

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

KATHERINE SULLIVAN, *et al.*,
Plaintiffs,

v.

MICHAEL G. SUMMERS, *et al.*,
Defendants.

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No. 1:24-cv-00172-MJM

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Defendants Jared Demarinis, State Administrator of Elections; Michael G. Summers, Chairperson, Maryland State Board of Elections; William G. Voelp, Vice-Chairperson, Maryland State Board of Elections; Yaakov Weissmann, Member, Maryland State Board of Elections; and, Janet Millenson, Member, Maryland State Board of Elections; by undersigned counsel submit this memorandum in support of their Motion to Dismiss Plaintiffs' Complaint or, in the Alternative, for Summary Judgment. .

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No. 1:24-cv-00172-EA

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**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS OR, IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Katherine Strauch Sullivan and David Morsberger (“Plaintiffs”) filed this civil action against the Maryland State Board of Elections and State Administrator of Elections (the “State Board”) to compel disclosure of Maryland’s list of registered voters, with voting histories attached, for use in a specific activity: door-to-door canvassing of Maryland residences to question voters about their participation in prior elections. According to the plaintiffs, the National Voter Registration Act, 52 U.S.C. §§ 20501–20511 (the “NVRA”), requires disclosure of any records documenting a voter’s participation in a past election; and, the law preempts any restriction on using that record for investigatory activities into that past election, including door-to-door questioning.

But the NVRA governs administration of voter registration records, not records of past elections. *Compare* 52 U.S.C. §§ 20501–20511 (entitled “Nation Voter Registration”) *with* 52 U.S.C. §§ 20701–20706 (“Federal Election Records”). It was thus “not designed as a tool to root out voter fraud, ‘cross-over voting,’ or any other illegal or allegedly illegal activity with casting a ballot on election day.” *Judicial Watch, Inc. v. Lamone*, 399 F.Supp.3d 425, 435 (D. Md. 2019)

(quotation omitted). Maryland law, therefore, does not contravene the NVRA by conditioning access to voter registration data, which includes voting histories, on an individual's affirmation that they will not use those voting histories to conduct private criminal investigations by contacting voters about their voting practices.

Similarly, Maryland's condition on access to its voter registration data abides by First Amendment principles. *Fusaro v. Howard*, 19 F.4th 357, 370 (4th Cir. 2021). A condition on the use of voter registration data is not a viewpoint-dependent constraint on speech, but a content-based condition on access to government information. *Fusaro v. Cogan*, 930 F.3d 241, 253 (4th Cir. 2019). Inasmuch, it is not subject to strict scrutiny, but to *Anderson-Burdick* balancing. *Id.* at 264. And both this Court and the Fourth Circuit have upheld Maryland's use condition under the *Anderson-Burdick* balancing framework. *Howard*, 19 F.4th at 370 (affirming the district court's ruling on the same).

Finally, the State Board is administratively authorized to clarify what is, and is not, an acceptable use of voter registration data. Maryland's legislature delegated to the State Board broad regulatory authority over dissemination of the state's voter registration list. *See* Md. Code Ann. (LexisNexis 2022), Elec. Law Art. § 3-506(a)(2). Within that authority is the power to specify "the authorization to be required for providing a list," Elec. Law § 3-506(a)(2)(ii), which reasonably empowers the State Board to elucidate what is an allowable "purpose . . . related to the electoral process," Elec. Law § 3-506(a)(1)(ii)(2), for which a voting history may be used.

STATEMENT OF FACTS

Allegations in the Complaint

1. Plaintiffs are two registered voters concerned with “the integrity of the state’s elections” because of perceived misadministration of voter registration records. (ECF 1 ¶¶ 2, 19, 20.)

2. To address their concerns, plaintiffs in the past have “canvass[ed] Maryland neighborhoods door-to-door to try and verify the accuracy of those records, including . . . voting histories.” (ECF 1 ¶ 4.)

3. During these canvasses, plaintiffs “contacted individual voters” to verify both personal registration information and “other official election records.” (ECF 1 ¶ 39.)

4. Specifically, plaintiffs would review “voting records obtained from [the State Board]” and then attempt to question individual voters, in person, about the veracity of those voting records. (ECF 1 ¶ 39.)

5. Plaintiffs “investigatory canvassing activities” (as they call them), allegedly uncovered an instance of “potential inaccuracies in the State’s voting record”—twenty unnamed individuals who are recorded as voting in the 2020 election but claim to have not done so. (ECF 1 ¶¶ 40, 41.)

6. On September 20, 2023, David Morsberger submitted a completed request on the prescribed form for a statewide voter registration list. (ECF 1 ¶ 44.) That request is attached to this motion hereto as Exhibit A.¹

¹ This Court may consider the September 20, 2023 request because it is expressly referenced in the Complaint. (ECF 1 ¶ 44.); *see HQM, Ltd. v. Hatfield*, 71 F. Supp. 2d 500, 502 (D. Md. 1999).

7. By his request, Mr. Morsberger requested a statewide list of registered voters. (Exhibit A.)

8. By that same request, Mr. Morsberger also requested lists of all voters who voted by provisional ballot during the 2022 general election; and, all voters subscribed on the Permanent Mail-In Applicant List. (Exhibit A.)

9. And by that same request, Mr. Morsberger further requested, in a separate file from the registered voter list, the voting histories of all registered voters for every primary and general election dating back to 2006. (Exhibit A.)

10. In that request, Mr. Morsberger struck out language from the form oath. (ECF 1 ¶ 44; Exhibit 1.)

11. Mr. Morsberger's request was not honored. (ECF 1 ¶ 44.)

12. On or around September 25, 2023, Katherine Strauch Sullivan asked "the Baltimore County Board of Elections how to obtain a voter registration list." Ms. Strauch Sullivan took no other actions in relation to obtaining a voter registration list. (ECF 1 ¶ 45.)

13. Plaintiffs claim that COMAR 33.03.02.01B(1)(c) prevents them from obtaining voter registration lists for the purpose of "investigatory canvassing activities that may entail direct communication with voters." (ECF 1 ¶ 49.)

14. Plaintiffs further claim that the NVRA requires the disclosure of the voter registration list "for any investigatory activities (including non-commercial election-related canvassing communications) concerning potential inaccuracies, errors or anomalies in Maryland's voter registration rolls." (ECF 1 ¶ 58.)

15. Plaintiffs therefore allege that COMAR 33.03.02.01B(1)(c) is preempted by the NVRA because it stands as an obstacle to the accomplishment of two of the NVRA's purposes. (ECF 1 ¶¶ 53, 54.)

16. Plaintiffs also claim that COMAR 33.03.02.01B(1)(c) is "dependent on the viewpoint espoused by the speaker," and thus violates the First Amendment. (ECF 1 ¶¶ 68, 69, 70.)

17. Finally, plaintiffs claim that the State Board did not possess the authority to promulgate COMAR 33.03.02.01B(1)(c). (ECF 1 ¶ 83.)

The NVRA and its Standardization of Voter Registration Practices

The NVRA is a product of congressional recognition that "the right to vote is a fundamental right," that governments have a duty to "promote the exercise of that right," and that "discriminatory and unfair registration laws can have a damaging effect on voter participation and disproportionately harm voter participation by various groups, including racial minorities." *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 334 (4th Cir. 2012) (quotation marks omitted). Congress therefore enacted the NVRA, in part, to "combat a trend of declining numbers of voters who participate in Federal elections, a contributing factor to which was difficulties encountered by some who desire to register to vote." *True the Vote v. Horseman*, 43 F. Supp. 3d 693, 721 (S.D. Miss. 2014) (citing S. Rep. 103-6 at 2 (1993)). Accordingly, Congress set four purposes for the NVRA:

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

52 U.S.C. § 20501(b).

To meet the first two purposes, increasing voter registration and easing barriers to registration, Congress standardized amongst the states three minimum methods by which an individual may register to vote: simultaneous application for a motor vehicle license, mail application on a federally-designed form, and application in person at a voter registration agency.

52 U.S.C. § 20503(a)(1)–(3). Each state must also ensure that an eligible applicant is registered to vote no later than 30 days before an upcoming election. 52 U.S.C. § 20507(a)(1).

To meet the latter two purposes of the law, protection of electoral integrity through maintenance of accurate and current voter registration lists, Congress enacted safeguards against practices that “purge” voter rolls in unfair or discriminatory ways. *Long*, 996 F.3d at 264. The NVRA thus allows a state to remove a voter from a voter registration list for only one of four reasons: at the request of the registrant, the incapacitation of the registrant by criminal conviction or mental disability, the death of the registrant, and a change in the registrant’s residence. 52 U.S.C. § 20507(a)(3)&(4). The law also requires states to operate a “general program” to accurately remove ineligible names from the registration list, *id* at § 20507(a)(4), and demands that any such “program or activity” be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965,” *id* at § 20507(b)(1). Finally, states are prohibited from removing a voter from the voter registration list “by reason of the person’s failure to vote.” *Id.* at § 20507(b)(2).

Congress entrusted the public, in part, with overseeing the states’ compliance with the NVRA.² See *True the Vote*, 43 F. Supp. 3d at 721 (“The NVRA Public Disclosure Provision is

² The NVRA also permits the United States Attorney General to enforce the statute by bringing a civil action for declaratory and injunctive relief. 52 U.S.C.

one means of ensuring compliance with the NVRA’s stated goals.”) A public disclosure provision requires a state to “maintain for at least two years” accessible records of the state’s “programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 52 U.S.C. § 20507(i)(1). And with those records, individuals “aggrieved” by a violation of the NVRA are entitled to file a private cause of action against offending state officials (after providing notice of the violation and an opportunity to remedy it). *Id.* at § 20510(b).

Plaintiffs, using the private cause of action, contend that the disclosure provision requires Maryland to grant them a voter registration list, including voting history information, for the purpose of investigating voter participation in past elections. (ECF 1 ¶ 49.)

Access to Maryland’s Voter Registration Records and List

Two laws govern Maryland’s disclosure of information about voters in Maryland. Section 3-505 of the Election Law Article, entitled “Voter Registration Records,” requires the State Board to adopt regulations for retaining and storing voter registration applications and “other voter registration records that the State Board considers appropriate.” Election Law § 3-505(a). Retained records must be open to public inspection in the offices of the local boards of elections. *Id.* at § 3-505(b)(1). An original record may only be removed from a local board office on a temporary basis for data processing or pursuant to a court order. *Id.* at § 3-505(b)(2)(ii). And records “concerning programs to ensure the accuracy and currency of the statewide voter registration list” must be maintained for at least two years. *Id.* at § 3-505(c)(1); *see also* 52 U.S.C. § 20507(i)(1).

§ 205010(a). And criminal penalties attach to knowing and willful violations of the law. *Id.* at § 20511.

Section 3-506 of the Election Law Article, which is the statute at issue in this case, governs public access to Maryland's voter registration list. To obtain a copy of the list, an individual must provide a "written application" and a "statement, signed under oath" that the list will not be used for "commercial solicitation" or "any other purpose not related to the electoral process." Election Law § 3-506(a)(1). Other than that, the State Board is empowered to adopt regulations specifying, among other things: "the information to be included on the list," *id* at § 3-506(a)(2)(iv); "the format of the information," *id* at § 3-506(a)(2)(vii); and "the authorization to be required for providing a list," *id* at § 3-506(a)(2)(ii). Knowingly allowing a list to be used "for any purpose not related to the electoral process" is a misdemeanor punishable by at least 30 days, but no more than 6 months' imprisonment and/or a fine no less than \$10 and no greater than \$250. Election Law §§ 3-506(c) & 16-1001(a).

Using the regulatory authority granted to it, the State Board promulgated COMAR 33.03.02.01B(1) to clarify the meaning of "other purpose not related to the electoral process." The regulation provides that "electoral process" means what it says—"the system established by the Maryland Constitution, Election Law Article, Annotated Code of Maryland, and regulations of the State Board, by which a person is elected to a public office or by which voters express a preference on a ballot question." COMAR 33.03.02.01B(1)(a). The regulation further provides an illustrative, but not exhaustive, list of activities included within the ambit of "electoral process." COMAR 33.03.02.01B(1)(b). And finally, COMAR 33.03.02.01B(1)(c) excludes from "electoral process" in-person voter contact in support of private criminal investigations into past elections:

"Electoral process" does not include investigations. The use of a voter registration list to contact an individual voter as part of an investigation into an illegal or suspected illegal infraction or violation involving the voter's behavior in a specific election is not a "purpose... related to the electoral process" as those

terms are used in Election Law Article, § 3-506(a)(1)(ii)(2), Annotated Code of Maryland.

By its terms, COMAR 33.03.02.01B(1)(c) restricts a person from using a voter registration list, and specifically a voting history appended to a list, to contact and question a voter about their participation in a past election. The regulation does not prohibit any other activity involving the use of the voter registration list or investigatory activities that don't involve contacting voters about their conduct in past elections.

Differences Between the Voter Registration List and Voter Histories

A voter registration list and a voting history are not one in the same. To be sure, Maryland law requires the preservation of “voting history information on a current basis for a period covering at least the 5 preceding years” within its voter registration list program. Elec. Law § 3-101(b)(6). But it does not require the disclosure of voting history information at all, much less with the disclosure of a voter registration list. *See* Elec. Law § 3-506(a)(2)(iv) (leaving to the State Board the authority to determine “the information to be included on a list”).

Maryland maintains a statewide voter information database called MDVOTERS. *Judicial Watch*, 399 F. Supp at 432. One of the functions of the MDVOTERS database is to catalogue individual voter registrations, with each registration entry composed of three parts: “voter data, images of transaction source documents, and an activity log.” *Id.* Voter data includes “name, date of birth, [residential] address, . . . current registration status, the reason for the most recent change in status, and the source of the change.” *Id.* Images of source documents and the activity log act as metadata for the voter registration record, verifying when and how changes were made to the voter registration entry. *Id.*

A voter registration list disclosed under Election Law § 3-506 is a “pared down compilation of registered voters” from the MDVOTERS database. *Id.* at 439. The voter registration list does not contain the source documents or activity log. *Id.* And it does not contain all the “voter data” fields, disclosing “only a subset of the voter data, including information, such as voter name and address, and excluding other information, such as Social Security number.” *Id.* at 440. Accordingly, the voter registration list is an edited, representative version of the MDVOTERS database that does not disclose all the information that Maryland has collected about its voters. *See also* (ECF 1 Exhibit 1 (identifying the “Registered Voter List” as a “text file containing a list of registered voters with voter ID, name, party, gender, residential address, mailing address, status (active or inactive), state and county registration dates, split and precinct, congressional district, legislative district, councilmanic district, ward, municipal district, commissioner district and county.”))

A voting history is a compilation of information on when and how registered voters participated in Maryland elections going back to 2006. (ECF 1 Exhibit 1.) With a voting history, an individual could determine whether and how a voter participated in each primary, special, or general election over the past two decades. (ECF 1 Exhibit 1.) The State Board provides voter histories by two methods: integrated into a voter registration list or as a record separate from the voter registration list. (ECF 1 Exhibit 1.)

If an individual chooses to request a voting history to be integrated into a voter registration list, they can receive information on whether a voter participated in up to five past elections. (ECF 1 Exhibit 1.) This “integrated voting history” will only add one column (per election) to the voter registration list indicating whether the voter voted in

that election; it will not disclose the method by which the voter voted, or when. Declaration of Erin Dennis, Acting Deputy Director of Candidacy and Campaign Finance, Maryland State Board of Elections, ¶ 6 (attached to this motion hereto as “Exhibit B”). Mr. Morsberger, in his request to the State Board, did not request an “integrated voting history.” (Exhibit A.)

If an individual chooses to request a voting history as a separate file from the voter registration list, they will receive more than participation information. The separate voting history file will provide “detailed information on where, when, and by what method a voter voted in an election.” (Exhibit B ¶ 6); *see also* (ECF 1 Exhibit 1 (providing that a separate voting history file will provide data fields including “Voting Method, Date of Voting, Precinct, [and] Early Voting Location”).) Moreover, the separate voting history file is not limited to five elections; at maximum it can provide information on all elections conducted in Maryland dating back to 2006. (Exhibit B ¶ 6); (ECF 1 Exhibit 1).

Production of a voting history is also distinct from the production of a voter registration list. Both records derive from the statewide MDVOTERS database. (Exhibit B ¶¶ 7, 9, 10.) But the software reports within MDVOTERS that generate each record are separate and distinct. (Exhibit B ¶¶ 7, 9, 10, 11.) In other words, generation of the voter registration list relies on gathering different data from MDVOTERS than generation of a voting history. (Exhibit B ¶¶ 7, 9, 10, 11.) A request for a voter registration list cannot generate a voting history, and a request for a voting history file cannot generate the demographic data provided by the voter registration list. (Exhibit B ¶ 11.)

ARGUMENT

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED; OR, ALTERNATIVELY, SUMMARY JUDGMENT SHOULD BE GRANTED TO THE STATE BOARD AS A MATTER OF LAW.

To survive a motion to dismiss under Federal Rule of Civil procedure 12(b)(6), a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although the Court must accept well-pled factual allegations in a complaint as true, it is not required to accept conclusory factual allegations. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Society Without A Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011). Nor is the Court required to consider unsupported legal conclusions or legal conclusions disguised as factual allegations. *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [similarly] do not suffice,” because “we are not bound to accept as true a legal conclusion couched as a factual allegation.”). Therefore, a plaintiff cannot rely on unsupported legal conclusions, legal conclusions couched as factual allegations, or conclusory factual allegations devoid of any reference to actual events. *Iqbal*, 556 U.S. at 678. Rather, the complaint must contain direct and plausible allegations respecting all material elements necessary to sustain recovery under a viable legal theory. *Twombly*, 550 U.S. at 570.

Summary judgment must be granted where there is no dispute as to material fact and the moving party is entitled to judgment as a matter of law. *Philpot v. Indep. Journal Review*, 92 F.4th 252, 257 (4th Cir. 2024) (quotation omitted). To survive a properly supported motion for summary judgment, the non-moving party must present evidence from which a reasonable fact-finder could return a verdict in its favor. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). The mere existence of some disputed fact does not require

denial of the motion. *Thompson Everett, Inc. v. National Cable*, 57 F.3d 1317, 1322 (4th Cir. 1995). Rather, the disputed facts must be material to an issue necessary for resolution of the case and the quality and quantity of the evidence offered to create a question of fact must be adequate to support a verdict. *Id.*

II. THE NVRA DOES NOT PREEMPT COMAR 33.03.02.01B(1)(C) BECAUSE IT DOES NOT APPLY TO THE SUBJECT MATTER OF THE REGULATION AND THE NVRA DOES NOT DEPUTIZE INVESTIGATIVE CANVASSING.

Plaintiffs allege that COMAR 33.03.02.01B(1)(c) “obstructs” the disclosure provision of the NVRA by prohibiting the use of “voter lists for any investigatory activities . . . concerning potential inaccuracies, errors or anomalies in Maryland’s voter registration rolls.” (ECF 1 ¶ 58.) But plaintiffs’ allegation relies on three unstated premises, none of which find support in fact or in the law.

First, the regulation does not prohibit using a voter registration list for an investigatory activity into the accuracy of a voter roll. The regulation permits using the demographic information in the voter registration list (name, address, registration status, etc.) to conduct activities ensuring the accuracy of that demographic information and the registration eligibility of an individual. What the regulation prohibits is using a voter registration list, and necessarily by extension a voting history, to question a voter about their conduct in past elections. COMAR 33.03.02.01B(1)(c) prohibits using a voting history to impeach election records.

Plaintiffs therefore necessarily argue secondarily that the NVRA applies to the disclosure of voting histories the same as it applies to the disclosure of voter registrations. But it does not. A voting history, unlike a voter registration, does not bear on the “accuracy and currency of the official lists of eligible voters.” 52 U.S.C. § 50207(i)(1). The NVRA disclosure provision

therefore does not apply to voting histories; and, in turn, the NVRA cannot preempt a restriction on the use of a voting history.

Third, plaintiffs rely on the premise that if the NVRA did apply to voting histories, principles of preemption would have the federal law displace the restriction on investigative canvassing. It would not. Obstacle preemption, as alleged by the plaintiffs (ECF 1 ¶¶ 54, 58), does not invalidate any provision that relates to the subject matter of the federal legislation; obstacle preemption “arises when a state law ‘interferes with the methods by which the federal statute was designed to reach [its] goal.’” *Judicial Watch*, F. Supp. 3d at 444 (quoting *Columbia Venture v. Dewberry & Davis*, 604 F.3d 824, 829-30 (4th Cir. 2010)). And door-to-door investigative canvassing was not one of the methods by which the NVRA was designed to effectuate any of its purposes.

Plaintiffs’ allegation therefore fails to state a claim upon which relief can be granted.

A. The Language of COMAR 33.03.02.01B(1)(c) Was Tailored to Specifically Restrict the Use of Voting Histories for Investigative Canvassing into Past Election Conduct.

Plaintiffs allege that the COMAR 33.03.02.01B(1)(c) applies broadly to restrict their use of “voter registration records” and “voter lists” for “investigatory activities” into “Maryland’s voter registration rolls.” (ECF 1 ¶¶ 56, 57, 58.) But the regulation is written specifically to allow nearly all activity relating to maintaining the currency and accuracy of an official roll of eligible, registered voters. COMAR 33.03.02.01B(1)(a) & (b). It only prohibits one instance of behavior: contact with a voter about that voter’s behavior in a previous election. And that behavior, necessarily, involves using a voting history as a basis for questioning an individual about their past voting conduct.

The specificity of COMAR 33.03.02.01B(1)(c) is understood in the context of the two subsections that precede it. COMAR 33.03.02.01B(1)(a) defines the term “electoral process” as

the entirety of the legal apparatus for Maryland elections—the “system” established by state constitution, law, and regulation for electing a person to “public office” or for expressing a preference for a question on a ballot. COMAR 33.03.02.01B(1)(b) provides a non-exhaustive list of ten activities that fall within the “electoral process,” including “registering voters” and “petitioning candidates or questions to the ballot.” Between the two provisions, then, “purpose . . . related to the electoral process,” Election Law § 3-506(a)(1)(ii)(2), is a widely inclusive categorization; a voter registration list can be used for an enormous range of activities.

COMAR 33.03.02.01B(1)(c) provides that “electoral process” does not include one activity, “investigations,” and defines what is meant by that regulatory term. A prohibited investigation involves using a voter registration list to:

- 1) “contact an individual voter”
- 2) “as part of an investigation into an illegal or suspected illegal infraction or violation”
- 3) “involving the voter’s behavior”
- 4) “in a specific election.”

COMAR 33.03.02.01B(1)(c).

Logically, an individual would not use the demographic information in a voter registration list alone to contact a voter about their past voting activities. Doing so would be an enormous waste of time—the investigator would travel door-to-door asking people about their past election participation when a voting history already provides exactly that information. And, ultimately, asking a person about their behavior in a past election does not speak to that person’s eligibility to vote. Finding out whether a person voted in a past election cannot tell the investigator, or the State Board, whether the person is eligible to vote in the next election.

Eligibility to vote in Maryland does not depend on past electoral participation.³ See Elec. Law § 3-102(a)(1) (providing that a person is eligible to register vote in Maryland if they are a citizen, over the age of 16, a resident of the State, and completes the registration process); see also 52 U.S.C. § 20507(b)(2) (prohibiting a voter's removal from a voter roll for their failure to participate in an election).

An individual would only use a voter registration list with an integrated voting history, or a separate voting history file, to contact a voter about their participation in a past election. Only with a voting history could the investigating individual make any meaningful assessment of the voter's responses; and the voter's responses are only relevant to the information contained in the voting history. The restriction in COMAR 33.03.02.01B(1)(c), then, can only apply to an individual using a voting history to conduct an investigatory canvass; and therefore, only restricts the use of a voting history in undertaking such an activity.

Plaintiffs seem to acknowledge as much in their complaint. In their factual allegations, plaintiffs refer to their efforts to contact individual voters in order to verify information “contained in registration *or other official election records*”; and plaintiffs claim that they would analyze “registration *or voting records*” to identify potential errors for later canvassing. (ECF 1 ¶ 39 (emphasis added).) Plaintiffs profess to have never used inappropriate means in their investigatory canvassing activities “in connection with any person's registration *or voting decisions or activities*.” (ECF 1 ¶ 41 (emphasis added).) And the only example of an inaccuracy

³ An inactive voter may be removed from the voter rolls by failing to vote in an election during a certain period. See Elec. Law § 3-502(e)(2). But the voter can only become “inactive” by moving out of state and failing to respond to a forwardable notice card mailed to the voter's last in-state address. See Elec. Law § 3-502(c). Such a voter would not reside in-state for the purposes of plaintiffs' investigatory canvassing activities, and thus the accuracy of that voter's entry on Maryland's voter rolls could not be assessed by plaintiffs' activities.

uncovered by plaintiffs' efforts were "potential inaccuracies in the State's *voting records*." (ECF 1 ¶ 40 (emphasis added).)

Insofar, then, as plaintiffs allege that COMAR 33.03.02.01B(1)(c) applies to their use of demographic information in a voter registration list to verify the accuracy of Maryland's record of eligible, registered voters, they are incorrect. The regulation logically cannot, and therefore does not, apply to the use of the list for checking the accuracy of the demographic details and eligibility information in the State's voter rolls. Plaintiffs are correct, though, that COMAR 33.03.02.01B(1)(c) applies to their efforts to use voting histories—"election records" or "voting records," as they call them—to contact a voter about "voting decisions or activities" from a prior election in an effort to identify "potential inaccuracies in the State's voting records." (ECF 1 ¶¶ 38, 39, 40.)

B. The NVRA Does Not Compel Disclosure of Voting Histories.

The disclosure provision of the NVRA, 52 U.S.C. § 20507(i)(1), provides plaintiffs' basis for pleading Count One of their complaint. (ECF 1 ¶ 58.) Where the law applies to a record, that record must be disclosed in accordance with the provision. And if the record must be disclosed, the means and process for its disclosure must comply with the purposes of the NVRA. Plaintiffs assert that the restriction in COMAR 33.03.02.01B(1)(c) does not comply with the purposes of the NVRA. (ECF 1 ¶¶ 57, 58.) But 52 U.S.C. § 20507(i)(1) does not apply to voting histories in the first place because voting histories have no bearing on the currency or accuracy of a voter roll.

52 U.S.C. § 20507(i)(1) requires disclosure of "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." *Id.* For the provision to apply, there must first be a "program" and "activity." *Long*, 682 F.3d at 335. The program and activity must be conducted for the

“purpose of ensuring the accuracy and currency of official lists of eligible voters.” *Id.* (quoting 52 U.S.C. § 20507(i)(1)). And the program and activity must produce a record “concerning [its] implementation.” *Id.* at 335-36.

Using this three-step analysis, the Fourth Circuit in *Project Vote/Vote for America v. Long*, held that completed voter registration applications were records subject to disclosure under 52 U.S.C. § 20507(i)(1). 682 F.3d at 340. The process of reviewing a voter registration application was both a “program” and “activity,” in that it was a “particular task” of an election official “carried out in the service of a specified end.” *Id.* at 335. The review of a voter registration application was conducted to ensure the accuracy and currency of the official voter list, because it allowed election officials to register eligible applicants, reject ineligible applicants, and ensure a “most recent and errorless account” of qualified voters. *Id.* And the applications themselves qualified as implementation records because they were “integral to [the program and activity’s] execution”—the applications were the means to verify whether an applicant met the statutory requirements for voting eligibility. *Id.* at 336.

Using the same analysis, this Court in *Judicial Watch v. Lamone* ruled that Maryland’s list of registered voters, disclosed under Election Law § 3-506, was also a record subject to disclosure under 52 U.S.C. § 20507(i)(1). 399 F. Supp. 3d at 440. The Maryland list was nothing more than “a pared down compilation of voter registrations,” *id.* and voter registrations were indistinguishable from the voter registration applications review in *Long*, *id.* at 399. This Court thus concluded that the information in Maryland’s voter registration list, including voter names and address, but excluding other information like Social Security numbers, was subject to disclosure under the NVRA. *Id.* at 440.

Voting histories fail this three-step analysis. Voting histories are a record of voting. And voting can be characterized as a program and activity. But individuals do not vote “for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” *Id.* Individuals vote because “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). And so, a voting history is not a record of a program designed to ensure the accuracy of the voter registration list. It is a record of an individual’s participation in an election, collected at the time the person votes to prevent against the person voting more than once in the same election. *See* Elec. Law § 16-201(a)(3) (criminalizing voting, or attempting to vote, more than once in the same election).

Accordingly, the NVRA does not compel the disclosure of voting histories. The NVRA does not apply to the records and materials of past elections. *See True the Vote v. Horseman*, 43 F. Supp. 3d 693, 724-28 (S.D. Miss. 2014) (ruling that pollbooks, absentee ballot applications, and absentee ballot envelopes were election records not subject to the NVRA disclosure provision); *see also Long*, 682 F.3d at 338-39 (noting that overseas requests for a voter registration applications, or absentee ballots, are protected from the NVRA disclosure requirement by other federal law); *and compare* 52 U.S.C. § 20701 (requiring the retention all records “relating to any application, registration, payment of poll tax, or other act requisite to voting in [a federal] election” for 22 months) *with* 52 U.S.C. § 20507(i)(1) (requiring the retention of records subject to disclosure under the NVRA for two years). And the purposes of the NVRA do not transform the public disclosure provision into a post-election discovery tool. *See True the Vote*, 43 F. Supp. 3d at 722.

Maryland may therefore choose to disclose its voting history information as a matter of policy. But it is not compelled to disclose that information by 52 U.S.C. § 20507(i)(1). The NVRA does not preempt COMAR 33.03.02.01B(1)(c), because it does not apply to it.

C. COMAR 33.03.02.01B(1)(c) Does Not Conflict with Any of the NVRA’s Methods for Ensuring Accurate Voter Rolls.

Even if the NVRA applied to voting histories, it would not preempt a regulatory restriction on using voting histories to conduct investigative canvassing. Plaintiffs argue here that COMAR 33.03.02.01B(1)(c) “obstructs the effectuation” of the disclosure provision in the NVRA, (ECF ¶ 58), but it does not. The disclosure provision does not entitle an individual to investigate the conduct of a past election. COMAR 33.03.02.01B(1)(c) therefore does not contravene any of the “methods by which the federal statute was designed to reach” its goals. *Gade v. Nat. Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 103 (1992). Consequently, the NVRA would not preempt the regulation.

Under the Supremacy Clause, U.S. CONST., art. VI, cl. 2, when a state law conflicts with a federal law, the state law is preempted. *Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1111 (4th Cir. 1988). A “conflict” arises when it is impossible to comply with both the state and federal law, or, pertinent here, when the “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Columbia Venture*, 604 F.3d at 829-30 (quotation omitted). “[O]bstacle” preemption occurs specifically when the state law “interferes with the methods by which the federal statute was designed to reach [its] goal.” *Id.* at 830 (quoting *Gade*, 505 U.S. at 103) (alteration in original).

The NVRA sets four purposes for itself, all of which concern eligibility to participate in the electoral process. *See* 52 U.S.C. § 20501(b). To effectuate those purposes, the law establishes a uniform framework for registering eligible voters, 52 U.S.C. § 20503(a), and

minimum standards and processes for removing ineligible voters from voter rolls, 52 U.S.C. § 20507(c)&(d). Nothing in the NVRA governs the actual conduct of an election or the means by which a state administers and records a specific electoral contest. The NVRA simply “focuses on voter registration and removal, not on who voted in a specific election.” *True the Vote*, 43 F. Supp. 3d at 720.

The NVRA, then, is not an instrument to impeach election records. *Judicial Watch*, 399 F.Supp.3d at 435 (“The NVRA was not designed as a tool to root out voter fraud, ‘cross-over voting,’ or any other illegal or allegedly illegal activity with casting a ballot on election day.”) It contains no “methods” for investigating irregularities in the conduct of a past election. *Columbia Venture*, 604 F.3d at 830. There is nothing in the NVRA for COMAR 33.03.02.01B(1)(c) to frustrate, because the federal law does not govern the same conduct as the state regulation—evaluation of records of past elections.

COMAR 33.03.02.01B(1)(c) thus differs from the “Use Ban” that the First Circuit held was preempted by the NVRA in *Public Interest Legal Foundation, Inc. v. Bellows*. 94 F.4th 36 (1st Cir. 2024). The state law in that case prohibited the use of Maine’s voter registration file “for any purpose that is not directly related to evaluating the State’s compliance with its voter list maintenance obligations.” *Id.* at 53 (quotation omitted). The *Bellows* Court held that because the provision prevented the evaluation of all other states’ voter registration programs, it was preempted by the NVRA disclosure provision. *Id.* at 54. Critically, though, the *Bellows* Court noted that an individual was entitled under the NVRA to use Maine’s voter registration file to evaluate any state’s voter registration effort. *Id.* The “Use Ban” thus prohibited an activity contemplated and permitted by the NVRA and was necessarily preempted by it. *Id.*

COMAR 33.03.02.01B(1)(c) does not prohibit an activity contemplated or permitted by the NVRA. It proscribes investigating past elections. The regulation does not pose an obstacle to any part of the NVRA, much less its “methods,” and therefore would not be preempted by it.

III. COMAR 33.03.02.01B(1)(C) IS A CONSTITUTIONAL CONDITION ON ACCESS TO GOVERNMENT INFORMATION UNDER THE FIRST AMENDMENT.

Section 3-506(a)(1)(ii) conditions disclosure of Maryland’s voter registration list on an affirmation that the list will only be used for purposes related to the electoral process. In doing so, the law imposes a content-based restriction on access to a governmental record. *Fusaro v. Cogan*, 930 F.3d 241, 253 (4th Cir. 2019). Nonetheless, the statutory content-based restriction “does not run afoul of the Free Speech Clause” because it is a justifiable and modest burden given the state’s interest in preventing unnecessary voter harassment. *Fusaro v. Howard*, 19 F.4th 357, 370 (4th Cir. 2021). The same holds true for COMAR 33.03.02.01B(1)(c). The regulation imposes the same, content-based restriction on access to a governmental record; and, it is justified in doing so to “shield[] Maryland registered voters from harassment.” *Howard*, 19 F.4th at 370.

Plaintiffs’ First Amendment allegations in this suit have already been addressed by the Fourth Circuit in *Fusaro v. Cogan* and *Fusaro v. Howard*. In *Cogan*, the Fourth Circuit held that the statutory condition on access to a voter registration list—Election Law § 3-506(a)(1)(ii)—occupied a unique place on the First Amendment spectrum. 940 F.3d at 255-56. The voter registration list was a governmental record, so there was no inherent First Amendment right to its disclosure. *Id.* at 249. But because of the “close connections” between the voter registration list

and political speech, and because the condition was content-based,⁴ the Election Law § 3-506(a)(1)(ii) restriction was “susceptible to a First Amendment challenge.” 940 F.3d at 255.

Importantly, susceptibility to First Amendment challenge did not equate with strict scrutiny. Because Election Law § 3-506(a)(1)(ii) fell “squarely within areas traditionally subject to government regulation”—access to governmental records and regulation of elections—it would be reviewed under the balancing test articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and refined in *Burdick v. Takushi*, 504 U.S. 428 (1992). 940 F.3d at 257. That balancing test was articulated as follows:

In short, election laws are usually, but not always, subject to ad hoc balancing. When facing any constitutional challenge to a state's election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that “order, rather than chaos, is to accompany the democratic process.

Id. at 257-58 (quoting *McLaughlin v. N.C. Bd. Of Elec.*, 65 F.3d 1215, 1221 (4th Cir. 1995)).

In *Howard*, the Fourth Circuit held that Election Law § 3-506(a)(1)(ii) survived First Amendment scrutiny under the *Anderson—Burdick* balancing test. 19 F.4th at 369-70. Conditioning access to the voter registration list on its use for an electoral purpose imposed a “modest” burden on an individual requesting the list. *Id.* at 370. And the state’s interests—“safeguarding the [voter registration list], protecting Maryland’s election system, and shielding Maryland registered voters from harassment”—justified the burden. *Id.* And in relation to

⁴ The opinion in *Cogan* also rested its conclusion on the fact that Election Law § 3-506(a)(1)(ii) was a speaker-based restriction. 930 F.3d at 252-53. The law then, as it does now, restricted access to a state voter registration list to “a Maryland registered voter.” Elec. Law § 3-506(a)(1). Through subsequent litigation, however, the speaker-based restriction was struck down as preempted by the National Voter Registration Act. *See Judicial Watch v. Lamone*, 399 F. Supp. 3d 425, 442-45 (D. Md. 2019).

harassment, the *Howard* court noted that it owed “due regard to Maryland's determination that its citizens should not face an onslaught of communication[s] or solicitations irrelevant to the electoral process as the price of participation in the electoral process.” *Id.* (alteration in original).

The same analysis and outcome apply to COMAR 33.03.02.01B(1)(c). The regulation imposes the same conditional, content-based restriction on access to the voter registration list and voting histories. Where the law challenged in *Cogan* and *Howard* restricted an individual from a class of behaviors (using the list for purposes unrelated to the electoral process), the regulation at issue here restricts a single behavior (contacting a voter about past participation in an election). But that difference does not change the First Amendment analysis. The voter registration list and voting histories are governmental records, a condition on their disclosure is subject to *Anderson-Burdick* balancing, and the state’s interest in shielding registered voters from harassment justifies the conditional burden. *See Howard*, 19 F.4th at 369-70. This Court should give “due regard to Maryland's determination that its citizens should not face an onslaught” of private investigations into their participation in past elections. *Id.* at 370 (alteration in original).

Plaintiffs attempt to avoid this conclusion by alleging that COMAR 33.03.02.01B(1)(c) is a viewpoint-based restriction, rather than a content-based description. (ECF 1 ¶¶ 68, 69.) Viewpoint discrimination is the regulation of speech “when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberg v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). It operates when “government targets not subject matter, but particular views taken by speakers on a subject.” *Id.* In contrast, “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

COMAR 33.03.02.01B(1)(c) prohibits using a voter registration list “to contact an individual voter as part of an investigation into an illegal or suspected illegal infraction or violation involving the voter’s behavior in a specific election.” The regulation does not concern itself with the motivation behind the investigation or the type of infraction being investigated. To that end, the regulation does not discriminate between a canvasser investigating voter fraud or one investigating improper exclusion from the polls in a past election (a distinction plaintiffs try to draw (ECF 1 ¶ 69)). The regulation pinpoints a subject matter—a voter’s past behavior in an election—and builds a prohibition around that subject matter.

COMAR 33.03.02.01B(1)(c) survives First Amendment scrutiny just as its implementing statute, Election Law § 3-506(a)(1)(ii) survived in *Cogan* and *Howard*. Count Two of the complaint fails to state a claim upon which relief can be granted.

IV. COMAR 33.03.02.01B(1)(C) IS A VALID EXERCISE OF THE STATE BOARD’S ADMINISTRATIVE AUTHORITY BECAUSE IT IS CONSISTENT WITH THE “LETTER AND SPIRIT” OF THE LAW THAT THE STATE BOARD IMPLEMENTS.

The State Board is forbidden from disclosing a voter registration list to an individual unless the individual affirms in writing, under oath, that the list will not be used for “commercial solicitation” or “any other purpose not related to the electoral process.” Elec. Law § 3-506 (a)(1)(ii). Furthermore, the State Board is empowered to “adopt regulations that *specify* . . . the authorization to be required for providing a [voter registration] list.” Elec. Law § 3-506(a)(2)(ii) (emphasis added). COMAR 33.03.02.01B(1)(c) is therefore a validly promulgated regulation because it specifies, by providing a clarifying definition, the authorization required for disclosure of a registration list. The regulation is accordingly “consistent with the letter and spirit of the law under which the agency acts,” and a valid exercise of the State Board’s authority. *Oyarzo v. Md. Dep’t of Health and Mental Hygiene*, 187 Md. App. 264, 289 (2009) (quotation omitted).

The State Board, like other Maryland agencies, performs a quasi-legislative function when it promulgates new regulations. *Fogle v. H & G Restaurant*, 337 Md. 441, 453 (1995). “[I]n assessing the validity of a new regulation, a court must simply determine whether the [quasi-legislative] responsibilities were properly empowered to the agency and [whether they] have been performed within the confines of the traditional standards of procedural and substantive fair play.” *Id.* (quoting *Dep’t of Nat. Res. v. Linchester*, 274 Md. 211, 223 (1975)) (alterations in original). The plaintiffs in this case do not challenge the validity of the delegation of authority to the State Board; they challenge whether the State Board validly exercised its delegated authority.

The validity of a given regulation depends on whether it is “consistent with the letter and spirit of the law under which the agency acts.” *Oyarzo*, 187 Md. App. at 289 (quotation marks omitted). Where the law makes a “broad” delegation of authority to adopt regulations in a particular area, the regulation must be upheld unless it plainly contradicts the language or purpose of the implementing statute. *Id.* at 292 (quotation marks omitted). And there is no requirement that the law provide specific authorization for the subject matter of a regulation. *Christ by Christ v. Md. Dep’t of Nat. Res.*, 335 Md. 427, 439 (1994).

Plaintiffs’ assert that COMAR 33.03.02.01B(1)(c) must be declared invalid because the Election Law Article does not expressly provide the State Board “a power to independently define or interpret the term electoral process.” (ECF 1 ¶ 79) (quotation marks omitted). But there need not be such an expressly specific delegation of authority. *See Christ*, 335 Md. at 439-40 (collecting cases supporting the principle that the Legislature need not provide a direct grant of authority for a specific regulation).

The Maryland General Assembly provided a statutory framework for the creation of a voter registration list, *see e.g.* Elec. Law § 3-101(a) & (b); but broadly entrusted administration of that list to the State Board *see* Elec. Law § 2-103(b)(6) (granting the State Administrator authority to “implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list”); *see also id* at § 3-101(c)(1) (directing the State Administrator to “define, maintain, and administer the statewide voter registration list”); § 3-505(a) (delegating to the State Board the authority to “adopt regulations for the retention and storage of and reasonable access to original voter registration applications and other voter registration records the State Board considers appropriate”).

The Election Law Article accordingly provides two broad delegations of authority to the State Board to adopt regulations specifying the authorization required to obtain a voter registration list. First, the State Board is granted authority to “ensure compliance” with the Election Law Article by, among other things, “adopt[ing] regulations to implement [the State Board’s] powers and duties.” Elec. Law § 2-102(b)(4). The Election Law Article requires affirmation that a voter registration list will not be used for a purpose unrelated to the “electoral process.” *Id.* at § 3-506(a)(1)(ii)(2). And it is the State Board’s duty to withhold the voter registration list from an individual who declines to provide that affirmation, such as Mr. Morsberger. *Id.* at § 3-506(a)(1); *see also id* at § 3-506(c). The State Board is therefore authorized to promulgate rules implementing its duty to distinguish acceptable list requests from list requests that must be denied.

Second, the Election Law Article delegates to the State Board authority to define how a voter registration list is disclosed. The State Board is required to set by regulation, among other things, “the fee to be paid for providing a list,” “the information to be included on a list,” and

“the format of the information.” Elec. Law § 3-506(a)(2)(iii), (iv) & (vii). Pertinent here, the Election Law Article further requires the State Board to adopt “regulations that specify . . . the authorization to be required for providing a [voter registration] list.” Elec. Law § 3-506(a)(2)(ii). And that authorization necessarily includes “a statement, signed under oath, that the list is not intended to be used for . . . any other purpose not related to the electoral process.” *Id.* at § 3-506(a)(1)(ii)(2).

COMAR 33.03.02.01B(1)(c) does not contradict the terms or the spirit of either statutory delegation. No provision of the Election Law Article permits a private citizen to challenge the validity of a past election by conducting a door-to-door investigation into individual voters’ behavior. Title 12 of the Election Law Article only permits electoral challenges by petition for recount, *see* Elec. Law §§ 12-101–12-107, and by petition for judicial review of any “act or omission . . . inconsistent with [the Election Law Article] or other law applicable to the elections process,” *id.* at § 12-202(a).

Moreover, COMAR 33.03.02.01B(1)(c) does not contradict the language of Election Law § 3-506(a)(1)(ii)(2), “any other purpose not related to the electoral process,” by providing it a clarifying definition. In *Oyarzo v. Md. Dept. of Health & Mental Hygiene*, the Appellate Court of Maryland addressed a similar challenge. 187 Md. App. at 267. The appellant dairy farmer in *Oyarzo* sought to invalidate a Department of Health and Mental Hygiene regulation that “purported to redefine the terms ‘sale’ and ‘sell’ in the context of transactions that involve the right to acquire raw milk.” *Id.* at 270. Both terms were used in a statute, Health General § 21-434, prohibiting the sale of raw milk for human consumption. *Id.* at 267. The challenged

regulation added a clarifying definition for the words “sale” and “sell” to include, among other things, “agistment agreement[s].”⁵ *Id.* at 270.

The appellate court held that the regulation was a valid exercise of delegated regulatory authority. *Id.* at 294. The delegating language provided the Department of Health and Mental Hygiene with authority to “make, revise, or revoke rules and regulations pertaining to the definitions, standards of identity, production, collection, transporting, receiving, transferring, processing, pasteurization, packaging, storing, and selling of milk products.” *Id.* at 291. Because the department could make regulations pertaining to milk transactions, it could validly promulgate a regulation defining “sale” and “sell.” *Id.* at 292.

The same is true here of the State Board’s authority to “specify . . . the authorization to be required for providing a list.” Elec. Law § 3-506(a)(2)(ii). Where that authorization depends on an affirmation that the list will be used for electoral purposes, it falls within the State Board’s regulatory ambit to “specify” what is, and is not, an authorized electoral purpose.

COMAR 33.03.02.01B(1)(c) is thus a valid exercise of the State Board’s delegated rulemaking authority. Count Three of the complaint fails to state a claim upon which relief can be granted.

CONCLUSION

The motion to dismiss should be granted.

Respectfully submitted,

ANTHONY G. BROWN
Attorney General of Maryland

⁵ “[A]gistment’ is defined as: “A type of bailment in which a person, for a fee, allows animals to graze on his or her pasture; the taking in of cattle or other livestock to feed at a per-animal rate.” *Oyarzo*, 187 Md. App. at 267 (quoting Black’s Law Dictionary at 73 (8th ed. 2004)).

/s/ Daniel M. Kobrin

DANIEL M. KOBRIN
Federal Bar No. 30392
Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
dkobrin@oag.state.md.us
(410) 576-6472
(410) 576-6955 (facsimile)

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Attorneys for the State Board

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