

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INTEREST LEGAL FOUNDATION, INC.,

Plaintiff,

v.

MONICA HOLMAN EVANS, in her official capacity
as Executive Director of the District of Columbia Board
of Elections,

Defendant.

Case No. 1:21-cv-03180-FYP

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

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Plaintiff Public Interest Legal Foundation, Inc., (“Foundation”) files this response in opposition to Defendant Monica Holman Evans’s (“Defendant” or “Executive Director”) Motion to Dismiss (Doc. 9).

INTRODUCTION

The Foundation’s Complaint alleges that the requested records are used to implement the District of Columbia Board of Elections’ (“DCBOE”) voter list maintenance program and are therefore within the scope of the National Voter Registration Act (NVRA) scope. (Doc. 1 ¶¶ 15-25.) The Foundation further alleges that its request for those records is being denied in violation of the NVRA. (Doc. 1 ¶¶ 37-59.) The Foundation has thus stated a plausible claim for relief.

The Executive Director’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 Electronic Registration Information Center (“ERIC”) Deceased Reports are subject to public inspection under the statute’s plain meaning because they are records upon which DCBOE relies to determine who belongs on its official list of eligible voters. Those records squarely “concern” a core voter list maintenance activity.

The NVRA’s text controls this case and the outcome is not a close call. Congress expressly requires DCBOE to conduct a “program” that removes deceased registrants from the rolls. 52 U.S.C. § 20507(a)(4)(A). The DCBOE conducts that program using the ERIC Deceased Reports. Congress expressly requires public disclosure of “all records concerning the

implementation” of such voter list maintenance “programs.” 52 U.S.C. § 20507(i)(1). The requested records fall squarely under the statute.

Deciding who is eligible and who is ineligible to vote is not an activity that should occur in a secret process lacking transparency. Congress decided otherwise and allowed the public to monitor list maintenance records. The Executive Director is acting in concert with ERIC to violate explicit federal law and is thereby jeopardizing the voting rights of D.C.’s citizenry.

Any conflict that may arise here between the NVRA’s broad disclosure mandate and other federal statutes and regulations exists *solely* because of the Executive Director’s *voluntary* participation in ERIC. It is thus the Executive Director, not the Foundation, that seeks to circumvent federal law through her strategic choices. The Executive Director cannot abrogate the NVRA as a matter of law no matter her potentially good intentions. Decisions about whether certain records may be withheld or redacted are a factual question, not a legal one. *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 259 (4th Cir. 2021) (“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.”). Those decisions must also be made carefully in a way that renders each statute effective.

The Executive Director finds textual ambiguity where none exists. *See Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1341 (N.D. Ga. 2016) (interpreting NVRA and finding “there is no ambiguity here”). The Supreme Court instructs that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Congress said “all” voter list maintenance records are subject to disclosure. “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).

BACKGROUND

The Foundation

The Foundation is a non-profit, non-partisan 501(c)(3) organization that specializes in election and voting rights issues. (Doc. 1 ¶ 4.) The Foundation’s activities include research, education, remedial programs, and litigation. (*Id.*) To implement its organizational mission, the Foundation regularly utilizes state and federal open records laws that require government records be made available to the public. (*Id.*) Using those records, the Foundation analyzes the programs and activities of state and local election officials in order to determine whether lawful efforts are being made to keep voter rolls current and accurate in accordance with federal and state law, and to determine whether eligible registrants have been improperly removed from voter rolls. (*Id.*) The Foundation also educates the public about these matters. (*Id.*)

The National Voter Registration Act

For its work, the Foundation often relies upon National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. §§ 20501 *et seq.* Section 8(a)(4)(A) of the NVRA requires each state—a term that includes the District of Columbia¹—to conduct a “general program” to remove decedents from the voter roll. Section 8(i)(1) of the NVRA acts like an even stronger version of a federal freedom of information law, requiring election administration officials to “make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities² 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 52 U.S.C. § 20502(4).

² These are referred to as “voter list maintenance” programs or activities throughout this brief.

The Electronic Registration Information Center

Since 2012, the District of Columbia has been a member of the Electronic Registration Information Center, which is otherwise known as ERIC. ERIC is a “is a non-profit organization with the declared mission of assisting states to improve the accuracy of America’s voter rolls and increase access to voter registration for all eligible citizens.” (Doc. 1 ¶ 10.)

All ERIC members must sign the ERIC “Membership Agreement,” which “sets forth the terms and conditions of membership” in ERIC. (Doc. 1 ¶ 14.) Among other things, the ERIC Membership Agreement requires each member, including the District of Columbia, to provide its entire voter roll to ERIC every sixty days. (Doc. 1 ¶ 15.) ERIC then “process[es] data that relates to the maintenance of [Members’] voter registration lists and provide[s] regular (at least on a monthly basis) reports to [each] Member.” (Doc. 1 ¶ 17.) From ERIC, the District of Columbia receives “reports that show voters who have moved within their state, voters who have moved out of state, **voters who have died**, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered.” (Doc. 1 ¶ 18 (hereafter, “ERIC Deceased Reports”) (emphasis added).)

When the District of Columbia receives ERIC Deceased Reports showing voters who are likely deceased, the District of Columbia is required by agreement to, “at a minimum, initiate contact with th[ose] voter[s] in order to correct the inaccuracy or obtain information sufficient to inactivate or update the voter[s’] record[s].” (Doc. 1 ¶ 21.) The District of Columbia “has ninety (90) days after the data was sent to initiate contact with at least 95% of the voters on whom data indicating a record was inaccurate or out-of-date ... was provided.” (Doc. 1 ¶ 22.) The ERIC Membership Agreement provides further, “Within ten (10) business days of the ninetieth day, [the District of Columbia] shall provide a written certification to the Executive Director of ERIC

that Member has complied or not complied with” that requirement. (Doc. 1 ¶ 23.) In other words, the Executive Director is contractually required to use the ERIC Deceased Reports to conduct voter list maintenance.

DCBOE Denies the Foundation Access to ERIC Deceased Reports

More than seven months ago, on June 24, 2021, the Foundation emailed a letter to DCBOE asking to inspect or receive the following records pursuant to the NVRA’s Public Disclosure Provision:

1. All “ERIC Data” received from ERIC during the years 2019, 2020, and 2021 concerning registered voters identified as deceased or potentially deceased.
2. All reports and/or statewide-voter-registration-system-generated lists showing all registrants removed from the list of eligible voters for reason of death for the years 2019, 2020, and 2021. Such lists will optimally include unique voter identification numbers, county or locality, full names, addresses, and dates of birth.

(Doc. 1-1 (hereafter, the “Request”).) The Foundation defined “ERIC Data” to mean what it means in the ERIC Membership Agreement: “data included in reports provided by ERIC’ to member states. (Doc. 1 ¶ 38 (quoting Doc 1-1 (quoting ERIC Bylaws, Exhibit A (Membership Agreement) at Section 4(a) (PDF page 18)).)

On June 30, 2021, DCBOE denied the Foundation’s request for voter identification numbers and “other information that is confidential under CDMR 3-510.5.” (Doc. 1 ¶ 40.) On July 16, 2021, DCBOE denied the Foundation’s request for ERIC Deceased Reports. (Doc. 1 ¶ 42.) DCBOE provided to the Foundation a list of former registrants removed from the District of Columbia voter roll for the reason of death during the period January 1, 2019, to June 29, 2021. (Doc. 1 ¶ 46.) DCBOE denied the Foundation’s request for unique voter identification numbers and dates of birth on the grounds that D.C. law prohibits disclosure of that information. (*Id.*)

On July 21, 2021, the Foundation notified then-DCBOE Executive Director, and chief election official, Alice P. Miller, that she and the DCBOE are in violation of the NVRA for failure to permit inspection of voter list maintenance records as required by 52 U.S.C. § 20507(i). (Doc. 1 ¶ 47; Doc. 1-3 (hereafter, the “Notice Letter”).) The Foundation sent the Notice Letter to the Executive Director via email and by certified mail through the United States Postal Service. (Doc. 1 ¶ 48.)

While the Notice Letter alleged that the denial of the requested records violated the NVRA, the Foundation explained that its request could be satisfied if the Executive Director produced the ERIC Deceased Reports with nothing more than unique voter identification numbers. The Foundation “consent[ed], in this instance, to the redaction of all data elements contained in the Limited Access Death Master File (“LADMF”) and protected by 15 C.F.R. § 1110 *et seq.*, such as SSN dates of birth, SSN dates of death, SSN death locations, and full/partial SSN numbers.” (Doc. 1 ¶ 52.) The Foundation also asked that the deceased registrant list provided in response to Request #2 be resubmitted with unique voter ID numbers. (*Id.*)

On October 19, 2021, DCBOE responded to the Foundation, confirmed its denial of the Foundation’s request for the ERIC Deceased Reports. (Doc. 1 ¶ 53.) DCBOE also confirmed its denial of the Foundation’s request for the deceased registrant list with unique voter ID numbers. (Doc. 1 ¶ 54.) DCBOE claimed that this data is exempt from disclosure under the NVRA because “[m]any”—but not all—of the voter identification numbers assigned to D.C.’s registrants are “legacy registration numbers that contain information that relates to the identity of the voter registration agency at which the affected individuals were registered.” (Doc. 1-4 at 3.) Instead, DCBOE provided “a deceased voter file that contains voter registration system-

generated identification numbers, which are unique to each voter.” (Doc. 1-4 at 3 (hereafter, the “DCBOE Deceased Reports”).

The NVRA afforded the Executive Director ninety (90) days to cure her NVRA violation, 52 U.S.C. § 20510(b)(2), a period that expired, at the latest, on October 24, 2021. (Doc. 1 ¶ 58.) The Executive Director did not cure her NVRA violation by October 24, 2021, and as of the date this memorandum was filed, has still not cured the violation. (Doc. 1 ¶ 59.) This action is 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).) “In considering a motion to dismiss for failure to plead a claim on which relief can be granted, the court must consider the complaint in its entirety, accepting all factual allegations in the complaint as true, even if doubtful in fact, and construe all reasonable inferences in favor of the plaintiff.” *Townsend v. United States*, 236 F. Supp. 3d 280, 296 (D.D.C. 2017).

ARGUMENT

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

The threshold question this Court must answer is this: “Are the ERIC Deceased Reports provided to DCBOE and used by DCBOE to conduct list maintenance within the NVRA’s scope?” The overwhelming weight of authority says the answer is “yes.” The Foundation’s allegations allow this Court “to draw the reasonable inference,” *Iqbal*, 556 U.S. at 678, that the ERIC Deceased Reports are 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).

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:

- 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) (“[T]he court **DENIES** Defendants’ request in their Motion for Review to make any redactions of completed voter registration forms beyond the applicant’s SSN.”).
- Records concerning “efforts” to “identify noncitizen registrants.” *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d at 269 (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 in part) (“[T]he Disclosure Provision’s broad grant of access is not limited to records related to registrant death or changes in residence.”).
- 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) (magistrate judge recommendation that motion to dismiss be denied), *adopted by Pub. Interest Legal Found., Inc. v. Bennett*, No. 4:18-CV-00981, 2019 U.S. Dist. LEXIS 38686 (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 in part), 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).

These decisions properly recognize the broad scope of the NVRA’s plain language. As one federal appellate court prudently recognized, the NVRA’s “the use of the word ‘all’ [as a modifier] suggests an expansive meaning because ‘all’ is a term of great breadth.” *Project Vote / Voting for Am., Inc. v. Long*, 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.

A. The ERIC Deceased Reports Are Subject to Public Disclosure Under the NVRA’s Plain Language.

The parties agree that when interpreting the NVRA’s Public Disclosure Provision, the Court should begin with the statutory text. (Doc. 9-1 at 9.) “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). “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); *see also Johnson v. SEC*, 87 F.3d 484, 487 (D.C. Cir. 1996) (defining statutory text using dictionary definitions). Under these principles, the requested records fit squarely within the NVRA’s text.

i. The ERIC Deceased Reports and DCBOE Deceased Reports Are “Records.”

The Executive Director does not dispute that the requested records are “records” under the NVRA’s Public Disclosure Provision. Because the NVRA does not define “record,” the Court considers the common and ordinary meaning of the term. *See Kemp*, 208 F. Supp. 3d at 1335 (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.”³

The ERIC Deceased Reports are “list[s]” or “report[s]” that provide the name and other identifying information for “voters who have died.” (Doc. 1 ¶ 18.) As such, the reports are both a “body of known [and] recorded facts” about each deceased registrant and “a collection of related items of information” about deceased registrants “treated as a unit.” The ERIC Deceased Reports are therefore plainly “records” under the common and ordinary meaning of the term.

The DCBOE Deceased Reports qualify as “records” for precisely the same reasons. DCBOE has produced extracts from these reports to the Foundation—without voter ID and date of birth information—and the Foundation can thus plainly observe that these reports are a “list” of the names and addresses of all registered voters DCBOE has removed from the voter roll due to the deaths of the registrants.

Electronic records are also within the scope of the NVRA. The NVRA requires disclosure of “all records,” not just physical records. 52 U.S.C. § 20507(i)(1). As the Northern District of Georgia recognized, “Interpreting ‘records’ to exclude information contained within electronic databases ... would allow States to circumvent their NVRA disclosure obligations simply by

³ <https://www.merriam-webster.com/dictionary/record> (last accessed Feb. 17, 2022.)

choosing to store information in a particular manner. Given the ubiquity and ease of electronic storage, this would effectively render Section 8(i) a nullity.” *Kemp*, 208 F. Supp. 3d at 1336.

ii. The ERIC Deceased Reports “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*, 752 F. Supp. 2d at 706; *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).

DCBOE conducts programs and activities to keep the D.C. voter roll current and accurate. The NVRA, a federal law, requires DCBOE 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 ... the death of the registrant.” 52 U.S.C. § 20507(a)(4)(A) (emphasis added). The Help America Vote Act (“HAVA”), another federal law, requires DCBOE to maintain a “[m]inimum standard for accuracy of State voter registration records,” including, “[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.” 52 U.S.C. § 21083(a)(4), (a)(4)(A).⁴ District of Columbia law further requires (“shall”) DCBOE to “develop a systematic program to maintain the voter roll and keep it current.” D.C. Code § 1-1001.07(j)(1). DCBOE must “cancel a voter

⁴ D.C.’s official plan for implementing HAVA provides, “The Board currently complies with all HAVA list maintenance requirements, as well as with all requirements in the NVRA. Records from the U.S. District and D.C. Superior Courts and the Department of Vital Statistics are matched against Board records to identify incarcerated felony convicts, **deceased voters** and other individuals who are no longer eligible to vote.” *Available at* https://dcboe.org/dcboe/media/PDFFiles/DC_Preliminary_State_Plan.pdf (last accessed Feb. 17, 2022) (emphasis added).

registration ... upon notification of the death of a registrant[.]” D.C. Code § 1-1001.07(k)(1). As part of this general program, DCBOE is also more specifically required to

request at least monthly ... the name, address, and date of birth, if known, of each District resident 18 years of age and over reported deceased within the District, together with the name and address of each District resident who has been reported deceased by other jurisdictions since the date of the previous report.

D.C. Code § 1-1001.07(k)(2).

DCBOE is also afforded broad discretion to conduct additional list maintenance programs. “As part of its systematic voter roll maintenance program, the Board may, by regulation, develop additional procedures to identify and remove from the voter roll registrants who are deceased and no notification was received from the Bureau of Vital Statistics[.]” D.C. Code § 1-1001.07(j)(3). Relevant here, “The Board’s Executive Director may enter into agreements with other Chief State Election Officials for the purpose of verifying information on its statewide voter registration list to ensure the accuracy of the District’s voter registry.”

C.D.C.R. § 3-519.7.

The Executive Director has exercised her discretionary authority to join ERIC and to enter into the ERIC Membership Agreement, which is made by and among each state’s “chief election official or a chief election official’s designee.” *See* ERIC Bylaws, Art. II, Sec. 1, https://ericstates.org/wp-content/uploads/2020/02/ERIC_Bylaws_01-2020.pdf (last accessed Feb. 17, 2022). The purpose of this agreement is “to ensure the accuracy of the District’s voter registry.” C.D.C.R. § 3-519.7. Indeed, ERIC’s “sole mission” is to “improve the accuracy of America’s voter rolls and increase access to voter registration for all eligible citizens.” <https://ericstates.org/> (last accessed Feb. 17, 2022).

DCBOE’s membership in ERIC is a “program” or “activity” within the purview of the NVRA because it is conducted to make sure D.C.’s registration records and eligible voter list are

“errorless” and contain the “most recent” information for each registrant. The Executive Director does not argue anything to the contrary.

The remaining question for the Court is whether the ERIC Deceased Reports “concern” the “implementation” of DCBOE’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 715 (1966)).

DCBOE is specifically required by its Membership Agreement to use the ERIC Deceased Reports to correct or update voter registration records so that those records are accurate. (Doc. 1 ¶¶ 20-23.) By doing so, DCBOE fulfills—at least in part—its federal (NVRA and HAVA) and state (D.C. Code and Municipal Regulations) voter list maintenance obligations. The ERIC Deceased Reports plainly “relate to” D.C.’s “fulfillment” of those activities. There is no credible argument to the contrary.

Project Vote v. Long reinforces this conclusion. In that case, the plaintiff sought copies of certain completed applications for voter registration pursuant to the NVRA’s Public Disclosure Provision. *Project Vote*, 682 F.3d at 332-33. When election officials denied the request, the plaintiffs filed a federal action to compel disclosure of the requested records. The district court granted the plaintiffs summary judgment and the Fourth Circuit Court of Appeals affirmed that judgment. Addressing the records’ relation to Virginia’s “implementation” of voter list maintenance activities, the court explained,

The requested applications are relevant to carrying out voter registration activities because they are “the means by which an individual provides the information necessary for the Commonwealth to determine his eligibility to vote.” *Project Vote*, 752 F. Supp. 2d at 707. Without verification of an applicant’s citizenship, age, and

other necessary information provided by registration applications, state officials would be unable to determine whether that applicant meets the statutory requirements for inclusion in official voting lists. Thus, completed applications not only “concern[] the implementation of” the voter registration process, but are also integral to its execution.

Project Vote, 682 F.3d at 336.

The same reasoning supports the Foundation here. Instead of citizenship and age, DCBOE uses the ERIC Deceased Reports to evaluate and verify whether each registrant is alive—perhaps the most fundamental voter qualification. Those reports are thus essentially “the means by which an individual provides the information necessary for [DCBOE] to determine his eligibility to vote.” *Id.* at 336. As in *Project Vote*, so here: the ERIC Deceased Reports not only “concern[] the implementation of” DCBOE’s voter list maintenance program, “but are also integral to its execution.” *Id.*

II. The Executive Director’s Interpretation is Contrary to NVRA’s Text and Intent and Produces Absurd Results.

The Executive Director’s efforts to narrow the NVRA’s scope are contrary to the NVRA’s unambiguous text. Furthermore, the Executive Director’s interpretation is plainly contrary to the NVRA’s intent because it would absurdly obliterate the transparency Congress intended.⁵ These arguments should therefore be rejected.

A. Congress Used the Word “Concerning,” Not “Reflecting.”

The Executive Director protests that “Plaintiff does not allege that the ERIC Deceased Reports contain any information reflecting any “programs” or “activities” as defined under the

⁵ The Executive Director wonders, “[I]t is unclear what countervailing benefits, if any, plaintiff believes will be gained by public disclosure of ERIC’s Deceased Reports and all other requested information.” That is for Congress to decide, not a District of Columbia government employee. As the Complaint alleges, the Office of the District of Columbia Auditor found that DCBOE “did not comply with the applicable federal and District laws regarding the removal of decedents from the voter list[.]” (Doc. 1 ¶ 30.) The NVRA was designed to shine a light on situations just like this. The “benefits” of transparency here are self-evident, and one benefit is for government employees not being able to hide mistakes from the public regarding voter rolls.

Activities Disclosure Provision, let alone the ‘implementation’ thereof.” (Doc. 9-1 at 14.) This statement misstates the law. The NVRA uses the word “concerning,” not “reflecting.”

“Concerning” casts a wider net than “reflecting.” Using the ordinary meaning of the word Congress actually used, records are subject to public disclosure if they simply “relate to” the “implementation” of a voter list maintenance activity. *True the Vote*, 43 F. Supp. 3d at 719.

There is no requirement, in the text or context, that records contain information that “reflects” – whether a mirror image or derivative - the underlying activity.

Even using the reliance on a word that does not exist in the NVRA—“reflecting”—the ERIC Deceased Reports *do* “reflect” voter list maintenance activities performed by ERIC on DCBOE’s behalf. (Doc. 1 ¶ 17 (“ERIC ‘process[es] data that relates to the maintenance of [Members’] voter registration lists and provide[s] regular (at least on a monthly basis) reports to [each] Member.’” (*quoting* ERIC Membership Agreement at Preamble).) The ERIC Deceased Reports are the end product of ERIC’s comparison between D.C.’s registration files and verifiable death records.⁶ (*See* Doc. 1 ¶¶ 15-19.) The ERIC Deceased Reports ultimately decide who will remain active on the voter rolls, and who will not, because they are deceased have died. The Foundation’s allegations are thus sufficient even under the non-existent statutory language the Executive Director has fancied.

There is nothing “conclusory” about the Foundation’s allegations. On the contrary, the Foundation’s Complaint alleges detailed facts that methodically allow this Court “to draw the

⁶ It makes no difference that ERIC performs this voter list maintenance activity because the NVRA very clearly requires disclosure of “all records,” not just records created by the States. 52 U.S.C. § 20507(i)(1). Furthermore, ERIC is a separate entity in name only. ERIC’s website asks, “Who Controls ERIC?” ERIC answers, “The states.” FAQs, <https://ericstates.org/>. ERIC’s website also asks, “Who Pays for ERIC Operations.” ERIC again answers, “The member states.” *Id.* If states could avoid their NVRA transparency obligations by simply outsourcing voter list maintenance operations to third parties, it would defeat the statute’s purpose. *See Kemp*, 208 F. Supp. 3d at 1336 (rejecting interpretation that “would allow States to circumvent their NVRA disclosure obligations”). Fortunately, Congress guarded against that possibility by drafting the NVRA’s language broadly enough to encompass all programs and activities, no matter who performs them.

reasonable inference,” *Iqbal*, 556 U.S. at 678, that the ERIC Deceased Reports are 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). (Doc. 1 ¶¶ 10-26.) The Foundation’s Complaint alleges, *inter alia*, that D.C. is a member of ERIC (Doc. 1 ¶ 13), that DCBOE “receives reports from ERIC showing registrants who are deceased or likely deceased” (Doc. 1 ¶¶ 18, 20), and that DCBOE uses those reports—consistent with its contractual obligations—to evaluate who should and who should not be removed from D.C.’s official list of eligible registrants. (Doc. 1 ¶¶ 21-23). Based on those allegations, the Foundation’s Complaint alleges that “the District of Columbia uses ERIC Deceased Reports to conduct list maintenance programs and activities required by the NVRA, including cancellation of registrations belonging to deceased individuals. *See* 52 U.S.C. § 20507(a)(4)(A).” (Doc. 1 ¶ 25.) The Foundation has stated a claim for relief that is “plausible.”

B. The Word “Implementation” Does not Limit the NVRA’s Scope in a Material or Dispositive Way, Especially Under these Circumstances.

The Executive Director next posits that the term “implementation” limits the NVRA’s scope. (Doc. 9-1 at 12.) More specifically, the Executive Director claims, *Project Vote v. Kemp* “found” that “Congress used the word ‘implementation’ to ‘restrict[] the scope of the records required to be disclosed’ to information about ‘processes’ for voter list maintenance.” (Doc. 9-1 at 12 (quoting *Kemp*, 208 F. Supp. 3d at 1339.) That is not near what *Kemp* concluded. Only in one specific context did *Kemp* consider it “reasonable” to read “implementation” as a word of limitation. *Kemp*, 208 F. Supp. 3d at 1338-39 (considering NVRA’s registration “procedures”).

When read in all relevant contexts and in light of the NVRA’s purposes and legislative history, the *Kemp* court reached a much broader conclusion: “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.” *Kemp*, 208 F. Supp. 3d at 1341. Within the statute’s expansive reach, the court held, were records showing “[e]ach change in an applicant’s voter registration status” and “[t]he specific reason why applicants, assigned a status reason of ‘Error,’ ‘Hearing,’ or ‘Reject,’ were canceled.” *Kemp*, 208 F. Supp. 3d at 1341-44. *Kemp* thus supports the Foundation’s entitlement to the ERIC Deceased Reports and DCBOE Deceased Reports—records that likewise reveal “[t]he specific reason why” a particular registration record was canceled, and the Executive Director’s arguments to the contrary miss the actual reasoning and outcome in *Kemp*.

It is not necessary to explore the outer bounds of the term “implementation” here because it is alleged that the ERIC Deceased Records are used as part of a program to keep D.C.’s eligible voter list free of deceased registrants and defenses to the contrary are factual questions for another day.

C. The NVRA’s Text Reaches an Indefinite Number of Programs and Activities, Not Only So-Called “Active Processes.”

The Executive Director next claims that the NVRA is limited to what she calls “active processes,” which she defines as those processes that “‘result in the removal’ of registered voters.” (Doc. 9-1 at 16.) The ERIC Deceased Reports do not fall within this definition because, in her view, the underlying activity is “the mere receipt and review of information provided by a third party.” (*Id.*)

Again, the Executive Director is adding language to a statute that Congress never passed. The distinction between so-called “active processes” and “review of information” finds no support from any word used in the Public Disclosure Provision. In fact, the Executive Director admits that her argument is entirely based on the “broader context” and “the NVRA as a whole.”

(Doc. 9-1 at 15.) Her argument also depends on alleged “statutory ambiguities” that she does not establish or even identify. (Doc. 9-1 at 15.) The distinction also does not help the Executive Director here because the requested records plainly relate to D.C.’s ongoing and active process to identify and remove deceased registrants, a process mandated by federal law, D.C. law, and the ERIC Membership Agreement, which requires DCBOE to provide registration records to ERIC for voter list maintenance purposes “every sixty (60) days.” (Doc. 1 ¶ 15.) But again, that is a factual question, not a defense available to support a Rule 12 motion. “[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) (citations omitted), and this Court should decline the invitation to add words to the NVRA that Congress did not use, *Am. Civil Rights Union v. Phila. City Comm’rs*, 872 F.3d 175, 182-83 (3d Cir. 2017) (“[W]e will not amend the statute by reading that requirement into its text when Congress obviously chose not to do so.”).

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 (internal citations and quotations omitted). 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. 3d at 719; *Kemp*, 208 F. Supp. 3d at 1337-38 (same).

The word “active” is found nowhere in these definitions and the Court should “not read into [the statute] what is not stated therein, nor [should] the Court ignore the plain language of [the statute].” *Nat’l Women, Infants, & Children Grocers Ass’n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 100 (D.D.C. 2006); *see also Qi-Zhuo v. Meissner*, 315 U.S. App. D.C. 35, 70 F.3d 136, 140 (1995) (“Where, as here, the plain language of the statute is clear, the court generally

will not inquire further into its meaning...at least in the absence of ‘a clearly expressed legislative intent to the contrary.’” (quoting *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993)); *Kemp*, 208 F. Supp. 3d at 1336 n.25 (“The Court is not permitted to insert limiting language, such as ‘physical’ or ‘non-electronic,’ into the statute.”).

Other courts have both explicitly and implicitly rejected similar attempts to limit the NVRA’s scope in a way that contravenes its plain language. In *Public Interest Legal Foundation v. Boockvar*, the Foundation sought records from the Commonwealth of Pennsylvania concerning voter registration and cancellation by foreign nationals. *Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d at 555-57. The Commonwealth argued that the NVRA’s Public Disclosure Provision is limited to records concerning the death and relocation of registrants, and therefore categorically excludes citizenship records. *Id.* at 560. The court disagreed, holding that the NVRA’s “Disclosure Provision contemplates an *indefinite* number of programs *and* activities,” not just those concerning death and relocation. *Id.* (emphasis in original). The court continued, “The phrase ‘programs and activities’ as used in the Disclosure Provision aligns neatly with another provision in Section 8—specifically, subsection 20507(b), which governs ‘[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections.’ *Id.* (quoting 52 U.S.C. § 20507(b)) (emphasis added).

The Executive Director’s interpretation is also undermined by *Project Vote v. Long*, in which the Fourth Circuit concluded that “the process of reviewing voter registration applications is a ‘program’ and ‘activity,’” covered by the NVRA “because it is carried out in the service of a specified end—maintenance of voter rolls[.]” *Project Vote*, 682 F.3d at 335. In other words, the Fourth Circuit refutes the Executive Director’s claim that “the mere receipt and review of

information provided by a third party” falls outside the scope of the law. (See Doc. 9-1 at 16.) It is worth noting that Fourth Circuit’s conclusion was not a close call. It found the NVRA “unmistakably encompasses completed voter registration applications.” *Project Vote*, 682 F.3d at 336.

The ERIC Deceased Reports serve the same purpose as voter registration applications: they allow election officials to evaluate whether each registrant is eligible to vote. As in *Project Vote*, they are the “means by which an individual provides the information necessary for the [DCBOE] to determine his eligibility to vote,” 682 F.3d at 336—in this instance, her status as living or deceased. Evaluating the eligibility of voters on the basis of death (or for any reason whatsoever)—and the attendant action of cancelling ineligible registrations—determines “whether persons belong on the lists of eligible voters, thus ensuring the accuracy of those lists.” *Project Vote*, 752 F.Supp.2d at 707. Who is and is not eligible to be included on the official list of 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 relevant statutory language being unambiguous, judicial inquiry is complete. See *Germain*, 503 U.S. at 254.

The Public Disclosure Provision is not limited to so-called “active processes” by word, context, or intent. Nor does it exclude records simply because their source is a third party. Finding that it does would conceal from public scrutiny other fundamental records election officials use to grant and remove voting rights. A registrant erroneously thrown off the voter roll would be barred from viewing the records that led to her improper cancellation. This is precisely the sort of behavior that Congress intended to make transparent, but the Executive Director believes she is allowed to hide. As the Northern District of Georgia prudently recognized,

Limiting the disclosure requirement to a set of general process implementation records without the production of records to show the results of the processes and activities put into place would hinder the public's ability to "protect the integrity of the electoral process" and to ensure voting regulation programs and activities are implemented in a way that accomplishes the purposes of the statute and are not executed in a manner that is "discriminatory and unfair." See 52 U.S.C. § 20501.

Kemp, 208 F. Supp. 3d at 1340.

The Executive Director would also have this Court exclude copies of completed voter registration applications, which were sought by the plaintiff in *Project Vote* in order to investigate whether applications submitted by "students at Norfolk State University, a historically African-American college, ... had been erroneously rejected by the Norfolk General Registrar[.]" *Project Vote*, 682 F.3d at 333.

The Executive Director advances an interpretation of the NVRA that would permit election officials to conceal records related to their decisions to wipe the names of eligible voters from the rolls and declare them ineligible, while hiding the records that led to their disenfranchisement. The Executive Director's proffered interpretation is thus contrary to both the text and intent of the NVRA. Congress required transparency in the list maintenance process. The Public Disclosure Provision was designed to allow the public "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). The Executive Director's interpretation renders that goal impossible. "Public 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 Executive Director asks this Court to rewrite the NVRA.

The Public Disclosure Provision "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be

sacrificed to administrative chicanery, oversights, or inefficiencies.” *Project Vote*, 682 F.3d at 335. The Executive Director’s interpretation ensures that disenfranchising mistakes will stay hidden from public scrutiny. Such an interpretation would thus produce an absurd result, and “absurd results are to be avoided.” *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).

D. There is No Need to Consult Legislative History, Especially Legislative History for Bills that Did Not Become Law.

Finding no support in the NVRA’s text, structure, or purpose, the Executive Director turns to legislative history. This Court should decline to consider it for at least two reasons. First, Senate Bill 460 did not become law and therefore its legislative history has no value, especially when it is refuted by the NVRA’s plain text.

Second, and more fundamental, “[w]here the terms of a statute are unambiguous, judicial inquiry is complete,” and resort to ‘the more controversial realm of legislative history’ is unnecessary.” *In re England*, 375 F.3d 1169, 1178 (D.C. Cir. 2004) (citing and quoting, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 642 (1990) and *Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004)). The Court “do[es] not resort to legislative history to cloud a statutory text that is clear.” *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 339 (2020) (citation omitted). In the words of the Supreme Court, “Legislative history is irrelevant to the interpretation of an unambiguous statute.” *Davis v. Mich. Dep’t of the Treasury*, 489 U.S. 803, 808 n.3 (1989).

The Executive Director does not identify which of the NVRA’s words are ambiguous, much less why any of those words is ambiguous. Nor could she. As explained earlier and worth noting again, each of the NVRA’s operative words has a clear and common dictionary definition that comports with the statute’s context and purposes. To the Foundation’s knowledge, none of the courts that have considered the NVRA’s text has identified *any ambiguity*. In fact, at least

one court has expressly concluded that “there is no ambiguity here.” *Kemp*, 208 F. Supp. 3d at 1341.⁷

To be sure, the NVRA’s words have expansive meanings. *See Project Vote*, 682 F.3d at 336 (“[T]he use of the word ‘all’ [as a modifier] suggests an expansive meaning because ‘all’ is a term of great breadth.”). Congress drafted the NVRA broadly on purpose. Prior to the NVRA’s enactment, there were virtually no federally mandated voter list maintenance requirements—except for, perhaps, more generally applicable civil rights laws, like the Voting Rights Act.

There is nothing inherently suspect about a broadly written statute, and “[a]s a general matter of statutory construction, a term in a statute is not ambiguous merely because it is broad in scope.... In employing intentionally broad language, Congress avoids the necessity of spelling out in advance every contingency to which a statute could apply.” *In re Phila. Newspapers, LLC*, 599 F.3d 298, 310 (3d Cir. 2010) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (“holding that the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”)).

III. There is No Conflict Between the NVRA and Other Federal Laws with Respect to Disclosure of Deceased Registrant Records Generally.

The Executive Director claims that if the NVRA is read to encompass records identifying deceased registrants it will create an irreconcilable conflict with other federal laws and further require the Court to conclude that those laws repealed the NVRA. (Doc. 1-9 at 21-27.) To avoid these issues, the Executive Director claims, the Court must conclude that the NVRA categorical excludes records related to deceased registrants and dismiss the complaint. Not so.

⁷ The *Kemp* court continued, “[E]ven if there was, the scant legislative history relevant to Section 8(i) that the parties identify, and that the Court has been able to locate, supports that specific application information falls within the Section 8(i) disclosure requirement.” 208 F. Supp. 3d at 1341.

For starters, there is plainly no conflict between the NVRA and any other federal law when it comes to disclosure of the requested records *qua* records. Whether deceased registrant records are within the NVRA’s scope is a distinct question from whether *specific information* contained in specific records—like Social Security numbers— should be redacted. To the Foundation’s knowledge, every court to interpret the NVRA has considered those two issues separately. For example, the Fourth Circuit found that completed voter registration applications were “unmistakably” within the NVRA’s scope, *Project Vote*, 682 F.3d at 336, but separately upheld the lower court’s exclusion of Social Security numbers—and only that information, *id.* at 339. In *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d at 266, the Fourth Circuit found that defendants’ “efforts ... to identify noncitizen registrants qualify as a ‘program’ or ‘activity’ to ensure an accurate list of eligible voters,” and vacated the lower court’s dismissal of a complaint. Separately, the Court found that certain “information” could be excluded through “redaction protocols.” *Id.* at 259, 268.

None of the other federal laws the Executive Director cites precludes, or even addresses, disclosure of deceased registrant records. Regardless, at best for the Executive Director, these are factual questions and not the basis for a Rule 12 motion.

IV. The NVRA Does Not Conflict with Regulations Governing the LADMF.

A. The Foundation Does Not Seek Any Information Not Subject to Disclosure.

The Executive Director is incorrect in asserting the Foundation seeks records protected from disclosure. The Limited Access Death Master File (“LADMF”) is a product made available by the Department of Commerce which includes the “the name, social security account number, date of birth, and date of death of deceased individuals” who died “during the three-calendar-year period beginning on the date of the individual’s death.” 15 C.F.R. § 1110.2(a). To access the

LADMF directly from the Commerce Department, an individual or entity must certify that she meets certain requirements. *See* 15 C.F.R. § 1110.102(a)(1)-(4). ERIC compares state voter roll data to LADMF data to identify deceased registrants. (Doc. 1 ¶ 19.)

The Foundation does not seek LADMF records. The Foundation seeks records provided by ERIC to the Executive Director that were generated by ERIC for voter list maintenance purposes. Records from third parties, as compared to the LADMF itself, are not subject to any statutory or regulatory prohibition on disclosure under the law, or under the NVRA. Because the Foundation does not seek or want LADMF data, there is no conflict.

B. Personally Identifying Information Obtained Through An Independent Source—like DCBOE—is Not Subject to LADMF Protections.

There is a second reason the NVRA does not conflict with the LADMF in these circumstances: the ERIC Deceased Reports do not contain LADMF data. Federal regulations governing access to the LADMF provide,

As used in this part, Limited Access DMF does not include an individual element of information (name, social security number, date of birth, or date of death) in the possession of a Person, whether or not certified, but obtained by such Person through a source independent of the Limited Access DMF. If a Person obtains, or a third party subsequently provides to such Person, death information (i.e., the name, social security account number, date of birth, or date of death) independently, such information in the possession of such Person is not part of the Limited Access DMF or subject to this part.

15 C.F.R. § 1110.2.

In other words, information obtained through an independent source is not subject to LADMF disclosure restrictions, even if that same information is contained in the LADMF. This is significant because the information ERIC receives for each D.C. registrant is independently obtained from DCBOE every sixty days. (Doc. 1 ¶ 15.) ERIC compares that information to LADMF data and tells DCBOE which D.C. registrants are likely deceased. (Doc. 1 ¶¶ 17-18.) In

other words, the ERIC Deceased Reports contain information that was independently obtained through DCBOE and those reports are therefore not subject to federal disclosure prohibitions. 15 C.F.R. § 1110.2.

Whatever remaining questions the Court may have about the LADMF and its use in the creation of the ERIC Reports are appropriately answered following discovery and, in necessary, *in camera* review.

C. Voter Identification Numbers Are Not LADMF Data.

As an alternative to its request for ERIC Deceased Reports in their entirety, the Foundation offered to satisfy its request by receiving the ERIC Deceased Reports with nothing more than the voter identification numbers for all deceased registrants. (Doc. 1 ¶ 52(1).) The Executive Director refused that offer. (Doc. 1 ¶ 53.)

Voter identification numbers are not protected by LADMF regulations because they are not contained in the LADMF. This is not a valid basis to withhold this specific data.⁸

D. The Foundation Is Likely Authorized to Receive LADMF Data.

Even if LADMF data appears in the ERIC Deceased Reports—which is a factual question—the Foundation is likely authorized to receive it. Contrary to what the Executive Director believes, a certified entity may share LADMF data with an uncertified entity if the uncertified entity satisfies certain criteria. *See* 15 C.F.R. § 1110.102(4). In fact, federal regulations ask certified entities to disclose if they “intend[] to disclose such deceased individual’s DMF to any person.” 15 C.F.R. § 1110.102(b).

ERIC and DCBOE are apparently proof that uncertified entities may use records and data which may have previously utilized LADMF data and compared the data with other records to

⁸ To be clear, the Foundation maintains its request for the ERIC Deceased Reports in their entirety.

produce separate documents or other non-LADMF records. The Commerce Department publishes a list of persons and entities certified to receive LADMF data:

<http://classic.ntis.gov/assets/pdf/DMFcertifiedList.docx>.⁹ As of November 1, 2021, neither ERIC nor the DCBOE is listed as being so certified. ERIC and DCBOE would appear to receive records with LADMF data themselves because they nevertheless satisfy the necessary criteria, even while they are not certified by the Commerce Department.

The Foundation believes it, too, satisfies the criteria to receive LADMF data. As alleged, the Foundation “analyzes the programs and activities of state and local election officials in order to determine whether lawful efforts are being made to keep voter rolls current and accurate in accordance with federal and state law, and to determine whether eligible registrants have been improperly removed from voter rolls.” (Doc. 1 ¶ 4.) The Foundation believes that due to these activities and others it has a “legitimate fraud prevention interest,” 15 C.F.R. § 1110.102(4)(ii), and is therefore eligible to receive the same data DCBOE receives from ERIC.

V. There is No Indication that ERIC Deceased Reports Implicate Driver’s License Record Data.

The Executive Director also raises the Driver’s Privacy Protection Act (“DPPA”) as a reason to dismiss the complaint entirely. (Doc. 9-1 at 23-24.) The DPPA prohibits the disclosure of “personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record.” 18 U.S.C. § 2721(a)(1). For starters, the Foundation does not seek any information contained in a “motor vehicle record.” The Foundation seeks voter list maintenance documents created by ERIC and used by DCBOE to remove deceased registrants. The DPPA is irrelevant here.

⁹ As of February 17, 2022, this link is not operational. The Foundation relies on a version obtained from an earlier time.

Although DCBOE is required to send ERIC “all licensing or identification contained in the motor vehicles database” every sixty days (Doc. 1 ¶ 15) little, if anything, is known about how—or even *if*—that data is used to identify deceased registrants. DCBOE does not say, possibly because DCBOE does not know.

In the lone NVRA case where the DPPA was held to apply, the defendants had “described at length the rigorous and targeted analysis of voter-registration data and driver’s license data that produced the requested records.” *Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d at 561. Yet, even then, the DPPA was not a categorical bar to disclosure. Instead, records were exempt only “*to the extent* they include[d] personal information obtained by the DMV in connection with a motor vehicle record.” *Id.* at 563 (emphasis added). The motion to dismiss was denied, in part, and the case proceeded to discovery. *Id.* at 564.

Prior to discovery, there is simply no way for the Foundation, or the Court, to evaluate the Executive Director’s unsworn claim that the requested records implicate protected DPPA data. This especially true for the Foundation’s alternative offer to receive the ERIC Deceased Reports with nothing more than voter identification numbers.

It is questionable whether DCBOE is even sending driver’s license data to ERIC. According to a media report published just last week, the Executive Director “said the board has only had ‘intermittent success’ getting the data from the DMV over the last three years, and that the problems have gotten so persistent recently that ERIC has issued warning and probation letters to D.C.—and even raised the possibility that the city could be removed from the system altogether.” Austeruhle, Data Errors Imperil D.C.’s Participation In Group That Cleans Up States’ Voter Rolls, Feb. 9, 2022, <https://dcist.com/story/22/02/09/dc-voter-rolls-problems/> (last accessed Feb. 17, 2022). Under these circumstances, dismissal is plainly inappropriate.

VI. If Any Conflicts Remain, the Remedy is Redaction, Not Dismissal.

The Supreme Court instructs that “courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The wholesale exclusion of deceased registrant records, including the ERIC Deceased Reports, would be the antithesis of giving the NVRA effect. The remedy, to the extent it is needed, is redaction, and only to the extent that it does not prevent achievement of the NVRA’s transparency goals. *See Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738, 743 (E.D. Va. 2011); *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”). The same is true for any information contained in the requested records that identifies the source of registration, what the Executive Director refers to as “legacy voter registration numbers.” (Doc. 9-1 at 10.)

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. 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, *see also id.* at 258 (“[W]e observe

that because the district court dismissed the Foundation’s complaint without permitting discovery, we cannot consider ‘every particular question that may arise with respect to the implementation’ of the disclosure provision in this case.”). It would likewise be inappropriate to resolve this case prior to discovery.

VII. Any D.C. Law that Prohibits Disclosure of Date of Birth Information is Preempted and Unenforceable.

DCBOE raised D.C. law a defense to disclosure in its letters denying the Foundation’s Request. (See Doc. 1-2 at 2, Doc. 1-4 at 2-3.) D.C. law prohibits the disclosure of certain registrant specific information, including dates of birth. See D.C. Code § 2-534(a)(6); CDCR 3-510.¹⁰ Date-of-birth information is crucial to voter list maintenance and the Foundation’s work because without it, it is much harder to distinguish one registrant from another.

The NVRA requires disclosure of “all” voter list maintenance records, which includes date-of-birth information. See *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020). D.C. law prohibiting disclosure of date-of-birth information conflicts with the NVRA and is therefore preempted and unenforceable under Article VI, Clause 2 of the United States Constitution (the Supremacy Clause), Article I, Section 4, Clause I of the United States Constitution (the Elections Clause), and the Supreme Court’s decision in *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013).

In *Inter Tribal*, the Supreme Court held in unambiguous terms that the NVRA is superior to any conflicting state laws. In such situations, “the state law, ‘so far as the conflict extends, ceases to be operative.’” *Inter Tribal*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U. S. 371, 384 (1880)). The Court also stated:

When Congress legislates with respect to the “Times, Places and Manner” of holding congressional elections, it *necessarily* displaces some element of a pre-

¹⁰ To be clear: the Foundation does not want and has never asked for Social Security numbers.

existing legal regime erected by the States. Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that *the statutory text accurately communicates the scope of Congress's pre-emptive intent*.... In sum, there is no compelling reason not to read Elections Clause legislation simply to mean what it says.

Id. at 14-15 (emphasis added). The so-called presumption against preemption “does not hold” when Congress acts under the Elections Clause. *Inter Tribal*, 570 U.S. at 14. To the extent any D.C. law prohibits disclosure of the requested records or date-of-birth information, that law is preempted. *Project Vote*, 813 F. Supp. 2d at 743 (“[T]o the extent that any Virginia law, rule, or regulation forecloses disclosure of completed voter registration applications with the voters’ SSNs redacted, the court FINDS that it is preempted by the NVRA.”).

VIII. To the Extent the ERIC Membership Agreement Prohibits Disclosure, it is Invalid.

The ERIC Membership Agreement provides,

Should a Member receive a request to disclose ERIC Data and determines that it is legally obligated, in whole or in part, to comply with such request, **it shall not make the disclosure without first obtaining a court order compelling it to do so**, a copy of which shall be provided to ERIC.

(*See* Doc. 1 ¶ 45.) In short, the ERIC Membership Agreement requires states to withhold records that the NVRA makes public. Parties cannot contract to violate federal law. Supreme Court “cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.” *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982). The ERIC Membership Agreement is invalid to the extent it prohibits disclosure of the requested records.

CONCLUSION

For the foregoing reasons, the Complaint’s allegations are legally sufficient. The Executive Director’s Motion should therefore be denied.

Date: February 17, 2022.

Respectfully submitted,

/s/ Noel H. Johnson

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** Motion for admission pro hac vice granted*

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2022, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

/s/ Noel H. Johnson
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