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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PUBLIC INTEREST LEGAL FOUNDATION, INC., *Plaintiff*, *v.* **KEVIN MEYER,** in his official capacity as Lieutenant Governor for the State of Alaska, *Defendant*.	Civil Case No. 1:22-cv-00001-SLG

PLAINTIFF PUBLIC INTEREST LEGAL FOUNDATION'S
RESPONSE TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Imagine the following scenario: election officials receive a list from a non-governmental, third-party contractor containing hundreds or even thousands of registered voters who are suspected of being ineligible to vote. Consistent with state law, election officials "promptly" cancel the voter registration of every individual on that list. *See* Alaska Stat. § 15.07.130(c). Election officials then send notice to all canceled registrants, notifying them of their removal from the official list of eligible voters.

Oh no! Some of those individuals were not actually ineligible to vote! Puzzled by their receipt of cancellation notices, those voters contact state election officials and ask to see the proof that led to their disenfranchisement. "Sorry," says the government, "that information is confidential."

"But look here," say the voters, "federal law says 'all' voter list maintenance records are open to public inspection." 52 U.S.C. § 20507(i)(1).

"Yes, it does." says the government. "You can look at *other* records, but not the ones you want to see."

"But look here," say the voters, "experts say your list maintenance contractor sometimes makes mistakes. Voting rights are important. You must get this right." (Doc. 1 ¶¶ 26-30.)

"Sorry," says the government, "you still cannot see the records that led to your removal."

"Hello. We are a legal foundation that acts in the public interest. We study voter registration records and take action when registrants are added, maintained, or removed in error. Can we see those records?" (Doc. 1 ¶ 4.)

"No," says the government. "You cannot see those records either. Just trust us."

This scenario is not a fiction. It is essentially the state of so-called government transparency in Alaska, and the position Defendant ("Alaska") takes in this action. The National Voter Registration Act ("NVRA") is not a "take our word for it" statute, as Alaska believes. Congress wrote something different. Congress requires full, not selective transparency.

The Foundation's Complaint alleges that the requested records "concern" the implementation of Alaska's voter list maintenance program and are, therefore, within the NVRA's scope. (Doc. 1 ¶¶ 15-24.) The Foundation further alleges that Alaska is denying the

Foundation's records request in violation of the NVRA and injuring the Foundation. (Doc. 1 ¶¶ 31-52.) The Foundation has thus stated a plausible claim for relief.

Alaska's Motion to Dismiss relies on an incorrect interpretation of the NVRA that strays far from the plain-meaning analysis this Court must conduct. In statutory interpretation cases, the statute's plain language is preeminent, and where unambiguous, it is determinative. The NVRA's words unambiguously require public inspection of "all records concerning the implementation" of voter list maintenance programs and activities. 52 U.S.C. § 20507(i)(1). The requested records are subject to public inspection under the NVRA's plain meaning because they are records upon which Alaska relies to determine who belongs on its official list of eligible voters. In fact, Alaska concedes that the requested reports are "considered" when the state removes deceased registrants. (Doc. 40 at 13.) Those reports thus squarely "concern" a core voter list maintenance activity under 52 U.S.C. § 20507(i)(1).

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 Alaska's *voluntary* participation in ERIC. It is thus Alaska, not the Foundation, that seeks to circumvent federal law through its strategic choices. Alaska cannot abrogate the NVRA as a matter of law no matter its potentially good intentions. Nor can Alaska ignore federal regulations expressly placing the requested data outside the scope of the laws on which Alaska relies. Alaska'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.

Why registrants are removed from Alaska's voter roll should not be shrouded in secrecy. Congress agreed and allowed the public to monitor list maintenance activities through access to public records. Not just *some* records, but "all records." 52 U.S.C. § 20507(i)(1). Alaska's concealment of the requested records violates federal law. Because the Foundation plausibly alleges such a violation, the Motion to Dismiss should be denied.

BACKGROUND

The Foundation is a non-profit, non-partisan, 501(c)(3) organization that specializes in election and voting rights issues. (Doc. 1 ¶ 4.) For its work, the Foundation often relies upon the NVRA, 52 U.S.C. §§ 20501 *et seq*. Section 8(a)(4)(A) of the NVRA requires each state to conduct a "general program" to remove decedents from the voter roll. Section 8(i)(1) of the NVRA acts like a stronger version of the federal Freedom of Information Act ("FOIA"), requiring election officials to "make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities 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").

Since 2016, Alaska has been a member of the Electronic Registration Information Center ("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 ¶ 9.) In Alaska's words, ERIC "helps states improve the accuracy of their voter rolls." (Doc. 40 at 4.) From ERIC, Alaska 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).)

Alaska is contractually obligated to use the ERIC Deceased Reports to conduct voter list maintenance. (Doc. 1 ¶¶ 20-23.)

More than one year ago, on August 11, 2021, the Foundation contacted the Alaska Division of Elections and requested 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").) On September 16, 2021, Alaska denied the Foundation's request for the ERIC Deceased Reports. (Doc. 1-2 (hereafter, the "Denial Letter").) Alaska granted in part and denied in part the Foundation's second request and provided "a list of deceased voters DOE removed from the voter registration list between January 1, 2019 and August 11, 2021," but withheld "dates of birth" on the grounds that such information is confidential under Alaska law. (Doc. 1-2.)

On September 20, 2021, the Foundation notified Defendant Kevin Meyer, Alaska's chief election official, that he and his office 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 ¶ 36; Doc. 1-3 (hereafter, the "Notice Letter").) The Foundation explained that its request could be satisfied if Alaska produced the ERIC Deceased Reports with nothing more than voter identification numbers. (Doc. 1 ¶ 41.) Alaska did not respond to the Notice Letter. (Doc. 1 ¶ 42.)

STANDARD OF REVIEW

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

ARGUMENT

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

The Foundation's allegations allow the 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. Courts Interpret the NVRA's Text Broadly.

A brief survey of relevant decisions is helpful and instructive. Courts in multiple circuits have interpreted the Public Disclosure Provision expansively and found that it compels broad disclosure of voter list maintenance records. The following are types of records or activities held to be or plausibly be within the NVRA's scope:

- Records concerning "efforts" to "identify noncitizen registrants." *Pub. Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 266 (4th Cir. 2021) (vacating order granting motion to dismiss).
- Records "created pursuant to a system designed to identify ineligible voters based on their noncitizen status." *Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 561 (M.D. Pa. 2019) (denying motion to dismiss), *summary judgment granted by Pub. Int. Legal Found. v. Chapman*, No. 1:19-CV-622, 2022 U.S. Dist. LEXIS 60585 (M.D. Pa., Mar. 31, 2022).
- Applications for voter registration with all personally identifying information except for Social Security numbers. *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) (affirming order granting summary judgment); *Project Vote/Voting for Am., Inc. v. Long*, 889 F. Supp. 2d 778, 782 (E.D. Va. 2012).
- Records concerning registrants who did not satisfy the citizenship requirements for voter registration. *Pub. Interest Legal Found. v. Bennett*, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *2 (S.D. Tex. Feb. 6, 2019) (denying motion to dismiss), *adopted by Pub. Interest*

Legal Found., Inc. v. Bennett, No. 4:18-CV-00981, 2019 U.S. Dist. LEXIS 38686 (S.D. Tex. Mar. 11, 2019).

- "The date voter registration applications were signed by an applicant"; "[t]he date applications were entered into the [voter registration] Database"; "[e]ach change in an applicant's voter registration status"; "[w]hether an election official manually, instead of mechanically, changed the status of one or more applicants"; "[r]easons other than the most recent reason why an applicant was rejected, canceled, or otherwise not added to the voter roll"; "[t]he specific reason why applicants, assigned a status reason of 'Error,' 'Hearing,' or 'Reject,' were canceled"; '[r]ecords for canceled applicants with a status reason other than one of the eleven options in the drop-down menu in the Database" and, records concerning letters sent to applicants "to the extent the letters concern the status or completeness of an individual's application or otherwise relate to the evaluation of an individual's eligibility." *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1341-44 (N.D. Ga. 2016).
- The "complete list of all Mississippi voters [in] all status categories" with "each voter's name, unique identification number, residential and mailing addresses, voting precinct code, registration date, voter status, last date voted, and congressional district assignment." *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014).
- The "voter registration list for [a] County that includes fields indicating name, home address, most recent voter activity, and active or inactive status," *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 446 (D. Md. 2019) (granting motion for summary judgment), and date-of-birth information, *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020).
- "[T]he most recent voter registration list for Illinois, including fields for registered voters' names, full dates of birth, home addresses, most recent voter activity, unique voter IDs, and voting status." *Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS 102543, at *5 (N.D. Ill. June 1, 2021).
- "Defendants acted in violation of the Public Disclosure Provision of the NVRA when Defendants refused to make available for viewing and photocopying the full statewide voter registration list." *Pub. Interest Legal Found. v. Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27 (C.D. Ill. Mar. 8, 2022) (denying motion to dismiss and granting the Foundation's motion for summary judgment).
- Maine's "Voter File" is "subject to disclosure under the NVRA" and "Plaintiff has pleaded sufficient facts that, when taken as true, establish a plausible claim of obstacle preemption" against various use-restrictions for Voter File. *Pub. Interest Legal Found., Inc. v. 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 "the following information pertaining to the 11,246 registered voters identified as potential non-citizens:

  a. Voter name (first, middle, last, suffix);
  g. Voter Identification Number;
  h. Date of voter registration application;
  i. Effective date of voter registration;
  j. Status of voter registration;

k. Any known prior voter registration statuses and dates of changes in voter registration status;
l. All known voting history;
m. Issuance date of current driver's license, personal identification, or election identification certificate; and
n. Date on which individual provided the DPS with documentation indicating lawful presence but not U.S. citizenship, if known."

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 recognize and reflect the broad scope of the NVRA's plain language. As one federal appellate court prudently recognized, the NVRA's "use of the word 'all' [as a modifier] suggests an expansive meaning because 'all' is a term of great breadth." *Project Vote*, 682 F.3d at 336 (internal citations omitted). Congress chose "all" to give the NVRA a sweeping reach, and that choice has enormous significance.

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

The parties agree that statutory interpretation beings with the statute's text. (Doc. 40 at 11.) "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citations and quotations omitted); *See also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted). "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (citations and quotations omitted). Under these principles, the requested records fit comfortably within the NVRA's reach.

The Eastern District of Virginia concluded that "a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state." *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697 (E.D. Va. 2010); *see also True the Vote*, 43 F. Supp. 3d at 719-20 ("A list of voters is 'accurate' if it is 'free from error or defect' and it is 'current' if it is 'most recent.'") (citations omitted).

The Foundation's Complaint alleges that Alaska conducts programs and activities to keep its voter roll current and accurate. (Doc. 1 ¶ 24.) In fact, the NVRA, a federal law, requires Alaska to "conduct a general *program* that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of … the death of the registrant." 52 U.S.C. § 20507(a)(4)(A) (emphasis added). Alaska concedes this. (Doc. 40 at 13 ("The Division has a program to ensure the accuracy and currency of the voter list by removing deceased voters, in accordance with the NVRA.").) The Help America Vote Act ("HAVA"), another federal law, requires Alaska to also have "[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).

State law also provides for "[v]oter registration list maintenance." Alaska Stat. § 15.07.130. With respect to deceased registrants, Alaska "obtain[s] from the bureau of vital statistics a certified list of all residents over 18 years of age who have died or who have been presumptively declared dead. Promptly after receipt of each list, but, in any event, at least once each month, the director shall cancel the registration of all deceased voters." Alaska Stat. § 15.07.130(c).

Alaska is afforded discretion to share information with "another state or an organized group of states for the purpose of ensuring the accuracy of the state's voter registration list …."

Alaska Stat. § 15.07.195(c)(5). Alaska has exercised its discretionary authority to join ERIC and share information with ERIC's members for purposes of keeping Alaska's voter registration list accurate. Alaska's membership in ERIC is a "program" or "activity" within the purview of the NVRA because it is conducted to make sure Alaska's eligible voter list is "errorless" and contains the "most recent" information for each registrant. Indeed, ERIC's "sole mission" is to "improve the accuracy of America's voter rolls and increase access to voter registration for all eligible citizens." https://ericstates.org/ (last accessed Sept. 27, 2022). Alaska readily concedes that ERIC "helps states improve the accuracy of their voter rolls[.]" (Doc. 40 at 4.)

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

The Foundation alleges that Alaska uses the ERIC Deceased Reports to correct or update voter registration records so that those records are accurate. (Doc. 1 ¶¶ 20-24.) By doing so, Alaska fulfills—at least in part—its federal (NVRA and HAVA) and state (Alaska Statutes) voter list maintenance obligations. Alaska even concedes that the ERIC Deceased Reports "concern" or "relate to" the state's voter list maintenance activities. As Alaska explains in its Motion, "The deceased voter reports are third-party reports provided to the Division that contain information on potentially deceased voters." (Doc. 40 at 14.) The ERIC Deceased Reports are one of the "inputs the Division consider[s]" when implementing the voter list maintenance program. (Doc. 40 at 13.) In other words, Alaska relies on and uses the ERIC Deceased Reports

to identify deceased registrants and cancel their registration records. The ERIC Deceased Reports thus "concern" voter list maintenance activities in every sense of the word.

Project Vote v. Long reinforces this conclusion. In that case, the plaintiff filed an NVRA action to compel disclosure of certain completed applications for voter registration. *Project Vote*, 682 F.3d at 332-33. 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, Alaska uses the ERIC Deceased Reports to evaluate and verify whether each registrant is alive—arguably the most fundamental voter qualification. Those reports are thus essentially "the means by which an individual provides the information necessary for [Alaska] 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" Alaska's voter list maintenance program, "but are also integral to its execution." *Id*. There is no credible argument to the contrary.

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

Alaska's efforts to narrow the NVRA's scope are contrary to the NVRA's unambiguous text. Furthermore, Alaska's interpretation is plainly contrary to the NVRA's intent because it would absurdly obliterate the transparency Congress intended.

A. Congress Used the Word "Concerning," Not "Containing."

Alaska protests that "PILF does not allege that [the] reports contain any information regarding Division programs or activities, much less their implementation." (Doc. 40 at 14.) Alaska misstates the law. The NVRA uses the word "concerning," not "contain[ing]." 52 U.S.C. § 20507(i)(1). "Concerning" casts a wider net than "containing." Using the ordinary meaning of the word Congress actually used, records are subject to public disclosure if they simply "relate to" the "implementation" of a voter list maintenance activity. *True the Vote*, 43 F. Supp. 3d at 719. There is no requirement, in the text or context, that records "contain" information that reflects or explains the underlying activity.

Even so, the Complaint alleges that the ERIC Deceased Reports *do* reflect voter list maintenance activities performed by ERIC on Alaska's behalf. (Doc. 1 ¶ 17 ("ERIC 'process[es] data that relates to the maintenance of [Members'] voter registration lists and provide[s] regular (at least on a monthly basis) reports to [each] Member.'" (quoting ERIC Membership Agreement at Preamble).) The ERIC Deceased Reports are the end product of ERIC's comparison between Alaska's registration files and verifiable death records.[1] (*See* Doc. 1 ¶¶ 15-20.) The ERIC

[1] It makes no difference that ERIC does the comparison because the NVRA very clearly requires disclosure of "all records," not just records created by the States. 52 U.S.C. § 20507(i)(1). Furthermore, ERIC is a separate entity in name only. ERIC's website asks, "Who Controls ERIC?" ERIC answers, "The states." FAQs, https://ericstates.org/. ERIC's website also asks, "Who Pays for ERIC Operations." ERIC again answers, "The member states." *Id*. If States could avoid their NVRA transparency obligations by simply outsourcing voter list maintenance operations to third

Deceased Reports ultimately decide who will remain active on the voter rolls, and who will not, because they have died. The Foundation's allegations are thus sufficient even under the non-existent statutory language Alaska has fancied.

There is nothing conclusory about the Foundation's allegations. On the contrary, the Foundation's Complaint alleges detailed facts that methodically allow this Court "to draw the 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 Alaska is a member of ERIC (Doc. 1 ¶ 13), that Alaska, from ERIC, "receives reports that show … voters who have died" (Doc. 1 ¶¶ 18, 20), and that Alaska uses those reports—consistent with its statutory and contractual obligations—to evaluate who should and who should not be removed from Alaska's official list of eligible registrants, (Doc. 1 ¶¶ 21-23). Based on those allegations, the Foundation's Complaint alleges that "Alaska uses ERIC Deceased Data to conduct voter list maintenance programs and activities required by state law and the NVRA, including cancellation of registrations belonging to deceased individuals. *See* 52 U.S.C. § 20507(a)(4)(A)." (Doc. 1 ¶ 24.) The Foundation alleges facts, not labels, and its claim for relief is sufficiently "plausible." *Twombly*, 550 U.S. at 570.

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

Alaska next posits that the term "implementation" limits the NVRA's scope. (Doc. 40 at 12.) More specifically, Alaska claims, that "with the word 'implementation,' the statute

parties, it would defeat the statute's purpose. *See Kemp*, 208 F. Supp. 3d at 1336 (rejecting interpretation that "would allow States to circumvent their NVRA disclosure obligations"). Fortunately, Congress guarded against that possibility by drafting the NVRA's language broadly enough to encompass all programs and activities, no matter who performs them.

'restrict[s] the scope of the records required to be disclosed' to only those 'relating to the processes a State implements to fulfill its NVRA obligations.'" (Doc. 40 at 11 (quoting *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1339 (N.D. Ga. 2016)).) That is not near what *Project Vote, Inc. v. 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 explicitly 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. In short, the NVRA requires disclosure of both process records and individual applicant records. 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. Alaska's arguments to the contrary miss the reasoning and real outcome in *Kemp.*

It is not necessary to explore the outer bounds of the term "implementation" here because it is plausibly alleged and not contested that the ERIC Deceased Records are considered, used, and relied on to keep Alaska'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.

Alaska next claims that the NVRA is limited to "project[s] that the state actively pursues," which Alaska defines as those "processes that can result in actual changes to voter registration lists." (Doc. 40 at 18.) The ERIC Deceased Reports do not fall within this definition because, in Alaska's view, the underlying activity is "the mere receipt and review of information from a third-party." (*Id.*)

Again, Alaska 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, Alaska admits that its argument is entirely based on the NVRA's "broader context." (Doc. 40 at 17.) The argument also depends on alleged textual ambiguities that Alaska does not even identify. (Doc. 40 at 16.) The distinction also does not help Alaska here because the requested records plainly relate to Alaska's ongoing and active process to identify and remove deceased registrants, a process mandated by federal law, Alaska law, and the ERIC Membership Agreement, which requires Alaska 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), and this Court should decline the invitation to add words to the NVRA that Congress did not use, *Am. Civil Rights Union v. Phila. City Comm'rs*, 872 F.3d 175, 182-83 (3d Cir. 2017) ("[W]e will not amend the [NVRA] by reading that requirement into its text when Congress obviously chose not to do so.").

Consistent with Supreme Court guidance, courts have construed "program" and "activity" to "carry their ordinary, contemporary, common meaning." *Pioneer Inv. Servs.*, 507

U.S. at 388, and have concluded that "[a] 'program' is 'a schedule or system under which action may be taken towards a desired goal' and an 'activity' is 'a specific deed, action, function, or sphere or action,'" *True the Vote*, 43 F. Supp. at 719; *Kemp*, 208 F. Supp. 3d at 1337-38 (same). The word "active" is found nowhere in the law and "a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency." *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Reves v. Ernst & Young,* 507 U.S. 170, 177 (1993) (citations and quotations omitted); *Kemp*, 208 F. Supp. 3d at 1336 n.25 ("The Court is not permitted to insert limiting language, such as 'physical' or 'non-electronic,' into the statute.").

Other courts have both explicitly and implicitly rejected similar attempts to limit the NVRA's scope in a way that contravenes its plain language. In *Public Interest Legal Foundation v. Boockvar*, the Foundation sought records from the Commonwealth of Pennsylvania concerning voter registration by and removal of registered foreign nationals. *Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 555-57 (M.D. Pa. 2019). 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).

Alaska'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 (emphasis added). In other words, the Fourth Circuit refutes Alaska's claim that "the mere receipt and review of information from a third party" falls outside the scope of the law. (*See* Doc. 40 at 18.) 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 [Alaska] to determine his eligibility to vote"—in this instance, his 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 703. 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. *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 Alaska believes it 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.

By exempting information reviewed by election officials, Alaska 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.

Alaska 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. Alaska's proffered interpretation is thus contrary to both the text and intent of the NVRA. Congress required transparency in the list maintenance process. The Public Disclosure Provision was designed to allow the public "to monitor[] the state of the voter rolls and the adequacy of election officials' list maintenance programs." *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12-13 (S.D. Fla. Mar. 30, 2018). Alaska frustrates the NVRA's design.

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." Alaska's interpretation ensures that disenfranchising mistakes will stay hidden from public scrutiny. Such an interpretation would thus produce an absurd result, and "absurd results are to be avoided." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).

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

Finding no support in the NVRA's text, structure, or purpose, Alaska turns to legislative history. This Court should decline to consider it. The Senate Report on which Alaska relies is not the law and therefore has no value, especially when it is refuted by the NVRA's plaint text. *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 588 n.7 (9th Cir. 1981) ("In interpreting statutes, we are not free to substitute legislative history for the language of the statute."). In short, "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).

Alaska does not identify which of the NVRA's words are ambiguous, much less why any of those words is ambiguous. Nor could it. As explained earlier and worth noting again, each of the NVRA's operative words has a clear and common dictionary definition that comports with the statute's context and purposes. To the Foundation's knowledge, none of the courts that have considered the NVRA's text has identified *any ambiguity*. In fact, at least one court has expressly concluded that "there is no ambiguity here." *Kemp*, 208 F. Supp. 3d at 1341.[2]

[2] *Kemp* continues, "[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.

Courts have similarly rejected Alaska's suggestion that Section 8(i)(2) should be read as a limit on Section 8(i)(1). Section 8(i)(2) specifies that the records subject to disclosure under 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). As the Fourth Circuit recognized, "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. Alaska is not even acting consistent with its own argument. Alaska claims "the Disclosure Provision is primarily directed at records of where voters live." (Doc. 40 at 19.) Yet Alaska is concealing the address information contained in the ERIC Deceased Reports, contrary to what Alaska declares Congress cared most about. Nevertheless, Congress did not care only about address information. Congress cared about "all records." We know this because that is what Congress actually wrote in the law. 52 U.S.C. § 20507(i)(1).

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."). We must remember that prior to the NVRA, there were virtually no federally mandated voter list maintenance requirements—except for, perhaps, more generally applicable civil rights laws, like the Voting Rights Act. Congress drafted the NVRA broadly on purpose in order to capture the varying and diverse list maintenance activities of 44 states and the District of Columbia. 52 U.S.C. § 20503(b) (explaining that NVRA does not apply to states with same-day registration).

There is nothing inherently suspect about a broadly written statute, and "[a]s a general matter of statutory construction, a term in a statute is not ambiguous merely because it is broad in scope. In employing intentionally broad language, Congress avoids the necessity of spelling out

in advance every contingency to which a statute could apply." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 310 (3d Cir. 2010) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) ("holding that the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'")).

III. There is No Irreconcilable Conflict Between the NVRA and other Federal Laws.

A. There is No Conflict with Respect to Disclosure of Deceased Registrant Records Generally.

There is plainly no conflict between the NVRA and other federal laws 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 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 data, *id*. at 339. None of the other federal laws Alaska cites precludes, or even addresses, disclosure of deceased registrant records. At best for Alaska, these are factual questions that are not appropriately resolved at the Rule 12 stage.

B. The NVRA Does Not Conflict with Laws Governing the LADMF.

1. The Foundation Does Not Seek Any Confidential Records.

Alaska is incorrect in asserting the Foundation seeks records protected from disclosure. The Limited Access Death Master File ("LADMF") is a product made available by the Department of Commerce which includes the "the name, social security account number, date of birth, and date of death of deceased individuals" who died "during the three-calendar-year period beginning on the date of the individual's death." 15 C.F.R. § 1110.2. 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 provided by ERIC to Alaska that were generated by ERIC for voter list maintenance purposes. Records from third parties, as compared to the LADMF itself, are not subject to any statutory or regulatory prohibition on disclosure under the law, or under the NVRA. Because the Foundation does not seek or want LADMF data, there is no conflict.

2. The 2019 ERIC Deceased Report Is Partially or Entirely Outside the Scope of LADMF Regulations.

The LADMF encompasses only individuals who have died in the last three years. 15 C.F.R. § 1110.2. ("Limited Access DMF. The DMF product made available by NTIS which includes DMF with respect to any deceased individual at any time during the three-calendar-year period beginning on the date of the individual's death."). Death records older than three years are not LADMF data and those records are therefore not subject to LADMF licensing and disclosure restrictions. In fact, death records older than three years are defined as "Open Access DMF," which is "[t]he DMF product made available by NTIS which does not include DMF with respect to any deceased individual at any time during the three-calendar-year period beginning on the date of the individual's death." 15 C.F.R. § 1110.2.

It is October 2022, so the 2019 ERIC Deceased Report includes registrants who died more than three years ago. Even if the LADMF applied here, the LADMF data used to identify the registrants on the 2019 report are not subject to LADMF licensing and disclosure restrictions. Each day that passes, more and more data become three years old and similarly free of those restrictions. Alaska may not rely on its LADMF-based defenses for those records.

3. Personally Identifying Information Obtained Through an Independent Source Is Not Subject to LADMF Protections.

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

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

15 C.F.R. § 1110.2 (emphasis added).

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. For example, if a registrant's name is contained in both LADMF records and voter registration records, the registrant's name is not confidential. This is significant because ERIC independently obtains a multitude of voter registration data, *e.g.* name and address, from Alaska every sixty days. (Doc. 1 ¶ 15.) ERIC compares that information to LADMF data and tells Alaska which registered Alaskans are deceased. (Doc. 1 ¶¶ 17-18.) In other words, the ERIC Deceased Reports contain information that was independently obtained from Alaska's voter registration records, and the personally identifying data in those reports is therefore not subject to the LADMF's disclosure restrictions. [3]

[3] The "independently obtained data" exemption is more evidence that Congress intended for LADMF regulations to operate narrowly and not completely blanket all data that crosses paths with LADMF data. Recall that it is Alaska that has strategically chosen to compare its voter registration files to the LADMF. No matter its good intentions, Alaska cannot abrogate the

In any event, the extent to which personally identifying information is contained in ERIC Deceased Reports is a factual question that is appropriately answered following discovery and, if necessary, *in camera* review.

4. Voter Identification Numbers Are Not LADMF Data.

To avoid litigation, the Foundation offered to receive the ERIC Deceased Reports with only voter identification numbers. (Doc. 1 ¶ 41.) Alaska refused that offer. (Doc. 1 ¶ 42.) But voter identification numbers are not protected by LADMF regulations because they are not contained in the LADMF. This is therefore not a valid basis to withhold this specific data.[4]

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

Even if LADMF data appears in the ERIC Deceased Reports—which is a factual question not properly before this Court at this time—the Foundation is likely authorized to receive it. Contrary to what Alaska suggests, 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(a)(1)-(4).

Alaska is proof that uncertified entities may receive records generated using LADMF data. The Commerce Department publishes a list of persons and entities certified to receive LADMF data: https://ladmf.ntis.gov/docs/DMFcertifiedList.docx. As of September 12, 2022, the State of Alaska is not reported as being so certified. Alaska receives records generated using LADMF data either because (1) Alaska nevertheless satisfies the necessary criteria, even while it

NVRA. Proper application of the "independently obtained data" exemption provides this Court with a reasonable way to give effect to the NVRA, while leaving LADMF regulations intact.

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

is not certified by the Commerce Department, or (2) the data contained in the ERIC Deceased Reports is independently obtained and not LADMF data to begin with.

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 Alaska receives from ERIC.

6. There Is No Indication that ERIC Deceased Reports Implicate Driver's License Record Data.

Alaska also suggests the Driver's Privacy Protection Act ("DPPA") is a reason to dismiss the complaint *entirely*. (Doc. 40 at 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 "motor vehicle record" data. The Foundation seeks voter list maintenance records created by ERIC and used by Alaska to remove registrants. The DPPA is irrelevant here.

Although Alaska is required to send ERIC "all licensing or identification contained in the motor vehicles database" every sixty days (Doc. 1 ¶ 15), little, if anything, is known about how—or even *if*—that specific data is used to identify *deceased* registrants. Alaska does not say, possibly because Alaska does not know. Recall that ERIC also identifies registrants who have changed residences. (*See* Doc. 1 ¶ 18.) Driver's license data reveals a registrant's residence, and it is more likely that ERIC uses that data to confirm residency, not vitality.

Prior to discovery, there is simply no way for the Foundation, or the Court, to evaluate Alaska's unsworn claim that the requested records implicate any protected DPPA data. This especially true for the Foundation's alternative offer to receive the ERIC Deceased Reports with nothing more than voter identification numbers, which are not DPPA data. (Doc. 1 ¶ 47.)

The interplay between the DPPA and the NVRA has been directly confronted in three cases, all of which support the Foundation. In *Public Interest Legal Foundation v. Reed*, No. 16-cv-01375 (E.D. Va., filed Oct. 31, 2016), the Foundation sought records relating to the cancellation of noncitizen registrants, including a cancellation list and copies of each canceled registrant's application for registration. *Id*., Complaint (Dkt. 1). The court rejected the defendant's DPPA defense:

> Defendant has moved to dismiss the Complaint on the grounds that the privacy provision of the [DPPA] … overrides the public disclosure provision of the NVRA under the circumstances of this case. The Court finds that the DPPA does not apply to the disclosure of the voter information requested by Plaintiff. Because Plaintiff has stated a plausible claim for declaratory and injunctive relief, it is hereby ORDERED that Defendant Susan Reed's Motion to Dismiss is DENIED.

Order (Dkt. 24 at 1-2).

In the lone case where the DPPA was held to apply, the court applied it narrowly, according to its text, and, importantly, in a way that did not invalidate the NVRA.

> [The DPPA] applies only to the personal information obtained from DMV motor vehicle records and information derived from that personal information. Our holding **does not** protect information derived from non-DMV sources even when that information is included in a record containing personal information obtained from DMV records.

Pub. Int. Legal Found. v. Chapman, No. 1:19-CV-622, 2022 U.S. Dist. LEXIS 60585, *16 (M.D. Pa., Mar. 31, 2022) (emphasis added). The court's holding thus acts like the LADMF's "independently obtained data" exception. For example, if a registrant's name and address are obtained by ERIC from Alaska's voter registration records—which they are—that information is

not protected by the DPPA. The court continued, "when only some of the information is or derives from personal information obtained from DMV records, the record or document must be disclosed with only personal information or derived information redacted." *Id*.

In the most recent case, the DPPA was held to *authorize* disclosure of DMV data contained in list maintenance records because the DPPA permits disclosure of such data for use in connection with an "investigation in anticipation of litigation." *Campaign Legal Ctr. v. Scott*, No. 1:22-CV-92-LY, 2022 U.S. Dist. LEXIS 144848, at *18-19 (W.D. Tex. Aug. 2, 2022) ("The court concludes that the Driver's Act does not prevent the Secretary from producing the Records."). While *Campaign Legal Ctr.* was recently reversed on appeal on standing grounds, *Campaign Legal Ctr. v. Scott*, No. 22-50692, 2022 U.S. App. LEXIS 27312 (5th Cir. Sep. 29, 2022), its resolution of the DPPA question remains reasonable and persuasive. The Foundation alleges that consistent with its generally programming it plans to use the requested records "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. 40 ¶ 4.) The Foundation likewise qualifies for the DPPA's "investigation in anticipation of litigation" exception. Dismissal on this basis is thus plainly inappropriate.

7. 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. 40 at 21.) For starters, Congress chose a different standard for the NVRA than it close 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. Alaska asks this Court to rewrite the NVRA to include exemptions Congress did not intend.

In no case has FOIA or the Privacy Act been considered 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, "fact of death" is not protected LADMF data. 81 FR 34882, 34883. Last, Alaska has undermined the entire premise of its privacy arguments by disclosing the statewide list of registrants canceled for

reason of death, which includes the names and addresses of thousands of deceased registrants. (Doc. 1 ¶ 34; Doc. 40 at 7.) That information—which was correctly disclosed—is also likely contained in the ERIC Deceased Reports. Considering all the foregoing, Alaska cannot credibly maintain that disclosure of the reports would nevertheless constitutes a "clearly unwarranted invasion of personal privacy" under FOIA.[5] (Doc. 40 at 21 (quoting 5 U.S.C. § 552(b)(6).)

To the extent Alaska relies on state law to avoid disclosure, those laws are without force because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution's Elections and Supremacy Clauses. *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 9 (2013); *see also ACORN v. Edgar*, 880 F. Supp. 1215, 1222 (N.D. Ill. 1995); *Project Vote*, 813 F.Supp.2d at 743 (E.D. Va. 2011); *Bellows*, No. 1:20-cv-00061-GZS, 2022 U.S. Dist. LEXIS 38875, at *14 ("Having concluded that the Voter File falls within the ambit of the NVRA's Public Disclosure Provision, the Court concludes that Plaintiff has pleaded sufficient facts that, when taken as true, establish a plausible claim of obstacle preemption."); *Matthews*, No. 20-cv-3190, 2022 U.S. Dist. LEXIS 40640, at *27 ("The Foundation has also shown that Section 5/1A-25 conflicts with, and is preempted by, the Public Disclosure provision insofar as Section 5/1A-25 prohibits the photocopying and duplication of the same list."). It thus makes no difference that Alaska law makes date-of-birth information confidential.[6] (Doc. 40 at 30-31.)

[5] Alaska references FOIA standards but does not attempt to apply them, which is another reason to disregard these arguments.

[6] Alaska argues that *Judicial Watch v. Lamone*, which authorized disclosure of birthdates under the NVRA, can be distinguished because Maryland law does not make birthdates confidential, whereas Alaska law does. (Doc. 40 at 31 n.137.) If that were true, it would turn the Supremacy Clause on its head. State law does not invalidate federal law. Federal law invalidates conflicting state law. Whether Alaska protects birthdate information is irrelevant.

8. If Any Conflicts Remain, the Remedy Is Redaction, Not Dismissal.

"[C]ourts 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). Wholesale exclusion of the ERIC Deceased Reports is the antithesis of giving the NVRA effect. The remedy, if it is needed at all, is redaction, and only to the extent it does not prevent achievement of the NVRA's transparency goals. *See Project Vote*, 813 F. Supp. 2d at 743; *True the Vote*, 43 F. Supp. 3d at 736-39; *Kemp*, 208 F. Supp. 3d at 1345; *N.C. State Bd. of Elections*, 996 F.3d at 267 (explaining that privacy concerns "do[] not render the requested documents affiliated with potential noncitizens immune from disclosure under the plain language of the NVRA").

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

IV. The Foundation's Pre-Litigation Notice Letter Was Sufficient to Include Voter Identification Numbers.

Alaska does not allege any procedural deficiencies in the Foundation's case with one minor exception. Alaska claims that the Foundation did not provide sufficient pre-litigation notice that Alaska's refusal to provide voter identification numbers for Request #2 violates the NVRA. (Doc. 40 at 29.) Alaska's attempt at gamesmanship should be rejected. The Foundation asked for voter identification numbers. (Doc. 1-1 at 2.) Alaska did not address that request in its response nor affirmatively deny it. (Doc. 1-2.) Alaska did, however, affirmatively deny the Foundation's request for dates of birth (Doc. 1-2 ("The list does not include the voters' dates of birth, because that information is confidential."). The Foundation notified Alaska's chief election officer that Alaska's refusal to provide **any** of the requested information is an NVRA violation: "Failure to permit public inspection or otherwise provide copies of the requested records is a violation of federal law for which the NVRA provides a private right of action. 52 U.S.C. § 20510(b)." (Doc. 1-3 at 3.) The Foundation comprehensively addressed preemption as well: "Any Alaska law that limits disclosure of the requested records is without force because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution's Elections and Supremacy Clauses." (Doc. 1-3 at 2.) Alaska now claims that the Foundation's failure to identify voter identification numbers specifically deprived Alaska of "notice of this alleged violation" and deprived the Foundation of a private right of action under the NVRA. (Doc. 40 at 29.)

To be sure, the NVRA requires litigants "to provide written notice of the violation to the chief election official of the State involved." 52 U.S.C. § 20510. This pre-litigation notice requirement has a purpose—to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d

833, 838 (6th Cir. 1997) (citing Senate Comm. on Rules and Admin., National Voter Registration Act of 1993, S. Rep. No. 6, 103d Cong., 1st Sess. 41 (1993)). The NVRA's notice requirement is not uncompromisingly rigid. *See e.g.*, *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1348 (N.D. Ga. 2016) (finding NVRA notice letter "which clearly articulated its concerns and stated it sought 'any records' pertaining to its concerns, met the notice requirement of 52 U.S.C. § 20510(b)(1)."); *see also Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 921-23 (S.D. Ind. 2012). Nor does it require "futile acts," like providing notice where the defendant has no intention of attempting compliance. *Miller*, 129 F.3d at 838. It should also not countenance Alaska's attempted "gotcha!" moment. Alaska should not be allowed to avoid compliance with federal law by hiding the ball about what information it is withholding from requestors and then claiming the requestor did not specifically complain about those hidden records. Regardless, the Foundation's notice letter was sufficient. Alaska was notified that "[f]ailure to permit public inspection or otherwise provide copies of the requested records is a violation of federal law." (Doc. 1-3 at 3.) Alaska knew it denied the Foundation access to voter identification numbers and so the notice letter can reasonably be interpreted to include all information requested but not provided.

Regardless, Alaska does not claim any deficiency over voter identification numbers with respect to Request #1. Nor could it. The Foundation offered a compromise centered around voter identification numbers in the notice letter. The Foundation's claim for voter identification numbers is ripe in any event.

There is an inherent asymmetrical distribution of knowledge in public records cases. The government is the keeper of the information. That is why most state open records laws require the government to explain specifically which records were withheld and the specific statutory

basis for each withheld record. Alaska did not do that here. It remained silent about voter identification numbers. It now wants that information excluded from consideration. The court should find no defect in the Foundation's pre-litigation notice letter. Not only was the actual notice letter sufficient to inform Alaska that it may face litigation over all improperly withheld information, a more specific notice letter would have been "futile," *Miller*, 129 F.3d at 838, because Alaska is adamant that "voter identification numbers are protected by state law," (Doc. 40 at 28). Alaska cannot credibly claim it was denied an opportunity to comply with the request.

CONCLUSION

The Foundation is not "paint[ing] the Disclosure Provision with a broad brush," as Alaska believes. The Foundation is simply framing the expansive picture Congress already painted. The gallery is filled with similar works painted by a multitude of federal court judges. The text and the precedent—indeed, the entire portfolio—supports the Foundation. Alaska's Motion to Dismiss should therefore be denied.

Dated: September 30, 2022.

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

By: /s/ Noel H. Johnson
Noel H. Johnson, *Pro Hac Vice*