

Linda A. Kerns, Esquire (NJ Bar No. 001051999)
LAW OFFICES OF LINDA A. KERNS, LLC
1420 Locust Street – Suite 200
Philadelphia, PA 19102
Tel: (215) 731-1400
Fax: (215) 701-4154
linda@lindakernslaw.com

Maureen Riordan*
Noel H. Johnson*
PUBLIC INTEREST LEGAL FOUNDATION
32 E. Washington St., Ste. 1675
Indianapolis, IN 46204
Tel: (317) 203-5599
Fax: (888) 815-5641
njohnson@PublicInterestLegal.org
mriordan@PublicInterestLegal.org
* *Admitted Pro Hac Vice*
Attorneys for Plaintiff Public Interest Legal Foundation

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**PUBLIC INTEREST LEGAL
FOUNDATION, INC.,**

Plaintiff,

v.

TAHESHA WAY, in her official capacity
as Secretary of State for the State of New
Jersey,

Defendant.

Civil Case No. 3:22-cv-02865-
FLW-RLS

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

STANDARD OF REVIEW 5

ARGUMENT 5

 I. The Secretary May Not Contest Factual Allegations At this Stage
 Without Converting Her Motion to Dismiss into a Motion
 for Summary Judgment 5

 II. The Foundation’s Complaint States a Plausible Claim
 for an NVRA Violation 10

 A. The Foundation Seeks “All” Records, Not Only
 the “Voter Module.” 11

 B. Courts Interpret the Public Disclosure Provision Broadly..... 11

 C. Generally, the Requested Records “Concern[] the
 Implementation of Programs and Activities Conducted
 for the Purpose of Ensuring the Accuracy and Currency
 of its Official List of Eligible Voters.”..... 14

 D. The Voter Module “Concern[s] the Implementation of
 Programs and Activities Conducted for the Purpose of
 Ensuring the Accuracy and Currency of its Official List
 of Eligible Voters.” 16

 III. The Secretary Reads Additional Requirements and
 Exemptions Into the NVRA’s Text 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Acevedo v. Monsignor Donovan High Sch.,
420 F. Supp. 2d 337 (D.N.J. 2006)..... 6, 8, 10

ACORN v. Edgar,
880 F. Supp. 1215 (N.D. Ill. 1995)..... 19

Arizona v. Inter Tribal Council of Arizona,
570 U.S. 1 (2013)..... 2, 19

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..... 5, 10

Bates v. United States,
522 U.S. 23 (1997)..... 17

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 5

Cent. Contracting Co. v. Md. Cas. Co.,
367 F.2d 341 (3d Cir. 1966)..... 7

Conn. Nat’l Bank v. Germain,
503 U.S. 249 (1992)..... 14

Ex parte Siebold,
100 U. S. 371 (1880)..... 3

Ill. Conservative Union v. Illinois,
2021 U.S. Dist. LEXIS 102543 (N.D. Ill. June 1, 2021)..... 13

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997)..... 6

In re Rockefeller Center Properties, Inc. Sec. Litig.,
184 F.3d 280 (3d Cir. 1999)..... 7

Judicial Watch, Inc. v. Lamone,
399 F. Supp. 3d 425 (D. Md. 2019)..... 13

Judicial Watch, Inc. v. Lamone,
455 F. Supp. 3d 209 (D. Md. 2020)..... 13

Lamie v. United States Tr.,
540 U.S. 526 (2004)..... 14

Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.,
 331 F.3d 406 (3d Cir. 2003)..... 8, 20

Pension Benefit Guar. Corp. v. White Consol. Indus.,
 998 F.2d 1192 (3d Cir. 1993)..... 6 n.2, 8

Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship,
 507 U.S. 380 (1993)..... 14, 17

Project Vote, Inc. v. Kemp,
 208 F. Supp. 3d 1320 (N.D. Ga. 2016)..... 12, 17, 21

Project Vote/Voting for Am., Inc. v. Long,
 752 F. Supp. 2d 697 (E.D. Va. 2010) 15

Project Vote/Voting for Am., Inc. v. Long,
 813 F. Supp. 2d 738 (E.D. Va. 2011) 19

Project Vote/Voting for Am., Inc. v. Long,
 889 F. Supp. 2d 778 (E.D. Va. 2012) 12

Project Vote/Voting for Am., Inc. v. Long,
 682 F.3d 331 (4th Cir. 2012)12-13, 20-21

Pub. Interest Legal Found., Inc. v. Bellows,
 2022 U.S. Dist. LEXIS 38875 (D. Me. Mar. 4, 2022)..... 13, 19

Pub. Interest Legal Found. v. Bennett,
 2019 U.S. Dist. LEXIS 39723 (S.D. Tex. Feb. 6, 2019) 12

Pub. Interest Legal Found., Inc. v. Bennett,
 2019 U.S. Dist. LEXIS 38686 (S.D. Tex. Mar. 11, 2019) 12

Pub. Interest Legal Found., Inc. v. Bell,
 2019 U.S. Dist. LEXIS 179485 (E.D.N.C. Oct. 16, 2019)..... 22

Pub. Interest Legal Found. v. Boockvar,
 431 F. Supp. 3d 553 (M.D. Pa. 2019)..... 12, 18

Pub. Int. Legal Found. v. Chapman,
 2022 U.S. Dist. LEXIS 60585 (M.D. Pa., Mar. 31, 2022) 12

Pub. Interest Legal Found. v. Matthews,
 2022 U.S. Dist. LEXIS 40640 (C.D. Ill. Mar. 8, 2022)..... 13, 19

Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections,
 996 F.3d 257 (4th Cir. 2021) 12, 21-22

Schmidt v. Skolas,
 770 F.3d 241 (3d Cir. 2014)..... 6-7

Tindall v. Allegheny Cty. Hous. Auth.,
2018 U.S. Dist. LEXIS 154996 (W.D. Pa. Sep. 12, 2018)..... 8

True the Vote v. Hosemann,
43 F. Supp. 3d 693 (S.D. Miss. 2014) 12

United States v. Monsanto,
491 U.S. 600 (1989)..... 18

Constitutions, Statutes, and Rules

U.S. Constitution, Article VI, Clause 2 19

U.S. Constitution, Article I, Section 4, Clause I..... 19

52 U.S.C. § 20501(b)(3)-(4) 19

52 U.S.C. § 20507(i)(1) 1-3, 10, 15, 17-18, 20

52 U.S.C. § 21083(a)(1)(A) 2, 9

52 U.S.C. § 21083(a)(2)(B)(iii) 2, 9-10, 15

52 U.S.C. § 21145(a)(4)..... 21

N.J.S.A. 47:1A-1.1 4

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiff Public Interest Legal Foundation, Inc. (“Foundation”) hereby responds in opposition to Defendant Tahesha Way’s (“Secretary”) Motion to Dismiss. (Doc. 10.)

INTRODUCTION

The Foundation’s Complaint alleges that the requested records “concern” the implementation of the Secretary’s voter list maintenance activities and, therefore, fall well within the scope of the National Voter Registration Act (“NVRA”). The Foundation further alleges that the Secretary is denying the Foundation’s records request in violation of the NVRA and injuring the Foundation. The Foundation thus stated a plausible claim for relief.

The Secretary’s Motion to Dismiss relies on an incorrect interpretation of the NVRA that strays far from the plain-meaning analysis this Court must conduct. In statutory interpretation cases, the statute’s plain language is preeminent, and where unambiguous, it is determinative. The NVRA’s words unambiguously require public inspection of “all records concerning the implementation” of voter list maintenance programs and activities. 52 U.S.C. § 20507(i)(1). The requested records are subject to public inspection under the statute’s plain meaning because they “concern” the steps or actions taken to keep New Jersey’s voter roll accurate. In fact, the Secretary concedes that at least one responsive record, known as the Voter Module, “is an instruction manual” that shows how to “add, delete, or

modify the information” contained in the state’s “official database of registered voters.” (Doc. 10-1 at 1-2.) The Voter Module thus squarely “concern[s]” a core voter list maintenance activity under 52 U.S.C. § 20507(i)(1).

The Secretary’s narrow and exclusive focus on the Voter Module inappropriately limits the actual Complaint. The Foundation requested “[c]opies of **all** manuals, guidance, instructions, and other written procedures for identifying, merging, and/or cancelling duplicate voter registration records.” (Doc. 1 ¶ 13 (emphasis added).) Federal law requires the Secretary to conduct these underlying activities, namely, ensuring that “duplicate names are eliminated from the computerized list” of registered voters, 52 U.S.C. § 21083(a)(2)(B)(iii), a list that must be “administered at the State level.” 52 U.S.C. § 21083(a)(1)(A). The Foundation alleges that the Secretary is denying the Foundation access to more than simply the Voter Module. (Doc. 1 ¶ 13.) The Secretary cannot dodge liability by rewriting the Foundation’s Complaint more narrowly.

Nor can the Secretary add exceptions to the NVRA that Congress chose not to add. Any New Jersey law prohibiting disclosure to the Foundation is invalid here because the NVRA is superior to any conflicting state law under the Constitution’s Elections Clause and Supremacy Clause. *See Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013). In such situations, “the state law, ‘so far as

the conflict extends, ceases to be operative.” *Id.* at 9 (quoting *Ex parte Siebold*, 100 U. S. 371, 384 (1880)).

How and why registrants are added and removed from voter rolls should not be decisions shrouded in secrecy. Congress agreed and allowed the public to monitor list maintenance activities through access to public records. The Secretary’s concealment of such records violates federal law. Because the Foundation plausibly alleges such a violation, the Motion to Dismiss should be denied.

BACKGROUND

The Foundation is a non-profit, non-partisan, 501(c)(3) organization that specializes in election and voting rights issues. (Doc. 1 ¶ 5.) For its work, the Foundation often relies upon the NVRA, 52 U.S.C. §§ 20501 *et seq.* Section 8(i)(1) of the NVRA acts like a stronger version of the federal Freedom of Information Act (“FOIA”), requiring election officials to “make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities¹ conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]” 52 U.S.C. § 20507(i)(1) (hereafter, the “Public Disclosure Provision”).

¹ These are referred to as “voter list maintenance” programs or activities herein.

On September 21, 2021, the Foundation emailed a letter to the Division of Elections at the New Jersey Secretary of State's office. (Doc. 1 ¶ 13.) The letter requested the following records, pursuant to the NVRA's Public Disclosure Provision:

Copies of all manuals, guidance, instructions, and other written procedures for identifying, merging, and/or cancelling duplicate voter registration records.

(Doc. 1-2 (hereafter, the "Request").)

The Division of Elections requested five (5) extensions of time to respond to the Foundation's Request, (Doc. 1 ¶ 14), only to finally deny the request after more than six months. (Doc. 1 ¶ 15; Doc. 1-3 (hereafter, the "Denial Letter").)

The Denial Letter explained,

Please be advised that the documents you seek relating to the State of New Jersey's election process is deemed confidential because its disclosure would expose critical vulnerability within the State's election process. See N.J.S.A. 47:1A-1.1. ... The documents you request detail how the State's election systems function and how to make discrete changes within the systems. If disclosed, this information would create a grave risk to the integrity of New Jersey's election system.

(Doc. 1-3; Doc. 1 ¶ 16.) The Division of Elections did not specify how many records it was withholding or provide the names or basic descriptions of those records. (*See* Doc. 10-2 (conceding that withheld records were "not identified by name in the response").) The Division of Elections claimed it was providing "the guide to implementing the National Voter Registration Act and the Rutgers Manual

to Voting.” (Doc. 1-3; Doc. 1 ¶ 17.) Yet neither document was attached to the Denial Letter. (Doc. 1 ¶ 17.) As the Secretary concedes, those records were not provided until after the Foundation filed this action. (*See* Doc. 10-2 ¶ 15.)

On April 4, 2022, the Foundation notified the Secretary—New Jersey’s chief election official—in writing that she is violating the NVRA by denying access to the requested records. (Doc. 1-4 (hereafter, the “Notice Letter”); Doc. 1 ¶¶ 18-25.) The Secretary has not cured her NVRA violation within the time the NVRA affords under these circumstances. (Doc. 1 ¶¶ 26-29.) This action is therefore ripe.

STANDARD OF REVIEW

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. The Secretary May Not Contest Factual Allegations At this Stage Without Converting Her Motion to Dismiss into a Motion for Summary Judgment.

The Secretary’s Motion relies on written testimony from Assistant Secretary of State Lauren M. Zyriek (Doc. 10-2 (hereafter, the “Zyriek Affidavit”)), which is used in an attempt to establish two factual contentions: (1) the Voter Module is the only responsive record not provided to the Foundation (*see* Doc. 10-2 ¶¶ 5, 16),

and (2) the Voter Module does not concern the Secretary's voter list maintenance activities, (*see* Doc. 10-1 at 10).

The Court should not consider the Zyriek Affidavit for two separate but related reasons. **First**, “an affidavit from a defendant may not be considered in deciding a motion to dismiss.” *Schmidt v. Skolas*, 770 F.3d 241, 250 (3d Cir. 2014). Rather, “[t]o decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record.”² *Id.* at 249 (citations and quotations omitted); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (“As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.”). Ms. Zyriek’s written testimony is none of these things and therefore cannot be considered at this stage without converting the motion to dismiss into one for summary judgment and allowing the Foundation “a reasonable opportunity to present all material pertinent to such a motion under Rule 56.” *Acevedo v. Monsignor Donovan High Sch.*, 420 F. Supp. 2d 337, 340 (D.N.J. 2006).

² While the Voter Module is a public record under the NVRA, it cannot be considered a “public record” for purposes of this analysis. *See Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993) (“We hold that a document is not a public record for purposes of a motion to dismiss solely because it might be subject to disclosure under FOIA.”).

The Secretary appeals to the so-called exception that allows the Court to consider a “document integral to or explicitly relied upon in the complaint.” (Doc. 10-1 at 6 (quoting *In re Rockefeller Center Properties, Inc. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir. 1999)).) Even assuming that the Voter Module is “integral,” the Secretary asks the Court to consider the Zyriek Affidavit, and not the Voter Module, so, fundamentally, the exception does not apply. (Doc. 10-1 at 7 (“In lieu of attaching the confidential Voter Module to the present motion to dismiss, DOE filed the above-referenced Zyriek Declaration, which describes the Voter Module.”).) An affidavit “clearly may not be considered at this stage. *See Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341, 343 (3d Cir. 1966) (converting a motion to dismiss to a motion for summary judgment where the parties submitted affidavits in support of their positions).” *Skolas*, 770 F.3d at 249.

As the Third Circuit has explained, “The rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated [w]here the plaintiff has actual notice ... and has relied upon these documents in framing the complaint.” *Skolas*, 770 F.3d at 249 (citations and quotations omitted). The Foundation had no notice of either the Voter Module or Zyriek’s testimony when “framing the complaint.” In fact, the Secretary’s motion is the first time the Secretary has revealed the name or basic nature of the Voter Module or alleged that it is the only

remaining responsive document. The Zyriek Affidavit therefore does not qualify for the exception.

Second, the Zyriek Affidavit presents “factual questions that cannot be resolved on a 12(b)(6) motion to dismiss.” *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 416 (3d Cir. 2003). Among these factual issues are (1) the scope and adequacy of the Secretary’s search for responsive documents (i.e., that the Voter Module is the only responsive document); (2) the contents of the Voter Module, and (3) the claim that those contents pose a security risk that cannot be mitigated by redactions. (See Doc. 10-2 ¶¶ 5, 8-12, 14.)

As the Western District of Pennsylvania prudently stated, “A motion to dismiss is not the appropriate procedural instrument for a defendant to argue it’s side of the story.” *Tindall v. Allegheny Cty. Hous. Auth.*, No. 2:18-CV-00160-CRE, 2018 U.S. Dist. LEXIS 154996, at *3 n.1 (W.D. Pa. Sep. 12, 2018). The time for story telling is at trial or the summary judgment stage. The Court cannot credit, or even consider, the Secretary’s testimony without converting the Secretary’s motion to dismiss into a motion for summary judgment and giving the Foundation an opportunity to contest that testimony. *Acevedo*, 420 F. Supp. 2d at 340; see also *Pension Benefit Guar. Corp.*, 998 F.2d at 1196 (“The reason that a court must convert a motion to dismiss to a summary judgment motion if it considers

extraneous evidence submitted by the defense is to afford the plaintiff an opportunity to respond.”).

Even at this stage, there are reasons to think the Secretary’s facts do not tell the whole story. For starters, the federal Help America Vote Act (“HAVA”) explicitly requires “each State, acting through the chief State election official, [to] implement ... [a] computerized statewide voter registration list defined, maintained, and administered **at the State level**” 52 U.S.C. § 21083(a)(1)(A) (emphasis added). HAVA also requires regular voter list maintenance, *id.* § 21083(a)(2)(A), that is “conducted in a manner that ensures that ... (iii) duplicate names are eliminated from the computerized list, *id.* § 21083(a)(2)(B)(iii). In other words, the Secretary must administer and/or conduct activities that “eliminate” duplicates. Yet the Secretary claims she does not maintain even a single written “instruction” related to her federal law obligations. (*See* Doc. 1 ¶ 13 (seeking, *inter alia*, “all ... instructions ... for identifying, merging, and/or cancelling duplicate voter registration records”).)

The Voter Module itself raises a strong and reasonable inference that additional responsive records have been overlooked. According to the Secretary,

While the SVRS contains voter registration information, the Voter Module does not. Nor does the Voter Module contain the State’s policies and procedures as to how to determine whether a voter must be removed from the SVRS. It simply instructs how to make those changes in the SVRS, once a determination has already been made that such changes need to be entered.

(Doc. 10-1 at 3-4.) This paragraph implicitly concedes that New Jersey has “policies and procedures” for determining when duplicate registration records require maintenance. Indeed, it would make little sense to maintain instructions for *how* to modify records if the Secretary did not additionally maintain instructions for determining *when* to modify records. That is especially true in light of the Secretary’s federal law obligation to “eliminate” duplicate registration records. 52 U.S.C. § 21083(a)(2)(B)(iii).

For these reasons, the Zyriek Affidavit should be disregarded. If it is not, the Foundation must be afforded “a reasonable opportunity to present all material pertinent to [a summary judgment] motion under Rule 56.” *Acevedo*, 420 F. Supp. 2d at 340.

II. The Foundation’s Complaint States a Plausible Claim for a NVRA Violation.

The Foundation’s Complaint allows the Court “to draw the reasonable inference,” *Iqbal*, 556 U.S. at 678, that procedural and guidance documents related to removing, merging, and correcting duplicate voter registrations are records “concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of the official lists of eligible voters,” 52 U.S.C. § 20507(i)(1), and are therefore, within the NVRA’s scope.

A. The Foundation Seeks “All” Records, Not Only the “Voter Module.”

Contrary to the Secretary’s assertion, the Foundation did not limit its request to the “Voter Module.” (*See* Doc. 10-1 at 1.) Rather, as alleged, the Foundation is seeking “all manuals, guidance, instructions, and other written procedures for identifying, merging, and/or cancelling duplicate voter registration records.” (Doc. 1 ¶ 13.) As addressed above, the Foundation plausibly alleges a denial of a broader set of records. The Secretary may not narrow the Foundation’s Complaint to fit her legal theory or her version of the facts.

Records responsive to the Foundation’s request are wide-ranging. They include procedural manuals, technical manuals, guidance documents, formal instructions, informal instructions (e.g., an email to or from a county official), and hand-written notes (including notes regarding individual applicant or registrant records). Notably, responsive records can go well beyond this list, which should in no way be considered a boundary.

B. Courts Interpret the Public Disclosure Provision Broadly.

Courts in multiple circuits have interpreted the NVRA’s Public Disclosure Provision expansively and found that it compels broad disclosure of voter list maintenance records. The following are types of records or activities held to be or plausibly be within the NVRA’s scope:

- Records concerning “efforts” to “identify noncitizen registrants.” *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 266 (4th Cir. 2021) (vacating order granting motion to dismiss).
- Records “created pursuant to a system designed to identify ineligible voters based on their noncitizen status.” *Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 561 (M.D. Pa. 2019) (denying motion to dismiss), *summary judgment granted by Pub. Int. Legal Found. v. Chapman*, No. 1:19-CV-622, 2022 U.S. Dist. LEXIS 60585 (M.D. Pa., Mar. 31, 2022).
- Applications for voter registration with all personally identifying information except for Social Security numbers. *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) (affirming order granting summary judgment); *Project Vote/Voting for Am., Inc. v. Long*, 889 F. Supp. 2d 778, 782 (E.D. Va. 2012).
- Records concerning registrants who did not satisfy the citizenship requirements for voter registration. *Pub. Interest Legal Found. v. Bennett*, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *2 (S.D. Tex. Feb. 6, 2019) (denying motion to dismiss), *adopted by Pub. Interest Legal Found., Inc. v. Bennett*, No. 4:18-CV-00981, 2019 U.S. Dist. LEXIS 38685 (S.D. Tex. Mar. 11, 2019).
- “The date voter registration applications were signed by an applicant”; “[t]he date applications were entered into the [voter registration] Database”; “[e]ach change in an applicant’s voter registration status”; “[w]hether an election official manually, instead of mechanically, changed the status of one or more applicants”; “[r]easons other than the most recent reason why an applicant was rejected, canceled, or otherwise not added to the voter roll”; “[t]he specific reason why applicants, assigned a status reason of ‘Error,’ ‘Hearing,’ or ‘Reject,’ were canceled”; “[r]ecords for canceled applicants with a status reason other than one of the eleven options in the drop-down menu in the Database” and, records concerning letters sent to applicants “to the extent the letters concern the status or completeness of an individual’s application or otherwise relate to the evaluation of an individual’s eligibility.” *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1341-44 (N.D. Ga. 2016).
- The “complete list of all Mississippi voters [in] all status categories” with “each voter’s name, unique identification number, residential and mailing addresses, voting precinct code, registration date, voter status, last date voted, and congressional district assignment.” *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014).

- The “voter registration list for [a] County that includes fields indicating name, home address, most recent voter activity, and active or inactive status,” *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 446 (D. Md. 2019) (granting motion for summary judgment), and date-of-birth information, *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020).
- “[T]he most recent voter registration list for Illinois, including fields for registered voters’ names, full dates of birth, home addresses, most recent voter activity, unique voter IDs, and voting status.” *Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS 102543, at *5 (N.D. Ill. June 1, 2021).
- “Defendants acted in violation of the Public Disclosure Provision of the NVRA when Defendants refused to make available for viewing and photocopying the full statewide voter registration list.” *Pub. Interest Legal Found. v. Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27 (C.D. Ill. Mar. 8, 2022) (denying motion to dismiss and granting the Foundation’s motion for summary judgment).
- Maine’s “Voter File” is “subject to disclosure under the NVRA” and “Plaintiff has pleaded sufficient facts that, when taken as true, establish a plausible claim of obstacle preemption” against various use-restrictions for Voter File. *Pub. Interest Legal Found., Inc. v. Bellocs*, No. 1:20-cv-00061-GZS, 2022 U.S. Dist. LEXIS 38875, at *13-14 (D. Me. Mar. 4, 2022).

These decisions properly recognize the broad scope of the NVRA’s plain language. As one federal appellate court prudently recognized, the NVRA’s “use of the word ‘all’ [as a modifier] suggests an expansive meaning because ‘all’ is a term of great breadth.” *Project Vote*, 682 F.3d at 336 (internal citations omitted). Congress chose “all” to give the NVRA a sweeping reach, and that choice has enormous significance that should be the basis for denying the Motion to Dismiss.

C. Generally, the Requested Records “Concern[] the Implementation of Programs and Activities Conducted for the Purpose of Ensuring the Accuracy and Currency of its Official List of Eligible Voters.”

The Secretary’s argument depends entirely on the Secretary’s unestablished and untested averment that the Foundation limited its request to the Voter Module, a record the Secretary identified for the first time in her Motion. However, the Secretary does not contest the Foundation’s more general allegation that the requested “manuals, guidance, instructions, and other written procedures” are within the NVRA’s scope. Nor would any such claim have merit.

Statutory interpretation begins with the statutory text. “It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citations and quotations omitted); *See also Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”) (citations omitted). “Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning.” *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388 (1993) (citations and quotations omitted). Under these principles, the requested records fit squarely within the NVRA’s text.

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 (E.D. Va. 2010); see also *True the Vote*, 43 F. Supp. 3d at 719-20 (“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).

The Secretary plainly conducts programs and activities to keep New Jersey’s voter roll current and accurate. As explained, HAVA requires the Secretary to “eliminate” duplicate registration records, 52 U.S.C. § 21083(a)(2)(B)(iii), and the Secretary does not claim anything to the contrary.

The remaining question for the Court is whether the requested records “concern[]” the “implementation” of New Jersey’s voter list maintenance activities. 52 U.S.C. § 20507(i)(1). “The word ‘concern’ is a broad term meaning ‘to relate or refer to.’” *True the Vote*, 43 F. Supp. 3d at 719 (quoting Webster’s Third New International Dictionary of the English Language 470 (2002)). “To ‘implement’ means to ‘fulfill’ or ‘carry out.’” *True the Vote*, 43 F. Supp. 3d at 719 (quoting The Random House Dictionary of the English Language 304 (1966)).

The requested records show officials how to correct or update voter registration records so that those records are accurate. (Doc. 10-1 at 3.) By doing

so, the Secretary fulfills—at least in part—her federal (*e.g.*, HAVA) and state voter list maintenance obligations. The requested records thus “relate to” the Secretary’s list maintenance activities, and therefore fall squarely within the NVRA’s scope, as the Foundation alleges. (Doc. 1 ¶ 30.)

D. The Voter Module “Concern[s] the Implementation of Programs and Activities Conducted for the Purpose of Ensuring the Accuracy and Currency of its Official List of Eligible Voters.”

Even if the Voter Module were the only record at issue, dismissal would not be warranted because the Voter Module falls within the NVRA’s scope under the statute’s plain language. The Secretary’s own statements confirm this. She explains that the New Jersey’s “official database of registered voters” is called the “Statewide Voter Registration System (“SVRS”).” (Doc. 10-1 at 1.) “The SVRS is a secure electronic database that serves as the official State repository for the information of every legally registered voter in New Jersey.” (Doc. 10-1 at 3.) “The Voter Module details how to take actions to add, modify, or delete voter registration information from the SVRS.” (Doc. 10-1 at 3.)

The Secretary could not be clearer: “[T]he Voter Module instructs how to add or remove registered voters from the SVRS.” (Doc. 10-1 at 3.) Adding and removing registered voters from the state’s “official database of registered voters” is the *sine qua non* of “activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters” under 52 U.S.C. §

20507(i)(1). The Voter Module plainly “concerns” or “relates to” these activities because it “details how to take actions to add, modify, or delete voter registration information from the SVRS.” (Doc. 10-1 at 3.) No credible argument to the contrary exists.

III. The Secretary Reads Additional Requirements and Exemptions into the NVRA’s Text.

The Secretary gives two reasons why she may nevertheless conceal the Voter Module, neither of which has merit. **First**, the Secretary claims the Voter Module is outside the NVRA’s scope because it does not contain “substantive information” about registered voters. (See Doc. 10-1 at 14-15.) The Secretary is adding language that Congress never passed. The NVRA’s Public Disclosure Provision requires disclosure of “all records” that merely “concern” or relate to a voter list maintenance “program” or “activity.”

Consistent with Supreme Court guidance, courts have construed “program” and “activity” to “carry their ordinary, contemporary, common meaning.” *Pioneer Inv. Servs.*, 507 U.S. at 388. Those courts have concluded that “[a] ‘program’ is ‘a schedule or system under which action may be taken towards a desired goal’ and an ‘activity’ is ‘a specific deed, action, function, or sphere or action.’” *True the Vote*, 43 F. Supp. at 719; *Kemp*, 208 F. Supp. 3d at 1337-38 (same). The word “substantive” is found nowhere in these definitions and courts must “ordinarily resist reading words or elements into a statute that do not appear on its face.” *Bates*

v. United States, 522 U.S. 23, 29 (1997)). “[I]nterpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature,” *United States v. Monsanto*, 491 U.S. 600, 611 (1989), and this Court should decline the invitation to add words to the NVRA.

Another court has rejected a similar attempt to limit the NVRA’s scope in a way that contravenes its plain language. In *Public Interest Legal Foundation v. Boockvar*, the court held that the NVRA’s “Disclosure Provision contemplates an *indefinite* number of programs and activities,” not just those concerning death and relocation, as the defendants argued. 431 F. Supp. 3d 553, 560 (M.D. Pa. 2019) (emphasis in original).

Congress enacted the Public Disclosure Provision precisely so officials could not decree that the public has no interest monitoring how they add and remove registered voters. (See Doc. 10-1 at 15 (“Simply put, the Voter Module does not contain any information that helps anyone from the public monitor the registration of New Jersey voters or ensure the accuracy or currency of the voter rolls.”). Congress, not the Secretary, decides which records the public has an interest in seeing, and Congress mandated disclosure of “all records” that relate to voter list maintenance activities. 52 U.S.C. § 20507(i)(1).

Although it is not the Foundation’s burden to establish the utility of the requested records, the very existence of a manual, even a so-called “technical

manual” (Doc. 10-1 at 1), that shows election officials how to update voter registration records contains important information for the public. Seeing and confirming that officials possess a step-by-step guide for keeping registration data accurate gives the public confidence in the electoral processes that determine the public’s leaders. Disclosure of the Voter Module—and other requested records—plainly furthers the NVRA’s goals—namely, “protect[ing] the integrity of the electoral process,” and “ensur[ing] that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b)(3)-(4).

Second, the Secretary claims the Voter Module is exempt because disclosure would “harm election security.” (Doc. 10-1 at 10.) To the extent the Secretary relies on state law to avoid disclosure (*see* Doc. 1 ¶ 16), those laws are without force because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution’s Elections and Supremacy Clauses. *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 9 (2013); *see also ACORN v. Edgar*, 880 F. Supp. 1215, 1222 (N.D. Ill. 1995); *Project Vote*, 813 F.Supp.2d at 743 (E.D. Va. 2011); *Bellows*, No. 1:20-cv-00061-GZS, 2022 U.S. Dist. LEXIS 38875, at *14 (“Having concluded that the Voter File falls within the ambit of the NVRA’s Public Disclosure Provision, the Court concludes that Plaintiff has pleaded sufficient facts that, when taken as true, establish a plausible claim of obstacle preemption.”); *Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27

(“The Foundation has also shown that Section 5/1A-25 conflicts with, and is preempted by, the Public Disclosure provision insofar as Section 5/1A-25 prohibits the photocopying and duplication of the same list.”).

The NVRA itself contains no exemption for security concerns. Congress chose a broad standard for the NVRA. “[T]he statute identifies the information which Congress specifically wished to keep confidential.” *Project Vote*, 752 F.Supp.2d at 710. Such information is limited to “records relate[d] to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.” 52 U.S.C. § 20507(i)(1). The NVRA contains no other exemptions. *See Project Vote*, 682 F.3d at 336. Congress deliberately opted for broad disclosure because “[p]ublic disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections.” *Project Vote*, 682 F.3d at 339-40.

The Secretary’s bases her case for an extra-textual exemption on conjecture and hypotheticals. She asks this Court to rewrite a federal law based on what so-called “bad actors” not before the Court might try to do. (Doc. 10-1 at 2, 10, 16.) Furthermore, what can or cannot be done with one or two pages of the Voter Module are factual questions that are not appropriately resolved at the Rule 12 stage. *See Morganroth & Morganroth*, 331 F.3d at 416.

The Secretary's claim that Section 303 of HAVA prevents disclosure (Doc. 10-1 at 15-16) is meritless and defeated by Section 303's text, which requires only "measures to prevent *unauthorized* access" to the computerized voter registration list. 52 U.S.C. § 21083(a)(3) (emphasis added). As the Northern District of Georgia recognized, "NVRA disclosure is not 'unauthorized' access because it is specifically required." *Kemp*, 208 F. Supp. 3d at 1347. The court found "this interpretation is *required* because the HAVA expressly provides that 'nothing in this [Act] may be construed to ... supersede, restrict, or limit the application of [the NVRA].'" *Id.* (quoting 52 U.S.C. § 21145(a)(4)); *see also Project Vote*, 682 F.3d at 338 ("[B]y its own terms, HAVA cannot restrict or limit the application of the NVRA's public disclosure requirement."). Section 303 of HAVA was designed to prevent "hacking or online attacks," *Kemp*, 208 at 1347, not prevent election transparency.

The Foundation never asked for access credentials to the state's registration database, as the Secretary would have this Court believe. The Foundation asks for a record of basic list maintenance instructions. The remedy for any security concerns, should the facts validate those concerns, is redaction, and only to the extent it does not prevent achievement of the NVRA's transparency goals. *See Project Vote*, 813 F. Supp. 2d at 743; *True the Vote*, 43 F. Supp. 3d at 736-39; *Kemp*, 208 F. Supp. 3d at 1345; *N.C. State Bd. of Elections*, 996 F.3d at 267

(explaining that privacy concerns “do[] not render the requested documents affiliated with potential noncitizens immune from disclosure under the plain language of the NVRA”).

Whether the Secretary’s security concerns are valid and whether such concerns can be mitigated by redactions are, again, factual question that should await discovery for resolution. In *Pub. Interest Legal Found., Inc. v. Bell*, No. 5:19-CV-248-BO, 2019 U.S. Dist. LEXIS 179485 (E.D.N.C. Oct. 16, 2019), the Foundation sought, pursuant to the NVRA, records concerning defendants’ efforts to identify non-United States citizens on the voter rolls. *Id.* at *3. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6), holding that those records were categorically outside the NVRA’s scope. *Id.* at *12. On appeal, the Fourth Circuit vacated the decision and remanded the case for further proceedings. *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257 (4th Cir. 2021). The court explained, “Because discovery was not conducted, we cannot discern on this record whether the Foundation may be entitled to disclosure of some of the documents requested.” *Id.* at 259. It would likewise be inappropriate to resolve this case prior to discovery.

CONCLUSION

For these reasons, the Secretary’s Motion should be denied.

Dated: July 19, 2022.

For the Plaintiff Public Interest Legal Foundation:

/s/ Linda A. Kerns

Linda A. Kerns, Esquire (NJ Bar No. 001051999)
LAW OFFICES OF LINDA A. KERNS, LLC
1420 Locust Street – Suite 200
Philadelphia, PA 19102
Tel: (215) 731-1400
Fax: (215) 701-4154
linda@lindakernslaw.com

Noel H. Johnson*
Maureen Riordan*
PUBLIC INTEREST LEGAL FOUNDATION
32 E. Washington St., Ste. 1675
Indianapolis, IN 46204
Tel: (317) 203-5599
Fax: (888) 815-5641
njohnson@PublicInterestLegal.org
mriordan@PublicInterestLegal.org
* *Admitted Pro Hac Vice*

Attorneys for Plaintiff Public Interest Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2022, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Linda A. Kerns
Linda A. Kerns
linda@lindakernslaw.com
Attorney for Plaintiff

RETRIEVED FROM DEMOCRACYDOCKET.COM