UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INTEREST LEGAL FOUNDATION, INC., **Plaintiff,** **v.** **MONICA HOLMAN EVANS,** **Defendant.**	**Civil Action No. 21-3180 (FYP)**

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

Regulations

INTRODUCTION

Defendant Monica Holman Evans, director of the District of Columbia Board of Elections (BOE), has moved to dismiss plaintiff's Complaint, which alleges that BOE must disclose voter identification numbers and reports created by the Electronic Registration Information Center (ERIC) under the National Voter Registration Act (NVRA). Plaintiff's disjointed response asserts facts not pled in the Complaint, addresses questions not at issue in this case, and fails to grapple with many of the arguments BOE raised in its motion. Based on plaintiff's own allegations, the ERIC reports at issue (ERIC Deceased Reports) are not records "concerning the implementation" of the requisite "programs and activities" mandated for disclosure under Section 8(i) of the NVRA (the Activities Disclosure Provision). Plaintiff fails to respond to BOE's argument that District of Columbia (District) voter identification numbers are barred from disclosure under the NVRA's plain language. That language also does not encompass the ERIC Deceased Reports, which are third-party reports that do not concern the "implementation" of any "programs" or "activities." Plaintiff altogether disregards BOE's alternative argument that language elsewhere in the NVRA leads to the same conclusion, does not engage with the relevant legislative history, and fails to explain how its reading of the Activities Disclosure Provision can be squared with various other provisions of federal law. Perhaps most importantly, plaintiff doubles down on an interpretation that would undermine rather than promote the NVRA's stated purpose. Plaintiff's unsupported insistence to the contrary, no discovery is needed. The Complaint should be dismissed.

ARGUMENT

I. Plaintiff Fails To Respond to BOE's Argument that the NVRA's Plain Language Bars Disclosure of Voter Identification Numbers.

In support of its motion to dismiss, BOE argued first and foremost that plaintiff has failed to state a claim under the plain language of the NVRA's Activities Disclosure Provision, which

expressly prohibits disclosure of voter registration numbers and limits required disclosures to records "concerning the implementation" of specified "programs and activities." Mem. in Support of Def.'s Mot. to Dismiss (Def.'s Mem.) [9-1] at 8-14. As to voter identification numbers, plaintiff offers no response to BOE's argument that the plain language of the NVRA prohibits disclosure of voter identification numbers because many of them are legacy numbers tied to the individual's voter registration agency. *Id.* at 10; *see also* 52 U.S.C. § 20507(a)(6) (prohibiting public disclosure of any information that would reveal "the identity of the voter registration agency through which any particular voter is registered"). Moreover, the District has already provided plaintiff with alternative numbers unique to each voter. *See* Oct. 19, 2021 Letter [1-4] at 2. Plaintiff offers no response to this, let alone one showing that it has stated a claim for relief.[1] That alone is grounds to dismiss this claim. *See* LCvR 7(b) (motion may be treated as conceded when no opposition memorandum filed); *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) (LCvR 7(b) "understood to mean that if a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded").

II. Plaintiff's Plain-Language Argument Ignores the Full Text of the Activities Disclosure Provision and Relies on Facts Not Pled in the Complaint.

As to the ERIC Deceased Reports and any sensitive personal information contained within them, plaintiff asserts—without citation to the Complaint—that BOE "conducts programs and activities to keep the D.C. voter roll current and accurate," pointing to federal and District legal provisions either requiring or permitting BOE to review its voter rolls. Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss (Pl.'s Opp'n) [10] at 11. But those legal provisions say nothing about the

[1] Elsewhere in its brief, plaintiff contends that voter registration numbers "are not protected by [Limited Access Death Master File (Limited Access DMF)] regulations because they are not contained in the [Limited Access DMF]." Pl.'s Opp'n at 26. BOE addresses that point below. The scope of the NVRA's plain language, however, is a separate point plaintiff does not address.

ERIC Deceased Reports or how they are used. Even plaintiff's footnoted citation to a BOE document purportedly about the District's compliance with the Help America Vote Act, *see id.* at 11 n.4, makes no mention of the ERIC Deceased Reports or any information contained within them. As BOE previously argued, plaintiff has offered no specific factual allegations about how the District uses the ERIC Deceased Reports that, if true, would suffice to show they are records concerning the "implementation" of "programs and activities" under the NVRA. *See* Def.'s Mem. at 13-14. Plaintiff now insists it has alleged "that DCBOE uses [the ERIC Deceased 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." Pl.'s Opp'n at 16 (citing Compl. ¶¶ 21-23). But the portion of the Complaint plaintiff cites does not say that. The cited paragraphs merely allege that the District's agreement with ERIC sets forth certain timetables for reaching out to unspecified voters. *See* Compl. ¶¶ 21-23. Plaintiff cannot survive a motion to dismiss by adding allegations that do not appear in the Complaint. *See Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 160 n.7 (D.D.C. 2014) ("It is well settled law that a plaintiff cannot amend his or her complaint by the briefs in opposition to a motion to dismiss.").

Plaintiff further contends that the Activities Disclosure Provision's use of the word "concerning" expands the provision's scope to records that "relate to" the implementation of any voter list maintenance programs or activities.[2] Pl.'s Opp'n at 13. But plaintiff ignores that,

[2] Citing paraphrased language in BOE's brief, plaintiff suggests that BOE has mischaracterized the Activities Disclosure Provision as pertaining to records "reflecting," rather than "concerning," the implementation of applicable programs and activities. *See* Pl.'s Opp'n at 14-15. That is wrong. BOE has correctly characterized—and correctly quoted—the provision's language throughout its arguments. *See, e.g.*, Def.'s Mem. at 12 ("Rather, the Activities Disclosure Provision is limited by its plain language to those records 'concerning the implementation' of specified 'programs and activities.'"); *id.* at 13 ("Indeed, plaintiff has failed to allege that the ERIC Deceased Reports concern the 'implementation' of a 'program' or 'activity' of the relevant kind

whatever the scope of the word "concerning," the relevant records must still concern the "implementation" of a defined "program" or "activity." *See* 52 U.S.C. § 20507(i). As other courts have observed, the word "implementation" limits the applicable universe of records to those concerning active "processes" for voter list maintenance programs and activities, as made plain by common dictionary definitions of "implement" that plaintiff fails to acknowledge: "to give practical effect to and ensure the actual fulfillment *by concrete measures*," *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1337 (N.D. Ga. 2016) (emphasis added) (citing Webster's Third New Int'l Dictionary 1134 (2002)), and "to put into effect *according to or by means of a definite plan or procedure*," *id.* (emphasis added) (citing Webster's Encyclopedic Unabridged Dictionary 961 (2001)). Plaintiff has not alleged any "concrete measures" or a "definite plan or procedure" to which the ERIC Deceased Reports relate. Plaintiff merely asserts, without citation, that BOE's "membership in ERIC is a 'program' or 'activity' … 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,'" Pl.'s Opp'n at 12-13, and that BOE "uses the ERIC Deceased Reports to evaluate and verify whether each registrant is alive—perhaps the most fundamental voter qualification," *id.* at 14. But those uncited assertions appear nowhere in the Complaint. Once again, plaintiff cannot amend its pleadings through briefing on a motion to dismiss. *See Kingman Park*, 27 F. Supp. 3d at 160 n.7.

Plaintiff's puzzling citation to the Fourth Circuit's decision in *Project Vote/Voting for America v. Long*, 682 F.3d 331 (4th Cir. 2012), offers no help. That case addressed whether the Activities Disclosure Provision required disclosure of "completed voter registration applications"

beyond a single conclusory allegation to that end."); *id.* at 18 ("[T]he Activities Disclosure Provision expressly applies only to records 'concerning the implementation' of those programs and activities … .").

in Virginia. *Id.* at 335. The Court there concluded that registration applications "are the means by which an individual provides the information necessary for [Virginia] to determine his eligibility to vote," and without them, "state officials would be unable to determine whether that applicant meets the statutory requirements for inclusion in official voting lists." *Id.* at 336. Here, however, plaintiff does not allege that ERIC Deceased Reports or any of the information contained within them are necessary to—or used at all in—voter registration. Indeed, despite listing eight cases (*Long* among them) in which courts purportedly ordered some records disclosed under the NVRA, *see* Pl.'s Opp'n at 8-9, the vast majority of those cases dealt with voter registration lists, applications, or other related records, and even by plaintiff's characterization, none involved reports provided to the government agencies in question by third parties. Plaintiff has failed to articulate how the ERIC Deceased Reports concern the "implementation" of any "program" or "activity" as contemplated by the NVRA's plain language. This alone is grounds for dismissal.

III. Plaintiff Fails To Address the Statutory Context and Policy Implications of Its Proposed Reading of the NVRA and Offers No Explanation of How To Reconcile Other Statutes with That Interpretation.

BOE has argued that even if the statutory language is not clear on its face, plaintiff's reading of the Activities Disclosure Provision is demonstrably incorrect when considered against the NVRA's statutory context and legislative background, as well as the policy ramifications of plaintiff's proposed interpretation. *See* Def.'s Mem. at 14-15 (citing *United States v. Wilson*, 290 F.3d 347, 354 (D.C. Cir. 2002)). Plaintiff's failure to address several of those items and its scattershot response to the rest makes clear that its analysis of the NVRA cannot be defended.

A. Plaintiff Fails To Engage with the Language of the NVRA as a Whole or Its Legislative History.

BOE has first argued that the use of "program" and "activity" in other parts of the NVRA makes clear that those terms refer only to active processes throughout the statute, including in the

Activities Disclosure Provision. Def.'s Mem. at 16-18. Plaintiff wholly avoids this argument about the statute's context, reverting to a series of confusing, non-responsive points about the Activities Disclosure Provision's plain meaning. *See* Pl.'s Opp'n at 17-20. In so doing, plaintiff ignores the numerous NVRA provisions that use the terms "program" and "activity" to refer to clearly defined, active processes that, when executed, can result in alterations to voter registration lists. *See* Def.'s Mem. at 16 (citing 52 U.S.C. §§ 20504-20507). A statute, however, must be interpreted "as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout." *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Plaintiff has offered no analysis as to why that should not apply here.

Relatedly, BOE has argued that even if the words "programs and activities" leave open whether the Activities Disclosure Provision only encompasses records of active processes, Congress's inclusion of the word "implementation" resolves the question, as that word appears nowhere else in the NVRA. Def.'s Mem. at 18-19. Failing to engage directly with this argument, plaintiff merely takes issue with BOE's characterization of *Kemp*, contending that "[o]nly in one specific context did *Kemp* consider it 'reasonable' to read 'implementation' as a word of limitation." Pl.'s Opp'n at 16. Whatever the relevance of *Kemp* on this point, plaintiff misunderstands the analysis. Different facts may warrant different outcomes, but any statutory term's meaning remains fixed across contexts. *See United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality op.) ("[T]he meaning of words in a statute cannot change with the statute's application."); *cf. Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F.3d 460, 464 (6th Cir. 2010) (concluding that under Bankruptcy Code provision, "the particular practical implication of what is excluded varies with the context, but the meaning and operation of the word 'notwithstanding'

does not change"). The court in *Kemp* made no suggestion otherwise, offering analysis of the term "implementation" in the Activities Disclosure Provision with no mention of context-specific variation. *See, e.g.*, *Kemp*, 208 F. Supp. 3d at 1338 ("The specific question is what purpose the word 'implementation' has in the Section 8(i) phrase 'implementation of programs and activities.'"). From that analysis, the court indeed determined that certain records pertaining to applicants' voter registration statuses were subject to disclosure, as BOE previously noted. *See* Def.'s Mem. at 13 (citing *Kemp*, 208 F. Supp. 3d at 1342). But the court also found a number of requested records to fall outside the NVRA's parameters, *see id.* (citing *Kemp*, 208 F. Supp. 3d at 1343) (voter telephone numbers, certain automatically generated letters, disposition of letters sent to voter registration applicants), and said nothing about any records of the type at issue here. In any case, the *Kemp* court acknowledged that "implementation" places limits on which records the NVRA subjects to disclosure in all contexts.[3] The Activities Disclosure Provision must be read to give that term independent meaning. *See* Def.'s Mem. at 18-19 (citing *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1045 (D.C. Cir. 2015)). Plaintiff provides no relevant argument to the contrary.

Additionally, BOE has argued that the legislative history of the NVRA resolves any residual ambiguity as to the Activities Disclosure Provision's scope, as legislative history "may give meaning to ambiguous statutory provisions" where the principles gleaned from the legislative history also find support in the statutory language itself. Def.'s Mem. at 19 (quoting *Int'l Bhd. of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 699-700 (D.C. Cir. 1987)).

[3] By plaintiff's own admission, the *Kemp* court also reached its conclusions by reading the Activities Disclosure Provision "in all relevant contexts and in light of the NVRA's purposes and legislative history," *see* Pl.'s Opp'n at 16, cutting against plaintiff's repeated insistence that nothing but the statute's text could be relevant to discerning its meaning.

Both of plaintiff's arguments against this point fall flat. Plaintiff first argues that because BOE pointed to legislative history of a Senate bill that was itself never passed into law, "its legislative history has no value." Pl.'s Opp'n at 22. Plaintiff tellingly cites no authority for this proposition and does not acknowledge that the cited Senate bill's language mirrors—verbatim—the House bill that eventually passed into law. *Compare* H.R. 2, 103rd Cong., § 8(i) (1993) (available at https://www.congress.gov/bill/103rd-congress/house-bill/2/text/ih) *with* S. 460, 103rd Cong., § 8(i) (1993) (available at https://www.congress.gov/bill/103rd-congress/senate-bill/460/text) (using the same text). Plaintiff identifies no reason why the Senate's extended comments regarding the precise language of the Activities Disclosure Provision should be discounted. Indeed, doing so is a valid exercise in analyzing legislative history. *See Goldring v. District of Columbia*, 416 F.3d 70, 74-75 (D.C. Cir. 2005) (relying on a similar report—the house report for a similar bill, where the senate version was ultimately passed—as relevant legislative history, although ultimately rejecting the use of the legislative history because the statutory language was not ambiguous).

Second, plaintiff argues that because the meaning of the Activities Disclosure Provision is unambiguous, the Court should not look to the legislative history. Pl.'s Opp'n at 22-23. But that simply begs the question. BOE has of course argued that the plain meaning of the Activities Disclosure Provision warrants dismissal of plaintiff's claim. *See* Def.'s Mem. at 8-14. As noted, however, BOE has argued in the alternative that even if the provision's language leaves its scope unclear, other tools of statutory interpretation—among them the legislative history—show that plaintiff's reading is incorrect. *Id.* at 14-15. Indeed, the Senate Committee Report reveals that Congress envisioned the Activities Disclosure Provision to pertain to "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency *of addresses on the official list of eligible voters*." S. Rep. No. 103-6, at 35 (1993)

(emphasis added). If the scope of the Activities Disclosure Provision is ambiguous, this clear statement shows that plaintiff's unduly expansive reading has no merit. *See* Def.'s Mem. at 20. Plaintiff fails to engage at all with this argument.

B. Plaintiff Cannot Reconcile Its Reading of the Activities Disclosure Provision with Other Federal Legislation.

Plaintiff likewise offers no persuasive response to BOE's argument regarding the broader context of federal legislation. BOE has argued that plaintiff's reading of the Activities Disclosure Provision would conflict with other federal statutes existing at the time of its passage and enacted since. Def.'s Mem. at 20-24. In response to this, plaintiff first makes the confusing argument that other courts have separately considered "[w]hether deceased registrant records are within the NVRA's scope" and "whether *specific information* contained in specific records … should be redacted." Pl.'s Opp'n at 24 (plaintiff's emphasis). Leaving aside whether that correctly characterizes the ERIC Deceased Reports (which, even as alleged, are third-party reports, not "registrant records"), the two cases plaintiff cites for this proposition do not deal with "deceased registrant records" at all. *See* Pl.'s Opp'n at 24 (citing *Long*, 682 F.3d at 336, and *Pub. Interest Legal Found., Inc. v. North Carolina State Bd. of Elections (NCBOE)*, 996 F.3d 257, 266 (4th Cir. 2021)). Plaintiff's further insistence that "these are factual questions and not the basis for a Rule 12 motion," Pl.'s Opp'n at 24, misunderstands the litigation process. Once a motion to dismiss has been filed, discovery is improper unless the facts pled, if true, would warrant relief under the legal claims raised. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (standard for proper pleadings "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions," as "only a complaint that states a plausible claim for relief survives a motion to dismiss"); *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should … be exposed at

the point of minimum expenditure of time and money by the parties and the court." (internal quotation marks omitted)). But the backdrop of other federal legislation makes clear here that the correct reading of the NVRA leaves plaintiff with no claim in the first place; the Activities Disclosure Provision could not encompass the information plaintiff is seeking without abrogating other federal statutes. *See* Def.'s Mem. at 21 (citing *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 735 (S.D. Miss. 2014)). That is so even if all of plaintiff's allegations are assumed to be true.

Seemingly in response to BOE's argument that the NVRA must also be read in harmony with subsequent federal legislation, plaintiff offers two arguments for why its interpretation of the NVRA does not conflict with the legal regime surrounding the Limited Access Death Master File (Limited Access DMF).[4] *See* Pl.'s Opp'n at 24. First, plaintiff contends it "does not seek [Limited Access DMF records]," but rather "seeks records provided by ERIC to the [BOE] Executive Director that were generated by ERIC for voter list maintenance purposes." *Id.* at 25. If plaintiff means to assert that Limited Access DMF information somehow morphs into something else once a certified entity shares it, such a contention is invalid on its face. That is plainly not what the applicable federal regulation means when it exempts from compliance information obtained "independently," *i.e.*, from other sources. *See* 15 C.F.R. § 1110.2. On the other hand, if plaintiff means to assert that the ERIC Deceased Reports do not contain any information that also appears in the Limited Access DMF, plaintiff cannot do so when it has conceded the very opposite in an exhibit attached to its Complaint. *Compare* Pl.'s Opp'n at 25-26 ("In other words, the ERIC Deceased Reports contain information that was independently obtained through DCBOE and those

[4] Although plaintiff cites only to federal regulations, as BOE previously explained, the Limited Access DMF exists pursuant to the Bipartisan Budget Act of 2013. *See* Def.'s Mem. at 4; 42 U.S.C. § 1306c(b). BOE's previous citations to relevant statutory provisions erroneously cited subsection (a) of the statute, instead of subsection (b). *See* Def.'s Mem. at 4.

reports are therefore not subject to federal disclosure prohibitions."), *with* July 21, 2021 Letter to BOE [1-3] at 3 ("The Foundation will consent, in this instance, to the redaction of all [ERIC Report] data elements contained in the Limited Access Death Master File … ."). Indeed, plaintiff asserts in its Complaint that ERIC includes the Limited Access DMF in its reports. *See* Compl. ¶¶ 19-20; *see also* Electronic Registration Info. Ctr., 2017 Annual Report (ERIC 2017 Annual Report) at 6, *available at* https://bit.ly/3teZ4wr (stating that Limited Access DMF information transmitted to members through ERIC).[5] Any assertions to the contrary are based on facts not pled in the Complaint and cannot be used to defeat a motion to dismiss.[6] *See Kingman Park*, 27 F. Supp. 3d at 160 n.7.

Second, plaintiff contends that it is "likely authorized" to receive Limited Access DMF information based on its alleged activity monitoring state and local elections. *See* Pl.'s Opp'n at 26-27. Plaintiff "believes that due to these activities and others it has a 'legitimate fraud prevention interest,'" qualifying it to receive Limited Access DMF information from certified entities under applicable regulations. *Id.* at 27 (quoting 15 C.F.R. § 1110.102(a)(4)(ii)). The Complaint, however, does not allege that BOE's withholding of the ERIC Deceased Reports is unlawful based on plaintiff's eligibility for Limited Access DMF certification. Indeed, the Complaint says nothing about plaintiff's eligibility and simply asserts that the Activities Disclosure Provision mandates

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[5] Plaintiff references the ERIC 2017 Annual Report in its Complaint. *See* Compl. ¶ 13.

[6] *Compare* Pl.'s Opp'n at 25 ("ERIC compares [information provided by BOE] to [Limited Access DMF] data and tells DCBOE which D.C. registrants are likely deceased. (Doc. 1 ¶¶ 17-18)"), *with* Compl. ¶ 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.'" (Plaintiff's alterations) (citing ERIC Bylaws at 16)), *and with* Compl. ¶ 18 ("From ERIC, '[e]ach member state 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.'" (Plaintiff's emphasis) (quoting FAQs, What Reports Do States Receive From ERIC, https://ericstates.org/)).

disclosure of the ERIC Deceased Reports full-stop, without regard for the requesting entity's eligibility for Limited Access DMF certification.[7] *See, e.g.*, Compl. ¶¶ 60-61. Moreover, although plaintiff alleges facts about its organizational mission, *see* Compl. ¶ 4, plaintiff ignores that non-certified entities are not eligible to receive Limited Access DMF data unless they meet additional certification criteria, including that the entity must have "systems, facilities, and procedures in place to safeguard such information, and experience in maintaining the confidentiality, security, and appropriate use of such information." 42 U.S.C. § 1306c(b)(2)(B). Plaintiff has not argued it has such systems, facilities, and procedures in place—let alone alleged this in its pleadings. In any case, plaintiff's contention does not address BOE's argument that such a reading of the NVRA would conflict with the statutory and regulatory regime governing Limited Access DMF certification.

Third, plaintiff makes the misleading contention that BOE "raises the Driver's Privacy Protection Act ("DPPA") as a reason to dismiss the [C]omplaint entirely," Pl.'s Opp'n at 27 (citing Def.'s Mem. at 23-24), but that "[p]rior to discovery, there is simply no way for [plaintiff], or the Court, to evaluate the Executive Director's unsworn claim that the requested records implicate protected DPPA data," *id.* at 28. Plaintiff does not cite to any claim by BOE—unsworn or otherwise—about DPPA data. Regardless, plaintiff's own allegations state that the District must provide to ERIC "all licensing or identification [records] contained in the [District's] motor vehicle

[7] Plaintiff attempts to argue that "uncertified entities may use records and data" from the Limited Access DMF based on an assertion that both ERIC and BOE are not certified entities. *See* Pl.'s Opp'n at 26-27. However, this is again contradicted by documents incorporated by reference into plaintiff's own Complaint. *See* ERIC 2017 Annual Report at 6 (noting ERIC's annual payments "for its certification and subscription to the data on deceased Americans"). Although the District is not a certified entity, the Limited Access DMF Certification Program criteria plainly envision government entities as meeting certification requirements and thus the proper recipients of data from certified entities. *See* 42 U.S.C. § 1306c(b)(2)(c) (applicable government entities must agree to follow IRS code requirements for government safeguard of records).

database," Compl. ¶ 15, that the District must provide ERIC with similar data from "other agencies within its jurisdiction that perform any voter registration functions, including … those required to perform voter registration pursuant to the National Voter Registration Act," *id.* ¶ 16, and that "ERIC processes data that relates to the maintenance of Members' voter registration lists and provides regular (at least on a monthly basis) reports to each Member," *id.* ¶ 17 (alterations adopted) (internal quotation marks omitted). *See also* 52 U.S.C. §§ 20503(a), 20504 (requiring motor vehicle departments to perform voter registration). Discovery is thus beside the point because plaintiff has already alleged, and BOE has assumed to be true for the purpose of its motion to dismiss, that ERIC Deceased Reports contain motor vehicle registration data. Plaintiff fails to address BOE's argument that plaintiff's reading of the NVRA would conflict with the DPPA's privacy protections. *See* Def.'s Mem. at 23-24.

C. Plaintiff Fails To Address BOE's Argument that Plaintiff's Reading of the NVRA Would Undermine the Statute's Purpose.

Plaintiff wholly ignores BOE's final statutory context argument that even if the plain meaning, context, and legislative backdrop of the NVRA do not fully clarify the scope of the Activities Disclosure Provision, policy considerations overwhelmingly militate against adopting plaintiff's reading and warrant dismissal. *See* Def.'s Mem. at 25-27; *see also Wilson*, 290 F.3d at 361 (relying on policy considerations to interpret ambiguous statute). BOE has explained that finding the requested information to be within the scope of the Activities Disclosure Provision would subject the District, ERIC, and plaintiff alike to potential civil penalties, would harm the District's efforts to ensure accurate voter rolls, and would do so without providing any countervailing benefit. *See* Def.'s Mem. at 25-27. Plaintiff offers no response to these points, nor does plaintiff respond to the related points BOE raised: that Congress did not intend the NVRA to be a backdoor to the Limited Access DMF Certification Program, *see* Def.'s Mem. at 25 (citing

S. Carolina Pub. Serv. Auth. v. F.E.R.C. (SCPSA), 762 F.3d 41, 59 (D.C. Cir. 2014)); that incentivizing ERIC to cease its reporting would undermine the goal of the NVRA "to ensure that accurate and current voter registration rolls are maintained," *see id.* at 26 (internal quotation marks omitted) (quoting 52 U.S.C. § 20501(b)); and—perhaps most importantly—that plaintiff has alleged no problem with the District's voter rolls in any way connected to the information sought, *see id.* at 26. Plaintiff's failure to respond to these arguments can and should be taken as a concession. *See* LCvR 7(b); *Wannall*, 775 F.3d at 428.

IV. Although Any Records Ordered To Be Disclosed Would Require Redactions, that Issue Only Arises if Plaintiff Has Stated a Claim for Relief.

Finally, BOE has argued—again in the alternative—that even if all of its other arguments are unsuccessful, plaintiff is still not entitled to the requested records without appropriate redactions. *See* Def.'s Mem. at 28. Plaintiff concedes that if the Court orders production of relevant records, redaction may be necessary. Pl.'s Opp'n at 29. Plaintiff is incorrect, however, to assert it would "be inappropriate to resolve this case prior to discovery." *Id.* at 30. No discovery is needed to conclude plaintiff has failed to state a claim.[8]

CONCLUSION

For the foregoing reasons, and for the reasons stated in BOE's motion to dismiss, the Court should dismiss plaintiff's Complaint with prejudice.

Dated: March 17, 2022.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

[8] Plaintiff's three additional arguments—that the ERIC Deceased Reports are "records" within the meaning of the Activities Disclosure Provision, Pl.'s Opp'n at 10-11; that the NVRA preempts conflicting state and local laws, *id.* at 30-31; and that ERIC membership agreements cannot override the NVRA, *id.* at 31—do not respond to any points raised in BOE's motion.

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