IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KATHERINE SULLIVAN, *et al.*,

Plaintiffs,

v.

MICHAEL G. SUMMERS, *et al.*,

Defendants.

No. 1:24-cv-00172-MJM

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Katherine Strauch Sullivan and David Morsberger respectfully submit this reply in support of their motion for summary judgment.

I. By Prohibiting Plaintiffs From Using Records Concerning Voter List Maintenance, Including Voter History, to Investigate the Accuracy and Integrity of the Voter Rolls, the Use Restriction Obstructs the NVRA's Purposes

By regulation, Maryland prohibits citizens from using any component of the voter registration list, including voter history data, for any "investigations," including those "into an illegal or suspected illegal infraction or violation involving the voter's behavior in a specific election." S*ee* COMAR 33.03.02.01B(1)(c), 33.03.02.04A (the "Use Restriction"). The undisputed facts establish that Plaintiffs have used, and wish to continue to use, the voter list to engage in investigatory canvassing to identify possible errors or inaccuracies in the voter rolls. By forbidding them from doing so, the Use Restriction thwarts Congress' stated objectives of "protect[ing] the integrity of the electoral process" "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(3)-(4). It accordingly is preempted.

A. Maryland's Voter History Records Concern Voter List Maintenance Programs and Activities

Section 8(i) of the National Voter Registration Act of 1993, 52 U.S.C. § 20501, *et seq.* ("NVRA"), allows citizens to access records concerning voter list maintenance programs and activities. Such records include voter history information collected by the Maryland State Board of Elections ("SBE") because that data is—and by law must be—used by "Maryland election officials . . . to monitor, track and determine voter eligibility." *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 439 (D. Md. 2019) ["*Lamone I*"]. Plaintiffs have identified many cases holding the same, while Defendants have identified zero cases holding otherwise.

Besides running directly contrary to every precedent on the books, the Defendants' argument that the NVRA's production requirement does not apply to voter history is debilitated by three independent consequential errors.

1. Section 8(i) Covers "All Records Concerning" Voter List Maintenance Programs or Activities, Like Voter Histories, Not Merely Records That "Document" List Maintenance

Defendants repeatedly misstate the scope of Section 8(i), which embraces all records that have a nexus to list maintenance programs and activities. Defendants declare instead that "the record must document a program or activity 'conducted for the purpose' of maintaining the voter roll" to fall within Section 8(i). ECF 33 at 13. This constricted formulation finds its refutation in the statutory text. Section 8(i) mandates disclosure of "***all records concerning*** the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1) (emphasis added).[1] Fixating on the phrase "for the purpose"—which they describe as an "intent" prerequisite (ECF 33 at 13)—the Defendants elide the "sweeping language" encapsulated in the first clause. *Pub. Interest Legal Found., Inc. v. Bellows*, 92 F.4th 36, 48 (1st Cir. 2024).

That same textual contortion has found little traction in the Fourth Circuit or elsewhere. Section 8(i) "very clearly requires that '*all* records' be disclosed," which "suggests an expansive meaning because 'all' is a term of great breadth." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (citations omitted); *see also Bellows*, 92 F.4th at 47 (explaining that "the term 'concerning' used 'in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." (citations omitted; emphasis in original)). And efforts that collect, input, and use voter histories to identify

[1] The rest of the provision enumerates two narrow exceptions, neither of which is relevant here.

and potentially cancel or correct invalid or deficient voter registrations are, by definition, "programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1); *see also Project Vote*, 682 F.3d at 335 (a function "carried out in the service of a specified end—maintenance of voter rolls" is a "program" and "activity" under Section 8(i)); *Pub. Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 941 (C.D. Ill. 2022) (records "regarding maintenance activities" are covered); *Pub. Interest Legal Found., Inc. v. Knapp*, C/A No. 3:24-cv-1276-JFA, slip op. at 10-11 (D.S.C. Sept. 18, 2024) (the activities of "inputting voter registration information into" the state database and "updating voters' already existing information . . . are conducted to ensure that [the state] is keeping an accurate and current account of its official lists of eligible voters"), *available at* https://tinyurl.com/yc6rs2yd.

Thus, Section 8(i) covers any document ("all records") that is relevant or has a nexus to ("concerning")[2] the maintenance of the voter registration list ("programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters").

In insisting that Section 8(i) applies only to records that narrowly "document" or are "produce[d]" or "born" by a list maintenance program, ECF 33 at 13, 15, the Defendants impermissibly "add[] limitations to Section 8(i) where Congress did not." *Bellows*, 92 F.4th at 48. By its plain terms, section 8(i) reaches all records "regarding maintenance activities, the processes involved in the maintenance activities, or the output of those maintenance activities." *Matthews*, 589 F. Supp. 3d at 941; *Lamone I*, 399 F. Supp. 3d at 439 (Section 8(i) covers records concerning "the process of creating, updating, and auditing registrations"); *Bellows*, 92 F.4th at 48 (a record

[2] Indulging their habit of "quibbling over semantics," *Lamone I*, 399 F. Supp. 3d at 442, Defendants fixate on the Plaintiffs' use of the term "nexus" and how it purportedly differs from similar adjectives invoked in other filings. ECF 33 at 12. These words are all synonyms of each other and, more importantly, of the operative term "concerning" in Section 8(i). *See* BLACK'S LAW DICTIONARY (12th ed. 2024) ("nexus" means "a connection or link").

that "relates to the carrying out of [a state's] voter list registration and maintenance activities . . . is thereby subject to disclosure"); *Voter Reference Found., LLC v. Torrez*, 2024 WL 1347204, at *136 (D.N.M. Mar. 29, 2024) (Section 8(i) is "not confined solely to those programs that the NVRA references").[3]

Voter history data falls squarely within this ambit because it is a "record concerning" Maryland's programs or activities to identify and (if appropriate) remove non-residents from the voter rolls. Defendants do not and cannot dispute that they must track the voting behavior of inactive voters; if such individuals do not vote in any election over the course of two federal election cycles, their registration must be canceled. *See* 52 U.S.C. § 20507(d); Md. Election Law § 3-503(c). To this end, the Help America Vote Act of 2002 ("HAVA") mandated that states must implement "[a] system of file maintenance" "in accordance with the provisions of the [NVRA]" to "remove ineligible voters" "who have not voted in 2 consecutive general elections for Federal office." 52 U.S.C. § 20507(a)(2)(A), (a)(4)(A). The federal Election Assistance Commission, which helps states implement HAVA, has unsurprisingly confirmed that "[w]hile a registrant's voting and registration history are not specifically mandated to be a part of the statewide voter registration list, the tracking of this information is required in order to meet NVRA and HAVA requirements regarding the removal of names from voter rolls." U.S. Election Assistance

[3] Denying the applicability of any relevancy rubric, the Defendants cite a carefully cropped quote from *Public Interest Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257 (4th Cir. 2021). But the full sentence imparts a very different point: "[T]he term 'all records' in the disclosure provision does not encompass any relevant record from any source whatsoever, ***but must be read in conjunction with the various statutes enacted by Congress to protect the privacy of individuals and confidential information held by certain governmental agencies***." *Id.* at 264 (emphasis added). As discussed in more detail *infra*, the court was merely pointing out that Section 8(i) must be applied against the backdrop of other statutory privacy protections; the court decidedly did not cabin the categories of records that Section 8(i) facially encompasses.

Comm'n, *Voluntary Guidance on Implementation of Statewide Voter Registration Lists* (July 2005), available at: https://tinyurl.com/yb6kckxk.

Against this, Defendants offer an obvious red herring. They insist that "the State need *not* keep any record of the voter's actual participation in the election—it need only record the voter's *appearance* to participate in the election." ECF 33 at 9. Perhaps, but Maryland does use actual participation to fulfill its NVRA obligations, removing any registrant who "fails to vote." Md. Election Law § 3-503(c). Whether the NVRA would permit Maryland to use some type of data other than voter history thus has nothing at all to do with this case.

It is precisely because voter history is a component of every state's list maintenance functions that courts have uniformly confirmed that Section 8(i) mandates its disclosure. *See Bellows*, 92 F.4th at 47 (state's voter file, which "captures voter record and voter participation history . . . reflects the additions and changes made by [state] election officials in the [central voter registration system] pursuant to federal and state law as part of [the state]'s voter list registration and maintenance activities"); *Pub. Interest Legal Found. v. Chapman*, 595 F. Supp. 3d 296, 307 (M.D. Pa. 2022) (plaintiff was entitled to "the name and voting history of any registrant identified as a potential noncitizen"); *Voter Reference*, 2024 WL 1347204, at *137; *Knapp*, slip op. at 10 (NVRA mandated access to South Carolina list, which was "[m]uch like" the list in *Bellows*, to include voter history information).

2. Section 8(i) is Not Limited Only to Records that the NVRA Requires States to Generate or Retain

Defendants also wrongly conflate the NVRA's minimum recordkeeping requirements with the scope of Section 8(i). According to Defendants, the NVRA "provides an express mandate as to what record a state must maintain in connection with its removal provision: the people to whom notice cards are sent." ECF 33 at 10. It follows, they say, that because the NVRA does not require

that Maryland collect the more granular voting history data amassed in MDVOTERS, then those records are not encompassed by Section 8(i). Preliminarily, this is a concession that Plaintiffs are entitled to at least partial summary judgment with respect to the data the NVRA does require Maryland to collect. More fundamentally, Defendants misstate the law. The relevant clause of Section 8(i)(2) actually says that "the records maintained pursuant to paragraph (1) ***shall include*** lists of the names and addresses of all persons to whom" notice are sent (emphasis added). And "[c]ourts have repeatedly indicated that 'shall include' is not equivalent to 'limited to.'" *Project Vote*, 682 F.3d at 337. In fact, this Court and others have already repudiated Defendants' contention that Section 8(i) is coterminous with the NVRA's baseline recordkeeping requirements. As the Court has explained to these Defendants in the recent past, "the NVRA 'sets a floor, not a ceiling,' as to the sorts of 'records' that must be disclosed under Section 8(i)." *Lamone I*, 399 F. Supp. 3d at 438 (quoting *Project Vote*, 682 F.3d at 336-37); *see also Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 560 (M.D. Pa. 2019) (noting that "the Disclosure Provision contemplates an *indefinite* number of programs *and* activities").

This point has particular salience with respect to the duration of Maryland's voter history data. According to the Defendants, "five years of voting history information is more than the NVRA needs. NVRA removal is predicated on, at maximum, the failure to vote over a two-year span." Therefore, they reason, any additional voter history information retained by the SBE is not covered by Section 8(i). *Id*. Multiple problems inhere in that argument. It is factually incorrect; voter removal is predicated on the failure to vote in any election from the time the voter receives a confirmation notice through the next two biennial federal elections—in other words, up to ***four***

calendar years. *See* 52 U.S.C. § 20507(d)(2)(A).[4] Second, the Defendants again fundamentally "misunderstand the statute. It does not provide that a state need not produce a record if it is over two years old. Rather, the statute provides that a state must retain the applicable records for at least two years. Accordingly, if a state chooses to retain a record beyond two years, the NVRA requires the state to produce that record." *Lamone I*, 399 F. Supp. 3d at 441; *see also Ill. Conservative Union v. Illinois*, 2021 WL 2206159, at *7 n.3 (N.D. Ill. Jun. 1, 2021) ("Defendants also argue that in requesting an eleven-year voter history, Plaintiffs go beyond what Section 8(i) requires. But the Court agrees with Plaintiffs that Defendants read Section 8(i) too narrowly, with two years being the minimum number of years for which states must make records available."). Finally, verifying a State's compliance with the NVRA's removal program may very well require examining voting history data ***beyond*** the two-election-cycle time window. For example, the presence of a voter who has not voted in any election on the inactive list for six continuous years would indicate non-compliance with the NVRA's list maintenance protocols.

In short, the NVRA inarguably compels Maryland to retain and use in list maintenance programs and activities *some* voting history information. Even if it does not necessarily require Maryland to collect a voter's method of voting (e.g., by mail or in-person), the State's choice to track voter history this way and incorporate such data into its voter registration list, *see* Md. Election Law § 3-101(b)(6), brought it under Section 8(i)'s auspices. *See Lamone I*, 399 F. Supp. 3d at 441; *Bellows*, 92 F.4th at 47.

[4] For example, assume a voter is moved to inactive status in December 2024. The State would have to track her voting history through two subsequent federal elections—in November 2026 and November 2028—and could cancel her registration only if she did not vote (or otherwise update her registration) in any election during that nearly four-year period.

3. The Hypothetical Applicability of Privacy Statutes to Other Types of Data in Other Cases is Irrelevant

The fact that *other* statutes might in some circumstances shield information *other than* voter history is irrelevant to voter history's status as "a record concerning" list maintenance programs or activities, within the meaning of Section 8(i). Embarking on a tangent, Defendants invoke a new Maryland law that protects the home addresses of certain judicial officers from public disclosure, which, they reason, would be preempted under Plaintiffs' interpretation of the NVRA. ECF 33 at 13. This argument is curious, both because Plaintiffs seek neither judges' addresses nor an order declaring that statute preempted, *see generally Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1980) (courts "do not sit to decide hypothetical issues or to give advisory opinions"), and because it smacks of *post hoc* reasoning—*i.e.*, the Court should reverse engineer a certain statutory construction now to avert a potentially undesirable policy outcome in a future case. *See Project Vote*, 682 F.3d at 340 (the desirability of public disclosure "belongs in the legislative arena" and a court's "sole function . . . is to enforce [the statute] according to its terms." (citation omitted)).

More to the point, the Defendants' argument is substantively wrong. Of course, voter addresses are covered by Section 8(i). They are a basic and indispensable attribute of a valid voter registration. This Court thus has already held that Section 8(i) mandates the disclosure of registered voter lists "that include[] . . . home address." *Lamone I*, 399 F. Supp. 3d at 446. And at least one court has already rejected the same argument Defendants advance here. *Project Vote/Voting for Am., Inc. v. Long*, 889 F. Supp. 2d 778, 781 (E.D. Va. 2012) (holding the NVRA required disclosure of registration addresses of law enforcement officials, judges, and others protected by state's address confidentiality program and full birth dates); *Judicial Watch, Inc. v.*

Lamone, 455 F. Supp. 3d 209, 224 (D. Md. 2020) ["*Lamone II*"] ("Birth dates are part of Maryland voter registration applications" and hence covered by Section 8(i)).

That is not to say that judges' addresses—which, again, are not at issue in this case—may never receive certain protections. As the Fourth Circuit has explained, "the proper balance between transparency and voter privacy . . . is a policy question properly decided by the legislature, not the courts." *Project Vote*, 682 F.3d at 339. Courts cannot haphazardly contract Section 8(i)'s scope to conduce certain preferred policy outcomes. But they should read Section 8(i) "in conjunction with the various statutes enacted by Congress to protect the privacy of individuals and confidential information held by certain governmental agencies." *N.C. State Bd. of Elections*, 996 F.3d at 264. Engaging in such an analysis, a court in an appropriate case may or may not conclude that Section 8(i) must yield to Maryland's statutory limitations on judicial address disclosures. But Defendants have not once argued that voter history is private information, nor could they since voting is a public act and, in any event, Maryland already makes such information available to the public. Nor do they contend that it is immunized by any privacy law, and wandering hypotheticals cannot obscure that voter history data inescapably is a "record[] concerning" voter list maintenance programs or activities, within the meaning of Section 8(i).

B. The Use Restriction Obstructs the Plaintiffs from Conducting Investigatory Canvassing to Identify Potential Errors or Anomalies in the Voter List

Section 8(i) aspires to "assist the identification of both error and fraud in the preparation and maintenance of the voter rolls." *Project Vote*, 682 F.3d at 339. It follows that Section 8(i)'s "expansive," *id.* at 336, right of access encompasses a subsidiary prerogative to use covered records to research possible errors or inaccuracies in the voter list, irrespective of their cause. *See Bellows*, 92 F.4th at 54 (holding that "the analysis and subsequent dissemination of Voter File data to the public is necessary to accomplish the objectives behind the NVRA," to include allowing

citizens "to identify, address, and fix irregularities in states' voter rolls"); *Voter Reference*, 2024 WL 1347204, at *144 (NVRA protects "the ability to engage with disclosed records in such a way that facilitates identification of voter registration-related irregularities").

Defendants tellingly do not deny that the Use Restriction does, in fact, prohibit Plaintiffs from using any component of the voter list in their investigatory canvassing. Rather, they argue merely that voter history is categorically irrelevant to verifying the accuracy or integrity of *other* data in the list. ECF 33 at 16. This is plainly wrong. First, voter history is itself a component of the voter list, *see* Md. Election § 3-101(b)(6), and so any canvassing that cross-checks the accuracy of that data is, by definition, aimed at verifying the accuracy and currency of the list. More broadly, self-reports of voter history data are directly relevant to probing other components of the list. As discussed above, voting history during particular intervals can determine whether a voter designated as inactive must be reinstated to active status or removed from the rolls altogether. Canvassing may confirm that voters listed as active have in fact voted, indicating their status as registrants is accurate and current. Or it may uncover the opposite—that persons the state has recorded as having voted have in fact been absent from the polls for some time—indicating that the list is inaccurate or out-of-date. Either way, voting history is directly relevant to evaluating the accuracy and currency of the list.

Finally, it bears emphasis that the Plaintiffs' rights under Section 8(i) do not wax and wane according to the ostensible efficacy of their efforts. In this vein, Defendants appear to fault the Plaintiffs for not utilizing administrative complaint procedures under HAVA or Maryland law. But HAVA merely provides individuals with a process to allege violations of subchapter III of HAVA, *see id.* § 21112(a)(2)(B)—not violations of the NVRA or other laws governing list maintenance. And more fundamentally, Defendants' struggle to engraft exhaustion of remedies

or litigation prerequisites onto citizens' Section 8(i) rights is completely detached from the statutory text or case law. The NVRA assures "transparency" to equip citizens to "assist the identification of both error and fraud" in the voter rolls. *See Project Vote*, 682 F.3d at 339. The stipulated facts confirm that the Plaintiffs have done just that; they have used voter lists, in conjunction with canvassing data, to prepare and present reports documenting their findings of potential errors or anomalies. *See* ECF 31 at ¶¶ 27-28, 30, 32, 37. They need not show that any particular item of data in the voter lists is indispensable to that purpose, *see Lamone II*, 455 F. Supp. 3d at 225. And the NVRA empowers citizens to act as a watchdog of government agencies, not the other way around. Plaintiffs' Section 8(i) rights certainly are not conditioned on the SBE's satisfaction with their efforts or agreement with their findings.

II. The Use Restriction is Viewpoint Discriminatory

By conditioning use of the voter list on a speaker's subjective perspective and motivation, the Use Restriction codifies a viewpoint-based regulatory distinction, in violation of the First and Fourteenth Amendments. Defying hornbook law, Defendants announce that "[a]n investigative canvass is an exercise in information gathering," and hence not protected speech. ECF 33 at 17. But, of course, "scores of Supreme Court and circuit cases apply the First Amendment to safeguard the right to gather information as a predicate to speech." *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed., Inc.*, 60 F.4th 815, 829 (4th Cir. 2023); *Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 160 (2002) ("For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering."). And while the state can to some extent regulate uses of government data, any provision that "represents, or poses a substantial risk of, viewpoint discrimination" is subject to strict scrutiny. *Fusaro v. Cogan*, 930 F.3d 241, 263 (4th Cir. 2019).

The Use Restriction converts what might otherwise be a content-based restriction confined to the "subject" of a voter's behavior into a viewpoint-based distinction denoted by the speaker's belief in the existence or non-existence of a "suspected illegal infraction or violation." The Use Restriction "thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination." *Matal v. Tam*, 582 U.S. 218, 249 (2017).

Because it is viewpoint discriminatory, the Use Restriction is subject to strict scrutiny, which, "in practice, is virtually impossible to satisfy," *Wash. Post. v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019). Defendants' cross-motion for summary judgment provides no factual evidence corroborated by record citations relating to either the State's putative "compelling interests" underlying the Use Restriction or the "tailoring" employed to achieve them. The Use Restriction accordingly violates the First and Fourteenth Amendments.

CONCLUSION

For the reasons stated herein and in the motion, the Court should enter summary judgment in Plaintiffs' favor with respect to Count I and/or Count II of the Complaint.

Respectfully submitted this 23rd day of September, 2024.

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CERTIFICATE OF SERVICE

I certify that, on this 23rd day of September, 2024 the foregoing was served by CM/ECF on the following:

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