United States District Court
District of Maine

PUBLIC INTEREST LEGAL FOUNDATION, INC. *Plaintiff*, *v.* **SHENNA BELLOWS,** in her official capacity as the Secretary of State for the State of Maine *Defendant*.	Case No. 1:20-cv-00061-GZS

Plaintiff Public Interest Legal Foundation's
Response in Opposition to Defendant's Motion to Dismiss the Amended Complaint

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Introduction

The Secretary's Motion to Dismiss (Doc. 58) relies on an incorrect interpretation of the National Voter Registration Act ("NVRA") that strays far from the plain-meaning analysis this Court must conduct. The NVRA unambiguously requires public inspection of all records "concerning" voter list maintenance activities. 52 U.S.C. § 20507(i)(1). Maine's eligible voter list ("Voter File") is subject to public inspection because it is the culmination and end product of Maine's voter list maintenance activities. Congress did not limit the NVRA's sweeping inspection provision to a subset of activities, as the Secretary claims. Instead, Congress drafted the NVRA broadly, and that choice has enormous significance and must be given effect.

Congress also intended voter list maintenance to be transparent. Allowing the public to monitor the activities of the officials who maintain the rolls safeguards the right to vote. Congress did not shield certain officials from public scrutiny. Yet Maine law does precisely that by prohibiting the public from using Maine's Voter File to study and remedy list maintenance errors, including in all other states where duplicate registrations may exist with Maine's registrations. The Supreme Court has acknowledged that "about 2.75 million people are said to be registered to vote in more than one State." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). Anyone who engages in good government work using Maine's Voter File risks crushing fines. Congress did not make list maintenance records public so that states may then prosecute and fine citizens who use this federal right. Maine law is plainly an obstacle to the accomplishment of the NVRA's purposes and is therefore preempted and invalid under the United States Constitution. *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013).

The Secretary cannot overcome the NVRA's text or its preemptive effect. The Foundation has stated a plausible claim for relief and the Secretary's Motion should be denied.

Factual and Procedural Background

Section 8(i)(1) of the NVRA acts like a federal freedom of information law, requiring election administration officials to "make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities[1] conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" 52 U.S.C. § 20507(i)(1) (hereafter, the "Public Disclosure Provision").

More than two years ago, the Foundation requested from the Secretary a copy of Maine's Voter File pursuant to the NVRA's Public Disclosure Provision. (Doc. 55 ¶ 23.) The Secretary denied the Foundation's request, citing Maine law that limits disclosure of the Voter File to certain preferred persons and entities. (Doc. 55 ¶¶ 26, 34-35, 39.) On February 19, 2020, the Foundation filed this action to compel the Secretary to permit access to the Voter File as required by federal law. (Doc. 1.) The parties engaged in discovery and settlement discussions but were unable to reach an agreement. As a result of the Secretary's actions, the 2020 General Election was conducted without the transparency Congress intended. In early 2021, the parties filed cross-motions for summary judgment, (Docs. 35, 39), which were fully briefed as of May 28, 2021.

Less than one month later, the Secretary notified the Court that Maine had amended the challenged law. (Doc. 47.) The Secretary also contended that once the law becomes effective, the Foundation's claims would become moot. (Doc. 47 at 2.) The Court reserved ruling on the pending cross-motions for summary judgment and granted the Foundation the opportunity to move to amend the complaint by November 1, 2021. (Doc. 50 at 2.)

On November 1, 2020, the Foundation moved to amend the complaint (Doc. 51), a request that was granted on November 29, 2021 (Doc. 53 (docket entry only).) Later that day, the

[1] These are referred to as "voter list maintenance" programs or activities.

Foundation filed the Amended Complaint, which alleges that Maine law, as amended, continues to violate the NVRA. The Amended Complaint seeks declaratory and injunctive relief. The Court then denied as moot the motions for summary judgment. (Doc. 54 (docket entry only).) On December 20, 2021, the Secretary moved to dismiss the Amended Complaint. (Doc. 58.)

Standard of Review

"[T]he Court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in plaintiff's favor." *Me. Educ. Ass'n Benefits Tr. v. Cioppa*, 842 F. Supp. 2d 373, 376 (D. Me. 2012). A complaint survives if it "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007).

Argument

I. Count I is Not Moot.

"[A] case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citations and quotations omitted) (emphasis added). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*. (quotations and citations omitted). Under this framework, Count I is not moot.

Maine law functionally denies the Foundation access to the Voter File by placing conditions on the Foundation's federal inspection rights—namely, an agreement to abide by Maine's impermissible use restrictions. To receive the Voter File, the Foundation must first "make[] a request to the Secretary of State," 21-A M.R.S. § 196-A(1)(J), on a form provided by the Secretary, *see* https://www.maine.gov/sos/cec/elec/data/index.html (attached as Exhibit A). The form requires a written agreement to abide by "the restrictions on use and redistribution of data" found in Maine law as well as consent to the imposition of fines that can reach $5000 per

offense. Exhibit A at 3. Submission of the form is a mandatory prerequisite to receiving the Voter File. *Id*. ("*The following information must be provided, and the form must be signed*.").

The effect of Maine's restriction is to hide Maine's mistakes or shortcomings in list maintenance. To receive the Voter File, the Foundation must sacrifice an integral part of its mission—studying and enforcing voter list maintenance programs across other states, activities Maine law prohibits and punishes. 21-A M.R.S. §§ 196-A(1)(J)(1), 196-A(5). In other words, to exercise its federal rights, the Foundation must agree to injure itself. Choosing between losing a federal right and injury is no choice at all. It is the functional equivalent of a denial.

The Foundation seeks a declaration that the Secretary's actions violate the NVRA. (Prayer for Relief ¶¶ 1-2, 5.) Such a declaration would resolve a real and immediate controversy because it could have the effect of invalidating the written agreement Maine law currently requires as a condition of access to the Voter File.

To be clear, it is the pre-receipt agreement—not the use restrictions themselves—that creates the controversy for purposes of Count I. The NVRA grants the public an unconditional right to physically inspect the Secretary's list maintenance records—"all" of them. 52 U.S.C. § 20507(i)(1). Congress did not attach conditions to exercising federal NVRA rights. No advance promises must be made. No fines must be risked. No pre-conditions are permitted. The pre-receipt agreement violates federal rights. There is thus a concrete and immediate conflict between the NVRA and Maine law that this Court can effectively remedy.

The Secretary's erroneous insistence that the Voter File is *not* subject to the NVRA is the foundation of this conflict: "The Court should rule that § 8(i) does not extend to this data[.]" (Doc. 58 at 10.) Whatever access the Secretary is now granting the public is not pursuant to federal law. (*Id*. at 8 ("PILF is now entitled *under state law* to obtain the precise data it claims to

seek.").) In other words, the very issue that spawned this action—whether the Voter File is within the NVRA's scope—remains unresolved. (Doc. 58 at 10.) The Foundation has a live, concrete, and enduring interest in the outcome of this dispute because it will determine the parties' rights and obligations now and in the future. *UniÓn De Empleados De Muelles De P.R., Inc. v. Int'l Longshoremen's Ass'n, AFL-CIO*, 884 F.3d 48, 58 (1st Cir. 2018) (a declaratory judgment "can be used by a party to later obtain further relief") (citations omitted).

II. The Foundation's Amended Complaint States a Claim for a Violation of the NVRA.

A. The Voter File Is Subject to Disclosure Under the NVRA's Plain Language.

Despite legislative changes, the original threshold question presented in this case remains before the Court: Is the Voter File within the NVRA's scope? While that may be a question of first impression for this Court, the overwhelming weight of authority supports the Foundation. Indeed, the Foundation alleged that numerous courts to address this question has answered that question "yes." (Doc. 55 ¶ 70 ((citing *Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 438-442, 446 (D. Md. 2019); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014) ("[T]he Voter Roll is a 'record' and is the 'official list[] of eligible voters' under the NVRA Public Disclosure Provision."); *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *13 (S.D. Fla. Mar. 30, 2018) ("[E]lection officials must provide full public access to all records related to their list maintenance activities, including their voter rolls."); *see also Ill. Conservative Union v. Illinois*, No. 20 C 5542, 2021 U.S. Dist. LEXIS 102543, at *15 (N.D. Ill. June 1, 2021) (holding, at the pleading stage, that statewide voter roll "falls within Section 8(i)'s disclosure provision")).) There is no reason to answer differently here.

The parties agree that when interpreting the Public Disclosure Provision, the Court should begin with the statutory text. (Doc. 58 at 10.) "To resolve whether plaintiff has stated a

claim upon which relief may be granted, the court must decide whether the Requested Records…are 'records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.'" *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 705 (E.D. Va. 2010). "Accordingly, the court must first determine what constitutes a program or activity conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. The court then applies that standard to determine whether [the Requested Records] … concern the implementation of such a program or activity. To do so, the court examines the plain meaning of the Public Disclosure Provision." *Id*. The Supreme Court instructs that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id*. at 254 (citations and quotations omitted).

The text of the Public Disclosure Provision is unambiguous: All records concerning activities conducted to make voter registration information current and accurate are subject to public disclosure, period. The Foundation has stated a claim upon which relief may be granted.

1. The Voter File "Concern[s]" the "Implementation of Programs and Activities Conducted for the Purpose of Ensuring the Accuracy and Currency of Official Lists of Eligible Voters[.]"

Maine has programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.[2] Maine's Central Voter Registration ("CVR") database is used to carry out these programs and activities. (*See* Doc. 58 at 3-4.)

One of Maine's voter list maintenance activities is creating new voter registration records for people who are not registered to vote. *See* 21-A M.R.S. § 152(2). Entering a new registration

[2] The Secretary does not contest that the Voter File is a "record" under the NVRA.

record is an activity "conducted for the purpose of ensuring the accuracy and currency" of the voter roll. Another of Maine's voter list maintenance activities is making changes and updates to voter record information stored in the CVR. *See* 21-A M.R.S. § 129(1)-(2). Changing this information is an activity "conducted for the purpose of ensuring the accuracy and currency" of the voter roll. Maine law further requires cancellation of a voter registration record when the registrant moves to another jurisdiction in or outside Maine, 21-A M.R.S. § 161(2-A)(A)-(B), and official will also cancel a registration record when the registrant dies, 21-A M.R.S. § 128(1), or is in inactive status and fails to vote for two consecutive general elections, 21-A M.R.S. § 162-A(2); and when a registrant requests cancellation. The registrar must "keep a record" of all additions and cancellations. 21-A M.R.S. § 161(5). Again, cancelling registrations is an activity "conducted for the purpose of ensuring the accuracy and currency" of the voter roll. In addition, Maine law requires that "[b]efore printing the final incoming voting list prior to any election … [t]he registrar shall review the records of marriage, death, change of name and change of address … and shall revise the central voter registration system accordingly." 21-A M.R.S. § 128(1).

Interpreting the NVRA's terms, the Eastern District of Virginia concluded that "a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state." *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d at 706; *see also True the Vote*, 43 F. Supp. 3d at 719-20 ("A list of voters is 'accurate' if it is 'free from error or defect' and it is 'current' if it is 'most recent.'") (citations omitted). Each of Maine's activities described above is a "program" or "activity" within the purview of the NVRA because it is conducted to make sure Maine's registration records and eligible voter list are "errorless" and contain the "most recent" information for each registrant.

The remaining question for the Court is whether the Voter File "concern[s]" Maine's voter list maintenance activities. 52 U.S.C. § 20507(i)(1). The common and ordinary meaning of the word "concern" is "to relate to." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/concerns?src=search-dict-hed (last accessed January 24, 2022). The Voter File plainly relates to Maine's voter list maintenance activities in at least two ways.

a. The Voter File Reflects and Is the End-Product of Maine's Voter List Maintenance Activities.

The CVR, and the Voter File specifically, contains information about each eligible registrant, including name, addresses, and year of birth. 21-A M.R.S. § 196-A(1)(B). As described previously, the CVR is used to implement the activities Maine conducts to keep that voter record information current and accurate. At the time it is generated the Voter File reflects and contains each registrant's "most recent" information. The Voter File is thus the culmination and end product of the implementation of Maine's voter list maintenance activities. Put differently, a straight line can be drawn between Maine's activities (the start) and the Voter File (the finish). The Voter File "concerns" Maine's activities and is within the NVRA's scope.

b. The Voter File is a Compilation of Voter Registration Records, Which Maine Uses to Determine and Track Voter Eligibility.

Judicial Watch, Inc. v. Lamone, 399 F. Supp. 3d 425 (D. Md. 2019) is particularly instructive because it resolved the same question at issue here. In *Judicial Watch*, the court granted the plaintiffs summary judgment, holding that a list of Maryland's registered voters is a "record" covered by the NVRA's Public Disclosure Provision. The court explained,

> In Maryland, State and local officials rely on voter registrations to register new voters and to remove ineligible voters, thereby "'ensuring the accuracy and currency of official lists of eligible voters.'" [*Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012)] (internal citation omitted). And, the voter registrations are clearly records that concern the implementation of the program and activity of maintaining accurate and current eligible voter lists. After all, they

> contain the information on which Maryland election officials rely to monitor, track, and determine voter eligibility.

Judicial Watch, 399 F. Supp. 3d at 439. Because "a voter list is simply a pared down compilation of voter registrations," *id*. at 440, the court reasoned, it is likewise a "record" covered by the NVRA's Public Disclosure Provision, *id*. at 440-442.

The Voter File is likewise a "compilation of voter registrations." *Id*. at 440. Indeed, the information contained in the Voter File is pulled directly from the official voter record information stored in the CVR, the information that election officials endeavor to keep current and "on which [Maine] election officials rely to monitor, track, and determine voter eligibility." *Judicial Watch*, 399 F. Supp. 3d at 439. The Voter File is thus a record covered by the NVRA.

True the Vote v. Hosemann, 43 F. Supp. 3d 693 (S.D. Miss. 2014) also supports the Foundation. In that case, the plaintiff sought a "a complete list of all Mississippi voters [in] all status categories" *Id*. The court observed,

> Mississippi has an electronic election recordkeeping system, SEMS, that contains its Voter Roll information. The Voter Roll is created from data in SEMS and is maintained by the State. Counties receive voter registration applications from individual registrants and must scan the applications and other pertinent registration documentation into SEMS. …
>
> The Court likewise concludes that the Voter Roll is a "record" and is the "official list[] of eligible voters" under the NVRA Public Disclosure Provision. The process of compiling, maintaining, and reviewing the voter roll is a program or activity performed by Mississippi election officials that ensures the official roll is properly maintained to be accurate and current.

Id.

Maine also has an electronic election record keeping system—the CVR. The Voter File is generated from information stored in the CVR, including names and addresses, and is Maine's current eligible voter list. 21-A M.R.S. § 196-A(1)(B). "The process of compiling, maintaining, and reviewing" the Voter File is an activity performed by Maine election officials "that ensures

the official roll is properly maintained to be accurate and current." *True the Vote*, 43 F. Supp. 3d at 723. The Voter File is a "record" of that activity and thus within the NVRA's broad scope.

B. The Secretary's Tortured Interpretation is Contrary to NVRA's Text and Intent and Produces Absurd Results.

The Secretary strains to narrow the NVRA's scope with two allegedly textual arguments, neither of which is supported by the plain meaning of the statute's words and which are, in fact, defied by those words. Furthermore, the Secretary's interpretation is plainly contrary to the NVRA's intent because it would absurdly obliterate the transparency Congress intended.

1. "Conducted for the purpose of ensuring."

The Secretary first posits that the statute's use of the word "ensuring" means the Public Disclosure Provision is limited to activities that "guarantee" that voter roll data is accurate. (Doc. 58 at 11.) This alone is an incorrect interpretation because, no party can guarantee perfection. American voter rolls are fraught with error and discrepancies. Mistakes happen. Deciding whether records are public based on the error rate of the underlying activity is an absurd standard under which records related to *unreliable* activities—those that demand the most transparency—would be shielded from view. To be sure, the Foundation wishes to use the data to assist states in maintaining their voter rolls as accurate as possible.

The Secretary also contends that the NVRA is even further limited to activities that can be classified as "oversight" activities *and* those that "make sure that data, once it is in the system, *remains* accurate and current." (Doc. 58 at 11 (emphasis in original).) Falling outside the scope of the law, the Secretary claims, are "day-to-day administrative functions such as adding individual registrants to the system." (*Id.*) This interpretation is plainly contrary to what Congress wrote. The distinction between "oversight" and "day-to-day" functions finds no support from the word "ensuring" or any other word. The same goes for the distinction between

adding new registrants and maintaining existing data. The Public Disclosure Provision does not exclude records related to newly added registrants by word, context, or intent. In fact, the Eastern District of Virginia considered and rejected that very argument, concluding, "There is ample support throughout the NVRA, therefore, for the conclusion that the Public Disclosure Provision is meant to cover records concerning the implementation of voter registration procedures, which by necessity include voter registration applications." *Project Vote*, 752 F. Supp. 2d at 709.

Nor are these distinctions even helpful to the Secretary. The Voter File is equally the product of newly added voter data and the maintenance of existing data. It "concerns," relates to, and reflects both of those activities. To find that only records of the latter activity are public would produce the absurd result of making only a portion of the Voter File a public document, and "absurd results are to be avoided," *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).

The Secretary adds that the phrase "conducted for the purpose" means only Maine's voter list maintenance activities that are "purposeful." (Doc. 58 at 12.) On the other hand, "[a]ctivities and programs that have the incidental effect of ensuring accuracy or currency of voter rolls are thus outside the scope of the provision." (*Id*.) The Secretary does not explain what she means by "incidental effect," or why this distinction is relevant. In the end it does not matter because the Voter File is the product of numerous purposeful—and legally mandated—activities, including adding, updating, and deleting registration data.

2. "Implementation."

The Secretary posits next that the word "implementation" limits the scope of the Public Disclosure Provision in a relevant and dispositive way. In the Secretary's view, the NVRA covers only "records that would describe, document, or otherwise concern how the relevant "programs and activities" were put into practice." (Doc. 58 at 13.) Such records would include

"correspondence" about voter list maintenance activities and "documents showing specific edits of voter information," but would not include the Voter File. (*Id*.)

The Secretary's constrained view is not supported by the text's plain meaning and has been rejected by every court that has addressed the NVRA's scope. "Implement" means "carry out"[3] and, as addressed earlier, "concerning" means "related to." Accordingly, the statute is very broad. "[A]ll records" that merely relate to carrying out Maine's voter list maintenance activities are covered. The Voter File, as the end product of all voter list maintenance activities, "relates to" the "implementation" of those activities and is therefore within the law's scope.

The Secretary's position is also undermined by Section 8(i)(2), which explains that public records "shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made." 52 U.S.C. § 20507(i)(2). Such a list of names does not describe or document "how" any activity was "put into practice." (Doc. 58 at 13.) Yet the list is expressly within the scope of Section 8(i)(1). Numerous other critical records would become secret under the Secretary's view, including voter registration applications, the very document that determines eligibility.

3. Even if Considered, the NVRA's "Structure" Supports the Foundation.

"[I[n cases of statutory interpretation, the language of the statute enjoys preeminence." *Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n*, 989 F.2d 1266, 1270 (1st Cir. 1993). "When the words of a statute neither create ambiguity nor lead to an entirely unreasonable interpretation, an inquiring court need not consult other aids to statutory

[3] https://www.merriam-webster.com/dictionary/implement (last accessed Jan. 24, 2022); *see also Project Vote*, 752 F. Supp. 2d at 707 (discussing "implementation").

construction." *Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003). The Supreme Court is clear on this point. *Germain*, 503 U.S. at 253-54. Even if the Court consults the NVRA's "structure," (Doc. 58 at 13), it should find no reason to overrule the statute's plain meaning.

First, the Secretary claims that if Congress intended for voter rolls to be public records, the Public Disclosure Provision would refer to them specifically. (Doc. 58 at 13-14.) That is an untenable conclusion, especially when Congress used the word "all" in the NVRA. Prior to the NVRA's enactment, there were virtually no federally mandated voter list maintenance requirements—except for, perhaps, more generally applicable civil rights laws, like the Voting Rights Act. Congress was tasked with drafting a public records tool to capture the activities and attendant records of fifty different states. It would have been a Herculean, if not impossible, task to enumerate all relevant records, or even relevant *categories* of records. Instead, Congress followed the most prudent path by drafting broad language that covers "all" records related to list maintenance programs *and* activities. *See Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 560 (M.D. Pa. 2019) ("[T]he [NVRA's] Disclosure Provision contemplates an *indefinite* number of programs *and* activities.") (emphasis in original). There are scores of voter list maintenance records not specifically mentioned in the NVRA, but that does not mean Congress intended to *exclude* them from the statute, especially when they are encompassed by the text.

The Secretary's contention that the records described in Section 8(i)(2) should be considered a limitation was addressed and rejected in *Project Vote*. *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 337 (4th Cir. 2012) ("[T]he term 'shall include' sets 'a floor, not a ceiling.'… Courts have repeatedly indicated that 'shall include' is not equivalent to 'limited to.').

The Secretary fundamentally takes issue with the NVRA's breadth. But there is nothing inherently suspect about a broadly written statute. Public records laws are almost universally

drafted for maximum transparency. For example, the Maine Freedom of Access Act provides, "Except as otherwise provided by statute, a person has the right to inspect and copy **any public record** in accordance with this section … ." Me. Rev. Stat. tit. 1, § 408-A (emphasis added).

Congress chose words of "great breadth." *Project Vote*, 682 F.3d at 336 ("[T]he use of the word 'all' [as a modifier] suggests an expansive meaning because 'all' is a term of great breadth."). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). Congress's choices must be honored.

Maine's position allows Maine to escape public scrutiny of the state's performance of its NVRA obligations. Congress passed the NVRA as written to avoid this exact circumstance.

III. The Amended Complaint Plausibly Alleges that the NVRA Preempts and Supersedes Maine Law.

The Secretary concedes that Maine law "impose[s] restrictions on subsequent use and dissemination" of the Voter File. (Doc. 58 at 15.) The Foundation challenges four of those restrictions: **(1)** the prohibition on selling, transferring, or using the Voter File for "for any purpose that is not directly related to evaluating the State's compliance with its voter list maintenance obligations" (Doc. 55 ¶¶ 78-86) ("Use Ban"), **(2)** the prohibition on causing any identifying information to be made accessible by the public (*Id*. ¶ 49) ("Make-Available Ban"); **(3)** the prohibition on using the Voter File to enforce the NVRA (*Id*. ¶ 47) ("Enforcement Ban"); and, **(4)** the fines imposed for violating those prohibitions (*Id*. ¶¶ 87-94) ("Fines").[4]

These restrictions allow Maine to hide other NVRA violations. The Enforcement Ban effectively provides Maine immunity from any lawsuit related to the NVRA's obligation to

[4] For example, the Foundation may discover that Maine is not removing dead or relocated registrants. Hiding the voter file and prohibiting uses protects government malfeasance.

remove deceased and relocated registrants. The restrictions conflict with the NVRA and are therefore preempted and unenforceable under Article VI, Clause 2 of the United States Constitution (the Supremacy Clause), Article I, Section 4, Clause I of the United States Constitution (the Elections Clause), and the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013). In *Inter Tribal*, the Supreme Court held in unambiguous terms that the NVRA is superior to any conflicting state laws. In such situations, "the state law, 'so far as the conflict extends, ceases to be operative.'" *Inter Tribal*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U. S. 371, 384 (1880)). The Court:

> When Congress legislates with respect to the "Times, Places and Manner" of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States. Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that *the statutory text accurately communicates the scope of Congress's pre-emptive intent*…. In sum, there is no compelling reason not to read Elections Clause legislation simply to mean what it says.

Id. at 14-15 (emphasis added). The so-called presumption against preemption "does not hold" when Congress acts under the Elections Clause. *Inter Tribal*, 570 U.S. at 14 (emphasis added).

Federal preemption of state law "may be express or implied." *United States v. Machias Sav. Bank*, No. 1:21-mc-00320-LEW, 2022 U.S. Dist. LEXIS 2835, at *4 (D. Me. Jan. 6, 2022) (citations and quotations omitted). There are two types of implied preemption: "field preemption and conflict preemption, which itself comes in two varieties: obstacle preemption and impossibility preemption." *Capron v. Office of the AG of Mass.*, 944 F.3d 9, 21 (1st Cir. 2019). "Conflict preemption" occurs where "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (citations and quotations omitted).

To evaluate preemption the Court must first consider the NVRA's purposes:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501(b)(1)-(4). To help accomplish these objectives, Congress enacted the Public Disclosure Provision. The Fourth Circuit prudently observed that the Public Disclosure Provision "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." *Project Vote*, 682 F.3d at 334-35. Another court has observed that the Public Disclosure Provision "convey[s] Congress's intention that the public should be monitoring the state of the voter rolls and the adequacy of election officials' list maintenance programs." *Bellitto*, 2018 U.S. Dist. LEXIS 103617, at *12-13. Congress did not intend only for public oversight; Congress intended for public *enforcement*, as demonstrated by the NVRA's private-right-of-action provision, 52 U.S.C. § 20510(b), which the Foundation utilizes often.

The Foundation alleges that Maine law conflicts with the NVRA and that the Foundation intends to use the Voter File for purposes Maine law prohibits—namely, evaluating list maintenance activities in other states, enforcing the NVRA, and transferring potentially irregular registration and voting data to other states for investigation. (Doc. 55 ¶¶ 45-51.) Next, the Court must ask: has the Foundation plausibly alleged that Maine's restrictions make achieving the NVRA's purposes impossible or stand as obstacles to their fulfillment? The answer is "yes."

A. The Use Ban is Preempted.

The *Judicial Watch* case is again instructive. The court in *Judicial Watch* also held that the NVRA's Public Disclosure Provision preempts a Maryland law that required an applicant

requesting a voter registration list to be a Maryland registered voter. 399 F. Supp. 3d at 443- 445. The court found that limiting access to Maryland voters "is an obstacle to the accomplishment of the NVRA's purposes"—namely, "protect[ing] the integrity of the electoral process," and "ensur[ing] that accurate and current voter registration rolls are maintained" 52 U.S.C. § 20501(b)(3)-(4). *Judicial Watch*, 399 F. Supp. 3d at 445. The court specifically recognized that "Section 8(i) of the NVRA provides for the disclosure of voter registrations in order to 'assist the identification of both error and fraud in the preparation and maintenance of voter rolls.'" *Id*. (quoting *Project Vote*, 682 F.3d at 339). By limiting disclosure to Maryland voters, Maryland law "exclude[ed] organizations and citizens of other states from identifying error and fraud," contrary to the NVRA's purposes. *Id*. The court held, "It follows that the State law is preempted in so far as it allows only Maryland registered voters to access voter registration lists." *Id*.

Maine law prohibits the Foundation (and other person) from using the Voter File to evaluate legal compliance and identify list maintenance errors (and perhaps fraud) *in all other states*. *See* 21-A M.R.S. § 196-A(1)(J). Maine imposes severe fines for engaging in such activities. *Id*. § 196-A(5). Maine law is an "obstacle" because it "something that impedes progress or achievement"[5] of at least two of the NVRA's purposes: "protect[ing] the integrity of the electoral process," and "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(3)-(4).

The Secretary responds by claiming "Congress almost certainly intended to require each state to provide information about *its own* list maintenance activities, not other states' activities." (Doc. 58 at 19.) The Foundation agrees. The Foundation is not asking Maine to *provide* information about other states' activities. Rather, the Foundation is asking to *use* Maine's data as

[5] https://www.merriam-webster.com/dictionary/obstacle (last accessed Jan. 22, 2022).

part of its nationwide study of other jurisdictions. Such a use is entirely consistent with the NVRA's oversight function. There is no evidence indicating that Congress intended to confine that function to each state's borders. The opposite is true. Congress tasked states with establishing programs that remove the names of voters who have changed residences. 52 U.S.C. § 20507(a)(4)(B). Congress envisioned that the states would meet this requirement by using the *National* Change of Address database. 52 U.S.C. § 20507(c)(1); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1840 (2018) (discussing "Postal Service option set out in the NVRA"). Maine law impermissibly obstructs the NVRA's oversight function.

B. The Enforcement Ban is Preempted.

By prohibiting all uses that are not related to "evaluating" Maine's legal compliance, Maine effectively prohibits using the Voter File to enforce the NVRA. 21-A M.R.S. § 196-A(1)(J)(1). The NVRA's private-right-of-action provision shows Congress plainly intended that the public would enforce the NVRA. 52 U.S.C. § 20510(b). Maine law makes Congress's enforcement goals impossible. Banning enforcement actions plainly conflicts with federal law.

The Secretary dismisses the Foundation's concerns, claiming that "enforcement" is "an exercise in 'evaluating'" Maine's legal compliance and such a use would therefore fall within the statute's permissible uses. (Doc. 58 at 20.) The Secretary's concession is a good start but does not have the force of law. Absent an authoritative interpretation by the Maine Supreme Judicial Court, the Foundation remains at risk. Furthermore, unless the Foundation could obtain a protective order—*after* committing itself to a federal action—it risks separately violating the Make-Available Ban, as the Secretary concedes. (Doc. 58 at 20.) Maine's scheme is plainly inconsistent with the NVRA's enforcement mechanism.

C. The Make-Available Ban is Preempted.

The Voter File's recipient may not:

> Cause the voter information or any part of the voter information that identifies, or that could be used with other information to identify, a specific voter, including but not limited to a voter's name, residence address or street address, to be made accessible by the general public on the Internet or through other means.

21-A M.R.S. § 196-A(1)(J)(2). On its face, the NVRA does not prohibit publication of list maintenance data. In fact, in Section 8(i)(2) Congress made personally identifying information public—specifically, "names and addresses." 52 U.S.C. § 20507(i)(2). This makes sense because without personally identifying information one registrant cannot be distinguished from another. The Fourth Circuit even found it "*self evident* that disclosure will assist the identification of both error and fraud in the preparation and maintenance of voter rolls." *Project Vote*, 682 F.3d at 339 (addressing privacy concerns) (emphasis added). It is unreasonable to think that Congress would *require* the *public* disclosure of voter's names while tolerating the state's ability to punish—with crushing fines—the mere publication of that same information.

The Make-Available Ban is invalid primarily because it is a ban on speech that violates the Constitution's First Amendment. U.S. Const. Amend. I. The Make-Available Ban is also preempted because it is an obstacle to achieving the NVRA's purposes. As part of its mission, the Foundation issues reports to educate the public and government officials about voter list maintenance activity nationwide. (Doc. 55 at 3.) These reports occasionally include *public* records that contain information such as a last name or voter ID number.

The Foundation also transmits apparent irregular registration and voting data to election officials throughout the country to help "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(4). Those communications are subject to open records laws and by sending them the Foundation is plausibly "caus[ing] voter information … to be

made accessible by the general public … through other means," in violation of Maine law. 21-A M.R.S. § 196-A(1)(J)(2). The Foundation's activities are consistent with Congress's intent but are banned by Maine law. The Make-Accessible Ban is therefore preempted and unenforceable.

The Secretary claims that public disclosure of personally identifying information "would directly thwart the NVRA's purpose of encouraging voter participation," (Doc. 56 at 19-20.) If that were true, we would expect to see large-scale evidence of it nationwide, and specifically in Maine. Personally identifying information has been publicly available under the NVRA since 1993, and for years, Maine's political parties and others have been able to obtain personally identifying information and use it to contact—or in the eyes of some, bother—voters. Yet the Secretary does not offer a single instance where voter participation was discouraged. In fact, "Maine's 2020 election turnout was among highest in US," according to reports.[6]

D. The Fines are Preempted.

Because each of the challenged restrictions is preempted and unenforceable, the Fines must necessarily be too. Maine may not punish what Congress allows here. It is axiomatic that monetary penalties deter conduct—indeed, it is their purpose—and they are thus plainly an obstacle to Congress's goals. This Court should find the Fines preempted.

Conclusion

The NVRA means what it says—"**all records**" concerning voter list maintenance are subject to public inspection. For the foregoing reasons, the Secretary's Motion should be denied.

[6] https://bangordailynews.com/2020/11/25/politics/maines-2020-election-turnout-was-among-highest-in-us/ (last accessed Jan. 24, 2022).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2022, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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