

**RECORD NO. 18-2167**

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In The  
**United States Court Of Appeals**  
**For The Fourth Circuit**

**DENNIS FUSARO,**

*Plaintiff – Appellant,*

v.

**EMMET C. DAVITT, Maryland State Prosecutor, in his official capacity;**  
**CHAIRMAN DAVID J. MCMANUS, JR., Maryland State Board of Elections;**  
**VICE-CHAIRMAN PATRICK J. HOGAN, Maryland State Board of Elections;**  
**MEMBER MICHAEL R. COGAN, Maryland State Board of Elections;**  
**MEMBER KELLEY A. HOWELLS, Maryland State Board of Elections;**  
**MEMBER GLORIA LAWLAH, Maryland State Board of Elections,**  
**all in their official capacities,**

*Defendants – Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
AT BALTIMORE**

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**BRIEF OF APPELLANT**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO  
If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO  
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### **Jurisdictional Statement**

“[D]istrict courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C.A. § 1331. Dennis Fusaro brought civil claims against the members of the Maryland State Board of Elections (collectively, the “Board of Elections”) and Maryland State Prosecutor Emmet Davitt, regarding MD CODE, ELECTION LAW, § 3-506, which arose under the Constitution of the United States, specifically the First and Fourteenth Amendments. JA 12–15. Thus, the United States District Court for the District of Maryland had subject matter jurisdiction.

“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States...” 28 U.S.C.A. § 1291. The district court entered a final decision denying preliminary injunction and dismissing all of Fusaro’s claims on September 4, 2018. JA 60. Fusaro filed a timely notice of appeal on September 26, 2018. JA 61. This Court has appellate jurisdiction.

### **Statement of Issue Presented for Review**

Whether MD. CODE, ELECTION LAW, § 3-506 is unconstitutional because it enhances the speech of Maryland registered voters and deprives all other citizens of the same benefit.

### Statement of the Case

The State of Maryland provides certain speakers a competitive advantage that it denies all others wishing to comment on political issues: access to its registered voter list. Dennis Fusaro is an experienced politico with an extensive track record in national, state, and local elections. JA 10. He is a resident and registered voter in Virginia. JA 8–9.

Fusaro served as a political consultant to a candidate in a victorious race for County Council in Anne Arundel County, Maryland, in 2014. *Id.* In reaction to an automated phone call received by county voters during that election cycle, which cost less than \$100 to produce, Maryland State Prosecutor Emmet Davitt sought to use the campaign finance provisions of the Maryland Election Law Article to fine Dennis Fusaro \$1,000 and put him in jail for 30 days for allegedly failing to include a proper disclaimer in the call's message. JA 8, 35–37. Following a verdict of not guilty in the jury trial over this charge, Fusaro sought to criticize Davitt with a letter to Maryland registered voters, which would also ask these voters to encourage Davitt to resign. JA 17–18, 38–39. The Maryland State Prosecutor is appointed by the governor with advice and consent of the state senate, and is not subject to elections. *See* JA 11; MD. CODE, CRIM. PROC., § 14-102(c).

Wishing to reach politically-minded citizens, Fusaro sought access to Maryland's registered voter list to best focus his speech. He submitted a completed

application for a copy of the list to the Board of Elections on August 24, 2017. JA 11–12, 19–21. This was denied on August 28, 2017, because Fusaro is not a Maryland registered voter. JA 11–12, 22–26. The denial was based on MD. CODE, ELECTION LAW, § 3-506 (“Section 3-506”), which states, in relevant 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.

As a Virginia resident, Fusaro cannot register to vote in Maryland. JA 8; MD. CODE, ELECTION LAW, § 3-102(a)(1)(iii). Fusaro is also concerned that he may be prosecuted by Davitt for mailing his letter and other materials, because they are “not related to the electoral process[.]” JA 11–12. Violation would subject him to misdemeanor penalties under the statute and perjury charges, and thus he would not send his letter even if he had the list. *Id.*; see MD. CODE, CRIM. LAW, § 9-101(b). Neither, for this reason, can Fusaro access the list from other sources without subjecting them to risk of criminal charges. Both the registered voter and content restrictions over the Maryland registered voter list are unconstitutional

abridgements of Fusaro's rights to free speech under the First Amendment. U.S. CONST., amend I.

Fusaro filed a verified complaint against Davitt and the members of the Board of Elections, all in their official capacities, in Maryland federal court on December 4, 2017. JA 7–16. Fusaro sought a preliminary injunction on December 15, 2017. JA 27–29. In response, the defendants filed a motion to dismiss on January 26, 2018. JA 30–31. On September 4, 2018, the court denied Fusaro's motion for preliminary injunction and granted the Board's and Davitt's motion to dismiss. JA 32–60. This ruling was appealed on September 26, 2018, and is now presented to this Court for review. *See* JA 61.

### **Summary of the Argument**

Contrary to the opinion of the court below, this is not a public records case. This is a case in which a state government offers its own registered voters a competitive speech advantage over everyone else. This is a law that bars non-residents the same access to Maryland's registered voters list as it grants certain residents. But Section 3-506 only ensures that non-resident speakers hoping to reach Maryland registered voters—that is, the people who care about the political affairs of their state—will have a more difficult time doing so. Under First Amendment precedent, there is no justification for this abridgement of free speech.

Because Section 3-506 only allows Maryland registered voters to access the registered voter list for the purpose of affecting the electoral process, it provides Maryland-based speakers with a powerful competitive advantage. This attempt by Maryland to put its thumb on the scale of political discussion in favor of its residents must be subject to strict scrutiny. To make matters worse, the content-based restriction applied to the list prevents Fusaro from accessing this important resource from other sources. In this case, access and use are First Amendment issues, and the law does not survive strict scrutiny.

The prohibition in Section 3-506 on using the registered voter list for purposes not related to the electoral process is a content-based restriction on speech that cannot survive either standard First Amendment review or vagueness concerns. The content provision is also unconstitutional, facially and as applied to Fusaro.

## **Argument**

### **Standard of Review**

This Court reviews a district court's grant of a motion to dismiss *de novo*. *Lucero v. Early*, 873 F.3d 466, 469 (4th Cir. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Matherly v. Andrews*, 859 F.3d 264, 274 (4th Cir. 2017), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court "accept[s]

as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff.” *Id.*

This Court reviews a district court’s denial of a preliminary injunction for abuse of discretion. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002), citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). “We accept the court’s findings of fact absent clear error, but review its legal conclusions *de novo.*” *Id.*, citing *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 601 (4th Cir.1992).

## **Introduction**

The First Amendment states that “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. This applies to state law through the Fourteenth Amendment. U.S. CONST. amend. XIV; *see Snyder v. Phelps*, 580 F.3d 206, 214 (4th Cir. 2009), *aff’d*, 562 U.S. 443 (2011). Typically, the First Amendment protects against governmental efforts to control what citizens can and cannot say, what Americans instinctively recognize as censorship. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989). But lawmakers and executives can be clever, and courts recognize that the First Amendment also protects against subtler interference in the marketplace of ideas. *See, e.g., Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (striking down



a law that “compell[ed] individuals to speak a certain message”). Most importantly, for purposes of Fusaro’s case, the First Amendment also requires the government to provide access to some public records, such as summary judgment court filings, when there is no compelling governmental interest in preventing disclosure. *Virginia Dep’t of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004), citing *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Similarly, once a state opens up registered voter lists to the public, it must do so evenhandedly, so it does not disadvantage certain speakers. *See, e.g., Mahan v. Nat’l Conservative Political Action Comm.*, 315 S.E.2d 829, 830 (Va. 1984); *Cal-Almond, Inc. v. United States Department of Agriculture*, 960 F.2d 105, 109 (9th Cir. 1992). The registered voter requirement and content restrictions in Section 3-506 make Maryland’s access restrictions to its list of registered voters unconstitutional under the First Amendment.

The provisions in Section 3-506 that limit the use of the registered voter list to purposes related to the electoral process are also unconstitutional. If Fusaro’s letter regarding Emmet Davitt is prohibited under the law, the law fails standard First Amendment review. If Fusaro’s letter is allowed, this interpretation leaves the provision unsalvageable under the vagueness doctrine.

The court below erred by interpreting this as a case about access to public records. It did not consider the serious disadvantage Maryland imparts against non-

residents and Maryland residents who are unregistered to speak about Maryland political issues. This reflects a sort of “First Amendment Equal Protection” claim, or as the Supreme Court has put it, “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230, (2015) (quoting *Citizens United v. Fed. Election Com’n*, 558 U.S. 310, 340 (2010)). Here, that means Maryland is without the power to make certain Marylanders’ political speech more effective while disadvantaging non-residents and unregistered Marylanders.

**I. By Restricting Access to the Maryland Registered Voter List to Maryland Registered Voters, Section 3-506 Violates the First Amendment**

Dennis Fusaro is not a Maryland registered voter. He challenges the access restrictions facially and as-applied to himself. The only legitimate justification for restricting access to Maryland registered voters is an anti-fraud interest, which may be achieved by less restrictive means. However, there is also no compelling justification for the content restrictions, which prevent Fusaro from accessing lists that are already in private hands, such as from a fellow campaign consultant who acquired the list as a Maryland registered voter. Both the registered voter and content restrictions in Section 3-506 are thus unconstitutional under the First Amendment. *See Mahan*, 315 S.E.2d at 830 (overturning access restrictions on a state voter list on Equal Protection grounds).

**A. The Maryland Registered Voter List is a Powerful Electoral Tool, Not Merely a Public Record**

By the terms of Section 3-506, the registered voter list maintained by the Board of Elections is strictly intended for purposes related to the electoral process, providing criminal penalties against those who use the list for “purpose[s] *not* related to the electoral process[.]” MD. CODE, ELECTION LAW, § 3-506(c) (emphasis added). The list’s value is self-evident: it is an up-to-date electronic database that provides contact information of Maryland’s most politically engaged citizens. For those who have the list, it is an efficient means to reach voters, and to more effectively engage in “expression ‘at the core of our electoral process and of the First Amendment freedoms.’” *Buckley v. Valeo*, 424 U.S. 1, 39 (1976), *citing Williams v. Rhodes*, 393 U.S. 23, 32 (1968). This is not happenstance, or a byproduct of the law, but the very reason the list exists. *Cf. McBurney v. Young*, 569 U.S. 221, 232–34 (2013).

To be clear, Maryland manipulates the marketplace of ideas protected by the First Amendment by ensuring out-of-state voices are muffled and certain in-state voices amplified. Just as if Maryland offered preferential parade or protest permits to residents and denied them to non-residents, such attempts to imbalance the marketplace of ideas could not stand.

The Supreme Court has struck down interventions into the marketplace of ideas before, particularly laws that meddle in the political and electoral process with unjustified burdens and exclusions. In *Arizona Free Enterprise Club’s Freedom*

*Club PAC v. Bennett*, the Court addressed a public campaign financing system that provided not only money to participating candidates, but “matching funds.” That is, the government disbursed

matching funds when the amount of money a privately financed candidate receive[d] in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed[ed] the general election allotment of state funds to the publicly financed candidate.

564 U.S. 721, 729 (2011). This had nothing to do with party, or the viewpoint of a campaign, but whether a candidate participated in the public financing system or not and, if he did not, whether he received too much support. The Court rejected arguments that the numerous disparities at issue were not abridgements of speech, or that the funds merely created “more speech.” *Id.* at 740–43. By providing subsidies to an opposing party contingent on one’s speech, the regime created serious disincentives to political engagement. It also blatantly provided state-conferred benefits to a select few speakers. This violates the First Amendment. In other words, the government has no “authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

The distinctions between Maryland’s registered voter list and the regime in *Arizona Free Enterprise Club* do not shield Section 3-506 from meaningful scrutiny. The list is a tool to which Fusaro has no access, though rather than unduly

subsidizing Fusaro's opponents based on his political activity, it hinders this activity at the outset by forcing him to somehow build his own list, providing a *de facto* subsidy to Maryland registered voters. Indeed, this starkly distinguishes the list from a mere public record: as the court below noted, "the Board [of Elections] must provide reasonable access to 'original voter registration applications' and 'other voter registration records,' . . . without limitation to registered voters or specific purposes." JA 34–35, *citing* MD. CODE, ELECTION LAW, § 3-505. Section 3-506 does not restrict access to the information itself, but to a very convenient amalgamation of this information, bolstering the intent and effect of the law to give a select class a political advantage over other citizens. *See Buckley*, 424 U.S. at 48–49 ("[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[.]") Like public financing, the law may not bypass serious scrutiny simply because the government is not obligated to provide it in the first place. *Cf.* JA 56 ("Indeed, Maryland 'could decide not to give out [such] information at all without violating the First Amendment.[.]'" (citations and footnote omitted)).

Setting aside the large number of Marylanders who are prohibited from accessing the list and focusing on Fusaro, this Court has previously rectified prohibitions on the political activity of nonresidents. In *Libertarian Party of Virginia*

*v. Judd*, this Court struck down Virginia’s resident witness requirement for circulator petitions, and joined a majority of circuits that have addressed similar laws. 718 F.3d 308, 316–17 (2013) (collecting cases). Though the law placed no restrictions on content, such as party or cause, prohibiting a class of persons from engaging in core political speech triggered strict scrutiny. *Id.* The Court accepted that the Virginia residency requirement served an anti-fraud interest, but ruled it was not narrowly tailored and thus violated the First Amendment. *Id.* at 317–19.

The differences between Maryland’s registered voter list and the signature requirements addressed in *Judd* are of little consequence, but upholding the court below in this case would provide states with a troubling workaround to controlling Fourth Circuit precedent. Surely if a state were to create official, numbered ballot petitions for circulation—a practice in numerous states—and, though not requiring resident signatures for *submission*, restricted *access* to these documents in the first place based on residency status, the precedent in *Judd* and other circuits would still apply. Yet, here the court below upheld an access restriction on an even broader swath of citizens to an equally important political tool. Strict scrutiny is appropriate.

That *Judd* was decided on the basis of an Equal Protection claim rather than the First Amendment is of no consequence. First Amendment jurisprudence jealously protects against government efforts to disfavor some voices while

amplifying others. Indeed, it has developed its own distinctive line of cases embracing just this view—which amounts to “First Amendment Equal Protection” reasoning. Whenever government enacts barriers to make speech by certain groups more difficult or expression of disfavored views more burdensome, strict scrutiny is invoked, and the laws are usually stricken. *See, e.g., De Jonge v. Oregon*, 299 U.S. 353 (1937) (state law banning membership in Communist Party invalidated); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (ban against teaching evolution invalidated); *Citizens United*, 558 U.S. at 340 (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others” and disallowing a speech prohibition applied selectively to corporations and unions). Somehow, the court below did not appreciate that Maryland retains a powerfully unconstitutional tool to impose “invidious discrimination” against disfavored speakers. *Becerra*, 138 S. Ct. at 2375 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423–424, n. 19 (1993)). Under the First Amendment, this is not permitted.

The court below based its opinion on cases that have declined to apply strict scrutiny to accessing certain public records, particularly *Los Angeles Police Dep’t v. United Reporting Pub. Corp.* 528 U.S. 32 (1999). However, the court acknowledged that “the concurring and dissenting opinions in *United Reporting* provides limited guidance as to when a restriction on the disclosure of

government-held information might implicate the First Amendment.” JA 56. Moreover, “[the Supreme] Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.” JA 57, *citing* *McBurney*, 569 U.S. at 232; *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978); *United Reporting*, 528 U.S. at 40; *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 588 (2011) (Breyer, J., dissenting)) (emphasis added). Even if Section 3-506 is assessed under this public records precedent, this case is an exception. The law does not task a government agency with providing significant research and culling information on a customized, individual basis. *Cf. McBurney*, 569 U.S. at 226. Fusaro is not seeking access to a facility that is entirely closed to the public. *Cf. Houchins*, 438 U.S. at 4–5. He is seeking a copy of a pre-existing file that, by definition, exists to affect the electoral process. JA 20. Fusaro merely seeks to be treated like any other speaker wishing to engage the Maryland electorate on the same terms as Maryland registered voters. Maryland prohibits this without any sensible justification. That Maryland does not wish out-of-state voices to be as effective as some of its own residents is no basis to uphold this restriction under the First Amendment.

**B. The Court Below Failed to Weigh the Disparate Impact Section 3-506 has Against Non-Resident Speakers**

By electing to view this case as an access to public records challenge rather than a discriminatory First Amendment challenge, the lower court failed to conduct



the appropriate analysis. Non-residents do not shed their First Amendment rights to engage on issues related to Maryland on equal footing with Maryland residents. This is especially so for residents of neighboring states who may have related interests within Maryland. To better understand this, consider the longstanding dispute from 1785 until 2003 between Maryland and Virginia over control of the Potomac River and related riparian rights. *See Virginia v. Maryland*, 540 U.S. 56 (2003).

Since the early 1930s, Maryland required a permitting system for water withdrawal from the Potomac River and demanded Virginia comply with its regulations. Affected Virginia industries, commerce, environmentalists, and businessmen quite likely would have valuable points of view to impart about this dispute. But under Section 3-506, only Maryland registered voters have access to registered voters lists, which allows them to communicate more effectively and efficiently with the electorate of the state. Underfunded environmentalists residing in Virginia hoping to reach the Maryland electorate would be denied this same chance to be effective in criticizing Maryland policy and expanding debate about an important public issue.

To be certain, the “right to gather information”—such as equal access to voter lists—is within the protection of the First Amendment. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)); *Cal-Almond, Inc.*, 960 F.2d at 109. Along with this, the

creation and publication of information constitute speech for First Amendment purposes. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2010). This only makes good sense. Certain resources and means of publication are protected as essential components of the First Amendment. Thus, laws “enacted to control or suppress speech may operate at different points in the speech process.” *Citizens United*, 558 U.S. at 336. Put another way, the Maryland law operates at the “front end of the speech process” by restricting the use of a common public record and an otherwise “ubiquitous, instrument of communication” made available to in-state residents. *See ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012). But Section 3-506 does so in a peculiarly selective manner—by forbidding only non-residents from having effective political engagement in Maryland.

What the court below missed cannot be overstated here: there is no fixed line between creating speech and speech itself. Taxes specially focused on ink and paper violate the First Amendment, even if they target precursory speech activities. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 582 (1983). Courts cannot “disaggregate Picasso from his brushes and canvas.” *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010). If government prohibited the use of projectors—a precursor to actual speech—without a license, First Amendment concerns would be implicated. *Alvarez*, 679 F.3d at 596 (internal quotations and citations omitted). And, so it goes with registered voter lists:

(1) an important precursor and part of speech, (2) concerning public affairs, where (3) access is only denied to non-residents and unregistered residents.

**C. The Content Provisions of Section 3-506 Unconstitutionally Obstruct Fusaro's Access to the List**

Finally, this is a case “in which the government is prohibiting a speaker from conveying information that the speaker already possesses.” *United Reporting*, 528 U.S. at 40. The court below overlooked the effect of the content provisions in the law on Fusaro's and others' access to the registered voter list. JA 55. This is apparent in the court's effort to distinguish previous public records cases at the Supreme Court:

Additionally, the *Sorrell* Court said . . . “Vermont . . . imposed a restriction on access to information in private hands,” which “confront[ed] the [*Sorrell*] Court with a point reserved, and a situation not addressed, in *United Reporting*. . . . [U]nlike in *United Reporting*, [the *Sorrell* Court had] ‘a case in which the government [was] prohibiting a speaker from conveying information that the speaker already possesse[d].’”

JA 55, quoting *Sorrell* 564 U.S. at 568 (emphasis added). The court also considered this a distinguishing feature between Section 3-506 and the Vermont law in *Sorrell*: “Fusaro's suit is also different from *Sorrell*, where the state had ‘imposed a restriction on access to information in private hands.’” JA 56, citing *Sorrell*, 564 U.S. at 568. But the content provisions in Section 3-506 also prohibit Fusaro from private access to the list.

“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[.]” MD. CODE, ELECTION LAW, § 3-506(c). Fusaro publicly pled that, but for the restrictions, he would use the list for purposes not related to the electoral process. JA 11, 18. He is foreclosed from seeking the list from citizens who already possess it, unless he were to either disavow his desired use of the list or find someone willing to risk prosecution.<sup>1</sup> Just as a candidate for office may challenge campaign contribution regulations on free speech grounds, Fusaro may challenge restrictions that prevent access to information in private hands that others are allowed access to. *See Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734–35 (2008). This also makes a facial challenge appropriate, and is bolstered by the vagueness concerns with the term “electoral process.” *United Reporting*, 528 U.S. at 40; *see infra* part II(B).

#### **D. The Access Prohibitions in Section 3-506 Violate the First Amendment**

The list enhances the First Amendment activities of some, and the law abridges the free speech of those who are prohibited access to it.

The net effect of [the law] is to extend to its enumerated class[] of authorized recipients a relatively facile and inexpensive means of

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<sup>1</sup> There is no precedent or definition of when a registered voter list is “under the person’s control[.]” One might argue if Fusaro were to receive a copy of it from a Maryland registered voter or another source, the source’s liability would sever because it would no longer be under his control. But it is just as plausible an interpretation that liability would not sever should the individual know of Fusaro’s desired use at the time the list was provided.

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.

*Mahan*, 315 S.E.2d at 832. This is not to say that is the end of Fusaro's challenge, but only that the court below was required to undertake such analysis. Under strict scrutiny, Section 3-506 does not pass muster.

The State of Maryland has no interest to justify restricting access to the registered voter list outside of the prevention of using the list for fraudulent activity, a concern noted in *Judd*. 718 F.3d at 317. But that case related to collecting signatures to qualify candidates or ballot measures, and thus the law at issue had a more direct tie to the submission of official documents. 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. As noted by the court below, the information contained in the list is available by other means, suggesting that—though it is a burden to acquire—it does not pose this risk in and of itself. *See* JA 34–35. Administrative convenience (via less applications for the list) or incentives for Marylanders to register to vote may be governmental interests, but they should not be recognized by this Court as compelling, or even important for First Amendment purposes.

Even if fraud is a compelling interest served by the access restriction in Section 3-506, it is not narrowly tailored. There are ample less restrictive alternatives to address fraud, and such remedies are already contained in Maryland law. *See* MD. CODE, CRIM. LAW, § 8-301 (penalizing identity fraud); MD. CODE, CRIM. LAW, § 8 (penalizing dozens of different forms of fraud). Moreover, if jurisdiction over nonresidents is a concern, the Board of Elections could simply require submission to jurisdiction as a condition of access. *See Judd*, 718 F.3d at 318–19.

Section 3-506 is not merely a public record, it is a governmental intervention into Maryland’s political arena, where Dennis Fusaro has every right to continue his active role. By denying access to Fusaro, other nonresidents, and Marylanders who are not registered to vote, the law abridges free speech. Section 3-506 does not pass First Amendment scrutiny, and its access provisions should be preliminarily enjoined from enforcement. This Court should remand this matter to the court below to reconsider the constitutionality of Section 3-506 under appropriate precedent.

**II. By Restricting Use of the Maryland Registered Voter List from “purpose[s] not related to the electoral process,” Section 3-506 Violates the First Amendment**

Section 3-506 also regulates content, threatening to punish anyone who uses the registered voter list for any purpose “not related to the electoral process” with criminal penalties. The court below did not address this provision of the law, facially or as applied to Fusaro’s letter. *See* JA 17–18, 58. This restriction in the law is,

however, as integral to Fusaro’s speech as access to the list itself, and “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, this appeal relates to a denial of a preliminary injunction, which was fully briefed for the court below. *See* JA 58–60. Thus, this Court should remand the case with instructions to order that Fusaro has a right to purchase a copy of the registered voter list, and to enjoin enforcement of the limitation that the list that it may only be used for purposes related to the electoral process.

Fusaro challenged the content restriction on two grounds: first, it either does not permit him to mail his letter, in which case it does not survive strict scrutiny. JA 14. Secondly, if somehow the law may be construed to consider criticism of an unelected government official a purpose related to the electoral process, then the law is unconstitutionally vague, and threatens arbitrary and discriminatory enforcement. *Id.* Under either analysis, the content provision is unconstitutional.

**A. The “Electoral Process” Provisions of Section 3-506 is a Content-Based Restriction of Speech**

If one has the registered voter list, Section 3-506 specifies that it is a misdemeanor to use it “for any purpose not related to the electoral process[.]” This presumably means a candidate for office may use the list to advocate for his own election or against the election of his opponent. However, it is likely a misdemeanor for Fusaro to use the list to advocate for public issues or to criticize unelected officials. The

provision thus restricts the content of speech, and is subject to strict scrutiny. *See Reed*, 135 S. Ct. at 2230 (“[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”).

“The State must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution.” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011) (internal citations omitted). Unlike the access restriction discussed in the previous section, there is no conceivable governmental interest in curtailing political speech. *Cf. Ostergren v. Cuccinelli*, 615 F.3d 263, 271 (4th Cir. 2010) (identifying certain categories of “unprotected” speech). Even if such an interest can be identified, it is not properly tailored. The “electoral process” limitation in Section 3-506 is presumptively unconstitutional under First Amendment scrutiny, and nothing can overcome this presumption.

**B. The “Electoral Process” Provision of Section 3-506 is Unconstitutionally Vague**

Alternatively, if this Court believes Fusaro’s letter is not prohibited under Section 3-506, he (and, admittedly, his counsel) has no idea where the presumably narrow confines of content related to the electoral process ends and the broader political speech begins. *See JA 11* (“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.”) Indeed, the law also prohibits using the list for “commercial solicitation,” but there is a variety of commercial speech that



may *also* relate to the electoral process; but the former is prohibited under the law, and the latter is not.

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).

As a regulation of political speech, Section 3-506 abuts upon the most sensitive area of First Amendment freedom, and should be subjected to the most rigorous vagueness analysis.

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* MD. CODE, ELECTION LAW, § 1-101(k)(1)(ii) (emphasis added). Though this suffers from overbreadth problems, it does not shed light on “electoral process.”

Neither does a legal dictionary provide meaningful guidance. “[E]lectoral 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.” BLACK’S LAW DICTIONARY 596 (9th ed. 2009). This would be in keeping with other provisions of the law. *See* MD. CODE, ELECTION LAW, §§ 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[.]” MD. CODE, ELECTION LAW, § 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 or other prospective activities would relate or not relate to the electoral process. Under any definition, the statute is not properly tailored. But the term is, practically speaking, undefined. In his letter, Fusaro would criticize Davitt and call for his resignation. *See* JA 18. Davitt is not an elected official, and has made no indication that he intends to seek elected office. However, in the letter Fusaro would criticize Davitt for prosecuting him for campaign finance violations, which may, tangentially, make the speech related to the electoral process. *See* MD. CODE, ELECTION LAW, § 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, CRIM. PROC., § 14-107(c). But Fusaro's best guesses are not binding upon State Prosecutor Davitt, 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.

These content restrictions in section 3-506(a)(1)(ii) and (c) are unconstitutional or void for vagueness under the First Amendment, and this Court should enjoin their enforcement.

### **Conclusion**

Section 3-506 is a peculiar vortex. Because it is an intentional governmental manipulation of political speech in Maryland, access to the list should be subjected to

strict scrutiny, under which the registered voter requirement fails. However, the term that defines this intervention—“electoral process”—is also an unconstitutional restriction of free speech for both access and use of the list. For the foregoing reasons, both the access and content restrictions of Section 3-506 are unconstitutional, and the Court should reverse the district court’s dismissal and rule that Dennis Fusaro is entitled to a preliminary injunction that allows him to purchase a copy of the Maryland registered voter list and use it to criticize State Prosecutor Emmet Davitt.

Respectfully submitted,

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*Counsel of Appellant*

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