No. 24-01255

IN THE

United States Court of Appeals
for the Sixth Circuit

PUBLIC INTEREST LEGAL FOUNDATION

Plaintiff-Appellant

v.

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

Defendant-Appellee

ELECTRONIC REGISTRATION INFORMATION CENTER, INC.

Movant-Appellee

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

APPELLANT'S REPLY BRIEF

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Under the district court's interpretation, only a state that lacks any state voter roll list maintenance statutes could be liable under Section 8 of the NVRA. Instead, as the Foundation argued in its Opening Brief, the NVRA's requirement of "a reasonable effort" must mean something more than merely having a statutory program.

The Secretary's brief supporting the district court's decision is long in length but short on support for the district court's finding that there is no genuine issue of material fact whether the Secretary's program satisfies the NVRA's requirement of reasonable effort. Likewise, the Electronic Registration Information Center's (ERIC) response cannot support the denial of *any* discovery into the organization's squarely relevant activities.

ARGUMENT

I. This Appeal Squarely Presents the Question of Whether "Reasonable Effort" Is a Fact-Intensive Inquiry or a Legal Question.

This is the first time a Circuit Court has been presented with the opportunity to review the granting of summary judgment on the question of whether a state is making a "reasonable effort." This appeal squarely presents the question of whether "reasonable effort" is indivisible from a factual inquiry, or a mere legal question. The Foundation contends the question of "reasonable effort" is indivisible from a factual inquiry and summary judgment is warranted in only the

most extraordinary circumstances in a NVRA Section 8 case. (Doc. 21 at 22-25.) The Secretary contends that "whether Michigan's program meets the NVRA requirement of a 'reasonable effort' is a legal question, not a factual one that precludes summary judgment." (Doc. 35 at 51-52.) The Secretary would undo the compromise that led to the passage of the NVRA.

A. *Bellitto* Acknowledged that the Question of "Reasonable Efforts" Is Fact Intensive.

Contrary to the Secretary's reliance on *Bellitto v. Snipes*, 935 F.3d 1192 (11th Cir. 2019), the district court agreed that reasonable effort was indivisible from a factual inquiry. There, "[t]he district court denied summary judgment… concluding that whether [the election official] actually conducted an adequate general program of list maintenance to remove voters who had moved or died was a fact-intensive question, more appropriately resolved after a full airing at trial…." *Bellitto*, 935 F.3d at 1197.

The court explained,

> The district court concluded, ***as a legal matter***, that the NVRA requires the state or the County to create a program of list maintenance that makes a reasonable effort to remove voters who become ineligible only by reason of death or change of address, and that, ***as a matter of fact***, the evidence established that Snipes had made an adequate effort to do so, availing herself of the NVRA's change-of-address safe harbor and relying on state and Social Security administration death records in order to identify and remove deceased voters.

Id. (emphasis added).

That the Eleventh Circuit could "discern no clear error in the district court's finding," *id*. at 1195, does not support the Secretary's position that factual inquiries have no place in a Section 8 analysis. That determination was made on a different standard of review than is applicable here, with findings of fact and conclusions of law following an extensive bench trial that did not occur here.

B. Other Contexts Demonstrate that the Question of "Reasonable Efforts" Is, Necessarily, Fact Intensive.

Because this Circuit has never considered what the NVRA means by "reasonable effort," how other courts, including this one, have interpreted and applied "reasonable" in other contexts supports that reasonableness is indivisible from a factual inquiry. (*See* Doc. 21 at 22-23.) The Secretary stubbornly dismisses how other courts have interpreted "reasonable" as having nothing to add here and confines "reasonable" to a mere legal question.

Consider the application of the Secretary's interpretation in the context of a dispute over a trade secret like this Court encountered in *Niemi v. NHK Spring Co*., 543 F.3d 294 (6th Cir. 2008). There, the district court granted the defendant's motion for summary judgment on a misappropriation of trade secret claim. The law at issue defined trade secret, in relevant part, as "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Id*. at 299. Plaintiff

was tasked with proving that his efforts were *reasonable* and "the district court held that [the plaintiff] had presented 'no evidence of affirmative acts . . . to maintain the secrecy of the designs.'" *Id*. This Court "conclude[d] that the district court's summary judgment ruling on the claim for misappropriation of trade secret was in error." *Id*. at 303. This Court considered, and distinguished, the defendant's reliance on another district court's determination of *reasonableness*.

> New Mather also cites *Hoffmann-La Roche Inc. v. Yoder,* 950 F. Supp. 1348 (S.D. Ohio 1997). In [*Hoffmann-La Roche*]*,* the district court denied injunctive relief, finding that controverted evidence of a confidentiality agreement and other reasonable efforts was insufficient to sustain the plaintiff's burden. In some respects, the factual record presented in [*Hoffmann-La Roche*] is analogous to the instant record. However, the [*Hoffmann-La Roche*] court premised its award of judgment to the defendant on detailed fact findings only *after* conducting a full-blown trial, making credibility determinations, and carefully weighing the evidence. The plaintiff in [*Hoffmann-La Roche*] thus received precisely what Niemi wants: his day in court. Although Niemi's showing of reasonable efforts, on paper, may appear to be no stronger than that described in [*Hoffmann-La Roche*]*,* it is nonetheless sufficient to win for Niemi what [Hoffmann-La Roche] was granted, the opportunity to tell his story in a trial.

Niemi, 543 F.3d at 303. According to this Court, "except where the evidentiary showing of reasonable efforts could not conceivably support a judgment in favor of the plaintiff, the reasonableness of the efforts is a question for the trier of fact." *Id*. *Niemi* provides support for reversal.

Like the losing defendant in *Niemi*, the Secretary dismisses the Foundation's evidence as irrelevant and claims that judgment as a matter of law is appropriate. Like the losing defendant did regarding *Hoffmann-La Roche*, the Secretary also relies heavily on the *Bellitto* court's interpretation of "reasonable efforts." Note the expansive questions of fact the Foundation has presented here—thousands of dead registrants, similar findings of problems by the state auditor, voters on the rolls decades after death, and on and on. These are factual issues squarely implicating reasonableness.

C. The Secretary's Recitation of Facts Emphasize the Factual Nature of this Case.

That the question of reasonableness here is fact intensive is demonstrated in the sheer length of the Secretary's factual recitations. (Doc. 35 at 5-31.)[1] Of course, the mere existence of laws and procedures does not entitle the Secretary to anything, particularly judgment. Aspirational procedures and statutes do not resolve the question of whether efforts are reasonable.

[1] The Foundation responded to the "essentially identical" (Doc. 35 at 64) recitation of facts below. (*See* Foundation's Opposition, R. 168, Page ID # 3406-3446; Foundation's Reply, R. 178, Page ID # 3614-3633).

II. Multiple Genuine Issues of Material Fact Exist Whether the Secretary Has a Reasonable List Maintenance Program to Remove Deceased Registrants.

A. There Are Genuine Factual Disputes about Whether the Presence of Tens of Thousands of Deceased Individuals on the QVF Is Reasonable.

The Secretary does not contest the presence of tens of thousands of deceased registrants on the active voter rolls, and this creates a genuine issue of material fact. At no point does the Secretary contest the accuracy of the Foundation's data. Further, she entirely ignores the Michigan Auditor General's two relevant reports on her list maintenance practices pertaining to deceased registrants and the Auditor General's independent analysis of deceased registrants on the QVF. (*See* Doc. 21 at 28-29.) Either, standing alone, create a genuine issue of material fact.

At no point does the Secretary ever contend the 27,000 deceased registrants identified by the Foundation are actually alive. The Secretary points to an analysis done by an employee as to the earlier of the Foundation's two lists,[2] but even that demonstrates that the Foundation's data shows 2,024 registrants listed as "Active" that are 100 years old or older, 126 registrants born between 1900 and 1910, 1,139 registrants born between 1911 and 1920, and 759 registrants born between 1921

[2] The Foundation cannot replicate this analysis because the Secretary has not provided the QVF used. This bolsters the Foundation's request to depose Mr. Talsma.

and 1923. (Decl., R. 168-3, Page ID # 3458.) The number of active supercentenarians on the list is next to impossible and creates a genuine issue of material fact as to whether something has gone awry in Michigan's program.

Further, even as to the registrants on the Foundation's list that the Secretary *eventually* removed, the *grossly belated removal* provides an additional reason why a genuine issue of material fact exists. The Foundation's expert determined the average number of days between when the registrant was marked as deceased in the QVF and the listed date of death is 1,940, which is over 5 ***years***. (Decl., R. 168-4, Page ID # 3464.)

Regardless, the numbers are the numbers, and at worst, a genuine issue of material fact exists regarding how many tens of thousands of dead registrants are on the voter rolls, how long they have been dead on the rolls, and the adequacy of the Secretary's response. These are factual disputes lying at the heart of the list maintenance provisions of the NVRA.

B. There Are Genuine Factual Disputes about Whether the Secretary Follows Michigan Election Statutes and Procedures.

Adding factual insult to injury, there are genuine issues of material fact whether the Secretary is following Michigan statutes, specifically Mich. Comp. Laws § 168.509o. This statute requires the Secretary 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." Mich. Comp. Laws § 168.509o(4). The record raises genuine issues of material fact whether the Secretary was even following this law. Namely, she compares the social security information she receives to the *driver's file*, not the *voter file*, the "QVF." (*See* Doc. 21 at 29-32.) Compliance with the statute to maintain the voter file free from deceased voters is not accomplished by cleaning the driver's license file. They are not the same.

C. The Applicability and Reliability of Election Assistance Commission Data Is a Genuine Issue of Material Fact.

As to the question of whether the Election Assistance Commission (EAC) data is applicable and reliable, the Secretary claims this "does not address a 'material fact' because regardless of whether Michigan's program is the sixth most effective in the nation or not, it is definitely not the worst." (Doc. 35 at 46.) Yet, the Secretary relies on the EAC data to support her position that the program is reasonable despite EAC data having well known inaccuracies. (Doc. 35 at 30-31); *see Judicial Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d 399, 406 (M.D. Pa. 2021). Importantly, the district court incorrectly found that EAC data was "fatal to PILF's claim that Michigan's program does not represent a reasonable effort to remove the names of deceased voters from the QVF." (R. 180, Page ID # 3657.)

Allowing EAC data—data which has been found to be inaccurate in other court proceedings—to smother all other factual disputes is reversable error. At worst for the Foundation, the Secretary may rely on EAC data at trial subject to the Foundation presenting witnesses to describe the history of inaccuracy in these data. It is a factual question.

D. Totality of the Circumstances Create a Factual Dispute.

The Secretary dismisses the cumulative "totality of the circumstances" for the failure to remove dead voters from the rolls by shirking the responsibility onto local township clerks. She incorrectly claims that "local clerks have primary responsibility for maintaining the voter rolls for their jurisdiction, including cancelling registrations for deceased persons." (Doc. 35 at 19.) This is flat wrong under 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. The Secretary is the chief State election official for the State of Michigan. Mich. Comp. Laws § 168.21. Also, in the very same paragraph, the Secretary contends that local clerks entered "between 20 and 30% of 'deceased' cancellations." (Doc. 35 at 19.) Meaning, the *vast majority* were done by the Secretary, yet she still claims the local clerks have "primary responsibility."

While the Secretary recites the process local clerks *may* follow, it does not provide any evidence that the local clerks, in fact, *do or must* follow the process. While there is a process authorized by statute, there remains a question of fact regarding whether any local clerk is actually following it.

III. The NVRA Requires a "Reasonable" List Maintenance Effort.

Whether Michigan's dead removal program is reasonable is indivisible from a factual inquiry. The NVRA requires election officials 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" death and change of address. 52 U.S.C. § 20507(a)(4) (emphasis added).[3]

A. The History of the Passage of the NVRA Is an Important Tool for Considering the Novel Issues Presented in this Case.

The Secretary opposes the Foundation's discussion of the history of the passage of the NVRA as unnecessary "[b]ecause the plain language is clear." (Doc. 35 at 55.) This is a disservice to a thorough examination of the novel issues here. The Foundation devoted an entire section to the history and passage of the NVRA

[3] The Secretary decides, without authority, that this obligation is "modest." (Doc. 35 at 3.) The Secretary criticizes the Foundation's use of a website dictionary for the definition of "reasonable," claiming a hard-bound copy provides "greater precision and guidance than what is provided on a free website." (Doc. 35 at 54.) In the end, any pedantic distinctions between the dictionaries cited make no difference in the analysis. None of the definitions include the words the Secretary uses: "modest" and "relatively modest." (Doc. 35 at 3, 51.)

because the addition of "reasonable effort" language was central to the passage of the NVRA. (Doc. 21 at 17-20.) *Amici* in support of the Foundation likewise provided extensive analysis of why the history of the passage matters. (*Amicus Curiae* Brief of Restoring Integrity and Trust in Elections, Doc. 25 at 8-15; *Amicus Curiae* Brief of Republican National Committee, Doc. 27 at 15-16.) As *amicus* Restoring Integrity and Trust in Elections put it, "Simply put, legislators understood a 'reasonable effort' as demanding a sustained, genuine effort to keep deceased and out-of-state voters off the voter rolls. Repeatedly, the expectation was that States would maintain 'accurate' lists." (Doc. 25 at 15.)

The parties here disagree on what "reasonable effort" means, but no credible meaning can be divorced from a factual inquiry. The circumstances of the Act's passage illuminate the core importance of clean rolls. The Secretary ignores it.

B. The Supreme Court, in Upholding Ohio's Vigorous List Maintenance Efforts, Did Not Need to Address the Meaning of "Reasonable Effort."

The Secretary also misreads the Supreme Court's opinion in *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756 (2018). At issue in that case was Ohio's "procedures to identify and remove voters who have lost their residency qualification." *Husted*, 584 U.S. at 765. The dead were not at issue.

Specifically, Ohio had two procedures regarding registrants who may have *moved*. One was "the Postal Service option set out in the NVRA[,]" which the Court deemed "undisputedly lawful." *Id.* (citing 52 U.S.C. § 20507(c)(1)). But Ohio did not stop there. The Court noted that "because according to the Postal Service '[a]s many as 40 percent of people who move do not inform the Postal Service,' Ohio does not rely on this information alone." *Id*. The Court upheld Ohio's list cleaning process in its entirety, *id*. at 779, pointing out that "[i]t has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate," *id*. at 760.

The Court dismissed the dissent's argument that "Ohio's process violates §20507(a)(4), which requires States to make a 'reasonable effort' to remove the names of ineligible voters from the rolls." *Id*. at 778. "Whatever the meaning of §20507(a)(4)'s reference to reasonableness, the principal dissent's argument fails since it is the federal NVRA, not Ohio law, that attaches importance to the failure to send back the card." *Id*. In other words, the Court did not need to address what "reasonable effort" meant because "Ohio's Supplemental Process follows [52 U.S.C. § 20507(d)] to the letter." *Husted*, 584 U.S. at 767. *Husted* upheld Ohio's vigorous scrubbing of its voter rolls for those who have moved, not those who died. Congress has not set forth limitations on removing deceased registrants like it

did for those who have moved. *Husted*'s reasoning does not support the Secretary's position.

IV. The Foundation Is Entitled to Summary Judgment that the Secretary Failed to Comply with the Public Disclosure Provision.

The Secretary concedes that she did not respond to the Foundation's request to inspect records. (Doc. 35 at 47.) The Secretary excuses her failure to act to "[o]ther events occurring contemporaneous with PILF's requests to inspect documents." (Doc. 35 at 34.) But the NVRA does not provide for excuses for lack of compliance. The record shows that the Foundation reached out multiple times and offered to receive the records electronically. (R. 1-9, Page ID # 64, R. 1-10, Page ID # 66.) The record also shows that the Foundation was physically present in the Secretary's office in October 2020. (R. 1-7, Page ID # 54.) The Secretary did not communicate with the Foundation to seek more time to respond nor choose to provide documents electronically. Further, even if "Bureau staff were not allowed back into their offices until February of 2021," (Doc. 35 at 35), the underlying complaint was not filed until November 2021.

A. There Are Categories of Documents that Have Not Been Provided.

The Secretary incorrectly claims that the Foundation "does not dispute that it has been provided every requested document relating to voter registration through

discovery." (Doc. 35 at 4.) That is news to the Foundation as it identified several categories of records it *still has not received*, including 1) Data in the Secretary's possession from the Social Security Administration (Doc. 21 at 45-46); 2) Records Relating to the Investigation of Potentially Deceased Registrants (Doc. 21 at 48-49); and, 3) All records and correspondence regarding the Secretary's use of ERIC to conduct voter roll list maintenance, (Doc. 21 at 49-50). The Secretary continues to press that "[i]t is far from clear" that the records the Foundation sought "are records subject to disclosure under [the] NVRA." (Doc. 35 at 75.) Because the Secretary failed to provide requested documents covered by the NVRA, and continues to refuse to provide them, the Foundation is entitled to summary judgment and the District Court should be reversed.

B. The Foundation Has Standing.

The Secretary incorrectly argues that the Foundation "lacked standing to bring its claim where it failed to demonstrate any actual injury." (Doc. 35 at 79.) According to the Secretary, "[t]he district court did not reach this issue because it determined that PILF's claims were moot." (Doc. 35 at 79.) But the Secretary neglects the district court's finding that the Foundation had standing as to Count II when it resolved the Secretary's motion to dismiss. "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.) At the summary judgment stage, the Secretary asked the district court to reconsider its reliance on a Supreme Court decision and, instead, follow an out-of-circuit case from 2022. (Secretary's Motion, R. 166, PageID. # 3349.) The district court did not, and now, the Secretary seeks to have this Court find that the Foundation lacks standing. The Foundation has standing. (*See* Foundation Reply, R. 178, Page ID # 3622-3625.)

1. The Foundation Has Suffered an Informational Injury.

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). The Supreme Court reaffirmed the holding of *Public Citizen* in *Akins*, 524 U.S. 11. *See also Public Interest Legal Found., Inc. v. Bellows*, 664 F. Supp. 3d 153, 166 (D. Me. 2023) (citing *Akins*, 524 U.S. at 21).

2. The Foundation Has Suffered "Downstream Consequences."

Campaign Legal Center v. Scott, in addition to being out of circuit, is distinguishable. (Doc. 35 at 79-80.) There, the plaintiffs sought "information including the names and voter identification numbers of persons suspected of being

noncitizens though registered to vote." *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*. at 933.

On appeal, the Fifth Circuit reversed and remanded with instructions to dismiss, holding that the plaintiffs did not adequately allege a sufficient injury 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.

Id. at 936 (emphasis added).

The Foundation's Complaint satisfies the *Scott* standard because it alleges both an information injury and additional injuries, or "downstream consequences," *Id*. at 937, caused by the deprivation of information.

The Secretary misconstrues the Foundation's injury in this case. (Doc. 35 at 81.) The Foundation's Complaint describes the Foundation's programmatic activities that are relevant to this action. Even the portion of the record the Secretary cites for its argument states that the Secretary's violation "prevents the Foundation from engaging in its research, educational, and remedial activities." (*Id*. (citing R. 1, Page ID # 19 ¶ 71).) The Foundation also alleges that it "seeks to promote the integrity of elections in Michigan and other jurisdictions nationwide through research, education, remedial programs, and litigation." (R. 1, Page ID # 2.) Further, "[t]he Foundation communicates with election officials about problems or defects found in list maintenance practices and about ways to improve those practices." (*Id*.) The Secretary has impaired the accumulation of institutional knowledge to assist and inform these core functions, knowledge informed by state's compliance with the NVRA. The Foundation's injuries thus exceed the mere deprivation of information.

Whereas the plaintiffs in *Scott* alleged speculative injuries to others not before the court, 49 F.4th at 936 ("*the public* and *affected Texas voters* writ large),

the Foundation alleges concrete and imminent injuries to *itself* that are directly traceable to the Secretary's refusal to disclose information under the NVRA. The "downstream consequences" the Foundation identifies are consistent with the examples articulated by the *Scott* concurrence, including the need "to engage in public advocacy about a pressing matter of policy." *Scott*, 49 F.4th at 940 (Ho, J., concurring in the judgment). *See also*, *United States v. McDowell*, No. 3:19-cr-14-RGJ, 2023 U.S. Dist. LEXIS 161185, at *6-7 (W.D. Ky. Sep. 11, 2023) ("Smithers also appears to satisfy the Fifth Circuit's interpretation, which suggests that a downstream consequence includes the inability to use the sealed information for a distinct, civic purpose.").

Further, *Scott* did not alter the landscape upon which the district court previously determined the Foundation had standing. As this Court recently explained,

> Since *TransUnion*, the courts of appeals have consistently recognized that, to have standing, a plaintiff claiming an informational injury must have suffered adverse effects from the denial of access to information. *See* … *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 936-39 (5th Cir. 2022); … And courts have further recognized that *TransUnion* did not work a "sea change"
>
> …
>
> Two earlier Supreme Court informational-injury cases are not to the contrary. *See* [*Akins*]; [*Public Citizen*].

Grae v. Corr. Corp. of Am., 57 F.4th 567, 570 (6th Cir. 2023).

V. The Foundation Is Entitled to Discover Relevant Facts About ERIC's Participation in Michigan's Voter List Maintenance Program.

The District Court erred when it denied the Foundation the opportunity to discover *any* relevant facts from ERIC.

ERIC was created by states to help themselves comply with federal voter list maintenance laws. Indeed, ERIC's reports are tailored to identify the exact types of ineligible registrants the NVRA requires Michigan to remove from its official list of eligible voters. (*Compare* Hamlin Decl., R. 82, Page ID # 885 ⁋ 30 *with* 52 U.S.C. § 20507(a)(4).) ERIC even touts itself as "the most effective tool available to help election officials maintain more accurate voter rolls." ERIC, What is ERIC?, https://ericstates.org/about/ (last accessed August 1, 2024). In Michigan, ERIC plays an even more exclusive role. ERIC is the *only source* of death information that the Secretary compares directly against the QVF. (Doc. 21 at 34.)

Despite its central role in Michigan list maintenance, ERIC effectively says it should be immune from discovery in a suit to enforce NVRA compliance—the filing of which is a right conferred by Congress. *See* 52 U.S.C. § 20510(b). Such a position is contrary to the rules of discovery and basic notions of fairness. The position would also give license to states to shield list maintenance activities

behind third parties despite Congress deciding such activities should be transparent.

A. The District Court Erred When It Conditioned Discovery on the Foundation's Ability to Demonstrate Errors in ERIC's Processes.

The Federal Rules of Civil Procedure authorize "extremely broad" discovery. *United States v. Leggett & Platt*, 542 F.2d 655, 657 (6th Cir. 1976) (citations omitted). The default rule is the Foundation may "depose any person, including a party, without leave of court except as provided in Rule 30(a)(2)." Fed. R. Civ. P. 30(a)(1). The Foundation "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1).

"Evidence is 'relevant' if its existence simply has some 'tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Jones*, 566 F.3d 353, 364 (3d Cir. 2009) (quoting Fed. R. Evid. 401). "[T]his standard of relevancy is liberal." *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 905 (6th Cir. 2006) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993)).

The "heavy" burden was on ERIC to demonstrate that the subpoena should nevertheless be quashed. *CH Holding Co. v. Miller Parking Co.*, 2013 U.S. Dist.

LEXIS 120541, at *7 (E.D. Mich. Aug. 26, 2013) ("The party seeking to quash a subpoena bears a heavy burden of proof."). Yet the lower court placed the burden on the Foundation to first show ERIC's processes were inadequate or unreliable.

> If there was some demonstration that the information that ERIC was providing was not reliable and should not be relied on by Michigan or it was unreasonable for Michigan to rely on it to the extent that they were, I can see there being some potential avenue for discovery, but at least on the record in front of me, I don't have that.

(Transcript, R. 108, Page ID # 1978.) In other words, the standard was not "relevance," but something much higher—namely, the Foundation's ability to factually prove that Michigan's list maintenance process contains a defect. The lower court erred when it set the bar for discovery above where the Federal Rules have set it. ERIC now asks this Court to double down and force the Foundation to prove that *what it would have discovered* would have precluded summary judgment. (Doc. 36 at 23.) ERIC's proposed standard simply compounds the error. Instead, this Court should remand with instructions to evaluate relevancy as the federal rules and case law define it.

B. Discovery of ERIC Is Proportional to the Needs of this Case.

1. The Foundation's Subpoena Seeks to Discover Relevant Information Beyond the ERIC Reports.

Discovery must also be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Whether discovery is proportional considers, *inter alia*, "whether the

burden or expense of the proposed discovery outweighs its likely benefit." *Id*. The lower court erroneously viewed the ERIC Reports as the *only* relevant information, (Transcript, R. 108, Page ID # 1978 ("[A]t this point the record as it's been developed really only makes relevant in this case the information that Michigan has, including the reports that it's received from ERIC."), and therefore saw no benefit to additional discovery, (Order, R. 165, Page ID # 3334 (affirming order quashing subpoena and explaining that the Magistrate Judge found that "the record did not reveal any other particularized issue necessitating possession of the additional discovery.").)

The ERIC Reports do not constitute the entire universe of relevant information. Far from it. The ERIC Reports are simply the end product of ERIC's processes. They do not reveal the process used to create them. Nor do they reveal whether and to what extent individuals identified by SSA as deceased were *not* included in ERIC's reports, and for what reason. In other words, comprehensiveness and accuracy cannot be determined simply by looking at the Reports. Nor do the Reports reveal communications internal to ERIC that might reveal relevant information that was never communicated to Michigan, such as problems or discrepancies with Michigan's voter registration data that might prevent ERIC from accurately identifying deceased registrants. Recall that

Michigan's voter registration records sometimes omit information that ERIC uses to match records, like date of birth. (*See* Doc. 21 at 3.) Errors in ERIC's processes and data will naturally cause downstream consequences for member-states like Michigan who rely on those processes and data to maintain accurate records. In computer science lingo, garbage in, garbage out.[4] In these circumstances, it is reasonable and fair to subject the entire process to scrutiny.

ERIC protests that "the methodology that ERIC follows in generating its deceased reports is no mystery." (Doc. 36 at 6.) Yet most methodological details revealed thus far originate from ERIC's website and an untested affidavit signed by ERIC's Executive Director. (*See, e.g.*, Doc. 36 at 4-7 (citing ericstates.org and Hamlin Decl.).) Litigation does not work that way. "Discovery plays an important role in our adversarial system: full development of the facts surrounding a matter furthers 'the purpose discovery is intended to serve—advancing the quest for truth.'" *Trujillo v. Bd. of Educ.*, Nos. CIV 02-1146 JB/LFG, CIV 03-1185 JB/LFG, 2007 U.S. Dist. LEXIS 33919, at *10 (D.N.M. Mar. 12, 2007) (citing *Taylor v. Illinois*, 484 U.S. 400, 430 (1988) (Brennan, J., dissenting)). Full development of the facts is simply not possible when one party is denied an opportunity to test the other party's assertions and discover her own facts from the same sources. *See*

[4] Wikipedia, https://en.wikipedia.org/wiki/Garbage_in,_garbage_out (last accessed August 1, 2024).

Twin v. Ho-Chunk Nation Griev. Review Bd. Dep't of Admin., 2012 Ho-Chunk Supreme LEXIS 12 ("The truth in an adversarial system is possible only when the parties have evenly balanced opportunities to bring their case before the court."). Prejudice is inherent on an unequal playing field.

Even if ERIC's methodology was undisputed, development of relevant facts would be less than full. ERIC has offered no information, publicly or in this litigation, about other relevant matters, including omissions and errors, and mistakes in its reports, including situations where the SSA later determines than an individual listed as deceased is actual alive. *See* SSA, FAQs, "What should I do if I am incorrectly listed as deceased in Social Security's records?", https://faq.ssa.gov/en-US/Topic/article/KA-02917 (last accessed August 1, 2024); Anderson, *You may be dead: Every year, Social Security falsely lists 6,000 people as deceased*, CNBC, Jan. 12, 2017, https://www.cnbc.com/2017/01/12/social-security-falsely-lists-6000-people-a-year-as-dead.html (last accessed August 1, 2024).

Michigan's witnesses could not answer questions about ERIC's operations, including errors in ERIC's reports. (*See* Response to Motion to Quash, R. 94, Page ID # 1533-1534.) Answers to these questions are both highly relevant and in ERIC's exclusive possession. The benefits of discovery of ERIC are self-evident.

2. The "Non-Party" Standard Is Not Appropriate in These Circumstances.

The district court analyzed the Foundation's subpoena under the standard for discovery served on a non-party, placing considerable weight on the supposed burden compliance would inflict upon ERIC. (*See* Transcript, R. 108, Page ID # 1970; Order, R. 165, Page ID # 3334.) ERIC advances the same standard. (Doc. 36 at 31.)

Applying the "non-party" standard to ERIC is not appropriate in these circumstances. While ERIC may be privately organized under the federal tax code, ERIC has all the hallmarks of a state actor, one with direct ties to Michigan. ERIC's website asks, "Who Controls ERIC?" ERIC answers, "The members." FAQs, https://ericstates.org/faq/ (last accessed August 1, 2024). In fact, ERIC's Board of Directors is comprised of representatives of the member states, which are appointed by the member state's chief election official. (Hamlin Decl., R. 82, Page ID # 883 ⁋ 15.) Furthermore, Michigan's Director of Elections, Jonathan Brater, is ERIC's Immediate Past Chair. ERIC, Current Board Members, https://ericstates.org/who-we-are/ (last accessed August 1, 2024).

In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), the Supreme Court held that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself

permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." While Michigan did not join ERIC by "special law," Secretary Benson engaged in an official act when she made Michigan part of ERIC. ERIC exists to further "governmental objectives"—namely voter list maintenance. State governments also have permanent authority to appoint ERIC's Board of Directors. (Hamlin Decl., R. 82, Page ID # 883 ⁋ 15.) It is at least plausible that ERIC is also a state actor under the three tests used in the Sixth Circuit. *See Carl v. Muskegon Cty.*, 763 F.3d 592, 595 (6th Cir. 2014) ("Our court has identified three tests to resolve the state-actor inquiry: the public-function test, the state-compulsion test, and the nexus test.").

The Foundation does not argue that ERIC should be a party to this case or is independently responsible for complying with the NVRA. Rather, ERIC's status as central player in a list maintenance program should be considered when evaluating the burden of complying with the subpoena. ERIC is not a functionally separate entity from Michigan. ERIC is performing a government function—voter list maintenance. Michigan also sits on ERIC's Board of Directors. Michigan funds ERIC. Michigan can cast votes that determine how ERIC performs voter list maintenance for Michigan and other states. To deny discovery of ERIC is

tantamount to denying discovery of Michigan because ERIC is, by design, performing a sovereign function central to the factual issues in dispute here.

ERIC is not involved in this dispute by chance. Rather, ERIC was created to operate in a field that Congress determined should be entirely transparent. 52 U.S.C. § 20507(i)(1). Granting ERIC immunity from public scrutiny would undermine the efforts of Congress. The burden of sitting for a single deposition is minimal, and in any event, does not outweigh the benefit of discovery in these circumstances.

3. The Foundation Has Not Forfeited its Document Requests.

The Foundation has not forfeited its request for documents as ERIC suggests. (Doc. 36 at 30 n.9.) The Foundation's subpoena commanded testimony *and* production of documents. (R. 83-1, Page ID # 1367.) ERIC moved to quash the subpoena, including its document requests. (ERIC Motion, R. 81, Page ID # 857-880.) The lower court quashed the subpoena, including its document requests. (Order, R. 102, Page ID # 1940; Order, R. 165, Page ID # 3325-3334.) The Foundation appealed the District Court's order quashing the subpoena. (*See* Notice, R. 182, Page ID # 3668.) The Foundation thus preserved the issue for appeal, and it is properly before this Court. Contrary to ERIC's suggestion, preservation did not require the Foundation to independently compel production of

documents requested in the quashed subpoena. Such a motion would also have been duplicative and wasteful.

4. The Foundation Has Not Waived its Appeal of the Discovery Orders.

The Foundation has also not waived its entire claim to error. (Doc. 36 at 34-35.) For starters, ERIC's authorities are not on point, because they concern summary judgment orders, not discovery orders. In any event, the Foundation did not "fail[] to address" the district court's reasoning. Rather, the Foundation identified error in the district court's reasoning with respect to burden, relevancy, and proportionality. (*See* Doc. 21 at 39-40.) ERIC's preference for *how* the Foundation should have addressed those rulings does not mean that the Foundation "failed" to address them.

CONCLUSION

The Foundation asks this Court to reverse and remand the district court's entry of summary judgment as to its claim that the Secretary is violating the list maintenance obligations of the NVRA. The Foundation further asks this Court to instruct the district court as to the relevancy and weight of various evidence in a case for failure to implement a reasonable program to remove deceased registrants from the rolls.

The Foundation also asks this Court to reverse the district court and render judgment on the Foundation's claim that the Secretary violated the NVRA's Public Disclosure Provision.

Dated: August 1, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Fed. R. App. P. Rule 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by Rule 32(f), this brief contains 6,463 words.

This brief also complies with the typeface requirements Fed. R. App. P. 32(a)(5)(A) because this brief has been prepared in a proportionally space type face using Microsoft Word in 14-point Times New Roman.

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Dated: August 1, 2024.

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2024, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Kaylan Phillips
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