No. 11-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PROJECT VOTE/VOTING FOR AMERICA, INC.,

Plaintiff-Appellee

v.

ELISA LONG, in her Official Capacity as General Registrar of Norfolk, Virginia; DONALD PALMER, in his Official Capacity as Secretary, State Board of Elections,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

Congress enacted the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*, to increase the number of eligible citizens who register to vote in federal elections, enhance the participation of eligible citizens as voters in federal elections, protect the integrity of the electoral process, and ensure that accurate and current voter registration rolls are maintained. See 42 U.S.C.

1973gg(b). The Attorney General is charged with enforcement of the NVRA. See 42 U.S.C. 1973gg-9(a).

This case presents an issue of statutory interpretation – namely, whether Section 8(i) of the NVRA, 42 U.S.C. 1973gg-6(i), requires States to make voter registration applications publicly available and thus preempts state law prohibiting the release of such information. A holding that the NVRA does not require States to disclose voter registration applications would hinder election oversight by making it more difficult to ascertain whether States are fulfilling their obligations under the NVRA. In view of the limited enforcement resources of the United States, public disclosure of voter registration applications furthers the NVRA's goal of increased eligible voter registration and participation.

The United States has a significant interest in how this Court interprets the NVRA and files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

ISSUE PRESENTED

Whether Virginia's prohibition on the public disclosure of voter registration applications violates Section 8(i) of the NVRA, 42 U.S.C. 1973gg-6(i).

STATEMENT

1. The NVRA was enacted pursuant to Congress's Elections Clause authority and, by its terms, governs only federal elections. See 42 U.S.C. 1973gg(b); U.S. Const. Art. I, § 4, Cl. 1. The Act flowed from Congressional

findings that the right to vote is a fundamental right, the exercise of which federal, state, and local governments have a duty to promote, and that discriminatory and unfair registration laws and procedures can have a damaging effect on federal voter participation and disproportionately harm voter participation by various groups, including racial minorities. See 42 U.S.C. 1973gg(a). The purposes of the NVRA are to establish procedures that increase federal voter registration and enhance voter participation by eligible citizens, to protect the integrity of the electoral process, and to ensure States maintain accurate and current voter registration lists. See 42 U.S.C. 1973gg(b).

Under the NVRA, States must provide three methods of voter registration: (1) registration as part of a driver's license application; (2) mail registration using the form prescribed initially by the Federal Election Commission (and now by the Election Assistance Commission); and (3) registration through state-designated voter registration agencies. See 42 U.S.C. 1973gg-2(a); *Young* v. *Fordice*, 520 U.S. 273, 275 (1997). These voter registration methods must be provided "notwithstanding any other Federal or State law, [and] in addition to any other method of voter registration provided for under State law." 42 U.S.C. 1973gg-2(a). For all three types of registration, States must ensure that "any eligible applicant is registered to vote," 42 U.S.C. 1973gg-6(a)(1), and must "send notice to

each applicant of the disposition of [his or her voter registration] application," 42 U.S.C. 1973gg-6(a)(2).

In addition to registering eligible voters and notifying applicants of the disposition of their applications, the NVRA requires States to conduct a general program to promote the accuracy and currency of their official voter registration lists while simultaneously protecting against improper voter removal. See 42 U.S.C. 1973gg-6(a)(3)-(4). Under the NVRA, a voter may not be removed from a State's official list of eligible voters unless the voter requests his or her removal, is ineligible to vote by reason of criminal conviction or mental incapacity as provided by state law, dies, or has become ineligible due to a change of address confirmed in accordance with the NVRA. See 42 U.S.C. 1973gg-6(a)(3)-(4); 42 U.S.C. 1973gg-6(c)-(f). A State may not remove an individual from its official lists simply because that person has failed to vote. See 42 U.S.C. 1973gg-6(b)(2).

The NVRA also requires public disclosure of voter registration activities. The Act states as follows:

> (1) 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.
>
> (2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in

> subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

42 U.S.C. 1973gg-6(i) (Public Disclosure Provision) (emphasis added). The notices referred to in paragraph (2) concern a State's ability to remove registered voters from its official lists on the basis of a suspected change in address. See 42 U.S.C. 1973gg-6(d)(2).

2. Section 24.2-444 of the Virginia Code governs the State's disclosure of voter registration records. The statute provides as follows:

> A. Registration records shall be kept and preserved by the general registrar * * *. The State Board shall provide to each general registrar * * * lists of registered voters for inspection and lists of persons registering pursuant to [absentee voter registration] and [overseas voter registration]. The lists shall contain the name, address, year of birth, gender and all election districts applicable to each registered voter. The lists shall be opened to public inspection at the office of the general registrar when the office is open for business. * * * The State Board shall provide to each general registrar lists of persons denied registration for public inspection * * *.
>
> B. The general registrars * * * shall make available for public inspection and copying * * * all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of the registration records pursuant to §§ 24.2-427 [registration cancellation by voter or for persons known to be deceased or disqualified to vote], 24.2-428 [suspected change of address and inactive status] and 24.2-428.1 [other procedures for assigning inactive status], including lists of the names and addresses of all persons to whom notices are sent, and information concerning whether each person has responded to the notice as of the date that inspection of the records is made.

> C. No list provided by the State Board * * * nor any record made available for public inspection * * * shall contain any of the following information: (i) an individual's social security number, or any part thereof; (ii) the residence address of an individual who has furnished a post office box in lieu of his residence address as authorized by [state law]; (iii) the declination by an individual to register to vote and related records; (iv) the identity of a voter registration agency through which a particular voter is registered; or (v) the day and month of birth of an individual. *No voter registration records other than the lists provided by the State Board under subsection A and the records made available under subsection B shall be open to public inspection*.

Va. Code Ann. § 24.2-444 (West 2011) (emphasis added). Accordingly, state law prohibits the public inspection of voter registration applications, including rejected applications and related records.[1]

3. In May 2009, plaintiff Project Vote/Voting for America, Inc. (Project Vote) sought access from the Norfolk General Registrar to the "voter registration applications of any individual who timely submitted an application [in 2008] who was not registered to vote in time for the November 4, 2008 general election, and also other documents, such as documents identifying the reasons the applications

[1] Virginia is the only State in the jurisdiction of the Fourth Circuit that bars access to voter registration applications. Maryland, North Carolina, South Carolina, and West Virginia each make these applications available for public inspection, albeit subject to certain privacy restrictions. See, *e.g.*, Md. Code Ann., Elec. Law § 3-505 (West 2011) (voter registration records); Md. Code Ann., State Gov't § 10-611 *et seq.* (West 2011) (public records); N.C. Gen. Stat. Ann. § 132-6 (West 2010) (public records); N.C. Gen. Stat. Ann. § 163-82.10 (West 2010) (voter registration records); S.C. Code Ann. § 30-4-30 (2010) (public records); S.C. Code Ann. § 7-5-410 (2010) (voter registration records); W. Va. Code Ann. § 3-2-30 (West 2011) (voter registration records).

were rejected." J.A. 18-19.[2] Project Vote requested the records under the Public Disclosure Provision, based on its belief that the Norfolk General Registrar had incorrectly rejected the applications of students at Norfolk State University (NSU), a historically African-American public university in Norfolk, Virginia. J.A. 18-19.

After its request was denied under state law, Project Vote provided the requisite notice of violation to the State in accordance with Section 11(b) of the NVRA, 42 U.S.C. 1973gg-9(b), and filed the complaint in this case. J.A. 12-23. Project Vote sought a declaration that the State was in violation of the NVRA and that Section 24.2-444 was preempted. J.A. 22. It also sought an injunction prohibiting the State from denying it access to the requested records. J.A. 13, 22.

4. On March 26, 2010, the State filed a motion to dismiss. J.A. 26-28. In addition to arguing that Project Vote lacked standing, the State asserted two merits-based arguments: (1) the Public Disclosure Provision relates only to voter removal programs; and (2) Virginia law does not conflict with, and is not preempted by, the NVRA because (a) the Public Disclosure Provision does not grant access to voter registration applications and (b) Virginia allows the public to inspect records concerning the maintenance of voter registration lists. J.A. 34-48.

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[2] "J.A. __" refers to the page numbers within the Joint Appendix filed with this Court on September 12, 2011.

On October 29, 2010, the district court denied the State's motion. See *Project Vote/Voting for Am., Inc.* v. *Long*, 752 F. Supp. 2d 697 (E.D. Va. 2010). After finding standing, the court considered two questions: (1) "what constitutes a program or activity conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters"; and (2) "whether * * * voter registration applications[ ] concern the implementation of such a program or activity." *Id.* at 705.

The court first looked to the statute's plain meaning and, relying on dictionary definitions, determined that "a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state." *Project Vote*, 752 F. Supp. 2d at 706. It next stated that "[t]he process of evaluating voter registration applications * * * is a central part of 'ensuring the accuracy and currency of the official lists of eligible voters.'" *Ibid.* (quoting 42 U.S.C. 1973gg-6(i)(1)). The court found that where a State incorrectly denies an application, its official lists are "inaccurate and obsolete." *Ibid.*

The court further found that the exceptions to the Public Disclosure Provision, *i.e.*, preventing disclosure of records related to a declination to register to vote or the identity of a voter registration agency through which any particular voter is registered, supported its conclusion that the provision applied to voter

registration procedures. See *Project Vote*, 752 F. Supp. 2d at 706-707. The court noted that if it interpreted the provision to apply only to voter removal programs, the statutory exceptions would be rendered superfluous. See *id.* at 707.

Finally, the court considered the meaning of the phrase "records concerning the implementation of." Again relying on dictionary definitions, the court concluded that the Public Disclosure Provision governs "records which relate to carrying out" registration procedures and removal programs. See *Project Vote*, 752 F. Supp. 2d at 707. It explained that voter registration applications are "the means by which an individual provides the information necessary for the Commonwealth to determine his eligibility to vote * * * [and], perhaps more than other records, are relevant to carrying out voter registration procedures." *Ibid.* It also noted that Congress used broad language in requiring disclosure of "all records" not specifically excepted. *Id.* at 708. The court rejected the State's argument that Section 1973gg-6(i)(2) limited the records subject to disclosure. See *id.* at 708 n.17.

The court then determined that the specific context in which the Public Disclosure Provision appeared – and the broader context of the statute as a whole – supported its conclusion that the State was required to make voter registration applications available to the public. See *Project Vote*, 752 F. Supp. 2d at 708-709. It also examined the NVRA's purposes and concluded that its interpretation of the

Public Disclosure Provision was congruent with increasing voter registration, enhancing voter participation, protecting the integrity of the electoral process, and ensuring the accuracy and currency of voter registration rolls. See *id.* at 710. The court did find, however, that disclosing a registrant's social security number (SSN) would undermine federal voter registration and participation. See *id.* at 711.

5. On January 31, 2011, Project Vote moved for summary judgment. J.A. 292-294. In response, the State renewed the arguments it made in its motion to dismiss and further submitted that disclosing original applications was inconsistent with the State's obligations under the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, and the Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, 123 Stat. 2195, which amended the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff *et seq.* J.A. 309-313.

On July 20, 2011, the district court granted summary judgment to Project Vote. See *Project Vote/Voting for Am., Inc.* v. *Long*, No. 10cv75, 2011 WL 2963032 (E.D. Va. July 20, 2011). The court explained that it did not have to harmonize the NVRA with the MOVE Act or HAVA, neither of which concerned the security or privacy of voter registration applications. See *id.* at *3. The court then incorporated the reasoning set forth in its prior decision and held that insofar as state law prohibits the disclosure of redacted voter registration applications, it is preempted by the NVRA. See *id.* at *4. The State timely appealed. J.A. 440-442.

SUMMARY OF ARGUMENT

The district court correctly interpreted the NVRA to require public access to voter registration applications. The plain meaning of the Public Disclosure Provision, the specific context in which it appears in the NVRA, and the use of the terms "programs" and "activities" elsewhere in the statute all support the court's conclusion. Public disclosure of voter registration applications also promotes the NVRA's express purposes, *i.e.*, increased voter registration and participation by eligible voters, electoral integrity, and the maintenance of current and accurate voter registration lists.

Privacy concerns do not counsel against public inspection of voter registration applications. Nothing in the NVRA requires an applicant to disclose his or her social security number in order to register to vote. Similarly, the federal mail registration form does not request specific information regarding an applicant's record of felony convictions or mental incapacity. Where a State requires an applicant's social security number or other sensitive information for voter registration purposes, that information may be redacted prior to disclosure of any records requested under federal law. Finally, the security and privacy protections contained in the MOVE Act and HAVA neither govern nor conflict with the public disclosure of voter registration applications under the NVRA.

ARGUMENT

SECTION 24.2-444 OF THE VIRGINIA CODE VIOLATES THE NVRA

A. Virginia's Prohibition On The Public Disclosure Of Voter Registration Applications Conflicts With The Language, Structure, And Purpose Of The NVRA

1. Principles Of Statutory Interpretation

In resolving issues of statutory interpretation, courts look to the statutory language and, if it is plain, apply it according to its terms. See *Crespo* v. *Holder*, 631 F.3d 130, 133 (4th Cir. 2011). To determine whether a statute's language is plain, a court considers "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *National Coal. for Students with Disabilities Educ. & Legal Def. Fund* v. *Allen*, 152 F.3d 283, 289 (4th Cir. 1998) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Under a plain meaning analysis, a court gives statutory terms their "ordinary, contemporary, common meaning." *Crespo*, 631 F.3d at 133 (internal quotation marks and citation omitted). A court must consider all the words used and not review phrases in isolation. See *United States* v. *Ide*, 624 F.3d 666, 668 (4th Cir. 2010), cert. denied, 131 S. Ct. 2962 (2011). "The context in which a term is used often determines how broadly or narrowly a term is to be defined." *National Coal. for Students with Disabilities*, 152 F.3d at 290. When Congress uses broad

language, the court may not disregard it. See *ibid.* If the statutory text lends itself to more than one reasonable interpretation, the court must find "that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and the general purposes that Congress manifested." *Wheeler* v. *Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 284 (4th Cir. 2011), pet. for cert. pending No. 11-107 (filed July 21, 2011).

2. The District Court Properly Interpreted The Public Disclosure Provision

The language, structure, and purpose of the NVRA support the conclusion that the Public Disclosure Provision applies to voter registration applications.

a. In analyzing the Public Disclosure Provision, the district court correctly focused its inquiry on the meaning of the phrase "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." The court looked to the dictionary definitions of the terms used and concluded that "a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state." *Project Vote/Voting for Am., Inc.* v. *Long*, 752 F. Supp. 2d 697, 706 (E.D. Va. 2010).

Evaluating voter registration applications and registering eligible applicants to vote are important means through which States ensure accurate and current voter

registration lists. While voter removal programs allow States to maintain updated lists and protect against voter fraud, those programs do not alone assure accurate and current voter registration lists. Rather, official lists are accurate and current only insofar as States properly register eligible voters and timely add them to their lists. Thus, the district court correctly concluded that voter registration activities as well as voter removal programs are important to ensuring accurate and current eligible voter lists.

Having determined that voter registration and voter removal both qualify as "programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," the district court then analyzed whether voter registration applications are "records concerning the implementation of" voter registration activities. See *Project Vote*, 752 F. Supp. 2d at 706-707 (citation omitted). The court properly looked to the ordinary, common meaning of "records concerning the implementation of," and concluded that it pertained to "records which relate to carrying out" the covered programs and activities. *Id.* at 707.

Voter registration applications are the primary means through which a State determines an individual's eligibility to vote. Moreover, because a State can neither register an individual to vote nor conduct any voter removal programs with respect to that individual without receipt and processing of an original voter registration application, all voter administration procedures ultimately depend on

the initial evaluation of, and the accurate and timely processing of, voter registration applications. Voter registration applications thus relate to the carrying out of voter registration activities; they are subject to disclosure under the NVRA because they fall within the ordinary, common meaning of "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters."

That States must make voter registration applications publicly available is all the more apparent given the statutory requirement that States disclose "all" records not specifically excepted. See 42 U.S.C. 1973gg-6(i)(1). As this Court stated in *National Coalition for Students with Disabilities*, "the use of the word 'all' [as a modifier] * * * suggests an expansive meaning because 'all' is a term of great breadth." 152 F.3d at 290. Moreover, as the district court correctly found, both statutory exceptions to disclosure, *i.e.*, declinations to register to vote and the identity of the voter registration agency through which a particular voter is registered, relate only to voter registration activities. If a court were to interpret the Public Disclosure Provision to apply exclusively to voter removal programs, the statutory exceptions would be rendered superfluous. See *Walters* v. *Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *Crespo*, 631 F.3d at 135.

In addition, under the maxim of *expressio unius est exclusio alterius*, the inclusion of specific exceptions to the operation of a statute is an indication that the statute should apply in all instances of the sort not specifically excepted. As the Supreme Court explained in *Barnhart* v. *Peabody Coal Co.*, the maxim applies "when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." 537 U.S. 149, 168 (2003) (internal quotation marks omitted).

Congress likely would have included applications to register to vote alongside declinations to register to vote and the identity of an applicant's voter registration agency had it wanted to exempt voter registration applications from disclosure. Thus, a court can infer that the Public Disclosure Provision applies to voter registration applications. This conclusion is supported by NVRA provisions stating that all three types of voter registration methods must be accompanied by written statements that a declination to register to vote and the office through which an application is submitted will remain confidential. See 42 U.S.C. 1973gg-3(c)(2)(D)(ii)-(iii); 42 U.S.C. 1973gg-5(a)(7); 42 U.S.C. 1973gg-7(b)(4)(ii)-(iii). These provisions do not evince any Congressional intent to withhold voter registration applications from public inspection.

b. The broader statutory context of the Public Disclosure Provision also supports public inspection of voter registration applications. It is well-settled that

"identical words used in different parts of the same [statute] are intended to have the same meaning." *Healthkeepers, Inc.* v. *Richmond Ambulance Auth.*, 642 F.3d 466, 472 (4th Cir. 2011) (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). A court can infer that the term "programs and activities" in the Public Disclosure Provision applies to both voter registration and voter removal based on how "programs" or "activities" is used elsewhere in the NVRA.

As an initial matter, Section 1973gg-6(i)'s title, "Public disclosure of voter registration activities," implies that the provision concerns more than voter removal programs. Under the NVRA, "registration" encompasses four methods of submitting a voter registration application: simultaneous to a driver's license application; by mail; through a state-designated voter registration agency; and pursuant to state law. See 42 U.S.C. 1973gg-2(a). Mandatory state activities attendant to federal voter registration include: ensuring that eligible applicants are registered to vote in a timely fashion; notifying applicants of the disposition of their applications; providing that a registrant's name cannot be removed from the official list of eligible voters except under certain circumstances; conducting a general program to remove the names of ineligible voters; informing applicants of voter eligibility requirements and penalties for false registration; and ensuring that the identity of an applicant's voter registration agency, if any, remains confidential. See 42 U.S.C. 1973gg-6(a)(1)-(6). Given the NVRA's expansive use of

"registration" as well as the numerous obligations imposed on States with respect to the administration of voter registration under Section 1973gg-6(a), there is no basis for reading "[p]ublic disclosure of voter registration activities" under Section 1973gg-6(i) to cover only voter removal records.

Moreover, Section 1973gg-6(b), entitled "Confirmation of voter registration," provides that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll * * * shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act" and shall not result in the removal of a registrant's name by reason of that person's failure to vote. 42 U.S.C. 1973gg-6(b). Given the title of Section 1973gg-6(b) and its placement directly after the list of mandatory activities attendant to federal voter registration, Section 1973gg-6(b) can be understood only as "program[s] or activit[ies]" undertaken to ensure that a registrant properly is included on voter registration rolls both upon initial registration (*e.g.*, a procedure that detects false registration) and in subsequent election cycles (*e.g.*, a voter removal program). Thus, just as in the Public Disclosure Provision, Congress used the term "program or activity" in Section 1973gg-6(b) to cover both the inclusion of an eligible voter on official lists and the use of removal programs to ensure the continued eligibility of persons on those lists.

c. Disclosing voter registration applications also advances the statutory purposes of increasing eligible voter registration, enhancing voter participation, protecting electoral integrity, and maintaining current and accurate voter registration rolls.

While the State argues it suffices under the NVRA to allow public inspection of voter registration lists and official records concerning voter removal programs, the accuracy and currency of official lists can only be determined by comparing the information set forth in those lists with the information submitted during the registration process. Public inspection of original applications ensures that States are properly evaluating applications, rejecting applicants only for legitimate reasons, processing eligible applications in a timely fashion, and notifying applicants of the disposition of their applications. See, *e.g.*, 42 U.S.C. 1973gg-3(e); 42 U.S.C. 1973gg-5(d); 42 U.S.C. 1973gg-6(a)(1)-(2). Broad inspection of original applications also helps ensure that a State's registration activities and removal programs are uniform, nondiscriminatory, and in compliance with the Voting Rights Act. See 42 U.S.C. 1973gg-6(b)(1) (protecting against selective confirmation and purging procedures). Public inspection also ensures that election officials are processing updated information in a timely manner, thereby avoiding later confusion at the polls. See 42 U.S.C. 1973gg-3(a)(2) (updating prior registration information).

Importantly, public disclosure of voter registration applications helps uncover systemic problems in any given jurisdiction. Broad inspection of voter registration records allows the public to identify the basis for numerous rejected applications and remedy registration issues in advance of future elections.[3] This is especially important for voter registration drives, which Congress envisioned under the NVRA. See 42 U.S.C. 1973gg-4(b). Similarly, public inspection of original records may help bring systemic problems to the attention of the Election Assistance Commission, which assesses the impact of the NVRA and formulates recommendations for improvements in procedures, forms, and other matters affected by the Act. See 42 U.S.C. 1973gg-7(a)(3). Public disclosure of voter registration applications thus advances one of the central purposes of the NVRA,

[3] The importance of understanding the basis for an application's denial is readily apparent in this case. In its brief, the State asserts that the applications at issue were rejected because NSU falls within two voting precincts; the State thus needed students' dormitory addresses, not the general school address, for voter administration purposes. See Appellant's Br. 9-10. The State further explains that many of the notices it sent to rejected applicants were returned as undeliverable. See Appellant's Br. 10. On election day, the State provided provisional ballots to those students whose names did not appear on the poll books. See Appellant's Br. 10. The Electoral Board later voted to count all ballots cast by otherwise qualified students who provided their residence address on their provisional ballot forms, if the address was located within the precinct where the provisional ballot was cast. See Appellant's Br. 10. Thus, otherwise qualified voters who cast a provisional ballot at the wrong precinct did not have their votes counted. If the public and private organizations were aware of this address issue through their inspection of rejected applications and related records, they could easily rectify this recurring basis for denial, thereby increasing eligible voter registration and participation.

i.e., making the registration process accessible to as many eligible voters as possible.

3. The State's Counterarguments Should Be Rejected

As explained above, the language, structure, and purpose of the NVRA support the conclusion that the Public Disclosure Provision covers voter registration applications.

The State argues that because information contained in rejected applications has never appeared on official voter registration lists, those records do not concern list maintenance. See Appellant's Br. 12-13. The Public Disclosure Provision, however, covers not only compiled registration lists, but all records concerning "programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." The maintenance of current and accurate eligible voter lists necessarily encompasses the State's evaluation of voter registration applications and its compilation of updated registration lists. Rejecting ineligible applicants and requesting further information from applicants who submit incomplete applications are activities that ensure the accuracy of voter registration lists. Rejected applications relate to these activities. Thus, the State's argument fails.

The State also argues that paragraph (2) of the Public Disclosure Provision limits the records a State must make available for public inspection. See

Appellant's Br. 15-16. The NVRA mandates that a State's publicly available records include "lists of the names and addresses of all persons to whom notices described in [Section 1973gg-6(d)(2)] are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made." 42 U.S.C. 1973gg-6(i)(2).

The State misinterprets the Public Disclosure Provision in arguing that paragraph (2) limits disclosure to only those documents concerning notice and confirmation of a suspected change in address. Rather, paragraph (2) merely allows for ease of oversight on an issue that was particularly troublesome to Congress – *i.e.*, the improper removal of registrants from official lists – by mandating that States create a list they might not otherwise generate. See S. Rep. No. 6, 103d Cong., 1st Sess. 18 (1993). The statutory language that records "shall include" the enumerated lists in paragraph (2) is not exhaustive; it merely requires States to maintain these lists, among other records, for a period of at least two years. See *National Fed'n of the Blind* v. *FTC*, 420 F.3d 331, 338 (4th Cir. 2005) (explaining that "shall include" did not act as words of limitation), cert. denied, 547 U.S. 1128 (2006).[4]

[4] The State's disclosure provision, which parrots the Public Disclosure Provision, further undermines the State's argument. In addition to disclosing the lists required under paragraph (2), the State discloses records created pursuant to Virginia Code §§ 24.2-427, 24.2-428, and 24.2-428.1. See Va. Code Ann. § 24.2-

(continued…)

The State likewise argues that the district court erred in concluding that the NVRA's specific exceptions to public disclosure apply to voter registration generally and not merely to voter registration agencies. See Appellant's Br. 13-14. As discussed above, the NVRA's confidentiality provisions for declinations to register to vote and the site of an application's submission apply to all three methods of voter registration. See p. 16, *supra*. Moreover, regardless of how a declination to register to vote is manifested, it relates to voter registration efforts, not voter removal.

Exempting declinations to register to vote is consistent with the oversight function of the Public Disclosure Provision and the conclusion that the provision applies to voter registration applications. The State's actions with respect to ensuring current and accurate voter registration lists are relevant only insofar as a particular individual seeks to register, or is registered, to vote. The public interest in the integrity of official lists does not extend either to a personal decision not to register to vote or to a declination to register on the basis of voter ineligibility. As for the second statutory exception, Congress determined that disclosing the identity

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(…continued)
444(B). The State also compiles and discloses lists of persons denied registration. See Va. Code Ann. § 24.2-444(A). Thus, while the state legislature limited public disclosure of election records to official registration lists and voter removal records, it likely did not interpret the Public Disclosure Provision as restricted to the enumerated lists in paragraph (2).

of the agency through which an individual voter submits a registration application hinders voter registration efforts, thus undermining a central purpose of the NVRA. Congress included two statutory exceptions to public disclosure; neither concerns voter registration applications.

B. Voter Registration Records Can Be Redacted To Address Legitimate Privacy Concerns

The State also argues that public disclosure of voter registration applications will chill voter registration because the state form reflects information about felony convictions and mental incapacity. See Appellant's Br. 22. The State's arguments should be rejected.[5]

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[5] The State has abandoned its argument below that requiring an applicant's SSN on the state form counsels against public disclosure. Both this Court and the Virginia Supreme Court have held that voter registration applications with redacted SSNs are subject to disclosure. See *Greidinger* v. *Davis*, 988 F.2d 1344, 1353-1354 (4th Cir. 1993) (holding that the right to vote was substantially burdened only insofar as the State publicly released SSNs); *Rivera* v. *Long*, No. 070274, slip op. 3 (Va. Feb. 8, 2008) (unpublished) (J.A. 78-81) (holding that predecessor statute to Section 24.2-444 required public disclosure of redacted applications).

Nothing in the NVRA requires disclosure of an applicant's SSN to register to vote. Indeed, when the Federal Election Commission first developed the mail voter registration form, it noted that not all States required SSNs for voter registration purposes and that, because of variations in state practices, it would refer applicants to state-specific instructions for providing an identification number. See 59 Fed. Reg. 32,313-32,314 (June 23, 1994). In light of the Privacy Act of 1974, 5 U.S.C. 552a note, Congress would have anticipated that if existing state practices required a SSN for voter registration purposes, that SSN would be redacted prior to the release of any records requested under the NVRA.

As an initial matter, the information the State seeks to withhold is largely available to the public. More importantly, however, an eligible applicant can register to vote in federal elections without disclosing such information. Under the NVRA, States must accept the federal mail voter registration form, see 42 U.S.C. 1973gg-2(a), which contains no specific information about an applicant's felony convictions or mental incapacity. Rather, the federal form merely requires the applicant to affirm that he or she is a United States citizen, meets the eligibility requirements of his or her state (*e.g.*, the applicant has not been declared mentally incompetent and has not been convicted of a felony or has had his or her civil rights restored), subscribes to any oath required, and has provided truthful information under penalty of perjury. See National Mail Voter Registration Form, available at, http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited Oct. 12, 2011). Thus, an applicant who previously was declared mentally incompetent or lost his or her voting rights because of a felony conviction can use the federal form to register to vote if he or she currently is eligible to vote and has privacy concerns with respect to use of the state form.

In addition, if the State believes that its voter registration form raises privacy concerns, it can revise that form to remove specific requests for sensitive personal information. Likewise, redaction of highly sensitive information may be warranted in certain circumstances. See 5 U.S.C. 552a note. Cf. 5 U.S.C. 552(b)(6) (federal

agency files subject to disclosure may be redacted if disclosure "would constitute a clearly unwarranted invasion of personal privacy"); 5 U.S.C. 552(b) ("Any reasonably segregable portion of a record shall be provided * * * after deletion of the portions which are exempt."). The complete withholding of original voter registration applications, however, conflicts with the NVRA.

C. The MOVE Act And HAVA Do Not Limit The Disclosure Of Voter Registration Applications

The State also argues that the district court's interpretation of the Public Disclosure Provision conflicts with privacy protections in the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, and the Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, 123 Stat. 2195, which amended the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff *et seq*. See Appellant's Br. 20-21. The State's arguments should be rejected.

The State argues that Congress could not have intended disclosure of voter registration applications under the NVRA when much of the same personal information is protected under HAVA. As relevant here, HAVA established provisional voting and voting information requirements. See 42 U.S.C. 15482. Under HAVA, voters may cast a provisional ballot where they do not appear on a jurisdiction's official voter registration lists but declare that they are registered voters in that jurisdiction and eligible to vote in a federal election. See 42 U.S.C.

15482(a). States must provide written notice to each voter who casts a provisional ballot that the voter may use the State's free access system (*e.g.*, a toll-free number or Internet website) to determine whether his or her vote was counted, and, if not, why. See 42 U.S.C. 15482(a)(5). HAVA requires States to establish procedures "to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system." 42 U.S.C. 15482(a). It also restricts "[a]ccess to information about an individual provisional ballot * * * to the individual who cast the ballot." 42 U.S.C. 15482(a).

The privacy protections afforded under HAVA concern only the information collected, stored, or otherwise used by the free access system, which is accessible to individual voters to determine whether their votes were counted and, if not, why. HAVA does not conflict with the NVRA, which concerns only pre-election voter registration activities and voter removal programs, not any particular voter's ballot activity. Moreover, HAVA specifically provides that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." 42 U.S.C. 15545(a)(4).

The same flaws extend to the State's argument under the MOVE Act. The MOVE Act requires States to ensure the security of procedures established for the transmission of voter registration and absentee ballot applications to uniformed

services voters and overseas voters. See 42 U.S.C. 1973ff-1(a)(6) and (e)(6)(A). It also requires States to protect the privacy of the identity and personal data of voters who request or are sent voter registration and absentee ballot applications under the Act. See 42 U.S.C. 1973ff-1(e)(6)(B). These protections exist "throughout the process of making such request or being sent such application." 42 U.S.C. 1973ff-1(e)(6)(B). Similar security and privacy protections exist for the transmission of blank absentee ballots to these voters. See 42 U.S.C. 1973ff-1(a)(7) and (f)(3).

Just as with HAVA and its protections for provisional voting, the privacy protections afforded under the MOVE Act do not govern the *submission* of a voter registration application and, thus, the decision to be placed on an official list of registered voters. Rather, much like declinations to register to vote or the identity of an agency through which a voter is registered, requests for voter registration and absentee ballot applications are not public. Once submitted, however, voter registration applications are subject to disclosure under the NVRA, thereby allowing for public oversight of a State's eligibility determinations and list compilation.

The State's privacy concerns are undermined by state law, which releases lists of persons registered as absentee or overseas voters. See Va. Code. Ann. § 24.2-444(A). These lists contain "the name, address, year of birth, gender and all election districts applicable to each registered voter." Va. Code Ann. § 24.2-

444(A). Because the State also makes lists of all denied applicants available for public inspection, see Va. Code Ann. § 24.2-444(A), it is only the actual voter registration applications and the basis for their denial that are withheld from the public. Accordingly, this Court should reject the State's arguments that public access to voter registration applications injects otherwise personal information into the public sphere.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1809 **Caption:** Project Vote/Voting for America, Inc. v. Long, et al.

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