No. 18-2167

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DENNIS FUSARO,

Plaintiff-Appellant,

v.

EMMET C. DAVITT, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland
(Ellen L. Hollander, United States District Judge)

BRIEF OF APPELLEES

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December 13, 2018

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-2167 Caption: Dennis Fusaro v. Emmett C. Davitt et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Emmett C. Davitt, David J. McManus, Jr., Patrick J. Hogan, Michael R. Cogan, Kelley A. Howells,
(name of party/amicus)

Gloria Lawlah,

who is appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ John R. Grimm Date: 12/13/2018

Counsel for: Appellees

CERTIFICATE OF SERVICE

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JURISDICTIONAL STATEMENT

Plaintiff-appellant Dennis Fusaro sought declaratory and injunctive relief for alleged violations of the First and Fourteenth Amendments arising from the denial of his request for a copy of a list of all registered voters in Maryland. Mr. Fusaro, a Virginia resident, was not eligible to receive the list because, under Maryland law, an individual must be registered to vote in Maryland to obtain a Maryland voter list. The defendants-appellees moved to dismiss Mr. Fusaro's lawsuit based on Supreme

Court precedent holding that a denial of access to state records that is not viewpoint based does not violate the First Amendment. The district court entered an order dismissing Mr. Fusaro's claims and denying his motion for preliminary injunction on September 4, 2018. (J.A. 60.) Mr. Fusaro timely appealed. (J.A. 61.) The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 2201 & 2202, and 42 U.S.C. § 1983. This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Did the district court correctly determine that a Maryland statute denying non-registered voters access to a statewide list of registered voters does not violate the First or Fourteenth Amendments, based on Supreme Court cases holding that the Constitution does not guarantee access to state records?

STATEMENT OF THE CASE

This appeal arises from Mr. Fusaro's unsuccessful attempt to obtain a list of Maryland's registered voters. Under Maryland law, registered voters may purchase a copy of such a list for uses related to the electoral process. Because Mr. Fusaro lives in Virginia, and is thus not registered to vote in Maryland, the State Board of Elections denied his request for a copy of the list. Mr. Fusaro filed a lawsuit in the District of Maryland alleging that the statute governing access to Maryland voter lists is unconstitutional, both facially, and as-applied to Mr. Fusaro. The district

court, applying relevant Supreme Court caselaw, disagreed and dismissed his lawsuit. *Fusaro v. Davitt*, 327 F. Supp. 3d 907 (D. Md. 2018).

The Requested Maryland Voter List

There are more than three-and-a-half million active registered voters in Maryland, and the State Board of Elections maintains an accurate, up-to-date database containing information about all of them.[1] The database includes details like voters' name, party registration, gender, home address, and mailing address. *See* Application for Voter Registration Data ("Voter Application") at 2, *available at* https://elections.maryland.gov/pdf/SBEAPPL.pdf. A voter list requested pursuant to the Voter Application is generated from this database.

By law, the State Board must provide a Maryland voter list to any Maryland registered voter who submits a written application with a statement, signed under oath, attesting that the list will not be used for commercial solicitation or "any other purpose not related to the electoral process." Md. Code Ann., Elec. Law § 3-506(a)(1)(ii); *see also* Md. Code Regs. ("COMAR") 33.03.02.04 through 33.03.02.06 (establishing Board of Elections regulations for obtaining list).

[1] *See* Eligible Active Voters on the Precinct Register—By County, *available at* https://elections.maryland.gov/press_room/2018_stats/GP18_Eligible_Active_Voters_by_County.pdf (listing 3,597,135 eligible active voters as of June 26, 2018).

In order to facilitate Maryland voters' use of such a list for "purpose[s] . . . related to the electoral process," Elec. Law § 3-506(a)(1)(ii)(2), the State Board provides voter lists in several formats, including a "Walking List," which is designed for door-to-door canvassing, a list of applicants for absentee ballots, a list of early voters, a voting history file, and a list of all registered voters in the State. Voter Application at 2. These lists are available in a "format [that] is easily imported into Microsoft products," and the entire statewide list costs $125. *Id.* Although the State Board's voter registration lists are only available to Maryland voters, each local board of elections must make its "[v]oter registration records" available for "public inspection," Elec. Law § 3-505(b)(1), and under the State Board's regulations, "[a]ny person may request to inspect or copy a public record" of either the State Board or a local board. COMAR 33.04.01.03A. Thus, even without access to a voter list, it is possible for anyone to acquire at least some of the voter information it may include.

Factual Background

Dennis Fusaro is a Virginia-based political consultant with experience in Maryland politics. In 2014, Mr. Fusaro was the campaign manager for a successful candidate for County Council in Anne Arundel County, Maryland. *Fusaro*, 327 F. Supp. 3d at 911. Shortly before the 2014 election, thousands of people in Anne Arundel County received an automated phone call purporting to congratulate the

rival of Mr. Fusaro's candidate for "his bravery in coming out of the closet," and supporting a Maryland transgender-rights bill that the recording claimed put "children . . . at risk by sexual predators[.]" *Id.* at 912. The recording stated that the call was "[p]aid for and authorized by Marylander's [*sic*] for Transgenders." *Id.*

In reality, there was no such group as "Marylanders for Transgenders." Because the recorded calls stated they were sponsored by a fictitious group, defendant-appellee Emmet Davitt, who is Maryland's State Prosecutor,[2] concluded that they violated Maryland election law, which requires campaign materials to include an authority line. Elec. Law § 13-401(a)(1). Mr. Davitt allegedly traced the phone call to Mr. Fusaro, and prosecuted him for criminal violations of Maryland election law.[3] *Fusaro*, 327 F. Supp. 3d at 911-12. Mr. Fusaro was initially convicted following a bench trial in the District Court of Maryland, but was ultimately acquitted by a jury after a *de novo* appeal in the Circuit Court for Anne Arundel County. *Id.* at 911.

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[2] The Maryland State Prosecutor is an unelected government official with statewide jurisdiction to prosecute certain specified crimes, including crimes involving public officials, and violations of State election law. Md. Code Ann., Crim. Proc. §§ 14-102(a) (creating Office of State Prosecutor), 14-107 & 14-109 (enumerating powers and crimes within jurisdiction), & 14-102(c)(1) (providing for appointment of State Prosecutor).

[3] *See* Elec. Law § 13-602(a)(9) (criminalizing violations of Election Law § 13-401).

Following his acquittal, Mr. Fusaro tried to buy a statewide Maryland voter list from the State Board. He claims the reason he wants the list is so that he can "send letters to Maryland registered voters," (J.A. 11)—and only voters, despite the fact that Mr. Davitt is an unelected official, Elec. Law § 14-102(c)(1)—including one letter that "criticizes Maryland State Prosecutor Emmet C. Davitt for prosecuting Fusaro, and [that] calls upon readers to encourage him to resign."

Mr. Fusaro submitted an application for a copy of the statewide voter list, and signed the required declaration that he would not use the list for commercial solicitation or other purposes unrelated to the electoral process. (J.A. 20.) However, the State Board denied Mr. Fusaro's application because, as a Virginia resident, Mr. Fusaro is not a Maryland registered voter and thus not eligible to purchase the list. (J.A. 23.) In an email exchange with Mr. Fusaro after his application was denied, the State Board confirmed that Mr. Fusaro's request "was rejected because you must be a Maryland resident and registered voter to request a copy of the voter registration list." (J.A. 26.) Nothing in Mr. Fusaro's application indicated how he intended to use the list, and nothing in the Board's communication with him suggested his request was denied for any reason other than the fact that he is not a registered voter.

Procedural History

Mr. Fusaro filed a complaint for declaratory and injunctive relief in the District of Maryland on November 13, 2017. (J.A. 7.) He sought a permanent

injunction against enforcement of § 3-506 of the Election Law Article, and a declaration that it violates the First and Fourteenth Amendments because it denies non-voters access to voter lists, and because it only grants access to lists for election-related purposes. (J.A. 12, 15.) And he argued that the statute's reference to purposes "not related to the electoral process" was unconstitutionally vague, both facially, and as applied to him. (J.A. 13, 15.) He filed a motion for preliminary injunction on December 15, 2017. (J.A. 27.) Mr. Davitt and the State Board filed a consolidated motion to dismiss for failure to state a claim, and opposition to Mr. Fusaro's motion for preliminary injunction on January 26, 2018. (*See* J.A. 5.)

On September 4, 2018, the district court issued a memorandum opinion granting the defendants' motion to dismiss because Mr. Fusaro had failed to state a claim, and denying Mr. Fusaro's motion for preliminary injunction. *Fusaro*, 327 F. Supp. 3d at 907. Mr. Fusaro filed a timely appeal on September 26, 2018. (J.A. 61.)

SUMMARY OF ARGUMENT

Neither the First nor Fourteenth Amendment entitles Mr. Fusaro to access Maryland's statewide list of registered voters. Section 3-506, which Mr. Fusaro challenges here, does not place any restrictions on Mr. Fusaro's speech, but only limits his ability to acquire certain information in the State's possession. The Supreme Court has long held that there is no First or Fourteenth Amendment right of access to government information, and that regulations that do no more than

control access to government records do not implicate constitutional rights, at least when they do not restrict how people can use information they already possess. Because § 3-506 only limits who can request State records in the first instance, but places no restrictions on Mr. Fusaro's ability to communicate any information he possesses independently, he has no constitutional claim to accessing the list.

Nor does the fact that Maryland makes voter lists available to registered voters for limited purposes, but not to others, affect its constitutionality. Under Supreme Court precedent, states are free to support some speech while not supporting others as long as they do not draw viewpoint-based distinctions, and there is no contention that § 3-506 denies access to Maryland voter lists based on a speaker's views. Thus, Maryland has no constitutional obligation to make voter lists available to Mr. Fusaro simply because it makes such lists available to Maryland voters. The district court correctly held that Mr. Fusaro had not stated a claim, and properly dismissed his lawsuit.

Mr. Fusaro's failure to state a First Amendment challenge to § 3-506 is sufficient to affirm the district court. Moreover, Mr. Fusaro's Fourteenth Amendment vagueness challenge is not ripe because the provision Mr. Fusaro claims is unconstitutionally vague—the statute's prohibition on uses of voter lists that are unrelated to the electoral process—has never been applied against Mr. Fusaro. Nor is he under any threat that this prohibition will be enforced against him because he

is not a Maryland registered voter. Mr. Fusaro was denied access to a statewide voter list solely because he is not a Maryland voter, and unless and until he becomes one, it is entirely speculative whether he will ever be denied access to a list because of how he intends to use it.

In any event, by Mr. Fusaro's own admission, § 3-506 is not vague. In his complaint, Mr. Fusaro stated unambiguously that the letters he wishes to send are unrelated to the electoral process, and thus the statute is clear enough that Mr. Fusaro recognizes how it applies to him. And because a person against whom a law can be properly applied may not challenge its vagueness as applied to someone else, Mr. Fusaro's admission is fatal to his vagueness claim, whether styled as a facial or as-applied challenge.

Even without this damning admission, however, Mr. Fusaro still has not shown that § 3-506 is unconstitutionally vague. The statute's language limiting access to voter lists for purposes related to the electoral process clearly prohibits uses like committing fraud or voter harassment, selling voter lists, or, as relevant here, using the a list to communicate about unelected State officials.

Finally, because Mr. Fusaro cannot prevail on any of his claims, the district court correctly denied his motion for a preliminary injunction. Preliminary injunctive relief is an extraordinary remedy that is only available when a plaintiff has shown a likelihood of success on the merits. Because Mr. Fusaro cannot make

even this threshold showing, he is not entitled to an injunction, and the decision below should be affirmed.

ARGUMENT

I. THIS COURT REVIEWS THE DISTRICT COURT'S GRANT OF A MOTION TO DISMISS DE NOVO, AND DENIAL OF A PRELIMINARY INJUNCTION FOR ABUSE OF DISCRETION.

This Court reviews the grant of a motion to dismiss for failure to state a claim *de novo*. *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 423 (4th Cir. 2018). To state a claim, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted). On review, the Court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of the plaintiff. *Id.*

The Court reviews the denial of a preliminary injunction for abuse of discretion, reviewing the district court's factual findings for clear error and its legal conclusions *de novo*. *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). A district court abuses its discretion when it misapprehends or misapplies the applicable law. *Id.* It commits clear error when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks omitted).

II. THE CONSTITUTION DOES NOT GUARANTEE MR. FUSARO ACCESS TO STATE RECORDS.

The district court's holding that Mr. Fusaro failed to state a claim under either the First or Fourteenth Amendment was correct, because "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion).

A. Mr. Fusaro's Constitutional Challenges Rest on a Mischaracterization of Section 3-506 as a Speech Restriction.

As an initial matter, the crux of Mr. Fusaro's arguments is a mistaken belief that § 3-506 of the Election Law Article operates as a speech restriction. Mr. Fusaro argues that by limiting who can access Maryland's voter lists, the statute is a "manipulation of political speech," Appellant's Br. 25, and that § 3-506's electoral-process restriction might "not permit him to mail his letter[.]" Appellant's Br. 22. Indeed, he frames the issue as whether his "*letter* is . . . *prohibited* under Section 3-506[.]" Appellant's Br. 22 (emphasis added). But describing § 3-506 as a ban on Mr. Fusaro's message fundamentally misunderstands the statute which, in reality, has no effect on the letter Mr. Fusaro intends to send.

The statute at issue does not prevent Mr. Fusaro from sending whatever letter he wants to whomever he wants; it simply makes him ineligible to receive a specific State record that is entirely collateral to his message. The only connection between

that record and the letter Mr. Fusaro wants to send is that the list he has requested is a useful collection of potential recipients' addresses. But even without that collection, he has every right to communicate with Maryland voters, and he is free to gather their addresses using any information in the public domain: He can purchase a private database of addresses, he can find voter information in the publicly available records of the State and local boards of elections, and he can even pay the U.S. Postal Service to deliver his letter to every home in the State, and therefore every registered voter.[4]

Nor does Mr. Fusaro's message itself depend on having access to voter lists. The letter he wants to send to Maryland voters is a complaint about his prosecution, which is unrelated to the information contained in any voter list (J.A. 18), and Mr. Fusaro does not allege that he has any plans to communicate with Maryland voters about the content of the list itself.[5] At most, § 3-506 prevents the Board of Elections from *facilitating* Mr. Fusaro's speech, but Mr. Fusaro does not need a voter list to communicate his message.

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[4] *See* Using Every Door Direct Mail, *available at* https://www.usps.com/business/every-door-direct-mail.htm.

[5] Thus, this is not a case where a law prevents a speaker from generating his message in the first instance, and Mr. Fusaro's comparison to laws that "operate[] at the 'front end of the speech process'" is inapt. Appellant's Br. 16 (citing *ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) (analyzing application of eavesdropping law to prohibit recording police officers in public)).

When viewed correctly, as nothing more than a limit on access to government records, § 3-506 easily passes constitutional muster. The Supreme Court has never recognized a free-speech interest in acquiring government information, and it has held that states may facilitate the speech of some without facilitating the speech of others.

B. There Is No Constitutional Right to Access a Maryland Voter List.

The First Amendment, which applies to Maryland through the Fourteenth Amendment, prohibits any law "abridging the freedom of speech[.]" U.S. Const. amend. I; *Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348, 352 (4th Cir. 2011) ("The First Amendment has been made applicable to the states by incorporation onto the Fourteenth Amendment."). Although the First Amendment guarantees Mr. Fusaro's right to criticize Mr. Davitt, it does not require Maryland to help him do so. Courts have consistently rejected claims, like Mr. Fusaro's, that the First or Fourteenth Amendment creates a right of access to government information, and concluded that the Constitution permits selectively awarded speech subsidies that are not based on a speaker's viewpoint. Thus, Maryland may grant its voters access to voter registration lists without allowing access to non-residents like Mr. Fusaro.

In *Houchins*, a plurality of the Court held that a television news station did not have a First Amendment right to inspect non-public areas of a local jail. 438 U.S. at 3-4. In reaching this conclusion, the Court explained that it had "never intimated a First Amendment guarantee of a right of access to all sources of information within government control," and noted that even if there is a right "to *communicate* information once it is obtained," the Court's holdings did not "intimate[] that the Constitution *compels* the government to provide the media with information or access to it on demand." *Id.* at 9 (emphasis in original). In short, "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 14.[6]

Applying *Houchins*, the Supreme Court rejected a constitutional challenge nearly identical to Mr. Fusaro's in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). *United Reporting* involved a

[6] Other Circuits also have rejected First-Amendment challenges like Mr. Fusaro's. In *Center for National Security Studies v. United States Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), the D.C. Circuit upheld the Government's denial of a Freedom of Information Act request for information about post-September 11 detainees, noting that the First Amendment "does not expressly address the right of the public to receive information," and that "disclosure of government information generally is left to the 'political forces' that govern a democratic republic." 331 F.3d at 349. Similarly, the Seventh Circuit has held that a statute restricting access to information in driver's license records did not violate the First Amendment because "[p]eering into public records is not part of the 'freedom of speech' that the [F]irst [A]mendment protects." *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 2003).

California law that allowed access to the addresses of recent arrestees only for specific non-commercial purposes. *Id.* at 34. The plaintiff, a company that sold arrestee information to clients such as lawyers, insurance companies, and counselors, brought a facial challenge to the statute, arguing that it violated the First and Fourteenth Amendments. *Id.* at 34, 36. But the Court disagreed, explaining that the California law was "nothing more than a government denial of access to information in its possession." *Id.* at 40 (citing *Houchins*, 438 U.S. at 14).

Mr. Fusaro's constitutional arguments cannot be squared with the reasoning behind the Court's decision in *United Reporting*. Although *United Reporting* involved a pre-enforcement facial challenge, *id.* at 36, the First-Amendment principles the Court espoused apply with equal force to Mr. Fusaro's attempt to access a Maryland voter list. Specifically, the *United Reporting* Court agreed with the petitioner's view that "a law regulating access to information in the hands of [the government]" is "not an abridgment of anyone's right to engage in speech[.]" *Id.* at 40. Thus, like § 3-506, the California statute "merely require[d] that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so." *Id.* Like California in *United Reporting*, Maryland simply denies Mr. Fusaro access to a record that he does not already have, but it does not abridge his speech or prevent

him from sharing any information that comes into his possession through other sources.[7]

Moreover, Mr. Fusaro's application was denied because he is not a Maryland resident and registered voter, as § 3-506 requires, and not because of any First-Amendment protected activity such as his political views or party affiliation.[8] The Court has *upheld* state laws, similar to § 3-506, that restrict access to state records based on *residency*. In *McBurney v. Young*, 569 U.S. 221 (2013), the Court held that the Virginia Freedom of Information Act did not violate the Privileges or Immunities Clause or the Dormant Commerce Clause even though it denied non-Virginia citizens access to any state records.[9] 569 U.S. at 224. An access restriction based on voter-registration status is not meaningfully distinct from a residency restriction,

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[7] Mr. Fusaro's reliance on *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) is therefore misplaced, because that case involved a statute that "imposed a restriction on access to information in private hands." 564 U.S. at 568 (distinguishing *United Reporting*).

[8] As the district court noted below, six justices in *United Reporting* "agreed that a state violates the First Amendment by limiting access to government-held information when the restriction is based on one's political viewpoint or party affiliation." 327 F. Supp. 3d at 921. Likewise, in his *United Reporting* concurrence, Justice Scalia questioned whether a state could restrict individuals' access to records that are made generally available to the *press*, and are thus, effectively, part of the public record. 528 at 42 (Scalia, J., concurring).

[9] This Court has held that the same Virginia statute does not violate the Equal Protection Clause of the Fourteenth Amendment even though it denies prisoners general access to state records. *Giarratano v. Johnson*, 521 F.3d 298 (4th Cir. 2008).

at least for someone like Mr. Fusaro, who is not a registered Maryland voter because he is not a Maryland resident.

Courts have, therefore, resoundingly rejected constitutional challenges to state laws that limit initial *access* to government records, at least insofar as they do not restrict the *use* of information independently in private hands. *See, e.g.*, *United Reporting*, 528 U.S. at 42 (Ginsburg, J., concurring) ("[T]he statute at issue does not restrict speakers from conveying information that they already possess."); *Houchins*, 438 U.S. at 9 (distinguishing between restrictions on communicating information once it is obtained and accessing information in the first instance). In this respect, § 3-506 is no different from the policies upheld in *McBurney*, *United Reporting*, and *Houchins*.[10]

[10] Of course, even if he were eligible to request a voter list, § 3-506 would prohibit Mr. Fusaro from using it for non-electoral purposes. But that is only because the statute places an *ex ante* restriction on how Maryland voter lists can be used as a condition for receiving a copy in the first place. By contrast, the statute does not restrict the use of *information* that happens to appear on the lists, if it comes from another source. For instance, a Marylander who knows her friend's address does not violate § 3-506 by sending her friend a personal letter, even if the friend's address is also on a Maryland voter list. As Justice Ginsburg put it in her *United Reporting* concurrence, "[a]nyone who comes upon [regulated] address information in the public domain is free to use that information as she sees fit." 528 U.S. at 42 (Ginsburg, J., concurring).

C. Maryland May Place Viewpoint-Neutral Conditions on Who Can Access its Voter Lists, and for What Purposes.

A central element of Mr. Fusaro's challenge to § 3-506 is that the statute limits both who can access Maryland voter lists, and how the voter lists can be used. According to Mr. Fusaro, these limits "manipulate[] the marketplace of ideas" by giving Maryland voters a resource that is denied to others, and thus require § 3-506 to satisfy strict scrutiny. Appellant's Br. 9, 12. Mr. Fusaro is incorrect: The Supreme Court has been clear that states may make a benefit—even one that facilitates speech—available selectively, as long as the criteria for receiving the benefit are viewpoint neutral, as they are with § 3-506.

Although § 3-506 can be viewed as a subsidy that gives Maryland voters an affordable tool that they can use for political speech, that does not render the statute unconstitutional, or even subject it to strict scrutiny. To the contrary, "it is well established that the government can make content-based distinctions when it subsidizes speech." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188-89 (2007); *see also Reagan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (upholding ban on tax-exempt status for lobbyist groups where there was "no indication that the statute was intended to suppress any ideas"). As Justice Ginsburg explained in her *United Reporting* concurrence, a state is "free to support some speech without supporting other speech" as long as "the award of the subsidy is not based on an illegitimate criterion such as viewpoint[.]" 528 U.S. at 43

(Ginsburg, J., concurring).[11] Indeed, "if States were required to choose between keeping proprietary information to themselves and making it available without limits, States might well choose the former option" leading "not to more speech overall but to more secrecy and less speech." *Id.*

Mr. Fusaro does not contend that § 3-506 regulates access to voter lists based on a speaker's *viewpoint*, and for good reason—the statute allows all Maryland voters to use a list for election-related purposes, regardless of what view they care to express.[12] Even if that makes § 3-506 a *content*-based regulation, as Mr. Fusaro contends, it does not make § 3-506 unconstitutional.

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[11] The Virginia Supreme Court's decision in *Mahan v. National Conservative Political Action Committee*, 227 Va. 330 (1984), which was decided before *United Reporting*, cannot be reconciled with this principle. In that case, the Virginia court held that a statute like § 3-506 failed to satisfy strict scrutiny because it denied certain political committees access to a state voter database that other committees could request. 227 Va. at 333-35. However, *Mahan* did not hold that Virginia could not base eligibility on residency or registered voter status, but rather that where Virginia provided the list to certain categories of political organizations it could not exclude other, similar political organizations. Nor did the court grapple with Supreme Court precedent allowing states to make viewpoint-neutral speech subsidies to limited classes of individuals. *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 769 (2011) (Kagan, J., dissenting) ("We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another."); *United Reporting*, 528 U.S. at 43 (Ginsburg, J., concurring).

[12] A viewpoint-based distinction is "an egregious form of content discrimination" that occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject[.]" *Rosenberer v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Mr. Fusaro misreads the Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) as prohibiting states from advantaging some political actors but not others. *Arizona Free Enterprise* did not involve a simple speech subsidy, but rather a law that *penalized* some speakers to the benefit of others. The statute at issue allowed political candidates receiving public campaign funding to receive matching funds for every dollar above a threshold spent by or in support of a privately funded candidate. 564 U.S. at 729. In other words, "every dollar that a [privately funded] candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent." *Id.* at 730.

Thus, what rendered the statute unconstitutional under the First Amendment was not, as Mr. Fusaro contends, that it "blatantly provided state-conferred benefits to a select few speakers," Appellant's Br. 10, but rather that the statute burdened candidates' ability to speak in support of their campaigns by giving their opponents an in-kind benefit in direct proportion to their use of their own personal funds. *Id.* at 736-37. Nothing in the Court's *Arizona Free Enterprise* decision suggests that it was upsetting the general rule that viewpoint-neutral speech subsidies are constitutional. And *Arizona Free Enterprise* cannot stand for the proposition that states may not open public records to a limited class of speakers, because in

McBurney, which was decided after *Arizona Free Enterprise*, the Court upheld a Virginia statute that did exactly that.

Section 3-506 is wholly different from the statute the Court struck down in *Arizona Free Enterprise*. Although it provides Maryland voters a tool that non-voters cannot access, it does not actively suppress the speech of non-voters, and it certainly does not do so in response to the speech of registered voters. Mr. Fusaro's reliance on *Arizona Free Press* is therefore misplaced.

D. None of Mr. Fusaro's Other Cases Establish a General Right of Access to Government Information.

Notwithstanding the Supreme Court's refusal to recognize a constitutional right to access government information, Mr. Fusaro analogizes § 3-506 to laws that were found to unconstitutionally burden speech. Those comparisons all miss the mark.

First, Mr. Fusaro argues that states cannot "target precursory speech activities." Appellant's Br. 6. But the case he cites, *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), involved a series of taxes on newspaper publishers that "single[d] out the press" and "target[ed] a small group of newspapers." 460 U.S. at 591. Whatever it may say about prior restraints on the press, *Minneapolis Star* does not stand for the proposition that generally applicable records-access regulations are unconstitutional whenever they

deny someone access to information that could lead to speech. Moreover, the Supreme Court has explicitly distinguished cases involving preemptive burdens on the press from cases involving limits on access to government records. For instance, in *Houchins*, the Court held that *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)—which involved a tax on newspaper revenues—was inapplicable because it "dealt only with government attempts to burden and restrain a newspaper's communication with the public" and thus "meant no more than that the government cannot restrain communication of whatever information the media acquire[.]" 438 U.S. at 10. The Court, therefore, has already rejected Mr. Fusaro's argument that cases removing targeted barriers to a free press apply to his effort to access a Maryland voter list.

Next, Mr. Fusaro claims that "the First Amendment also requires the government to provide access to some public records, such as summary judgment court filings . . . ." Appellant's Br. 7. This is true, but the right of access to court documents does not extend to non-judicial records like Maryland voter lists. Indeed, the public's right to access materials filed in court derives from the common law right "to inspect and copy all *judicial* records and documents," and the "First Amendment guarantee of access . . . to particular *judicial* records and documents." *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) (emphasis added) (internal quotation marks omitted). But lists of registered voters

are not court records, and nothing about a specific right to access public court records implies a right to access all government information. Mr. Fusaro does not point to any authority applying the right of access to court documents to a statute restricting access to non-judicial records, and such a result would be directly inconsistent with the holdings in *Houchins*, *United Reporting*, and *McBurney*.

Finally, Mr. Fusaro relies on caselaw overturning restrictions on non-residents' ability to witness ballot-access petitions, but that precedent falls far afield of the facts of this case. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308 (4th Cir. 2013). Unlike accessing government records, the Supreme Court has held that petition circulation is "core political speech, because it involves interactive communications concerning political change." *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (internal quotation marks omitted). Section 3-506, on the other hand, does not regulate speech. Although Mr. Fusaro's *letter* could be seen as "communication[] concerning political change," *id.*, § 3-506 does not deny him the right to send that letter. Mr. Fusaro's reliance on *Judd* thus cannot be reconciled with the Supreme Court's holding in *McBurney* that the Constitution does not guarantee him "access [to] public information on equal terms with citizens of" Maryland. 569 U.S. at 232 (finding no violation of Privileges or Immunities Clause).

Because Mr. Fusaro does not have a constitutional right to access a Maryland voter list, the district court correctly held that he failed to state a claim, and dismissed his case. The fact that Maryland may constitutionally deny Mr. Fusaro, a non-Maryland voter, access to a voter list, is sufficient to dispose of this appeal without reaching Mr. Fusaro's vagueness claim. But that claim, too, is without merit, so even if the Court does reach that question, it should affirm the decision below.

III. MR. FUSARO FAILED TO STATE A VAGUENESS CHALLENGE TO SECTION 3-506.

Mr. Fusaro is incorrect that § 3-506 is unconstitutionally vague under the Fourteenth Amendment. The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. Under the Due Process Clause, a statute is unconstitutionally vague if 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." *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012). However, courts "do not hold legislators to an unattainable standard when evaluating enactments in the face of vagueness challenges." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 371 (4th Cir. 2012). "A statute need not spell out every possible factual scenario with 'celestial precision' to avoid being struck down on vagueness grounds." *United States v. Hager*, 721 F.3d 167, 183 (4th

Cir. 2013) (citation omitted). And a statute "'must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *Id.* at 183 (citation omitted).

Here, Mr. Fusaro seizes on § 3-506's reference to "purpose[s] not related to the electoral process," § 3-506(a)(1)(ii)(2), to argue that the statute is unconstitutionally vague. But by his own admission, that language provided him "fair notice of what is prohibited" in this case, *Martin*, 700 F.3d at 135, such that he can conform his own conduct to it. That fact alone is fatal to his vagueness claim.

A. The Court Should Not Reach Mr. Fusaro's Vagueness Challenge, Because It Is Not Ripe.

As an initial matter, this Court should not reach Mr. Fusaro's vagueness challenge because Mr. Fusaro has not been denied access to a voter list due to how he plans to use it, so his challenge to the "electoral process" restriction is entirely theoretical. A legal challenge that "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," is unripe and thus not justiciable. *Scroggins v. Lee's Crossing Homeowner's Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013).

Mr. Fusaro has not been denied access to a voter list because an anticipated use of the list was unrelated to the electoral process.[13] Rather, the *sole basis* for the State Board rejecting Mr. Fusaro's request for a list is that he is not a registered voter. (*See* J.A. 23 ("It was rejected because you must be a Maryland resident and registered voter to request a copy of the voter registration list.").) Thus, the "electoral process" restriction in § 3-506 has never been applied to Mr. Fusaro. And because Mr. Fusaro will never qualify to obtain a Maryland voter list as long as he is not a registered Maryland voter, it is entirely speculative whether he will ever be denied access to the voter list because of how he plans to use it.[14]

B. Mr. Fusaro Admits That His Letter Is Unrelated to the Electoral Process.

Even if the Court does reach Mr. Fusaro's vagueness challenge, it fails on the merits, because Mr. Fusaro admits that he is able to understand how § 3-506 applies to him. On appeal, Mr. Fusaro claims that he has "no idea where the presumably

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[13] Nor does Mr. Fusaro argue that he was prevented from accessing a privately held copy of a voter list, so his argument that there is "no compelling justification" for the provisions of § 3-506 that "prevent Fusaro from accessing lists that are already in private hands," Appellant's Br. 8, is not properly before the Court.

[14] Even though the standard for ripeness is relaxed in First Amendment challenges, a plaintiff must still show "a factual record of an actual or threatened action resulting in the suppression of free speech[.]" *Pearson v. Leavitt*, 189 F. App'x 161, 163 (4th Cir. 2006) (per curiam). Because, as a non-Maryland voter, Mr. Fusaro cannot show that he will ever be entitled to a Maryland voter list, he cannot meet even a relaxed ripeness standard.

narrow confines of content related to the electoral process end[] and the broader political speech begins." Appellant's Br. 22. But his complaint, which must be accepted as true at this stage, tells a different story. There, Mr. Fusaro stated in no uncertain terms that his 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[.]" (J.A. 13.) And Mr. Fusaro admitted that his letter, and other communications he might wish to make using a statewide voter list, "are not related to the electoral process." (J.A. 12.) In other words, while he may not be able to discern with certainty in all circumstances what *is* related to the electoral process, he had no trouble recognizing that his proposed letter in this case is *not*, which means § 3-506 has provided him fair notice of whether his conduct is prohibited.

The fact that Mr. Fusaro appears to understand how § 3-506 applies to his own conduct undermines his claim that the statute is unconstitutionally vague. And because § 3-506 is not vague as applied to Mr. Fusaro, he cannot argue that it is potentially vague as applied to others, because a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Martin*, 700 F.3d at 135 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); *see also id.* at 137 (noting that decision to bring facial challenge "does not allow

[challengers] to lean on extravagant hypothetical scenarios that bear no resemblance to their own conduct").

Moreover, even if Mr. Fusaro had not admitted that his letter does not satisfy § 3-506's "electoral process" provision, he still has not stated a colorable vagueness challenge. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 749 (4th Cir. 2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). Section 3-506's "electoral process" requirement prohibits obvious abuses of voter lists like committing fraud or identity theft; intimidating voters; selling lists to third parties.

This is enough for "the ordinary person exercising ordinary common sense" to "sufficiently understand and comply with" the law in the ordinary run of cases. *Id.* (quoting *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006)). Whatever the outer limits of conduct "related to the electoral process" may be, Mr. Fusaro has acknowledged that he understands it not to include the purpose of his letter advocating for the resignation of an unelected official. His dissatisfaction with that understanding does not properly state a vagueness challenge.

IV. THE DISTRICT COURT PROPERLY DENIED MR. FUSARO'S REQUEST FOR A PRELIMINARY INJUNCTION.

Finally, the district court correctly found that, because Mr. Fusaro had failed to state any claim upon which relief could be granted, a preliminary injunction was inappropriate. Preliminary injunctive relief is an "extraordinary remedy never awarded as of right." *Winter v. National Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). It is only available "upon a clear showing that the plaintiff is entitled to such relief," which requires the plaintiff to demonstrate "[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." *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

The district court did not abuse its discretion in denying Mr. Fusaro's motion for preliminary injunction. It applied the correct legal standard, 327 F. Supp. 3d at 924, and correctly held that because Mr. Fusaro failed to state a claim, he did not show even a possibility, much less a likelihood of success on the merits. This Court should affirm the district court's denial of Mr. Fusaro's request for a preliminary injunction.

CONCLUSION

The decision of the district court should be affirmed.

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Respectfully Submitted,

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ADDENDUM OF PERTINENT PROVISIONS

Md. Code, Ann., Election Law § 3-506—Request for list of registered voters by registered voters

(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.

(2) In consultation with the local boards, the State Board shall adopt regulations that specify:

(i) the time for a list to be provided under this subsection;

(ii) the authorization to be required for providing a list;

(iii) the fee to be paid for providing a list;

(iv) the information to be included on a list;

(v) that the residence address of an individual who is a participant in an address confidentiality program may not be disclosed;

(vi) that a participant in an address confidentiality program is not required to apply to the State Board to keep the individual's residence address confidential;

(vii) the format of the information; and

(viii) the medium or media on which the information is to be provided.

Request for list of registered voters by jury commissioner

(b)(1) The State Administrator or a designee shall provide a copy of the statewide voter registration list and voter registration records to a jury commissioner on request and without charge by means agreed to with the Administrative Office of the Courts.

(2) On application of the Attorney General, a circuit court may compel compliance with paragraph (1) of this subsection.

Unauthorized use of registered voter list subject to penalties

(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.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 18-2167 **Caption:** Dennis Fusaro v. Emmett C. Davitt et al.

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