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 REPLY IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

In response to the Secretary of State's motion, Plaintiff Public Interest Legal Foundation ("PILF") appears to have abandoned any facial challenge to the voter privacy protections in 21-A M.R.S. § 196-A(1)(J) ("Exception J"). PILF focuses instead on arguing that Exception J is preempted as applied to PILF's planned uses for the personal voter data available under Exception J (the "Voter File"). But PILF's opposition fails to rebut the Secretary's showing that Exception J's prohibition on publication of voters' personal information—whether to "educate the public," PILF Opp. at 10, or otherwise—directly furthers Congress's purposes in enacting the NVRA, and is therefore not preempted. Neither does PILF rebut the Secretary's showing that Exception J will not otherwise meaningfully interfere with PILF's intended uses of the Voter File. Because Exception J—facially and as applied to PILF's proposed activities—is fully consistent with the NVRA, the Court should grant summary judgment to the Secretary and deny it to PILF.

Reply Argument

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

PILF continues to argue that the Secretary is somehow denying it access to the Voter File. Nowhere does PILF's opposition acknowledge that the Court has already dismissed that claim. *See* Order on Mot. to Dismiss (ECF No. 61) at 7. PILF has not attempted to amend its complaint to revive that claim nor has the Secretary given express or implied consent to trying this dismissed claim. *See* Def.'s Statement of Mat. Facts (ECF No. 79) ¶¶ 26–27 (objecting to facts relevant to denial-of-access claim); Fed. R. Civ. P. 15(b)(2). Under those circumstances, it is improper for PILF to continue to press this claim at summary judgment.

Even if the Court were to consider PILF's claim, it would fail. PILF now argues that it is being denied access because it would be committing the crime of unsworn falsification if it returned a properly completed request form to the Secretary. PILF Opp. at 13. But PILF's return of a completed form would meet neither of the elements of unsworn falsification. First, unsworn falsification requires a false statement. 17-A M.R.S. § 453(1)(A). The Secretary's request form requires merely that the requestor acknowledge that it "understand[s]" that there are state-law restrictions on misuse of the Voter File.[1] PILF clearly "understand[s]" that Exception J exists. It could thus sign the form without making a false statement. Second, unsworn falsification requires that the false statement be made on 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). The Request Form contains no such notification. Nor, to undersigned's knowledge, would any statute or regulation authorize such notification. In

[1] The current form is available at https://www.maine.gov/sos/cec/elec/data/2021-10%20Request%20Form%20for%20Obtaining%20Data%20from%20CVR.doc. *See* Joint Stip. (ECF No. 73) at ¶ 13.

short, nothing is stopping PILF from submitting a request form to the Secretary.

II. The NVRA Does Not Preempt Exception J's Limitations on the Use and Dissemination of Voters' Personal Information

A. The Secretary Is Entitled to Summary Judgment to the Extent the Amended Complaint Makes a Facial Challenge to the Protections in Exception J

The Secretary demonstrated in her motion that she is entitled to summary judgment on PILF's apparent facial challenge to Exception J because PILF cannot meet its 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)). The Secretary showed, among other things, that by protecting Maine voters against harassment, intimidation, "doxxing," commercial solicitations, and similar evils, Exception J's limitations on use and dissemination of voter data are not just consistent with Congress's purposes in enacting the NVRA but actively further those purposes. SOS Mot. at 13–22.

In response, PILF appears to disavow any facial challenge to Exception J, PILF Opp. at 3, notwithstanding its arguments in its initial motion that "[t]he Use Ban is facially invalid," PILF Mot. at 10, that "[t]he Enforcement Ban is facially invalid," *id.* at 12, and that the so-called "Make-Available Ban" "is preempted and invalid," *id.* at 14. Given PILF's concession that it is not (or no longer) asserting a facial challenge to Exception J, PILF Opp. at 3–4, the Secretary is entitled to summary judgment on any such claim in the Amended Complaint.

B. The Secretary Is Entitled to Summary Judgment to the Extent the Complaint Makes an As-Applied Challenge to Exception J

Having disavowed a facial challenge to Exception J, PILF argues in its opposition that Exception J is nevertheless preempted as applied to some of PILF's own planned activities involving the Voter File. The Secretary is entitled to summary judgment on this claim as well.

1. *Exception J's Limitations on Permissible Uses Do Not Extend to PILF's Planned Uses*

The Secretary has established both by legal argument and undisputed testimony that the limitations on uses of the Voter File should not and will not be interpreted to prevent PILF from using the Voter File to either bring enforcement actions against governments (what PILF terms "the Enforcement Ban") or to analyze other states' voting lists (what PILF terms the "Use Ban").

In response, PILF argues that the Court should interpret Exception J in a far more sweeping manner than the Secretary, thereby maximizing the chances of a conflict between Exception J and Congress's intent in enacting the NVRA. But that analysis is backwards. In interpreting state law in the context of a preemption challenge, this Court avoids expansive interpretations where "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). This Court has already suggested that a "capacious interpretation" of Exception J might permit the uses of the Voter File that PILF wishes to pursue. ECF No. 61 at 9 n.5. Particularly where, as here, the enforcing agency agrees that the capacious interpretation of the statute is the correct one, the Court should adopt that interpretation and thereby avoid any need to determine whether a more expansive interpretation of Exception J's limitations would be preempted.

PILF argues that Exception J cannot be read to allow PILF to bring legal claims based on its analysis of the Voter File because *evaluating*—the term used in Exception J—has a different dictionary definition than *enforcing*. PILF Opp. at 5. But the Secretary's point is not that the terms are synonymous, but that an enforcement action based on the Voter File would necessarily *also* involve evaluation. Moreover, the Court need not even consider whether "evaluation" encompasses enforcement actions because Exception J by its plain language allows for other purposes, as long as they are "directly related" to evaluation. PILF's only response to this point

is to suggest a hypothetical use of the Voter File that PILF speculates that the Secretary would not support. *Id.* at 6. But putting aside how Exception J might apply to a hypothetical action that PILF itself does not claim to want to take, an interpretation of a statute is not invalid merely because it requires the enforcing official to apply judgment to particular facts to determine applicability. Indeed, the NVRA itself contains provisions that require a similar if not greater degree of judgment by enforcing officials. *See* 52 U.S.C. § 20511 (criminalizing, among other things, intimidating, threatening, and coercing of voters).

PILF also argues that Exception J's reference to evaluating "the State's"—as opposed to "a state's" or "states'"— compliance with list maintenance obligations must be read to limit those evaluation activities to Maine. PILF Opp. at 6–8. But while this might be a plausible reading of the statute in a vacuum, two factors indicate it is the wrong reading here. First, the Court should consider that, in Maine courts, "the goal of statutory interpretation is to give effect to the Legislature's intent." *Manirakiza v. Dep't of Health & Hum. Servs*., 2018 ME 10, ¶ 8, 177 A.3d 1264. The goal of Exception J is to authorize use of the Voter File for assessing list maintenance efforts while simultaneously protecting that data from exploitative or other inappropriate uses. Interpreting Exception J to allow for cross-state analysis furthers the former goal without harming the latter. It is fully consistent with legislative intent. Second, while the Secretary continues to maintain that a stricter reading of the statute would also be consistent with the NVRA, *see* SOS Mot. at 26–27, to the extent the Court might conclude otherwise, it should apply the avoidance canon to construe the statute in a manner that avoids any such issues. *See Pharm. Care Mgmt. Ass'n v. Rowe*, 307 F. Supp. 2d at 164.

PILF also argues that the Secretary's interpretations of Exception J, set forth in a sworn declaration of the Deputy Secretary of State in charge of elections and filed with the

authorization of the Secretary, are untrustworthy because the Secretary could "change her mind" about the proper interpretation of the statute. PILF Opp. at 8–9. The Court should decline to make such an assumption absent any record evidence supporting such a theory. The same goes for PILF's speculation that the Office of Attorney General (OAG) might enforce the statute differently than the Secretary interprets it. *Id.* at 9. The OAG represents the Secretary in this matter and is fully in accord with the Secretary's interpretation.

PILF also attempts to analogize the Secretary's interpretation of Exception J to the recognized exception to the mootness doctrine in cases in which the defendant has voluntarily ceased an illegal act. But here there was no cessation of a pre-existing activity. Exception J is new; the Secretary had no practice of enforcing it (or referring cases for enforcement) in the manner PILF claims to fear. The Court should therefore not look to caselaw on voluntary cessation, but the decisions in which this Court and the First Circuit have accepted and considered limiting interpretations of state laws offered by the enforcing agency. *See, e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66 (1st Cir. 2011); *ACA Connects - Am.'s Commc'ns Ass'n v. Frey*, 471 F. Supp. 3d 318, 331 n.3 (D. Me. 2020).[2]

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

The Secretary demonstrated in her motion that Exception J's prohibition on publication of voters' personal information directly furthers the purposes of Congress in enacting the NVRA by protecting voters from harassment, intimidation, "doxxing," and similar evils. SOS Mot. at 27–29. In response, PILF argues that there is a lack of evidence that protecting voters' personal

[2] Though these decisions hold that courts are obliged to consider the enforcing agency's interpretation in the context of a facial challenge, there is no reason the same principle should not also apply to the extent PILF brings an as-applied challenge.

information encourages voter participation, citing the increased turnout following Exception J's enactment. PILF Opp. at 10. But Exception J on the whole clarified and enhanced privacy protections for the Voter File; the increased turnout following its enactment, if anything, supports the Secretary's position. More broadly, the relevant question is not whether Exception J resulted in "large-scale" increases in voter registration, *id.*, it is whether a state law protecting the privacy of voter personal data is consistent with the objectives of Congress in enacting the NVRA. Courts have recognized as a matter of law that such protections could reasonably be thought to encourage voter registration. *See Fusaro v. Howard*, 19 F.4th 357, 369 (4th Cir. 2021); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 739 (S.D. Miss. 2014).

PILF also argues that the prohibition on publishing voter personal information is inconsistent with § 8(i)(2) of the NVRA, which requires states to retain and make available to the public the names and addresses of voters who were sent a notice under § 8(d)(2) seeking confirmation of their address. But there are dramatic differences between the two lists. The § 8(i)(2) list contains much less personal data—no year of birth, no voting participation history, no enrollment status. The § 8(i)(2) list is also limited to the subset of voters who received (d)(2) postcards in the past two years—not every single registered voter in the State. And, finally, the § 8(i)(2) list, unlike the Voter File, is created as a direct result of NVRA-authorized list maintenance activities. Given these differences, Congress's decision that the (d)(2) list should be publicly available in no way suggests that Exception J's protections are contrary to Congress's purposes.

Conclusion

The Court should grant summary judgment to the Secretary.

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