

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

VOTER REFERENCE
FOUNDATION, LLC,

Plaintiff,

v.

ALBERT SCHMIDT, in his official
capacity as Secretary of the
Commonwealth,

Defendant.

No. 1:24-cv-294

Judge Christopher C. Conner

BRIEF IN SUPPORT OF MOTION TO DISMISS

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BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant Secretary of the Commonwealth Al Schmidt¹ respectfully submits this brief in support of his motion to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(6).

Pennsylvanians should not have to give up their personal privacy in order to participate in the electoral process. Yet that result is exactly what plaintiff Voter Reference Foundation, LLC (“VRF”) seeks here. VRF requests that this Court compel the Secretary to turn over the personal information of all Pennsylvania registered voters, including their addresses and dates of birth, so that VRF can publish personal details of over eight million Pennsylvania citizens on its website.

Exercising rulemaking authority granted to him by the Pennsylvania General Assembly, the Secretary has issued reasonable regulations designed to prevent such wholesale violations of privacy. Relevant here, those regulations require anyone seeking a copy of one of the available lists of registered voters in Pennsylvania to agree not to publish the list on the internet. VRF, however, refuses to agree to this

¹ The Secretary of the Commonwealth is the head of the Department of State. *See* 71 P.S. § 66.

reasonable limitation—instead, insisting that both the National Voter Registration Act, 52 U.S.C. §§ 20501–20511 (“NVRA”), and the First Amendment give it an unfettered right to post personal information about every Pennsylvania voter on the internet.

VRF’s claims are without foundation. This modest restriction on the use of personal information about Pennsylvania voters in no way conflicts with the NVRA. Nor does it implicate, much less violate, the First Amendment. VRF’s complaint should be dismissed in its entirety.

PROCEDURAL HISTORY

VRF is an Ohio entity that operates a website, VoteRef.com, that publishes the personal information of voters contained in state voter registration databases, including name, address, birth year, party affiliation, and voting history information, purportedly so that citizens can “crowdsource” the process of “rectifying any errors” on their own data or that of “their neighbors, friends, and others.” Compl. ¶¶ 8, 42–43, 46. VRF currently has voter data for 32 states posted on its website. Compl. ¶ 52. VRF claims that it seeks to access and post Pennsylvania’s voter data “so that the public may become and remain informed regarding

Pennsylvania's elections and voter registration rolls, and conduct the oversight envisioned in the NVRA." Compl. ¶ 53.

VRF filed a request pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101–67.3104 ("RTKL"), on March 7, 2022, seeking a copy of the Full Voter Export ("FVE").² Compl. ¶ 56, Ex. A. That request was made solely pursuant to the RTKL and did not mention the NVRA. While VRF included an attestation that it would only use the FVE for statutorily permissible purposes, it made clear it would not agree to refrain from publishing Pennsylvania voter data on the internet. Compl. ¶¶ 57–60; Ex. A.

The Department denied the request on April 13, 2022, because of VRF's refusal to adhere to the requirements of the Pennsylvania Voter Registration Law and the Department's corresponding regulations governing access to the FVE. Compl. ¶¶ 62–65, Ex. C. The Department also noted in its denial that VRF had previously published Pennsylvania voter information on the internet, in violation of the applicable

² The FVE contains information about all Pennsylvania voters. The contents of the FVE are described more extensively in Statement of Facts Part I.B, *infra*.

regulations, which had prompted the Department's Chief Counsel to write to VRF's parent entity on January 21, 2022, to demand that VRF immediately take the information down. Compl. ¶ 65; *see also* Letter of Timothy E. Gates, dated Jan. 21, 2022, attached hereto as Ex. 1.³

VRF appealed the Department's denial to the Pennsylvania Office of Open Records and then to Pennsylvania Commonwealth Court, which affirmed the Department's decision on October 20, 2023. Compl. ¶ 66; *Swoboda v. Pa. Dep't of State*, No. AP 2022-1069R (Pa. Open Records July 15, 2022); *aff'd*, 304 A.3d 105, 116 (Pa. Cmwlth. 2023).

Several months later, on November 2, 2023, VRF sent the Secretary and the Department a document entitled "Notice of Violation of the NVRA," claiming that the Department's denial of its March RTK Request was a violation of the NVRA—notwithstanding the fact that the March 2022 Request was made pursuant to the RTKL. Compl. ¶ 69, Ex. D, A. Also on November 2, 2023, VRF sent a separate letter containing a new

³ VRF references this letter in Paragraph 65 of its complaint and unquestionably had notice of it. As such, the Court may consider it without converting the instant motion into one for summary judgment. *See In re Burlington Coat Factory Securities Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

request for the FVE, this time pursuant to the NVRA. Compl. ¶¶ 73–74, Ex. E. The Secretary responded to both the Notice and the request on November 16, 2023, granting the request on the condition that VRF sign the affirmation required pursuant to Pennsylvania law. Compl. ¶ 76; Ex. F. VRF refused to do so and again wrote to the Secretary and Department on November 17, 2023, contending that the Department continued to violate the NVRA “because the Secretary knows VRF cannot satisfy that condition.” Compl. ¶¶ 80–83; Ex. G.

On February 19, 2024, VRF filed this action.

STATEMENT OF FACTS

I. Statutory Framework

A. *The National Voter Registration Act*

The National Voter Registration Act was enacted in 1993, well before Americans had widespread access to the internet, and Congress was clear as to its findings and purpose. As to the former, Congress stated:

(1) the right of citizens of the United States to vote is a fundamental right; (2) it is the duty of the Federal, State and local governments to promote the exercise of that right; and (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and

disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a). As to the NVRA's purposes, Congress emphasized the NVRA was enacted:

(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.

Id. § 20501(b). The NVRA goes on to address national procedures for voter registration designed to make the process easier and more accessible, 52 U.S.C. §§ 20503–20507, and establishes requirements with respect to maintenance of voter registration lists. *Id.* 52 U.S.C. § 20507.

Section 20507 requires states to update their voter registration rolls but also prohibits states from removing voters from the official list of eligible voters except under the circumstances prescribed pursuant to subsections 20507(a)(3), (b) (c) & (d). In so doing, the NVRA reflects the sometimes-competing concerns of the need to increase and enhance voter participation on the one hand and the need to ensure the accuracy and currency of voter rolls on the other.

Finally, and at issue in this litigation, the NVRA also includes an inspection provision that requires states to

make available for public inspection and, where available, photocopying at a reasonable cost, 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, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

52 U.S.C. § 20507(i).⁴

B. Pennsylvania Voter Registration Law and the Full Voter Export

The Pennsylvania voter registration statute, Act 2002-3 (the “Registration Law”), requires the Department to implement and administer a statewide uniform registry of electors (“SURE system”). 25 Pa. Cons. Stat. §§ 1201, 1222. The Registration Law contains a provision for the establishment of a street list and a public information list for each of Pennsylvania’s 67 counties, which contain information for each elector. 25 Pa. Cons. Stat. §§ 1403, 1404. The Department provides

⁴ Subsection 20507(i)(2) provides that such records include the list of names and addresses of all persons to whom notices described in subsection (d)(2) are sent and information concerning whether such person has responded to those notices.

access to data required to be compiled in these lists through its issuance of the full voter export list (“FVE”). The FVE consists of a full export of all voters by county and contains the following fields: voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential address, mailing address, polling place, date last voted, all districts in which the voter votes (i.e., congressional, legislative, school district, etc.), voter history, and the date the voter’s record was last changed.⁵

Section 1404(b)(1) empowers the Secretary to “promulgate reasonable regulations governing access to” the public information list. Section 1404(b)(3) further provides:

No individual who inspects the list may use information contained in the list for purposes unrelated to elections, political activities or law enforcement. Before inspecting the list or obtaining names of registered electors or other information from the list, the individual must provide identification to the public official having custody of the public information list and must state in writing that any information obtained from the list will not be used for purposes unrelated to elections, political activities or law enforcement.

Id.

⁵ The three lists are collectively referred to as the “voter lists.”

In accordance with the grant of authority to the Secretary in Section 1404(b)(1), the Department issued regulations at 4 Pa. Code § 184.14(b) governing the public information lists.⁶ The regulations provide, *inter alia*, certain restrictions required by both Section 20507(i)(1) of the NVRA (barring identify of voting registration agency through which one is registered) and Section 1404(a) of the Voter Registration law (prohibiting disclosure of signature of a registrant). The regulations further provide a process by which certain categories of voters⁷ can request county registration commissions to protect the confidentiality of their home addresses. 4 Pa. Code § 183.14(4) & (5).

Further, the regulations prohibit the list from being published on the internet. 4 Pa. Code § 183.14(k) (the “internet restriction”). Before the FVE is provided, the requester must affirm that any information obtained from the FVE will not be used for commercial or other purposes,

⁶ Regulations governing the Street Lists are located at 4 Pa. Code § 183.13, and are substantially the same, including the internet restriction at issue here.

⁷ These include: law enforcement officers, correctional employees, judicial officials, and state prosecutors, 4 Pa. Code § 183.14(c)(4), as well as those who have received Protection from Abuse orders or other protective orders or others who can demonstrate their personal safety is endangered by revealing their home address. 4 Pa. Code § 183.15(c)(5).

except purposes related to elections, political activities and law enforcement, as required by 25 Pa. Cons. Stat. §§ 1207(b) & 1404(c)(2) and further affirm that they will not publish the FVE on the Internet, as such publication is prohibited by 4 Pa. Code § 183.14(k). Compl. ¶ 30.

II. VRF's Allegations

VRF's complaint raises six claims. Count One alleges that the Department's requirement that anyone requesting the voting lists agree not to publish voters' information on the internet is preempted by the NVRA. Counts Two and Three allege that the Department's responses to VRF's 2022 and 2023 requests for the voter files violated the NVRA. Count Four alleges that the Voter Privacy Provision violates the First Amendment by banning "core political speech." Count Five alleges that the requirement violates the First Amendment because it is impermissibly overbroad. Finally, Count Six does not assert any new legal theories, but asks for a declaratory judgment based on the earlier alleged violations.

QUESTIONS PRESENTED

1. Does the NVRA preempt Pennsylvania's restriction on publishing the voter lists on the internet?
2. Did the Department of State violate the NVRA in its responses to VRF's 2022 and 2023 requests for the voter lists?
3. Does the prohibition on publishing the voter lists on the internet violate the First Amendment?

ARGUMENT

In evaluating a motion to dismiss, a court “must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009) (citation omitted). If those well-pleaded facts fail to establish “that the plaintiff has a ‘plausible claim for relief,’” then the complaint must be dismissed. *Id.* at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

I. The NVRA Does Not Preempt the Internet Restriction

Count One of the complaint alleges that Pennsylvania’s requirement that the voter lists not be published on the internet is preempted by the inspection provision of the NVRA. But neither the text nor purpose of the NVRA supports this claim. Pennsylvania’s reasonable limitation on the re-publication of sensitive voter information does not conflict with its obligation to make certain information “available for

public inspection and, where available, photocopying.” 52 U.S.C. § 20507(i). And reading a prohibition of such reasonable limitations into the NVRA flies in the face of the statute’s stated purpose.

A. The Internet Restriction Does Not Conflict with the Text of the NVRA

Congress enacted the NVRA pursuant to its authority under the Constitution’s Elections Clause. U.S. Const. art. I, § 4. That clause grants state legislatures the authority to regulate “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” while providing that Congress “may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.”

Analysis of preemption claims under the Elections Clause is straightforward. As the Supreme Court has recognized, “[b]ecause the power the Elections Clause confers is none other than the power to preempt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013). It is the text—and the text alone—that controls whether a statutory provision enacted under the Election Code preempts a state requirement.

There is no conflict between the text of the NVRA and Pennsylvania's internet restriction. The mandate under the NVRA provides that states must, subject to certain exceptions, "maintain for at least 2 years and . . . make available for public inspection and, where available, photocopying at a reasonable cost, 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).⁸ Assuming, *arguendo*, that the voter lists fall within the scope of this section, the Department does all that is required of it: it maintains such records for two years and makes them available for public inspection and copying. VRF does not and cannot claim otherwise.

Specifically, 25 Pa. Cons. Stat. § 1404(a) expressly allows for inspection of a printed or computerized public information list that contains the name, address, date of birth and voting history of each registered elector in a particular county. The public information list is available to access subject to reasonable regulations promulgated by the

⁸ While the heading in Subsection (i) is "Public disclosure of voter registration activities," the text contains the more specific language of "public inspection" and "photocopying." 52 U.S.C. § 20507(i)(1).

Secretary of the Commonwealth that govern access to the list along with restrictions on not being able to tamper with the list when viewing and on using the information provided in the list for purposes unrelated to elections, political activities or law enforcement. *See* 25 Pa. Cons. Stat. § 1404(b). Nothing in this section in any way acts as a restraint on the NVRA.

VRF nevertheless contends that the right of access under the NVRA is “unqualified.” Compl. ¶ 82. It is not. This Court has previously held that “the Disclosure Provision does not guarantee unfettered access to confidential sensitive information.” Memorandum, *Pub. Int. Legal Found. v. Boockvar*, No. 1:19-CV-622 (M.D. Pa. Dec. 19, 2019), ECF No. 23, at 14 n.3. Other courts have likewise held that the NVRA allows for the redaction of sensitive personal information. *See, e.g., Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 56 (1st Cir. 2024);⁹ *Pub. Int. Legal*

⁹ *Bellows* went on to hold that a provision under Maine law that prohibited making voter information “accessible by the general public on the Internet or through other means” was preempted by the NVRA. *See* 92 F. 4th at 54 (discussing Me. Rev. Stat. Ann. tit. 21-A, § 196-A(1)(J)(2)). The analysis of that decision should not control here. For one thing, the *Bellows* court grounded much of its discussion in cases analyzing preemption claims under the Supremacy Clause, without considering whether the logic of those decisions necessarily applied in the Elections

Found., Inc. v. N. Carolina State Bd. of Elections, 996 F.3d 257, 267 (4th Cir. 2021); *Pub. Int. Legal Found., Inc. v. Matthews*, 589 F. Supp. 3d 932, 942 (C.D. Ill. 2022); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1345 (N.D. Ga. 2016).

Redaction, of course, entails the *withholding* of information. Here, the Department does not seek to withhold anything—it simply seeks to avoid having voters’ personal information available on the internet, where it can be accessed by anyone in the world for any purpose. Nothing in the NVRA conflicts with this requirement.

B. Invalidating the Internet Restriction Would Frustrate the Purposes of the NVRA

Because the plain text of the NVRA does not conflict with the Commonwealth’s Internet restriction, Count One should be dismissed. This conclusion is further underscored by looking to the statutory purpose of the NVRA. Requiring states to allow any requestor to re-publish covered information on the internet, without limitation, would frustrate those purposes.

Clause context. *See* 92 F. 4th at 51–56. In addition, it simply assumed that “public inspection” of relevant materials necessarily equated to “public release” of those same materials, without considering the key differences between the two concepts. *Id.* at 54–55.

In enacting the NVRA, Congress specifically found that “the right of citizens of the United States to vote is a fundamental right” and that “it is the duty of the Federal, State, and local governments to promote the exercise of that right.” 52 U.S.C. § 20501(a)(1)–(2). The first two stated goals of the statute both focus on increasing voter participation: Congress sought “to establish procedures that *will increase the number of eligible citizens who register to vote* in elections for Federal office” and to “make it possible for Federal, State, and local governments to implement [the statute] in a manner that *enhances the participation of eligible citizens as voters* in elections for Federal office.” *Id.* § 20501(b)(1)–(2) (emphasis added).

Under VRF’s reading of the NVRA, any citizen who chooses to register to vote must accept that her personal information, including her name, address, date of birth, sex, political party, and voting history, among other information, will be subject to posting on the internet for the entire world to access.¹⁰ Putting potential voters to such a choice will

¹⁰ Whether VRF intends to omit some of this personal information (such as day and month of birth) from what it posts on the internet is irrelevant to the legal question. VRF’s preemption claim is boundless, and nothing in its complaint suggests that it could be legally precluded

discourage registration, achieving precisely the opposite of the NVRA's stated goal. The internet restriction was adopted so that voters do not have to consent to the widespread disclosure of their personal information—and the increased risk of identify theft and other harms that could result—in order to exercise their fundamental rights. To suggest that a statute adopted well before the internet became a household word, and for the express purpose of *increasing* voter registration, nevertheless *requires* all voters to face these risks, turns common sense on its head.

To the extent VRF claims that reading such a requirement into the NVRA would further the statute's other two stated goals—"to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained"—the complaint is woefully inadequate. It lacks any well-pleaded allegations that would justify concluding that barring states from prohibiting the publication of sensitive voter information on the internet—as VRF contends the NVRA

from putting all of the information it receives on the internet. In fact, the logic of VRF's preemption claim would extend to the disclosure of personal information about those individuals who are protected under state law. *See supra* note 7 (discussing protections).

does—further the goal of “ensur[ing] that accurate and current voter registration rolls are maintained.” On this score, the allegations of the complaint are purely speculative. VRF claims that users of its website “*can* contact their election officials to help correct inaccurate or outdated information.” Compl. ¶ 1 (emphasis added). It further asserts that it “encourages users of the Website to report . . . errors directly to the appropriate government official.” ¶ 8.

But the complaint is devoid of well-pleaded allegations that posting such information on the internet actually furthers the ends of improving the accuracy of voter lists. Pennsylvania law sets forth specific processes and strict requirements governing the removal of voters from the rolls. *See* 25 Pa.C.S. § 1901. They do not authorize counties to remove voters from the rolls based solely on claims made by individuals who reviewed the voter file on a website. Rather, counties must comply with the requirements of the NVRA before removing any voter from the rolls.

In fact, the allegations in the complaint affirmatively undercut VRF’s allegations. The complaint contains a list of statutory provisions that VRF claims reflect Pennsylvania’s “programs and activities for ensuring accurate voter registration records.” Compl. at 9–10. Posting

personal voter information on the internet is necessary, VRF contends, to “meaningfully evaluate whether the state is faithfully and accurately performing these list maintenance ‘programs’ and ‘activities.’” Compl. ¶ 41.

But a majority of the provisions VRF identifies as “programs” or “activities” are not currently in effect, having been superseded or suspended pursuant to statutory authority.¹¹ And the complaint does not cite the operative provisions of Pennsylvania law governing list maintenance efforts, which are in effect precisely because other provisions were suspended as a result of the NVRA. *See* 25 Pa.C.S.

¹¹ Sections 292 through 298 of Title 25 of the unconsolidated statutes, 25 P.S. §§ 292–298, date from an era in which Pennsylvania law imposed different registration requirements for different types of municipalities. Those provisions were all superseded by the 2002 Registration Law. *See* 25 Pa.C.S. § 1103 (“This part applies to all counties.”). Sections 1506 through 1512 of Title 25 of the Consolidated Statutes, 25 Pa.C.S. §§ 1506–1512, were all suspended pursuant to section 1513, which provides that “[t]o the extent that the Secretary of the Commonwealth determines that the [NVRA] prohibits the cancellation of registration for elections for Federal office because of a failure to vote as provided in section 1510 ... the provisions of sections 1506 ... through 1512 ... are suspended.” *See* Notice from the Secretary of the Commonwealth, 32 Pa.B. 1360 (Mar. 9, 2002) (announcing suspension).

§§ 1901–1906. So VRF’s allegations serve more as a cautionary tale than as proof of the benefits from its list-maintenance efforts.

The Department’s regulations were promulgated to establish a proper manner and means of access to voter registration data and to institute safeguards to protect that information from potential misuse. Publication of the FVE on the Internet would expose every registered voter in Pennsylvania to an increased risk of identity theft and the misuse of their private information, and would have a chilling effect on voter registration, in direct contravention of the purposes and intent of the NVRA.

Indeed, courts interpreting the NVRA’s public inspection provision have recognized that it does not foreclose consideration of privacy concerns. *See Pub. Int. Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 264, 267 (4th Cir. 2021) (recognizing that the district court had the ability to redact certain “uniquely sensitive information”); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1345 (N.D. Ga. 2016) (concluding that birth dates, partial phone numbers and social security numbers should be redacted and stating “it is illogical that in enacting the NVRA, Congress intended to erode Federal and State law protecting

against the disclosure of private, personal information.”); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 729 (S.D. Miss. 2014) (concluding that the NVRA does not require automatic public disclosure of registrants’ birthdates and noting that finding otherwise “would create a gaping hole in the statutory landscape whereby personal, otherwise protected information would lose its protection once a citizen registered to vote.”).

Neither the Pennsylvania Voter Registration Law nor the Department’s regulations prohibit VRF from obtaining the records it seeks. They simply set reasonable terms as to accessibility of such records. VRF has refused to abide by these terms and, in fact, has previously violated them and plans to do so again in the future. But nothing in the NVRA gives VRF the right to disregard Pennsylvania’s reasonable voter protections. Count One should be dismissed.

II. The Department’s Responses to VRF’s Requests Did Not Violate the NVRA

VRF further alleges that the Department previously violated the NVRA on two separate occasions, in each case by failing to provide VRF with the FRE when requested to do so. This suggestion is likewise meritless.

A. The Department's Response to VRF's 2022 Request Did Not Violate the NVRA

VRF's 2022 Request was submitted on the "Standard Right-to-Know Law Request Form" developed by the Pennsylvania Office of Open Records, and explicitly invoked the Pennsylvania Right-to-Know Law, in the opening lines of the letter-form attachment containing the specifics of the request itself. Nowhere in the 2022 Request does VRF allude to—much less invoke the provisions of—the NVRA.

Having received a request under the RTKL, the Department replied pursuant to the RTKL, which provides that it "shall not apply" if its provisions "regarding access to records conflict with any other Federal or State law." 65 P.S. § 67.3101.1. Accordingly, the Department issued the denial of April 13, 2022. VRF appealed the denial to the Office of Open Records; both that tribunal and the Commonwealth Court affirmed the Department's decision. *Swoboda v. Pa. Dep't of State*, No. AP 2022-1069R (Pa. Open Records July 15, 2022); *aff'd*, 304 A.3d 105, 116 (Pa. Cmwlth. 2023). VRF declined to seek further appellate review.

VRF now argues that the Department somehow violated the NVRA by failing to provide it with the FVE. But it submitted the 2022 Request exclusively pursuant to RTKL, and the Department responded to the

RTKL request pursuant to the provisions of that statute. The adequacy and correctness of the Department's response were vindicated in court. VRF's belated claim that the Department's correct response under the RTKL to the RTKL request somehow infringed on its rights under NVRA is meritless. The NVRA does not require government agencies to read requestors' minds, and the Department was well within its rights in treatment VRF's RTKL request as a RTKL request. This count should be dismissed.

B. The Department's Response to VRF's 2023 Request Did Not Violate the NVRA

The Department's response to VRF's 2023 Request similarly did not violate the NVRA. The Secretary responded to VRF's request by agreeing to provide the FVE if VRF agreed to the internet restriction. VRF refused to do so, and the Secretary was therefore unable to provide VRF with the requested list.

As explained above, the internet restriction is not preempted by the NVRA. VRF's claim that the Secretary violated the NVRA by refusing to provide the list even though it refused to agree not to publish voter information on the internet is entirely dependent on its argument that internet restriction is preempted. Because there is no conflict between

the internet restriction and the NVRA, the Secretary's request that VRF agree to the internet restriction before receiving the FVE was likewise fully consistent with the NVRA. Thus, this count should be dismissed.

III. The Internet Restriction Does Not Violate the First Amendment

VRF argues that the internet restriction violates the First Amendment in two separate ways. First, it claims that it improperly infringes on core political speech. Second, it alleges that it is impermissibly overbroad. Neither claim has merit.

A. The First Amendment Does Not Guarantee Access to Government Information

As an initial matter, the First Amendment does not create a right of access to information in the possession of the government. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978); accord *Cap. Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174–75 (3d Cir. 1986). States may restrict access to public information—such as by establishing certain criteria for granting access—so long as the criteria applied are not “illegitimate.”

L.A. Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 43–44 (1999) (Ginsburg, J., concurring).¹²

This is therefore “not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses.” *United Reporting*, 528 U.S. at 40. Rather, VRF seeks access to information in the Department’s possession, and refuses to agree not to publish the information on the Internet before receiving the information. The First Amendment does not give it any right to such information.

¹² Justice Ginsburg’s concurrence reflects on the implications of a contrary holding, in which a state is not permitted to impose conditions on the access to information, but (consistent with *Houchins*) is permitted to withhold information in its entirety:

[I]f States were required to choose between keeping proprietary information to themselves and making it available without limits, *States might well choose the former option*. In that event, disallowing selective disclosure would lead not to more speech overall but to more secrecy and less speech. . . . [S]ociety’s interest in the free flow of information might argue for upholding laws like the one at issue in this case rather than *imposing an all-or-nothing regime under which “nothing” could be a State’s easiest response*.

United Reporting, 528 U.S. at 43–44 (Ginsburg, J., concurring) (emphasis added).

B. The Internet Restriction Satisfies the *Anderson-Burdick* Framework

Even if the First Amendment were held to apply to the requirement than recipients of the voter lists agree to the internet restriction, VRF's First Amendment claims would have no merit. As two recent court of appeals decisions confirm, the *Anderson-Burdick* balancing test governs the analysis of First Amendment claims challenging election-related rules, such as VRF's here. Under this test, which grows out of two U.S. Supreme Court decisions, the court is to consider the specific burdens placed upon the rights of the plaintiff challenging a regulation, and determine whether they are "severe" or not. *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 145 (3d Cir. 2022) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). "Severe" restrictions are to be tested according to the measure of strict scrutiny, but other restrictions may, if they are "reasonably [and] nondiscriminatory," be weighed against "the State's important regulatory interests." *Mazo*, 54 F.4th at 145.

The Third Circuit has ruled that use of the *Anderson-Burdick* balancing test is appropriate even when "an election law burdens a fundamental right" if it also "regulates the mechanics of the electoral

process.” *Mazo*, 54 F.4th at 140 (cleaned up). The *Mazo* court cited cases in which the U.S. Supreme Court and various courts of appeals have applied the *Anderson-Burdick* test to a panoply of election-related regulations relating to “the voting process,” all of which “implicated speech and association to some degree,” even as they directly concerned only the “mechanics of the electoral process.” *Mazo*, 54 F.4th at 141–42.¹³

¹³ This compilation of cases where the courts have applied the *Anderson-Burdick* test is illuminating in the broad spectrum of cases involving the mechanics of the electoral process where the test has been applied:

The Supreme Court[has applied] *Anderson-Burdick* to a wide range of electoral-process regulations. These include the time, place, and manner of elections, such as “notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.” In line with this broad authority, the Supreme Court has also applied *Anderson-Burdick* to ballot access rules; regulation of party primaries; voter identification laws; and the content of ballots.

The Courts of Appeals have followed suit, scrutinizing under *Anderson-Burdick* laws regulating, *e.g.*, the order in which candidates’ names appear on the ballot, whether the ballot is electronic, the form and content of ballot initiatives, absentee voting, early voting, nomination of candidates, voter registration, the counting of ballots, polling hours, voter identification and proof-of-citizenship requirements, regulation of voter data, the appointment and qualifications of election workers, the use of primaries or caucuses, the use

The *Anderson-Burdick* test governs for the additional reason that the internet restriction does not burden “core political speech” in any way. *Id.* at 138. While “core political speech” is not easily defined, its “lodestar” is “interactive communication concerning political change.” *Id.* at 142 (cleaned up). VRF instead seeks to re-publish personal data about citizens of the Commonwealth. The mere fact that these citizens have chosen to register to vote does not convert their personal information into “core political speech,” and VRF’s suggestion to the contrary is meritless.

A recent Fourth Circuit decision applied the *Anderson-Burdick* framework to a claim regarding access to registration lists. That court

of straight-ticket voting, the use of ranked choice voting, the cancellation of an uncontested primary, the use of district-level or at-large election systems, and the composition of Independent Redistricting Commissions. Even beyond laws governing the voting process itself, the appellate courts regularly apply *Anderson-Burdick* to regulations affecting candidates, including the qualifications of elected and appointed officers, the filling of vacancies and special elections, term limits, and even the expulsion of elected officials. Though each of these regulations necessarily implicated speech and association to some degree, each was nonetheless primarily directed at regulating specific mechanics of the electoral process.

Mazo, 54 F.4th at 140–42 (citations and some footnotes omitted).

concluded that access to lists of registered voters “implicates interests that are protected by the First Amendment.” *Fusaro v. Cogan*, 930 F.3d 241, 250 (4th Cir. 2019) (*Fusaro I*). In *Fusaro I*, the court considered a Maryland law that provided for distribution of the list of registered voters only to applicants who were themselves registered voters in Maryland, and with the condition that it be used only for purposes “related to the electoral process,” and specifically excluding “commercial solicitation” from the scope of authorized uses. *Fusaro I*, 930 F.3d at 246 (citing Md. Elec. Law § 3-506(a), (c)). The court found that these restrictions did “not severely burden speech, nor [do they] raise any suspicion of improper government action,” and accordingly, determined it was appropriate to apply the *Anderson-Burdick* framework. *Fusaro I*, 930 F.3d at 263.

In weighing the interests implicated, the court credited Maryland’s asserted interest of protecting voters’ privacy and avoiding the disincentive to political participation that might result if voters should “become inundated with non-electoral-process-related-communications” through use of the voter registration list. *Fusaro v. Howard (Fusaro II)*, 19 F.4th 357, 369 (4th Cir. 2021). The court further found that the burden imposed on Fusaro, as the requester, was “modest,” in that it required

him to abide by a “benign” limitation of non-commercial use. *Fusaro II*, 19 F.4th at 370.

In sum, we conclude that the Use Provision. . . does not run afoul of the Free Speech Clause. When weighed against the State’s interests — that is, safeguarding the List, protecting Maryland’s election system, and shielding Maryland registered voters from harassment — the burden imposed on Fusaro is modest. We are satisfied that the State has thus met its burden under the *Anderson-Burdick* balancing test.

Fusaro II, 19 F.4th at 370.

The provision in Maryland law requiring the applicant to attest “that he will use the List for purposes that are ‘related to the electoral process,’”—described as the “Use Provision” in *Fusaro II*—closely parallels the limitation in the Pennsylvania regulations that provide for use only related to “elections, political activities or law enforcement.” 25 Pa. Cons. Stat. § 1404(b)(3). The Court should find that these limitations in Pennsylvania law are also, at most, a modest burden on VRF’s access and use of the lists.

The internet restriction applies to all requesters and the Department applies it even-handedly, which VRF does not contest. And VRF cannot represent that it is uniquely or especially burdened by this rule. Any burden it faces is minimal. *Mazo*, 54 F.4th at 146 (holding that

the burden is minimal when “(a) the requirement is nondiscriminatory and applies equally to all candidates . . . (b) the requirement leaves open ample and adequate alternatives . . . and (c) Appellants have failed to provide evidence of any specific burden on either themselves or any other candidate.”).

By contrast, as in *Fusaro II*, the Department has strong interests in protecting voter privacy. *See* 19 F.4th at 369; *see also Pa. State Educ. Ass’n v. Commw. Dep’t of Cmty. & Econ. Dev.*, 148 A.3d 142, 158 (Pa. 2016) (finding inherent right of privacy in residential addresses under state constitution). The Court should reject any attempt to downplay or discount the importance of these interests.

For these reasons, even if the internet restriction implicates the Frist Amendment, it easily satisfies the *Anderson-Burdick* test. The Court should reject VRF’s arguments and dismiss Count Four.

C. The Internet Restriction Is Not Overbroad

Finally, there is no merit to VRF’s claim that the internet restriction is overbroad. Statutes are deemed overbroad if they “offend[] the constitutional principle that ‘a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be

achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *Zwickler v. Koota*, 389 U.S. 241, 250 (1967) (internal citations omitted). A statute is overly broad under the First Amendment and therefore facially invalid “if the impermissible applications of the law are substantial when judged in relation to the statute’s plainly legitimate sweep.” *Hewlette-Bullard on behalf of J.H-B. v. Pocono Mtn. Sch. Dist.*, 522 F. Supp. 3d 78, 96 (M.D. Pa. 2021), quoting *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999).

Accordingly, it is not enough for a plaintiff to point to one impermissible application of the law. *Id.*, citing *Free Speech Coal., Inc. v. Att’y Gen. of U.S.*, 677 F.3d 519, 537 (3d Cir. 2012). Rather, a plaintiff must show the law is “substantially overbroad.” *United States v. Williams*, 553 U.S. 285, 303 (2008). That is, the law must create a real risk that the statute will damage third parties’ ability to speak. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800–801 (1984).

Pennsylvania’s internet restriction is not overbroad as (1) there is no general First Amendment right to access government information, *see supra*; and (2) the Commonwealth’s limitations on the sharing of voter data online are clear. In fact, despite lacking a general First Amendment

right to access government information, Pennsylvania's laws allow VRF and others to obtain data related to the Commonwealth's voter rolls, subject to specific limitations designed to protect its citizens. VRF cannot plausibly assert that a regulation that simply requires it to agree to reasonable conditions before giving it data that it otherwise has no right of access to is constitutionally overbroad.

Finally, the Commonwealth's restrictions are content and viewpoint neutral. They prevent all individuals, regardless of political affiliation or message, from publishing personal voter information on the internet. Moreover, the enacted laws and promulgated regulations are squarely within the Commonwealth's power to regulate access to government information. This Court should dismiss VRF's overbreadth claim as a matter of law.

CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss should be granted, and VRF's complaint should be dismissed in its entirety.

March 28, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.8(b), I certify that the above brief contains 6,724 words. In making this certificate, I have relied on Microsoft Word's word-count feature.

Dated: March 28, 2024

/s Michael J. Fischer
Michael J. Fischer

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EXHIBIT 1

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COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

January 21, 2022

Via First Class Mail

Doug Truax
Restoration Action, Inc.
c/o CorpAmerica
251 Little Falls Drive
Wilmington, DE 19808

RE: Unlawful posting of Pennsylvania-voter information on VoteRef.com

Dear Mr. Truax:

I represent the Pennsylvania Department of State in this matter. It has come to the Department's attention that "Voter Reference Foundation LLC," a self-identified subsidiary of the entity for whom you serve as President, Restoration Action Inc., has unlawfully posted Pennsylvania-voter information on its website, VoteRef.com. Please be advised that Pennsylvania law prohibits such information from being published on the internet. Moreover, any party who obtains the information agrees to that prohibition. Accordingly, the Department demands that Restoration Action Inc. and Voter Reference Foundation LLC take immediate action to remove all Pennsylvania-voter information from VoteRef.com and any other related websites under their custody or control.

Respectfully,

A handwritten signature in blue ink, appearing to read "Timothy E. Gates".

Timothy E. Gates
Chief Counsel
Pennsylvania Department of State