UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PUBLIC INTEREST LEGAL FOUNDATION, INC.,

Plaintiff,

v.

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

Defendant.

Docket No. 1:20-cv-00061-GZS

SECRETARY OF STATE'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Shenna Bellows, in her official capacity as Secretary of State ("Secretary"), moves for summary judgment against Plaintiff Public Interest Legal Foundation, Inc. ("PILF") and opposes PILF's motion for summary judgment (ECF No. 74).

Memorandum of Law

The National Voter Registration Act of 1993 (NVRA) was an effort by Congress to increase public participation in federal elections by removing barriers that prevented Americans from registering to vote. To further that purpose, the law effectively directs states 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).

Maine has long taken this directive to heart. Specifically, since 2005, Maine law has consistently provided that the voter data held in Maine's central voter registration system (CVR)—which contains personal information and voting participation history for all of Maine's 1,142,764 registered voters—is confidential and may be used for only certain limited purposes.

These confidentiality provisions were motivated in part by what the Legislature determined to be a "compelling state interest" of ensuring that voters are not discouraged from participating in the voting process. *See* 21-A M.R.S.A. § 195. Mainers have thus had assurance that, if they register to vote, the personal information they provide to the government will be protected.

In this action, PILF seeks to bring that longstanding assurance to an end. In this action, PILF not only seeks access to personal data on all of Maine's registered voters—which this Court has recognized PILF is now free to obtain under recently amended state law—but access to that data free of *any* limitations on how it may use or further disseminate that data. Most troublingly, PILF, which has in the past used government records to identify in its published reports individual voters whom it suspects of misconduct, seeks the right to publicly disseminate personally identifying information about individual Maine voters.

PILF's legal theory is that § 8(i) of the NVRA (52 U.S.C. § 20507(i)), which requires states to "make available" certain records relating to programs and activities to ensure accurate voter lists, preempts Maine's law that *allows* voter records to be disclosed to PILF, subject merely to reasonable conditions on the use and further dissemination of those voter records. The Court should reject this theory. Far from posing an obstacle to Congress's purposes in enacting the NVRA, Maine's restrictions on misuse and publication of personal data on individual voters directly furthers the NVRA's purposes. It allows public access to voter registration data, including personally identifying data, negating any claim that Maine is thwarting § 8(i)'s goal of allowing the public to hold the government accountable for its voter list maintenance practices. At the same time, by restricting the uses of that data to valid NVRA-related purposes and by prohibiting the public dissemination of personally identifying voter data, it simultaneously furthers the NVRA's overriding purpose of ensuring that Mainers are not deterred from

registering to vote over fear that their personal data will be sold to commercial interests, posted to the Internet, or otherwise misused for purposes unrelated to the purposes of the NVRA.

Because Maine law regulating the use and dissemination of personal voter data does not conflict with the purposes of Congress in enacting the NVRA and thus is not preempted, the Court should grant summary judgment to the Secretary and deny summary judgment to PILF.

Summary of Undisputed Facts

The NVRA

In 1993, Congress enacted the NVRA. *See* Pub. L. No. 103–31, 107 Stat. 77 (1993). The NVRA required the States to make a number of reforms and improvements to their voter registration practices, including a variety of requirements intended to make it easier for Americans to register to vote. *See* 52 U.S.C.A. § 20504 (requiring states to allow individuals applying for drivers' licenses to also register to vote); § 20505 (requiring states to accept mail-in registrations); § 20506 (requiring states to designate agencies to assist voters with registration). The NVRA has four stated purposes: "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," 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," to "protect the integrity of the electoral process," and 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 relate to 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).

At issue in this litigation is § 8 of the NVRA, "Requirements With Respect to

Administration of Voter Registration." *Id.* § 20507. Section 8 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 State 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. Def.'s Statement of Mat. Facts (ECF No. 79) ("DSMF") ¶ 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. § 21083(a)(1)(A). 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. DSMF ¶ 41. That system, known as the Central Voter Registration system, or CVR, currently (as of November 20, 2022) contains registration data on 925,899 active status voters and 216,865 inactive status voters. *Id.* ¶ 44. 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. *Id.* ¶ 46; *see* 2005 P.L. ch. 404 (codified at 21-A M.R.S. § 196, recodified as amended at 21-A M.R.S. § 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. 2005 P.L. ch. 404, § 9; *see* 21-A M.R.S. § 195; DSMF ¶¶ 47–49.

The Amendment of Maine's Voter Privacy Law to Allow NVRA-Related Uses of Voter Data

State 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. § 196-A(1). At the outset of this litigation in 2020, the statue listed nine exceptions, lettered A through I, that allowed disclosure of various types of CVR data for various purposes, including political campaigns (Exception B), certain governmental uses (Exceptions G and I), and, in semi-anonymized form, research (Exception F). PILF requested what is known as the party/campaign-use voter file (hereinafter, the "Voter File") available to campaigns under Exception B. DSMF ¶ 8. Because PILF was, at the time, not eligible under Maine law to receive the Voter File under Exception B, the Secretary denied PILF's request. *Id.* ¶ 26.

In June 2021, however, the Maine legislature amended § 196-A(1) to expand the permissible uses of CVR data. It created a new Exception J, which provided 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. § 196-A(1)(J). Exception J took effect on October 18, 2021. *See* P.L. 2021, ch. 310. It authorizes disclosure of the same voter file available to campaigns under Exception B. DSMF ¶ 54. Following the effective date of the statute, had PILF submitted a properly completed request form and the applicable fee, the Secretary would have provided the Voter File to PILF. DSMF ¶ 59. PILF, however, has chosen not to do so. *Id.* ¶ 58.

A Voter File contains the following information about each of the (currently) 1,142,764 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

DSMF ¶¶ 51, 54.

The 2021 amendments to § 196-A 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)(A). 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).

The Secretary's List Maintenance Efforts

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. *Id.* ¶ 60. Concerted list maintenance efforts of various types were undertaken in 2007, 2009, 2011, and 2013, 2017, and 2022. *Id.* ¶¶ 63–66. Records of these list maintenance activities are retained for 2 years, as

required by § 8(i) of the NVRA, and are made available for public inspection and copying. *Id.* ¶ 67. List maintenance is also occurring through 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. *Id.* ¶ 65.

PILF

PILF is an Indiana-based organization dedicated to fighting alleged "lawlessness" in elections. *Id.* ¶ 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. *Id.* ¶¶ 74–77. PILF ultimately reissued the report with an apology for "any characterization of those registrants as felons." *Id.* ¶ 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. *Id.* ¶ 79. Although PILF will sometimes redact identifying information about voters in court filings and reports—in part out of concern for voter privacy or mistaken identities—it has no set practice in this regard. *Id.* ¶¶ 86–89. Although in a case involving Maryland's voter file it was agreeable to various restrictions on its ability to publish data from the file, it is in this case seeking to obtain the Voter File free of any limitations on dissemination of voters' personal information. *Id.* ¶ 90; PILF Mot. for S.J. at 13–14.

Argument

I. Legal Standard

"Generally, a party is entitled to summary judgment if, on the record before the Court, it appears 'that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law.'" *Friends of Merrymeeting Bay v. Hydro Kennebec, LLC*, No. 1:11-CV-00035-GZS, 2015 WL 1523830, at *1 (D. Me. Apr. 2, 2015) (quoting Fed. R. Civ. P. 56(c)(2)). A fact is material if it has "the potential to affect the outcome of the suit under the applicable law." *Id.* (quoting *Nereida–Gonzalez v. Tirado–Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The standard is identical where, as here, there are cross-motions for summary judgment. *Id.* (citing *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 34 (1st Cir. 2005)). "[T]he court must mull each motion separately, drawing inferences against each movant in turn." *Id.* (quoting *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 6 (1st Cir. 2003)).

II. The Secretary of State Is Not Denying PILF Access to the Voter File

PILF argues that the Secretary of State is violating § 8(i) of the NVRA because, in early 2020—before the enactment of Exception J—she denied PILF's request to obtain the Voter File. PILF Mot. at 5. PILF is foreclosed from any such argument because this Court has already dismissed PILF's claim that the Secretary is denying it access to the Voter File.

Count I of PILF's amended complaint, captioned "Denial of Access," claimed that PILF was suffering informational injury "because [it] does not have records and information to which it is entitled under federal law." Am. Compl. ¶ 73 (ECF No. 55). It further alleges that the Secretary is "denying the Foundation the ability to obtain the requested voter list maintenance records." *Id.* ¶ 74. In its Order on the Secretary's Motion to Dismiss, the Court dismissed Count I as moot, recognizing that "[t]hrough 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." ECF No. 61 at 7. The Court thus concluded that the Secretary is not in violation of the NVRA's requirement that a state "make available" certain election registration records. *Id.* The Court reached this conclusion after specifically noting the requirement that PILF submit a request form to obtain the file. *Id.* at 6. Because the Court has dismissed Court I,

PILF cannot pursue a denial-of-access theory on summary judgment.

Though the Court should not go any further than its own prior order, the factual record confirms that, if PILF submits a properly completed request form and pays the applicable fee, the Secretary will provide it with the Voter File. DSMF ¶ 59. PILF's own complaint discusses the request process, confirming that it has been well aware that submission of a form is necessary to obtain the Voter File. Am. Compl. ¶¶ 53–62. Thus, even if the Court had not dismissed this claim, the undisputed material facts do not support PILF's theory that the Secretary's denial of PILF's request prior to the enactment of Exception J means that she is somehow *now* failing to "make available" the Voter File. 52 U.S.C.A. § 20507(i).

III. The NVRA Does Not Preempt States' Reasonable Limitations on the Use and Dissemination of Voters' Personal Information

A. To Prevail, PILF Must Establish that the Exception J Conflicts with NVRA

Since § 8 lacks an express preemption provision, PILF must show a conflict between the NVRA and Exception J. 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." *ACA Connects*, 471 F. Supp. 3d at 323 (quoting *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015)). "[A] court should not find pre-emption too readily in the absence of clear evidence of a conflict." *Comcast of Me./N.H., Inc. v. Mills*, 435 F. Supp. 3d 228, 243 (D. Me. 2019) (quoting *Geier v. Am. Honda Motor Co*., 529 U.S. 861, 885 (2000)).

Legislation such as the NVRA, which is enacted under Congress's power under the Elections Clause to regulate the "Times, Places and Manner" of congressional elections, preempts state law "so far as the two are inconsistent, and no farther." *Ex parte Siebold*, 100 U.S. 371, 386 (1879). Such federal legislation is not subject to a traditional preemption analysis

but is interpreted "simply to mean what it says." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 15, (2013).

But while the typical preemption analysis may not apply, state election laws must still be "examined in light of the particular federal-state balance achieved in that arena," in which the Founders "delegated substantial authority over Federal Elections to the States." *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 730 (S.D. Miss. 2014). In considering that balance, a State's authority is "particularly potent" regarding "procedural regulations and rules to oversee and ensure the integrity of elections." *Id.* (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995)). Thus, even if the Court may not apply the traditional presumption against preemption in interpreting the NVRA, it conversely may not read the NVRA's provisions more expansively than Congress intended. *Id.* (citing *Ex parte Siebold*, 100 U.S. at 392).

Here, the Court should be particularly cautious about adopting an expansive interpretation § 8(i) for two reasons. First, while the Supreme Court has recognized that Congress's power under the Election Clause is broad enough to encompass regulation of voter registration, *Inter Tribal*, 570 U.S. at 8–9, a requirement that states publicly disclose personal information about individual voters would surely be at the outer edge of Congress's power to regulate the "Times, Places and Manner" of congressional elections. U.S. Const., art. I, § 4, cl. 1. Such a requirement would be far removed from typical Elections Clause legislation addressing the "when, where, and how" of congressional elections. *Inter Tribal*, 570 U.S. at 29 (Thomas, J., dissenting) (quoting T. Parsons, Notes of Convention Debates, Jan. 16, 1788)).

Second, *Inter Tribal* eschewed a traditional preemption analysis in part because regulating congressional elections does not involve States' "historic police powers," and, as a result, the "federalism concerns . . . are somewhat weaker" than in Supremacy Clause

preemption cases. 570 U.S. at 14. But § 196-A is only partly an election law. It is also a privacy law, protecting Maine citizens from, among other things, commercial exploitation of their private data. *See* 21-A M.R.S. § 196-A(1)(J)(1) (prohibiting sale of data). This Court has recognized that privacy is a "field[] of traditional state regulation." *ACA Connects v. Frey*, 471 F. Supp. 3d 318, 325 (D. Me. 2020) (citing *Medtronic v. Lohr*, 518 U.S. 470, 475 (1996)). Thus, even if the Court may not start with the usual presumption against preemption, it can and should take into account the extent to which PILF's expansive preemption theory violates principles of federalism and intrudes into matters that Congress has traditionally left to the States to regulate.

Notably, PILF appears here to be asserting only a facial challenge to Exception J. *See* PILF Mot. at 6, 10, 12. PILF therefore "bears the burden to establish . . . that 'no set of circumstances exists under which the [statute] would be valid.'" *NCTA—The Internet & Television Ass'n v. Frey* ("*NCTA*"), 7 F.4th 1, 17 (1st Cir. 2021) (quoting *Pharm. Rsch. & Mfrs. of Am. v. Concannon* ("*PhRMA*"), 249 F.3d 66, 77 (1st Cir. 2001)). Moreover, "[t]he existence of a hypothetical or potential conflict" is insufficient to warrant the preemption of state law. *PhRMA*, 249 F.3d at 77 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

B. Compliance with the NVRA and Exemption J Is Not Impossible

By amending § 196-A(1) to add Exemption J, Maine has "ma[d]e available," *see* 52 U.S.C.A. § 20507(i)(1), the individual voter data that PILF contends is covered by Section 8(i) of the NVRA. *See* ECF No. 61 at 7. Thus, even assuming *arguendo* that § 8(i) of the NVRA applies to the Voter File (*see* Part IV below), compliance with federal and state law is not "impossible." *ACA Connects*, 471 F. Supp. 3d at 323. The only remaining question is whether Maine's reasonable limitations on the use and further dissemination of the data in the Voter File "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*

C. Exception J's Limitations on Use and Publication Are in Harmony with Purposes and Objectives of Congress

The Court should conclude that the protections in Exception J are fully consistent—indeed, *they directly further*—the objectives of Congress in enacting the NVRA, as well as the larger federal regulatory framework regarding protection of voters and personal privacy.

1. *Congress's Primary Purpose in Enacting the NVRA Was to Enhance Public Participation in Federal Elections by Encouraging Voter Registration*

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. § 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 that the NVRA does not "supersede, restrict, or limit the application of the Voting Rights Act of 1965 [VRA]," nor does it authorize or require conduct prohibited by the VRA. *Id.* § 20510(d). The VRA, as discussed further in section 3 below, provides its own prohibitions on state or private actors interfering with voting rights. Federal agency guidance on the NVRA confirms that it "is specifically intended to be complementary to rather than contradictory to the [VRA]." *See* National Clearinghouse on Election Administration, Federal Election Commission, "Implementing the National Voter Registration Act of 1993," (Jan. 1, 1994) (hereinafter, "FEC Guidance") at 5-11.[1]

2. *Exception J Does Not Conflict with the NVRA's Purposes*

Exception J directly furthers the NVRA's core purpose of encouraging voter registration and enhancing participation in federal elections. It would, for example, prevent 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. DSMF ¶¶ 74–78. The threat of such voter "doxxing" could reasonably be expected to discourage non-voters from registering—particularly

[1] This guidance document is 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. It has been described as a "reference guide created by the National Clearinghouse on Election Administration, Federal Election Commission, in 1994 to describe the requirements of the NVRA, identify important issues to states' implementation of the NVRA and conforming legislation, and to offer examples of forms and procedures for implementing the NVRA." *PILF v. Way*, No. CV 22-02865 (FLW), 2022 WL 16834701, at *1 n.1 (D.N.J. Nov. 9, 2022).

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).

More broadly, Exception J provides Mainers with assurance that, by registering to vote, they will not expose their personal information to scammers, hackers, commercial interests, or foreign governments, whom voters might reasonably fear could use their information for purposes contrary to the goals of the NVRA, ranging from unsolicited advertising to scams to misinformation campaigns.[2] As the Fourth Circuit has recognized in rejecting a constitutional challenge to Maryland's limitations on the private uses of its voter list, such use 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) (quoting the government's brief and concluding those asserted interests "are legitimate").

Indeed, the privacy risks that Exception J seeks to address are not merely hypothetical. In *Voter Reference Foundation, LLC v. Balderas*, No. CIV 22-0222, 2022 WL 2904750 (D.N.M. July 22, 2022), the court considered an effort by New Mexico officials to prosecute an organization for posting New Mexico's voter file to the Internet, which, like Maine's, included registration data and voter history. *Id.* **9–10. After comparing New Mexico's laws to Maine's

[2] *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%20Manipulation%20Tactics%20for%202022%20Midterm%20Elections.pdf (noting that foreign actors may claim to have "hacked" or "leaked" U.S. voter registration data); National Conference of State Legislatures, "Securing Voter Registration Systems" (July 2018), *at* https://www.ncsl.org/research/elections-and-campaigns/securing-voter-registration-systems.aspx (noting that "[a]t least 18 state voter registration databases were scanned by Russian-affiliated cyber actors in 2016").

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 *72. As a result, the court enjoined state officials from prosecuting the organization for posting the data. *Id.* at *96.

Balderas makes it clear that, without the protections in Exception J, 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. Indeed, the plaintiff in *Balderas* apparently has plans to do just that. *See id.* at *5 (noting that the plaintiff organization plans to obtain and post data from all 50 states). Exception J provides assurance to Mainers that registering to vote will not expose their personal data to such inappropriate uses. Exception J is thus 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." 52 U.S.C.A. § 20501(b)(2).

Although undersigned is aware of no court decision that has considered whether use limitations on sensitive election records covered by § 8(i) are preempted, a few courts have considered federal preemption in the context of whether sensitive information allegedly covered by § 8(i) may be redacted. 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). In so holding, the court found it significant that the plaintiffs "seek materials for an election challenge, a goal outside the purposes of the NVRA." 43 F. Supp. 3d at 733. 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*)). The court noted that current and potential registrants who knew this 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 Am., Inc. v. Long*, 752 F. Supp. 2d 697, 712 (E.D. Va. 2010)).

Exception J 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. DSMF ¶¶ 82–83. Rather than authorizing redaction, Exception J requires requestors to abide by reasonable limits on use and dissemination. Exception J thus, similar to Mississippi's law, harmonizes the access goals of § 8(i) 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 misusing or publicizing their personal data.

Notably, while state limitations on the use and dissemination of voter data are rarely challenged, they are not uncommon.[3] PILF acknowledges that many states have prohibitions on

[3] *See, e.g*., Az. Rev. Stat. Ann. § 16-168 (restricting uses and further dissemination of voter registration data); Cal. Elections Code § 2194(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).

the commercial use of voter data. DSMF ¶ 92. A compilation of state laws published by the National Conference of State Legislatures (NCSL) confirms a wide variety of use limitations. NCSL, "Access To and Use Of Voter Registration Lists," *available at* https://www.ncsl.org/research/elections-and-campaigns/access-to-and-use-of-voter-registration-lists.aspx (last visited Nov. 4, 2022). If states were preempted from prohibiting requestors from using voter data in a manner inconsistent with the purposes of the NVRA, one would expect at least some of these protections to have been challenged and struck down.

True the Vote is also significant for its recognition that the "goal" of the requestor is relevant to the preemption analysis. 43 F. Supp. 3d at 733; *see also id.* at 739. That is precisely the rubric used by Exception J to regulate uses of the Voter File. Section § 8(i) was added to the NVRA for one purpose: to ensure that the public can assess whether the voter list maintenance activities authorized by § 8 of the NVRA are being carried out in conformance with § 8's requirements. *See, e.g.*, 52 U.S.C. § 20507(d). This narrow purpose is confirmed by Federal Election Commission's (FEC's) guide interpreting the NVRA, in which it describes § 8(i) as ensuring "Accountability of List Maintenance Activities." FEC Guidance at 5-15. Indeed, the FEC's interpretation of § 8(i) was so narrow that it did not even regard records of routine removals from the voter registration list to be within the scope of § 8(i)—describing such records as something states "might" want to retain "[a]s a matter of prudence." *Id.* at 5-16.

Given Congress's narrow purposes in enacting § 8(i), as confirmed by the FEC's contemporaneous interpretation, Maine's decision to limit permissible uses of the Voter File to purposes "directly related to evaluating the State's compliance with its voter list maintenance obligations," 21-A M.R.S. § 196-A(1)(J) is entirely consistent with congressional intent.

PILF relies on *Lamone v. Judicial Watch, Inc.*, 399 F. Supp. 3d 425 (D. Md. 2019) to

argue that Exception J's limitations on use of the Voter File are preempted. PILF Mot. at 9. But *Lamone* involved a Maryland law that prohibited disclosure of voter data altogether unless the requestor was a registered Maryland voter. *Id.* at 445. It found that the non-resident exclusion was preempted by the NVRA because it "exclud[ed] organizations and citizens of other states from identifying error and fraud." *Id.* Under Exception J, in contrast, no organization or citizen of any state—including PILF—is excluded from examining Maine's list for error or fraud.

In addition, *Lamone*'s reasoning in striking down Maryland's restriction was based in part on a significant loophole in the Maryland law: the law placed no restriction on a Maryland voter obtaining the list and transferring it to an out-of-state entity. *Id.* The *Lamone* court thus rightly viewed Maryland's law as an arbitrary restriction that "does not advance a valid state interest." *Id.* The same criticism does not apply to Exception J, which includes a framework to ensure both that the data can be used for NVRA-related purposes no matter the identity of the requestor, and that the data will not be used or disseminated in a manner inconsistent with the policies underlying both the NVRA and 21-A M.R.S. § 196-A.

Finally, in considering whether Exception J is an obstacle to Congress's intent, the Court should consider the (at best) remote relationship between the Voter File and the types of records with which Congress was likely concerned in enacting § 8(i). Even assuming *arguendo* that the Voter File is technically within the scope of § 8(i)(1), it is certainly not the sort of record that the drafters of the NVRA had in mind in 1993, when federal law did not yet even require states to maintain centralized voter-registration databases. *See* 52 U.S.C. § 21083(a)(1)(A) (enacted Oct. 29, 2002). Section § 8(i)(2) indicates the types of records that the drafters were primarily concerned about, clarifying that the records described by § 8(i)(1) "shall include lists of the names and addresses of all persons to whom [NVRA change-of-residence] notices are sent."

These records—which are available to the public, DSMF ¶ 67—provide meaningful information about a jurisdiction's actual efforts to update its lists to account for voters' changes in residence under a procedure authorized by the NVRA. A Voter File, in contrast, is just a static list of Maine voters and their personal information, including numerous voters whose status has never been altered as a result of list-maintenance activities. DSMF ¶ 71. Given the massive amount of personal data contained in the File that has no connection to list-maintenance activities, it is consistent with the purposes of the NVRA for Maine to place greater limits on the use of such data compared with records that actually document the State's list-maintenance practices.

3. *Maine's Limitations on Use and Dissemination of Personally Identifying Voter Information Are in Harmony with Other Federal Laws and Policies*

In considering whether Exception J is consistent with the objectives of Congress, the Court should also consider the myriad federal statutes that already existed when the NVRA was enacted protecting personal privacy and protecting voters from harassment and intimidation, and of which the drafters § 8(i) were assuredly aware. *See PILF v. N.C. State Bd. of Elections*, 996 F.3d 257, 264 (4th Cir. 2021) (observing that § 8(i)'s disclosure requirement "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").

With regard to voter privacy, 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. § 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. § 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, perhaps most notably, it had enacted the Civil Rights Act of 1960, which authorizes the Attorney General to obtain from states "all records and papers . . . relating to any application, registration, payment of poll tax, or other act requisite to voting," *id.* § 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 seek from Maine the same Voter File that is now available to PILF under Exception J, federal law would severely limit his ability to further disclose that data. A state law that places similar limitations on private parties obtaining that same data cannot be said to conflict with congressional policy regarding voter privacy.

Federal statutes prohibiting voter intimidation and harassment are also directly furthered by Exception J. In addition to the NVRA itself, a number of federal laws outlaw various forms of voter intimidation. *See, e.g.*, 52 U.S.C.A. §§ 10307(b), 10101(b). The publication of personal information about specific voters, whether it be 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 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. DSMF ¶¶ 29, 34, 84–85. Absent Exception J, nothing would stop PILF, or some other organization, from publishing reports that include the names, addresses, and other personal information of specific Maine voters that the organization suspects (but cannot prove) voted multiple times. Such public accusations, or the threat of them, could well be intimidating to voters. Exception J thus furthers

the important federal policy of preventing voter intimidation.

Even the Fourth Circuit, which has otherwise expansively interpreted § 8(i), has recognized that this latticework of existing federal and state law tempers § 8(i)'s scope. *See PILF*, 996 F.3d at 264. Recognizing policy concerns warranting the protection of certain information—including protecting law enforcement investigations and protecting exonerated individuals from "long-standing personal and professional repercussions"— the panel endorsed a state proposal to redact certain sensitive information where the redactions would still permit PILF "to identify 'error and fraud' based on citizenship status in 'maintenance of voter rolls' in the manner envisioned by Congress when it sought transparency and enacted the NVRA's disclosure provision." *Id.* at 268. Because Exception J strikes a similar balance between providing access and protecting Mainers from harm, the Court should conclude it is not preempted.

D. Exception J Does Not Prevent PILF from Engaging in Activities Consistent with the Purposes of the NVRA

At a minimum, the analysis in the previous sections shows that PILF cannot succeed in showing that "no set of circumstances exists under which [Exception J] would be valid." *NCTA*, 7 F.4th at 17. It is clearly consistent with the purposes of the NVRA for Maine to disallow, for example, commercial uses of the Voter File, posting the entirety of the Voter File to the Internet, or "doxxing" of individual voters suspected of wrongdoing. Because PILF's summary judgment motion appears to be a facial challenge to Exception J, it should be denied on this ground alone. But, even to the extent PILF's motion or amended complaint might be read to also assert an as-applied challenge, the Secretary is entitled to summary judgment.

The Court's order on the Secretary's motion to dismiss recognized "uncertainty as to how Maine will enforce and interpret the privacy protections imbedded into Exception J" and further

noted that "a capacious interpretation of the permissible uses under this amended language may include all of Plaintiff's evaluation activities and obviate concerns animating Counts II and III." Order at 9 n.5. This Court has also previously recognized in the preemption context that it is "charged with avoiding a declaration of unconstitutionality if there is an alternative interpretation that would render the [challenged statute] lawful." *Pharm. Care Mgmt. Ass'n v. Rowe*, 307 F. Supp. 2d 164, 172 (D. Me. 2004); *see also Nat'l Pharmacies, Inc. v. Feliciano-de-Melecio*, 221 F.3d 235, 241–42 (1st Cir. 2000) (recognizing that, where state courts would do so, state laws "should ordinarily be given a constitutional interpretation where fairly possible"); *State v. Hutchinson*, 2009 ME 44, ¶ 32, 969 A.2d 923 (noting that the Law Court "will seek to interpret any statute in a way that is consistent with the constitution"). Exception J can be reasonably interpreted—and in fact *is* so interpreted by the Secretary—to largely permit PILF to engage in its planned activities, so long as it avoids public disclosure of voters' personal information.

1. *The Secretary Does Not Interpret Exception J to Prohibit Use of the Data in a Legal Proceeding over a State's List Maintenance Activities*

PILF claims that § 196-A must be interpreted to prevent it from using the Voter File in legal proceedings to enforce the NVRA. PILF Mot. at 11–13. As the Secretary stated in her motion to dismiss, *see* Mot. to Dismiss at 20 (ECF No. 58), and as is confirmed in the summary judgment record, DSMF ¶ 94, she does not hold such a rigid interpretation of Exception J. Nor would such an interpretation be consistent with the text and purposes of that provision.

PILF contends that the term "evaluating" cannot encompass a judicial proceeding, which would instead involve "enforc[ing]" the NVRA. PILF Mot. at 12. But, of course, those two concepts are not mutually exclusive; while a judicial proceeding would certainly involve attempted enforcement of the NVRA, it would also involve the parties and the court "evaluating" the state's list maintenance efforts.

What is more, even if judicial proceedings are not "evaluat[ion]," the plain language of Exception J allows the Voter File to be used for more than just evaluation. Exception J does not say that the Voter File may not be used for "any purpose *other than* evaluating the State's compliance with its voter list maintenance obligations"; it states that the file may not be used for "any purpose *that is not directly related to* evaluating the State's compliance with its voter list maintenance obligations." Under the plain language of the statute, multiple "purposes" are permitted; those purposes simply must be "directly related" to the evaluation. An enforcement action based on PILF's findings after evaluating the Voter File 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.

PILF complains that it cannot rely on the Secretary's interpretation of Exception J because it has not been endorsed by the Maine Supreme Judicial Court. PILF Mot. at 12. But the absence of a definitive judicial interpretation undercuts PILF's case, not the Secretary's. It is PILF's burden to establish that Exception J is preempted. *NCTA*, 7 F.4th at 17. As the First Circuit has recently observed, if the text of a statute "does not compel" an interpretation that would result in federal preemption, and the plaintiff fails to show that the interpretation "must be adopted even though the text does not compel it," the preemption concern "may well be a hypothetical one." *Id.* at 19. Based on that analysis, the First Circuit declined in *NTCA* to find the state law at issue preempted. *Id.* Here, even if PILF's interpretation of Exception J were plausible, it is certainly not an interpretation compelled by the text of the statute.

In any event, it is highly unlikely that the Law Court would disagree with the Secretary's interpretation. Even if "directly relates" could be interpreted in different ways, the Secretary's reasonable interpretation of an ambiguous statute is entitled to deference in state courts.

Arsenault v. Sec'y of State, 2006 ME 111, ¶ 11, 905 A.2d 285 ("When a statute is ambiguous we defer to the interpretation of the agency charged with its administration, if the agency's interpretation is reasonable"). And the Secretary's interpretation here is, at a bare minimum, a reasonable one. Indeed, an interpretation of Exception J that allowed an organization to evaluate Maine's voter list, but then prohibited it from doing anything with the results of the evaluation would be a strange and unreasonable interpretation of the statute given its express allowance for "purpose[s]" beyond just evaluation.

2. *The Secretary Does Not Interpret Exception J to Prohibit Use of the File to Analyze Other State's Voter List Maintenance Efforts*

PILF also claims that the Exception J would prohibit it from using Maine's Voter File to analyze the list maintenance efforts of states other than Maine. PILF Mot. at 9–11. PILF asserts this claim based on the language of Exception J limiting use of the file to "purpose[s]" that are "directly related to evaluating the State's compliance with its voter list maintenance obligations." 21-A M.R.S. § 196-A(1)(J)(1).

The Secretary would not view use of the data to evaluate another state's list maintenance activities to be a violation of Exception J. DSMF ¶ 93. While, at first glance, the statute's use of the phrase "the State's" might seem to limit permissible activities to those that are Maine-related, this Court has already suggested that a "capacious interpretation" of Exception J might not "limit Plaintiff's ability to use Maine's Voter File to evaluate NVRA compliance by other states." Order at 9 n.5. The Secretary has adopted such a capacious interpretation. And, indeed, reading the statute to impose such a restriction would be inconsistent with the legislative purpose, which was simply to allow use of the voting list for list-maintenance evaluation activities consistent with the NVRA. Maine's equivalent of the Dictionary Act further 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.").

What is more, as already noted, the statutory text of Exception J allows for multiple purposes, so long as those purposes are "directly related" to evaluation of list maintenance activities. Even if Exception J's reference to "State" is limited to Maine, 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. 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 list. Given this Court's duty to "avoid[] a declaration of unconstitutionality if there is an alternative interpretation that would render the [challenged statute] lawful," *Pharm. Care Mgmt. Ass'n*, 307 F. Supp. 2d at 172, it should liberally construe Exception J to permit this use of the Voter File.

Finally, if the Court were to determine that Exception J cannot be interpreted to permit PILF to use the Voter File to analyze other states' lists, it should conclude that such a restriction does not pose an obstacle to the objectives of Congress. PILF cites not a shred of legislative history suggesting that Congress, in enacting § 8(i), intended anything more than to allow interested parties to evaluate the list maintenance efforts of the state making the records available. Indeed, § 8(i)(1)'s reference to records involving "the implementation of programs and activities" conducted to maintain voter lists confirms that Congress's purpose was to illuminate those state-specific "programs and activities." 52 U.S.C.A. § 20507(i)(1). Particularly in the era before mandatory centralized voter registration databases, it is doubtful Congress could have even conceived of the sort of cross-state evaluation efforts PILF proposes

here. Moreover, PILF concedes that these efforts do not even produce definitive results. DSMF ¶¶ 84–85. Thus, even if the Privacy Protections must be construed to bar cross-state evaluation, it would not run afoul of the purposes of Congress.

3. *PILF Lacks Standing to Seek Invalidation of Exception J on the Basis of Legal Interpretations the Secretary Has Disclaimed*

Another, more fundamental problem, with PILF's claims that it is prohibited from using the Voter File for enforcement and cross-state evaluations is that it has not established standing to pursue such claims. In order 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)).

Here, given the Secretary's interpretation of § 196-A(1)(J) as permitting cross-state evaluation of voter lists and enforcement of list maintenance requirements, PILF has not and cannot establish a substantial risk that Maine will enforce the Privacy Protections against it in the event it engages in those activities. *See Reddy v. Foster*, 845 F.3d 493, 502 (1st Cir. 2017) (finding no injury in fact where the government had "affirmatively disavowed" prosecution under the circumstances at issue). The Court should therefore reject PILF's arguments to the contrary for lack of standing.

4. *The Prohibition on Publication of Voters' Personal Information Does Not Pose an Obstacle to the NVRA's Purposes*

Finally, PILF challenges Exception J's bar on publishing personally identifying voter information derived from the Voter File. PILF Mot. at 13–15. PILF asserts that this bar interferes with its intended activities, which includes "us[ing] the Voter File to educate the general public, including through the Internet." *Id.* at 14.

As already argued in Part III.C above, Maine's efforts to protect voters' personal information are entirely consistent with the purposes behind the NVRA. By limiting the use of voter personal information, Maine law furthers two key purposes of the NVRA: encouraging Maine citizens to become and remain registered voters and protecting registrants or potential registrations from potential intimidation. *See* 52 U.S.C.A. §§ 20501(b)(1) & (2); 20511(1). The arguments in Part III.C dispose of PILF's claim.

PILF argues that the bar on publishing personal data is somehow inconsistent with the NVRA because § 8(i)(2) provides that the names and addresses of voters receiving NVRA change-of-address notices under § 8(d)(2) are among the records that states must retain and make available under § 8(i)(1). PILF Mot. at 13. But that argument begs the question. Nothing in § 8(i) suggests that states would be preempted from placing reasonable limits on the use and dissemination of records retained under § 8(d)(2), so long as the records are made available. In addition, data concerning voters who were, in the recent past, subject to actual NVRA list maintenance activities are far more relevant to the core purpose of § 8(i)—ensuring that states conduct list maintenance efforts in a manner consistent with the rest of § 8—than is a static list of all Maine voters and their personal information and voting histories. Indeed, contrary to PILF's argument, the very narrowness of § 8(i)(2) supports the notion that enhanced privacy protections on *other* personal voter data are consistent with the NVRA's purposes.[4]

Moreover, while PILF may wish to publish names and other personally identifying

[4] PILF also asserts, in a single sentence, that the bar on publishing private voter information violates the First Amendment. PILF Mot. at 14. PILF did not assert a First Amendment claim in its complaint and, even if it had, "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). The Court should therefore disregard PILF's unsupported assertion, which would fail on the merits anyway. *See Fusaro v. Howard*, 19 F.4th 357, 370 (4th Cir. 2021) (rejecting First Amendment challenge to use restrictions on Maryland voter file).

information about individual voters, it does not adequately explain how doing so furthers the purposes of § 8(i). The purpose of that provision is to hold *the government* accountable for its list maintenance practices; it is assuredly not to facilitate accusations of crimes or other misconduct against individual voters. *Cf.* DSMF ¶¶ 73–78. In the unlikely event PILF finds irregularities in Maine's Voter File, nothing in the Privacy Protections prevent it from publishing a report detailing those irregularities, as long as it does not disclose individual voter information. Nor does anything prevent it from identifying particular voters to Maine officials for potential further investigation or including voters' information in a sealed court filing. DSMF ¶¶ 94, 97–98. The only thing PILF cannot do is publish identifying information about particular voters. Such a reasonable prohibition in no way thwarts § 8(i)'s purpose.

IV. The Court Should Reconsider Its Conclusion that the Voter File Is Subject to § 8(i)

The Secretary recognizes that the Court determined in its Order on the motion to dismiss that the Voter File falls within the scope of § 8(i). ECF No. 61 at 10. However, because the Court was limited to considering the allegations in the complaint, it was not privy to certain additional facts now available in the summary judgment record. Two categories of additional facts warrant reconsideration of the Court's conclusion.

First, the summary judgment record makes clear the highly attenuated relationship between the Voter File and the list-maintenance programs and activities conducted by the Secretary. The Secretary does not use the Voter File generated from CVR under § 196-A(1)(J) for any list maintenance activities. DSMF ¶ 68. The File contains no information on cancelled voters and no data that would indicate whether a particular voter's registration information was altered by list-maintenance activities. *Id.* ¶¶ 69–70. Moreover, the Voter File contains data on numerous voters whose data has never been altered by the Secretary's list-maintenance activities. *Id.* ¶ 71. And, finally, the Voter File contains elements unrelated to the registration process,

most notably each voter's participation history in elections. *Id.* ¶¶ 51–52.

Second, the summary judgment records shows that the Secretary has undertaken discrete initiatives over the years to conduct NVRA-approved maintenance of Maine's voter rolls, including an initiative earlier this year to send NVRA postcards under § 8(d)(2) to registered voters who may have changed their residence. DSMF ¶¶ 60–66. As required by the NVRA, the Secretary has retained and, in the case of the 2022 effort, is currently retaining and making available for public inspection and copying, records relating to these efforts. *Id.* ¶ 67.

These material facts demonstrate that the Voter File is not the sort of record that may be properly understood as 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." 52 U.S.C.A. § 20507(i)(1). Rather, it is a list of voters at a single point in time that is neither used for nor describes the efforts of elections officials to "ensur[e]" the accuracy and currency of voter lists. *Id.* That the Secretary does routinely conduct such efforts, and makes records of those activities publicly available, shows that her interpretation of § 8(i) as limited to records relating to such "programs and activities" is a meaningful reading of § 8(i) that would in fact provide the public with the information needed to hold state and local officials accountable for the type of list maintenance activities contemplated by the NVRA.

V. The Civil Penalty Provisions Are Not Preempted

PILF does not offer a distinct argument in support of its claim that the civil penalty provisions in 21-A M.R.S. § 196-A(5) are preempted. Thus, if the Court upholds Exception J (or any portion thereof), it should also uphold the penalty provisions in § 196-A(5).

Conclusion

For the foregoing reasons, the Court should grant summary judgment to the Secretary and deny summary judgment to PILF.

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