

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN**

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

v.

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

Defendant.

Civ. No. 1:21-cv-929

**ORAL ARGUMENT
REQUESTED**

**PLAINTIFF’S RESPONSE IN OPPOSITION
TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

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Introduction

Among the many arguments in Defendant’s voluminous summary judgment memorandum, the argument not made stands out. What’s missing is any argument that there are any living individuals on the Foundation’s lists of over 27,000 likely deceased registrants. Rather, Defendant tacitly concedes that Foundation has made an accurate claim that the individuals the Foundation identified as deceased are in fact deceased. Defendant goes further and even boasts that some have now been removed and more will be removed years down the road. Subsequent removal decades after the date of death is not the “reasonable” program the statute requires. 52.U.S.C. 20507.

In 2020, the Foundation discovered that Defendant had 27,000 likely deceased registrants languishing on the Qualified Voter File (“QVF”). (ECF No. 1-8, PageID.61.) At the same time, the Michigan Auditor General identified approximately 27,000 likely deceased registrants on the QVF, independently corroborating the Foundation’s findings. (*See* ECF No. 133, PageID.2697.) Instead of investigating the Foundation’s research, Defendant ignored it. Defendant also ignored the Foundation’s proper request for related records that Congress deemed open to public inspection. Now, the Defendant’s Motion for Summary Judgment includes only a promise to remove a fraction of the discovered dead registrants in 2025 or 2027. (ECF No. 149-11, PageID.3176-3178.)

The Foundation’s research—aligned with the Michigan Auditor General—constitutes undisputable evidence of a problem. The Foundation has even provided copies of obituaries and photographs of gravestones for many active registrants it has identified as deceased. Exhibit A (sample of photographs and obituaries with some information redacted for this filing.) (*See also* ECF No. 1-3, PageID.45-47.) But this motion does not rise and fall on the *Foundation’s*

research. The record demonstrates that Defendant is failing to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of – (A) the death of the registrant.” 52 U.S.C. §20507(a)(4)(A).

Summary Judgment Standard

“Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Brown v. Schultz*, No. 1:19-cv-634, 2023 U.S. Dist. LEXIS 97757, at *3 (W.D. Mich. Jan. 26, 2023). “In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party.” *Johnson v. Mehaffey*, No. 1:22-cv-342, 2023 U.S. Dist. LEXIS 177158, at *6 (W.D. Mich. Aug. 28, 2023) (quoting *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000).)

Defendant’s Statement of Facts

The bulk of Defendant’s summary judgment memorandum consists of its opinions concerning factual allegations. Defendant does not detail specific, numbered statements but, rather, narrates its view of the facts. A review of this narrative yields either evidence *in support* of the Foundation’s claims or, in some instances, factual inaccuracies in how the Defendant framed the evidence. This factual dispute undermines any right to summary judgment for Defendant. For example, Defendant attaches two affidavits by its employee, Stuart Talsma to its motion. (ECF Nos. 149-10 and 149-11, PageID.3171-3178.) Mr. Talsma recently conducted a review of *one* of two lists the Foundation provided to the Defendant against the *current* QVF.¹

¹ The Foundation is unable to replicate Mr. Talsma’s analysis because the Defendant has not provided it with the QVF that Mr. Talsma used. The last time the Defendant provided the Foundation with the QVF was in May 2023. This, along with other factors, supports the Foundation’s FRCP 56(d) Motion filed contemporaneously with this response.

Mr. Talsma categorizes the dead registrants into groups of “Active,” “Verify,” “Challenged,” “Cancelled,” “Rejected,” or “Unknown.” (ECF Nos. 149-10, PageID.3173.) At no point does Mr. Talsma (or any other Defendant witness) ever state these 27,000 deceased registrants are alive.²

The Foundation’s Research Director, Logan Churchwell, and one of the Foundation’s expert witnesses, Mr. Kenneth Block, each examined Mr. Talsma’s findings. Mr. Churchwell identified 2,024 registrants listed as “Active” that are 100 years old or older. Exhibit B at 1. Further, 126 registrants were born between 1900 and 1910, 1,139 registrants were born between 1911 and 1920, and 759 registrants were born between 1921 and 1923. The number of active supercentenarians on the list is next to impossible and precludes a finding that Defendant’s list maintenance program is “reasonable” as a matter of law. Rather than remove dead registrants from the rolls, Defendant claims that about 4,921 are scheduled to be removed from the rolls by 2025 or 2027. (ECF No. 149-11, PageID.3178.) It is not “reasonable” to wait up to four years to partially address a problem that could and should be fixed now. The NVRA offers a quicker path to clean rolls that the Defendant refuses to implement.

Further, even as to the registrants on the Foundation’s list that the Defendant *eventually* removed, the *grossly belated removal* provides an additional reason why Defendant is not entitled to judgment as a matter of law. According to Mr. Block, Mr. Talsma’s analysis showed a total of 6,297 registrants with a “voter status” of canceled and a “status reason” of deceased. Exhibit C at 1. Mr. Block compared the status date from Mr. Talsma’s spreadsheet with the date of death from his original analysis. Exhibit C at 2. According to Mr. Block’s comparison, the average number of days between when the registrant was marked as deceased in the QVF and the

² Defendant could have compared the Foundation’s list of dead registrants to the information it has received from the Social Security Administration or the Michigan Department of Health and Human Services to answer this question once and for all, but it has not.

listed date of death is 1,940, which is over 5 *years*. Exhibit C at 2. The NVRA does not brook a five year wait to remove deceased registrants.

I. Michigan’s List Maintenance Program Is Unreasonable.

“The [NVRA] has two main objectives: increasing voter registration and removing ineligible persons from the States’ voter registration rolls.” *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). *See also Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1141-42 (S.D. Ind. 2018) (“The [NVRA] established procedural safeguards to protect eligible voters against disenfranchisement and to direct states to maintain accurate voter registration rolls.”); and, *Common Cause Ind. v. Lawson*, 937 F.3d 944, 947 (7th Cir. 2019) (“As does the NVRA as a whole, this part of the law reflects two competing concerns: on the one hand, the need to ensure the integrity of the electoral process, §§ 20501(b)(3)-(4); and on the other hand, the need to increase voter registration and enhance voter participation, §§ 20501(b)(1)-(2).”).

To accomplish the objective of ensuring the integrity of elections, Section 8 of NVRA requires Michigan to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of – (A) the death of the registrant; or (B) a change in the residence of the registrant [,]” 52 U.S.C. § 20507(a)(4). The Foundation’s claims focus on the former requirement—the removal of deceased registrants. Defendant’s cited statutory authority to the contrary is inapplicable. Importantly, although Section 8 of the NVRA generally restricts states from removing ineligible registrants from the voter rolls within 90 days of a primary or general election, federal and state law allow registrants who have died to be removed *at any time*, *see* 52 U.S.C. § 20507(c)(2)(B)(i); Mich. Comp. Laws § 168.509dd(2)(b). *See also* U.S. Dep’t of Justice, The National Voter Registration Act Of 1993 (NVRA) Questions and Answers, *available at* <https://www.justice.gov/crt/national-voter->

registration-act-1993-nvra (“This 90 day deadline does not, however, preclude...removal due to death of the registrant...nor does the deadline preclude correction of a registrant’s information.”). (ECF No. 1 PageID.3-4.)

One of the Foundation’s experts is the former chief election official for the State of Colorado, Scott Gessler. Mr. Gessler explained in his report that “[i]n evaluating Michigan’s efforts, federal law considers whether the Secretary takes proactive steps, has established a set of policies and procedures, and makes reasonable efforts.” Exhibit D at 8. Mr. Gessler goes on to explain that he considered three factors,

First, the Secretary must take proactive steps to ensure that the deceased registrants are removed from the voter rolls...

Second, the Secretary must have a “general program” rather than a series of *ad hoc* efforts....

Third, the NVRA imposes a duty of care to require states to act reasonably. Mere effort is inadequate.

Exhibit D at 8-9. The NVRA requires performance, not merely aspirations.

A. There Are Material Disputes about Whether Defendant Follows State Statutes and Procedures.

Defendant devotes pages cataloging state laws. (ECF No. 149, PageID.3033-3036.) Each state law speaks for itself, and the Court should disregard any of Defendant’s purported facts that go beyond the plain language of the statute. Even more importantly, the mere existence of laws and procedures does not entitle Defendant to anything, particularly judgment. Aspirational procedures do not absolve an election official.

The United States has argued in court, “the question whether the general program of list maintenance [a chief election official] undertakes in fact amounts to a ‘reasonable effort’ to remove ineligible voters under Section 8 of the NVRA *goes beyond the simple existence of state*

laws and procedures, to include consideration of the actual efforts undertaken pursuant to those laws and procedures.” (ECF No. 1-1, PageID.33) (emphasis added.) Simply put, a “reasonable effort” demands that the proof be in the proverbial pudding, not merely part of the state statutory recipe.

Worse for Defendant, there appears to be no follow-through on the aspirational statutory procedures in the record. There certainly, at best for Defendant, a factual dispute on Defendant’s follow-through on the aspirational procedures.

One example on this absence of follow-through is Defendant’s reference to Mich. Comp. Laws § 168.509o(4). (ECF No. 149, PageID.3033.) This law requires the Defendant to “develop and utilize a process by which information obtained through the United States Social Security Administration’s death master file that is used to cancel an operator’s or chauffeur’s license ... of a deceased resident of this state is also used at least once a month to update the qualified voter file.” Fair enough. Defendant’s purported substantive follow-through consists of a statement regarding an action taken “[b]ased on these laws.” (ECF No. 149, PageID.3034.) The proof in the pudding? Defendant provides a citation in footnote 3 that takes us to an internet link. (*Id.*) Clicking on that link yields—ridiculously—a “404 – Page Not Found Error.” Trying to find the proof in the pudding by searching the actual language quoted by Defendant on the State of Michigan’s website yields no results.

The truth is that Defendant does a better job cleaning the driver’s license database than the QVF, and that is at the heart of Defendant’s failures to keep rolls in Michigan clean. *See* Exhibit D at 13. It is disputed how effectively updates from the driver’s file database have worked to clean the QVF. *See* Exhibit D at 11 (citing Auditor General Performance Audit Report.)

Elsewhere, Defendant relies only upon speculative statements made by the Director of Elections in a deposition without sufficient evidence that he has personal knowledge of each statement and is otherwise qualified to testify to such statements. (*See, e.g.*, ECF No. 149, PageID.3036 (relying on the Director’s deposition for the proposition that “it is not practically possible to identify every person who has died in a state with millions of people.”).) The Court should consider “the actual efforts undertaken pursuant to those laws and procedures” to keep the *QVF* up-to-date and ignore all of Defendant’s speculative statements.

B. Michigan Does Not Compare Social Security Administration Information Against the Qualified Voter File.

Among the most significant failures are the Defendant’s failure to compare Social Security Administration (“SSA”) death information against the actual *QVF*. Rather, the Defendant compares the information from the SSA against its CARS database. (ECF No. 154-5, PageID.3257-3259, 3260-3261.) Defendant’s recitation of the process of comparing information from the SSA against CARS does not answer the question of whether Defendant is conducting reasonable list maintenance on the *QVF*. The NVRA does not mandate reasonable maintenance of a state’s list of drivers; it requires reasonable maintenance of a state’s list of registered voters. Defendant is not entitled to judgment as a matter of law when it intentionally directs its maintenance efforts at the wrong list, especially when the Auditor General has cataloged a breakdown in interaction between CARS and the *QVF*.

It is undisputed that the two databases are not the same. (ECF No. 154-4 at 32:24-25, 37:3-6.) It is undisputed that registrants are on the *QVF* without any appearance in CARS. Exhibit D at 12. It is undisputed that only the SSA information for precisely exact matches in the CARS systems might find their way to the *QVF*. (ECF No. 154-5, PageID.3257-3258.) In other words, keeping CARS clean does not clean the *QVF*.

Defendant relies upon speculation from one of its employees as to what information the CARS system contains. (ECF No. 149, PageID.3038.) Nowhere in the record is an accounting of how many individuals in CARS lack a social security number and, therefore, will not be evaluated against information received from the SSA. As further downstream consequences of Defendant's choice to compare death information it receives against CARS, any "close" matches are likewise not compared against the QVF. All "close" matches are processed by motor vehicle staff, not staff from the Bureau of Elections. (ECF No. 154-5, PageID.3257-3258.)

Further, as to information provided by the SSA, it is undisputed that the Defendant relies only on updates (ECF No. 149, PageID.3037) and does not, at any point, compare its entire database against the SSA cumulative list of individuals who have died. That exercise could solve the entire problem here of decades-deceased active registrants. Mr. Gessler opines that the Defendant's reliance on updates "is unreasonable because these recent death notices fail to identify many deceased registrants on the QVF." Exhibit D at 10.

Mr. Gessler goes on to explain that, first, "the updates cannot remove deceased registrants who are registered *after* the date of death, either through mistake or fraud." Exhibit D at 11. The Foundation identified 334 such registrations in its analysis. (ECF No. 1, PageID.15.) "Second, the automated or human matching process for near matches results in some errors," that would be mitigated by cumulative review of the records. Exhibit D at 11.

It is also unreasonable that Defendant knows about the problems but makes no effort to remedy them. For example, Defendant is aware of the need for more frequent reconciliation between databases. Defendant agreed with the Michigan Auditor General's finding that it needed to compare the entire CARS database to the QVF on a quarterly basis to mitigate errors in the daily updates between the systems. *See* Exhibit D at 11. Defendant touts the recent increase on

the reconciliation, noting that “[t]he quarterly reconciliation makes sure that the data is in sync so that if—for whatever reason—some data had not been synchronized on a daily reconciliation it would be caught by the quarterly process.” (ECF No. 149, PageID.3039.)

At best, whether Defendant’s program is “reasonable” is a factual question subject to genuine dispute.

C. Michigan Does Not Compare Michigan Department of Health and Human Services Information Against the Qualified Voter File.

Defendant does not compare information received from the Michigan Department of Health and Human Services (MDHHS) directly against the QVF. Like the information from the SSA, it compares the MDHHS information against the CARS database. (ECF No. 154-5, PageID.3257-3259, 3260-3261.) The same failure occurs here because these tools are aimed at something other than the QVF and rely upon a synchronization between CARS and the QVF when it is undisputed that the databases house different information. (ECF No. 154-4 at 32:24-25, 37:3-6.) This inadequate failure is also unreasonable list maintenance.

Once again, the Defendant relies on monthly updates from MDHHS and does not, at any point, compare the QVF against the MDHHS *cumulative list* of individuals who have died. (ECF No. 149, PageID.3037, Exhibit D at 10.) Michigan maintains death records dating back to 1867. Exhibit D at 10. Yet Defendant does not utilize them. For the reasons stated above, this is not reasonable.

D. Michigan Relies on Inadequate Data from ERIC.

The Defendant performs voter list maintenance using information provided by a third party, the Electronic Registration Information Center (ERIC), without knowing the methodology the organization employs. Exhibit D at 13-15.

It is undisputed that the data from ERIC is the *only source* of death information that Defendant compares against the QVF. (ECF 86-1, PageID 1437:18-24.) Defendant's staff member in charge of reviewing ERIC reports, Rachel Clone, testified that, outside of the updates from CARS, ERIC reports are "the only other source" of "processing deceased records in any systematic way." Exhibit E at 158:17-19. But there are factual disputes about whether that source of information is adequate, with indications that reliance on ERIC reports alone is grotesquely inadequate.

Ms. Clone also testified that every ERIC deceased report she has seen included a match on the last four digits of the individual's Social Security number. (ECF No. 149-5, PageID.3112, page 55, line 3-7.) Ms. Clone also testified that the QVF does not contain the last four digits of each registrant's Social Security number. (ECF No. 149-5, PageID.3111, page 53, line 3-6.) Therefore, there is no evidence that ERIC is processing those individuals for which Defendant does not maintain the last four of their Social Security numbers.

E. Defendant Stopped List Maintenance Efforts in the Weeks Prior to an Election.

Defendant's representatives in its 30(b)(6) deposition stated that, until recently, Defendant had a procedure in place to "stop processing deceased notices" approximately "two weeks prior" to any election. Exhibit E at 154:7-19. The stated reason was to ensure "that the Bureau of Elections would have their most current voter rolls prior to the elections. That there would not be any ongoing maintenance of the rolls prior to the election[.]" Exhibit E at 154:7-19.) Ironically, this procedure achieved the opposite result; a less up-to-date voter roll at arguably the most important time for accurate and current voter rolls. Further, Defendant did not have a practice in place to check to see if, while they stopped their list maintenance, there were

any vote credits assigned to a person who they knew was deceased but had not yet cancelled. Exhibit E at 160:10-20.

Defendant stops processing the information it does receive from ERIC “leading up to a major election,” and does not start again until weeks after an election. Exhibit E at 158:19-20. There is no state or federal law that mandates abandoning list maintenance as to deceased registrants at this critical time. Instead, federal law specifically permits the removal of a deceased registrant at *any time*. (ECF No. 1, PageID.3-4.) Defendant’s deliberate choice to stop maintaining its voter rolls—when such maintenance could easily continue—is an additional reason Defendant is not entitled to judgment as a matter of law.

F. Defendant Does Not Make Reasonable Efforts to Follow up on Information It Receives on Deceased Registrants.

Defendant does not make a reasonable effort to follow up on information it receives regarding deceased registrants. The Foundation provided evidence and requested meetings on multiple occasions to provide credible helpful data, *infra*, and the Defendant ignored it. The Foundation’s information is but one example. According to Mr. Gessler, the Secretary’s lack of “procedures to handle information submitted by members of the public” demonstrate that “it does not conduct a general program that makes reasonable efforts to receive, investigate, or resolve reports of deceased registrants.” Exhibit D at 15-16.

G. Defendant Is Ultimately Responsible for List Maintenance, not Local Clerks.

Defendant claims that “local clerks have primary responsibility for maintaining the voter rolls for their jurisdiction, including cancelling registrations for deceased persons.” (ECF No. 149, PageID.3041.) Wrong, as a matter of federal law. The NVRA mandates that “[e]ach State shall designate a State officer or employee as the chief State election official to be responsible

for coordination of State responsibilities under this chapter.” 52 U.S.C. § 20509. Secretary Benson is the chief State election official for the State of Michigan. Mich. Comp. Laws § 168.21. Also, in the very same paragraph, Defendant contends that local clerks entered “between 20 and 30% of cancellations for being ‘deceased.’” (ECF No. 149, PageID.3041.) Meaning, the *vast majority* were done by the Defendant.

Further, while Defendant recites the process local clerks *may* follow, it does not provide any evidence that the local clerks, in fact, *do* follow the process. While there is a process authorized by statute, there is absolutely no evidence any local clerk is following it.

Additionally, there are statements by the Defendant that are not supported by the record citation provided. For example, Defendant refers to “cancellations entered by local clerks based on information they receive” and cites Defendant’s answer to the Foundation’s first interrogatory. (ECF No. 149, PageID.3037.) But that interrogatory response does not concern local clerks at all and, thus, does not support Defendant’s statement.

II. There Is Evidence that Michigan’s QVF Contains an Unjustifiable Number of Deceased Registrants.

It is undisputed that there are tens of thousands of deceased registrants on Michigan’s voter rolls. According to Defendant, “there will always be some number of deceased registrants on the voter rolls...” (ECF No. 149, PageID.3036.) Defendant asserts that “it is not practically possible to identify every person who has died in a state with millions of people.” (ECF No. 149, PageID.3036.) Perfection is not the standard here. The record demonstrates that Defendant has been informed about evidence of likely deceased registrants on the QVF.

A. The Foundation Informed Michigan About 27,000 Deceased Registrants.

This dispute should have been resolved years ago and that it has not further highlights the unreasonableness of Defendant’s program. In September 2020, the Foundation alerted the Secretary to its research and findings. (ECF No. 1-4, PageID.48-50.) The Foundation did not ask for anyone to be removed based only upon its findings but, rather, clearly stated,

We have utilized multiple means to verify these potentially deceased registrants, but ultimately only your office can conclusively determine whether the registrants are indeed deceased. . . .

(*Id.*, PageID.49.) On September 29, 2020, the Secretary’s office sent a letter requesting “a written description of the matching criteria used” – as if any “matching criteria” were a more urgent matter than dead registrants on the rolls. (ECF No. 11-2, PageID.126.) Yet the Foundation played along. On October 5, 2020, the Foundation informed the Secretary that its findings “are based on matching full names, full dates of birth, Social Security numbers, and credit address history information.” (ECF No. 1-6, PageID.52.) The Foundation also provided a spreadsheet “identifying the voter ID numbers of the registrants” identified. (*Id.*)

Apparently learning the details of the “matching criteria” was not as important as Defendant first claimed. The Foundation waited for a response that would not come. The Foundation made use of the time and purchased a brand-new copy of the QVF. Using the same careful measures it employed for the first matching exercise, the Foundation performed a second matching exercise. (ECF No. 1 PageID.10.)

In November 2020, the Foundation alerted the Secretary—a second time—to its additional research and findings. (ECF No. 1-8 PageID.61.) The Foundation reminded the Defendant about the ignored correspondence, including that “[o]n September 29, 2020, your office responded requesting additional information. On October 5, 2020, we responded and

provided the requested information.” (*Id.*) More silence followed. Neither the “matching criteria” nor two separate studies seemed to merit a response.

In December 2020, the Foundation tried again. Pursuant to the NVRA’s public inspection provision, the Foundation sought to see what – if anything – the Defendant was doing with the information the Foundation had generated at no small expense. The Foundation asked to inspect records concerning the Secretary’s efforts to remove deceased registrants from the QVF. (ECF No. 1 PageID.11.) The Foundation offered to travel to visit and inspect the records.

The day before its intended visit, the Secretary’s office sent an email denying the inspection request and stating that the office is “still awaiting your matching criteria, which was requested on September 30th.” (ECF No. 1 PageID.12.) Again, the “matching criteria” proved more urgent than the actual problem of dead registrants, never mind that the much-sought criteria had already been provided.

In January 2021, the Foundation wrote to the Secretary again, emphasizing that it had provided the requested information on October 5, 2020. (ECF No. 1-13, PageID.72.) More silence from the Secretary followed.

It is undisputed that the Foundation provided information about how it conducted its match, were that even relevant to the NVRA, which it is not. Defendant now questions the sufficiency of the detail provided, claiming the Foundation “provided little detail about the method” of its analysis. (ECF No. 149, PageID.3042.) It is undisputed that the Foundation provided the requested information. It is also undisputed that a citizen need not be subject to a government inquiry about methodology when it provides simple basic information about defects in list maintenance. Defendant claims that one staffer reviewed the October 2020 list and “determined that each of the first ten individuals she checked had already been cancelled in

QVF.” (ECF No. 149, PageID.3043.) The fact undermines any claim that the Secretary needed more “detail” to conduct an analysis. Rather, the Secretary’s staff confirmed that a similar analysis of the entire list could have been done in “[l]ess than an hour.” (ECF No. 133-5, PageID.2815.) In fact, the Defendant has now done the analysis, but only as to *one* of the Foundation’s two lists of likely deceased registrants. *See infra*. The quest for “matching criteria” in hindsight appears more to be a deflection and delaying tactic about genuine, credible, and accurate concerns about the failure to conduct reasonable list maintenance and should be viewed as such for purposes of this motion.

Defendant’s own October 2020 analysis further demonstrates that no material question of fact exists that its list maintenance program is unreasonable. First, Defendant only examined the first ten registrants on a list of tens of thousands, a wholly inadequate sample size. Second, Defendant’s review of those ten registrants showed that the registrants had been recently *cancelled as deceased*. (ECF No. 149-5, PageID.3128.) In other words, the Foundation’s list did not contain individuals who were demonstrably alive. Defendant’s actions were not a reasonable response to credible and accurate information provided to it about list maintenance failures. *See* Exhibit D at 17-18.

Defendant statement about the Foundation’s “apparent reluctance to provide details” about its research (ECF No. 149, PageID.3043) highlights Defendant’s years-long delay in acting on the Foundation’s work. Defendant claims that what it was seeking was “relatively straightforward” and proceeds to quote a staffer’s interpretation of “matching criteria.” (ECF No. 149, PageID.3043.) Among the questions the staffer conjured up at the deposition were “what was the level of the match.” (*Id.*) This question was answered in the Foundation’s October 5, 2020, letter when it stated that it “match[ed] full names, full dates of birth, Social Security

numbers, and credit address history information.” (ECF No. 1-6, PageID.52.) The record demonstrates that the Foundation provided the Secretary with information about its methodology and that the Defendant did not raise *any* concerns over the sufficiency of the detail provided or ask *any* follow up questions. When asked how he would conduct a similar analysis, Defendant’s expert said that he “would do what [Mr. Block] tried to do, but I would have provided much more detail about the decisions I made which is matching it to a database that would try to include Social Security numbers.” (ECF No. 133-6, PageID.2842.) The record shows that the Foundation provided information multiple times, made itself available for further discussion, and the Secretary chose not to respond.

B. The Auditor General Told Michigan About 27,000 Deceased Registrants.

The Defendant heard about tens of thousands of deceased individuals languishing on the voter rolls from someone else besides the Foundation, namely Michigan’s own Auditor General. The Auditor General has been sounding the alarm about deceased registrants for years.

These alarms sounded in both 2019 and, again, in 2021. Performance Audit, Report Number 231-0235-19 (Dec. 2019), *available at* <https://audgen.michigan.gov/wp-content/uploads/2019/12/r231023519.pdf>; Performance Audit, Report Number 231-0235-21 (Mar. 2022), *available at* <https://audgen.michigan.gov/wp-content/uploads/2022/03/r231023521-4999.pdf>. Had the Defendant changed course and fixed the problem after these alarms, this case may have never been necessary. Failure to change course was not reasonable list maintenance.

Finding One of both audits found problematic conditions regarding the QVF, and the Secretary agreed to take action. *Id.* In 2021, the Auditor General performed a “death match for active voters in the QVF” matching “First Name, Last Name (OR Former Last Name), and Date of Birth to the Death Record File from Vital Records[.]” (ECF No. 133-2, PageID.2714.) The

audit manager was deposed and testified that the death match yielded between “twenty to thirty thousand” deceased registrants on the QVF – a number of some significance because it is substantially similar to the Foundation’s research.

Q. Did you also make a determination as to whether or not there were dead people who were still on the roll, voter’s roll?

A. Yes. That was an additional test we paid attention to this time around where we actually took the active registrants, and we sent it to our people who have access to the death records, run that match for us...

Q. How many did you get?

A. I do not know exactly. When we did that match, it was...twenty to thirty thousand on the initial match.

(ECF No. 133-3, PageID.2798.) Subsequently, the Auditor General’s working papers were produced, which indicated that the specific number of deceased matches was more than 27,000. (See ECF No. 133-2, PageID.2713-2786. See also ECF No. 133, PageID.2697 (explaining spreadsheet.)) The deponent did not testify to any demands for “matching criteria” before the Defendant agreed with the audit.

C. Mr. Block’s Report Clearly Demonstrates the Steps Taken.

Mr. Block’s report sets forth the steps he took to create the lists of likely deceased individuals. (See ECF No. 121-2, PageID.2195-2203.) In its Motion, Defendant restyles many of the arguments it made in its Motion in Limine as statements of facts. The Foundation incorporates by reference its responses to the Defendant’s two motions in limine and disputes the accuracy and materiality of Defendant’s statements. (See ECF No. 133, PageID.2692-2711 and ECF No. 141, PageID.2947-2961.) By way of example, Defendant states that Mr. Block “admitted that he has no degree in political science or statistics.” (ECF No. 149, PageID.3045.)

No such degree is necessary under the Federal Rules of Evidence.³ Mr. Block has developed and honed his process, (*see* ECF No. 121-2, PageID.2198, 2200), but the general concept of matching one database to another is hardly novel. (*See* ECF No. 121-3, PageID.2311) (“the provision of the file of people, a database of people, to process through a database like the GLBA, any of the GLBA databases is a pretty common occurrence and their databases match demographic information on individuals every day all day long.”) In fact, Defendant purports to do the same type of matches with information from the SSA. (*See* ECF 86-1, PageID.1424-26.)

Notably, the Michigan Auditor General was able to replicate the process and Defendants own expert testified that he “would do what [Mr. Block] tried to do, but [he] would have provided much more detail about the decisions I made...” (ECF No. 133-6, PageID.2842.)

Defendant inadequately quotes Mr. Block’s report. They quote his explanation of what data normalization is, (ECF No. 149 PageID.3044), and omits significant relevant portions of his analysis. Mr. Block said precisely *which* fields he normalized.

The data elements that we normalized in the Michigan QVF are:

- Registration date
- Registration status code
- Street address information
- Mailing address information

(ECF No. 121-2, PageID.2197-2198.)

Defendant also states that Mr. “Block admits that he does not know what filters were applied for the 2020 list,” (ECF No. 149, PageID.3045), as if the filter holds any significance to

³ Likewise unnecessary is the Secretary’s mischaracterization of Mr. Block as being “initially unclear what [a concept] meant.” (ECF No. 149, PageID.3047.) Rather, as the transcript reflects, Mr. Block was unclear as to defense counsel’s *questions*. For example, counsel asked “What standards do you employ for a process must [sic] be done this way?” Mr. Block said, “I’m still unclear. I mean the answer to that could vary dramatically.... Could you tell me a little bit more about specifically what it is you’re asking for?” (ECF No. 121-3, PageID.2312.)

the results. As Mr. Block explains, “The filter only limited the number of registrants put through the process to determine if the registrant was deceased. Any registrants eliminated using these filters were excluded from any matching and, therefore, not part of this analysis.” (ECF No. 121-2, PageID.2196.)

Further, Defendant criticizes Mr. Block for not watching over the computer as matches were made. (ECF No. 149, PageID.3047.) This is akin to calling into question a credit report because a mortgage lender did not personally watch matches be made. Even more directly, there is no evidence that the Defendant watches over the matches that result in *automatic* removal from the QVF. Mr. Block made it clear that he “was very aware of what and how they did it.” (See ECF No. 121-3, PageID.2339.) As he explained in his deposition:

the important work occurs in the creation, in the iteration of that process bringing it to the point where it’s ready to be used repetitively over and over again. So the oversight that was exercised on this process was in helping to fine tune the process and getting it to the point where the results were deemed as good as we can get them. ... You put the data in and the data comes out and there isn’t really any supervisory work that needs to happen during that time.

(ECF No. 121-3, PageID.2372-73.)

Defendant’s framing of Mr. Block’s testimony demonstrates that factual disputes exist and judgment in Defendant’s favor as a matter of law is inappropriate. Mr. Block’s research was empirical, not theoretical. Meaning, he compared one set of data against another set of data to yield specific results, not a study of what results are likely. The results were given to the Defendant before this case was filed. Also, the key sets of data are and have been available to the Defendant. One set is the QVF that the Secretary is charged with maintaining and the other is data from the SSA, which the Defendant claims to already use. Multiple Rules of Evidence make Mr. Block’s testimony admissible and therefore form a basis to deny summary judgment to Defendant. *See e.g.*, Rule 701.

D. Defendant's Experts Cannot Dispute the Foundation's Findings.

Defendant's experts are both professional academics, neither of whom testified that the findings of Mr. Block and the Auditor General of approximately 27,000 deceased registrants are incorrect. There is nothing in the record that suggests that they were asked to—or ever tried—to determine how many deceased registrants are on the QVF. One of Defendant's experts claimed, “there is no direct way to know for sure if a registered voter has died.” (ECF No. 121-4, PageID.2379.) Importantly, the expert said he would do the match the way Mr. Block did. (ECF No. 133-6, PageID.2842.) When asked how to determine if a specific person is deceased when the social security number is not listed in the QVF, Professor Katz said, “you would need to find some way to impute that missing Social Security number to match it with the public federal deaths.” (ECF No. 133-6, PageID.2848.) This is exactly what Mr. Block did. Defendant's own experts support the methodology of Mr. Block.

Defendant's review of one of the Foundation's lists supports awarding the *Foundation* summary judgment on Count One. Weeks before the deadline for dispositive motions, Defendant caused an employee, Stuart Talsma, *finally* to compare one of the Foundation's two lists of deceased registrants against the current QVF. The result supports a finding of summary judgment in favor of the Foundation on Count One. Indeed, Defendant's own staff confirmed that over 19,000 registrants still remain on the QVF—now multiple *years after these names were first brought to the attention of the Defendant*. (ECF No. 149-10, PageID.3173.)

Defendant's response to being informed about these deceased registrants provides an example of how an election official *should not* act. Instead of earnestly reviewing the data, the Defendant refused to review more than the first ten registrants on a list of tens of thousands, deeming the rest of the list “dubious” based absurdly on this cursory review of ten names. (ECF

No. 149-5, PageID.3128.)⁴ Now the Defendant has compared the full list against the QVF but only as to *the first* of the Foundation's two lists, not the second one. Nevertheless, the Foundation's expert compared the second list as of May 2023 and determined that astonishingly "23,306 out of 27,801 voter identification numbers from PILF's second set of identified likely deceased voters" *still remain* on the QVF. (ECF No. 121-2, PageID.2190.)

As a result of the Foundation's motion to depose Mr. Talsma, the Defendant was ordered to supplement its response to the Foundation's Interrogatory No. 4. Defendant did so on October 19, 2023. Exhibit F. Defendant touts that "only 10,409 remain active voters." (ECF No. 149, PageID.3060.) According to the Foundation's expert, Mr. Block, 51 "active" registrants in the spreadsheet have a "year of birth of 1907 or earlier." Exhibit C at 4. In other words, at least 51 registrants over the age of 116 identified by the Foundation over 3 years ago as deceased *remain* on the Defendant's list of active registrants. That *some* registrants have now been canceled—most of which were for the reason of "deceased"—and more are likely to be canceled in the next four years, is not a safe harbor as a matter of law in the NVRA.⁵ Both the many years it took for these actions, as well as the inadequacy of the cleaning are grounds to deny Defendant's motion.

⁴ Despite Defendant's assertions, the Foundation could not force the Defendant to conduct a full analysis. Once the Defendant did the analysis, the Foundation attempted to take Mr. Talsma's deposition, a request that was rejected by the magistrate judge.

⁵ Mr. Block also identified some discrepancies in Defendant's data. Specifically, Mr. Talsma noted that there were 51 registrants on the Foundation's list for whom there was not a corresponding voter ID number in the current QVF. Mr. Block confirmed that each of these 51 voter ID numbers is listed in the October 2019 version of the QVF in his possession. Further, 20 of the 51 were in the February 2021 QVF, two were in the July 2022 QVF, and one is in the May 2023 QVF provided to the Foundation. Exhibit C at 4-5. As is stated above, the Defendant has not provided the Foundation with the QVF it used in its September analysis so the Foundation cannot verify whether the voter ID numbers are, indeed, not present there. But the discrepancies between the various QVFs in the Foundation's possession raises serious concerns about the Defendant's record keeping practices.

E. Defendant’s Review of Select Neighboring States Does Not Merit a Finding of Summary Judgment.

Defendant’s reliance on its expert’s review of five states near Michigan as evidence that it is in compliance with the NVRA is misplaced. First, two states Defendant chose to consider two states that are entirely exempt from the NVRA - Minnesota and Wisconsin. *See* U.S. Dep’t of Justice, The National Voter Registration Act Of 1993 (NVRA) Questions and Answers, *available at* <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (“Six States (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming are exempt from the NVRA.”) Second, performance in *Michigan* matters. Defendant’s argument is akin to the student who fails a test but tells their parents other classmates failed worse. Arguments to the contrary are irrelevant.

III. Michigan Failed to Allow Inspection of List Maintenance Records.

On December 11, 2020, the Foundation requested, pursuant to the NVRA’s public inspection provision, 52 U.S.C. § 20507(i), to inspect records concerning Defendant’s efforts to remove deceased registrants from the QVF. (ECF No. 1-9, PageID.63-64 (“Inspection Request Letter”).)

The Foundation’s Inspection Request Letter requested to inspect, or receive copies of, a set of documents related to Michigan’s “implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i)(1). (ECF No. 1-9, PageID.64.)

Specifically, Foundation sought to inspect::

- a. Data files [Defendant] has received from the federal [SSA] listing deceased individuals;
- b. Any records relating to the cancelation of deceased registrants from the [QVF], including but not limited to reports that have or can be generated from Michigan’s QVF;

- c. Any records relating to the investigation of potentially deceased registrants who are listed on the QVF, including but not limited to correspondence between [Defendant's] office and local election officials.
- d. All records and correspondence regarding [Defendant's] use of [ERIC] to conduct voter roll list maintenance.

(ECF. No. 1-9 at PageID.63-64.)

Defendant's implication that the Foundation did not alert Defendant of its intention to visit until two days before the intended visit is demonstrably false. (ECF No. 149, PageID.3051.) The Inspection Request Letter stated the plan to send a representative on December 18, 2020, and asked to be alerted should Defendant wish to provide copies of the records instead. (ECF No. 1-9, PageID.64.) It is undisputed that the Defendant received the Foundation's December 11, 2020, Letter. (ECF No. 157, PageID.3276.)

On December 17, 2020, the Foundation received an email from Defendant's office denying the Foundation's request to inspect documents on December 18, 2020. The email did not provide copies of the requested documents. (ECF No. 1-10, PageID.65-66.)

On December 18, 2020, the Foundation sent a letter notifying Defendant that it was in violation of the NVRA for failing to permit inspection and duplication of public records. (ECF ECF No. 1-11, PageID.67-68.) It is undisputed that the Defendant received the Foundation's December 18, 2020, Letter. (ECF No. 157, PageID.3276.)

Pursuant to 52 U.S.C. § 20510(b), "[i]f the violation is not corrected within 90 days after receipt of a notice..." then "the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation." It is undisputed that ninety days following the Foundation's December 18, 2020, Letter is March 18, 2021. (ECF No. 157, PageID.3277.) It is undisputed that Defendant did not respond to the Foundation's December 18, 2020, Letter. (*Id.*)

On January 13, 2021, the Foundation wrote another letter to the Defendant regarding its research. Along with its response, the Foundation provided an additional spreadsheet of the specific registrants that appeared to be deceased. (ECF No 1-13, PageID.72-73.) It is undisputed that the Defendant received this letter. (ECF No. 157, PageID.3277.) It is also undisputed that Defendant did not respond. (*Id.*)

Defendant devotes several pages detailing “[o]ther events occurring contemporaneous with” the Foundation’s requests. (ECF No. 149, PageID.3053-3055.) Even assuming that the Defendant has provided sufficient record citations for these statements, none of them are material to any question before the Court. The NVRA does not contain any omnibus excuse for non-compliance, much less does it contain excuses for non-compliance of the sort Defendant seeks. Defendant does not point to any authority supporting the evaluation of any such evidence in connection with whether or not the Defendant has violated the NVRA. Defendant could have, but did not, communicate with the Foundation to seek more time to respond. Further, even if “Bureau staff were not allowed back into their offices until February of 2021,” (ECF No. 149, PageID.3055,) it cannot be disputed that the Foundation filed this action some *nine months* later, in November of 2021. Equities here weigh substantially in favor of the patient, flexible, earnest, and courteous efforts by the Foundation to obtain records that Congress deemed the Foundation has a right to inspect.

Argument

I. The Foundation Has Not Had Sufficient Time for Discovery.

“[A] court may grant summary judgment based on the rationale that the non-movant lacks evidentiary support...only if the non-movant had ‘a sufficient opportunity for discovery.’”

Scadden v. Werner, 677 F. App'x 996, 999 (6th Cir. 2017) (quoting *Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996).)

As a preliminary matter, because the Foundation has not been permitted to conduct all relevant discovery, it is unable to fully present facts essential to its opposition to the Defendant's motion. Accordingly, pursuant to Federal Rule of Civil Procedure 56(d), and for the reasons stated in the motion filed contemporaneously, the Foundation asks this Court to deny, or defer consideration of, the Defendant's motion for summary judgment.

II. Michigan Has Failed to Maintain a General List Maintenance Program that Makes a Reasonable Effort to Remove the Names of Deceased Registrants.

For all the reasons stated above, Defendant has failed to maintain a general list maintenance program that makes a reasonable effort to remove the names of deceased registrants. Defendant relies upon two out-of-circuit cases in support of its motion, neither of which concerns a motion for summary judgment. The first case, *Bellitto v. Snipes*, was decided following a five-day bench trial. *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *2-3 (S.D. Fla. Mar. 30, 2018).⁶ In fact, the defendant sought summary judgment before trial and its motion was denied. There, the defendant argued that summary judgment is appropriate given that “the undisputed facts definitively establish that [defendant's] removal program is ‘reasonable under the statutory standard.’” *Bellitto v. Snipes*, 302 F. Supp. 3d 1335, 1357 (S.D. Fla. 2017). The court noted that the plaintiff had provided evidence of a very high registration rate in the county as compared to the rest of the country and stated that “the Court

⁶ The Eleventh Circuit noted that it “review[s] for clear error factual findings made by a district court after a bench trial...a highly deferential standard of review.” *Bellitto v. Snipes*, 935 F.3d 1192, 1197 (11th Cir. 2019) (internal quotations and citations omitted.) The court stated that “we can discern *no clear error* in the district court's finding that Supervisor Snipes made reasonable efforts to remove registrants from the voter rolls on account of death or relocation.” *Id.* at 1205 (emphasis added.)

must accept the evidence provided by...the non-movant, and draw all reasonable inferences in its favor.” *Id.* at 1357. Here, not only has the Foundation provided evidence of likely deceased registrants lingering on the voter rolls, the Foundation also presents evidence that the Defendant’s program suffers from such flaws as not comparing death records to the QVF directly at all.

Further, *Bellitto* involved the evaluation of a Florida county’s list maintenance procedures, not Michigan’s procedures. Following the presentation of evidence at the bench trial, the *Bellitto* court considered it important whether a jurisdiction “[u]ses information from the state health department or other similarly reliable sources to identify voters who have recently died to update its voter rolls and remove deceased individuals from the rolls.” *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *21 (S.D. Fla. Mar. 30, 2018). Here, Defendant does not use such information to identify voters but, rather, to identify license holders in its CARS database. At minimum, there are tens of thousands of registrants with no presence in CARS that are never compared against the death information received by the Defendant.

The second case Defendant relies upon is *Public Interest Legal Foundation v. Boockvar*. The decision cited by the Defendant was the denial of a motion for preliminary injunction, *not* the adjudication of a motion for summary judgment. At such a preliminary stage, before any discovery was conducted, the court found that “[w]ithout allegation, let alone proof, of a specific breakdown in Pennsylvania’s voter registration system, we cannot find that the many procedures currently in place are unreasonable.” *Pub. Interest Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 359 (M.D. Pa. 2020). In contrast, the record here contains evidence of breakdowns and flaws in the Defendant’s systems. Further, the *Boockvar* case did not proceed to discovery much less dispositive motions because the parties negotiated in good faith and chose to settle the

litigation. Less than six months after the case was filed, the parties entered into a stipulation under which Pennsylvania agreed to take remedial action and pay the Foundation attorney's fees, costs, and expenses. *See* Settlement Agreement and Release, *available at* <https://publicinterestlegal.org/pilf-files/Settlement-Agreement-Executed-by-PILF-and-secretary.pdf>.

Fundamentally, Defendant argues incorrectly, without citation, that "PILF claims that Michigan's program is unreasonable based entirely upon the number of 'potentially deceased' voters...." (ECF No. 149, PageID.3058.) Not so. As an initial matter, the Foundation's research is not on trial here but, rather, the Defendant's program is. More importantly, to argue that the Foundation's claims are "based entirely" on its research is misleading and shortsighted. The Foundation articulated a non-exhaustive list of twelve reasons why the Defendant's list maintenance as to deceased registrants is unreasonable in its response to Defendant's Interrogatory No. 9.

In no particular order, the first reason that Defendant's program for removing deceased registrants is unreasonable is that the Defendant does not compare information received from the [SSA] directly against the [QVF].

Second, as to information provided by the [SSA], the Defendant relies on monthly updates and does not, at any point, compare its entire database against the [SSA]'s cumulative list of individuals who have died.

Third, the Defendant does not compare information received from the [MDHHS] directly against the [QVF].

Fourth, as to information provided by the [MDHHS], the Defendant relies on monthly updates and does not, at any point, compare its entire database against the cumulative list of individuals who have died.

Fifth, the information in the [QVF] and the State of Michigan's Drivers' File is not uniform and Defendant knows of differences between the two even as to individuals that have a presence on both files. Further, there are approximately 82,000 individuals who are on the [QVF] but not on the State of Michigan's Drivers' File and, therefore, are not being compared against information received from the [SSA]

or the [MDHHS] at all. The 82,000 number is subject to increase as individuals are removed from the Drivers' File.

Sixth, Defendant has a known history of inadequate reconciliation between the [QVF] and the State of Michigan's Drivers' File that caused deceased individuals to remain on the [QVF], even after being subject to a state audit, and having the Foundation point out the deficiencies in Defendant's processes.

Seventh, the Defendant performs voter list maintenance using information provided by a third party, [ERIC], without knowing the methodology the organization employs.

Eighth, the Defendant does not have a policy or procedure, or at minimum not a reasonable policy or procedure, to receive, investigate, or resolve reports of deceased registrants provided by third parties other than [ERIC].

Ninth, Defendant failed to investigate the Foundation's list of potentially deceased registrants and failed to meet with the Foundation despite its many requests to do so.

Tenth, Defendant was informed on September 18, 2020, that its voter rolls contained tens of thousands of potentially deceased registrants. Defendant was subsequently notified on October 5, 2020, November 25, 2020, and January 13, 2021, regarding potentially deceased registrants remaining on its rolls. On October 5, 2020, and January 13, 2021, the Foundation provided Defendant with the voter ID numbers of tens of thousands of potentially deceased registrants it found. As Mr. Block described in his report, of the 27,801 potentially deceased registrants the Foundation identified to the Secretary in January 2021, 23,306 remain on the rolls as of May 1, 2023.

Eleventh, the Defendant has apparent and known "placeholder" and "implausible" dates of birth on the [QVF] and has not taken adequate steps to investigate or otherwise correct these dates.

Twelfth, Defendant's records concerning deceased cancellations contain errors, with some individuals listed in a cancellation report remaining on the [QVF] well after the stated date of cancellation.

Exhibit G at 3-5. The Foundation's claims are supported by record evidence, including fact and expert witness testimony. Summary judgment should not be granted to the Defendant as to Count One. At worst, a genuine factual dispute exists.

III. Michigan Failed to Allow Inspection of Records Pursuant to the NVRA.

A. The Foundation Has Standing to Bring this Suit.

This Court has already determined that the Foundation has standing when it resolved Defendant's motion to dismiss. (ECF No. 35, PageID.390-395.) The Court noted, "With regard to Count II, PILF's records claim, the Supreme Court has held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information that must be publicly disclosed pursuant to a statute. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998)." (ECF No. 35, PageID.390.) It is undisputed that prior to the filing of this litigation, the Foundation requested from the Secretary four categories of voter list maintenance records pursuant to the NVRA's Public Disclosure Provision: (1) data from the SSA, (2) QVF cancelation records, (3) records relating to the investigation of potentially deceased registrants, and (4) ERIC records. (ECF. No. 1-9 at PageID.63-64, ECF No. 157, PageID.3276.) It is undisputed that the requested documents "concern" list maintenance activities—here, the documents are both used for and reflect those activities. (ECF No. 154, PageID.3215-3216.) Michigan's Director of Elections himself classified what the Foundation requested as "records about voter list maintenance." (ECF No. 154-4, PageID.3248.) It is also undisputed that the Secretary did not provide the Foundation with any of the requested records prior to the filing of this lawsuit. (ECF No. 157, PageID.3276.)

Defendant acknowledges the law of the case but asks this Court to reconsider its decision in light of an out-of-circuit case from 2022. (ECF No. 149, PageID.3062.) Defendant's request should be denied.

1. The Foundation Has Suffered an Informational Injury.

The Informational Injury Doctrine is decades old. The Supreme Court explained that to establish standing in public-records cases, the plaintiff "need show [no] more than that they

sought and were denied specific agency records.” *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989). In *Public Citizen*, the plaintiff sought records pursuant to the Federal Advisory Committee Act (“FACA”). The Supreme Court held that FACA created a public right to information by requiring advisory committees to the executive branch of the federal government to make available to the public its minutes and records, with some exceptions. 491 U.S. at 446-47. The defendant asserted that the plaintiff did not “allege[] [an] injury sufficiently concrete and specific to confer standing.” *Id.* at 448. The Supreme Court “reject[ed] these arguments.” *Id.* at 449.

The Court reaffirmed the holding of *Public Citizen* in *FEC v. Akins*, 524 U.S. 11 (1998), explaining, “a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” *Id.* at 21.

Citing *Public Citizen* and *Akins*, the Eastern District of Virginia explained that “[f]or a plaintiff to sufficiently allege an informational injury, it must first allege that the statute confers upon it an individual right to information, and then that the defendant caused a concrete injury to the plaintiff in violation of that right.” *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 702 (E.D. Va. 2010). The court first recognized that “the NVRA provides a public right to information.” *Id.* at 703. Where there is “no dispute that the plaintiff has been unable to obtain the [r]equested [r]ecords,” “the plaintiff’s alleged informational injury is sufficient to survive a motion to dismiss for lack of standing.” *Id.* at 703-04.

For similar reasons, the Southern District of Texas ruled that the Foundation had standing to compel citizenship-related list maintenance records under the NVRA. *Pub. Interest Legal Found. v. Bennett*, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *8-*10 (S.D. Tex. Feb. 6, 2019) (denying motion to dismiss), *adopted by Pub. Interest Legal Found., Inc. v. Bennett*, No.

4:18-CV-00981, 2019 U.S. Dist. LEXIS 38686 (S.D. Tex. Mar. 11, 2019). The Southern District of Indiana accords. *See Judicial Watch, Inc. v. King*, 993 F.Supp.2d 919, 923 (S.D. Ind. 2012) (citing *Akins*, 524 U.S. at 24-25) (“As noted above, the Plaintiffs assert two distinct violations of the NVRA. With regard to the Records Claim, the Defendants do not—and cannot—assert that the Plaintiffs lack standing.”).

2. The Foundation Has Suffered “Downstream Consequences.”

The case cited by the Defendant is distinguishable from this case. There, the plaintiffs sought “information including the names and voter identification numbers of persons suspected of being noncitizens though registered to vote.” *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 932-933 (5th Cir. 2022). Plaintiffs “obtained an injunction from the district court requiring the State of Texas to provide [this] information.” *Id.*

On appeal, the Fifth Circuit reversed and remanded with instructions to dismiss, holding that the plaintiffs did not adequately allege an injury sufficient to establish standing. *Id.* at 939. The Fifth Circuit interpreted the Supreme Court’s decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), to mean that “even in public disclosure-based cases, plaintiffs must and can assert ‘downstream consequences,’ which is another way of identifying concrete harm from governmental failures to disclose.” *Scott*, 49 F.4th at 938.

The Court explained:

On appeal, Plaintiffs attempt to establish standing by asserting three theories of informational injury standing. First, Plaintiffs contend that as “civic engagement organizations . . . [they] have standing to request records under the NVRA[.]” and therefore have a right to the requested registrant records. Second, they maintain that “there is [a] downstream injury with respect to the public not having visibility into how Texas is keeping its voter lists[.]” Third, Plaintiffs assert that “there is [a] downstream injury with respect to the public not having visibility into . . . properly registered Texans being discriminated against and burdened in their right to vote.” The first theory was rejected by this court only a few weeks ago, and the other two

theories encompass no more than alleged injuries to *the public* and *affected Texas voters* writ large.

Scott, 49 F.4th at 936 (emphasis added). The Court noted further, “They do not allege that identification of voter names and identification numbers will directly lead to action relevant to the NVRA or any other statute, nor that their direct participation in the electoral process will be hindered.” *Id.* at 938.

The Foundation’s complaint satisfies the *Scott* standard because it alleges both an information injury and additional injuries, or “downstream consequences,” *Scott*, 49 F.4th at 937, caused by the deprivation of information.

Paragraph 3 of the Complaint describes the Foundation’s programmatic activities that are relevant to this action. Specifically, the Foundation alleges that it “seeks to promote the integrity of elections in Michigan and other jurisdictions nationwide through research, education, remedial programs, and litigation.” (ECF No. 1, PageID.2.) “The Foundation communicates with election officials about problems or defects found in list maintenance practices and about ways to improve those practices.” (*Id.*) Further, “[t]he Foundation relies on accurate voter rolls to conduct analyses and to educate the public in Michigan and across the nation about the integrity of their elections.” (*Id.*)

The NVRA requires Michigan to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . the death of the registrant.” 52 U.S.C. § 20507(a)(4)(A). The requested records concern that general program. The alleged injuries thus include impairment of “action relevant to the NVRA,” *Scott*, 49 F.4th at 936, namely, assessment of Michigan’s compliance with that NVRA obligation.

Whereas the plaintiffs in *Scott* alleged speculative injuries to others not before the court, *Scott*, 49 F.4th 936 (“*the public and affected Texas voters writ large*) (emphasis added), the Foundation alleges concrete and imminent injuries to *itself* that are directly traceable to Defendant’s refusal to disclose information under the NVRA. Defendant’s actions are preventing the Foundation from engaging in regular, identifiable, programmatic activities that have a nexus to the interests Congress sought to protect via the NVRA.

The “downstream consequences” the Foundation identifies are consistent with the examples articulated by the *Scott* concurrence:

There may be any number of ways that Plaintiffs here can establish a ‘downstream consequence’ that they will suffer if denied the information they seek. Perhaps the information is necessary to engage in public advocacy about a pressing matter of policy—as was the case for Washington Legal Foundation and others in *Public Citizen*. Perhaps the information is essential to furthering Plaintiffs’ mission to protect the voting rights of various communities.

Scott, 49 F.4th at 940 (Ho, J., concurring in the judgment).

For these reasons, the Foundation satisfies the standard for standing articulated in *Scott*.

B. Defendant’s Denial of Access to List Maintenance Records Violates the NVRA.

It is not up to the Defendant to decide which records are covered by the NVRA’s Public Disclosure Provision. Congress has already done that. The law requires public disclosure of “**all records** concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]” 52 U.S.C. § 20507(i)(1) (emphasis added). As articulated in the Foundation’s Motion for Summary Judgment, each of the requested records fall squarely within the scope of this disclosure command. (ECF No. 154, PageID.3221-3225.) The Foundation incorporates by reference its discussion of the specific records at issue.

Defendant does not dispute that the Foundation properly made a request pursuant to the NVRA. (ECF No. 149, PageID.3064.) Defendant does not dispute that the Foundation requested records that are subject to the NVRA. (ECF No. 149, PageID.3064.) Defendant does not dispute that it provided *zero* records prior to the filing of this suit. (ECF No. 149, PageID.3064-65.) None. Yet, Defendant contends that *it* should be granted summary judgment as to Count II. Why? Because Defendant *was busy* when the Foundation requested to see the documents and, in its opinion, “it is far from clear that all of the documents” sought by the Foundation “are actually records subject to disclosure under the NVRA.” (ECF No. 149, PageID.3065.)

The NVRA’s Public Disclosure Provision furthers Congress’s purposes by allowing the public to monitor, analyze, assess, and critique the work of election officials. Transparency fosters accountability. To allow the Defendant to determine what records are accessible, and when they are accessible, would thwart the purpose of the provision.

In the words of *Bellitto*, the NVRA’s Public Disclosure is

available to any member of the public ... and convey[s] Congress’s intention that the public should be monitoring the state of the voter rolls and the adequacy of election officials’ list maintenance programs. [52 U.S.C. § 20507(i)]. Accordingly, election officials must provide full public access to all records related to their list maintenance activities, including their voter rolls. *Id.* This mandatory public inspection right is designed to preserve the right to vote and ensure that election officials are complying with the NVRA. *Project Vote v. Long*, 682 F.3d. 331, 335 (4th Cir. 2012).

Bellitto, 2018 U.S. Dist. LEXIS 103617, at *12-13. Indeed, Congress made all list maintenance records subject to public inspection precisely so that the public can enjoy a transparent election process and assess compliance with federal laws. “Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections.” *Project Vote*, 682 F.3d at 339-40.

Defendant's position would shield the Defendant from public scrutiny of records showing what response or action an election official took after being alerted to a serious problem. Defendant did not provide the very records cataloging her response to the credible prospect that over 27,000 active registrants on Michigan voter rolls were dead, some for decades. That is precisely the sort of information Congress made subject to inspection in the NVRA.

This emphasizes the need for a permanent injunction in this matter. (ECF No. 154, PageID.3226-3228.) A permanent injunction is necessary to prevent the Defendant from unilaterally vetoing the public's inspection rights at the moment they are most needed.

Conclusion

The NVRA requires Defendant to conduct reasonable list maintenance and allow inspection of list maintenance records. Defendant has failed to do both and Defendant's motion for summary judgment should be denied.

Dated: October 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to each ECF participant.

Dated: October 30, 2023

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Plaintiff