6, ECF No. 30, and the "federally mandated voter registration record." *id.* at 7.[5] PILF asked for the Voter List, which is what is provided to qualified electors and "is a report that is generated from [the Computerized Registration System]." Leach Aff. ¶ 8, ECF No. 29-2.[6] As previously noted, the Voter List is a report that is generated from the Computerized Registration System, whereas the Computerized Registration System itself is a

[5] PILF also discusses and appears to suggest it requested the "Statewide *Computer* Registration List," PILF Resp. & Reply at 6-7, ECF No. 30, a term whose meaning is not obvious and which has not been previously defined.

[6] VREMS is the commonly-used term for the Computerized Registration System. Stipulation of Facts ¶ 6, ECF No. 27; Leach Aff. ¶ 6, ECF No. 29-2. To avoid confusion and for consistency, the SEC uses the term Computerized Registration System rather than VREMS.

database that contains "a vast amount of other voter information that is not included on the Voter List." *Id*.[7] In sum, the Voter List sold to qualified electors that PILF specifically asked for is not used by the SEC in any manner to "ensure the accuracy and currency of the official list of eligible voters." *See* § 20507(i)(1).

C. *PILF's repetition of its arguments about case law involving different documents and different jurisdictions is unavailing.*

When PILF cites "the universal weight of authority supporting the Foundation," none of PILF's arguments here appear to address the SEC's actual arguments as to why the case law does not support PILF's position. PILF's "universal weight of authority" likely refers to one precedential case that did not concern a Voter List, *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012), and three non-precedential cases which did, *Pub. Int. Legal Found., Inc. v. Bellows,* 92 F.4th 36 (1st Cir. 2024); *Pub. Int. Legal Found., Inc. v. Matthews*, 589 F.Supp. 3d 932 (C.D. Ill. 2022); and *Judicial Watch, Inc. v. Lamone*, 399 F.Supp. 3d 425 (D. Md. 2019).

When discussing *Project Vote*, PILF sets up arguments the SEC never made. The SEC has not parsed or dissected the words "of," "regarding," and "concerning" in Section 8(i)(1) in the particular manner suggested by PILF.[8] From the beginning of this litigation, the SEC has simply contended that Section 8(i)(1) "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," *see, e.g., Hibbs v. Winn*, 542

[7] The SEC therefore denies that the Voter List at issue "is a mirror image of – if not the same information with a different label – as the information contained in the VREMS system." PILF Resp. & Reply at 6, ECF No. 30; *see also* Leach Aff. ¶ 13, ECF No. 29-2 (describing contents of the Computerized Registration System); *cf. id*. ¶ 11 (describing the information fields on the Voter List).

[8] Similarly, PILF also argues that "Section 8(i)(1) reaches well beyond registrant removal records," and that "concerning" means something different than "containing," PILF Resp. & Reply at 6, ECF No. 30, even though the SEC never made those arguments. But the SEC's primary argument is simply that the statutory language fairly read does not encompass what PILF has asked for.

U.S. 88, 101 (2004), and that doing so leads to the conclusion that the Voter List is not a Section 8(i)(1) record.

PILF's reliance on these non-precedential cases also rests on an unwarranted and incorrect assumption that the characteristics of Voter Lists, how election officials use Voter Lists, and the laws regarding access and dissemination to Voter Lists are uniform in all states. *See Est. of Alvarez,* 96 F.4th at 693. PILF's argument that "this case is just like that one" ignores the fact that the question at issue here is *the SEC's* use of the *South Carolina* Voter List in the context of Section 8(i)(1).[9] *See Rosmer v. Pfizer Inc.*, 263 F.3d 110, 118 (4th Cir. 2001) ("[W]e cannot allow the fact that other circuits have called a statute ambiguous to negate this circuit's duty to interpret the text of the enactment. To hold otherwise would mean that we would automatically call a statute ambiguous because a sister circuit has interpreted a statute in a contrary manner. In effect, we would be abandoning our own duty to interpret the law.").

2. Even assuming the Voter List is a Section 8(i)(1) record, the SEC is entitled to summary judgment that the NVRA does not preempt state law.

A. *Congress Did Not Intend to Preempt S.C. Code § 7-3-20(D)(13)'s restriction on Disseminating the Voter List to Qualified Electors when it passed the NVRA.*

Contrary to PILF's assertion, and assuming that the Voter List is a Section 8(i)(1) record, the fact that the NVRA allows non-governmental entities to ask for that document does not mean that the public disclosure of records concerning "list maintenance activities" is a "significant objective" of the legislation. As PILF itself notes—and it has the burden of proving preemption—the NVRA requires "*states* to 'conduct a general program that makes a reasonable effort to remove

[9] In the context of a non-NVRA constitutional challenge to a Maryland statute restricting a Virginia resident from receiving Maryland's registered voter list, the Fourth Circuit upheld the State's restrictions and further held that "the decision to make government information available to the public is generally a 'question of policy' for the 'political branches.'" *Fusaro v. Cogan* 930 F.3d 241, 250 (4th Cir. 2019) (internal quotation marks omitted).

the names of ineligible voters from the official lists of eligible voters by reason of death or a change in residence.'" PILF Resp. & Reply at 7, ECF No. 30 (emphasis added); *see also* 52 U.S.C.A. § 20507(b) (referring to "[a]ny *State* program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll ….") (emphasis added). But that means[10] that the "significant" objective of the NVRA is governing the conduct of states with respect to federal elections. Stated another way, Congress did not create a system that primarily or "significantly" functions through the disclosure of information about "list maintenance activities" to private entities. This is especially true given that there is nothing in the legislative history showing that Congress contemplated that private entities would play any "significant" role in fulfilling Congress' NVRA primary objectives.[11] As such, PILF has not met its burden to show § 7-3-20(D)(13) is preempted and the SEC therefore is entitled to summary judgment.[12]

[10] PILF cites to a portion of *Project Vote* holding that Section 8(i)(1) encompasses completed voter registration applications, 682 F.3d at 335, but that case had nothing to do with preemption. In *Pub. Int. Legal Found., Inc. v. Dahlstrom*, 673 F.Supp. 3d 1004, 1011 (D. Alaska 2023), the district court interpreted Section 8(i)(1) to plausibly allege that deceased voter reports were covered for the purposes of a motion to dismiss. Neither of these cases advance PILF's position in this case.

[11] Nor does the legislative history suggest that Congress expected that Section 8(i)(1) records, once disclosed, would play any part in fulfilling a state's "list maintenance activities."

[12] In its Introduction, PILF unhelpfully cites *Condon v. Reno*, 913 F.Supp. 946 (D.S.C. 1995), as being the first example of South Carolina not complying with the NVRA. The SEC respectfully contends that it is complying with the NVRA and state law as more fully explained in its filings in this case. It is noteworthy that the statutory requirement restricting dissemination of the Voter List (now codified at § 7-3-20(D)(13)) was already in effect during the extensive litigation that took place as part of *Condon v. Reno*, as it had been since 1967. This same statutory requirement was even recodified in 1996 S.C. Acts No. 466, § 2, which was the NVRA implementation legislation enacted soon after *Condon v. Reno*.

B. ***The SEC is entitled to summary judgment on its remaining claims that the NVRA does not preempt certain other provisions of S.C. Code Ann. § 7-3-20(D)(13), § 7-5-170(1), § 30-2-50, and § 30-2-310(A)(1)(e) .***

PILF did not contest[13] and effectively conceded several arguments raised by the SEC in its motion for summary judgment. First, PILF did not contest the § 7-3-20(D)(13) requirement that the SEC collect a "reasonable fee" for providing the Voter List; in fact, it agreed to pay the required fee. PILF Resp. & Reply at 9, ECF No. 30. Second, PILF did not contest the prohibitions in S.C. Code § 7-5-170(1) and § 30-2-310(A)(1)(e) on disclosure of a voter's social security number; in fact, it agreed to redaction of any social security numbers. *Id.* Third, PILF did not contest and, thus, conceded the validity of the prohibition in S.C. Code Ann. § 30-2-50 against any use of the Voter List for commercial solicitation. *See Jones*, 323 F.Supp. 2d at 690. The SEC therefore is entitled to summary judgment on each of its claims in this regard.

Conclusion

For the reasons stated above and in its memorandum in response and support, the SEC respectfully contends that it is entitled to summary judgment on each of its claims and that PILF's motion for summary judgment should be denied.

[*Signature Page Follows*]

[13] *See Jones v. Family Health Center, Inc.*, 323 F.Supp. 2d 681, 690 (D.S.C. 2003) (holding claim abandoned when it was not addressed in opposition to summary judgment).

Respectfully submitted,

s/ Tracey C. Green

Mary Elizabeth Crum (Fed. ID No. 372)
Tracey C. Green (Fed. ID No. 6644)
Michael R. Burchstead (Fed. ID No. 10297)
Benjamin R. Jenkins IV (Fed. ID No. 14138)
BURR & FORMAN LLP
PO Box 11390
Columbia, SC 29211
(803) 799-9800
lcrum@burr.com
tgreen@burr.com
mburchstead@burr.com
bjenkins@burr.com

Thomas W. Nicholson (Fed. ID No. 12086)
STATE ELECTION COMMISSION
1122 Lady Street, Suite 500
Columbia, SC 29201
(803) 734-9063
tnicholson@elections.sc.gov

Counsel for Defendant Howard M. Knapp, in his official capacity as Executive Director of the South Carolina Election Commission

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Columbia, South Carolina