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

VOTER REFERENCE FOUNDATION, LLC,	)
Plaintiff,	)
v.	) **Civil Action: 1:24-CV-00294-CCC**
ALBERT SCHMIDT, in his official capacity as Secretary of the Commonwealth of Pennsylvania,	) Judge Christopher C. Conner
	) **ORAL ARGUMENT REQUESTED**
Defendant.	)

BRIEF IN SUPPORT
OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Voter Reference Foundation exists to accomplish the two main purposes of the National Voter Registration Act: to expand voting while also maintaining the integrity of elections. Under the NVRA, these twin goals are complementary. VRF shows how. It educates citizens about how elections and voter list maintenance work, provides public access to voter data for those who agree to use it for lawful purposes, and empowers citizens to associate with it to crowdsource searching for errors in the data. VRF encourages these citizens to petition state officials to address any errors found. By opening up the details of list maintenance to ordinary citizens, voter confidence is promoted and voter participation expands.

As part of its nationwide campaign to post the voter rolls of all 50 states on its website, VRF requested Pennsylvania's official state voter roll from the Secretary, but he refused to provide it.

Pennsylvania concedes its interest in knowing if citizens identify errors in its rolls, but muzzles requestors when they try to share its voter data online. Requesters like VRF have found online sharing the most efficient and effective way to engage in the public oversight envisioned by the NVRA. But in Pennsylvania, they must risk perjuring themselves just to access data. Or, worse yet, they must agree to self-censorship as the cost of doing business with the Secretary. VRF was not willing to

pay the price of compelled silence in exchange for the voter data to which it was entitled.

The parties' positions expose a fundamental disagreement about whether citizens should be involved in examining their own voter records. Where VRF values transparency and accountability, the Secretary insists that his role is to protect the people from themselves. Fortunately, Congress resolved these competing views decades ago. The NVRA not only mandated nationwide rules for voter registration and voter roll maintenance, but promised transparency in the process by including a Public Disclosure Provision, giving the public the right to inspect all records related to a state's voter list maintenance. Court after court has agreed that states' voter lists are themselves subject to public disclosure, and that state laws limiting the broad access envisioned by NVRA are preempted.

On the undisputed facts, the Internet Sharing Ban, which bars VRF and others from engaging in online speech that shares this data, is preempted by the NVRA. *See* Section IV. The Secretary's denial of VRF's requests under the guise of the Ban similarly, but independently, violates the NVRA's Public Disclosure Provision. *See* Section V.

The Internet Sharing Ban, which prohibits speech including the voter data which federal law mandates be made available to the public, violates the First Amendment because: (1) it completely bans VRF's main form of speech on elections

and politics; and (2) is an unconstitutional condition on granting a government benefit—NVRA mandated access to the data—by forcing VRF to surrender speech rights as a condition of access. These restrictions fail strict scrutiny. *See* Section VI. The Ban is also unconstitutionally overbroad. *See* Section VII.

VRF is entitled to declaratory and injunctive relief to protect its federal statutory and constitutional rights to access and share Pennsylvania voter data, thereby ensuring that Pennsylvania is fulfilling its list maintenance duties.

PROCEDURAL HISTORY

Plaintiff filed its Complaint (ECF No. 1) on February 20, 2024. The Secretary moved to dismiss under Rule 12(b)(6). That motion is fully briefed. No answer has been filed. Fact discovery closed on August 7, 2024. Pursuant to the Parties' agreement (*see* ECF No. 32), these cross-motions for summary judgment follow.

STATEMENT OF FACTS[1]

The facts of this case are straightforward and mostly undisputed. VRF twice requested voter data, including Pennsylvania's official voter list, from the Secretary. The Secretary denied both requests for one of two reasons: (1) because VRF previously obtained Pennsylvania voter data and published it online, or (2) because

[1] The material, undisputed facts are laid out in detail in Plaintiff's Statement of Uncontroverted Facts filed contemporaneously with this brief. When relevant, those facts are incorporated in the argument below.

VRF would not sign an affirmation agreeing to refrain from publishing the data online. This litigation followed.

STATEMENT OF QUESTIONS INVOLVED

I. Does the NVRA require Pennsylvania to make its official list of eligible voters available for public inspection?

II. Did the Secretary violate the NVRA by refusing to produce that data to VRF?

III. Does the NVRA preempt Pennsylvania's Internet Sharing Ban?

IV. Does the Internet Sharing Ban violate the First Amendment by prohibiting all online speech involving voter data which must be made available under the NVRA?

ARGUMENT

I. Summary judgment standard

Summary judgment must be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must provide "affirmative evidence, beyond the allegations of the pleadings" establishing its entitlement to judgment as a matter of law. *Pappas v. City of Lebanon*, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004). Evidence is viewed "in the light most favorable to the non[ ]moving party and draw all reasonable inferences in that party's favor." *Thomas v. Cumberland County*, 749 F.3d 217, 222 (3d Cir. 2014).

II. VRF has standing[2]

VRF is "aggrieved" under 52 U.S.C. § 20510(b) and has standing to bring its NVRA claims because the Secretary denied its record requests. *See Pub. Int. Legal Found. v. Boockvar*, 370 F. Supp. 3d 449, 455-56 (M.D. Pa. 2019); **Statement of Facts ("SOF") ¶¶117-127** (3/7/22 Request); **¶¶128-130** (11/2/23 Request); **¶¶135-138** (denial).

VRF has standing to bring its First Amendment claims because its protected political speech is chilled by the Internet Sharing Ban. *See Falcone v. Dickstein*, 92 F.4th 193, 203 (3d Cir. 2024), *cert denied sub nom. Murray-Nolan v. Rubin*, 144 S. Ct. 2560 (2024) ("[A]lleged First Amendment free speech violations are concrete and particular injuries…") (quotations omitted). But for the Ban and the Secretary's use of the Ban to deny VRF the data it seeks, VRF could and would use that data to engage in speech and association regarding the accuracy and currency of Pennsylvania's voter list and the integrity of its elections. **SOF ¶¶166-168**. VRF has standing to pursue its claims.

III. Pennsylvania's voter list must be made available under the NVRA

The NVRA's Public Disclosure Provision (52 U.S.C. § 20507(i)) gives VRF the right to access and share Pennsylvania voter data, including Pennsylvania's voter list and the FVE. *See* Section III(a), *infra*. But the Secretary refused to provide this

[2] The Secretary's motion to dismiss did not contest VRF's standing. ECF No. 19.

data to VRF because of the Internet Sharing Ban. This scheme runs afoul of the NVRA in two ways: (1) the Internet Sharing Ban is preempted because it unlawfully frustrates the NVRA's goals; and (2) the Secretary's refusal to fulfill VRF's requests violates the Public Disclosure Provision.

a. Pennsylvania's SURE database and FVE are "records" subject to public inspection under the NVRA

The NVRA requires states to make reasonable efforts to maintain the accuracy of their voter rolls, 52 U.S.C. § 20507(a)(4), and to make documents related to list maintenance publicly available:

> Each State shall maintain for at least 2 years and shall 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…

Public Disclosure Provision, 52 U.S.C § 20507(i)(1)**.**

The Secretary does not seriously contest that the data must be made available under the NVRA, **SOF ¶¶55-61**; ECF No. 19, p. 19 ("Assuming, arguendo, that the voter lists fall within the scope of this section…"). The Secretary even admitted that if someone wanted to evaluate whether Pennsylvania was properly conducting its list maintenance, requesting and analyzing voter data is exactly what they should do. **SOF ¶¶54, 59**.

Pennsylvania uses its SURE database—its centralized online voter database and official voter roll, **SOF ¶22**—to conduct "programs and activities…for the

purpose of ensuring the accuracy and currency of" its official list of eligible voters. Just two years ago, this Court held that records contained in SURE—like the FVE—must be disclosed under the NVRA:

> NVRA requires states to disclose "all records" related to any effort by the state to ensure "the accuracy and currency" of voter registration lists. See 52 U.S.C. § 20507(i)(1). As we explained in our decision on the Commonwealth's motion to dismiss, "[t]he word 'all' is expansive." (See Doc. 23 at 11 (citing *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012))). Congress intended NVRA's disclosure obligations to reach a broad array of "programs and activities." See 52 U.S.C. § 20507(i)(1); (see also Doc. 23 at 12). The Commonwealth's use of the SURE database to maintain the accuracy and currency of county voting registration lists brings the records held in that database within the universe of disclosable records under NVRA. See 52 U.S.C. § 20507(i)(1). Unless disclosure is blocked by some other law or legal principle, the Commonwealth must disclose the requested SURE records.

Pub. Int. Legal Found. v. Chapman, 595 F. Supp. 3d 296, 306 (M.D. Pa. 2022).[3]

That decision is consistent with every other court to examine whether a state voter list is a "record" under the NVRA, because Pennsylvania's SURE system and FVE are "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." *See Pub. Int. Legal Found., Inc. v. Bellows,* 92 F.4th 36 (1st Cir. 2024) (voter registration list from Maine's central voter registration system available

[3] The defendant in *Chapman* filed a notice of appeal to the Third Circuit on March 29, 2023, Case No. 23-1590. The Court of Appeals heard oral argument on September 11, 2024, and, as of the filing of this Motion, has not issued an opinion.

under NVRA); *Pub. Int. Legal Found., Inc. v. Knapp*, Case No. 3:24-cv-1276-JFA, Slip Op. at *9 (D.S.C. September 18, 2024) (recognizing "weight of authority surrounding the NVRA supports [the] conclusion" that voter data in South Carolina's computerized voter database are "records" under the NVRA)*; Judicial Watch, Inc. v. Lamone,* 399 F.Supp.3d 425, 439 (D. Md. 2019) (individual voter data are "records"); *Long*, 682 F.3d at 335-36 (registration applications are "records"); *Pub. Int. Legal Found., Inc. v. Matthews*, 589 F. Supp. 3d 932, 940 (C.D. Ill. 2022) (voter list is "record"). Tellingly, VRF just prevailed under nearly identical facts and theories in New Mexico. *See Voter Reference Foundation, LLC v. Torrez,* 2024 WL 1347204 (D.N.M. March 29, 2024) (New Mexico must make voter data available under NVRA and internet publication ban preempted).

In this case, VRF requested voter data, including the FVE, on two occasions. **SOF ¶¶117-127** (3/7/22 Request); **¶¶128-130** (11/2/23 Request); *see also* Section V, *infra*. The FVE is a full export of all voters and contains: voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential and mailing addresses, polling place, date last voted, all districts in which the voter votes, voter history, and date the voter's record was last changed. **SOF ¶15**. The data comprising the FVE is maintained and updated in SURE. **SOF ¶¶22, 24**. Pennsylvania conducts and/or memorializes all its voter list

maintenance programs and activities via the SURE database, **SOF ¶27, 58**, including, but not limited to:

- Conducting the National Change of Address program, **SOF ¶39;**
- Cancelling voter registrations and documenting the reason for cancellation, **SOF ¶¶31, 41;**
- Documenting voter history, **SOF ¶33;**
- Updating voters who moved out of state, **SOF ¶43;**
- Updating voters who moved in state, **SOF ¶42;**
- Identifying duplicate registrations, **SOF ¶44;**
- Removing voters who died, **SOF ¶¶38;**
- Tracking all changes made to a voter's registration status or profile, **SOF ¶45;**
- Updating the list based on information Pennsylvania receives from its participation in the Electronic Registration Information Center ("ERIC"), **SOF ¶¶36-37, 42-44;** and,
- Monitoring counties' progress on list maintenance activities, **SOF ¶50.**

Because it is inextricably intertwined with these list maintenance functions, the voter list and FVE are "records" subject to public disclosure. They consist of (1) voter data, containing the individual's personal information and registration status sorted into fields; and (2) an activity log that records the changes made to the voter data. **SOF ¶15**. Like the voter registration applications in *Long*, the voter list, FVE, and voter data contained within the FVE are all "records" because the process of creating, updating, and auditing voter data "is a 'program'. . . carried out in the service of a specified end—maintenance of voter rolls—and it is an 'activity' because it is a particular task . . . of [Pennsylvania] election employees." *Id*., 682 F.3d at 335 (quotation omitted).

Pennsylvania uses the SURE database to maintain the accuracy and currency of its voter list, as reflected in the FVE. Therefore, the records of those list maintenance functions in SURE, including the FVE, must be made available under the NVRA's Public Disclosure Provision.

IV. VRF is entitled to judgment on its NVRA preemption claim (Count I)

Pennsylvania's Internet Sharing Ban—the sole basis for its refusal to provide voter data to VRF—is preempted by the NVRA's Public Disclosure Provision.

The Secretary acknowledges that the voter list must be made available under the NVRA, **SOF ¶¶55-60**, but claims that Pennsylvania may nevertheless impose conditions on the use of the list—here, the Internet Sharing Ban. **SOF ¶61**. Requestors who do not agree to the Ban are denied access. **SOF ¶¶56, 64, 66-67, 143**. The Ban frustrates one of the NVRA's main objectives: for citizens to access, analyze, and discuss the data so that they can detect and remedy errors in the maintenance of voter rolls. Blocking citizen-to-citizen speech discussing the data and undermining efforts to scrutinize the voter list defeats the purpose of public disclosure and creates an unlawful obstacle to effectuating the NVRA's mandates.

a. NVRA obstacle preemption

Obstacle preemption is one form of implied preemption under the Supremacy Clause. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (state law preempted when it "stands as an obstacle to the accomplishment and execution of

the full purposes and objectives of Congress"). No presumption against preemption applies to the NVRA, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013), because the Elections Clause "empowers Congress to 'make or alter' state election regulations[,]" and the "assumption that Congress is reluctant to pre-empt does not hold when Congress acts" thereunder. *Id.* at 14; *see also Harkless v. Brunner*, 545 F.3d 445, 455 (6th Cir. 2008) (presumption does not apply to NVRA).

Against this background, the NVRA preempts a range of state laws. *See Inter Tribal*, 570 U.S. at 11-13 (proof of citizenship); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) (limitations on acceptance of voter registrations); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006) (requirements for registration workers). This includes state limitations on non-profits' access to voter data. *See Lamone*, 399 F.Supp.3d at 445; *Bellows,* 92 F.4th 36 (1st Cir. 2024)*; Voter Reference Foundation, LLC v. Torrez,* 2024 WL 1347204 (D.N.M. March 29, 2024); *Matthews*, 589 F. Supp. 3d at 940.

b. The NVRA preempts the Internet Sharing Ban.

Congress expressly identified the NVRA's four purposes: to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," to "enhance [] the participation of eligible citizens as voters in elections for Federal office," "to protect the integrity of the electoral process," and "to ensure that accurate and current voter registration rolls are

maintained." § 20501(b)(1)-(b)(4). The Public Disclosure Provision "assist[s] the identification of both error and fraud in the preparation and maintenance of voter rolls." *Long*, 682 F.3d at 339. Prohibitions on sharing voter data, which make it more difficult to identify error and fraud, directly contradict Congress's stated objectives and create improper obstacles to its implementation.

VRF is aware of two cases that considered whether a state can prohibit the online publication of its voter list. Both cases held that states must not only make their voter lists available under the NVRA, but prohibitions on sharing those lists online are preempted. *See Bellows,* 92 F.4th 36 (1st Cir. 2024); *Voter Reference Foundation, LLC v. Torrez,* 2024 WL 1347204 (D.N.M. March 29, 2024). VRF is unaware of any authority to the contrary.

In *Bellows*, the First Circuit held that Maine's prohibition on making voter data "accessible by the general public on the Internet or through other means…is [in]consistent with the structure and purpose of the [NVRA] as a whole." 92 F.4th at 52 (citations omitted) (alterations in original). Discussing the Public Disclosure Provision, the First Circuit noted:

> Such a provision evinces Congress's belief that public inspection, and thus public release, of Voter File data is necessary to accomplish the objectives behind the NVRA. Indeed, the analysis and subsequent dissemination of Voter File data to the public is necessary if members of the public, or organizations such as PILF, are ever to identify, address, and fix irregularities in states' voter rolls by exercising their private right of action under the NVRA.

Id. The First Circuit rejected Maine's argument that its publication ban furthered the NVRA's purpose of maximizing voter participation by protecting privacy: "even if the Publication Ban does further the NVRA's objective of enhancing the participation of eligible citizens as voters, it nonetheless creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as stated in 52 U.S.C. § 20501(b)(1)-(4)." *Id.* at 55. The court observed that Congress already weighed the privacy risks posed by public disclosure against the interest favoring the same, noting that other federal law protects voters' privacy interests. *Id.*; *see also Voter Reference Found., LLC v. Torrez*, No. CIV 22-0222 JB/KK, 2024 WL 1347204, at *144 (D.N.M. Mar. 29, 2024) (agreeing with *Bellows* and noting that New Mexico's "Ban largely deprives individuals and entities of the ability to engage with disclosed records in such a way that facilitates identification of voter registration-related irregularities and thereby severely limits the extent to which the Public Inspection Provision can contribute meaningfully to furthering the NVRA's objectives.").

The same is true here. Pennsylvania's Internet Sharing Ban directly undermines the principles of public disclosure and scrutiny that are central to the NVRA. Prohibiting the sharing of voter data online is antithetical to the NVRA's purposes, stands as an obstacle to its objectives, and is preempted.

V. The Secretary violated the NVRA by failing to produce records to VRF (Counts II-III)

The NVRA's Public Disclosure Provision requires states to make their voter lists publicly available. *See* Section III, *supra*. Accordingly, VRF is entitled to Pennsylvania's voter list and FVE under the plain text of the NVRA. VRF made two requests for that voter data. **SOF ¶¶117-127** (3/7/22 Request); **¶¶128-130** (11/2/23 Request). The Secretary refused to fulfill those requests despite being obligated to do so by the NVRA, **SOF ¶¶135-138,** twice violating the NVRA. **¶¶131-134** (first notice of violation); **139-143** (second notice).

i. The Secretary denied VRF's March 7, 2022 request

On March 7, 2022, VRF requested the FVE from DOS. **SOF ¶117.** The request included an attestation that the List would only be used for statutorily permissible purposes relating to elections, political activities, and law enforcement as required by 25 Pa.C.S. § 1401 et seq. and 4 Pa. Code § 183.14. **SOF ¶118.** The request explained that VRF could not use the online form to request the FVE because it required VRF to agree not to publish the information online. **SOF ¶¶119-121.**

The Department denied VRF's request in a letter from Open Records Officer Janelle Hawthorne, **SOF ¶122,** stating the requested records "are only available upon completion of an affirmation that the information will only be used for purposes relating to elections, political activities, and law enforcement," citing 25 Pa. C.S. § 1404 et seq. and 4 Pa. Code§ 183.14. **SOF ¶123.** But VRF's March 7th

Request met that requirement: it included an affirmation agreeing to the various conditions outlined on the Department's website. **SOF ¶124.** It only omitted the agreement that the information would not be posted on the Internet. ***Id.*** Thus, at the time it denied VRF's request, the Department had the very affirmation it claimed was the basis its denial, **SOF ¶125**, but the letter ignored this and asserted the absence of that affirmation as grounds for denial. ***Id.***

The Department next claimed VRF had previously obtained the FVE "but violated the voter registration law and the Department's regulations by publishing the information obtained on the Internet, namely, [its] website," and stated that "[a]s a result of those actions, your request for voter registration information is denied." **SOF ¶126.** The letter did not cite any legal authority for denying a request on these grounds, ***id.***, nor did it cite VRF's refusal to agree to the Internet Sharing Ban as a reason for denial. **SOF ¶127.** On November 2, 2023, VRF sent the Secretary a notice under 52 U.S.C. § 20510(b) informing him that his refusal to fulfill the March 7th request violated the NVRA. **SOF ¶¶131-134.**

The FVE must be made available under the NVRA, *see* Section III, *supra*, and the Internet Sharing Ban, the sole basis for denying VRF's request, is preempted. *See* Section IV, *supra*. The Secretary had no lawful reason to deny VRF's request and the March 2022 denial violated the NVRA, 52 U.S.C. § 20507(i).

ii. The Secretary denied VRF's November 2, 2023 request

On November 2, 2023, VRF sent the Secretary a second NVRA request for voter data. **SOF ¶128.** VRF also made the Secretary and Department aware of its intention to use the data for two of its projects—one involving online posting and one that does not. **SOF ¶129.** Like the prior request, VRF's November 2 Request affirmed the data would be used for permissible purposes, but did not agree to refrain from posting the data online. **SOF ¶¶129-130.** The Secretary responded stating "that request is granted on the condition that VRF completes the affirmation required for obtaining this data pursuant to Pennsylvania law. *See* 25 Pa.C.S. § 1404; 4 Pa. Code § 183.14," **SOF ¶137**, effectively denying the request. The Secretary did not acknowledge VRF's plans to publish the requested Pennsylvania voter data on the Internet. **SOF ¶138.** VRF sent the Secretary a notice under 52 U.S.C. § 20510(b) informing him that his refusal to fulfill the November 2nd request violated the NVRA. **SOF ¶¶139-143.**

The requested data, including the FVE, must be made available under the NVRA, *see* Section III *supra*, and the Internet Sharing Ban, the sole basis for denying VRF's request, is preempted. *See* Section IV, *supra*. The Secretary had no lawful reason to deny VRF's request. The November 2023 denial violated the NVRA, 52 U.S.C. § 20507(i).

VI. The Internet Sharing Ban directly restricts core political speech and fails strict scrutiny (Count IV)

The Internet Sharing Ban directly restricts core political speech by prohibiting the online sharing of voter data, even when done for lawful purposes. Because the Ban does not serve a compelling interest and is not narrowly tailored, it fails strict scrutiny.

The NVRA requires voter lists be made available. VRF need not establish an independent right to access those lists under the First Amendment. Once a state makes, or is required to make, certain information, data, or records available to the public, the First Amendment limits how the government may restrict the subsequent use and sharing of that information and prevents states from conditioning access in a manner which would violate the First Amendment. *See Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (invalidating West Virginia statute imposing criminal sanctions if juvenile offender's name was published without written court approval because "[o]ur recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards."); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (reasoning that publication of unlawfully intercepted phone call was protected speech because "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance ... One of the costs associated with participating in public affairs is an attendant loss of privacy.").

a. The First Amendment protects VRF's speech involving voter data

The First Amendment protects VRF from unreasonable burdens on core political speech regarding elections unless the Ban serves a compelling state interest. "Congress shall make no law [. . .] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The First Amendment safeguards speech and the dissemination of information on the Internet with the same vigor as the writings in a newspaper or a speaker in the town square. *See Reno v. ACLU,* 521 U.S. 844, 868 (1997); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.") (citation omitted).

"The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983), and "[t]he First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotation

omitted). Speech about and including voter data is protected. As noted by the Fourth Circuit:

> … three important considerations compel our conclusion that § 3-506 implicates interests that are protected by the First Amendment. First, the List is closely tied to political speech, which generally receives the strongest First Amendment protection… the List is a valuable tool for political speech… And, in addition to the List's obvious practical utility to political expression, § 3-506 all but ensures that the List will be used to further such speech. More specifically, § 3-506(c) makes it a misdemeanor to use the list 'for any purpose not related to the electoral process.' Thus, the text of § 3-506 reinforces the connection between the List and political speech. In these circumstances, we are obliged to hesitate before placing such a regulation beyond judicial scrutiny…

Fusaro v. Cogan, 930 F.3d 241, 250 (4th Cir. 2019) (citations omitted). Similarly here, the FVE may only be used for political and election related purposes, **SOF ¶¶62, 72, 123**, reinforcing its inherent connection to the types of speech which receive the highest protection.

b. The Internet Sharing Ban infringes on VRF's constitutionally protected speech

i. Restriction of core political speech

VRF's speech that shares Pennsylvania voter data is constitutionally protected. *See* Section VI(a), *supra*. Pennsylvania routinely makes voter data available to political parties and campaigns for inherently political means and even conditions access to the voter data, in part, on the data being used for election and election campaign purposes—necessarily political objectives. **SOF ¶¶62, 72, 123.** Further, Pennsylvania makes voter data available to companies who then sell that

data to clients to turn a profit and advance particular ideologies. **SOF ¶78, 157-161.** Because voter data cannot be divorced from its wholly political nature, the dissemination of that data is protected under the First Amendment.

Until the Secretary demanded that it remove it, **SOF ¶108,** VRF posted Pennsylvania voter data on VoteRef.com along with commentary regarding how ordinary citizens can use and review the data. **SOF ¶3, 6, 13.** The website included a call to action for citizens to contact state officers charged with maintaining the voter rolls if errors were identified. **SOF ¶7-8.** The website itself, including the voter data on the website, was and is core political speech. *See Meyer v. Grant,* 486 U.S. 414, 421 (1988) (efforts to seek "political change" even if it does not involve overtly persuading a citizen that one's views are correct, is core political speech). Pennsylvania's Ban silences core political speech by banning the sharing of the underlying data necessary to effectively engage in that speech. *See id*. at 424 (striking down Colorado's ban on payments to petition circulators because it banned the most effective means of speech, and "the First Amendment protects appellees' right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing.").

Speech sharing information about the voting status and history of Pennsylvania voters, particularly when used in the manner contemplated by VRF, sits at the zenith of First Amendment protection. *See Fusaro*, 930 F.3d at 250.

Discussions regarding voting, elections, electoral processes, and election integrity are issues in which the public does and should have a high level of interest. Compare *Meyer*, 486 U.S. at 421 (protection was at its "zenith" for speech regarding trucking deregulation). Yet the Internet Sharing Ban makes it more difficult, more expensive, and essentially impossible for VRF to disseminate meaningful information regarding Pennsylvania's elections, including the Commonwealth's efforts and success in maintaining accurate and up to date voter rolls. **SOF ¶14-15, 144-149.**

VRF hopes that millions of concerned citizens who share its interest in election transparency, participation, and integrity will view, analyze, and discuss the data. VRF's plan is to crowd-source the analysis of the data, so that interested citizens can associate with VRF and with each other to analyze and engage in political speech regarding the data. **SOF ¶¶3, 6**. Yet the Secretary states that it is precisely the use of the Internet to bring the data to ordinary citizens that renders VRF's sharing unlawful. **SOF ¶¶55** (crowdsourcing is permissible); **113** (but "we're here because of the publication aspect of this…"). But the Ban does not leave open ample, comparable, and effective alternative channels for communication, limiting the size of the audience that can be reached.

c. The Internet Sharing Ban unconstitutionally conditions access to Pennsylvania voter data on the surrender of First Amendment rights

The Internet Sharing Ban is further constitutionally infirm because, as applied by the Secretary, access to voter data that would otherwise be made available under federal law is conditioned on the requestor's surrender of First Amendment rights, specifically, the right to share that data on the Internet. "[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech[.]" *United States v. American Library Assn., Inc*., 539 U.S. 194, 210, 123 S.Ct. 2297 (2003) (cleaned up). Here, citizens' ability to access and then engage in speech that shares the data in the voter rolls is an essential First Amendment right. *See* Section VI(a), *supra*. Speech among citizens sharing data about who has voted, when, and where sits at this "highest rung" and is entitled to special protection, *Connick*, 461 U.S. at 145, particularly given that the NVRA requires states to make this data available. *See* 52 U.S.C. § 20507(i)(1).

The NVRA's treatment of voter lists as records that must be available to the public advances the First Amendment rights of requesters who wish to use the records for election purposes and to petition their government to undertake steps to maintain accurate voter rolls. That is because such lists are not simply collections of data, compiled for commercial or administrative use. Rather, voter lists are inherently political tools for free speech and association. *See Fusaro,* 930 F.3d 241,

251 (4th Cir. 2019); *see also Green Party of N.Y. v. N.Y. State Bd. of Elections*, 389 F.3d 411, 420 (2d Cir. 2004) (political parties use voter registration lists for "activities essential to their exercise of First Amendment rights"). Indeed, the Secretary's request form contemplates that the data will be used for activities of which the First Amendment is most protective, including political and election related purposes. **SOF ¶¶62-63**.

VRF desires, and has attempted, to exercise its benefit of access to Pennsylvania voter data, a benefit guaranteed by the NVRA. **SOF ¶¶117-127** (3/7/22 Request); **¶¶128-130** (11/2/23 Request). No state, including Pennsylvania, can impair or withhold that benefit by conditioning it on recipients' surrender of their First Amendment-protected rights to engage in online speech with their fellow citizens in which the data is shared for permissible and protected purposes. That surrender particularly stings here, where the very purpose of the data-sharing speech is to enable citizens to petition the government to ensure that the voter rolls are accurate and that elections are being properly and securely run—a goal that, in turn, will increase confidence and participation in elections.

Pennsylvania cannot condition access to federally mandated public records by requiring requestors to agree to refrain from exercising their First Amendment rights in return. The First Amendment does not tolerate such a high price tag.

d. The Internet Sharing Ban cannot survive strict scrutiny.

Because the Internet Sharing Ban directly restricts constitutionally protected, core political speech, it cannot stand unless it survives strict scrutiny.

> Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest…Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.

Citizens United, 558 U.S. at 340-41 (internal quotations and citations omitted). *See also Meyer*, 486 U.S. at 425 (where state imposes a substantial burden on core political speech, scrutiny is "well nigh insurmountable"). The Secretary has the burden to demonstrate that the Ban furthers a compelling state interest and is narrowly tailored. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75 (2002).

i. The Secretary cannot demonstrate that the Ban furthers a compelling state interest.

The Secretary must demonstrate that the Ban serves a compelling interest. An interest is compelling if it addresses an actual concrete problem—"[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York,* 447 U.S. 530, 543 (1980); *see also Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622, 644 (1994) (plurality) ("[The government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a

direct and material way."). Without assuming Defendant's burden to prove that the Internet Sharing Ban satisfies strict scrutiny, VRF suggests that on the undisputed facts, the Secretary cannot meet this burden.

In his Motion to Dismiss, the Secretary asserted one potential interest: voter privacy. *See* ECF No. 19 at 37. But Congress, in crafting the Public Disclosure Provision, clearly established a policy favoring transparency, even at the expense of privacy:

> We do not think appellants' privacy concerns unfounded. By requiring public disclosure of personal information,[] Section 8(i)(1) may conceivably inhibit voter registration in some instances. However, this potential shortcoming must be balanced against the many benefits of public disclosure. It is self-evident that disclosure will assist the identification of both error and fraud in the preparation and maintenance of voter rolls. State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. Without such transparency, public confidence in the essential workings of democracy will suffer.

Long, 682 F.3d at 339-40 (footnote omitted).

Not only has Congress already resolved the policy debate in favor of transparency, but the Secretary cannot present any concrete evidence that VRF's past posting of voter data or, by extension, its plans to post voter data in the future, have caused any tangible harm to Pennsylvania voters. The Secretary does not monitor how requestors use data. **SOF ¶150**. He concedes that he is unaware of anyone using the data VRF posts for unlawful purposes, **¶¶152-154**, or that any

Pennsylvania voter canceled his registration as a result of the sharing of the data. **¶155**.[4] Absent any evidence of a compelling need for the Ban, it cannot satisfy strict scrutiny. Again, though it is not VRF's burden, it provided testimony that it takes substantial steps to protect the data it posts, including requiring agreement with the site's terms of service, **SOF ¶91**, blocking IP addresses from certain geographic regions, **¶94**, and preventing data scraping, **¶96**.

Even if voter privacy was a compelling interest, the Ban would "fail as hopelessly underinclusive," *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015), because the Secretary admits that a requestor could obtain the same data and mail it, **SOF ¶80**, or email it, **¶¶79, 151**, to everyone in the state, or even post it on a website so long as a login is required. **¶81**.

ii. The Internet Sharing Ban is not narrowly tailored

Even if the Secretary could identify a compelling interest, the Internet Sharing Ban nevertheless fails strict scrutiny for lack of narrow tailoring.[5] Narrow tailoring requires using the "least restrictive means among available, effective alternatives." *Camp Hill Borough Republican Ass'n v. Borough of Camp Hill*, 101 F.4th 266, 271

[4] This is underscored by the fact that Ohio and North Carolina publish their voter rolls directly on the Internet without widespread intimidation or disenfranchisement. *See* https://www6.ohiosos.gov/ords/f?p=111:1 (Ohio, last accessed December 3, 2024; https://www.ncsbe.gov/results-data/voter-registration-data (North Carolina, last accessed December 3, 2024).

[5] Plaintiff again argues without assuming Defendant's burden to demonstrate tailoring.

(3d Cir. 2024). "The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (internal citations and quotations omitted).

The Internet Sharing Ban is not narrowly tailored because Pennsylvania and federal law already protect voter privacy, where necessary, and the Ban is not the least restrictive means of doing so. Pennsylvania has two different protected voter programs voters may utilize to protect the privacy of their information, **SOF ¶73**, and VRF does not post data for protected voters. **SOF ¶12, 89, 96**. Pennsylvania laws prohibiting harassment, stalking, and election interference address the concerns the Secretary is likely to raise. *See* 18 Pa. C.S. § 2709.1 (criminalizing stalking); 25 Pa. Stat. § 3527 (criminalizing election interference). And federal protections exist to maintain the privacy of sensitive data, when necessary. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. 552a et seq.; Drivers Privacy Protection Act of 1994, 18 U.S.C. § 2721 et seq.

For the reasons stated above and herein, the Internet Sharing Ban violates VRF's First Amendment rights and cannot survive strict scrutiny. VRF is entitled to judgment as a matter of law on its Count IV.

VII. VRF is entitled to judgment on its overbreadth claim (Count V)

The Internet Sharing Ban prohibits the sharing of any voter data online. **SOF ¶74.** The Ban is the antithesis of the NVRA. While the NVRA champions sunlight, transparency, and citizen involvement, the Ban embraces state control over citizen speech regarding the Secretary's maintenance of Pennsylvania voter rolls. Yet "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring). Here, the Ban prohibits substantially more protected speech than is necessary to advance any compelling government interest. For this reason, the Ban is overbroad and cannot stand.

a. Law regarding overbreadth challenges

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). "[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly

legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The concern that an overbroad statute deters protected speech is especially strong where, as here, the statute imposes criminal sanctions. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Criminal sanctions may cause speakers, including VRF, to remain silent rather than communicate even arguably unlawful words, ideas, and images. *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

"The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). The parties agree that the Internet Sharing Ban prohibits the publication of voter data on the Internet, regardless of whether the publication is for an otherwise permissible purpose. **SOF ¶¶74-77; 113** (purpose of posting not at issue).

Second, the Court must consider whether the Internet Sharing Ban proscribes "a substantial amount of protected expressive activity" judged relative to any plainly legitimate purpose served by the Ban. *Williams*, 553 U.S. at 297. The Ban is an absolute prohibition on the online sharing of voter data between a requester and any other person, regardless of whether the sharing is for an otherwise permissible governmental or election related purpose. The Ban has no valid applications to weigh against its invalid applications, particularly given its direct conflict with federal law.

A complete Ban attacks a problem that calls for a scalpel by employing a machete, and its reach—a total ban on online speech that shares voter data, much of which constitutes core political speech—is far broader than any legitimate sweep of a statute dedicated to ensuring that voter data is not used for commercial or nefarious purposes. Because of the Ban's overbreadth, VRF and others like it have refrained and will refrain from engaging in speech protected by the First Amendment out of fear of prosecution.

VIII. The Court should permanently enjoin the Internet Sharing Ban.

a. VRF is entitled to a permanent injunction.

VRF is entitled to permanent injunctive relief preventing the Commonwealth from enforcing the Internet Sharing Ban or invoking it as a basis for denying a request for records under the NVRA. To attain a permanent injunction, a plaintiff must demonstrate: (1) a reasonable probability of success on the merits; (2) irreparable harm; (3) the threatened injury outweighs potential harm to defendant; and (4) the injunction is in the public interest. *Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994) (quotations omitted). The first factor—success on the merits—is the subject of the entirety of this brief to this point and favors VRF. The remaining three factors also weigh in favor of permanent injunctive relief.

i. VRF will suffer irreparable harm

Where Congress expressly provides for injunctive relief to prevent violations of a federal statute, a plaintiff need not demonstrate irreparable harm to obtain a

preliminary injunction. *ReMed Recovery Care Centers v. Township of Willistown,* 36 F. Supp. 2d 676, 688 (E.D. Pa. 1999) (holding that, due to the nature of housing discrimination, a violation of Fair Housing Amendments Act creates a presumption of irreparable harm) (citing *Rosa v. Resolution Trust Corp.,* 938 F.2d 383, 400 (3d. Cir. 1991)). The NVRA expressly provides that a private party may "bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to [a violation of the NVRA]." 52 U.S.C § 20510(b)(2). This approach is justified because Congress has already balanced the equities in the NVRA and has determined that, as a matter of public policy, violations of the statute should be remedied or prevented by injunctive relief.

In any event, every day that VRF is denied access to the voter data, it is prohibited from carrying out the very reason for its existence: to engage with the public to ensure the accuracy and currency of state voter rolls. First, VRF suffers an ongoing informational injury, including the loss of opportunity to timely obtain Pennsylvania data critical to the debate regarding the effectiveness of Pennsylvania's list maintenance activities. Second, VRF loses the opportunity to take action to urge election officials to institute remedial measures before additional elections took place. Monetary damages cannot redress these injuries. *See Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1350 (N.D. Ga. 2016) ("There is no monetary remedy

that can correct the public's lack of access to information enabling it to ensure the integrity of Georgia's voter registration process.").

Further, the continued denial of access also prevents VRF from engaging in core political speech protected by the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."); *see also Stilp v. Contino*, 613 F.3d 405 (3d Cir. 2010). Thus, if the Court finds for VRF on the merits of any of its First Amendment claims, that determination necessitates a finding that VRF is suffering irreparable injury.

ii. The injury to VRF outweighs any harm that may be caused to Defendant and the public interest favors an injunction

VRF's informational and speech injuries outweigh any potential harm to the public or the Secretary: "[t]he balance of hardships does not weigh in favor of the defendant[], as a permanent injunction will simply compel the defendants to comply with their responsibilities under the NVRA and, thus, will prevent them from denying the public of a statutory right." *Project Vote/Voting For Am., Inc. v. Long*, 813 F. Supp. 2d 738, 744 (E.D. Va. 2011), *aff'd and remanded*, 682 F.3d 331 (4th Cir. 2012).

The Secretary is likely to claim that voter privacy and participation will be harmed by an injunction. But that is unsupported by any actual evidence that any voter has de-registered because of VRF's speech. **SOF ¶155.** Defendant presented

no concrete evidence that VRF's speech erodes public confidence in Pennsylvania elections, that VRF manipulated or misrepresented any voter data, **SOF ¶156**, or that anyone has been harassed, stalked, or solicited as a result of VRF's speech. **SOF ¶¶152-154.** The Secretary's anticipated reliance on complaints from citizens who dislike VRF's methods is insufficient to overcome the interests in conveying and receiving the data—interests Congress itself safeguarded in the NVRA:

> It is not the province of this court [] to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting NVRA Section 8(i)(1), which plainly requires disclosure of completed voter registration applications. Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections.

Long, 682 F.3d at 339-40 (footnote omitted). "The public has an interest in seeing that the State [] complies with federal law, especially in the important area of voter registration. Ordering the state to comply with a valid federal statute is most assuredly in the public interest." *Kemp*, 208 F. Supp. 3d at 1351 (citations and quotations omitted).

Vindicating First Amendment rights is also in the public interest. "[M]any courts have held that there is a significant public interest in upholding First Amendment principles." *Am. Freedom Def. Initiative v. Se. Pennsylvania Transp. Auth.*, 92. F.Supp.3d 314, 330 (E.D. Pa. 2015).

Because VRF is entitled to judgment as a matter of law on the above claims and the equities weigh in its favor, it is also entitled to permanent injunctive relief.

CONCLUSION & REQUESTED RELIEF

The Court should enter judgment for VRF on all counts. The facts material to these claims are not in dispute. VRF respectfully requests the Court enter judgment consistent with the accompanying motion.

Respectfully submitted this 6th day of December, 2024.

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CERTIFICATE OF WORD COUNT

Pursuant to the Court's order dated October 28, 2024 (ECF No. 33), "[t]he Parties may file supporting and opposing briefs not to exceed 8,000 words, exclusive of any statement of uncontroverted facts or response to the other party's statement of uncontroverted facts." I certify that this brief contains 8,000 words as calculated by the word count feature of Microsoft Word, which was used to prepare this brief.

/s/ Edward D. Greim
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE WITH L.R. 7.1

Pursuant to Local Rule 7.1, I certify that Plaintiff's counsel conferred with Defendant's counsel regarding this motion. Defendant does not concur in the motion.

/s/ Edward D. Greim
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that, on December 6, 2024, I filed the above document with the Court's CM/ECF system. Service will be accomplished on all counsel of record through the CM/ECF system.

/s/ Edward D. Greim
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