No. 23-1361

United States Court of Appeals
For the First Circuit

PUBLIC INTEREST LEGAL FOUNDATION, INC.

Plaintiff – Appellee

v.

SHENNA BELLOWS, in her official capacity as the Secretary of State for the State of Maine

Defendant – Appellant

On appeal from the United States District Court, District of Maine

BRIEF OF DEFENDANT-APPELLANT SHENNA BELLOWS

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Jurisdictional Statement

This appeal is from a final judgment of the district court, dated March 28, 2023 (ECF No. 88), granting summary judgment to Plaintiff-Appellee Public Interest Legal Foundation Inc. ("PILF") on Counts II and III of its Amended Complaint. Defendant-Appellant Secretary of State Shenna Bellows filed a timely notice of appeal on April 14, 2023. This Court therefore has jurisdiction over this appeal under 28 U.S.C.A. § 1291.

Statement of the Issues Presented for Review

1. Whether § 8(i) of the National Voter Registration Act of 1993, 52 U.S.C.A. § 20507(i) (West), requires Maine to make publicly available a data file generated from its Central Voter Registration system containing name, address, voter participation history, and other personal information for all of Maine's 1.1 million registered voters.

2. Whether, if the NVRA requires such disclosure, the NVRA preempts a state-law privacy protection that bars requestors from disseminating voters' personal information to the general public through the Internet or by other means.

3. Whether Plaintiff-Appellee PILF failed to establish that it had standing to seek relief against provisions of Maine's voter-privacy laws that the Secretary of State and Maine Attorney General do not intend to enforce in the manner that PILF claims to fear.

Statement of the Case

Introduction

When Congress enacted the National Voter Registration Act ("NVRA") in 1993, it did so with an invitation to states to implement the law "in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C.A. § 20501(b)(2) (West). When Congress, a decade later in the Help America Vote Act, required states to create voter registration databases in which the personal information of every voter in the state would be aggregated into a single centralized system, Maine took Congress's invitation in the NVRA to heart. In creating its Central Voter Registration system ("CVR") in 2005, Maine enacted strict confidentiality protections to prevent misuse of that aggregated personal data. The Maine Legislature rooted those protections in part in Maine's "compelling state interest" in "ensur[ing] that voters are not discouraged from participating the voting process," P.L. 2005, ch. 404, § 2—the same goal that Congress embraced in passing the NVRA.

The lower court's holding that the NVRA preempts some of these state-law statutory protections as applied to PILF undermines, rather than promotes, this core NVRA purpose. It gives PILF the green light

to lob public and unsubstantiated allegations of misconduct at individual Maine voters using data obtained from the CVR system. It opens the door to weaponization of the CVR system by individuals or groups seeking to harass or intimidate voters. And, far from furthering the NVRA's pro-registration purposes, the court's holding creates a deterrent to potential voters, who will now have to consider whether they wish to provide personal information to the government that may then be turned over to private groups who can disseminate it at will.

The NVRA does not require this counterintuitive result. The district court's decision adopts an erroneously broad interpretation of a modest disclosure provision in the NVRA. Congress intended that provision to require states to retain and make available for public inspection records of its "programs and activities" to purge its voter lists of ineligible voters. *See* 52 U.S.C.A. § 20507(i). But the district court, adopting the erroneous reasoning of a Fourth Circuit decision that was later narrowed, read this modest provision as requiring disclosure of essentially all state records relating to the registration of voters, no matter how attenuated from Maine's conduct in maintaining voter lists. The district court's interpretation—like the Fourth Circuit's—takes a

lengthy and nuanced statutory disclosure provision and reads it so broadly as to render its many limiting and modifying terms meaningless. The lower court's interpretation should be rejected because it violates the canon of statutory construction that all words of a statute should be accorded meaning.

Even if this Court agrees that the NVRA's disclosure requirement extends to a static aggregation of the personal information of 1.1 million Maine voters, it should still reverse the lower court's decision. Maine law expressly allows PILF to obtain the data that it seeks. That law's only restriction on PILF's planned activities is to prevent PILF from publishing voters' personal information to the general public through the Internet or by other means. PILF is thus free to obtain CVR data on Maine voters and analyze it as it sees fit. The only thing it wishes to do but cannot is publish voters' personal data. Because this state-law limitation is not only consistent with Congress's purposes in enacting the NVRA, but *directly furthers* those congressional purposes, the district court erred by concluding that Maine's limitation on publication of that data is conflict-preempted by the NVRA.

Finally, the Court should reject PILF's standing to attack other aspects of Maine's voter-privacy law. PILF gives these provisions the most expansive possible reading in order to manufacture a justiciable controversy where none exists. The Secretary of State ("Secretary") and Maine Attorney General have expressly and unconditionally disavowed any intent to enforce those provisions in the manner PILF claims to fear. As a result, the district court erred in entering judgment for PILF on those aspects of its claims.

The Court should reverse the district court's entry of judgment for PILF and remand with instructions to enter summary judgment for the Secretary.

Statement of Facts

The following facts drawn from the summary judgment record are undisputed.[1]

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[1] Although PILF purported to qualify or deny many of the Secretary's statements of fact, most of those qualifications and denials simply asserted, without further explanation or citation to the record, that PILF was "without knowledge" to admit or deny the alleged fact or that the alleged fact was not "material." *See* A337–352. Those responses are not true qualifications or denials because they do not even suggest, let alone establish with record evidence, a genuine factual dispute. *See* D. Me. L.R. 56(c). Although the District Court did not

The National Voter Registration Act.

In 1993, Congress enacted the NVRA. *See* Pub. L. No. 103–31, 107 Stat. 77 (1993). The NVRA required states to make various reforms and improvements to their voter registration practices, including requirements intended to make it easier for Americans to register to vote. *See* 52 U.S.C.A. § 20504 (West) (requiring states to allow individuals applying for drivers' licenses to also register to vote); § 20505 (West) (requiring states to accept mail-in registrations); § 20506 (West) (requiring states to designate agencies to assist voters with registration).

The NVRA has four stated 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 [the 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

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specifically address these faulty qualifications and denials, it concluded that there was "no genuine dispute of material fact" between the parties. Add. at 9–10 & n.13.

(4) to "ensure that accurate and current voter registration rolls are maintained." *Id.* § 20501(b). Congress issued three findings supporting its passage of the NVRA, which highlight the importance of protecting and promoting the right to vote and the "damaging effect on voter participation" of "discriminatory and unfair registration laws and procedures." *Id.* § 20501(a).

Section 8 of the NVRA regulates, in large part, how states should maintain what it refers to as their "official lists of eligible voters." *Id.* § 20507(a)(4). Most notably, it requires states to conduct a general program that makes a reasonable effort to remove voters from such lists who are deceased or have changed residences, while simultaneously requiring considerable precautions to avoid removing still-eligible voters. *Id.* § 20507(a)(4), (b), (c), (d). Among those precautions is a requirement that states follow certain specific procedures before they may remove voters from the rolls based on a suspected change of residence. *Id.* § 20507(d).

As an added safeguard against improper purging of voters from registration lists, § 8 imposes on states a requirement that they make

records of their list-maintenance activities available to the public. That requirement provides:

> (1) 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.
>
> (2) The records maintained pursuant to paragraph (1) 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.

Id. § 20507(i).

Maine's creation of a centralized voter registration system.

At the time the NVRA passed in 1993, Maine, like many states, had no centralized voter registration database. Appendix ("A") at 337 (Pl.'s Resp. to Def.'s Statement of Mat. Facts ("SMF") ¶ 38). Rather, because Maine elections are administered primarily at the municipal level, each of Maine's more than 500 municipalities was responsible for maintaining voter rolls for its residents. *Id.* ¶ 39. Municipalities

maintained these records in a variety of forms, including handwritten lists and a variety of electronic formats. *Id.*

That changed after Congress enacted the Help America Vote Act of 2002 (HAVA). HAVA required states to modernize election administration in various ways, including by requiring each State to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State." 52 U.S.C.A. § 21083(a)(1)(A) (West). HAVA recognizes the sensitivity of these databases, expressly requiring that the administrator of the database "shall provide adequate technological security measures to prevent the unauthorized access" to the database. *Id.* § 21083(a)(3).

By 2007, Maine had complied with its obligation under HAVA to create a centralized voter registration database. A338 (SMF ¶ 41). As of November 2022, that system, known as the Central Voter Registration system, or CVR, contained registration and voter participation data on approximately 1.1 million Maine voters: 925,899 active status voters and 216,865 inactive status voters. *Id.* ¶ 44; 21-A

M.R.S.A. § 721 (West 2023). Realizing that CVR would become a repository of sensitive information on hundreds of thousands of Maine voters, the Maine Legislature enacted legislation in 2005 to protect the confidentiality of CVR data (hereinafter, the "Privacy Law"). A339 (SMF ¶ 46); *see* P.L. 2005, ch. 404 (codified at 21-A M.R.S.A. § 196, recodified as amended at 21-A M.R.S.A. § 196-A). The Legislature identified three "compelling state interests" at stake in regulating public access to CVR data: preventing voter fraud, preventing the potential disenfranchisement of voters, and ensuring that voters are not discouraged from participating in the voting process. P.L. 2005, ch. 404, § 2; *see* A339–340 (SMF ¶¶ 47–49).

The Privacy Law provides that "information contained electronically in the central voter registration system and any information or reports generated by the system are confidential." 21-A M.R.S.A. § 196-A(1) (West 2023) (reproduced at pages 31–34 of the Addendum ("Add.")). At the outset of this litigation in 2020, the statute contained nine exceptions, lettered A through I, that allowed disclosure of various types of CVR data for specified purposes, including political campaigns (Exception B), certain governmental uses (Exceptions G and

I), and, in semi-anonymized form, research (Exception F). *See* 21-A M.R.S.A. § 196-A (West 2017).

The Voter File

Exception B of the Privacy Law has long allowed campaigns and political parties to purchase—subject to limitations on misuse and further dissemination—a data report compiled from CVR called the party/campaign use voter file (hereinafter, "the Voter File"). *See* P.L. 2009, ch. 564, § 8. The statewide version of the Voter File contains the following information about each of the 1,142,764 Maine voters listed in the CVR system:

- the voter's name
- residence address
- mailing address
- year of birth
- enrollment status (i.e. party)
- electoral districts
- voter status
- date of registration,
- date of change of the voter record if applicable,
- voter participation history
- voter record number
- any special designations indicating uniformed service voters, overseas voters or township voters

A340 (SMF ¶ 51). Only some of this information comes from voter registration applications. *See* 21-A M.R.S.A. §§ 122(1) & 152 (West 2023). Voter participation history, for example, is not derived from registration data. A340 (SMF ¶ 49); *see* 21-A M.R.S.A. § 721.

In June 2021, the Maine legislature amended the Privacy Law to allow individuals or entities seeking to evaluate voter-list maintenance practices to purchase a copy of the Voter File. P.L. 2021, ch. 310. The new Exception J provides as follows:

> J. An individual or organization that is evaluating the State's compliance with its voter list maintenance obligations may, consistent with the National Voter Registration Act of 1993, 52 United States Code, Section 20507(i) (2021), purchase a list or report of the voter information described in paragraph B from the central voter registration system by making a request to the Secretary of State and paying the fee set forth in subsection 2. A person obtaining, either directly or indirectly, voter information from the central voter registration system under this paragraph may not:
>
> (1) Sell, transfer to another person or use the voter information or any part of the information for any purpose that is not directly related to evaluating the State's compliance with its voter list maintenance obligations; or
>
> (2) 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.A. § 196-A(1)(J). Exception J took effect on October 18, 2021. *See* P.L. 2021, ch. 310, § 2. It authorizes disclosure of the same Voter File available to campaigns under Exception B to individuals or entities seeking to evaluate voter-list maintenance practices. A341 (SMF ¶ 54). It also amended Exception B so that the limitations on use and dissemination of the Voter File in Exceptions B and J were largely the same. P.L. 2021, ch. 310, § 1.

The 2021 amendments to the Privacy Law also altered the enforcement mechanism for violations of the statute. Under the prior version of the statute, there was no specified penalty, which meant that any knowing violation of the statute was a Class E crime. *See* 21-A M.R.S.A. § 32(1) (West 2023). The amended statute eliminates the criminal penalty, providing instead that violations are non-criminal civil violations for which fines of up to $1,000 can be assessed for a first violation or up to $5,000 for repeat violations. *Id.* § 196-A(5).

PILF's request for the Voter File

PILF is an Indiana-based organization dedicated to fighting alleged "lawlessness" in elections. A346 (SMF ¶ 72). In 2017, PILF issued a report called *Alien Invasion II*, which alleged a "[c]overup" of

noncitizen registration and voting in Virginia. *Id.* ¶ 73. The report appended government records showing the names and contact information of specific individuals who turned out to be legal Virginia voters, resulting in some of those voters bringing a federal civil rights lawsuit against PILF. A346–47 (SMF ¶¶ 74–77). PILF ultimately reissued the report with an apology for "any characterization of those registrants as felons." A347 (SMF ¶ 78).

Even after that, PILF continues to publicize personal information about voters, issuing a report in 2019 containing the names, addresses, and birthdates of individual Florida voters that it alleged were registered to vote twice. A348 (SMF ¶ 79). PILF has no set practice as to whether it redacts voter information in its reports. A349 (SMF ¶ 85).

On October 17, 2019, PILF sent a letter to the Secretary requesting a copy of the Voter File. A319 (Def.'s Statement of Mat. Facts ("DSMF") ¶¶ 6–7). Because, at the time, Exception J had not yet been enacted, the Secretary denied PILF's request, since PILF was not eligible to purchase the Voter File under then-current law. A321 (DSMF ¶ 24); A199. Following the effective date of Exception J—October 18, 2021—had PILF submitted a properly completed request

form and the applicable fee, the Secretary would have provided the Voter File to PILF. A342–43 (SMF ¶ 59); Add. at 18. PILF, however, has chosen not to do so. A342 (SMF ¶ 58); Add. at 9 & n.12.

The Secretary's efforts to maintain the data in CVR.

Since implementation of CVR in 2007, the Secretary has engaged in a program of maintaining the data in CVR, as required by the NVRA and HAVA. A343 (SMF ¶ 60). The Secretary undertook concerted list maintenance efforts in 2007, 2009, 2011, and 2013, 2017, and 2022. A343–44 (SMF ¶¶ 63–66). The Secretary is maintaining records of its 2022 list-maintenance activities for two years, as required by § 8(i) of the NVRA, and, as with past NVRA maintenance efforts, those records are available for public inspection and copying. A344–45 (SMF ¶ 67). The Secretary is also conducting list maintenance using the Electronic Registration Information Center (ERIC), which provides a secure electronic platform for member states to cross-check their voter registration data with those of other states. A344 (SMF ¶ 65).

Procedural History

PILF filed this action on February 19, 2020. A002. Its sole claim was that the Secretary violated the NVRA by denying PILF's request for the Voter File. Following the Legislature's addition of Exception J

to the Privacy Law in June 2021, PILF amended its complaint to add claims that the NVRA preempted Exception J's limitations on use and publication of the Voter File (Count II) and associated civil penalties (Count III). A183–85. PILF also continued to maintain that the Secretary was unlawfully denying it access to the Voter File (Count I). A182.

The Secretary moved to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(1) and (6). The court granted the Secretary's motion to dismiss PILF's denial-of-access claim as moot. Add. at 24–26. The court otherwise denied the Secretary's motion to dismiss, concluding that § 8(i) of the NVRA did apply to the Voter File but that determination of whether Maine's restrictions on use and dissemination of the Voter File were preempted required further factual development. Add. at 27–31.

Following a shortened discovery period, both parties moved for summary judgment. On March 28, 2023, the court issued an Order on Cross-Motions for Summary Judgment granting summary judgment to PILF and denied summary judgment to the Secretary on the remaining claims. Add. at 18. The court determined that PILF's challenge to

Exception J was an as-applied challenge, not a facial challenge. Add. at 10–11 n.16. It further concluded that the state-law limitations on PILF's intended uses of the data in the Voter File information conflicted with the purposes of the NVRA and were therefore preempted. *Id.* at 13. Despite undisputed facts presented by the Secretary that were not before the court at the motion-to-dismiss stage, the court declined to reconsider its prior conclusion that § 8(i) of the NVRA applied to the Voter File. *Id.* at 9 n.12. And, finally, the court concluded that PILF had standing to challenge certain restrictions in Exception J even though the Secretary and the Maine Attorney General disclaimed any intent to enforce those restrictions in the manner PILF claimed to fear. *Id.* at 14.

The Secretary timely appealed from the district court's judgment. A354. The Secretary also moved for a partial stay of the district court's ruling—asking that the court stay pending appeal the portion of its ruling declaring that Exception J's limitation on causing voter information to be made accessible by the general public on the Internet or through other means was preempted as applied to PILF. ECF No. 93; *see* 21-A M.R.S.A. § 196-A(1)(J)(2). Following briefing, the district

court granted the requested stay, concluding that the relevant factors, including the fact that "disclosure directly affects the privacy of Maine voters," justified the issuance of the partial stay. ECF No. 96 at 5.

Summary of the Argument

The district court erred by interpretating § 8(i) of the NVRA to encompass the Voter File, a static list of voter personal information unrelated to the State's conduct of list-maintenance activities authorized by the NVRA. Section 8(i) is an elaborately worded provision, applying only to records relating to the "implementation" of state programs and activities "conducted for the purpose of ensuring" the accuracy and currency of lists of eligible voters. The Voter File has nothing to do with Maine's programs and activities intended to "ensur[e]" accuracy and currency of its voter lists and certainly does not relate to "implementation" of those activities. It is simply a list of personal data drawn from the CVR system to provide information to eligible requestors.

The district court should not have adopted the Fourth Circuit's overbroad interpretation of § 8(i) in *Project Vote/Voting for America v. Long*, 682 F.3d 331 (4th Cir. 2012). That decision incorrectly concluded that the ministerial act of processing a voter registration application was an activity conducted "for the purpose of ensuring" accuracy and currency of voter lists. In fact, Congress's intent, as is apparent from

both the plain text of the NVRA, its statutory structure, and its legislative history, was to make available to the public records illuminating governmental efforts to remove ineligible voters from voter lists. The Voter File sheds no meaningful light on these activities.

Even if the Voter File is encompassed by § 8(i), the district court erred in concluding that its prohibition on publication of personal information of individual Maine voters was preempted by the NVRA. While the NVRA requires states to permit requestors to inspect and copy covered records, it does not prohibit states from imposing reasonable limitations on requestors' further dissemination of sensitive voter information. Such limitations directly further the pro-registration purposes of the NVRA by giving assurances to potential registrants that the government will safeguard any personal information that they provide on their registration card.

Moreover, several courts, including even the Fourth Circuit, have recognized that §8(i) should be interpreted in light of federal policies protecting the privacy of individual citizens. PILF's maximalist interpretation of § 8(i) as preempting even the most reasonable state

laws intended to protect sensitive personal information of voters is inconsistent with these decisions.

Finally, the lower court erred in concluding that PILF had standing to challenge other state-law limitations on the use of the Voter File. These limitations can reasonably be interpreted to avoid any potential conflict with the NVRA or PILF's planned activities. The Secretary and the Attorney General affirmatively adopted these narrowing interpretations in signed briefs and declarations. Thus, with the exception of Exception J's ban on publication of voter data—which is entirely consistent with the NVRA's purposes and thus not preempted—PILF is under no realistic threat that the limitations in Exception J will be enforced against it if it engages in its planned activities. The district court therefore erred in concluding that PILF had standing to seek judicial relief against statutory provisions that do not apply to it.

Argument

I. The district court erred in concluding that § 8 of the NVRA applies to the Voter File.

This Court reviews grants of summary judgment *de novo*, drawing all reasonable inferences in favor of the non-moving party. *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 92 (1st Cir. 2013). Because "[f]ederal preemption issues are questions of statutory construction," this Court also reviews those questions *de novo*. *Id.* Even where there is no presumption against preemption, "the burden to prove preemption is on the plaintiffs." *Capron v. Off. of Att'y Gen. of Mass.*, 944 F.3d 9, 21 (1st Cir. 2019).

A. The plain language of § 8(i) cannot be read to encompass a compilation of 1.1 million voters' personal information.

In construing § 8(i) of the NVRA, the Court should "start with the statutory text." *Woo v. Spackman*, 988 F.3d 47, 50–51 (1st Cir. 2021). This means considering "the plain meaning of the words in 'the broader context of the statute as a whole.'" *United States v. Godin*, 534 F.3d 51, 56 (1st Cir. 2008) (quoting *United States v. Roberson*, 459 F.3d 39, 51 (1st Cir. 2006)); *see also In re Hill*, 562 F.3d 29, 32 (1st Cir. 2009) (words in a statute "carry their plain and ordinary meaning" unless expressly defined). "Words in a statute are not islands but 'must be read

in their context and with a view to their place in the overall statutory scheme.'" *New Hampshire Lottery Comm'n v. Rosen*, 986 F.3d 38, 55 (1st Cir. 2021) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Moreover, all of the words in the statute must be considered; courts "generally ought not to interpret statutes in a way that renders words or phrases either meaningless or superfluous." *City of Providence v. Barr*, 954 F.3d 23, 37 (1st Cir. 2020).

The key legal issue in this case is whether § 8(i) should be read to encompass the Voter File. That File is a compilation of personal information on every single Maine voter, downloaded from the State's CVR system at a particular point in time. The Voter File is not a list maintenance tool; it is undisputed that the Secretary does not use it do list maintenance.[2] A345 (SMF ¶ 68). The Voter File does not say whether a particular voter's registration information has ever been

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[2] PILF purported to deny all the facts described in this paragraph on the grounds that the district court "already ruled that the Voter File is subject to disclosure under the NVRA." A345 (SMF ¶¶ 68–71). In addition to being a non sequitur, this denial was not supported by citations to record evidence and was therefore insufficient to generate a genuine factual dispute.

altered by list maintenance activities. *Id.* ¶ 70. The Voter File does not include any information on cancelled registrations. *Id.* ¶ 69. And it includes information on numerous Maine voters whose data has never been affected by list-maintenance activities. *Id.* ¶ 71. In short, it is just a static list of personal data on 1.1 million registered Maine voters.

The plain language of § 8(i) cannot be reasonably construed to force states to provide public access to a compendium of voters' personal information like the Voter File. The key portion of that provision states:

> Each State shall . . . make available for public inspection . . . 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.A. § 20507(i)(1) (emphasis added). Notice what the provision does not say. It does not say that each state must make publicly available "all records relating to voter registration" or something similarly sweeping. Congress could have done that. It knows how to write such broad provisions, legislating for example that election officials must preserve for 22 months and make available to the U.S. Attorney General on a confidential basis "all records and papers which

come into [their] possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election." 52 U.S.C.A. §§ 20701, 20703, 20704.

But in § 8(i), which contemplates disclosure of records to the public rather than in confidence to the Attorney General, Congress chose narrower, less categorical language. To be subject to disclosure under the NVRA, voter registration–related records must concern "programs and activities" conducted to make the voter rolls accurate and current. And even that is not enough. The programs and activities must "ensur[e]" the accuracy and currency of voter rolls. They must be "conducted for the purpose" of ensuring accuracy and currency. And, for § 8(i) to apply, the records requested must also concern the "implementation" of those programs and activities. The district court erred in interpreting § 8(i) because it failed to give independent meaning to each of these qualifiers.

Conducted for the Purpose of Ensuring. The first textual constraint on the scope of § 8(i) is its limitation to records concerning programs and activities that are "conducted for the purpose of ensuring" the accuracy and currency of voter rolls. While Congress could have

chosen to broadly require production of documentation of activities and programs "relating to" the accuracy and currency of voter lists, it chose instead a narrower phrase that—if given independent meaning and not treated as surplusage, as the district court did—significantly limits its scope.

Ensure means, among other things, "to make certain" or "guarantee." Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/ensure# (last visited June 9, 2023). The use of this term indicates Congress's intent to direct § 8(i)'s retention and disclosure obligation not toward day-to-day administrative functions such as adding individual registrants to the system—which cannot reasonably be described as activities that "guarantee" or "make certain" that the rolls are accurate and current—but rather toward the government's oversight activities and programs to make sure that data, once it is in the system, *remains* accurate and current. In other words, Congress intended that § 8(i) apply only to the sorts of list-maintenance programs and activities authorized and regulated by the remainder of § 8.

This limit is confirmed by § 8(b). That section uses language almost identical to § 8(i), referring to any "program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll." 52 U.S.C.A. § 20507(b). Section 8(b)'s heading offers a shorthand phrase to summarize these programs and activities: "*Confirmation* of voter registration." *Id.* (emphasis added). By referring to these programs as activities relating to "confirmation" of registration information, § 8(b) confirms that the "programs and activities" described in § 8(i) are those that validate the accuracy and currency of the data in voter lists, and not those that carry out day-to-day administrative tasks.

What is more, even a program or activity that ensures accuracy or currency of voter lists is not necessarily within the scope of § 8(i). Although Congress could have provided for disclosure of records of programs or activities "to ensure" accuracy and currency of the voter lists, it included a further caveat. To be covered, the programs and activities must be conducted "for the purpose" of ensuring accuracy and currency. Programs and activities that might have the effect of

ensuring accuracy and currency, but are not intentionally designed for that purpose, are excluded from § 8(i)'s reach.

This plain reading of § 8(i) as limited to purposeful oversight activities to maintain the integrity of the voter list is confirmed by the larger context of the statutory provision in which § 8(i) appears. Section 8 earlier requires states to conduct a "general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C.A. § 20507(a)(4). Much of the remainder of the section is devoted to regulating what states' programs or activities relating to voter list maintenance may and may not do to remove voters from states' voter rolls. Section 8(b), for example, requires such "programs and activities" to be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965" and to comply with the restrictions in subsection (d) on purging voters. *Id.* § 20507(b). Section 8(c) allows for the use of USPS change-of-address information in such a program. *Id.* § 20507(c).

Thus, when the words of § 8(i) are properly read "with a view to their place in the overall statutory scheme,'" *N.H. Lottery Comm'n*, 986 F.3d at 55, the "programs and activities" referenced in that provision

are the voter-roll maintenance programs and activities described and regulated in the prior subsections, such as Maine's efforts in 2007, 2009, 2011, 2013, 2017, and 2022, *see* A343–44 (SMF ¶¶ 63–65); not any and all "activities" in which an election official might engage that somehow relates to voter registration.

Implementation. The other significant limitation of the scope of § 8(i) is its use of the term *implementation* of programs and activities. By limiting the scope of records available to those concerning "implementation," § 8(i) targets only a subset of the government's records concerning its voter-roll maintenance programs and activities: records that would describe, document, or otherwise concern how the relevant "programs and activities" were put into practice. For example, correspondence between decision-makers concerning list-maintenance activities or documentation showing specific edits of voter information or changes to voter status resulting from maintenance would be covered. The Voter File contains none of this information.

* * *

These significant textual limitations show that Congress did not intend for § 8(i) to extend to a compilation of data on all of Maine's 1.1

million registered voters. A data file containing such information as voters' names, years of birth, addresses, and voter participation history does not provide any meaningful information about how the state went about "implementing" any programs or activities "conducted for the purpose of ensuring" the accuracy and currency of its voter rolls. All that data file provides is a static list of who is currently registered, as well as personal information about each registrant.

In rejecting this straightforward reading of § 8(i), the district court adopted the Fourth Circuit's reasoning in *Project Vote*, 682 F.3d 331. Add. at 29–30. The Fourth Circuit is the only court of appeals to date that has interpreted the scope of § 8(i). But *Project Vote* interprets § 8(i) in a manner that treats the textual qualifiers discussed above as mere surplusage, reading § 8(i) in a manner that would cause it to apply to essentially all documents relating to voter registration. This Court should strike a different path; one that recognizes § 8(i) not as a public records free-for-all, but as a targeted disclosure requirement requiring transparency when a state engages in the list-maintenance activities authorized and regulated by § 8.

The issue in *Project Vote* was whether § 8(i) required public disclosure of completed voter registration applications. 682 F.3d at 333. The court held that reviewing voter registration applications was both a "program" and an "activity" by election officials. *Id.* at 335. It further held that this program/activity was "for the purpose of ensuring the accuracy and currency" of voter lists, reasoning that "by registering eligible applicants and rejecting ineligible applicants, state officials 'ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state.'" *Id.* The court concluded that the applications concerned "implementation" of the relevant program or activity because applications were "the means by which an individual provides the information necessary for the Commonwealth to determine his eligibility to vote." *Id.* at 336.

Project Vote's boundless interpretation of § 8(i) is mistaken because it reads out of the statute all of its qualifying language, turning it into a catch-all provision covering virtually all voter registration records of any sort. Under its interpretation, the ministerial task of processing a voter registration card becomes the implementation of a program or activity "for the purpose of ensuring" the accuracy and

currency of the voter rolls. But a registrar is not acting "for the purpose of ensuring" the accuracy and currency of the rolls merely by processing an individual application. His or her "purpose" is to decide whether the application is valid and, if so, to enter the voter's data into the CVR system. While one may hope and expect that the determination and data-entry are error-free, "ensuring" accuracy or currency is not the "purpose" of the exercise. It is only those programs and activities designed to check or update the registrar's work after the fact—*i.e.*, list-maintenance activities—that can fairly be said to be "for the purpose of ensuring" voter-list accuracy and currency.

Project Vote's interpretation of § 8(i) becomes even more implausible when that provision is considered in the context of § 8 as a whole. That section does not seek to regulate the entirety of states' registration processes. Most notably, it does not regulate how a registrar must go about processing an individual voter registration card. Rather, § 8 regulates the conduct of voter-list maintenance activities. It requires states to conduct such activities while placing restrictions on how they may do so, requiring for example that states must follow a specific procedure to remove a voter from the rolls based

on change of address. 52 U.S.C.A. § 20507(d). It logically follows that the disclosure provision that Congress placed within this section is aimed at ensuring public access to records that show how the state goes about implementing those required list-maintenance programs and activities.

Indeed, *Project Vote*'s only analysis of the overall statutory framework is to point out that the word "Registration" appears in the title of the Act and in the heading of § 8—asserting that Congress's choice of these general labels confirms that Congress intended the detailed statutory language it drafted in § 8(i) was little more than a generic requirement that states make available all "voter registration records." *Project Vote*, 682 F.3d at 337. But if Congress intended such a result, it would have plainly said so. Congress did not do so because it intended something more limited and nuanced than the court in *Project Vote* acknowledges.

In relying on *Project Vote,* the district court also failed to acknowledge that the Fourth Circuit, without explicitly overruling *Project Vote*, has since announced a more nuanced interpretation of § 8(i) in *Public Interest Legal Foundation, Inc. v. North Carolina State*

Board of Elections, 996 F.3d 257 (4th Cir. 2021). In that case, the court held that § 8(i) "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. Though the records at issue in that case—largely involving criminal investigations of registrants—were different than the Voter File at issue here, the Fourth Circuit's holding that § 8(i) must be interpreted to take into account general federal privacy policy supports the conclusion that, even if § 8(i) might require disclosure of a particular registration application of a particular voter, it does not mandate disclosure of the State's entire voter database to anyone who asks.

Congress enacted the NVRA in the context of a strong federal policy of protecting the privacy of Americans generally, and American voters in particular. Congress had enacted the Privacy Act of 1974, 5 U.S.C.A. § 552a, which imposes strict limitations on the ability of federal agencies to disclose records containing personally identifying information about individuals without their consent, backed by threat of civil liability and even criminal penalties. *See* 5 U.S.C.A. § 552a(b),

(g) & (i). It had enacted the Freedom of Information Act, 5 U.S.C.A. § 552, which includes an exception to public disclosure for records "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See* 5 U.S.C.A. § 552(b)(6). And it had enacted the Civil Rights Act of 1960, which authorizes the U.S. Attorney General to obtain voter registration records from states, 52 U.S.C.A. § 20703, but then forbids the Attorney General from disclosing such records except to Congress, other government agencies, and in court proceedings. *Id.* § 20704.

In other words, if the U.S. Attorney General were to ask the Secretary for the Voter File, federal law would severely limit his ability to further disclose that data. These strong federal privacy policies, of which Congress should be presumed to have been aware in enacting the NVRA in 1993, support interpreting § 8(i) to limit disclosure of voter personal information to circumstances such as those described in § 8(i)(2)—where the voter's status has actually been affected by the state's list-maintenance activities.

Even as a textual matter, it does not follow from *Project Vote*'s holding that Voter File is also a covered record. The File is just a static

list of aggregated voter information that the Secretary generates from CVR to provide information to eligible requestors. Unlike a registration card, which must be processed by an election official, the Voter File is not used by the Secretary to "implement[]" any program or activity relating to voter registration, let alone one that is "for the purpose of ensuring" accuracy and currency of voter lists. A345. Moreover, while *some* of the data in the Voter File is derived from individual voter registration cards, other data in the Voter File—most notably voter participation history—has nothing to do with voter registration and did not come from registration cards. A340. It is therefore not accurate to call the Voter File, as the district court did, a mere "compilation of voter registration applications." Add. at 29. And even if it were, a data compilation of 1.1 million voters' personal information provides for far more potential for abuse by commercial interests, scammers, and hackers than the handful of voter registration cards at issue in *Project Vote*.

In concluding otherwise, the lower court also adopted the reasoning of a district court decision in Maryland that was required to follow *Project Vote*. Add. at 29 (citing *Judicial Watch, Inc. v. Lamone*,

399 F. Supp. 3d 425 (D. Md. 2019)). But in extending *Project Vote* to voter lists, the Maryland decision incorrectly treated a computer-generated list of selected voter data for every voter in the state as the same thing as a single registration card.

These are not the same thing. Voter lists and voter registration cards are distinct "records" serving different purposes. Even if, as *Project Vote* incorrectly reasoned, a voter card is covered by § 8(i) because a registrar relied upon it to "implement[]" the activity of processing that application, it does not follow that a massive computer-generated trove of voter data, some coming from registration cards and some not, is likewise a record "concerning" the implementation of that activity. *See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655–56 (1995) (warning against construing statutory phrase "related to" so as to allow for "infinite relations" untethered from the objectives of the statute).

B. The structure of § 8 supports the Secretary's reading.

In addition to the text of § 8(i) itself, language throughout § 8 indicates that Congress had no intention of including voter lists within the scope of § 8(i). Congress understood what a voter list was and

expressly and repeatedly considered the role of such lists in the NVRA's statutory framework. *See, e.g.*, 52 U.S.C.A. § 20507(a)(3), (a)(4), (b)(2), (c)(2)(A), (c)(2)(B)(i), (d)(1), (d)(3) (referencing "the official list [or lists] of eligible voters"). Indeed, it even mentions such "lists" in § 8(i) itself, without expressly providing for their disclosure. Given how extensively § 8 addresses the topic of voter lists, if Congress had wanted to mandate that states make public their voter lists, it would have just said so. Instead, Congress drafted a complex disclosure provision full of qualifiers.

Another structural indicator that Congress did not intend to require disclosure of voter lists are the opening words of § 8(i)(1). Paragraph 1 starts with a requirement that states should "maintain for at least 2 years" the documents described in the section. That requirement provides another clue that Congress had in mind historical documentation of the state's list-maintenance efforts and not the voter lists themselves, which constantly evolve as voters are added or removed, or their data is updated. The lower court's reading of the statute would suggest that, each time a voter is added or removed from CVR, or voter information in the CVR is edited, Congress intended that

states make a copy of the entire revised list and preserve it for a two-year period. Such a reading is not plausible.

Finally, the requirement in paragraph 2 of § 8(i) that states disclose lists of voters who received subsection (d)(2) notices further confirms that Congress did not have voter lists in mind when it drafted paragraph 1 of § 8(i). Paragraph 2 explains that the list-maintenance records described in paragraph 1 "shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent" along with information on those voters' responses. 52 U.S.C.A. § 20507(i)(2). Paragraph 2 thus requires states to retain and make public a specific narrow subset of data that includes voters' personally identifying information.

Congress presumably included paragraph 2 because it recognized that the general disclosure provision in paragraph 1 did not unambiguously extend to records of such notices. Paragraph 2 thus shows that Congress reflected on the circumstances under which states might need to retain and produce personally identifying information regarding voters. It chose to expressly require production of such data

only for the limited subset of individuals on the states' rolls who have received subsection (d)(2) notices.

Unlike the Voter File, the voter data described by subsection (i)(2) do in fact concern state programs intended to ensure the accuracy and currency of voter lists. The (d)(2) notices are, after all, a key element of states' NVRA-required list-maintenance activities.

While Congress felt the need to clarify that lists of (d)(2) notices were subject to disclosure, it included no paragraph 3 clarifying that the entire contents of a state's voter list are also within the scope of subsection 1. Under the "venerable canon" of *inclusio unius est exclusio alterius*, "if one of a category is expressly included within the ambit of a statute, others of that category are implicitly excluded." *Sasen v. Spencer*, 879 F.3d 354, 362 (1st Cir. 2018). Here, the fact that Congress specifically considered the circumstances under which voter identifying information must be disclosed, and yet did not expressly provide for public disclosure of entire lists of voters, demonstrates that Congress had no such intent to authorize such an invasion of voters' privacy.

C. Agency interpretation of the NVRA near the time of enactment supports the Secretary's view.

The lower court's expansive interpretation of § 8(i) also runs counter to the interpretation of the federal agency charged with implementing the NVRA at the time of its enactment. In 1994, the National Clearinghouse on Election Administration, part of the Federal Election Commission (FEC), issued a guidance document for states entitled *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches and Examples* (hereinafter, the "FEC Guide") (Add. 35–42).[3] As the FEC was, at the time, the agency responsible for implementing the NVRA, *see* 52 U.S.C.A. § 21132 (West), its interpretations of the NVRA in its Guide "reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

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[3] available at https://www.eac.gov/sites/default/files/eac_assets/1/1/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201%201994.pdf (last visited June 9, 2023).

The FEC Guide includes a chapter on "Record Keeping and Reporting Requirements." Add. at 37. After quoting § 8(i) and noting that it requires states to maintain lists of voters who were sent subsection (d)(2) notices, the FEC Guide goes on provide that states are *not* required to retain—though they may wish to consider doing so "as a matter of prudence"—"records of removals from the voter registration list." *Id.*

If the interpretation of § 8(i) reflected in the FEC's guidance is credited, it completely undermines the reasoning of *Project Vote* and thus the basis for the lower court's decision. If the processing of a voter registration card is an activity "for the purpose of ensuring the accuracy and currency" of the voter list, as *Project Vote* holds, then the processing of a removal from the voter list must also be. The act of removing an ineligible voter from the rolls, whether due to death or change of residence, far more clearly affects the "accuracy and currency" of the voter list than the processing of a new voter registration application.

Yet, according to the FEC, records of routine removals of voters from the rolls are *not* subject to § 8(i)'s requirements. The explanation for the FEC's interpretation is evident: like the Secretary, the FEC

understood § 8(i) to apply to the sort of purposeful voter-list maintenance programs authorized by § 8, but not to election clerks' ministerial day-to-day activities of processing additions, removals, and changes to the voter list.

D. The lower court's reading of § 8(i) does not further the NVRA's purposes.

Finally, the district court's interpretation of § 8(i) runs afoul of one of the NVRA's key purposes: to "make it possible for Federal, State, and local governments to implement [the Act] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C.A. § 20501(b)(2). The district court's interpretation of § 8(i) would not help Maine to implement the NVRA in a manner that enhances the participation of eligible citizens to vote. Quite the opposite. If Maine citizens know that the personal information that they provide on a registration form will be indiscriminately disclosed to private parties, some Mainers may well be deterred from registering to vote.

The fact that groups like PILF may use such information to publicize the names and addresses of voters whom they believe—sometimes inaccurately—to be improperly registered only enhances the

potential for deterring legal voters from registering. *See* A347–49 (SMF ¶¶ 78–84). Indeed, the Maine Legislature enacted § 196-A in part because of its concern that a failure to protect voter privacy may deter some eligible Mainers from participating in Maine elections. A341 (SMF ¶ 54); *see* P.L. 2005, ch. 404, § 2.

II. The district court erred in concluding that the Publication Ban is preempted by the NVRA.

Even if § 8(i) applies to the Voter File, the district court erred in concluding that Maine cannot place reasonable limitations on the publication of the personal data in the File, as it has done in Exception J. Nothing in the text of § 8(i) forbids or expressly preempts state limitations on the use and public dissemination of voter data obtained through § 8(i). Indeed, such state-law restrictions on the use of voter data—most notably restrictions on the commercial use of such data—are commonplace throughout the country.[4] A350 (SMF ¶ 92).

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[4] *See, e.g.*, Az. St. § 16-168(F) (restricting uses and further dissemination of voter registration data); Cal. Elections Code § 2194(a)(2) (prohibiting, among other things, publication of voter data); S.D. Codified Laws § 12-4-41 (limiting use of voter data to "election purposes" and prohibiting internet publication); *see also* National Conference of State Legislatures (NCSL), "Access To and Use Of Voter Registration Lists," available at https://www.ncsl.org/research/elections-

The centerpiece of Maine's Exception J is its ban on causing personal information from the Voter File to be "made accessible by the general public on the Internet or through other means" (the "Publication Ban"). *See* 21-A M.R.S.A. § 196-A(1)(J)(2). This provision is intended to ensure, among other things, that persons and entities obtaining Maine's Voter File do not use it to publicize the personal information of Maine voters whom they suspect of misconduct.

In ruling that the limitations in Exception J were preempted by the NVRA, the district court gave little individualized consideration to the Publication Ban. But this important provision—the only one that would actually limit PILF's intended activities given the Secretary's limiting construction of the other provisions at issue, *see* Part III below—deserves to be separately considered. The Publication Ban is not only entirely consistent with the purposes of the NVRA, it actively furthers those purposes.

Because the NVRA contains no express preemption provision, the Publication Ban must be analyzed under the doctrine of conflict

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and-campaigns/access-to-and-use-of-voter-registration-lists.aspx (last visited June 9, 2023).

preemption. Conflict preemption exists where "compliance with both state and federal law is impossible" or 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) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, 101 (1989)). Because the NVRA is enacted under Congress's power under the Elections Clause, there is no presumption against preemption. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013). Nonetheless, the NVRA preempts state law only "so far as the two are inconsistent, and no farther." *Ex parte Siebold*, 100 U.S. 371, 386 (1879). The NVRA should be interpreted "simply to mean what it says." *Inter Tribal Council of Arizona*, 570 U.S. at 15.

A. The Publication Ban furthers the objectives of Congress

Section 8(i) is a minor provision in a much larger statutory framework that is primarily aimed at encouraging more citizens to participate in federal elections. The legislative history reflects a concern by Congress about "[t]he declining numbers of voters who participate in Federal elections." S. Rep. 103-6 at 2 (1993). That history also recounts testimony that "discriminatory and restrictive

practices that deter potential voters are employed by some States." *Id.* at 3. The history notes the drafters' concern "with the impact of a regulation or practice on the exercise of the right to vote and not with the question of whether its impact was intentional or inadvertent." *Id.* As a whole, the legislative history demonstrates that, while the NVRA had multiple goals, the primary one was to increase the number of Americans who were registered to vote and thus able to participate in federal elections.

This overriding goal of enhancing voter participation in federal elections is expressed in the statutory text. Most notably, the NVRA states as one of its purposes to "make it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C.A. § 20501(b)(2). The NVRA also includes legislative findings that "it is the duty of Federal, State, and local governments to promote the exercise of [the] right [of citizens to vote]," and that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for

Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id.* § 20501(a)(1)–(3).

The NVRA also expresses Congress's intent to protect potential voters from intimidation, discrimination, and other pernicious activities that could reduce voter participation. 52 U.S.C.A. § 20511(1) makes it a federal crime to knowingly and willfully intimidate, threaten, or coerce any person for registering to vote, attempting to register to vote, or voting. Congress also made sure to provide in 52 U.S.C.A. § 20507 that the NVRA does not "supersede, restrict, or limit the application of the Voting Rights Act of 1965 [VRA]," nor does the NVRA authorize or require conduct prohibited by the VRA.

The Publication Ban directly furthers the NVRA's core purpose of encouraging voter registration and enhancing participation in federal elections. For example, it prevents an organization from using the Voter File to publicly accuse specific named voters of criminal activity. PILF itself has been accused of this very practice. A346–47 (DSMF ¶¶ 74–78). The threat of such voter "doxxing" could reasonably be expected to discourage non-voters from registering—particularly those from ethnic or language minority groups who may be more likely to fear

being wrongly accused of illegal registration or voting. In sufficiently egregious cases, it might even be the sort of "intimidation" that the NVRA expressly criminalizes. *See* 52 U.S.C.A. § 20511(1).

Indeed, the privacy risks that the Publication Ban seeks to address are not hypothetical. In *Voter Reference Foundation, LLC v. Balderas*, 616 F. Supp. 3d. 1132 (D.N.M. 2022), the court considered an effort by New Mexico officials to prosecute an organization for posting to the Internet New Mexico's entire voter file, including registration data and voter history. *Id.* at 1159, 1166. After comparing New Mexico's laws to Maine's Exception J, the court concluded that New Mexico's law (unlike Maine's) could not be interpreted to prohibit the organization's actions. *Id.* at 1242. As a result, the court enjoined state officials from prosecuting the organization for posting the data. *Id.* at 1275.

Balderas makes it clear that, without the Publication Ban, the same organization—or a similar organization—would be free to obtain and post the entirety of Maine's Voter File to the Internet, allowing anyone from criminals to advertisers to foreign governments to look up the personal information and voting participation history of any Maine voter. The Publication Ban provides assurance to Mainers that

registering to vote will not expose their personal data to such inappropriate uses. It is thus an effort by Maine to follow Congress's directive to "implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C.A. § 20501(b)(2).

As the Fourth Circuit has recognized in rejecting a constitutional challenge to Maryland's limitations on the private use of its voter list, such limitations further legitimate government interests in "safeguarding Maryland registered voters from harassment and abuse, protecting the privacy of personal information, and encouraging both voter registration and participation." *Fusaro v. Howard*, 19 F.4th 357, 369 (4th Cir. 2021). The Publication Ban similarly furthers Maine's interest in protecting voters from public exposure of their personal data, which voters might reasonably fear could be used for purposes contrary to the goals of the NVRA, ranging from unsolicited advertising to scams to misinformation campaigns.[5]

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[5] *See, e.g.*, Federal Bureau of Investigation, "Foreign Actors Likely to Use Information Manipulation Tactics for 2022 Midterm Elections" (Oct. 6, 2022), *at* https://dl.ncsbe.gov/election-security/facts/PSA_Foreign%20Actors%20Likely%20to%20Use%20Information%20

Courts have recognized that the NVRA's pro-registration purposes must be considered in interpreting § 8(i). In *True the Vote v. Hosemann*, the district court upheld a Mississippi law protecting information concerning a voter's birthdate in the face of a challenge under § 8(i). 43 F. Supp. 3d. 693 (S.D. Miss. 2014). The court pointed to Congress's goal of ensuring "that the NVRA increased, not discouraged, voter registration and participation." 43 F. Supp. 3d at 736. It noted that the birthdates, "when combined with other identifying information available in voter registration records, can be used to obtain—both legally and improperly—a host of other highly personal information about an individual, particularly in this day of computers with vast searching powers." *Id.* (citing *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz. 1998) (*en banc*)). As the court further noted, registrants and potential registrants who knew

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Manipulation%20Tactics%20for%202022%20Midterm%20Elections.pdf (last visited June 9, 2023) (noting that foreign actors may claim to have "hacked" or "leaked" U.S. voter registration data); NCSL, "Securing Voter Registration Systems" (July 2018), *at* https://www.ncsl.org/research/elections-and-campaigns/securing-voter-registration-systems.aspx (last visited June 9, 2023) (noting that "[a]t least 18 state voter registration databases were scanned by Russian-affiliated cyber actors in 2016").

that this personal information "could be disclosed to any requester without restriction on further dissemination of the personal information 'would understandably be hesitant to make such information available for public disclosure.'" *Id.* at 739 (quoting *Project Vote/Voting For America*, 752 F. Supp. 2d 697, 712 (E.D. Va. 2010)).

The Publication Ban uses different means to safeguard Maine voters from precisely the same potential invasions of privacy and thereby to prevent precisely the same evil—discouraging Mainers from becoming and remaining registered voters. PILF uses the same sophisticated technology that can match data from voter files with commercial databases to produce detailed profiles of each voter, including dates of birth and even social security numbers. A348 (SMF ¶¶ 82–83).

Rather than authorizing redaction, the Publication Ban requires requestors to avoid publication of personal data to the general public. It thus, similar to Mississippi's law, harmonizes the access goals of § 8(i) (assuming *arguendo* they apply to the Voter File) and the overarching goals of the NVRA of encouraging and facilitating voter registration. Under Exception J, organizations wishing analyze Maine's Voter File

for irregularities are free to do so, while voters and potential voters are assured that those organizations are forbidden from publicizing their personal data.

In concluding that Exception J's limitations are preempted by § 8(i), the lower court characterizes those limitations as "alter[ing] or modify[ing]" § 8(i). Add. at 14 (quoting *Fish v. Kobach*, 840 F.3d 710, 729 (10th Cir. 2016)). But they do no such thing. Exception J allows PILF and similar organizations to engage in the "inspection" and "copying" that PILF claims is required by the law. 52 U.S.C.A. § 20507(i)(1). The Publication Ban merely prevents those organizations from using that information for purposes inimical to the NVRA—posting voters' personal information to the internet or "doxxing" voters based on unconfirmed suspicions of misconduct. These restrictions are no different than other restrictions on the use of voter files, such as restrictions on commercial use, that are commonplace throughout the country. *See* n.4, *supra*. Nothing in the text of § 8(i) prevents states, which have a legitimate interest in protecting this data, *see Fusaro*, 19 F.4th at 369, from imposing such limitations. Thus, contrary to the lower court's conclusion, there is no need to "finely parse" the NVRA

"for gaps or silences into which [the] state regulation might fit." Add. at 14 (quoting *Fish*, 840 F.3d at 729).

Finally, in concluding that the Publication Ban was inconsistent with Congress's transparency goals in enacting § 8(i), the district court failed to adequately consider *why* Congress wanted transparency. Given federal laws and policies prohibiting intimidation and harassment of voters, *see* Part II.B., below, Congress did not want transparency in order to help private groups level unsubstantiated public allegations of misconduct at individual voters. Rather, Congress wanted to ensure transparency regarding the *government's* efforts to maintain its voter lists.

The Publication Ban is carefully targeted to prohibit only the former activities, while still allowing for full transparency of the state's registration activities. In the unlikely event that PILF finds irregularities in Maine's Voter File, the Publication Ban would not prevent it from publishing a report detailing those irregularities—as long as it does not publish unredacted individual voter information. Nor does anything prevent PILF from identifying particular voters to Maine officials for potential further investigation or including voters'

information in a sealed court filing. A350–51 (SMF ¶¶ 94, 97–98). The only thing that PILF cannot do is publish identifying information about particular voters. Such a reasonable limitation in no way thwarts § 8(i)'s purpose.

B. The Publication Ban is in harmony with federal privacy policies

As noted above, the Fourth Circuit recognized that § 8(i) "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." *PILF*, 996 F.3d at 264. Thus, in considering whether Exception J's limitations are consistent with the objectives of Congress, the Court should consider the myriad federal statutes that already existed when the NVRA was enacted that protect personal privacy and protect voters from harassment and intimidation, and of which the drafters of § 8(i) were assuredly aware.

Those relevant statutes include the three federal statutes discussed in Part I.A: the Privacy Act of 1974, 5 U.S.C.A. § 552a, the Freedom of Information Act, 5 U.S.C.A. § 552, and the Civil Rights Act of 1960, 52 U.S.C.A. § 20704. But they also include federal statutes prohibiting voter intimidation and harassment. *See, e.g.*, 52 U.S.C.A.

§§ 10307(b), 10101(b). The publication of personal information about specific voters, whether in the context of asserting deficiencies in a state's voter lists or in some other context, could well intimidate voters in violation of the spirit, and, in some cases, the letter of these federal laws. Indeed, PILF has indicated that it intends to cross-reference the voter history contained in the Voter File with voter history that it has obtained from other states to make inferences—which it concedes it cannot definitively prove—about whether individuals may have voted twice in the same election. A323–24 (DSMF ¶¶ 29, 34); A349 (SMF ¶¶ 84–85). Absent the Publication Ban, nothing would stop PILF, or another organization, from publishing reports that include the names, addresses, and other personal information of specific Maine voters that the organization suspects (but has not proven) voted multiple times. Such public accusations, or the threat of them, could well intimidate voters. Exception J thus furthers the important federal policy of preventing voter intimidation.

III. The district court erred by granting relief relating to Exception J's other restrictions on use of the Voter File.

The district court also concluded that PILF was entitled to relief with respect to certain other limitations in Exception J on use of the

Voter File. Issuing such relief was error because the Secretary and the Attorney General have expressly disclaimed PILF's interpretation of those provisions as well as any intent to enforce those provisions against PILF in the manner that PILF claims to fear. Because there is no realistic threat of enforcement, PILF cannot establish that it has standing to challenge those provisions.

For PILF to meet its burden to establish standing, it must show an "injury in fact." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Where the injury is merely threatened, the plaintiff must show that the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)).

In addition to the Publication Ban—which the parties agree could expose PILF to an enforcement action based on PILF's planned activities if it is upheld—PILF claims that it is threatened by enforcement of the provision in Exception J that prohibits use of the Voter File for "any purpose that is not directly related to evaluating the State's compliance with its voter list maintenance obligations." 21-A M.R.S.A. § 196-A. PILF specifically claims that this provision will

prevent it from (a) using the Voter List in enforcement actions under the NVRA and (b) using the data in the Voter File to search for irregularities in the voter lists of states other than Maine.

For several reasons, PILF is under absolutely no threat—let alone a "certainly impending" threat—that it would be subject to an enforcement action for engaging in either of these activities. The district court therefore erred in concluding that PILF had standing to pursue these claims.

First, the plain language of Exception J allows the Voter File to be used for enforcement purposes. Exception J does not prohibit the Voter File from being used for "any purpose *other than* evaluating the State's compliance with its voter list maintenance obligations"; it prohibits the Voter File from being used for "any purpose *that is not directly related to* evaluating the State's compliance with its voter list maintenance obligations." 21-A M.R.S.A. § 196-A(1)(J)(1) (emphasis added). Under the plain language of the statute, multiple "purposes" are permitted; those purposes simply must be "directly related" to the evaluation. If PILF uses its analysis of the Voter File as a basis for an enforcement action under the NVRA, that use would quite plainly be "related" to the

preceding evaluation. Moreover, the relation would be "direct," since the evaluation would form the basis for the legal action.

Second, while Exception J's use of the singular *State* could perhaps be read to limit the use of the Voter File to evaluating only Maine's compliance with the NVRA—and not the compliance of other states—that narrow interpretation would be inconsistent with the purpose of Exception J, which was to allow use of the Voter File for list-maintenance evaluation activities consistent with the NVRA. There is no plausible reason why the Maine Legislature would have intended to allow in-state review of list-maintenance practices and not cross-state review. Thus, while perhaps not the most immediately obvious reading of Exception J, the only interpretation consistent with legislative purpose is one that allows cross-state analyses.

The statutory text permits this interpretation. First, Maine's equivalent of the Dictionary Act confirms that a statute's reference to "State" does not necessarily mean Maine specifically. See 1 M.R.S.A. § 72(21) ("'State,' used with reference to any organized portion of the United States, may mean a territory or the District of Columbia."). Second, even if Exception J's reference to "State" is limited to Maine, a

requestor's use of Maine's Voter File to cross-reference voter data with other states' lists for evaluation purposes is closely related to the evaluation of Maine's own list. Indeed, it many cases, it might be unclear whether a perceived discrepancy was the result of an error in the Maine list or the other state's list. An evaluation of another state's list would be closely intertwined with—and thus "directly related to"—an evaluation of Maine's Voter File.

In any event, even if stricter interpretations of Exception J are possible, the fact remains that both the Secretary of State and the Attorney General have expressly and unequivocally disclaimed any intent to enforce Exception J in the manner that PILF claims to fear. The Deputy Secretary of State's declaration at summary judgment—which was reviewed and authorized by the Secretary of State—confirms that the Secretary of State would not view either of the activities identified by PILF to violate Exception J. A295–97 (Flynn Decl. ¶¶ 14–23). The Office of Attorney General represented in the Secretary's summary judgment briefing that it held the same view, ECF No. 86 at 6, and restates that representation here.

In rejecting the Secretary's narrow interpretations of Exception J and the Secretary's and Attorney General's representations that it would not be enforced in the manner that PILF claimed to fear, the district court made several errors.

First, it incorrectly cited the unavailability of the presumption against preemption in this case as a reason to decline to interpret Exception J narrowly to avoid preemption. Add. at 14 n.19. But the presumption against preemption is grounded in an assumption that, absent clear language to the contrary, Congress does not intend to preempt state laws. *See Massachusetts Ass'n of Health Maint. Organizations v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999) (noting, in discussing the presumption, that "congressional intent stands at the base of all preemption analysis"). Construing state law narrowly to avoid a potential conflict with the NVRA in no way imputes to Congress any intent to write the NVRA narrowly to avoid preemption of state laws. Thus, rather than reading Exception J broadly to conflict with the NVRA, the lower court should have followed the Supreme Court's dictum that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Ohio v. Akron Ctr. for Reprod.*

Health, 497 U.S. 502, 514 (1990) (quoting *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 494 (1983) (Powell, J., concurring)); *see NCTA—The Internet & Television Assoc. v. Frey*, 7 F.4th 1, 19 (1st Cir. 2021) (declining to interpret state law in a manner that would subject it to preemption where text or other considerations did not compel such an interpretation).

Second, the lower court wrongly disregarded the assurances of the Secretary and the Attorney General that they did not intend to enforce Exception J against PILF if it engaged in enforcement actions or cross-state list analysis using the Voter File. The court rejected these assurances because they "do not have the force of law and are not binding on [her] or future office holders." ECF No. 87 at 14. But this Court has, in past, accepted similar statements as legally sufficient. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66 (1st Cir. 2011) (accepting "narrowing construction" of challenged state law offered for the first time in appellate brief); *Reddy v. Foster*, 845 F.3d 493, 502 (1st Cir. 2017) (finding no standing in part because government had "affirmatively disavowed prosecution" absent certain preconditions not present).

The assurances of the Secretary of State and Attorney General given here were not qualified or equivocating. They state plainly that those offices would not view any cross-state or enforcement use of the Voter File as violations of Exception J, as long as PILF abided by the Publication Ban. And, while it is perhaps possible (though not particularly plausible) that a future Attorney General or Secretary of State could "change [their] mind," despite their predecessors' unconditional representations in federal court, that possibility is not "certainly impending" in the face of disavowals by current officials of any intent to enforce Exception J as PILF claims to fear. *Reddy*, 845 F.3d at 505. The Court should therefore rule that PILF lacks standing to challenge these provisions.

Conclusion

For the foregoing reasons, the order of the district court granting summary judgment to PILF should be reversed and the case remanded with instructions to enter summary judgment for the Secretary.

DATED: June 9, 2023

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1. This brief contains 12,187 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that on June 9, 2023, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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Addendum

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PUBLIC INTEREST LEGAL FOUNDATION INC, Plaintiff, v. SHENNA BELLOWS, Defendant.	)	Civil No. 1:20-cv-00061-GZS

J U D G M E N T

Pursuant to the Order on Motion to Dismiss Amended Complaint entered March 4, 2022 and the Order on Cross-Motions for Summary Judgment entered on March 28, 2023 by U.S. District Judge George Z. Singal;

JUDGMENT of dismissal is hereby entered as to Count 1; and

JUDGMENT is further entered for plaintiff, Public Interest Legal Foundation Inc. as against defendant, Shenna Bellows on Counts 2 and 3.

CHRISTA K. BERRY, CLERK

/s/ Jennifer G. Driscoll
Deputy Clerk

Dated this 28th day of March, 2023.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the Court are Motions for Summary Judgment filed by Plaintiff Public Interest Legal Foundation Inc. (ECF No. 74) and Defendant Shenna Bellows (ECF No. 81).[1] Having considered the Motions and the related filings (ECF Nos. 73, 77-79, 84-86), the Court GRANTS Plaintiff's Motion (ECF No. 74) and DENIES Defendant's Motion (ECF No. 81) for the reasons stated herein.

I. LEGAL STANDARD

A party is entitled to summary judgment if it appears, based on the record before the Court, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is 'genuine' if the evidence is such that a reasonable jury could resolve the point in the favor of the non-moving party, and a fact is 'material' if it has the potential of affecting the outcome of the case." Taite v. Bridgewater State Univ., Bd.

[1] Defendant's Motion is marked on the docket as ECF No. 81 but available at ECF No. 80, along with her Response to Plaintiff's Motion. The Court cites to ECF No. 80 herein to refer to both Defendant's Motion and her Response.

of Trs., 999 F.3d 86, 93 (1st Cir. 2021) (cleaned up). The party moving for summary judgment must demonstrate an absence of evidence that supports the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has made this preliminary showing, the nonmoving party must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir. 1999) (cleaned up); see Fed. R. Civ. P. 56(e). "That evidence, however, cannot 'rely on improbable inferences, conclusory allegations, or rank speculation.'" Snell v. Neville, 998 F.3d 474, 486 (1st Cir. 2021) (alterations in original omitted) (quoting Enica v. Principi, 544 F.3d 328, 336 (1st Cir. 2008)). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment for the moving party." In re Ralar Distribs., Inc., 4 F.3d 62, 67 (1st Cir. 1993). "However, summary judgment is improper when the record is sufficiently open-ended to permit a rational factfinder to resolve a material factual dispute in favor of either side." Morales-Melecio v. United States (Dep't of Health and Hum. Servs.), 890 F.3d 361, 368 (1st Cir. 2018) (cleaned up). "When determining if a genuine dispute of material fact exists, [courts] look to all of the record materials on file, including the pleadings, depositions, and affidavits without evaluating the credibility of witnesses or weighing the evidence." Taite, 999 F.3d at 93 (cleaned up). The existence of cross-motions for summary judgment does not change the standard for construing the undisputed facts. Rather, the Court is required to "view each motion separately and draw all reasonable inferences in favor of the respective non-moving party." Roman Catholic Bishop v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013).

District of Maine Local Rule 56 prescribes a detailed process by which the parties are to present to the Court the "material facts . . . as to which the moving party contends there is no genuine issue." D. Me. Loc. R. 56(b). This local rule requires each statement of material fact to be "followed by a citation to the specific page or paragraph of identified record material supporting the assertion." D. Me. Loc. R. 56(f). A party opposing a motion for summary judgment must then file an opposing statement in which it admits, denies, or qualifies the moving party's statements, with citations to supporting evidence, and in which it may set forth additional facts, again with citations to supporting evidence. See D. Me. Loc. R. 56(c). In constructing the narrative of undisputed facts for purposes of summary judgment, the Court deems any statement with a supporting record citation admitted but "may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment." D. Me. Loc. R. 56(f).

II. BACKGROUND[2]

Plaintiff, the Public Interest Legal Foundation, Inc. ("Plaintiff" or "PILF"), "is a 501(c)(3) non-partisan, public interest organization" that "seeks to promote the integrity of elections nationwide through research, education, remedial programs, and litigation." (Def. Responses to Pl. Statement of Material Facts (ECF No. 79) ("Def. Resp. SMF"), PageID # 806.) It uses "records and data complied through [federal and state] open records laws" to: "analyze[] the programs and activities of state and local election officials in order to determine whether lawful efforts are being made to keep voter rolls current and accurate"; and "produce and disseminate reports, articles, blog and social media posts, and newsletters in order to advance the public education aspect of its

[2] The Court has drawn the limited factual narrative that follows from the parties' joint stipulation of material facts, as well as their individual statements of material facts and responses to opposing statements. See ECF Nos. 73, 79, 85. The remaining portion of this section sets out the relevant procedural history, as well as the statutory background at issue in this case.

organizational mission." (Id.)[3] Defendant Shenna Bellows, the Secretary of State for the State of Maine ("Defendant" or the "Secretary"), "is Maine's chief election official and 'the coordinator of state responsibilities under the National Voter Registration Act of 1993.'" (Joint Stipulation of Material Facts (ECF No. 73) ("JSMF"), Page ID # 631 (citing 21-A M.R.S.A. § 180).)

"For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections, but in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened." Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1838 (2018). "The NVRA 'erect[s] a complex superstructure of federal regulation atop state voter-registration systems.'" Id. (quoting Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 5 (2013)). It requires states to, inter alia:

> maintain for at least 2 years and [] 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) (hereafter, the "Public Disclosure Provision").

Since 2007, Maine has maintained a computerized voter registration system that contains "the name and registration information of every legally registered voter in the State." (Pl. Responses to Def. Statement of Material Facts (ECF No. 85) ("Pl. Resp. SMF"), PageID # 879.) Under Maine law, "information contained electronically in the central voter registration system and any information or reports generated by the system are confidential and may be accessed only by municipal and state election officials for the purposes of election and voter registration

[3] PILF "uses a state's voter roll and other voter registration and voting records to monitor, study, and evaluate that particular state's voter list maintenance activities and also those of other jurisdictions and states." Def. Resp. SMF (ECF No. 79), PageID # 811.

administration," along with certain other individuals or entities for delineated purposes. 21-A M.R.S.A. § 196-A(1).

On October 17, 2019, PILF sent a letter to the Secretary requesting an electronic copy of Maine's "statewide voter registration list" (the "Voter File")[4] pursuant to the Public Disclosure Provision. (ECF No. 55-1; see JSMF, Page ID #s 630-31.)[5] The Voter File is stored in Maine's central voter registration system. (Pl. Resp. SMF, PageID # 881); see 21-A M.R.S.A. § 196-A(1)(B). PILF acknowledged in its letter that it did not meet any of Maine's statutory criteria then in effect for access to the Voter File. (See ECF No. 55-1); see also 21-A M.R.S.A. § 196-A(1) (Supp. 2021) ("Access to data from the central voter registration system"), amended by P.L. 2021 ch. 310, §§ 1–2 (eff. Oct. 18, 2021). PILF also claimed that Maine's denial of access to the Voter File violated the Public Disclosure Provision. (See ECF No. 55-1.) After further communications with PILF, the Secretary ultimately concluded in early February 2020 that she did not have authority to release the Voter File to PILF. (See generally ECF Nos. 55-2–55-7; see also JSMF, PageID #s 630-31.) On February 19, 2020, PILF filed suit against the Secretary seeking declaratory and injunctive relief under the NVRA. (ECF No. 1.)

In June 2021, the Governor of Maine signed into law a new exception to the general confidentiality regime prohibiting disclosure of the Voter File ("Exception J"). See P.L. 2021, ch. 310 § 2. Under Exception J, an "individual or organization that is evaluating Maine's compliance

[4] The Voter File consists of the following information: "the voter's name, residence address, mailing address, year of birth, enrollment status, electoral districts, voter status, date of registration, date of change of the voter record if applicable, voter participation history, voter record number and any special designations indicating uniformed service voters, overseas voters or township voters." 21-A M.R.S.A. § 196-A(1)(B); see Pl. Resp. SMF, PageID # 881.

[5] The parties agree that ECF Nos. 55-1 through 55-7 represent several letters and emails they exchanged between October 2019 through early February 2020. See JSMF, PageID #s 630-31. Accordingly, the Court cites to those underlying exhibits.

with its voter list maintenance obligations may . . . purchase" the Voter File. 21-A M.R.S.A. § 196-A(1)(J). The amended statute also provides for privacy protections that limit the use and dissemination of voters' data. Specifically, anyone obtaining the Voter File under Exception J is forbidden to:

> (1) Sell, transfer to another person or use the voter information or any part of the information for any purpose that is not directly related to evaluating the State's compliance with its voter list maintenance obligations; or
>
> (2) 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.

Id. Under the amended statute, a violation of Exception J is "a civil violation for which a fine of not more than $1,000 may be adjudged." Id. § 196-A(5).[6] "[E]ach voter's information" that is publicly shared in violation of Exception J "constitutes a separate offense" under the statute. See id.

To obtain the Voter File, an applicant organization must complete a standardized form.[7] The form reminds an applicant seeking the Voter File under Exception J that the data is "[o]nly for use by an individual or organization to evaluate the State's compliance with NVRA list maintenance obligations."[8] It also requires an applicant to certify that it understands the

[6] Those who have previously violated 21-A M.R.S.A. §§ 196-A(1) or 196-A(4) face an increased fine threshold of $5,000 for any subsequent violation. See 21-A M.R.S.A § 196-A(5)(B).

[7] See Fact Sheet on Obtaining Data and Instructions for Completing a Request for Obtaining Data from Maine's CVR – October, 2021 Version, https://www.maine.gov/sos/cec/elec/data/2021-10%20CVR%20Data%20Request%20Form%20Facts%20and%20Instructions.doc (last visited March 28, 2023); see also JSMF, PageID # 631.

[8] See Request for Obtaining Data from Maine CVR – October 2021 Version, https://www.maine.gov/sos/cec/elec/data/2021-10%20Request%20Form%20for%20Obtaining%20Data%20from%20CVR.doc (last visited March 28, 2023); see also JSMF, PageID # 631.

information received from Maine's Central Voter Registration system "is subject to the restrictions on use and redistribution of data, as provided in 21-A MRSA, section 196-A."[9]

After these statutory changes took effect in October 2021, and with the Court's leave, PILF filed an Amended Complaint (ECF No. 55). The Amended Complaint alleges three separate violations of the NVRA: (1) denial of access to the Voter File (Count I); (2) impermissible restrictions on use of the Voter File (Count II); and (3) impermissible fines stemming from those restrictions (Count III). (Am. Compl. (ECF No. 55), PageID #s 507-10.) On March 4, 2022, the Court issued an order dismissing Count I on the basis that "no live controversy exist[ed] regarding access to the data PILF seeks" because "the newly created Exception J to the Maine Voter File disclosure statute" would allow PILF to "obtain without the Court's assistance information previously inaccessible to it." (Mot. to Dismiss Order (ECF No. 61), PageID # 592.) The Court also concluded that PILF's preemption-based challenges in Count I were "appropriately addressed under Counts II and Count III." (Id.) In evaluating Counts II and III, the Court determined that the Voter File falls within the ambit of the Public Disclosure Provision and is therefore subject to disclosure under the NVRA. (See id., PageID #s 595-96.)[10] The Court ultimately concluded that

[9] Request for Obtaining Data from Maine CVR, supra note 8.

[10] The Secretary asserts in her Motion for Summary Judgment that the Court should reconsider this conclusion because "the Court was limited to considering the allegations in the [Amended] [C]omplaint" and therefore "was not privy to certain additional facts now available in the summary judgment record." Def. Mot. (ECF No. 80), PageID # 853; see Def. Resp. SMF, PageID # 805. Those "categories of additional facts" are (1) "the highly attenuated relationship between the Voter File and the list-maintenance programs and activities conducted by the Secretary"; and (2) the Secretary's undertaking of "discrete initiatives over the years to conduct NVRA-approved maintenance of Maine's voter rolls." Def. Mot., PageID #s 853-54. According to the Secretary, "[t]hese material facts demonstrate that the Voter File is not . . . a record 'concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.'" Id., PageID # 854 (quoting 52 U.S.C. § 20507(i)(1)). The Court does not find cause to disturb its prior determination, which is consistent with those from several other courts. See, e.g., Illinois Conservative Union v. Illinois, No. 20 C 5542, 2021 WL 2206159, at *5 (N.D. Ill. June 1, 2021) (collecting cases concluding "that the NVRA's reference to 'records'

"resolution of the preemption issues raised by Counts II and II [] depend[ed] on the development of a fuller factual record, as well as on interpretation of the restrictions Maine's law actually imposes." (Id., PageID # 597.)[11] As such, it declined to dismiss Counts II and III. (See id.)

To date, PILF has not submitted a request form, or paid the requisite fee, for the Voter File. (See Pl. Resp. SMF, PageID #s 883-884; Flynn Aff. (ECF No. 77), PageID # 747.) The Secretary has not provided PILF with the Voter File. (JSMF, PageID # 631.)

III. DISCUSSION

Plaintiff moves for summary judgment on Counts II and III on the basis that the Public Disclosure Provision of the NVRA preempts Exception J's restrictions on the Voter File's use. (See generally Pl. Mot. (ECF No. 74).)[12] Defendant, in turn, moves for summary judgment on the basis that Exception J "does not conflict with the purposes of Congress in enacting the NVRA and thus is not preempted." (Def. Mot. (ECF No. 80), PageID # 827.) Because there is no genuine

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. . . includes voter list data"); Project Vote/Voting for Am., Inc. v. Long, 682 F.3d 331, 335-36 (4th Cir. 2012) (applications to register to vote are "records" under the Public Disclosure Provision).

[11] More specifically, the Court "acknowledge[d] uncertainty as to how Maine will enforce and interpret the privacy protections imbedded into Exception J." Mot. to Dismiss Order, PageID # 594. To date, it has remained unclear the extent to which Maine will enforce the privacy protections of Exception J. The parties have not identified, and the Court has not found, any decisions by Maine state courts regarding Exception J. As detailed below, however, the Secretary has shared her interpretation of Exception J and its privacy protections.

[12] To the extent that Plaintiff also "asks the Court to reconsider its ruling that [Plaintiff's] denial-of-access claim (Count I) is moot and enter judgment in [Plaintiff]'s favor," the Court declines this request. Pl. Reply (ECF No. 84), PageID # 875 (citation omitted). The Court previously dismissed Count I not only because "the newly created Exception J" allowed Plaintiff to obtain the Voter File (albeit, under certain conditions) but also because "Plaintiff's theory of 'functional' denial of access" of the Voter File was "a preemption-based challenge to the conditions." Order on Mot. to Dismiss, PageID # 592. The Court addresses herein those preemption-based challenges, which as it previously held, "are appropriately addressed under Counts II and III, where they are raised directly." Id. In the absence of any evidence that PILF made an actual request for access under Exception J, the Court sees no basis to reconsider Count I.

dispute of material fact,[13] the question before the Court is a legal one: does the NVRA preempt Exception J?[14]

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). "Preemption has three branches: 'express,' 'field,' and 'conflict.'" Maine Forest Prod. Council v. Cormier, 51 F.4th 1, 6 (1st Cir. 2022) (citation omitted). Obstacle preemption, which is an "offshoot of conflict preemption," "is implicated when 'the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (quoting Arizona v. United States, 567 U.S. 387, 399 (2012)).[15] In this case, Plaintiff "challenges the following [] restrictions and attached fines" as obstacles to the accomplishment of the NVRA's purposes:

> (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," (ECF No. 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").

(Pl. Mot., PageID # 643; see Pl. Reply (ECF No. 84), PageID # 863.)[16]

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[13] The Court acknowledges the parties' qualification or denial of certain portions of the opposing statements of material fact. See generally Def. Resp. SMF & Pl. Resp. SMF. However, the Court concludes that none of these factual disputes are material to the resolution of Plaintiff's remaining claims.

[14] The Court's determination as to whether the NVRA preempts Exception J also necessarily applies to the fines imposed by 21-A M.R.S.A. § 196-A(5) for a violation of Exception J. See Pl. Mot., PageID # 652; Def. Mot., PageID # 854.

[15] Because the parties focus their arguments solely on obstacle preemption, the Court follows their lead and does not discuss other preemption types.

[16] In her Motion for Summary Judgment, Defendant characterizes Plaintiff's preemption challenge as a "facial" one and therefore asserts that PILF "bears the burden to establish . . . that 'no set of circumstances exist under which the [Maine statute] would be valid.'" See Def. Mot., PageID # 836 (quoting NCTA—

Two principles govern the interpretation of preemption claims. "First, the purpose of Congress is the ultimate touchstone in every pre-emption case." Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). "Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," a presumption against preemption applies until rebutted by the "clear and manifest purpose of Congress." Id. (internal quotation marks and alterations omitted). As the Court previously explained, however, a "presumption against preemption does not apply in this case." (Mot. to Dismiss Order, PageID # 594); see Inter Tribal, 570 U.S. at 14 (concluding that "the presumption against pre-emption sometimes invoked in [] Supremacy Clause cases" does not apply to "Elections Clause legislation" such as the NVRA); U.S. Const., Art. I, § 4, cl. 1 (providing that states shall prescribe the times, places, and manner of congressional elections but that Congress "may at any time by [l]aw make or alter such [r]egulations").

To discern Congress's intent behind the NVRA, the Court "focus[es] first on the statutory language" and then the statute's "purpose, history, and the surrounding statutory scheme." Massachusetts Delivery Ass'n v. Coakley, 769 F.3d 11, 17 (1st Cir. 2014) (citation omitted); see Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990). As this Court previously recognized, the plain language of the Public Disclosure Provision requires the disclosure of statewide voter registration lists, including the Voter File at issue here. (See Order on Mot. to Dismiss, PageID #s 595-96); 52 U.S.C. § 20507(i)(1). "Although Section 8(i)(1) generally requires disclosure of applicable records, it creates exceptions 'to the extent that such records relate (1) to a declination

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The Internet & Television Ass'n v. Frey, 7 F.4th 1, 17 (1st Cir. 2021)). Plaintiff denies that it has brought a facial challenge and points to certain restrictions and fines in Exception J that it asserts are obstacles to achieving the NVRA's goals and Plaintiff's intended activities. See Pl. Reply, PageID #s 864-66. To the extent Plaintiff's Amended Complaint could be read as asserting a facial challenge, the Court construes its recent disavowal of such a facial challenge as a waiver.

to register to vote or (2) to the identity of a voter registration agency through which any particular voter is registered.'" Project Vote/Voting for Am., Inc. v. Long, 682 F.3d 331, 336 (4th Cir. 2012) (citation omitted). The Voter File does not fall within either of these two exceptions. The statutory language is also clear that Congress enacted the NVRA to: "increase the number of eligible citizens who register to vote" in federal elections, "enhance[] the participation of eligible citizens as voters" in those elections, "protect the integrity of the electoral process," and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b); see Husted, 138 S. Ct. at 1838 ("The [NVRA] has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls."). As this Court previously concluded, Congress furthered these purposes by "creat[ing] both the Public Disclosure Provision and a private enforcement mechanism available in the event of a state's violation of the Provision." (Mot. to Dismiss Order, PageID # 594 (citing 52 U.S.C. §§ 20507, 20510).)

Maine law restricts the use of information disclosable under the Public Disclosure Provision. More specifically, Exception J prohibits the use of the Voter File "for any purpose that is not directly related to evaluating the State's compliance with its voter list maintenance obligations." 21-A M.R.S.A. § 196-A(1)(J). Based on the plain meaning of the statutory language, the Court finds that Exception J would prohibit an organization such as Plaintiff from using the Voter File to evaluate *another* state's compliance with its voter list maintenance obligations[17] or

[17] Exception J, as well as the other portions of Maine's election statute, does not define "State." See generally 21-A M.R.S.A. §§ 1-1207. The Secretary maintains that Exception J's reference to "the State" "does not necessarily mean Maine specifically," as "confirm[ed]" by "Maine's equivalent of the Dictionary Act." Def. Mot., PageID # 849; see 1 M.R.S.A. § 72(21) ("'State,' used with reference to any organized portion of the United States, may mean a territory or the District of Columbia."). Even if Exception J refers to Maine specifically, the Secretary asserts, the "use of Maine's list to cross-reference voter data with other states' lists for evaluation purposes is closely related to the evaluation of Maine's own list" and is therefore permissible under Exception J's terms. Def. Mot., PageID # 850. The Court is not persuaded. First, the Court agrees with Plaintiff that 1 M.R.S.A. § 72(21) does not suggest that "State" as used therein refers to

from publicly releasing the Voter File's data. See id.; see also Est. of Joyce v. Com. Welding Co., 55 A.3d 411, 415 (Me. 2012) ("[W]e first look to the plain meaning of the statutory language, and 'construe that language to avoid absurd, illogical or inconsistent results.'" (citation omitted)). It would also arguably prohibit the use of the Voter File to enforce the NVRA.[18]

The Public Disclosure Provision's disclosure mandate, meanwhile, does not allow a state to impose these restrictions. See 52 U.S.C. § 20507(i)(1). Additionally, as noted previously, the Public Disclosure Provision furthers Congress's purposes of "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); see id. §§ 20507, 20510. The Court concludes that Exception J, by limiting the disclosure of information within the ambit of the Public Disclosure Provision, poses "sufficient

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any state; rather, it suggests that "state" may include a United States territory or the District of Columbia. See Pl. Reply, PageID # 870; see also 1 M.R.S.A. § 72. Second, if the Maine legislature intended to permit the use of the Voter File for the purpose of evaluating *another* state's voter list maintenance, it could have easily indicated as much in the statutory language. Rather, it chose to limit the statutory language to "the State," which – given its singular, capitalized form and its placement in a Maine statute – one would reasonably understand to refer to Maine specifically. The Secretary also has not pointed to any legislative history suggesting that the Maine legislature meant to broadly include all states in Exception J. Finally, a comparison of Exception J to other portions of the election statute supports this Court's conclusion that "the State" refers to Maine specifically. See, e.g., 21-A M.R.S.A. § 1205-A (dividing "[t]he State" into two congressional districts that consist of only Maine counties); see also Inter Tribal, 570 U.S. at 10 ("Words that can have more than one meaning are given content . . . by their surroundings." (citation omitted)); Brown v. Gardner, 513 U.S. 115, 118 (1994) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute."); Est. of Joyce v. Com. Welding Co., 55 A.3d 411, 415 (Me. 2012) ("[W]e first look to the plain meaning of the statutory language, and 'construe that language to avoid absurd, illogical or inconsistent results.'" (citation omitted)).

[18] The Secretary asserts that attempting to enforce the NVRA would necessarily "involve," or at least be directly related to, evaluating a state's list maintenance efforts. See Def. Mot., PageID #s 847-48. Accordingly, she concludes that Exception J would allow for the use of the Voter File to enforce the NVRA. Plaintiff, in turn, stresses the different meanings of "evaluate" and "enforce" and points to "basic rules of statutory interpretation requir[ing] that words in a statute be given" their ordinary meaning. Pl. Mot., PageID # 867 (citation omitted). To the extent that evaluation of Maine's Voter File would form the basis of a legal action to enforce the NVRA, the Court concludes such enforcement would likely be "directly related" to evaluation of Maine's voter list maintenance obligations. However, for the reasons set forth above, Exception J as written would prohibit using the Voter File to enforce the NVRA when the basis for such action was the evaluation (via Maine's Voter File) of *another* state's voter list maintenance obligations.

obstacle[s]" to the accomplishment and execution of Congress's purposes. See Cormier, 51 F.4th at 6 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." (quoting Crosby, 530 U.S. at 373)); see also Jud. Watch, Inc. v. Lamone, 399 F. Supp. 3d 425, 445 (D. Md. 2019) (concluding that state law's exclusion of voter organizations, which "have the resources and expertise that few individuals can marshal," from access to voter registration lists undermined the Public Disclosure Provision's efficacy). To the extent the Secretary asks this Court to interpret Exception J as consistent with the NVRA, the Court declines to "finely parse" the NVRA "for gaps or silences into which [the] state regulation might fit." Fish v. Kobach, 840 F.3d 710, 729 (10th Cir. 2016).[19] "If Congress intended to permit states to so alter or modify" the Public Disclosure Provision by limiting the disclosure of certain information, "it would have so indicated." Id.[20]

For similar reasons, the Court is not persuaded by the Secretary's argument that Plaintiff lacks standing to pursue its claims challenging the Use and Enforcement Bans. The Secretary maintains that, because she interprets Exception J "as permitting cross-state evaluation of voter lists and enforcement of list maintenance requirements," PILF cannot show an "injury in fact" and therefore lacks standing. (Def. Mot., PageID # 851; see id., PageID # 849.) It is undisputed that Plaintiff regularly uses "records and data complied through [federal and state] open records laws"

[19] In support of her request that the Court apply the avoidance canon and construe Exception J as consistent with the Public Disclosure Provision, Defendant cites to (inter alia) Judge Woodcock's decision in Pharm. Care Mgmt. Ass'n v. Rowe, 307 F. Supp. 2d 164 (D. Me. 2004). See Def. Mot., PageID #s 847, 850; Def. Reply (ECF No. 86), PageID #s 898-99. In that case, the presumption against preemption applied and did so "with special force" because the court was evaluating a state statute that "regulate[d] an area of public health." Pharm. Care, 307 F. Supp. 2d at 172. Additionally, the avoidance canon applied "more particularly" in that case because the court was evaluating a motion for preliminary injunction. Id. Here, in contrast, the presumption against preemption does not apply at all. See Mot. to Dismiss Order, PageID # 594; Inter Tribal, 570 U.S. at 14-15. That case is therefore inapposite to the case at bar.

[20] Indeed, as noted above, Congress provided two exceptions to the Public Disclosure Provision's broad mandate, neither of which apply here. It is not within this Court's purview to manufacture additional exceptions.

to evaluate how various states maintain their voter lists and to "produce and disseminate reports, articles, blog and social media posts, and newsletters in order to advance the public education aspect of its organizational mission." (Def. Resp. SMF, PageID # 806.) Plaintiff uses a state's voter roll to not only evaluate "that particular state's voter list maintenance activities [but] also those of other jurisdictions and states." (Id., PageID # 811.) It is therefore likely that Plaintiff would use Maine's Voter File to, inter alia, evaluate other states' voter-list maintenance and would publicly disseminate the information therein as part of its educational efforts. As discussed above, this conduct would contravene Maine law. Accordingly, it is "highly probable" that Plaintiff "will at some point find itself [] in violation of a statute that takes direct aim at its customary conduct." New Hampshire Right to Life Pol. Action Comm. v. Gardner, 99 F.3d 8, 16 (1st Cir. 1996). Plaintiff's challenges are therefore "entirely appropriate unless the state can convincingly demonstrate that the statute is moribund or that it simply will not be enforced." Id. Here, Maine has done neither.

The Court recognizes that the record here includes an affidavit from the Deputy Secretary of State affirming that "the Elections Division would not view" the use of the Voter List "data to evaluate other states' voters list maintenance" or in "judicial proceedings relating to list maintenance or the integrity of voter lists to be a violation of" Exception J. (Flynn Aff., PageID #s 747-48.) However, these representations, as Plaintiff notes, "do not have the force of law and are not binding on [her] or future office holders." (Pl. Reply, PageID # 870.)[21] Thus, Plaintiff has

[21] Moreover, as Plaintiff notes, violations of Maine's election laws are investigated and prosecuted by the "Attorney General (or district attorney), not the Secretary." Pl. Reply, PageID # 871. To this end, the Secretary maintains that the Office of Attorney General, which "represents the Secretary in this matter," "is fully in accord with the Secretary's interpretation" of Exception J. Def. Reply, PageID # 900. However, even "an attorney general's non-binding promise not to prosecute does not eliminate plaintiffs' standing" because "the Attorney General or his successors might change their mind." Rhode Island Med. Soc. v. Whitehouse, 66 F. Supp. 2d 288, 303 (D.R.I. 1999); see Stenberg v. Carhart, 530 U.S. 914, 940 (2000)

not been provided meaningful assurances – such as "an affidavit foreswearing prosecution—to mitigate [its] fears." Universal Life Church Monastery Storehouse v. Nabors, 35 F.4th 1021, 1035 (6th Cir. 2022); see Gardner, 99 F.3d at 17 ("[D]efendants have not only refused to disavow [the statute], but their defense of it indicates that they will some day enforce it."). For these reasons, the Court agrees that Plaintiff "continues to face a real and imminent threat of harm sufficient to challenge the Enforcement Ban and the Use Ban." (Pl. Reply, PageID # 872); see Fed. Election Comm'n v. Akins, 524 U.S. 11, 21 (1998) ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.").

The Court also acknowledges Defendant's privacy concerns related to the disclosure of sensitive information contained in the Voter Roll. (See, e.g., Def. Mot., PageID # 836.) Defendant maintains that Exception J, by restricting the use and dissemination of voter information, "provides assurance to Mainers that registering to vote will not expose their personal data to [] inappropriate uses." (See id., PageID # 840.) Consequently, according to Defendant, "Exception J is [] quite literally an effort by Maine to do precisely what Congress bade it to do: 'implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office.'" (Id. (quoting 52 U.S.C. § 20501(b)(2)).) However, "[e]ven state law that 'attempts to achieve one of the same goals as federal law' may be preempted when 'it involves a conflict in the method' of execution." Cormier, 51 F.4th at 11 (quoting Arizona, 567 U.S. at 399). In the Court's view, Maine law poses such a conflict. "The plain meaning of the NVRA's disclosure requirement is that disclosure of completed voter registration applications containing [information such as] the address, birth date, and signature of applicants includes disclosure of that information." Project

("[O]ur precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities.'" (citation omitted)).

Vote/Voting for Am., Inc. v. Long, 889 F. Supp. 2d 778, 781 (E.D. Va. 2012).[22] While the Court recognizes that the Public Disclosure Provision "may conceivably inhibit voter registration in some instances" by "requiring public disclosure of personal information," "this potential shortcoming must be balanced against the many benefits of public disclosure." Project Vote, 682 F.3d at 339; see, e.g., Pub. Int. Legal Found., Inc. v. Matthews, 589 F. Supp. 3d 932, 942 (C.D. Ill. 2022) (concluding that a state's "interest in protecting the privacy of its citizens is not so great as to permit noncompliance with the Public Disclosure Provision"), clarified on denial of reconsideration, No. 20-CV-3190, 2022 WL 1174099 (C.D. Ill. Apr. 20, 2022). "It is 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. Moreover, the Court echoes the following reasoning by the Fourth Circuit:

> It is not the province of this court . . . to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting NVRA Section 8(i)(1), which plainly requires disclosure of completed voter registration applications. Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections.

Id. Thus, the Court cannot ignore the plain language of the NVRA and Congress's purposes to safeguard Exception J and its privacy protections. In sum, the Court concludes that the NVRA preempts Exception J.

[22] Additionally, the NVRA requires the Election Assistance Commission, "in consultation with the chief election officers of the States, [to] develop a mail voter registration application form" for federal elections. 52 U.S.C. § 20508(a)(2). That registration form, the NVRA mandates, must be accepted and used by every state. Id. § 20505(a)(1); see Inter Tribal, 570 U.S. at 5. The form requires applicants to provide, inter alia, their full name, residential address, mailing address, and birth date. See 11 C.F.R. §§ 9428.3, 9428.4; see also Gonzalez v. Arizona, 677 F.3d 383, 395-96 (9th Cir. 2012) (discussing contents of the form). There is therefore "no question that Congress intended that such information be disclosed under the statute." Project Vote, 889 F. Supp. 2d at 781.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion for Summary Judgment (ECF No. 74) and DENIES Defendant's Motion for Summary Judgment (ECF No. 81).

In accordance with this ruling, the Court concludes that Plaintiff is entitled to a declaratory judgment in its favor on Counts II and III of its Amended Complaint. The Court accordingly finds that the Public Disclosure Provision of the NVRA, 52 U.S.C. § 20507(i)(1), preempts the restrictions of Exception J, 21-A M.R.S.A. § 196-A(1)(J). The Court also finds that the Public Disclosure Provision preempts the fines imposed by 21-A M.R.S.A. § 196-A(5) for a violation of Exception J.

Additionally, the Court acknowledges that, beyond its request for declaratory relief, Plaintiff's Amended Complaint also seeks permanent injunctive relief. (See Am. Compl., PageID # 511.) However, nothing in the parties' briefing addresses this request. Moreover, nothing in the factual record establishes that Plaintiff satisfies the four-factor test for a permanent injunction. See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Rather, the record suggests that Defendant would grant Plaintiff's request for the Voter File if and when it files the requisite form and pays the applicable fee. (See Flynn Decl., PageID #s 747-49.) To the extent that Plaintiff retains concern that its request for the Voter File would be contingent on accepting the limitations on use and dissemination contained in Exception J, the Court is satisfied that its judgment declaring those limitations preempted is a sufficient remedy on the record presented. See Greene v. Ablon, 794 F.3d 133, 157 (1st Cir. 2015) ("An injunction should not be granted where 'a less drastic remedy' will suffice." (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-66 (2010))). Thus, in an exercise of its discretion, the Court declines to grant Plaintiff permanent injunctive relief in connection with this grant of summary judgment.

Finally, to the extent that the Amended Complaint additionally seeks an award of attorney's fees and expenses under 52 U.S.C. § 20510(c), Plaintiff may file a motion in accordance with District of Maine Local Rule 54.2.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 28th day of March, 2023.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

ORDER ON MOTION TO DISMISS AMENDED COMPLAINT

Before the Court is Defendant Secretary Shenna Bellows' Motion to Dismiss (ECF No. 58). Having considered the Motion and related filings (ECF Nos. 59 & 60), the Court GRANTS IN PART and DENIES IN PART the Motion.

I. LEGAL STANDARD

The pending Motion invokes two separate bases for dismissal under Federal Rule of Civil Procedure 12(b): lack of subject matter jurisdiction due to mootness and failure to state a claim. See Fed. R. Civ. P. 12(b)(1) & (6).

Generally, a federal court is obligated to ensure the existence of subject matter jurisdiction before considering the merits of any complaint. See, e.g., United States v. University of Mass., Worcester, 812 F.3d 35, 44 (1st Cir. 2016). Plaintiffs generally bear the burden of demonstrating subject matter jurisdiction. See, e.g., Woo v. Spackman, 988 F.3d 47, 53 (1st Cir. 2021). Faced with a motion to dismiss under Rule 12(b)(1), the Court applies the same "plausibility standard applicable under Rule 12(b)(6)" to the operative complaint. Hochendoner v. Genzyme Corp., 823

F.3d 724, 730 (1st Cir. 2016). However, the Court may also consider additional materials submitted by either side that allow it to resolve the jurisdictional challenge. See Valentin v. Hospital Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001) (noting that "plaintiff's well-pleaded factual allegations . . . [may be] augmented by an explanatory affidavit or other repository of uncontested facts").

Once the Court determines it has jurisdiction over the asserted claims, it may consider whether the operative complaint contains sufficient factual matter to "'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "In evaluating whether a complaint states a plausible claim, [the Court] 'perform[s] a two-step analysis.'" Saldivar v. Racine, 818 F.3d 14, 18 (1st Cir. 2016) (quoting Cardigan Mountain Sch. v. New Hampshire Ins. Co., 787 F.3d 82, 84 (1st Cir. 2015)). First, "the court must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. University of Puerto Rico, 676 F.3d 220, 224 (1st Cir. 2012) (citing Iqbal, 556 U.S. at 678).

Second, the Court "must determine whether the 'factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Id., 676 F.3d at 224 (quoting Iqbal, 556 U.S. at 678). "This standard is 'not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.'" Saldivar, 818 F.3d at 18 (quoting Iqbal, 556 U.S. at 678); see also Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth., 4 F.4th 63, 70 (1st Cir. 2021) (same). "Although evaluating the plausibility of a legal claim requires the reviewing court to draw on its judicial experience and common sense, the court may not disregard properly pled factual allegations, even if it strikes a savvy judge that actual proof of those facts is improbable." Ocasio-Hernández v. Fortuño-Burset,

640 F.3d 1, 12 (1st Cir. 2011) (internal citations and quotation marks omitted). Rather, "[t]he relevant inquiry focuses on the reasonableness of the inference of liability" drawn from the facts. Id. at 13.

In assessing whether a complaint adequately states a claim, the Court considers the "facts and documents that are part of or incorporated into the complaint." United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortuño, 633 F.3d 37, 39 (1st Cir. 2011) (internal quotation marks omitted). But, the Court may also "supplement those facts with facts 'gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.'" González v. Vélez, 864 F.3d 45, 48 (1st Cir. 2017) (quoting Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011)).

II. BACKGROUND

Plaintiff Public Interest Legal Foundation ("PILF") is an Indiana non-profit organization that "seeks to promote the integrity of elections nationwide through research, education, remedial programs, and litigation." (Am. Compl. (ECF No. 55), PageID # 497.) On October 17, 2019, PILF wrote to the then-Secretary of State of Maine. (See Pl. Ex. A (ECF No. 55-1).) PILF's letter informed the Secretary that it sought an electronic copy of Maine's "statewide voter registration list" ("Voter File"),[1] but acknowledged that it did not meet any of the state statutory criteria then in effect for access to the Voter File. (See id.); see also 21-A M.R.S.A. § 196-A(1) (Supp. 2021) ("Access to data from the central voter registration system"), amended by P.L. 2021 ch. 310, §§ 1–

[1] Subsequent email communication between the parties clarified that PILF's use of the term "statewide voter registration list" corresponded to what Maine calls the "party/campaign use voter file." See Pl. Exs. F & G (ECF Nos. 55-6 & 55-7, PageID #s 522–24). This information, which the Court refers to as the "Voter File," consists of the following information: "the voter's name, residence address, mailing address, year of birth, enrollment status, electoral districts, voter status, date of registration, date of change of the voter record if applicable, voter participation history, voter record number and any special designations indicating uniformed service voters, overseas voters or township voters." 21-A M.R.S.A. § 196-A(1)(B). The Voter File is stored in Maine's "central voter registration system." See id.

2 (eff. Oct. 18, 2021). PILF claimed that Maine's denial of access to the Voter File violated the Public Disclosure Provision of the National Voter Registration Act ("NVRA"), 52 U.S.C. §§ 20501–20511. See 52 U.S.C. § 20507(i). After exchanging several subsequent communications with PILF seeking to accommodate the organization's needs, the Secretary ultimately concluded in February 2020 that she did not have authority to release the Voter File to PILF. (See Pl. Exs. B–G (ECF Nos. 55-2–55-7).) Shortly thereafter, on February 19, 2020, PILF filed suit against the Secretary seeking declaratory and injunctive relief under the NVRA.[2] Last spring, the parties filed Cross-Motions for Summary Judgment (ECF Nos. 35 & 39).

However, while the Cross-Motions were under advisement, the Maine Legislature added a new exception, "Exception J," to the general confidentiality regime prohibiting disclosure of the Voter File. See P.L. 2021, ch. 310 § 2. Under Exception J, an "individual or organization that is evaluating Maine's compliance with its voter list maintenance obligations may . . . purchase" the Voter File. 21-A M.R.S.A. § 196-A(1)(J). The amended statute also provides for "privacy protections" that limit use and dissemination of voters' data. (Def. Mot. (ECF No. 58), PageID # 532.) Specifically, anyone obtaining the Voter File under Exception J is forbidden to

> (1) Sell, transfer to another person or use the voter information or any part of the information for any purpose that is not directly related to evaluating the State's compliance with its voter list maintenance obligations; or
>
> (2) 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.A. § 196-A(1)(J). To obtain the Voter File, an applicant organization must complete a standardized form. (See Pl. Response Ex. A (ECF No. 59-1).) The form reminds applicants

[2] Shenna Bellows, the current Secretary of State of Maine, has been substituted for former Secretary Matthew Dunlap pursuant to Federal Rule of Civil Procedure 25(d).

seeking the Voter File under Exception J that the data is "[o]nly for use by an individual or organization to evaluate the State's compliance with NVRA list maintenance obligations." (Id., PageID # 576.) The form also requires applicants to certify the following: "I, the undersigned requestor of Information from Maine's Central Voter Registration (CVR) system, understand that the information I receive from the CVR is subject to the restrictions on use and redistribution of data, as provided in 21-A MRSA, section 196-A." (Id., PageID # 577.)

The Court directed PILF to seek leave to amend its Complaint after the statutory changes took effect in October 2021, and denied the Cross-Motions for Summary Judgment as moot. (See 08/31/21 Proc. Order & Rep. of Conf. (ECF No. 50).) PILF filed an Amended Complaint, which the Secretary timely moved to dismiss. The Amended Complaint alleges three separate violations of the NVRA: (1) denial of access to the Voter File (Count I); (2) impermissible restrictions on use of the Voter File data (Count II); and (3) impermissible fines stemming from those restrictions (Count III).

III. DISCUSSION

A. Count I

Defendant seeks dismissal of Count I on the ground that the intervening change in Maine law renders it moot under Federal Rule of Civil Procedure 12(b)(1), or alternatively that Plaintiff has failed to state a plausible claim for relief under Rule 12(b)(6). The Court addresses Defendant's mootness argument first because it implicates the Court's subject matter jurisdiction. See Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 71–72 (2013); United States v. Millenium Labs., Inc., 923 F.3d 240, 248 (1st Cir. 2019).

Count I of the Amended Complaint alleges that Plaintiff has been denied access to information that must be publicly available under the NVRA's Public Disclosure Provision. The Public Disclosure Provision states as follows:

> 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). Count I alleges not that Plaintiff cannot obtain the Voter File under any circumstances, but rather that to do so it must agree to Maine's statutory restrictions on use and dissemination, which it claims are preempted by the NVRA. In its own words, Plaintiff claims that Maine's use of its request form for the Voter File amounts to a "functional[]" denial of the Voter File in violation of the Public Disclosure Provision. (Am. Compl., PageID # 507.) Defendant asserts this claim is moot, arguing that the Voter File is "now available to PILF" if it "completes and submits the request form." (Def. Mot., PageID # 534.)

"At all stages of litigation, a plaintiff must maintain a personal interest in the dispute. The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings." Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021). "A case becomes moot—and therefore no longer a Case or Controversy for the purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (internal quotation marks omitted). Where a challenged state law is amended during the pendency of litigation, the amendment may moot the case by affording a plaintiff the remedy she seeks. See Town of Portsmouth v. Lewis, 813 F.3d 54, 58–59 (1st Cir. 2016) (affirming

dismissal of a suit for declaratory and injunctive relief as moot where a change in state law led to a cessation of the conduct complained of). Where a plaintiff alleges that an amended statute continues to violate his legal rights, however, it may be appropriate to continue the litigation under amended pleadings. Cf. New York State Rifle & Pistol Ass'n, Inc. v. City of N.Y., 140 S. Ct. 1525, 1526–27 (2020).

Through the newly created Exception J to the Maine Voter File disclosure statute, Plaintiff can now obtain without the Court's assistance information previously inaccessible to it. Its claim that Defendant is violating the Public Disclosure Provision, which requires a state to "make available" certain election registration records, is thus moot. 52 U.S.C. § 20507(i)(1); see Horizon Bank & Trust Co. v. Massachusetts, 391 F.3d 48, 53 (1st Cir. 2004) ("[A] case not moot at the outset can become moot because of a change in the fact situation underlying the dispute, making relief now pointless."). In short, no live controversy exists regarding access to the data PILF seeks, and the Court therefore concludes Count I is subject to dismissal. See Bayley's Campground, Inc. v. Mills, 985 F.3d 153, 157 (1st Cir. 2021).

The Court alternatively concludes that Plaintiff's theory of "functional" denial of access does not state a plausible claim for relief and thus Count I is subject to dismissal under Rule 12(b)(6). The Public Disclosure Provision simply requires that a state make covered records available. See 52 U.S.C. § 20507(i)(1). Plaintiff does not allege that Maine's new regime withholds covered records from it, and so the Public Disclosure Provision does not entitle it to relief. The Court views Plaintiff's "functional denial" argument instead as a preemption-based challenge to the conditions. Plaintiff's arguments for preemption are appropriately addressed under Counts II and III, where they are raised directly.

B. Counts II & III

Defendant further asserts that Counts II and III of the Amended Complaint fail to state plausible claims for relief.[3] In Count II, Plaintiff claims an NVRA violation based on the use restrictions imposed by 21-A M.R.S.A. § 196-A(1)(J). In Count III, Plaintiff claims an NVRA violation based on the fines imposed by 21-A M.R.S.A. § 196-A(5). At the heart of each count is an assertion that the NVRA preempts the conditions Maine imposes on the use and dissemination of its Voter File.[4] More specifically, Plaintiff claims that Maine's restrictions on use and dissemination of its Voter File "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the NVRA. Capron v. Office of Att'y Gen. of Mass., 944 F.3d 9, 26 (1st Cir. 2019) (internal quotation marks omitted).

Two principles govern claims of preemption, including obstacle preemption. "First, the purpose of Congress is the ultimate touchstone in every pre-emption case." Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). "Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," a presumption against preemption applies until rebutted by the "clear and manifest purpose of Congress." Id. (internal quotation marks and alterations omitted). However, this presumption does not apply to legislation passed pursuant to the Elections Clause "[b]ecause the power the Elections Clause confers is none other than the power to pre-empt," and thus "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's

[3] Defendant also cursorily adverts to an argument in its Reply that Plaintiff's claims are unripe because Plaintiff has not yet applied for the Voter File under Exception J. The Court notes that undeveloped arguments are ordinarily not entertained. See, e.g., United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). Furthermore, the Court is satisfied of the ripeness of Counts II and III.

[4] Because neither party has argued otherwise, the Court assumes for present purposes that Plaintiff's preemption claims fit within the scope of the private right of action conferred by the NVRA at 52 U.S.C. § 20510(b)(1) ("A person who is aggrieved by a violation of [the NVRA]" is entitled to bring suit, provided certain notice requirements, not contested here, are met.).

pre-emptive intent." Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 14 (2013). Because the NVRA is such a law, the presumption against preemption does not apply in this case. See id. at 13–14.

In support of its claim that Maine's restrictions on use and dissemination of the Voter File stand as obstacles to the NVRA, Plaintiff points again to the NVRA's Public Disclosure Provision. According to Plaintiff's theory, the Public Disclosure Provision "'conveys Congress's intention that the public should be monitoring the state of the voter files and the adequacy of election officials' list maintenance programs.'" (Am. Compl., PageID # 500 (quoting Bellitto v. Snipes, No. 0:16-cv-61474-BB, 2018 U.S. Dist. LEXIS 103617, at *12–13 (S.D. Fla. Mar. 30, 2018)) (internal alteration omitted).) By limiting Plaintiff's ability to use Maine's Voter File to evaluate other states' compliance with their respective NVRA obligations and to release all or portions of the Voter File publicly, Plaintiff claims, Maine's law stands as an obstacle to the achievement of the purposes of the NVRA.[5] (See id., PageID # 509; Pl. Response (ECF No. 59), PageID # 571.)

For purposes of the pending Motion, both sides agree that the Court must first determine whether the Voter File is covered by the Public Disclosure Provision. (See Def. Mot., PageID #s 536–41; Pl. Response, PageID #s 557–66.) Via the NVRA, Congress sought "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. §§ 20501(b)(3) & (4). To further these purposes, Congress created both the Public Disclosure Provision and a private enforcement mechanism available in the event of a state's violation of the Provision. See id. §§ 20507 & 20510; see also Judicial Watch, Inc. v.

[5] While the Court accepts this claim as a well-pled allegation for purposes of the present motion, the Court also acknowledges uncertainty as to how Maine will enforce and interpret the privacy protections imbedded into Exception J. See 21-A M.R.S.A. §§ 196-A(1)(J)(1) & (2). Ultimately, a capacious interpretation of the permissible uses under this amended language may include all of Plaintiff's evaluation activities and obviate the concerns animating Counts II and III. However, in the absence of a more developed factual record, the Court cannot presently conclude as a matter of law that the language of Exception J does not limit Plaintiff's ability to use Maine's Voter File to evaluate NVRA compliance by other states.

Griswold, --- F. Supp. 3d ---, 2021 WL 3631309, at *9 (D. Colo. Aug. 16, 2021). If Congress did not require that a state make its Voter File publicly available by including the Voter File within the scope of the NVRA's Public Disclosure Provision, it would follow that Congress did not intend the NVRA to affect a state's ability to withhold the Voter File. Cf. Consumer Data Indus. Ass'n v. Frey, --- F.4th ---, 2022 WL 405956, at *5 (1st Cir. Feb. 10, 2022) ("A legislature 'says in a statute what it means and means in a statute what it says there.'") (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)). And, because preemption is ultimately a function of Congress' intent, see Wyeth, 555 U.S. at 565, a state law regulating disclosure of a record not falling under the Public Disclosure Provision cannot plausibly be preempted by the NVRA.

Faced with the need to decide the issue, the Court concludes that the Voter File is a "record[] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" within the meaning of the Public Disclosure Provision and thus is subject to disclosure under the NVRA. 52 U.S.C. § 20507(i)(1). In making this determination, the Court finds persuasive and adopts the relevant reasoning of the Fourth Circuit and a federal district court in Maryland. See Project Vote/Voting for America v. Long, 682 F.3d 331, 335–36 (4th Cir. 2012); Judicial Watch, Inc. v. Lamone, 399 F. Supp. 3d 425, 437–38 (D. Md. 2019).

When interpreting the Public Disclosure Provision, like any other 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). The Voter File is a compilation of voter registration applications. See 21-A M.R.S.A. §§ 122(1) & 196-A(1)(B) (listing information contained in the Voter File); Lamone, 399 F. Supp. 3d at 440. When a state registrar reviews voter applications and enters information from those applications into the "central

voter registration system" from which the Voter File is produced, she engages in a "program" or "activity." See Project Vote, 682 F.3d at 335. "Moreover, the 'program' and 'activity' of evaluating voter registration applications is plainly 'conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.' . . . It is unclear what other purpose it would serve." Id. Finally, the Voter File is a "record[] concerning the implementation of" such a "program[] and activit[y]" because it represents the end result of the entry of voter registration applications, as described above. 52 U.S.C. § 20507(i)(1); see Project Vote, 682 F.3d at 335–36.

Having concluded that the Voter File falls within the ambit of the NVRA's Public Disclosure Provision, the Court concludes that Plaintiff has pleaded sufficient facts that, when taken as true, establish a plausible claim of obstacle preemption. See Lamone, 399 F. Supp. 3d at 445 (finding that a state law restricting voter file access to an in-state resident was obstacle preempted by the NVRA because the law excluded nationwide enforcement by excluding organizations with "resources and expertise that few individuals can marshal."). Plaintiff alleges that it seeks to use Maine's Voter File to audit other states' compliance with their NVRA obligations, but that the conditions imposed by Maine statute prevent it from doing so. (See Am. Compl., PageID #s 503–05 & 509–10.) The NVRA imposes obligations on all states. See 52 U.S.C. § 20502(4). PILF is an organization that operates nationwide, using information obtained from various states. (See Am. Compl., PageID # 497.) It is "plausible, not . . . merely conceivable," that Plaintiff's proposed activities further the NVRA's goals of "protect[ing] the integrity of the electoral process; and . . . ensur[ing] that accurate and current voter registration rolls are maintained." Ocasio-Hernández, 640 F.3d at 12; 52 U.S.C. §§ 20501(b)(3), (4). It is also plausibly alleged that Maine's disclosure law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the NVRA because it may inhibit Plaintiff from

comparing one state's data to another or from releasing that data publicly. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); (see also Pl. Response, PageID #571.).

Ultimate resolution of the preemption issues raised by Counts II and III will depend on the development of a fuller factual record, as well as on interpretation of the restrictions Maine's law actually imposes. Nevertheless, at this stage—particularly given that the NVRA is not subject to the presumption against preemption, see Inter Tribal Council of Ariz., 570 U.S. at 14—Counts II and III plausibly allege a violation of the NVRA. Accordingly, Counts II and III survive Plaintiff's request for dismissal.

IV. CONCLUSION

For the reasons stated, the Court hereby GRANTS Defendant's Motion to Dismiss (ECF No. 58) as to Count I, but DENIES the Motion as to Counts II and III.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 4th day of March, 2022.

§196-A. Use and distribution of central voter registration system information

1. Access to data from the central voter registration system. For the purposes of Title 1, section 402, information contained electronically in the central voter registration system and any information or reports generated by the system are confidential and may be accessed only by municipal and state election officials for the purposes of election and voter registration administration, and by others only as provided in this section.

A. An individual voter may obtain any information contained in that voter's record within the central voter registration system either from the registrar in the voter's municipality of residence or from the Secretary of State. The individual voter information must be made available to that voter upon request and free of charge. The Secretary of State may design a report to facilitate providing information to an individual voter. [PL 2009, c. 564, §8 (NEW).]

B. A political party, or an individual or organization engaged in so-called "get out the vote" efforts directly related to a campaign or other activities directly related to a campaign, or an individual who has been elected or appointed to and is currently serving in a municipal, county, state or federal office, may purchase a list or report of certain voter information from the central voter registration system by making a request to the Secretary of State or to a registrar if the information requested concerns voters in that municipality. The Secretary of State or the registrar shall make available the following voter record information, subject to the fees set forth in subsection 2: the voter's name, residence address, mailing address, year of birth, enrollment status, electoral districts, voter status, date of registration, date of change of the voter record if applicable, voter participation history, voter record number and any special designations indicating uniformed service voters, overseas voters or township voters. A person obtaining, either directly or indirectly, information from the central voter registration system under this paragraph may not:

(1) Sell, transfer to another person or use the voter information or any part of the voter information for any purpose that is not directly related to activities of a political party, "get out the vote" efforts directly related to a campaign or other activities directly related to a campaign; or

(2) 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.

This paragraph does not prohibit a political party, party committee, candidate committee, political action committee or any other organization that purchased voter information from the central voter registration system from providing access to such information to its members, volunteers or employees for purposes directly related to party activities, "get out the vote" efforts or a campaign. For purposes of this paragraph, "campaign" has the same meaning as in section 1052, subsection 1. [PL 2021, c. 310, §1 (AMD).]

C. The registrar shall make available, in electronic form and free of charge, upon the request of any person authorized under section 312 to obtain a municipal caucus list, the following voter record information for each voter in the municipality: the voter's name, residence address, mailing address, enrollment status, electoral districts, voter status, voter record number and any special designation indicating whether the voter is a uniformed service voter, overseas voter or township voter. The Secretary of State also shall make available the statewide caucus list, in electronic form and free of charge, to the state committee of each political party. [PL 2009, c. 564, §8 (NEW).]

D. A municipal clerk or registrar shall make available to any person upon request and free of charge an electronic list of voters who requested or were furnished absentee ballots for their municipality for a specified election. The Secretary of State may make available free of charge the

statewide absentee voter list in electronic form. The electronic list must include the information provided in section 753-B, subsection 6, paragraph A, except that the voter's record number must be provided instead of the voter's name and residence address. In addition, a municipal clerk or registrar shall make available upon request, subject to the fees set forth in subsection 2, paragraph A, the printed list, created and maintained pursuant to section 753-B, of voters who requested or were furnished absentee ballots. [PL 2009, c. 564, §8 (NEW).]

E. The Secretary of State or a registrar may make available, upon the request of any other governmental or quasi-governmental entity, certain voter information for that entity's authorized use only. The following information may be provided in electronic form and free of charge: the voter's name, year of birth, residence address, mailing address, electoral districts, voter status, date of registration or date of change of the voter record if applicable, voter record number and any special designations indicating uniformed service voters, overseas voters or township voters. Data made available under this paragraph may not be used for solicitation or for purposes other than the governmental or quasi-governmental entity's authorized activities and may not be redistributed.

Authorized uses of the data by the Legislature include providing voter information to a Legislator for purposes of communicating with the Legislator's constituents and conducting legislative business. [PL 2011, c. 534, §11 (AMD).]

F. The Secretary of State shall make available to any person upon request and free of charge the following voter record information in electronic form: either the voter's first name or last name, but not both names in the same report; year of birth; enrollment status; electoral districts to include congressional district and county only; voter status; date of registration or date of change of the voter record if applicable; date of the last statewide election in which the voter voted; and any special designations indicating uniformed service voters, overseas voters or township voters. The Secretary of State or the registrar also may make available to any person upon request and free of charge any report or statistical information that does not contain the names, dates of birth, voter record numbers or addresses of individual voters. [PL 2009, c. 564, §8 (NEW).]

G. The Secretary of State or a registrar shall make available free of charge any information pertaining to individual voters, other than participants in the Address Confidentiality Program established in Title 5, section 90-B, that is contained in the central voter registration system to a law enforcement officer or law enforcement agency that makes a written request to use the information for a bona fide law enforcement purpose or to a person identified by a court order if directed by that order. Information pertaining to individual voters who are Address Confidentiality Program participants that is contained in the central voter registration system may be made available for inspection to a law enforcement agency that is authorized by the Secretary of State pursuant to Title 5, section 90-B to obtain Address Confidentiality Program information. Data made available under this paragraph may not be used for purposes other than law enforcement or as directed in the court order. [PL 2009, c. 564, §8 (NEW).]

H. When responding to a request about a specific voter registered in a specific municipality, the registrar of that municipality or the Secretary of State may use information contained in the central voter registration system to provide the registration status, enrollment status and electoral districts for that voter. [PL 2009, c. 564, §8 (NEW).]

I. The Secretary of State shall make available free of charge to the federal or state court system the voter registration information for voters, other than participants in the Address Confidentiality Program established in Title 5, section 90-B, statewide or by district as requested for the purpose of jury selection or other bona fide court purposes. [PL 2013, c. 131, §10 (NEW).]

J. An individual or organization that is evaluating the State's compliance with its voter list maintenance obligations may, consistent with the National Voter Registration Act of 1993, 52 United States Code, Section 20507(i) (2021), purchase a list or report of the voter information

described in paragraph B from the central voter registration system by making a request to the Secretary of State and paying the fee set forth in subsection 2. A person obtaining, either directly or indirectly, voter information from the central voter registration system under this paragraph may not:

(1) Sell, transfer to another person or use the voter information or any part of the information for any purpose that is not directly related to evaluating the State's compliance with its voter list maintenance obligations; or

(2) 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. [PL 2021, c. 310, §2 (NEW).]

[PL 2021, c. 310, §§1, 2 (AMD).]

2. Fees. For the purpose of calculating fees pursuant to this section, a record includes the information on one individual voter. Fees paid to the Secretary of State must be deposited into a dedicated fund for the purpose of offsetting the cost of providing the information and maintaining the central voter registration system and other authorized costs relating to compliance with the federal Help America Vote Act of 2002, Public Law 107-252, 116 Stat. 1666. A municipality may keep the fees paid to the municipality. The fees for information provided pursuant to this section are as follows:

A. The fee for information provided in printed form is $1 for the first page and 25¢ per page for all additional pages, except that the fee for additional pages of mailing labels is 75¢ per page; and [PL 2009, c. 564, §8 (NEW).]

B. The fee for information provided in electronic form is based on the number of records requested. The fee entitles the requestor to receive the initial electronic report or file and, upon request, up to 11 updates free of charge during the subsequent 12-month period, except that no more than one free update may be requested during any 30-day period. The fee schedule is as follows:

(1) For 900,001 or more voter records, $2,200;

(2) For 600,001 to 900,000 voter records, $1,650;

(3) For 400,001 to 600,000 voter records, $1,100;

(4) For 250,001 to 400,000 voter records, $825;

(5) For 150,001 to 250,000 voter records, $550;

(6) For 100,001 to 150,000 voter records, $275;

(7) For 75,001 to 100,000 voter records, $220;

(8) For 50,001 to 75,000 voter records, $182;

(9) For 35,001 to 50,000 voter records, $138;

(10) For 25,001 to 35,000 voter records, $83;

(11) For 15,001 to 25,000 voter records, $55;

(12) For 7,501 to 15,000 voter records, $33;

(13) For 1,001 to 7,500 voter records, $22; or

(14) For 1 to 1,000 voter records, $11. [PL 2009, c. 564, §8 (NEW).]

[PL 2009, c. 564, §8 (NEW).]

3. Response to requests. Municipal clerks, registrars and the Secretary of State's office shall respond to all requests for information from the central voter registration system pursuant to this section within 5 business days of receipt of a written request and upon payment of any applicable fee. A

municipal clerk or registrar may provide only information concerning voters registered within that municipal jurisdiction. The Secretary of State may design a form to be used for all requests for information or lists from the central voter registration system.
[PL 2009, c. 564, §8 (NEW).]

4. Discrimination prohibited. An individual or organization that accesses or obtains voter information from the central voter registration system may not use that information or any part of that information to engage in discrimination on the basis of physical or mental disability, race, color, age, sex, sexual orientation, religion, ancestry or national origin, including but not limited to discrimination prohibited by the Maine Human Rights Act and federal civil rights laws. For purposes of this paragraph, "federal civil rights laws" means the following federal laws and statutes, as amended, and the regulations promulgated under those laws and statutes, as amended, as of January 1, 2021:

A. Title II of the federal Americans with Disabilities Act of 1990, 42 United States Code, Sections 12131 to 12165; [PL 2021, c. 310, §3 (NEW).]

B. Section 504 of the federal Rehabilitation Act of 1973, 29 United States Code, Section 794; [PL 2021, c. 310, §3 (NEW).]

C. Title VI of the federal Civil Rights Act of 1964, 42 United States Code, Sections 2000d to 2000d-7; [PL 2021, c. 310, §3 (NEW).]

D. The federal Older Americans Amendments of 1975, 42 United States Code, Sections 6101 to 6107; and [PL 2021, c. 310, §3 (NEW).]

E. Title IX of the federal Education Amendments of 1972, 20 United States Code, Sections 1681 to 1688. [PL 2021, c. 310, §3 (NEW).]
[PL 2021, c. 310, §3 (NEW).]

5. Penalty. A person who:

A. Violates subsection 1 or subsection 4 commits a civil violation for which a fine of not more than $1,000 may be adjudged; and [PL 2021, c. 310, §4 (NEW).]

B. Violates subsection 1 or subsection 4 after having previously violated either subsection 1 or subsection 4 commits a civil violation for which a fine of not more than $5,000 may be adjudged. [PL 2021, c. 310, §4 (NEW).]

For purposes of this subsection, each voter's information that a person causes to be made accessible to the general public in violation of subsection 1, paragraph B or J constitutes a separate offense.
[PL 2021, c. 310, §4 (NEW).]

SECTION HISTORY

PL 2009, c. 564, §8 (NEW). PL 2011, c. 534, §11 (AMD). PL 2013, c. 131, §10 (AMD). PL 2013, c. 330, §1 (AMD). PL 2015, c. 447, §7 (AMD). PL 2021, c. 310, §§1-4 (AMD).

Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples

Prepared by:
The National Clearinghouse on Election Administration
Federal Election Commission
Washington, D.C.
January 1, 1994

CHAPTER 7 - RECORD KEEPING AND REPORTING REQUIREMENTS

This chapter addresses the record keeping and reporting requirements of the National Voter Registration Act and related confidentiality issues. There are three types of record keeping requirements:

- those specifically cited in the law
- those implied by the reporting requirements, and
- those that local election officials may wish to adopt for their own purposes

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.

As a matter of prudence, though not as a requirement of the Act, States might also want to retain for the same period of time all records of removals from the voter registration list — the date and the reason.

The purposes of such record keeping are two-fold. First, such records enable the registrar to maintain an accurate "inactive" file as described in Chapter 5. Second, they enable interested private and public agencies to ensure that "list cleaning" activities are nondiscriminatory and otherwise in accordance with the NVRA.

Finally, although the Act does not specifically require that declinations be retained, States may nevertheless want to do so in order to maintain an audit trail, to ensure evidence should there be allegations of wrongdoing, and for the benefit of the agencies themselves.

RECORD KEEPING IMPLIED BY THE REPORTING REQUIREMENTS

The law requires the Federal Election Commission to report to the Congress each two years on the impact of the NVRA on the administration of elections for federal office [Section 9(a)3] and grants the FEC regulatory authority to this end [Section 9(a)(1)].

The FEC views this task as similar to the reporting procedures adopted pursuant to the Voting Accessibility for the Elderly and Act of 1984. That is to say, we envision a three-tier reporting pyramid with local election officials providing reports to the State, State election officials providing summary reports to the FEC, and the FEC preparing a report to the Congress.

We are unable, at this early date, to specify exactly what information the FEC might require of State and local election offices for the purpose of reporting to the Congress. This issue will require considerable consultation with the States. The FEC's objective is to be thorough but not burdensome.

Although the FEC is currently in the midst of research and rulemaking proceedings in order to determine what data are important yet practicable, our preliminary view is that the following data are likely to be requested:

1. State Voting Age Population (to be obtained by the FEC from the Bureau of Census)

2. The number of voters registered in the federal general election two years previous to the most recent federal general election (from previous records at the FEC)

3. The number of voters registered in the most recent federal general election

4. The total number of new registrations received between the past two federal general elections

5. The total number of voter registration applications received from (or generated by) motor vehicle offices between the past two federal general elections, as well as the total number of these that were duplicates.

6. The total number of voter registration applications received by mail between the past two federal general elections, as well as the total number of these that were duplicates.

7. The total number of voter registration applications received from (or generated by) all public assistance agencies (except agencies primarily serving the disabled) between the past two federal general elections, as well as the total number of these that were duplicates.

8. The total number of voter registration applications received from (or generated by) all agencies primarily serving the disabled between the past two federal general elections, as well as the total number of these that were duplicates.

9. The total number of voter registration applications received from (or generated by) Armed Forces recruitment offices between the past two federal general elections, as well as the total number of these that were duplicates.

10. The total number of voter registration applications received from (or generated by) all other designated or discretionary agencies between the past two federal general elections, as well as the total number of these that were duplicates.

11. The total number of voter registration applications received by all other means (in-person, deputy registrars, organized voter registration drives, etc.) between the past two federal general elections, as well as the total number of these that were duplicates.

12. The number of confirmations mailed out between the past two federal general elections in accordance with the NVRA

13. The number of responses to these confirmations mailings returned between the past two federal general elections

14. The total number of names that were, for whatever reason, deleted from the voter registration list between the past two federal general elections

15. The postal costs incurred between the past two federal general elections for all mailings requisite under the NVRA

16. In the first report, a general description of the State's implementation of the NVRA (with emphasis on which options were taken); and in subsequent reports, any changes made to the program

17. Problems encountered

By the same token, our preliminary view is that the following data will *not* be requested:

- The number of persons registered between the past two federal general elections *who voted in the past federal general election* (either totally or by registration intake method).
- Any registration numbers or other information regarding *specific* participating offices or agencies.
- The number of declinations filed at agencies or offices.
- The number of persons voting under the "fail-safe" provisions of the NVRA.
- The general or operating costs of implementing the NVRA.

We anticipate that the definitive list of data items required to be reported to the FEC will be promulgated in the second quarter of 1994.

OTHER RECORDS THAT ELECTION OFFICIALS MAY WISH TO KEEP

In addition to retaining the documents and records required either by the NVRA or by the Federal Election Commission, there are two other types of documents that election officials may want to have retained for their own purposes:

- the declination statements completed by applicants for public assistance, and
- any written affirmations required of fail-safe voters.

Ideally, the declination statement completed by each applicant for public assistance — whether it indicates that the applicant wishes to register to vote or declines to do so — would contain the name of the applicant and the date the statement was completed. This could be accomplished preferably by having the applicant sign and date the completed statement or else by having the service agent note the name and date on the statement.

If the name and date are affixed to the declination statement, it could then be removed from the applicant's case file and retained separately by the agency under secure and confidential conditions.

There are several reasons why such a procedure recommends itself. First, it would provide an audit trail of all such transactions should there be subsequent official or legal enquiries. (Indeed, the Election Crimes Branch of the Department of Justice has indicated that declination statements may fall under the 22-month document retention requirements of 42 U.S.C. 1974 *et seq.*). Second, in the event that there are subsequent official or legal enquiries, such a procedure would facilitate an investigation while ensuring the confidentiality of the public assistance case files. And third, should the agency be reimbursed for its voter registration activities through federal matching funds, such a procedure would provide clear evidence of all such activity.

For many of the same reasons, election officials may want to securely retain any written affirmations that State law may require of fail-safe voters on election day (although whether or not to require written affirmations from such voters is optional under the NVRA). Again, such records would provide an audit trail for any subsequent legal enquiry and in any event would clearly fall under the 22-month document retention requirements of 42 U.S.C. 1974 *et seq.*

IMPORTANT ISSUES IN RECORD KEEPING

The most significant issue regarding record keeping is confidentiality. The law specifically prohibits the public disclosure of information regarding any individual's declination to register or regarding the specific public assistance agency or motor vehicle *office* through which any particular individual registered [Sections 5(b), 5(c)(2)(D)(iii), 8(i)(1), and 7(a)(7)].

Yet information regarding the total *number and rate* of persons registered by each social service agency might prove valuable to local election officials and public interest groups even if such detailed information is not requested by the FEC.

The problem is that voter registration documents and records are generally considered public documents and, indeed, are often used for other purposes such as verifying petitions. Thus, in order to prevent divulging the public assistance agency or motor vehicle office through which any particular applicant registered, procedures must be created to obtain aggregate numbers by agency without identifying the agency in any decipherable way on the original voter registration document. (See also the discussions of accounting for motor voter registration forms in Chapter 2, accounting for mail registration forms in Chapter 3, and accounting for agency registration forms in Chapter 4).

Another confidentiality issue is the public disclosure of a registrant's social security number. States that request or require social security number on their voter registration form may want to explore this issue — especially in light of the case of *Greidinger v. Davis,* 988 F.2d 1344 (4th Cir. 1993). Ultimately, all States might want to consider maintaining the confidentiality of all *original* voter registration documents while providing public access to computerized lists of registered voters minus the confidential information.

Alternately, States might want to consider requesting only the last four digits of an applicant's social security number — thereby providing a sorting number while not compromising the confidentiality of the applicants whole number.

Finally, States might want to review their own confidentiality laws regarding the voter registration records of certain protected individuals such as law enforcement officers, abused spouses, stalker victims, public personalities, and the like. This issue is especially important in light of the Act's public disclosure requirements [Section 8(i)(2)].