

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

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

v.

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

Defendant.

Civ. No. 1:21-cv-929

**ORAL ARGUMENT
REQUESTED**

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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Table of Contents

Table of Authorities ii

Introduction..... 1

Plaintiff’s Undisputed Material Facts2

Argument6

 I. Summary Judgment Standard7

 II. The Foundation is Entitled to Summary Judgment on Count II of its
 Complaint.....8

 A. The Foundation Requested List Maintenance Records and the Secretary
 Denied the Foundation’s Request for Over Two Years.....8

 B. Defendant’s Denial of Access to List Maintenance Records Violates the
 NVRA9

 1. The Requested Records Are Subject to Public Disclosure Under
 the NVRA’s Plain and Unambiguous Terms.....9

 a. Each Document the Foundation Requested Is a “Record”10

 b. The Requested Records “Concern” the “Implementation of
 Programs and Activities Conducted for the Purpose of
 Ensuring the Accuracy and Currency of Official Lists
 of Eligible Voters[.]”11

 1. Data from the SSA11

 2. QVF Cancellation Records.....12

 3. Records relating to the investigation of potentially
 deceased registrants.....13

 4. ERIC Records.....14

 2. Disclosure of the Requested Records Is Consistent with
 Congress’s Intent15

 3. A Permanent Injunction Is Warranted16

 III. The Foundation Is Entitled to Summary Judgment on Defendant’s
 Affirmative Defenses18

Conclusion21

Table of Authorities

Cases

Ardestani v. INS,
502 U.S. 129 (1991).....9

Ass’n of Cmty. Orgs. for Reform Now v. Fowler,
178 F.3d 350 (5th Cir. 1999)16

Bellitto v. Snipes,
No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617 (S.D. Fla. Mar. 30, 2018) 15-17

Bennett v. Spear,
520 U.S. 154 (1997).....16

Brown v. Schultz,
No. 1:19-cv-634, 2023 U.S. Dist. LEXIS 97757 (W.D. Mich. Jan. 26, 2023).....7

Conn. Nat’l Bank v. Germain,
503 U.S. 249 (1992).....9

Citizens for Responsibility & Ethics in Wash. v. United States Dep’t of Justice,
922 F.3d 480 (D.C. Cir. 2019)).....8

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006).....16

Fed. Election Comm’n v. Akins,
524 U.S. 11 (1998).....19

Goland v. CIA,
607 F.2d 339 (D.C. Cir. 1978)8

Greater Birmingham Ministries v. Merrill,
No. 2:22cv205-MHT, 2022 U.S. Dist. LEXIS 181339 (M.D. Ala. Oct. 4, 2022). 10-11

Husted v. A. Philip Randolph Inst.,
138 S. Ct. 1833 (2018).....1

Judicial Watch, Inc. v. Lamone,
399 F. Supp. 3d 425 (D. Md. 2019).....7

Pub. Int. Legal Found. v. Chapman,
595 F. Supp. 3d 296 (M.D. Pa. 2022)7

Pub. Interest Legal Found. v. Matthews,
589 F. Supp. 3d 932 (C.D. Ill. 2022)19

Project Vote, Inc. v. Kemp,
208 F. Supp. 3d 1320 (N.D. Ga. 2016)..... 10, 17-18

Project Vote/Voting for Am., Inc. v. Long,
752 F. Supp. 2d 697 (E.D. Va. 2010)11

Project Vote/Voting for Am., Inc. v. Long,
813 F.Supp.2d 738 (E.D. Va. 2011) 7, 17-18

Project Vote / Voting for Am., Inc. v. Long,
682 F.3d 331 (4th Cir. 2012) 7, 10-11

Shapiro v. DOJ,
No. 12-cv-313, 2020 U.S. Dist. LEXIS 115871 (D.D.C. July 2, 2020)8

True the Vote v. Hosemann,
43 F. Supp. 3d 693 (S.D. Miss. 2014).....11

United States v. Louisiana,
196 F. Supp. 3d 612 (M.D. La. 2016).....19

Statutes and Rules

52 U.S.C. §§ 20501-205116

52 U.S.C. § 20501(b)(3)-(4)15

52 U.S.C. § 20507(a)(4).....1, 2

52 U.S.C. § 20507(i).....1, 2, 3, 6, 9, 10

52 U.S.C. § 20510(b).....1, 3, 4, 19

Other Authorities

Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/record>10

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Pursuant to Federal Rule of Civil Procedure 56 and LCivR 7.2, Plaintiff Public Interest Legal Foundation (“Foundation”) moves for summary judgment on Count II of its Complaint, (ECF No. 1, PageID.1-20), and on the affirmative defenses stated in Defendant’s Answer (ECF No. 14, PageID.161-162.) There are no issues of material fact genuinely in dispute and the Foundation is entitled to judgment as a matter of law.

Introduction

“The National Voter Registration Act has two main objectives: increasing voter registration and removing ineligible persons from the States’ voter registration rolls.” *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). To accomplish the objective of ensuring the integrity of elections, Section 8 of NVRA requires Michigan to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of – (A) the death of the registrant; or (B) a change in the residence of the registrant[.]” 52 U.S.C. § 20507(a)(4). (ECF No. 1 PageID.3.) The NVRA also requires that election officials provide public disclosure of “all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i)(1). The Defendant is obligated to provide such records upon request. The NVRA then provides a private right of action for failure to comply with this public disclosure obligation. 52 U.S.C. § 20510(b).

The first question is whether the Defendant has complied with its disclosure obligations under the NVRA. The record is undisputable: Defendant has failed to comply with her legal duty to provide access to all list maintenance records, and the Foundation is therefore entitled to summary judgment on Count II.

The next question is whether the Defendant's affirmative defenses set forth in its Answer can withstand scrutiny. They cannot and the Foundation is entitled to summary judgment as to all five of Defendant's affirmative defenses.

Plaintiff's Undisputed Material Facts

In addition to those included in the parties' Joint Statement of Undisputed Facts (hereinafter "Joint SUMF"), the Foundation states that the following facts are not in dispute.

1. Section 8(a)(4)(A) National Voter Registration Act of 1993 ("NVRA") provides that Michigan 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," *inter alia*, "the death of the registrant." 52 U.S.C. § 20507(a)(4)(A).

2. Section 8(i)(1) of the NVRA provides,

Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, 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, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

52 U.S.C. § 20507(i)(1).

3. The Foundation is a non-partisan, non-profit, public interest organization that seeks to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. (ECF No. 1 PageID.2.) Exhibit A, Declaration of Logan Churchwell,

¶ 4.

4. The Foundation has dedicated significant time and resources to evaluating the accuracy of Michigan's voter roll and offering Defendant assistance with her voter list maintenance obligations. The Foundation communicates with election officials about problems

or defects found in list maintenance practices and about ways to improve those practices. (ECF No. 1 PageID.2.) Exhibit A, ¶ 5.

5. On September 18, 2020, the Foundation sent, via email and mail, a letter to Defendant about its research and findings as to Michigan registrants that appeared to be deceased. (ECF No. 1 PageID.9, ECF 1-4, PageID.48-50.)

6. The Foundation's September 18, 2020, Letter notified the Defendant that Michigan was in violation of the NVRA, 52 U.S.C. § 20510(b). (ECF No. 1 PageID.9, ECF 1-4, PageID.48-50 ("Statutory Notice Letter").)

7. The Foundation sent a letter to the Defendant on October 5, 2020, that included a spreadsheet of the specific registrants that appeared to be deceased. (ECF No. 1 PageID.9, ECF No. 1-6, PageID.52-53.)

8. On November 25, 2020, the Foundation sent a letter to the Defendant outlining its additional research and findings regarding registrants that appeared to be deceased. (ECF No. 1 PageID.11, ECF No. 1-8, PageID.61-62.)

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

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

11. Specifically, Foundation's letter dated December 11, 2020, sought to inspect the following records:

- a. Data files [Defendant] has received from the federal Social Security Administration listing deceased individuals;
- b. Any records relating to the cancelation 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;
- c. Any records relating to the investigation of potentially deceased registrants who are listed on the QVF, including but not limited to correspondence between [Defendant's] office and local election officials.
- d. All records and correspondence regarding [Defendant's] use of the Electronic Registration Information Center to conduct voter roll list maintenance.

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

12. The Foundation's December 11, 2020, Letter stated that the Foundation would send a representative to Defendant's office on December 18, 2020, and asked that Defendant inform the Foundation should it wish to provide copies of the records instead. (ECF No. 1-9, PageID.64.)

13. On December 17, 2020, the Foundation received an email from Defendant's office denying the Foundation's request to inspect documents on December 18, 2020. The email did not provide copies of the requested documents. (ECF No. 1 PageID.12, ECF No. 1-10, PageID.65-66.) Exhibit B, Deposition of the Michigan Department of State at 118:12-17.

14. On December 18, 2020, the Foundation sent a letter to the Defendant notifying her that she was in violation of the NVRA for failing to permit inspection and duplication of public records. (ECF No. 1 PageID.12; ECF No. 1-11, PageID.67-68)

15. Pursuant to 52 U.S.C. § 20510(b), "[i]f the violation is not corrected within 90 days after receipt of a notice..." then "the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation." Ninety days following the Foundation's December 18, 2020, Letter is March 18, 2021.

16. On January 13, 2021, the Foundation wrote another letter to the Defendant regarding its research. Along with its response, the Foundation provided an additional spreadsheet of the specific registrants that appeared to be deceased. (ECF No. 1 PageID.12, ECF No 1-13, PageID.72-73.)

17. The QVF and CARS databases are not the same and may contain different information for a specific person. Exhibit C, Deposition of Jonathan Brater at 32:24-25, 37:3-6.

18. Defendant, through CARS, receives information regarding deceased individuals from the U.S. Social Security Administration (SSA) approximately every week. Exhibit D, Defendant's Responses to Plaintiff's Interrogatories, No. 1 and 7.

19. Defendant relies upon data from the SSA regarding individuals who have died to update CARS which then updates a corresponding entry, if any, in the QVF. Exhibit D at 1-2.

20. Defendant, through CARS, receives information regarding deceased individuals from the Michigan Department of Health and Human Services (MDHHS) approximately every week. Exhibit D at 1-2, 4-5.

21. Defendant, through CARS, receives information from members of the public regarding deceased individuals. Exhibit D at 2.

22. Defendant receives information from the Electronic Registration Information Center ("ERIC") regarding deceased individuals approximately every other month. Exhibit B at 41:22-25.

23. ERIC is the only other incoming source of information as to deceased registrants apart from changes to the driver's license database file. (ECF 86-1, PageID 1437:18-24.)

24. The QVF database can generate various reports, including a list of records that were cancelled. Exhibit C at 61:13-22.

25. Defendant also assists local clerks with investigating potentially deceased registrants. (ECF No. 1, PageID.6, see also ECF No. 1-2, PageID.41.) Exhibit C at 98:11-24.

Argument

This is a case for declaratory and injunctive relief under the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. §§ 20501-20511. The Foundation seeks summary judgment as to Count II of its Complaint. There, the Foundation alleges that “Defendant has failed to allow the Foundation to inspect records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of Michigan’s official lists of eligible voters in violation of Section 8 of the NVRA, 52 U.S.C. § 20507(i).” (ECF No. 1, PageID.18.) With two irrelevant exceptions, section 20507(i)(1) of the NVRA is similar to a federal freedom of information law, albeit more powerful than FOIA, requiring election administration officials to “make available for public inspection and, where available, photocopying at a reasonable cost, 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) (hereafter, the “Public Disclosure Provision”).¹

The Foundation has dedicated significant time and resources to evaluating the accuracy of Michigan’s voter roll and offering Defendant assistance with her voter list maintenance obligations. The Foundation communicates with election officials about problems or defects found in list maintenance practices and about ways to improve those practices. (ECF No. 1 PageID.2.) Foundation Statement of Undisputed Material Facts (“Foundation SUMF”) ¶ 4.

¹ “[P]rograms and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters” are referred to as “voter list maintenance” programs or activities.

It is not disputed that the Foundation requested and was denied access to list maintenance documents. Joint SUMF ¶¶ 11-16, Foundation SUMF ¶¶ 9-15. Accordingly, judgment should enter for the Foundation.

Further, the undisputed record demonstrates that the Defendant's affirmative defenses set forth in its Answer cannot withstand scrutiny. The Foundation is entitled to summary judgment as to all five of Defendant's affirmative defenses.

I. Summary Judgment Standard

“Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Brown v. Schultz*, No. 1:19-cv-634, 2023 U.S. Dist. LEXIS 97757, at *3 (W.D. Mich. Jan. 26, 2023). In similar matters, other courts have awarded summary judgment to the requester where the requester has shown as a matter of law that the requested records are within the scope of the Public Disclosure Provision. *See Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738, 742 (E.D. Va. 2011) (the issue is “whether the NVRA’s Public Disclosure Provision requires the Requested Records to be made available to the public for inspection and photocopying”), *aff’d Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012); *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425 (D. Md. 2019). Recently, the Middle District of Pennsylvania granted summary judgment on the Foundation’s public records claim while finding that “Congress struck such a balance when it enacted NVRA, deciding transparency in how states determine voter eligibility—the vital bedrock of our electoral system—is generally paramount.” *Pub. Int. Legal Found. v. Chapman*, 595 F. Supp. 3d 296, 307 (M.D. Pa. 2022).

The NVRA permits a public inspection, a right that far exceeds traditional Freedom of Information Act (“FOIA”) remedies. But, even in FOIA actions, it is the *defendant* that bears the

burden of proving that a requested record is statutorily exempt from disclosure. *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (“In order to prevail on an FOIA motion for summary judgment, ‘the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act’s inspection requirements.’”) (citations omitted). Stated differently, “FOIA places the burden on the agency to sustain its action, and the agency therefore bears the burden of proving that it has **not** improperly withheld the requested records.” *Shapiro v. DOJ*, No. 12-cv-313, 2020 U.S. Dist. LEXIS 115871, at *11 (D.D.C. July 2, 2020) (emphasis added) (citing *Citizens for Responsibility & Ethics in Wash. v. United States Dep’t of Justice*, 922 F.3d 480, 487 (D.C. Cir. 2019)) (other citations and quotations omitted). At minimum, no less should apply here.

II. The Foundation Is Entitled to Summary Judgment on Count II of its Complaint.

A. The Foundation Requested List Maintenance Records and the Secretary Denied the Foundation’s Request for Over Two Years.

It is undisputed that prior to the filing of this litigation, the Foundation requested from the Secretary four categories of voter list maintenance records pursuant to the NVRA’s Public Disclosure Provision: (1) data from the Social Security Administration (“SSA”), (2) QVF cancelation records, (3) records relating to the investigation of potentially deceased registrants, and (4) ERIC records. (ECF. No. 1-9 at PageID.63-64.), Joint SUMF ¶¶ 11-12, Foundation SUMF ¶¶ 9-12. It is undisputed that the requested documents “concern” list maintenance activities—here, the documents are both used for and reflect those activities. Joint UMF ¶¶ 26-29, Foundation SUMF ¶¶ 18-25. Michigan’s Director of Elections himself classified what the Foundation requested as “records about voter list maintenance.” Exhibit C at 47:5-8 (“Q: Do you know which records the Public Interest Legal Foundation is seeking in this complaint? A. I don’t remember specifically. Generally, records about voter list maintenance.”). It is also

undisputed that the Secretary did not provide the Foundation with any of the requested records prior to the filing of this lawsuit. Joint SUMF ¶ 16, Foundation SUMF ¶¶ 13, 15. These facts are not genuinely in dispute.

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

1. The Requested Records Are Subject to Public Disclosure Under the NVRA’s Plain and Unambiguous Terms.

On its face, the NVRA’s Public Disclosure Provision is a broad mandate, requiring public disclosure of “**all records** concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]” 52 U.S.C. § 20507(i)(1) (emphasis added). The requested records fall squarely within the scope of this disclosure command.

“The starting point in statutory interpretation is the language [of the statute] itself.” *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (citations and quotations omitted). The Supreme Court instructs that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). “When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Id.* at 254 (citations and quotations omitted). The text of the Public Disclosure Provision is unambiguous: “Each state ... shall 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). All records concerning activities conducted by Michigan to make voter registration information current and accurate are subject to public disclosure, period. The records the Foundation is seeking are records subject to inspection and disclosure by the statute’s plain text.

a. Each Document the Foundation Requested Is a “Record.”

The Secretary cannot genuinely dispute that the documents the Foundation requested are not each a “record” under the NVRA’s Public Disclosure Provision. Because the NVRA does not define “record,” the court considers the common and ordinary meaning of the term. *See Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1335 (N.D. Ga. 2016) (interpreting meaning of “record” in NVRA). The Merriam-Webster Dictionary defines record as “a body of known or recorded facts about something or someone” and “a collection of related items of information (as in a database) treated as a unit.”² The requested records are each a “record” under the plain meaning of the term.

It makes no difference that any of the requested records are generated and distributed in an electronic format because the NVRA requires disclosure of “all records,” not just physical records. 52 U.S.C. § 20507(i)(1). As the Northern District of Georgia prudently recognized, “Interpreting ‘records’ to exclude information contained within electronic databases ... would allow States to circumvent their NVRA disclosure obligations simply by choosing to store information in a particular manner. Given the ubiquity and ease of electronic storage, this would effectively render Section 8(i) a nullity.” *Project Vote, Inc.*, 208 F. Supp. 3d at 1336. In fact, in considering a NVRA inspection claim, the Middle District of Alabama recently ordered election officials to send to the requester “in digital form all of the records it has requested.” *Greater Birmingham Ministries v. Merrill*, No. 2:22cv205-MHT, 2022 U.S. Dist. LEXIS 181339, at *13 (M.D. Ala. Oct. 4, 2022). The court did not hold that digital access is required in *all* cases but

that the provision requires digital access in the specific circumstances of this case, where the records are already kept in digital form, where providing them in any other form would unduly interfere with the NVRA’s express purposes, and where the window of time before the registration deadline for the next election is so slim.

² <https://www.merriam-webster.com/dictionary/record> (last accessed Oct. 2, 2023).

To hold otherwise would be to sanction precisely the kind of “administrative chicanery ... [and] inefficiencies” that the NVRA was designed to prevent.

Greater Birmingham Ministries v. Merrill, No. 2:22cv205-MHT, 2022 U.S. Dist. LEXIS 181339, at *15 (M.D. Ala. Oct. 4, 2022) (quoting *Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012).)

b. The Requested Records “Concern” the “Implementation of Programs and Activities Conducted for the Purpose of Ensuring the Accuracy and Currency of Official Lists of Eligible Voters[.]”

Interpreting the plain meaning of the NVRA’s terms, the Eastern District of Virginia concluded that “a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a ‘most recent’ and errorless account of which persons are qualified or entitled to vote within the state.” *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 706 (E.D. Va. 2010); *see also True the Vote*, 43 F. Supp. 3d 693, 719-20 (S.D. Miss. 2014) (“A list of voters is ‘accurate’ if it is ‘free from error or defect’ and it is ‘current’ if it is ‘most recent.’”) (Citations omitted). Each of the requested records concerns the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.

1. Data from the SSA

It is undisputed that the Defendant receives data from the SSA regarding individuals who have died. Foundation SUMF ¶ 18. It is undisputed that the Defendant relies upon data from the SSA regarding individuals who have died to update CARS which then updates a corresponding entry, if any, in the QVF. Foundation SUMF ¶ 19.

During discovery, the Foundation requested “Documents and communications from the Social Security Administration to you regarding individuals who are or may be deceased. The timeframe for this request is 2016 to present.” Exhibit E, Plaintiff’s Second Set of Requests for

Production of Documents No. 12. Defendant objected to the request as, in part, “overly broad, vague and unduly burdensome.” Exhibit F, Defendant’s Response to Plaintiff’s Second Set of Requests for Production of Documents No. 12. Notably, Defendant did not state that no responsive documents exist nor object to the relevancy of the requested documents. Indeed, it is undisputed that the Defendant receives information from SSA and that information concerns the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. Foundation SUMF ¶¶ 18-19.

Defendant is required to allow inspection of such records pursuant to the NVRA. It has not done so.

2. QVF Cancellation Records

It is undisputed that the QVF can generate a report of registrants who have been canceled. Foundation SUMF ¶ 24. In discovery, the Foundation requested “All reports from the Michigan Qualified Voter File showing registrants who have been canceled because they were determined to be deceased, including the source of information and date of cancellation. The timeframe for this request is 2016 to the present.” Exhibit E at Request for Production No. 14. The Defendant provided a cancellation report in response. Exhibit F at Response to Request for Production No. 14. There can be no dispute that this record concerns the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. There is no indication that the Defendant had a good faith reason for withholding this document before and the Foundation has no assurance that it will not be withheld again. For the reasons described further below, a permanent injunction is warranted.

3. Records relating to the investigation of potentially deceased registrants

There is no dispute that any records relating to Defendant investigating potentially deceased registrants concern the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. It is undisputed that Defendant has not permitted the Foundation to inspect such records pursuant to its NVRA Inspection Request.

The Foundation knows such records exist. In its Complaint, the Foundation alleged as follows:

19. City of Detroit election officials also stated that they provided the State of Michigan with the potentially deceased registrant data provided by the Foundation. According to the City of Detroit election officials, “The State discovered that in many cases, discrepancies between the information contained in the SSDI and in the QVF has made it difficult to confirm the deaths of the voters at issue. However, the State is continuing its investigation, and is cancelling voters as deceased as it deems appropriate.” Exhibit 2 at 5.

(ECF No. 1, PageID.6, *see also* ECF No. 1-2, PageID.41.) All records relating to that investigation, including correspondence between the City and the Secretary’s office, are responsive to the Foundation’s NVRA Inspection Request. The interaction with the City of Detroit is not an isolated incident. In his deposition, Michigan Director of Elections referred to general investigations that may occur.

11 Q. · What procedures do you have in place for information
12 · · · submitted from a relative about a deceased individual?

13 A. · If an individual believes that -- or if an individual is
14 · · · reporting that a relative or anyone they know, really, is
15 · · · deceased and is registered to vote, that information is best
16 · · · directed to the municipal clerk for that voter. · The clerks
17 · · · are the ones who do the individual level review.

18 · · · · · · · · · So, typically, if that information was provided to
19 · · · the Bureau, the Bureau would first contact the clerk to
20 · · · follow up on that. · The Bureau might also assist the clerk as
21 · · · needed, if requested.

22 Q. · How would the Bureau assist the local clerk in that instance?

23· A· ·If the clerk asked for help looking something up in the
24· · · ·Qualified Voter File, Bureau staff could help them with that.

Exhibit C at 98:11-24. The exact number of responsive documents would be known to the Defendant but, based upon the record, it is not zero. Defendant is required to allow inspection of such records pursuant to the NVRA. It has not done so.

4. ERIC Records

It is undisputed that the Defendant receives information from the ERIC regarding deceased individuals. Foundation SUMF ¶ 22. The Foundation has briefed the role ERIC plays in Secretary Benson’s list maintenance program. *See, e.g.*, ECF No. 94, PageID.1511-1535. *See also*, ECF 86-1, PageID.1433:1-3 (“The Bureau of Elections receives a report from the Electronic Registration Information Center of possible deceased voters in the State of Michigan”) and 1434:13-15 (“Q. So the information from ERIC is sufficient, sufficient grounds for removal of a registrant as deceased? A. Yes.”); ECF 86-1, PageID.1437:18-24 (“[W]e are a member of the ERIC organization, and they send us information on matches for possibly deceased voters in Michigan, and we review those. So that would be the only other, outside of from the driver file, the only other incoming deceased information would be from the ERIC organization.”); ECF 86-1, PageID 1440:5 (“We get deceased records from ERIC.”). ERIC is the “only other” incoming source of information regarding deceased registrants apart from changes to CARS. *See* Foundation SUMF ¶ 23. The ERIC records concern the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.

The Foundation endeavored to resolve its concerns with the Defendant’s discovery responses directly with the Defendant over the course of several months, including working towards a mutually acceptable protective order to address Defendant’s concerns. The parties’

protective order resolves Defendant's data-sensitivity concerns. (*See* ECF No. 77, PageID.845-849.) Yet Defendant unapologetically continued to withhold ERIC records even pursuant to the discovery rules. The Foundation was required to file a motion to compel, (ECF No. 113, PageID.2018-2020,) which Defendant opposed, (ECF No. 118, PageID.2105-2126.) The magistrate judge held a hearing on the motion and ordered Defendant to produce responsive documents. (ECF No. 139, PageID.2924.)

That the Defendant now, by order of the Court, has provided ERIC records does not render the Foundation's claim for this category of documents moot. Indeed, the Foundation has no assurance that the Defendant will provide the documents in the future. For the reasons described further below, a permanent injunction is warranted.

Indeed, the fact that the Defendant refused to provide the majority of the ERIC records until it was ordered to do so is indisputable proof of the Defendant's failure to provide the documents in compliance with its statutory mandate under the NVRA. The Foundation requests that the Court convert the order on the motion to compel to a final judgment in its favor.

2. Disclosure of the Requested Records Is Consistent with Congress's Intent.

To find that the requested records are not within the scope of the NVRA is inconsistent with the explicit intent of Congress. The NVRA was enacted for four purposes, including "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)(3)-(4). The NVRA's Public Disclosure Provision reflects Congressional intent by allowing the public to monitor the activities of government as they concern the right to vote:

[The NVRA's Public Disclosure Provision is] available to **any member of the public** ... and convey[s] Congress's intention that the public should be monitoring the state of the voter rolls and the adequacy of election officials' list maintenance programs. [52 U.S.C. § 20507(i)]. Accordingly, **election officials must provide**

full public access to all records related to their list maintenance activities, including their voter rolls. *Id.* This mandatory public inspection right is designed to preserve the right to vote and ensure that election officials are complying with the NVRA. *Project Vote v. Long*, 682 F.3d. 331, 335 (4th Cir. 2012).

Bellitto v. Snipes, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018) (emphasis added). Indeed, Congress made *all* list maintenance records subject to public inspection precisely so that the public can enjoy a transparent election process and assess compliance with federal laws. *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 364 (5th Cir. 1999) (private-right-of action meant to “encourage enforcement by so-called ‘private attorneys general’” (quoting *Bennett v. Spear*, 520 U.S. 154, 165 (1997))).

3. A Permanent Injunction Is Warranted.

The Court should enter summary judgment and a permanent prospective injunction with an affirmative duty to disclose records similar to those requested. Such an injunction is necessary under these circumstances to prevent impairment of the public’s right to access list maintenance information in the future.

“The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court[.]” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A permanent injunction is warranted where a plaintiff demonstrates: “(1) that it has suffered an irreparable injury; (2) that remedies available at law...are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved....” *Id.* Each of these elements is satisfied.

Defendant’s steadfast refusal to comply with the NVRA caused the Foundation to suffer irreparable harm in at least two ways. First, the Foundation suffered an informational injury, including the loss of opportunity to obtain in a timely fashion information vital to the current and

ongoing debate surrounding election administration. Second, the Foundation lost the opportunity to take action to urge election officials to institute remedial measures before more elections could take place. *See Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018) (describing NVRA’s oversight function). Monetary damages cannot redress these injuries. *Kemp*, 208 F. Supp. 3d at 1350 (“There is no monetary remedy that can correct the public’s lack of access to information enabling it to ensure the integrity of Georgia’s voter registration process.”).

The danger of injury recurring is real. Defendant has not produced a single document in response to the Foundation’s NVRA request. The only documents the Defendant produced without a court order were in response to *discovery requests*, see Exhibit F at Response to Request for Production No. 14. The other records that have been produced – ERIC records –were only produced in part following the Foundation’s pursuit of the Defendant’s initial objections, culminating in an order from this Court in late August 2023. Defendant’s behavior underscores the need for prospective relief. No one should be forced to file a federal action—and then hope to reach the discovery stage—to possibly obtain some of the public record sought years after the request was made.

In *Project Vote/Voting for Am., Inc. v. Long*, the court concluded,

Considering the ubiquity of voting in our representative democracy, there is a “real and immediate threat” that members of the public, like the plaintiff, may again be wrongfully denied the statutory right to inspect and photocopy completed voter registration records with the voters’ SSNs redacted.

813 F. Supp. 2d 738, 744 (E.D. Va. 2011) (citations and quotations omitted). (emphasis in original). For the reasons described, the same real threat exists here.

“The balance of hardships does not weigh in favor of the defendants, as a permanent injunction will simply compel the defendants to comply with their responsibilities under the

NVRA and, thus, will prevent them from denying the public of a statutory right.” *Project Vote*, 813 F. Supp. 2d at 744; *see also Kemp*, 208 F. Supp. 3d at 1350 (considering preliminary injunction).

The public interest would also be served by a permanent injunction. The *Kemp* court prudently recognized that “[t]he public has an interest in seeing that the State of Georgia complies with federal law, especially in the important area of voter registration. Ordering the state to comply with a valid federal statute is most assuredly in the public interest.” *Kemp*, 208 F. Supp. 3d at 1351 (citations and quotations omitted); *see also Project Vote*, 813 F. Supp. 2d at 745. The same is undoubtedly true in Michigan as well.

A permanent prospective injunction will not just ensure future compliance with the NVRA, it will, more importantly, ensure *timely* compliance. Timely compliance will help eliminate the possibility that one or more federal elections will occur without the transparency Congress intended, as occurred here. Because all elements are satisfied, a permanent injunction should enter.

III. The Foundation Is Entitled to Summary Judgment on Defendant’s Affirmative Defenses.

Further, the Foundation is entitled to summary judgment as to the affirmative defenses stated in Defendant’s Answer.

First, Defendant asserted that “[o]ne or more of the Plaintiff’s claims fail to state a claim upon which relief may be granted and are, therefore, subject to dismissal as a matter of law.” (ECF No. 14, PageID.161.) The Court rejected that argument in its Order denying the Defendant’s motion to dismiss. (ECF No. 35, PageID.384-408.) For the same reasons, the Foundation is entitled to summary judgment as to Defendant’s first affirmative defense.

Second, Defendant asserted that the “Foundation lacks standing and, therefore, this Court is without jurisdiction over this case.” (ECF No. 14, PageID.161.) This Court has already determined that the Foundation has standing as to Count I when it resolved Defendant’s motion to dismiss. (ECF No. 35, PageID.390-395.) Although Count II was not before it at the time, the Court noted that “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.) For the reasons explained above, the Foundation failed to obtain information that must be publicly disclosed pursuant to the NVRA. The Foundation notified the Defendant of her violation. Foundation SUMF ¶ 14. Defendant did not respond. Joint SUMF ¶ 16. Pursuant to 52 U.S.C. § 20510(b)(2), “[i]f the violation is not corrected within 90 days after receipt of a notice...” then “the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.” More than ninety days passed before the Foundation filed this action. Joint SUMF ¶ 17. Therefore, the Foundation has satisfied NVRA’s pre-litigation notice requirements. The Foundation is entitled to summary judgment as to Defendant’s second affirmative defense.

Third, Defendant asserted that “Plaintiff’s claims may be barred in whole, or in part, by governmental immunity, including but not limited to absolute immunity, qualified immunity, and/or Eleventh Amendment immunity.” (ECF No. 14, PageID.161.) Of course, sovereign immunity does not apply when “Congress has unequivocally abrogated individual States’ sovereign immunity by law through a valid exercise of Congressional authority.” *Pub. Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 937 (C.D. Ill. 2022). Congress has done just that by enacting the NVRA. *See United States v. Louisiana*, 196 F. Supp. 3d 612, 657 (M.D. La.

2016). The Foundation is entitled to summary judgment as to Defendant's third affirmative defense.

Fourth, Defendant asserted that "Plaintiff's request for injunctive relief fails to state a claim on which relief can be granted, therefore warranting dismissal as a matter of law because, among other things, Plaintiff alleges, at best, a mere apprehension of injury, and an alleged failure to carry out discretionary activities without any allegation that Plaintiff had a clear legal right to the performance of a specific duty by either (sic) Defendant." (ECF No. 14, PageID.161.) For the reasons above regarding Defendant's arguments on the Foundation's standing, the Foundation has been injured and its request for injunctive relief is appropriate. The Foundation is entitled to summary judgment as to Defendant's fourth affirmative defense.

Fifth, Defendant asserted that "Any claim for money damages is speculative and therefore, must be denied." (ECF No. 14, PageID.162.) The Foundation does not seek money damages in this action. The Foundation is entitled to summary judgment as to Defendant's fifth affirmative defense.

Conclusion

The NVRA means what it says—“all records” concerning voter list maintenance are subject to public inspection and reproduction. For the reasons explained herein, that broad mandate includes the requested records. Because there are no material facts genuinely in dispute, the Foundation is entitled to judgment as a matter of law.

Dated: October 2, 2023

Respectfully submitted,

For the Plaintiff:

/s/ Kaylan Phillips

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CERTIFICATE OF SERVICE

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

Dated: October 2, 2023

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Plaintiff

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