

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DENNIS FUSARO)
242 Brunswick Rd.)
Stephens City, VA 22655)

Plaintiff,)

EMMET C. DAVITT, Maryland State Prosecutor,)
in his official capacity.)
300 East Joppa Road, Suite 410)
Towson, MD 21286)

DAVID J. McMANUS, JR., Chairman,)
Maryland State Board of Elections;)
PATRICK J. HOGAN, Vice Chairman,)
Maryland State Board of Elections;)
MICHAEL R. COGAN, Member,)
Maryland State Board of Elections;)
KELLEY A. HOWELLS, Member,)
Maryland State Board of Elections;)
GLORIA LAWLAH, Member,)
Maryland State Board of Elections,)
all in their official capacities.)
151 West Street, Suite 200)
Annapolis, MD 21401)

Defendants.)

Civil Action No. _____

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Dennis Fusaro, by his attorneys Stephen Klein and Benjamin Barr of the Pillar of Law Institute and John Garza of the Garza Law Firm, bring this action for declaratory and injunctive relief, and complain as follows:

INTRODUCTION

1. On February 21, 2017, Dennis Fusaro was convicted in a bench trial of improper political speech in Maryland for failure to include a campaign finance disclaimer on an automated phone call that cost under \$100 to facilitate. *State v. Fusaro*, D-07-CR-16-000734 (D. Ct. Anne Arundel Co., Feb. 21, 2017). He was sentenced to 30 days in jail and a \$1,000 fine. On August 3, 2017, after a *de novo* jury trial before his peers, Fusaro was found not guilty. *State v. Fusaro*, C-02-CR-17-000351 (Cir. Ct. Anne Arundel Co., Aug. 3, 2017).

2. Appreciating the jury's seriousness and respect for his First Amendment rights in his second trial, Fusaro would like to share his story with Maryland citizens, express his frustration with the Maryland State Prosecutor and encourage Marylanders to echo his concern by encouraging Davitt to resign.

3. Fusaro would do this via U.S. Mail with letters addressed to certain Maryland registered voters, drawing from Maryland's registered voter list. *See, e.g., Exhibit A.*

4. As a Virginia resident, Fusaro is foreclosed from registering to vote in Maryland. *See* MD. CODE ANN. ELEC. LAW ("E.L.") § 3-102(a)(1)(iii). Thus, under the Maryland Election Law Article he is prohibited from obtaining a list of Maryland registered voters. E.L. § 3-506(a)(1). For this reason, the Maryland State Board of Elections denied Fusaro a copy of this list on August 28, 2017. *See Exhibit C.*

5. Even if provided a list of registered voters, if Fusaro uses the Maryland registered voter list to send a letter about his prosecution and Davitt—a message that has nothing to do with an election—he would run afoul of the required oath to not use the list “for any other purpose not related to the electoral process.” E.L. § 3-506(a)(1)(ii)(2), (c); *see Exhibit B.* Failure to comply

with these provisions could subject Fusaro to up to 10 years' imprisonment. E.L. § 3-506(c); E.L. § 16-501(a), (c); MD. CODE ANN. CRIM. LAW § 9-101(b).

6. Wary of unconstitutional prosecutions against political speech, Fusaro brings this preemptive action to vindicate his constitutional rights against the registered voter requirement and content restrictions related to the Maryland registered voter list.

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff's claims arise under the Constitution of the United States, specifically the First Amendment and Fourteenth Amendment. This Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, and the Civil Rights Act, 42 U.S.C. § 1983.

8. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(1)–(2) because Defendants reside in the District of Maryland and all of the events or omissions giving rise to the claims occurred in this district.

PARTIES

9. Plaintiff Dennis Fusaro is a resident of Stephens City, Virginia and a registered voter in the Commonwealth of Virginia.

10. Defendant Emmett C. Davitt is the Maryland State Prosecutor, whose office is in Baltimore County. He is empowered to “investigate . . . criminal offense[s] under the State election laws[.]” MD CODE ANN. CRIM. PROC. § 14-107. He previously supervised a prosecution of Fusaro for alleged violations of E.L. § 13-602(a)(9). Davitt is sued in his official capacity.

11. Defendant David J. McManus, Jr. is the Chairman and a member of the Maryland State Board of Elections (“the Board”), which maintains an office in Anne Arundel County. He is sued

in his official capacity. The Board is tasked with “adopt[ing] regulations that specify . . . (ii) the authorization to be required for providing a list [of registered voters.]” E.L. § 3-506(a)(2).

12. Defendant Patrick J. Hogan is the Vice Chairman and member of the Board. He is sued in his official capacity.

13. Defendant Michael R. Cogan is a member of the Board. He is sued in his official capacity.

14. Defendant Kelley A. Howells is a member of the Board. She is sued in her official capacity.

15. Defendant Gloria Lawlah is a member of the Board. She is sued in her official capacity.

STATEMENT OF FACTS

16. Dennis Fusaro has experience in Maryland politics, including serving as a campaign consultant to a victorious race for County Council in Anne Arundel County in 2014. He intends to continue his involvement in elections and political advocacy in Maryland.

17. Fusaro has experience in politics beyond Maryland, including serving as National Field Director in 2007 and 2008 for Ron Paul for President. He intends to continue his involvement in elections and political advocacy nationwide.

18. E.L. § 3-506 states, in pertinent part:

(a)(1) A copy of a list of registered voters shall be provided to a Maryland registered voter on receipt of:

(i) a written application; and

(ii) a statement, signed under oath, that the list is not intended to be used for:

1. commercial solicitation; or

2. any other purpose not related to the electoral process.

* * *

(c) A person who knowingly allows a list of registered voters, under the person’s control, to be used for any purpose not related to the electoral process

is guilty of a misdemeanor and, on conviction, is subject to the penalties under Title 16 of this article.

19. Title 16 of the Election Law Article states that “A person may not willfully and falsely take an oath or affirmation prescribed: (1) by the State Board; or (2) pursuant to this article.” E.L. § 16-501(a). Moreover, “[a]ny person who violates subsection (a) of this section is guilty of perjury and shall be punished according to the laws of the State for perjury.” E.L. § 16-501(c). Perjury in Maryland is “a misdemeanor . . . and on conviction is subject to imprisonment not exceeding 10 years.” MD. CODE ANN. CRIM. LAW § 9-101(b).

20. Following an unsuccessful prosecution against him for campaign finance violations, Fusaro would like to send letters to Maryland registered voters. One letter criticizes Defendant Maryland State Prosecutor Emmet C. Davitt for prosecuting Fusaro and calls upon readers to encourage him to resign. *See, e.g., Exhibit A*. Davitt is not an elected official, the mailer does not advocate for the election or defeat of candidates or ballot measures or mention a candidate for office or ballot measure. *See MD. CODE ANN. CRIM. PROC. § 14-102(c)* (the State Prosecutor is “appointed by the governor with the advice and consent of the Senate.”).

21. Fusaro believes the best audience for his story is citizens, specifically Maryland citizens who are civic-minded enough to maintain voter registration.

22. In the future, Fusaro would send other letters and non-commercial materials that relate to issues of local and national political importance, but not the electoral process.

23. Fusaro mailed a completed Application for Voter Registration Data to the Maryland State Board of Elections with proper payment on August 24, 2017. *See Exhibit B*.

24. According to a reply received by Fusaro denying his application, it was rejected on August 28, 2017, based on E.L. § 3-506. *See Exhibit C*. Responding to an e-mail on September

6, 2017, Erin W. Dennis, an employee of the Board, confirmed this was the reason for rejection.

See Exhibit D.

25. But for the residency and content restrictions in E.L. § 3-506, Fusaro would obtain a list of registered Maryland voters to share messages via U.S. Mail. He has been prevented from obtaining the list by the Board.

26. Because of the content requirement prohibiting the use of the registered voter list “for any purpose not related to the electoral process[,]” in the event Fusaro does acquire the list of registered voters, he fears another prosecution from the Defendant State Prosecutor for sending a mailer that is not related to the electoral process. *See Exhibit A.* Fusaro will refrain from sending his letter and many future communications, because they are not related to the electoral process and because he cannot reasonably determine what type of speech actually is related to the electoral process.

COUNT I

The Maryland Registered Voter Requirement in E.L. § 3-506(a)(1) is Unconstitutional Under the First and Fourteenth Amendments

27. On written application, a copy of a list of registered Maryland voters shall only be provided “to a Maryland registered voter.” E.L. § 3-506(a)(1).

28. The First Amendment requires that “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend. I.

29. “The First Amendment applies to action at the state and local level through the Fourteenth Amendment.” *Snyder v. Phelps*, 580 F.3d 206, 214 (4th Cir. 2009), *aff’d*, 562 U.S. 443 (2011); U.S. CONST. amend. XIV.

30. By limiting access to the registered voter list to Maryland registered voters, E.L. § 3-506(a)(1) selectively advantages some political speakers and disadvantages others. *See Mahan v.*

Natl. Conservative Political Action Comm., 227 Va. 330, 335 (1984) (“Among the many voices clamoring for attention in the political arena, the statute grants an advantage of time and money to some which it denies to others. When classifications of this kind affect fundamental constitutional rights, they are subject to strict judicial scrutiny.”).

31. E.L. § 3-506(a)(1) forces Fusaro to either seek out voter information through more time-consuming and expensive means than Maryland registered voters lists, or move to Maryland and register to vote.

32. Fusaro’s voice in Maryland politics may not be selectively silenced simply because he is not a registered voter. The registered voter requirement serves no governmental interest and, in the event one is actually served, E.L. § 3-506(a)(1) is not narrowly tailored. *See Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 317 (4th Cir. 2013) (“[A]n election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest.” (internal citation omitted)).

33. The registered voter requirement to obtain a list of registered Maryland voters is unconstitutional under the First Amendment, facially and as applied to Fusaro.

COUNT II

Limiting the Use of the List of Registered Voters to Purposes “Related to the Electoral Process” in E.L. § 3-506(a)(1), (c) is Unconstitutional Under the First and Fourteenth Amendments

34. To obtain a copy of a list of registered Maryland voters, an applicant must swear under oath that “the list is not intended to be used for . . . any . . . purpose not related to the electoral process.” E.L. § 3-506(a)(1)(ii), (c).

35. Davitt is an appointed official, thus Fusaro’s letter does not—and literally cannot—call for Davitt’s election or defeat or be reasonably interpreted to relate to elections or the electoral process.

36. Limiting the use of a voter list to purposes “related to the electoral process” prohibits the use of the voter list for a variety of constitutionally-protected political speech—including the “[d]iscussion of public issues”—that does not relate to the electoral process. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“Discussion of public issues *and* debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.” (emphasis added)).

37. Content-based restrictions are subject to strict scrutiny. *See C. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 632–35 (4th Cir. 2016). To survive strict scrutiny, a law must be narrowly tailored to serve a compelling governmental interest. *Id.*

38. Limiting the use of the voter list to purposes “related to the electoral process” is a content-based restriction that prohibits the use of the registered voter list for political speech that is entitled to just as much protection as election-related speech. The law serves no compelling interest, and is not properly tailored to serve any governmental interest.

39. The content limitations in E.L. § 3-506(a)(1) and (c) are unconstitutional under the First Amendment.

40. The term “related to the electoral process” is also unconstitutionally vague, facially and as applied to Fusaro’s letter. *See Exhibit A; Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). The term is not defined in the statute or anywhere in Maryland law. It is not defined in case law, regulation, or administrative guidance. Courts interpreting similar language have found it unconstitutional in the context of campaign finance law. *Am. Civ. Liberties Union of Nevada v. Heller*, 378 F.3d 979, 1002 (9th Cir. 2004). Similarly, E.L. § 3-506 threatens Fusaro with prosecution for forbidden uses of the registered voter list that cannot be readily determined.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for the following relief:

1. A declaratory judgment that the Maryland registered voter requirement in E.L. § 3-506(a)(1) is unconstitutional.
2. A declaratory judgment that limiting the use of the list of registered voters to purposes “related to the electoral process” in E.L. § 3-506(a)(1) and (c) is unconstitutional. Alternatively, a declaratory judgment that the term “related to the electoral process” is unconstitutionally vague facially and as applied to Fusaro’s speech.
3. Preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of the Maryland registered voter requirement or the limitation of using a list for purposes “related to the electoral process” in E.L. § 3-506(a)(1) and (c).
4. Plaintiff’s reasonable costs and attorneys’ fees pursuant to 42 U.S.C. § 1988, or any applicable statute or authority, and further relief this Court may grant in its discretion.
5. Any other relief that the Court deems just and appropriate.

Respectfully submitted,

/s/ John Garza

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* Pro hac vice *motion to be filed.*

Dated this 4th day of December, 2017.

DENNIS FUSARO VERIFICATION

I, Dennis Fusaro, declare as follows:

1. I reside at 242 Brunswick Rd., Stephens City, VA 22655.
2. I have personal knowledge of my activities, including those set out in this Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements contained in this Verified Complaint concerning my existing and proposed activities are true and correct.

Executed on November 30, 2017.



Dennis Fusaro