

September 27, 2023

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VIA FIRST CLASS MAIL AND EMAIL

**Re: Notice of Claim**

To the State Board of Elections and Administrator DeMarinis:

We, in association with Justin Riemer of Riemer Law LLC, represent Katherine Strauch Sullivan and David Morsberger, both of whom are residents of, and registered voters in, the State of Maryland. This letter constitutes a notice of claim pursuant to 52 U.S.C. § 20510(b). By conditioning, through its recent amendments to 33.03.02.01B of the Code of Maryland Regulations (“COMAR”), access to and use of Maryland’s voter registration list only for purposes that the State Board of Elections (“SBE”) deems related to the “electoral process,” the SBE has wrongfully denied access to voter registration records that are subject to mandatory disclosure by the federal National Voter Registration Act, 52 U.S.C. § 20501, *et seq.* (“NVRA”). SBE has further wrongfully conditioned disclosure of the registration records on the requestor signing a sworn certification that he or she will not use the records for purposes that are both expressly and fairly contemplated by the NVRA. And, independent of the unlawful oath, SBE also exceeds its legal authority by subjecting requestors to criminal liability for using the list for purposes the NVRA permits.

In addition, the SBE's newly promulgated definition of "electoral process" in COMAR section 33.03.02.01B(1) is defective for the independent reasons that (1) the SBE lacks any authority, statutory or otherwise, to unilaterally redefine the statutory prerequisites governing access to the voter registration list and to expand the types of uses that constitute a criminal violation; (2) it unlawfully excludes activities and communications that are, in fact, "related to the electoral process," within the meaning of Md. Code, Election Law § 3-506(a)(1)(ii)(2); and (3) it unduly burdens expressive and associational activities protected by the First and Fourteenth Amendments.

## **I. Factual Background**

Maryland law permits any "Maryland registered voter" to obtain a copy of the state's registration rolls upon certifying under oath that the information will not be used for a "commercial solicitation" or for "any other purpose not related to the electoral process." Md. Code, Election Law § 3-506(a)(1)(ii). Maryland law also imposes misdemeanor criminal penalties for "a person who knowingly allows a list of registered voters...to be used for any purpose not related to the electoral process." *Id.* at (c). Although the General Assembly has neither defined the term "electoral process" nor licensed the SBE to do so, the SBE adopted on June 20, 2023, an amendment to the COMAR that denotes the term as follows:

- (a) "Electoral process" means the system established by the Maryland Constitution, Election Law Article, Annotated Code of Maryland, and regulations of the State Board, by which a person is elected to a public office or by which voters express a preference on a ballot question.
- (b) "Electoral process" includes, but is not limited to registering voters, forming political parties, qualifying as a candidate for public office, petitioning candidates or questions to the ballot, drafting and publishing ballot questions, conducting elections, casting ballots, canvassing ballots, recounting an election, and financing a campaign.
- (c) "Electoral process" does not include investigations. The use of a voter registration list to contact an individual voter as part of an investigation into an illegal or suspected illegal infraction or violation involving the voter's behavior in a specific election is not a "purpose... related to the electoral process" as those terms are used in Election Law Article, §3-506(a)(1)(ii)(2), Annotated Code of Maryland.

COMAR 33.03.02.01B(1).

Shortly thereafter, the SBE revised the affidavit form that persons seeking a copy of the voter registration list must execute. The new form includes an averment that the requestor will use the data only for "activities that meet the definition of 'electoral process' as defined in COMAR 33.03.02.01B(1)," and disavows uses "for investigations into an illegal or suspected illegal infractions or violations of voters' behaviors in a specific election."<sup>1</sup>

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<sup>1</sup> Two ancillary points merit mention. First, the phrase "violations of voters' behavior" makes neither grammatical nor logical sense. Second, the COMAR provision that governs the content of the requestor affidavit has never been amended to mandate this certification. *See* COMAR 33.03.02.04.

On September 21, 2023, Mr. Morsberger submitted to the SBE a request for the current statewide voter registration list, with the affidavit averments derived from the amended COMAR 33.03.02.01B(1) crossed-out. On September 27, 2023, the SBE rejected his request, stating that “the application must be signed without any redactions.” *See Exhibit A.* On September 25, 2023, Ms. Sullivan inquired of the Baltimore County Board of Elections how to obtain a statewide voter registration list, given that the county’s standard affidavit form had not been updated to reflect the amended COMAR 33.03.02.01B(1). On September 26, 2023, the Baltimore County Board of Elections informed Ms. Sullivan that she would be required to use the amended affidavit in order to obtain the list. *See Exhibit B.*

Ms. Sullivan and Mr. Morsberger have used, and intend in the future to use, the statewide voter registration list in connection with various non-commercial canvassing activities. These canvassing projects have occasionally entailed cross-checking certain data (*e.g.*, address information or voting history) in the registration list by contacting the voter or individuals residing at the address where the voter is registered and asking him or her to verify the information on file.

## II. Legal Claims

### A. COMAR 33.03.02.01B(1)’s Restrictions on List Distribution and Use Are Preempted by the NVRA

By withholding voter registration lists unless a requestor forfeits his right to use the information for any purpose that it not “related” to the SBE’s definition of the “electoral process,” COMAR 33.03.02.01B(1) contravenes, and is preempted by, the NVRA. Section 8(i) of the NVRA mandates that:

Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

52 U.S.C. § 20507(i)(1). Voter registrations—both individualized applications and aggregated lists—are among the records to which Section 8(i) guarantees a right of public access. *See Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 440-41 (D. Md. 2019) [*“Lamone I”*] (holding that Maryland’s voter registration list is subject to Section 8(i)); *see also Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (concluding that Section 8(i) “unmistakably encompasses completed voter registration applications”). Importantly, Section 8(i) supersedes contrary state laws that constrain citizens from using registration records for purposes that the NVRA protects. In purporting to prohibit citizens from using voter registration data for legitimate investigative and oversight purposes protected by the NVRA, COMAR 33.03.02.01B(1) obstructs controlling federal law, and hence is preempted.

To the extent the SBE’s justification for its edict is that Section 8(i) safeguards only *access* to—as distinguished from the *use* of—voter registration records, such a distinction is doctrinally unsound and logically unsustainable. Access encompasses the ability both to actually obtain records and to use them freely—at least for purposes that are protected by the NVRA. The mere physical availability of registration records, as an end in itself, is nugatory; rather, availability is innately and invariably a means to carry out some specific use. To posit that Section 8(i) protects only the ability to view or possess a registration record—but not to do

anything with it—reduces what Congress intended to be a robust mechanism for State accountability to a pointless abstraction. See *Greater Birmingham Ministries v. Merrill*, 2:22CV205-MHT, 2022 WL 5027180, at \*5 (M.D. Ala. Oct. 4, 2022) (noting that “the right to access voter records serves as a necessary foundation for a broad array of opportunities to engage and to make use of those records as the requesting party sees fit”); *Illinois Conservative Union v. Illinois*, 20 C 5542, 2021 WL 2206159, at \*7 (N.D. Ill. June 1, 2021) (declining to dismiss claim that state’s statutory prohibition on photocopying registration records “conflicts with Section 8(i) and frustrates the NVRA’s purpose”).

Recognizing the untenability of any construction of Section 8(i) that severs access from use, a federal court recently invalidated a Maine law that prohibited requestors of voter lists from using the information “for any purpose that is not directly related to evaluating the State’s compliance with its voter list maintenance obligations,” or making voter-identifying information “accessible by the general public on the Internet or through other means.” *Pub. Interest Found., Inc. v. Bellows*, No. 1:20-cv-00061-GZS, 2023 WL 2663827, at \*3 (D. Me. Mar. 28, 2023) (quoting 21-M.R.S.A. § 196-A(1)(J)). Emphasizing that Congress aspired in enacting the NVRA to “‘protect the integrity of the electoral process’ and ‘ensure that accurate and current voter registration rolls are maintained,’” *id.* at \*5, the court reasoned that Maine’s encumbrances on Section 8(i)’s right of access obstructed this legislative objective, *id.* at \*7. It accordingly concluded that Section 8(i) “does not allow a state to impose these restrictions” on a requestor’s use of voter lists. *Id.*

The same impermissible restriction on protected investigatory activities afflicts COMAR 33.03.02.01B(1). Even assuming (but not conceding) that the statutory caveat that voter lists may not be used for any “purpose not related to the electoral process,” Md. Code, Election Law § 3-506(a)(1)(ii)(2), is facially consistent with Section 8(i), the SBE’s ostensible implementation of it in COMAR 33.03.02.01B(1) (and the attendant revised affidavit form) is not. Congress did not camouflage the intentions undergirding the NVRA. Section 8(i) empowers citizens to fulfill the express purposes of the NVRA to enhance electoral integrity, particularly with respect to the accuracy of registration rolls, by obtaining those rolls and independently analyzing them to identify inaccuracies and other errors. In this vein, “investigation into an illegal or suspected illegal infraction or violation” of voting or registration laws prohibited by COMAR 33.03.02.01B(1)(c) is not a purpose that is inimical or extraneous to Section 8(i); to the contrary, it is precisely the activity that Congress desired to safeguard and promote.

Irrespective of whether the SBE deems our clients’ canvassing projects to be worthwhile, see generally *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209, 225 (D. Md. 2020) [*“Lamone IP”*] (noting that a requestor “need not demonstrate its need for [the requested] information in order to facilitate its effort to ensure that the voter rolls are properly maintained”), COMAR 33.03.02.01B(1)’s obstructive effect on their NVRA-protected investigatory activities is obvious. To use one example (which has a basis in our clients’ past canvassing experiences), assume that review of a voter list indicates that a given individual recently voted for the first time, despite having been on the rolls for many years. Upon being contacted, the individual states that she actually had not cast a ballot in that election. That representation (if accurate) may evidence flaws or vulnerabilities in the State’s registration or recordkeeping practices.

In short, Ms. Sullivan and Mr. Morsberger have sustained two variations of the same legal wrong. As an initial matter, their access to the statewide voter list has been impeded in a literal sense. And even if Mr. Morsberger or Ms. Sullivan ultimately is able to physically obtain a copy of the list, their right of access remains functionally extinguished because the SBE has forbidden them—under the threat of criminal penalties—from engaging in exactly the activities Congress intended to protect.

Contact with individual voters is intrinsically intertwined with broader investigations of the State's list maintenance practices and policies. By thwarting and chilling wide swaths of legitimate and good faith inquiries, COMAR 33.03.02.01B(1) vitiates a central pillar of the NVRA. It accordingly is preempted and invalid.

For these reasons, we request that, no later than 90 days after receipt of this letter, you repeal COMAR 33.03.02.01B(1)'s purported definition of "electoral process," and remove from the requestor affidavit form the new averments derived from that provision. If you fail to do so, our clients intend to seek judicial remedies to vindicate their rights under the NVRA.

If or to the extent a court determines that COMAR 33.03.02.01B(1) is consistent with or required by Election Law § 3-506(a)(1)(ii), which it is not as explained *infra*, our clients intend to pursue a claim that the statutory provision likewise is preempted by the NVRA.

### **B. The SBE Has No Authority To Adopt COMAR 33.03.02.01B(1)**

COMAR 33.03.02.01B(1) is unenforceable for the independent reason that the SBE has no authority to impose its own substantive limitations or preconditions on the obtainment of voter lists. The *only* statutory conditions precedent to the procurement of a voter lists are the submission of (1) "a written application" and (2) a sworn statement promising not to use voter data for "commercial solicitation" or "any other purpose not related to the electoral process." Md. Code, Election Law § 3-506(a)(1)(ii). The General Assembly has permitted the SBE to regulate only the procedural and logistical attributes of the list preparation process, such as the deadline for fulfilling requests, the format of a list, and the assessment of a fee. *Id.* § 3-506(a)(2). Nothing in this short catalogue of discrete authorizations licenses the SBE to unilaterally promulgate and enforce its own freewheeling understanding of key statutory terms, especially when it broadens the scope of prohibited activities that could subject our clients and others to criminal prosecution.

### **C. The Amended COMAR 33.03.02.01B(1) Conflicts with Election Law § 3-506(a)(1)(ii)**

Even assuming *arguendo* that the SBE may independently define the term "electoral process," the formulation codified in the amended COMAR 33.03.02.01B(1) is incompatible with the underlying statute, Election Law § 3-506(a)(1)(ii). See generally *Dept. of Human Res., Baltimore City Dept. of Social Servs. v. Hayward*, 45 A.3d 224, 236 (Md. 2012) (emphasizing that agency regulations "must be consistent, and not in conflict, with the statute the regulations are intended to implement. We have consistently had that the statute must control.").

The General Assembly has expressly permitted any person who obtains a voter list to use the information for any non-commercial purpose "related to the electoral process." Md. Code, Election Law § 3-506(a)(1)(ii)(2). The amended COMAR 33.03.02.01B, however, purports to prohibit various actions and activities that are, in fact, very much "related to the electoral process." The "electoral process" denotes "1. The method by which a person is elected to public office in a democratic society. 2. The taking and counting of votes." *Fusaro v. Howard*, 19 F.4th 357, 372 (4th Cir. 2021) (quoting BLACK'S LAW DICTIONARY (11th ed. 2019)). Investigations into potential errors or fraud in particular voter registrations or ballot submissions are—invariably and definitionally—related to both the "method" of electing public officials and "the taking and counting of votes." Accordingly, the amended COMAR 33.03.02.01B is facially inconsistent with the controlling statute. And even assuming that the amended COMAR 33.03.02.01B is found to comport with Election Law § 3-506(a)(1)(ii)(2), then the statutory provision would itself be impliedly preempted by Section 8(i) of the NVRA. See *supra* Section II.A.

#### **D. The Amended COMAR 33.03.02.01B Unduly Burdens First Amendment Rights**

Finally, the SBE’s inventive and artificially restrictive definition of “electoral process” unconstitutionally infringes expressive and associational rights protected by the First and Fourteenth Amendments to the U.S. Constitution. To be sure, the Fourth Circuit has held, in a different context, that Election Law § 3-506(a)(1)(ii)’s “electoral process” limitation did not, facially or as applied to one set of particular plaintiffs, violate the First Amendment. *See Fusaro*, 19 F.4th at 368. Those conclusions, however, were predicated in part on the court’s broad conception of “electoral process,” which comported with the term’s “common sense” dictionary definition. *See id.* at 370, 372. By contrast, the SBE’s highly constrictive conception of the same term inflicts a correspondingly more substantial burden on our clients’ constitutionally protected canvassing activities. In addition, we believe discovery may reveal that the amended COMAR 33.03.02.01B was, even if facially neutral, precipitated by a targeting of certain groups based on their actual or perceived partisan or ideological orientation. *See generally Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (strict scrutiny applies to laws that, “though facially content neutral . . . were adopted by the government ‘because of disagreement with the message [the speech] conveys’” (citation omitted)). Our clients accordingly reserve all rights to pursue claims arising out of the First and Fourteenth Amendments, or any other applicable provision of the United States or Maryland constitutions.

Thank you for your attention to this important matter.

Respectfully,

/s/ Kory Langhofer  
Kory Langhofer

/s/ Thomas Basile  
Thomas Basile

## **Exhibit A**

**From:** Erin Dennis -SBE-[REDACTED] >  
**Date:** September 27, 2023 at 09:21:55 EDT  
**To:** David Morsberger [REDACTED] >  
**Cc:** Joanna Benjamin -SBE-[REDACTED] >, Brett Paradise -SBE-[REDACTED] >  
**Subject:** Request for Voter Registration Data

Hi, David.

In order to fulfill the request, the application must be signed without any redactions. Please complete the attached copy and resend. Please note, that the substance of the statement and oath on the application have not changed, but changes have been made to the form and language of the oath.

Thanks!

*Erin W. Dennis*  
Maryland State Board of Elections  
151 West Street, Suite 200  
P.O. Box 6486  
Annapolis, Maryland 21401  
[REDACTED]  
(F) 410.974.5415  
<http://www.elections.maryland.gov/>



## **Exhibit B**

----- Forwarded message -----

From: Ruie LaVoie <[REDACTED]>  
Date: Tue, Sep 26, 2023 at 4:00 PM  
Subject: RE: New Data  
To: Kate Strauch Sullivan <[REDACTED]>

Hi Kate,

I can't agree to the use of the previous form as the requirements changed with new state regulations. If you came to the office with the previous form, we would have had to ask you to sign the new form before processing the request. There was a delay in the website update however, the correct form was and is available in our office. I understand your position and will continue to follow-up in relaying to the State Board. Please understand that I must follow State Regulations.

All the best,  
Ruie

From: Kate Strauch Sullivan <[REDACTED]>  
Sent: Tuesday, September 26, 2023 1:34 PM  
To: Ruie LaVoie <[REDACTED]>  
Subject: Re: New Data

**CAUTION:** This message from [REDACTED] originated from a non Batmore County Government or non BCPL email system. Hover over any links before clicking and use caution opening attachments.

Thank you Ruie.

Would it be ok if I just signed the old form? I'm a bit worried about the new oath language from the State.

Could we just process with the old form? I can drop it off tomorrow when I come for tomorrow's meeting.

Please advise.

Kate

"The truth is like a lion; you don't have to defend it. Set it free; it will defend itself."

On Tue, Sep 26, 2023 at 1:21 PM Ruie LaVoie <[REDACTED]> wrote:  
Hi Kate,

I hope you are doing well. The website is updated with the new form. I so appreciate you bringing that to my attention. I also attached a copy for your convenience.

Also attached is the flier we distributed at the Central Committee meeting. There will be an updated version once the early voting locations are established for 2024.

Please let me know if you need anything else or if I can be of assistance. Have a wonderful afternoon!

All the best,  
Ruie

**From:** Kate Strauch Sullivan <[REDACTED]>  
**Sent:** Monday, September 25, 2023 5:42 PM  
**To:** Ruie LaVoie [REDACTED]>  
**Subject:** New Data

**CAUTION:** This message from [REDACTED] originated from a non Baltimore County Government or non BCPL email system. Hover over any links before clicking and use caution opening attachments.

Good Evening Ruie,  
I'm preparing to purchase a new round of data and I noticed the BC BOE paperwork does not match that of the State BOE. The oath at the bottom of their paperwork is not the same as the oath at the bottom of Baltimore County BOE paperwork. I just want to be sure I fill out the proper paperwork and fully understand what I'm signing.

Also, do you have the Election Flyer you handed out at our Central Committee meeting? I think it's a great piece to hand out in preparation for the upcoming election and I'd love a digital copy of it.

Thanks and see you Wednesday.

Kate

"The truth is like a lion; you don't have to defend it. Set it free; it will defend itself."

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