

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**PUBLIC INTEREST LEGAL
FOUNDATION,**

Plaintiff,

v

Case No. 19-13638
Hon. David M. Lawson
Mag, Judge Michael J.
Hluchaniuk

**JANICE M. WINFREY, in her official
Capacity as Detroit City Clerk, and GEORGE
AZZOUZ, in his official capacity as Director
Of Elections for the City of Detroit,**

Defendants.

**DEFENDANTS JANICE M. WINFREY AND GEORGE AZZOUZ'S REPLY
BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE
PLEADINGS**

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STATEMENT OF ISSUES PRESENTED

- I. If the Court grants Defendants' motion, would this mean that a list maintenance program that fails to remove thousands of deceased voters cannot, "under any set of facts," plausibly violate the NVRA?

The City of Detroit answers "No."

- II. Have Defendants properly relied upon items in the Court record in their motion?

Defendants answer "Yes."

- III. May the Court consider Mr. Azzouz's Declaration and its attachments in this motion?

Defendants answer "Yes."

- IV. Does Defendants' motion raise fact issues, precluding the dismissal of this action?

Defendants answer "No."

- VI. Are *Judicial Watch Project, Inc. v King*, *American Civil Rights Union v Martinez-Rivera*, *Voter Integrity Project NC Inc. v Wake County Board of Elections*, and *Bellitto v Snipes*, 221 F.Supp.3d 1354 (S.D. Fla 2016) distinguishable from the present case?

The City of Detroit answers "Yes."

STATEMENT OF MOST CONTROLLING AUTHORITY

In support of Defendants' position that Defendants properly relied upon items in the Court record in their motion:

Fed. R. Civ. P. 10(c); court docket in present case

In support of Defendants' position the Court may consider Mr. Azzouz's Declaration and its attachments in this motion:

Schnell v. City of Chicago, 407 F.2d 1084, 1085 (7th Cir.1969); *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 453 (7th Cir. 1998); *United States v 2121 Kirby Drive, Unit 33, Houston, TX*, No. CIV.A. H-06-3335, 2007 WL 3378353, at *3 (SD Tex, November 13, 2007); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 297 (6th Cir. 2008)

In support of Defendants' position that *Judicial Watch Project, Inc. v King*, *American Civil Rights Union v Martinez-Rivera*, *Voter Integrity Project NC Inc. v Wake County Board of Elections*, and *Bellitto v Snipes* are distinguishable from the present case:

Judicial Watch Project, Inc. v King, 993 F. Supp.2d 919 (S.D. Ind. 2012), *American Civil Rights Union v Martinez-Rivera*, 166 F. Supp.3d 779 (W.D. Tex. 2015), *Voter Integrity Project NC Inc. v Wake County Board of Elections*, 301 F. Supp. 3d 612 (E.D. N.C. 2017) and *Bellitto v Snipes*, 221 F.Supp.3d 1354 (S.D. Fla 2016).

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INTRODUCTION

In this case, Plaintiff, Public Interest Legal Foundation (“PILF”), alleges that the City of Detroit’s elections officials, Janice M. Winfrey and George Azzouz, have violated the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. §§ 20501-20511, by failing to make a “reasonable” effort to maintain the accuracy of the City’s voter rolls. Plaintiff seeks declaratory and injunctive relief.

On February 28, 2020, Defendants filed a Motion for Judgment on the Pleadings. (ECF No. 27.)

On April 3, 2020, Plaintiff filed a Response and brief in opposition to Defendants’ motion. (ECF No. 36.) Defendants file this reply pursuant to Local Rule 7.1(e)(1)(C).

ARGUMENT

I. Defendants have not requested the Court to rule that Plaintiff cannot, *under any set of facts*, plausibly demonstrate that Defendants have violated the NVRA; Defendants argue that Plaintiff has not done so under the facts of *this case*.

Plaintiff asserts that if the Court grants Defendants motion, this would mean that a list maintenance program that fails to remove thousands of deceased voters cannot, “under any set of facts,” plausibly violate the NVRA. (ECF No. 36, PageID.713)

But Defendants’ motion is not addressed to “any set of facts,” but to the specific facts as alleged by Plaintiff in this lawsuit. In this case, Plaintiff claims

that the City of Detroit's list of registered voters contains more registrants than there are residents of voting age. (ECF No. 1, ¶¶ 20, 22, PageID.8, 9.) That statement is demonstrably false. (See ECF 17-4, PageID.346, ECF 17-12, PageID.384.) Plaintiff also claims that the City's voting list contains, or contained, more than 2,000 deceased voters. Even if true, this would represent an error rate of only 0.4 %, a miniscule percentage, given that the City's voter list contains nearly a half million voters. Plaintiff also claims that the City has taken *no remedial action*" to maintain the accuracy of its voter lists (ECF No. 1, ¶56) – essentially, that the City has no voter list maintenance procedures whatsoever. Again, this is demonstrably false. (See ECF No. 17-8, 17-12 and 17-13.)

In light of these facts, Defendants argue that Plaintiff has not plausibly alleged that Defendants have violated the NVRA.

II. Defendants have properly relied upon items in the Court record; the Court shall determine the relevancy and weight to be given such documents.

At page 9 of its brief (PageID.721), Plaintiff argues that “Defendants offer misplaced and irrelevant commentary not of issue in this case without citations to the record as required by this Court's rules.” Defendants' brief does properly rely on citations in the record. Under Fed. R. Civ. P. 10(c), the exhibits to Defendants' amended answer to Plaintiff's Complaint are themselves pleadings and part of the record. Defendants clearly identified where in the record each of its exhibits

appeared. In response to Plaintiff's argument that Defendants' exhibits are not relevant, the Court will be able to make this determination.¹

Plaintiff also argues that Defendants' motion is based on evidence outside the pleadings, which require the motion to be converted to a motion for summary judgment. Again, however, all of the documents attached to Defendants' Amended Answer to Plaintiff's Complaint were themselves pleadings, which are not "outside evidence." The only document outside of the pleadings Defendants relied upon was a complaint filed in *Bellito v Snipes*, United States District Court for the Southern District of Florida, Case No. 0:16-cv-6174-BB, but it is appropriate for the Court to take judicial notice of such pleadings.² *Lyons v Stoval*, 188 F.3d 327, 333 (6th Cir. 1999).

III. The Court may consider Mr. Azzouz's Declaration and its attachments.

¹ While Plaintiff criticizes Defendants' inclusion of several articles relating to different issues involved in this case as exhibits, Plaintiff's Complaint similarly relies on articles from third parties. At paragraph 21, Plaintiff cites a 9-year old article from Crain's Detroit Business alleging that in 2011, the City's voter rolls had inaccuracies. (ECF No. 1, PageID.9.) Plaintiff did not, however, attach the article as an exhibit, but merely provided an internet citation.

² Plaintiff argues that it is improper to take judicial notice of such document, because it was superseded by a later amended complaint. However, Defendants attached the complaint merely to show that the plaintiff had made a voter registration ratio argument similar to that Plaintiff make in this case, which the court ultimately rejected. The plaintiff made the same allegation in its amended complaint. See Amended Complaint filed in *Bellito v Snipes*, United States District Court for the Southern District of Florida, Case No. 0:16-cv-6174-BB, attached as Exhibit A. The Court may similarly take judicial notice of this document without converting the motion to a summary judgment motion.

Plaintiff claims that, in particular, the Court should disregard the declaration of George Azzouz and its exhibits (filed as ECF No. 17-12), asserting that such documents may not be considered written instruments under Fed. R. Civ. P. 10 (c). The Declaration is analogous to an affidavit, which many courts have ruled may be considered as a pleading in Rule 12(c) motions if it is attached to a complaint or answer. See, e.g., *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir.1969) (“affidavits and exhibits attached to the complaint are a part thereof for all purposes.”); *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 453 (7th Cir. 1998) (“Historically, this Court has interpreted the term “written instrument”⁴ as used in Rule 10(c) to include documents such as affidavits[.]”); *United States v 2121 Kirby Drive, Unit 33, Houston, TX*, No. CIV.A. H-06-3335, 2007 WL 3378353, at *3 (SD Tex, November 13, 2007) (“The Fifth Circuit, like many other circuits, harbors no reservation about recognizing attached affidavits as ‘written instruments’ for inclusion in Rule 10(c).”).

The Sixth Circuit has not established a per se rule on this issue, but district courts within the district have considered affidavits attached to defendants’ answers in resolving motions to dismiss. For example, while the Court in *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008), confirmed that the district court on a motion to dismiss had properly excluded an expert witness affidavit - which (unlike the Azzouz Declaration) contained opinions and

did not appear to have been attached to any pleadings - but held that affidavits which had been attached to the defendant's answer to the complaint were properly considered as pleadings in resolving the motion. *Id.*, at footnote 3, p. 297.

IV. Defendants' motion does not raise fact issues, but is based on incontestable facts.

Plaintiff also argues that the Court must dismiss Defendants' motion because it raises fact issues, which cannot be resolved in the context of this motion. It is true that there are some factual issues in this case. However, the key facts upon which Defendants rely are not reasonably contestable. Regardless of whether Plaintiff is truly non-partisan, whether the City's voter roll actually contains the names of persons born in the 19th century (or whether these are typographical errors), etc., - and even if the Court disregards Mr. Azzouz's declaration - Plaintiff's claim that the City's voter rolls have more voters than the Census estimate of eligible voters is false, and the number of alleged deceased voters Plaintiff has identified is less than 1% of the total. Defendants assert that these facts show that Plaintiff has failed to show a plausible violation of the NVRA.

V. *Judicial Watch Project, Inc. v King, American Civil Rights Union v Martinez-Rivera, Voter Integrity Project NC Inc. v Wake County Board of Elections, and Bellitto v Snipes* are distinguishable from the present case.

In its brief in opposition to Defendants' motion, Plaintiff relies on *Judicial Watch Project, Inc. v King*, 993 F. Supp.2d 919 (S.D. Ind. 2012), *American Civil*

Rights Union v Martinez-Rivera, 166 F. Supp.3d 779 (W.D. Tex. 2015), *Voter Integrity Project NC Inc. v Wake County Board of Elections*, 301 F. Supp. 3d 612 (E.D. N.C. 2017) and *Bellitto v Snipes*, 221 F.Supp.3d 1354 (S.D. Fla 2016).

However, as shown below, each of these cases is distinguishable from the present case, and did not raise the same arguments Defendants raise in the present motion.

In *Judicial Watch Project, Inc. v King*, 993 F. Supp.2d 919 (S.D. Ind. 2012), the plaintiff alleged that the Indiana Secretary of State's voter list maintenance procedures had violated the NVRA. The defendant filed a motion to dismiss, arguing that (1) the plaintiff had failed to comply with the NVRA's notice provisions; (2) the plaintiff lacked standing; (3) the Indiana Secretary of State was an improper party. It is true that the Court denied the defendant's motion, but Defendants do not rely on these defenses in the present motion. Therefore, *Judicial Watch Project v King* has no application here.

The plaintiff in *Judicial Watch Project v King* alleged in its complaint that the voter registration rate exceeded 100% in multiple counties of the state, but it does not appear that the defendant disputed these figures, and this issue did not play a part in the Court's analysis. In contrast, Defendants have not only contested Plaintiff's voter registration rate figures here, but have introduced documents proving that the number of registered City voters does not exceed the most recent U.S. Census estimate of voting age residents.

In *American Civil Rights Union v Martinez-Rivera*, 166 F. Supp.3d 779 (W.D. Tex. 2015), the plaintiff alleged that the defendant Tax Assessor/Collector had failed to make a reasonable effort to conduct voter list maintenance programs, in violation of the NVRA. In particular, the plaintiff alleged that:

[t]he voter rolls for Zavala County have more registered voters than there are citizens in the County who are eligible to vote. (*Id.* at 4, para. 10.) The Complaint supports this claim by comparing two figures: the number of Zavala County citizens eligible to vote in 2010—8,205 people—and the number of people actually registered to vote in Zavala County in March of 2014—8,623 people.³ (*Id.*) The Plaintiff argues that these figures demonstrate an “implausible” registration rate of 105%. (*Id.*)

American Civil Rights Union v Martinez-Rivera, supra, at 785. The defendant filed a motion to dismiss the complaint, which was assigned to a magistrate judge.

While the defendant argued that certain factors could explain a registration rate of greater than 100%, the defendant never disputed that the figures the plaintiff had cited did in fact, show such a rate. As a result, the magistrate and the trial judge accepted this portion of the plaintiff’s argument as untrue. The magistrate filed a report recommending that the defendant’s motion be denied, stating:

”an implausible 105% registration rate gives rise to the strong inference that the Defendant failed to conduct reasonable voter list maintenance procedures.” *Id.* at 793. The trial judge adopted the magistrate’s report and denied the motion to dismiss.

In contrast, while the Plaintiff in the present case similarly alleges that the City has a voter registration rate exceeding 100%, Defendants have produced documents conclusively showing that this is untrue.

Voter Integrity Project NC Inc. v Wake County Board of Elections, 301 F. Supp. 3d 612 (E.D. N.C. 2017) is distinguishable for similar reasons. In that case, the defendant filed a motion to dismiss the plaintiff's NVRA action, arguing that (1) it was not properly named as a defendant; (2) the plaintiff had not complied with the NVRA's notice requirements; and (3) plaintiff's allegations were insufficient to state a claim under the NVRA. In response to the defendant's third argument, the plaintiff claimed that U.S. Census data showed that the defendant's voter rolls had more registered voters than there were voting age residents.

As in *American Civil Rights Union v Martinez-Rivera*, the plaintiff in *Voter Integrity Project NC Inc.* never contested this claim. The court denied the defendant's motion to dismiss, emphasizing that the plaintiff's complaint alleged that the number of registered voters in Wake County "has exceeded and continues to exceed, the number of eligible voters, which allegation *is in turn supported by reliable data[.]*" *Id.*, at 620 (emphasis added.)

But in the present case, Plaintiff's claim that the number of registered voters on the City's voting list exceeds the number of eligible voters is *not* "supported by reliable data." As Defendants have shown, the number of registered voters in the

City of Detroit was less than the number of eligible voters according to the most recent Census data.

In *Bellitto v Snipes*, 221 F.Supp.3d 1354 (S.D. Fla 2016), which involved similar issues as the present case, the court denied the defendant's initial motion to dismiss (before dismissing the case after a bench trial). But it is not clear what arguments the defendant presented in support of its motion. From the opinion, it doesn't appear that the defendant introduced documents establishing that its voter roll contained fewer persons than the census estimate of eligible voters, or that the defendant emphasized that the number of alleged improper registrations totaled less than 1% of the total voter list, as Defendants do in this case.

Dated: April 17, 2020

/S/ Eric B. Gaabo
Eric B. Gaabo (P39213)
Attorney for Defendants

CERTIFICATE OF SERVICE:

**DEFENDANTS' REPLY BRIEF IN SUPPORT MOTION
FOR JUDGMENT ON THE PLEADINGS**

I state that on April 17, 2020, I served Defendants' Reply Brief in Support of Motion for Judgment on the Pleadings on the other parties to this case by electronically filing these documents with the U.S. District Court for the Eastern District of Michigan, which will forward these documents to all parties of record through its electronic e-filing system.

Respectfully submitted,

S/Eric B. Gaabo (P39213)

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Dated: April 17, 2020