IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KATHERINE SULLIVAN, *et al.*,	*	
Plaintiffs,	*	
v.	*	No. 1:24-cv-00172-MJM
MICHAEL G. SUMMERS, *et al.*,	*	
Defendants.	*	

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

Katherine Strauch Sullivan and David Morsberger ("Plaintiffs") oppose the motion to dismiss their complaint filed by the defendant-members of the Maryland State Board of Elections and the Maryland State Administrator of Elections (collectively, the "State Board") by relying, primarily, on a list maintenance tool requiring removal of inactive voters from a voter roll after the voters' failure to vote in two consecutive general elections for federal office. *See* 52 U.S.C. § 20507(d)(1); Elec. Law § 3-502(e). Plaintiffs' reliance falters in two ways, though. The existence of a list maintenance tool making voting histories relevant to a voter roll does not subject voting histories to the NVRA disclosure provision; and voting histories do not factually provide plaintiffs with the information they need to assess the efficacy and accuracy of the list maintenance tool.

Moreover, plaintiffs have failed to articulate the viewpoint against which they allege the State Board has discriminated by promulgating COMAR 33.03.02.01B(1)(c).

The regulation does not target a viewpoint but regulates a subject matter. It, accordingly, passes First Amendment scrutiny.

I. PLAINTIFFS AND AMICUS LEGALLY MISAPPREHEND WHAT THE NVRA COMPELS FOR DISCLOSURE.

As it relates to the NVRA and preemption, plaintiffs' and their supporting amicus's arguments rely on the assertion that voting histories are relevant to determining when an inactive voter should be removed from a state's voter roll. They thus describe the effect of voting histories on the maintenance of a voter registration list as "integral" (ECF 22 at 1, 11), "innate" (*id* at 3), "intertwined" (*id* at 7), "critical" (ECF 27 at 4), and "necessary" (*id* at 9). But in using these terms, plaintiffs and amicus avoid the actual statutory language for determining when disclosure is compelled. The law does not mandate disclosure when a record is uniquely relevant to a list maintenance process. *See Public Interest Legal Foundation v. North Carolina State Bd. Of Elec.*, 996 F.3d 257, 264 (4th Cir. 2021) ("[T]he term 'all records' in the disclosure provision does not encompass any relevant record from any source whatsoever . . ."). The law requires disclosure of all records "of activities and programs *conducted for the purpose*" of maintaining an accurate and current voter roll. 52 U.S.C. § 20507(i)(1) (emphasis added).

The analysis starts and ends with the words "conducted for the purpose"—the plain language of the statute that triggers the disclosure requirement. *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012). When an activity and program is conducted for the express purpose of voter registration maintenance, "all records concerning" that activity and program must be disclosed. 52 U.S.C. §

20507(i)(1); *see also Long*, 682 F.3d at 335 ("Moreover, the program and activity of evaluating voter registration applications is plainly conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. It is unclear what other purpose it would serve"). When a program or activity is conducted for a purpose other than list maintenance, the statutory condition is not met and the resulting records need not be disclosed. Plaintiffs and amicus fail to arrive at this plain understanding of the statutory language because neither party mentions the phrase "conducted for the purpose" in their analysis, focusing instead on the terms "all records" and "concerning." (ECF 22 at 6-7; ECF 27 at 8-9.)

The question, then, is not as plaintiffs and amicus pose it: how relevant is the record, itself, to an aspect of list maintenance? The question for determining whether § 20507(i)(1) compels disclosure is: what is the purpose of the activity and program that produced the record. And the answer in this case is not maintenance of the voter registration list.

Voting histories are a record, to be sure. But voting histories are a record of when, where, and how a person participated in an election. The "program" that produces a voting history is an election; the "activity" is casting (or not) a mail in, in-person, or provisional ballot. And voters do not choose to cast ballots in elections in order to update their voter registration entries. Voters choose whether to cast ballots to "hav[e] a voice in the election of those who make the laws under which, as good citizens, [they] must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are

those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.")

If the analysis were as plaintiffs and amicus argue, absurd and congressionally unintended results would obtain. Focusing on a list maintenance procedure and identifying for disclosure all records relevant to that procedure would have the NVRA preempt state laws governing countless confidential records. For instance, federal and state laws require the removal of an individual from a voter roll upon the verification of that individual's death. *See* 52 U.S.C. § 20507(a)(4)(A); Elec. Law § 3-504(c). This would mean that plaintiffs and amicus could demand death certificates from Maryland's Department of Health for all registered voters; and, any state law to the contrary would be preempted by the NVRA. *See* COMAR 10.03.0108B(2) (providing a list of the individuals authorized to obtain a death certificate). Federal and state laws also strip eligibility from individuals "by reason of criminal conviction or mental incapacity." 52 U.S.C. 20507(a)(3)(B); *see also* Elec. Law. 3-501(2)(i). Plaintiffs and amicus, under their analysis, would therefore be entitled to sealed court records, inmate case records, and mental health records, among other documents, as records "concerning" the removal of ineligible voters from the voter registration list.

But by its own plain language, the NVRA does not go so far. "[C]onducted for the purpose" is conditional, limiting language. The statute, by its own terms, ensures that only those records produced from "activities and programs" that operate for list maintenance will be disclosed to the public for list oversight. Records incidentally

relevant to list maintenance, but otherwise produced by programs for other reasons, do not fall within the ambit of § 20507(i)(1).

II. PLAINTIFFS AND AMICUS FACTUALLY MISAPPREHEND WHAT CAN BE DONE WITH THE INFORMATION CONTAINED IN A COPY OF MARYLAND'S VOTER REGISTRATION LIST.

Plaintiffs' and amicus's NVRA arguments further rely on a one-to-one factual relationship between the information contained in a voting history and the ability to scrutinize when an inactive voter should be removed from a voter roll. Plaintiffs assert that a voting history permits them to judge the "veracity" of an inactive voter's status in Maryland's registration database; amicus asserts that a voting history is "necessary to determine" timely removal of inactive registrants. (ECF 27 at 9). But neither is functionally true. A Maryland voting history does not give plaintiffs or amicus the information they need to accurately review a voter's inactive status.

First, a voting history can provide far more information than is required for assessing whether an inactive voter should be removed. Federal and state law mandate removal of an inactive voter after that voter both fails to return a notification card (thereby becoming inactive) and fails to vote, or appear to vote, in two consecutive general elections for federal office. 52 U.S.C. § 20507(d)(1); Elec. Law § 3-502(e). But a voting history can provide more than whether a voter participated in the two most recent general elections. It can provide whether a voter participated in any election, primary or general, dating back to 2006. (ECF 1 Exhibit 1.) And it can disclose when, where, and how a voter participated, specifying whether a voter mailed their ballot or voted by provisional ballot in a specific precinct or early voting center. (ECF 1 Exhibit

1; ECF 19-3, ¶ 6.) A voting history, then, can provide a wealth of information completely irrelevant to an inactive voter's status on a voter registration list. The NVRA cannot compel the disclosure of that irrelevant information.

And yet, that is exactly what Mr. Morsberger requested. (ECF 19-2.) Mr. Morsberger did not ask for a list of registered voters with voting histories from two general elections integrated into the list (providing the participation information that could inform whether the inactive voter ought to be removed). Mr. Morsberger requested a voter registration list with a separate voting history file that contained detailed participation information from every Maryland election between 2006 and 2022. (*Id*). And Mr. Morsberger's request sought voting histories from Maryland's primary elections, which have no bearing whatsoever on the status of inactive voters. (*Id*); *see* 52 U.S.C. § 20507(b)(2)(B) (prohibiting removal after a failure to vote unless the individual failed to respond to a notification and did not vote "in 2 or more consecutive general elections for Federal office").

Second, to determine whether an inactive voter must be removed from the list, an election official must know three things: (1) whether the voter is inactive; (2) the date on which the voter became inactive; and (3) whether the voter failed to vote, or failed to appear to vote, "during the period beginning with the date of the notice through the next two general elections." Elec. Law § 3-506(e)(2)(ii). A voting history provides only that first data point—whether the voter's status is "inactive" at the time the list is requested. (ECF 1 Exhibit 1). A voting history does not provide *when* the voter became inactive. *Id.* Accordingly, a voting history does not accurately provide whether a voter's inactive

status justifies removing them from the voter registration list. Plaintiffs and amicus could only know that a voter was inactive and that the voter failed to participate in past elections, but could not know whether the temporal relationship between those two facts justified removal.

It is also worth noting that plaintiffs did request and use voting histories prior to- and during the pendency of this litigation, but it was not for "ascertain[ing] the veracity of a voter's ostensible inactive status." (ECF 22 at 6.) On March 6, 2024, Maryland Election Integrity, a limited liability company formed in Maryland, filed suit in this Court against the State Board alleging widespread electoral mismanagement by the State Board. Complaint (ECF 1), *Maryland Election Integrity, LLC, et al. v. Maryland State Board of Elections*, Case No. 1:23-CV-000672 (filed Mar. 6, 2024). Katherine Sullivan is alleged in that suit to be a member of Maryland Election Integrity. Amended Complaint ¶ 10 (ECF 16), *Maryland Election Integrity, LLC, et al. v. Maryland State Board of Elections*, Case No. 1:23-CV-000672 (filed Apr. 8, 2024). David Morsberger filed a 38-paragraph affidavit in support of Maryland Election Integrity's request for a preliminary injunction to halt Maryland's 2024 presidential primary election. Affidavit of David Morsberger (ECF 9-14), *Maryland Election Integrity, LLC, et al. v. Maryland State Board of Elections*, Case No. 1:23-CV-000672 (filed Mar. 29, 2024) attached hereto as "Exhibit A." Together, Ms. Sullivan and Mr. Morsberger authored a 16-page report, entitled

"Restoring Faith in Maryland Elections," attached hereto as "Exhibit B,"[1] that provided the bases for Maryland Election Integrity's allegations of mismanagement.

Based on the information provided in the report and in the suit, Ms. Sullivan and Mr. Morsberger used voter registration records with voting histories to conduct a statewide investigative canvass. (Exhibit A ¶¶ 7, 27; Exhibit B at 1-2.) The canvass did not seek to verify the status of inactive voters, but instead focused on manufacturing evidence of perceived voting irregularities in the 2020 election. (*Id* at ¶ 34.) And despite facially shoddy methodology and math, *see* Brief of Amicus Curiae The Brennan Center for Justice (ECF 13-1), *Maryland Election Integrity, LLC, et al. v. Maryland State Board of Elections*, Case No. 1:23-CV-000672 (filed Apr. 4, 2024), the results of the canvass were used in an effort to enjoin Maryland from holding future elections.

Plaintiffs do not seem interested in using voting histories for the perfunctory verification of inactive voters. Their interest in voting histories seems to stem from a desire to litigate, and re-litigate, the results of the 2020 presidential election; and, to prevent Maryland's voters from participating in the upcoming 2024 presidential election. (*See* Exhibit B; *see also* Amended Complaint at 35-37, *Maryland Election Integrity, LLC v. Maryland State Board of Elections*.) Impeachment of electoral results and cessation of

[1] In their compliant, plaintiffs refer to previous canvassing efforts and analyses of voter registration records they had undertaken prior to filing this suit. (ECF 1 ¶ 37-43.) Insofar as the report is a product of those efforts, this Court may evaluate it in considering the motion to dismiss. *See HQM, Ltd. v. Hatfield*, 71 F. Supp. 2d 500, 502 (D. Md. 1999).

electoral operations are not, however, stated purposes of the NVRA. *See* 52 U.S.C. § 20501(b).

III. VIEWPOINT DISCRIMINATION IS BASED ON CENSORING A MESSAGE; COMAR 33.03.02.01B(1)(C) REGULATES A SUBJECT MATTER.

"The Supreme Court has made clear that the principal inquiry in assessing a claim of viewpoint discrimination is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786, 795 (4th Cir. 2004) (alteration in original). Plaintiffs, notwithstanding their arguments and hypotheticals, fail to identify or articulate what conveyed message COMAR 33.03.02.01B(1)(c) targets for censorship.[2] They assert that "investigations, motivated by, or predicated on, the canvasser's interest in a potential illegal or suspected illegals infraction" is a class of viewpoints that the regulation targets.[3] (ECF 22 at 21-22.) But "investigations" into unlawful conduct are not a viewpoint; and supporting one does not convey any message about the supporter.

COMAR 33.03.02.01B is a permissible restriction because it operates on an entire subject matter, rather than a specific message. *See Robertson v. Anderson Mill Elementary School*, 989 F.3d 282, 290 (4th Cir. 2021) (school principal's prohibition on publishing student essay on LGBTQ rights was viewpoint neutral because the prohibition stemmed from the subject—"LGBTQ rights"—rather than the content of the actual essay

[2] Notably, in their notice of claim, plaintiffs expressed the belief that the regulation targeted "certain groups based on their actual or perceived partisan or ideological orientation." (ECF 1-2 at 6.) It does not and plaintiffs dropped that allegation in filing their complaint.

[3] It is difficult to conceive what else could motivate an investigation.

itself). It is therefore indistinguishable, from a First Amendment perspective, from the Election Law § 3-506(a)(1)(ii)(2) prohibition against using a voter registration list for "any other purpose not related to the electoral process." *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.") Both provisions are "politically neutral—that is, [they] do not distinguish between viewpoints, economic classes, or political affiliations." *Fusaro v. Howard*, 19 F.4th 357, 370 (4th Cir. 2021). The COMAR regulation could become viewpoint discriminatory if it further restricted voter contact based on the illuminating suspicion, or specific conduct, giving rise to the investigation. But it does not; any investigation, whether for voter fraud, improper purging from the voter roll, improper possession of ballots,[4] or wagering on an election,[5] is proscribed.

COMAR 33.03.02.01B(1)(c) is therefore viewpoint neutral and survives First Amendment scrutiny as a matter of law. *Howard*, 19 F.4th at 370.

CONCLUSION

The motion to dismiss should be granted.

Respectfully submitted,

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[4] *See* Elec. Law § 16-206(a)(9).

[5] *See* Elec. Law § 16-902.

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