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

VOTER REFERENCE FOUNDATION, LLC,	)
Plaintiff,	)
v.	) **Civil Action: 1:24-CV-00294-JFS**
ALBERT SCHMIDT, in his official capacity as Secretary of the Commonwealth of Pennsylvania,	) Judge Joseph F. Saporito, Jr.
	) **ORAL ARGUMENT REQUESTED**
Defendant.	)

REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Every court to analyze whether a state must make its voter list available under the NVRA's Public Disclosure Provision agrees the list must be disclosed. The Secretary offers no reason why the Commonwealth's voter list should be the exception to the rule.

From there, this case is straightforward. Because the list must be made publicly available, a state regulation severely limiting its availability—here, Pennsylvania's Internet Sharing Ban—stands as an obstacle to the Public Disclosure Provision and is preempted to the extent of that conflict. And because the preempted Ban was the sole reason the Secretary denied VRF's requests, the Secretary's denial of those requests violated the NVRA.

Because federal law requires the list be made available, the Ban— a state regulation prohibiting speech involving that list—cannot withstand First Amendment scrutiny even if the First Amendment initially provides no independent right to access the list. Once federal law makes information available about government operations and activities (for example, the list), it is almost never defensible to prohibit citizens from engaging in speech that truthfully shares that information. And the Secretary has not carried his burden to demonstrate that the Ban advances a compelling or unique state interest that cannot be achieved in some manner less restrictive of protected speech.

VRF is entitled to judgment as a matter of law, its motion should be granted, and the Secretary's denied. The Court should require the Secretary to provide the Full Voter Export to VRF and prohibit him from enforcing the Internet Sharing Ban.

RESPONSE TO SECRETARY'S STATEMENT OF FACTS

The Secretary only disputes a handful of Plaintiff's fact statements, but largely fails to identify record evidence establishing an actual dispute. First, the Secretary claims certain paragraphs "mischaracterize[] testimony," but fails to identify what was mischaracterized. *See* ECF No. 45, ¶¶13, 28, 77-8, 81, 151, 157. Similarly troubling, the Secretary claims to dispute facts asserted by VRF but does so by interjecting *additional* facts from outside the record, unsupported by record citations. *See* ¶¶6, 13, 25, 32, 91, 95, 101. This is not the proper way to dispute fact statements, *see* L.R. 56.1, and these phantom facts should be disregarded.

Finally, the Secretary incorporates by reference his Statement of Undisputed Material Facts filed in support of his own motion, *see* Secretary's Response (ECF No. 44) (**"SOS RIO"**) at p. 7, n. 2, claiming these as established facts even though VRF controverted several statements on which he relies. *See* ECF No. 42. If the Court considers the referenced filing in resolving VRF's motion, it should also consider VRF's responses controverting those statements.

I. VRF'S Efforts & the Internet Sharing Ban

The Secretary again questions the sincerity of VRF's efforts, contending it does nothing to inform officials of errors in the voter rolls. Even if this could matter, the record says otherwise. The Secretary concedes VRF's intent is for its associates to directly contact election officials if they identify errors. SOS RIO, p. 11. And VRF contacted the Department when it identified issues in 2021. **VRF Statement of Facts, ECF No. 35 ("SOF") ¶¶103-106.**

The Secretary's repeated accusations of VRF undermining voter privacy similarly ring hollow. Pennsylvania law makes the same voter data directly available from the Secretary. *See* 4 Pa. Code §§ 183.13(c); 183.14(b). Third-party vendors *sell* this data to clients on the open market. **SOF ¶78**. And the Secretary has not prohibited selling, mailing, **¶80**, emailing, **¶79**, or posting this data on a password-protected site. **¶81**.

The Secretary thinks VRF should do more to monitor and prevent potential misuse of the data, even though the Department itself does not monitor requestors' use. **¶82**. But VRF removes protected voter information, **¶89**, redacts judges, marshals, and law enforcement officers, **¶90**, and involves legal counsel to evaluate other requests for removal. And there is no evidence that VRF's activities encourage the misuse of voter data. ***See*** **¶152** (no knowledge of illegal use); **¶153** (no knowledge of commercial use); **¶154** (no knowledge of stalking or harassment).

There is also no evidence that any voter canceled their registration because of VRF. **¶155**. And the Secretary knocks VRF for failing to take legal action or report a violation of its terms of service, but concedes that VRF *has never become aware of any such violation*. *See* Response, pp. 12-13; **SOF ¶93.**

In sum, the Secretary's statement of facts attempts to muddy the waters, but is largely contradicted by the record on which this case must be resolved.

II. The Department is substantially involved in voter list maintenance, including maintaining SURE.

The Secretary claims the NVRA's "primary purpose" is reducing barriers to voting. SOS RIO, pp. 3-4. But the NVRA explicitly identifies four co-equal purposes:

> (1) to…increase the number of eligible citizens who register to vote…;
> (2) to…enhance[] the participation of eligible citizens as voters in elections for Federal office;
> (3) to protect the integrity of the electoral process; and
> (4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501(b). To advance these purposes, the NVRA mandates list maintenance activities, which the Secretary claims are the sole province of Pennsylvania's counties. Again, the record says otherwise. The Department is substantially involved in list maintenance activities and the maintenance of the SURE database. **SOF ¶¶27, 34-38, 41-44, 49-50**. And the Secretary is responsible for ensuring the Commonwealth's compliance with the NVRA. **¶¶20-21.**

RESPONSE TO SECRETARY'S PROCEDURAL HISTORY

The procedural history of this case is largely uncontested. VRF notes that although it appealed the denial of its 2022 request, no court adjudicated VRF's NVRA or First Amendment claims.

ARGUMENT

I. This would be the first court in the nation to hold that a state's voter list is not subject to disclosure under the NVRA.

Whether a state's official voter list must be disclosed under the NVRA's Public Disclosure Provision (52 U.S.C. § 20507(i)), is not a novel issue. At least eight federal courts have determined the lists must be disclosed. *See Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 49 (1st Cir. 2024); *Pub. Int. Legal Found., Inc. v. Knapp*, No. 3:24-CV-1276-JFA, 2024 WL 4792051, at *5 (D.S.C. Sept. 18, 2024); *Jud. Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425 (D. Md. 2019) (completed voter registration applications); *Pub. Int. Legal Found., Inc. v. Matthews*, 589 F. Supp. 3d 932, 941 (C.D. Ill. 2022); *Voter Reference Found., LLC v. Torrez*, 727 F. Supp. 3d 1014, 1032 (D.N.M. 2024); *Project Vote/Voting For Am., Inc. v. Long*, 813 F. Supp. 2d 738, 743 (E.D. Va. 2011), *aff'd and remanded*, 682 F.3d 331 (4th Cir. 2012) ; *True the Vote v. Hosemann,* 43 F. Supp. 3d 693, 723 (S.D. Miss. 2014). The Department of Justice—which enforces the NVRA—agrees. **VRF Exs. P, Q**.

The Secretary does not—and cannot—point to any authority to the contrary.

II. The NVRA preempts the Internet Sharing Ban.

Because Pennsylvania's statewide voter list must be made publicly available under the NVRA, the Internet Sharing Ban—which directly prohibits public sharing of the list—stands as an obstacle to the NVRA's purpose and is preempted.

a. The Elections Clause embraces obstacle preemption claims.

The Secretary argues obstacle preemption is not cognizable under the Elections Clause, the constitutional provision under which the NVRA was promulgated, *see* SOS RIO, pp. 22-24, because "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." P. 23 (*citing Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13-14 (2013)). This is wrong.

Election Clause preemption is undoubtedly guided by different principles than Supremacy Clause preemption. For one, the presumption against preemption does not apply to Elections Clause legislation because "[w]hen Congress legislates [under the Elections Clause], it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Arizona*, 570 U.S. at 14. *See also Harkless v. Brunner*, 545 F.3d 445, 454–55 (6th Cir. 2008) ("In ratifying Article I, Section 4, the states not only gave Congress plenary authority over federal elections but also explicitly ensured that all conflicts with similar state laws would be resolved wholly in favor of the national government. Accordingly, the logic behind the plain-statement rule—

that Congress must be explicit when it encroaches in areas traditionally within a state's core governmental functions—does not apply…."). Two, an "action of Congress [under the Elections Clause], so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold,* 100 U.S. 371, 384 (1879).

The Secretary claims prior caselaw interpreting the NVRA's Public Disclosure Provision, including *Bellows*, was blind to these distinctions. SOS RIO, p. 23, n. 6. Wrong again. The First Circuit specifically addressed and applied the Elections Clause in *Bellows*:

> In all preemption cases, ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'". Such assumption, however, "does not hold when Congress acts under th[e Elections Clause], which empowers Congress to 'make or alter' state election regulations." "Because 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 [preemptive] intent." Thus, "because Congress's authority for the NVRA is rooted in the [Elections Clause]," the presumption against preemption does not apply here.

92 F.4th at 51–52 (citations omitted) (cleaned up).

The First Circuit next discussed the different types of preemption (including conflict preemption of which obstacle preemption is a subset), before "turn[ing] to the purposes and intended effects of the NVRA." *Id.* at 52. "For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in

federal elections, but in 1993, with the enactment of the [NVRA], Congress intervened." *Id.* (citing *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 761 (2018)). The NVRA "erected a complex superstructure of federal regulation atop state voter-registration systems." *Arizona*, 570 U.S. at 5. Having already found Maine's Voter File is a "record" subject to disclosure, the First Circuit concluded Maine's Publication Ban conflicted with, and was preempted by, 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.

Bellows, 92 F. 4th at 54. The Court rejected the argument, echoed here, that Maine's Ban actually furthers *one* of the NVRA's purposes:

> We are unpersuaded. First, our task is to determine whether [the Ban] "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In doing so, we must "examin[e] the [NVRA] as a whole" to "identify[ ] its purpose and intended effects." And, for the aforementioned reasons, 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 (citations omitted) (cleaned up). It is unclear why the Secretary reads this analysis out of the opinion, but the assertion that the First Circuit ignored the Elections Clause is simply incorrect.

Bellows is no outlier either. Federal courts regularly apply conflict or obstacle preemption in NVRA cases. *See Knapp*, 2024 WL 4792051, at *7 (South Carolina

prohibition on publication of voter list preempted by NVRA); *Lamone*, 399 F. Supp. 3d at 445 (NVRA conflict preempts law providing data only to Maryland voters); *Matthews*, 589 F. Supp. 3d at 943 (Illinois law prohibiting photocopying of list conflicts with NVRA); *Torrez*, 727 F. Supp. 3d at 1223 (New Mexico's publication conflict preempted); *Long*, 813 F. Supp. 2d at 743 ("…[T]o the extent that any Virginia law, rule, or regulation forecloses disclosure of completed voter registration applications…the court FINDS that it is preempted by the NVRA."). What's more, before reaching these conclusions, each court first found the state voter lists at issue were subject to disclosure under the NVRA. *See* Section I, *supra.*

Contrary to the Secretary's assertion, adopting VRF's position that Pennsylvania's voter list is subject to disclosure and the Internet Sharing Ban is preempted would put this Court squarely in the majority, not render it an exception.

b. The Internet Sharing Ban frustrates the NVRA's goals.

The Internet Sharing Ban frustrates the NVRA's goals. A state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). The Ban frustrates at least two of the NVRA's objectives: (i) preserving the integrity of elections; and (ii) maintaining accurate rolls. 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. Burdening this process makes rectifying those errors less likely.

Both cases to analyze state prohibitions on online voter list publication concluded the NVRA preempted those prohibitions. *See Bellows,* 92 F.4th 36 (1st Cir. 2024); *Torrez,* 2024 WL 1347204 (D.N.M. March 29, 2024). The Department of Justice agrees. **VRF Exs. P, Q**. VRF is unaware of any authority to the contrary. The Secretary cites none.

The reasoned discussion in *Bellows* held "the analysis and subsequent dissemination of Voter File data to the public is necessary if members of the public, or organizations [], are ever to identify, address, and fix irregularities in states' voter rolls by exercising their private right of action under the NVRA." 92 F.4th at 54. The First Circuit also recognized the privacy interests at play: "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.

Pennsylvania's Ban is no different. It directly undermines the transparency the Public Disclosure Provision seeks to achieve, frustrating its purpose. For that reason, the Ban is preempted.

c. VRF's preemption claim is not "boundless."

Pointing to an alternate universe in which VRF sought *different* data for *different* purposes, the Secretary argues that VRF's preemption claim is "boundless," and that VRF limiting its requests to certain data to be used for lawful purposes is "irrelevant to the legal question… and nothing in its complaint suggests that it could be legally precluded from putting all of the information it receives on the internet." SOS RIO, p. 26.

VRF does not request, or will redact, the sensitive data about which the Secretary is concerned, including social security numbers, driver's license numbers, email addresses, or phone numbers. **SOF ¶167**. In fact, this data is not included in the FVE. **¶71**. VRF requests specific lists in part because they omit these types of information, yet contain the necessary data points for VRF to conduct its crowdsourcing and oversight functions. That is the limit of VRF's interest. VRF does not ask the Court to order the production of this sensitive data, or to allow it to publish that information online or elsewhere.

Further, VRF's NVRA preemption claim only applies to the extent a restriction placed on NVRA disclosure rights actually frustrates the purposes of the NVRA. Even if the state collects sensitive information, that data is simply unnecessary for the oversight functions in which VRF engages, or those the NVRA contemplates the public will undertake. Simply put, VRF does not need that

information to help maintain the accuracy of the rolls. That is why VRF has never sought these categories of "sensitive information," nor has it ever argued that the NVRA preempts restrictions on providing it.

If, hypothetically, another plaintiff sought a declaration that it was entitled to every voter's social security number and had a right to post that information online and use it for any purpose it desired, they would need to satisfy the court that doing so advances, rather than frustrates, the NVRA's purposes. But that is not the question before this Court. And VRF need not prove that case to prevail on its own.

III. If the Court agrees with VRF on the issues above, it must find that the Secretary violated the NVRA by refusing to disclose the records VRF sought.

The resolution of Counts II & III of VRF's Complaint—whether the Secretary should have produced the requested records—is straightforward. The Parties do not dispute when the relevant requests were made or their contents, or the substance of the Secretary's denials. If Pennsylvania's voter list must be made available under the NVRA and the Internet Sharing Ban is preempted, the Secretary necessarily violated the NVRA by refusing VRF's requests. If the List need not be made available, or the Ban is not preempted, then the Secretary was within his rights to refuse VRF's requests.

The only dispute relevant here is whether VRF's 2022 request was defective because it did not specifically remind the Secretary of his obligations under the

NVRA. The Secretary contends that because VRF did not label its request an "NVRA request," he is excused of any obligation that might have existed to produce records. SOS RIO, pp. 29-30.

The Public Disclosure Provision does not require a requestor to use magic words to remind a state election official of his federal obligations. Rather, the obligation to produce is triggered by a request for records covered by the Provision. The only notice contemplated by the NVRA is the notice from the aggrieved party to the state official identifying the alleged violation. 52 U.S.C. § 20510(b). Thus, even if the Secretary could feign ignorance before, he knew at least as early as November 2, 2023, that VRF's request was made under the NVRA. **VRF Ex. M**. The Secretary refused to correct his violation in the 90-day cure period, but did so at his own peril: if he was wrong, his refusal must be considered a violation.

Because he was, it is.

IV. The Internet Sharing Ban violates the First Amendment.

a. VRF need not prove an independent First Amendment access right as a precondition to vindicating its speech rights.

VRF need not demonstrate a right of *access* under the First Amendment to prevail on its speech claims because, as established above, the NVRA requires the lists be made available.

The First Amendment curtails a state's ability to prohibit the publication of lawfully obtained information, *see Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979)

("recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards"), or even information unlawfully obtained by someone other than the speaker. *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (publication of unlawfully intercepted phone call was protected speech because "…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."). Because the information VRF seeks to publish must be made available under federal law, Pennsylvania's attempts to quash that speech are irreconcilable with these precedents.

In that regard, this *is* closer to the cases "in which the government is prohibiting a speaker from conveying information that the speaker already possesses," *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 43–44 (1999), or, at least, information it should have if the Secretary complied with federal law. Refusing to provide the records to VRF because of its planned speech, then using VRF's lack of access against it, is a roadmap for censorship.

b. The speech in which VRF and its associates intend to engage is core political speech, and the Ban severely burdens that speech.

The Secretary contends VRF's proposed speech is not protected, because "core political speech" must involve "interactive communication concerning political change." SOS RIO, pp. 31-34 (*citing Mazo v. New Jersey Secy of State*, 54

F. 4th 124, 142 (3d Cir. 2022) (quotation omitted). A non-profit making government data transparent so that citizens can review it, discuss it, and petition their state officials to make changes, is "interactive communication concerning political change." *See also Meyer v. Grant,* 486 U.S. 414, 421 (1988) (effort at "political change," even when not overtly persuading a citizen that one's views are correct, is core political speech). The straw man argument—that the Ban actually *protects* core political speech by protecting privacy, SOS RIO, p. 32—is misleading because the same data is easily obtained from the Secretary and can be widely distributed, including by mail, email, websites, or selling lists to clients. **SOF ¶¶78-81.**

Because the Ban directly restricts constitutionally protected, core political speech, it cannot stand unless it survives strict scrutiny. *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010) (internal quotations and citations omitted). The Secretary has the burden to demonstrate 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). He has not done so.

The Secretary insists that VRF's speech is not important enough to justify the application of strict scrutiny, and the Court should instead judge the Ban under the *Anderson-Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). That standard applies a balancing test weighing the burden on plaintiff's rights against the state's interest in upholding the

speech infringing regulation. Severe burdens are subject to strict scrutiny, while minimal burdens may be upheld if they are reasonable and nondiscriminatory.

However, "[t]he fact that an election law burdens a fundamental right is necessary but not sufficient to trigger *Anderson-Burdick*; the law also must regulate 'the mechanics of the electoral process.'" *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). The Internet Sharing Ban does not regulate the mechanics of the electoral process: *how, where, or when* people vote. Rather, the Ban prohibits activity in a completely different realm: (a) *pure speech* regarding (b) *how officials keep records* of (c) *how people voted* (d) when *they voted in the past*. *Anderson-Burdick* is wholly inapplicable. Strict scrutiny applies.

Even if the Court applied *Anderson-Burdick*, the burden on VRF's (and others') First Amendment rights is severe. The Internet Sharing Ban is a wholesale prohibition on the most common, cheap, and effective communication tool in the modern era: the Internet. To entirely foreclose speech via this medium is a severe burden regardless of the topic, but especially so when the speech being banned specifically relates to evaluating a government function, and petitioning that government if errors are identified. Even under *Anderson-Burdick*, the Court should apply strict scrutiny.

Regardless of the framework, the Secretary asserts two potential interests: voter privacy and "ensuring voters are not discouraged from participating in the

political process." Congress resolved the first interest in crafting the Public Disclosure Provision, favoring transparency over 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 fails to present any concrete evidence that VRF's posting of voter data causes tangible harm to voters' privacy or discourages voter participation. VRF 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, **¶97.** The Secretary fails to muster any evidence that any Pennsylvania voter has canceled their registration because of VRF. **¶155**. 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 or email it to everyone in the state, or even post it on a website with a login. *See* p. 3, *supra*.

The Secretary also fails to demonstrate the Ban is the "least restrictive means among available, effective alternatives." *Camp Hill Borough Republican Ass'n v. Borough of Camp Hill*, 101 F.4th 266, 271 (3d Cir. 2024). 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. **¶¶12, 89, 96**. Pennsylvania could expand those programs if it is concerned about voter privacy. Relatedly, Pennsylvania laws prohibiting harassment, stalking, and election interference address concerns regarding misusing the data. *See* 18 Pa.C.S. § 2709 (criminalizing harassment); 18 Pa. C.S. § 2709.1 (stalking); 25 Pa. C.S. § 3527 (election interference). And federal protections exist to maintain the privacy of sensitive data, when necessary. *See, e.g.*, Privacy Act, 5 U.S.C. § 552a, *et seq*.; Drivers Privacy Protection Act, 18 U.S.C. § 2721, *et seq*. Pennsylvania has done nothing to show that these more narrowly-tailored protections are ineffective to address its concerns. Instead, the Secretary wants VRF to prove those lesser-restrictions valid. SOS RIO, p. 38. That is not VRF's burden.

For the reasons stated above and herein, the Internet Sharing Ban violates VRF's First Amendment rights and cannot survive strict scrutiny.

c. The Ban is overbroad.

The Parties agree that the Internet Sharing Ban prohibits the sharing of any voter data on the Internet. Their only disagreement is whether the Ban has permissible applications to weigh against its impermissible ones. *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

VRF contends that *most* applications of the Ban are impermissible, because the Ban is at odds with both the NVRA—which prioritizes public disclosure and the transparency it brings—and the First Amendment, as it prevents citizens from analyzing—and criticizing—the maintenance of Pennsylvania voter rolls.

The Secretary contends the Ban is permissible because he claims to apply it in an evenhanded manner. SOS RIO, p. 40. But it's not enough that the Ban applies to everyone on the same terms. A speech-silencing regulation is not saved merely because it equally suppresses all voices, particularly when the speech being suppressed is directed at evaluating and criticizing the performance of state officials in conducting a critical government function.

To the contrary, a complete ban on online speech sharing voter data is far broader than any legitimate regulation dedicated to protecting voter privacy or prohibiting commercial and nefarious uses. The record demonstrates the Ban does

not actually protect voter privacy. The Secretary does not monitor how other requestors use the data he claims to care so much about. **SOF ¶150**. And the Secretary fails to demonstrate that less severe means could not be used to protect those interests.

The Ban's overbreadth is incongruent with the First Amendment and has caused VRF and other potential critics to refrain from engaging in protected speech.

V. A permanent injunction is warranted.

The Parties agree that if VRF loses on the merits, it is not entitled to a permanent injunction. But because it is entitled to judgment, as described above, this factor weighs in its favor.

Further, both the informational and speech injuries VRF suffers from the Secretary's continued refusal to produce the requested records, and from its speech being silenced, constitute irreparable harm. *See Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1350 (N.D. Ga. 2016) ("...[N]o monetary remedy [] can correct the public's lack of access to information enabling it to ensure the integrity of Georgia's voter registration process."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms…unquestionably constitutes irreparable injury.")

Finally, the equities here are predetermined by Congress: "[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." *Long*, 813 F. Supp. 2d at 744 (E.D. Va. 2011). "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).

There is no countervailing evidence to weigh against these considerations. The Secretary presents no evidence that any voter canceled their registration because of VRF. **SOF ¶155.** Nor is there evidence that VRF's speech erodes public confidence in Pennsylvania elections, that VRF manipulated or misrepresented any voter data, **¶156**, or that anyone has been harassed, stalked, or solicited as a result of VRF's speech. **¶¶152-154.**

If the Court agrees with VRF on the merits, a permanent injunction requiring the Commonwealth to comply with federal law by producing the requested records and preventing it from enforcing the Internet Sharing Ban is both warranted and required.

CONCLUSION

For the foregoing reason, VRF's motion should be granted and the Secretary's denied. The Court should require the Secretary to produce the requested records to

VRF, enjoin him from enforcing the Ban, and award VRF its attorney's fees under 52 U.S.C. § 20510(c).

VRF respectfully requests oral argument on the Parties' cross-motions for summary judgment pursuant to Local Rule 7.9.

Respectfully submitted this 31st day of January, 2025.

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CERTIFICATE OF WORD COUNT

Pursuant to the Court's order dated October 28, 2024 (ECF 33), "[t]he Parties may file reply briefs not to exceed 5,000 words, exclusive of any response to the other party's statement of additional uncontroverted facts." I certify that this brief contains 4,995 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 SERVICE

I certify that, on January 31, 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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