

RECORD NO. 18-2167

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**

REPLY BRIEF OF APPELLANT

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Argument

MD. CODE, ELECTION LAW § 3-506 is prophylactic, imprecise, and unduly burdensome. State Prosecutor Davitt and the Maryland State Board of Elections (collectively, “the State”) make every effort to ignore the law’s content discrimination while focusing on its access restriction. This safely adheres to the conclusion of the court below. *See* JA 58. But this is a mistaken conclusion. Section 3-506 should be invalidated because it favors native speakers over out-of-state voices.

Although ripeness is a legitimate concern when considering Fusaro’s desire to send his letter criticizing Davitt to Maryland registered voters prior to his acquisition of the list, this does not mean that the content restrictions do not affect access to the list itself: quite the contrary. Moreover, the nature of the registered voter list requires the Court to consider free speech interests beyond public records doctrine. Indeed, the law operates as a classic form of content and viewpoint-based discrimination. Finally, when Fusaro’s access to the list is ensured, it is appropriate to analyze and strike down the provision in Section 3-506 that limits use of the list to purposes “related to the electoral process.”

I. The First Amendment Protects Fusaro’s Access to the Maryland Registered Voter List

The State’s adoption of Fusaro’s “damning admission” that his letter is not related to the electoral process and its own assertion that this same provision of Section 3-506 prohibits “selling lists to third parties” affirms that Fusaro cannot access the list

from other sources without subjecting other citizens to criminal charges. Appellees' Br. 9, 28. Moreover, because the fundamental purpose of the registered voter list is, unlike most public records, to influence the electoral process, access implicates interests at the core of the First Amendment. Finally, the content restrictions show that access to the list is restricted based on the viewpoint of non-registered Maryland residents and nonresidents, for there is no legitimate basis to restrict access in this way.

A. The “Electoral Process” Requirement Provision is a Speech Restriction on Fusaro’s Access to the Registered Voter List

The State and the court below conclude that Section 3-506 does not restrict the use of information in private hands. Appellees' Br. 17; JA 53–57. More precisely, the law “does not prohibit Fusaro from using information he already possesses *or could obtain to communicate with the public, including Maryland registered voters.*” JA 56 (emphasis added). This is incorrect: though denial of access from the Board of Elections may be premised on registered voter status, the provision penalizing “knowingly allow[ing] a list of registered voters, under the person’s control, to be used for any purpose not related to the electoral process” applies to anyone in possession of the list.¹ MD. CODE, ELECTION LAW § 3-506(c).

¹ The State argues that the information contained in the list is available from other sources, but by its own description the list is a unique document. Appellees' Br. 3–4; *see also* JA 34–35. This does not allow content restrictions on the list itself and, moreover, shows that it cannot pass strict scrutiny, since the information itself is not being regulated and is thus not protected.

The State argues that Fusaro concedes his letter is not related to the electoral process, and adopts this posture. *See* Appellees’ Br. 26–28; JA 18. Thus, the challenge to the electoral process provision implicates his access to the list itself: whomever he seeks the list from may be charged with a misdemeanor for providing him the list knowing he wants to use it for purposes not related to the electoral process.

The vagueness of the electoral process provision is most urgent here, and this concern is only heightened by the State’s brief, where it asserts that the electoral process provision prohibits “selling lists to third parties” outright. Appellees’ Br. 28. Fusaro could claim to third parties, rightfully, that he will not send his letter and thus comply with the electoral process restriction. JA 20. But that appears to be of no relevance, by the State’s own arguments: if selling copies of the list is a purpose not related to the electoral process, then giving it away is prohibited, too. Thus, the “electoral process” provision of Section 3-506 implicates not only Fusaro’s potential use of the list, but access to it in private hands.²

When considering the Supreme Court’s public records cases, Section 3-506 most closely aligns with *Sorrell v. IMS Health, Incorporated*, 564 U.S. 552 (2011). The case challenged a Vermont law that “prohibit[ed] pharmacies and other

² Seeking the list from third parties could also implicate Fusaro in charges for “willfully induc[ing] or procur[ing], or offer[ing] to induce or procure, another person to willfully and falsely take an oath or affirmation prescribed” by the Board of Elections. MD. CODE, ELECTION LAW § 16-501(b).

regulated entities from selling or disseminating prescriber-identifying information for marketing.” *Id.* at 562. With the State acknowledging that the registered voter list cannot be sold without violating the electoral process restriction, Fusaro is indeed wholly foreclosed from legally acquiring it. He has just as much standing to challenge this restriction as those who are already in possession of the list. *Burke v. City of Charleston*, 139 F.3d 401, 405 n.2 (4th Cir. 1998); *see also Ball v. Madigan*, 245 F. Supp. 3d 1004, 1009–10 (N.D. Ill. 2017) (recognizing a pre-enforcement challenge to a campaign contribution ban by candidates prior to seeking banned contributions). The content-based prohibition must be addressed and stricken regardless of Section 3-506’s registered voter requirement.

B. The Maryland Registered Voter List is Not Merely a Public Record, and the Registered Voter Requirement is a Speech Restriction

The registered voter restriction in Section 3-506 is also a speech restriction. The cursory dismissal of *Libertarian Party of Virginia v. Judd* by the State on the basis of the facts of the present case being “far afield” is a critique better directed toward its reliance on public records cases like *Houchins* and *United Reporting*. 718 F.3d 308 (2014); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Los Angeles Police Dep’t v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999); Appellees’ Br. 23. Fusaro is not seeking special access to a county jail or mundane arrest records, but a valuable political tool that exists solely to influence the electoral process. Because the

registered voters' information is otherwise available, it is highly suspect that the registered voter requirement is content-neutral. *Sorrell*, 564 U.S. at 566 (“A government bent on frustrating an impending demonstration might pass a law demanding two years’ notice before the issuance of parade permits.”). Nevertheless, because the list implicates electoral speech by its own terms, access restrictions must be subjected to strict scrutiny.

The law before this Court is prophylactic, imprecise, and unduly burdensome. *See Riley v. National Federation for the Blind*, 487 U.S. 781, 800 (1988). As admitted by Maryland, it “clearly prohibits uses like committing fraud or voter harassment, selling voter lists, or, as relevant here, using the list to communicate about unelected State officials.” Appellees’ Br. at 9. But Maryland enjoys no authority to prohibit, or make more difficult, communication about unelected state officials. Indeed, it is Maryland’s duty to draft laws that address valid interests while respecting the First Amendment. Broad, prophylactic laws like Section 3-506 are suspect under controlling First Amendment precedent. *See NAACP v. Button*, 371 U.S. 415, 438 (1963).

It is true that Fusaro might cobble together voter list information from a multitude of other government sources in an inconvenient and time-consuming manner. At the same time, Maryland registered voters would have access to the specially curated lists in controversy. But the fact that Maryland leaves open a speech avenue “more burdensome than the one it forecloses” does not solve the First

Amendment inquiry here. *Fed. Election Com'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986). Where government programs produce indirect speech burdens that they could not produce directly, they violate the First Amendment. *Id.* at 255–56. Because Maryland offers a curated voter list to but one special group to communicate most effectively about political issues, the First Amendment commands Section 3-506 be stricken.

The State rightfully notes that “petition circulation is ‘core political speech, because it involves interactive communications concerning political change.’” *Id.*, quoting *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999). Yet the State does not address a pressing consequence of its argument: the law could require the use of official petitions in circulation—a practice in some other states—deny access to nonresidents or persons not registered to vote, and entirely bypass the First Amendment. *See* Appellant’s Br. 11–13; *see, e.g.*, WYO. STAT. § 22-24-310(b), (c); KAN. STAT. 25-4309. Such an access restriction would either nullify *Judd*, or must pass strict scrutiny. The restriction could not withstand this test, for the practice would serve as nothing more than censorship at the “front end of the speech process[.]” *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012). This harm would not be remedied by allowing nonresidents or non-registered residents to acquire the list by associating with a Marylander who is registered to vote: this is not the least restrictive means tailored to a compelling governmental interest,

and would also raise unique First Amendment concerns. However, as previously discussed, the State has claimed the law prohibits third party distribution as well.

Upholding Section 3-506 could have more chilling effects in Maryland. For example, the Board of Elections rightfully acknowledges at the outset of a frequently asked questions (“FAQ”) document about signature gathering for petitions that a circulator need not be a Maryland registered voter or resident to participate in the process. *See Petitioner Signature Gathering FAQ*, STATE OF MARYLAND, Feb. 28 2012, available at <https://elections.maryland.gov/petitions/Petition%20Signature%20Gathering%20FAQ.pdf> (last visited Dec. 20, 2018). According to the State’s argument, this FAQ and all other information about the process published by the Board could be placed into restricted viewing or pulled offline entirely, with access reserved to Maryland registered voters on the basis that these documents are nothing more than “public records.” This would fail for the same reason as the previous scenario, because these are not just public records, but publications integral to political participation. This Court should not greenlight further experiments in political nativism. *See Thompson v. Hebdon*, 909 F.3d 1027, 1040–43 (9th Cir. 2018) (striking down an Alaska law that placed an aggregate limit on campaign contributions from nonresidents). Under the federal Constitution, Maryland is not obligated to have signature forms for ballot initiatives, to provide information about signature collection or, as in the present

case, to make a registered voter list available. But if it does, because such records serve no other purpose than to influence communications concerning political change, any restrictions on access must be subjected to strict scrutiny. Section 3-506 is not tailored to a compelling governmental interest.

There is little case law directly on point to address Fusaro's claim, but the Supreme Court anticipated this. "This Court has repeatedly made clear that there is no constitutional right to obtain *all* the information provided by FOIA laws." *McBurney v. Young*, 569 U.S. 221, 232 (2013) (emphasis added). The line must be drawn here, for Fusaro's speech is just as much a "communication[] concerning political change" as a ballot petition.

C. The Registered Voter Restriction is Content and Viewpoint-Based Discrimination

"Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 340 (2010). And controlling content is not a business the government has any authority over. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). Viewpoint discrimination need not be explicit—as it rarely is. *Id.* The danger lurking behind viewpoint discrimination is that government is attempting to remove specific speakers, ideas, or perspectives from broader public debate.

Under First Amendment jurisprudence, government discrimination among viewpoints is a "more blatant" form of content discrimination. *Rosenberger v.*

Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995). Where laws are found to be content or viewpoint based, strict scrutiny is the appropriate level of review. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

Maryland decided that certain native speakers' perspectives are the best perspectives to be heard by the electorate. It has no business making this determination and no power to enforce it. Section 3-506 is elusive in its reach: it purports to be a carefully crafted restriction to protect the integrity of elections. To do so, Maryland provides an effective precursor and part of speech—access to registered voters' addresses—to hometown heroes while making effective political engagement by outsiders impracticable. Maryland makes no attempt to limit Section 3-506 to protecting against fraud or illicit commercial motives. Instead, it attempts to enforce government hostility to outside voices.

Discrimination against disliked speakers invokes strict scrutiny. *Reed*, 135 S. Ct. at 2230. A law “limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based.” *Id.* Maryland's attempt to silence out-of-state speakers is similarly problematic. Maryland enjoys plenary power to prevent fraud in elections, but it cannot clothe a discriminatory ban as an anti-fraud provision. Nor can it simply declare this a case about “public records” and dismiss important First Amendment interests. Section 3-506 achieves one goal particularly well: shutting down outside voices.

Suppose in 2020 that Maryland voters approve a controversial ballot measure to tax coal and natural gas shipments from Virginia and West Virginia at 400 percent. At the same time, a “Healthy Marylanders” party emerges, dedicated to eradicating all uses of coal in the state. Delegate candidates from this party begin to gain prominence and Maryland sparks a national controversy. In response, Virginia coal workers wish to launch an advocacy campaign illustrating how their 12.8 million short tons of coal produced in 2017 benefit Maryland. To do so, they need access to the same voter list that certain Marylanders may obtain. They would like to share their message with individuals most connected to the political process—registered voters. But Maryland ensures that only insiders enjoy that benefit.

Under the preceding hypothetical, environmentalists and native Marylanders are allowed full, effective political engagement on the issue of coal. But Virginians, West Virginians, DC residents, and more are precluded from the same ease of access and interaction with registered Maryland voters. The message from Annapolis is clear: native voices are welcome, but dialogue from neighboring states is discouraged. Maryland’s hostility to anyone but Marylanders accessing its registered voter list and speaking about important political issues relevant to Maryland voters is not tolerated under the First Amendment. Whether as a viewpoint-based restriction or content-based restriction, Section 3-506 should be stricken.

II. The “Electoral Process” Provision of Section 3-506 is an Unconstitutional Content-Based Restriction

The State mischaracterizes Fusaro’s vagueness challenge as arising from the due process clause of the Fourteenth Amendment. Appellees’ Br. 24. He challenged the term “related to the electoral process” as unconstitutional under the First Amendment. JA 13–14; Appellant’s Br. 22–25. Vagueness review is more rigorous for content-based restrictions because “criminal sanctions may well cause speakers to remain silent rather than communicate even *arguably* unlawful words, ideas, and images.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872, (1997) (emphasis added). However, with the State’s acceptance that Fusaro’s speech about State Prosecutor Davitt is not related to the electoral process, a simple exercise of strict scrutiny is appropriate to prevent criminal charges against Fusaro for using the list to send his letter.³ See Appellees’ Br. 26–28.

Fusaro has already sworn not to use the list for any “purpose not related to the electoral process.” JA 20; MD. CODE, ELECTION LAW § 3-506(c). If he violated this oath, he could be convicted of a misdemeanor punishable by up to imprisonment 10 years. See MD. CODE, ELECTION LAW § 16-501(a), (c); MD. CODE, CRIM. LAW § 9-101(b). His letter would constitute “conduct [that] is prohibited,” as opposed to,

³ Though supporting this simpler analysis to strike down the statute’s “electoral process” content provision as applied to his letter, Fusaro does not waive his vagueness challenge, particularly in light of his previous discussions of how the vagueness of this content provision endangers citizens who might independently facilitate his access to the list. See Appellant’s Br. 18; *see supra* part I(A).

perhaps, using the list to send a letter or flier calling for the election or defeat of a candidate for public office. Appellees' Br. 27. This distinction makes the law a content-based restriction, similar to a sign ordinance addressed by the Supreme Court in *Reed v. Town of Gilbert*:

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's *Two Treatises of Government*, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech.

135 S. Ct. at 2227. Strict scrutiny is thus appropriate. *Id.*

This Court must consider whether this content provision is narrowly tailored to address compelling governmental interests. The most recent legitimate interests that the State identifies are the prevention of "fraud or identity theft [or] intimidating voters[.]" Appellees' Br. 28. These are already crimes in Maryland, and federal law also punishes voter intimidation. *See* MD. CODE, CRIM. LAW § 8-301; MD. CODE, ELECTION LAW § 16-201(a)(5), (6); 18 U.S.C. § 594. These statutes are each less restrictive means than banning speech, and adhere to the paradigm that censoring speech is not a prophylactic to preventing crimes. The "electoral process" restriction is facially unconstitutional, and should be stricken.

Conclusion

Residency in a state affords certain privileges and immunities that may be denied to nonresidents, but the rights afforded to all American citizens under First Amendment are not among them. *See Thompson*, 909 F.3d at 1040–43. The practical effect of upholding Section 3-506’s access restriction would be to provide Maryland and other states with a devious tool to enact the political nativism that this Court struck down in *Judd*. 718 F.3d at 317. Because of the nature of the registered voter list and its content limitation that restricts both use and access to the list, the registered voter requirement and “electoral process” provisions must be struck down as violations of the First Amendment.

Respectfully submitted,

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