

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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DENNIS FUSARO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17-cv-03582-ELH
	)	Hon. Ellen L. Hollander
EMMET C. DAVITT, Maryland State Prosecutor,	)	
in his official capacity, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM IN SUPPORT OF  
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION

**INTRODUCTION**

The Maryland Election Law Article is rife with censorship. Dennis Fusaro has already endured prosecution under the Article’s campaign finance provisions for failure to navigate its maze, which “function[s] as the equivalent of prior restraint[.]” *See Citizens United v. Fed. Election Commn.*, 558 U.S. 310, 335 (2010); *see, e.g.*, MD. CODE ANN. ELEC. LAW (“E.L.”) §§ 13-602(a)(9), 13-401, 1-101(k)(1). Fusaro believes Maryland State Prosecutor Emmet Davitt, who instigated the prosecution, is unqualified for his office, and Fusaro would like to express this to Maryland voters in a letter that would ask recipients to encourage Davitt to resign. *See Compl.*, Exh. A. However, Fusaro is once again muzzled by the law, this time by an outright prohibition that prevents him from accessing the state’s registered voter list, an important means of communication that Maryland law restricts to Maryland registered voters. *See Verified Complaint for Declaratory and Injunctive Relief (“Compl.”)*, Dkt. 1, ¶¶ 18, 22–25. The value of this list is

self-evident, and Fusaro believes that citizens who keep up their voter registration are more likely to pay attention to his message. Compl. ¶ 21. But even if Fusaro were able to purchase a copy of this list, if he sent the letter in question he could again be charged by the State Prosecutor, this time for violating the law's content restrictions. Fusaro respectfully requests this Court preliminarily enjoin enforcement of the registered voter requirement in E.L. § 3-506(a)(1) and the content restrictions in E.L. § 3-506(a)(1) and (c), because they are unconstitutional.

To receive a preliminary injunction, “the movant ‘must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.’” *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc), quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). In the First Amendment context, the likelihood of success is the determinative factor for issuing a preliminary injunction. See, e.g., *Hassay v. Mayor*, 955 F. Supp. 2d 505, 517, 527 (D. Md. 2013). Fusaro's verified complaint establishes all of the facts necessary for this Court to issue a preliminary injunction. See *In re Patriot's Point Associates, Ltd.*, 902 F.2d 1566 (4th Cir. 1990) (unpublished) (“In the context of a preliminary injunction, where swiftness is a virtue, the district court may rely upon a verified complaint as a basis for an injunction.”).

#### **I. Fusaro is Likely to Succeed on the Merits of His Claims**

Fusaro's complaint is grounded in the First Amendment of the United States Constitution. See Compl. ¶¶ 27–40. These constitutional counts are against different provisions of one section of the Maryland Election Law Article, section 3-506:

- (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.

Specifically, the counts challenge the limitation of providing a list of registered voters strictly to “a Maryland registered voter,” the oath prohibiting use of the list for “any other purpose not related to the electoral process” and the prohibition on “knowingly allow[ing] a list of registered voters . . . to be used for any purpose not related to the electoral process” as unconstitutional. These provisions of the statute should be enjoined from enforcement, facially and as applied to Fusaro.

**A. Fusaro Is Likely to Succeed on the Merits of His First Amendment Challenge to the Registered Voter and Content Restrictions in Section 3-506**

The registered voter and content restrictions in section 3-506 fail to satisfy different, well-established First Amendment precedents, which are applicable to state law through the Fourteenth Amendment. *See Snyder v. Phelps*, 580 F.3d 206, 214 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011). Both restrictions are subject to strict scrutiny, and must be enjoined because they are not narrowly tailored to serve a compelling governmental interest. *See Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 317 (4th Cir. 2013). Moreover, the content restriction also fails to satisfy the most stringent standards of the First Amendment vagueness doctrine.

**1. The Registered Voter Restriction in Section 3-506(a)(1) Violates the First Amendment**

The registered voter restriction in § 3-506(a)(1) has been enforced against Fusaro. He submitted a completed application with the proper payment for the registered voter list to the Maryland State Board of Elections, and the application was denied. *See* Compl. ¶¶ 23–24, Exh's B,

C. An employee of the Board of Elections confirmed that the registered voter restriction was the reason for the denial. Compl. ¶ 24, Exh. D. Thus, although pre-enforcement challenges are appropriate in the First Amendment context (as detailed in section (I)(A)(2) below), the Court need not address First Amendment standing principles because this provision has already been applied to Fusaro and is in full effect.

First Amendment scrutiny is proper for this issue. Where government statutes, rules, or regulations drive certain speakers or viewpoints out of the marketplace of ideas, they are presumptively unconstitutional. *See, e.g., Grosjean v. Am. Press Co.*, 297 U.S. 233, 240, 251 (1936) (striking down a tax on newspapers based on their circulation numbers, which on its face evinced “the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.”). Section 3-506(a)(1) fits this category. The law removes whole classes of speakers—out-of-state citizens and Marylanders who have not registered to vote—from accessing material available to Maryland registered voters that helps them speak.<sup>1</sup> The motivation behind the law is irrelevant, its effect alone is a First Amendment violation:

Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

*Minneapolis Star and Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 591–92 (1983).

Fusaro is no less entitled to free press protection than institutional media. *Citizens United*, 558 U.S. at 352, quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (Scalia, J., dissenting) (“We have consistently rejected the proposition that the institutional press has any

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<sup>1</sup> Limiting the list to registered voters is also likely a constitutional violation as applied to Marylanders who would like to access the list without registering to vote. The Court should consider this in its tailoring analysis.

constitutional privilege beyond that of other speakers.”). The registered voter requirement places Fusaro at a competitive disadvantage against Maryland registered voters and impairs his ability to communicate as effectively.

As it pertains to discrimination in public access to records, specifically voter files, *Mahan v. Natl. Conservative Political Action Committee* provides the most on-point and persuasive analysis. 315 S.E.2d 829 (Va. 1984). In that case, a Virginia statute limited access to the electronic file of the “statewide central roster of registered voters,” which the Virginia Board of Elections interpreted to exclude an “independent political committee” registered under federal law. *Id.* at 830–32. A Virginia trial court struck down the law, and the Virginia Supreme Court recognized the problem of such discrimination:

The net effect of [the law] is to extend to its enumerated classes of authorized recipients a relatively facile and inexpensive means of identifying voters, which is denied to other classes who may also wish to influence elections. 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.

*Id.* at 832. Thus, uneven state advantages for speech are constitutionally suspect, just like uneven legal burdens against speech. *Id.* at 833, citing *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment[.]”) The court affirmed that the restriction was unconstitutional. *Id.* at 835. The distinctions between the registered voter requirement in section 3-506(a)(1) and the Virginia law at issue in *Mahan* are of no constitutional significance.

Under strict scrutiny—or even intermediate scrutiny—the state is required to provide a governmental interest to justify the regulation. *Judd*, 718 F.3d at 317. In dealing with elections,

the Fourth Circuit has generally found compelling or important governmental interests to include the prevention of fraud. *Id.* But these cases have usually related to collecting signatures to qualify candidates or ballot petitions, and thus have a more direct tie to the submission of official documents and ballot access. It is unclear how limiting access to a list of registered voters implicates an anti-fraud interest, particularly since access to the list is not only prohibited to out-of-state citizens, but to Marylanders who have not registered to vote. Administrative convenience (via less applications for the list) or incentives for Marylanders to register may be the best interests the Defendants can muster, but they should not be recognized by this Court as compelling, much less important governmental interests.

In the event that a governmental interest is actually served by the law, it nevertheless does not survive strict or intermediate scrutiny. Even where courts have recognized the interest in preventing fraud, they have nevertheless struck down residency requirements as improperly tailored to address the issue. *See Judd*, 718 F.3d at 317–19; *see also Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1029–31 (10th Cir. 2008). Although section 3-506(a)(1) is not strictly a residency requirement, the idea that a Maryland registered voter is somehow less likely to commit fraud or would be easier to investigate and prosecute than a Marylander who is not registered to vote is even more incredible than the argument put forth and rejected in *Judd*. *See* 718 F. 3d at 318–19. Thus, for similar reasons as those discussed in *Judd*, under any form of scrutiny the state’s anti-fraud interest may be addressed by less restrictive means, such as requiring an out-of-state-resident like Fusaro to submit to Maryland jurisdiction as a condition of acquiring the list. *See* 718 F. 3d at 318–19.

The registered voter requirement in section 3-506(a)(1) is unconstitutional, facially and as-applied to Fusaro, and should be enjoined by this Court.

## 2. The Content Restrictions in Section 3-506(a)(1)(ii), (c) Violate the First Amendment

In his application to acquire the Maryland registered voter list, Fusaro signed the oath that the list was “not intended to be used for commercial solicitation or for any other purpose not related to the electoral process.” Compl., Exh. B. If it were not for the unconstitutional content restriction of section 3-506—upon which this oath is based—Fusaro would use the list for purposes related to the electoral process and unrelated to the electoral process. *See* Compl. ¶ 22. After this Court enjoins the unconstitutional registered voter restriction and Fusaro is allowed to acquire the list, this content-based restriction on its use will be immediately ripe for review. Fusaro has standing to challenge these content restrictions.

“To establish Article III standing, a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likel[i]hood’ that the injury ‘will be redressed by a favorable decision.’” *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2342 (2014) (internal citations omitted). Where the First Amendment is concerned, standing is a more relaxed analysis: “[W]e have held that a plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’” *Id.* Fusaro has provided this Court with a letter he would send to citizens via the registered voter list. Compl., Exh. A. The content of this letter is undoubtedly a function of “speech” and “press” for First Amendment purposes. As will be discussed in the following subsections, the law proscribes Fusaro’s speech or, at best, provides no meaningful guidance for him to avoid a legal violation. Fusaro has already faced a prosecution over political speech requirements in Maryland; injunctive relief is the only remedy, and this Court should enjoin the enforcement of sections 3-506(a)(1)(ii)(2) and (c), respectively.

**i. The Content Restrictions Unconstitutionally Censor Fusaro**

Section 3-506 prohibits using the registered voter list for commercial purposes or any “purpose not related to the electoral process[.]” E.L. § 3-506(a)(1), (c). On its face, this restriction allows or forecloses the use of the list based on the content of the user’s speech. Under any reading, its prohibitions abridge speech that is not related to the electoral process, including political speech that receives just as much protection as electoral speech under the First Amendment. *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)). Strict scrutiny of this content-based restriction is proper.

Strict scrutiny requires a law to be narrowly tailored to serve a compelling governmental interest. *Judd*, 718 F.3d at 317. Similar to the discussion in part (I)(A)(1), it is difficult to propound what interests are supposedly served by limiting the use of the voter list to purposes “related to the electoral process.” In cases discussing use of similar lists, such as campaign finance disclosures, government agencies have argued that individual privacy, privacy of organizations (such as political committees that must report their contributors) and the economic value of lists as intellectual property justify restricting the use of these lists for commercial purposes. *See Fed. Election Commn. v. Legi-Tech, Inc.*, 967 F. Supp. 523, 532–33 (D.D.C. 1997). These interests are not implicated here: the commercial limitation in section 3-506(a)(1)(ii)(1) is not challenged, and in regards to the “electoral process” limitation, there is no distinction in privacy protection for allowing voters to be contacted for purposes “related to the electoral process” and other forms of political speech. Moreover, the registered voter list is not the result of disclosure from private organizations, but from various Maryland agencies and political subdivisions. *See, e.g.*, E.L. § 3-101(c) (“The State Administrator shall . . . (2) with the local boards, ensure the currency and

accuracy of each individual voter’s registration record[.]”). Yet again, it is difficult to comprehend how an anti-fraud interest is implicated by the statute.

Even if there is a governmental interest served by the content requirements in section 3-506, these provisions are not properly tailored. The commercial limitation, which is not challenged in this case, ensures that the voter list will not be used by for-profit entities to sell products or otherwise dis-incentivize voter registration.<sup>2</sup> For other acts, such as fraud, the law may require Fusaro to submit to Maryland jurisdiction as a condition of acquiring the list. By failing to tailor the law to these interests, Section 3-506 prohibits too much speech, and should be enjoined.

**ii. The Content Restrictions are Unconstitutionally Vague**

If it is conceivable that Fusaro’s proposed speech is “related to the electoral process,” or that any political speech fits the bill, one can only wonder why there is such a limitation in the law in the first place. Given the criminal penalties imposed by violating his oath to the State Board, and the propensity of the State Prosecutor to construe the law’s requirements in favor of regulation, optimistic conceptions do not amount to constitutional protection. A statute is void for vagueness when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). Moreover,

where a vague statute ‘abut(s) upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of (those) freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.’

*Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citations omitted). The term “related to the electoral process” in section 3-506—prohibitions that, if violated, trigger perjury

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<sup>2</sup> Fusaro does not argue that there are no First Amendment concerns with this limitation, but merely notes that he is not challenging this provision.

penalties—are unconstitutional under the vagueness doctrine, facially and as applied to Fusaro’s speech. *See* Compl., Exh. A.

A person of ordinary intelligence cannot determine what type of speech is or is not “related to the electoral process.” Courts examining similar statutory definitions that regulate political speech have determined them to be unconstitutionally vague. *See, e.g., Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 832–33 (7th Cir. 2014) (the statutory term “political purposes” is unconstitutionally vague); *Allen v. Bartholomew County Court Services Dept.*, 185 F.Supp.3d 1075, 1082–86 (S.D. Indiana 2016) (policy barring “political activity” unconstitutionally vague); *Ruff v. City of Leavenworth, Kan.*, 858 F. Supp. 1546, 1558–59 (D. Kansas 1994) (terms “political” and “campaigning” unconstitutionally vague). Here, the term “electoral process” is not defined in the Election Law Article. Moreover, there are no interpretive guidelines defining this term. On its face, one might consider this limitation to allow speech that supports or criticizes candidates for office or ballot questions. But campaign finance provisions found in Maryland law specifically reference candidates and ballot questions, by specifically defining “campaign material” as speech that “relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question[.]” *See* E.L. § 1-101(k)(1)(ii) (emphasis added). Though this suffers from its own overbreadth problem, it does not shed light on “electoral process.” Moreover, turning to a legal dictionary, “electoral process” is “1. The method by which a person is elected to public office in a democratic society. 2. The taking and counting of votes.” *Electoral process*, BLACK’S LAW DICTIONARY (9th ed. 2009). This would be in keeping with other provisions of the law. *See* E.L. §§ 8-101, 8-103. But still *other* provisions state that material related to the “electoral process” includes “a publication that includes the text of [the Election Law Article], relevant portions of the

Maryland Constitution, and information gathered and maintained regarding elections[.]” E.L. § 2-102(9). There is simply no clear guidance in law, case law or regulation.

With this in mind, Fusaro cannot reasonably understand whether his letter relates or does not relate to the electoral process. Under any definition, the statute is not properly tailored. *See supra* part (I)(A)(2)(i). But the term is, practically speaking, undefined. In his letter, Fusaro would criticize Davitt and call for his resignation. *See* Compl., Exh. A. Davitt is not an elected official, and has made no indication that he intends to seek elected office. However, Fusaro criticizes Davitt for prosecuting him for campaign finance violations, which may, tangentially, make the speech related to the electoral process. *See* E.L. § 2-102(9). Even more peripherally, since Davitt is appointed and overseen by Maryland elected officials, perhaps that makes the letter legal under the law. *See* MD CODE ANN. CRIM. PROC. § 14-107(c). But Fusaro’s best guesses are not binding upon the State Prosecutor, and since Fusaro cannot come to a reasonable conclusion in any event, he will indeed “steer far wider of the unlawful zone” by not speaking at all. *Grayned*, 408 U.S. at 109; *see* Compl. ¶ 26.

A law that is so undefined as the “electoral process” content provisions of section 3-506 promises arbitrary and discriminatory enforcement. Fusaro is clearly known to Davitt, has faced the full brunt of his prosecutorial force and, though eventually victorious, is not eager to endure it again. *See State v. Fusaro*, D-07-CR-16-000734 (D. Ct. Anne Arundel Co., Feb. 21, 2017); *State v. Fusaro*, C-02-CR-17-000351 (Cir. Ct. Anne Arundel Co., Aug. 3, 2017). These content restrictions in section 3-506(a)(1)(ii) and (c) are unconstitutional and void for vagueness under the First Amendment, and this Court should enjoin their enforcement.

## **II. Fusaro Will Suffer Irreparable Harm in Absence of Preliminary Relief**

In the First Amendment context, once a movant has established a likelihood of success, the final three elements of the preliminary injunction analysis are perfunctory, or self-evident. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Fusaro has been denied using the registered voter list for any speech whatsoever via the registered voter requirement in section 3-506, which he unsuccessfully requested in August, 2017. After this Court enjoins this requirement, Fusaro will still be silenced under the statute’s unconstitutional content restrictions. Absent preliminary relief, this irreparable harm will continue.

## **III. The Balance of Harms Tips in Fusaro’s Favor**

“[P]recedent counsels that ‘a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.’” *Centro Tepeyac*, 722 F.3d at 191, quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Here, the Defendants for the Board of Elections may face the slightest harm of processing more applications for the registered voter list. (Notably, however, Fusaro has not challenged the price of the list.) Defendant Davitt will have one less vague speech restriction to enforce. Without an injunction, however, Fusaro and citizens across Maryland and the United States will remain unconstitutionally hobbled by the registered voter requirement and wholly censored by the content restriction of section 3-506. The balance of harms plainly tips in Fusaro’s favor.

## **IV. An Injunction is in the Public Interest**

On its face, the registered voter and content restrictions in section 3-506 censor not only Fusaro, but any American from out-of-state who seeks to speak out in Maryland. Moreover, the

registered voter requirement also places an unconstitutional condition on Marylanders, who should not be required to register to vote to engage in free speech. Finally, the censorship of the content restrictions in section 3-506 also censor all Americans, including Maryland registered voters, by limiting the use of the list to content that is “related to the electoral process.” Free speech is in the public interest, and enjoining the provisions at issue will only serve the ends of the First Amendment.

### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court enter an order enjoining the enforcement of E.L. § 3-506 as detailed in the Plaintiff’s Motion for Preliminary Injunction.

Respectfully submitted,

/s/ Stephen R. Klein

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Dated this 15th day of December, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2017, the foregoing Memorandum in Support of Plaintiff's Motion for Preliminary Injunction was electronically filed with the Clerk of the Court using the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Stephen Klein