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

KATHERINE SULLIVAN, *et al.,*

Plaintiffs,

v.

MICHAEL G. SUMMERS, *et al.,*

Defendants.

No. 1:24-cv-00172-MJM

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs Katherine Strauch Sullivan and David Morsberger respectfully submit this response in opposition to the Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (ECF 19).

## INTRODUCTION

Maryland law prohibits use of its statewide voter registration list, which it defines to include each registrant's "voting history," for a "commercial solicitation" or for any "purpose not related to the electoral process." Md. Election Law §§ 3-506(a)(1)(ii)(2), 3-101(b)(6). Plaintiffs do not challenge that proscription. The State Board of Elections ("SBE" or "State Board"), however, has distended a narrow statutory limitation in a categorical ban on the use of the voter list for any "investigations"—including inquiries into "an illegal or suspected illegal infraction or violation involving the voter's behavior in a specific election"—and mandates that requestors of the list execute an affidavit agreeing to that encumbrance, *see* COMAR 33.03.02.01B(1)(c), 33.03.02.04A (hereafter, the "Use Restriction"). The Use Restriction is unenforceable for three independent reasons.



First, it obstructs the express objectives of, and hence is preempted by, the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501, *et seq.* ("NVRA"). Section 8(i) of the NVRA secures for the Plaintiffs a right to access "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i)(1). Because voter history records are integral to the State's registration list maintenance practices and because Plaintiffs' investigatory canvassing vindicates Congress' stated purposes of "ensur[ing] that accurate and current voter registration rolls are maintained," *id.* § 20501(b)(4), the Use Restriction impermissibly thwarts superseding federal law.

Second, the Use Restriction—as interpreted by the Defendants in their Motion to Dismiss—predicates the permissibility of investigatory canvassing using the voter registration list entirely on the purpose and perspective of the canvasser. It is therefore viewpoint discriminatory, in violation of the First and Fourteenth Amendments of the United States Constitution.

Third, because the Use Restriction purports to prohibit investigatory activities that are, in fact, "related to the electoral process," it conflicts with Md. Election Law § 3-506 and exceeds the scope of SBE's regulatory authority.

## STANDARD OF REVIEW

When adjudicating a motion to dismiss under Rule 12(b)(6), the Court "must accept as true all well-pleaded allegations and draw all reasonable factual inferences in plaintiff's favor." *Mays v. Sprinkle*, 992 F.3d 295, 299 (4th Cir. 2021); *see also Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015) (cautioning that "a motion to dismiss under Rule 12(b)(6) does not typically resolve the applicability of defenses to a well-pled claim"). "In general, a court 'is not to consider matters outside the pleadings or resolve factual disputes when ruling on a motion to dismiss.'" *Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co.*, 912 F. Supp. 2d 321, 332 (D. Md. 2012) (quoting *Bosiger v. U.S. Airways, Inc.*, 510 F.3d 442, 450 (4th Cir. 2007)). Although a movant's reliance on alleged facts extrinsic to the Complaint enables the Court, in its discretion, to convert a motion to dismiss into a motion for summary judgment, "conversion of a motion to dismiss into a motion for summary judgment is discouraged where 'the parties have not had an opportunity for reasonable discovery.'" *John v. Essentia Ins. Co.*, CV 23-310-PJM, 2023 WL 8998951, at *2 (D. Md. Dec. 28, 2023) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)).

## ARGUMENT

### I. The Plaintiffs Have Pleaded a Plausible Claim That the Use Restriction Is Preempted Because It Prevents Plaintiffs From Using Records of the State's Programs and Activities to Verify the Accuracy of the Voter Rolls

The Use Restriction impedes the NVRA's aspiration of empowering individual citizens to independently review and assess the efficacy of a State's "programs and activities conducted for the purpose of ensuring the accuracy and currency" of Maryland's voter registration rolls." 52 U.S.C. § 20507(i)(2). Defendants deploy two primary arguments to circumvent the NVRA's expansive preemptive scope. First, they contend that Section 8(i) does not reach voter histories—*i.e.*, records reflecting whether a given registered voter has cast a ballot in preceding elections. *See* ECF 19-1 at 17–20. Second, they insist that the Plaintiffs' investigatory canvassing is not a list maintenance oversight function protected by the NVRA because it does not advance the NVRA's purposes. *See id.* at 20–22. Both rationales dissipate under scrutiny. Voter histories are an innate component of list maintenance practices and NVRA programs generally, and thus subject to Section 8(i). And even if they were not, the Use Restriction still ensnares other elements of the voter registration list that are undisputedly protected under Section 8(i). In addition, Plaintiffs' canvassing activities are tailored to identify potential errors or inconsistencies in the State's voter registration records, irrespective of their origin or cause. Defendants may not like Plaintiffs' canvassing methods, which involve voter-to-voter engagement regarding past behavior that may "involv[e]" "a suspected illegal infraction or violation." COMAR 33.03.02.01B(1)(c). But, as Plaintiffs have adequately alleged, this work produces information that is relevant to the accuracy and currency of voter registration lists. The NVRA thus protects it from state interference. At the very least, Defendants have not produced a shred of evidence that Plaintiffs' work is not capable

of producing information relevant to the NVRA's purposes. Therefore, they are entitled to neither dismissal nor summary judgment.

### A. The NVRA Protects Access to the Records That Plaintiffs Use in Their Canvassing, Including Voter Histories

Section 8(i) of the NVRA requires incorporating records concerning voters' activities in prior elections into "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). In other words, voter histories maintained by the SBE are incorporated into Section 8(i) and subject to mandatory disclosure under the NVRA. Defendants do not dispute that voter histories have utility in the investigatory canvassing that the Use Restriction prohibits. *See* ECF 19-1 at 16–17. Further, other facets of the statewide registration list that even Defendants appear to concede are within Section 8(i)'s ambit would, contrary to their evidence-free assertions to the contrary, have utility in the investigatory canvassing that the Use Restriction prohibits.

#### *1. Section 8(i) Entitles Plaintiffs to Access Voter Histories That Are Included in the Voter List*

Maryland law expressly designates "voting history information" for inclusion in the "statewide voter registration list," *see* Md. Election Law § 3-101(b)(6), precisely because that data is used to maintain current and accurate voter rolls. When an election official receives reliable information (*e.g.*, notice from the U.S. Postal Service or mail returned as undeliverable) indicating that a registered voter has changed residences, the NVRA affords two avenues for ascertaining the voter's continued eligibility. Both begin by the official mailing the voter a confirmation notice. 52 U.S.C. § 20507(d). If the voter "confirms in writing" with the official that she has moved out of the jurisdiction, the official will cancel the registration. *See id.* § 20507(d)(1)(A). Alternatively, if a voter fails to return the confirmation notice requesting additional information concerning her

residency status, the official must place her into "inactive" status, which can extend for up to two federal election cycles (*i.e.*, four calendar years). *See id.* § 20507(d)(2)(A). If the voter does not update or confirm her registration information or vote in any election during that period, her registration will be canceled. *See id*. The Help America Vote Act of 2002, 52 U.S.C. § 21081, *et seq.*, supplements this regulatory rubric with a recordkeeping mandate. States must create and administer "a single, uniform, official, centralized, interactive computerized statewide voter registration list." 52 U.S.C. § 21083(a)(1)(A). This statewide voter registration list must be maintained in conformance with the NVRA, to include tracking the voter history of inactive voters and, if appropriate, eventually canceling their registrations. *See id.* § 21083(a)(2)(A).

Maryland law itself adopts this so-called "NVRA process." If a voter who appears to have changed residences does not respond to the official's mailed confirmation notice, the official may not remove the voter from MDVOTERS, the statewide registration list, unless the voter "has not voted or appeared to vote (and, if necessary, corrected the record of the voter's address) … during the period beginning with the date of the notice through the next two general elections." *See* Md. Election Law § 3-502(e)(2)(ii); *see also* COMAR 33.05.07.01.[1] And an inactive voter who does not vote during that period "shall be removed from the statewide voter registration list." Md. Election Law § 3-503(c). Even in a highly mobile society, this is the only method federal and state law permits to cancel non-residents from the voter registration list.

Notably, Defendants appear to agree that a registrant's active or inactive status is a record covered by Section 8(i). *See* ECF 19-1 at 10. But a voter's inactive status necessarily is conditioned upon apparent non-participation in recent elections. And the NVRA expressly allows



[1] Maryland law also allows inactive voters to convert their registrations to active status by signing and updating their address on a ballot access petition. *See* COMAR 33.05.07.03.

the Plaintiffs to ascertain the veracity of a voter's ostensible inactive status by examining the data (*i.e.*, participation history) underpinning it. *See Pub. Interest Legal Found., Inc. v. Dahlstrom*, 673 F. Supp. 3d 1004, 1014 (D. Alaska 2023) ("Limiting the disclosure requirement to a set of general process implementation records without the production of the underlying data to show the inputs of the processes and activities put in place would hinder the public's ability to 'protect the integrity of the electoral process' in a way that accomplishes the purposes of the statute.").

It follows from all this that Defendants are simply wrong when they contend that voter participation history records are not subject to NVRA disclosure obligations. Voter participation history "concern[s] the implementation of programs and activities conducted for" voter list maintenance, 52 U.S.C. § 20507(i)—namely, the monitoring of inactive voters and the eventual reinstatement or cancelation of their voter registration.

In the end, the Defendants' constricted conception of Section 8(i), which excludes even records that the State itself statutorily includes in its voter registration list, is nothing more than an attempted resurrection of the position that this Court and the Fourth Circuit have repeatedly repudiated. *See Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 442 (D. Md. 2019) ["*Lamone I*"] (faulting Defendants for "quibbling over semantics" in resisting Section 8(i) requests). Multiple textual attributes of Section 8(i) underscore its substantial scope and Congress' desire to construct robust transparency mechanisms. The term "all records concerning," 52 U.S.C. § 20507(i)(1), "suggests an expansive meaning because 'all' is a term of great breadth." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (citation omitted)). The same is true for the word "concerning." *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1337 (N.D. Ga. 2016) ("The word 'concern' is a broad term meaning."); *Pub. Interest Legal Found., Inc. v. Bellows*, 92 F.4th 36, 47 (1st Cir. 2024) ("[T]he term 'concerning' used in a legal context generally

has a broadening effect, ensuring that the scope of the provision covers not only its subject but also matters relating to that subject'" (citation omitted)). Further, that this facially plenary right of access is cabined by only two specific statutory exceptions—namely, records reflecting an individual's declination of a registration opportunity or the identity of a public agency at which a particular voter registered, *see* 52 U.S.C. § 20507(i)—implicitly forecloses other exclusions. *See Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 560 (M.D. Pa. 2019) ("The contrast between the broad mandate to disclose 'all' records and the tailored protection of two types of records implies that Congress crafted this provision carefully"). And the provision's sweep of sundry "programs and activities" denotes an intent to secure transparency into all facets of state and local governments' processes for creating, updating and verifying their voter rolls. *See Long*, 682 F.3d at 335 (explaining that a "program" is a "plan" "carried out in the service of a specified end—maintenance of voter rolls," and an "activity" is "a particular task and deed of [Maryland] election employees"); *Boockvar*, 431 F. Supp. 3d at 560 (noting that Section 8(i) "contemplates an *indefinite* number of programs *and* activities" relating to list maintenance); *Pub. Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 941 (C.D. Ill. 2022) (holding that "any record, be it data regarding maintenance activities, the processes involved in the maintenance activities, or the output of those maintenance activities, including the statewide voter registration list, must be made available to the public").



Voter history falls squarely within this statutory ambit because it is intertwined with ensuring the accuracy and currency of voter lists. Because voter history ***must*** be used to monitor and (as appropriate) modify or cancel the registrations of suspected non-residents, at least two courts have compelled its disclosure under Section 8(i). *See Bellows*, 92 F.4th at 47 (holding that the statewide voter file, which includes "voter record and voter participation history information"

"reflects the additions and changes made by Maine election officials . . . pursuant to federal and state law as part of Maine's voter list registration and maintenance activities"[2]); *Pub. Interest Legal Found. v. Chapman*, 595 F. Supp. 3d 296, 307 (M.D. Pa. 2022) (holding that Section 8(i) entitled request to "the name and voting history of any registrant identified as a potential noncitizen"). No court has held to the contrary.[3]

Finally, this Court's opinion in *Lamone I* is almost directly on point. As it explained, records that "contain the information on which Maryland election officials rely to monitor, track, and determine voter eligibility" necessarily "concern the implementation of the program and activity of maintaining accurate and current eligible voter lists." *Lamone*, 399 F. Supp. 3d at 439; *see also Boockvar*, 431 F. Supp. 3d at 561 (Section 8(i) covers records "created pursuant to a system designed to identify" potentially ineligible registrants). Of course, *Lamone I* did not explicitly address voter history in ordering the disclosure of various aspects of the statewide voter registration list, but the Defendants' express arguments against the release of voter participation data suggests they believed it was at issue. *See* ECF 49-1, State Defs.' Memorandum in Opposition to Pl.'s Mot. for Summary Judgment and in Support of State Defs.' Cross-Mot. for Summary Judgment at 12, 23, *Judicial Watch, Inc. v. Lamone*, No. 17-cv-2006-EH (D. Md. Mar. 11, 2019). At the very least, *Lamone I*'s logic transposes easily; because under the NVRA and state law



[2] *Bellows* also eviscerates the Defendants' meaningless distinction in using different processes to export some voter history from MDVOTERS. *See* ECF 19-1 at 10-11. The only relevant factor is that the "electronic report[s]" containing voter history are "output[s]" from MDVOTERS, "the database through which [Maryland] carries out its voter list registration and maintenance activities." *Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 47 (1st Cir. 2024).

[3] Voter history data that is incorporated into the statewide voter registration list and that is used for certain list maintenance activities stands in marked contrast to the freestanding election administration materials (*e.g.*, pollbooks and absentee ballot applications) that were deemed outside Section 8(i)'s scope in in *True the Vote v. Hosemann*, 43 F. Supp. 3d 693 (S.D. Miss. 2014).

Maryland elections officials must "rely" on voter participation history "to monitor [and] track" the migration of voters from active to inactive and/or canceled status, 399 F. Supp. 3d at 439, voter participation history certainly "concern[s] the implementation" of list maintenance, 52 U.S.C. § 20507(i)(1), and hence is subject to disclosure under Section 8(i). *See also Boockvar*, 431 F. Supp. 3d at 561 (commenting that "a broad reading [of Section 8(i)] promotes the integrity of the voting process and ensures a public vehicle for ensuring accurate and current voter rolls").

*2. The Use Restriction Prevents Investigatory Canvassing Using Other Records That Section 8(i) Undisputedly Covers*

Even assuming *arguendo* that voter participation history is not among the records to which Section 8(i) applies, the Use Restriction still prohibits Plaintiffs from using in their investigatory canvassing components of the voter registration list that the Defendants appear to acknowledge are protected by Section 8(i): namely, voters' names, addresses, birth dates, and active or inactive status, as well as an activity log reflecting changes in the registration over time. *See* ECF 19-1 at 9; *see also Lamone I*, 399 F. Supp. 3d at 446 (ordering the disclosure of name, address and activity data under Section 8(i)); *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209, 225 (D. Md. 2020) ["*Lamone II*"] (ordering disclosure of date of birth data).



Defendants' argument that the Use Restriction applies only to voter history information falls flat. The Use Restriction itself does not differentiate between the various informational elements in the voter registration list. All applicants must, as a condition of obtaining the list—not just the voter history information—execute an affidavit agreeing that they will not "knowingly allow[] ***any part of that list*** to be used for . . . any other purpose that is not related to the electoral process," as defined by the Use Restriction. COMAR 33.03.02.04A (emphasis added). Indeed, the Use Restriction is itself an exercise of the SBE's purported authority to regulate the voter registration list. *See* Md. Election Law § 3-506(a)(2); *see also infra* Section III.

More substantively, Defendants' supposition that the Use Restriction could never affect investigatory canvassing that relies on list components other than voter history is both factually unsupported and conceptually unsound. Defendants assert that:

> Logically, an individual would not use the demographic information in a voter registration list 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.

ECF 19-1 at 15. Multiple flaws are embedded in this reasoning. First among them is its circularity; it presupposes that all information in the registration list is accurate when that is, to the contrary, the very proposition that Plaintiffs are probing.

Even if the SBE's voter history information is wholly excluded from the list made available to canvassers, however, voters' self-reports of their participation can be used to investigate potential "illegal infraction[s]." Suppose, for example, that the canvasser visits 123 Main Street; the sole resident is Mary Smith, who, when asked, states that she voted in the 2022 election in that county. The voter registration list, by contrast, indicates that there is no Mary Smith registered in that county. To use another example: a canvasser makes inquiries of a voter on the inactive list, who informs the canvasser that he voted in the preceding election—an action that should have restored his registration to active status. Or maybe that voter says he did not vote in the last two federal general elections—inaction that would have required officials to cancel his registration. These asymmetries could very well reflect "illegal infraction[s]" that are leading to inaccuracies in the voter registration list. Perhaps the discrepancies are attributable to intentional wrongdoing by either the voter or another third party, which of course would be "illegal infraction[s]." Or perhaps they reflect errors, malfeasance or inadequate data administration practices on the part of elections officials—which also would be "illegal infraction[s]" because they evidence that election

officials were failing to abide by the NVRA's requirements that would prohibit cancellation of individuals who voted during the two federal election waiting period or that the officials were failing to remove those who did not. *See* 52 U.S.C. § 20507(a)(3)(C), (a)(4). But in either case they "involv[e] the voter's behavior" and thus the Use Restriction prohibits Plaintiffs from pursuing them.

In any event, the Complaint directly and expressly alleges that Plaintiffs use the voter registration list for canvassing activities covered by the Use Restriction, but nowhere represents that Plaintiffs rely solely or exclusively on voter history data in their efforts. *See* ECF 1, ¶¶ 38, 39, 58. The Court must "accept as true the factual allegations of the challenged complaint," *Lambeth v. Bd. of Comm'rs. Of Davidson Cnty., NC*, 407 F.3d 266, 268 (4th Cir. 2005); the question of which items within the voter registration list Plaintiffs have used or will use in connection with investigatory canvassing cannot be adjudicated through a motion to dismiss. *See Mayor and City Council of Baltimore v. Trump*, 416 F. Supp. 3d 452, 480 (D. Md. 2019) ("Courts ordinarily do not 'resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses' through a Rule 12(b)(6) motion." (citation omitted)). To the extent Defendants' motion purports to be one for summary judgment, they have furnished no record support for factual representations concerning which voter registration list data Plaintiffs do or do not use in canvassing. *See* Fed. R. Civ. P. 56(c)(1); *Kurland v. ACE Am. Ins. Co.*, CV JKB-15-2668, 2017 WL 354254, at *1 (D. Md. Jan. 23, 2017) ("The burden is on the moving party to demonstrate the absence of any genuine dispute of material fact.").



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In sum, voter history data—which Maryland expressly denominates a component of its statewide voter registration list, *see* Md. Election Law § 3-101(b)(6)—is integral to processes

mandated by both federal and state law for monitoring and updating the registration status of certain voters. *See* 52 U.S.C. §§ 20507(d)(2), 21083(a)(2)(A); Md. Election Law § 3-503. It follows that this information "concern[s] the implementation" of "programs and activities" relating to voter list maintenance. *See* 52 U.S.C. § 20507(i)(1). They accordingly are records that the SBE must disclose to Plaintiffs under Section 8(i) of the NVRA. In addition, even assuming *arguendo* that voter history is not protected by the NVRA, other components of the statewide voter registration list can be used in the investigatory canvassing that the Use Restriction prohibits—or at least, whether they can be so used cannot be resolved at this stage of the litigation.

### B. Plaintiffs Have Pleaded a Valid Claim That, Because the Use Restriction Obstructs the NVRA's Stated Purposes of Protecting Election Integrity and Ensuring Adequate List Maintenance, It Is Preempted

When a state law or regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it is preempted. *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 829–30 (4th Cir. 2010) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)); *see also* U.S. Const. art. VI. Although "[c]ourts generally apply a presumption against federal preemption in fields the states traditionally regulate," *Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315, 321 (4th Cir. 2012) (citation omitted), no such supposition applies here. The NVRA is predicated on Congress' authority under the Constitution's Elections Clause to determine "[t]he Times, Places and Manner of holding" federal elections. *See* U.S. Const. art. I, § 4. Because the States never possessed an antecedent sovereign power to regulate federal elections, the federalism concerns that animate the usual presumption against preemption are not implicated in this context. *See Lamone*, 399 F. Supp. 3d at 444 ("The Elections Clause 'empowers Congress to make or alter state election regulations,' and therefore 'the assumption that Congress is reluctant to pre-empt does not hold when Congress acts' under that

Clause" (quoting *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 14 (2013) (quotation marks omitted)); *see also Matthews*, 589 F. Supp. 3d at 940 ("The presumption for, rather than against, federal preemption is . . . the proper starting point" in NVRA cases). Accordingly, the Use Restriction is preempted if "it obstructs the effective implementation of Section 8(i) and hinders the realization of the NVRA's enumerated purposes." *Lamone*, 399 F. Supp. 3d at 445.

*1. The Defendants' Litigation Position Conflicts with the Use Restriction's Broad Prohibition on Using the Voter List for Any "Investigation"*

Before evaluating Section 8(i)'s preemptive effective, it is important to first distill the Use Restriction's actual scope. To reiterate, Maryland permits persons to use the statewide voter registration list only for purposes that are "related to the electoral process." Md. Election Law § 3-506(a)(1)(ii)(2). The Use Restriction provides, in relevant part:

> "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."

COMAR 33.03.02.01B(1)(c). Defendants assert that the Use Restriction "only prohibits one instance of behavior: contact with a voter about that voter's behavior in a previous election." ECF 19-1 at 14. This construction, however, can be sustained only by effectively excising the first sentence of the definition. *See generally Downes v. Downes*, 880 A.2d 343, 349 (Md. 2005) (Courts "do not add words or ignore those that are there" when interpretating a statute). By its plain terms, the first sentence of the provision unconditionally and unqualifiedly excludes *all* "investigations" from the definition of "electoral process." While the second sentence singles out a particular species of investigation for proscription, there is no textual indication whatsoever that the second sentence purports to modify or delimit the general term "investigations" used in the preceding sentence.

The distinction is not one of semantic technicalities. Individuals seeking a copy of the statewide voter registration list must agree, under penalty of perjury, to adhere to the Use Restriction, *see* COMAR 33.03.02.04A, and those who breach that agreement subject themselves to criminal liability, *see* Md. Election Law § 3-506(c). The SBE's apparent position that the substantive scope of the Use Restriction is defined by solely the second sentence in COMAR 33.03.02.01B(1)(c) may be colorable, but in the absence of its ratification by the Supreme Court of Maryland, it is sufficiently untethered from the text that this Court cannot adopt it as a formal limiting construction. *See Toghill v. Clarke*, 877 F.3d 547, 556 (4th Cir. 2017) ("[F]ederal courts are *without* power to adopt a narrowing construction of a state statute unless such a construction is *reasonable and readily apparent*" (citation omitted; emphases in original)). And it is, at best, unclear that an interpretive position announced by the SBE in litigation filings could preclude other state or local officials from pursuing criminal or other adverse actions against the Plaintiffs. *See Bellows*, 92 F.4th at 50 (declining to adopt proposed limiting construction, noting that defendants' "representations do not promise nonenforcement of the Use Ban but rather state that the Elections Division would not view [plaintiff]'s intended activities as violations").

Further, the interpretation advanced by the Defendants in this litigation introduces another layer of uncertainty. Specifically, the Defendants appear to posit that the Use Restriction affects investigations only into "an illegal or suspected illegal infraction or violation" that was *committed by* the voter. But the language of the Use Restriction is not so confined; rather, the suspected infraction or violation under inquiry need only "involv[e] the voter's behavior," even if the actual fault (to the extent there is any) lies with elections officials or other third parties. *See* COMAR 33.03.02.01B(1)(c).

The upshot is that, for purposes of adjudicating Plaintiffs' NVRA claim, the Court should read the Use Restriction to mean what it says: the statewide voter registration list cannot be used in furtherance of *any* "investigations."

*2. Defendants' Interpretation of the Use Restriction Obstructs the NVRA's Purpose of Uncovering Potential "Error and Fraud" in the Voter List*

Even assuming *arguendo* that the Use Restriction encompasses only those "investigations" that entail "contact[ing] an individual voter as part of an investigation into an illegal or suspected illegal infraction or violation" ***by*** the voter, it "nonetheless creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Bellows*, 92 F.4th at 55. The Court need not labor to infer the legislative goals undergirding the NVRA; Congress explicitly enumerated four of them, to include "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(3)-(4); *see Lamone*, 399 F. Supp. 3d at 445 (citing this provision in denoting the NVRA's preemptive scope).



The Use Restriction obstructs the NVRA's purpose of empowering citizens to "assist the identification of both error and fraud in the preparation and maintenance of the voter rolls." *Long*, 682 F.3d at 339. Defendants' assertion that the NVRA "is not an instrument to impeach election records" or "for investigating irregularities in the conduct of a past election," ECF 19-1 at 21, confounds a key distinction that is at the crux of the NVRA. The NVRA certainly does not confer a *carte blanche* right to inspect any and every facet of election administration. For example, the NVRA does not entitle individuals to obtain copies of pollbooks or absentee voting applications in a search for potentially fraudulent submissions. *See Hosemann*, 43 F. Supp. 3d at 727–28. It does, however, seek to facilitate inquiries into "both error and fraud and the preparation and maintenance of voter rolls," so that elections officials are "accountab[le] to the public in ensuring

that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible." *Long*, 682 F.3d at 339.

Crucially, the NVRA does not distinguish between the various potential ***causes*** of an error, inaccuracy, or anomaly in the voter rolls; its objective is to identify and correct such problems, whatever their genesis. *See Lamone I*, 399 F. Supp. 3d at 445 (NVRA preempted state statute that prevented non-Maryland residents from using voter list to "identify[] errors and fraud"). Investigatory canvasses focused on voter list irregularities that may be rooted in fraud or other "infractions" are no different, as far as the NVRA is concerned, from investigations into errors that appear attributable to innocent data entry mistakes. Indeed, a canvasser may not even know whether he is investigating an "infraction[]" or an inadvertent error until the canvassing is completed and he analyzes the information collected. The critical question is whether the state law is standing in the way of using records covered by the NVRA to produce information relevant to the currency and accuracy of its voter lists.



As alleged clearly in the Complaint, the Plaintiffs' investigatory canvassing activities—which do include interviewing voters (on a strictly voluntary, non-coercive basis) about their conduct in past elections and potential infractions involving their behavior—have yielded evidence of potential anomalies or inaccuracies in the voter registration list. *See* ECF 1 at ¶¶ 2, 38–42. This is precisely the type of use that Section 8(i)'s right of access exists to vindicate. The NVRA's protection of this activity is not conditioned on who caused the potential inaccuracy or other problem in the voter list (*e.g.*, the voter himself, an election official, or a third party) or the reason for the discrepancy (*e.g.*, an "infraction" of a specific statute or a good faith error).[4] *See Bellows*,

[4] States can, of course, require that NVRA-protected investigations be conducted in a manner that does not entail harassment, coercion, intimidation or similarly threatening behavior. The NVRA

92 F.4th at 54 (finding state restriction on public disclosure of voter list and using it to verify accuracy of other states' voter registration lists) preempted, pointing to "Congress' belief that public inspection, and thus public release, of Voter File data [including voter history] is necessary to accomplish the objectives behind the NVRA"); *Greater Birmingham Ministries v. Merrill*, No. 2:22-cv-205-MHT, 2022 WL 5027180, at *5 (M.D. Ala. Oct. 4, 2022) (observing that "the right to access voter records serves as a necessary foundation for a broad array of opportunities to engage and to make use of those records as the requesting party sees fit"). And, of course, at this stage of the proceedings, those allegations must be accepted as true.

In short, collecting information directly from individuals concerning their past voting behavior or other attributes of their registration status can be—and, for the Plaintiffs, is in fact—a means of identifying mistakes, outdated information, or procedural irregularities in the official voter list. Defendants' only apparent rejoinder to this foundational interrelationship between voter participation history and list maintenance is relegated to a single footnote in which they perfunctorily assure the Court that a voter on the inactive list "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." ECF 19-1 at 16 n.3. But that sleight of hand obscures that the residency status of an inactive voter is inherently uncertain.

There is no guarantee that an inactive voter has necessarily left the state, or even moved at all. Defendants' footnote disregards that the NVRA's and Maryland's inactivation and waiting period are "procedural safeguards … in place to protect against wrongful disenfranchisement."



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itself imposes similar strictures. *See* 52 U.S.C. § 20511(1) (providing for criminal liability on anyone who "knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person" in connection with voter registration).

*Indiana State Conf. of Nat'l Ass'n for Advancement of Colored People v. Lawson*, 326 F. Supp. 3d 646, 656 (S.D. Ind. 2018). Many inactive voters have not moved out of state and eventually vote. For example, "[i]n the November 2008 general election … 6.9 percent" of "inactive registered voters" voted. 94 Md. Op. Att'y Gen. 151 (2009). It is also important to remember that a voter is inactivated simply by failing to respond to a confirmation mailing. "[C]onfirmation notices may go unanswered for any number of legitimate reasons, including the voter being elsewhere on vacation, mistaking the notice for election-related campaign literature or junk mail and not reading it, or simply forgetting to respond to it." *Maryland Green Party v. Maryland Bd. Of Elections*, 377 Md. 127, 149 (2003). Defendants are also simply wrong that the confirmation and inactivation process applies solely to suspected ineligible voters who have moved out of state. For example, Maryland utilizes the inactivation and cancellation process to remove certain suspected deceased voters. SBE Policy 2023-02.[5] The Defendants also fail to explain how the required confirmation process operates when officials have received undeliverable mail sent to a voter but have no indication whether the voter has moved within or outside Maryland. Specifically, if an inactive voter presents herself to vote in a Maryland election, she will be permitted to do so and her registration will be updated and restored to active status. *See* 52 U.S.C. § 20507(d), (e); Md. Election Law § 3-502(d), (e). A voter would remain in inactive status ***only*** if her residency status remains unconfirmed and she does not cast a ballot over the course of several years of being designated inactive.



Other fact patterns likewise illuminate the utility of voluntary in-person interviews in vetting the accuracy of the voter list. For example, assume that an individual approached by the

[5] Available at https://elections.maryland.gov/laws_and_regs/documents/2023-02%20Obituary%20Processing.pdf.

Plaintiffs freely shares that he has resided at a given address for twenty years and has voted in every election during that time period, but a review of the voter list indicates that the same individual is nowhere to be found on the rolls (or, alternatively, is registered in a different jurisdiction). In-person interviews might also reveal that individuals who have been removed from the voter list for ostensibly being deceased are actually very much alive (or *vice versa*).

Perhaps the Defendants are skeptical that such canvassing activities will be effective in eliciting actual errors or anomalies in the voter registration rolls. But Section 8(i)'s preemptive force is not conditioned on the efficacy of Plaintiffs' canvassing activities. *See Long*, 682 F.3d at 340 ("It may or may not be that Section 8(i)(1) is the most effective means of promoting the NVRA's stated purposes . . . But this debate belongs in the legislative arena, not the courts."); *Lamone II*, 455 F. Supp. 3d at 225 (a plaintiff "need not demonstrate its need for [the requested] information in order to facilitate its effort to ensure that the voter rolls are properly maintained."). It is sufficient that the Plaintiffs' investigatory canvassing is capable of yielding the type of information that can be used to identify errors, inaccuracies or anomalies in the voter registration rolls (whatever their cause). Because the Complaint plausibly alleges that the Use Restriction directly impedes the Plaintiffs' ability to carry out such activities, it states a valid claim that the Use Restriction "obstructs the effective implementation of Section 8(i) and hinders the realization of the NVRA's enumerated purposes." *Lamone I*, 399 F. Supp. 2d at 445.



## II. By Conditioning the Permissibility of Canvassing on the Speaker's Purpose or Perspective, the Defendants' Interpretation of the Use Restriction Renders It an Unconstitutional Viewpoint-Based Regulation of Protected Speech

If Defendants are correct that the Use Restriction applies only to investigations "into an illegal or suspected illegal infraction or violation," then it differentiates between protected speech based on the viewpoint of the speaker, in violation of the First and Fourteenth Amendments.

"Government 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*, 576 U.S. 155, 163 (2015). By contrast, viewpoint-based regulation—which is "a subset of content-based restrictions," *Saltz v. City of Frederick, MD*, 538 F. Supp. 3d 510, 540 (D. Md. 2021)—"occurs when a government official 'targets not subject matter, but particular views taken by speakers on a subject.'" *Robertson v. Anderson Mill Elem. Sch.*, 989 F.3d 282, 290 (4th Cir. 2021) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). A viewpoint-based law, regulation or governmentally sanctioned practice "is presumed to be unconstitutional," *Rosenberger*, 515 U.S. at 828, and can survive only if the government "prove[s] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Saltz*, 538 F. Supp. 3d at 541; *see also Greater Baltimore Ctr. For Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 288 (4th Cir. 2013) (reiterating that "a viewpoint-based restriction of private speech rarely, if ever, will withstand strict scrutiny review" (citation omitted)). Defendants seemingly do not (and cannot) dispute that Plaintiffs' alleged face-to-face canvassing activities are constitutionally protected expression. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 162 (2002) (emphasizing "the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas").



Defendants' construction of the Use Restriction converts what otherwise may be a content-based regulation of all "investigations" using the voter list into a viewpoint-based restriction on only those investigations that are premised on a perspective of which they disapprove. The Fourth Circuit acknowledged that Maryland's prohibition on using the voter list for any "purpose not related to the electoral process," Md. Election Law § 3-506(a)(1)(ii)(2), "imposes content- and

speaker-based conditions on access to and use of the List." *Fusaro v. Cogan*, 930 F.3d 241, 250 (4th Cir. 2019). Conceptualizing the statute as primarily controlling access to government information, the Court adjudicated its constitutionality under the so-called *Anderson-Burdick* standard, which "balances" the magnitude of the burden on expressive activity relative to countervailing "state interests." *Id.* at 257–58. Importantly, however, the court emphasized that "the crucial consideration in assessing the propriety of a restriction on access to government information is whether it represents, or poses a substantial risk of, viewpoint discrimination." *Id.* at 263. If an interpretation or application of the statute transgressed this neutrality criterion, strict scrutiny would ensue. *See id.*

If (as Defendants contend) the Use Restriction prohibits using the voter list for investigatory canvassing ***only if*** the investigation concerns "an illegal or suspected illegal infraction or violation involving the voter's behavior in a specific election," COMAR 33.03.02.01B(1)(c)—as distinguished from all "investigations" or even all direct contact involving the voter's past conduct—it is facially viewpoint-discriminatory. Viewpoint discrimination inheres in a government-imposed distinction that is "based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Reed*, 576 U.S. at 168 (citation omitted). Importantly, "viewpoint discrimination" is not limited to the targeting of a single, identifiable message; it can consist of proscribing an entire class of viewpoints. *See Rosenberger*, 515 U.S. at 831 ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint."); *Matal v. Tam*, 582 U.S. 218, 243 (2017) (holding that ban on registration of "disparaging" trademarks was viewpoint discrimination, explaining that "[t]o be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and

socialists, and those arrayed on both sides of every possible issue . . . But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint."); *Iancu v. Brunetti*, 588 U.S. 388 (2019) (same conclusion concerning ban on "immoral" or "scandalous" trademarks); *Am. Freedom of Defense Initiative v. Suburban Mobility Auth. For Regional Transp.*, 978 F.3d 481, 499 (6th Cir. 2020) ("The [Supreme] Court has held that viewpoint discrimination exists even when the government does not target a narrow view on a narrow subject and instead enacts a more general restriction—such as a ban on all 'religious' speech or on all 'offensive' speech."). Here, the Use Restriction (as Defendants interpret it) allows canvassers to contact voters about their behavior in past elections—but ***only if*** the canvassing is not motivated by, or predicated on, the canvasser's interest in a potential "illegal or suspected illegal infraction." That encapsulates a viewpoint-based regulation.[6]

The Defendants' insistence that the Use Restriction "does not discriminate" between canvassing activities, ECF 19-1 at 25, is belied by a simple hypothetical. Assume there are two non-profit organizations, Group A and Group B. Both groups conduct door-to-door canvassing using Maryland's voter registration list, and both ask canvassed individuals (on a purely voluntary basis) questions about their participation in past elections. Group A intends to use the survey responses to analyze whether elections officials are properly implementing laws designed to make voting easier and more accessible, or to learn more about what motivates people to vote or refrain from doing so. Group B suspects that inadequate list maintenance procedures in the SBE are leading to improper registrations by ineligible individuals (whether caused by the voter's



[6] Further aggravating the constitutional problem, Defendants at times vacillate on the actual parameters of their interpretation of the Use Restriction. At one point in the Motion to Dismiss, they characterize as categorically restricting "contacting a voter about past participation in an election." ECF 19-1 at 24.

wrongdoing or an election worker's dereliction of a statutory duty), and will incorporate its findings in a report that itemizes SBE's shortcomings. While Group A is on legally safe terrain, Group B is in the crosshairs of a potential criminal prosecution for violating the Use Restriction. *See* Md. Election Law § 3-506(c). Indeed, the Use Restriction's differentiations among canvassing activities are even more granular than the foregoing hypothetical suggests. Defendants' assurance that the Use Restriction is neutral with respect to the "type of infraction being investigated," ECF 19-1 at 25, collides with the regulatory text, which singles-out investigations into "illegal or suspected illegal infraction or violation involving the voter's behavior in a specific election." COMAR 33.03.02.01B(1)(c). In other words, the Use Restriction allows use of the voter list to conduct investigatory canvassing that entails direct voter contact—but only if the canvasser espouses a specific motivation or perspective with respect to the issue of potential infractions or unlawful behavior. If the canvasser is looking to confirm legality or conducting an investigation where legality is not at issue, the speech is allowed. If the canvasser suspects that infractions may have occurred, she is ensnared in the Use Restriction's constraints. The Use Restriction accordingly is—under Defendants' own interpretation of it—viewpoint-discriminatory on its face.



Because the Complaint validly pleads a plausible claim of viewpoint-based discrimination, the Defendants bear the burden of establishing that the Use Restriction is "narrowly tailored to serve a compelling government interest." *St. Michael's Media, Inc. v. Mayor and City Council of Baltimore*, 566 F. Supp. 3d 327, 366 (D. Md. 2021) (citation omitted); *see also id*. at 359 ("The government bears the burden of showing that the regulation satisfies the applicable level of scrutiny."). "[S]trict scrutiny, in practice, is virtually impossible to satisfy," *Wash. Post. v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019), and Defendants' Motion—to the extent it purports to seek summary judgment—provides no factual evidence corroborated by record citations relating

to either the State's putative "compelling interests" underlying the Use Restriction or the "tailoring" employed to achieve them.[7] The Court accordingly should deny the Motion and hold that Count II states a valid claim.

## III. Plaintiffs Have Adequately Pleaded That the Use Restriction's Definition of "Electoral Process" Conflicts with Controlling Statutes and Exceeds the SBE's Authority

Maryland's election statutes do not grant the State Board the authority to define the term "related to the electoral process." The Defendants throw a smattering of statutes at the wall to show otherwise, but only §§ 3-506(a)(1)(ii)(2) and (a)(2)(ii) merit extended discussion.[8] Neither empowers the Board to police the line between the electoral process and other domains.



[7] The Motion's passing allusion to "the state's interest in shielding registered voters from harassment," ECF 19-1 at 24, does not even come close to discharging its burden in the strict scrutiny context, particularly given the Complaint's express affirmation that the Plaintiffs have never engaged in such misconduct. *See* ECF 1 at ¶¶ 41–42. "The Supreme Court has made clear that, when free speech values are at stake, states must supply rationales that are 'far stronger than mere speculation about serious harms.' The First Amendment does not permit states to broadly conjure hypotheticals in support of expressive burdens. If any evidence—no matter how indirect or futuristic—could concretize a purported harm, speech would be rendered substantially more vulnerable." *Washington Post*, 944 F.3d at 522 (citations omitted); *see also Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 100–01 (1972) ("Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.").

[8] Defendants' citations to §§ 2-102(b)(4), 2-103(b)(6), 3-101(a) and (b), and 3-505(a) as grants of authority are makeweights. Section 2-102(b)(4) merely grants regulatory authority. Plaintiffs do not dispute that the State Board has regulatory authority but only within its enumerated powers. Section 3-101 and 2-103 do not confer regulatory authority, but merely set forth the responsibilities of the State Administrator of Elections to implement HAVA. And § 3-505(a) is addressed only to the storage of physical records. Defendants' citation to § 3-101, moreover, is rich. While that provision does nothing to establish their authority to adopt the Use Restriction, it does fatally undercut their argument that "voter history" is distinct from the "voter registration list." That very provision specifically states that the "voter registration list" "shall…include voting history information." *See supra* Section I.A.

The cited provisions confer only narrow authority on SBE, limited to procedural matters, and tellingly they do not encompass any authority to define statutory terms. Defendants note that under § 3-506(a)(1)(ii)(2), they have an obligation to ensure that the voter registration list is not to be released absent the receipt of "a statement, signed under oath" that the requester does not intend to use it "for a purpose unrelated to the 'electoral process.'" True enough. But that language cannot be read to confer enforcement authority. It does not, on its face or by implication, empower the State Board to police the boundary between the electoral process and other domains. Once the Defendants have ensured, by regulation or otherwise, that no request for the list is fulfilled without the required affirmation, their statutory duty is fulfilled. Whether a requester's subsequent conduct is in breach of their affirmation is a question for those who do have enforcement authority, including law enforcement and the courts. *See e.g.*, *Fusaro v. Howard*, 472 F. Supp. 3d 234, 248 (D. Md. 2020), *aff'd*, 19 F.4th 357 (4th Cir. 2021) ("According to DeMarinis, the issue of use of the List for commercial purposes 'would be an enforcement question, and that would be within the State Prosecutor's Office.'").



Defendants next try to hang their hat on § 3-506(a)(2)(ii), which empowers them to "adopt regulations that specify … the authorization to be required for providing a list" in "consultation with the local boards." Defendants have nothing coherent to say about how this provision empowers them to define the term "electoral process." They seem to believe that it enables them to require requesters to agree in "the authorization" to any condition they might want to impose upon access or use of the list. But context strongly suggests otherwise. It suggests that this power to "specify . . . the authorization to be required" is addressed to the form of the document the requester must submit and the method by which it is submitted. Nothing suggests that it was meant to confer power on the Defendants to redefine statutory terms.

First, the statutory restrictions on accessing and using the list are grouped into subsection (a)(1). But "the authorization" language is found in subsection (a)(2).

Second, the other matters subsection (a)(2) empowers the State Board to "specify" are all administrative in nature. Along with the power to specify "the authorization," the subsection also confers the power to specify the timing of production, the format of the information to be produced, and the fees to be collected. These are all housekeeping matters. It would be strange, to say the least, to find a grant of authority to reinterpret statutory terms plopped down in the middle of these otherwise ordinary authorities.

Finally, all subsection (a)(2) powers must be exercised "in consultation with local boards." That makes sense for resolution of administrative matters that involve coordination between distinct entities. It makes no sense for a grant of interpretive authority to Defendants. And in fact, Defendants have not supplied any evidence that they in fact "consult[ed] with local boards" in adopting the Use Restriction.



Neither of the two cases Defendants cite change any of this or otherwise support their claim to authority. In *Oyarzo v. Maryland Dep't of Health & Mental Hygiene*, 187 Md. App. 264, 291-292 (2009), the Court of Special Appeals upheld an agency regulation defining a statutory term because "the regulatory powers granted to the Secretary of the Department" were "very broad" and included the authority to "make … regulations pertaining to the definitions … of … selling milk products." Unlike in *Oyarzo,* Maryland's statutes give the State Board no similar authority to define statutory terms, nor are the State Board's regulatory powers as broad.

Defendants also rely heavily on *Christ by Christ v. Maryland Department of Natural Resources*, a case that challenged an agency's authority to prohibit minors under fourteen from operating personal watercraft. In upholding the agency regulation, the Court of Appeals noted that

the statute "gave [the agency] broad authority to promulgate 'regulations governing … the operations of any vessels,'" and that such authority "plainly encompassed" the regulatory prohibition in question. *Christ*, 335 Md. 427, 439 (1994). The authority to collect an "statement, signed under oath" or to "specify . . . the authorization" does not "plainly encompass" the authority to redefine terms in the way that a power to regulate the "operation of any vessels" entails authority to prevent minors from operating them. *Id.*; § 3-506(a)(2).

In any event, the Board's definition of the "political process" is plainly inconsistent with the "letter and spirit of the law under which the agency acts" and thus must be declared null and void. *Christ by Christ v. Maryland Dep't of Nat. Res.*, 335 Md. 427, 437 (1994). Both *Oyarzo* and *Christ* are clear that even when an agency has broad authority, the regulation must "not contradict the language or purpose of the statute." *Oyarzo* 187 Md. App. 264, 292 (2009) (citing to *Christ*, 335 Md. At 437). A court "will not . . . give effect to agency regulations that are inconsistent with or conflict with the statute the regulations are intended to implement." *McClanahan v. Washington Cnty. Dep't of Soc. Servs.*, 445 Md. 691, 708 (2015). In the end, the "statute must control." *Dep't of Hum. Res., Baltimore City Dep't of Soc. Servs. v. Hayward*, 426 Md. 638, 658 (2012).



The Use Restriction conflicts with the statute for several reasons.

First, it conflicts with the plain language. "Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology." *Kushell v. Dep't Of Nat. Res.*, 385 Md. 563, 576 (2005) (citing *Deville v. State*, 383 Md. 217, 223 (2004)). And the plain meaning of "related to the electoral process" are those things that are connected, in some way, to the method by which a person is elected to office and the taking and counting of votes. *See Fusaro v. Howard*, 19 F.4th 357, 372

(4th Cir. 2021)[9] *See also Fusaro v. Howard*, 472 F. Supp. 3d 234, 266 (D. Md. 2020), *aff'd*, 19 F.4th 357 (4th Cir. 2021) ("The plain meaning of the term 'electoral process,' along with its inclusion in various places in Maryland's election statutes, indicates that it pertains to the process of conducting elections."). Defendants make no effort, at all, to reconcile their definition of "related to the electoral process" to the plain meaning of the term or any other meaning for that matter. And as discussed *supra* Section I.B., Plaintiffs' activities which are now proscribed by the Use Restriction are clearly connected to and pertain to the process of conducting elections under any reasonable interpretation of the phrase's meaning. They produce information relevant to the accuracy and currency of the voter registration list, among other information relevant to how voters participated in past elections and thus how they might similarly participate in future elections.

Second, the Defendants' interpretation cannot even be reconciled with its own expressed understanding of the meaning of "the electoral process." According to Defendants, "'electoral process' means what it says – the system established by [Maryland law] by which a person is elected to public office or by which voters express a preference on a ballot question." ECF 19-1 at 8 (quoting COMAR 33.08.02.01B(1)(a)). But the Defendants never explain how investigations into possible illegality of past participation are not related to the process by which people are elected to office (*i.e.*, voting). And indeed, they are so related. They can produce evidence confirming or undermining the currency and accuracy of official lists of voters, they can produce evidence confirming or calling into question election results, and they can produce information that inspires new election-related legislation or regulation. It is difficult to understand how such investigations could be anything other than "related to the electoral process."



[9] *See also Friedman v. Hannan*, 412 Md. 328, 339 (2010) (internal citations and quotations omitted) ("the term 'relating to' means that there is a connection between two subjects, not that the subjects have to be the same").

Third, the Defendants' interpretation is wholly arbitrary and incoherent. In a futile attempt to save the Use Restriction from NVRA preemption, Defendants concede that it "does not prohibit . . . the use of the voter registration list for investigatory activities that don't involve contacting voters about their conduct in past elections." ECF 19-1 at 11. Defendants do not explain, because they cannot, why an investigation using the same information and looking into the same matters that does not entail contacting a voter fits within its definition of "related to the electoral process" but one that does entail such conduct falls outside of it. The investigations are identical in all relevant respects. If one is related to the electoral process, then so is the other. Any other conclusion would be nonsensical and arbitrary and could not possibly be consistent with the letter and spirit of the law or the statutory scheme.

Finally, if Defendants can adopt a regulation that is untethered to the plain meaning, internally inconsistent, and arbitrary, there is no limit to their authority to exclude disfavored activity from the "electoral process." Today, it is investigations. Tomorrow it might be polling. And the next day, it could be volunteer recruitment or even get-out-the-vote operations. If the Defendants' *ipse dixit* assertion that Plaintiffs' activity is not part of the electoral process is allowed to prevail here, there is no reason it should not prevail in those cases.

The Use Restriction is wholly incompatible with the statutory scheme and the State Board's regulatory authority.

## CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Dismiss in its entirety.

Respectfully submitted this 29th day of March, 2024.

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**CERTIFICATE OF SERVICE**

I certify that, on this 29th day of March, 2024 the foregoing was served by CM/ECF on all registered CMF users and by email on the following:

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