United States District Court
District of Maine

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

Plaintiff Public Interest Legal Foundation's
Opposition to Defendant Secretary of State's Motion for Summary Judgment and
Reply in Support of Plaintiff's Motion for Summary Judgment

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Plaintiff Public Interest Legal Foundation ("Foundation") hereby opposes the Motion for Summary Judgment filed by Defendant Bellows (hereafter, the "Secretary") (Doc. 80) and replies in support of the Foundation's Motion for Summary Judgment (Doc. 74).

Introduction

The Secretary is not entitled to summary judgment for at least three reasons.

First, the Secretary incorrectly claims the Foundation is pursuing a facial challenge to the entirety of Exception J and to succeed the Foundation must establish that the law has zero valid applications. (Doc. 80 at 12.) Not true. The Foundation's Amended Complaint very clearly challenges specific use restrictions (and fines) that conflict with the NVRA and the Foundation's intended activities. (*See, e.g.*, Doc. 55 ¶¶ 46-52, 81-82, 90-92.) The Foundation's present Motion accords. (Doc. 74 at 6 ("The Foundation challenges the following three restrictions and attached fines ….").) The Foundation's burden is to demonstrate that the challenged restrictions stand as obstacles to Congress's objectives and the Foundation has done that.

Second, the Secretary replaces the statute's unambiguous text with the non-authoritative and non-binding views of Maine's Deputy Secretary of State. (*See* Doc. 77 ("Flynn Declaration").) The Secretary's second-hand promise to not enforce the law as written does not have the force of law and she is free to change her mind at any time. The threat of enforcement remains real absent an authoritative ruling from this Court. In any event, the Secretary does not decide what the law means. That is the Court's job. The Court's interpretive powers are, however, constrained by the plain meaning of the words the legislature actually used. To read Maine law as the Secretary urges requires rewriting the text, not just interpreting it. The conflict being clear and unavoidable, judgment should enter for the Foundation with respect to the Use-Ban and the Enforcement Ban.

Third, the Make-Available Ban is a complete ban on speech, and it cannot be justified by the Secretary's baseless speculation about "voter intimidation." (Doc. 80 at 21.) For starters, Congress singled out registrants' names and addresses for public disclosure, 52 U.S.C. § 20507(i)(2), a circumstance that should preclude any argument that mere re-publication of that same information amounts to voter intimidation. Furthermore, the Foundation has no intention of intimidating anyone. Instead, the Foundation wishes to further Congress's objectives by educating the public about voter list maintenance activity nationwide, an activity that occasionally requires publishing *public* records that contain names and addresses. Maine may not punish what Congress intends.

For these reasons, the Court should deny the Secretary's Motion for Summary Judgment and grant the Foundation's Motion for Summary Judgment.

ARGUMENT

I. The Secretary Is Not Entitled to Summary Judgment.

A. The Foundation Does Not Need to Prove Exception J Has Zero Valid Applications.

The Secretary attempts to raise the Foundation's burden of proof by rewriting the Foundation's claim as a facial challenge to the entirety of Exception J. (Doc. 80 at 12.) According to the Secretary, the Foundation "bears the burden to establish … that 'no set of circumstances exists under which the [statute] would be valid.'" (Doc. 80 at 12 (quoting *NCTA—The Internet & Television Ass'n v. Frey* ("*NCTA*"), 7 F.4th 1, 17 (1st Cir. 2021).)

The Court may ignore all portions of the Secretary's Motion that depend on this claim because the Foundation's Amended Complaint does not allege that Exception J is invalid in all applications. What the Foundation has alleged is that certain use restrictions (and fines) found in Exception J conflict with the NVRA and the Foundation's intended activities. (*See, e.g.*, Doc. 55

¶¶ 46-52, 81-82, 90-92.) Consistently, the Foundation's Motion for Summary Judgment explains that the Foundation challenges "three restrictions and attached fines," (Doc. 74 at 6), and explains how the Foundation's intended activities conflict with those restrictions.

To be sure, the Foundation uses the word "facially" to describe the relevant statutory conflicts: "The challenged restrictions facially prohibit activities that the NVRA permits, intends, and encourages, and which further the NVRA's purposes." (Doc. 74 at 6.) But to say that specific restrictions "facially" prohibit specific activities that further the NVRA's purposes—such as the Use-Ban prohibiting the evaluation of New York's voter list maintenance activities (Doc. 74 at 10-11)—is altogether different than saying Exception J is invalid in all applications. The Foundation has never made the latter argument.

Relying on this faulty premise, the Secretary trots out a speculative parade of horribles in an effort to demonstrate that Exception J could theoretically prevent harm to voters. In this parade, the Secretary includes (1) the "doxxing" of "ethnic and language minorities" (Doc. 80 at 14), (2) criminal voter intimidation (Doc. 80 at 15), and (3) misuse by "scammers, hackers, commercial interests, or foreign governments" (Doc. 80 at 15). The Secretary even invokes the activities of a different plaintiff in a completely different federal action. (Doc. 80 at 15 (citing *Voter Reference Foundation, LLC v. Balderas*, No. CIV 22-0222, 2022 WL 2904750 (D.N.M. July 22, 2022).) None of this is relevant to the question before this Court because the Foundation does not allege an intention to engage in these activities nor that they were intended by Congress, much less that they would further the NVRA's objectives.

What is more irrelevant is the Secretary's reference to unfounded and unproven accusations made against the Foundation in a 2018 federal action. (*See* Doc. 80 at 14; Doc. 79 ¶ 77 (citing *League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int.*

Legal Found., No. 1:18-CV-00423 (E.D. Va., filed April 12, 2018).) If the Secretary is suggesting that the Foundation, specifically, should be denied the benefit of federal rights, the Foundation may have a claim against the Secretary for viewpoint discrimination. *See Voter Reference Found., LLC v. Balderas*, No. CIV 22-0222 JB/KK, 2022 U.S. Dist. LEXIS 130385, at *253-65 (D.N.M. July 22, 2022) (finding plaintiff who had requested voter roll data was likely to succeed on part of its viewpoint discrimination claim).

"Conflict preemption" occurs where "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (citations and quotations omitted). The Foundation has identified four instances where Maine law poses such obstacles. (Doc. 74 at 6.) It is those conflicts the Court must evaluate, not the unchallenged aspects of Exception J or the far reaches of potential criminal wrongdoing.

Maine is free to criminalize voter intimidation. What Maine cannot do is override federal objectives. Nor can Maine rewrite the Foundation's complaint to artificially raise the burden of proof. The Foundation has sufficiently demonstrated conflicts between Maine law and the NVRA. (Doc. 74 at 6.) In those instances, Maine law "ceases to be operative." *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 9 (2013) (citations and quotations omitted).

B. The Use Ban and the Enforcement Ban Conflict with the NVRA Under Their Plain Language.

1. The Secretary's Proffered Interpretations Are Contrary to the Statute's Text.

The Secretary first argues that Exception J does not conflict with the NVRA because Exception J can be interpreted to allow the Foundation's intended activities. The problem with these arguments is they contravene the plain meaning of the statute's text, which is what

determines legislative intent. "When the language of a statute is plain and admits of no more than one meaning … the sole function of the courts is to enforce the statute according to its terms." *People to End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1, 5 (1st Cir. 2003) (citations and quotations omitted).

a. The Enforcement Ban

Exception J's Enforcement Ban prohibits using 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. § 196-A(J)(1). The Secretary argues that this language does not prevent the Foundation from enforcing the NVRA because "attempted enforcement of the NVRA … would also involve the parties and the court 'evaluating' the state's list maintenance efforts." (Doc. 80 at 23.)

"Maine's basic rules of statutory interpretation require that words in a statute be given 'their plain, common, and ordinary meaning.'" *Palmieri v. Nynex Long Distance Co.*, 437 F.3d 111, 116 (1st Cir. 2006) (quoting *Butterfield v. Norfolk & Dedham Mut. Fire Ins. Co.*, 2004 ME 124, 860 A.2d 861, 862 (Me. 2004)). The word "evaluate" means to "to determine the significance, worth, or condition of usually by careful appraisal and study." Merriam-Webster, https://www.merriam-webster.com/dictionary/evaluate (last accessed Dec. 20, 2022). The word "enforce" means to "compel" or "to give force to." Merriam-Webster, https://www.merriam-webster.com/dictionary/enforce (last accessed Dec. 20, 2022). "Evaluate" and "enforce" thus mean different things and the legislature chose to use only the former word.

The Secretary counters that even if those words mean different things, the statute still does not preclude enforcement because "[a]n enforcement action based on PILF's findings after evaluating the Voter File would quite plainly be 'related' to the preceding evaluation" and "the

relation would be 'direct,' since the evaluation would form the basis for the legal action." (Doc. 80 at 23.) The problem with this argument is that it could easily be used to include activities that the Secretary would likely not endorse. For example, an evaluation might reveal that certain registration records are duplicated or have errors. A subsequent door-to-door canvassing effort designed to confirm the accuracy of those records would be "related" in a "direct" way to the preceding evaluation because the evaluation would "form the basis" for the canvassing effort.

The Secretary's construction creates unnecessary ambiguity and uncertainty about what is permissible and what is punishable. These things can be avoided by simply "enforc[ing] the statute according to its terms." *People to End Homelessness, Inc.*, 339 F.3d at 5. The legislature chose the word "evaluating." It did not choose the word "enforce." By its text, the Enforcement Ban prohibits NVRA enforcement actions, meaning it prohibits activities necessary for the achievement of Congress's objectives. The Enforcement Ban is thus preempted. (*See* Doc. 74 at 11-13.)

b. The Use Ban

The Use Ban derives from the same language as the Enforcement Ban, that is, the prohibition on using 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. § 196-A(J)(1). For the first time, the Secretary takes the position that Exception J does not prohibit using the Voter File to evaluate *other state's* voter list maintenance efforts because the phrase "the State" means *any* state. (Doc. 80 at 25.) This argument similarly fails the plain language analysis.

The Maine legislature did not say "states." The legislature used the singular "state." The legislature did not say "a" state or "any" state but said "the" state. The word "State" is also capitalized, which connotes uniqueness. The legislature also chose to capitalize the term

"Secretary of State," which unquestionably refers to Maine's Secretary of State. Generally speaking, Section 196-A addresses access and use of data related to Maine's registered voters. All of this points to one thing: when the legislature wrote "the State," it meant Maine and only Maine.

The legislative intent is so abundantly clear that the Secretary agreed with this interpretation in her Motion to Dismiss briefing.

> Similarly, PILF contends that it may wish to use Maine's voter data not just to evaluate Maine's compliance with § 8, but other states' compliance. *Id*. ¶ 46. There is no reason to think, however, that Congress had such purposes in mind in enacting § 8(i). Rather, Congress almost certainly intended to require each state to provide information about *its own* list maintenance activities, not other states' activities.

(Doc. 58 at 20.)

Perhaps realizing the unavoidable conflict the statute has created, the Secretary has now changed her mind. She cannot, however, change the statute's text, which plainly limits the Voter File's use to evaluation of "the State" of Maine. *See Voter Reference Found., LLC v. Balderas*, No. CIV 22-0222 JB/KK, 2022 U.S. Dist. LEXIS 130385, at *225 (D.N.M. July 22, 2022) ("While the Secretary of State is entitled to interpret the Election Code in the manner she sees fit, the Court owes her interpretation little deference *if it is not based in the relevant statutes*, valid reasoning, and is not consistent with the Secretary of State's actual practice of whom it refers to the Attorney General for violations of the Election Code.") (emphasis added).

To support her new view of the legislature's intent, the Secretary offers nothing more than a citation to "Maine's equivalent of the Dictionary Act." (Doc. 80 at 25 (citing 1 M.R.S.A. § 72(21).) The Act, she claims, "confirms that a statute's reference to 'State' does not necessarily mean Maine specifically." (*Id*.) The Dictionary Act does no such

thing. The Act provides, "'State,' used with reference to any organized portion of the United States, may mean a territory or the District of Columbia." 1 M.R.S.A. § 72(21). All this means is "state" sometimes includes territories and the District of Columbia. It does not mean that "state" always means *any* state, and much less that the legislature intended for "the State" in Exception J to mean all states.

The Dictionary Act cannot change the fact that in this instance, the legislature chose the phrase "the State." The text, context, and subject matter of the statute all support the conclusion that the legislature intended to refer to one state: Maine.

By its text, Maine law prohibits the Foundation (and all other persons) from using the Voter File to evaluate legal compliance and identify list maintenance errors (and perhaps fraud) in all other states. (1)(J). Maine law is an "obstacle" to Congress's objectives, and it is therefore superseded and invalid. (Doc. 74 at 10-11.)

2. If the Court Adopts the Secretary's Interpretation, the Court Must Give Those Interpretations the Force of Law.

In a declaration filed with the Secretary's Motion, Deputy Secretary of State Julie Flynn states that the Secretary interprets Maine law "as permitting cross-state evaluation of voter lists and enforcement of list maintenance requirements." (Doc. 80 at 27; Doc. 77 ¶¶ 16-17.) Deputy Secretary Flynn also shares her view that other activities are statutorily permissible under certain circumstances. (Doc. 77 ¶¶ 18-22.)

Deputy Secretary Flynn's promises do not have the force of law and are not binding on the current Secretary or future office holders. In other words, the Secretary is free to change her mind and enforce the law as written at any time. This risk is all the more severe in these circumstances where the Secretary has simply adopted a litigation position contrary to the

statute's text in an obvious effort to defeat the Foundation's standing.[1] (*See* Doc. 80 at 27.) Furthermore, the Attorney General (or district attorney), not the Secretary, is tasked with investigating and prosecuting alleged violations of the election laws. 21-A M.R.S. § 33. The Secretary's promises are thus illusory.

The Secretary's actions are not unlike a defendant who attempts to moot a case by ceasing her allegedly unlawful conduct after the conduct is challenged in court. In such cases, "a defendant's voluntary change in conduct moots a case only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Calvary Chapel of Bangor v. Mills*, 52 F.4th 40, 47 (1st Cir. 2022) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). As her about-face on the Use Ban demonstrates, the Secretary is willing to quickly change her interpretation of Exception J depending on the circumstances. It is not "absolutely clear" that she will not do so again.

Nevertheless, if the Court is inclined to agree with the Secretary that Exception J textually permits some or all of the Foundation's intended activities, the Court should make authoritative rulings and give those interpretations the force of law. *See Voter Reference Found., LLC v. Balderas*, No. CIV 22-0222 JB/KK, 2022 U.S. Dist. LEXIS 130385, at *201-17 (D.N.M. July 22, 2022) (ruling that plaintiff's intended use of voter registration records falls within the scope of permissible uses under New Mexico law). Alternatively, the Foundation would

[1] If the Court determines that the Foundation lacks standing to pursue any claim, the proper course of action is to dismiss the claim without prejudice. Judgment cannot be entered for the Secretary if the Court lacks jurisdiction to hear the claim. *See Fannie v. Chamberlain Mfg. Corp., Derry Div.*, 445 F. Supp. 65, 78 (W.D. Pa. 1977) ("[I]t has been decided that it is error to rule on a summary judgment motion where a court determines that it lacks jurisdiction over the subject matter."); *Rivera-Sanchez v. ITL Int'l*, 30 F. Supp. 2d 187, 190 (D.P.R. 1998) ("The granting of summary judgment is a disposition based on the merits of the case; therefore, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction.") (citations and quotations omitted).

consider, as it always has, resolving its claims via consent decree or settlement agreement. However, absent a resolution that bears sufficient judicial imprimatur or is otherwise enforceable, the Foundation continues to face a real and imminent threat of harm sufficient to challenge the Enforcement Ban and the Use Ban.

C. The Make Available Ban Stands as An Obstacle to the NVRA's Objectives.

The Secretary does not contest that the Make Available Ban conflicts with the Foundation's intended activities, namely, to use the Voter File to educate the general public (including through the Internet) and transmitting apparent irregular registration and voting data to election officials throughout the country. (*See* Doc. 74 at 13-14.) The Secretary's entire defense of the Make Available Ban rests on speculation—that if the Foundation is allowed to educate the public and government officials about specific registration records, the public at-large will refuse to participate in the electoral process. (*See, e.g.*, Doc 80 at 28.)

If what the Secretary argues was true, we would expect to see large-scale evidence of it nationwide, and specifically in Maine. Personally identifying information has been publicly available under the NVRA since 1993, and for years, Maine's political parties and others have been able to obtain personally identifying information and use it to make intrusive, at-home contact, with voters. Yet the Secretary does not offer a single instance where voter participation was discouraged.

In fact, the opposite is true. "Maine's 2020 election turnout was among highest in US," according to reports.[2] And according to the Secretary herself, Maine's turnout in the 2022

[2] https://bangordailynews.com/2020/11/25/politics/maines-2020-election-turnout-was-among-highest-in-us/ (last accessed Dec. 21, 2022).

election—which occurred after the passage of Exception J—was potentially the best in the nation.

> "Mainers should be so proud," Bellows said in an interview. "In 2020, we were third in the nation in voter participation. Given the high absentee ballot returns and the lines at polls today, we think we may on track to be first in the country."[3]

Neither history nor the record supports the Secretary's arguments.

The Secretary cannot rely on unchallenged aspects of Exception J to justify the aspects that pose clear obstacles to Congress's objectives. For example, the Secretary's alleged interest in curbing misuse by "scammers, hackers, commercial interests, or foreign governments" (Doc. 80 at 15) cannot justify a complete ban on educating the public with specific voter registration records. And there is no risk that invaliding the challenged aspects would risk invaliding the unchallenged aspects because preemption applies only "so far as the conflict extends." *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

In Section 8(i)(2) Congress made personally identifying information public—specifically, "names and addresses." 52 U.S.C. § 20507(i)(2). This makes sense because without personally identifying information one registrant cannot be distinguished from another. It is unreasonable to think that Congress would *require* the public disclosure of voter's names and addresses while tolerating the state's ability to punish—with crushing fines—the mere publication of that same information. What is reasonable—and what is consistent with the NVRA's purposes—is to conclude that Congress believed public disclose of names and addresses to be necessary to achieve the statute's goals.

[3] https://www.mainepublic.org/politics/2022-11-08/maine-voter-turnout-is-very-high-on-election-day-says-secretary-of-state (last accessed Dec. 21, 2022).

D. Count I Is not Moot Because Submitting a Request Form Would Likely Require the Foundation to Commit the Crime of Unsworn Falsification.

The Foundation has moved for Summary Judgment on its claim that the Secretary is denying the Foundation access to the Voter File. (Doc. 74 at 5-6; Doc. 55 ¶¶ 68-77.) The Secretary counters that it is not denying the Foundation access and "if PILF submits a properly completed request form and pays the applicable fee, the Secretary will provide it with the Voter File." (Doc. 80 at 10.) Deputy Secretary Flynn explains, "If PILF submits to the Elections Division a properly completed request form *acknowledging the limitations on use and dissemination of the Voter File* and pays the applicable fee, the Elections Division would provide PILF with the Voter File." (Doc. 77 ¶ 13.) In other words, the obtain the Voter File, the Foundation must swear to abide by the very use restrictions it is challenging in this matter and to refrain from engaging in activities fundamental to its mission and intended by Congress.

In *Voter Reference Found., LLC v. Balderas*, No. CIV 22-0222 JB/KK, 2022 U.S. Dist. LEXIS 130385, at *217-25 (D.N.M. July 22, 2022), the court found that an organization or individual may be liable for false swearing under New Mexico law if it signs a voter data request form authorization with the intention to engage in activities prohibited by law. Similarly, the Foundation may violate Maine law if it signs Maine's voter data request form. Maine's request form provides,

> 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 MRS, section 196-A, subsections 1 and 4, and that violations of either of these subsections is a civil violation for which fines of up to $1,000 for a first offense and up to $5,000 for each subsequent offense may be adjudged.[4]

[4] Request for Obtaining Data from Maine CVR – October 2021 Version, *available at* https://www.maine.gov/sos/cec/elec/data/2021-10%20Request%20Form%20for%20Obtaining%20Data%20from%20CVR.doc (last accessed Dec. 22, 2022).

Under Maine law, "A person is guilty of unsworn falsification if: … He makes a written false statement which he does not believe to be true, on or pursuant to, a form conspicuously bearing notification authorized by statute or regulation to the effect that false statements made therein are punishable[.]" 17-A M.R.S. § 453(1)(A). If the Foundation signs the form and agrees to the foregoing statement with the intent to use the Voter File in a manner forbidden by Maine law (but consistent with the NVRA), the Foundation may be liable for the crime of "unsworn falsification."

Access conditioned on committing a crime is no access at all. As alleged in the Amended Complaint, "By conditioning the Foundation's federal right to inspect voter list maintenance records on the Foundation's agreement to abide by impermissible state-law use restrictions, Maine functionally denies the Foundation access to the "Party/Campaign Use Voter File." Maine's policy in this regard violates and conflicts with the NVRA, a federal law." (Doc. 55 ¶ 72.) The Secretary explicitly concedes that she "has not provided the 'Party/Campaign Use Voter File' to the Foundation." Fact Stip. ¶10. The Court has determined that the Foundation's claim is ripe, (Doc. 61 at 8 n.3.), and that the Voter File is "subject to disclosure under the NVRA," (Doc. No. 61 at 10). For these reasons, the Foundation respectfully asks the Court to reconsider its ruling that the Foundation's denial-of-access claim (Count I) is moot (Doc. 61 at 6-7) and enter judgment in the Foundation's favor.

E. There Is No Reason to Reconsider the Ruling that the Voter File is Within the NVRA's Scope.

The Court was correct when it held that the Voter File is within the NVRA's scope. (Doc. 61 at 10-12.) For the reasons previously argued and adopted by the Court, the Court should reject the Secretary's request to reconsider that ruling. (*See* Doc. 80 at 29-30.)

Conclusion

Maine law poses unavoidable, textual obstacles to the achievement of the NVRA's purposes. For the foregoing reasons, the Foundation, not the Secretary, is entitled to judgment as a matter of law.

Dated: December 23, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2022, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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