

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

THE COMMITTEE FOR
MASSACHUSETTS VOTER
IDENTIFICATION BALLOT QUESTION,

Plaintiff,

v.

HON. WILLIAM FRANCIS GALVIN, in his
official capacity as Secretary of the
Commonwealth of Massachusetts,

Defendant.

Civil Action No.: 1:24-cv-12029-NMG

REPLY¹ IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Summary judgment in favor of Plaintiff, The Committee for Massachusetts Voter Identification Ballot Question ("Committee"), is proper. This is because the rationale that Defendant, the Hon. William Francis Galvin, in his official capacity as Secretary of the Commonwealth of Massachusetts ("Commonwealth"), employs to try to relieve him of his obligations under 52 U.S.C. § 20507(i)(1), the Public Disclosure Provision of the National Voter Registration Act of 1993 ("NVRA"), is inconsistent with the plain language of the statute, unsupported by any precedent or other authority, and conflicts with the purpose and intent of the statute.

I. Defendant Is Solely Responsible For Providing The Requested Materials

Defendant's central argument is that the NVRA does not "explicitly" assign him, as the Commonwealth's Chief Election Official, the duty of complying with the Public Disclosure Provision so as to provide the statewide voter records ("Voter Records") that Plaintiff requested pursuant to the

¹ Authorized per this Court's orders dated Oct. 30, 2024 (ECF No. 17) and Dec. 27, 2024 (ECF No. 21) (extending filing deadline to Jan. 22, 2025).

NVRA. Defendant’s Cross-Motion and Opposition (“Opp’n”), ECF No. 23, at 12. Defendant argues that he may delegate his duty of complying with the Public Disclosure Provision to the individual local election officials in each of the 351 cities and towns that comprise the Commonwealth, thereby dividing the Commonwealth’s required uniform compliance among its political subdivisions. That argument is meritless, as described below.

A. The Plain Language Of The Statute Dictates Defendant’s Obligations

As an initial matter, the NVRA requires that “[e]ach State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act.” 52 U.S.C. § 20509. Defendant acknowledges that he is the “chief State election official” under the NVRA. Opp’n 3.

The Public Disclosure Provision of the NVRA states:

Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

52 U.S.C. § 20507(i)(1) (emphasis added). When interpreting this statute, “the plain meaning of [the] statute’s text must be given effect.” *New Hampshire Lottery Comm’n v. Rosen*, 986 F.3d 38, 55 (1st Cir. 2021) (internal alterations and quotation marks omitted). It is clear that the statute identifies one actor, the “State” (with a capital “S”) that is obligated to carry out two actions: (1) to “maintain” the Voter Records, and (2) to “make available” those Voter Records.

The NVRA defines “State” as “a State of the United States and the District of Columbia.” 52 U.S.C. § 20502(4). Furthermore, the word “State,” when capitalized, refers to a state as a whole, not a political subdivision. *Morse v. Republican Party*, 517 U.S. 186, 254 (1996) (Thomas, J., dissenting) (“The ordinary meaning of the word ‘State’ ... particularly when capitalized—is generally understood to

mean one of the 50 constituent States of the Union.”). *See also* Plaintiff’s Memorandum in support of its Motion for Summary Judgment (“Motion”), ECF No. 19, at 12 n.3. Therefore, the “State” as the actor in the Public Disclosure Provision refers to the Commonwealth as a whole.

The word “shall” in a statute imposes a mandatory obligation “impervious to judicial discretion.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). The Public Disclosure Provision mandates that the “State shall maintain ... and shall make available” the Voter Records. 52 U.S.C. § 20507(i)(1). In other words, by its plain language the statute mandates that one actor, a single entity—the State—perform the two actions of maintaining and making available the Voter Records.

Defendant concedes that he is responsible for performing the first action—maintaining Voter Records pursuant to the NVRA—via the Commonwealth’s VRIS database. Opp’n 4. Furthermore, “maintain” is an active verb that incorporates the view of being responsible for providing a service;² i.e., providing an active oversight of that service that is non-delegable. *See, e.g., United States v. Missouri*, 535 F.3d 844, 849-50 (8th Cir. 2008) (discussing the NVRA’s use of “different verbs” when assessing whether an action is delegable). Therefore, pursuant to Defendant’s own admission and the plain language of the Public Disclosure Provision, Defendant is carrying out the first mandatory and non-delegable action—to “maintain” the Voter Records.

The mandatory second action, to “make available” the Voter Records, is by the plain language of the statute the obligation of the same single actor, the State. Therefore, given that Defendant performs the first mandatory action, it follows from the statute that Defendant must perform the second mandatory action as well.

Defendant argues that he performs the second mandatory action by coordinating the efforts of the local election officials in each of the 351 cities and towns that comprise the Commonwealth to make the

² *See* <https://www.merriam-webster.com/dictionary/maintain> (last visited Jan. 20, 2025).

Voter Records available to the public through individual requests to those cities and towns. Opp’n 14. That argument misses the point. The Public Disclosure Provision does not mandate coordination.³ It mandates that a single actor—the State—make those records available. Indeed, under Defendant’s interpretation, multiple actors (the local election officials in each of the 351 cities and towns)—not the single actor State—would make the Voter Records available. Defendant’s argument is inconsistent with the plain language of the Public Disclosure Provision.

Defendant further argues that he would still meet his obligation to make the Voter Records available “even if” a local election official did not comply with an individual request.⁴ Opp’n 15. The incongruity of that argument is underscored by Defendant’s claim that such non-compliance could be remedied through “administrative and judicial recourse” under Massachusetts law. *Id.* at 15 n.3. That is outside of, and in conflict with, the NVRA.

Defendant cites with approval a guide (hereinafter, “Guide”) that the Federal Election Commission published on January 1, 1994, titled *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples*. Opp’n 13-14, 14 n.2. The Guide serves as a general reference tool; it does not have the force of law. *Public Interest Legal Found., Inc. v. Bellows*, 92 F.4th 36, 47 (1st Cir. 2024).

Defendant claims that the Guide “explains that local ‘voter registration officials’ are required to maintain the records and to make them available for public inspection under § 20507(i)” Opp’n 14 (emphasis added). It is unclear where the Guide endorses this view. For example, Chapter 7 of the Guide, titled “Record Keeping and Reporting Requirements” includes the following passage:

³ Although 52 U.S.C. § 20509 requires “the chief State election official to be responsible for coordination of State responsibilities under the [NVRA],” this “coordination” does not permit *carte blanche* delegation. *See, e.g., United States v. Missouri*, 535 F.3d 844, 849-50 (8th Cir. 2008).

⁴ This is not a hypothetical scenario; Plaintiff has encountered instances of non-compliance. *See E. Risser Decl.*, ECF No. 19-4, at 2 ¶ 8.

RECORD KEEPING REQUIREMENTS SPECIFIED IN THE LAW

The Act requires voter registration officials to maintain for at least 2 years and to make available for public inspection (and, where available, for photocopying at a reasonable cost), “all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered” [Section 8(i)(1)]. And according to Section 8(i)(2), these records are to include:

- lists of the names and addresses of all persons to whom confirmation mailings were sent (see Chapter 5 above), and
- information concerning whether or not each such person responded to the mailing as of the date that the records are inspected.

Guide 7-1 (emphasis added).⁵

The word “local” does not appear in that passage. Nothing in that passage places any requirement on “local” voter registration officials. Indeed, references to a “local voter registration official” are only in Chapter 1 of the Guide,⁶ which describes the limited role of that official in the acceptance of voter registration applications and in challenges to voter eligibility:

THE ROLE OF THE LOCAL REGISTRATION OFFICIAL

A principal objective of the National Voter Registration Act is to expand the number and range of locations where citizens may obtain and complete a voter registration application. The House Report makes it quite clear, however, that although completing a voter registration application may be *simultaneous* with other transactions, such an application does not constitute *automatic* registration. Indeed, “[o]nly the election officials designated and authorized under State law are charged with the responsibility to enroll eligible voters on the list of voters. This bill should not be interpreted in any way to supplant that authority. The Committee is particularly interested in ensuring that election officials continue to make determinations as to applicant’s eligibility, such as citizenship, as are made under current law and practice” [Hse Rpt Section 5, page 8].

In other words, an application received by the local voter registration official is *only* an application and may be subject to whatever verification procedures are currently applied to all applications. By the same token, any subsequent challenge to the eligibility of a registrant would appear to fall within the domain of the local registration official in accordance with current State laws and practices.

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Guide 1-6.

⁵ Sections 8(i)(1) and 8(i)(2) cited in the passage are codified at 52 U.S.C. §§ 20507(i)(1), (2), respectively.

⁶ Other references to a “local registration official” appear in the Guide, but none relate to the mandatory action of making the Voter Records available.

One portion of the Guide that Defendant does not cite is instructive. The Guide notes the complexity of voter registration list maintenance. Guide 5-16. “Voter registration list maintenance” encompasses disclosure of the Voter Records. *Bellows*, 92 F.4th at 48. Chapter 5 of the Guide, titled *Voter Registration List Maintenance Provisions*, recommends that a single person be responsible for performing that “complex task.”

Putting Someone in Charge

Experience suggests that tasks are better accomplished when carried out under the authority and control of a single person. This is especially true for the complex task of voter registration list maintenance and record keeping.

Election offices might want to consider designating one individual to be in charge of and responsible for all list maintenance activities. Such a designation might facilitate meeting the reporting requirements discussed in Chapter 7.

Guide 5-16.

That single person is the Defendant.

B. There is Neither Precedent Nor Authority Authorizing Defendant to Delegate His Obligations

Defendant cites no precedent or other authority that supports his argument that he may delegate the obligations that the Public Disclosure Provision imposes on him. Defendant does refer to multiple Massachusetts statutes that describe the duties of local election officials. Opp’n 5-6. But Defendant cites no statute that delegates his mandatory compliance with the Public Disclosure Provision to those local election officials. *Cf. Bellitto v. Snipes*, 935 F.3d 1192, 1195 (11th Cir. 2019) (noting that although the NVRA imposes responsibility on the Florida Secretary of State, Florida law specifically delegates voter registration list maintenance to local (county-level) election officials).

Courts that have concluded that the Public Disclosure Provision requires the release of Voter Records have not specifically addressed the issue of delegating the obligations of that Provision.^{7, 8}

⁷ See, e.g., *Public Interest Legal Found., Inc. v. Bellows*, 92 F.4th 36, 47 (1st Cir. 2024); *Public Interest Legal Found., Inc. v. Bellows*, 588 F. Supp. 3d 124, 133 (D. Me. 2022); *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012); *Public Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 941 (C.D. Ill. 2022); *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 438-42 (D. Md.

However, at least one court has concluded that the responsibility of complying with the Public Disclosure Provision rests solely on the Secretary of State. *Voter Reference Found., LLC v. Torrez*, 727 F. Supp. 3d 1014, 1218 (D.N.M. 2024) (“[T]he Secretary of State’s Office statutorily was bound to produce that voter data in response to [Plaintiff’s] request The Secretary of State’s Office’s refusal to produce the records is a violation of the NVRA.”) (emphasis added).

Defendant’s argument that he may delegate his obligation to make available the Voter Records pursuant to the Public Disclosure Provision has no basis in law.

II. Defendant’s Refusal Is An Affront To The Statute And Inconsistent With His Existing Practice

In furtherance of the purposes of the NVRA, 52 U.S.C. § 20501(b)(1)-(4), Congress included the Public Disclosure Provision and a private right of action in the NVRA to enforce that Provision. *Bellows*, 92 F.4th at 52.

Defendant’s refusal to provide the Voter Records pursuant to the Public Disclosure Provision is contrary to the purposes of the NVRA. It runs afoul of the sweeping language of the statute. It prevents the transparency that the NVRA seeks to bring to voter list registration and maintenance activities.

There is no question that Defendant is able to provide the Voter Records because he does provide them to “certain entities.” Opp’n 4. Those entities are:

state party committees, statewide candidate committees, state ballot question committees, the jury commissioner, adjutant general and any other individual, agency or entity that the state secretary shall designate by regulation consistent with the purposes of this section

Id. at 4-5; G.L. ch. 51 § 47C. Additionally, Defendant must produce those Voter Records in a “computer readable” format “at a fair and reasonable cost” that does not exceed the actual cost of

2019); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014); *Voter Reference Found., LLC v. Torrez*, 727 F. Supp. 3d 1014, 1217-18 (D.N.M. 2024); *Public Interest Legal Found., Inc. v. Knapp*, No. 3:24-cv-1276-JFA, 2024 U.S. Dist. LEXIS 209495, at *13 (D.S.C. Sept. 18, 2024).

⁸ *Missouri*, 535 F.3d at 849-50, does not specifically address the Public Disclosure Provision.

preparation. *Id.* Defendant’s refusal to provide the same information to Plaintiff is perplexing. It is an inconsistency that is particularly glaring in view of the purposes of the NVRA and the absence of any authority relieving Defendant of his obligation under the Public Disclosure Provision to produce the Voter Records to Plaintiff.

Furthermore, it is concerning that in this summary judgment motion practice Defendant has unilaterally inserted limiting language into G.L. ch. 51 § 47C, changing “state ballot question committees” to “state ballot question committees for or against a question to appear at the next statewide election” as an entity that can obtain Voter Records.⁹ Opp’n 7 (emphasis added). Defendant now, and for the first time, states that this emphasized language prevents Plaintiff from obtaining the Voter Records under G.L. ch. 51 § 47C. *Id.* Defendant never raised this issue when Plaintiff was making its multiple requests for Defendant’s licensing agreement. *See* Plaintiff’s Complaint (“Compl.”), ECF No. 1, ¶¶ 10-11.

Plaintiff’s status as a duly-organized Massachusetts state ballot question committee that has been in continuous operation since October 2023 qualifies it to receive the Voter Records under G.L. ch. 51 § 47C. Defendant’s unilateral insertion of the emphasized language into the Commonwealth’s statute without authority is another improper attempt to prevent Plaintiff from having access to the Voter Records.

To meet his obligation under state law, Defendant produces Voter Records in a user-friendly computer readable electronic format. G.L. ch. 51 § 47C. He should do the same to meet his obligation under the NVRA. Anything less than this is a “purposeless obstruction” that at least one court has derided. *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 441 (D. Md. 2019).

⁹ Compare Opp’n 7, with Opp’n 4 (quoting G.L. ch. 51 § 47C in its proper form).

III. The ERIC Member Data Files

Defendant does not contest Plaintiff's arguments that (1) the Public Disclosure Provision encompasses the Member Data Files, and (2) the Member Data Files are not available from local election authorities. Defendant simply states that he has no Member Data Files and creation of the requested Member Data Files will not occur until Defendant agrees with ERIC on a "Certification Date." Opp'n 16; Def's Statement of Undisputed Facts, ECF No. 24, at 6-11 ¶ 15. Defendant further states that such agreement will be deferred until a new statewide voter registration database becomes available in the summer of 2025. *Id.*

In view of Defendant's claim that agreement on a Certification Date might be reached in a few months from now, the issue of whether Defendant must produce the Member Data Files as part of the Voter Records is ripe. Therefore, Plaintiff respectfully urges the Court to settle this issue now, and reiterates its request that the Court (1) conclude that the Public Disclosure Provision mandates production of the Member Data files, and (2) order Defendant to produce the Member Data files when they become available.

IV. Preemption

Plaintiff's Complaint alleges facts to support a preemption claim. Plaintiff alleges that Defendant conditioned producing the Voter Records on the execution of a "licensing agreement" that Defendant failed to provide to Plaintiff. Compl. ¶¶ 10-11. Furthermore, Plaintiff put Defendant on notice regarding preemption by stating, "requiring a license as a condition for providing the [Voter Records] would appear to be an impermissible restriction that the federal statute preempts." Compl., Ex. D, ECF No. 1-4, at 2.

These factual assertions satisfy Fed. R. Civ. P. 8(a)(2) regarding the preemption issue. Plaintiff does not make a blanket assertion of its entitlement to relief. Rather, it has provided the required fair

notice of its claim and the grounds for its claim. *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir. 2012) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007)). Plaintiff has, therefore, adequately stated a preemption claim.¹⁰

V. Defendant's Statement Of Undisputed Facts

Defendant's Statement of Undisputed Facts ("DSOF"), ECF No. 24, at 6-11, is nothing more than a verbatim restatement of the Affidavit of Michelle K. Tassinari ("Tassinari Aff."), ECF No. 23-1. That affidavit is replete with inadmissible hearsay. *See, e.g.*, Tassinari Aff. ¶¶ 3, 4, 12, 13, and 16. Plaintiff objects to the corresponding paragraphs 2, 3, 11, 12, and 15 in the DSOF on at least this basis. Plaintiff objects to paragraphs 4, 5, 7, 8, and 9 in the DSOF to the extent that they mischaracterize the cited statutes. Plaintiff objects to paragraph 13 in the DSOF because it is based on Defendant's unauthorized insertion of limiting language into G.L. ch. 51 § 47C.

VI. CONCLUSION

For the reasons set forth above and in its Motion, Plaintiff respectfully requests that the Court enter summary judgment in its favor.

Respectfully submitted,

Dated: January 22, 2025

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 Identification Ballot Question.*

¹⁰ Defendant now asserts that he can exclude Plaintiff from receiving the Voter Records pursuant to language that Defendant unilaterally and improperly inserted into G.L. ch. 51 § 47C. *See supra* § II. Defendant asserts this for the first time in his Opposition. Opp'n 7. This recent assertion further supports Plaintiff's preemption claim.

CERTIFICATE OF SERVICE PURSUANT TO LOCAL RULE 5.2

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on January 25, 2025.

/s/Brian M. Gaff

Brian M. Gaff (BBO No. 642297)

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