

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN**

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

v.

JOCELYN BENSON, in her official capacity as
Michigan Secretary of State,

Defendant.

Civ. No. 1:21-cv-929

**PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S PARTIAL MOTION TO DISMISS**

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Plaintiff Public Interest Legal Foundation (the “Foundation”) submits this response to Defendant’s partial motion to dismiss and memorandum in support thereof (ECF Nos. 10-11 PageID.91-122.)

INTRODUCTION

The Foundation found nearly 26,000 likely deceased registrants on Michigan’s voter rolls, the majority of whom have been dead for many years. The Foundation attempted to work with Michigan to correct this problem for more than a year but was met with silence and inaction. Now Defendant seeks to dismiss the Foundation’s claim that Michigan is failing to conduct reasonable list maintenance. In so doing, Defendant asserts two theories: (i) the Foundation has no standing and (ii) the Foundation failed to allege any specific facts suggesting that Defendant’s list maintenance program for removing the names of ineligible individuals from the voter rolls is unreasonable and thereby violative of the National Voter Registration Act (“NVRA”). Both arguments lack merit.

The Foundation has standing both under the U.S. Constitution and under the NVRA. Defendant’s motion misapplies the private right of action and list maintenance provisions of the federal law which grants standing to a party, like the Foundation, “who is aggrieved by a violation of [the NVRA].” 52 U.S.C. § 20510(b)(1). Courts that have considered this issue overwhelmingly support the Foundation’s position here, including in the Western District of Michigan. *See* Order Denying Motion to Dismiss, *Daunt v. Benson*, Case 1:20-cv-00522 (Oct. 28, 2020) (1:20-cv-00522 PageID.358.)

The Foundation has also sufficiently pled a plausible violation of the NVRA. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Foundation pled that “as of August 2021, 25,975 potentially deceased registrants are on Michigan’s voter rolls. Of those, 23,663 registrants have

been dead for five years or more, 17,479 registrants have been dead for at least ten years, and 3,956 registrants have been dead for at least *twenty* years.” (ECF No. 1 PageID.2) (emphasis in original). The Foundation further pled that even after these circumstances were brought to the Defendant’s attention, no action was taken. (ECF No. 1 PageID.9-15.) Taking the Foundation’s allegations as true and drawing all reasonable inferences in the Foundation’s favor, the Foundation’s Complaint states a plausible claim for relief. Defendant’s Motion should be denied.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) requires courts to evaluate motions to dismiss on the basis of the pleadings alone. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). While a complaint need not contain detailed factual allegations, it must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). “Plausibility requires showing more than the ‘sheer possibility’ of relief but less than a ‘probab[le]’ entitlement to relief.” *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 280 (6th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678). When evaluating a motion to dismiss, courts “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

ARGUMENT

Not only is the Foundation’s legal standing to bring this action well established under the case law, but the Foundation’s Complaint (ECF No. 1 PageID.1-20) provides highly detailed allegations regarding the Defendant’s deficiencies in removing deceased registrants from the voter

rolls. Defendant labors to reframe this case by devoting nearly ten pages of its twenty-four-page Memorandum to its “Statement of the Facts.” (ECF No. 11 PageID.99-109.) The Foundation’s Complaint determines the facts in a Rule 12 motion, not a defendant’s reworking of the facts. The facts in the Complaint are detailed, including the list maintenance activities the NVRA requires of Michigan, (ECF No. 1 PageID.3-4), and the deficiencies the Foundation has discovered, (ECF No. 1 PageID.8-15.) While Michigan has procedures for removing deceased registrants from the rolls, those procedures are emphatically inadequate and unreasonable, as evidenced by (i) the presence of more than 25,000 dead individuals on the rolls, (ii) the fact that most of those deceased registrants have remained on the rolls for many years—in some cases, decades—following their deaths, and (iii) Defendant’s apparent passivity after the Foundation alerted her to the identities of potentially deceased registrants occupying the rolls and the replicable methodology for eliminating the problem. (*See* ECF No. 1 PageID.7-15.) Any one of these three allegations support standing.

Defendant also understates her obligations under the NVRA. She suggests that the mere fact that the state has certain statutory procedures in place for removing the names of deceased individuals from the rolls necessarily makes those procedures reasonable and compliant with the NVRA. But the legal question is not only if she is doing something but also how well she is doing it.

The Foundation alleges in the Complaint that Defendant’s list maintenance program is unreasonable within the meaning of the NVRA. (*See* ECF No. 1 PageID.7-8.) Additionally, Defendant seems to admit that only dead registrants with certain identifying information available in their records are cancelled, and she takes no additional steps to investigate the potentially deceased registrants or to remove them from the rolls. (ECF No. 11 PageID.102-103) (citing a document that refers to several known flaws in Michigan’s list maintenance procedure, including

instances of “a clerical error” where “a ballot will be recorded as cast by a deceased individual when it was actually cast by a living individual with a similar name,” instances of “erroneous birthdate or a placeholder birthdate,” and instances where Defendant’s alleged list maintenance efforts “may not identify an individual who has died, in which case that individual will stay on the voter rolls until the local election clerk identifies the deceased individual’s record and cancels it.”) (ECF No. 11 PageID.102-103.) These admissions support denial of the Motion.

A. The Court Has Jurisdiction Over the Foundation’s Claims.

1. The Foundation Satisfied the NVRA’s Pre-Litigation Notice Requirements.

Defendant claims that notice was insufficient here; however, not only was notice sufficient, the Foundation followed up on the problems it identified on multiple occasions. The Complaint alleges these efforts. (ECF No. 1 PageID.9-12.) On September 18, 2020, the Foundation alerted Defendant to its research and findings regarding the accuracy of Michigan’s rolls, including the fact that approximately 34,000 Michigan registrants appeared to be deceased. (ECF No. 1 PageID.9.) This letter also served as statutory notice to Defendant that Michigan was in violation of the NVRA, 52 U.S.C. § 20510(b). (ECF No. 1 PageID.9.) “A person who is aggrieved by a violation of [the NVRA] may provide written notice of the violation to the chief election official of the State involved.” 52 U.S.C. §20510(b)(1). If the violation is not corrected within 90 days of the notice, a period shortened to 20 days “if the violation occurred within 120 days before the date of an election for Federal office,” then “the aggrieved person may bring a civil action in an appropriate district court.” 52 U.S.C. §20510(b)(2). The NVRA’s legislative history “indicate[s] that Congress structured the notice requirement in such a way that notice would provide states in violation of the Act an opportunity to attempt compliance before facing litigation.” *Ass’n of*

Community Orgs. For Reform Now v. Miller, 129 F.3d 833, 838 (6th Cir. 1997). The Foundation’s September 18, 2020, Notice Letter did just that.

Defendant, citing an out-of-circuit case, claims that “the allegations in the notice must be specific enough to identify the allegedly aggrieved individual and the actions-or-lack-thereof, which aggrieved him.” (ECF No. 11 PageID.112.) The case relied upon, however, is inapposite because it concerned a party that provided *no* notice. That is hardly the case here. The Foundation’s Notice Letter clearly identified the Foundation, provided statutory citations underpinning the alleged, ongoing violations, detailed the evidence that supports the allegations, and offered to meet to discuss further. (ECF No. 1-4 PageID.48-50.) All told, the Foundation provided Defendant *411 days* from the date of its Notice Letter to correct the ongoing violation before it filed suit. After the Defendant’s initial letter dated September 29, 2020, the Foundation promptly responded on October 5, 2020. (ECF No. 1 PageID.10.) Hearing no response, the Foundation wrote to Defendant again on November 25, 2020, (ECF No. 1 PageID.11), and January 13, 2021, (ECF No. 1 PageID.12), reinforcing the concerns in its Notice Letter and reiterating that “[w]ithout sufficient remediation of this problem, Michigan is and will remain in violation of state and federal law.” (ECF No. 1-6 PageID.53, ECF No. 1-8 PageID.62, ECF No. 1-13 PageID.73.) Defendant did not respond to either of these letters.

Defendant’s interpretation of what the NVRA requires for pre-suit notice is not supported by the text of the NVRA, any case law interpreting the NVRA, and, even more, has been rejected by another decision of the Western District of Michigan.¹ In *Daunt v. Benson*, Defendant presented

¹ The *Daunt* case is not mentioned in the Defendant’s Memorandum. Instead, Defendant cites to an out-of-circuit court decision concerning the adjudication of a motion for preliminary injunction for her argument that the Foundation’s Notice Letter is not sufficient. Although not discussed in Defendant’s Memorandum, that case involved a similar notice letter to the one here. *See Public Interest Legal Foundation v. Boockvar*, 495 F. Supp. 354, 357 (M.D. Pa. 2020). The Foundation

substantively similar arguments as she does here. *Compare* Motion to Dismiss Memorandum at 12, *Daunt v. Benson*, Case 1:20-cv-00522 (Oct. 14, 2020) (1:20-cv-00522 PageID.315) with Defendant’s Memorandum (ECF. No. 11 PageID.112). There, the plaintiff “mailed a statutory notice letter to Secretary Benson and Director Brater, notifying Defendants that at least 19 Michigan counties were in violation of section 8 and formally requesting that Defendants correct these violations within the 90-day timeframe specified in federal law.” Amended Complaint at 13, *Daunt v. Benson*, Case 1:20-cv-00522 (Sept. 30, 2020) (1:20-cv-00522 PageID.255). As here, Defendant argued that the plaintiff’s notice letter “does not identify any law, policy, or activity by the Secretary or the Director that could be considered non-compliance with the NVRA, much less one that aggrieved him.” Motion to Dismiss at 12-13, *Daunt v. Benson*, Case 1:20-cv-00522 (Oct. 14, 2020) (1:20-cv-00522 PageID.315-316). In denying Defendant’s motion, the Court determined that the notice letter was sufficient. Specifically, the Court stated:

And I don’t think it’s incumbent on the plaintiff in a notice letter to say “Here is the existing program of the state and here are the particular flaws in it.” I think it is simply incumbent on the plaintiff to say “Here is why I think there’s a problem and why I don’t think whatever program you’re using, if any, is up to the task.”

Transcript at 15:22-16:3, *Daunt v. Benson*, Case 1:20-cv-00522 (Nov. 03, 2020) (1:20-cv-00522 PageID.375-376). As in *Daunt* and other cases interpreting the NVRA’s notice requirement, the Foundation’s Notice Letter is sufficient. In *Judicial Watch v. King*, the defendants argued that the plaintiff’s notice letter “fails to provide sufficient details about any alleged violation of the NVRA to satisfy the notice requirement.” *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 922 (S.D. Ind. 2012). According to the court,

reached a settlement with the Defendant to remove deceased voters from Pennsylvania’s rolls. *See* Press Release, “Lawsuit to Remove Dead Voters in Pennsylvania Ends with Win for Election Integrity,” (April 7, 2021), <https://publicinterestlegal.org/press/lawsuit-to-remove-dead-voters-in-pennsylvania-ends-with-win-for-election-integrity/>.

It is not surprising that the Letter does not contain any detailed allegations, inasmuch as the NVRA provision at issue does not contain any detailed requirements; it simply requires “reasonable effort” on the part of the State. The Letter sets forth the reasons for [the plaintiff’s] conclusion that the Defendants have failed to comply with that general requirement. The Court believes that was sufficient to satisfy the notice requirement of the NVRA...

Id. See e.g., Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d 779, 795 (W.D. Tex. 2015) (“The letter gives the Defendant enough information to diagnose the problem. At that point it was the Defendant’s responsibility to attempt to cure the violation.”); *see also Voter Integrity Project NC, Inc. v. Wake Cty. Bd. of Elections*, 301 F. Supp. 3d 612, 618 (E.D.N.C. 2017).

The Foundation’s Notice Letter provided the Defendant sufficient information and evidence to diagnose the problem. Indeed, Defendant notes that her office “did a sample review of several of the entries on the spreadsheet PILF provided, which revealed that the voters had, in fact, been cancelled as deceased.” (ECF No. 11 PageID.107.)² This belies Defendant’s argument that the Foundation’s Notice Letter did not provide enough information for the state to “verify or test” the Foundation’s findings. (ECF No. 11 PageID 114.) If there was any doubt, the Foundation went to the time and expense of verifying its data again and again and offering information to the Defendant. (ECF No. 1 PageID.10-12.) The Foundation satisfied the NVRA’s notice requirements.

2. The Foundation Satisfies the Requirements of Article III of the Constitution.

Defendant makes two arguments in her claim that the Foundation lacks Article III standing. First, Defendant claims that “PILF has not alleged a concrete and demonstrable injury,” and the organization “did not divert resources from its mission.” (ECF No. 11 PageID.114, 116.) Second,

² The Foundation disputes the veracity of these claims, but notes that such claims are fact-based (and unsubstantiated). Thus, such claims are not properly before the Court at this stage of the proceedings.

Defendant claims that “a favorable ruling will not likely redress any alleged injury.” (ECF No. 11 PageID.116.) Neither argument has merit.

The doctrine of standing comes from Article III of the Constitution, which gives federal courts jurisdiction over cases and controversies. *See* U.S. CONST. art. III § 2. “To establish standing, a plaintiff must show an injury in fact that is fairly traceable to the defendant’s conduct and is likely to be redressed by a favorable judicial decision.” *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020).

[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-181 (2000). “To avoid impermissibly assessing the merits, a court must ‘assume for the purposes of [a] standing inquiry that a plaintiff has stated valid legal claims.’” *Public Interest Legal Found. v. Boockvar*, 370 F. Supp.3d 449, 455 (M.D. Pa. 2019) (quoting *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017)).

The NVRA specifically grants a private right of action to a party “who is aggrieved by a violation of this Act.” 52 U.S.C. § 20510(b)(1). The overwhelming weight of authority supports the Foundation’s position, including the court’s reasoning in *Daunt v. Benson*. (1:20-cv-00522 PageID.377-381.) Other courts are also in accord. *See, e.g., Public Interest Legal Found. v. Boockvar*, 370 F. Supp.3d at 455; *Public Interest Legal Found. v. Bennett*, No. H-18-0981, 2019 U.S. Dist. LEXIS 39723, at *10 (S.D. Tex. Feb. 6, 2019); *Martinez-Rivera*, 166 F. Supp. 3d at 790; *Judicial Watch v. King*, 993 F. Supp.2d 919, 925 (S.D. Ind. 2012); *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014). Indeed, district court decisions that support Defendant’s

standing arguments are wanting. Moreover, at the pleading stage of a case, a plaintiff simply must meet the threshold legal standard for surviving a motion to dismiss, *viz.*, that it is *plausible* that the plaintiff has standing. *See Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 556.

i. The Foundation’s Injury Is Sufficient for the Standing Requirement.

In the wake of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), and its progeny, it is well settled that organizations like the Foundation have standing to sue in their own right for the time and resources they are forced to expend due to extra burdens imposed on them as a result of a defendant’s conduct. An organization can demonstrate its injury by alleging that it had to divert significant resources to counteract the defendant’s activities, thereby impairing its ability to provide its own activities, with the consequent drain on its resources. *See Havens Realty Corp. v. Coleman*, 455 U.S. at 379; *Martinez-Rivera*, 166 F. Supp.3d at 788. As demonstrated below, this is particularly true in the context of an NVRA Section 8 claim like the one being asserted here. The Foundation has alleged it diverted significant resources to counteract Defendant’s activities, thereby impairing its ability to advance its own activities, with the consequent drain on its resources. (ECF No. 1 PageID.3.) The court acknowledged this interest in *Daunt*, noting that “[t]he concerns that [the plaintiff] articulates around...potential for extra work and resources policing the validity and propriety of the election are exactly interests that are within the scope of the NVRA....” *Daunt* Transcript at 21:5-9 (1:20-cv-00522 PageID.381).

The broadest of allegations of such an organizational injury will suffice at this phase of the proceeding. *Martinez-Rivera*, 166 F. Supp.3d at 788 (describing the allegations of organizational injury the Supreme Court deemed adequate in *Havens*); *Common Cause / New York v. Brehm*, 344 F. Supp.3d 542, 549 (S.D.N.Y. 2018) (“[A]s far as standing is concerned—there is no requirement that the Court evaluate the substantive merits of Plaintiff’s purported reasons for diverting its

resources, provided Plaintiff plausibly alleges the diversion occurred because of Defendant's alleged actions.").

The Foundation outlined its specific injury in the Complaint. It spent many thousands of dollars reviewing and analyzing Michigan's voter roll to determine if Defendant had removed the dead registrants to which the Foundation had alerted Defendant. (ECF No. 1 at ¶ 6 PageID.2-3.) The Foundation expended resources obtaining the QVF and comparing it against verifiable death records. (ECF No. 1 PageID.8-10.) Because Defendant failed to respond to the Foundation as to whether these deceased registrants had been removed or provide documentation detailing Defendant's process to clean the rolls, the Foundation had to continue expending resources to purchase copies of the QVF and analyze them against verifiable death records. (ECF No. 1 PageID.10-12.) As Defendant continued to ignore the Foundation, the Foundation had to continue to investigate Defendant's list maintenance practices to determine if deceased registrants were being removed. (ECF No. 1 PageID.13-15.) Defendant's failure to comply with NVRA aggrieved the Foundation by causing the Foundation to spend additional resources to determine if the deceased registrants were removed from the voter rolls. (ECF No. 1 ¶ 66 PageID.18.) All of these activities are directly traceable to, and were compelled by, Defendant's actions and inactions. Each also forced the Foundation to divert its limited resources—which it had hoped to deploy elsewhere—to ameliorating Defendant's refusal to follow the law and the negative impact it had on the Foundation's core mission. (ECF No. 1 ¶¶ 7, 66 PageID.3, 18.)

The Foundation also suffered a separate "informational injury as a direct result of Defendant's violations of Section 8 of the NVRA because the Foundation does not have the data and records requested." (ECF No. 1 ¶ 71 PageID.19.) The Foundation was forced to keep purchasing and analyzing the voter file to see if Defendant had corrected the ongoing violation.

(ECF No. 1 PageID.10-15.) The Foundation diverted its limited resources from other states with similar issues in order to determine if Michigan had cleaned up its voter roll. (ECF No. 1 ¶ 7 PageID.3.) The Foundation’s specific injuries are directly related to Defendant’s refusal to turn over documents and remove dead registrants from its voter rolls.

Defendant disputes the Foundation’s diversion of resources claim and cites *Shelby Advocates for Valid Elections v. Hargett*, 947 F. 3d 977, 982 (6th Cir. 2020) as legal support for her argument. (ECF No. 11 PageID.115-116.) She claims that the Foundation has not suffered an injury since its mission is to “conduct research or ensure that accurate rolls are maintained.” (ECF No. 11 PageID.116.) Defendant’s reliance on *Shelby Advocates* is misplaced. As *Online Merchs. Guild v. Cameron* explains, “within-mission organizational expenditures are enough to establish direct organizational standing” and *Shelby Advocates* did not find otherwise. 995 F.3d 540, 548 (6th Cir. 2021). But even if Defendant’s assertion that expenses in accordance with the mission of an organization do not constitute an injury was correct, Defendant’s failure to remove deceased registrants directly caused the repeated expenditure of Foundation resources. (See ECF No. 1 PageID.10-15.) As the Seventh Circuit recently noted while addressing organizational standing under the NVRA, the Supreme Court in *Havens* specifically “found that the impairment of [an organization’s] ability to do work *within* its core mission [is] enough to support standing.” *Common Cause Ind. v. Lawson*, 937 F.3d 944, 954 (7th Cir. 2019) (quoting *Havens*, 455 U.S. at 379) (emphasis in original).

Finally, Defendant argues that the Foundation’s “claims of harm are hypothetical or speculative” because the Foundation used the phrase “potentially deceased” in the Complaint. (ECF No. 11 PageID.115.) Defendant converts the Foundation’s care in making assertions to this Court into a weapon. To disabuse any perceived doubt, the Foundation has gone to great effort to

ensure the accuracy of its research and has confidence in the conclusions. (ECF No. 1 ¶¶ 27-37, 49-53 PageID.8-11, 14-15.) A false positive in the list of over twenty thousand registrants provided to the Defendant cannot be precluded with complete certainty, but the Foundation never asked the Defendant, nor does the Complaint’s prayer for relief seek, that potential dead registrants be removed without any basis to do so or additional inquiry. Further, the Foundation’s claims are not limited to the tens of thousands specific examples of unreasonable list maintenance provided to the Defendant. The Foundation alleges something more substantial—a longstanding and systematic breakdown of list maintenance activities by the Defendant. (ECF No. 1 PageID.7-8.) These are well pled allegations of violations of Section 8 of the NVRA. The examples provided are additional supporting evidence of those underlying and unresolved problems.

ii. Relief from this Court Would Redress the Foundation’s claim.

Second, Defendant argues that “a favorable ruling will not likely redress any alleged injury.” (ECF No. 11 PageID.116.) To the contrary, a judicial decree ordering Defendant to implement and follow a reasonable and effective list maintenance program that cross-references the names of registrants against the Social Security Death Index, as the Foundation seeks, would correct Defendant’s violations of the NVRA alleged in the Foundation’s Complaint. (ECF No. 1 PageID.19-20.) It would also spare the Foundation from having to monitor, purchase, and analyze Michigan’s voter rolls over and over, since Defendant would be maintaining Michigan’s list as to deceased registrants. *See Daunt* Transcript at 19:16-20:1 (1:20-cv-00522 PageID.379-380.)

B. The Foundation’s Complaint States a Claim for a Violation of the NVRA.

Closely connected to her standing defense, Defendant contends that the Foundation has failed to state a claim under the NVRA. Her primary argument appears to be simply that Michigan has a statutory procedure for removing deceased registrants from the voter rolls. (ECF No. 11

PageID.1118.) This entirely circular argument amounts to, “We have a statutory procedure in place; therefore, *ipso facto*, it must be reasonable.” That is not the law. This case is governed by federal law. Any reasonableness determinations are factual questions for another day, and not part of a Rule 12 inquiry. The Foundation carefully set forth in its Complaint *why* Michigan has failed to implement a “reasonable” list maintenance program within the meaning of the NVRA. (See ECF No. 1 PageID.7-8.) For now, the proof is in the pudding, or more appropriately, in the allegations. The Foundation has alleged that over 25,000 deceased registrants remain on Michigan’s QVF. (ECF No. 1 PageID.2.) The Foundation has alleged that thousands of these registrants have remained on the active rolls for decades. (ECF No. 1 PageID.2.) The Foundation has alleged that the Defendant was given this information and for over a year did nothing about it. (ECF No. 1 PageID.9-12.) It is hard to imagine what else the Foundation could allege to establish a Section 8 violation. One thing is certain, whether the deficiencies are attributable to Defendant’s unwillingness to implement a more effective list maintenance program or, as she seems to argue in her brief, a state statutory framework that is rife with known flaws, are factual questions that is not properly before the Court at this stage of the proceedings. *See Daunt* Transcript at 16:15-20 (1:20-cv-00522 PageID.376) (“whether or not the State has a program, whether or not it’s implemented a program, and whether or not it’s reasonable, those are merits issues”).

1. The NVRA Requires Election Officials to Accurately Maintain Their Voter Rolls.

Every one of the four legislative purposes of the NVRA support the Foundation’s claims in this case. They are (1) “to establish procedures that will increase the number of *eligible* citizens who register to vote[,]” (2) to “enhance[] the participation of *eligible* citizens as voters,” (3) “to protect the integrity of the electoral process,” and (4) “to ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b) (emphasis added).

Defendant complains that “[t]he NVRA does not require states to implement a specific program for removing voters or to immediately remove every voter who may have become ineligible.” (ECF No. 11 PageID.118.) The Foundation does not allege that Defendant must implement a specific program or immediately remove every ineligible registrant because the NVRA does not require a plaintiff to so plead. Congress provided election officials flexibility to implement a generalized program to keep voter rolls clean. Congress did not include a detailed checklist of steps within the NVRA for election officials to follow. Rather, Congress enacted the NVRA “(3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained,” 52 U.S.C. § 20501(b)(3)-(4), while specifically directing election officials to remove registrations belonging to those who pass away, 52 U.S.C. § 20507(a)(4)(A).

The language of the NVRA passed by Congress does far more than ask if a state is doing list maintenance. It contemplates effective maintenance. When a complaint alleges that a jurisdiction, year after year, decade after decade, allows tens of thousands of dead registrants to remain active on the voter rolls entirely undetected, (ECF No. 1 PageID.2), then an allegation that the list maintenance program is not reasonable is a well-pled allegation under Section 8 of the NVRA. Reasonable list maintenance is the law. 52 U.S.C. § 20507(a)(4). When the dead remain undetected on Michigan’s QVF, as the Foundation’s well-pled complaint details, a claim is stated under the NVRA and a motion to dismiss should be denied.

An election official’s flexibility to fix such a problem—whether they employ every means available or just a few—is irrelevant to a motion to dismiss when a plaintiff pleads that the problem is acute and the problem persists year after year, decade after decade, and is known to the election official. Discretion regarding *how* to do reasonable list maintenance is not the same as discretion

whether to do reasonable list maintenance. An election official has an obligation to use tools to maintain the rolls that are reasonably matched to the circumstances of the jurisdiction. *See Voter Integrity Project NC, Inc.*, 301 F. Supp. 3d at 619 (the fact that election officials are not using a readily available tool “may be relevant to determine the reasonableness of [the defendant’s] efforts at voter list maintenance.”) Indeed, courts in other Circuits have also approved consent decrees or settlements with flexible remedial plans under the NVRA where election officials conduct various activities based on their circumstances in order to correct their failure to properly maintain their rolls in contravention of the NVRA. *E.g. American Civil Rights Union v. Clarke County, Miss., Election Commission*, No. 2:15-cv-101 (S.D. Miss. Nov. 25, 2015).

2. The Foundation Alleges that Defendant Is Failing to Remove Deceased Registrants.

The Foundation alleges that “as of August 2021, 25,975 potentially deceased registrants are on Michigan’s voter rolls. Of those, 23,663 registrants have been dead for five years or more, 17,479 registrants have been dead for at least ten years, and 3,956 registrants have been dead for at least *twenty* years.” (ECF No. 1 PageID.2) (emphasis in original).

In response to these allegations, Defendant raises three primary objections. First, Defendants state that the Foundation’s “list of potentially deceased voters represents just 0.3 percent of registered voters maintained in the QVF.” (*See* ECF No. 11 PageID.119.) This is irrelevant. The NVRA did not incorporate ratios. The NVRA said nothing about percentages. Worse for the Defendant, the NVRA certainly provided no statistical safe harbor for a Defendant who was informed of thousands of dead registrants on the rolls for decades yet still did nothing about it. No numbers absolve that malfeasance.

Further, although the Defendant may not be concerned by allegations of tens of thousands of deceased registrants, courts interpreting the NVRA have denied motions to dismiss on far less

significant allegations. For example, in *Bellitto v. Snipes*, the plaintiff alleged, in part, that “Defendant has received information regarding over 200 registered voters who have either died or who no longer reside in the community.” *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1365 (S.D. Fla. 2016). The court found that “this factual allegation and other claims made in the Amended Complaint are sufficient to state a claim under Section 8.” *Id.* See also Transcript at 16:6-9, *Daunt v. Benson*, Case 1:20-cv-00522 (Nov. 03, 2020) (1:20-cv-00522 PageID.376) (finding that a comparison of census data against the Michigan QVF led to “a reasonable inference, or at least a plausible inference is there’s a problem with the system that’s been used to address the voter registration list.”)

The Foundation alleges that it provided Defendant with reliable information regarding not hundreds but *thousands* of registrants who have died and that Defendant has not taken action to remove these individuals from Michigan’s voter rolls. See *Bellitto v. Snipes*, 221 F. Supp. 3d at 1365-66 (finding that the organizational plaintiff “has plead sufficient facts to support its claim that Defendant inadequately removed the names of registrants who have died....”)

Second, Defendant questions the validity of the Foundation’s research. (See ECF No. 11 PageID.121.) This is a gripe never mentioned to the Foundation in response to the Foundation’s multiple requests for meetings with the Defendant, until now. Regardless, that is a factual question, not a legal one under Rule 12. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995) (“It is not the function of the court to weigh evidence or evaluate the credibility of witnesses” when deciding Rule 12(b)(6) motion.).

Further, Defendant is incorrect to dismiss the Foundation’s allegations about post-death registrations as “at least a possible indication that the people on their list may not, in fact, be dead.” (ECF No. 11 PageID.121.) To the contrary, post death registration has proven in the past to be

real, and arrests have been made after the Foundation detected the phenomena. As the Foundation explained in its Complaint, it found similar problems on the rolls in Pennsylvania. (ECF No. 1 PageID.15-16.) The Foundation investigated further, even traveling to the graveyard of one individual who appeared to register to vote after death. As the Foundation stated in its Complaint, in early 2021, a Pennsylvania widower was indicted for allegedly impersonating that person (his late wife) by registering to vote *after she died* and requesting an absentee ballot. (See ECF No. 1 PageID.15-16.) The man is accused of impersonating his late wife, despite her death in 2013. (See ECF No. 1 PageID.15-16.) The deceased was credited for voting absentee in 2020. (ECF No. 1 PageID.16.)

As the Foundation alleged in its Complaint, such “findings merit investigation and action by the Defendant.” (ECF No. 1 PageID.15.) The Foundation is not alleging that Defendant must “haunt cemeteries” as Defendant speculates, (ECF No. 11 PageID.120), the Foundation, itself, has documented post-death registration by visiting cemeteries and photographing the evidence of the disturbing phenomena. See *Protecting Your Vote: The Vulnerabilities in our Electoral System* (Aug. 19, 2021), <https://publicinterestlegal.org/podcast/episode-2-the-vulnerabilities-in-our-electoral-system/>.

Third, Defendant argues that “[n]o removal program will be perfect.” (ECF No. 11 PageID.120.) But the Foundation is not asking for absolute precision. The NVRA requires every state 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 (A) the death of the registrant.” 52 U.S.C. § 20507(a)(4)(A). While perfection is not required, a program that allows tens of thousands of likely deceased individuals to remain on the rolls, many of whom have been dead for more than a decade, and all of whom were brought to the attention of the Defendant well

before this litigation commenced (ECF No. 1 PageID.9-12), is simply unreasonable. When the Foundation confronted Defendant with these deficiencies, she took no remedial action. (ECF No. 1 PageID.9-12). Worse still, Defendant now effectively asks the Court to validate her decision to bury her head in the sand on this issue by arguing that the “NVRA does not require a state enact an exhaustive program to remove every voter who becomes ineligible (much less every voter whom a private party *claims* is ineligible).” (ECF No. 11 PageID.98.)

The U.S. District Court for the Eastern District of North Carolina considered a complaint where the plaintiff alleged that the defendant “‘undertakes absolutely no effort whatsoever to use data available from the Wake County Clerk of Superior Court obtained from jury excusal communication’ to identify ‘residents who self-identify as non-citizens or non-residents’ or to identify ‘potentially obsolete mailing addresses of registrants.’” *Voter Integrity Project NC, Inc.*, 301 F. Supp. 3d at 618. The defendant there, like the Defendant here, claimed that the plaintiff’s “allegations are insufficient to show a violation of the obligation to conduct a program that makes a reasonable effort at voter list maintenance.” *Id.* The court disagreed with the defendant,

Thus, the fact that WCBOE does not use a “readily available tool,” (Compl., DE # 1, ¶ 19), to remove ineligible voters does not mean in and of itself that WCBOE has failed to make a reasonable effort at voter list maintenance. However, it, along with other evidence, may be relevant to determine the reasonableness of WCBOE’s efforts at voter list maintenance.

Id. at 619. The court denied the defendants’ motion to dismiss, ruling “a reasonable inference can be drawn that [the defendant] is not making a reasonable effort to conduct a voter list maintenance program in accordance with the NVRA.” *Id.* at 620.

The Foundation’s allegations permit “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *Iqbal*, 556 U.S. at 678, and are sufficient to raise the right to relief “above the speculative level,” *Twombly*, 550 U.S. at 555.

CONCLUSION

For all the preceding reasons, the Foundation respectfully requests that the Court deny Defendant's motion to dismiss.

Dated: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to each ECF participant.

Dated: January 18, 2022

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Plaintiff