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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT,

Plaintiff,

DOCKET NO. 1:20-cv-522

vs.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State; JONATHAN BRATER, in his official capacity as Director of the Michigan Bureau of Elections; SHERYL GUY, in her official capacity as Antrim County Clerk; DAWN OLNEY, in her official capacity as Benzie County Clerk; CHERYL POTTER BROWE, in her official capacity as Charlevoix County Clerk; KAREN BREWSTER, in her official capacity as Cheboygan County Clerk; SUZANNE KANINE, in her official capacity as Emmet County Clerk; BONNIE SCHEELE, in her official capacity as Grand Traverse County Clerk; NANCY HUEBEL, in her official capacity as Iosco County Clerk; DEBORAH HILL, in her official capacity as Kalkaska County Clerk; JULIE A. CARLSON, in her official capacity as Keweenaw County Clerk; MICHELLE L. CROCKER, in her official capacity as Leelanau County Clerk; ELIZABETH HUNDLEY, in her official capacity as Livingston County Clerk; LORI JOHNSON, in her official capacity as Mackinac County Clerk; LISA BROWN, in her official capacity as Oakland County Clerk; SUSAN I. DEFYTER, in her official capacity as

1 Otsego County Clerk MICHELLE
2 STEVENSON, in her official
3 capacity as Roscommon County
4 Clerk; and LAWRENCE KESTENBAUM,
5 in his official capacity as
6 Washtenaw County Clerk,

7
8 Defendants.

9 _____/

10 TRANSCRIPT OF HEARING ON MOTION TO DISMISS AND
11 RULE 16 SCHEDULING CONFERENCE
12 BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE
13 GRAND RAPIDS, MICHIGAN

14 October 27, 2020

15 Court Reporter: Glenda Trexler
16 Official Court Reporter
17 United States District Court
18 685 Federal Building
19 110 Michigan Street, N.W.
20 Grand Rapids, Michigan 49503

21 Proceedings reported by stenotype, transcript produced by
22 computer-aided transcription.
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1 that as well, Your Honor.

2 Mr. Daunt's allegations in his Complaint even as
3 amended don't rise to that level. He's not shown that he's
4 aggrieved.

5 *THE COURT:* All right. And anything else,
6 Ms. Brailey?

7 *MS. BRAILEY:* Yes, Your Honor. We agree that he has
8 not alleged that he's aggrieved, but on top of that, as we
9 mentioned in our brief on page 3, we also argue that
10 Article III standing is a requirement in and of itself in
11 addition to being aggrieved under the statute. And I would
12 also like to note that, you know, after the response we would
13 like the opportunity to have a reply and we can provide an
14 NVRA-focused brief if that would be helpful to the Court.

15 *THE COURT:* All right. Well, I don't think any
16 additional briefing is needed at this stage, to tell you the
17 truth. And, of course, a ruling on a motion under Rule 12
18 doesn't mean it's the end of the issue. Rule 56 is always
19 there. But for Rule 12 purposes I don't think there's any
20 reason to go forward with further briefing because I think the
21 motions as they stand need to be denied.

22 I think there's clear standing established as a
23 matter of allegations here and at least a plausible claim
24 stated, which is all that needs to be happening at this stage
25 of the case. And I'll just briefly articulate why I think

1 that's the case.

2 The parties are, of course, correct in their briefing
3 that you need under 52 U.S.C. § 2510 a person aggrieved, and
4 then, of course, under Article III of the Constitution somebody
5 is aggrieved that still satisfies the constitutional
6 requirements of standing.

7 In addition, under the National Voter Registration
8 Act you'd also have to show that the individual involved or the
9 person aggrieved satisfied the notice requirement. I think
10 they are all established here. At least as a matter of
11 pleading. Which doesn't mean that the plaintiff ultimately
12 prevails but does, I think, mean that the plaintiff gets to go
13 beyond where they are right now.

14 With respect, first of all, to the notice letter, the
15 notice letter is attached to the First Amended Complaint, and
16 it's, in my view, a fairly detailed statement of why the
17 plaintiff thinks that there's a problem with the Michigan voter
18 registration lists and in particular that the defendants
19 haven't followed through on their obligation to come up with
20 under Section 8 an appropriate general program to remove voters
21 that don't belong on the registration list because they have
22 moved or because there has been a death. And I don't think
23 it's incumbent on the plaintiff in a notice letter to say "Here
24 is the existing program of the state and here are the
25 particular flaws in it." I think it is simply incumbent on the

1 plaintiff to say "Here is why I think there's a problem and why
2 I don't think whatever program you're using, if any, is up to
3 the task."

4 And certainly on the face of things, at least in
5 Leelanau County if you have more registered voters than
6 eligible voters living, at least based on the census data, a
7 reasonable inference, or at least a plausible inference is
8 there's a problem with the system that's been used to address
9 the voter registration list. And there's additional specific
10 examples given. I don't know if those numbers are going to
11 hold up. I don't know if that's going to be explained in some
12 other fashion. But I do think for purposes of a notice letter
13 as well as the allegations of the First Amended Complaint which
14 largely repeat that detail, there's at least a plausible case
15 for a problem with the Section 8 obligation. And whether or
16 not the State has a program, whether or not it's implemented a
17 program, and whether or not it's reasonable, those are merits
18 issues that, of course, aren't decided today and the plaintiff
19 may ultimately not prevail, but I think they have done enough
20 to get that far.

21 What the plaintiff's First Amended Complaint includes
22 in addition to what's in the notice letter is additional
23 factual basis that the plaintiff says illustrates the reasons
24 for their concern in terms of the I think it was about 500,000
25 or so returns that came back when the Secretary of State sent

1 out the absentee applications earlier. It was after the notice
2 letter but before the First Amended Complaint. And I think
3 that adds to the plausibility for purposes of the 12(b)(6) and
4 also gets into where we'll go next which is whether or not
5 Mr. Daunt is an aggrieved person under the statute and
6 sufficiently pleading a basis for standing with Article III.

7 I think that Mr. Daunt in the First Amended Complaint
8 really relies on three main categories of injury that he says
9 are concrete and particularized. He is a voter in the state of
10 Michigan. He is concerned about the possibility that his vote
11 would be diluted. But he's not only focused on that. He's
12 also concerned about the general cloud on the outcome of an
13 election if the registration lists aren't properly purged and
14 reflecting somebody -- or a list that's complied with the
15 Section 8 requirement. And he's concerned that he has to spend
16 extra time and effort policing the efforts of the secretary and
17 the director of elections to make sure these lists are where
18 they need to be and to make sure that the voting is coming off
19 properly. And I don't think that matters that he's doing so or
20 alleging his interest in doing so as an individual as opposed
21 to an organization. The fact that he is expressing the same
22 kind of concern that the organization did in the American Civil
23 Rights Union case from the Western District of Texas is, I
24 think, fundamentally the point. And he alleges a plausible
25 basis for why he as an individual voter in the state and active

1 in Republican politics in his case would be interested and
2 concerned about that, and for purposes of alleging injury I
3 think that's sufficient.

4 The point that the plaintiff makes about Spokeo and
5 the statutory cause of action is, I think, also important.
6 You know, I think so many of us, both at the bench and the bar,
7 from the Supreme Court point of view look at Spokeo as a case
8 that denied standing on a statutory claim or at least found it
9 inadequate as presently alleged and wanted to go back and have
10 the lower courts review it under the new standard. And so it's
11 easily cited and I think to some extent potentially
12 misunderstood as a case that makes standing unusually difficult
13 for a plaintiff seeking to enforce a private right of action
14 under a congressional statute. But in fact, as the
15 Ninth Circuit found on remand in Spokeo, 867 F.3d. 1108 in
16 2017, the fact that Congress makes a decision to create a
17 private right of action is something that the Court is
18 obligated under the Supreme Court's decision and then as
19 interpreted now by the circuits, Second Circuit, Ninth Circuit,
20 when the Congress says "We have the following interests," and
21 here we have a variety of interests at issue in the Voter
22 Registration Act, but two of them certainly are concerned with
23 exactly what Mr. Daunt says he's concerned with, the integrity
24 of the electoral process in ensuring that accurate and current
25 voter registration roles are maintained, when Congress lays

1 those out and says here is a private right of action for a
2 person aggrieved to enforce it, and that person, Mr. Daunt in
3 this case, comes forward, that's close to almost -- I won't say
4 a slam dunk -- but close to saying if not Mr. Daunt, then who?
5 This is exactly the kind of person that Congress had in mind to
6 protect these interests for the reasons that Mr. Daunt
7 articulates in the First Amended Complaint.

8 The intervenors are here, and I thought their claim
9 for intervention was clear enough because they are concerned
10 with also making sure that the other interests of the
11 National Voter Registration Act are recognized and enforced and
12 that we don't unduly purge voter roles, making it more
13 difficult for eligible citizens to register or to participate
14 in elections. They are both sides of the same coin, and I
15 think this is exactly the way Congress thought the interests
16 would be vindicated and protected on all sides. So for me when
17 you have a congressionally created private right of action like
18 this to address exactly the interests that Mr. Daunt says he's
19 suffering from a fear of losing, you have intervenors on the
20 other side who want to make sure things don't go off the rails
21 in removing people who deserve to be there or discouraging them
22 from registering, we have exactly the interests aligned that I
23 think Congress, first of all, had in mind and that the
24 Supreme Court in *Spokeo* and the circuits following *Spokeo* have
25 recognized as part and parcel of what's involved in a statutory

1 cause of action.

2 I already touched on the American Civil Rights Union
3 case which I think -- we might have missed something -- but I
4 think it's the only National Voter Registration Act case I saw
5 cited by anybody on the standing issue, did result in standing
6 for the plaintiff, albeit not on every theory advanced but
7 at least on multiple theories. And the only other cases that I
8 saw outside of the NVRA context that talked about general
9 dilution or fear of dilution I think are all readily
10 distinguishable and that none of those arise under a situation
11 like the National Voter Registration Act where Congress has
12 articulated the private right of action and reasons for it.

13 The other case that I think was referenced of
14 interest in probably the State briefing, it might have been the
15 intervenors, was the Buchholz case from our circuit under the
16 Fair Debt Collection Practices Act where standing was not
17 recognized, but that's a perfect example of where the interests
18 that the party plaintiff was talking about was not within the
19 scope of the cause of action that Congress had set up, and I
20 think in that case the trial court here, Judge Quist, and then
21 the Sixth Circuit affirming him said, "No, that's not right.
22 We don't have Article III standing here even though you might
23 have a technical issue under the statute." And that's because
24 in Buchholz the complaint was that the lawyers were harassing
25 the plaintiff by writing him letters, telling him he had to pay

1 on a debt that he didn't contest. And undoubtedly that may
2 have created anxiety, but not the kind of anxiety that was at
3 the root of the Fair Debt Collection Practices Act.

4 And I think in this case the situation is quite
5 different. The concerns that Mr. Daunt articulates around
6 potential for dilution, potential for a cloud on the election,
7 and potential for extra work and resources policing the
8 validity and propriety of the election are exactly interests
9 that are within the scope of the NVRA, just as the interests
10 the intervenors intend to protect are other interests on the
11 other side of the NVRA coin. So from my perspective there is
12 proper notice in advance. There is at least a plausible basis
13 for a cause of action alleged under the National Voter
14 Registration Act and a plausible basis for standing articulated
15 under Article III. So for those reasons I'm going to deny the
16 pending motions to dismiss.

17 Of course, the parties remain free to raise all these
18 issues as the record develops in addition to the merits, and
19 that's what we'll litigate going forward. But the motions I'm
20 denying today.

21 The schedule is really not something the parties
22 disagree about very much. At least once the motions are
23 decided. So let me do this: I'll articulate deadlines that I
24 would propose and then see if anybody has comments or
25 objections to that or concerns about it or anything else that