No. 24-1255

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff-Appellant,

v.

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

Defendant-Appellee,

ELECTRONIC REGISTRATION INFORMATION CENTER, INC.,

Movant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE
MICHIGAN SECRETARY OF STATE JOCELYN BENSON

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TABLE OF FREQUENTLY-USED ACRONYMS

BOE	Michigan Bureau of Elections
CARS	Customer and Automotive Records System
EAC	U.S. Election Assistance Commission
EAVS	Election Administration and Voting Survey
ERIC	Electronic Registration Information Center
HAVA	Help America Vote Act
LADMF	Social Security Administration Limited Access Death Master File
MDOS	Michigan Department of State
MDHHS	Michigan Department of Health and Human Services
NVRA	National Voter Registration Act of 1993
QVF	Qualified Voter File
SSA	U.S. Social Security Administration
SSDI	Social Security Death Index

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant Public Interest Legal Foundation (PILF) has requested oral argument. However, Defendant-Appellee Michigan Secretary of State Jocelyn Benson does not request oral argument because she believes that oral argument is unnecessary for the Court to decide the issues presented in this appeal of the district court's well-reasoned opinion, and that the issues raised in this appeal are reasonably resolved by established law.

JURISDICTIONAL STATEMENT

Defendant-Appellee Michigan Secretary of State Jocelyn Benson concurs in the Plaintiff-Appellant Public Interest Legal Foundation's (PILF) statement of jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether the National Voter Registration Act of 1993's requirement that a state must conduct a list maintenance program that makes a "reasonable effort" to remove ineligible voters should be interpreted according to the ordinary and common meaning of the words?

2. Whether there were no genuine questions as to any material facts and summary judgment could be granted in favor of the Michigan Secretary of State?

3. Whether the district court did not abuse its discretion by denying PILF's Rule 56(d) motion where the motion failed to identify any specific information PILF sought through additional discovery and show how that discovery would lead to a different result?

4. Whether the Secretary of State was entitled to judgment as a matter of law as to PILF's claim under the NVRA's public inspection provision where PILF admits that there were no longer any documents left to produce and its claim was therefore moot?

INTRODUCTION

After nine months of discovery and nearly three years of litigation, this lawsuit over the scope and application of the National Voter Registration Act of 1993 (NVRA) ended when the district court concluded that Michigan's program for removal of deceased persons from its list of eligible voters satisfied the modest "reasonable effort" statutory threshold. On appeal, the Public Interest Legal Foundation (PILF) raises a multitude of issues in search of an argument warranting reversal of the district court's decision. But this case should instead present only a straightforward question of statutory interpretation that ought to begin and end with the plain language of the statute.

Under that plain language, Michigan's multi-layered approach to list maintenance readily passes muster. The program utilizes federal death records, state death records, updates provided by local clerks, and reports provided by a multistate program comparing Michigan's voter list against death information from the Social Security Administration. Importantly, the components of Michigan's program are not disputed.

PILF's arguments are not compelling. First, it argues that NVRA's "reasonable effort" standard includes whatever additional

procedures PILF thinks advisable. Next, it contends that whether Michigan's program makes a "reasonable effort," or its varied critiques of that program, constitute questions of fact that preclude summary judgment. Each of these arguments is either at odds with the plain language of the statute or is contradicted by established law.

PILF then suggests that summary judgment should have been denied or delayed because PILF was "blocked" from conducting discovery—not by the Secretary of State—but by the orders of the district court denying its discovery motions. But the district court's decisions on discovery or under Rule 56(d) are reviewed only for abuse of discretion, and PILF fails to demonstrate error under that standard.

Finally, PILF argues that it was entitled to summary judgment on its claim under NVRA's public inspection of records provision. But PILF does not dispute that it has been provided every requested document relating to voter registration through discovery. As a result, there is no further relief that PILF can be granted as to that claim, and it was properly dismissed as moot.

STATEMENT OF THE CASE

A. Legal and factual components of Michigan's voter list maintenance program

1. NVRA's list maintenance requirements

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 NVRA, 52 U.S.C. § 20507, provides several procedures that must be carried out by participating states with respect to the administration of voter registration. These procedures, among other things, insure "each eligible applicant" is registered to vote in an election and prevent hasty removals of registrants from voter rolls.

Section 8 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 registrant's name 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).

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]" § 20507(a)(4)(A)-(B). (Emphasis added).

Subsection (b) requires that the program implemented under subsection (a)(4) be "nondiscriminatory," 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 removal under § 20507(b)(2).

In addition to NVRA, the 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, § 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 by creating 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 8.3 million registered voters in the QVF, of which approximately 600,000 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). It also provides that "the State election system shall include provisions to ensure that voter registration records are accurate

[1] *See* Mich. Dep't of State, Bureau of Elections, Voter registration statistics, https://mvic.sos.state.mi.us/VoterCount/Index.

and are updated regularly, including . . . safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 52 U.S.C. § 21083(a)(4)(B). These provisions essentially parallel or incorporate NVRA.

2. Michigan's legal structure for list maintenance practices with respect to deceased voters

After NVRA was enacted, Michigan amended the Michigan Election Law, Mich. Comp. Laws § 168.1 *et seq*., to incorporate or come into compliance with its requirements. Most of these changes 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, § 509o requires the Secretary to "develop and utilize a process by which information obtained through the United States Social Security Administration's death master file that is used to cancel an operator's or chauffeur's license . . . or an official state personal identification card . . . of a

[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.

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 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."). Maintenance of the voter registration list is carried out in strict accordance with all relevant state and federal laws by the Michigan Bureau of Elections and the more than 1,600 election clerks in the state.[3] Based on these laws, each week the Michigan Department of State uses information from the Social Security

[3] *See* Mich. Dep't of State, *Fact Checks*, Michigan's list of registered voters is maintained in accordance with federal law, https://www.michigan.gov/sos/faqs/elections-and-campaign-finance/fact-checks.

Administration's death index [SSDI] to cancel the records of individuals in the QVF who have died.[4]

Under § 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 then must "compare this list with the registration records and cancel the registration of all deceased electors." *Id.*

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

> 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 of that elector must remain in the inactive voter file until 1 of the following occurs:
>
> (a) The elector votes at an election.

[4] *See* Mich. Dep't of State, *Voter registration cancellation procedures*, https://www.michigan.gov/sos/~/link.aspx?_id=0CA77C36E2D44E0DBCAB875DE164507F&_z=z.

> (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).

Local clerks are also authorized to conduct programs to remove names from the QVF. *See* Mich. Comp. Laws § 168.509dd(1) (providing 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"). Such a program must be uniformly administered and comply with NVRA. 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).

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

Within the above legal structure, Michigan's program is administrated through 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 delay between when someone dies and when that information is received for it to be used to cancel the registration; also, it is not practically possible to identify every person who has died in a state with millions of people. (R. 149-2, Def's MSJ, Ex. A, Brater Dep, PageID.3075.) From 2019 to March 2023, between 400,000 and 450,000 registrations were cancelled because the voter was deceased. (*Id.*, PageID.3077.)[5]

[5] *See also* Mich. Dep't of State, *Voter registration cancellation procedures*, 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.

Michigan's program 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 Registration Information Center (ERIC),[6] and cancellations entered by local clerks based on information they receive. (R. 149-3, Def's MSJ, Ex. B, PageID.3085-3087).

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

The Michigan Department of State (MDOS) receives—on more or less a weekly basis—from the Social Security Administration (SSA) and from the MDHHS files containing persons who have been identified by those agencies as deceased since the time of the last most recent file. (*Id.*; R. 149-4, Def's MSJ, Ex. C, Harris Dep, p 44 ln 15-20, PageID.3098; R. 149-5, Def's MSJ, Ex. D, MDOS Dep, PageID.3110-3111, 3117.) The SSA reports also include the names of individuals who have died outside Michigan. (R. 149-5, PageID.3113.) These reports

[6] Mich. Comp. Laws § 168.509o(5) requires the Secretary to participate in multistate programs that assist in the verification of voter registration status.

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. (R. 149-4, PageID.3101.)

Michigan's old driver file was migrated to CARS over multiple years between 2017 and 2021. (*Id.*, PageID.3101.) CARS contains the names, addresses, dates of birth, and last four digits of social security numbers for drivers and persons with state identification cards. (*Id.*, PageID.3095-3097.) CARS contains social security numbers for most 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. (*Id.*, PageID.3100; R. 149-5, PageID.3111-3112.) In contrast, social security numbers are not a required field for the QVF. (R. 149-5, PageID.3112.) In Michigan, people are offered the opportunity to register to vote during any driver's license or state ID transaction. (R. 149-6, Def's MSJ, Ex. E, Belton Dep, PageID.3132.) 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. (R. 149-5, PageID.3115.)

If the records from SSA or MDHHS are a 100% match to the name, date of birth, and social security number in CARS, 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." (R. 149-3, PageID.3085-3087; R. 149-4, PageID.3098.) If none of these data elements match a record in CARS, it will be considered "no match" and CARS will disregard it. (R. 149-4, PageID.3098.)

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. (R. 149-3, PageID.3085-3087; R. 149-5, PageID.3118.) 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. (R. 149-3, PageID.3085-3087.) After receiving the file, SSA will indicate whether any of the individuals have been identified as deceased. (*Id.*) If that person has not already been marked as deceased, they will then be changed to "deceased" in

CARS, and that information will be transferred and updated in the QVF. (*Id.*)

Changes to a person's information in CARS is imported to the QVF on a nightly basis. (R. 149-5, PageID.3114.) The entire QVF is also reconciled with the CARS driver file on a quarterly basis. (R. 149-8, Def's MSJ, Ex. G, Talsma Dep, PageID.3145-3146.) This reconciliation confirms 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. (R. 149-2, PageID.3074.) The quarterly reconciliation process began in 2021. (*Id.*, PageID.3076.)

5. 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 for a voter—then it is placed in a queue for it to be manually reviewed by staff in the Driver Records Activity Unit to determine if there is enough information available for a match. (R. 149-3, PageID.3085-3087; R. 149-4, PageID.3099-3100.) The Unit's process has been summarized in a procedure describing the procedures staff use to identify possible

matches. (R. 149-4, PageID.3103-3104.) If at least three 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. (R. 149-3, PageID.3085-3087). Generally, partial matches are reviewed within 7 to 10 days, although occasional backlogs have occurred resulting in review taking up to four weeks. (R. 149-4, PageID.3101-3102.) The Unit may also receive information—such as a death certificate—from family members of a deceased person. (R. 149-5, PageID.3116.)

6. Reports of deceased individuals provided by ERIC

Michigan joined ERIC in 2020. (R. 149-5, PageID.3108.) Every two months, the Michigan Bureau of Elections (Bureau) receives a report from ERIC that identifies individuals registered in Michigan who may be deceased. (R. 149-7, Def's MSJ, Ex. F, Clone Dep, PageID.3136-3137.) These bi-monthly reports are not lengthy, and generally include about 10 or fewer individuals. (*Id.*, PageID.3138.) Often, by the time the ERIC reports arrive, the individuals have already been marked deceased through other means. (R. 149-8, PageID.3144.) 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. (R. 149-5, PageID.3109.) Because not every voter has a driver's license or state ID, the ERIC reports are a way to identify those deceased individuals. (R. 149-2, PageID.3078.) The ERIC deceased reports are created by comparing Michigan's QVF to the SSDI, and ERIC then provides a list of potential matches to Michigan. (R. 149-2, PageID.3080.)

The ERIC reports are manually reviewed by Bureau staff within a week of receiving them. (R. 149-7, PageID.3137.) 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. (*Id.*, PageID.3138.) If there is not an exact match, staff may attempt to confirm the match through outside sources, such as published obituaries. (*Id.*, PageID.3138.) If there is enough information to support a match, then the voter registration can be cancelled. (*Id.*) This staff review is double-checked by a manager. (*Id.*, PageID.3139.)

7. Removal of deceased individuals by local clerks

Cancellation of voter registrations by local clerks is described in the Election Officials' Manual. (R. 149-9, Def's MSJ, Ex. H, Election Officials' Manual, PageID.3168.) Outside of specific functions assigned by law to the Secretary, local clerks have primary responsibility for maintaining the voter rolls for their jurisdiction, including cancelling registrations for deceased persons. (R. 149-7, PageID.3140.) 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. (*Id.*, PageID.3140.) From 2019 through 2022, between 20% and 30% of "deceased" cancellations were entered by local clerks. (R. 149-10, Def's MSJ, Ex. I, Talmsa Aff., PageID.3174-3175.)

County clerks are required to provide death notices to city and township clerks, who will cancel voter registrations on that basis. (R. 149-2, PageID.3079.) They may also use death information in newspapers, such as obituaries, or personal knowledge that an individual has died to cancel the registration. (*Id.*, PageID.3079.)

Lastly, if election mail is returned as undeliverable, the registration is made inactive, and the voter is sent a notice of cancellation. (*Id.*, PageID.3081.) If the voter does not respond, and they do not vote for two consecutive federal elections, the registration is cancelled. (*Id.*)

B. PILF's lists of "potentially deceased" voters

On September 18, 2020, PILF sent a letter to Secretary Benson 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, Bureau staff responded to PILF and requested more information about PILF's matching process and how the list was created. (R. 149-5, PageID.3119; *Id.*, Ex. 4, PageID.3128; R. 149-14, Def's MSJ, Ex. M, 09/29/2020 letter, PageID.3197.)

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. (R. 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.*)

Bureau staff reviewed PILF's information and determined that each of the first ten individuals had already been cancelled in QVF. (R. 149-5, PageID.3119; *Id.*, PageID.3128.) In fact, each of those ten had already had their registrations cancelled between October and December of 2019—a year before PILF's letter. (*Id.*, PageID.3128.) 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. (R. 149-2, PageID.3082.) 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.

(R. 149-5, PageID.3120-3121.) Staff concluded that PILF's claims were "dubious." (*Id.*, PageID.3128.)

On November 25, 2020, PILF sent another letter to the Secretary in which it claimed to have purchased a new copy of the QVF and performed a "sample match of the voter file against the [SSDI]." (R. 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 as 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. (R. 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. (R. 1-13, PageID.72-73.)

1. Creation of PILF's lists

In his report, PILF's expert Kenneth Block described the process he used to create PILF's lists of "potentially deceased" voters. (R. 121-2, Block Report, PageID.2197-2200, ¶¶ 28-32.) Block's description explicitly stated that the voter information from Michigan's QVF was first "normalized" by Simpatico Software (Block did not identify anyone specifically). (*Id.*, ¶ 28.) Block stated 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 admitted 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; R. 121-3, PageID.2323.) The filtering reduced the number of voter records sent through the matching process. (R. 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 those results 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. 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. (R. 121-3, PageID.2224-2225.) Instead, he is the

founder of Simpatico Software, a computer engineering and consulting company. (*Id.*, PageID.2237.)

Block described himself as a "relational database expert." (*Id.*, PageID.2282.) 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 he could not identify anyone to whom he would compare his work. (*Id.*, PageID.2282-2283.) 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. (*Id.*, PageID.2283-2284.) The process he used to create the lists has not been peer reviewed or subject to a third-party audit. (*Id.*, PageID.2309.)

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 litigation in that state. (*Id.*, PageID.2303-2304.) 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. (*Id.*, PageID.2319-2320.) Block stated that his process is proprietary to Simpatico and so it is not used by anyone else. (*Id.*, PageID.2310-2311.)

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." (R. 121-2, PageID.2311.) 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. (R. 121-3, PageID.2349-2350.)

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. (*Id.*, PageID.2311, PageID.2313.) However, Block also stated that his "sanity check" procedure is not written down. (*Id.*, PageID.2314-2315.) 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." (*Id.*, PageID.2314.)

Block admitted that neither he nor anyone at Simpatico supervised or watched Red Violet perform the matching. (*Id.*, PageID.2338-2339.) He also did not know what specific GLBA databases Red Violet used to perform the matching. (*Id.*, PageID.2347.) 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. (*Id.*, PageID.2339-2340.) Neither Block nor anyone at Simpatico has seen the social security numbers that were matched to Michigan voters in the QVF by Red Violet. (*Id.*, PageID.2340.) Simpatico only received an indicator from the vendor whether the voter was deceased. (*Id.*, PageID.2343.)

3. The Secretary's experts' inability to replicate Block's results

Secretary Benson 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. (R. 121-4, PageID.2377, Katz Report.) Michael Herron is a Professor of Quantitative Social Science at Dartmouth College. (R. 121-5,

PageID.2398, Herron Report.) 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. (R. 121-4, PageID.2378-2382; R. 121-5, PageID.2397, 2435-2437.)

C. Actual status of persons on 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. (R. 149-10, PageID.3172-3175.) Out of the 27,275 voter ID numbers provided in PILF's list, 10,409 remained active and without qualification. (*Id.*, PageID.3173.) And 7,749 of the voters identified by PILF in its original list have already been removed. (*Id.*) Of those cancelled registrations, 5,766 were cancelled before this lawsuit was filed on November 3, 2021. (*Id.,* PageID.3174.) 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. (*Id.* PageID.3173-3174.) Another 4,654 have been identified as "challenged," meaning that 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." (*Id.*) Out of the 9,046 registrations that were marked as "verify" or "challenged," 4,921 are already slated for cancellation in 2025 or 2027. (R. 149-11, Def's MSJ, Ex. J, Talsma Aff., PageID.3178.) Regardless, voters with either a "challenged" or "verify" status *cannot vote* before taking some action or providing information confirming their eligibility to vote. (R. 149-10, PageID.3174.)

D. Professor Herron's comparison of Michigan's program to neighboring states

In 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. (R. 121-5, PageID.2438-2446.) 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 SSA information, or the timing

requirements related to removal of deceased voters. (*Id.*, PageID.2445-2446.)

E. Election Administration and Voting Survey (EAVS) and Census data

Federal 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 (EAC), Michigan cancelled the sixth largest total number of registrations based on death in the 2016 election cycle; the fourth most in the 2018 cycle; the fifth most in the 2020 cycle; and the fifth most in

the 2022 cycle.[7] For context, Michigan ranks tenth in voting-age population.[8]

F. PILF's requests to review NVRA records

On December 11, 2020, PILF sent a letter to Secretary Benson 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.

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

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

> 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.

(R. 1-9, PageID.63-64.) PILF cited 52 U.S.C. § 20507(i)(l), 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." (R. 1-10, PageID.65-66.) On December 17, 2020, Bureau staff responded, stating that MDOS had not agreed to that date, and that the building was closed to the public due to the then-ongoing pandemic. *(Id.)* On December 18, 2020, PILF sent a letter asserting that the Secretary was in "violation" of NVRA for failing to permit the inspection. (R. 1-11, PageID.67-68.) On January 13, 2021, PILF sent another letter stating that Michigan had violated NVRA by failing to allow PILF to inspect documents. (R. 1-13, PageID.72-73.)

1. 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, year of birth, and date of registration. (R. 149-5, PageID.3123.) In addition, there is a "voter history file," which has 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, whether they are in verify or challenge status, or whether they are already cancelled for some reason, such as being deceased. (*Id.*) In response to Request to Produce #14, the Secretary produced all reports from the QVF showing registrants who were cancelled as deceased from 2016 to the time of the request. (R. 149-12, Def's MSJ, Ex. K, PageID.3183.)

MDOS also issues guidance on its website and through correspondence regarding procedures for list maintenance such as cancellations. (R. 149-5, PageID.3124.) The Secretary produced these

kinds of documents in response to Requests to Produce #1, #2, #10, #11, and #16. (R. 149-13, Def's MSJ, Ex. L, PageID.3189-3195; R. 149-12, PageID.3180-3187.)

2. Other events occurring contemporaneous with PILF's requests to inspect documents

The months leading up to and following the November 2020 election were a historically frantic time for Michigan and the Bureau. As explained by Director of Elections Jonathan Brater in his deposition, October and September of 2020 was the lead-up to the presidential election, including a larger mailing of absentee ballots due to the then-ongoing pandemic. (R. 149-2, PageID.3083.) In addition, the Bureau was helping local jurisdictions run their elections because of staff shortages and locations made unavailable because of the pandemic. (*Id.*) After election day, the counting of ballots was not completed until the Thursday after the election because of the high volume of absentee ballots. (*Id.*) After that, there were the post-election canvasses, which were made more eventful because of attempts to prevent the certification of the election. (*Id.*) There was a high volume of false information about elections and elections officials that required public

response. (*Id.*) This all took a considerable amount of the Bureau's resources, and, as Director Brater said, "that was the time at which our resources were the most depleted." (*Id.*)

Shortly after the November 2020 election, the Bureau was deluged with telephone calls and e-mails. (R. 149-5, PageID.3125.) Phone lines were shut down due to the volume of calls, including threats of violence. (*Id.*) The Bureau's offices were closed due to bomb threats, and even staff were not allowed in the building. (*Id.*, PageID.3125.) Numerous lawsuits were filed immediately following the election. (*Id.*, PageID.3125.) The Board of State Canvassers met in an undisclosed location on November 23, 2020, to certify the election results due to threats. (*Id.*, PageID.3125.) In addition, the state legislature sent subpoenas to MDOS requesting thousands of pages of election-related documents. (*Id.*, PageID.3125.) Bureau staff were receiving threats against them personally and were under police protection. (*Id.*, PageID.3126.) Bureau staff were not allowed back into their offices until February of 2021. (*Id.*, PageID.3127.)

G. District court proceedings

PILF filed its complaint against Secretary Benson on November 3, 2021. (R. 1, PageID.1.) Count I alleged that the Secretary had failed to maintain a program to remove ineligible voters from the state's voter rolls in violation of NVRA. (*Id.*, PageID.17-18.) And Count II alleged that the Secretary had failed to permit the inspection of records as required by NVRA. (*Id.*, PageID.18-19.)

1. Discovery and Discovery-related motions

The district court ordered discovery to proceed until May 26, 2023. (R. 43, Order, PageID.449.) And the parties later stipulated to extend discovery through July 26, 2023. (R. 50, Order Ext. Dates, PageID.462.)

a. PILF's attempt to take Secretary's deposition

In February of 2023, PILF served a notice of deposition for Secretary Benson. The Secretary filed a motion for protective order to prevent the deposition, on the grounds that high-ranking government officials are generally not subject to deposition unless those officials have personal knowledge of the matter and the party seeking the deposition demonstrates that the information sought cannot be

obtained elsewhere. (R. 63, Br., PageID.717-751.) PILF argued that the deposition was justified based on a statement the Secretary made on *Face the Nation* and because PILF had addressed pre-litigation letters to her. (R. 71, PILF Resp., PageID.788-802.)

Th magistrate heard the motion in April 2023. (R. 75, Hearing Tr., PageID.810-814.) She began by stating that she was inclined to grant the motion because PILF had not demonstrated that the Secretary had any first-hand knowledge that PILF could not obtain through other sources, but that she was willing to grant the motion without prejudice if other discovery showed that there was some information that only the Secretary could provide or if the Secretary attempted to insert her testimony in some way. (*Id.*, PageID.810.) The magistrate then allowed PILF to argue its position further, during which PILF relied on the Secretary's various statutory duties. (*Id.*, PageID.812.) PILF also argued that "if Secretary Benson wants to put it on record that she has no knowledge of relevant facts as to list maintenance procedures in Michigan, then it's equivalent to confessing judgment in this matter." (*Id.*).

Following PILF's argument, the magistrate stated she remained unconvinced, but she granted the protective order without prejudice and invited PILF to revisit the matter if anything indicated that the Secretary "and only she, could testify as to why a certain policy or procedure was made." (*Id.*, PageID.813.) The magistrate entered an order granting the Secretary's motion for the reasons stated on the record. (R. 74, Order, PageID.806.)

PILF did not appeal the magistrate's decision to the district court and filed no subsequent motion seeking to renew its request for the Secretary's deposition.

b. PILF's subpoena to ERIC

PILF served a subpoena on ERIC seeking information about its origins, funding, and capabilities, as well as its bylaws, membership agreement, board members, advisory boards, processes, vendors, contractors, and partners. (*See* R. 94, PageID.1522-1525.) ERIC filed a motion in federal court in Delaware to quash the subpoena directed to it by PILF in this lawsuit. (R. 81, Br., PageID.857-880.) After PILF filed a brief opposing ERIC's motion, (R. 86, Phillips Decl., PageID.1408-

1453; R. 94, PILF Resp., PageID.1511-1535), the court transferred the motion to the federal court in Michigan. (R. 87, Transfer, PageID.1454.)

The motion was granted by the magistrate. (R. 102, Order, PageID.1940.) PILF appealed the decision to the district court, which denied the appeal. (R. 109, Appeal, PageID.1983-1984; R. 165, Order, PageID.3325-3334.)

c. PILF's motion for second deposition of Stuart Talsma

During discovery, PILF took the deposition of Stuart Talsma on February 8, 2023. (R. 149-8, PageID.3142.) Talsma is an MDOS analyst who works with the QVF. As noted above, discovery closed on July 26, 2023.

On September 12, 2023, the Secretary supplemented her response to PILF's Request to Produce #9, which sought "any document, population study or report which you will use to defend against the cause of action in this case, assert any claim, or raise any affirmative defense." The supplement consisted of a report that had just been created identifying the then-current status of individuals identified on PILF's list of "potentially deceased" voters. (R. 159, PageID.3288.) The

report was produced by Talsma, using methods he described in his February deposition. *(Id.*, PageID.3287.)

PILF demanded that it be allowed to take a second deposition of Talsma. Because discovery had closed, that request was denied. PILF then filed a motion seeking to take Talsma's deposition. (R. 144, Br., PageID.2966-3012.) PILF did not identify any specific information it sought about the content of the report, and instead raised only questions about why the report was made at that time instead of earlier. (*Id.*)

In the Secretary's response, she pointed out that Talsma's deposition had already been taken, and in that deposition he had described how he would compare an Excel spreadsheet of voters (such as the one PILF attached to the complaint), whether he could perform a query of the QVF system to obtain those voters' information, and how long it would take to do so. (R. 159, Def's Resp., PageID.3287.) She also noted that, following Talsma's deposition, PILF had not made any discovery request in the subsequent five months seeking any report based on the QVF query described by Talsma in that deposition.

The magistrate denied PILF's motion. (R. 161, Minutes, PageID.3295.) However, the Secretary was ordered to further supplement her discovery responses to provide additional information about the report. (R. 162, Order, PageID.3295.) PILF did not appeal the magistrate's decision to the district court.

d. PILF's motion to compel ERIC reports

On July 14, 2023, PILF filed a motion to compel additional responses to its requests to produce regarding reports provided to the State by ERIC. (R. 114, Br., PageID.2021-2098). The Secretary opposed the motion, arguing that the ERIC reports contained Limited Access Death Master File (LADMF) data that was protected by federal law from disclosure. (R. 118, Resp., PageID.2105-2159).

The magistrate denied in part and granted in part the motion. (R. 139, PageID.2924.) The Secretary was ordered to produce the ERIC reports with redactions of information protected by statute. (*Id.*) The magistrate also ordered that the ERIC reports would be covered by the existing protective order. (R. 140, Tr., PageID.2944.)

e. The Secretary's motion to exclude PILF's experts

On July 28, 2023, the Secretary filed a motion in limine to exclude PILF's lists of "potentially deceased" voters and the expert reports of Block and Scott Gessler, who offered his opinion on whether Michigan's list maintenance program was reasonable. (R. 121, Br., PageID.2166-2647.) She argued that: (1) Block's report failed to meet *Daubert* standards of reliability; (2) Block's report and the "potentially deceased" lists were based upon inadmissible hearsay statements of unknown persons working for the vendor that matched voters in the QVF to social security numbers drawn from credit databases; (3) Block's report failed to include material that the magistrate had ordered must be included; and (4) Gessler's report presented only opinion about the ultimate issue. (R. 121, PageID.2177-2186.) PILF argued that Block's report met the *Daubert* standard and the magistrate's discovery order, that the lists were not hearsay, and that Gessler's report was admissible opinion testimony. (R. 133, Resp., PageID.2692-2863.)

On August 25, 2023, the Secretary filed a second motion in limine to exclude Block's July 26, 2023 "rebuttal" expert report on the grounds that it was not allowed under the case management order, and that it

was untimely and exceeded the scope of Professor Herron's report that it sought to rebut. (R. 136, Br., PageID.2871-2920.) PILF argued that Block's report concerned information that was not available at the time of his initial report, that any untimeliness was "justified and harmless," and that Block was qualified to offer his opinion. (R. 141, Resp., PageID.2947-2961.)

Because the district court granted summary judgment, it did not reach the issues in these motions and no order was entered.

2. Summary judgment motions

On October 3, 2023, PILF and Secretary Benson filed motions for summary judgment. The Secretary filed her motion seeking judgment as a matter of law on both counts of PILF's complaint. (R. 148, Def's MSJ, PageID.3018-3021; R. 149, Def's MSJ Brief, PageID.3023-3197.) PILF sought judgment only as to the records request alleged in Count II of its complaint. (R. 153, PILF MSJ, PageID.3204-3206; R. 154, PILF Br., PageID.3207-3270.)

PILF also filed a "Motion for Discovery Under Federal Rule of Civil Procedure 56(d)," in which it argued that the Secretary's motion should be denied or deferred because PILF "ha[d] not been permitted to

conduct all relevant discovery." (R. 170, Mot. Discovery, PageID.3517-3518; R. 172, Mot Discovery Br., PageID.3527-3532.) PILF argued that it had been denied the ability to take the Secretary's deposition, it had been denied discovery from ERIC, and it had been denied the ability to take a second deposition of Talsma. (R. 172, PageID.3528-3530.)

The Secretary opposed PILF's motion arguing that Rule 56(d) should not be used to deny or delay summary judgment based upon requests for discovery that had already been denied, and where—for two of the requests—PILF had not sought to appeal the magistrate's decision. (R. 174, Br. Opp., PageID.3535-3566.)

On March 1, 2024, the district court granted summary judgment to the Secretary. (R. 180, MSJ Op. & Order, PageID.3636-3666.) The court also denied PILF's motion for discovery under Rule 56(d). (*Id.*, PageID.3653-3654, 3659-3660.)

SUMMARY OF ARGUMENT

There are three principal issues presented by PILF's appeal.

First, there is the interpretation and application of NVRA's requirement that states "conduct a general program that makes a *reasonable effort* to remove the names of ineligible voters" from the

official lists of eligible voters by reason of the death of the registrant. 52 U.S.C. § 20507 (a)(4), (b), (d), (e) (emphasis added). While PILF argues that this provision should be read to impose specific program requirements or metrics upon the states, the statute does not include any such specific requirements. Instead, the term "reasonable effort" should be given its ordinary meaning, which is a "serious attempt that is within the bounds of common sense, fair, and not extreme or excessive." This interpretation is consistent with the purpose of NVRA and is in line with other federal courts' decisions. And Michigan's program more than satisfies this requirement.

Also, while PILF argues that there are "questions of fact," those arguments mostly address whether Michigan's program is or should be considered "reasonable." Such issues are essentially questions of statutory interpretation, and so are questions of law—not questions of fact. The remaining "questions of fact" raised by PILF address whether the data collected by the U.S. Election Assistance Commission (EAC) is accurate, and whether the "totality of the circumstances" create a question of fact.

But these arguments fail to present any evidence in the record that contradict the Secretary's position, and so they are not sufficient to satisfy PILF's burden to identify specific facts demonstrating a factual dispute. Also, PILF's argument about the EAC does not address a "material fact" because regardless of whether Michigan's program is the sixth most effective in the nation or not, it is definitely not the worst. So, a dispute over the EAC's accuracy would not require a different outcome in this case.

Second, PILF's appeal of the district court's denial of its motion under Rule 56(d) is reviewed for an abuse of discretion, and PILF's arguments simply do not satisfy that standard. Each of PILF's supposed "denials" of discovery were the subject of motions in the lower court for which PILF did not prevail. PILF is arguing that the district court obstructed its discovery. However, PILF fails entirely to identify any specific facts or information it expected to obtain from a deposition of the Secretary, a subpoena to ERIC about its operations, or a second deposition of Talsma. PILF also fails to make any argument as to how this additional discovery would lead to a different result in this case. In

short, the district court did not abuse its discretion in denying PILF's motion, and that judgment must be affirmed.

And third, PILF is not entitled to summary judgment as to its claim for the inspection of records concerning Michigan's list maintenance program. While it is true that the Secretary did not respond to PILF's request within the time required by statute, that was because the request was made on December 11, 2020, during which time the Secretary and her staff were facing significant disruptions in the aftermath of the 2020 general election. This technical failure does not equate to a "blank check" for PILF to obtain any record it wants. PILF's request is limited by the NVRA, which only provides for inspection of records of programs for the purpose of ensuring the accuracy and currency of official lists of eligible voters. PILF's requests went beyond "records of programs" and its arguments here seek to extend what might be obtained under the NVRA, such as data files obtained from the SSA or "all correspondence" between the Secretary and ERIC.

Regardless, PILF's claim under the NVRA's inspection provision is moot because PILF has already received every record it sought

pertaining to Michigan's removal program. PILF does not dispute this fact, and it does not identify any record that Michigan has not provided. As a result, there is no additional relief PILF can be granted, and the district court properly held the claim moot.

STANDARDS OF REVIEW

Rule 56 standard

This Court reviews a district court's grant of summary judgment de novo. See *Puska v. Delaware Cnty.*, 56 F.4th 1088, 1093 (6th Cir. 2023). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the movant has met its burden of production, the non-movant cannot rest on the pleadings but must "cit[e] to particular parts of materials in the record" showing that there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c). In resolving a summary judgment motion, this Court views the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Mixed questions of law and fact

When appellate courts consider "the application of a legal standard to settled facts," it is considered a mixed question of law and fact. *Singh v. Rosen,* 984 F.3d 1142, 1148 (6th Cir. 2021). Courts follow a case-by-case approach when choosing a standard of review for mixed questions. *Id.* If a question is more fact intensive, they typically review the question with deference; if it is more legal, they typically review it *de novo*. *Id.* (citing *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 69 (2020)).

Rule 56(d) standard

Rule 56(d) permits, but does not require, a court to defer consideration of a motion for summary judgment until after discovery. *First Floor Living LLC 22-3216 v. City of Cleveland*, 83 F.4th 445, 453 (6th Cir. 2014) (internal citation omitted). This Court reviews a district court's decision on a Rule 56(d) motion for an abuse of discretion. *Id.* This Court will not reverse the district court's decision unless the "ruling was arbitrary, unjustifiable, or clearly unreasonable." *Id.* (citations omitted).

This Court generally applies a five factor test to determine whether the district court abused its discretion: (1) when the movant learned of the issue that is the subject of the desired discovery; (2) whether the desired discovery would have changed the ruling below; (3) how long the discovery period had lasted; (4) whether the movant was dilatory in its discovery efforts; and (5) whether the opposing party was responsive to discovery requests. *Id.* (citation omitted). A district court does not abuse its discretion by denying a Rule 56(d) motion that is supported by mere "general and conclusory statements" or that fails to include "any details or specificity." *Id.* (citation omitted).

Also, courts have broad discretion over docket control and the discovery process. *Pittman v. Experian Info. Solutions, Inc.,* 901 F.3d 619, 642 (6th Cir. 2018). In addition to according substantial deference to the district court's discovery decisions, appellate courts will not reverse a decision to limit discovery "absent a clear showing that the denial of discovery resulted in actual and substantial prejudice to the complaining litigant." *Id.* (citation omitted). A district court may properly deny a motion to compel discovery where the motion to compel was filed after the close of discovery. *Id.*

ARGUMENT

I. The undisputed evidence shows that Michigan's program for the removal of deceased registrants meets NVRA's required "reasonable effort."

PILF did not dispute the legal structure of Michigan's list maintenance program, or any of the documents or testimony about how Michigan's program is administered. Instead, PILF's argument rested on how it believed Michigan's program could be improved or made more efficient. PILF argued that—without its suggested improvements—the program failed to satisfy NVRA's requirement that Michigan "conduct a general program that makes a *reasonable effort* to remove the names of ineligible voters" from the official voter list after the death of the registrant. 52 U.S.C. § 20507 (a)(4), (b), (d), (e) (emphasis added). The district court—viewing the facts in a light most favorable to PILF—determined that Michigan's program met the relatively modest requirement of making a "reasonable effort" to remove deceased voters.

On appeal, PILF argues that there are factual disputes preventing summary judgment. But PILF identifies few actual disputes over facts, and none that concern material facts. More often, PILF merely contends that certain facts should lead to the conclusion that Michigan's removal program is unreasonable. However, whether Michigan's

program meets the NVRA requirement of a "reasonable effort" is a legal question, not a factual one that precludes summary judgment.

1. NVRA requires a "reasonable effort" but not an exhaustive one, and it does not require any particular components as part of a program.

At its core, this appeal is essentially an argument about how NVRA's list maintenance requirement should be interpreted. While PILF believes that Michigan failed to make a "reasonable effort" to remove deceased voters as required by NVRA, PILF fails to articulate a coherent interpretation of the statute, and its arguments run against what the NVRA actually says.

"The starting point in any case involving the meaning of a statute [ ] is the language of the statute itself." *United States v. Plavcak,* 411 F.3d 655, 660-661 (6th Cir. 2005) (quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979)). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Id.* (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "In construing a federal statute, it is appropriate to assume that the ordinary meaning of the language that Congress employed

'accurately expresses its legislative purpose.' " *Id.* (citing *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985)).

NVRA provides that 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[.]" 52 U.S.C. § 20507 (a)(4)(A)-(B) (emphasis added). NVRA does not define what constitutes a "reasonable effort," and it does not include any specific metrics or measurements that must be met in order for a state program to meet that threshold.

Nonetheless, PILF argues that a "reasonable effort" to remove deceased voters "must amount to a quantifiable, objective standard that may be applied to all entities subject to the NVRA, including the Secretary." (Doc. 21, PILF Br., p 26.) But it never provides any legal authority for this conclusion, and it never articulates exactly what that "quantifiable standard" should be (or, for that matter, how states could know whether they achieved it).

Moreover, a "quantifiable, objective standard" is at odds with the plain language of the statute. NVRA simply does not include any specific standards for the removal of deceased voters. The ordinary

meaning of the words "reasonable effort" instead suggest a *bona fide* attempt by the state to remove deceased voters from its rolls.

The construction of the statute should begin—and end—with the plain language. PILF quotes the Merriam-Webster website definition of "reasonable" in its brief (Doc. 21, PILF Br., p 28), but its citation is incomplete—while the first meaning provided on that website is indeed, "being in accordance with reason," PILF's brief curiously omits the second and third offered meanings of the word that appear on that page: "not extreme or excessive" and "moderate, fair."[9] Because it does not mention these meanings, it also fails to explain why those meanings would not readily apply in this context. Also, PILF acknowledges that the definition of "effort" includes "a serious attempt." (*Id.*).

Alternatively, published dictionaries provide greater precision and guidance than what is provided on a free website:

> 1. Capable of reasoning: RATIONAL. 2. Governed by or in accordance with reason or sound thinking. 3. Within the bound of common sense <allowed a reasonable time for the trip>. 4. Not extreme or excessive : FAIR <reasonable fuel rates>.

[9] *See* definition of "reasonable" https://www.merriam-webster.com/dictionary/reasonable.

Riverside Webster's II New College Dictionary 923 (1995). These provided usages have clear application to the words of NVRA. Thus, a "reasonable effort" is a serious attempt that is sound, within the bounds of common sense, fair, and not extreme or excessive. This meaning is entirely consistent with the statutory text and does not lead to any absurd results. *See Dolan v. United States Postal Serv.,* 546 U.S. 481, 486 (2006); *Tennessee v. Hildebrand (In re Corrin)*, 849 F.3d 653, 657 (6th Cir. 2017). Because the plain language is clear, there is no need to resort to any extra-textual sources, like legislative history.

PILF's suggestion that NVRA's "reasonable effort" requirement permits judicial improvisation of additional requirements is also at odds with the Supreme Court's opinion in *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 778 (2018). There, the majority rejected the argument posed by the dissent that § 20507(a)(4), "authorizes the federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) and to strike down any state law that does not meet their own standard of 'reasonableness.' " *Id.* The dissent in that case had concluded that cancelling a voter's registration based on their failure to return a postcard after failing to vote for two years was "unreasonable" because

of its harshness, but the majority rejected that criticism after concluding that practice was provided for under NVRA and that it was not for federal courts to second guess Congress' judgment. *Id.* Here, the reasoning that federal courts should not impose their own standard of "reasonableness" applies with equal force to the premise that courts should not impose additional requirements that were not provided in the statute.

In *Bellitto v. Snipes,* the plaintiff argued (as PILF does here) that Florida'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. 935 F.3d 1192, 1207 (11th Cir. 2019). The Eleventh Circuit rejected that argument, holding that "a jurisdiction's reliance on reliable death records, such as state health department records and the [SSDI], 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.

Michigan similarly relies on SSDI and state health records to identify and remove deceased registrants. But 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. PILF did not dispute any of these facts in the lower court and does not do so now. So, Michigan already goes beyond what the Court in *Bellitto* held to be a "reasonable effort." While PILF argues that more deceased registrants might be identified through additional means, that does not make Michigan's effort unreasonable. In fact, the Eleventh Circuit rejected arguments that a state was required to adopt more extensive procedures to meet the "reasonable effort" standard under 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.

Id. at 1207 (emphasis added).

PILF argues that *Bellitto* is not applicable because the district court's decision followed a bench trial instead of summary judgment, and because the Eleventh Circuit reviewed the decision only for clear error rather than de novo. But PILF's effort to distinguish *Bellitto* misses the mark. First, there is no meaningful distinction between a bench trial or summary judgment where there is no dispute over the composition and operation of Michigan's program. While PILF spends much effort disputing whether Michigan's program is "reasonable," PILF did not dispute in its briefing before the district court or in its argument here any of the facts describing Michigan's efforts to remove deceased voters. Given that lack of dispute about the particulars of Michigan's program, there is no question of fact that would necessitate a bench trial, and the district court's conclusion based on the undisputed facts would be no different now than following such a trial. But second—and more pointedly—the Eleventh Circuit's conclusion about *what NVRA requires*—that is, that NVRA "requires a reasonable effort, not an exhaustive one"—was a legal determination, not a fact-

based determination. *Id.* Simply put, the Eleventh Circuit did not need a bench trial to interpret the statute, and neither does this Court.

PILF's arguments are also in conflict with another federal court decision that addressed a virtually identical claim to the one it raised here. In *Public Interest Legal Foundation v. Boockvar*, 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. 495 F. Supp. 3d 354, 356-357 (M.D. Penn. 2020). The court concluded that PILF failed to demonstrate a likelihood of success on the merits regarding the reasonableness of Pennsylvania's program where it relied entirely on its own list of "potentially deceased" voters without identifying any particular defect in the state's program:

> 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. The lower court in this case reached a similar conclusion after noting that PILF's 27,000 "potentially deceased" voters would comprise approximately only 0.3 percent of the total number of registered voters in Michigan. (R. 180, PageID.3657.)

None of these cases that have examined the "reasonable effort" requirement under 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.

Contrary to PILF's arguments, it is not—and has never been—the Secretary's position that the mere existence of a program is sufficient to satisfy NVRA without a reasonable effort. Again, the plain language of the statute requires a "reasonable effort," meaning a serious attempt within the bounds of common sense that is not extreme or excessive. Michigan's program readily meets this threshold.

PILF's arguments here—similar to those in *Boockvar*—depend on a conclusion that Michigan's program—which has resulted in the sixth, fourth, and fifth most deceased-cancellations in recent election cycles

for the state with the nation's tenth-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. And while PILF seeks to generate a "factual dispute" about the accuracy of the EAVS data on which these rankings are based, such a dispute is not over a *material fact*. In other words, whether Michigan is the fifth, tenth, or even twentieth state in terms of removing deceased voters, it is certainly not the fiftieth, and its efforts are not so disproportionate from the other states, *see*, *e.g.*, *Bellitto*, such as to fall below a "reasonable effort."

NVRA itself makes no mention of any specific method of identifying deceased voters, let alone PILF's process of using credit reports to co-relate "potentially deceased" persons to voter IDs on Michigan's QVF. PILF's effort to graft its own methodology (or the methods of its experts) into the requirements of federal law has no basis in the language of the statute and must be rejected.

Lastly, PILF's argument reaches too far when it contends that "[r]easonableness is an intensely fact-centric inquiry ill-suited for summary judgment in a NVRA Section 8 case." (Doc. 21, PILF Br., p

31.) In other words, PILF asks this Court to conclude that whether a state program makes a "reasonable effort" is a determination that could *never* be made through summary judgment. PILF's basis for this contention is a comparison to the treatment of reasonableness in other contexts, such as negligence actions. But NVRA did not create a negligence claim or similar cause of action for damages, and so such a comparison is, at best, strained. Moreover, PILF's analysis of "reasonableness" is beside the point where NVRA does not require "reasonableness" and instead requires only "a general program that makes a reasonable effort." The legality of the state's program is the issue—not the intentions or credibility of any individual that must be assessed by a fact-finder.

2. There are no genuine disputes as to any questions of material fact that precluded summary judgment in this case.

As this Court well knows, questions of statutory interpretation are questions of law. *See, e.g.*, *Performance Contr. Inc. v. Dynasteel Corp.*, 750 F.3d 608, 611 (6th Cir. 2014); *CFE Racing Prods. v. BMF Wheels, Inc.*, 793 F.3d 571, 597 (6th Cir. 2015). Similarly, the application of law to undisputed or established facts has elsewhere been recognized as a

question of law. *See e.g.*, *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 228 (2020); *Fras Abdul Audi v. Barr*, 839 F. App'x 953, 959 (6th Cir. 2020).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment, and factual disputes that are irrelevant or unnecessary will not be counted. *Id.* at 248.

"The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact." *Mosholder v. Barnhardt*, 679 F.3d 443, 448 (6th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." *Mosholder*, 679 F.3d at 448-49; *see also* Fed. R. Civ. P. 56(e).

Here, the Secretary's motion for summary judgment included a detailed summary of the legal and factual composition of Michigan's

program for the removal of deceased voters—with citation to the factual record supporting each statement—that is essentially identical to the facts stated earlier in this brief. (R. 149, PageID.3030-3050.) So, it was PILF's burden to come forward with specific facts showing a triable issue of material fact. But it did not do so in its opposition to summary judgment in the lower court, and it does not do so now before this Court.

PILF has not presented any facts disputing what Michigan's list maintenance program includes or how it operates. Instead, PILF cites to its own proposals for how Michigan's program could be changed or improved. These are challenges to whether Michigan's program is sufficient to satisfy the "reasonable effort" requirement of NVRA. That is a question of statutory construction (i.e., what constitutes a "reasonable effort" under the NVRA). As a result, it is a question of law—not a question of fact. At best, it presents a mixed question of law and fact, with the "reasonable effort" legal standard being applied to the undisputed facts. But treating it as a mixed question does not change the outcome for PILF, as the question of whether the legal standard has been met is still predominantly a legal question rather than a factual one. Any dispute over whether Michigan's program is "reasonable,"

therefore, does not pose a genuine question as to any material fact and does not preclude summary judgment.

But of the seven subheadings in PILF's brief addressing supposed "factual disputes," four addressed whether a particular fact makes Michigan's program "reasonable." (Doc. 21, PILF Br., pp 36-44.) Because whether Michigan has satisfied the statutory requirement of a "reasonable effort" is a legal question, none of these defeat the Secretary's well-supported motion for summary disposition.

To be clear, these four topics were not "facts" that the lower court determined in favor of the Secretary. Instead, the district court *assumed that PILF's suggestions had merit*, but concluded that NVRA "requires only a 'reasonable effort,' not a perfect effort," and that PILF's identification of areas for improvement "does not serve to demonstrate that Michigan's multilateral process for the removal of deceased registrants from the QVF does not meet the threshold of a 'reasonable effort.' " (R. 180, PageID.3655-3656, 3658-3659.) That analysis was clearly a legal determination about the construction of the statute, not a factual one.

The remaining three claimed "factual disputes" similarly fail to demonstrate a genuine issue as to a material fact. PILF contends that the Secretary is not complying with legal requirements, but this argument is not based upon any dispute over what Michigan's program includes or how it operates. Instead, it is based on a question of state law, and whether comparing SSDI data to CARS instead of directly against the QVF complies with state requirements. PILF states that the Secretary is required to "develop and utilize a process" by which the SSDI data that is used to cancel the driver's license of a deceased resident of this state is also used to update the QVF. PILF contends that comparing SSDI to CARS instead of directly against the QVF does not satisfy this requirement. PILF also questions the Secretary's practice of pausing list maintenance during the two weeks prior to an election because it argues that 52 U.S.C. § 20507(c)(2)(B)(i) permits removal of deceased registrants "at any time." On their face, these are legal questions of statutory interpretation, not factual disputes that preclude summary judgment.

Next, PILF disputes the "applicability and reliability" of EAC data. (Doc. 21, II.F.) PILF cites to a Pennsylvania case in which the

EAC data was corrected after a plaintiff filed suit based on the original publication, and to its own expert report wherein Block states that EAVS data should not be relied upon "as a sole data source." (Doc. 21, PILF Br., pp 45-46.) But PILF did not present any specific evidence controverting the EAVS rankings referenced by the Secretary and district court, and this argument apparently rests on a general skepticism of the EAC's report.

But it is PILF's burden to set forth specific facts showing a triable issue of material fact. Here, PILF offers no specific facts and does not counter with any alternate data showing a different ranking Michigan should have been given instead. But, more pointedly and as noted above, PILF's argument misses the point. The Secretary's—and the lower court's—reference to the EAVS data was limited to an observation of where Michigan ranks as compared to other states in the number of registrations cancelled on the basis of death. It is not material whether that specific ranking is accurate—only that Michigan does not appear to be an outlier.

Lastly, PILF argues that the "totality of the circumstances" creates a factual dispute. (Doc. 21, PILF Br., pp 47-48.) This single-

paragraph argument does not cite to any specific facts showing a triable issue. On that basis alone, this argument must fail. *Mosholder*, 679 F.3d at 448-49. PILF offers no legal authority for its contention that a party may gesture broadly to an entire case record and suggest that—somewhere in there—a dispute of fact bars summary judgment. PILF's argument simply fails and should be rejected outright.

II. The lower court did not abuse its discretion when it denied PILF's Rule 56(d) motion.

As to this issue, PILF argues that it was "blocked from conducting discovery" because its subpoena to ERIC was quashed, it was not permitted to take the deposition of Secretary Benson, and it was not permitted to take a second deposition of Talsma months after discovery closed. Each of these issues was the subject of previous discovery motions through which each deposition or subpoena was denied. (R. 180, PageID.3660.) PILF also raised each of these arguments in the lower court as part of its motion for discovery under Rule 56(d), which the lower court denied. (R. 180, PageID.3660.) PILF's brief on appeal does not specify whether it seeks to appeal the district court's denial of its Rule 56(d) motion, or if it is appealing the underlying discovery

motions. However, Rule 56(d) motions and discovery motions are both reviewed for abuse of discretion, and here the district court did not abuse its discretion. *First Floor Living LLC*, 83 F.4th at 453.

In its motions, PILF did not argue—and does not argue here—that it was prevented from conducting discovery, or that the Secretary wrongfully withheld discoverable material. Instead, PILF merely repeated its earlier arguments from its discovery motions. (R. 180, PageID.3660.) The lower court observed that PILF did not articulate any specific facts that it sought to obtain from the Secretary, ERIC, or Talsma that would demonstrate the existence of a question of fact. (*Id.*) As a result, the district court concluded that PILF failed to meet the standard for Rule 56(d). Quoting this Court's opinion in *First Floor Living,* the district court concluded that PILF's "general desire to 'confirm that there were no further intentional or wrongful actions taking place,' to 'ensure the veracity of [the defendant's] evidence,' and to determine 'whether or not additional related information exists' " were insufficient to support a Rule 56(d) motion. (R. 180, PageID.3660).

On appeal, PILF offers nothing additional and continues to fail to identify any specific facts it believes would be relevant or necessary to

defend against the Secretary's summary judgment motion. But Rule 56(d) requires that the sought-after information must be "necessary" to the opposition of the motion for summary judgment. Fed. R. Civ. P. 56(d). PILF's arguments do not approach—let alone meet—this standard.

PILF suggests that the Secretary would be able to testify about list maintenance policies and procedures or the responses to PILF's disclosure requests. But PILF conducted extensive document discovery on those policies and procedures and took depositions of the Director of Elections and multiple lower-level employees who testified exhaustively on these topics. PILF does not identify any relevant or necessary details about the policies and procedures that it needed to oppose summary judgment.

Similarly, PILF has failed to identify any facts it needed about the September 2023 supplemental discovery report. This supplemental report was made by Talsma and consisted entirely of PILF's own list of "potentially deceased" voters showing those voters' then-current status in the QVF. PILF took one deposition of Talsma in February of 2023, during which he stated that he could make such a report, described how

he would make that kind of report, and how long it would take. For five months following this deposition, PILF undertook no follow-up discovery requesting the report Talsma testified he could provide. Discovery then closed on July 26, 2023, by which time it had lasted nine months. Also, as part of her order denying PILF's motion to compel Talsma's deposition, the magistrate directed the Secretary to provide additional supplemental information. PILF's argument now simply fails to identify any information Talsma might provide about the supplemental report that PILF does not already know.

Notably, PILF did not appeal the magistrate's rulings as to the depositions of the Secretary and Talsma in advance of the motions for summary judgment. PILF did, however, appeal the magistrate's decision to grant ERIC's motion to quash the subpoena it received from PILF. While the Secretary took no position on ERIC's motion in the lower court, for purposes of this appeal, it warrants observation that—during discovery—PILF was provided redacted copies of the reports ERIC provided to the State of Michigan. (R. 139, Order, PageID.2924.) PILF has therefore had the opportunity to review and analyze the information that Michigan receives from ERIC as part of its list

maintenance program. PILF's argument on appeal does not identify any specific information it seeks to obtain from ERIC that would be relevant or necessary to oppose the Secretary's motion for summary judgment, or how information obtained from ERIC might have changed the lower court's ruling.

As a result, PILF has not demonstrated that the district court abused its discretion when it denied PILF's motion under Rule 56(d), and so this Court should affirm that decision.

III. Because PILF was provided all the records it requested, its claim for injunctive relief was moot and the Secretary was entitled to judgment as a matter of law.

NVRA provides that "[a] person who is aggrieved by a violation of [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 alleged a violation of NVRA's public inspection provision and sought injunctive relief as to the records it sought in its requests. (R. 1, PageID.18-20.)

A. 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 Sch. 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 Cnty. 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).

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). With respect to Count II of PILF's complaint, the Secretary has already provided PILF with voluminous documents in discovery that exhaustively detail Michigan's list maintenance program, and PILF does not dispute that it is now in possession of all responsive records in the Secretary's possession. In fact, PILF has not identified a single record that it claims to be open to inspection under NVRA that has not already been provided by the Secretary. The last point of any real contention was the production of ERIC deceased reports, which was resolved by the district court with its August 31, 2023, Order. (R. 139, PageID.2924.) Because an injunction is no longer required for PILF to obtain the requested documents, there is no longer any meaningful

relief to be granted, and the district court correctly concluded that PILF's claim is now moot.

B. PILF was not entitled to inspect all the records it sought in its December 11, 2020, letter.

The Secretary does not dispute that PILF made a request on December 11, 2020, to inspect records. (R. 1-9, PageID.63-64.) Also, the Secretary acknowledges that at least some of the categories of records requested would be subject to inspection under NVRA, and that the documents were not provided before this lawsuit. The facts discussed earlier—the chaotic aftermath of the November 2020 general election—provide an explanation for the delayed response and inability to accommodate PILF's request. Simply put, PILF was demanding to see documents at an historically bad time for the Secretary and her staff. This is not an excuse—merely an explanation.

However, that does not make PILF's December 11, 2020 letter a blank check for the production of everything it sought, nor does it provide an opportunity for more relief than PILF actually requested in this lawsuit. It is far from clear that all the documents described in that letter are records subject to disclosure under NVRA.

The district court did not reach the issue of which documents were covered by NVRA's disclosure requirements because it determined that issue was moot since PILF did not dispute that it had already been given all responsive records of Michigan's list maintenance activities. (R. 180, PageID.3663.) So, if this Court determines that PILF's document inspection claim is not moot, it would then be necessary to determine the scope of NVRA's inspection and disclosure requirements.

NVRA requires that states 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). This Court has not yet had cause to examine the scope of § 8(i)(1), and courts in other circuits have so far only recognized that "records" subject to inspection under § 8(i)(1) include voter registration lists, applications for voter registration, and other records related to the accuracy of official lists of eligible voters. *Pub. Interest Legal Found., Inc. v. Way*, No. 22-02865, 2022 U.S. Dist. LEXIS 204083, at *15 (D.N.J., Nov. 9, 2022) (collecting cases). It is significant that in the *Way* decision, the 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. Simply put, NVRA does not require disclosure of every document that tangentially touches upon voter registration.

Also, in *Public Interest Legal Foundation, Inc. v North Carolina State Board Of Elections,* the Fourth Circuit held that while NVRA's disclosure provision was broad, the term "all records" "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." 996 F.3d 257, 264 (4th Cir. 2021).

Ultimately, the language of NVRA is subject to basic principles of statutory interpretation. Again, when 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 NVRA. PILF's requests for "data files" from the SSA do not neatly fall within the scope of "records" under § 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 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 Secretary's response to PILF's motion to compel. (R. 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 and 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 § 8 of NVRA, and the Secretary was entitled to judgment in its favor with respect to those requests.

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

Alternatively, the Secretary is entitled to summary judgment as to Count II because PILF lacked standing to bring its claim where it failed to demonstrate any actual injury. The district court did not reach this issue because it determined that PILF's claims were moot. However, if this Court concludes that PILF's claims were somehow not moot, it should still affirm in favor of the Secretary as to Count II because PILF failed to demonstrate its standing for that claim.

In *Campaign Legal Ctr. (CLC) v. Scott*, 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. 49 F.4th 931, 932-33

(5th Cir. 2022). The plaintiffs based their standing on three theories: (1) as a "civic engagement organization," they had standing to request records under 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 was 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 failed to demonstrate an actual injury. It observed that the second and third arguments raised only injuries to the *public* and "Texas voters" in general. *Id.* 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 held that Article III requires an actual injury even in the context of a statutory violation and focused on whether the plaintiffs had shown an actual injury caused by not receiving the requested documents. *CLC*, 49 F.4th at 936-37. Pointedly, the plaintiffs in *CLC* were relying on "informational injury" based simply on not having the data it requested, and the Fifth Circuit rejected that claim. *Id.*

That is *precisely* the same injury claimed by PILF here. (R. 1, Compl., PageID.19, ¶ 71.) Following the Fifth Circuit's reasoning in *CLC,* 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. If necessary, this Court should similarly conclude that PILF lacked standing to bring its claim in Count II, and that the Secretary is entitled to judgment as a matter of law.

D. A permanent injunction is unnecessary and inappropriate.

This Court has held that "a plaintiff seeking a permanent injunction must demonstrate that it has suffered irreparable injury, there is no adequate remedy at law, that, considering the balance of hardships between the plaintiff and defendant, remedy in equity is warranted, and that it is in the public interest to issue an injunction." *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006) (quoting *eBay Inc., et al v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Under Fed.

R. Civ. P. 65(d)(1), every injunction order must (1) state the reasons why it was issued, (2) state its terms specifically, and (3) describe in reasonable detail—without reference to the complaint or other document—the act or acts restrained or required.

Here, PILF's complaint made no reference to any request for a permanent injunction. (R. 1, PageID.19-20.) Instead, the complaint requested only a judgment "[o]rdering Defendant to allow inspection of 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." (*Id.,* PageID.19.) This language essentially repeats the requirements of 52 U.S.C. § 20507(i). PILF's first and only request for a permanent injunction occurred in its motion for summary judgment. However, it failed to support that request—or its argument here—with evidence or appropriate legal authority supporting such extraordinary relief.

PILF argued that it has suffered "irreparable injury" through a claimed "informational injury" and lost opportunity to urge election officials to take remedial measures. (R. 154, 3226-3227.) PILF failed entirely to support this claim with admissible evidence of virtually any

kind and does not even attempt to cite any part of the record supporting this argument. PILF did not identify any particular election officials that it would have "urged" to take any identifiable remedial measures, other than the Secretary.

Even in the declaration of Logan Churchwell, attached to PILF's summary judgment brief, he stated only that "[t]he 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." (R. 154-2, PageID.3235.) Even setting aside the obvious vagueness of this statement, it is merely a statement of PILF's general objectives, and it offers absolutely no evidence or support for any "informational injury" or lost opportunity purportedly caused by the Secretary's lack of response to its request to inspect records.

PILF next argues that there is somehow a danger of recurring violation because the Secretary produced documents through discovery after this lawsuit was initiated. It is not entirely clear how the

Secretary's compliance with discovery in any way demonstrates her unreasonableness, or the need for a permanent injunction. Regardless, to the extent that PILF complains that the Secretary raised legal objections to some of its requests, that only shows that the parties disagreed over the scope of NVRA and of discovery under the federal rules. It is not clear how a permanent injunction would avoid legal arguments in the future, unless PILF is seeking an injunction that would prohibit the Secretary or any subsequent Secretary of State from raising legal objections to any of PILF's future requests. Such an injunction, however, would raise obvious due process concerns, and PILF cites no authority supporting or authorizing such a restraint.

This also demonstrates a considerable problem with the scope of any injunction under Rule 65(d)(1), which requires that the order state its terms specifically and describe in reasonable detail—without reference to the complaint or other document—the act or acts restrained or required. Here, PILF's request does not even specifically state the terms of the injunction it seeks. It is not at all clear what acts PILF wants restrained or required—other than a generalized demand that the Secretary comply with NVRA.

But the Secretary does not require a permanent injunction to be told to comply with the law. Any declaration issued by this or any other Court as to the scope of NVRA's inspection requirement would be binding upon the Secretary with respect to any of the requests made by PILF in this lawsuit about this one request in 2020. PILF's request for a permanent injunction must be denied.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant-Appellee Michigan Secretary of State Jocelyn Benson respectfully requests that this Honorable Court affirm the district court's grant of summary judgment in her favor.

Respectfully submitted,

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Dated: July 11, 2024

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief does not comply with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains more than 13,000 words. This document contains 15,976 words. A motion to exceed word count is being filed contemporaneously with this brief.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on July 11, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint for Declaratory and Injunctive Relief	11/03/2021	R. 1	1-76
Case Management Order	10/13/2022	R. 43	449-450
Order (extending dates)	01/17/2023	R. 50	462
Defendants' Brief in Support of Motion for Protective Order	03/14/2023	R. 63	717-752
Plaintiff's Response in Opposition to Defendant's Motion for Protective Order	03/28/2023	R. 71	788-802
Order	04/12/2023	R. 74	806
Transcript (Motion to Compel / Motion for Protective Order)	04/14/2023	R. 75	807-839
Opening Brief of Non-Party ERIC's Motion to Quash Subpoena and for Protective Order and to Transfer this Motion to the USDC for Western District of Michigan	05/22/2023	R. 81	857-880

Declaration of Kaylan L. Phillips	05/22/2023	R. 86	1408-1453
Order (transfer ERIC's Motions)	05/22/2023	R. 87	1454
PILF's Response to Non-Party ERIC's Motion to Quash Subpoena and for Protective Order	05/22/2023	R. 94	1511-1535
Order (granting ERIC's Motion to Quash and for Protective Order)	06/14/2023	R. 102	1940
Appeal of Nondispositive Matter	06/28/2023	R. 109	1983-1984
Plaintiff's Brief in Support of Motion to Compel	07/14/2023	R. 114	2021-2093
Defendant's Brief in Opposition to Plaintiff's Motion to Compel	07/28/2023	R. 118	2105-2159
Defendant Secretary of State's Brief in Support of Motion in Limine	07/28/2023	R. 121	2166-2647
Plaintiff's Response in Opposition to Defendant's Motion in Limine	08/23/2023	R. 133	2692-2863
Defendant Secretary of State's Brief in Support of Motion in Limine re Kenneth Block	08/25/2023	R. 136	2871-2920
Order (setting dates)	08/31/2023	R. 139	2924

Transcript	08/31/2023	R. 140	2925-2946
Plaintiff's Response in Opposition to Defendant's Second Motion in Limine	09/08/2023	R. 141	2947-2961
Plaintiff's Brief in Support of Motion to Depose Stuart Talsma	09/29/2023	R. 144	2966-3012
Defendant Secretary of State's Motion for Summary Judgment	10/02/2023	R. 148	3018-3022
Defendant's Brief in Support of Motion for Summary Judgment	10/02/2023	R. 149	3023-3197
Plaintiff PILF's Motion for Summary Judgment	10/02/2023	R. 153	3204-3206
Plaintiff PILF's Memorandum in Support of Motion for Summary Judgment	10/02/2023	R. 154	3207-3270
Defendant's Brief in Opposition to Plaintiff's Motion to Depose Stuart Talsma	10/05/2023	R. 159	3282-3293
Minutes (hearing held 10/10/2023 re Plaintiff's Motion to Depose Stuart Talsma)	10/10/2023	R. 161	3295
Order (deny Plaintiff's motion for Talsma deposition)	10/10/2023	R. 162	3296

Memorandum Opinion and Order	10/30/2023	R. 165	3325-3334
Plaintiff's Motion for Discovery	10/30/2023	R. 170	3517-3524
Plaintiff's Brief in Support of Motion for Discovery	10/31/2023	R. 172	3527-3532
Defendant's Response to Plaintiff's Motion for Discovery	11/13/2023	R. 174	3535-3566
Opinion and Order	03/01/2024	R. 180	3636-3666