

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PUBLIC INTEREST LEGAL
FOUNDATION,

No. 1:21-cv-00929

Plaintiff,

HON. JANE M. BECKERING

v

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

Defendant.

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**DEFENDANT'S BRIEF IN SUPPORT OF HER
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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Defendant is entitled to summary judgment as to Count I because there is no genuine issue of material fact disputing that Michigan conducts a general maintenance program that makes a reasonable effort to remove the names of deceased voters from its list of eligible voters?
2. Whether Defendant is entitled to summary judgment as to Count 2 where PILF lacks standing to bring its claim for the disclosure of voting records and where PILF was not entitled to all of the records sought?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Bellitto v. Snipes, 935 F.3d 1192 (11th Cir., 2019)

Public Interest Legal Foundation v. Boockvar, 495 F. Supp. 3d 354 (M.D. Penn., Oct. 20, 2020)

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INTRODUCTION

This is a lawsuit brought under Section 8 of the National Voter Registration Act of 1993 (NVRA), which requires the states to conduct a general program, which is “uniform, non-discriminatory” and makes a “*reasonable* effort to remove the names of ineligible voters” from the official voter registration list by reason of the voter’s request, notice of death, or change of residence after certain precautions are taken. 52 U.S.C. § 20507(a)(4), (b), (d), (e). (Emphasis added). In this case, Plaintiff Public Interest Legal Foundation (PILF) alleged that Michigan failed to maintain such a program, and that claim was based entirely upon the results of a report produced by PILF, which purported to show that over 27,000 “potentially deceased” registered voters had not been removed from Michigan’s voter rolls. After completing discovery into the details of Michigan’s program for the removal of deceased registrants (as well the defects of PILF’s research), there is no genuine issue of material fact and the Secretary of State is entitled to judgment as a matter of law because Michigan does, in fact, maintain a program that makes a reasonable effort to remove the names of ineligible voters as required by the NVRA.

STATEMENT OF FACTS

A. Overview of NVRA’s list maintenance requirements.

The NVRA was enacted “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office,” “to make it possible for Federal, State and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters for Federal office,” “to protect the integrity of the electoral process,” and “to ensure that

accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b). Section 8 of the NVRA, codified in 52 U.S.C. § 20507, provides several procedures or other requirements to be carried out by participating states with respect to the administration of voter registration. This includes efforts aimed at insuring “each eligible applicant” is registered to vote in an election and taking precautions against hasty removals of registrants from voter rolls.

Section 8 of the NVRA requires a state to notify voters of the disposition of an application for registration, 52 U.S.C. § 20507(a)(2), and prohibits the removal of a name of a registrant except in narrow circumstances, i.e., at the registrant’s request, “by reason of criminal conviction or mental incapacity,” or through a “general program that makes reasonable efforts to remove” the names of voters rendered ineligible by death or upon a change of address. 52 U.S.C. § 20507(a)(3), (4).

The NVRA does not require states to comply with any particular program or to immediately remove every voter who may have become ineligible. Rather, a state must “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, in accordance with subsections (b), (c), and (d) [of]” 52 U.S.C. § 20507(a)(4)(A)-(B). (Emphasis added).

Subsection (b) requires that the program implemented to remove voters under subsection (a)(4) be a “nondiscriminatory” program, 52 U.S.C. § 20507(b)(1),

and “shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote” except where the state complies with certain requirements for removing voters under section 20507(b)(2).

In addition to NVRA, the federal Help America Vote Act (HAVA) of 2002 provides that “each State . . . shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, . . . computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State. . . .” 52 U.S.C. § 21083(a)(1)(A). Moreover, section 21083(a)(1)(A)(viii) states that “the computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.”

Michigan complied with these requirements long ago when it created the qualified voter file (QVF) as the State’s computerized statewide voter registration list. Mich. Comp. Laws §§ 168.509m(1)(a), 168.509o, 168.509p, 168.509q, 168.509r. Michigan currently has over 8.2 million registered voters in the QVF, of which approximately half a million are inactive registrations slated for cancellation in 2025 or 2027.¹

HAVA further requires that “the list maintenance performed . . . shall be conducted in a manner that ensures that . . . only voters who are not registered or who are not eligible to vote are removed from the computerized list.” 52 U.S.C. §

21083(a)(2)(B)(ii). Additionally, section 21083(a)(4)(B) of HAVA provides that “the

¹ See Michigan Department of State, Bureau of Elections, Voter registration statistics, available at <https://mvic.sos.state.mi.us/VoterCount/Index>.

State election system shall include provisions to ensure that voter registration records are accurate and are updated regularly, including . . . safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.”

The HAVA provisions essentially parallel or incorporate NVRA.

B. Michigan’s legal structure for list maintenance practices with respect to deceased voters.

After NVRA was enacted, Michigan made a significant number of amendments to the Michigan Election Law, Mich. Comp. Laws § 168.1 *et seq.*, to incorporate or come into compliance with its requirements. Most of these changes to the law originated in 1994 P.A. 441.² Section 509n makes the Secretary of State responsible for coordinating the requirements under NVRA. Mich. Comp. Laws § 168.509n.

With respect to the deaths of registered voters, section 509o requires the Secretary of State 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 . . . or an official state personal identification card . . . of a deceased resident of this state is also used at least once a month to update the qualified voter file to cancel the voter registration of any elector determined to be deceased.” Mich. Comp. Laws § 168.509o(4). The Secretary must also “make the canceled voter registration information . . . available to the clerk of each city or township to assist with the clerk’s obligations under

² See generally, Mich. Comp. Laws §§ 168.509m, 509n, 509o, 509p, 509q, 509r, 509t, 509u, 509v, 509w, 509x, 509z, 509aa, 509bb, 509cc, 509dd, 509ee, 509ff, and 509gg.

section 510.” (*Id.*) *See also* Mich. Comp. Laws § 168.509z(c) (“The secretary of state shall notify each clerk of the following information regarding residents or former residents of the clerk’s city or township . . . death notices received by the secretary of state.”) Based on these laws, “each week the Michigan Department of State uses information from the Social Security Death index [SSDI] to cancel the records of individuals in the [QVF] who have died.”³

Under section 510, “[a]t least once a month, the county clerk shall forward a list of the last known address and birth date of all persons over 18 years of age who have died within the county to the clerk of each city or township within the county. The city or township clerk shall compare this list with the registration records and cancel the registration of all deceased electors.” Mich. Comp. Laws § 168.510. County clerks act as the local registrar for purposes of maintaining vital records and statistics, such as deaths. Mich. Comp. Laws §§ 333.2804(4), 333.2815, 333.2833.

Section 509r(5) further provides that the Secretary must create and maintain “an inactive voter file.” Mich. Comp. Laws § 168.509r(5). Section 509r provides that voters who fail to vote for 6 years or confirm residency information must be placed in the inactive file:

(6) If an elector is sent a notice under section 509aa to confirm the elector’s residence information or if an elector does not vote for 6 consecutive years, the secretary of state shall place the registration record of that elector in the inactive voter file. The registration record

³ *See* Michigan Department of State, Bureau of Elections, Fact Checks, Michigan’s list of registered voters is maintained in accordance with federal law, available at [SOS - Fact Checks \(michigan.gov\)](https://sos.michigan.gov).

of that elector must remain in the inactive voter file until 1 of the following occurs:

- (a) The elector votes at an election.
- (b) The elector responds to a notice sent under section 509aa.
- (c) Another voter registration transaction involving that elector occurs. [Mich. Comp. Laws § 168.509r(6).]

However, “[w]hile the registration record of an elector is in the inactive voter file, the elector remains eligible to vote and his or her name must appear on the precinct voter registration list.” Mich. Comp. Laws § 168.509r(7). If a voter on the inactive voter file “votes at an election by absent voter ballot, that absent voter ballot must be marked in the same manner as a challenged ballot” Mich. Comp. Laws § 168.509r(8).

In addition, local clerks are authorized to conduct programs to remove names from the QVF. Section 509dd provides that a “clerk may conduct a program . . . to remove names of registered voters who are no longer qualified to vote in the city or township from the registration records of that city or township.” Mich. Comp. Laws § 168.509dd(1). Such a program must be uniformly administered and comply with the NVRA, including the requirement that any program be concluded 90 days or more before a federal election, except for removals done at the request of the voter, upon the death of a voter, or upon notice that the voter has moved and registered in a different jurisdiction. Mich. Comp. Laws § 168.509dd(1), (2)(a)-(c). To conduct a removal program, a local clerk may conduct a house-to-house canvass, send a general mailing to voters for address verifications, participate “in the national

change of address program established by the postal service,” or “other means the clerk considers appropriate.” Mich. Comp. Laws § 168.509dd(3).

C. Operation and practice of Michigan’s program for list maintenance with respect to deceased voters.

Within the legal structure described above, Michigan’s process is administrated through both automated processes and individual review, depending on the reliability of the information provided. However, there will always be some number of deceased registrants on the voter rolls because there is a lag in time between when someone dies and when that information is received for it to be used to cancel the registration, and also it is not practically possible to identify every person who has died in a state with millions of people. (Ex. A, Brater Dep, p 51 ln 8-22.) From 2019 to March 2023, between 400,000 and 450,000 registrations were cancelled because the voter is deceased (Ex. A, Brater Dep, p 77 ln 6-15.)⁴

Michigan’s process for the removal of deceased registrants includes automated removal based on SSDI and Michigan Department of Health and Human Services (MDHHS) records, manual review of “close matches” from the SSDI and MDHHS records, manual review of death reports received from the Electronic

⁴ See also Michigan Department of State, Bureau of Elections, Voter registration cancellation procedures, available at <https://www.michigan.gov/sos/~/link.aspx?id=0CA77C36E2D44E0DBCAB875DE164507F&z=z>. The data cited in Director Brater’s April 2023 deposition were from March 2023; this figure increases each week.

Registration Information Center (ERIC),⁵ and cancellations entered by local clerks based on information they receive. (Ex. B, Def's Answers to 1st Interrogatories, #1”

1. Automated removal based upon matches to federal and state death records.

The Michigan Department of State (MDOS) receives—on a more or less a weekly basis—from the Social Security Administration (SSA) and from the MDHHS files identifying persons who have been identified by those agencies as deceased since the time of the last most recent file. (Ex. B, Def's Answers to 1st Interrogatories, #1; Ex. C, Harris Dep, p 44 ln 15-20; Ex. D, MDOS Dep, p 49 ln 19—p 50 ln 23, p 83 ln 20—p 85 ln 6.) The SSA reports also include the names of individuals who have died outside the State of Michigan. (Ex. D, MDOS Dep, p 64 ln 7-13.) These reports are compared weekly to the list of active drivers in Michigan contained in CARS, the software system that Michigan uses to maintain its driver file. (Ex. C, Harris Dep, p 25 ln 4-5.) In Michigan, people are offered the opportunity to register to vote during any driver's license or state ID transaction. (Ex. E, Belton Dep, p 93 ln 11-24.) Michigan's old driver file was migrated to CARS over multiple years between 2017 and 2021. (Ex. C, Harris Dep, p 62 ln 9-11.) CARS contains the names, addresses, full dates of birth, and last four digits of social security numbers for drivers and persons with state identification cards. (Ex. C, Harris Dep, p 25 ln 19—p 28 ln 3; p 30 ln 13-17.) CARS contains social security

⁵ Mich. Comp. Laws § 168.509o(5) requires the Secretary to participate in multistate programs that assist in the verification of current resident and voter registration status of voters.

numbers for the majority of drivers in Michigan, and all driver's licenses that are newly entered into the CARS program will include the last four digits of the social security number. (Ex. C, Harris Dep, p 51 ln 19-23; Ex. D, MDOS Dep, p 53 ln 7—p 54 ln 18.) In contrast, social security numbers are not a required field for the QVF. (Ex. D, MDOS Dep, p 55 ln 12-17.) Because CARS keeps information on individuals even if their license or ID is no longer active, matches to SSA or MDHHS files will still be performed on persons with expired or lapsed licenses and IDs. (Ex. D, MDOS Dep, p 75 ln 18—p 76 ln 2.)

If the records from SSA or MDHHS are a 100% match to the name, date of birth, and social security number in Michigan's CARS system, CARS automatically updates the person's record to mark them as deceased and sends a notification through the QVF system and automatically updates the voter's status to "Cancelled – Deceased." (Ex B, Def's Answers to Pl's 1st Int., #1; Ex. C, Harris Dep. p 42 ln 8—19.) If none of these data elements match a record in CARS, it will be considered "no match" and CARS will disregard it. (*Id.*).

In addition, the Core Technology Platform Division of MDOS will produce a report from CARS identifying individuals whose driver's license or state ID are due to expire within 90 days. (Ex. B, Def's Answers to Pl's 1st Int., #1; Ex. D, MDOS Dep, p 86 ln 14—p 87 ln 9.) That report is used to generate renewal notices to be mailed, but the file is also shared with SSA to confirm that the individuals' names, dates of birth, or social security numbers have not changed. (Ex B, Def's Answers to Pl's 1st Int., #1.) After receiving the file, SSA will indicate whether any of the

individuals have been identified as deceased. (Ex B, Def's Answers to Pl's 1st Int., #1.) If that person has not already been marked as deceased, they will then be automatically changed to "deceased" in CARS, and that information will be transferred and updated in the QVF. (Ex B, Def's Answers to Pl's 1st Int., #1.)

Changes to a person's information in CARS will be updated in the QVF on a nightly basis. (Ex. D, MDOS Dep, p 72 ln 2-11.) In addition, the entire QVF is reconciled with the CARS driver file on a quarterly basis. (Ex. G, Talsma Dep, p 97 ln 25—p 98 ln 23.) The 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. (Ex. A, Brater Dep, p 38 ln 17-24.) The quarterly reconciliation process began in 2021. (Ex. A, Brater Dep, p 58 ln 17-19.)

2. Review of close or partial matches to death records.

If information received from SSA or MDHHS is only a partial match—meaning that it matches some, but not all, of the data fields—then it is placed in a queue for it to be manually reviewed by staff in the Driver Records Activity Unit Staff to determine if there is enough information available for a match. (Ex B, Def's Answers to Pl's 1st Int., #1); Ex. C, Harris Dep p 48 ln 18—p 50 ln 8.) The Unit's process has been summarized in a procedure describing the process staff use to identify possible matches. (Ex. C, Harris Dep, Exhibit 4.) If at least 3 data points match, the record will be considered a match and the person will be marked as deceased in CARS, which will cause QVF to be updated automatically. (Ex B, Def's Answers to Pl's 1st Int., #1). Generally, partial matches are reviewed within 7 to 10

days, although occasionally backlogs have occurred resulting in review taking up to 4 weeks. (Ex. C, Harris Dep, p 65 ln 23—p 66 ln 8.) In addition, the Unit may also receive information—such as a death certificate—from family members of a deceased person. (Ex. D, MDOS Dep, p 79 ln 22—p 80 ln 11.) Again, once a person is marked as deceased in CARS, that information will be updated in the QVF on a nightly basis. (Ex. D, MDOS Dep, p 72 ln 2-11.)

3. Reports of deceased individuals provided by ERIC.

Michigan joined the ERIC program in 2020. (Ex. D, MDOS Dep, p 41 ln 12-20.) Every two months, the Michigan Bureau of Elections (Bureau) receives a report from ERIC that identifies individuals registered in Michigan who may be deceased. (Ex. F, Clone Dep, p 69 ln 18—p 70 ln 10.) The bi-monthly deceased reports from ERIC are not lengthy, and generally include about 10 or fewer individuals. (Ex. F, Clone Dep, p 76 ln 2-4.) Often, by the time the ERIC reports arrive, the individuals have already been marked deceased through other means. (Ex. G, Talsma Dep, p 40 ln 2-13.) ERIC reports, however, contain information about individuals who are not in the driver's file—for example, because the individual does not have a driver's license or state ID card. (Ex. D, MDOS Dep, p 45 ln 20-22.) Because not every voter has a driver's license or state ID, the ERIC reports are a way to identify those deceased individuals. (Ex. A, Brater Dep, p 80 ln 25—p 81 ln 14.) The ERIC deceased reports are created by comparing Michigan's QVF to the Social Security Death Index (SSDI), and ERIC then provides a list of potential matches to Michigan. (Ex. A, Brater Dep, p 93 ln 9-16.)

Those ERIC reports are manually reviewed by Bureau staff within a week of receiving them. (Ex. F, Clone Dep, p 70 ln 11-15.) If there is an exact match of a person's first and last name, date of birth, driver's license number, and social security number and that person has not already been cancelled in the QVF, they would be cancelled based on the ERIC report. (Ex. F, Clone Dep, p 74 ln 18—p 75 ln 2.) If there is not an exact match, staff may attempt to confirm the match through outside sources, such as published obituaries. (Ex. F, Clone Dep, p 75 ln 3-11.) If there is enough information to support a match, then the voter registration can be cancelled. (*Id.*). This staff review is double-checked by Departmental Manager Rachel Clone. (Ex. F, Clone Dep, p114 ln 16—p 115 ln 9.)

4. Removal of deceased individuals by local clerks.

Cancellation of voter registrations by local clerks is described in the Election Officials' Manual. (Ex. H, Election Officials' Manual, Chapter 2, p 21.) Outside of specific functions assigned by law to the Secretary of State, local clerks have primary responsibility for maintaining the voter rolls for their jurisdiction, including cancelling registrations for deceased persons. (Ex. F, Clone Dep, p 119 ln 22—p 120 ln 8.) If a local clerk has personal knowledge of a voter's death—say, because they attended a funeral—or if they received county death records, they can cancel that voter's registration. (Ex. F, Clone Dep, p 120 ln 9-21.) From 2019 through 2022, between 20 and 30% of cancellations for being “deceased” were entered by local clerks. (Ex. I, Talmsa Affidavit, ¶10.)

County clerks are required to provide death notices to city and township clerks, who will cancel voter registrations on that basis. (Ex. A, Brater Dep, p 83 ln

3-12.) Municipal clerks may also use death information in newspapers—such as obituaries—or personal knowledge that an individual has died to cancel the registration. (Ex. A, Brater Dep, p 83 ln 13-21.)

Lastly, if election mail is returned as undeliverable, the registration is made inactive and the voter is sent a notice of cancellation. (Ex. A, Brater Dep, p 99 ln 11-15.) If the voter does not respond, and they do not vote for two consecutive federal elections, the registration is cancelled. (Ex. A, Brater Dep, p 99 ln 11-15.)

D. PILF’s lists of “potentially deceased” voters.

On September 18, 2020, PILF sent a letter to the Michigan Secretary of State in which it claimed to have compared a 2019 version of Michigan’s QVF to the SSDI and determined that there were “potentially more than 34,000 deceased individuals” with active voter registrations at that time. (R. 1-4, PageID.48-50.)

On September 30, 2020, Melissa Malerman, Director of the Filing Disclosure and Compliance Division for the Bureau responded to PILF, and requested more information about PILF’s matching process and how the list was created. (Ex. D, MDOS Dep, p 96 ln 24—p 97 ln 3; Ex D, MDOS Dep, Exhibit 4; Ex. M, September 29, 2020 letter.)

On October 5, 2020, PILF sent another letter, and attached a spreadsheet with voter ID numbers, which PILF claimed to show over 27,000 “records of concern” that matched names, dates of birth, social security numbers, and credit address information. (ECF No. 1-6, PageID.52-53.) However, PILF provided little detail about the method of how it matched the voters to “credit address information” or determined that the voters were deceased. (*Id.*)

Ms. Malerman reviewed PILF's information and determined that each of the first ten individuals she checked had already been cancelled in QVF. (Ex. D, MDOS Dep, p 96 ln 6-19; Ex. D, MDOS Dep, Exhibit 4 E-mail 10/5/2020.) In fact, each of those ten had already had their registrations cancelled between October and December of 2019—a year before PILF's letter. (Ex. D, MDOS Dep, Exhibit 4 E-mail 10/5/2020.) Also, PILF's apparent reluctance to provide details about its matching process lowered MDOS's confidence that the information PILF provided was accurate or that PILF's review could be recreated. (Ex. D, Brater Dep, p 199 ln 8-20.) What the Bureau staff were seeking was relatively straightforward:

Q (MS. PHILLIPS) What is matching criteria?

MR. FRACASSI: So what I want to know is how -- so when I say "matching criteria," what I'm looking for is more than just a list of numbers. I want to see the voter's name. I want to see the address, the date of birth. Just providing an Excel sheet with a list of numbers does not give us reliable information that what you're presenting is the same thing that we have, especially once we've already started looking them up and they're already marked as deceased.

So when I think of matching criteria, that's what I want to know. I want to know what steps that -- what steps were taken to compare this. What were the -- like what was the level of the match. Did -- if it was an address, for example, if one number in the address was off, was that sufficient to call this person deceased.

So that's what I was looking for were how did you take all of this external information and verify that that is who we have in QVF and then create this Excel sheet that was given to us.

(Ex. D, MDOS Dep, p 109 ln 6—p 110 ln 2.)

Ms. Malerman concluded that PILF's claims were "dubious." (Ex. D, MDOS Dep, Exhibit 4, E-mail 10/5/2020.)

On November 25, 2020, PILF sent another letter to the Secretary of State in which it claimed to have purchased a new copy of the QVF and performed a “sample match of the voter file against the Social Security Death Index.” (ECF No. 1-8, PageID.61-62.) Again, no details of the matching process were provided, but this time PILF claimed that “over 27,500 registrants” in the QVF were indicated by the SSDI to be deceased. The Bureau responded to this letter on December 17, 2020, and stated that the Bureau was still waiting to receive PILF’s matching criteria. (ECF No. 1-10, PageID.65-66.)

On January 13, 2021, PILF sent another letter claiming that Michigan was in violation of NVRA, and attached a copy of the spreadsheet it referenced in its November 25, 2020, letter. (ECF No. 1-13, PageID.72-73.)

1. Creation of PILF’s lists

In his report, PILF’s Expert Kenneth Block describes the process he used to create PILF’s lists. (ECF No. 121-2, PageID.2197-2200, ¶¶28-32.) Block’s description explicitly states that the voter information from Michigan’s QVF was first “normalized” by Simpatico Software (Block does not identify anyone specifically). (*Id.*, ¶28.) Block states that normalization is a process that “*includes things like* capitalizing all of the data supplied in the file, standardizing address information to U.S. Postal Service Standards, standardizing codes seen in every voter file from every state (for example using the same codes to represent political party names in all state data files), extracting and storing voter history data in a standardized way that we use for every state, etc.” (*Id.*, ¶28) (Emphasis added).

Then, the data was exported to a vendor – Virtual DBS – who “applied filters.” (*Id.*) Block admits that he does not know what filters were applied for the 2020 list. (*Id.*, ¶25.) The 2021 list, however, was filtered to add new registrants after October 2019, registrants with a status of “challenged,” and to remove registrants without “economic activity” in Virtual DBS’ “Gold Consumer File.” (*Id.*, ¶26; ECF 121-3, PageID.2323.) The filtering reduced the number of voter records sent through the matching process. (ECF No. 121-2, PageID.2197-2200, ¶28.)

Next, another vendor – Red Violet – performed a matching process to attempt to associate a voter record with a social security number obtained from credit bureau databases or Graham-Leach-Bliley Act (GLBA) databases. (*Id.*, ¶28-29.) If a social security number was obtained, that number was searched in the SSDI. (*Id.*, ¶29.) Block’s report did not identify any specific databases. Red Violet transmitted the results to Virtual DBS, who then transmitted them to Simpatico. (*Id.*, ¶29.)

Lastly, Simpatico performed what Block calls a “sanity check,” in which Simpatico checked that all names, addresses, and year of birth information in Red Violet’s results matched the information from the original file. (*Id.*, ¶29.)

2. Kenneth Block’s deposition testimony.

Block admitted that he has no degree in political science or statistics, and no education in the fields of probabilistic record linkage or entity resolution. (ECF No. 121-3, PageID.2224-2225, p 10 ln 1-10, p 10 ln 14, p 11 ln 6.) Instead, he is the founder of Simpatico Software, a computer engineering and consulting company. (ECF No. 121-3, PageID.2237, p 22 ln 20-24.)

Block described himself as a “relational database expert.” (ECF No. 121-3, PageID.2282, p 67 ln 6-7.) When asked to identify his peers in this field, Block stated that, “as far as from the matching efforts that I’m aware of over the last few years, I haven’t encountered anybody’s work that I would consider on the level of mine,” and could not identify anyone to whom he would compare his work. (ECF No. 121-3, PageID.2282-2283, pp 67 ln 12–68 ln 24.) Block admitted that he has not read any academic studies involving election administration, and that he was unaware of anyone in academic fields that performed this kind of work. (ECF No. 121-3, PageID.2283-2284, pp 68 ln 25–69 ln 7.) The process he used to create the lists has not been peer reviewed or subject to a third-party audit. (ECF No. 121-3, PageID.2309, p 94 ln 2-17.) Block asserted that his process was “tested” by the State of Pennsylvania, referring to the part of his report discussing the number of voters removed by Pennsylvania at some point following the list he created for that case. (ECF No. 121-3, PageID.2303-2304, pp 88 ln 21–89 ln 2.) However, he later admitted that he made no attempt to confirm the voters removed by Pennsylvania were, in fact, deceased, and he acknowledged that there were other reasons a registrant could be removed from the voter list. (ECF No. 121-3, PageID.2319-2320, pp 104 ln 21–105 ln 17.) Block stated that his process is proprietary to Simpatico and so it is not used by anyone else. (ECF No. 121-3, PageID.2310-2311, pp 95 ln 18–96 ln 18.)

Block admitted that he does not know the known error rate of his process, “but based on the empirical results that we’ve seen the results are really good.”

(ECF No. 121-2, PageID.2311., p 96 ln 19-24.) Block also does not know the error rate of the software utilized by his vendors to perform the matching process but nonetheless stated that he believes “error rates are largely theoretical numbers” and he disputes the idea that error rates may be known with precision. (ECF No. 121-3, PageID.2349-2350 pp 134 ln 23–135 ln 13.)

When asked what standards govern the methodology of his process, Block was initially unclear what that meant, but ultimately stated that the only standard he applied was the “sanity check” described in his report. (ECF No. 121-3, PageID.2311, p 96 ln 25, PageID.2313, p 98 ln 15.) However, Block also stated that his “sanity check” procedure is not written down. (ECF No. 121-3, PageID.2314-2315, pp 99 ln 25–100 ln 6.) Block also admitted that he has not performed any audit of Red Violet’s processes or code, stating “I’m not allowed anywhere near the internals of their system.” (ECF No. 121-3, PageID.2314, p 99 ln 6-9.)

Block admitted that neither he nor anyone at Simpatico supervised or watched Red Violet perform the matching. (ECF No. 121-3, PageID.2338-2339, pp 123 ln 25–124 ln 11.) Block does not know what specific GLBA databases Red Violet used to perform the matching. (ECF No. 121-3, PageID.2347, pp 132 ln 23–133 ln 4.) Block also admitted that he has no personal knowledge of who within Red Violet performed the matching, and that he is relying on Red Violet telling him that they performed the matching according to the terms he provided them. (ECF No. 121-3, PageID.2339-2340, pp 124 ln 12–125 ln 13.) Neither Block nor anyone at Simpatico has seen the social security numbers that were matched to Michigan

voters in the QVF by Red Violet. (ECF No. 121-3, PageID.2340, p 125 ln 14-17.)

Simpatico only received an indicator from the vendor whether the voter was deceased. (ECF No. 121-3, PageID.2343, p 128 ln 20-23.)

3. Defendant's experts cannot replicate Block's results.

Defendant retained two experts to analyze the methodology described in Block's report. Jonathan Katz is a Professor of Social Sciences and Statistics at the California Institute of Technology. (ECF No. 121-4, PageID.2377, Katz Report, p 1.) Michael Herron is a Professor of Quantitative Social Science at Dartmouth College. (ECF No. 121-5, PageID.2398, Herron Report, p 5, ¶3.) As detailed in the curricula vitae attached to their reports, each has published in peer review journals. Professors Katz and Herron each independently concluded that Block's methodology *could not be replicated* because the report did not provide sufficient information about how the process was performed. (ECF No. 121-4, Katz Report, PageID.2378-2382, p 2-6; ECF No. 121-5, Herron Report, PageID.2397, p 4 ¶10; PageID.2435-2437, p 42-44, ¶134-137)

E. Actual status of persons in PILF's October 5, 2020 list.

On September 13, 2023, MDOS Analyst Stuart Talsma compared the original October 5, 2020, list provided by PILF to the QVF. (Ex. I, Talsma Affidavit.) Out of the 27,275 voter ID numbers provided in PILF's list, 10,409 remain active and without qualification. (Ex. I, Talsma Affidavit, ¶4.) And 7,749 of the voters identified by PILF in its original list have already been removed. (Ex. I, Talsma Affidavit, ¶4.) Of those cancelled registrations, 5,766 were cancelled before this lawsuit was filed on November 3, 2021. (Ex. I, Talsma Affidavit, ¶9.) And 4,407

have been coded as “verify,” meaning that the voter’s eligibility has been questioned and they would need to provide additional information to confirm their eligibility before being allowed to vote. (Ex. I, Talsma Affidavit, ¶5-6.) Another 4,654 have been identified as “challenged,” and either their eligibility to vote has been formally challenged, or their registration has advanced to the next step in the verification process—for example, after a confirmation notice was returned as “undeliverable.” (Ex. I, Talsma Affidavit, ¶5-6.) Out of the 9,046 registrations that were marked as “verify” or “challenged,” 4,921 are already slated for cancellation in 2025 or 2027. (Ex. J, Talsma 10/02/2023 Affidavit, ¶2). Regardless, voters with either the “challenged” or “verify” statuses *would not be able to vote* before taking some action or providing information confirming their eligibility to vote. (Ex. I, Talsma Affidavit, ¶6.)

In addition, the admissibility of PILF’s lists—along with the report of the expert retained by PILF to create those lists—have been brought into question. Pursuant to Fed. R. Civ. P. 10(c), Defendant incorporates here by reference the facts and arguments raised in her brief supporting the pending motion in limine. (ECF No. 121, PageID.2166-2187.)

F. Professor Herron’s Comparison of Michigan’s Removal Program to Neighboring States

In Section 7 of Professor Herron’s Expert Report, he compared Michigan’s laws regulating the removal of deceased registrants to the laws of five neighboring states that share land and water boundaries with Michigan. (ECF No. 121-5, Herron Report, PageID.2438-2446, p 45-53). His review found nothing unusual

about Michigan's statutes with respect to the individuals responsible for removing deceased voters from the voter rolls, the frequency of removal efforts, the use of Social Security Administration information, or the timing requirements related to removal of deceased voters. (ECF No. 121-5, Herron Report, PageID.2445-2446, p 52-53, ¶¶167-171).

G. Election Administration and Voting Survey (EAVS) and Census Data

Federally-collected data shows that Michigan is consistently among the most active states in cancelling the registrations of deceased individuals. According to data collected by the U.S. Election Assistance Commission, Michigan cancelled the 6th largest total number of registrations based on death in the 2016 election cycle; 4th most in the 2018 cycle; 5th most in the 2020 cycle; and 5th most in the 2022 cycle.⁶ For context, according to the U.S. Census Bureau, Michigan ranks 10th in voting-age population.⁷

⁶ See U.S. Election Assistance Commission, Election Administration and Voting Survey 2016 at 97 (Table 4b), available at https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf; U.S. Election Assistance Commission, Election Administration and Voting Survey 2018 at 82 (Table 3b), available at https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf; U.S. Election Assistance Commission, Election Administration and Voting Survey 2020 at 165 (Voter Registration Table 5), available at https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf; U.S. Election Assistance Commission, Election Administration and Voting Survey 2022 at 188 (Voter Registration Table 5), available at https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf.

⁷ See U.S. Census Bureau, Population Estimates by Age (18+): July 1, 2022, available at <https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-detail.html>.

H. PILF's requests to review NVRA records.

On December 11, 2020, PILF sent a letter to the Secretary of State requesting that it be permitted to inspect four broad categories of records:

1. Data files your office has received from the federal Social Security Administration listing deceased individuals.
2. Any records relating to the cancellation of deceased registrants from the Qualified Voter File ("QVF"), including but not limited to reports that have or can be generated from Michigan's QVF.
3. Any records relating to the investigation of potentially deceased registrants who are listed on the QVF, including but not limited to correspondence between your office and local election officials.
4. All records and correspondence regarding your use of the Electronic Registration Information Center to conduct voter roll list maintenance.

(ECF No. 1-9, PageID.63-64.) PILF cited 52 U.S.C. §20507(i)(l) as the legal basis for its requests, which provides for inspection of records pertaining to, "the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters."

On December 16, 2020, PILF sent an e-mail declaring that its representative would visit MDOS offices on December 18, 2020—two days later—to inspect "voter roll maintenance records." (ECF No. 1-10, PageID.65-66.) On December 17, 2020, Bureau of Elections staff responded, stating that the Department had not agreed to the date chosen by PILF, and that the building was closed to the public due to the then-ongoing pandemic. (ECF No. 1-10, PageID.65-66.) Notably, December 18 was also the date that Michigan's members of the electoral college met. (Ex. D, MDOS Dep, p 117 ln 14—p 118 ln 1.) On December 18, 2020, PILF sent a letter stating that the Secretary of State was in "violation" of the NVRA for failing to permit

inspection of documents. (ECF No. 1-11, PageID.67-68.) On January 13, 2021, PILF sent another letter stating that Michigan had violated the NVRA by failing to allow PILF to inspect documents. (ECF No. 1-13, PageID.72-73.)

I. Kinds of documents kept by MDOS concerning list maintenance that may be subject to public inspection under NVRA.

The QVF can be queried to run a list of voter registration information that contains the voter's name, the year of birth, and the date of registration. (Ex. D, MDOS Dep, p 144 ln 3—p 145 ln 2.) In addition, there is a “voter history file” which has the general information about each individual voter, including whether they have voted in an election (indicated by a yes or no), whether they have voted absentee (also indicated by a yes or no), and the address history of that voter. (*Id.*) Concerning cancellations, QVF can also create reports that detail the voter's status, such as whether they are active, if they're in verify or challenge status, or if they are already canceled for some reason, such as being deceased. (*Id.*) In response to Request to Produce #14, Defendant has produced to Plaintiff all reports from the QVF showing registrants who were cancelled for being deceased from 2016 to the time of the request. (Ex. K, Def's Answer to 2nd RTP, p 4.)

MDOS also issues guidance on its website and through correspondence regarding processes and procedures for list maintenance activities such as cancellations. (Ex. D, MDOS Dep, p 148 ln 9—p 149 ln 5.) Defendant has produced these kinds of documents in response to Requests to Produce 1 (“Documents relating to the Defendant’s procedures and practices as to registrants who are or may be deceased”), 2 (“Communications with any local, state, or federal entity related to the

2020 or 2021 Deceased Registrant Lists, this litigation, and/or the subject matter thereof”) 10 (“The manual, handbook, or any other written or electronic documents that outline any processes for maintaining the Qualified Voter File”), 11 (“Training documents relating to voter list maintenance, including all information contained within the Michigan Elections eLearning Center Information”), and 16 (“All communications to or from local election clerks concerning the removal of registrants from the Qualified Voter File on the basis that the registrant is deceased.”) (Ex. L, Def’s Answer to 1st RTP; Ex. K, Def’s Answer to 2nd RTP.)

J. Other events occurring contemporaneous with PILF’s requests.

The months leading up to and following the November 2020 election were a historically frantic time for the State of Michigan and the Bureau of Elections in particular, as explained by Director Brater:

Q: What other things were going on in October and September of 2020?

A. Well, there was the lead-up to the presidential election, the state -- there -- in fact, it was ongoing already because absentee ballots were already being mailed out, which was a much higher factor in that election than other elections because of the Covid 19 pandemic. We were also working to help jurisdictions run, you know, get through their elections because of problems related to Covid, staff members getting sick, polling locations becoming unavailable. So there were a number of emergencies and crises that were ongoing in the lead-up to the 2020 election.

Q. Similarly, were there other things going on in November of 2020 after election day?

A. Yes.

Q. What kinds of things were going on after election day?

A. Well, there were a -- first of all, I mean, the -- the counting of ballots didn't come -- become complete until sometime, I think, on Thursday after Election Day because of the high volume of absentee ballots, perhaps Friday, even.

And the post-election canvas process, which happens at the county level and on the state level, was much more eventful than in prior elections because of attempts to prevent the certification of the election.

There were a high volume of lawsuits being filed. There was a high volume of false information being made about the election and about election officials that needed to be responded to. And then the -- the pandemic was still ongoing as well, of course.

Q. So the -- the other things you've just discussed here, would it be fair to say those were taking a considerable amount of the Bureau's resources?

A. Yes.

Q. All right. How would you describe the availability of the Bureau's resources during this time as opposed to any other time since you've been at the Bureau as Director of Elections?

A. I would say that was the time at which our resources were the most depleted.

(Ex. A, Brater Dep, p 201 ln 23—p 202 ln 12.) Beginning on the night of the November 3, 2020, election, the Bureau of Elections started receiving hundreds—if not thousands—of telephone calls and e-mails. (Ex. D, MDOS Dep, p 183 ln 13—p 184 ln 7.) Phone lines were shut down due to the volume of calls, including threats of violence. (*Id.*). The Bureau's offices were closed to the public due to bomb threats, and staff were not even allowed in the building. (Ex. D, MDOS Dep, p 184 ln 8-15.) There were also a significant number of lawsuits filed immediately following the election. (Ex. D, MDOS Dep, p 184 ln 16-20.) The Board of State Canvassers met on November 23, 2020 to certify the results of the election and, due

to the volume of threats, the Board was required to meet in an undisclosed location. (Ex. D, MDOS Dep, p 184 ln 21—p 185 ln 11.) In addition, the state legislature sent subpoenas to MDOS requesting tens of thousands of pages of election-related documents. (Ex. D, MDOS Dep, p 185 ln 12-16.) Bureau staff were also receiving threats against them personally and were under police protection. (Ex. D, MDOS Dep, p 186 ln 6-14.) Bureau staff were not allowed back into their offices until February of 2021. (Ex. D, MDOS Dep, p 190 ln 13-22.)

ARGUMENT

I. Because Michigan maintains a general list maintenance program that makes a reasonable effort to remove the names of deceased voters, the Defendant is entitled judgement in its favor as to Count I.

Count I of PILF's Complaint claims that the Secretary of State has violated the NVRA by failing to make reasonable efforts to conduct voter list maintenance to remove the names of deceased individuals. (ECF No. 1, PageID.17, ¶63.) Under the NVRA, a state must "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, in accordance with subsections (b), (c), and (d) [of]" 52 U.S.C. § 20507(a)(4)(A)-(B) (emphasis added).

With respect to the deaths of registered voters, the Michigan Election Law requires the Secretary of State 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 . . . or an official state personal identification card . . . of a deceased resident of this state is

also used at least once a month to update the qualified voter file to cancel the voter registration of any elector determined to be deceased.” Mich. Comp. Laws § 168.509o(4).

Michigan’s program for the removal of deceased registrants is detailed in the statement of facts above, and—importantly—the components of that program and the means by which it operates are not in dispute. In short, Michigan’s process for the removal of deceased registrants is comprised of automated removal based on SSDI and Michigan Department of Health and Human Services (MDHHS) records, manual review of “close matches” from the SSDI and MDHHS records, manual review of death reports received from the Electronic Registration Information Center (ERIC), and cancellations entered by local clerks based on information they receive. The gravamen of PILF’s claim, then, is not that Michigan has failed to implement a program, but instead that Michigan’s program violates the NVRA because Michigan’s program does not rise to the level of a “reasonable effort” to remove deceased individuals under 52 U.S.C. §20507(a)(4).

There are few cases in which federal courts have examined what is required for a “reasonable effort” to remove deceased individuals under NVRA, but the cases that exist do not support PILF’s claims here. In *Bellitto v. Snipes*, 935 F.3d 1192, 1205-1205 (11th Cir., 2019), the plaintiff argued (as PILF does here) that the defendant’s program was unreasonable—even though they used SSDI and state health department records—because additional tools (such as the social security cumulative death index) were available to identify more deceased voters. The

Eleventh Circuit rejected that argument, holding that “a jurisdiction’s reliance on reliable death records, such as state health department records and the Social Security Death Index, to identify and remove deceased voters constitutes a reasonable effort,” and that “[t]he state is not required to exhaust all available methods for identifying deceased voters; it need only use reasonably reliable information to identify and remove such voters.” *Id.* at 1205.

Here, Michigan similarly relies on SSDI and state health records in order to identify and remove deceased registrants. But—in addition—it also obtains information from ERIC to assist in identifying deceased voters who do not have a driver’s license or state ID. Also, any local clerk who has received reliable information that a voter in their jurisdiction has died can take action to cancel that voter’s registration. So, Michigan already goes beyond what the Court in *Bellitto* held to be required for a “reasonable effort.” While PILF argues that more deceased registrants might be identified through additional means, that does make Michigan’s program unreasonable. Pointedly, the Eleventh Circuit rejected arguments that a state was required to adopt more extensive procedures in order to meet the “reasonable effort” standard under the NVRA:

It is plausible that if the County had also used the SSDI Cumulative or STEVE, it could have captured additional deceased voters. But the **NVRA only requires that Broward County make a reasonable effort, not an exhaustive one**, and the Florida Health Department’s records and the SSDI are reliable sources of information concerning registrant deaths. Indeed, [the plaintiff] has failed to establish that these sources would not effectively capture most deceased voters. The failure to use duplicative tools or to exhaust every conceivable mechanism does not make [the County’s] effort unreasonable.

Bellitto, 935 F.3d at 1207 (emphasis added).

Also, in *Public Interest Legal Foundation v. Boockvar*, 495 F. Supp. 3d 354, 356-357 (M.D. Penn., Oct. 20, 2020), the District Court denied a motion for preliminary injunction filed by PILF that sought to compel the removal of over 21,000 “potentially deceased” voters from the Pennsylvania voter rolls. In so holding, the Court concluded that PILF failed to demonstrate a likelihood of success on the merits regarding the reasonableness of Pennsylvania’s maintenance program where it relied entirely on its own list of “potentially deceased” voters:

Plaintiff does not allege that [Pennsylvania’s] program itself is deficient, nor does it point to a specific breakdown that makes the program “unreasonable.” Instead, Plaintiff argues that the sheer number of allegedly deceased registered voters it has uncovered is a “hallmark of an unreasonable list maintenance program.” We disagree. Approximately 130,000 Pennsylvanians die every year. This means that, even assuming all 22,206 “apparently” deceased individuals died in the same year, a maximum of 17% of deceased registered voters have not been removed from the voter rolls. As Plaintiff’s counsel acknowledged at yesterday’s hearing, the NVRA does not require perfection. Nor shall we.

Without 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.

Boockvar, 495 F. Supp. 3d at 359. It is significant that PILF’s arguments in *Boockvar* are nearly identical to the claims it makes here—that is, PILF claims that Michigan’s program is unreasonable based entirely upon the number of “potentially deceased” voters, but it has not claimed that Michigan’s program is not operating correctly.

None of the courts that have examined the “reasonable effort” requirement under the NVRA have found this statute to impose exacting or onerous obligations

on the states. Indeed, they instead recognized that exhaustive efforts and perfection are not required.

PILF's arguments here—similar to those in *Boockvar*—depend on a determination that Michigan's program—which has resulted in the 6th, 4th, 5th, and 5th most deceased-cancellations in recent election cycles for the state with the nation's 10th largest number of registered voters—must nonetheless be unreasonable based on PILF's own lists matching “potentially deceased” voters derived from comparing credit reports to the SSDI. But the NVRA itself makes no mention of any specific method of identifying deceased voters, let alone PILF's poorly-defined process of using credit reports to co-relate “potentially deceased” persons to voter ID's on Michigan's QVF.

As noted earlier, there are over 8.2 million registered voters in the state of Michigan, of which the 27,275 in PILF's October 5, 2020 list of “potentially deceased” voters would comprise less than 0.3 % of the total number of voters. So, similar to the District Court's conclusion in *Boockvar*—even if *all* of the voters on PILF's list were deceased, that number of deceased voters would simply not be unreasonable in a state of this size. However, the undisputed evidence shows that PILF's lists are not an accurate appraisal of Michigan's program.

According to the affidavit of Stuart Talsma, 7,749 of the voters identified by PILF in its October 5, 2020 list have already been removed. (Ex. I, Talsma Affidavit, ¶4). Of those cancelled registrations, 5,766 were cancelled before this lawsuit was filed on November 3, 2021. (Ex. I, Talsma Affidavit, ¶9).

In addition, over 9,000 of the voters on PILF's original list have been marked with "verify" or "challenged" status that may lead to the voters' removal under normal processes. (Ex. I, Talsma Affidavit, ¶4). Out of the registrations that were marked as "verify" or "challenged," 4,921 are already slated for cancellation in either 2025 or 2027. (Ex. J, Talsma 10/02/2023 Affidavit, ¶2). Even so, voters with the "challenged" and "verify" statuses *would not be able to vote* before taking some action or providing information confirming their eligibility to vote. (Ex. I, Talsma Affidavit, ¶6.)

This means that, out of the 27,275 voters included in the list originally provided by PILF, only 10,409 remain active voters able to cast a ballot without taking further action. (Ex. I, Talsma Affidavit, ¶4.) To be clear, it is far from certain that those 10,409 are deceased—these are just voters for whom Michigan does not have sufficient information to justify cancelling their registrations. Again, under HAVA, Michigan must conduct its list maintenance in such a way as to remove *only* voters who are not eligible to vote from the the QVF. 52 U.S.C. §21083(a)(2)(B)(ii). But even so, 10,409 is considerably less than half the original PILF list of "potentially deceased" voters and is only about 0.1% of the total number of registered voters in Michigan.

PILF's claim to the contrary rests entirely on the opinions of their two experts, Kenneth Block—who helped create the lists of "potentially deceased" registrants—and Scott Gessler—the former Secretary of State of Colorado. As discussed in the earlier statement of additional facts and in the pending motion in

limine, Mr. Block's report and the lists are not admissible evidence because they are based on impermissible hearsay (i.e. the statements of unknown persons working for "Red Violet" who actually performed the searches and compiled the lists). More pointedly, the Mr. Block work was reviewed by two highly qualified professors who perform research matching databases, and each determined that they could not replicate Block's results because he did not provide sufficient detail about his methodology.

Mr. Gessler's report is also subject to the motion in limine on the grounds that it is a legal argument rather than an expert opinion. But even if Gessler's opinion were admissible, it would only present the opinion of one former Secretary of State as to what *he* believes a reasonable program ought to include—it would not add words to the statute or impose any legal obligation upon Michigan to adopt Mr. Gessler's ideas.

The undisputed evidence demonstrates that Michigan has a program for the removal of deceased registrants, and that program is based on SSA and MDHHS death records, together with other additional sources of information. Michigan's program more than satisfies the modest statutory requirement of making a "reasonable effort" to remove deceased registrants, and so Defendant is entitled to judgment as a matter of law as to Count I of the Complaint.

II. Because PILF lacks standing to bring its claim for the disclosure of voting records and where there is no genuine issue of material fact that PILF was not entitled to all of the records sought, the Defendant is entitled judgement in its favor as to Count II.

The NVRA provides in 52 U.S.C. §20507(i)(1) that states will “make available for public inspection . . . 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.” “A person who is aggrieved by a violation of [the NVRA] may provide written notice of the violation to the chief election official of the State involved” and may file suit for injunctive relief if the violation goes uncorrected. 52 U.S.C. § 20510(b)(1)-(2). In Count II of its complaint, PILF alleges a violation of this section and seeks injunctive relief. (ECF No. 1, PageID.18-20.)

A. PILF lacks standing to bring suit for a violation of NVRA’s disclosure provisions where it has failed to demonstrate an actual injury.

In its brief supporting its motion to dismiss, Defendant raised PILF’s lack of standing. (ECF No. 11, PageID.93-130.) This Court rejected that argument in its opinion and order. (ECF No. 35, PageID.384-408.) Defendant renews its argument on the basis of the Fifth Circuit’s subsequent decision in *Campaign Legal Ctr. v. Scott*, 49 F.4th 931 (5th Cir. 2022). In that case, the Fifth Circuit reversed the district court’s injunction requiring the State of Texas to produce documents after determining that the plaintiffs lacked standing to bring a claim under NVRA’s public disclosure provision. *CLC*, 49 F.4th at 932-933. The plaintiffs based their standing on three theories: (1) as “civic engagement organization,” they had standing to request records under the NVRA; (2) that there was a “downstream

injury” to them with respect to the public not having visibility into how Texas is keeping its voter lists; and (3) 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.” *CLC*, 49 F.4th at 936. The Court rejected those arguments and held that the plaintiffs had failed to demonstrate an actual injury. The Court observed that the 2nd and 3rd arguments raised only injuries to the *public* and “Texas voters” in general. *CLC*, 49 F.4th at 936. Citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337-42 (2016) and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021), the Court focused instead on whether the plaintiffs had shown an actual injury caused by not receiving the requested documents:

Even if Plaintiffs had a right to the records sought, an issue we do not reach, they have not established an injury in fact. *See Spokeo*, 578 U.S. at 341, 136 S. Ct. at 1549. *Spokeo* implied and *TransUnion* held that “under Article III, an injury in law is not an injury in fact.” *TransUnion*, 141 S. Ct. at 2205.

* * *

As this court recently observed, *TransUnion* rejected “the proposition that ‘a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.’” *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, ___ F.4th ___, 2022 U.S. App. LEXIS 22649, 2022 WL 3355249, at *4 (5th Cir. Aug. 15, 2022) (quoting *TransUnion*, 141 S. Ct. at 2205). [R]egardless of whether a statutory right is procedural or substantive, *Spokeo* emphasized that ‘Article III standing requires a concrete injury *even in the context of a statutory violation.*’” *Id.* (quoting *Spokeo*, 578 U.S. at 341, 136 S. Ct. at 1549) (emphasis added).

Campaign Legal Ctr, 49 F.4th at 936-937. Pointedly, the plaintiffs in *CLC* were relying on “informational injury” based simply not having the data it requested.

Campaign Legal Ctr, 49 F.4th at 936-937.

That is *precisely* the same injury claimed raised by PILF here:

The Foundation has suffered an informational injury as a direct result of Defendant’s violation of Section 8 of NVRA because the Foundation does not have the data and records requested. The NVRA confers upon the Foundation the right to information, and by denying that information to the Foundation, the Defendants have caused a concrete injury to the Plaintiff. This violation also prevents the Foundation from engaging in its research, educational, and remedial activities.

(ECF 1, Complaint, PageID.19, ¶71.) As a result, PILF has similarly failed to demonstrate any concrete and particularized injury caused by the alleged violation of NVRA’s disclosure provision. Absent any actual harm to it from not obtaining the requested personal voter information, PILF has no cognizable injury in fact and lacks standing to bring this claim—even if there were a violation of the statute.

PILF’s claim in Count II must be dismissed.

B. PILF is or was not entitled to inspect all of the documents it sought in its December 11, 2020, letter.

Again, the NVRA provides that states will “make available for public inspection . . . 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).

Here, the Defendant does not dispute that PILF made a request on December 11, 2020, to inspect records. (ECF No. 1-9, PageID.63-64.) Also, the Defendant acknowledges that at least some of the categories of records requested would be

subject to inspection under the NVRA, and that the documents were not provided prior to the filing of this lawsuit. The facts discussed earlier—the chaotic aftermath of the November 2020 general election—provide an explanation for the Defendant’s inability to respond to PILF’s request. Simply put, PILF was demanding to see documents at an historically bad time for the Michigan Bureau of Elections.

However, that does not make PILF’s December 11, 2020 letter a blank check for the production of everything it sought. In its request to inspect records, PILF sought four broad categories of records:

1. Data files your office has received from the federal Social Security Administration listing deceased individuals.
2. Any records relating to the cancellation of deceased registrants from the Qualified Voter File (“QVF”), including but not limited to reports that have or can be generated from Michigan’s QVF.
3. Any records relating to the investigation of potentially deceased registrants who are listed on the QVF, including but not limited to correspondence between your office and local election officials.
4. All records and correspondence regarding your use of the Electronic Registration Information Center to conduct voter roll list maintenance.

(ECF No. 1-9, PageID.63-64.) It is far from clear that all of the documents described in that letter are actually records subject to disclosure under the NVRA.

The NVRA requires the states to make available for public inspection “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). The Sixth Circuit has not yet had cause to examine the scope of section 8(i)(1), and courts in other circuits have so far only recognized that “records” subject to inspection under section 8(i)(1) of NVRA include

voter registration lists, applications for voter registration, and other records related to the accuracy of official lists of eligible voters. *Public Interest Legal Foundation, Inc. v. Way*, 2022 U.S. Dist. LEXIS 204083 at *15 (D. New Jersey, Nov. 9, 2022) (collecting cases). In *Way*, the New Jersey District Court also concluded that Voter Modules—which the court described as “the instruction manual for computer software”—was not a record subject to inspection under NVRA. *Id.* at *14-20.

Also, in *Public Interest Legal Foundation, Inc. v N.C. State Bd. Of Elections*, 996 F.3d 257, 264 (4th Cir. 2021), the Fourth Circuit held that while NVRA’s disclosure provision was broad, the term “all records” in the statute, “does not encompass any relevant record from any source whatsoever, but must be read in conjunction with the various statutes enacted by Congress to protect the privacy of individuals and confidential information held by certain governmental agencies.”

Ultimately, the language of the NVRA is subject to basic principles of statutory interpretation. In interpreting statutes, the initial inquiry is whether the statute has a “plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). “The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” *Somberg v. Utica Cmty. Schs*, 908 F.3d 162, 179 (6th Cir. 2018) (internal quotations omitted).

Looking at PILF’s requests, they go beyond “records of programs” and seek to extend what might be obtained under the NVRA. PILF’s requests for “data files”

from the SSA do not neatly fall within the scope of “records” under section 8(i)(1). A data file received by the SSA is not a voter registration list and is not a record “related to the accuracy of official list of registered voters.” Instead, a data file is just that—data. That data is then used to create the record—in this case, Michigan’s official list of voters. The distinction is subtle, but significant—the “record” is Michigan’s QVF, as updated through the information from CARS. Moreover, the SSA files are subject to their own statutory privileges and protections that must be read in concert with the NVRA. *PILF*, 996 F.3d at 264. Similarly, “all correspondence” with ERIC is not a “program and activity conducted” for list maintenance purposes. 52 U.S.C. 20507(i)(1). And, with regard to ERIC’s deceased reports, those records are subject to LADMF restrictions, as discussed in the Defendant’s response to PILF’s motion to compel. (ECF 118, PageID.2105-2159). While PILF’s motion to compel was ultimately granted, the ability of the documents to be produced through discovery (with some redactions the added security of a protective order) does not negate the legal restrictions imposed on LADMF records. PILF is not entitled to such material under section 8 of NVRA, and Defendant is entitled to judgment in its favor with respect to those requests.

C. PILF’s request for injunctive relief is no longer redressable where it has obtained all available documents through discovery.

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477

(1990)). Federal courts have a continuing duty to ensure that they adjudicate only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *McPherson v. Mich. High School Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc).

If “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,” then the case is moot and the court has no jurisdiction. *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). A “live” controversy is one that “persists in ‘definite and concrete’ form even after intervening events have made some change in the parties’ circumstances.” *Mosely v. Hairson*, 920 F.2d 409, 414 (6th Cir. 1990) (citing *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) (“The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.”) (internal quotation marks and citation omitted). In other words, a case is moot where the court lacks “the ability to give meaningful relief[.]” *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019).

With respect to Count II of Plaintiff’s Complaint, the Defendant has already provided PILF with voluminous documents in discovery that exhaustively detail its list maintenance program, and it is not evident that the Defendant is in possession of any additional documents subject to public inspection under NVRA. The last point of any real contention was the production of ERIC deceased reports, which was resolved by the Court with its August 31, 2023 Order. (ECF 139, PageID.2924).

Upon information and belief, PILF is now in possession of all responsive records of Michigan's list maintenance activities. Because an injunction is no longer required for Plaintiff to obtain the requested documents, there is no meaningful relief to be granted and PILF's claim is now moot.

CONCLUSION AND RELIEF REQUESTED

For these reasons, there is no genuine issue of material fact, and Defendant Secretary of State is entitled to judgment in their favor as a matter of law, together with any other relief that the Court determines to be appropriate under the circumstances.

Respectfully submitted,

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Dated: October 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2023, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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