No. 24-01255

IN THE

United States Court of Appeals

for the Sixth Circuit

PUBLIC INTEREST LEGAL FOUNDATION

Plaintiff-Appellant

v.

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

Defendant-Appellee

ELECTRONIC REGISTRATION INFORMATION CENTER, INC.

Movant-Appellee

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

APPELLANT'S OPENING BRIEF

J. Christian Adams
Kaylan Phillips
Joseph M. Nixon
Noel H. Johnson
Public Interest Legal Foundation, Inc.
107 S. West Street, Ste 700
Alexandria, VA 22314
(703) 745-5870
adams@PublicInterestLegal.org
kphillips@PublicInterestLegal.org
jnixon@PublicInterestLegal.org
njohnson@PublicInterestLegal.org

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, counsel for Plaintiff-Appellant Public Interest Legal Foundation, Inc., certifies that no party to this appeal is a subsidiary or affiliate of any publicly owned corporation not named in the appeal and no publicly owned corporation or its affiliate, not a party to this appeal, has a substantial financial interest in the outcome of this litigation.

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Public Interest Legal Foundation

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Public Interest Legal Foundation requests oral argument. This appeal presents questions of first impression for this Court and raises issues of national importance regarding the interpretation of the National Voter Registration Act.

STATEMENT OF JURISDICTION

Plaintiff-Appellant Public Interest Legal Foundation (the "Foundation") brought a two-count complaint alleging violations of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20507, for (1) failure to conduct list maintenance and (2) failure to allow inspection of public records and data. (Complaint, R. 1, Page ID # 1-20.) The district court had jurisdiction pursuant to 28 U.S.C. § 1331, because the action arises under the laws of the United States, and 52 U.S.C. § 20510(b), because the action seeks declaratory and injunctive relief under the NVRA.

The district court entered summary judgment against the Foundation on March 1, 2024. (Judgment, R. 181, Page ID # 3667.) A timely Notice of Appeal was filed on March 26, 2024. (Notice, R. 182, Page ID # 3668-70.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Does the NVRA's requirement that states make "a reasonable effort to remove the names of" dead registrants from the voter rolls require something more than merely having a list maintenance program regardless of the effectiveness of the program?

2. Does a genuine issue of fact exist regarding whether Michigan violated the NVRA by failing to make "a reasonable effort to remove the names of" dead registrants on the active voter rolls when evidence shows:

    a. The federally mandated statewide voter database contained at least 27,000 deceased registrants? (*See* Exhibit 6, R. 1-6, Page ID # 52-53.)

    b. Thousands of deceased registrants were on the rolls decades after death? (*See* Complaint, R. 1, Page ID # 2.)

    c. The average time it took to remove deceased registrants is more than five years after death, with the longest amount of time being 34 years? (*See* Expert Declaration, R. 168-4, Page ID # 3464.)

    d. The Office of the Michigan Auditor General independently criticized the effectiveness of the list maintenance programs of the Secretary in finding, *inter alia*, approximately 27,000 deceased

registrants on the voter roll? (*See* Motion in Limine Opposition, R. 133, Page ID # 2697.)

e. The federally mandated statewide voter database is infested with errors impairing list maintenance such as missing dates of birth, implausible dates of birth, instances of data fields missing outright, such as dates of registration? (*See* Talsma Deposition, R. 176-2, Page ID # 3590 ("[W]e have unknown birth dates."); Secretary Summary Judgment Reply, R. 176, Page ID # 3574 ("But voter registrations from the old legacy system are still part of the database, which leads to some issues with the data.").)

f. Michigan election officials were unresponsive to specific, sound data provided by the Foundation regarding these errors and deceased registrants, (*see* Summary Judgment Opposition, R. 168, Page ID # 3421), and instead called the Foundation's efforts "a thinly veiled attempt to undermine voter's faith in their voice, their vote and our democracy." Press Release, Michigan Department of State, Secretary Benson Issues Statement on Dismissal of PILF Lawsuit (Mar. 2, 2024), *available at*

https://www.michigan.gov/sos/resources/news/2024/03/02/secretary-benson-issues-statement-on-dismissal-of-pilf-lawsuit.

g. Discovery showed that Michigan election officials directed list maintenance activities largely at the statewide *driver* file and failed to address efforts toward the statewide *voter* file? (*See* Summary Judgment Opposition, R. 168, Page ID # 3417-19.)

3. Is summary judgment appropriate against the Foundation when the district court denied discovery in the form of depositions of the Secretary and third-party discovery against the Electronic Registration Information Center, a contracted entity who services the ultimate issue in the case? (*See* Motion for Discovery Brief, R. 172, Page ID # 3527-3530.)

4. Is summary judgment warranted for a state that failed to allow inspection of public records pursuant to the NVRA? (*See* Summary Judgment Opposition, R. 168, Page ID # 3432-3434.)

STATEMENT OF THE CASE

"The National Voter Registration Act has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). To accomplish the express purpose of keeping accurate rolls, 52 U.S.C. § 20501(b)(4), Section 8 of NVRA requires Michigan to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of – (A) the death of the registrant; or (B) a change in the residence of the registrant[,]" 52 U.S.C. § 20507(a)(4).

The NVRA also requires that election officials provide public disclosure of "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1). The NVRA provides a private right of action for failure to comply with this public disclosure obligation. 52 U.S.C. § 20510(b).

The Foundation compared a portion of the Qualified Voter File ("QVF") with the Social Security Death Index and identified at least 27,000 likely deceased registrants with an active registration languishing on Michigan's QVF. (Exhibit 6, R. 1-6, Page ID # 52.) Independently and almost simultaneously, the Michigan Auditor General also identified approximately 27,000 likely deceased registrants

on the QVF, as well as system breakdowns. (*See* Motion in Limine Opposition, R. 133, Page ID # 2697.) Instead of investigating the Foundation's research, the Secretary ignored it. The Secretary also ignored the Foundation's proper request for related records that Congress deemed open to public inspection.

The Foundation's research—echoing the Michigan Auditor General's findings—creates a genuine disputed issue of material fact. The Foundation dedicated significant time and resources to evaluating the accuracy of Michigan's voter roll and offering assistance to cure the problem. As part of its mission, the Foundation communicates with election officials about problems or defects found in list maintenance practices and about ways to improve those practices. (Complaint, R. 1, Page ID # 2.) The Foundation's research has assisted election officials with effective list maintenance across the country, including its research identifying deceased registrants. *See, e.g.*, Complaint at 3-4, *Pub. Int. Legal Found. v. Boockvar*, No. 1:20-cv-01905 (M.D. Pa., filed Oct. 15, 2020).

Communications by the Foundation

The Foundation first communicated its findings of dead registrants to the Secretary on September 18, 2020. (Complaint, R. 1, Page ID # 9, Exhibit 4, R. 1-4, Page ID # 48-50.) The Foundation's September 18, 2020, Letter notified the Secretary that Michigan was in violation of the NVRA. (Exhibit 4, R. 1-4, Page ID

48-50.) The Foundation provided a spreadsheet with the specific registrants who were dead on October 5, 2020. (Complaint, R. 1, Page ID # 10, Exhibit 6, R. 1-6, Page ID # 52-53.)

On November 25, 2020, the Foundation sent a letter to the Secretary outlining additional research and findings regarding registrants that it concluded were deceased. (Complaint, R. 1 Page ID # 10-11, Exhibit 8, R. 1-8, Page ID # 61-62.)

On December 11, 2020, the Foundation requested, pursuant to the NVRA's public inspection provision, 52 U.S.C. § 20507(i), to inspect records concerning the Secretary's efforts to remove deceased registrants from the QVF. (Exhibit 9, R. 1-9, Page ID # 63-64.) It is undisputed that the Secretary received the letter. (Joint Statement of Undisputed Material Facts, R. 157, Page ID # 3276.)

Specifically, Foundation sought to inspect:

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

(Exhibit 9, R. 1-9 at Page ID # 63-64.)

The Foundation planned to send a representative to Lansing, Michigan, on December 18, 2020, and asked to be alerted if the Secretary wished to provide copies of the records instead. (Exhibit 9, R. 1-9, Page ID # 64.) On December 17, 2020, the Foundation received an email from the Secretary's office *denying* the Foundation's request to inspect records on December 18, 2020. The email did not provide copies of the requested records. (Exhibit 10, R. 1-10, Page ID # 65-66.)

On December 18, 2020, the Foundation notified the Secretary that she was in violation of the NVRA for failing to permit inspection and photocopying of public records. (Exhibit 11, R. 1-11, Page ID # 67-68.) It is undisputed that the Secretary received this letter and did not respond. (Joint Statement of Undisputed Material Facts, R. 157, Page ID # 3276.)

On January 13, 2021, the Foundation wrote another letter to the Secretary providing an additional spreadsheet of specific registrants it concluded were deceased. (Exhibit 13, R. 1-13, Page ID # 72-73.) It is undisputed that the Secretary received this letter and never responded. (Joint Statement of Undisputed Material Facts, R. 157, Page ID # 3277.)

The Foundation's Complaint and the Denial of the Secretary's Motion to Dismiss

The Foundation filed its two-count Complaint on November 3, 2021. On December 13, 2021, the Secretary moved to dismiss only Count 1, the list maintenance claim. (Motion to Dismiss, R. 10, Page ID # 91-92.) The Foundation filed an opposition to the motion to dismiss on January 13, 2022. (Motion to Dismiss Opposition, R. 16, Page ID # 164-187.) The district court denied the Secretary's motion to dismiss on August 25, 2022. (Order, R. 35, Page ID # 384-408.) Specifically, the district court found the following:

> PILF has alleged that over 25,000 deceased registrants remain on Michigan's QVF and that thousands of these registrants have remained on the active rolls for decades. Further, PILF alleged that it gave this information to Secretary Benson, who, for over one year, "did nothing about it," despite the mandates of the NVRA and Michigan's Election Law. The factual allegations, accepted as true, plausibly give rise to an entitlement to relief under the NVRA.

(Order, R. 35, Page ID # 401.)

Relevant Discovery Proceedings

The parties then conducted discovery. Relevant to this appeal are three of the Foundation's requests for discovery.

1. Deposition of Michigan's Chief Election Official

Michigan Secretary of State Jocelyn Benson is Michigan's chief election official and is "responsible for coordination of State responsibilities" under the

NVRA. 52 U.S.C. § 20509; Mich. Comp. Laws § 168.509n. On February 21, 2023, during the discovery period, the Foundation served a notice of deposition for the Secretary, setting the deposition for April 20, 2023. (Notice, R. 63-2, Page ID # 740.) On March 14, 2023, the Secretary sought a protective order preventing the Foundation from taking the Secretary's deposition. (Motion for Protective Order, R. 62, Page ID # 713-716.) After response, (Response, R. 71, Page ID # 788-802), a hearing was held on April 12, 2023, (Hearing Minutes, R. 73, Page ID # 805). An order was issued granting the motion that same day, (Order, R. 74, Page ID # 806), and the transcript is included in the record, (Transcript, R. 75, Page ID # 807-839).

2. Deposition of and Documents from the Secretary's Agent for List Maintenance Activities.

The record demonstrates that work done by a Delaware corporation, the Electronic Registration Information Center ("ERIC"), constitutes the only direct comparison between the QVF and the Social Security Administration's death records. (*See* Summary Judgment Opposition, R. 168, Page ID # 3420.) The Secretary and her employees revealed in discovery without dispute that they were not familiar with how ERIC conducted list maintenance activities. To obtain the answers, the Foundation subpoenaed ERIC requesting a deposition of the organization and the production of documents. ERIC moved to quash the subpoena in the District of Delaware. (*See* Motion, R. 80, Page ID # 854-855.) The

Foundation responded, (*see* Response, R. 94, Page ID # 1511-35), and then the case was transferred to the district court, (*see* Order, R. 87-88, Page ID # 1454-57). The magistrate judge granted ERIC's motion to quash, (Order, R. 102, Page ID # 1940), saying she did not "have in front of [her] at this point any showing by PILF that anything in ERIC's reports is incorrect or unreliable…," (Transcript, R. 108, Page ID # 1978). Neither did the Foundation as it did not have all responsive documents. The Foundation appealed to the district court, (Appeal, R. 109, Page ID # 1983-1984), which denied the appeal on October 30, 2023, (Opinion and Order, R. 165, Page ID # 3325-3334). Summary judgment was granted without the Foundation able to depose either the Secretary or the entity to whom the Secretary delegates list maintenance.

3. Deposition of the Secretary's Employee Stuart Talsma

After the close of discovery, the Secretary sent the Foundation a newly created document. The document is a 341-page pdf of a spreadsheet that the Secretary said is "a report comparing the list of voter ID's provided by PILF to the current QVF and providing the current status of each voter ID." (Exhibit to Motion to Depose, R. 144-2, Page ID # 2981.) The Foundation requested to depose the employee that created the document, Mr. Talsma, but the Secretary denied the request. (Exhibit A, R. 144-2, Page ID # 2979-2981.) The Foundation filed a

motion to depose Mr. Talsma. (Motion to Depose, R. 143, Page ID # 2964-2965.) Before the Foundation's motion was heard, the Secretary filed its motion for summary judgment, which included two separate affidavits from Mr. Talsma. (Exhibits I and J, R. 149-10, 149-11, Page ID # 3171-3178.) The Foundation's request for a deposition was heard by the magistrate judge on October 10, 2023 and was denied, though the Secretary was ordered to provide additional information. (Order, R. 162, Page ID # 3296, Transcript, R. 163, Page ID # 3297-3323.) Summary judgment was granted without the Foundation being able to depose the Secretary's employee about the analysis of the Secretary's list maintenance as compared to the Foundation's data.

Summary Judgment Proceedings

On October 2, 2023, both parties filed motions for summary judgment. The Foundation's motion sought summary judgment as to Count Two, the public disclosure provision, and as to the Secretary's affirmative defenses. (Foundation Summary Judgment, R. 153, Page ID # 3204-3206.) The Secretary's motion also sought summary judgment as to Count Two, and Count One, regarding whether Michigan's list maintenance procedures are reasonable. (Secretary's Summary Judgment, R. 148, Page ID. # 3018-3022.) The Foundation filed a response in opposition to the Secretary's motion, (Summary Judgment Opposition, R. 168,

Page ID # 3406-3446), as well as a motion for discovery pursuant to Fed. R. Civ. P. 56(d), (56(d) Motion, R. 170, Page ID # 3517-3519). The Secretary filed a response in opposition to the Foundation's motion. (Secretary Response, R. 166, Page ID # 3335-3363.) On November 13, 2023, the Foundation filed a reply to its motion, (Foundation Reply, R. 178, Page ID # 3614-3633), as did the Secretary (Secretary Reply, R. 176, Page ID # 3569-3585).

On March 1, 2024, the district court issued an order denying the Foundation's motion for summary judgment, denying the Foundation's motion for discovery under Fed. R. Civ. P. 56(d), and granting the Secretary's motion for summary judgment on both counts. (Opinion and Order, R. 180, Page ID # 3636-3666.) The Foundation filed its Notice of Appeal on March 26, 2024, appealing the order and judgment, as well as previous orders on the discovery disputes. (Notice, R. 182, Page ID # 3668-3670.)

SUMMARY OF THE ARGUMENT

This appeal presents an issue of national importance: How bad must a state voter roll get before the state violates the federal requirement under Section 8 of the NVRA by not having a program to reasonably keep voter rolls free of the dead? Put another way, this appeal presents the issue of whether the compromise of 1993 that gave America the NVRA—by inserting the language mandating reasonable list maintenance now before this Court to break a filibuster in the Senate —means anything.

Does the NVRA's requirement of "a reasonable effort" require something more than the trappings of a program? Or, should the NVRA proof be in the list maintenance pudding?

A genuine issue of material fact exists regarding whether Michigan violated the list maintenance obligations of the NVRA. The district court even craved guidance from this Court. (Opinion and Order, R. 180, Page ID # 3656.) With good reason, because scant authority exists as to what constitutes "reasonable" list maintenance even three decades after enactment of the NVRA.

Here at least, the Foundation presented disputed questions of material fact as to the reasonableness of the Secretary's program by presenting facts as to how *ineffective* it was. The Secretary seeks to evade scrutiny by relying on something

labeled a "program" to remove deceased registrants, no matter how ineffective. Indeed, if there was a textbook dispute of material fact under Section 8's list maintenance obligations, this is it.

Yet the district court granted summary judgment to the Secretary. Because no Circuit Court of Appeals has ever had the opportunity to opine what a factual dispute looks like under Section 8 of the NVRA, this Court should reverse and remand this case to the district court with instructions: it is not enough to have a program to keep voter rolls free from the dead, it must be effective. Section 8's reasonableness requirement does not ask if a state list maintenance program exists, but how it is performing. The proof should be in the pudding, and Michigan's defense that it has a program, no matter how shoddy, is not what Congress intended or enacted.

In addition to discounting the factual disputes raised by the Foundation, the district court denied the Foundation essential discovery into the Secretary's program. For starters, the Foundation was denied the ability to depose the Secretary herself. For good measure, the Foundation was denied a deposition of a leading player in the Secretary's list maintenance process - ERIC. The Foundation was even denied a deposition of the Secretary's employee who conducted relevant list analysis and upon whom the Secretary relied heavily for her very own

summary judgment motion. These denials of discovery should be reversed so the complete picture and truth about the Secretary's list maintenance programs can be ascertained.

Lastly, the district court should be reversed, and judgment rendered, on whether the Secretary violated the transparency obligations of Section 8. She did.

ARGUMENT

Standard of Review

This Court "review[s] a district court order granting summary judgment under a *de novo* standard of review, without deference to the decision of the lower court." *Brannam v. Huntington Mortg. Co.*, 287 F.3d 601, 603 (6th Cir. 2002). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)). The Court "must view all the facts, evidence, and any inferences that may permissibly be drawn, in favor of the nonmoving party." *Rose v. State Farm Fire & Cas. Co.*, 766 F.3d 532, 535 (6th Cir. 2014) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986)).

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

The NVRA requires election officials to "conduct a general program that makes a *reasonable effort* to remove the names of ineligible voters from the official lists of eligible voters by reason of" death and change of address. 52 U.S.C. § 20507(a)(4) (emphasis added). Only the removal of ineligible voters for death is at issue here. "Reasonable effort" to remove deceased registrants must amount to a quantifiable, objective standard that may be applied to all entities subject to the NVRA, including the Secretary.

A. The History of the Passage of the NVRA Demonstrates the Importance of "Reasonable Effort."

Without the list maintenance obligations, the NVRA would not exist. Indeed, President Bush vetoed a previous version in 1992. *See* Message from the President of the United States Returning Without My Approval S. 250, The National Voter Registration Act of 1992, Senate Doc. 102-23, *available at* https://www.senate.gov/legislative/vetoes/messages/BushGHW/S250-Sdoc-102-23.pdf. Senator Robert Dole managed a successful filibuster to stop the bill, but eventually negotiated an end to the filibuster in exchange for the inclusion of list maintenance obligations. *See* 103 Cong. Rec. 5156-57 (1993). Previous versions of the legislation could not survive a Republican filibuster in the Senate until these list maintenance obligations were added to the bill. *Compare* National Voter

Registration Act of 1989, H.R. 2190, 101st Cong. § 106 (1989) (requiring a "program based on official information relating to death" and "systematic review" of residence addresses) *with* National Voter Registration Act of 1993, H.R. 2, 103rd Cong. § 8 (1993) (requiring "a general program that makes a reasonable effort" to conduct list maintenance). As to list maintenance of deceased registrants, the 1989 version merely required the following:

> Each covered State shall establish a program under which the head of each State agency that, in the normal course of business, receives information indicating that (because of death, criminal conviction, or mental incapacity) the name of a voter should be removed from the official voter registration list under State law, shall transmit that information to the appropriate State election official.

101 H.R. 2190, § 106(b). Absent from early versions is the mandate that a program be "reasonable" or require actions calculated to produce foreseeable and effective outcomes. In the early versions of the NVRA that were vetoed, merely having a program that transmits information was enough. The versions that died in Congress would provide some support to the district court's grant of summary judgment, but not the version of the NVRA that became law.

Fatal to the Secretary's position here, Congress went further in the version of the NVRA that became law in 1993. It required states to "conduct a general program that makes a *reasonable effort to remove* the names of ineligible voters" due to their death. 52 U.S.C. § 20507(a)(4) (emphasis added).

Section 20507(a)(4) departs from the previous version of the bill in two ways that support the Foundation.

First, instead of the mere existence of a "program" that collects and transmits information, Congress required a "program that makes a reasonable effort." Congress went further. The text of Section 8 requires a concrete outcome, "remov[al]." Congress added an effectiveness goal and standard. Instead of merely exchanging information within an election bureaucracy (the 1989 bill), states had to act reasonably to achieve an ultimate outcome to make American elections more reliable – removal of the dead. Section 8 requires it: the proof must be in the pudding.

The Merriam-Webster Dictionary defines "reasonable" as "in accordance with reason" and "possessing sound judgment." Merriam-Webster, https://www.merriam-webster.com/dictionary/reasonable. *See also* Black's Law Dictionary (Pocket 6th ed. 1996) (defining reasonable as "[r]eflecting good judgment, rational, sound, and sensible …"). The definitions of "effort" include the "conscious exertion of power: hard work," "a serious attempt," "something produced by exertion or trying," and "the total work done to achieve a particular end." Merriam-Webster, https://www.merriam-webster.com/dictionary/effort. In

other words, Congress replaced the mere obligation for the existence of a plan with the obligation for a plan that works to achieve an end.

The second way that Congress expanded the requirement beyond mere information sharing (the 1989 bill) is that Congress did not delineate the minimum steps required for list maintenance. In contrast, Congress did so as it relates to a program to "identify registrants whose addresses may have changed." 52 U.S.C. § 20507(c). There, Congress defined a specific safe harbor, where if those statutory procedures were used, states could properly cancel the eligibility of those who moved to a new residence. Not so for the dead. For the dead, states were required to have a reasonable program that ends with the reasonably effective removal of the deceased.

Note that the NVRA restricts states from systematically removing registrants from the voter rolls within 90 days of a primary or general election, 52 U.S.C. § 20507(c)(2)(A), yet allows the dead to be removed at any time, 52 U.S.C. § 20507(c)(2)(B)(i). *See also* U.S. Dep't of Justice, The National Voter Registration Act Of 1993 (NVRA) Questions and Answers, *available at* https://www.justice.gov/crt/national-voter-registration-act-1993-nvra ("This 90 day deadline does not, however, preclude…removal due to death of the registrant…nor does the deadline preclude correction of a registrant's information.").

Contrary to the assertions of the Secretary, the Foundation does not suggest that perfection is required. Section 8 is not a strict liability obligation. A smattering of dead registrants may always evade detection. But the factual record here is different and contains tens of thousands of dead registrants who have languished on the active rolls, sometimes for multiple decades. Worse, the factual record here contains system breakdowns, ineffective procedures, failure to follow state statutes, and to cap it all off, an institutional unwillingness to respond to credible indications of a problem.

B. The United States Department of Justice Admonishes that "Actual Efforts" Matter.

The United States has taken a position in agreement with the Foundation and has flat rejected the core rationale of the district court. In a statement of interest in a similar case, the United States admonishes "the question whether the general program of list maintenance [a chief election official] undertakes in fact amounts to a 'reasonable effort' to remove ineligible voters under Section 8 of the NVRA *goes beyond the simple existence of state laws and procedures, to include consideration of the actual efforts undertaken pursuant to those laws and procedures*." (Exhibit 1, R. 1-1, Page ID # 33 (emphasis added).)

C. "Reasonable Effort" Is a Fact-Intensive Inquiry.

Reasonableness is an intensely fact-centric inquiry ill-suited for summary judgment in a NVRA Section 8 case. Although what the NVRA means by "reasonable effort" is a question of first impression for this Circuit, courts routinely interpret and apply a "reasonable" care or effort mandate in other contexts. *See*, *e.g.*, *Virginian R. Co. v. Sys. Fed'n*, 300 U.S. 515, 550 (1937) (involving language in the Railway Labor Act that requires "every reasonable effort to make and maintain agreements," and stating that "[w]hether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees"). Reasonableness in a negligence tort, for example, is a longstanding, well-established, factual inquiry. *Wyatt v. Nissan North America, Inc.*, 999 F.3d 400, 415 (6th Cir. 2021) (holding, "Nissan's three-week delay in investigating explicit allegations of unwanted physical invasions creates a question of reasonableness that should be resolved by a jury."); Wigmore, Evidence § 2553 (Chadbourn rev. 1981); Harper, Fowler V.; James, Fleming; and Gray, Oscar S., "Harper, James and Gray on Torts, 3rd edition" (2007), §§ 16.9, 17.1 and 17.4 (opinion by expert).

The Health Care Quality Improvement Act considers whether there has been "a reasonable effort to obtain the facts of the matter." 42 U.S.C. §

11112(a)(2). The Fifth Circuit held that the law's "reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard." *Poliner v. Tex. Health Sys.*, 537 F.3d 368, 377 (5th Cir. 2008) (collecting cases); *see also Ritten v. Lapeer Reg'l Med. Ctr.*, 611 F. Supp. 2d 696, 719 (E.D. Mich. 2009) ("In determining whether a professional review action meets the criteria of § 11112(a), the courts apply 'an objective standard, rather than a subjective good faith requirement.'") (citation omitted). In a case involving that Act, a court noted, "Because questions of law do not turn upon the satisfaction of evidentiary burdens, it is clear that the reasonableness or adequacy of a particular review action is a question of fact, to be resolved by the trier of fact." *Reyes v. Wilson Mem'l Hosp.*, 102 F. Supp. 2d 798, 810 (S.D. Ohio 1998).

The Foundation opposed summary judgment in part by reliance on one of its experts, the former chief election official for the State of Colorado, Scott Gessler. (Summary Judgment Opposition, R. 168, Page ID # 3415.) Mr. Gessler explained that "the NVRA imposes a duty of care to require states to act reasonably. Mere effort is inadequate. Rather, a reasonableness standard governs state action. In assessing reasonableness, I consider (1) what would constitute a prudent course of action, and (2) whether the benefits of a general program outweigh the costs."

(Exhibit D, R. 168-5, Page ID # 3477.) Mr. Gessler went on to find that Michigan's program was unreasonable, pointing to specific actions or inactions, including:

> The state's sole reliance on weekly LADMF updates and recent state death notices is unreasonable because these recent death notices fail to identify many deceased registrants on the QVF. A comparison between the full file DMF and the entire file of DHHS records on one hand, and the QVF on the other hand, is necessary to catch errors in the weekly update process.
>
> …
>
> Michigan fails to compare social security death information or DHHS death information to the complete voter roll.[1]
>
> …
>
> ERIC's reports of deceased registrants do not constitute a reasonable program for reviewing the 82,000 records that do not appear on the [Driver's File]…
>
> …
>
> The Secretary has no general program and does not make reasonable efforts to follow up on information it receives that registrants on the QVF are deceased.
>
> …
>
> For voters who have no corresponding entry in the [Driver's File], there is no state policy to evaluate a date of birth that is implausible (such as a birthdate in 1823 or 1900) or remove that registrant as deceased.

[1] Mr. Gessler also opines that this failure "seemingly violates Michigan law, which requires the Secretary to conduct a full review of the entire QVF…" (Exhibit D, R. 168-5, Page ID #3480.)

(Exhibit D, R. 168-5, Page ID # 3478, 3480, 3482, 3483, 3484.) *See* Fed. R. Evid. 704(a). Mr. Gessler's report detailed numerous examples of actions and inactions he believed to be unreasonable, notably without rebuttal. Mr. Gessler's opinions created a genuine issue of material fact as to prevailing professional norms as to reasonable list maintenance regarding deceased registrants.

D. The Eleventh Circuit's Opinion in *Bellitto v. Snipes* Is Not Applicable.

The district court relied on the Eleventh Circuit's decision in *Bellitto v. Snipes*, 935 F.3d 1192 (11th Cir. 2019), in finding that Michigan's list maintenance program is reasonable. The district court's reliance is misplaced. First, *Bellitto* was decided following a bench trial. *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *2-3 (S.D. Fla. Mar. 30, 2018). The defendant sought summary judgment and was denied. There, the defendant argued that summary judgment is appropriate given that "the undisputed facts definitively establish that [defendant's] removal program is 'reasonable under the statutory standard.'" *Bellitto v. Snipes*, 302 F. Supp. 3d 1335, 1357 (S.D. Fla. 2017) (citation omitted). The plaintiff had provided evidence of a very high registration rate in the county as compared to the rest of the country. The Court stated that it "must accept the evidence provided by … the non-movant, and draw all reasonable inferences in its favor." *Id*. Here, the Foundation does not rely on the sort of evidence in *Bellitto*

and instead provides the actual names of deceased registrants lingering on Michigan's active voter rolls, as well as other bundles of evidence, including the undisputed fact that the Secretary's program does not even compare death records to the QVF at all.

Second, because of the procedural posture, the Eleventh Circuit utilized a different standard of review than the one required in this case. There, the court "review[ed] for clear error factual findings made by a district court after a bench trial … a highly deferential standard of review." *Bellitto v. Snipes*, 935 F.3d at 1197 (internal quotations and citations omitted). The court stated that "we can discern *no clear error* in the district court's finding that Supervisor Snipes made reasonable efforts to remove registrants from the voter rolls on account of death or relocation." *Id*. at 1205 (emphasis added).

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

The Foundation presented multiple genuine issues of material fact concerning whether the Secretary has a reasonable list maintenance program to remove deceased registrants. The grant of summary judgment should be reversed. Allowing it to stand will render the reasonable list maintenance mandates of Section 8 a dead letter.

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

Through data analysis that Michigan's own expert conceded he would use, sound obituary research, and even graveside visits, the Foundation identified tens of thousands of deceased registrants on the QVF. More than 27,000 dead registrants on the active voter rolls, some for more than two decades after death, creates a material issue of fact about whether Michigan has complied with Section 8 of the NVRA. The factual record shows that the Foundation's research is based upon a *fraction* of the QVF, approximately 15 percent for the first batch and approximately 40 percent for the second, (Expert Report, R. 121-2, Page ID # 2198 ("The 2019 processing examined 1,099,524 registrants, while the 2020 processing examined 3,221,753 registrants")), so the universe of dead registrants detailed is certainly underinclusive. When a state fails to remove tens of thousands of deceased registered voters, year after year, decades after death, it is difficult to imagine what Congress sought to remedy in Section 8 if not the fact record in this case. At a minimum, a genuine factual dispute exists regarding the failure to remove 27,000 dead voters from the active rolls, including how long they languished after death, and the district court should be reversed.

The undisputed record shows the Michigan Auditor General found similar problems. *See* Performance Audit, Report Number 231-0235-19 (Dec. 2019), *available at* https://audgen.michigan.gov/wp-content/uploads/2019/12/r231023519.pdf; Performance Audit, Report Number 231-0235-21 (Mar. 2022), *available at* https://audgen.michigan.gov/wp-content/uploads/2022/03/r231023521-4999.pdf. Finding One of both audits found problematic conditions regarding the QVF, and the Secretary agreed to take action. *Id.*

In 2021, the Auditor General performed a "death match for active voters in the QVF" matching "First Name, Last Name (OR Former Last Name), and Date of Birth to the Death Record File from Vital Records[.]" (Exhibit A, R. 133-2, Page ID # 2714.) The audit manager was deposed in this case and testified that the death match yielded between "twenty to thirty thousand" deceased registrants on the QVF – a number that bolsters the Foundation's conclusions.

> Q. Did you also make a determination as to whether or not there were dead people who were still on the roll, voter's roll?
>
> A. Yes. That was an additional test we paid attention to this time around where we actually took the active registrants, and we sent it to our people who have access to the death records, run that match for us…
>
> Q. How many did you get?

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

(Deposition Transcript, R. 133-3, Page ID # 2798.) Documents from the Auditor General obtained in discovery show the number of deceased matches was more than 27,000. (*See* Exhibit A, R. 133-2, Page ID # 2713-2786. *See also* Motion in Limine Opposition, R. 133, Page ID # 2697 (explaining spreadsheet).) The similarity between the conclusions of the two independent studies of dead registrants creates another genuine issue of material fact.

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

The mere existence of state list maintenance statutes does not entitle the Secretary to summary judgment. The position of the United States is: "the question whether the general program of list maintenance [a chief election official] undertakes in fact amounts to a 'reasonable effort' to remove ineligible voters under Section 8 of the NVRA goes beyond the simple existence of state laws and procedures, to include consideration of the actual efforts undertaken pursuant to those laws and procedures." (Exhibit 1, R. 1-1, Page ID # 33.) The United States is correct; what matters to Section 8 of the NVRA is whether the Secretary *effectively* follows the list maintenance statutes and procedures. There is a genuine issue of

material fact whether the Secretary follows Michigan statutes and internal procedures. Failure to follow them is another basis to reverse and remand.

For example, failure to follow Mich. Comp. Laws § 168.509o(4) creates a genuine issue of material fact in dispute. This statute requires the Secretary to "develop and utilize a process by which information obtained through the United States Social Security Administration's death master file that is used to cancel an operator's or chauffeur's license … of a deceased resident of this state is also used at least once a month to update the qualified voter file." But the undisputed record shows that the Secretary *does not* compare information from the Social Security Administration directly against the QVF. (*See* Exhibit D, R. 168-5, Page ID # 3480-3481.) The Secretary follows this statute only up to the word "also," and then stops. The record shows that no direct comparison to the QVF occurs, and this creates a genuine issue of material fact whether Section 8 of the NVRA has been violated. (*See* Exhibit B, R. 168-5, Page ID # 3479) (citing Auditor General Performance Audit Report).)

More genuine disputes of material fact fill the record meriting reversal. It is also undisputed that the Secretary relies only on *updates* to the Social Security Administration ("SSA") death index and does not utilize the entire file, (Secretary Summary Judgment Brief, R. 149, Page ID # 3037) – a practice that might solve

the problem of registrants who have been dead for decades. This is akin to only practicing law out of the pocket parts, and not the actual comprehensive code. Mr. Gessler opines that the Secretary's reliance on updates "is unreasonable because these recent death notices fail to identify many deceased registrants on the QVF." (Exhibit D, R. 168-5, Page ID # 3478.) Again, another genuine issue of material fact is in dispute.

Strangely, the record shows some are registering to vote after death. Mr. Gessler explains that merely using SSA "updates cannot remove deceased registrants *who are registered after the date of death*, either through mistake or fraud." (Exhibit D, R. 168-5, Page ID # 3479.) The Foundation flagged 334 of these. (Complaint, R. 1, Page ID # 15.) "Second, the automated or human matching process for near matches results in some errors," that would be mitigated by cumulative review of the records (Exhibit D, R. 168-5, Page ID # 3479), and yet another factual question about the reasonableness of the program.

Finally, there is undisputed evidence that the Secretary long had a procedure in place to "stop processing deceased notices" approximately "two weeks prior" to an election. (Exhibit E, R. 168-6, Page ID # 3492.) That way "the Bureau of Elections would have their most current voter rolls prior to the elections. That there would not be any ongoing maintenance of the rolls prior to the election[.]" (Exhibit

E, R. 168-6, Page ID # 3492.) Ironically, this procedure achieved the opposite result: a less accurate voter roll when it counted most. Recall, federal law specifically permits the removal of a deceased registrant at *any time*. 52 U.S.C. § 20507(c)(2)(B)(i). The Secretary's deliberate choice to stop maintaining its voter rolls—when such maintenance could easily continue—is another factual question on a growing pile of them.

C. There Are Genuine Factual Disputes about Whether Michigan's Comparison of Death Information Against the Driver's File Rather than the QVF Is Reasonable.

It gets worse. Among the most significant failures in the Secretary's list maintenance program is the failure to compare SSA death information against the actual voter file, the QVF. Instead, the Secretary compares the information from the SSA against its Driver's File. (Exhibit D, R. 154-5, Page ID # 3257-3261.) They are not the same and the NVRA does not mandate reasonable maintenance of a state's list of drivers; it requires reasonable maintenance of a state's list of registered voters. (Exhibit C, R. 154-4, Page ID # 3246-3247.)

It is undisputed that registrants are on the QVF but not the Driver's File. (Exhibit D, R. 168-5, Page ID # 3480.) It is undisputed that only the SSA death records with absolute correlation in the Driver's File system are used to clean the QVF. (*See* Exhibit D, R. 154-5, Page ID # 3257-3258.) Keeping the Driver's File

free from deceased drivers does not do the same for the QVF. Moreover, there is a question of fact about whether the requirement of absolute correlation of the match before the QVF is cleaned is reasonable.

Adding to the pile, a factual dispute exists about how many in the Driver's File lack a social security number and, therefore, can never be evaluated over at the voter file using information received from the SSA. If a Social Security number does not exist in the Driver's file, the process hits a stoplight. Worse, the record shows that any "close" matches from SSA dead data with Driver's File data are in the end *not compared against the QVF*. All "close" matches are processed by motor vehicle staff, not staff from the Bureau of Elections. (Exhibit D, R. 154-5, Page ID # 3257-3258.) These bureaucratic potholes and roadblocks create yet more factual disputes whether Michigan has a reasonable program to remove the dead.

Even more undisputed unreasonable bungles fill the record. Michigan does not compare death information received from the Michigan Department of Health and Human Services (MDHHS) directly against the QVF. Just like SSA death information, it is only compared to the CARS database. (Exhibit D, R. 154-5, Page ID # 3257-3261.) The Secretary counts on a synchronization between CARS and the QVF when it is undisputed that the databases house different information. (Exhibit C, R. 154-4, Page ID # 3246-3247.)

The Secretary relies on monthly updates from MDHHS and does not ever compare the QVF against the MDHHS *cumulative list* of individuals who have died. (Exhibit D, R. 168-5, Page ID # 3478.) Comprehensive death records dating back to 1867 exist, yet they are not used for list maintenance. (Exhibit D, R. 168-5, Page ID # 3478.)

D. There Are Genuine Factual Disputes about Whether Michigan's Reliance on ERIC Reports Is Reasonable.

The Secretary uses a third party to perform list maintenance, ERIC, yet has no understanding how ERIC does so. (Exhibit D, R. 168-5, Page ID # 3481-3483.) There are factual disputes about whether outsourcing list maintenance to ERIC is reasonable.

It is undisputed that the data from ERIC is the *only source* of death information that the Secretary compares directly against the QVF. (Exhibit D, R. 86-1, Page ID # 1437:18-24.) The Secretary's staff member in charge of reviewing ERIC reports, Rachel Clone, testified that other than updates from the Driver's File, ERIC reports are "the only other source" of "processing deceased records in any systematic way." (Exhibit E, R. 168-6, Page ID # 3496.)

E. There Are Genuine Factual Disputes about Whether Michigan's Lack of Responsiveness Is Reasonable.

The Secretary ignored sound evidence of serious problems in the QVF, whether because of ideological hostility or bureaucratic inertia. The lack of responsiveness creates a genuine issue of fact whether the program is reasonable. Learning about problems then ignoring them is not reasonable. According to Mr. Gessler, the Secretary's lack of "procedures in place to handle information submitted by members of the public" demonstrate that "it does not conduct a general program that makes reasonable efforts to receive, investigate, or resolve reports of deceased registrants." (Exhibit D, R. 168-5, Page ID # 3483-3484.)

The Secretary's staff confirmed that a similar analysis of the entire list could have been done in "[l]ess than an hour." (Exhibit D, R. 133-5, Page ID # 2815.) Following the close of discovery, the Secretary finally got around to checking the whole list provided. The facts surrounding the Secretary's response to the Foundation's research is another question of material fact regarding reasonableness.

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

The district court relied heavily on numbers from the Election Assistance Commission ("EAC") to evaluate Michigan's list maintenance procedures in

relation to other states, adopting the Secretary's arguments. (Secretary Summary Judgment Brief, R. 149, Page ID # 3050.) This too creates a disputed issue of material fact. Other federal courts have rightfully found these EAC reports to be infested with reporting errors and questioned their relevance in evaluating the reasonableness of a list maintenance program. For example, in Pennsylvania, a plaintiff relied upon data published by the EAC in its complaint alleging violations of Section 8 for the NVRA. Specifically,

> Judicial Watch believed the number of removals reported in the February 18, 2020 datasets for Question A9e—eight in Bucks County, five in Chester County, and four in Delaware County—were "absurdly small," indicating "a multi-year failure by those jurisdictions to comply with the core requirements of Section 8(d)(2) of the NVRA."

Judicial Watch, Inc. v. Pennsylvania, 524 F. Supp. 3d 399, 402 (M.D. Pa. 2021). The court noted that "the public records on which Judicial Watch relies have been revised." *Id*. at 406. Following the errata, the data showed that "Bucks County removed 15,714 registrants … Chester County removed 11,519; and Delaware County removed 20,968." *Id*. In Delaware County, as an example, that errata note amounted to a percentage change in that data point of 524,100%. Simply, errors in the EAC reports have scuttled other assessments of reasonableness and, at worst, a genuine issue of material fact exists here whether the EAC reports are reliable.

The Foundation's expert, Mr. Ken Block, described the problem in a supplemental report. According to Mr. Block,

> My experience working with EAVS data is that it is not a data set that should be relied upon in any meaningful way when used as a sole data source. County and sometimes municipal election workers fill out this survey, often making mistakes or misunderstanding the questions. Some election jurisdictions track data that EAVS requests, and some do not.

(Supplemental Expert Report, R. 133-7, Page ID # 2859.) For comparison, Mr. Block notes, "The EAVS data reports that only 4 Indiana registrants were removed over multiple years for the reason of being deceased. Of course, this is a highly suspect statistic that is clearly incorrect." (Supplemental Expert Report, R. 133-7, Page ID # 2859.) Further, Indiana "removed more than 1,000,000 registrants from its voter rolls for all reasons. In contrast, Michigan – with not quite twice as many registrants as Indiana - removed only 239,780." (Supplemental Expert Report, R. 133-7, Page ID # 2860.)

The data contained in the EAC reports is self-reported by the states. The EAC simply republishes the information provided by the states, *see* 11 C.F.R. § 9428.7(a). The unreliability of the EAC reports has been reported in the press. According to the EAC Report, "Clark County [Washington] reported 273,240 'active' and 205,233 'inactive' voters to the commission for a registration total of 478,473." Jake Thomas, *The Columbia*, "Nonprofit spots discrepancy; county

election officials call it human error," (Nov. 29, 2017), *available at* https://www.columbian.com/news/2017/nov/29/nonprofit-spots-discrepancy-clark-county-elections-officials-call-it-human-error/. The county election official "mistakenly entered the number of 'nonactive' instead of 'inactive' voters," bringing the total down from the reported 205,233 to 31,610. *Id*.

Further, the EAC will issue errata notes following publication of the report to correct data found within the report. *See*, *e.g.*, Errata Note, U.S. ELECTION ASSISTANCE COMM'N (Dec. 18, 2023), https://www.eac.gov/sites/default/files/2023-12/Errata_Note_2022_Policy_Survey_v1.1.pdf.

Certainly, the report of a federal commission that has so many well-known errors cannot be the basis to enter summary judgment against a party as happened here. At worst, a material issue of fact exists whether the numbers in the EAC report provide sanctuary to Michigan here.

G. Totality of the Circumstances Create a Factual Dispute.

Standing alone, any of the factual disputes merit reversal. But this Court should rule that the totality of the circumstances also creates a genuine issue of material fact. That is, one fact after another after another becomes greater than the sum of its parts. Whether something is "reasonable' under Section 8, should

depend on the totality of these facts in dispute, and not merely in isolation: Tens of thousands of dead registrants, on the rolls for decades, with failures to match the QVF to databases, with the state auditor reaching the same conclusion, with terrible hygiene on the rolls, with stubborn resistance to help, on and on. The cumulative totality can create a genuine issue of material fact as to whether a program is reasonable, and the district court should be reversed.

III. Summary Judgment Is Not Appropriate When the Foundation Was Denied Relevant Discovery.

This Court has stated that "a court may grant summary judgment based on the rationale that the non-movant lacks evidentiary support … only if the non-movant had 'a sufficient opportunity for discovery.'" *Scadden v. Werner*, 677 F. App'x 996, 999 (6th Cir. 2017) (quoting *Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996)). The Foundation was blocked from conducting discovery touching the heart of the ultimate factual questions in three ways.

A. Evidence Regarding ERIC's Processing of Deceased Matches.

The Secretary concedes that ERIC's reports are the only direct comparison between the QVF and the Social Security Administration's death records. (*See* Exhibit A, R. 86-1, Page ID # 1414-16.) ERIC's procedures are squarely relevant. In granting ERIC's motion to quash, the magistrate judge found that there was nothing in the record to indicate that ERIC's reports were "incorrect or unreliable,"

or that ERIC was providing data that was "not reliable and should not be relied on by Michigan." (Transcript, R. 108, Page ID # 1978.) That is not the discovery standard, and to the extent it is, there *was* information showing the process was inadequate. (Exhibit D, R. 168-5, Page ID # 3483.) Discovery on ERIC, the magistrate ruled, would not "be proportional to the litigation[.]" (Transcript, R. 108, Page ID # 1979.) The ruling should be reversed because the procedures used by ERIC to clean, or not clean as is more likely, goes to the central issue of this case.

The magistrate's denial turned the rules of discovery upside down. The order required the Foundation to first show that there are defects in ERIC's process used to identify deceased registrants when the Foundation had no access to what those procedures were.

The Foundation is entitled to discovery related to ERIC's processing of deceased matches for the Secretary.

B. Evidence Concerning the Secretary's Policies and Procedures Regarding List Maintenance as to Deceased Registrants.

The Foundation sought to depose the Secretary about list maintenance procedures and directives. The Secretary sought a protective order, which was granted without prejudice by the magistrate judge. (Order, R. 74, Page ID # 806.) The NVRA mandates that "[e]ach State shall designate a State officer or employee

as the chief State election official to be responsible for coordination of State responsibilities under this chapter." 52 U.S.C. § 20509. Secretary Benson is the chief State election official for the State of Michigan. Mich. Comp. Laws § 168.21. Secretary Benson's testimony is highly relevant. She would be able to testify as to what policies and procedures she has regarding the removal of deceased registrants along with her lack of responsiveness to the Foundation's data. Citing a lack of time for a deposition, nevertheless Secretary Benson appeared on CBS "Face the Nation" and spoke about this case. *See* Transcript: Michigan Secretary of State Jocelyn Benson on "Face the Nation," Sept. 4, 2022, CBS News (Sept. 4, 2022), https://www.cbsnews.com/news/jocelyn-benson-face-the-nation-transcript-09-04-2022/.

C. Testimony Regarding the Secretary's September 2023 Analysis.

After discovery closed, the Secretary produced a comparison of the Foundation's data with the active voter file. (Exhibit I, R. 149-10, Page ID # 3173.) The 341-page pdf was sent to the Foundation saying it was "a report comparing the list of voter ID's provided by PILF to the current QVF and providing the current status of each voter ID." (Exhibit A, R. 144-2, Page ID # 2981.)

The Foundation requested to depose Stuart Talsma, the author. Mr. Talsma is the same employee who provided prior deposition testimony that a comparison

of the Foundation's lists against the QVF would take less than an hour. (Exhibit D, R. 133-5, Page ID # 2815.)

The deposition of Mr. Talsma regarding the September 2023 document is relevant to the claims and defenses in this case. For good measure, the Secretary relied upon it in its summary judgment motion.

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

It is undisputed that the Foundation requested and was denied access to list maintenance records subject to disclosure. (*See* Joint Statement of Undisputed Facts, R. 157, Page ID # 3276; Summary Judgment Brief, R. 154, Page ID # 3213-3214.) Contrary to the overwhelming weight of authority, the district court denied the Foundation's summary judgment motion and granted the Secretary's motion as to Count II. The district court held that "Secretary Benson represents, and PILF does not dispute, that PILF is in possession of all responsive records of Michigan's list maintenance activities." (Opinion and Order, R. 180, Page ID # 3663.) Not so.

What the Secretary actually argued is that "PILF fails entirely to identify a single record *open to inspection under the NVRA* that it has not already been provided by the Defendant. There is no longer anything for PILF to obtain, and so Count II is moot." (Reply to Summary Judgment, R. 176, Page ID # 3584

(emphasis added); *see also* Response to Summary Judgment, R. 166, Page ID # 3358 ("it is not evident that the Defendant is in possession of any additional documents *subject to public inspection under NVRA*") (emphasis added).) In so doing, the Secretary read the Public Disclosure Provision narrowly.

The NVRA's Public Disclosure Provision is a broad mandate, requiring public disclosure of "**all records** concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" 52 U.S.C. § 20507(i)(1) (emphasis added). The requested records fall squarely within the scope of Section 8.

"The starting point in statutory interpretation is the language [of the statute] itself." *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (citations and quotations omitted). The Supreme Court says, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 254 (citations and quotations omitted). The text of the Public Disclosure Provision is unambiguous: "Each state … shall make available for public inspection ... *all records* concerning the implementation of *programs and activities* conducted for the purpose of ensuring the *accuracy and currency* of official lists of

eligible voters." 52 U.S.C. § 20507(i)(1) (emphasis added). All records concerning activities conducted by Michigan to conduct list maintenance are subject to public disclosure, period. The records the Foundation is seeking are records subject to inspection and disclosure by the statute's plain text.

A. Each Document the Foundation Requested Is a "Record."

Because the NVRA does not define "record," the court considers the common and ordinary meaning of the term. *See Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1335 (N.D. Ga. 2016) (interpreting meaning of "record" in NVRA). The Merriam-Webster Dictionary defines record as "a body of known or recorded facts about something or someone" and "a collection of related items of information (as in a database) treated as a unit." Merriam-Webster, https://www.merriam-webster.com/dictionary/record.

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

Interpreting the plain meaning of the NVRA's terms, the Eastern District of Virginia concluded that "a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state." *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 706 (E.D.

Va. 2010); *see also True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 719-20 (S.D. Miss. 2014) ("A list of voters is 'accurate' if it is 'free from error or defect' and it is 'current' if it is 'most recent.'") (citations omitted). Each of the requested records concerns the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.

1. Data from the SSA

It is undisputed that the Secretary receives data from the SSA regarding individuals who have died. (Summary Judgment Brief, R. 154, Page ID # 3215.) It is undisputed that the Secretary relies upon data from the SSA to find registrants who have died. (Summary Judgment Brief, R. 154, Page ID # 3215.)

During discovery, the Foundation requested "Documents and communications from the Social Security Administration to you regarding individuals who are or may be deceased. The timeframe for this request is 2016 to present." (Exhibit E, R. 154-6, Page ID # 3264.) The Secretary objected to the request as, in part, "overly broad, vague and unduly burdensome." (Exhibit F, R. 154-7, Page ID # 3269.) The Secretary did not state that no responsive documents exist nor object to the relevancy of the requested documents. Indeed, federal election retention mandates make that response problematic. 52 U.S.C. § 20701. The Secretary argued that the data regarding deceased individuals that it receives

from the SSA is not disclosable because it "is not a voter registration list and is not a record 'related to the accuracy of official list of registered voters.'" (Secretary Summary Judgment Response, R. 166, Page ID # 3354.) The uniform and heavy weight of authority establishes that defense is flat wrong. *See*, *e.g.*, *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d at 1341 ("The Court concludes that, in addition to requiring records regarding the processes a state implements to ensure the accuracy and currency of voter rolls, considering the NVRA as a consistent whole, individual applicant records are encompassed by the Section 8(i) disclosure requirements."); *Pub. Int. Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 941 (C.D. Ill. 2022) ("On balance, the two phrases, when read together, make clear that any record, be it data regarding maintenance activities, the processes involved in the maintenance activities, or the output of those maintenance activities, including the statewide voter registration list, must be made available to the public.").

The underlying records themselves are essential for the Foundation to "monitor[] the state of the voter rolls and the adequacy of election officials' list maintenance programs." *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018). Without the requested records, the Foundation cannot evaluate whether the Secretary is adequately,

reasonably, and lawfully maintaining its voter list. The Foundation cannot evaluate if the Secretary is using SSA Data reasonably and effectively.

2. QVF Cancelation Records

It is undisputed that the QVF can generate a report of registrants who have been canceled. (Summary Judgment Brief, R. 154, Page ID # 3215.) In discovery, the Secretary provided a cancellation report. (Exhibit F, R. 154-7, Page ID # 3270.) The record should have been, but was not, provided in response to the Foundation's request under the Public Disclosure Provision. Even as to documents the Secretary has now provided pursuant to discovery or discovery motions, the Foundation's claims are not moot. The Sixth Circuit has found that, "'as a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *Ostergren v. Frick*, 856 F. App'x 562, 566 (6th Cir. 2021) (internal quotations omitted). "However, while the 'bar is high' to show that voluntary cessation has mooted a claim, it is slightly lower 'when it is the government that has voluntarily ceased its conduct.'" *Id*. at 567 (internal quotations omitted.) Courts have found that, for government officials, "self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Love v. Johnson*, No. 15-11834, 2016 U.S. Dist. LEXIS 112035, at *7-8 (E.D. Mich. Aug. 23, 2016).

The records that the Secretary has now allowed the Foundation to see were in response to discovery requests or a court order on a discovery motion, not a voluntary, genuine change in the Secretary's policy.

3. Records Relating to the Investigation of Potentially Deceased Registrants

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

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

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

(Complaint, R. 1, Page ID # 6, *see also* Exhibit 2, Page ID # 41.) All records relating to that investigation, including correspondence between the City and the Secretary's office, are responsive to the Foundation's NVRA Inspection Request. The interaction with the City of Detroit is not an isolated incident. In his deposition, Michigan Director of Elections referred to general investigations that may occur.

> 11 Q.· ·What procedures do you have in place for information
> 12· · · ·submitted from a relative about a deceased individual?
> 13· A.· ·If an individual believes that -- or if an individual is
> 14· · · ·reporting that a relative or anyone they know, really, is
> 15· · · ·deceased and is registered to vote, that information is best
> 16· · · ·directed to the municipal clerk for that voter.· The clerks
> 17· · · ·are the ones who do the individual level review.
> 18· · · · · · · ·So, typically, if that information was provided to
> 19· · · ·the Bureau, the Bureau would first contact the clerk to
> 20· · · ·follow up on that.· The Bureau might also assist the clerk as
> 21· · · ·needed, if requested.
> 22· Q.· ·How would the Bureau assist the local clerk in that instance?
> 23· A.· ·If the clerk asked for help looking something up in the
> 24· · · ·Qualified Voter File, Bureau staff could help them with that.

(Exhibit C, R. 154-4, Page ID # 3250.) The exact number of responsive documents would be known to the Secretary. The Secretary is required to allow inspection of such records pursuant to the NVRA. It has denied the request.

4. ERIC Records

It is undisputed that the Secretary receives information from ERIC regarding deceased individuals. (Summary Judgment Brief, R. 154, Page ID # 3215.) ERIC is

the "only other" incoming source of information regarding deceased registrants apart from changes to CARS. (*See* Summary Judgment Brief, R. 154, Page ID # 3215.) The ERIC records concern the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.

The Foundation requested ERIC-related documents during discovery and again, the Secretary denied the request. The Foundation filed a motion to compel turnover of these documents, (Motion to Compel, R. 113, Page ID # 2018-2020), which the Secretary opposed, (Opposition, R. 118, Page ID # 2105-2126). The magistrate judge held a hearing on the motion and ordered the Secretary to produce ERIC Deceased Reports. (Order, R. 139, Page ID # 2924.)

That the Secretary now, by order of the lower court, has provided *some* ERIC records does not render the Foundation's claim for this category of documents moot. The Foundation sought "All records and correspondence regarding [Secretary's] use of [ERIC] to conduct voter roll list maintenance[,]" (Exhibit 9, R. 1-9 at Page ID # 64,) not *just* the ERIC Deceased Reports. Further, as to the ERIC Deceased Reports, the Foundation has no assurance that the Secretary will provide the documents in the future without a declaratory judgment. For the reasons described further below, a permanent injunction is warranted.

C. Disclosure of the Requested Records Is Consistent with the NVRA.

The NVRA was enacted for four purposes, including "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(3)-(4). The NVRA's Public Disclosure Provision reflects Congressional intent by allowing the public to monitor the activities of government as they concern the right to vote:

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

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

D. A Permanent Injunction Is Warranted.

The Court should reverse the lower court and render judgment for the Foundation that includes a permanent prospective injunction with an affirmative duty to disclose records subject to disclosure under Section 8. Such an injunction is necessary under these circumstances to prevent impairment of the public's right to access list maintenance information in the future.

"The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court[.]" *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). A permanent injunction is warranted where a plaintiff demonstrates: "(1) that it has suffered an irreparable injury; (2) that remedies available at law…are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved…." *Id*. at 391. Each of these elements is satisfied.

The Secretary's ongoing refusal to comply with the NVRA caused the Foundation to suffer irreparable harm in at least two ways. First, the Foundation suffered an informational injury, including the loss of opportunity to obtain in a timely fashion information vital to the current and ongoing debate surrounding election administration. Second, the Foundation lost the opportunity to take action

to urge election officials to institute remedial measures before more elections could take place. *See Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018) (describing NVRA's oversight function).

The danger of injury recurring is real. The Secretary has not produced a single document in response to the Foundation's NVRA request. The only documents the Secretary produced without a court order were in response to *discovery requests*. (*See* Exhibit F, R. 154-7, Page ID # 3270.) The other records that have been produced – ERIC Deceased Reports – were only produced in part following the Foundation's pursuit of the Secretary's initial objections, culminating in a disclosure order. The Secretary's behavior demonstrates why a declaratory judgment and injunction is merited. No one should be forced to file a federal lawsuit—and then hope to reach the discovery stage—to possibly obtain some of the public record sought years after the request was made.

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

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

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

"The balance of hardships does not weigh in favor of the defendants, as a permanent injunction will simply compel the defendants to comply with their responsibilities under the NVRA and, thus, will prevent them from denying the public of a statutory right." *Project Vote*, 813 F. Supp. 2d at 744; *see also Kemp*, 208 F. Supp. 3d at 1350 (considering preliminary injunction).

The public interest would also be served by a permanent injunction. The *Kemp* court prudently recognized that "'[t]he public has an interest in seeing that the State of Georgia complies with federal law, especially in the important area of voter registration. Ordering the state to comply with a valid federal statute is most assuredly in the public interest.'" *Kemp*, 208 F. Supp. 3d at 1351 (citations and quotations omitted); *see also Project Vote*, 813 F. Supp. 2d at 745.

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

Further, below, the Secretary focused on "[o]ther events occurring contemporaneous with" the Foundation's requests. (Secretary Summary Judgment Brief, R. 149, Page ID # 3053-3055.) But the NVRA does not detail excuses for non-compliance. Further, even if "Bureau staff were not allowed back into their offices until February of 2021," (Secretary Summary Judgment Brief, R. 149, Page ID # 3055), nine months elapsed after that before the case was filed. Equities here weigh substantially in favor of the patient, flexible, earnest, and courteous efforts by the Foundation to obtain records that Congress deemed the Foundation has a right to inspect.

CONCLUSION

The Foundation asks this Court to reverse and remand the district court's entry of summary judgment as to its claim that the Secretary is violating the list maintenance obligations of the NVRA. The Foundation further asks this Court to instruct the district court regarding Section 8 of the NVRA as to the relevancy and weight of various evidence in a case for failure to implement a reasonable program to remove deceased registrants from the rolls. After remand, the district court should consider as relevant evidence of:

1. **Deceased registrants on the voter rolls**. The district court should consider the cumulative number of deceased registrants who were on the voter

rolls, regardless of the proportion of overall registrants. The proportion of deceased registrants is not relevant because a single improper vote can make a difference and has made a difference in Michigan elections that ended in ties. *See* Public Interest Legal Foundation, "Tracking Elections that Ended in Ties & Close Results," https://publicinterestlegal.org/tied-elections/.

2. **Time Elapsed Since the Registrant Died**. The district court should consider as relevant the time elapsed since each registrant died. The longer the registrant has remained on the voter roll following death adds to the weight of the evidence of elapsed time. The greater the time that a decedent remained on the rolls, the greater the weight of the evidence that the district court should consider. The Foundation, for example, created a genuine issue of material fact alleging that thousands of registrants remained on the voter rolls in Michigan a decade or more after death. Some are alleged to have died in the 1990s but remain on the Michigan voter roll. The district court should be instructed to give great weight to registrants who remained on the rolls for decades after death when considering if Section 8 has been violated.

3. **Internal State Audits**. The district court should consider as relevant any audits conducted by offices of the state of Michigan that reach the same or similar conclusions as the Foundation about the failure of existing programs to

timely remove deceased registrants from the active voter rolls. The district court should weigh the degree to which internal state audits reach similar conclusions regarding failures of procedure, and most of all, numeric similarity between the evidence presented by the Foundation and the numeric catalog presented in any state audits of the death removal procedures and results. Should the Foundation's evidence bear a close resemblance to the conclusions reached by internal state audits regarding dead registrant removal programs, that evidence should be given both relevance and substantial weight. The degree to which the conclusions between any internal state audit and the Foundation's evidence differ, then the district court should ascribe commensurate weight against the Foundation.

4. **Bad Voter Roll Hygiene**. The district court should be instructed that evidence of bad voter roll hygiene is relevant. Bad hygiene includes such things as registrant records containing no dates of birth, incomplete or missing data fields and implausible dates of birth, such as in the 19th Century. Evidence of bad voter roll hygiene is relevant because failure to maintain these data accurately impairs the list maintenance process and makes it more difficult to match data about those who have died with registration records on the statewide voter database. The district court should be instructed that the degree to which bad hygiene exists, it is relevant. The weight accorded should be commensurate with the number of

instances of bad hygiene found on the voter rolls. To the extent that no instances of bad hygiene exist, then that evidence should support the Secretary.

5. **Responsiveness of Election Officials to Information about Problems**. It is not reasonable list maintenance when instances of deceased registrants are brought to the attention of election officials and those officials are not responsive, or barely responsive to the information. The district court should be instructed that evidence of a lack of responsiveness to such information is relevant evidence of the reasonableness of a list maintenance program. Outright hostility to information received—including evidence of derogatory emails and insulting characterizations of the provider of the information, are particularly weighty examples of a lack of responsiveness weighing against the reasonableness of any list maintenance program. The district court should be instructed that evidence of an election official expressing public hostility, ridicule, or characterizing those with information about list maintenance problems in derogatory terms is both relevant and, depending on the degree, weighty for assessing the reasonableness of a program. Congress decided that private parties have a role to play in maintaining the accuracy of the nation's voter rolls, and when election officials, at best, ignore them, and at worse, insult them, it is relevant to the question of whether the Secretary has a reasonable list maintenance program.

6. **Lack of Awareness of Outsourced List Maintenance**. The district court should be instructed that it is relevant when an election official does not understand the scope of the data it receives from third party vendors to conduct list maintenance. While lower in weight than the previous evidentiary instructions, the district court should be instructed that the Foundation's evidence specifically as to ERIC, derived from depositions of the Secretary's staff, that a lack of understanding or errors in understanding about ERIC deceased lists is relevant to whether or not a reasonable list maintenance program is in place.

7. **Expert Opinion**. The district court should be instructed that what the "industry standard" is for list maintenance among election officials, and what could be done differently, is relevant. While the district court may be free to disregard any opinion as not credible or the various other means to discount an expert, what is "reasonable" is, to some extent, what is being done elsewhere, what is possible, and what could be improved. It is not enough to say that a program is in place when evidence indicates there are serious shortcomings to a program.

8. **Failure to Follow State Statutes and Procedures.** The district court should consider the extent to which the Secretary fails to follow Michigan list maintenance statutes and her own administrative procedures.

9. **Totality of the Circumstances.** To the degree multiple categories of relevant evidence exists, the cumulative effect should be considered.

The Foundation also asks this Court to reverse the district court and render judgment on the Foundation's claim that the Secretary violated the NVRA's Public Disclosure Provision. In the alternative, this Court should remand that claim to the trial court for consideration consistent with the Court's holding.

Dated: May 28, 2024.

Respectfully submitted,

For the Plaintiff Public Interest Legal Foundation:

/s/ Kaylan Phillips
J. Christian Adams
Kaylan Phillips
Joseph M. Nixon
Noel H. Johnson
Public Interest Legal Foundation, Inc.
107 S. West Street, Ste 700
Alexandria, VA 22314
(703) 745-5870
adams@PublicInterestLegal.org
kphillips@PublicInterestLegal.org
jnixon@PublicInterestLegal.org
njohnson@PublicInterestLegal.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Fed. R. App. P. Rule 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Rule 32(f), this brief contains 12,925 words.

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

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Public Interest Legal Foundation

Dated: May 28, 2024.

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2024, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Public Interest Legal Foundation

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

R. 1 – 1-14, Complaint with exhibits, Page ID # 1-76

R. 35, Motion to Dismiss Order, Page ID # 384-408

R. 62, Motion for Protective Order, Page ID # 713-716

R. 63, Secretary's Brief in Support of Motion for Protective Order with exhibits Page ID # 717-752

R. 71, Foundation's Opposition to Motion for Protective Order, Page ID # 788-802

R. 74, Order Granting Motion for Protective Order, Page ID # 806

R. 75, Hearing Transcript, Page ID # 807-839

R. 80, Motion to Quash, Page ID # 854-855

R. 86-1, Exhibits to Foundation's Opposition to Motion to Quash, Page ID # 1410-1453

R. 94, Foundation's Opposition to Motion to Quash, Page ID # 1511-35

R. 102, Order Granting Motion to Quash, Page ID # 1940

R. 108, Transcript, Page ID # 1951-1982

R. 109, Appeal of Magistrate Judge's Ruling, Page ID # 1983-1984

R. 110, Foundation's Brief in Support of Appeal, Page ID # 1985-1995

R. 133 – 133-7, Foundation's Opposition to Motion in Limine with exhibits, Page ID # 2692-2853

R. 143, Motion to Depose, Page ID # 2964-2965

R. 144 – 144-5, Foundation's Brief in Support of Motion to Depose with exhibits, Page ID # 2966-3012
R. 148, Secretary's Motion for Summary Judgment, Page ID. # 3018-3022

R. 149 – 149-14, Secretary's Brief in Support of Motion for Summary Judgment with exhibits, Page ID # 3023-3197

R. 153, Foundation's Motion for Summary Judgment, Page ID. # 3204-3206

R. 154 – 154-7, Foundation's Brief in Support of Motion for Summary Judgment with exhibits, Page ID # 3207-3270

R. 157, Joint Statement of Undisputed Facts, Page ID # 3275-3278

R. 162, Order Denying Motion to Depose, Page ID # 3296

R. 163, Transcript, Page ID # 3297-3323

R. 165, Opinion and Order Denying Appeal of Magistrate Judge's Ruling, Page ID # 3325-3334

R. 166, Secretary's Opposition to Motion for Summary Judgment, Page ID # 3335-3363

R. 168 – 168-8, Foundation's Opposition to Motion for Summary Judgment with exhibits, Page ID # 3406-3514

R. 170, Foundation's Motion for Discovery, Page ID # 3517-3519

R. 172, Foundation's Brief in Support of Motion for Discovery, Page ID # 3527-3532

R. 176 – 172-5, Secretary's Motion for Summary Judgment Reply, Page ID # 3569-3611

R. 178, Foundation's Motion for Summary Judgment Reply, Page ID # 3614-3633

R. 180, Opinion and Order, Page ID # 3636-3666.

R. 181, Judgment, Page ID # 3667

R 182, Notice of Appeal, Page ID # 3668-70