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# ARTICLE

## DEMOCRACY'S BUREAUCRACY:

### THE COMPLICATED CASE OF VOTER REGISTRATION LISTS

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#### ABSTRACT

*This Article calls attention to the development and derailment of a novel cross-governmental bureaucracy for voter registration. It focuses specifically on voter registration lists as the vulnerable backbone of election administration. In short, the constitutional allocation of election authority has left a mobile electorate scattered across fifty different state registration lists. The result is more than a tenth of the electorate is likely registered in their former jurisdiction and more than a third is not registered at all. The solution, in the vocabulary of election officials, has become “list maintenance”—or, identifying when voters, previously registered at one address, subsequently move or die, often by matching administrative data or coordinating across agencies.*

*Part I traces the rise of national, but not federal, efforts to coordinate voter registration lists across states. In particular, it offers the first comprehensive account of the Electronic Registration Information Center (“ERIC”), a nonprofit corporation run by state chief election officials to facilitate list maintenance by pooling voter registration and other critical voter data, from state driver’s license records to the federal death file. But after a decade of growth ERIC has begun to unravel: nine Republican states have now quit the bipartisan effort. Part II argues that disjointed voter registration lists are an easily exploited democratic vulnerability, partly due to the unintended effects of federal privacy law. It explains how state voter registration lists often lack a*

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*unique national identifier, so efforts to simply compare state voter registration lists produce the appearance of fraud where none exists; how more reliable comparison requires supplementing registration lists with confidential administrative data, subordinating one form of legitimacy for another; and how private interest groups, engaging in what this Article terms “vigilante list maintenance,” increasingly use public, but necessarily incomplete, administrative records to further fan partisan narratives about fraud. Finally, Part III offers a series of policy solutions to both fortify list maintenance from attack and promote enfranchisement. It proposes trimming the scope of federal privacy laws to accommodate election administration; flipping the procedural and substantive framework for list maintenance; and expanding the government’s obligation to update, rather than cancel, registrations as voters move. Ultimately, this Article resists the familiar narrative that pits voter access against electoral integrity; a robust national, but not federal, bureaucracy for voter registration can promote both values.*

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## INTRODUCTION

If voting rights are “preservative of all rights,”<sup>1</sup> voter registration has become foundational to our elections.<sup>2</sup> Yet how we manage voter registration lists has largely escaped academic attention. That oversight is understandable—lists of who is registered to vote and where can seem trivial against the backdrop of the “voting wars.”<sup>3</sup> But it is also unfortunate—it has meant we have not taken full account of the rise of a strange breed of national, but not federal, efforts to coordinate voter registration lists across states; the ways in which voter lists are being co-opted to offer the appearance of voter fraud; and the opportunity to build a more inclusive democracy by integrating jurisdictionally balkanized lists to reflect the mobility of the electorate.

The field of election law has recently taken an interest in election administration.<sup>4</sup> Some scholars have focused on the intimate connection between election administration and the right to vote in the face of increasing attacks on voting rights. Emphasizing the fragility of the right to vote, Joshua Sellers and Justin Weinstein-Tull have argued for a “governmental obligation to build an electoral apparatus.”<sup>5</sup> Sellers and Weinstein-Tull suggest that a robust right to vote requires not only “adequate funding and new standards for administrating elections” but also for states to “organize their election administration operations in a way that fosters functional government.”<sup>6</sup> For his part, Richard Pildes has emphasized the growing distrust of elections that characterizes our political moment, arguing democracy is in peril when “nearly half the country believes the [2020 presidential election] was illegitimate.”<sup>7</sup> He proposes that “policies and practices that would be fine under normal circumstances, but which are likely to trigger distrust today, need to be reconsidered.”<sup>8</sup>

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<sup>1</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>2</sup> Today, all states but North Dakota require voter registration. See NAT’L RSCH. COUNCIL, IMPROVING STATE VOTER REGISTRATION DATABASES: FINAL REPORT 5 (2010). But before the Civil War, most states did not require registration. See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 122-28, 253-54 (rev. ed. 2009). The requirement was adopted in most states between the 1870s and World War I, both to eliminate fraud and to suppress the vote. *Id.*

<sup>3</sup> See generally RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012).

<sup>4</sup> See, e.g., Justin Weinstein-Tull, *Federal Election Administration Laws*, in THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 1, 6 (Eugene Mazo ed., forthcoming 2024) (“[E]lection administration has only recently become the topic of legal scholarship.”).

<sup>5</sup> Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right To Vote*, 96 N.Y.U. L. REV. 1127, 1129 (2021).

<sup>6</sup> *Id.* at 1168 (laying out requirements for “constructed right to vote”).

<sup>7</sup> Richard H. Pildes, *Election Law in an Age of Distrust*, 74 STAN. L. REV. ONLINE 100, 103 (2022).

<sup>8</sup> *Id.*

These accounts are persuasive, but they have omitted the critical role of voter registration lists, along with the bureaucracy that maintains them, in the current ecosystem of election administration.<sup>9</sup> While voter registration is the entry point for citizens into the electoral process, “list maintenance” encompasses the ongoing task of maintaining voter registration lists as voters move and die. Our voter registration is tied to our residential address because where we live dictates who represents us. The difficulty with local political districts, from an election administration perspective, is that residential mobility breaks the fixed link between a voter’s registration and their residential address. This is no small problem: in 2020, about one hundred million people had moved within the previous five years.<sup>10</sup> But voters do not typically tell election officials when they move (and cannot tell them when they die).

Within our current political landscape, coordination of voter registration lists—both across local and state election officials and between election and nonelection officials—is the quintessential example of how an intergovernmental bureaucracy could promote the right to vote. Coordination can compensate for our decentralized electoral system and allow voter registration to follow mobile voters, unimpeded by jurisdictional boundaries. Further, lack of coordination—the fact that our state voter registration lists are balkanized, and that integration can come at the expense of public oversight—has been increasingly exploited to promote election distrust.

My focus on the *coordination* of voter registration lists complements recent work that considers the *content* of voter registration lists. Voter registration lists typically publicly identify who is registered to vote by name and address.<sup>11</sup> But some voter registration lists include additional information, such as registrants’ prior turnout history or self-identified race. In two illuminating projects, political scientist Eitan Hersh and legal scholars Bertrall Ross and Douglas Spencer have shown how these demographic details can shape our politics, allowing

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<sup>9</sup> For the origin of the “ecosystem” metaphor to describe election administration, see STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES, at v (2007).

<sup>10</sup> *Geographic Mobility: 2015 to 2020*, U.S. CENSUS BUREAU (Jan. 2023), <https://www.census.gov/data/tables/2020/demo/geographic-mobility/cps-2020-5yr.html> (follow link for tbl. 1-1) (providing Census data of respondents’ mobility between 2015 and 2020). The pattern was similar in 2010. See DAVID K. IHRKE & CAROL S. FABER, U.S. CENSUS BUREAU, GEOGRAPHICAL MOBILITY: 2005 TO 2010, at 2, 2 tbl.1 (2012) (detailing mobility rates throughout five-year periods from 1965 to 2010).

<sup>11</sup> See generally U.S. ELECTION ASSISTANCE COMM’N, AVAILABILITY OF STATE VOTER FILE AND CONFIDENTIAL INFORMATION (2020), [https://www.eac.gov/sites/default/files/voters/Available\\_Voter\\_File\\_Information.pdf](https://www.eac.gov/sites/default/files/voters/Available_Voter_File_Information.pdf) [<https://perma.cc/U4D7-CFVK>] (listing information available in voter file by state).

campaigns to target appeals by voters' race rather than their neighborhood,<sup>12</sup> or mobilize frequent, as opposed to infrequent, voters.<sup>13</sup>

This Article expands the focus from the specific content of voter registration lists to the accuracy and completeness of voter registration lists writ large. In particular, it calls attention to how federal and state actors have cobbled together a piecemeal administrative structure, both within and across states, to gather updated information about a voter, from their new address to their death. Many list maintenance activities are not particularly visible to the public or easily identifiable as election administration. For example, state motor-vehicle department interactions and the U.S. Postal Service's change-of-address requests are two of the most common sources of voter information for list maintenance.<sup>14</sup>

To the extent that list maintenance is visible, it is often mischaracterized as "voter purging." This partisan label has warped our understanding of list maintenance by equating it wholesale with disenfranchisement.<sup>15</sup> To be sure, list maintenance can result in disenfranchisement—a voter's registration can be cancelled because they are wrongly identified as having moved from their address of registration. But cancellations also reflect voters who did move and thus are no longer eligible voters at their former address. Importantly, the purging label obscures the promise of list maintenance as a potential tool of enfranchisement: it can facilitate the updating of voter registrations as voters move throughout a state and around the country.

Over the last decade, voter identification laws have dominated the debate in election law at the expense of attention to list maintenance. That debate shows

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<sup>12</sup> See EITAN D. HERSH, HACKING THE ELECTORATE: HOW CAMPAIGNS PERCEIVE VOTERS 123-40, 139 tbl.6.3 (2015) (comparing turnout rates of matched pairs of voters, where one voter in pair has race listed in voter file and other does not).

<sup>13</sup> See Bertrall L. Ross II & Douglas M. Spencer, *Voter Data, Democratic Inequality, and the Risk of Political Violence*, 107 CORNELL L. REV. 1011, 1040 fig.4 (comparing "contact gap" by year between rich and poor voters in states that do and do not disclose voter history); *id.* at 1041 tbl.1 (2022) (comparing contact gap by year in states that did not adopt voter history disclosure laws until 2010 with states that already did so in 2004).

<sup>14</sup> See *infra* Part I.B.1.

<sup>15</sup> For example, in their generative work, Lisa Manheim and Elizabeth Porter suggest that the federal law encouraging election officials to compare their voter registration list with the Postal Service's change-of-address list in order to fulfill their list maintenance responsibilities may amount to "intentional voter suppression." Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 249 n.181 (suggesting that "[u]nder our theory, there may at least be an argument" that "the federal requirement [is] itself tainted by intentional voter suppression" but conceding "there is not as much evidence to support [such] an inference"). The suggestion obscures both the current and potential role of list maintenance. For example, if local election officials learn a voter has moved within their jurisdiction based on the Postal Service list, federal law requires them to update, rather than cancel, the voter's registration. See 52 U.S.C. § 20507(f).

signs of coming to a political close.<sup>16</sup> There is no evidence of substantial voter fraud.<sup>17</sup> But the best evidence establishes that voter identification laws have also not led to substantial disenfranchisement.<sup>18</sup> This is not to say voter identification laws are good policy, but instead that reform efforts should turn to other parts of the ecosystem of election administration.

List maintenance—done poorly or done well—can affect a significant segment of the American population. Although somewhat dated, the best available evidence suggests about 25% of eligible citizens are not registered to vote and about 10% are not registered at their current address, and thus also may not be able to vote.<sup>19</sup> Further, the majority of people who are “mislisted” (i.e., no longer living at their registered address) moved within the past year.<sup>20</sup> A recent political science study, in partnership with local election officials in Orange County, California, estimates that automatically updating a voter’s

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<sup>16</sup> See, e.g., Jonathan Weisman & Nick Corasaniti, *Why Democrats Are Reluctantly Making Voter ID Laws a Bargaining Chip*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/06/23/us/politics/democrats-voter-id-laws.html> (describing shifting political position on voter identification laws among Democrats).

<sup>17</sup> See, e.g., Sharad Goel, Marc Meredith, Michael Morse, David Rothschild & Houshmand Shirani-Mehr, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Elections*, 114 AM. POL. SCI. REV. 456, 467 (2020) (developing and applying method to estimate how many people voted twice in 2012 presidential election and concluding “double voting is not currently carried out in such a systematic way that it presents a threat to the integrity of American elections”).

<sup>18</sup> See, e.g., Enrico Cantoni & Vincent Pons, *Strict ID Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018*, 136 Q.J. ECON. 2615, 2615 (2021) (comparing individual-level voter turnout across states and over time and concluding “the laws have no negative effect on registration or turnout”); Bernard L. Fraga & Michael G. Miller, *Who Do Voter ID Laws Keep from Voting?*, 84 J. POL. 1091, 1102 n.29, (2022) (reporting less than one-quarter of 1% of Texas voters filed so-called “reasonable impediment declaration” to be able to vote without presenting ID in state’s 2016 presidential election); Phoebe Henninger, Marc Meredith & Michael Morse, *Who Votes Without Identification? Using Individual-Level Administrative Data To Measure the Burden of Strict Voter Identification Laws*, 18 J. EMPIRICAL LEGAL STUD. 256, 258, 257, 266 tbl.2 (2021) (reporting less than 0.61% of Michigan voters filed so-called “Affidavit of Voter Not in Possession of Picture Identification” to be able to vote without presenting ID in state’s 2016 presidential election and that nearly all voters who filed an affidavit were previously issued still-active state ID). For a helpful framework to understand why such laws have limited partisan effects, see Justin Grimmer & Eitan Hersh, *How Election Rules Affect Who Wins* 1 (June 29, 2023) (unpublished manuscript), [https://www.eitanhersh.com/uploads/7/9/7/5/7975685/effectslaws\\_062923.pdf](https://www.eitanhersh.com/uploads/7/9/7/5/7975685/effectslaws_062923.pdf) [<https://perma.cc/R4PB-UY83>] (“[E]lection policies have small effects on outcomes because they tend to target small shares of the electorate, have a small effect on turnout, and/or affect voters who are relatively balanced in their partisanship.”).

<sup>19</sup> Simon Jackman & Bradley Spahn, *Politically Invisible in America*, 54 POL. SCI. & POL. 623, 624, 625 tbl.1 (2021) (estimating percent of citizens who are registered, unregistered, “mislisted,” and “unlisted” by matching respondents in 2012 American National Election Survey to nationwide commercial voter files).

<sup>20</sup> *Id.* at 626 fig.1.

registration after they move increased voter turnout by almost six percentage points.<sup>21</sup>

Along with co-authors, I have focused on empirically assessing an emerging model of list maintenance which is neither federal nor state, but rather entails horizontal, state-to-state coordination. Our work has evaluated the informal and now-defunct Interstate Voter Registration Crosscheck Program (“Crosscheck”), run by the Kansas Secretary of State, and its more legitimate and institutional successor, the Electronic Registration Information Center (“ERIC”). Among other things, the first study measured the extent to which Crosscheck manufactured the appearance of fraud by naively comparing voter registration lists across states.<sup>22</sup> The second assessed how ERIC now offers a much-improved approach to list maintenance using confidential voter registration and motor-vehicle records, although the complexity of the task means it is not without error.<sup>23</sup>

This Article builds on that political science work, situating the development of a “cross-governmental bureaucracy”<sup>24</sup> within the legal structure of election administration.

Part I sketches the constitutional allocation of power between the federal and state governments for regulating elections. Having established the Constitution’s shared framework, it focuses on the diffuse bureaucracy that has arisen to implement list maintenance. During a brief period beginning in the 1990s, Congress exercised its power to impose a “complex superstructure”<sup>25</sup> on top of state and local election administration. As is relevant here, federal law cobbles together a connection between state and local election officials, motor-vehicle officials, public assistance officials, and even federal Social Security and Postal

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<sup>21</sup> Seo-young Silvia Kim, *Automatic Voter Reregistration as a Housewarming Gift: Quantifying Causal Effects on Turnout Using Movers*, 3 AM. POL. SCI. REV. 1137, 1141 fig.2 (2022) (estimating effect of automatic reregistration by exploiting arbitrary cut-off date in run-up to 2018 general election, before which voters who filed change-of-address with Post Office request had their voter registration automatically updated and after which voters did not).

<sup>22</sup> Sharad Goel, Marc Meredith, Michael Morse, David Rothschild & Houshmand Shirani-Mehr, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Elections*, 114 AM. POL. SCI. REV. 456, 468 tbl.1 (2020) (examining 34,900 potential duplicate voters identified by Crosscheck between Iowa and other member states and finding only seven cases in which both registration records shared same first name, last name, date of birth, and last four digits of Social Security number and were used to vote).

<sup>23</sup> Gregory Huber, Marc Meredith, Michael Morse & Katie Steele, *The Racial Burden of Voter List Maintenance Errors: Evidence from Wisconsin’s Supplemental Movers Poll Books*, 7 SCI. ADVANCES, Feb. 19, 2021, at 1, 3.

<sup>24</sup> Bridget Fahey recently introduced the term. See Bridget A. Fahey, *Data Federalism*, 135 HARV. L. REV. 1007, 1014 (2022) (“[Cross-governmental bureaucracies] range from the formally chartered to the highly informal, are neither wholly federal nor wholly state in legal character, and are not fully domesticated by either federal or state law.”).

<sup>25</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5 (2013) (describing National Voter Registration Act of 1993 and Help America Vote Act of 2002).



Service officials to facilitate voter registration. But the federal framework leaves states as silos in election administration—a problem eventually addressed by the development of a cross-governmental bureaucracy.

In the early 2000s, reformers imagined various ways in which the introduction of statewide, electronic voter registration lists could lead to more accurate and complete lists. At the time, academic proposals included federal control<sup>26</sup> and federal supervision<sup>27</sup> of voter registration lists. But the development of list maintenance took a turn away from the classic fault lines reflected in traditional federalism debates and toward a novel arrangement: a corporation of member states from both political parties.

The development of ERIC challenges some of the core academic accounts of election administration, which is typically criticized as both too local and too partisan.<sup>28</sup> It also complicates the prevailing account of “election law federalism,” particularly its focus on the “widespread state prerogative to delegate election responsibilities to local government.”<sup>29</sup> One commentator recently lauded ERIC as “among the most significant advancements in . . . election administration in this country.”<sup>30</sup> Despite its importance, though, ERIC has received little critical academic attention. Part I fills that void by offering the first comprehensive legal and technical account of the organization. Part II argues that the novel cross-governmental bureaucracy for voter registration has been systematically exploited to promote distrust in elections. Reviewing Crosscheck, I explain why simply comparing voter registration lists across jurisdictions can yield the appearance of fraud where none exists. In short, statewide voter registration lists typically lack sufficient information to distinguish unique voters across states, in part because federal privacy protections limit the ability of election officials to collect voters’ (partial) Social Security numbers.

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<sup>26</sup> See, e.g., Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 969-71 (2005) (proposing federal government undertake universal registration of voters through issuance of “voter identification card[s]” and usage of biometric identification); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 501-02 (2008) (proposing responsibility of voter registration should be transferred from states to federal government).

<sup>27</sup> See COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at iv-v (Ctr. for Democracy & Election Mgmt. ed. 2005) [hereinafter CARTER-BAKER COMMISSION REPORT].

<sup>28</sup> See, e.g., Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 127 (2009) (identifying “twin problems of decentralization and partisanship”). HEATHER K. GERKEN, THE DEMOCRACY INDEX 6 (2009) (similarly focusing on “[p]artisanship and localism”).

<sup>29</sup> Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 747 (2016).

<sup>30</sup> Jessica Huseman, *The Goals of the Right and the Left Meet Within ERIC*, VOTEBEAT (Mar. 21, 2022, 1:20 PM), <https://www.votebeat.org/2022/3/21/22989365/eric-electronic-registration-information-center-republicans-democrats> [<https://perma.cc/C8TA-467X>].

I turn next to ERIC, which integrates the balkanized framework for voter registration through its access to not only voter registration records but also confidential motor-vehicle records. To overcome the obstacles of federal privacy law, ERIC merges state voter registration records with state motor-vehicle records to recover a partial Social Security number for voter registrations. But motor-vehicle records are subject to extensive federal privacy protections which restrict public oversight of ERIC's process.

For all the benefits of ERIC, the organization is now facing a coordinated legal and political attack. In the last year, as part of “[p]erhaps the widest-reaching example of structural interference in elections,”<sup>31</sup> ERIC has begun to unravel: nine Republican states have quit the bipartisan group.<sup>32</sup> At the same time, this Part highlights the most recent attacks on election administration, which I term “vigilante list maintenance.” These efforts complement the attacks on ERIC by exploiting public, but necessarily incomplete, access to administrative records to purportedly reveal discrepancies in voter registration. Some of the strategies recycle Crosscheck's flawed approach, transforming public oversight of voter registration from a tool to promote trust into a weapon for distrust.

In response to the attacks on ERIC, Part III introduces a set of proposals to both fortify the organization and expand its ambitions. I first revisit the federal role in list maintenance. For reasons both legal and political, the federal government is better suited to coordinating, rather than federalizing, state voter registration lists. In that vein, the federal government could do plenty to improve list maintenance. For one, Congress should trim the scope of federal privacy protections to promote sound election administration—both by making it easier to uniquely identify voters as they move and by ensuring public oversight of list maintenance. For another, Congress should also reconsider the proper balance between substantive and procedural protections for voters in list maintenance. In short, instead of any substantive standard for election officials to establish that a voter has moved, federal law currently relies on a lengthy series of procedural protections to allow the voter to confirm their residence for voter registration. A better approach would be to impose a minimum substantive standard and calibrate the quality of evidence that a voter moved with the extent of procedural protections. Finally, Congress should transform the list maintenance paradigm from cancelling the registration of voters who move to keeping their registration updated. To make the case, I revisit the U.S. Supreme Court's controversial decision in *Husted v. A. Phillip Randolph Institute*,<sup>33</sup>

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<sup>31</sup> Camille Squires, Opinion, *The Threats to Our Democracy Have Gone Local*, N.Y. TIMES (Apr. 15, 2023), <https://www.nytimes.com/2023/04/15/opinion/election-denial-eric-certification.html>.

<sup>32</sup> See discussion *supra* Part I.C.2.

<sup>33</sup> 138 S. Ct. 1833 (2018) (upholding Ohio's list maintenance process against statutory challenge under National Voter Registration Act); see also Manheim & Porter, *supra* note 15, at 221 (characterizing *Husted* as a “struggle for the soul of the NVRA”).

which upheld Ohio's practice of using a person's failure to vote as the sole reason to initiate cancellation of their registration.

The final Part then turns to how ERIC's cross-governmental bureaucracy can further the goal of more accurate and complete voter registration lists. As the rash of departures makes clear, the central obstacle to realizing ERIC's potential is its largely voluntary structure. But the potential benefits of a more robust ERIC make federal support worthwhile. To reimagine the list maintenance paradigm and fully account for voter mobility, ERIC could serve as a tool to finally realize proposals to nationalize—but not federalize—voter registration. Further, ERIC could leverage its unique data to better measure election administration, including improving the effectiveness of the National Voter Registration Act's "motor-voter" program to enfranchise voters and countering the growing misinformation about the extent of voter fraud. Finally, I suggest incorporating public assistance data into ERIC could help address stubborn inequalities in voter registration.

### I. MAPPING DEMOCRACY'S BUREAUCRACY

This first Part maps the legal structure of list maintenance, including its familiar components—the prominent role of local election officials—as well as the less familiar—the recent rise of a cross-governmental bureaucracy.

Voter list maintenance may seem boring. But it is “the ‘backbone’ of American elections.”<sup>34</sup> To understand why list maintenance is important, it is helpful to conceptualize a voter's eligibility as distinct from their registration. A voter is *eligible* to vote if they meet their state's qualification requirements. But a voter is only *able* to vote if they are properly registered in the jurisdiction in which they reside. Voter mobility thus breaks the fixed link between a voter's registration and their residential address. Mobility can lead to an inaccurate voter registration list in a voter's former jurisdiction, and an incomplete list in their new one.

List maintenance describes how election officials address the impact of voter mobility and voter death on registration lists.<sup>35</sup> While it may sound simple, the

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<sup>34</sup> Zach Montellaro, *2 More Republican States Abruptly Depart from Interstate Voter List Program*, POLITICO (Mar. 18, 2023, 7:00 AM), <https://www.politico.com/news/2023/03/18/republican-states-depart-from-interstate-voter-list-program-00087728> [<https://perma.cc/34BR-93JL>] (quoting Maine Secretary of State Shenna Bellows).

<sup>35</sup> Voter list maintenance also encompasses the removal of registrants who are ineligible to vote because they are not citizens or were convicted of a crime. This Article focuses on voter mobility and voter death because federal law only imposes an obligation on election officials to account for mobility and death, and because the “lion's share” of voter list maintenance is related to mobility and death. See *Bellitto v. Snipes*, 935 F.3d 1192, 1195, 1203 (2019) (“The NVRA requires a reasonable effort to remove only those voters who become ineligible because of death or change of address.”); Stephen Pettigrew & Charles Stewart III, *A Population Model of Voter Registration and Deadwood 2* (Mass. Inst. of Tech., Working Paper No. 2016-5, 2016) (modeling how voter mobility and death can make registration rolls inaccurate).

task is challenging because of the fundamental tension between the decentralization of election administration dictated by the Constitution and the mobility of a national electorate. Approximately one-third to one-half of all adults move within any five-year period, although about one-half of all people who move stay within the same county.<sup>36</sup> The tension between decentralization and mobility has precipitated a steady evolution in the bureaucracy for list maintenance in the twenty-first century, expanding beyond local election officials to include state election officials, state motor-vehicle officials, federal officials, and now the creation of a nonprofit composed of chief state election officials.

Part I.A sketches the constitutional allocation of election authority between the federal and state governments, since the balance of power marks the jurisdictional bounds of voter registration and creates the need for coordination. Part I.B then details the diffuse federal framework for list maintenance. Against that backdrop, Part I.C traces the recent development of a cross-governmental bureaucracy and offers the first comprehensive account of the Electronic Registration Information Center (“ERIC”).

#### A. *Constitutional Allocation of Election Authority*

This first Subpart briefly considers the constitutional division of election authority as it relates to voter registration. The next Subpart then reviews the federal government’s historically limited use of its election authority.

##### 1. Federal and State Constitutional Authority

The allocation of power between the federal and state governments is rooted in two distinctions set forth in the Constitution. The first is about the type of authority—whether it concerns election administration or voter qualifications. The second concerns the reach of that authority—whether it applies to federal or state elections.

The Constitution directs the states to *administer* congressional elections, but subjects state administrative choices to congressional control. Under the Elections Clause, states have the initial authority to set the “Times, Places and Manner of holding elections for Senators and Representatives.”<sup>37</sup> But Congress “may at any time . . . make or alter such Regulations.”<sup>38</sup> The Supreme Court has consistently held that Congress can use its authority over election administration to create a “complete code for congressional elections, including . . . regulations relating to registration.”<sup>39</sup>

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<sup>36</sup> Ihrke & Faber, *supra* note 10, at 2 tbl.1, 3 fig.2 (reporting five-year mover rates between 1970 and 2010 and five-year percent distribution of movers between 1980 and 2010).

<sup>37</sup> U.S. CONST. art. I, § 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The Supreme Court has understood the federal power over

The federal power over election administration is limited to federal elections, such that Congress cannot create a “complete code” to reach state elections.<sup>40</sup> In practice, though, states almost always choose to conduct “unitary” elections, effectively applying any federal law governing election administration to state elections too.<sup>41</sup>

The Constitution also directs the states to set voter *qualifications* for federal elections without providing for Congressional override. The Voting Qualifications Clauses provide that, to be eligible to vote for Congress, a person “shall have the [q]ualifications requisite for [e]lectors . . . of the [s]tate [l]egislature.”<sup>42</sup> Congress can thus “regulate *how* federal elections are held, but not *who* may vote in them.”<sup>43</sup> As a result, while Congress could create a single,

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election administration to apply to all federal elections—presidential and congressional—though the Constitution delineates between the two. Unlike the Elections Clause, the Presidential Electors Clause does not expressly subject state choices to Congressional control. *See* U.S. CONST., art. II, § 1 (“Congress may determine the [t]ime of [choosing] the [e]lectors [for President].”). The Court has previously seemed to locate the federal authority over the administration of *presidential* elections in the Necessary and Proper Clause. *See, e.g.,* *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (“To say that Congress is without power to pass appropriate legislation to safeguard [a presidential] election . . . is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government . . .”). More recently, it has elided any distinction between congressional and presidential elections at all. *See, e.g., Inter Tribal Council*, 570 U.S. at 16 (“[T]he Elections Clause empowers Congress to regulate how *federal* elections are held.” (emphasis removed and emphasis added)). Some academics have sought to challenge the Court’s settled understanding based on the textual differences between the Elections Clause and Presidential Electors Clause. *See, e.g.,* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 N.W. U.L. REV. 103, 108 (2017). Arizona has now taken up that challenge—the Department of Justice recently sued the state for requiring documentary proof of citizenship for presidential, but not congressional, elections. *See* Complaint at 2, *United States v. Arizona*, No. 22-cv-01124 (D. Ariz. July 5, 2022) (challenging Arizona’s House Bill 2492). Regardless, the practice of unitary elections makes the distinction between congressional and presidential elections less relevant for purposes of federal authority over voter registration.

<sup>40</sup> *See* Morley, *supra* note 39, at 106-08 (“Congress’s only power to regulate state and local elections comes from its ability to enforce the constitutional right to vote.”).

<sup>41</sup> *See generally id.* at 104 (“The unitary status of American elections has developed into a convention: a principle that is not constitutionally mandated, yet ‘guide[s] officials in how they exercise political discretion.’”); *see also Inter Tribal Council*, 570 U.S. at 41 (Alito, J., dissenting) (“As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace . . . state control of state and local elections.”).

<sup>42</sup> U.S. CONST. art. I, § 2 (for House of Representatives); *id.* amend. XVII, § 1 (for U.S. Senate).

<sup>43</sup> *Inter Tribal Council*, 570 U.S. at 16. In fact, all nine Justices in *Inter Tribal Council*, including the three who either concurred or dissented, agreed on this point. *See id.; id.* at 22 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 26 (Thomas, J., dissenting); *id.* at 38 (Alito, J., dissenting).

federal registration list for federal elections, any federal administrator would need to accommodate each state's unique qualification regimes,<sup>44</sup> straining the benefits of centralization.<sup>45</sup>

Together, these constitutional provisions create a system in which the bureaucracy that oversees elections is designed, inhabited, and governed by both federal and state policymakers and administrators.

## 2. Historical Use of Federal, State, and Local Authority

In light of the capacious power the Elections Clause confers on state governments, and on the tendency of states to delegate that power in turn to localities, almost all of election administration has been local.<sup>46</sup> Congress has only sparingly sought to exercise its power over election administration. The

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<sup>44</sup> Some academics have suggested the federal government could override states' constitutional authority to set voter qualifications, but that theory is unlikely to succeed today. The debate primarily centers on how to interpret the case *Oregon v. Mitchell*, 400 U.S. 112 (1970). There, four Justices endorsed the idea that Congress could enfranchise eighteen-year-olds in both federal and state elections under the Equal Protection Clause. *See id.* at 135 (Douglas, J., dissenting in part and concurring in the judgment in part); *id.* at 240 (Brennan, White & Marshall, JJ., dissenting in part and concurring in the judgment in part). Justice Black instead relied on the Elections Clause to support the age qualification in federal, though not state, elections. *See id.* at 122 (Black, J., announcing the judgment of the Court) ("[T]he powers of Congress to regulate congressional elections[] includ[e] the age and other qualifications of the voters."). Those who favor robust federal power in the current political climate, such as Nicholas Stephanopoulos, have argued Justice Black's Elections Clause theory is "controlling." Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 53 (2021). But the Equal Protection theory endorsed by the four concurring Justices is not so much "broader," *id.* at 52, than Justice Black's Elections Clause theory as it is distinct from it. Further, while there is some dispute about the views of Justice Douglas, it seems at least five justices across the four opinions in *Mitchell* disagreed with Justice Black's Elections Clause theory. In *Inter Tribal Council*, the Court counted Justice Douglas as the fifth Justice who "took the position that the Elections Clause did *not* confer upon Congress the power to regulate voter qualifications in federal elections." 570 U.S. at 16 n.8. Joshua Douglas has argued that the "vote count in *Oregon v. Mitchell* is disingenuous, as Justice Douglas did *not* state explicitly that the Elections Clause did *not* confer [the power to set voting qualifications]." Joshua A. Douglas, *(Mis)Trusting States To Run Elections*, 92 WASH. U. L. REV. 553, 592 (2015). Yet Justice Douglas wrote, "I . . . concur in the judgments as they affect federal elections, *but for different reasons*. I rely on the Equal Protection Clause . . ." *Mitchell*, 400 U.S. at 135 (emphasis added). Regardless, *Mitchell* is not likely to remain good law. *See supra* note 41 and accompanying text.

<sup>45</sup> Others have recognized this point too. For example, when Rick Hasen proposed federalizing voter registration, he acknowledged that "it might be best for states to continue to determine additional eligibility issues." Hasen, *supra* note 26, at 973. While the Fourteenth Amendment and other constitutional amendments have largely standardized voter qualifications, states still have drastically different approaches to whether people with felony convictions can vote. For a recent compendium of states' different approaches, see U.S. DEP'T OF JUST., C.R. DIV., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION (2022).

<sup>46</sup> For a robust history of the "local dimension of American suffrage" and our "hyper-federalized" regime, see ALEC C. EWALD, THE WAY WE VOTE 1 (2009).

three notable historical exceptions—during Reconstruction, World War II, and the civil rights era—reflect an approach in which the federal government did seek to displace local and state administration, but only in narrow and targeted ways that did not attempt to create a single, federal voter registration list. None of those efforts wholesale displaced state or local election administration or yielded a lasting federal electoral bureaucracy; instead, these episodes illustrate the legal possibilities and rare exercise of federal authority.

To start,<sup>47</sup> beginning in 1871, Congress authorized the limited appointment of election supervisors to root out voter fraud in select northern cities.<sup>48</sup> For example, in New York City, where voter fraud likely determined the state's 1868 presidential election, the chief federal election supervisor "construct[ed] an independent registry in which were listed all the qualified voters of the city."<sup>49</sup> In 1890, during the last gasp of Reconstruction, Congress came just a single vote shy of dramatically reworking the balance of federal and state power in election administration by extending the federal supervisory regime nationwide.<sup>50</sup> Instead, four years later, Congress repealed the regime entirely.<sup>51</sup>

Congress also briefly federalized voter registration during World War II for deployed military members. In 1942, Congress abruptly suspended state voter registration requirements for federal elections so those stationed abroad could vote without the lengthy delay of mailing a voter registration across the Atlantic.<sup>52</sup> To fully realize that goal, Congress also suspended existing state poll taxes for federal elections,<sup>53</sup> although it likely did not have such power to set

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<sup>47</sup> Before Confederate states were readmitted to the Union, Congress authorized the military to register eligible voters to participate in new state constitutional conventions, see Act of March 23, 1867, Pub. L. No. 40-6, § 1, 15 Stat. 2, 2 (1867). But here, Congress was relying on its power under the Guarantee Clause rather than the Elections Clause. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

<sup>48</sup> See Enforcement Act, Pub. L. No. 41-99, §§ 2, 4-5, 16 Stat. 433, 433-45 (1871) ("[P]rior to any registration of voters for an election . . . the circuit court . . . [shall appoint] two citizens . . . who shall be known and designated as supervisors of election."). Federal supervision was limited to "any city or town having upward of twenty thousand inhabitants" and contingent upon the written application of two citizens. *Id.* at 433. In practice, "the use of federal supervisors was concentrated in eight northern cities." Albie Burke, *Federal Regulation of Congressional Elections in Northern Cities, 1871-94*, 14 AM. J. LEGAL HIST. 17, 17 (1970). The law was a response to "the record vote fraud the Tweed Ring produced in the New York election of 1868." *Id.* at 21.

<sup>49</sup> Burke, *supra* note 48, at 21. Importantly, "the guide followed on election day on the question of who were eligible to vote was the 'federal registry' and not the city's." *Id.*

<sup>50</sup> For a detailed discussion of the vote and its implications, see Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows: George Grisbie Hoar and the 1890 Federal Elections Bill*, in FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING 126 (Stephen Skowronek & Mathew Glassman eds., 2007).

<sup>51</sup> See Act of February 8, 1894, ch. 25, 28 Stat. 36, 37 ("[A]ll other statutes and parts of statutes relating in any manner to supervisors of election . . . are hereby repealed.").

<sup>52</sup> See Act of September 16, 1942, Pub. L. No. 77-712, § 1, 56 Stat. 753, 753 (1942).

<sup>53</sup> See *id.*

voter qualifications.<sup>54</sup> In 1944, Congress created the United States War Ballot Commission and tasked it with creating a combined federal registration and absentee ballot application.<sup>55</sup> But, chastened by both legal and political criticism of its effort in 1942, Congress only “recommended” that states accept the federal forms.<sup>56</sup>

Finally, in the 1960s, Congress significantly expanded its reach into election administration, relying on both its specific elections-related authority, reviewed earlier,<sup>57</sup> as well as its general authority to enforce the Fourteenth and Fifteenth Amendments.<sup>58</sup> Particularly relevant here, beginning with the Voting Rights Act of 1965, Congress authorized the appointment of federal examiners to register voters in racially discriminatory jurisdictions.<sup>59</sup> Five years later, in 1970, Congress took the first, though limited, steps to facilitate voting by a mobile electorate as part of amendments to the Voting Rights Act. In short, the Amendments directed states to make absentee ballots available for voters absent from the jurisdiction, limited the length of any durational residency requirements, and required states to allow voters who moved between states in the immediate period before a presidential election to be able to vote for president in their former state of residence.<sup>60</sup>

#### B. *The Law of List Maintenance*

Within the Constitution’s shared framework for regulating elections, this Subpart focuses on the diffuse bureaucracy overseeing list maintenance. Given the constitutional backdrop, it surveys the different roles played by local, state, and federal officials, some of whom are dedicated to elections and others whose role is significant for elections but incidental to their primary governmental task.<sup>61</sup>

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<sup>54</sup> Five years earlier, in *Breedlove v. Suttles*, the Court unanimously upheld Georgia’s poll tax. 302 U.S. 277, 284 (1937). However, the federal law banning state poll taxes for soldiers during wartime was never challenged, likely because it ultimately enfranchised few military voters. See Brian C. Kalt, *Unconstitutional but Entrenched*, 81 BROOK. L. REV. 441, 446-47 (2016); Molly Guptill Manning, *Fighting To Lose the Vote*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 335, 353 (2016).

<sup>55</sup> See Act of April 1, 1944, Pub. L. No. 78-277, § 203, 58 Stat. 136, 137-38, 141-43.

<sup>56</sup> *Id.* § 202.

<sup>57</sup> See *supra* Part I.A.1.

<sup>58</sup> See U.S. CONST. amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *id.* amend. XV (“The right . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

<sup>59</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 6(b), 7, 9, 13(a), 79 Stat. 437, 439-45 (1965).

<sup>60</sup> Voting Rights Amendments of 1970, Pub. L. No. 91-285, § 202, 84 Stat. 314, 316-17.

<sup>61</sup> For a similar observation, see Sellers & Weinstein-Tull, *supra* note 5, at 1166 (“Election administration spills vertically across state and local governments and horizontally across state branches and officials.”).



The constitutional allocation of election authority makes it difficult to simply centralize voter registration in the federal government.<sup>62</sup> Instead, during a brief period beginning in the 1990s, Congress exercised its powers to impose a “complex superstructure”<sup>63</sup> on top of, rather than in lieu of, state and local election administration. The National Voter Registration Act (“NVRA”) of 1993<sup>64</sup> and the Help America Vote Act (“HAVA”) of 2002<sup>65</sup> bolstered the substantive right to vote.<sup>66</sup> To facilitate voter registration, federal law cobbled together a complex framework between local election officials and state election officials, motor-vehicle officials, public assistance officials, and even federal Social Security and postal service officials. But the federal scheme left states as silos in election administration—a problem eventually addressed by the states themselves through the emerging cross-governmental bureaucracy detailed in the next Subpart.

Two other federal laws, the Privacy Act of 1974<sup>67</sup> and the Driver’s Privacy Protection Act of 1994,<sup>68</sup> don’t directly regulate elections but do impact the performance of list maintenance, as I discuss *infra* Part II.

#### 1. National Voter Registration Act

The NVRA pieces together a framework to address the life cycle of registration, from initial registration through residential moves and ultimately until death. Beginning in the 1980s, academics and activists had grown concerned about declining voter turnout.<sup>69</sup> Based on Census estimates of the voting-age population, turnout had declined from a high of 63% in 1960 to just

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<sup>62</sup> In contrast to the American system, Canada’s federal elections agency maintains a single voter roll for federal elections. See JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CTR. FOR JUST., EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 1 (2009). For an updated comparative perspective on voter registration, see generally Yasmin Dawood, *Constructing the Demos: Voter Qualification Laws in Comparative Perspective*, in COMPARATIVE ELECTION LAW 281-82 (James A. Gardner ed., 2022).

<sup>63</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5 (2013).

<sup>64</sup> 52 U.S.C. §§ 20501-11.

<sup>65</sup> *Id.* §§ 20901-21145.

<sup>66</sup> See, e.g., Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right To Vote*, 49 HOWARD L.J. 741, 746 (2006) (characterizing NVRA and HAVA as “reflect[ing] a shift in national voting-rights legislation from an anti-discrimination to a substantive right-to-vote model”).

<sup>67</sup> Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a) (noting purpose of Privacy Act as “provid[ing] certain safeguards for an individual against an invasion of personal privacy”).

<sup>68</sup> Driver’s Privacy Protection Act of 1994, Pub. L. No. 103-322, Title XXX, § 300002(a), 108 Stat. 2099 (prohibiting release of certain personal information from state motor-vehicle records).

<sup>69</sup> See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON’T VOTE 4 (1988).

50% in 1988.<sup>70</sup> Many attributed the decline in turnout to the continued burden of state voter registration requirements.<sup>71</sup> At the time, election administration was hyperlocal.<sup>72</sup> Local election officials had different policies about when and how citizens could register to vote.<sup>73</sup> There were thousands of different voter registration lists, all of which were on paper.<sup>74</sup>

To turn to the statute, the NVRA imposes a federal obligation on election officials to conduct list maintenance in response to voter mobility or death. As a practical matter, any formal distinction in the life cycle between voter registration and voter list maintenance quickly collapses because of voter behavior—many people who submit an application to register to vote are already registered, but at a prior address yet to be updated by election officials.<sup>75</sup> Functionally, any activity which solicits updated information about a voter, from their new address to their death, can facilitate list maintenance. In fact, the NVRA anticipates that nonelection officials will often gather essential information for list maintenance in connection with nonelection purposes.

Specifically, the NVRA requires that local election officials “conduct a general program that makes a reasonable effort” to identify “ineligible voters . . . by reason of . . . death or a change in . . . residence”.<sup>76</sup> The federal

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<sup>70</sup> Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 963, 966 tbl.1 (2001) (reporting national turnout rate between 1948 and 2000). However, the “apparent decline in voter participation in national elections since 1972 [was] an illusion created by using the Bureau of the Census estimate of the voting-age population as the denominator of the turnout rate.” *Id.* at 963. In fact, it was “the ineligible population, not the nonvoting, [that had] been increasing since 1972.” *Id.* Still, the corrected turnout estimate for 1988, based on the voting-eligible population, was still just 54.2%. *Id.* at 966 tbl.1.

<sup>71</sup> See, e.g., PIVEN & CLOWARD, *supra* note 69, at 195-200; TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE* 60, 62-64 (2012) (identifying barriers to registration before the NVRA); Ross & Spencer, *supra* note 13, at 1025 (“[T]he dominant view became that voter registration laws were an important source of low turnout in the United States.”).

<sup>72</sup> See EWALD, *supra* note 46, at 1-3 (similarly characterizing election administration as “hyperfederalized”).

<sup>73</sup> See *id.* at 3 (highlighting role counties, cities, and towns, rather than states, played in maintaining voter registration lists).

<sup>74</sup> See *id.* (revealing nearly 13,000 local election jurisdictions were maintaining lists of voters).

<sup>75</sup> For example, more than half of all registration applications received during the 2020 election cycle were either (1) changes of name, party, or address within a local jurisdiction (49.4%), or (2) changes of address across local jurisdictions (9.5%). See ELECTION ASSISTANCE COMM’N, *ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT* 153-56 tbl.3 (2021) [hereinafter *EAVS 2020 REPORT*]. The implementation of same-day registration reveals a similar trend. For example, in Nevada’s 2020 general election, 55% of same-day registrations reflected voters who moved rather than new voters. See OFF. OF NEV. SEC’Y OF STATE, *2020 GENERAL ELECTION TURNOUT (2020)*, <https://www.nvsos.gov/sos/home/showpublisheddocument/9076/637419203877800000>.

<sup>76</sup> 52 U.S.C. § 20507(a)(4).

obligation recognizes that voters do not typically tell election officials when they move (and cannot tell them when they die) and gives election officials substantial discretion to determine the contours of their “general program.”<sup>77</sup> For example, they can obtain evidence that a voter moved using their own resources—such as checking if election mail is returned as undeliverable—or by coordinating with other agencies, including state departments of motor vehicles and the Post Office, as discussed *infra*.

By design, list maintenance is generally oriented towards the “remov[al] . . . of ineligible voters.”<sup>78</sup> But before removing a voter’s registration, election officials must comply with a set of procedural protections designed to prevent disenfranchisement. Under federal law, no registrant can be removed based on a change of residence unless the registrant meets one of two criteria—either the registrant confirms their move in writing or the registrant fails to respond to an official notice and fails to vote in the subsequent period between the notice and the second federal general election.<sup>79</sup> By responding to the notice or voting, the registrant can confirm they have not moved and avoid removal.

Importantly, there is a narrow legal exception to the general rule that has broad practical implications. In the case of voters who move *within* a local registrar’s jurisdiction (typically, a county),<sup>80</sup> the registrar “shall correct” rather than remove the voter’s registration.<sup>81</sup> This obligation is significant for enfranchisement because many people relocate within a county.<sup>82</sup> But it is contingent on local election officials specifically learning a voter has moved *within their jurisdiction* rather than generally learning that a voter no longer resides at their address of registration.

To fulfill their list maintenance obligations, election officials increasingly choose to rely on administrative records compiled by nonelection officials. Some of the most prominent bureaucratic interdependencies are not visible to voters. For example, the NVRA encourages election officials to coordinate list maintenance efforts with the U.S. Postal Service.<sup>83</sup> Although the Post Office is not typically considered part of election administration, at least outside of their

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<sup>77</sup> *See id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* § 20507(d)(1).

<sup>80</sup> *See id.* § 20507(j) (defining “registrar’s jurisdiction”).

<sup>81</sup> *Id.* § 20507(f).

<sup>82</sup> *See* IHRKE & FABER, *supra* note 10, at 3 fig.2 (displaying U.S. Census data gathered between 1980 and 2010 showing how over 50% of movers move within same county).

<sup>83</sup> *See* 52 U.S.C. §§ 20507(c)(1)(A)-(B) (designating Postal Service’s change-of-address list as safe harbor sufficient to fulfill election official’s obligation to conduct list maintenance).

role in mailing ballots, the Post Office has access to essential information for list maintenance.<sup>84</sup>

The National Change of Address (“NCOA”) list, compiled from change-of-address requests submitted to the Post Office, includes individuals’ former and current addresses. The list is designed to facilitate the efficient distribution of mail in a mobile country. The Postal Service offers the list as a commercial product, typically for direct mail marketing firms, although election officials also subscribe to the list. The connection between election offices and postal offices allows election officials to identify voters who have moved—and either update or take steps to cancel their registration.<sup>85</sup> But many people who move never submit a change-of-address request.<sup>86</sup> And relying on those who do introduces its own set of complications. For example, a person may seek to redirect their mail without intending to update their registration.<sup>87</sup> The postal change-of-address form gives no notice to a voter of the implications for voter registration.<sup>88</sup> Further, the change-of-address program does not gather the type of unique information, such as date of birth or Social Security number, that allows election officials to easily connect an individual’s change-of-address with their voter registration.<sup>89</sup> The ability to file a single change-of-address for an entire family can exacerbate both problems.<sup>90</sup>

Notably, the relationship between election offices and motor-vehicle offices is more visible to voters, although the scope of motor-vehicle officials’ involvement in election administration is still “relatively unappreciated.”<sup>91</sup> State motor-vehicle officials have perhaps the most significant role under the NVRA. For one, they are required to offer applicants for a driver’s license the opportunity to register to vote.<sup>92</sup> For another, unless the voter opts out, motor-vehicle officials are also responsible for forwarding any address change in a voter’s driver’s license to election officials.<sup>93</sup> In this sense, motor-vehicle

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<sup>84</sup> See *Common Cause/N.Y. v. Brehm*, 432 F. Supp. 3d 285, 295-96 (S.D.N.Y. 2020) (discussing how Postal Service is used as proxy for voter movement because of data it collects).

<sup>85</sup> See *id.*

<sup>86</sup> See *Husted v. A. Phillip Randolph Inst.*, 138 S. Ct. 1833, 1840 (2018) (citing federal audit of Postal Service, which concluded that “[a]s many as 40 percent of people who move do not inform the Postal Service” (citation omitted)).

<sup>87</sup> See, e.g., *Brehm*, 432 F. Supp. 3d at 298 (crediting expert testimony on this point).

<sup>88</sup> See *id.* (describing inaccuracies stemming from temporary changes of addresses).

<sup>89</sup> See *id.* at 297-98 (crediting expert testimony on this point).

<sup>90</sup> See *id.*

<sup>91</sup> LISA J. DANETZ, DEMOCRACY FUND, MOTOR VEHICLE DEPARTMENTS: BEDROCK OF AMERICAN DEMOCRACY 3 (2021) (indicating state agency officials, policymakers, advocates and the public are relatively unaware of DMV’s involvement in elections).

<sup>92</sup> See 52 U.S.C. § 20504(a) (“Each State motor vehicle driver’s license application (including any renewal application) . . . shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.”).

<sup>93</sup> See *id.* § 20504(d).

officials can play a central role in gathering the sort of updated information about voters needed to maintain both more accurate and more complete voter registration lists.<sup>94</sup> But in practice, these provisions, commonly referred to as “motor voter,” are often “the weakest link” in the interdependencies that have arisen to facilitate list maintenance.<sup>95</sup> (Relative to motor-voter, state public assistance and disability officials have related, although substantially less robust, election responsibilities, which they similarly perform poorly.)<sup>96</sup>

The NVRA provides for both federal enforcement and a private right of action.<sup>97</sup> Scholars have mined federal enforcement patterns to judge the relative costs and benefits of federal involvement in election administration, as I discuss *infra* Part III. The NVRA also supplements its emphasis on coordination by

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<sup>94</sup> Overall, during the 2020 election cycle, the plurality of voter registration applications came from a state motor vehicle department (39.3%). See EAVS 2020 REPORT, *supra* note 75, at 145-50 tbl.2. The Election Administration and Voting Survey unfortunately does not break down the number of address changes that came from a motor-vehicle department.

<sup>95</sup> PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 17 (2014) (detailing ways in which DMVs create obstacles to transfer of registration data and cause preventable inaccuracies in voter registration lists). Over a series of subsequent reports, Stuart Naifeh documented the continued lack of motor-voter compliance. For example, in his 2014 survey, some state departments of motor vehicles did not properly treat the change-of-address procedure as an opt-out procedure and some election officials only updated the voter's registration address when they moved within a county, but not across counties. See DEMOS, DRIVING THE VOTE 40 tbl.4 (2015) (identifying which states use opt-out or opt-in procedure); *id.* at 42 tbl.5 (identifying how different states treat address changes). Naifeh recently confirmed the latter problem was still an issue. See DEMOS, KEEPING PACE WITH MOTOR VOTER 15 (2021) (identifying state which, in 2018, had approximately 400,000 voter registrations with addresses not matching records kept by DMV).

<sup>96</sup> There are at least two differences in the statutory scheme. For one, while a state motor-vehicle official “may require only the minimum amount of information necessary” to register a person to vote or update their address, other state officials only need to distribute a mail voter registration form. Compare 52 U.S.C. § 20504(c)(2)(B), *with id.* § 20506(a)(4)(A). For another, while a state motor-vehicle official “shall” treat any change of address to a driver's license as a change of address for voter registration unless the individual opts out, there is no similar default for other state officials. Compare *id.* § 20504(d) (“Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.”), *with id.* § 20506(a)(4)(A). Both differences help explain why very few voter registration applications during the 2020 election cycle came from a state public assistance agency (1.6%). EAVS 2020 REPORT, *supra* note 75, at 145-50 tbl.2. For an account of the problem and promise of voter registration at state public assistance agencies, see DOUGLAS R. HESS, INST. FOR RESPONSIVE GOV'T, USING MEDICAID AUTOMATIC VOTER REGISTRATION TO ADDRESS PERSISTENT VOTER REGISTRATION PROBLEMS (2023) (detailing ways in which the statutory scheme “decreases the likelihood that [social service] agency visitors will accept the offer to register to vote” and “increases the likelihood that states will fail to comply with the law”).

<sup>97</sup> See 52 U.S.C. §§ 20510(a)-(b).

directing a federal agency—at first the Federal Election Commission, now the Election Assistance Commission—to create a standardized, federal registration form, which state and local election officials must accept.<sup>98</sup>

## 2. Help America Vote Act

In the aftermath of Florida's 2000 election, Congress revisited the balance between state and local election administration.<sup>99</sup> While the NVRA largely focused on coordination, the Help America Vote Act ("HAVA") took partial steps toward centralization.

As is relevant here, HAVA shifted election administration tasks, including aspects of list maintenance, from local to state governments.<sup>100</sup> HAVA mandates a particular bureaucratic arrangement within a state—each state must designate a chief election official and, through that official, implement a single, statewide, electronic voter registration list.<sup>101</sup> The statewide lists, though, are effectively siloed. Each registered voter must have a "unique identifier" on the statewide list, but the identifier need only be "unique" within a state, not across states.<sup>102</sup> As a result, the fifty lists are not interoperable.

Statewide, electronic voter registration lists facilitate connections between election and nonelection officials within a state. For example, to further list maintenance, the chief state election official is responsible for coordinating the list with "State agency records on death."<sup>103</sup> The chief state election official is also tasked with identifying duplicate registrations by the same voter.<sup>104</sup>

Although HAVA moved away from local voter registration lists, it did not expand list maintenance as a tool for enfranchisement. The NVRA requires election officials to update, rather than cancel, the voter's registration if they

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<sup>98</sup> See *id.* § 20505(a)(1).

<sup>99</sup> See EWALD, *supra* note 46, at 6 (chronicling attempt to reduce localism).

<sup>100</sup> There is a long history of federal efforts to shift administrative tasks from local to state governments in other policy domains. See, e.g., KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE 1935–1972 (2016) (documenting similar effort in social welfare context).

<sup>101</sup> See 52 U.S.C. § 21083(a)(1)(A).

<sup>102</sup> *Id.* § 21083(a)(1)(A)(iii) ("[A] unique identifier is assigned to each legally registered voter in the State."); *id.* § (a)(1)(A)(iv) ("The computerized list shall be coordinated with other agency databases within the State.").

<sup>103</sup> *Id.* § 21083(a)(2)(A)(ii)(II).

<sup>104</sup> See *id.* § 21083(a)(2)(B)(iii) ("[L]ist maintenance . . . shall be conducted in a manner that ensures that duplicate names are eliminated from the computerized list."). Further, to verify the information in voter registration forms, the chief state election official is also responsible for entering into an agreement with motor-vehicle officials. See *id.* § 21083(a)(2)(B)(i). In an example of the complex, interjurisdictional connections throughout election administration, HAVA also requires the chief motor-vehicle official to enter into an agreement with the Commissioner of Social Security. See *id.* § 21083(a)(5)(B)(ii).

learn a voter has moved *within* their jurisdiction.<sup>105</sup> HAVA did not expand the NVRA's update requirement to apply to moves within the *state*.<sup>106</sup>

To complete the picture, HAVA also created a federal bureaucracy of sorts, the Election Assistance Commission ("EAC").<sup>107</sup> But the commission illustrates Congress's lack of interest in federalizing election administration.<sup>108</sup> The EAC has no authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government."<sup>109</sup> Its two Democratic and two Republican appointees face a super-majority requirement even to provide guidance.<sup>110</sup>

### C. *A Cross-Governmental Bureaucracy*

This Subpart turns to the development of a cross-governmental bureaucracy for voter list maintenance. During the early 2000s, on the heels of the introduction of statewide, electronic voter registration lists, reformers imagined new governance structures to continue to address voter mobility and achieve more accurate and complete lists. The various proposals navigated the constitutional distribution of power and the historical roles of the federal and state governments in different ways, including federal control, federal supervision, interstate agreements, and a corporation of member states.

Two prominent scholars advocated for federal control of voter registration. Rick Hasen advocated for the federal government to "create and maintain [a] massive database . . . [with] information for every eligible voter."<sup>111</sup> Over a series of foundational articles, Daniel Tokaji similarly advocated for

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<sup>105</sup> See *id.* § 20507(f) ("In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters . . .").

<sup>106</sup> As a result, federal law still "largely [leaves] unprotected the voting rights of voters who move[d] outside of their [county]" without updating their voter registration. MYRNA PÉREZ, BRENNAN CTR. FOR JUST., *WHEN VOTERS MOVE* 6 (2009).

<sup>107</sup> See 52 U.S.C. § 20921 ("establish[ing] as an independent entity the Election Assistance Commission").

<sup>108</sup> For example, Rick Hasen has characterized the EAC as "designed to fail." Rick Hasen, *Another Blow for the EAC*, ELECTION L. BLOG (Feb. 24, 2009, 1:28 PM), <https://electionlawblog.org/?p=12109> [<https://perma.cc/CV68-PNUP>].

<sup>109</sup> 52 U.S.C. § 20929. The exception to the general rule is the EAC's rule-making power for the federal mail voter registration form. See *id.* § 20508(a)(2) ("The Election Assistance Commission . . . shall develop a mail voter registration application form for elections for Federal office; . . .").

<sup>110</sup> See *id.* § 20923(b)(2) (imposing partisan balance requirement for initial appointees); *id.* § 20923(b)(3)(A) (requiring vacancies "shall be filled in the manner in which the original appointment was made"); *id.* § 20928 (imposing super-majority requirement). Jennifer Nou has characterized the partisan balance requirement as a "distinctive design feature" among federal administrative agencies. Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 145 (2014).

<sup>111</sup> Hasen, *supra* note 26, at 971.

“registration federalization.”<sup>112</sup> For their part, former President Jimmy Carter and former Secretary of State James Baker proposed an alternative approach of federal supervision: a “distributed database” connecting state voter registration lists, to be managed or supervised by the federal government.<sup>113</sup>

These proposals reflected traditional federalism debates: Should the states manage the policy challenge, should the federal government do it, or (increasingly) should they do it together? This story takes an unexpected turn away from those classic fault lines, however, because while those debates were happening, state chief election officials began to forge their own bureaucracies to confront the problem of interjurisdictional voter mobility and the growing complexity of list maintenance. State election officials developed an unexpected cross-border bureaucracy that would strive to be national in scale, but not located within the federal government.<sup>114</sup>

In 2013, a commission appointed by President Obama “to identify best practices in election administration and make recommendations to improve the voting experience” endorsed the two nascent, state-based approaches: Crosscheck, hosted by the Kansas Secretary of State, and ERIC, a nonprofit where state chief election officials serve as the Board of Directors.<sup>115</sup> The commission encouraged states to “share data and synchronize voter lists so that states, *on their own initiative*, come as close as possible to creating an accurate database of all eligible voters.”<sup>116</sup> Interstate cooperation promised at least two of the benefits of centralization without the problems of federalization: the ability to address voter mobility across states and to expand states’ limited

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<sup>112</sup> See, e.g., Tokaji, *supra* note 26, at 501.

<sup>113</sup> CARTER-BAKER COMMISSION REPORT, *supra* note 27, at 14.

<sup>114</sup> Beyond the elections context, financial markets feature a similar coordination problem. Similar to how voter registrations must be updated following a move, financial markets depend on “records of the legal and beneficial owners of securities” which must be “update[d] . . . to reflect changes in ownership following the settlement of a trade.” Dan Awrey & Joshua C. Macey, *Open Access, Interoperability, and DTCC’s Unexpected Path to Monopoly*, 132 YALE L.J. 96, 124 (2022). But unlike in the elections context, Congress amended the Securities Exchange Act in 1975 to “facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities.” *Id.* at 129 (quoting 15 U.S.C. § 78q-1(a)(2)(A)(i)). Today, the Depository Trust and Clearing Corporation (“DTCC”) is the only depository and clearinghouse. *Id.* at 106.

<sup>115</sup> See PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 95, at 5, 28-29 (discussing how “[e]very effort needs to be made to facilitate coordination among the states,” reviewing Crosscheck and ERIC as “[t]wo existing projects [that] are emblematic of these efforts,” and “endors[ing]” them).

<sup>116</sup> *Id.* at iii (emphasis added).



bureaucratic capacities to conduct list maintenance, even within a state.<sup>117</sup> It garnered broad bipartisan support.<sup>118</sup>

The Obama commission endorsement fueled the growth of both Crosscheck and ERIC. What follows details the evolution of Crosscheck, the first attempt to facilitate cross-state list maintenance independent of the federal government. Although now defunct, Crosscheck offers one particular model of interstate cooperation that ultimately fueled the voter-fraud narrative and is now poised to potentially return. This Subpart then presents the first comprehensive account of ERIC, which substantially improved upon Crosscheck's model, but, as I show *infra* Part II, is now unraveling.

### 1. Interstate Voter Registration Crosscheck Program

After the passage of HAVA in 2002, the EAC sponsored a multi-year project to improve state voter registration lists.<sup>119</sup> In those early days, Kansas election officials took the view that an interstate exchange of voter registration information “does not need to be complicated.”<sup>120</sup> Instead, Kansas officials suggested that “it is a fairly simple matter for states to write memorandums of understanding, share data and process the results.”<sup>121</sup>

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<sup>117</sup> For a related, earlier observation, see, e.g., Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 732 (2008) (“Translocal institutions are legally and politically intriguing because they are national but not part of the federal government.”). Importantly, this particular type of interstate cooperation likely does not require the consent of Congress. The Compact Clause requires that “[n]o State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State.” U.S. CONST. art. I, § 10, cl. 3. However, the “application of the Compact Clause is limited to agreements that . . . ‘may encroach upon or interfere with the just supremacy of the United States.’” U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 471 (1978) (quoting New Hampshire v. Maine, 426 U.S. 363, 519 (1976)). Interstate cooperation in voter registration does not “interfere with the just supremacy of the United States,” *id.*, because Congress may displace it at any time with respect to federal elections and does not have any such power with respect to state elections. See discussion *supra* Part I.A.1. For a more substantial explanation of a similar view, see generally Jon D. Michaels & Emme M. Tyler, *Just-Right Government: Interstate Compacts and Multistate Governance in an Era of Political Polarization, Policy Paralysis, and Bad-Faith Partisanship*, 98 IND. L.J. 863 (2023).

<sup>118</sup> For example, the Republican National Lawyers Association “strongly agree[d]” with the Commission’s recommendation and pronounced that “there will be little public policy justification for any federal legislation in this area.” CHARLES H. BELL, JR. ET AL., REPUBLICAN NAT’L LAWS. ASS’N, RESPONSE TO THE REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 7-8 (Justin Riemer ed., 2014).

<sup>119</sup> See generally NAT’L RSCH. COUNCIL, IMPROVING STATE VOTER REGISTRATION DATABASES: FINAL REPORT (2010).

<sup>120</sup> Kan. Sec’y of State, *Data Crosschecking Keeps on Growing*, CANVASSING KAN., Dec. 2007, at 6, 6, [https://www.kssos.org/forms/communication/canvassing\\_kansas/dec07.pdf](https://www.kssos.org/forms/communication/canvassing_kansas/dec07.pdf) [<https://perma.cc/UVE2-XY59>].

<sup>121</sup> *Id.*

In 2005, the year before the EAC study began, Kansas signed the first multi-state agreement with the chief election officials in Iowa, Missouri, and Nebraska.<sup>122</sup> The initial agreement focused on identifying duplicate registrations between the participating states.<sup>123</sup> By 2007, Kansas was organizing a second collection of South-Central states to complement the original Midwest group.<sup>124</sup> At the time, there were at least two other regional efforts also aimed at identifying duplicate registrations across states.<sup>125</sup> But neither of these state efforts led to a lasting institutional arrangement. Instead, Kansas emerged as the leader of the initial cross-state election bureaucracy. In 2010, its two regional efforts merged to create Crosscheck, with Kansas serving as the host.<sup>126</sup>

Relative to ERIC, detailed in the next subsection, Crosscheck's sparse approach means there are few institutional details to recount.<sup>127</sup> Crosscheck operated on a two-page memorandum of understanding signed by chief state election officials.<sup>128</sup> The agreement envisioned that, once a year, Kansas would compare all participating states' voter registration lists.<sup>129</sup> Kansas would then return to each state a list of registrations which shared the exact same first name,

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<sup>122</sup> See PROJECT VOTE, 2010 ISSUES IN ELECTION ADMINISTRATION: INTERSTATE COMPACTS 2 (2010) (characterizing it as “[t]he first interstate compact formed to compare [voter registration] databases”); R. MICHAEL ALVAREZ, JEFF JONAS, WILLIAM E. WINKLER & REBECCA N. WRIGHT, INTERSTATE VOTER REGISTRATION DATABASE MATCHING: THE OREGON-WASHINGTON 2008 PILOT PROJECT 1 (2009).

<sup>123</sup> See Kan. Sec’y of State, *Data Crosschecking Expanding to Other States*, CANVASSING KAN., Sept. 2007, at 1, 1, [https://www.sos.ks.gov/forms/communication/canvassing\\_kansas/sept07.pdf](https://www.sos.ks.gov/forms/communication/canvassing_kansas/sept07.pdf) [<https://perma.cc/VW2A-6MS4>] (recounting how “states that are members of the Midwest Election Officials Conference—Iowa, Missouri, Nebraska and Kansas—initiated a program in late 2005 to share voter registration data across state lines to identify duplicate records”).

<sup>124</sup> See Kan. Sec’y of State, *supra* note 120, at 6-7.

<sup>125</sup> Between 2005 and 2006, state election officials in Kentucky, South Carolina, and Tennessee had participated in a pilot project. See Order Denying Injunction and Granting Partial Summary Judgement at 1-2, *Commonwealth of Kentucky v. State Bd. of Elections & Sec’y of State*, No. 06-CI-610 (Ky. Franklin Cir. Ct. Oct. 2, 2006) (detailing project). In 2008, the chief election officials in Oregon and Washington also participated in a pilot regional project to identify duplicate registrations. See ALVAREZ ET AL., *supra* note 122.

<sup>126</sup> See PROJECT VOTE, *supra* note 122, at 2.

<sup>127</sup> See Fahey, *supra* note 24, at 1043 (characterizing Crosscheck as a “perilously informal program”).

<sup>128</sup> See, e.g., Memorandum of Understanding for Interstate Voter Registration Data Comparison 1-2 (Jan. 2013) (outlining terms of Crosscheck in two-page memorandum signed by participating chief state election officials) (available at [https://www.aclupa.org/sites/default/files/field\\_documents/requested\\_documents\\_-\\_interstate\\_crosscheck\\_voter\\_registration\\_program\\_81\\_pages.pdf](https://www.aclupa.org/sites/default/files/field_documents/requested_documents_-_interstate_crosscheck_voter_registration_program_81_pages.pdf)).

<sup>129</sup> See, e.g., INTERSTATE VOTER REGISTRATION DATA CROSSCHECK, 2014 PARTICIPATION GUIDE (2013), [https://www.aclupa.org/sites/default/files/field\\_documents/requested\\_documents\\_-\\_interstate\\_crosscheck\\_voter\\_registration\\_program\\_81\\_pages.pdf](https://www.aclupa.org/sites/default/files/field_documents/requested_documents_-_interstate_crosscheck_voter_registration_program_81_pages.pdf) [<https://perma.cc/2YWV-LSZT>] [hereinafter CROSSCHECK, 2014 PARTICIPATION GUIDE] (starting at page 36 of file).

last name, and date of birth as a registration in another participating state.<sup>130</sup> This list of potentially duplicative registrations would also include any other voter information provided by the participating states, such as middle name, the last four digits of a Social Security number (“SSN4”), or date of registration, if available.<sup>131</sup> States did not pay to participate in Crosscheck and were not required to act on its results.<sup>132</sup>

Table 1 lists which states participated in Crosscheck.<sup>133</sup> Each row represents a state, and each column represents a particular year. For each year a state participated, the corresponding cell includes the number of registrations reported by Crosscheck as potentially duplicative. Over its lifetime, Crosscheck flagged seventy-two million registrations as potentially duplicative.

**Table 1.** State Participation in Crosscheck

| State | Year   |        |        |        |         |         |         |         |         |
|-------|--------|--------|--------|--------|---------|---------|---------|---------|---------|
|       | 2009   | 2010   | 2011   | 2012   | 2013    | 2014    | 2015    | 2016    | 2017    |
| AL    | –      | –      | –      | –      | –       | –       | –       | 110,124 | 119,900 |
| AK    | –      | –      | –      | –      | 17,778  | 17,968  | –       | –       | –       |
| AZ    | 15,662 | 20,236 | 39,676 | 54,038 | 117,280 | 135,412 | 127,388 | 120,138 | 137,262 |
| AR    | 16,562 | 34,560 | 42,261 | 32,361 | 56,241  | 54,884  | 59,755  | 55,100  | 68,380  |
| CO    | 24,406 | 42,925 | 61,522 | 68,271 | 139,911 | 150,421 | 139,105 | 128,706 | 143,018 |
| FL    | –      | –      | –      | –      | 263,848 | –       | –       | –       | –       |
| GA    | –      | –      | –      | –      | 255,378 | 286,279 | 275,493 | 270,122 | 330,354 |

<sup>130</sup> See *id.* at 4.

<sup>131</sup> See *id.* at 8 (listing data fields participating states should provide, if available).

<sup>132</sup> See *id.* at 2 (“There is no cost.”).

<sup>133</sup> The table uses a variety of sources. Leave Crosscheck, an investigative advocacy group, initially posted the potential duplicate registrations online but without documentation and is now defunct. I then validated the data by gathering the same information myself for any years in which it is publicly accessible. I have successfully validated the data for all years in which it has been possible to do so (2011, 2012, 2013, 2014, and 2017). See Kan. Sec’y of State, *Voter Registration List Maintenance Improvements*, CANVASSING KAN., Dec. 2011, at 6, 6, [https://www.sos.ks.gov/forms/communication/canvassing\\_kansas/dec11.pdf](https://www.sos.ks.gov/forms/communication/canvassing_kansas/dec11.pdf) [<https://perma.cc/PV7E-KGHN>] (verification for 2011); NAT’L ASS’N OF STATE ELECTION DIRS., INTERSTATE VOTER REGISTRATION CROSSCHECK SYSTEM 11 (2013) (available at [https://www.aclupa.org/sites/default/files/field\\_documents/requested\\_documents\\_-\\_interstate\\_crosscheck\\_voter\\_registration\\_program\\_81\\_pages.pdf](https://www.aclupa.org/sites/default/files/field_documents/requested_documents_-_interstate_crosscheck_voter_registration_program_81_pages.pdf)) (starting at page 30 of file) (verification for 2012); Kris Kobach, Sec’y of State, Kan., Presentation to the Presidential Commission on Election Administration, [https://www.eac.gov/sites/default/files/event\\_document/files/SOS-Kris-Kobach-PCEA-Presentation\\_%281%29.pdf](https://www.eac.gov/sites/default/files/event_document/files/SOS-Kris-Kobach-PCEA-Presentation_%281%29.pdf)) [<https://perma.cc/9BPG-BQ4T>] (Sept. 20, 2013) (verification for 2013); *Hearing on SB 34 Before the S. Comm. on the Judiciary*, 2015 Sess. (Kan. 2015) (testimony of Kris W. Kobach, Kansas Secretary of State) (verification 2014); COAL. OF N.H. TAXPAYERS, 2017 GRID OF POTENTIAL DUPLICATE REGISTRANTS WITHIN STATES (2017), <https://www.cnht.org/news/wp-content/uploads/2017/05/CrossStateCheckStatistics-2017.pdf> [<https://perma.cc/6FP9-HWQN>] (verification for 2017).

| State | Year   |        |         |         |         |         |         |         |         |
|-------|--------|--------|---------|---------|---------|---------|---------|---------|---------|
|       | 2009   | 2010   | 2011    | 2012    | 2013    | 2014    | 2015    | 2016    | 2017    |
| ID    | –      | –      | –       | –       | –       | 16,912  | 12,442  | 10,417  | 14,056  |
| IL    | –      | –      | 119,932 | 105,512 | 211,940 | 225,991 | 228,396 | 227,162 | 271,032 |
| IN    | –      | –      | –       | –       | –       | 230,015 | 234,398 | 226,288 | 258,350 |
| IA    | –      | 31,070 | 54,406  | 50,070  | 65,675  | 69,666  | 62,959  | 64,962  | 67,093  |
| KS    | 16,392 | 38,159 | 41,513  | 40,008  | 60,005  | 62,516  | 62,698  | 61,751  | 70,625  |
| KY    | 10,776 | 31,914 | 43,412  | 7,039   | 121,580 | 160,465 | 170,568 | 155,563 | 185,894 |
| LA    | 13,574 | 35,998 | 32,754  | 30,139  | 62,332  | 63,001  | 55,162  | 59,604  | 67,280  |
| ME    | –      | –      | –       | –       | –       | –       | 31,655  | –       | 38,242  |
| MA    | –      | –      | –       | –       | –       | 74,903  | 90,114  | 72,294  | 95,867  |
| MI    | –      | –      | –       | 82,418  | 183,800 | 224,961 | 208,624 | 203,134 | 209,003 |
| MS    | –      | 42,742 | 46,639  | 41,520  | 71,588  | 73,027  | 74,934  | 81,144  | 90,558  |
| MO    | –      | 70,738 | 97,805  | 79,661  | 128,972 | 130,192 | 130,499 | 122,355 | 144,474 |
| NE    | –      | 21,650 | 23,878  | 22,753  | 34,932  | 33,172  | 29,450  | 30,383  | 38,002  |
| NV    | –      | –      | –       | –       | –       | 47,962  | 43,468  | 42,984  | 47,624  |
| NH    | –      | –      | –       | –       | –       | –       | –       | –       | 47,305  |
| NY    | –      | –      | –       | –       | –       | –       | 248,651 | 196,178 | –       |
| NC    | –      | –      | –       | –       | –       | 294,696 | 280,846 | 227,946 | 280,906 |
| OH    | –      | –      | –       | –       | 204,192 | 234,600 | 248,520 | 193,046 | 239,542 |
| OK    | 17,099 | 25,752 | 32,198  | 27,458  | 51,946  | 49,778  | 53,842  | 44,894  | 59,174  |
| OR    | –      | –      | –       | –       | 57,782  | –       | –       | –       | –       |
| PA    | –      | –      | –       | –       | –       | 185,962 | 211,742 | –       | –       |
| SC    | –      | –      | –       | –       | 122,860 | 183,333 | 178,934 | –       | 184,094 |
| SD    | –      | 6,186  | 11,424  | 10,450  | 17,410  | 18,104  | 17,430  | 17,184  | 20,960  |
| TN    | –      | 58,590 | 72,297  | 45,839  | 116,860 | 116,792 | 129,606 | 109,320 | 148,247 |
| VA    | –      | –      | –       | –       | 154,290 | 171,278 | 169,560 | 142,309 | 177,226 |
| WA    | –      | –      | –       | –       | –       | 108,624 | –       | –       | –       |
| WV    | –      | –      | –       | –       | –       | 54,829  | 55,974  | –       | 52,862  |

As Table 1 shows, Crosscheck ultimately attracted the participation, at one time or another, of thirty-five states, including reliably Republican states such as Alabama and Texas, and reliably Democratic states such as Massachusetts. Table 1 also shows a limited pattern of state exit, the reasons for which I address *infra* Part II. Crosscheck effectively disbanded in 2018, following two successful federal lawsuits brought by civil rights organizations.<sup>134</sup> One of the suits, filed against Kansas, focused on the state’s failure to secure private

<sup>134</sup> See *Common Cause Ind. v. Lawson*, 937 F.3d 944, 962-63 (7th Cir. 2019) (affirming grant of preliminary injunction against Indiana’s use of Crosscheck based on National Voter Registration Act); *Moore v. Kobach*, 359 F. Supp. 3d 1029, 1053-54 (D. Kan. 2019) (denying Kansas’s motion to dismiss § 1983 claim for “ongoing violation of plaintiffs’ Fourteenth Amendment right to informational privacy” arising from state’s provision of voter information to other state Crosscheck participants).

information in voter registration records.<sup>135</sup> Following a preliminary injunction, Kansas never sought to restart Crosscheck with better security protocols, perhaps because its member states were already shifting to join ERIC instead.<sup>136</sup>

## 2. Electronic Registration Information Center (“ERIC”)

For some time, many state chief election officials participated in both Crosscheck and ERIC, as two distinct cross-state bureaucracies.<sup>137</sup> But ERIC ultimately displaced Crosscheck in the marketplace of states. States were motivated to continue to participate in cross-state arrangements because the churn of the national electorate consistently leaves voter registration lists outdated.<sup>138</sup> Further, Crosscheck only focused on a narrow aspect of list maintenance: duplicate registrations across states. In contrast, ERIC took on the task of list maintenance writ large, using expanded administrative records to also identify individuals who remained misregistered following a move or who were not registered at all.

Some commentators have labelled ERIC “among the most significant advancements in fair, nondiscriminatory election administration in this country.”<sup>139</sup> Despite its importance, though, the organization has received little critical academic attention. This Part fills that void by offering the first legal and technical account of the organization.

### a. Organization

ERIC has its roots in a working group on “voter registration modernization” launched in 2009 by the Pew Center on the States.<sup>140</sup> Compared to the federal study of state voter registration databases, the working group was responding to

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<sup>135</sup> Moore, 359 F. Supp. 3d at 1035, 1051 (holding plaintiffs pled facts sufficient to state informational privacy claim against Kansas for its participation in Crosscheck, where “files containing personal identifying information about Kansas voters and partial Social Security numbers were transmitted . . . by unsecure methods”).

<sup>136</sup> Press Release, ACLU of Kansas, ACLU of Kansas Settlement Puts “Crosscheck” Out of Commission for Foreseeable Future; Program Suspended Until Safeguards Added (Dec. 10, 2019), <https://www.aclukansas.org/en/press-releases/aclu-kansas-settlement-puts-crosscheck-out-commission-foreseeable-future-program> [<https://perma.cc/8VY8-3SDZ>] (discussing settlement precluding continuation of Crosscheck program unless extensive security measures were implemented).

<sup>137</sup> Compare *supra*, Table 1 (listing Crosscheck members by year), with *infra*, Table 2 (listing ERIC members by year).

<sup>138</sup> See Pettigrew & Stewart, *supra* note 35, at 50 tbl.5 (modeling how percentage of obsolete registration records naturally grows over time due to voter mobility or death without comprehensive list maintenance).

<sup>139</sup> See, e.g., Huseman, *supra* note 30.

<sup>140</sup> PEW CTR. ON THE STATES, UPGRADING DEMOCRACY: IMPROVING AMERICA’S ELECTIONS BY MODERNIZING STATES’ VOTER REGISTRATION SYSTEMS 12 (2010) (describing how, in 2009, Pew convened working group of forty-two experts on voter registration modernization “to identify the weaknesses of the current system; analyze the feasibility of practical, technology-based reforms; and recommend implementation strategies for states”).

a broader set of voter registration problems that had repeatedly plagued elections.<sup>141</sup> After the 2008 election, David Becker, then an official at Pew, asked election officials “if you could fix *one thing* in elections, what would it be?”<sup>142</sup> According to Becker, election officials were keenly aware that “the voter lists were incomplete, with large numbers of eligible voters not on the lists[,] . . . [and] fraught with inaccuracies[,] unable to keep up with Americans’ mobility.”<sup>143</sup> Crosscheck’s limited approach could not solve either problem.

To improve voter registration, the working group proposed a “[c]ommon [d]ata [e]xchange [c]ontrolled by the [s]tates.”<sup>144</sup> The working group was confident existing technology could “analyz[e] and resolv[e] data” from disparate state and federal administrative records to “deliver information on voters who had moved (within or out of state) and voters who had died.”<sup>145</sup> Between 2009 and 2012, the working group instead focused on developing a new governance structure to address several major challenges to state cooperation, including politicization, privacy, and efficacy.<sup>146</sup> Ultimately, in 2012, seven states founded ERIC with Pew’s assistance.<sup>147</sup>

ERIC is a peculiar institution, a nonprofit corporation run by member states via a set of bylaws and an accompanying membership agreement with express commitments to perform list maintenance.<sup>148</sup> The bylaws specify that “[t]he

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<sup>141</sup> See, e.g., Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1214 (2005).

<sup>142</sup> David Becker, *Innovation in Synthesizing Big Data: The Electronic Registration Information Center (ERIC)*, in THE FUTURE OF ELECTION ADMINISTRATION 253, 254 (Mitchell Brown, Kathleen Hale & Bridgett A. King eds., 2019).

<sup>143</sup> *Id.*

<sup>144</sup> PEW CTR. ON THE STATES, *supra* note 140, at 18.

<sup>145</sup> Becker, *supra* note 142, at 256.

<sup>146</sup> See *id.* at 256-57.

<sup>147</sup> See ELECTION REGISTRATION INFO. CTR., 2017 ANNUAL REPORT (2017) [hereinafter 2017 ANNUAL REPORT] (“ERIC . . . was formed in 2012 with assistance from The Pew Charitable Trusts.”). Pew subsequently encouraged state legislatures to authorize joining ERIC by pledging to cover some of the costs of participation. See, e.g., *Mailing Assistance Grants Available to New ERIC Participants*, PEW CHARITABLE TRS. (Jan. 8, 2016), <https://www.pewtrusts.org/en/research-and-analysis/articles/2016/01/08/ mailing-assistance-grants-available-to-new-eric-participants> [<https://perma.cc/MT44-NTLX>] (inviting “new members and states considering joining ERIC to apply for grants to help defray the cost of their initial outreach”); *Grants Available To Help Cover Electronic Registration Information Center Mailing Costs*, PEW CHARITABLE TRS. (May 19, 2017), <https://www.pewtrusts.org/en/research-and-analysis/articles/2017/05/19/grants-available-to-help-cover-electronic-registration-information-center-mailing-costs> [<https://perma.cc/T92G-RS8P>] (renewing invitation).

<sup>148</sup> See 2017 ANNUAL REPORT, *supra* note 147 (describing ERIC as nonprofit whose “real innovation is in its governance structure”). There is some evidence that the founding states modeled ERIC’s governance structure on Nlets. See CTR. FOR DEMOCRACY & TECH., PEW’S UPGRADING VOTER REGISTRATION (UVR) DESIGN: AN ASSESSMENT OF THE PRIVACY AND

members of the Corporation shall consist solely of state, territorial governmental units, or the District of Columbia.”<sup>149</sup> The Board of Directors is unwieldy: it is comprised of the chief state election official of every participating state.<sup>150</sup> In between annual meetings, the Board delegates authority to oversee operations to an executive committee of five member-states.<sup>151</sup>

ERIC now has three full-time staff members: an executive director, empowered to run ERIC’s day-to-day operations, and two engineers.<sup>152</sup> To fund ERIC, participating states pay a one-time membership fee of \$25,000, plus annual dues proportional to their population.<sup>153</sup> For the 2023-24 fiscal year, the annual dues ranged from about \$37,000 to about \$174,000.<sup>154</sup> Although the federal government does not formally fund ERIC, it contributes some financial support indirectly—numerous states have tapped federal funds, made available through HAVA, to cover the membership fee and annual dues.<sup>155</sup> State election officials must make two central commitments to join ERIC.

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DATA SECURITY PROTECTIONS 8 n.7 (2011) (comparing ERIC’s proposed governance structure with Nlets). Like ERIC, Nlets is “owned by the states” and facilitates “state-to-date data transfers and comparisons” for criminal justice information. Fahey, *supra* note 24, at 1023, 1049.

<sup>149</sup> ELEC. REGISTRATION INFO. CTR., INC., BYLAWS art. II, § 1 (2023) [hereinafter ERIC 2023 BYLAWS]. An earlier version of ERIC’s bylaws contemplated that a local jurisdiction might also join, but the provision was struck before being used. *Compare id.* (limiting participation to “state, territorial governmental units, or the District of Columbia”), with ELEC. REGISTRATION INFO. CTR., INC., BYLAWS art. II, § 1 (2012) (allowing for participation by “state, local or territorial governmental units or the District of Columbia”).

<sup>150</sup> ERIC 2023 BYLAWS, *supra* note 149, at art. III, § 2 (describing how all participating chief state election official members “have a right to appoint their Member Representative to serve as a director on the Board of Directors”). ERIC is thus an example of a “translocal organization[] of government actors,” or TOGA, although it goes beyond the typical networking, clearinghouse, and technical assistance roles of other similar organizations. Resnik et al., *supra* note 117, at 711.

<sup>151</sup> ERIC 2023 BYLAWS, *supra* note 149, at art. IV, §§ 1, 6 (providing “Board[] may designate from among its members an Executive Committee” consisting of five member states, and that “Executive Committee shall have the authority to exercise all powers of the Board of Directors between meetings of the Board”).

<sup>152</sup> *Who We Are*, ERIC, <https://ericstates.org/who-we-are/> [<https://perma.cc/S68M-43KQ>] (last visited Nov. 17, 2023).

<sup>153</sup> ERIC 2023 BYLAWS, *supra* note 149, at art. II, §§ 4-5.

<sup>154</sup> *FAQs*, ELEC. REGISTRATION INFO. CTR., <https://ericstates.org/faq/> [<https://perma.cc/G5SE-NYZY>] [hereinafter ERIC, *FAQs*] (last visited Nov. 17, 2023).

<sup>155</sup> Nevada, one of the founding states of ERIC, used HAVA funds to pay its annual dues. *See* 2022 NEV. SEC’Y OF STATE ELECTION SEC. FUNDS ANN. FED. FIN. & PROGRESS REP., at 4 (“The Electronic Registration Information Center (ERIC) is extremely helpful in this endeavor and annual state membership fees are budgeted from [the HAVA Election Security] grant category.”). Florida has too. *See* H.R., FINAL BILL ANALYSIS CS/HB 85, H.R. 115, 2d Sess., at 1 (Fla. 2018) (explaining HAVA grant funds can be used to pay for membership in nongovernmental entity to share voter registration data). Iowa has used HAVA funds to pay both the state’s membership fee and the costs of the eligible-but-unregistered mailing. *See*

First, state election officials must commit to share both state voter registration records and state motor-vehicle records every sixty days.<sup>156</sup> Because states generally organize voter registration and vehicle licensing as separate agencies, the state's chief election official effectively needs the cooperation of the state's chief licensing official to join ERIC.<sup>157</sup> To integrate each state's voter registration lists, ERIC requires members to follow "a de facto data standard for voter registration."<sup>158</sup>

Second, the chief state election official must commit to certain minimum steps to effectuate list maintenance. Member states must agree to "initiate contact" with voters ERIC identifies as having moved in order to "inactivate or update the voter's record."<sup>159</sup> Member states must also agree to "initiate contact" with individuals ERIC identifies as eligible, but not yet registered, to vote, in order to "inform them" how to do so.<sup>160</sup> Because local election officials in many states are vested with the statutory authority to conduct list maintenance, the state's chief election official effectively needs the cooperation of local election officials too.<sup>161</sup> For example, in some states, local election officials are required by statute to periodically confirm voters' registered addresses using specific sources, but such sources do not include ERIC.<sup>162</sup> In other states, local election officials are

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2018 IOWA SEC'Y OF STATE ELECTION SEC. FUNDS NARRATIVE, at 3 ("The [HAVA] funds will be utilized for membership dues, programming costs related to ERIC, and required mailings associated with membership in the ERIC program."). Oregon used HAVA funds to automatically integrate ERIC information into its statewide voter registration system. *See* 2018 OR. SEC'Y OF STATE ELECTION SEC. FUNDS NARRATIVE, at 2 (explaining plans to use HAVA fund toward integrating ERIC into current voter registration system).

<sup>156</sup> *See* ELEC. REGISTRATION INFO. CTR., INC., MEMBERSHIP AGREEMENT § 2(b) (2023) [hereinafter ERIC 2023 MEMBERSHIP AGREEMENT].

<sup>157</sup> Maine and Michigan are an exception to the general trend. In these states, the Secretary of State oversees both voter registration and motor-vehicle records. *See* ME. STAT. tit. 21-A, § 196-A(1), (3) (2023) (authorizing Secretary of State to use and share information from Maine's central voter registration system); tit. 29-A, § 401(5) (2023) (authorizing Secretary of State to maintain vehicle registration files); MICH. COMP. LAWS § 168.509o(1) (2023) (designating Secretary of State as overseer of Michigan's statewide voter file maintenance); *id.* § 257.204a(1) (2023) (requiring Secretary of State to create and maintain Michigan's centralized individual driving records).

<sup>158</sup> David Becker, Dir., Election Initiatives, Pew Charitable Trs., Presentation at the United States Election Assistance Commission Election Data Summit: How Good Data Can Help Elections Run Better (Aug. 12, 2015) (transcript available at <https://www.eac.gov/events/2015/08/12/election-data-summit>).

<sup>159</sup> ERIC 2023 MEMBERSHIP AGREEMENT, *supra* note 156, § 4(b).

<sup>160</sup> *Id.* § 4(a).

<sup>161</sup> Minnesota offers a notable exception in that state law dictates how local election officials "must process changes to voter records based upon [the shared] data." MINN. STAT. § 201.13(3)(d) (2022).

<sup>162</sup> *See, e.g.,* CONN. GEN. STAT. § 9-32(a) (2023) ("In each municipality the registrars . . . shall cause either (1) a complete house to house canvass . . . (2) a complete canvass to be made by mail . . . [or] (3) a complete canvass to be made by telephone . . .")



vested with discretionary authority for how to identify movers, though they have no statutory obligation to use ERIC.<sup>163</sup> But as a practical matter, many local election officials have encouraged—and even paid for—their state’s participation in ERIC.<sup>164</sup>

For all the benefits of ERIC as a coordinating mechanism, the organization has found itself in a precarious position. Table 2 reports state membership in ERIC over time as well as any relevant legislative authorization, including the type of authorization, the source of that authorization, and the year of

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(emphasis added)); FLA. STAT. §§ 98.065(2)(a)-(b) (2023) (providing that local “supervisor *must* incorporate one or more of the following procedures in the . . . list maintenance program” to identify any change of address: (a) “Use . . . information supplied by the United States Postal Service”; (b) “Identify . . . information from [mail] . . . sent to all registered voters in the county”; or (c) “Identify . . . information from address confirmation final notices mailed to all registered voters who have not voted in the” last two years (emphasis added)); MO. REV. STAT. § 115.179(1) (2023) (“The election authority *shall* have the registration records of all precincts in its jurisdiction canvassed every two years . . .” (emphasis added)); *id.* § 115.181(1) (“In its discretion, the election authority may order . . . a canvass to be made house-to-house, through the United States Postal Service, or by both methods.”); 25 PA. CONS. STAT. § 1901(b)(1) (2023) (“Each commission *shall* establish a program to identify registered electors whose address may have changed by establishing one of the following programs: (i) National change of address . . . (ii) confirmation mailing.” (emphasis added)).

<sup>163</sup> See, e.g., MICH. COMP. LAWS § 168.509aa(1) (2023) (“A clerk may use change of address information supplied by the United States postal service or other reliable information received by the clerk that identifies registered voters whose addresses may have changed . . .”); NEV. REV. STAT. § 293.530(1)(a) (2023) (“County clerks may use any reliable and reasonable means available to . . . determine whether a registered voter’s current residence is other than that indicated on the voter’s application to register to vote.”).

<sup>164</sup> For example, Florida’s local supervisors of elections “publicly challenged state officials” over membership in ERIC. Gary Fineout, Matt Dixon & Isabel Dobrin, *DeSantis Breaks with Scott Again – Marco Teakes on Conspiracy Theories – The Mayor and CFO’s Twitter Feud – Scott Israel’s Final Pitch*, POLITICO (Aug. 22, 2019, 7:00 AM), <https://www.politico.com/newsletters/florida-playbook/2019/08/22/desantis-breaks-with-scott-again-marco-takes-on-conspiracy-theories-the-mayor-and-cfos-twitter-feud-scott-israels-final-pitch-472053> [<https://perma.cc/54NK-69G8>]. The state association of supervisors of elections wrote to the governor to explain that they “are unanimous in believing that the time has come to enroll Florida in [ERIC].” Letter from Tammy Jones, President, Fla. Ass’n of Supervisors of Elections, to Ron DeSantis, Governor of Fla. (May 30, 2019) (on file with author). Similarly, Missouri’s Association of County Clerks and Election Authorities “unanimously passed a resolution urging [the state] to join ERIC.” Press Release, Mo. Sec’y of State’s Off., Missouri Is 23rd State To Join Electronic Registration Information Center (Jan. 17, 2018). Arizona’s county election officials did the same. See *Arizona Joins National Electronic Registration Information Center*, E. ARIZ. COURIER (Jan. 2, 2018), [https://www.eacourier.com/news/arizona-joins-national-electronic-registration-information-center/article\\_0d661c92-edca-11e7-a918-0f50a7710d59.html](https://www.eacourier.com/news/arizona-joins-national-electronic-registration-information-center/article_0d661c92-edca-11e7-a918-0f50a7710d59.html) [<https://perma.cc/W9BL-GV3U>]. In New Mexico, local election officials went one step further: counties initially paid for the state to join ERIC. See John Lindback, Exec. Dir., Elec. Registration Info. Ctr., Presentation at the National Association of State Election Directors 2017 Winter Conference 15 (Feb. 17, 2017), <https://www.nased.org/s/ERIC-Electronic-Registration-Information-Center-NASED-Winter-Conference-February-2017.pdf> [<https://perma.cc/8CA7-KSHM>].

authorization. When I could not find any relevant state authorization, the statutory authorization fields are blank.

The survey reveals that most election officials participate in ERIC at their own discretion; as a result, they can withdraw from ERIC at any time.<sup>165</sup> While election officials have generally joined ERIC following a specific legislative authorization, a few have joined before that specific authorization<sup>166</sup> or joined based on a general authorization that predates ERIC.<sup>167</sup> In contrast, only seven states actually require their chief election official to participate in ERIC.<sup>168</sup>

**Table 2.** State Participation in ERIC

| State       | Membership | Type          | Statutory Authorization             |      |
|-------------|------------|---------------|-------------------------------------|------|
|             |            |               | Source                              | Year |
| Maryland    | 2012-      | Discretionary | MD. CODE ANN., Elec. Law § 3-101(3) | 2011 |
| Delaware    | 2012-      | Discretionary | DEL. CODE tit. 15, § 1704           | 2017 |
| Virginia    | 2012-23    | Discretionary |                                     |      |
| Washington  | 2012-      | Discretionary | WASH. REV. CODE § 29A.08.125        | 2009 |
| Colorado    | 2012-      | Discretionary |                                     |      |
| Utah        | 2012-      | Discretionary | UTAH CODE ANN. § 20A-2-109          | 2011 |
| Nevada      | 2012-      | Discretionary | NEV. REV. STAT. § 293.675(8)-(9)    | 2011 |
| D.C.        | 2014-      | Discretionary | D.C. Mun. Regs. Tit. 3, § 519       | 2010 |
| Oregon      | 2014-      | Discretionary |                                     |      |
| Connecticut | 2014-      | Discretionary | CONN. GEN. STAT. § 9-50c            | 2012 |

<sup>165</sup> Further, the intrastate arrangements between state election officials and state motor-vehicle officials can be subject to bureaucratic disagreements. For example, a dispute between Washington, D.C.’s Board of Elections and its Department of Motor Vehicles led ERIC to threaten to expel the territory. *See* Martin Austerhuhle, *Data Errors Imperil D.C.’s Participation in Group That Cleans Up States’ Voter Rolls*, DCIST (Feb. 9, 2022, 4:04 PM), <https://dcist.com/story/22/02/09/dc-voter-rolls-problems/> [<https://perma.cc/9VWK-XRRS>]. The example illuminates Justin Weinstein-Tull’s more general discussion of how intrastate conflicts can undermine election administration. *See generally* Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083 (2018).

<sup>166</sup> For example, both Iowa and Delaware passed legislation requiring participation in ERIC years after its chief election official had already joined the organization. *Compare* Press Release, Paul D. Pate, Iowa Sec’y of State, Iowa Joins Multi-state Compact Aimed at Improving Voter Rolls and Increasing Registration (July 26, 2018), [https://sos.iowa.gov/news/2018\\_07\\_26.html](https://sos.iowa.gov/news/2018_07_26.html) [<https://perma.cc/64Q4-UHE3>] (announcing Iowa’s participation in ERIC on July 26, 2018), and ERIC, *FAQs*, *supra* note 154 (listing Delaware as one of seven states founding ERIC in 2012), with *infra* Table 2 (noting Delaware and Iowa passed statutory authorization to join ERIC in 2017 and 2021 respectively).

<sup>167</sup> For example, Washington State chose to join ERIC based on a statutory authorization predating ERIC.

<sup>168</sup> Of those states, Kentucky participates in ERIC because of a consent judgment with the Department of Justice. *See* *Jud. Watch, Inc. v. Adams*, 485 F. Supp. 3d 831, 837-38 (E.D. Ky. 2020) (“[Kentucky Secretary of State] agreed pursuant to . . . the Consent Judgment that they would use the Electronic Registration Information Center . . .”).

| State          | Membership | Type          | Statutory Authorization  |               |
|----------------|------------|---------------|--|---------------|
|                |            |               | Source   | Year          |
| Louisiana      | 2014-22    | Discretionary | LA. STAT. ANN. § 18:18(D)  | 2014          |
| Minnesota      | 2014-      | Discretionary | MINN. STAT. § 201.13(3)(d)   | 2014          |
| Rhode Island   | 2015-      | Discretionary | 17 R.I. GEN. LAWS § 17-9.1-34(f)                                       | 2016          |
| Alabama        | 2015-23    | Discretionary | ALA.CODE. § 17-4-38.1  | 2015          |
| Pennsylvania   | 2015-      | Discretionary |  |               |
| Illinois       | 2015-      | Mandatory     | 10 ILL. COMP. STAT. 5/1A-45  | 2014          |
| Alaska         | 2016-      | Discretionary | ALASKA STAT. § 15.07.195   | 2016          |
| West Virginia  | 2016-23    | Discretionary | W. VA. CODE § 3-2-4a   | 2013,<br>2016 |
| Wisconsin      | 2016-      | Mandatory     | WIS. STAT. § 6.36(1)   | 2015          |
| New Mexico     | 2016-      | Discretionary | N.M. STAT. ANN. § 1-4-11   | 2015          |
| Ohio           | 2016-23    | Discretionary | OHIO ADMIN. CODE 111:3-4-06  | 2016          |
| Arizona        | 2017-      | Discretionary | ARIZ. REV. STAT. § 16-166  |               |
| Missouri       | 2017-23    | Discretionary |  |               |
| South Carolina | 2018-      | Discretionary | S.C. CODE ANN. § 7-5-186(3)  | 2012          |
| Iowa           | 2013-23    | Mandatory     | IOWA CODE § 47.7   | 2021          |
| Michigan       | 2019-      | Mandatory     | MICH. COMP. LAWS § 168.509o  | 2018          |
| Georgia        | 2019-      | Discretionary | GA. CODE § 21-2-225  | 2019          |
| Kentucky       | 2019-      | Mandatory     | Jud. Watch, Inc. v. Adams, 485 F. Supp. 3d 831, 837-38 (E.D. Ky. 2020) | 2018          |
| Florida        | 2019-23    | Discretionary | FLA. STAT. § 98.075(2)   | 2018          |
| Texas          | 2020-23    | Discretionary | TEX. ELEC. CODE § 18.062   | 2015          |
| Maine          | 2021-      | Mandatory     | ME. REV. STAT. tit. 21-A, § 161(2-A)                                   | 2021          |
| Vermont        | 2021-      | Discretionary | VT. STAT. ANN. tit. 17, § 2154   | 2021          |
| Massachusetts  | 2022-      | Mandatory     | MASS. GEN. LAWS ch. 51, § 47C  | 2018,<br>2022 |
| New Jersey     | 2022-      | Discretionary | N.J. STAT. § 19:31-34.1  | 2021          |

The discretionary authority of state chief election officials may have fueled the quiet growth of ERIC, but, as I discuss *infra* Part II, it has also meant that the same election officials have been able to quickly withdraw with little

discussion or scrutiny. The table reveals that in the past year and a half ERIC has begun to unravel: nine states have quit<sup>169</sup> and more may follow.<sup>170</sup>

b. *Composition*

Over its first ten years, ERIC attracted a bipartisan set of member states. Figure 1 charts the partisan composition of ERIC's overall membership and its executive committee over time, based on either the party of each state chief election official, if the official is elected, or the party of whoever appointed the state chief election official, such as the governor.<sup>171</sup> The figure uses blue for Democratic election officials, red for Republican officials, and grey for officials appointed by state boards with partisan-balancing requirements.<sup>172</sup> It differentiates between elected and appointed officials based on the shade of blue or red. In general, it shows that both overall membership and executive committee membership were essentially equally split between chief state election officials of both parties, although the recent departures have shifted the partisan balance.<sup>173</sup>

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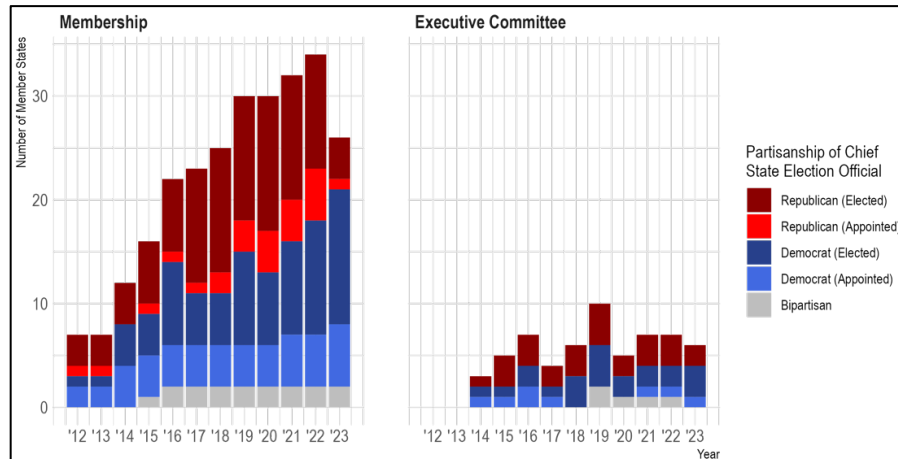
<sup>169</sup> A careful reader may notice that Iowa's chief election official has withdrawn from ERIC despite a state legislative mandate to participate in the group. *See infra* Table 2. The state seems to have withdrawn after repealing the relevant statute. *See* IOWA CODE § 47.7(3) (2022) (repealed IOWA CODE § 47.7(3) (2023)) ("The state registrar of voters shall use information from the electronic registration information center to update information in the statewide voter registration system . . .").

<sup>170</sup> For example, Arizona passed a bill to effectively withdraw from ERIC, but the governor vetoed it. *See* Letter from Katie Hobbs, Governor of Ariz., to Sen. Warren Petersen, President of the Ariz. Senate (May 26, 2023) (available at <https://www.azleg.gov/govlettr/56leg/1r/sb1135.pdf> [<https://perma.cc/6KUM-5JYE>] (vetoing Senate Bill 1135). Kentucky has asked a federal district court to amend the consent judgment requiring its participation in ERIC. *See* Order, ECF. No. 98, Jud. Watch Inc., v. Adams, No. 3:17-cv-00094 (E.D. Ky June 23, 2023). Further, while Oklahoma has never been a member of ERIC, the legislature has effectively banned its chief election official from participating in the future, at least in ERIC's current form. *See* OKLA. STAT. tit. 26, § 4-121(C) (2023) ("The Secretary of the State Election Board shall not join a multistate voter list maintenance organization if any of the following requirements are a condition of membership in the organization."). North Carolina lawmakers have banned the state from joining ERIC, which has also never been a member of ERIC. 2023 N.C. Sess. Laws 134 ("The State may not become a member of the Electronic Registration Information Center, Inc. . . .").

<sup>171</sup> For both the chief election official of each state as well as the selection process, see *Election Administration at State and Local Levels*, NAT'L CONF. OF ST. LEGISLATURES (Nov. 1, 2022), <https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels> [<https://perma.cc/83EL-2DNC>].

<sup>172</sup> In both Illinois and Wisconsin, the chief election official is appointed by a state board balanced by partisanship. *See id.*

<sup>173</sup> In fact, ERIC has a "practice of electing an Executive Committee comprised of . . . [c]hief [e]lection [o]fficials . . . from both major parties." ERIC, 2023 Annual ERIC Board of Directors Meeting Minutes 4 (Feb. 19, 2023), <https://ericstates.org/wp-content/uploads/documents/annual-board-of-directors-meeting-2023.pdf> [<https://perma.cc/3QET-RXTA>].

**Figure 1.** ERIC Membership by Partisanship

Still, ERIC’s bipartisan membership likely reflects its appeal to both partisan and nonpartisan interests in election administration. For one, ERIC’s membership agreement intentionally encompasses “[t]he goals of the right and the left.”<sup>174</sup> Broadly, ERIC’s membership agreement requires that members agree to pursue both more accurate and complete voter registration lists, although, as I take up *infra* Part III, it still leaves states with substantial discretion.

For another, ERIC solves a problem common to many states regardless of their partisanship. In short, list maintenance strains states’ limited bureaucratic capacities.<sup>175</sup> As early as 2009, Pew’s working group recognized that while “in theory, states could undertake these tasks in-house,” “most states lack the resources . . . or expertise” to do so.<sup>176</sup> After surveying local election expenditures, Joshua Sellers and Roger Michalski recently lamented that local governments “typically spend less than the price of a burrito” per voter.<sup>177</sup> ERIC supplements election officials’ bureaucratic capacities by taking on the task of matching administrative records. ERIC can do the task better than a local or state

<sup>174</sup> Huseman, *supra* note 30.

<sup>175</sup> See, e.g., VA. DEP’T OF ELECTIONS, ANNUAL LIST MAINTENANCE REPORT 4 (2022), <https://www.elections.virginia.gov/resultsreports/maintenance-reports/> (“The data quality from the ERIC program is significantly better than . . . any program that ELECT could operate in-house with existing resources.”).

<sup>176</sup> PEW CTR. ON THE STATES, *supra* note 140, at 18. The Obama-era commission on election administration later noted that “[t]he most universal complaint of election administrators . . . concerned a lack of resources.” PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 95, at 10.

<sup>177</sup> Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079, 1117 (2021).

election official because of both its technology and its accumulated expertise.<sup>178</sup> John Merrill, then Alabama's Republican Secretary of State, put it bluntly: "ERIC does something that no other entity is capable of."<sup>179</sup> Further, ERIC provides cost savings for underfunded election administration. For example, rather than have each state subscribe to the National Change of Address list, member states share a single subscription.

c. *Operations*

To turn to ERIC's operation, the basic design of ERIC consists of three components: data sources, data matching, and data reports. As described above, states participating in ERIC must commit to regularly share both voter registration and motor-vehicle records. ERIC supplements the state data with two shared datasets—federal death records and the Postal Service's National Change of Address list—and compares the data using its matching technology.<sup>180</sup> States then have access to multiple reports. Four of the reports identify voters who moved or died. Another report, known as the "eligible-but-unregistered" report, identifies persons who are not yet registered to vote. ERIC will publicly disclose only aggregate statistics about how member states use these five reports.<sup>181</sup> The statistics, though meager, are nonetheless informative of the newest approach to list maintenance.

Using the public data, Table 3 reports both the total number of voters with an outdated registration and the number of eligible-but-unregistered individuals identified by ERIC each year.<sup>182</sup> Because ERIC reports are only generated at the request of member states, the table is best understood as a reflection of states' practices rather than general patterns in the electorate. (The fluctuations in activity over time reflect both the growth over time in ERIC membership and the specific obligations of membership, discussed *supra* Part III.B.)

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<sup>178</sup> See, e.g., GARY BLAND & BARRY C. BURDEN, RTI INT'L, ELECTRONIC REGISTRATION INFORMATION CENTER (ERIC) STAGE 1 EVALUATION 22-23 (2013) (surveying state officials participating in ERIC and recounting "[s]tate officials lack the time and resources to connect [records with different name variants] by hand, so they appreciate that ERIC's contextual matching processes will identify matches even when names are not identical across files").

<sup>179</sup> Zach Montellaro, *Election Deniers Set Sights on Next Target*, POLITICO (Jan. 23, 2023, 4:30 AM), <https://www.politico.com/news/2023/01/23/election-deniers-2022-00078859> [<https://perma.cc/J2ES-TTL4>]; see also John Merrill, Opinion, *Response to Representative Wes Allen on ERIC Membership*, ALA. TODAY (Feb. 1, 2022), <https://altoday.com/archives/43963-john-merrill-response-to-representative-wes-allen-on-eric-membership> [<https://perma.cc/Q26J-JVT3>].

<sup>180</sup> See ERIC 2023 MEMBERSHIP AGREEMENT, *supra* note 156, §§ 3(a)(i)(E), (G) (2023); see also *Statistics*, ELEC. REGISTRATION INFO. CTR. [hereinafter ERIC, *Statistics*], <https://ericstates.org/statistics/> [<https://perma.cc/XD7E-LBNK>] (last visited Nov. 17, 2023).

<sup>181</sup> For the statistics, see ERIC, *Statistics*, *supra* note 180.

<sup>182</sup> The aggregate national patterns appear consistent with the state-specific patterns reported by some states. See, e.g., Stuart Holmes (@iamstuartholmes), TWITTER (Nov. 29, 2022, 11:50 AM), <https://twitter.com/iamstuartholmes/status/1597619082123444224> [<https://perma.cc/JR7E-YWDE>] (showing similar pattern of Washington voter data in 2022).

**Table 3.** ERIC's Aggregate Activities

| Year | Cross-State Movers | In-State Movers | In-State Duplicates | Deceased | Eligible but Unregistered |
|------|--------------------|-----------------|---------------------|----------|---------------------------|
| 2013 | 92,322             | 534,814         | 13,857              | 21,823   | ~400,000                  |
| 2014 | 186,791            | 1,235,023       | 19,996              | 50,571   | ~5,500,000                |
| 2015 | 269,824            | 742,266         | 14,030              | 61,278   | ~400,000                  |
| 2016 | 476,111            | 1,363,629       | 42,882              | 37,374   | ~14,000,000               |
| 2017 | 801,926            | 2,374,418       | 31,570              | 35,327   | ~440,000                  |
| 2018 | 696,501            | 1,690,113       | 177,118             | 37,219   | ~7,500,000                |
| 2019 | 1,089,041          | 1,555,378       | 90,450              | 73,906   | ~350,000                  |
| 2020 | 1,524,301          | 1,249,344       | 135,387             | 72,986   | ~17,000,000               |
| 2021 | 3,490,162          | 4,911,198       | 249,572             | 112,564  | ~1,000,000                |
| 2022 | 2,433,532          | 7,305,675       | 203,210             | 65,437   | ~4,400,000                |

With this caveat, the first column captures the number of “cross-state movers.” These individuals were registered to vote at an address that was less current than the address on either their driver’s license or voter registration in a different state. The column thus collapses two different registration issues: a person who was registered in two different states, as Crosscheck sought to identify, and a person who was only registered to vote in their previous state. Except for one reporting year, the number of cross-state movers is often considerably less than the number of in-state movers. This is consistent with mobility patterns, since the vast majority of people who move stay within the same state.<sup>183</sup>

The second column of Table 3 details the number of in-state movers reported by ERIC. These individuals were registered to vote at an address that was less current than the address on their driver’s license in the same state. Although ERIC is often billed as bridging the registration gap *between* states, Table 3 reveals that its largest contribution is actually identifying voter registrations which are outdated because a voter moved *within* a state. In 2022, ERIC identified more than seven million voter registrations as outdated because of an in-state move.

The third and fourth columns of Table 3 reflect ERIC’s less significant activities. The third column captures the number of “in-state duplicates”—individuals registered to vote two or more times in the same state at different addresses. ERIC identifies relatively few in-state duplicates because election officials can already reliably detect duplicate registrations within a state on their own. The fourth column captures the number of reported “deceased” voters—individuals registered to vote but listed in federal death data as deceased. As with in-state duplicates, ERIC has identified relatively few deceased registrants

<sup>183</sup> See U.S. CENSUS BUREAU, *supra* note 10; IHRKE & FABER, *supra* note 10, at 3 fig.2 (estimating distribution of movers for period 1980-2010).

because election officials already compare state voter registration lists to state death records.<sup>184</sup> Nonetheless, ERIC still identifies some in-state duplicates and deceased registrants overlooked by the states, likely because some voters may reregister after a move using an alternative name or die in a state different from the one in which they registered to vote.

The final column reflects the approximate number of eligible-but-unregistered voters reported by ERIC. This report is fundamentally different than the others—these individuals have a driver’s license but no voter registration in the state. ERIC often reports significantly more eligible-but-unregistered individuals than individuals with an outdated registration. For example, in 2020, ERIC identified more than 17 million eligible-but-unregistered people across thirty states.<sup>185</sup>

Finally, ERIC also produces two optional reports—a report comparing states’ voter registration records to the National Change of Address list and a report identifying potential voter fraud.<sup>186</sup> But ERIC has not released any information about how states have used the optional reports.

## II. EXPLOITING DEMOCRACY’S BUREAUCRACY

For the foreseeable future, Rick Pildes recently observed “our elections will take place in [a] sea of distrust.”<sup>187</sup> This Part argues that the flexible, evolving, and atypical bureaucracy for list maintenance mapped in the last Part has been exploited to promote that distrust. Most concerning, it has been used to create the *perception* of voter fraud—under the guise of resisting fraud, no less—where almost none in fact exists. Understanding these footholds for the partisan narrative of fraud and attacks on election administration enables Part III to offer a roadmap for reforms that can make list maintenance both more trustworthy and more inclusive.

Part II.A shows that simplified solutions to the complex problem of comparing registration lists across jurisdictions can yield the appearance of fraud. Part II.B then considers how an integrated approach to list maintenance, using confidential records, comes at the expense of public oversight. Finally, Part II.C highlights an emerging concern, which I term “vigilante list maintenance,” that exploits public, but incomplete, access to administrative records to transform oversight from a tool to promote trust into a potent weapon for distrust.

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<sup>184</sup> A rough comparison illustrates the point. In 2020, ERIC identified less than 100,000 deceased registrants. *See supra* Table 3. That same year, member states removed about 2.6 million deceased registrants. *See* EAVS 2020 REPORT, *supra* note 75, at 165-66 tbl.5.

<sup>185</sup> *See supra* Table 3. There are at least a few potential explanations: these individuals may have obtained a driver’s license before reaching voting age, may not have been offered to register when obtaining a license, or may have declined to register.

<sup>186</sup> *See* ERIC 2023 MEMBERSHIP AGREEMENT, *supra* note 156, § 3.

<sup>187</sup> Pildes, *supra* note 7, at 102.



A. *Simplistic Solutions to Complex Problems*

Crosscheck is the most prominent example of how the registration gap between states provides a ready foothold for the partisan narrative of voter fraud. The introduction of statewide, electronic voter registration lists in the early 2000s was a major advance in election administration. But statewide lists generally lack sufficient information to distinguish unique voters across states, in part because of the underappreciated effect of federal privacy protections.<sup>188</sup> In addition, state voter registration lists do not follow a national, interoperable template with uniform definitions. Comparing voter registration records across states has the appeal of sounding sensible, but in our disjointed federal election system it can greatly exaggerate the apparent number of duplicate registrations and double votes.

1. Privacy Obstacles

To understand the rise of Crosscheck, it's helpful to begin in 2011 when Kris Kobach was elected Kansas Secretary of State and effectively seized the reins of administering the interstate agreement. Kobach recruited states to join by presenting a simple slide comparing two voter registrations from two different states.<sup>189</sup> The slide illustrated both the allure of Crosscheck and one of its fatal flaws.

In Kobach's example, both registrants share the same first and last name (John Public), the same date of birth (January 1, 1975), and the same last four digits of their Social Security number (1234).<sup>190</sup> The inference was easy: Crosscheck could identify the duplicate registration with a high degree of accuracy. If Crosscheck had been able to collect all of that information, Crosscheck could in fact identify duplicate registrations with a high degree of accuracy. The combination of name, date of birth, and SSN4 effectively functions as a unique, national identifier for each voter.<sup>191</sup> But most of the voter registration records shared by states with Crosscheck lacked SSN4.<sup>192</sup>

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<sup>188</sup> Nonetheless, public commentary generally attributes Crosscheck's problems to the organization itself rather than the statutory scheme. *See, e.g.*, Jesse Wegman, Opinion, *Republicans Are No Longer Calling This Election Program a 'Godsend,'* N.Y. TIMES (June 6, 2023), <https://www.nytimes.com/2023/06/06/opinion/republican-voter-fraud-eric.html> (summarizing how Crosscheck "failed miserably because of inadequate *data analysis*" (emphasis added)).

<sup>189</sup> *See, e.g.*, Kris W. Kobach, National Association of State Election Directors, Interstate Voter Registration Crosscheck Program 10 (Jan. 26, 2013).

<sup>190</sup> *See id.*

<sup>191</sup> *See* Goel et al., *supra* note 22, at 460 ("Only 1 in 10,000 distinct people with the same first name, same last name, and same DOB would also share the same SSN4 by chance.").

<sup>192</sup> *See, e.g.*, Kris Kobach, Interstate Voter Registration Crosscheck Program, Testimony to Presidential Commission on Election Administration 35 (Sept. 20, 2013) (transcript available at <https://web.mit.edu/supportthevoter/www/files/2013/11/PCEA-Cincinnati-Public-Meeting-Transcript-Day-2.pdf> [<https://perma.cc/FS58-DBGY>]).

Kobach's presentation glossed over the collateral consequences of federal privacy protections for list maintenance. The Privacy Act of 1974 makes it unlawful for any "government agency to deny to any individual any right . . . because of such individual's refusal to disclose his social security account number."<sup>193</sup> Except for a handful of states exempt from the Privacy Act,<sup>194</sup> states cannot require individuals to provide their Social Security number to register to vote.<sup>195</sup> After policymakers raised the issue,<sup>196</sup> the Help America Vote Act amended the Privacy Act, but only in a narrow way—federal law requires that election officials collect a voter's state driver's license number if available, and collect their SSN4 only if the license number is unavailable.<sup>197</sup>

What Kobach billed as a precise exercise instead illustrates the problems previously raised by both the Federal Election Commission ("FEC"),<sup>198</sup> after the passage of the NVRA, and the Carter-Baker Commission,<sup>199</sup> after HAVA, of comparing voter registration records without a unique, national identifier. The Carter-Baker Commission specifically warned that "[e]fforts to match voter registrations in states that use different identifiers are complicated and may

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<sup>193</sup> Privacy Act of 1974, Pub. L. No. 93-579, § 7(a), 88 Stat. 1896, 1909.

<sup>194</sup> The Privacy Act has a grandfather exception: a state or local agency may require disclosure if it "maintain[s] a system of records [that was] in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual." *Id.*

<sup>195</sup> *See, e.g., Schwier v. Cox*, 412 F. Supp. 2d 1266, 1274 (N.D. Ga. 2005) (holding Georgia violated Privacy Act when it required applicants to disclose their Social Security numbers on voter registration forms), *aff'd*, 439 F.3d 1285, 1286 (11th Cir. 2006). Otherwise, state collection of a voter's Social Security number would likely be permissible at least as a matter of constitutional law. As one district court explained in reaching that conclusion, "[g]athering . . . social security numbers eliminates voter duplication and possible fraud, helps keep track of voters who move to different localities, and assists in purging disqualified voters from voting lists." *Greidinger v. Davis*, 782 F. Supp. 1106, 1110 (E.D. Va. 1992), *rev'd on other grounds*, 988 F.2d 1344 (4th Cir. 1993); *see also Greidinger*, 988 F.2d 1344, 1354 n.11 (4th Cir. 1993) ("Unquestionably, Virginia has a compelling state interest that is narrowly tailored in the receipt and internal use of a SSN.").

<sup>196</sup> *See THE NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS* 6 (2001), [http://web1.millercenter.org/commissions/comm\\_2001.pdf](http://web1.millercenter.org/commissions/comm_2001.pdf) [<https://perma.cc/Z2W6-JCWP>] ("Each state's . . . voter registration applications should require applicants to provide at least the last four digits of their Social Security number.").

<sup>197</sup> 52 U.S.C. § 21083(a)(5)(A)(i) ("[A]n application for voter registration . . . may not be accepted . . . unless the application includes—(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or (II) in the case of any other applicant . . . the last 4 digits of the applicant's social security number.").

<sup>198</sup> *See, e.g., FEC, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 1995-1996*, at 37-39 (1996) (reviewing common problems "of accurately ascertaining a registrant's identity").

<sup>199</sup> *See CARTER-BAKER COMMISSION REPORT, supra* note 27, at 13.

fail.”<sup>200</sup> But for reasons that are not apparent, the Obama Commission overlooked these prior warnings when it endorsed Crosscheck in 2013.<sup>201</sup> The oversight is particularly puzzling because Kobach himself acknowledged in his testimony to the Commission that only “roughly a third” of Crosscheck records have SSN4.<sup>202</sup>

In a recent study I co-authored with Sharad Goel, Marc Meredith, David Rothschild, and Houshmand Shirani-Mehr,<sup>203</sup> we illustrated how Crosscheck’s simple approach fueled misinformation about the extent of duplicate registrations and double voting. Table 4, below, reproduces one analysis from the study, based on the list of potentially duplicative registrations Crosscheck identified between Iowa and the other participating states. The table examines each pair of potentially duplicative registrations based on the availability and consistency of SSN4. It analyzes both the 2012 and 2014 results, though they are effectively the same.

The table reports that in 2012 Crosscheck identified 100,140 pairs of registrations between Iowa and participating states with the same first name, last name, and date of birth. The first row shows that 65,240 pairs, or about 65%, did not have SSN4 information for both registrations.<sup>204</sup> As a result, election officials could not easily confirm whether these registrations were duplicates. But there is no federal standard for the reliability of information used to initiate list maintenance. Under the NVRA, election officials could presume the voter had moved based on the Crosscheck match and send a confirmation notice to initiate the roughly four-year cancellation process.<sup>205</sup>

The second and third rows focus on the remaining 34,890 pairs, or about 35%, where both registrations had an SSN4, although Crosscheck did not examine it in its matching exercise. Because a voter’s name and date of birth is often not

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<sup>200</sup> *Id.* The Carter-Baker Commission offered, for example,

[T]he problem of figuring out whether Paul Smith in Michigan is the same person as Paul Smith in Kentucky. . . . Any match will need to rely on Paul Smith’s date of birth to estimate, based on some level of probability, whether the Paul Smith in each state is the same person or not.

*Id.*

<sup>201</sup> See PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 95, at 28-29.

<sup>202</sup> Kobach, *supra* note 192, at 38. Perhaps the Presidential Commission missed the importance of this fact because no one raised it. Both Kobach and Shane Hamlin, then the Chair of the Board of Directors of ERIC, presented their efforts as “complementary.” *Id.* at 35, 40. The fact that the groups shared overlapping membership likely reinforced that perception. In fact, Hamlin was also an election official in Washington State, which, at the time, participated in Crosscheck.

<sup>203</sup> See Goel et al., *supra* note 22, at 460.

<sup>204</sup> Litigation revealed the same pattern in Indiana, where a majority of voter registration records lacked SSN4 and approximately two-thirds of Crosscheck’s identified matches also had at least one unknown SSN4. See Expert Report of Dr. Michael P. McDonald at 7, *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139 (S.D. Ind. 2018) (No. 17-cv-3936) (reporting statistics for Crosscheck matches between Indiana and participating states in 2017).

<sup>205</sup> See *supra* Part I.B.1.

unique, when both registrations in a pair had an available SSN4, they shared the same SSN4 only 74% of the time. Ultimately, of the 100,140 potentially duplicative registrations identified by Crosscheck, only a quarter could be reliably identified as actual duplicate registrations (and even these duplicate registrations are not double votes).

**Table 4.** Crosscheck Results Between Iowa and Participating States

| Which information matched? |      |     |              | How many matches? |    |        |    |
|----------------------------|------|-----|--------------|-------------------|----|--------|----|
| Required                   |      |     | Optional     | 2012              |    | 2014   |    |
| First                      | Last | DOB | SSN4         | #                 | %  | #      | %  |
| Yes                        | Yes  | Yes | Not Possible | 65,240            | 65 | 90,378 | 65 |
| Yes                        | Yes  | Yes | Yes          | 25,987            | 26 | 34,189 | 25 |
| Yes                        | Yes  | Yes | No           | 8,913             | 9  | 14,766 | 11 |

As Crosscheck expanded, participating states began to realize its flaws. For example, Pennsylvania joined in 2014 and quit by 2015, after “local election officials explain[ed] that the program was useless.”<sup>206</sup> New York joined in 2015 and quit by 2016, with a state official explaining that the “majority of records were inaccurate.”<sup>207</sup> Kentucky, which had been in Crosscheck since it began, quit in 2017. As an anonymous source offered, “On the surface of it, it sounds like an okay thing to do[.] But then you start participating, and the data is not useful.”<sup>208</sup>

Instead of improving the accuracy of state voter registration lists, Crosscheck’s inflated results served to seed the narrative of voter fraud. In 2014, before Donald Trump launched the “Big Lie,”<sup>209</sup> prominent, conservative pundit Dick Morris applauded Crosscheck’s results as “the very first . . . concrete proof that massive voter fraud might have taken place in the 2012 election.”<sup>210</sup>

<sup>206</sup> Letter from Tom Wolf, Governor of Pennsylvania, to Kris Kobach, Vice Chair of Presidential Advisory Comm’n on Election Integrity (June 30, 2017), <https://www.dos.pa.gov/Documents/063017GovWolfLetter.pdf> [https://perma.cc/8V6V-QV6Z].

<sup>207</sup> Dell Cameron, *Eighth State Quietly Quit Free Anti-Voter-Fraud Program Over Security Concerns and ‘Unreliable’ Results*, GIZMODO (Jan. 29, 2018), <https://gizmodo.com/eighth-state-quietly-quit-free-anti-voter-fraud-program-1822514538> [https://perma.cc/VXL2-T3GN].

<sup>208</sup> *Id.*

<sup>209</sup> See generally Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV L. REV. F. 265 (2022).

<sup>210</sup> Dick Morris, Opinion, *Investigate 2012 Vote Fraud*, HILL (Apr. 8, 2014, 7:08 PM), <https://thehill.com/opinion/dick-morris/203019-dick-morris-investigate-2012-vote-fraud/> [https://perma.cc/VG5V-5YT5].

## 2. Uniformity Obstacles

Crosscheck's own participation guide acknowledged that the lack of availability of SSN4 meant "a significant number of apparent double votes are false positives."<sup>211</sup> But it glossed over a different problem also raised by the Carter-Baker Commission: state voter registration lists do not share a uniform, national template.<sup>212</sup> The guide recommended that when two registrations shared the same SSN4—such that it would be reasonable to conclude the same person was registered twice—a participating state should immediately cancel "the record with the *older* registration date."<sup>213</sup> That policy would have made sense if there was a uniform template for voter registration lists. But states have no uniform definition for a voter's date of registration and Crosscheck's minimal arrangement did not provide one.<sup>214</sup>

The lack of a uniform date of registration in state voter registration lists meant Crosscheck's recommended practice could transform list maintenance into a tool of disenfranchisement. Consider the registration pairs identified in Table 4 with the same SSN4: these pairs were very likely duplicate registrants. Still, they were not double voters. Among the 25,987 duplicate registrants in 2012, there were 7 instances of potential double voting, 2,542 instances where only the registration with the *earlier* date was used to vote, and 9,430 instances where only the registration with the *later* date or an unknown date was used to vote.<sup>215</sup> As a result, our study concluded that Crosscheck's recommended practice of cancelling the record with the older registration date risked preventing 300 legitimate votes for each seeming double vote prevented.<sup>216</sup>

After Indiana codified Crosscheck's recommendation, civil rights organizations successfully challenged the law for violating the NVRA.<sup>217</sup> The legal claim was not about the *reliability* of the match—after all, the NVRA does not impose a substantive standard for reliability—the claim was that Indiana did not follow the NVRA's undifferentiated procedural protections.<sup>218</sup>

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<sup>211</sup> See, e.g., CROSSCHECK 2014 PARTICIPATION GUIDE, *supra* note 129, at 5.

<sup>212</sup> See *id.*

<sup>213</sup> *Id.* at 4 (emphasis added).

<sup>214</sup> See 52 U.S.C. § 21083(a)(1)(A) (listing requirements of statewide voter registration list and not mentioning registration date). As would later become clear, some states used the date of most recent activity as the date of registration, while others used the original date a voter was registered in a particular county. See Exhibit L to Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 2, *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139 (S.D. Ind. 2018) (No. 74-12) (listing differences in definition of registration dates between states).

<sup>215</sup> Goel et al., *supra* note 17, at 467 tbl.1.

<sup>216</sup> *Id.* at 467.

<sup>217</sup> See *Common Cause Ind. v. Lawson*, 937 F.3d 944, 964 (7th Cir. 2019) (affirming preliminary injunction to prevent voter registrations from being removed in accordance with Crosscheck recommendation).

<sup>218</sup> See *id.* at 959 ("The accuracy or lack thereof of the state's information concerning the voter's change in residence makes no difference under the NVRA.").

B. *Lack of Transparency in Complex Solutions*

This Subpart argues that a more reliable approach to voter list maintenance must by necessity rely on confidential records, making it inherently vulnerable to claims, both legitimate and opportunistic, that it lacks sufficient public transparency. While some used Crosscheck to exploit the vulnerabilities in our disjointed federal framework, those who have promoted the narrative of fraud have exploited the lack of transparency of ERIC's unified framework. This cynical approach challenges the best tool for list maintenance, presumably because a "dirty" list has become a political boon.<sup>219</sup> In short, less accurate, siloed voter registration lists will make it easier to promote the specter of fraud. Despite (or because of) its promise, ERIC's bipartisan membership is now splintering.

1. Oversight Tradeoff

ERIC was able to connect the balkanized framework for voter registration in large part because of its access to confidential motor-vehicle records. As discussed previously, voter registration records typically contain a voter's state driver's license number, but not their Social Security number.<sup>220</sup> Motor-vehicle records in every state, however, contain *both* an individual's state driver's license number and their Social Security number. In contrast to voter registration, a 1976 amendment to the Privacy Act specifically allows motor-vehicle departments to collect Social Security numbers.<sup>221</sup> For all the benefits of motor-vehicle records for voter list maintenance, though, they are subject to extensive privacy protections. The result has been an unfortunate tradeoff between two different forms of legitimacy—on the one hand, more accurate and more complete registration lists, and on the other, a process that is open to public oversight.

Motor-vehicle records facilitate the accuracy and completeness of a voter registration list in at least two significant ways, one direct and the other indirect. First, motor-vehicle records can directly facilitate list maintenance within a state. By comparing voter registration records with motor-vehicle records, ERIC is able to identify individuals whose voter registration may be outdated—their driver's license address does not match their address of registration—and individuals who have a driver's license but are not registered to vote. Second,

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<sup>219</sup> For similar observations, see Miles Parks, *Right-wing Conspiracies Have a New Target: A Tool that Fights Actual Voter Fraud*, NPR (Feb. 9, 2022, 5:00 AM), <https://www.npr.org/2022/02/09/1076529761/right-wing-conspiracies-have-a-new-target-a-tool-that-fights-actual-voter-fraud> [<https://perma.cc/7HKM-9KEQ>] (discussing right-wing political opposition to ERIC); Wegman, *supra* note 188 (explaining how "[t]hat would seem to be a paradox, but it turns out it's the whole point").

<sup>220</sup> See *supra* Part I.B.2.

<sup>221</sup> 42 U.S.C. § 405(c)(2)(C)(i) ("It is the policy of the United States that any State . . . may, in the administration of any . . . driver's license, or motor vehicle registration law within its jurisdiction, . . . require any individual . . . to furnish to such State . . . the social security account number.").

motor-vehicle records also indirectly facilitate list maintenance both across states and between states and the federal government. By merging state voter registration records with state motor-vehicle records, ERIC is typically able to recover a Social Security number for each voter registration.<sup>222</sup> This clever workaround<sup>223</sup> is critical to comparing voter registration records across states and with the federal list of reported deaths, which are indexed by Social Security number.<sup>224</sup>

The federal privacy protections for motor-vehicle records have largely prevented researchers from conducting independent evaluations of ERIC.<sup>225</sup> In a recent study I co-authored with Greg Huber, Marc Meredith, and Katie Steele, we developed a work-around based on publicly available poll books to evaluate the reliability of ERIC in Wisconsin.<sup>226</sup> The results suggest that ERIC is generally able to accurately identify voters who have moved, although the cobbled-together system is not foolproof.<sup>227</sup>

As beneficial as motor-vehicle records are to improving list maintenance, their use has real public oversight costs because of a conflict between the

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<sup>222</sup> Motor-vehicle records can also be used to correct errors in voter registrations. For example, a survey of state election officials' experiences with ERIC in Delaware, Maryland, and Washington State reported that motor-vehicle records were used to correct inaccurate dates of birth in voter registration records. *See* BLAND & BURDEN, *supra* note 178, at 24.

<sup>223</sup> The clever workaround followed an earlier suggestion by the Carter-Baker Commission. In short, the Commission suggested, if Congress did not mandate the collection of voters' Social Security numbers for voter registration, then states could instead "collect Social Security numbers from their state's department of motor vehicles." CARTER-BAKER COMMISSION REPORT, *supra* note 27, at 14.

<sup>224</sup> David Becker, while touting the benefits of ERIC, has explained that "all you might have between your voter list and Social Security Death list is a name and birth date match," which "poses a big problem." David Becker, Dir. of Election Initiatives, Pew Charitable Trs., Testimony for Hearing on Presidential Commission on Election Administration (Sept. 20, 2013).

<sup>225</sup> *See, e.g.*, Letter from Reid Magney, Pub. Info. Officer, to author (on file with author) ("[Due] to the restrictions in the ERIC Membership Agreement and the statutory directive to comply with the Agreement as outlined above, this request is denied as it would require the transmission of ERIC Data for purposes other than the administration of elections.").

<sup>226</sup> *See* Huber et al., *supra* note 23, at 1.

<sup>227</sup> *See id.* at 4-5. The study examined individuals listed in Wisconsin's in-state and cross-state mover report who subsequently voted, because it is the act of voting that confirms a registrant's most recent address. It estimated that 88% of people ERIC identified as having moved did in fact move—ERIC correctly identified that when they moved, they had not updated their address of registration. The remaining 12% did not appear to move. Importantly, the latter set of people were not disenfranchised by the list maintenance process—they still voted, but at the address ERIC flagged as outdated. One potential reason ERIC misidentified some voters as movers is that an individual may change their driver's license address without intending to change their voter registration address. Importantly, minorities were more than twice as likely to vote at the address ERIC flagged as outdated, although explaining this racial disparity requires more careful consideration.

NVRA's transparency provisions,<sup>228</sup> discussed *infra*, and the Driver's Privacy Protection Act ("DPPA"). The DPPA limits the disclosure of "personal information . . . obtained . . . in connection with a motor vehicle record."<sup>229</sup> "Personal information" is defined exceptionally broadly as "information that identifies an individual, including . . . social security number, driver identification number, name, [and] address."<sup>230</sup> ERIC has access to motor-vehicle records provided by member states under the terms of a governmental-function exception,<sup>231</sup> but it may only redisclose such information to other authorized recipients.<sup>232</sup> To comply with the DPPA, ERIC's membership agreement requires states to agree not to disclose most ERIC reports.<sup>233</sup>

Relatedly, federal death records are also subject to federal privacy protections which similarly restrict public oversight, although the restrictions are less stringent than those on motor-vehicle records.<sup>234</sup> Under the Bipartisan Budget Act of 2013,<sup>235</sup> federal death records from the prior three years are only available

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<sup>228</sup> See *infra* Part II.B.2 (explaining how NVRA provides federal right to public inspection of state local list maintenance records).

<sup>229</sup> 18 U.S.C. § 2721(a).

<sup>230</sup> *Id.* § 2725(3).

<sup>231</sup> See *id.* § 2721(b)(1) (stating personal information from state motor-vehicle records may be disclosed "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions").

<sup>232</sup> See *id.* § 2721(c).

<sup>233</sup> ERIC's membership agreement previously required that if a member state "determines that it is legally obligated" to disclose an ERIC report, it will nonetheless "not make the disclosure without first obtaining a court order compelling it to do so." ELEC. REGISTRATION INFO. CTR., INC., BYLAWS § 4(a) (2022). ERIC recently revised its agreement to no longer require a court order and instead specify that a member state "shall not release or disclose" certain reports for specific reasons. ERIC 2023 MEMBERSHIP AGREEMENT, *supra* note 156, § 3(d); see also *infra* Part II.B.2 (discussing situation in which all states declined to provide requested ERIC reports, citing membership agreement among their reasons).

<sup>234</sup> The federal death file was originally made public in 1980. See *Social Security's Death Records: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 112th Cong. 2 (2012) (statement of Rep. Sam Johnson, Chairman, Subcomm. on Soc. Sec.) ("Since 1980, Social Security has been required to publicly make available Americans' personal information through the so-called Death Master File."). The death file was previously public because the Privacy Act of 1974 does not apply to deceased persons, see 5 U.S.C. § 552a(a)(2) (defining "individual"), and "[t]here is no action for the invasion of the privacy of one already deceased, in the absence of statute." RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (AM. L. INST. 1977).

<sup>235</sup> To be certified to use confidential federal death records, an individual or entity must have either "a legitimate fraud prevention interest" or "a legitimate business purpose" as well as "systems, facilities, and procedures in place to safeguard such information." 42 U.S.C. § 1306c(b)(2).



to persons meeting stringent certification requirements.<sup>236</sup> As with the DPPA, a certified person may not disclose the restricted data to an uncertified person or use the data for an uncertified purpose.<sup>237</sup>

## 2. Legal Challenges

While ERIC's necessarily opaque operations may have encouraged its growth outside of the partisan spotlight, the lack of oversight has left it on unsteady terrain, vulnerable to legal and political attacks.

Beginning in 2021, the Public Interest Legal Foundation ("PILF") made a series of public records requests for list maintenance reports provided by ERIC to member states.<sup>238</sup> PILF sought the records based on the NVRA, which pairs a federal obligation to conduct list maintenance with public oversight of the process.<sup>239</sup> Specifically, the NVRA preempts state public records laws by providing a federal right to public inspection of state and local list maintenance records. The NVRA's broad disclosure provision covers "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."<sup>240</sup>

PILF specifically requested ERIC's "deceased" report, which lists registered voters whom ERIC identified as having died.<sup>241</sup> (PILF has previously promoted the claim that thousands of people have illegally voted using the registrations of

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<sup>236</sup> To the extent that some states used the federal death data as part of list maintenance before the statutory change requiring certification, the expense of the certification requirement "has made it difficult to [continue to] access the [federal] data." Letter from Tre Hargett, Tennessee Sec'y of State, to Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity (July 14, 2017), <https://trumpwhitehouse.archives.gov/articles/presidential-advisory-commission-election-integrity-resources-2/> [<https://perma.cc/SWQ2-3K4G>].

<sup>237</sup> 42 U.S.C. § 1306c(c) (subjecting violators to penalty up to \$250,000 per calendar year).

<sup>238</sup> For the records requests, see Exhibit A to Complaint at 1, Pub. Int. Legal Found. v. Evans, No. 21-cv-03180 (D.D.C. Dec. 6, 2021) (No. 1-1); Exhibit A to Complaint at 1, Pub. Int. Legal Found., Inc. v. Griswold, No. 21-cv-03384 (D. Colo. Dec. 16, 2021) (No. 1-1); Exhibit A to Complaint at 1, Pub. Int. Legal Found., Inc. v. Meyer, No. 22-cv-00001 (D. Alaska Jan. 20, 2022) (No. 1-1); Exhibit B to Complaint at 1, Pub. Int. Legal Found. v. Ardoin, No. 22-cv-00081 (M.D. La. Feb. 4, 2022) (No. 1-2). Complementing PILF's NVRA-based attack, the Thomas More Society filed a series of state administrative complaints that participation in ERIC violates HAVA; however, these were quickly dismissed as "meritless." *In re* HAVA Elections Complaint of Gregory Buck & Minn. Elections Integrity Sols., No. OAH 60-3500-38808, 2022 WL 18673274, at \*6 (Minn. Off. Admin. Hearings Feb. 6, 2022) (finding "review of the federal statutory provisions demonstrate that Complainants' allegation is meritless; HAVA simply does not prohibit data sharing in this manner").

<sup>239</sup> PILF's NVRA litigation is part of a legal strategy dating back to the George W. Bush administration "to recast the NVRA as a stringent anti-voter-fraud law." Manheim & Porter, *supra* note 15, at 220-21 ("According to this view, the NVRA mandates that states implement aggressive measures to remove ineligible voters from the rolls, even if those measures may also have the effect of removing large swaths of eligible voters.").

<sup>240</sup> 52 U.S.C. § 20507(i)(1).

<sup>241</sup> See ERIC, *Statistics*, *supra* note 180.

deceased voters.)<sup>242</sup> Consistent with the ERIC membership agreement, all states declined to provide the requested reports, citing, among other things, the federal protections for death records and motor-vehicle records, as well as the membership agreement itself.<sup>243</sup> PILF promptly filed suit.<sup>244</sup> The litigation is currently pending in several federal district courts.<sup>245</sup>

Regardless of its ulterior motives, PILF's legal challenges should not be readily disregarded. ERIC narrowed its interpretation of the DPPA during the litigation as part of its "ongoing review of its data protection policies."<sup>246</sup> ERIC previously took the position that ERIC reports could not be publicly released, "[s]ince all ERIC reports inherently include driver's licensing data."<sup>247</sup> Information from motor-vehicle records, such as a voter's Social Security number, is typically used to supply the missing link between a voter's registration record and their federal death record.<sup>248</sup> But ERIC now takes the position that the DPPA does not apply to either the in-state duplicates report or the deceased report because information in motor-vehicle records is only "used in the background" and "does not actually appear in the reports" ERIC provides to states.<sup>249</sup>

ERIC's concession, though, may be of little consolation to PILF, or anyone seeking to independently evaluate ERIC's efforts. For one, ERIC maintains that federal protections of death records still prevent disclosure of the deceased report.<sup>250</sup> For another, ERIC still maintains that the DPPA prevents disclosure

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<sup>242</sup> See, e.g., PUB. INT. LEGAL FOUND., CRITICAL CONDITION: AMERICAN VOTER ROLLS FILLED WITH ERRORS, DEAD VOTERS, AND DUPLICATE REGISTRATIONS 8 (2020).

<sup>243</sup> For the denials, see Exhibit B to Complaint at 1, *Evans*, No. 21-cv-03180 (No. 1-2) (denying request due to "federally-protected Limited Access Death Master File (LADMF) data," "ERIC membership agreement," and "the federal [DPPA]"); Exhibit B to Complaint at 1, *Griswold*, No. 21-cv-03384 (No. 1-2) (denying request due to DPPA and LADMF but not ERIC Membership Agreement); Exhibit B to Complaint at 1, *Meyer*, No. 22-cv-00001 (No. 1-2) (denying request due to LADMF); Exhibit D to Complaint at 1, *Ardoin*, No. 22-cv-00081 (No. 1-4) (denying request due to ERIC membership agreement and LADMF).

<sup>244</sup> See sources cited *supra* note 238.

<sup>245</sup> A federal district court in Alaska recently paved the way for PILF to gain partial access to ERIC's deceased report, though it recognized that federal law "prevents disclosure of that data for a three-year period beginning after the death of an individual." Pub. Int. Legal Found., Inc. v. Dahlstrom, No. 1:22-CV-00001, 2023 WL 3498044, at \*10 (D. Alaska May 17, 2023).

<sup>246</sup> ERIC, *FAQs*, *supra* note 154 (stating In-State Duplicate and Deceased reports "do not fall within the scope of the DPPA").

<sup>247</sup> Letter from Shane Hamlin, Exec. Dir., Elec. Registration Info. Ctr., Inc., to the Hon. Rep. Seth M. Grove, Chair, & the Hon. Rep. Margo L. Davidson, Democratic Chair, House State Gov't Comm., Pennsylvania House of Reps. (Mar. 4, 2021), [https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2021\\_0037\\_0004\\_TSTMNY.pdf](https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2021_0037_0004_TSTMNY.pdf) [<https://perma.cc/M6RW-TLSC>].

<sup>248</sup> ERIC, *FAQs*, *supra* note 154 (explaining driver's licensing data is "highly useful for comparing against Social Security death data to identify deceased voters more accurately").

<sup>249</sup> *Id.*

<sup>250</sup> See *id.*

of the bulk of its remaining list maintenance reports, beyond the deceased report, because “the reports themselves contain” motor-vehicle information “from motor vehicle records.”<sup>251</sup>

In fact, PILF’s earlier efforts to obtain other list maintenance records were stymied by a similarly broad interpretation of the DPPA.<sup>252</sup> For example, in 2017, Pennsylvania election officials used citizenship information collected by its motor-vehicle agency to identify potential noncitizens registered to vote.<sup>253</sup> PILF requested “[d]ocuments regarding all registrants who were identified as potentially not satisfying the citizenship requirements for registration.”<sup>254</sup> The federal district court acknowledged the broad reach of the NVRA’s public oversight provision and how it “promotes the integrity of the voting process.”<sup>255</sup> But the federal court held that the DPPA shields the state records for the simple—and unsatisfying—reason that “[t]he source” of the citizenship information was the motor-vehicle record.<sup>256</sup>

To be clear, even if the member states are required to release ERIC reports to PILF under the NVRA, such oversight would not directly inhibit ERIC’s operation. But the political fallout has already prompted member states to revisit their participation in ERIC at a time of increasing scrutiny.<sup>257</sup>

### 3. Political Challenges

Politics has become a greater threat than litigation to ERIC’s survival. Beyond the legal challenges, PILF has used ERIC’s lack of transparency—legally mandated and otherwise—to fuel misinformation. As one observer recently put it, “[p]erhaps the widest-reaching example of structural interference in elections is the growing list of states that have pulled out of [ERIC].”<sup>258</sup>

ERIC’s membership began to unravel under the attacks of J. Christian Adams, the president of PILF. Adams’s attacks began in December 2021 on a right-wing

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<sup>251</sup> *Id.*

<sup>252</sup> See *Pub. Int. Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 562 (M.D. Pa. 2019) (holding “to the extent these requests implicate protected personal information contained in DMV records, they are shielded by the DPPA”). Pennsylvania’s Office of Open Records recently cited *Boockvar* to hold that “ERIC reports are exempt from disclosure” in response to a public information request. *Sheckler v. Pa. Dep’t of State*, No. AP 2022-0629, 2022 WL 2104291, at \*15-16 (Pa. Off. Open Recs. June 6, 2022) (holding, based on “attestations that the ERIC reports are derived from the motor vehicle record database,” that the Office of Open Records is “constrained to find that the ERIC Reports are exempt from disclosure”).

<sup>253</sup> See *Boockvar*, 431 F. Supp. 3d at 556.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 561.

<sup>256</sup> *Id.* at 563. The litigation is still ongoing. See *Pub. Int. Legal Found. v. Chapman*, 595 F. Supp. 3d 296, 312 (M.D. Pa. Mar. 31, 2022).

<sup>257</sup> See *supra* Table 2.

<sup>258</sup> Squires, *supra* note 31.

talk show.<sup>259</sup> Although he was a staunch defender of Crosscheck,<sup>260</sup> Adams described ERIC as “diabolical” and a “Soros-funded organization” that was “originally a blue-state project.”<sup>261</sup> Focusing on ERIC’s required outreach to unregistered voters, Adams characterized the organization as a “smokescreen” for Democratic efforts to turn out the vote and agreed with the right-wing talk-show host’s conclusion that ERIC is a “bait and switch.”<sup>262</sup> Adams also used ERIC’s lack of transparency to suggest nefarious motives. According to Adams, “states are using ERIC to hide what they are doing.”<sup>263</sup> Adams’s attacks were repeated, almost verbatim, in the Gateway Pundit,<sup>264</sup> “one of the major sources of pro-Trump misinformation online.”<sup>265</sup>

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<sup>259</sup> John Fredericks, #JFRS Daily Podcast: December 16, 2021, JOHN FREDERICKS RADIO NETWORK (Dec. 16, 2021), <https://johnfredericksradio.libsyn.com/jfrs-daily-podcast-december-16-2021> [<https://perma.cc/D84M-HYD3>] (statement by J. Christian Adams) (“States are using ERIC to hide what they are doing to clean up the voter rolls.”).

<sup>260</sup> See, e.g., J. Christian Adams, Opinion, *The Next Major Battle Over Voting Rights in America Is Based on a Lie*, HILL (Nov. 29, 2017, 8:00 AM), <https://thehill.com/opinion/civil-rights/362222-the-next-major-battle-over-voting-rights-in-america-is-based-on-a-lie/> [<https://perma.cc/K2TR-C9MQ>] (“Crosscheck is a tool that when used properly, helps the integrity of American elections.”).

<sup>261</sup> Fredericks, *supra* note 259 (statement by J. Christian Adams). Similarly, Cleta Mitchell, who plotted to overturn the 2020 election, has made ERIC a “frequent villain” on her podcast. Miles Parks, *How the Far Right Tore Apart One of the Best Tools To Fight Voter Fraud*, NPR (June 6, 2023, 2:56 PM), <https://www.npr.org/2023/06/04/1171159008/eric-investigation-voter-data-election-integrity> [<https://perma.cc/DX9U-L44R>] (stating Mitchell called ERIC “a very insidious organization” in one of her podcast episodes). For a fact check of George Soros’s (lack of) involvement in ERIC, see Amy Sherman, *Arizona’s Mark Finchem Falsely Links George Soros to Voter Roll Program*, POLITIFACT (Oct. 17, 2022), <https://www.politifact.com/factchecks/2022/oct/17/mark-finchem/arizonas-mark-finchem-falsely-links-george-soros-t/> [<https://perma.cc/JSQ8-88BJ>] (explaining ERIC “is funded by member states who pay an upfront fee to join and by annual dues,” not by George Soros).

<sup>262</sup> Fredericks, *supra* note 259.

<sup>263</sup> *Id.*

<sup>264</sup> Jim Hoft, *Who’s ‘Cleaning’ Our Voter Rolls? Soros Funded ERIC Is Now Used in 31 States*, GATEWAY PUNDIT (Jan. 20, 2022, 8:00 AM), <https://www.thegatewaypundit.com/2022/01/cleaning-voter-rolls-soros-founded-eric-now-used-31-states/> [<https://perma.cc/3NFR-KYHK>] (“ERIC is essentially a left wing voter registration drive disguised as voter roll clean up.”).

<sup>265</sup> Jeremy W. Peters, *Inside the Right-Wing Media Bubble, Where the Myth of a Trump Win Lives On*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/politics/trump-media.html>. A recent NPR analysis confirmed that the “conversation about ERIC really only began after the first Gateway Pundit article published.” Parks, *supra* note 261219.

A week after the Gateway Pundit story, Louisiana's Republican secretary of state suspended his participation in ERIC.<sup>266</sup> The Republican reversal<sup>267</sup> was the harbinger of the politicization of ERIC membership. Between January and July of 2023, the chief state election officials in Alabama,<sup>268</sup> Florida,<sup>269</sup> Missouri,<sup>270</sup> West Virginia,<sup>271</sup> Iowa,<sup>272</sup> Ohio,<sup>273</sup> Virginia,<sup>274</sup> and Texas<sup>275</sup>—all of whom were either elected Republicans or appointed by a Republican<sup>276</sup>—quit ERIC. As states withdrew, former President Trump added fuel to the fire, “falsely claiming that ERIC ‘pumps the rolls’ for Democrats.”<sup>277</sup>

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<sup>266</sup> See Press Release, Kyle Ardoin, Louisiana Sec’y of State, Louisiana To Suspend Participation in Voter Registration Compact (Jan. 27, 2022). Louisiana’s secretary of state “announced his ERIC decision to conservative activists” who deny the legitimacy of the 2020 election. Parks, *supra* note 261.

<sup>267</sup> Louisiana’s prior secretary of state, who was also a Republican, had strongly supported ERIC following a bipartisan, and nearly unanimous, authorization from the state legislature. See 2014 La. Acts 1258.

<sup>268</sup> See Letter from Wes Allen, Alabama Sec’y of State, to Shane Hamlin, Exec. Dir., Elec. Registration Info. Ctr. (Jan. 16, 2023).

<sup>269</sup> See Press Release, Cord Byrd, Florida Sec’y of State, Florida Withdraws From Electronic Registration Information Center (ERIC) Amid Concerns About Data Privacy and Blatant Partisanship (Mar. 6, 2023). At the time, ERIC had already flouted its membership obligations to contact eligible but unregistered voters in the run-up to the 2022 general election. See *2023 Annual ERIC Board of Directors Meeting*, ELEC. REGISTRATION INFO. CTR. (2023), <https://ericstates.org/wp-content/uploads/documents/annual-board-of-directors-meeting-2023.pdf> [<https://perma.cc/7PKC-9UPS>] (discussing how Florida had violated membership agreement provision).

<sup>270</sup> Letter from John Ashcroft, Missouri Sec’y of State, to Shane Hamlin, Exec. Dir. of ERIC (Mar. 6, 2023).

<sup>271</sup> Letter from Mac Warner, West Virginia Sec’y of State, to Shane Hamlin, Exec. Dir. of ERIC (Mar. 6, 2023).

<sup>272</sup> Paul Pete (@IowaSOS), TWITTER (Mar. 17, 2023, 5:17 PM), <https://twitter.com/IowaSOS/status/1636839092074717187?s=20> (statement by Paul Pete, Iowa Sec’y of St.).

<sup>273</sup> Letter from Frank LaRose, Ohio Sec’y of State, to Shane Hamlin, Exec. Dir. of Elec. Registration Info. Ctr. (Mar. 17, 2023).

<sup>274</sup> Letter from Susan Beals, Comm’r of Virginia Dep’t of Elections, to Shane Hamlin, Exec. Dir. of ERIC (May 11, 2023) (on file with Comm’r of Virginia Dep’t of Elections).

<sup>275</sup> Letter from Jane Nelson, Texas Sec’y of State, to Shane Hamlin, Exec. Dir. of Elec. Registration Info. Ctr. (July 20, 2023), [https://www.documentcloud.org/documents/23883050-file\\_8020](https://www.documentcloud.org/documents/23883050-file_8020).

<sup>276</sup> See Natalia Contreras, *Texas Set to Withdraw from ERIC After Final Legislative Approval*, VOTEBEAT (May 23, 2023, 8:09 PM), <https://texas.votebeat.org/2023/5/23/23735275/texas-eric-withdrawal-voter-roll-program-election-integrity> [<https://perma.cc/9YTW-6PTJ>] (describing how “eight Republican-run member states” quit).

<sup>277</sup> See Neil Vigdor, *G.O.P. States Abandon Bipartisan Voting Integrity Group, Yielding to Conspiracy Theories*, N.Y. TIMES (Mar. 7, 2023), <https://www.nytimes.com/2023/03/07/us/politics/gop-voter-registration-fraud-eric.html>. Now J. Christian Adams claims—unpersuasively—that his criticism was taken further than he intended. See Parks, *supra* note 261 (statement of J. Christian Adams) (“My view is that it’s better to be in ERIC than not in ERIC.”).

The exiting states have offered few substantive explanations for their departure. Following Adams and Trump, their ostensible criticism has generally focused on ERIC's required outreach to unregistered voters,<sup>278</sup> along with a strong dose of misinformation about ERIC's operations.<sup>279</sup> But there is no evidence the voter outreach efforts are partisan.<sup>280</sup> Still, to stem the tide of departures, member states voted on whether to make optional any outreach to eligible-but-unregistered voters.<sup>281</sup> But both versions of the proposal, which I take up *infra* Part III, failed along party lines.<sup>282</sup>

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<sup>278</sup> See *supra* notes 268-73.

<sup>279</sup> See, e.g., Alice Clapman, *States Cave to Conspiracy Theories and Leave Voter Data Cooperative ERIC*, BRENNAN CTR. FOR JUST. (Aug. 10, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/states-cave-conspiracy-theories-and-leave-voter-data-cooperative-eric> [<https://perma.cc/GWC3-Y4M9>] (chronicling how “ERIC has come under baseless attacks”).

<sup>280</sup> ERIC does not collect the party affiliation, race, or gender of voters. See ERIC 2023 BYLAWS, *supra* note 149, at Ex. B (listing data fields to be submitted by member states to ERIC); see also Webinar: June 2022 Membership Meeting (June 2022) (on file with author) (explaining how states “exclude party affiliation, race, and gender data if recorded”). While voter outreach is not partisan, it is expensive. States spend considerably more money fulfilling their membership duty to “initiate contact” with unregistered voters than on annual dues. For example, in 2020-21, Florida spent \$75,000 in annual dues compared to an estimated \$1.3 million to send mailers to eligible-but-unregistered voters. Daylina Miller, *Florida Joins National Database Network Aimed at Voter Accuracy*, WUSF (Dec. 12, 2019, 3:32 PM), <https://wusfnews.wusf.usf.edu/news/2019-12-12/florida-joins-national-database-network-aimed-at-voter-accuracy> [<https://perma.cc/P923-3PX4>].

<sup>281</sup> See *Approved Minutes - ERIC Board of Directors Meeting*, ELEC. REGISTRATION INFO. CTR. (Mar. 17, 2023) 1 [hereinafter ERIC, *Approved Minutes*], <https://ericstates.org/wp-content/uploads/documents/approved-minutes-board-of-directors-meeting.pdf> [<https://perma.cc/T7GY-Z3RM>]. The first proposal—dubbed the “a la carte” proposal—would have eventually allowed member states to “request ERIC reports on a schedule of its choosing (if at all).” *Id.* at 3. The second proposal would have revised the penalty for member states who fail to do an eligible-but-unregistered mailing. *Id.* at 4. Rather than “automatic[] remov[al],” “they would not receive the Voter Participation Report,” which looks for potential voter fraud. *Id.* To borrow the language of Florida’s election director, who once colorfully explained that there is a “carrot and stick” to participating in ERIC, the proposals amounted to no stick at all or a smaller stick, for those who think of outreach to eligible-but-unregistered voters as a stick. See Gare Fineout, *Election Fraud? Florida Won’t Pledge To Look for Voters Registered in Multiple States*, POLITICO (May 22, 2019, 2:41 PM), <https://www.politico.com/states/florida/story/2019/05/22/voter-fraud-florida-wont-commit-to-effort-to-look-for-voters-registered-in-2-states-1026006> [<https://perma.cc/6KUE-KN8P>].

<sup>282</sup> See ERIC, *Approved Minutes*, *supra* note 281, at 9. The first proposal garnered seventeen of thirty-one votes, well shy of the four-fifths requirement to amend the membership agreement. *Id.* Using the same measure of partisanship discussed *supra* Figure 1, 90% of Republican but only about 30% of Democratic election officials supported the proposal. The second proposal garnered twenty-one votes, but still failed. *Id.* The partisan distribution flipped: 100% of Democratic but only 20% of Republican election officials supported it. *Id.* In contrast, the vote to eliminate nonvoting seats on the Board of Directors was unanimous. *Id.* By that point, though, David Becker, who held the nonvoting seat, had

C. *Vigilante Oversight*

The political scientist Charles Stewart III recently called attention to the “great pressure” to do voter list maintenance “in a sloppy way,” and warned such pressure is only “going to be growing over the next several years.”<sup>283</sup> This Subpart highlights various emerging, and concerning, strategies of what might be best considered a vigilante approach to list maintenance. These approaches, which complement the attacks on ERIC, claim to replicate election officials’ list maintenance responsibilities to undermine them. In short, they exploit public access to administrative records to purportedly reveal discrepancies in voter registration. In this way, private interest groups and individuals are inserting themselves into the list maintenance process to create pressure on election officials to act precipitously in an area that calls for careful consideration.

Scrutinizing voter registration lists will certainly yield some inevitable—though likely innocuous—inaccuracies given decentralized administration and the regular churn of the electorate. But privacy protections necessarily mean that publicly available information lacks key elements for reliable list maintenance. One vigilante strategy recycles Crosscheck’s flawed approach to challenge the accuracy of voter registration lists. These interest group efforts merge publicly available voter registration records, which always lack Social Security numbers<sup>284</sup> and often lack complete dates of birth,<sup>285</sup> with commercial records in an attempt to uniquely identify voters. But, as illustrated above, that effort is considerably more complicated than they suggest.

The Government Accountability Institute (GAI), co-founded by Stephen Bannon, was one of the first groups that pursued this strategy after the 2016 election.<sup>286</sup> President Trump is best understood as trying to extend the same strategy through his advisory commission on election integrity. Kris Kobach, who led Crosscheck and served as the commission’s vice chair, requested voter

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already resigned. *Id.* at 2; see also David Becker (@beckerdavidj), TWITTER (Mar. 14, 2023, 11:47 AM), <https://twitter.com/beckerdavidj/status/1635668871657996289> (announcing resignation).

<sup>283</sup> David Canon et al., *Restoring Trust in the Voting Process*, 20 ELECTION L.J. 141, 146 (2021).

<sup>284</sup> The seminal case on this point is *Greidinger v. Davis*, where the Fourth Circuit held that disclosure of a voter’s Social Security number “creates an intolerable burden” on the right to vote. 988 F.2d 1344, 1355 (4th Cir. 1993).

<sup>285</sup> See Charles J. Pults, Note, *America’s Data Crisis: How Public Voter Registration Data Has Exposed the American Public to Previously Unforeseen Dangers and How To Fix It*, 105 IOWA L. REV. 1363, 1397-1409 (2020) (identifying voter data restrictions by state).

<sup>286</sup> See GOV’T ACCOUNTABILITY INST., *AMERICA THE VULNERABLE: THE PROBLEM OF DUPLICATE VOTING* (2017) (purporting to analyze duplicate voting by comparing voter rolls of twenty-one states).

registration and voter history data from each state.<sup>287</sup> But the commission folded after states largely refused to comply with Kobach's request.

More recently, PILF has developed the Safeguarding America's Votes and Elections ("SAVE") database, which it has offered to states as an alternative to ERIC.<sup>288</sup> In explicit contrast to ERIC, PILF advertises that SAVE "does not require states to provide confidential . . . information on its registered voters and unregistered residents."<sup>289</sup> PILF also promotes that, unlike ERIC, SAVE "does not cost . . . a dime to participate" and has "no membership structure . . . whatsoever."<sup>290</sup> Consistent with Adams's attacks on ERIC's outreach to unregistered voters, PILF promotes that "SAVE does not require members to mass mail voter registration offers to licensed drivers who are not registered to vote."<sup>291</sup>

The private data gathering efforts fill publications purporting to identify or suggest voter fraud. For example, GAI released a report, "America The Vulnerable," which claimed to identify more than 8,000 "highly likely" double votes in the 2016 presidential election across twenty-one states.<sup>292</sup> For its part, PILF has published a pair of incendiary reports, titled "Alien Invasion I" and "Alien Invasion II," accusing specific individuals of illegally voting because they were not citizens.<sup>293</sup> In its latest report, dubbed "Critical Condition," PILF used its SAVE database to make either misleading or likely wrong claims, that "there are hundreds of thousands of undetected dead registrants, dead registrants

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<sup>287</sup> See, e.g., Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to John Merrill, Alabama Sec'y of State (June 28, 2017) ("In addition, in order for the Commission to fully analyze vulnerabilities and issues related to voter registration and voting, I am requesting that you provide to the Commission the publicly-available voter roll data for Alabama . . .").

<sup>288</sup> After this Article was completed, a Georgia county agreed to use "EagleAI," a similarly flawed vigilante effort promoted by Cleta Mitchell as another alternative to ERIC. See Alexandra Berzon & Nick Corasaniti, *Georgia County Signs Up To Use Voter Database Backed by Election Deniers*, N.Y. TIMES (Dec. 1, 2023), <https://www.nytimes.com/2023/12/01/us/politics/georgia-county-election-deniers-trump.html>.

<sup>289</sup> PUB. INT. LEGAL FOUND., *supra* note 242, at 44.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> GOV'T ACCOUNTABILITY INST., *supra* note 286, at 2.

<sup>293</sup> For litigation over the reports, see *League of United Latin Am. Citizens - Richmond Region Council v. Pub. Int. Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at \*1 (E.D. Va. Aug. 13, 2018). In the face of claims for defamation and intimidation, PILF ultimately retracted its false accusations. See *LULAC v. Public Interest Legal Foundation*, PROTECT DEMOCRACY (July 25, 2019), <https://protectdemocracy.org/work/lulac-v-public-interest-legal-foundation-case/> [<https://perma.cc/6GWN-DFHV>] ("Mr. Adams and his organization agreed to settle the case after it was revealed that they had received warnings from elections officials, and even one of their own volunteers, that they were making false representations regarding the Virginia election records underlying their publications.").



casting ballots, registrants with multiple registrations within the same state and different states, [and] people voting twice across state lines.”<sup>294</sup>

A separate vigilante effort uses litigation to demand that election officials defend discrepancies, both real and imagined, in voter registration lists. For example, PILF sued both the city of Detroit and the state of Pennsylvania under the theory that the deceased registrants PILF identified were sufficient evidence that the jurisdictions failed to make a “reasonable effort” to remove the registration of voters who died.<sup>295</sup> Other conservative legal interest groups have pursued similar litigation strategies based on aggregate rather than individual-level data. For example, Judicial Watch recently sued multiple counties in Pennsylvania,<sup>296</sup> and the American Civil Rights Union recently sued Broward County, Florida,<sup>297</sup> under the theory that jurisdictions who have more registered voters than the estimated voting-age population must not be conducting adequate list maintenance.

In fact, because the NVRA typically imposes a roughly four-year process to cancel voter registrations based on a change of residence,<sup>298</sup> a registration list at any point in time will necessarily include voters who likely have moved and whose registration will eventually be cancelled.<sup>299</sup> In a jurisdiction with substantial mobility, it is possible that the list will appear to have more registered voters than residents.<sup>300</sup> The suits were unsuccessful, but they reveal how the NVRA’s procedural protections against disenfranchisement can be an easy invitation to sow misinformation, an issue addressed *infra* Part III.

Finally, True the Vote (“TTV”) has pursued an even more aggressive strategy to directly challenge the registration of individuals they allege are improperly registered to vote. In December 2020, on the eve of Georgia’s run-off election to determine control of the U.S. Senate, TTV launched a coordinated administrative challenge of more than 360,000 registered voters who it claimed no longer resided at their address of registration.<sup>301</sup> TTV had compared a public version of the state’s voter registration list with the commercially available

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<sup>294</sup> PUB. INT. LEGAL FOUND., *supra* note 224, at 3.

<sup>295</sup> See generally Pub. Int. Legal Found., Inc. v. Winfrey, 463 F. Supp. 3d 795 (E.D. Mich. 2020); Pub. Int. Legal Found. v. Boockvar, 495 F. Supp. 3d 354 (M.D. Pa. 2020).

<sup>296</sup> Jud. Watch, Inc. v. Pennsylvania, 524 F. Supp. 3d 399, 399 (M.D. Pa. 2021).

<sup>297</sup> Bellitto v. Snipes, 935 F.3d 1192 (11th Cir. 2019).

<sup>298</sup> See *supra* Part I.B.1.

<sup>299</sup> The political scientists Stephen Pettigrew and Charles Stewart III estimate that, if it takes six months to remove dead registrants and forty-eight months to remove movers, then the “average degree of deadwood [(i.e., obsolete records, due to a person moving or dying)] on a voter registration list . . . should be 11.2%.” Pettigrew & Stewart, *supra* note 35, at 31.

<sup>300</sup> See, e.g., *id.* at 5 (“The presence of registration rates greater than 100% is old news to election administration aficionados, but is fodder for those who suspect that registration rolls are bloated and prone to fraud.”).

<sup>301</sup> See Amended Complaint at 2, Fair Fight, Inc. v. True the Vote, Inc., No. 2:20-cv-00302-SCJ (N.D. Ga. Mar. 22, 2021) (No. 73).

National Change of Address list.<sup>302</sup> After the election, Fair Fight, a group led by Stacey Abrams, sought to enjoin any future, similar effort by TTV based on the theory it amounted to unlawful voter intimidation.<sup>303</sup> Part of Fair Fight's argument is that a voter may file a change-of-address request with the Postal Service without intending to change their legal residence for voter registration, such that immediate cancellation would never be appropriate.<sup>304</sup> Regardless, TTV did not even attempt to reliably use the NCOA list. For example, TTV's challenges were based on supposed matches with different middle initials, different suffixes, different last names, and who had already reregistered at their new address.<sup>305</sup> While the federal suit against TTV has been pending, the private interest group has launched a national campaign to recruit more local volunteers who can challenge individual voter registrations on the basis of TTV's data-gathering efforts, whatever that may be.<sup>306</sup> Other groups have also joined the effort to mass challenge voter registrations, repeating the scheme in Georgia's 2022 election and expanding it to Michigan and Texas.<sup>307</sup>

While mass challenges of this sort should never be permitted—they ignore the basic procedural protections necessary to prevent disenfranchisement—Fair Fight's observations also reveal another vulnerability in the tools provided by the NVRA. Federal law encourages states to use the NCOA list for list maintenance but does not provide minimum matching standards.<sup>308</sup> Nor does it put individuals on notice about the connection between a change-of-address request and voter registration. Both points are also taken up *infra* Part III as part of an effort to fortify list maintenance in an age of distrust.

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<sup>302</sup> See *id.* at 15 (“Defendants crafted their list . . . by comparing Georgia’s voter registration database to United States Postal Service’s National Change of Address (NCOA) registry.”).

<sup>303</sup> See *id.* at 29-30 (seeking to enjoin True the Vote from submitting challenges to voter eligibility in Georgia, contacting voters to confirm eligibility, participating in poll-watching, or recording voters and election workers at the polls). For earlier work developing the legal theory, see generally Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173 (2015).

<sup>304</sup> Brief in Support of Plaintiff’s Motion for Summary Judgement at 16, *Fair Fight*, No. 2:20-cv-00302 (No. 156) (“[I]ndividuals who submit an NCOA request do not forfeit their eligibility to vote in their home jurisdiction.”); see also *id.* at 9 (stating many changes of address were on or near military bases and universities, so clearly temporary).

<sup>305</sup> Declaration of Dr. Kenneth Meyer at 6-10, *Fair Fight, Inc.*, No. 2:20-cv-00302 (describing various obvious errors in challenge file).

<sup>306</sup> See IV3: INDEP. VOTER VALIDATION & VERIFICATION, <https://www.iv3.us/> [<https://perma.cc/KPR8-737U>] (last visited Nov. 17, 2023).

<sup>307</sup> See Nick Corasaniti & Alexandra Berzon, *Activists Flood Election Offices with Challenges*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html> (describing mass voter challenges in Texas and Michigan).

<sup>308</sup> See 52 U.S.C. § 20507(c)(1) (codifying that state may use “information supplied by the Postal Service . . . to identify registrants whose addresses may have changed” without providing additional details about how to do so).

## III. IMPROVING DEMOCRACY'S BUREAUCRACY

The voting wars have put more partisan pressure on our election administration than it was designed to bear. A system where election administration is local and partisan, where voters are mobile, and where privacy protections limit the flow of information cannot be resilient. With an appreciation of the unique risks attending voter registration, this Part seeks to both fortify list maintenance against the attacks detailed in Part II and expand its ambitions to better address voter mobility. Part III.A revisits the federal role in list maintenance, while Part III.B turns to realizing ERIC's full potential.

A. *Revisiting the Federal Role*

ERIC's initial success and its recent challenges should inform how we approach the future of list maintenance. There is ample room for federal law to further the goals of promoting voter access, ensuring electoral integrity, and building voter trust. The goal is not to end the voting wars but to insulate some of the essential functions of election administration, such as list maintenance, from it. To that end, I begin by offering three specific proposals—to trim the scope of federal privacy protections, establish a minimum substantive standard for list maintenance to ensure its reliability, and transform list maintenance by creating an affirmative obligation to update registrations as voters move.

Importantly, I do not propose federalizing voter registration. For reasons both legal and political, the federal government is better suited to setting minimum standards and coordinating, rather than centralizing, state voter registration lists. Multiple scholars have identified difficulties associated with federalization. For example, after initially supporting federalization, Daniel Tokaji grew pessimistic about the feasibility of a federal registration list, concluding that “none of the federal institutions . . . presents a particularly attractive model.”<sup>309</sup> In recent work, Lisa Manheim has similarly called attention to the worrisome implications of “presidential control of elections.”<sup>310</sup> The problem, in short, is that voter registration has a “clear partisan valence.”<sup>311</sup> Executive branch control would facilitate partisan administration of voter registration, while a bipartisan independent commission like the EAC would likely deadlock for similar partisan reasons.<sup>312</sup>

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<sup>309</sup> Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POL. REV. ONLINE 1, 15 (2009).

<sup>310</sup> Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385, 385 (2021).

<sup>311</sup> Tokaji, *supra* note 309, at 15. Further, the constitutional allocation of election authority means a state government could inhibit the uniformity promoted by a federal voter registration list by establishing a separate voter registration list for state elections. The increasing pressure of the voting wars suggests a state may be willing to pay the cost to take such a political stand.

<sup>312</sup> See, e.g., Tokaji, *supra* note 309, at 15 (“The major problem endemic to such institutions is stalemate along partisan lines.”); see also Nou, *supra* note 110, at 138, 143-51 (surveying federal election-related agencies and noting “many are structured to deadlock on partisan grounds”).

### 1. Trimming the Scope of Federal Privacy Restrictions

While the federal government should not federalize voter registration, there is plenty it could do to improve list maintenance. To start, the disjointed development of federal privacy law and federal election law has led us to unwittingly privilege privacy interests over sound election administration.<sup>313</sup> To be sure, there are ample reasons for privacy restrictions writ large. But as Part II recounts, some policymakers have long been uneasy about the collateral consequences of privacy protections.

Privacy interests generally limit the collection of Social Security numbers, which would otherwise function as a unique, national identifier for voter registration. When Congress adopted the Privacy Act of 1974, it focused on the “dangers of widespread use of SSNs as universal identifiers.”<sup>314</sup> But precisely for that reason, SSNs are invaluable for connecting voters across a decentralized election system. Currently, federal election law accommodates the privacy interest in a Social Security number by directing election officials to instead use an individual’s driver’s license number as the “unique” identifier for registration, if available.<sup>315</sup>

A better approach would revisit the proposals from a prior generation about how to navigate the tension between privacy interests and election administration. After the passage of the NVRA, the Federal Election Commission (“FEC”) recommended that states modify state law to collect SSN4 as part of voter registration.<sup>316</sup> Further, after the passage of HAVA, the Carter-Baker Commission endorsed the idea that the federal government should sacrifice some measure of privacy to improve list maintenance by mandating the collection of voters’ Social Security numbers.<sup>317</sup> These approaches are not without tradeoffs. For example, the election law scholar Spencer Overton, who

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<sup>313</sup> Beyond my focus on list maintenance, federal privacy law has also limited state efforts to extend automatic voter registration to Medicaid recipients. See Alex Burness, *Oregon Wants To Register Medicaid Recipients To Vote. Will Biden Officials Allow It?*, BOLTS (July 11, 2023), <https://boltsmag.org/automatic-voter-registration-medicare-medicoid-oregon-colorado/> [<https://perma.cc/Z26W-J28G>] (explaining how Centers for Medicare and Medicaid Services’ legal interpretation of privacy rules “bar[s] state Medicaid agencies from using or disclosing client data for purposes that are not directly connected to the Medicaid program”).

<sup>314</sup> *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993).

<sup>315</sup> See *supra* Part I.B.2.

<sup>316</sup> See FEC, *supra* note 198, at 37-39. The FEC opted not to require SSN4 on the newly created federal registration form. In the face of privacy concerns raised during the rulemaking process, the FEC instead chose to defer to states’ preferences in balancing voter privacy and voter identifiability. See National Voter Registration Act of 1993, 59 Fed. Reg. 32313-14 (June 23, 1994) (describing opposition by various commenters to voter identification number requirements).

<sup>317</sup> See CARTER-BAKER COMMISSION REPORT, *supra* note 27, at 15 (recommending collection of Social Security numbers to promote voter database interoperability across states).

sat on the Carter-Baker Commission, dissented from the proposal.<sup>318</sup> He acknowledged that collecting Social Security numbers would be “unquestionably beneficial to account” for voter mobility but feared it would “create[] substantial privacy and security hazards.”<sup>319</sup>

Congress has rebalanced the weight of privacy interests in other contexts. For example, Congress amended the Privacy Act in 1976 to permit states to require Social Security numbers in “the administration of any tax, general public assistance, driver’s license, or motor vehicle registration law.”<sup>320</sup> More recently, Congress also required the collection of Social Security numbers for states to issue a “REAL ID.”<sup>321</sup>

Voter registration is at least as weighty an interest, particularly in light of increasing partisan pressures on election administration. The FEC’s proposed approach of utilizing the last four digits of a Social Security number makes more sense than the Carter-Baker proposal for full SSN because it achieves many of the benefits of a unique identifier while reducing privacy concerns.<sup>322</sup> To the extent that greater collection of even the last four digits of Social Security numbers increases the risk of identity theft via a data leak or breach, that same risk is present with our administration of taxes, motor-vehicle licenses, and public assistance, and can be addressed by data security efforts.

Privacy interests also limit the disclosure of certain administrative data, such as state motor-vehicle records and federal death records, that have become essential to list maintenance. The DPPA limits the disclosure of motor-vehicle records to protect individuals from the annoyance of spam, the financial damage of identity theft, and the physical risk of stalkers.<sup>323</sup> At the time it was adopted, the DPPA did not conflict with the NVRA’s robust requirement for public disclosure of list maintenance records. But today, list maintenance increasingly requires the aggregation of confidential motor-vehicle (and death) records. The

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<sup>318</sup> See WENDY R. WEISER, JUSTIN LEVITT, CATHERINE WEISS & SPENCER OVERTON, NAT’L NETWORK ON STATE ELECTION REFORM, RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM 17 (2005) (arguing use of Social Security numbers in interstate databases is ill-advised).

<sup>319</sup> *Id.*

<sup>320</sup> Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 1712 (1976), 42 U.S.C. § 405(c)(2)(C)(i).

<sup>321</sup> See REAL ID Act of 2005, Pub. L. No. 109-13, § 202(d)(5), 119 Stat. 231, 314 (describing states’ verification responsibilities).

<sup>322</sup> Privacy concerns are reduced, but not eliminated, in part because it is possible to identify a person’s Social Security number based on their (often public) date of birth and predictable patterns in the assignment of Social Security numbers—in fact, before the Social Security Administration changed the assignment procedure, researchers were able to identify the first five digits of a person’s Social Security number in a single attempt for 44% of the sample studied. See Alessandro Acquisti & Ralph Gross, *Predicting Social Security Numbers from Public Data*, 106 PROC. NAT’L ACAD. SCIS. 10975, 10977 (2009).

<sup>323</sup> See, e.g., *Taylor v. Acxiom Corp.*, 612 F.3d 325, 336 (5th Cir. 2010) (“Congress originally passed [the DPPA] in response to the murder of actress Rebecca Schaeffer at the hands of a stalker.”).

DPPA is thus encroaching on the NVRA's transparency provision, shifting the balance toward privacy at the expense of oversight.

More accurate and more complete voter registration lists serve to improve our elections, and the public's confidence in them. But public trust can be undermined if effective list maintenance takes place outside of public view. To the extent there is a conflict between privacy and transparency, we should recalibrate the balance between the two values to promote transparency in election administration. But, on closer inspection, there appears to be little to lose from a privacy perspective by permitting the partial disclosure of motor-vehicle (and death) records when used to maintain voter registration lists. After all, voters' names and addresses are already publicly available as part of voter registration lists.<sup>324</sup>

## 2. Establishing a Minimum Substantive Standard for List Maintenance

Beyond federal privacy laws, the balance struck by the NVRA's "general program" for list maintenance has also proven thoroughly unsatisfying. One glaring omission in the NVRA is the lack of a minimum substantive standard for election officials to establish that a voter has moved so as to commence the cancellation process. In *Husted v. A. Phillip Randolph Institute*,<sup>325</sup> the Supreme Court held the NVRA does not require *any* "particular quantum of evidence of a change of residence" to initiate the cancellation process.<sup>326</sup> Instead, the NVRA relies on a series of procedural protections to allow the voter to confirm that their voter registration is indeed correct, either by responding to a confirmation notice or by voting during roughly the next four years.<sup>327</sup>

Many on the left have understandably little confidence in a list maintenance process that lacks a minimum substantive standard and fear the procedural protections can be inadequate.<sup>328</sup> The vast majority of confirmation notices yield

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<sup>324</sup> At least two recent proposals start from the contrary premise that motor-vehicle records are private and conclude that voter registration records should be shielded from disclosure too. See generally Audrey Paige Sauer, Note, *Privacy or the Polls: Public Voter Registration Laws as a Modern Form of Vote Denial*, 61 WM. & MARY L. REV. 1473 (2020) (positing voter registration reform should be modeled after DPPA); Pults, *supra* note 285, at 1363 (suggesting congressional action to "curtail the distribution of voter registration data"). But motor-vehicle records do not serve the same core democratic functions as voter registration records.

<sup>325</sup> 138 S. Ct. 1833 (2018).

<sup>326</sup> *Id.* at 1847.

<sup>327</sup> See *id.* at 1848 (explaining failure to take either action may result in removal from voting rolls).

<sup>328</sup> Myrna Pérez, the former director of the Brennan Center for Justice's Voting Rights and Elections Program, has argued "[t]he lack of consistent rules and procedures means that [a voter's risk of being purged] is unpredictable and difficult to guard against." MYRNA PÉREZ, BRENNAN CTR. FOR JUST., VOTER PURGES 3 (2008). There are certainly examples of election officials flouting the procedural protections for voters in list maintenance. See, e.g., JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018) (offering examples in Virginia in 2013 and in Brooklyn in 2016).

no response at all,<sup>329</sup> and many people registered to vote do not in fact vote. Nonetheless, the lengthy delay caused by the procedural protections leads to bloated voter registration lists—sometimes the number of registered voters exceeds the number of registrants—which many on the right have used in an attempt to substantiate spurious claims about fraud.<sup>330</sup>

These different concerns are illustrated by the contrast between Crosscheck and ERIC. Consider the case of a person registered to vote in Maryland who has apparently reregistered in Florida. Given the analyses recounted in Part II, if the information came from Crosscheck, it is not likely to be reliable, making procedural protections critical to prevent disenfranchisement.<sup>331</sup> If the information came from ERIC, though, it is likely quite reliable, making such protections less necessary and perhaps counter-productive.<sup>332</sup>

Congress should modify the NVRA to abrogate *Husted* by adopting minimum substantive reliability standards. A revised NVRA could better promote confidence in list maintenance on both the left and the right. It could calibrate the quality of evidence that a voter moved with the extent of procedural protections.<sup>333</sup> Election officials could reduce bloated voter registration lists by cancelling duplicate registrations more quickly, using more reliable information.

Reasonable people may disagree about what an ideal minimum substantive matching standard might be—and whether it would be wise to legislate such a standard given that technology may evolve. Nonetheless, an ideal minimum standard would likely require that two records share the same name and date of birth as well as another piece of information, such as an SSN4 or address.<sup>334</sup> Further, the National Change of Address list only contains an individual's (or family's) name, prior address, and future address. Given its important role in list maintenance, the Postal Service should at least also collect an individual's (or each family member's) date of birth. Finally, whatever the minimum matching

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<sup>329</sup> During the 2020 election cycle, only 12% of confirmation notices yielded a response from the voter. See EAVS 2020 REPORT, *supra* note 75, at 159-62 tbl.4 (reporting number of voter responses to confirmation notice by state).

<sup>330</sup> See, e.g., Pettigrew & Stewart, *supra* note 35, at 5.

<sup>331</sup> See *supra* Part II.A.1 (describing Crosscheck's limited functionality).

<sup>332</sup> See *supra* Part II.B.1 (describing ERIC's accuracy in identifying voters who have moved).

<sup>333</sup> An extension of the proposal might also consider the availability of same-day registration, much as the NVRA exempts states which had same-day registration at the time the law was passed and continue to do so. See 52 U.S.C. § 20503(b) ("This chapter does not apply to . . . (2) [a] State in which, under law that is in effect continuously on and after August 1, 1994, . . . all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.").

<sup>334</sup> For a validation of the approach, see Stephen Ansolabehere & Eitan D. Hersh, *ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name*, 4 STAT. & PUB. POL'Y 1, 1 (2017) (showing matches using combination of address, date of birth, gender, and name "produce a rate of matches comparable to 9-Digit Social Security Number"). It would also be important to allow election officials the flexibility to resolve the inevitable typos in voter registration records.

standards, providing notice to an individual that an administrative record will also be used to keep their voter registration updated can help ensure that the information collected is properly employed in list maintenance.

### 3. Transforming List Maintenance into a Tool for Enfranchisement

A minimum substantive standard for list maintenance, without more, would still leave voter registration lists both incomplete—because cancellation does nothing to ensure voters are registered at their new address—and inaccurate—to the extent there are procedural delays. This Subpart pivots to expanding the government’s list maintenance obligations to accommodate the mobility of the electorate. To illustrate the need for list maintenance as a tool for enfranchisement, it surveys the aftermath of *Husted* in Ohio.<sup>335</sup> *Husted* approved Ohio’s practice of using a person’s failure to vote as the sole reason to initiate the cancellation process. Using administrative data in Ohio, this Section suggests that Congress should do more than simply overrule *Husted* by establishing a minimum substantive standard for list maintenance. In addition, reformers should also advocate for an affirmative obligation to *update* registrations as voters move.<sup>336</sup> An affirmative obligation would lead to both more accurate and complete lists—a voter who moves would remain registered to vote, and there would be no need for current procedural protections to prevent disenfranchisement.

Lisa Manheim and Elizabeth Porter have described *Husted* as a “struggle for the soul of the NVRA.”<sup>337</sup> Yet, to date, there has been little empirical evidence evaluating the consequences of Ohio’s policy.<sup>338</sup> That lack of evidence has reinforced a shallow understanding of the impact of list maintenance and limited proposals for reform.

Many commentators have called for an end to Ohio’s policy, characterizing it as the quintessential “voter purge.”<sup>339</sup> But their arguments conflate the number of people whose voter registration was cancelled with the number of people

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<sup>335</sup> 138 S. Ct. 1833 (2018).

<sup>336</sup> Some advocates have argued the NVRA already requires intercounty, not just intracounty, address updates. See ARCHITA TAYLOR & SYLVIA ALBERT, CHANGES OF ADDRESS AND THE NATIONAL VOTER REGISTRATION ACT 18 n.38 (2016) (“While the statute and legislative history does not specifically address whether . . . the NVRA requires states to update addresses of voters who report inter-county moves to their DMV, there is no question that it is intent of the NVRA that such address updates within a state should be reported to election officials for the purpose of an update . . .”). But that legal argument has not been widely adopted.

<sup>337</sup> Manheim & Porter, *supra* note 15, at 221.

<sup>338</sup> Instead, legal scholarship has generally relied on anecdotes about disenfranchised voters. See, e.g., Naila S. Awan, *When Names Disappear: State Roll-Maintenance Practices*, 49 U. MEM. L. REV. 1107, 1108 (2019) (“All too often stories describe people appearing at the polls and learning that . . . their names have been removed from the voter registration rolls.”).

<sup>339</sup> See, e.g., *id.* at 1109 (referring to “voter-roll maintenance laws” as “purge laws”).



disenfranchised. Those quantities are not the same—some people whose registration was cancelled had in fact moved and thus were no longer eligible voters at their former address. To be clear, the difficulty is not that the call to end Ohio's policy by instituting minimum substantive standards is unreasonable—it is not—but that the call does not go far enough. To inform the future of list maintenance, it would be helpful to determine which voters whose registration was cancelled by Ohio's policy continued to reside at their registration address and which did not. The relative distribution of these two quantities can suggest the extent of the problem of voters being removed from the registration list relative to the problem of voter registration failing to keep pace with voter mobility. The former problem might be considered a problem of direct disenfranchisement, and the latter one of potential indirect disenfranchisement.

A settlement agreement following the *Husted* decision provides suggestive evidence about the extent of direct and potential indirect disenfranchisement—but the evidence is incomplete.<sup>340</sup> Still, the available data suggests that direct disenfranchisement is only one of the implications of Ohio's list-maintenance policy. Consider, as an example, the 1,512,715 people who Ohio targeted for cancellation in June 2015 because they did not vote in the 2014 general election.<sup>341</sup> Absent administrative error, voters who did not respond to the 2015 confirmation notice and who did not vote in any subsequent election, including the 2016 presidential or 2018 midterm election, had their registration

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<sup>340</sup> Off. of the Ohio Sec'y of State, Opinion Letter on Provisional Ballots Cast by Voters Cancelled Under Ohio's Supplemental Process 1 (Oct. 7, 2019), <https://www.ohiosos.gov/globalassets/elections/directives/2019/dir2019-23.pdf>. The settlement provides that voters whose registration was cancelled because of Ohio's policy will be offered a provisional ballot. *Id.* The number of successful provisional ballots provides an estimate of voters who would have been directly disenfranchised by Ohio's policy absent the settlement agreement. The remaining voters whose registrations were cancelled and who did not cast a provisional ballot represent a combination of different list-maintenance challenges: some of these voters may not have moved but have not attempted to vote, while others may have moved and reregistered or, more worryingly, moved and failed to reregister. Ultimately, there is not yet conclusive data about how many voters fall into each category.

<sup>341</sup> E-mail from David W. Bowling, Elections Couns., Off. of Ohio Sec'y of State, to Sarah A. Cherry, Minority Couns., Ohio House of Representatives (Feb. 24, 2016, 13:59 ET) (on file with author) (providing “data collected by the Secretary of State relating to the number of confirmation notices mailed pursuant to the . . . supplemental process in 2015”). Importantly, Ohio did not include in this list any person who had filed a change-of-address request with the Postal Service. In other words, Ohio was only relying on failure to vote to initiate this part of the cancellation process. See *Directive 2015-09*, OHIO SEC'Y OF STATE (2015), <https://www.ohiosos.gov/globalassets/elections/directives/2015/dir2015-09.pdf> [<https://perma.cc/26GE-JWTT>] (“This second component is designated the ‘supplemental process,’ because it seeks to identify electors whose lack of voter initiated activity indicates they may have moved, even though their names did not appear as a part of the NCOA process.”).

cancelled.<sup>342</sup> In September 2019, Ohio ultimately cancelled 182,858, or about 12%, of the 1,512,715 voter registrations initially targeted.<sup>343</sup> Since then, just 2,653, or about 2%, of the cancelled voters<sup>344</sup> have cast a valid provisional ballot in the same county as their original registration.<sup>345</sup> These voters may have been directly disenfranchised by Ohio's policy absent the settlement agreement.<sup>346</sup>

A more difficult question—one for another paper—is whether the remaining cancelled voters still live at their original address of registration. The proposal to simply end Ohio's policy would only be an effective reform if these cancelled voters still reside at their address of registration. To the extent that some of these

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<sup>342</sup> See OHIO REV. CODE ANN. § 3503.21(A)(7)(a)-(b) (West 2023) (“The registration of a registered elector shall be canceled upon . . . [t]he failure of the registered elector, after having been mailed a confirmation notice, to do either of the following: (a) [r]espond to such a notice and vote at least once during a period of four consecutive years, which period shall include two general federal elections; (b) [u]pdate the elector's registration and vote at least once during a period of four consecutive years, which period shall include two general federal elections.”).

<sup>343</sup> *Larose Encouraging a Fresh Start for Eligible Ohioans*, OHIO SEC'Y OF STATE (Sept. 27, 2019), <https://www.ohiosos.gov/media-center/press-releases/2019/2019-09-27/> [<https://perma.cc/N8QA-WV3B>] (“The Fresh Start list provided today contains 182,858 registrations that were cancelled pursuant to state and federal laws . . . .”); Darrel Rowland, *Ohio Purges 182,858 Voter Names*, AKRON BEACON J. (Sept. 27, 2019, 9:54 PM), <https://www.beaconjournal.com/story/news/politics/state/2019/09/28/ohio-purges-182-858-voter/2621877007> (“A state purge removed 182,858 names from Ohio's voter registration rolls.”).

<sup>344</sup> See generally *2020 Official Election Results*, OHIO SEC'Y OF ST., <https://www.ohiosos.gov/elections/election-results-and-data/2020/> (last visited Nov. 11, 2023) (click “Provisional Supplemental Report” and see column titled “Counted – APRI 2019” for relevant numbers). For background on the creation of this report, see *Directive 2022-12*, OHIO SEC'Y OF STATE § 8.06 (2022) (available at <https://www.ohiosos.gov/globalassets/elections/directives/2022/eom/dir2022-12-ch08.pdf> [<https://perma.cc/AVH8-AVJW>]).

<sup>345</sup> Other scholarship using a similar approach in North Carolina has found similar-sized effects. For example, Thessalia Merivaki and Daniel A. Smith examine the reasons given for provisional ballots cast on Election Day 2016 in North Carolina. Thessalia Merivaki & Daniel A. Smith, *A Failsafe for Voters? Cast and Rejected Provisional Ballots in North Carolina*, 73 POL. RSCH. Q. 65, 71-72 (2020). They report that 5,366 of the 58,100 provisional ballots were cast because the registrant was “[p]reviously removed;” 2,642 of these provisional ballots were fully counted. *Id.* at 72 tbl.2. In a working paper also focused on North Carolina, Kevin Morris identifies “someone as incorrectly purged if they were removed between 2010 and 2016 and cast a provisional ballot in 2016 at the address at which they were registered in 2010.” Kevin Morris, *Who Votes After Their Registration Is Cancelled? Evidence from North Carolina* 9 (Aug. 19, 2020) (unpublished manuscript), <https://preprints.apsanet.org/engage/apsa/article-details/5f43c7e1b8a1230019967bf6> [<https://perma.cc/34WN-CDSE>]. Although Morris does not report the denominator of the total number of people removed during the time period, he does identify “1,278 voters [that were] wrongfully purged between 2010 and 2016.” *Id.* at 10.

<sup>346</sup> Under the agreement, Ohio counts the provisional ballot so long as the “voter's current . . . address . . . [is] within the same county in which the voter was previously registered to vote prior to the voter's registration being cancelled.” Off. of the Ohio Sec'y of State, *supra* note 340, at 1.

cancelled voters moved but have not reregistered to vote at their new address, ending Ohio's policy would not fix the underlying problem. Instead, to address voter mobility, list maintenance needs to be about more than improving how we cancel voter registrations. This narrow view of list maintenance as disenfranchising has led the left to only seek to limit list-maintenance efforts, to its own detriment. At least based on ERIC's reports, there are still millions of voters who move and do not reregister at their new address and thus may potentially be unable to vote without intervention.<sup>347</sup>

To facilitate voter updates, federal law should require election officials to consult certain sources with potential information for current voter residences. When election officials reliably locate a voter's new address, they should be required to update, rather than cancel, that voter's registration. And when election officials can't locate a voter's new address, the inference that the voter moved should be considered less reliable and lengthy procedural protections considered more appropriate. The twin requirements should incentivize both those who care more about voter access and those who care more about electoral integrity to support a transformation of list maintenance.<sup>348</sup> To fully realize the benefits of this reform, though, the states would need to adopt a coordinated approach to voter registration—a proposal I take up in the next Section.

#### B. *Realizing ERIC's Potential*

This Section turns to how ERIC's unique structure can be leveraged to further the goal of more accurate and complete voter registration lists. The foundation established by ERIC's bylaws provides a strong starting point for further advancements, despite the recent slew of state withdrawals. Here, I highlight ERIC's potential to nationalize, but not federalize, voter registration; to better measure election administration; and to maximize the use of list maintenance. But ERIC can fulfill other goals too. If the federal government does not establish minimum standards for list maintenance or create an affirmative obligation to update registrations when voters move, as I propose above, the chief election officials in member states could amend ERIC's bylaws to adopt similar reforms. Under ERIC's current membership agreement, the choice to update or commence to cancel a voter's registration following an in-state move is up to states, based on state law.<sup>349</sup>

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<sup>347</sup> See *supra* Table 3 (providing that since 2019 number of "cross-state movers" has been greater than one million).

<sup>348</sup> The proposal avoids many criticisms, from both the left and right, of mandatory voting or mandatory registration. See, e.g., Tokaji, *supra* note 10, at 505 (summarizing debate). To be clear, the proposal is designed to eliminate *re*-registration requirements, but a voter who wishes to no longer be registered to vote could simply cancel their registration by "notif[ying] the applicable registrar." 52 U.S.C. § 20507(b)(2)(A).

<sup>349</sup> See ERIC 2023 MEMBERSHIP AGREEMENT, *supra* note 156, § 4(b) (requiring only that state "initiate contact" with voter).

The central obstacle to realizing ERIC's potential is its largely voluntary structure.<sup>350</sup> The fact that most states could withdraw at any moment—as nine states have already done—limits the practical ability of members to make additional demands on each other.<sup>351</sup> In response, Congress could incentivize membership in ERIC to limit the threat of a state's exit. For example, Congress could declare that participating in a cross-governmental election bureaucracy, with certain conditions for accuracy and transparency, would satisfy federal list-maintenance obligations.<sup>352</sup> Further, Congress could also offer conditional grants—if states participate, the federal government would pay any membership obligations and associated costs.<sup>353</sup> ERIC's total budget is only about \$1,700,000.<sup>354</sup> The potential benefits of a more robust ERIC make federal support worthwhile. Further, to the extent Congress uses its Spending Clause power, it would avoid questions about the limits of its Elections Clause authority.<sup>355</sup>

Before proceeding, I should acknowledge state efforts to replace ERIC entirely rather than realize its potential. In theory, states could stand up another cross-state bureaucracy for voter registration. In fact, some states are trying

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<sup>350</sup> See *supra* Table 2.

<sup>351</sup> The four-fifths threshold for amending the membership agreement only adds to the difficulty of building consensus to retain members. See ERIC 2023 MEMBERSHIP AGREEMENT, *supra* note 156, at art. VI, § 5.

<sup>352</sup> Currently, “the National Change of Address Process is a safe harbor in the National Voter Registration Act scheme for voter list maintenance.” *Bellitto v. Snipes*, 935 F.3d 1192, 1206 (11th Cir. 2019).

<sup>353</sup> In 2017, a few states in ERIC encouraged the federal government to take this approach. See, e.g., Letter from Tom Schedler, Louisiana Sec'y of State, to Presidential Advisory Comm'n on Election Integrity (Aug. 9, 2017), [https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/Official%20State%20Responses\\_Redacted%20%289.19.2017%29.pdf](https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/Official%20State%20Responses_Redacted%20%289.19.2017%29.pdf) [<https://perma.cc/N8GA-7X4U>] (“I strongly encourage the commission to support this tool by incentivizing more states to participate in its services.”); Letter from Wayne W. Williams, Colorado Sec'y of State, to Kris W. Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity (July 14, 2017), <https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/docs/Public-Official-Responses-Received-July-4-2017.pdf> [<https://perma.cc/7PXD-RAHA>] (“I would also strongly encourage that the federal government shift resources to incentivize states' participation in . . . [ERIC.]”); Letter from Kenneth R. Menzel, Gen. Couns., Illinois State Bd. of Elections, to Kris W. Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity (Sept. 19, 2017), [https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/Official%20State%20Responses\\_Redacted%20%289.19.2017%29.pdf](https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/Official%20State%20Responses_Redacted%20%289.19.2017%29.pdf) [<https://perma.cc/N8GA-7X4U>] (“We would recommend that ERIC membership be encouraged, or even monetarily subsidized, for all states.”).

<sup>354</sup> ERIC, *FAQs*, *supra* note 154.

<sup>355</sup> For a similar proposal and constitutional justification, see Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 107 (2014).

exactly that.<sup>356</sup> But one lesson from ERIC is the sheer difficulty of navigating federal and state privacy laws.<sup>357</sup> So far, the proposals seem to amount to little more than reviving Crosscheck's limited and flawed approach.<sup>358</sup>

### 1. Nationalizing Voter Registration

To reimagine the list-maintenance paradigm and fully account for voter mobility, we should nationalize, but not federalize, voter registration.<sup>359</sup> Twenty years ago, the Carter-Baker Commission responded to the debate about the proper governance structure for voter registration by proposing a centralized “distributed database” of state voter-registration lists.<sup>360</sup> At the time, the Commission suggested the system “could be managed . . . by an interstate compact . . . of state officials under EAC supervision.”<sup>361</sup> The Commission hoped institutional reform would enable “people . . . to register only once in their lifetime, and it would be easy to update their registration information when they move,” even across states.<sup>362</sup>

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<sup>356</sup> See, e.g., Miles Parks, *Republican States Swore Off a Voting Tool. Now They're Scrambling To Recreate It*, NPR (Oct. 20, 2023, 5:00 AM), <https://www.npr.org/2023/10/20/1207142433/eric-investigation-follow-up-voter-data-election-integrity> [https://perma.cc/W4J2-H36T].

<sup>357</sup> For a general explanation of why creating an alternative would be difficult, see, e.g., *id.*; Natalia Contreras, *Texas May Be About To Scrap a Voting Security System It Can't Replace*, VOTEBEAT (Mar. 28, 2023, 5:58 AM), <https://texas.votebeat.org/2023/3/28/23659141/eric-voter-rolls-replacement-electronic-registration-information-center> [https://perma.cc/3RW8-XMA3].

<sup>358</sup> For example, Ohio recently announced partnerships with Florida, Virginia, and West Virginia to share voters' name, date of birth, and voting history, but not driver's license data. Parks, *supra* note 219. The states will “find a first, middle, last name and date of birth that matches between us and another state”—which is what Crosscheck did. *Id.* Other state efforts seem similarly designed to fail. For example, Texas election officials must now comply with statutory mandates to setup (or contract with the provider of) a new system and yet spend less than \$100,000 on initial costs. TEX. ELEC. CODE ANN. §§ 18.062(a)(2), 18.062(c). Further, it's unclear whether Texas could even share motor-vehicle data, since it currently cannot share “any information that is not . . . found in a voter roll.” *Id.* § 18.062(1).

<sup>359</sup> Some scholars have pointed out that, at least in theory, decentralized election administration can have a security benefit. See, e.g., Weinstein-Tull, *supra* note 4 (manuscript at 12) (“[D]ecentralization provides a safeguard against widespread election hacking and other threats.”). But, in practice, decentralization often comes with a lack of technical expertise to ward off the latest threats. Further, “in close elections it is the weakest link among those who run elections that matters most.” RICHARD L. HASEN, ELECTION MELTDOWN 7 (2020).

<sup>360</sup> CARTER-BAKER COMMISSION REPORT, *supra* note 27, at 14 (“[O]ur Commission recommends a ‘distributed database’ that will connect all states’ registration lists. The creation of a computerized system to transfer voter data between states is entirely feasible.”).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at iv.

In the current legal and political landscape, even a beleaguered ERIC is in the best position to realize the Commission's proposal.<sup>363</sup> So long as voter registration is not federal, ERIC can avoid the dynamics of "partisan federalism"<sup>364</sup>—the degree to which states would be interested in using ERIC as a vehicle for interstate cooperation would not be predicated on which party controls the White House.<sup>365</sup>

The next step toward a modern "distributed database" of statewide voter-registration lists could take a number of forms. For example, currently, when ERIC detects that a voter has moved from one state to another, it sets off a disjointed process where the former state sends a confirmation notice to the voter's old address—which likely will not yield a response—and the new state sends a postcard to the voter's new address about registering to vote—which also will likely not yield a response. Instead, ERIC could send the first state a notification to approve a registration transfer. After approval, ERIC could then forward the information in both the prior and updated registration to the new state, who would then add the voter to its statewide registration list based on the new address provided by ERIC. This process, while somewhat inefficient, would be a significant improvement in the accuracy and completeness of voter registration and would be consistent with the principle that states control their lists.

## 2. Measuring Election Administration

If the most common critique of election administration is that it is too local and too partisan, the next most common gripe is probably the lack of good data. That lack of data "handicaps reform efforts."<sup>366</sup> ERIC can realize various proposals to use information disclosure as a tool to improve election administration and protect voting rights.<sup>367</sup> It holds the type of vital missing data

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<sup>363</sup> ERIC would thus assume a role similar to Elections Canada, the country's federal election authority, which maintains a voter roll for federal elections using information routinely provided by forty government agencies, including "[p]rovincial and territorial departments of motor vehicles, the national postal service, provincial and territorial electoral agencies, and the federal tax authority." ROSENBERG & CHEN, *supra* note 62, at 6.

<sup>364</sup> Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079-80 (2014) (describing how "[s]tates oppose federal policy because they are governed by individuals who affiliate with a different political party").

<sup>365</sup> In fact, Florida had conditioned and Georgia still conditions their ERIC membership on ERIC being solely "controlled and operated by the participating jurisdictions," not the federal government. FLA. STAT. ANN. § 98.075(2)(b)(3) (2023); *accord* GA. CODE ANN. § 21-2-225(d)(3) (2023).

<sup>366</sup> GERKEN, *supra* note 28, at 28.

<sup>367</sup> *See, e.g., id.* at 9 (ranking states and localities based on election performance, thus allowing administrators to quantify effectiveness of policies); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 117, 120 (2013) (proposing Congress compel states to disclose changes in "voting rules or practices" to "increase the exposure of potential misconduct and to incentivize deterrence," as opposed to "ex ante race

that could be used to measure the efficacy of the NVRA's motor-voter provisions and the extent of voter fraud. The first application can improve efforts of using list maintenance to enfranchise voters; the second can counter misinformation.

a. *Motor-Voter*

To realize ERIC's full potential, it's helpful to remember ERIC serves three distinct coordination functions: a *cross-state* function, a *federal* function, and a *within-state* function. ERIC's *within-state* function is best understood as a remedial effort to address the incomplete implementation of the NVRA's motor-voter provisions.<sup>368</sup> While ERIC is not in a position to fully remediate the deficiencies in motor-voter on its own, it can supply vital missing data to measure motor-voter programs and highlight potential improvements.

ERIC's *within-state* function and the NVRA's motor-voter requirements target a very similar population. In the latest available data, ERIC identified more than 7 million individuals who had a driver's license with a more recent address than their voter registration.<sup>369</sup> Under motor-voter, the bulk of these in-state moves should likely have been reported by motor-vehicle officials to election officials for a registration update.<sup>370</sup> Further, ERIC has identified millions of individuals with a driver's license but no voter registration.<sup>371</sup> Based on motor-voter, these individuals should have been asked whether they wanted to register to vote at the motor-vehicle office.<sup>372</sup>

In contrast to motor-voter, which offers voters a direct opportunity to register to vote or update an address of registration, ERIC generally facilitates an indirect opportunity, in the form of mailers sent by states, to encourage a voter to take

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discrimination model"); Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 19-20 (2013) (agreeing with and expanding Issacharoff's proposal).

<sup>368</sup> At a conference for election officials, Becker pitched ERIC as a tool to reveal "people who have moved that [motor-vehicle officials] . . . are required by law to tell [election officials] about," but have not. David Becker, Dir., Pew Charitable Trs. Election Initiatives, Remarks at U.S. Election Assistance Comm'n Election Data Summit: How Good Data Can Help Elections Run Better 214 (Aug. 12, 2015), <https://www.eac.gov/events/2015/08/12/election-data-summit> [<https://perma.cc/3NJ8-HD82>]. Becker explained he had "yet to meet an election official anywhere of any political party that doesn't want their Motor Vehicles agency to do a better job with voter registration." *Id.*

<sup>369</sup> See *supra* Table 3.

<sup>370</sup> See 52 U.S.C. § 20504(d) ("Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration . . . unless the registrant states on the form that the change of address is not for voter registration purposes.").

<sup>371</sup> See *supra* Table 3 (reporting ERIC identified more than 4,400,000 such individuals across member states in 2022).

<sup>372</sup> See § 20504(c)(1) ("Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license."). A significant exception is that first-time driver's license applicants may be minors and thus ineligible to vote.

further action. Based on state law, some states send voters a confirmation notice to their (likely outdated) address of registration,<sup>373</sup> which they are unlikely to receive or respond to, while others send the notification to the (likely new) driver's license address.<sup>374</sup> Further, while ERIC's highly-touted<sup>375</sup> outreach program to "eligible-but-unregistered" individuals is laudable, recent field experiments suggest it has increased voter registration by only between about one and two percentage points.<sup>376</sup> In contrast, a recent study evaluating reforms to the implementation of motor-voter in Colorado suggests that automatically registering voters at motor-vehicles offices increases the share of individuals who register to vote by almost thirty percentage points.<sup>377</sup>

Given the data, ERIC should refocus its *within-state* efforts.<sup>378</sup> ERIC is particularly well-suited to improve the implementation of motor-voter. While motor-voter is generally criticized for falling short of its goals, there is very little

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<sup>373</sup> See, e.g., DEL. CODE ANN. tit. 15, § 1704(b) (2023) ("The Department shall mail the [address verification] request to the address at which the person is registered to vote . . .").

<sup>374</sup> See, e.g., WASH. REV. CODE § 29A.08.620 (2023) ("The county auditor shall . . . send to all known addresses a confirmation notice . . .").

<sup>375</sup> In 2019, David Becker declared that ERIC's outreach "is probably the single most effective voter registration effort in history." Becker, *supra* note 142, at 262. At the time, Becker explained, ERIC had identified "over 34 million eligible but unregistered voters over the last several years." *Id.* Becker promoted that "over 5 million of these new voters registered," or about 15%. *Id.* But comparing whether anyone contacted between 2012 and 2018 ultimately registered by 2018 conflates the effect of ERIC's outreach with the effect of other political forces, such as campaign mobilization or heightened engagement, which accumulate over time.

<sup>376</sup> See Lisa A. Bryant, Michael J. Hanmer, Alauna C. Safarpour & Jared McDonald, *The Power of the State: How Postcards from the State Increased Registration and Turnout in Pennsylvania*, 44 POL. BEHAVIOR 535, 542, 543 fig.2 (2022) (showing outreach increased registration by about one percentage point in advance of Pennsylvania's 2016 general election); Christopher B. Mann & Lisa A. Bryant, *If You Ask, They Will Come (To Register and Vote)*, 63 ELECTORAL STUD. 1, 7 fig.2, 8 fig.5 (2020) (showing outreach increased registration, across various treatments, by about 2.2 percentage points in Delaware's 2012 General Election, and by 2.1 percentage points in Oregon's 2014 General Election). In theory, the limited effect could reflect either poor address information, a poor outreach method, or a population that is not politically engaged. The limited available information suggests poor address information is the least likely—only about 10% of the mail sent to unregistered individuals as part of the Delaware field experiment was unable to be delivered. See *id.* at app. A.

<sup>377</sup> See Justin Grimmer & Jonathan Rodden, *Changing the Default: The Impact of Motor-Voter Reform in Colorado* 11-12 tbls.1 & 2 (Working Paper, 2022), <https://responsivegoverning.org/wp-content/uploads/2022/06/RoddenGrimmer-Analysis-Paper.pdf> [<https://perma.cc/C6PT-6GNT>].

<sup>378</sup> The limited effectiveness of outreach to "eligible-but-unregistered" voters coupled with the political realities of maintaining a bipartisan data-sharing coalition should inform the difficult governance questions now faced by ERIC. Ultimately, although voter registration of eligible but unregistered voters is laudable, member states should be comfortable trimming the extent of membership requirements for voter outreach to maintain (or expand) the number of members.



data available to diagnose the extent of problems and point to potential solutions. ERIC can provide the unique national vantage point missing from the debate. For example, it is unlikely that millions of voters *knowingly* opt out of updating their registration at motor-vehicle offices.<sup>379</sup> It is possible that motor-vehicle officials do not always fulfill their obligations,<sup>380</sup> or that voters misunderstand the benefits of motor-voter as it is presented to them.<sup>381</sup> To address these concerns, ERIC could serve as a diagnostic tool to gauge the extent of noncompliance with the NVRA.<sup>382</sup> Further, ERIC could also measure how different prompts about registration and change-of-address opportunities affect voter response. Identifying best practices in motor-voter implementation would likely substantially boost both the accuracy and completeness of voter registration lists—but this isn't possible without better data.

b. *Voter Fraud Misinformation*

ERIC's data also presents a substantial opportunity to improve trust in elections by countering misinformation. As Part II demonstrates, private interest groups have exploited voter registration lists to promote the extent of voter fraud. There is no credible evidence of substantial fraud. But, as Rick Pildes has emphasized, "it is not hard to imagine that these charges [of fraud] will arise

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<sup>379</sup> *But see* Letter from John Ashcroft, *supra* note 270 (claiming eligible-but-unregistered individuals "already had an opportunity to register to vote and made the conscious decision to not be registered").

<sup>380</sup> *See, e.g., Why Are Millions of Citizens Not Registered To Vote?*, PEW CHARITABLE TRS. (June 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote> [<https://perma.cc/K89Q-CECV>] (reporting, based on nationally representative survey, that only 16% of unregistered voters, and 18% of registered voters, recalled being asked to register by motor vehicle agency, social service agency, or other government office).

<sup>381</sup> For example, during a transition to automatic voter registration, Colorado motor-vehicle officials asked individuals whether they wanted to update their voter registration address even though the office would automatically update their voter registration regardless of the individual response. Justin Grimmer and Jonathan Rodden report that one-third of individuals who had their voter registration automatically updated would have declined to update their address of registration. *See* Grimmer & Rodden, *supra* note 377, at 7-8.

<sup>382</sup> In fact, Kentucky participates in ERIC because of a consent judgment with the Department of Justice to resolve NVRA violations. *See* *Jud. Watch, Inc. v. Adams*, 485 F. Supp. 3d 831, 837-38 (E.D. Ky. 2020) ("[Kentucky Secretary of State] agreed pursuant to . . . the Consent Judgment that they would use the Electronic Registration Information Center . . ."). Similarly, the Department of Justice required Connecticut to continue its participation in ERIC as part of the state's remedial plan to cure NVRA violations. *See* MEMORANDUM OF UNDERSTANDING BETWEEN UNITED STATES OF AMERICA AND STATE OF CONNECTICUT, DOJ, C.R. DIV. 9 (Aug. 5, 2016) (reviewing Connecticut's use of ERIC and agreeing Connecticut "shall, in consultation with counsel for the United States, prepare a plan for modified and enhanced ERIC outreach strategies to persons identified as likely eligible voters").

again.”<sup>383</sup> In response, rather than repeatedly recite that voter fraud is insignificant,<sup>384</sup> a better way forward would aim to continually demonstrate it.

In 2018, after it was clear Crosscheck had effectively folded, ERIC members voted to amend the membership agreement to produce an optional report identifying potential “improper votes.”<sup>385</sup> ERIC’s ability to integrate confidential, administrative data allows it to more reliably monitor instances of double voting and votes on behalf of deceased individuals. So far, based on press releases by member states, ERIC has found little evidence of fraud.<sup>386</sup>

But ERIC does not disclose the standards it uses to create the report of potential fraud. Without transparency, ERIC cannot serve as a vehicle to credibly counter misinformation. Further, it appears most states do not request a “voter participation” report,<sup>387</sup> perhaps because they are confident there is no fraud to find. In normal times, that approach is sensible enough. But in an “age of distrust,” we should take the perception of fraud more seriously.

### 3. Maximizing List Maintenance

Relative to its potential, ERIC’s current membership agreement makes only minimal demands on its member states, in terms of both how states use ERIC to conduct list maintenance and the data states share with ERIC for list maintenance.

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<sup>383</sup> Pildes, *supra* note 7, at 107.

<sup>384</sup> See Nicholas Berlinski et al., *The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections*, 10 J. EXPERIMENTAL POL. SCI. 34, 34 (2023) (“[U]nsubstantiated voter-fraud claims undermine confidence in elections . . . and . . . their effects cannot easily be mitigated by fact-checking.”).

<sup>385</sup> Compare ELEC. REGISTRATION INFO. CTR., INC., BYLAWS art. II, § 6 (2016), with ELEC. REGISTRATION INFO. CTR., INC., BYLAWS art. II, § 6 (2018).

<sup>386</sup> In 2018, Iowa referred only nine voters to law enforcement. See Media Release, Off. of the Iowa Sec’y of State, Secretary Pate Refers Nine Instances of Suspected Double Voting to County Prosecutors (Dec. 27, 2019), [https://sos.iowa.gov/news/2019\\_12\\_27.html](https://sos.iowa.gov/news/2019_12_27.html) [<https://perma.cc/YKQ7-8SNE>]. Ohio only referred ten. See Letter from Frank LaRose, Ohio Sec’y of State, to Dave Yost, Ohio Att’y Gen. (Dec. 11, 2019). In 2019, Wisconsin referred 43 voters. See *Elections Commission To Discuss Suspected Voter Fraud Reports for 2020 and 2021 Elections*, WIS. ELECTIONS COMM’N (May 24, 2021), <https://elections.wi.gov/news/elections-commission-discuss-suspected-voter-fraud-reports-2020-and-2021-elections> [<https://perma.cc/Y8K3-GR76>].

<sup>387</sup> In response to the criticism by some member states of the requirement to conduct voter outreach to eligible-but-unregistered voters, Pennsylvania and Georgia recently proposed that states which do not conduct the required voter outreach would be barred from requesting a “voter participation” report, rather than being removed from membership entirely. See discussion *supra* Part II.B.3. The proposal would not have required each state to request a “voter participation report,” and may have resulted in fewer states doing so. Regardless, the proposal failed.

a. *How States Use ERIC*

For example, under the membership agreement, states are only required to request one of ERIC's four list maintenance reports every 425 days.<sup>388</sup> The different reports—for in-state movers, cross-state movers, deceased registrants, and duplicate registrants—focus on different aspects of list maintenance and do not contribute equally toward more accurate and complete lists. Similarly, a state is only required to request the list of eligible-but-unregistered voters once every two years, and is only required to contact each person once-per-address in their lifetime.<sup>389</sup> States should be encouraged to do more effective and more frequent list maintenance so as to realize all of the benefits of the information ERIC has already collected.

b. *Expanding ERIC's Data*

Another advancement would expand ERIC's data collection efforts. ERIC's current efforts are focused on voter registration records and motor-vehicle records. While the vast majority of individuals eligible to vote also have a driver's license, those who do not are currently excluded from the opportunities presented through ERIC. Importantly, the NVRA already requires public assistance and other state agencies to facilitate voter registration, although the requirement is not as robust as with motor-voter and likely suffers from even more significant compliance problems.<sup>390</sup>

Incorporating public assistance data into ERIC would help address the stubborn inequalities in voter registration.<sup>391</sup> Individuals who do not have a driver's license are disproportionately.<sup>392</sup> Further, public assistance data promises to be a particularly valuable source for keeping voter registration lists both accurate and complete. For example, Medicaid regulations mandate that recipients recertify their address at least once a year, so the information is more

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<sup>388</sup> 2023 MEMBERSHIP AGREEMENT, *supra* note 180, § 4 (“If a Member fails to make at least one request for ERIC Data for 425 days, ERIC will automatically provide ERIC Data within seven (7) business days of the 425th day . . .”).

<sup>389</sup> *Id.*

<sup>390</sup> *See infra* Part I.B.1.

<sup>391</sup> ERIC seems to be going in the opposite direction. To be sure, incorporating public assistance data would likely raise significant data governance questions, because integrating multiple administrative data sources beyond the voter file requires spelling out a hierarchy of which administrative source is presumed to be correct when two are in conflict. ERIC's membership agreement previously encouraged states to make their “best efforts” to transmit such data, although the provision was not used. Now, that encouragement has been repealed.

<sup>392</sup> *See, e.g.,* Vanessa M. Perez, *Americans with Photo ID: A Breakdown of Demographic Characteristics*, PROJECT VOTE (Feb. 2015), <https://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf> [<https://perma.cc/U7SP-R3CZ>] (“Lower-income individuals are less likely to have photo ID. Twelve percent of adults living in a household with less than \$25,000 annual income lack photo ID, compared to just 2 percent in households with over \$150,000 annual income.”).

likely to be up-to-date.<sup>393</sup> In contrast, driver's licenses typically have lengthy renewal periods, so addresses are not updated frequently.<sup>394</sup>

#### CONCLUSION

By this point, the “voting wars” follow a familiar narrative.<sup>395</sup> The voting wars are typically framed by pitting the goals of access and integrity against one another.<sup>396</sup> The familiar narrative was developed in the context of voter identification laws—if a poll worker asks a voter for identification, the requirement (may) restrict access and (may) bolster integrity. But not all aspects of election administration neatly fit that framework. More accurate voter registration lists can improve both access and integrity. Yet the voting wars framework cabins list maintenance either as an effort to prevent fraud or as an effort to suppress voting. That binary has led scholars and policymakers alike to largely overlook the development of a cross-governmental election bureaucracy, as well as the exploitation of, and the opportunities to improve, election administration. Our collective lack of attention has left us unprepared for a “war on election administration.”<sup>397</sup> A more sophisticated understanding of democracy's bureaucracy can inform efforts to both fortify election administration and transform list maintenance into a tool for enfranchisement.

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<sup>393</sup> See 42 C.F.R. § 435.916(a)(1) (2023) (“Except as provided in paragraph (d) of this section, the eligibility of Medicaid beneficiaries whose financial eligibility is determined using MAGI-based income must be renewed once every 12 months, and no more frequently than once every 12 months.”); *Eligibility Verification Policies*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/eligibility-verification-policies/index.html> [<https://perma.cc/M85X-LF2U>] (last visited Sept. 27, 2023) (noting some form of residency verification as requirement for Medicaid eligibility verification in all fifty states and D.C.).

<sup>394</sup> See *Older Drivers: Driver License Renewal*, INS. INFO. INST., <https://www.iihs.org/topics/older-drivers#driver-license-renewal> [<https://perma.cc/S532-JAZH>] (last visited Oct. 8, 2023).

<sup>395</sup> See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

<sup>396</sup> See, e.g., SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 150* (2006) (discussing “conflicting values of voter integrity and voter access” that “increasingly frame today’s debates about democracy”).

<sup>397</sup> Spencer Mestel, *New Right-Wing Conspiracies Threaten To Further Starve Local Election Systems*, BOLTS (Mar. 31, 2022), <https://boltsmag.org/right-wing-conspiracies-threaten-to-starve-election-systems/> [<https://perma.cc/5LTT-SXLC>].