

**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. 23).

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 programs and activities and are therefore within the scope of the National Voter Registration Act (“NVRA”). (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 federal court in Alaska reached that conclusion under identical circumstances just a few months ago. *Pub. Interest Legal Found., Inc. v. Dahlstrom*, No. 1:22-cv-00001-SLG, 2023 U.S. Dist. LEXIS 86783 (D. Alaska May 17, 2023). The Executive Director offers no reason to reach a different conclusion here.

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 fall within statute’s plain meaning because they are records upon which DCBOE relies to determine who belongs on its official list of eligible voters. The ERIC Deceased Reports squarely “concern” a core voter list maintenance activity.

There are no irreconcilable conflicts between the NVRA and other federal laws. The Foundation seeks voter list maintenance records, not Social Security Administration or driver's license data. Regardless, any potential conflict 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. Nor can the Executive Director ignore federal regulations expressly placing the requested data outside the scope of the laws on which she relies. The Executive Director's request for sweeping extra-textual exemptions is plainly inappropriate. In any event, decisions about whether certain records may be withheld or redacted are largely factual questions that are not appropriately resolved at the motion to dismiss stage.

For the following reasons, the Executive Director's Motion should be denied.

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”).

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

¹ 52 U.S.C. § 20502(4).

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

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 maintain an accurate and current voter roll.

DCBOE Denies the Foundation Access to ERIC Deceased Reports

More than two years 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 District of Columbia 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, confirming 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.

Procedural History and Current Status of Dispute

On February 3, 2022, the Executive Director moved to dismiss the Foundation’s complaint. (Docs. 9.) On April 10, 2023, the Court denied that motion without prejudice (*See* Minute Order entered on April 10, 2023 (no docket number)), and the parties thereafter narrowed their dispute. As was explained in the parties’ status report, the Executive Director has committed to producing to the Foundation ERIC Deceased Reports that are older than three years

and has agreed to produce DCBOE-generated deceased cancellation lists with voter identification numbers, redacted only to the extent necessary to protect the source of registration. (See Doc. 22.) As of the filing of this response, the redacted DCBOE-generated deceased cancellation lists have not been provided to the Foundation. Therefore, contrary to the Defendant's assertion, (Doc. 23 at n.4), the Foundation's Request No. 2 is not resolved.³

The dispute concerning Request No. 1 also remains concrete and ripe because the Executive Director continues to deny the Foundation's request for ERIC Deceased Reports that are less than three years old. (See Doc. 22 at 1-2). The Executive Director's renewed motion to dismiss (Doc. 23) and the Foundation's response focus on those records.

While the Executive Director's production of *some* ERIC Deceased Reports is a welcomed development, it creates a glaring conflict with the Executive Director's litigation position, namely, the Executive Director's argument that *all* ERIC Deceased Reports are outside the NVRA's scope. (Doc. 23 at 9 (“[T]he language of the statute does not require disclosure of the requested information.”).) Ultimately, the basis for disclosure matters little because the Executive Director's litigation position is wrong. *All* ERIC Deceased Reports are within the NVRA's scope and the Executive Director's motion should therefore be denied.

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

³ Upon learning from the Motion that the Executive Director believed the Foundation's second request was no longer at issue, the Foundation's counsel reached out to the Executive Director's counsel to ask when the relevant records were or would be produced. While counsel provided some records that may be responsive to Request No. 1, counsel did not provide records responsive to Request No. 2. As of the filing of this response, the Foundation has not received an update on when the records responsive to Request No. 2 will be produced.

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 Foundation’s allegations, and the overwhelming weight of authority, 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).

A. The NVRA’s Text Compels a Broad Interpretation.

i. *Public Interest Legal Foundation v. Dahlstrom* Supports the Foundation.

Recently, a federal court denied a similar motion to dismiss a complaint seeking disclosure of ERIC Deceased Reports. *Public Interest Legal Foundation v. Dahlstrom* involved a request to the State of Alaska to inspect the same category of ERIC Deceased Reports the Foundation seeks in this action. *Pub. Interest Legal Found., Inc. v. Dahlstrom*, No. 1:22-cv-00001-SLG, 2023 U.S. Dist. LEXIS 86783, at *5-6 (D. Alaska May 17, 2023). The Defendant, Alaska’s Lieutenant Governor, moved to dismiss the complaint, raising arguments nearly identical to the ones the Executive Director raises here. The court rejected those arguments, finding “no reason to deviate from the plain meaning of the disclosure provision’s key terms,” and ultimately concluding that “the NVRA’s disclosure provision does not categorically exclude the ERIC data from public disclosure.” *Id.* at *17-18.

While the court believed the Bipartisan Budget Act of 2013 may prevent disclosure of certain data points, the court “allow[ed] the parties to proceed with discovery, subject to any appropriate redactions, and present any further issues to the Court with a more developed record.” *Id.* at *21. For the reasons stated herein, the Foundation disagrees that the NVRA conflicts with the Bipartisan Budget Act of 2013 but agrees that this case should likewise move forward.

ii. Other Courts Interpret the NVRA’s Text Broadly.

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

- Records concerning “efforts” to “identify noncitizen registrants.” *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 266 (4th Cir. 2021).
- Records “created pursuant to a system designed to identify ineligible voters based on their noncitizen status.” *Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 561 (M.D. Pa. 2019) (denying motion to dismiss), *summary judgment granted by Pub. Int. Legal Found. v. Chapman*, No. 1:19-CV-622, 2022 U.S. Dist. LEXIS 60585 (M.D. Pa., Mar. 31, 2022).
- Applications for voter registration with all personally identifying information except for Social Security numbers. *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) (affirming order granting summary judgment); *Project Vote/Voting for Am., Inc. v. Long*, 889 F. Supp. 2d 778, 782 (E.D. Va. 2012).
- Records concerning registrants who did not satisfy the citizenship requirements for voter registration. *Pub. Interest Legal Found. v. Bennett*, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *2 (S.D. Tex. Feb. 6, 2019) (denying motion to dismiss), *adopted by Pub. Interest Legal Found., Inc. v. Bennett*, No. 4:18-CV-00981, 2019 U.S. Dist. LEXIS 38686 (S.D. Tex. Mar. 11, 2019).
- Among other things, records showing the “[r]easons other than the most recent reason why an applicant was rejected, canceled, or otherwise not added to the voter roll” and “[t]he specific reason why applicants, assigned a status reason of ‘Error,’ ‘Hearing,’ or ‘Reject,’ were canceled.” *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1341-44 (N.D. Ga. 2016).
- The “complete list of all Mississippi voters [in] all status categories” with “each voter’s name, unique identification number, residential and mailing addresses, voting precinct code,

registration date, voter status, last date voted, and congressional district assignment.” *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014).

- The “voter registration list for [a] County that includes fields indicating name, home address, most recent voter activity, and active or inactive status,” *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 446 (D. Md. 2019) (granting motion for summary judgment), and date-of-birth information, *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020).
- “[T]he most recent voter registration list for Illinois, including fields for registered voters’ names, full dates of birth, home addresses, most recent voter activity, unique voter IDs, and voting status.” *Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS 102543, at *5 (N.D. Ill. June 1, 2021).
- “Defendants acted in violation of the Public Disclosure Provision of the NVRA when Defendants refused to make available for viewing and photocopying the full statewide voter registration list.” *Pub. Interest Legal Found. v. Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27 (C.D. Ill. Mar. 8, 2022) (granting motion for summary judgment).
- Maine’s “Voter File” is “subject to disclosure under the NVRA.” *Pub. Interest Legal Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2022 U.S. Dist. LEXIS 38875, at *13-14 (D. Me. Mar. 4, 2022).
- Awarding mandatory-injunctive relief and entering final judgment, and ordering the Texas Secretary of State to provide plaintiffs with data concerning “registered voters identified as potential non-citizens[.]” *Campaign Legal Ctr. v. Scott*, No. 1:22-CV-92-LY, 2022 U.S. Dist. LEXIS 144848, at *28 (W.D. Tex. Aug. 2, 2022), *reversed on standing grounds by Campaign Legal Ctr. v. Scott*, No. 22-50692, 2022 U.S. App. LEXIS 27312 (5th Cir. Sep. 29, 2022).

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*, 682 F.3d at 336 (internal citations omitted). Congress chose “all” to give the NVRA a sweeping reach, and that choice has enormous significance.

iii. The United States Interprets the NVRA Broadly.

The United States recently filed an *amicus curiae* brief in the case of *Public Interest Legal Foundation v. Bellow*, No. 23-1361 (1st Cir.), urging the appellate court to affirm the lower court’s holding that Maine’s voter roll is within the NVRA’s scope. Doc. 00118033423, *Public Interest Legal Foundation*, No. 23-1361 (1st Cir., filed July 25, 2023). It is United States’s position that the NVRA’s “[s]tatutory text, context, and purpose establish that Section

8(i) covers records concerning both voter registration and list-maintenance activities, including voter registration lists such as the Voter File.” *Id.* at 14.

B. 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. 23 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 ERIC Deceased Reports fit squarely within the NVRA’s text.⁴

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 District of Columbia voter roll current and accurate. The NVRA, a federal law, requires DCBOE to “conduct a general *program*

⁴ The Executive Director does not dispute that the ERIC Deceased Reports are “records” under the NVRA’s Public Disclosure Provision. 52 U.S.C. § 20507(i)(1).

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).⁵ 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 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) (emphasis added). Relevant here, “The Board’s Executive Director may enter into agreements with other Chief State Election Officials for the purpose of verifying

⁵ 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.” District of Columbia Board of Elections and Ethics, MOVING ELECTIONS FORWARD IN THE DISTRICT OF COLUMBIA: A Plan for Implementing the Help America Vote Act in the District of Columbia, Aug. 3, 2003, *Available at* https://dcboe.org/dcboe/media/PDFFiles/DC_Preliminary_State_Plan.pdf (last accessed Aug. 15, 2023) (emphasis added).

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/documents/ERIC-Bylaw-MA-FINAL.pdf> (last accessed Aug. 15, 2023). 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 touts itself as “the most effective tool available to help election officials maintain more accurate voter rolls.” <https://ericstates.org/> (last accessed Aug. 15, 2023).

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)).

The Foundation alleges that DCBOE uses 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. In other words, DCBOE relies on and uses the ERIC Reports to identify deceased registrants and cancel their registration records. The ERIC Reports thus “concern” voter list maintenance activities in every sense of the word. 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.⁶ These arguments should therefore be rejected.

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

The Executive Director protests that “the ERIC Deceased Reports are not documents reflecting the ‘implementation’ of anything by the District.” (Doc. 9-1 at 15.) This statement misstates the law. The NVRA uses the word “concerning,” not “reflecting,” and “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 “reflect” the underlying activity, much less that the records “reflect” an action taken by the Executive Director, specifically.

Even so, 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

⁶ The Executive Director claims disclosure would “further[]no legitimate purpose for plaintiff.” (Doc. 23 at 26.) That is for Congress to decide, not a District of Columbia government official. 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 “purpose” of transparency here is self-evident, and one benefit is government employees cannot hide voter list maintenance mistakes from the public.

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. (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. 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. (Doc. 23 at 14.) On the contrary, the Foundation’s Complaint alleges detailed facts about ERIC’s data analyses and DCBOE’s reliance on the same, which allows 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). (Doc. 1 ¶¶ 10-26.) The Foundation’s Complaint alleges, *inter alia*, that the District of Columbia 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 the District of Columbia’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. 23 at 12-13.) 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—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. 23 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. 23 at 15.) Her argument also depends on alleged “statutory ambiguities” that she does not establish or even identify. (Doc. 23 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.

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.”).

The Executive Director acknowledges that *Public Interest Legal Foundation v. Dahlstrom* refuted the same arguments she makes here, (Doc. 23 at 13). *See Pub. Interest Legal Found., Inc. v. Dahlstrom*, No. 1:22-cv-00001-SLG, 2023 U.S. Dist. LEXIS 86783, at *13 (D. Alaska, May 17, 2023) (rejecting argument that “the term ‘implementation’ narrows the scope of the disclosure provision to only those [records] relating to the processes a State implements to fulfill its NVRA obligations and excludes from its scope anything more granular than process information.”) (internal quotations omitted). Yet she offers no rebuttal.

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.

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; *see also Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018) (explaining that 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.”). 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. Section 8(i)(2) Provides A Floor, Not a Ceiling, and Does Not Limit Section 8(i)(1).

NVRA Section 8(i)(2) provides that “[t]he records maintained pursuant to paragraph (1),” i.e., the Public Disclosure Provision, “shall include lists of the names and addresses of all

persons to whom notices described in subsection (d)(2) are sent[.]” 52 U.S.C. § 20507(i)(2). Section 8(d)(2) describes the address-confirmation notice that must be sent to any registrant prior to cancellation. 52 U.S.C. § 20507(d)(2).

The Executive Director posits that “the explicit requirement that voter-specific information must be maintained and provided under 52 U.S.C. § 20507(i)(2) reveals that voter-specific information is not included in the Activities Disclosure Provision.” (Doc. 23 at 12.) This position defies the statute’s text and canons of construction. Section 8(i)(1) very plainly requires disclosure of “all records.” 52 U.S.C. § 20507(i)(1). “Congress provided two exceptions to the Public Disclosure Provision’s broad mandate, neither of which apply here. It is not within this Court’s purview to manufacture additional exceptions.” *Pub. Interest Legal Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2023 U.S. Dist. LEXIS 52315, at *15 n.20 (D. Me. Mar. 28, 2023); *see also Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 710 (E.D. Va. 2010) (“[T]he [NVRA] identifies the information which Congress specifically wished to keep confidential[.]”).

Furthermore, Courts have rejected the view that Section 8(i)(2) should be read as a limit on Section 8(i)(1). As the Fourth Circuit put it, “the term ‘shall include’ sets ‘a floor, not a ceiling,’” and “Section 8(i)(2) merely describes a specific set of records that must be maintained—and not an exclusive list[.]” *Project Vote*, 682 F.3d at 337; *see also Dahlstrom*, 2023 U.S. Dist. LEXIS 86783, at *18 n.81.

Congress believed disclosure of personally identifying information was necessary for effective oversight of activities that could result in the removal of a registrant. Congress believed such information is also helpful for monitoring eligibility evaluations for other reasons, including death. In fact, the NVRA’s express language and the overwhelming weight of authority make it

unreasonable to conclude that Congress intended to keep the names of registrants a secret because that would produce the absurd result of eliminating the transparency and accountability the NVRA mandates.

E. 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).

Public Interest Legal Foundation v. Dahlstrom likewise supports the Foundation on this point.

The Court does not reach the legislative history identified by the Lieutenant Governor because the text of the disclosure provision in the context of the rest of the NVRA, and particularly the act’s object and policy, is clear. *Glickman*, 83 F.3d at 830-31 (quoting *Alarcon*, 27 F.3d at 389). Regardless, several courts have rejected the Lieutenant Governor’s argument based on the legislative history that the disclosure provision is only intended to require the disclosure of voter names and addresses. Docket 40 at 17-20. This is because Congress added the terms “shall include” in the text of the disclosure provision and “the term ‘shall include’ sets ‘a floor, not a ceiling.’” *See, e.g., Long*, 682 F.3d at 337 (citation omitted).

Dahlstrom, 2023 U.S. Dist. LEXIS 86783, at *18 n.81.

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. 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.”)).

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.

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. (*See* Doc. 23 at 20-24.) 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.

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 No 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 by the Bipartisan Budget Act of 2013. (Doc. 23 at 26-27.) 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 allegedly 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 that identify D.C. registrants, which were generated by ERIC for voter list maintenance purposes. Voter list maintenance records generated by third parties, as compared to LADMF data itself, are not subject to any statutory or regulatory prohibition on disclosure under the law, or under the NVRA.⁸ 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,

⁸ The FOIA exemption for LADMF data is not to the contrary. 42 U.S.C. § 1306c(e). The Social Security Administration is subject to FOIA. *See* <https://www.ssa.gov/foia/> (last accessed Aug. 17, 2023). The LADMF’s FOIA exemption is designed to protect LADMF data sought directly from the SSA. Notably, Congress did not include a similar exemption for NVRA requests, even though the NVRA had existed for two decades when the Bipartisan Budget Act of 2013 was passed.

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 District of Columbia registrant is independently obtained from DCBOE every sixty days. (Doc. 1 ¶ 15.) ERIC allegedly 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.

It is unlikely that the Commerce Department would have clarified that independently obtained information was *not* confidential unless the Department believed that recipients of that data knew that the same information was contained in the LADMF. In other words, the independent source rule is not meant to assure cemetery owners that they may display gravestones with names and dates of death.⁹ The rule is primarily meant to allow the recipients of LADMF data to share it they independently possessed the same data. For example, the John Hancock Life Insurance Company is authorized to access the LADMF.¹⁰ Presumably, the John

⁹ Indeed, it is nonsensical for the Executive Director to suggest that the names, dates of birth, and dates of death of all deceased persons would be confidential if the independent source rule did not exist.

¹⁰ https://www.ntis.gov/ladmf/ladmf_assets/DMFcertifiedList.pdf (last accessed August 4, 2023).

Hancock Life Insurance Company uses the LADMF to confirm whether a policy holder is deceased and eligible for insurance benefits. Under the Executive Director's reading of the law, John Hancock Life Insurance Company could not share the policy holder's names (the deceased) with beneficiaries because the names of the deceased were confirmed using the LADMF. Such an absurd result is not what Congress or the Commerce Department intended.

Other than date of death, neither ERIC nor the LADMF provides DCBOE with data it did not independently possess (or provide to ERIC). What ERIC tells DCBOE is nothing more than which registrants are deceased. In other words, DCBOE learns only "fact of death." When the LADMF regulations were proposed, the Commerce Department's National Technical Information Service (NTIS) made clear that "fact of death" is not protected information.

NTIS points out that "fact of death," *i.e.*, the fact that a person is no longer living, confirmation of which was identified by some commenters as important for legitimate business purposes, is not an element of the statutory definition of the term "Death Master File," and will not be considered by NTIS to be equivalent to "date of death" under the final rule.

81 FR 34882, 34883.

The creation of the ERIC Deceased Reports can easily be reimagined in the following way: The Executive Director holds in her hand a list containing each D.C. registrant's name, address, date of birth, and voter identification number. The Executive Director holds up the list so that ERIC can see it. ERIC then, allegedly, consults the LADMF, looking for names that match the names on the Executive Director's list. When ERIC finds a match, ERIC points to that name on the Executive Director's list. The Executive Director circles the name and proceeds with cancellation procedures. Other than "fact of death," did ERIC provide the Executive Director with any data that the Executive Director did not already have? No. The Executive Director already possessed each registrant's name, address, and date of birth. In other words, that

information was independently obtained, and therefore not LADMF data. *See* 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 registrants ERIC identified as deceased. (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.¹¹

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).

DCBOE is apparently proof that uncertified entities may use records and data which may have previously utilized LADMF data to produce separate documents or other non-LADMF records. The Commerce Department publishes a list of persons and entities certified to receive

¹¹ To be clear, the Foundation maintains its request for the ERIC Deceased Reports in their entirety.

LADMF data: https://www.ntis.gov/ladmf/ladmf_assets/DMFcertifiedList.pdf. As of August 1, 2023, the DCBOE is not listed as being so certified. DCBOE receives the ERIC Deceased Reports because it nevertheless satisfies the necessary criteria, even while they are not certified by the Commerce Department (or because the information contained in the reports is not LADMF data due to the independent source rule).

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. ERIC Deceased Reports Do Not Contain or Rely on 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. 23 at 6-7, 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.” But in any event, the DPPA is irrelevant here because, according to ERIC, DPPA data is not used to create the ERIC Deceased Reports.

ERIC’s website hosts a document entitled, “ERIC Reports: Legal Protections and Disclosure.” Available at https://ericstates.org/wp-content/uploads/documents/ERIC_Reports_Legal%20Protections_and_Disclosure_Chart.pdf

(last accessed Aug. 16, 2023). The document asks and answers questions about the data used to create each report ERIC generates for member states. Relevant here, the document asks, “Is Motor Vehicle Department Data (MVD) in the report?” With respect to the “Deceased Voter” report, the document answers, “No.” *Id.* The document also asks, “Is the data in the report protected under the Driver’s Privacy Protection Act?” With respect to the “Deceased Voter” report, the document answers, “No.” *Id.* The DPPA is thus irrelevant here.¹²

In any event, 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 is especially true for the Foundation’s alternative offer to receive the ERIC Deceased Reports with nothing more than voter identification numbers.

Under these circumstances, dismissal is plainly inappropriate.

VI. Neither FOIA Nor the Privacy Act Compel Dismissal.

Permitting disclosure of ERIC Deceased Reports does not require the Court to invalidate either FOIA or the Privacy Act. (Doc. 23 at 21-22.) For starters, Congress chose a different standard for the NVRA than it chose for those laws. “[T]he [NVRA] identifies the information which Congress specifically wished to keep confidential,” *Project Vote*, 752 F. Supp. 2d at 710, and that information is limited to two things not implicated here, 52 U.S.C. § 20507(i)(1). Congress deliberately opted for broad disclosure in the NVRA because “[p]ublic disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections.” *Project Vote*, 682 F.3d at 339-40. The Executive Director asks this Court to rewrite the NVRA to include exemptions Congress did not intend.

¹² The document also references the Bipartisan Budget Act of 2013 and LADMF regulations. For the reasons stated herein, the Foundation disagrees that these laws pose barriers to disclosure.

The Foundation knows of no case where FOIA or the Privacy Act have been grounds to *dismiss* an NVRA claim. Even in the limited instances where FOIA or the Privacy Act were considered relevant, the court permitted limited *redactions*, and only for highly sensitive data like Social Security numbers and birth dates—not names and addresses. *See Project Vote*, 208 F. Supp. 3d at 1345. Even one of those courts “acknowledge[d] that there may be circumstances that justify the disclosure of voter registrants’ birthdates.” *True the Vote*, 43 F. Supp. 3d at 739. Other courts have considered dates of birth within the NVRA’s scope, *Judicial Watch*, 455 F. Supp. 3d 209; *Project Vote*, 889 F. Supp. 2d at 781 (“Congress has made its intent clear with regard to disclosure of an applicant’s address, signature, and birth date; disclosure of that information, unlike SSNs, is required by the statute.”). “It is not the province of this court ... to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting NVRA Section 8(i)(1)[.]” *Project Vote*, 682 F.3d at 339.

Furthermore, the interests underlying FOIA and the Privacy Act are far more attenuated with respect to records concerning deceased registrants. “[D]eath clearly matters, as the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living.” *Campbell v. United States DOJ*, 164 F.3d 20, 33 (D.C. Cir. 1998). Moreover, as is explained above, “fact of death” is not protected LADMF data. 81 FR 34882, 34883. Last, the Executive Director has undermined the entire premise of her privacy arguments by disclosing the DCBOE-generated list of registrants canceled for reason of death, which includes the names and addresses of thousands of deceased registrants. (Doc. 1 ¶ 46; Doc. 23 at 7.) That information—which was correctly disclosed—is also contained in the ERIC Deceased Reports. The Foundation knows this because the Executive Director has produced ERIC Deceased Reports older than three years.

Considering all the foregoing, the Executive Director cannot credibly maintain that disclosure of the reports would nevertheless constitute a “clearly unwarranted invasion of personal privacy” under FOIA. (Doc. 23 at 21-22 (quoting 5 U.S.C. § 552(b)(6).)

VII. 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 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”).

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.

VIII. Any D.C. Law that Prohibits Disclosure of Date of Birth Information Is Preempted and Unenforceable.

DCBOE raised D.C. law as 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 3-510.¹³ 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,

¹³ To be clear: the Foundation does not want and has never asked for Social Security numbers.

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-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.”); *see also Dahlstrom*, 2023 U.S. Dist. LEXIS 86783, at *22 (“The Foundation has made a plausible claim that State law may be preempted by the NVRA, but the parties have provided only limited briefing on this issue.”); *Pub. Interest Legal Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2023 U.S. Dist. LEXIS 52315, at *20 (D. Me. Mar. 28, 2023) (“Thus, the Court cannot ignore the plain language of the NVRA and Congress’s purposes to safeguard Exception J and its privacy protections. In sum, the Court concludes that the NVRA preempts Exception J.”); *Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27 (“The Foundation has also shown that Section 5/1A-25 conflicts with, and is preempted by, the Public Disclosure provision insofar as Section 5/1A-25 prohibits the photocopying and duplication of the same list.”); *ACORN v. Edgar*, 880 F. Supp. 1215, 1222 (N.D. Ill. 1995). It thus makes no difference that D.C. law makes date-of-birth information confidential.

IX. 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: August 18, 2023.

Respectfully submitted,

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** Motion for admission pro hac vice granted*

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2023, 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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