Record No. 11-1809

In the United States Court of Appeals
For the Fourth Circuit

PROJECT VOTE/VOTING FOR AMERICA, INCORPORATED,
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
Norfolk Division

APPELLEE'S RESPONSE BRIEF

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the action brought by Appellee Project Vote/Voting for America, Inc. ("Project Vote") pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over Appellants' appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court erred in interpreting the plain language of the Public Disclosure Provision to require that Appellants make completed voter registration applications available for public inspection and copying.

STATEMENT OF THE NATURE OF THE CASE

Appellee Project Vote brought this action in response to Appellants' repeated denial of access to inspect and copy completed voter registration applications of prospective registrants denied registration in the city of Norfolk, Virginia in advance of the 2008 Presidential election. (J.A. 13). Appellants' refusal to grant such access constitutes a violation of the unambiguous requirements of the National Voter Registration Act's ("NVRA") Public Disclosure Provision. 42 U.S.C. § 1973gg-6(i). The Public Disclosure Provision requires states to make available for public inspection the following records:

> 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.

42 U.S.C. § 1973gg-6(i)(1). In the Complaint, Project Vote asked the district court both to declare that Appellants' repeated refusals violated federal law and require Appellants to disclose the requested materials.[1] (J.A. 11).

Appellants moved to dismiss the Complaint, claiming that Project Vote lacked standing to bring this suit and that voter registration applications are not subject to the Public Disclosure Provision. (J.A. 29-49). In particular, Appellants argued that the Public Disclosure Provision does not apply to completed voter registration applications because its reach is limited to those records concerning voter removal programs. (J.A. 38-44). Appellants based this interpretation on their view that the scope of the Public Disclosure Provision is limited to the records mentioned in 42 U.S.C. § 1973gg-6(i)(2), which sets out the minimum record-maintenance obligations of each State. (J.A. 42).

Project Vote responded that it had suffered a clear informational injury by Appellants' refusal to grant the requested access and that it therefore had standing to bring suit. (J.A. 91-95). Project Vote also pointed out that Appellants' interpretation of the Provision contradicted the statute's plain language that "all records" be disclosed and would render the exceptions clause meaningless, in contravention to the NVRA's purpose and many established principles of statutory

[1] Project Vote also sought costs, attorneys' fees and expenses under the NVRA's fee provision—42 U.S.C. § 1973gg-9(c).

interpretation. (J.A. 95-107). Appellants replied, (J.A. 134-91), and the district court heard oral argument on July 30, 2010. (J.A. 192-230).

The court issued a written opinion on October 29, 2010, rejecting Appellants' narrow interpretation of the Public Disclosure Provision's scope as "contradict[ing] the statute's plain meaning," and denying the motion to dismiss. (J.A. 235-70). The court agreed with Project Vote that, under a plain-meaning analysis of the statute, the NVRA unambiguously requires disclosure of voter registration applications. (J.A. 252-58). The court reasoned 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 qualified voters, and that the voter registration process "certainly falls within the purview of the federal statute, as such a process, by its very nature, is designed to ensure that the Commonwealth's lists are current and accurate." (J.A. 253).

The court analyzed the statute and found "ample support" in the common and ordinary meaning of the NVRA, the exceptions to the Public Disclosure Provision, the statute's contextual meaning, and its statutory purpose "for the conclusion that the Public Disclosure Provision is meant to cover records concerning the implementation of voter registration procedures, which by necessity include voter registration applications." (J.A. 254-62). The court also held that disclosure of the records would not infringe on applicants' privacy or undermine the purposes of the statute, provided social security numbers were redacted. (J.A.

263-72). Following the court's denial of their motion to dismiss, Appellants filed an answer to Project Vote's Complaint. (J.A. 272-85).

Project Vote subsequently moved for summary judgment based on its plain-language interpretation of the NVRA. (J.A. 292-94). Appellant Palmer opposed the motion, reasserting the arguments previously rejected by the court in its order on the motion to dismiss, and also alleging for the first time that Project Vote and the court's interpretation of the NVRA conflicted with two other federal statutes, the Military and Overseas Voter Empowerment Act ("MOVE"), 42 U.S.C. § 1973ff *et seq*., and the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq*. (J.A. 312-18). Appellant Long also repeated arguments regarding the definition of the Public Disclosure Provision and incorporated Palmer's arguments regarding MOVE and HAVA. (J.A. 328-41). Project Vote replied, stressing the plain language of the Public Disclosure Provision and arguing that MOVE and HAVA pose no conflict with the NVRA. (J.A. 374-89).

On July 20, 2011, the district court granted summary judgment in favor of Project Vote and afforded prospective relief by requiring Appellants to permit inspection and photocopying of completed voter registration applications with voters' social security numbers redacted. (J.A. 424-38). In its opinion, the district court restated its ruling on the Motion to Dismiss, rejecting Appellants' arguments for nondisclosure based on a plain-language interpretation of the NVRA's Public Disclosure Provision. *Id*. The court also agreed with Project Vote that MOVE and

HAVA do not conflict with the NVRA. *Id*. The court stayed relief pending the outcome of this appeal. (J.A. 443-44).

STATEMENT OF FACTS

Through its ongoing voter protection work with Advancement Project, another voting rights organization, and other local community organizations in Virginia, Project Vote received reports that several students at Norfolk State University ("NSU")—a historically African-American public university located in Norfolk, Virginia—experienced difficulty as they attempted to register to vote in advance of the November 2008 primary and general elections. (J.A. 18). Specifically, Project Vote learned that many applications submitted by ostensibly qualified on-campus NSU students were denied by Appellant Long's office. *Id.*

On May 11, 2009, Advancement Project requested by email that Appellant Long "make available for inspection and copying the completed voter registration applications of any individual who timely submitted an application at any time from January 1, 2008, through October 31, 2008, who was not registered to vote in time for the November 4, 2008 general election," as well as other documents, such as "documents identifying the reasons the applications were rejected." *Id.* at 18-19; 274. Advancement Project informed Appellant Long that the Requested Records must be made available for public inspection and copying pursuant to the Public Disclosure Provision, notwithstanding any Virginia law that might be interpreted to the contrary. *Id. at* 19, 274.

On May 13, 2009, Appellant Long responded that she would not permit inspection or copying of the Requested Records. *Id*. Later that day, Martha Brissette, an attorney and policy analyst with the Virginia State Board of Elections, emailed Advancement Project stating that Appellant Long had, in her opinion, correctly declined to permit inspection and copying of the Requested Records. *Id.* at 19, 272.

Representatives from Advancement Project and Project Vote traveled on May 15, 2009, to Appellant Long's office in Norfolk, Virginia, where they again requested access to the Requested Records and were denied the opportunity to inspect or copy those materials. *Id.* at 19, 281. On June 22, 2009, Project Vote, on behalf of itself and all others similarly aggrieved, wrote to Nancy Rodrigues, Appellant Palmer's predecessor, pursuant to Section 11(b) of the NVRA, giving notice of the violation of the Public Disclosure Provision and asking her to undertake appropriate remedial measures. *Id. at* 19, 274.

On July 22, 2009, Brissette informed Project Vote by email that the State Board of Elections, at its July 10, 2009 meeting, had voted to request an informal opinion of the Attorney General of Virginia regarding this matter. *Id. at* 20, 274. On September 25, 2009, Brisette forwarded to Project Vote the Attorney General's informal opinion that concluded that "the completed voter registration application of any individual is not a part of the record of the implementation of programs and activities conducted for the purposes of ensuring the accuracy and currency of

official lists of eligible voters covered by [the Public Disclosure Provision]." *Id* at 20, 275.

To date, Appellants have not made the Requested Records available to Project Vote or its representatives, *Id.* at 20, 275, 281, asserting that only records related to specific programs designed to remove registered voters from the voting rolls fall within the Public Disclosure Provision. *Id.* at 21-22, 276.

STANDARD OF REVIEW

Appellate courts review matters of statutory construction *de novo*, and begin with the plain language of the provision in question. *U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004); *see Stephens ex rel. R.E. v. Astrue*, 565 F.3d 131, 137 (4th Cir. 2009) ("A matter of statutory construction raised on appeal is a "quintessential question of law."). Moreover, "[i]t is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee,* 540 U.S. 526, 534 (2004).

SUMMARY OF THE ARGUMENT

The plain language of the Public Disclosure Provision requires that Appellants make completed voter registration applications publicly available for inspection and copying because they are records concerning the evaluative process by which Virginia determines whether potentially-eligible voters are included on

official voting lists. This process is a program or activity conducted to ensure that Virginia's voting lists are both accurate and current, and thus the Public Disclosure Provision requires that all records concerning its implementation—including the applications themselves—be made available for public inspection and copying. Appellants' narrow interpretation that the Public Disclosure Provision is limited to records concerning voter removal renders the Provision's exceptions clause meaningless, and is incorrect for that reason alone. It also ignores the fact that adding voters to the rolls is a key part of keeping voting rolls accurate and current. Their interpretation also confounds the purpose of the NVRA, and the context of the Public Disclosure Provision, which is to increase voter registration and participation in federal elections. Finally, Appellants' arguments that following the plain language of the Provision would create a conflict with MOVE and HAVA or raise constitutional concerns are baseless. MOVE and HAVE are inapposite to the issues presented here and Project Vote only seeks applications with social security numbers redacted.

ARGUMENT

I. The Plain Language Of The Public Disclosure Provision Requires That Virginia Make Voter Registration Applications Publicly Available For Inspection And Copying.

The plain language of the National Voter Registration Act's ("NVRA") Public Disclosure Provision, codified at 42 U.S.C. § 1973gg-(6)(i)(1), requires Virginia to make completed voter registration applications publicly available for

inspection and copying because they are records "concerning the implementation of a program or activity conducted for the purpose of ensuring the accuracy and currency of [Virginia's] official lists of eligible voters," specifically the very process by which Virginia evaluates potentially eligible applicants for inclusion the official lists. *Id.* Indeed, voter registration applications are the basis upon which Virginia election officials determine whether an individual is to be included on the lists or instead denied registration. The Public Disclosure Provision requires that Virginia make "all" such records publicly available, including voter registration applications, and this Court simply does not need to look beyond the Public Disclosure Provision' plain language to reach this conclusion. *See id.*

A. The Unambiguous Plain Language Of The Public Disclosure Provision Is The Beginning And The End Of The Statute's Proper Construction.

The Court's first step in interpreting the Public Disclosure Provision is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Willenbring v. United States*, 559 F.3d 225, 235 (4th Cir. 2009) (quotations omitted). When the text's plain meaning is unambiguous, "this first canon is also the last [and] judicial inquiry is complete." *Id*. Indeed, this Court should enforce the Public Disclosure Provision according to its plain language so long as "the disposition required by the text is *not absurd*." *Stephens ex rel. R.E. v. Astrue*, 565 F.3d 131, 137 (4th Cir. 2009) (quoting *Lamie v. United States Trustee*, 540 U.S. 526 (2004)) (emphasis added); *see also United*

States v. Abdelshafi, 592 F.3d 602, 607 (4th Cir. 2010) (courts "first and foremost strive to implement congressional intent by examining the plain language of the statute"). As the Supreme Court has recognized, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

Accordingly, when construing the Public Disclosure Provision its terms should be afforded their "ordinary, contemporary, common meaning" unless Congress intended them to have a different meaning. *Stephens*, 565 F.3d at 137 (quoting *North Carolina ex rel. Cooper v. Tenn. Valley Auth.* 515 F.3d 344, 351 (4th Cir. 2008)). When construing terms not otherwise defined in the statute, the Court "turn[s] to [their] dictionary definition for [their] common meaning." *United States v. Maxwell*, 285 F.3d 336, 341 (4th Cir. 2002); *see*, *e.g.*, *United States v. Groce*, 398 F.3d 679, 681 (4th Cir. 2005) (citing *Webster's Third New International Dictionary* as an authoritative source of a term's common meaning); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 289 (4th Cir. 1998) (stating that this Court "customarily turn[s] to dictionaries for help in determining whether a word in a statute has a plain or common meaning"); *United Staves v. Mitchell*, 39 F.3d 465, 468 (4th Cir. 1994) ("Because the word 'law' within the meaning of [the statute] is not defined, we

must give the word its ordinary meaning" as it is "commonly defined" in the dictionary."). In addition to the particular language at issue, courts also look to the "specific context in which the language is used, and the broader context of the statute as a whole" when determining the plain meaning. *Nat'l Coal. for Students with Disabilities*, 152 F.3d at 290.

Congress's inclusion of modifiers in the text that imply an expansive breadth, such as the word "all," further illustrate the proper scope of these terms. *Id.* Moreover, when Congress specifically exempts certain categories from otherwise applicable language, courts should not infer additional exceptions. *Rosmer v. Pfizer, Inc.*, 272 F.3d 243, 247 (4th Cir. 2001) (stating that inferring additional exceptions into a list of statutory exceptions drafted by Congress runs afoul of the doctrine of *expressio unius est exclusio alterius* and would amount to the court performing a "legislative trick"); *United States v. Rocha*, 916 F.2d 219, 243 (5th Cir. 1990). Courts also should not construe the antecedent language so narrowly as to render the Congressionally mandated exceptions thereto meaningless or superfluous. *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005) ("It is a classic canon of statutory construction that courts must give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous.").

B. The Plain Language Of The Public Disclosure Provision Requires That Virginia Disclose Completed Voter Registration Applications.

The Public Disclosure Provision's plain language unambiguously requires the public disclosure of completed voter registration applications. The statute provides 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.

42 U.S.C. § 1973gg-6(i)(1). The Provision thus 1) sets out a general category of records that must be made available for public inspection and copying and 2) excludes two types of specific records from this requirement. Since completed voter registration records fall within the Provision's general mandate and are not covered by its exceptions clause, they must be publicly disclosed.

Since Congress set out for these two specific exceptions to the provision's otherwise broad requirements, courts may not perform the "legislative trick" of inferring additional exceptions beyond those enumerated in this clause—instead, *all* other types of records concerning the implementation of pertinent programs or activities must be made available for public inspection and copying. *Rosmer*, 272 F.3d at 247; *Rocha*, 916 F.2d at 243 ("Under the principle of statutory construction *expressio unius est exclusio alterius*, the enumeration of specific exclusions from

the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.”).

The exceptions clause also refutes Appellants’ interpretation that the Public Disclosure Provision to apply only to voter removal records—that is, those records enumerated in Section 6(i)(2)—because that interpretation would render the exceptions clause nonsensical. *See Discover Bank*, 396 F.3d at 370. For this reason alone, Appellants’ arguments must fail. *Id.* The exceptions clause exempts records related to voter *registration*—forms indicating a declination to register, or the agency through which an individual registered—not voter *removal*. 42 U.S.C. § 1973gg-6(i)(1). These categories of materials would already be excluded under the Appellants’ proposed interpretation of the Provision, and thus the exceptions clause would be meaningless. Such a construction should be avoided. *Discover Bank*, 396 F.3d at 370.

Project Vote has not requested any records relating to an individual’s declination to register to vote or records that would identify the voter registration assistance agency through which an individual registered. The exceptions clause refers only to this small category of records relating to specific voter registration

agency public assistance programs mandated by the NVRA.[2] 42 U.S.C. § 1973gg-5. Appellants misunderstand the statute to the extent they suggest that completed voter registration applications are related to the excepted information. Rather, because completed voter registration applications are within the Provision's scope and do not fall under the exceptions clause, they must be disclosed pursuant to the mandate that "all records" be made available for inspection and copying. *Id.*; *see Nat'l Coal.*, 152 F.3d at 290 ("[T]he use of the word 'all' [as a modifier] suggests an expansive meaning because 'all' is a term of great breadth.").

1. *Evaluating Voter Registration Applications Is A Program And Activity Conducted To Ensure The Accuracy And Currency Of Official Lists Of Eligible Voters.*

The process of evaluating voter registration applications to determine whether an applicant should be included on the official list of eligible voters is a program or activity conducted for the purpose of ensuring the accuracy and currency of such lists. As the district court correctly noted, the term "current" refers to something that is "most recent" and the term "accurate" refers to something that is "free from error." *Project Vote/Voting for America, Inc. v. Long*,

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[2] The NVRA mandates that States must designate "voter registration agencies" which provide public assistance to individuals seeking to register to vote. 42 U.S.C. § 1973gg-5(a)(2). Individuals may decline the assistance offered by voter registration agencies, and that choice is considered a "declination to register" to vote for the purposes of the NVRA. 42 U.S.C. § 1973gg-5(a)(6)(B). In Virginia, a declination to register to vote is indicated by checking the appropriate box on the Commonwealth's Voter Registration Agency Certification Form. (J.A. 117). The exceptions clause exempts only records indicating such a declination or identifying the particular voter registration agency public assistance program through which someone registered. 42 U.S.C. § 1973gg-6(i)(1).

752 F.Supp. 2d 697, 706 (E.D. Va. 2010); *see Maxwell*, 285 F.3d at 341; *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 152 F.3d at 289; *Groce*, 398 F.3d 681. It follows, as the district court properly held, 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 America, Inc.*, at 706. Appellants do not appear to contest this general point, but rather contend that the evaluation of a voter registration applications is somehow separate from the effort to keep the rolls accurate and current. Appellants' Brief at 15. Appellants' theory is inconsistent with both Virginia law and common sense.

In Virginia, to be eligible to vote, an individual must first be deemed a "qualified voter." *See* Va. Code §§ 24.2-101; 24.2-400. In order to be a considered a "qualified voter," an individual must both meet statutory qualifications and register to vote. Registering to vote requires an individual to submit a completed voter registration application to election officials, who evaluate the information contained in the application, then either grant or deny an individual's inclusion on the official list of eligible voters. *See* Va. Code §§ 24.2-101; 24.2-417; 24.2-418; 24.2-422. This evaluative process ensures that the voting rolls are accurate by including only those individuals meeting the statutory requirements, and excluding individuals who do not satisfy those requirements. *See*, *e.g.*, Va. Code § 24.2-101. The process also ensures that the official lists are

current by providing all otherwise eligible voters the opportunity to be added to the list on an ongoing basis—for example, when they reach the minimum voting age of 18, have their voting rights restored, or move to the Commonwealth. *Id*.

This process is a "program or activity" covered by the Public Disclosure Provision. Neither the term "program" nor "activity" is defined in the NVRA, so this Court should look to the dictionary definition of both terms. *Maxwell*, 285 F.3d at 341; *Groce*, 398 F.3d 681; *Nat'l Coal. for Students with Disabilities*, 152 F.3d at 289; *Mitchell*, 39 F.3d 465, 468. The term "program" means "a plan of procedure" and "a schedule or system under which action may be taken toward a desired goal." *Webster's Third New International Dictionary*, 1812 (1993). The term "activity" means the "duties or functions" of "an organizational unit for performing a specific function." *Id.* at 22. The process by which Virginia election officials evaluate voter applications in order to determine whether a potentially eligible applicant is to be placed on the official list of eligible voters is thus both a "program" and an "activity." It is a "program" because it is a procedure and system under which action is taken towards the desired goal of registering eligible applicants and rejecting ineligible applicants. *See* Va. Code §§ 24.2-101; 24.2-417; 24.2-418; 24.2-422. It is also a duty and function of the state officials charged with carrying out this process, and therefore an activity. *See Id.*

2. *Completed Voter Registration Applications Are Records Concerning The Implementation Of This Program Or Activity*.

Completed voter registration applications are "records concerning the implementation" of this "program or activity." The term "implementation" means "the acting of implementing;" and "implement" means "to carry out." *Webster's Third New International Dictionary* 1134-35; *Maxwell*, 285 F.3d at 341; *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 152 F.3d at 289; *Groce*, 398 F.3d 681. The instructions on Virginia's Voter Registration Application Form remind the applicant how important the application is to implementing this process: "You are not officially registered to vote until this application is approved." (J.A. 64). The accuracy of a completed voter application is important enough that "making a materially false statement on [the application] constitutes the crime of election fraud, which is punishable under Virginia law as a felony." *Id*.

Completed voter registration applications are the only means by which individuals provide the Commonwealth the information necessary for officials to carry out their evaluative process. The registration application asks applicants to provide information verifying that they are both citizens of the United States and the Commonwealth of Virginia. *Id*. at 3. It requires individuals to report whether they will be 18 years old by the next general election, and the application will be denied if this condition is not met. *Id*. The application also requires that convicted felons report whether and when their voting rights were restored—another

condition for inclusion of the official list of eligible voters. *Id*. All of this information is necessary to evaluate whether to include an individual on the official list of eligible voters. Since completed voter registration applications are records concerning the implementation of this program or activity and fall under neither exception to the NVRA's disclosure requirements, they must be made publicly available. *See* 42 U.S.C. § 1973gg-6(i)(1).

C. The Public Disclosure Provision Is Not Limited Solely To Voter Removal Programs Or The Records Listed In Section 6(I)(2).

Appellants essentially make two textual arguments seeking to limit the Public Disclosure Provision's scope. First, they assert that the Provision's breadth is limited to voter removal records due to the use of the terms "programs and activities." Appellants' Brief at 17-20. Second, they claim that the Provision's breadth is further limited by Section 6(i)(2) due to the use of the term "shall include" with respect to Virginia's voter removal record maintenance obligations.[3] Appellants' Brief at 15-17**.** As discussed above, these attempts to narrow the Public Disclosure Provision's scope would its exceptions clause meaningless, and therefore must be rejected. *See infra*, at 13. *Discover Bank*, 396 F.3d at 370. But they also fail regardless of their effect on the exceptions clause.

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[3] Section 6(i)(2) provides that:

> "records *maintained* pursuant to [the Public Disclosure Provision] *shall include* lists of the names and addresses of all persons to whom notices described in [other NVRA sections] 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) (emphasis added).

1. *The Terms "Programs Or Activities" Do Not Limit The Public Disclosure Provision's Scope To Voter Removal Records.*

Appellants urge this Court, as they urged the district court during summary judgment briefing, to adopt a construction of the terms "program" and "activity" that greatly narrows the scope of these plain definitions and limits their applicability to voter removal only. Appellants' Brief at 17-20; *see* (J.A. 329-334). Appellants suggest that because the word "program" or "activity" also appear in other parts of the statute involving "list maintenance," their meaning throughout the statute can only refer to the act of removing individuals from the voting rolls.[4] Appellants' Brief at 17-20. This creative construction should be rejected.

(a) Voter Registration Is A Form Of List Maintenance.

Appellants misconstrue the meaning of the term "maintenance" by assuming list maintenance is limited to voter *removal*. "Maintenance" does not mean "removal," rather it means "the labor of keeping something . . . in a state of repair or efficiency: care, upkeep." *Webster's Third New International Dictionary*, 1362 (1993). *See Maxwell*, 285 F.3d at 341; *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund*, 152 F.3d at 289; *Groce*, 398 F.3d 681.

With respect to voting lists, "maintenance" includes *adding* those individuals to the rolls who meet Virginia's statutory requirements and should be included. This is effectuated in Virginia through voter registration, using voter

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[4]Appellants do cite no cases in support of this interpretation. *See* Appellants' Brief at 17-20.

registration applications. *See* Va. Code §§ 24.2-101; 24.2-417; 24.2-418; 24.2-422. Therefore, although Appellants argue that terms "program" and "activities" only "concern list maintenance, *not* voter registration," they fail to recognize that voter registration *is* list maintenance that adds newly eligible voters to the rolls. Without voter registration processes, including the registration applications, Virginia's official lists of eligible voters would neither be accurate nor current. Indeed, they would be quickly outdated and eventually nonexistent. *See* Virginia Code § 24.2-427(B) (procedures for removing deceased persons from the registration rolls). Even by Appellants' proposed standards, voter registration is a "program or activity" within the meaning of the Provision.

(b) The NVRA Is A Voter Registration Statute, Not A Voter Removal Statute.

Appellants also misconstrue the context in which these terms are used in the NVRA. Put simply, neither the NVRA as a whole nor the Public Disclosure Provision is a voter *removal* statute—the statute is designed to promote voter registration and participation. Tellingly, the applicable statutory titles and the NVRA's purpose demonstrate that Appellants' narrow interpretation is incorrect. *See I.N.S. v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 190 (1991) (a statute's or a section's titles can aid in interpreting the text); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) (legislative purpose included in the statute itself can aid a court's interpretation) (citations omitted).

First and foremost, the NVRA is a voter *registration* statute, not a voter *removal* statute. Its full title is the "National Voter Registration Act" and is codified under a subchapter entitled "National Voter Registration." 42 U.S.C. § 1973gg et seq. (emphasis added). The section under which the Public Disclosure Provision is found, Section 1973gg-6, is titled "Requirements with respect to administration of *voter registration*." 42 U.S.C. § 1973gg-6 (emphasis added). Even the Public Disclosure Provision's subsection title reads "Public disclosure of *voter registration activities*."[5] 42 U.S.C. § 1973gg-6(i) (emphasis added). The assertion that "program or activity" only arises in the context of *removing* voters from the rolls is simply not true.

And the few NVRA sections cited by Appellants are designed to *limit* the manner in which states may remove individuals from the official lists of eligible voters, not to facilitate such removal. *See*, *e.g.*, 42 U.S.C. §§ 1973gg-6(a)(4) (mandating that voters are removed from the rolls only subject to the NVRA's requirements and limitations); 6(b)-(d) (setting forth such limitations). This is in keeping with the NVRA's purpose, which is to increase voter registration and voter participation in federal elections, protect the integrity of the electoral process, and ensure that accurate rolls are maintained. *See* 42 U.S.C. § 1973gg(b). *See*, *e.g.*,

[5] Appellants assert that "the words 'programs' or 'activities,' other than in the public disclosure provision, only occur in three subsections of Section 8; always in connection with the [sic] list maintenance." Appellants' Brief at 18. This assertion conveniently ignores the Provision's very title, which refers to *voter registration activities*, and refuting their argument. 42 U.S.C. § 1973gg-6(i) (emphasis added).

South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1262 (4th Cir. 1989) (legislative purpose is of proper interpretive use to courts) (citations omitted).

The Congressional findings also embrace voter registration. In enacting the NVRA, Congress found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a)(3).

In sum, the NVRA facilitates voter registration and participation with the aim of preventing the disenfranchisement of registered or potentially eligible voters. The Public Disclosure Provision is a key part of this statutory scheme because it gives the public the ability to investigate and uncover any practice that causes such harm. Excluding completed voter applications from the reach of the Public Disclosure Provision runs directly counter to the very premise of the NVRA, in addition to the Provision's plain language.

2. *Section 6(i)(2) Does Not Limit The Public Disclosure Provision.*

Appellants' interpretation of Section 6(i)(2) as defining the exclusive set of documents whose disclosure is required is also incorrect for several reasons beyond the fact that this argument would render the exceptions clause meaningless. Section 6(i)(2) merely imposes minimum record *maintenance* requirements on the States, requiring them to *maintain* specific types of records concerning the limited ways in which they may remove a registered voter from the voting rolls. *Id*. But

the Public Disclosure Provision is clear that "all records" maintained by a state must *also* be *disclosed*. 42 U.S.C. § 1973gg-6(i)(1). The maintenance requirements and disclosure requirements are separate. *Id.*; *see* 42 U.S.C. § 1973gg-6(i)(2) (stating that "records maintained pursuant to [the Public Disclosure Provision] shall include" at least certain enumerated type of records). Section 6(i)(2) does not define the Provision's *disclosure* requirement. *Id.*

The use of the term "include" in Section 6(i)(2) makes clear that the records described are illustrative examples, not an exclusive list as Appellants assert. *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("The term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.") (citations omitted). Indeed, courts consistently have held that the use of the term "include" to introduce a list "indicates that the list is intended to be illustrative and not exclusive." *In re Strickland*, 230 B.R. 276, 285 (E.D.Va. 1999). *See also Samantar v. Yousuf*, 130 S.Ct. 2278, 2287 (2010); *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 77 (1979); *United States v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005); *United States v. Vargas-Garnica*, 332 F.3d 471, 473-74 (7th Cir. 2003); *Capitol Indemnity Corp. v. Braxton*, 24 Fed.Appx. 434, 442 (6th Cir. 2001); *Gordon v. Liberty Mut. Ins. Co.*, 675 F. Supp. 321, 324 (E.D. Va. 1987).

II. Neither MOVE Nor HAVA Is Relevant In Interpreting The Public Disclosure Provision's Plain Language.

Appellants urge this Court to depart from the natural reading of the Provision's plain meaning because, they argue, it conflicts with two other federal statutes. Appellants' Brief at 20-21 (citing 42 U.S.C. § 15482 ("HAVA") and 42 U.S.C. § 1793ff-1(e)(6)(B) ("MOVE")). But the Court should not consider the provisions of other statutes when the meaning of the statute at issue is plain and unambiguous. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *In re JKJ Chevrolet, Inc.*, 26 F.3d 481, 483 (4th Cir. 1994) ("If the language is plain and the statutory scheme is coherent and consistent, there is no need to inquire further.") (internal quotation marks and citations omitted). "Where the statutory language has a plain meaning, the court's inquiry is complete and it will enforce the statute as written." *Id.* (citing *Stephens ex rel. R.E. v. Astrue*, 565 F.3d 131, 137, 140 (4th Cir. 2009).

Given the clear language and unambiguous meaning of the Public Disclosure Provision, the Court should not look to MOVE and HAVA to interpret the NVRA. *See Willenbring v. United States*, 559 F.3d 225, 235 (4th Cir. 2009) (when "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," the "first canon [of statutory interpretation] is also the last [and] judicial inquiry is complete") (internal quotation marks and

citations omitted). But even if the Court were to consider these statutes, there is no conflict between them and the Public Disclosure Provision's plain language. The district court found that the plain language of the NVRA's Public Disclosure Provision requires the disclosure of voter registration applications. *See Project Vote/Voting for America, Inc. v. Long*, 752 F. Supp. 2d 697, 705 (E.D. Va. 2010). This finding does not implicate the security and privacy provisions of MOVE and HAVA.

A. Disclosing Applications Under The NVRA Does Not Conflict With HAVA.

Disclosure of completed voter registration applications does not conflict with HAVA's security and privacy protections, which apply only to provisional ballots. *See* 42 U.S.C. § 15482(a)(5). HAVA requires states to establish a provisional voting system, complete with procedures to protect the confidential status of an individual's provisional vote. *See id*. As evidenced by HAVA's legislative history, the focus of these security procedures is to protect the right to a secret ballot, not to prevent disclosure of information contained in voter registration applications. According to Congress's Joint Explanatory Statement, HAVA "[r]equires that . . . the ballot be promptly verified and counted if determined to be valid under State law, and *the voter (and no one else) be able to ascertain whether the ballot was counted (and if not, why not)* through a free-access system and be informed of that option when the ballot is cast." H.R. Conf. Rep. No. 107-730, pt. 1, at 75, *reprinted in* 2002 U.S.C.A.N.N. at 1094-95

(emphasis added). *See also Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981) (noting that the right to a secret ballot is "one of the fundamental civil liberties of our democracy") (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

Congress intended for HAVA's privacy provisions to complement and work in tandem with the NVRA. HAVA itself states that it does not "supersede, restrict, or limit the application of" the NVRA and that none of its provisions "may be construed to authorize or require conduct prohibited under" *inter alia*, the NVRA. *See* 42 U.S.C. § 15545(a). HAVA and the NVRA also do not allow state law to "trump" their requirements, as Appellants claim, Appellants' Brief at 20, but merely create an exception to the provisional voting provision for those states that do not use provisional ballots because they either do not require registration to vote or allow registration on the day of election. *See* 42 U.S.C. § 15482(a)(5)(B) (citing § 4(b) of the NVRA, 42 U.S.C. § 1973gg-2(b)). Section 4(b) of the NVRA has no bearing on the question of disclosure of voter registration applications. HAVA's reference to that section does not indicate an intent to prohibit disclosure of the information contained in such applications, nor does its protection of provisional ballots extend to voter registration applications.

B. <u>Disclosing Applications Under The NVRA Does Not Conflict With MOVE</u>.

Disclosure of completed voter registration applications under the NVRA does not offend MOVE's privacy provisions, which are concerned with the security of information transmitted during electronic requests for voter forms.

MOVE orders the states to establish procedures to "ensure that the privacy of the identity and other personal data of an absent uniformed services voter or overseas voter who requests or is sent a voter registration application or absentee ballot application . . . is protected *throughout the process of making such request or being sent such application.*" *Id.* § 1973ff-1(e)(6)(B) (emphasis added). These privacy protections, contained in a section entitled "Designation of means of electronic communication for absent . . . voters," are limited to electronic communications during the "voter registration and absentee ballot application *request processes*." *Id*. § 1973ff-1(e)(6)(A) (emphasis added).

Congress's intent in enacting MOVE was to designate a secure path for electronic communication between absentee voters and registration officials, lest the identifying information of absentee voters be compromised. *See* 156 Cong. Rec. S4,513, S4,517 (daily ed. May 27, 2010) (noting that MOVE combats the issues military and overseas voters face in corresponding with election officials). Since redaction of such uniquely private information as an individual's social security number is not possible at this stage of the registration process, MOVE ensures the privacy and security of the electronic channels used to transmit the request form.[6]

[6] *See* Federal Voting Assistance Program, *Registration and Absentee Ballot Request – Federal Post Card Application (FPCA)*, http://www.fvap.gov/resources/media/fpca.pdf (last updated January 24, 2011) (federal request form requires an individual's social security number).

MOVE's language and legislative history do not suggest that disclosure of voter registration forms will undermine the security of the absentee voting process. Congress explicitly protected "the privacy of the contents of absentee ballots," § 1973ff(b)(9)(B), but remained silent as to completed voter registration applications. MOVE's provisions shield the identities of absentee voters and the contents of their unredacted applications while they move through electronic channels. Disclosing the completed applications in a redacted form after they have reached and been reviewed by voting officials does not affect the absentee voting process. In fact, the Public Disclosure Provision serves to further MOVE's goals by ensuring that absentee voters receive the same protection from voter fraud and discrimination as their local counterparts.

III. Applying The Public Disclosure Provision To Registration Applications Does Not Raise Constitutional Issues Or Defeat The Statute's Purpose

Appellants liken the information requested in the Virginia Voter Registration Application to a situation where applicant's social security numbers are disclosed publicly, as the *Greidinger* court considered to raise constitutional concerns. *See Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993) (finding a statute that "condition[s] [the] right to vote on the public disclosure of [the plaintiff's] SSN" unconstitutional). To be clear, Project Vote has never requested applications with Social Security Numbers unredacted. It has only sought records with that information redacted. (J.A. 115).

But Appellants raise concerns as to information regarding felony convictions and court rulings about mental incapacity that may be contained on an application form. Appellants' Brief at 22. At the outset, these arguments are meritless because applicants do not have to provide this information to register to vote in Virginia. *See* 42 U.S.C. 1973gg-4(a) (requiring states to accept a federal voter registration form in addition to any other particular form the state develops). Virginia must accept the federal registration form, developed by the Federal Election Commission, as a valid voter registration application. *Id.* This form does not require that applicants enter any information regarding felony convictions or adjudications of mental incapacity.[7]

Moreover, court records of felony convictions are readily accessible by the public, and therefore are not similar to the social security numbers protected by *Greidinger*. *See Smith v. Doe*, 538 U.S. 84, 101 (2003) ("Although the public availability of the information may have a lasting and painful impact . . . the fact of [an individual's] conviction [is] already a matter of public record."); *Stevenson v. State & Local Police Agencies*, 42 F. Supp. 2d 229, 232 (W.D.N.Y.1999) (finding that the impact of disclosure of plaintiff's status as a sex offender under the Sex Offender Registration Act "is diminished by the fact that his conviction is already a

[7] *See* Register to Vote in Your State By Using This Postcard Form and Guide, available at http://www.eac.gov/assets/1/Documents/national%20mail%20voter%20registration%20form%20english%20February%2015%202011.pdf

matter of public record"). Voters do not have a privacy interest in preventing the disclosure of whether they have a felony conviction.

Disclosure of court orders of mental incapacity is also dissimilar to the disclosure of an individual's social security number. *See McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 77-78 (8th Cir. 1976). In *McNally v. Pulitzer Pub. Co.*, the Eighth Circuit Court of Appeals found that a newspaper's publication of portions of a psychiatric evaluation of McNally did not amount to an invasion of privacy. *Id.* The court reasoned that the newspaper article in question substantially repeated sections of the report read in open court as part of McNally's competency hearing. *Id.* at 77. Because of this prior disclosure, the court held that the newspaper had not wrongly published private non-public information. *Id.* Determinations of mental competency made in open court are available to the public and, like the report at issue in *McNally*, do not amount to sensitive private information. Here, the privacy concern is even more attenuated than in *McNally*, because Virginia's form only contains a box that can be checked "yes" or "no," without any of the details contained in the actual evaluation. (J.A. 55).

Moreover, SSNs by their nature are uniquely sensitive. In *Greidinger*, this Court catalogued the unique historical connection between SSNs and personal information, as well as the "alarming and potentially financially ruinous" implications of the number's disclosure. *See Greidinger*, 988 F.2d at 1352-53, 1354. Other courts of appeals agree that the disclosure of SSNs occupies a

uniquely private place distinguishable from other forms of identification. *See Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 365 (5th Cir. 2001) (noting the heightened risk of identity theft and fraud resulting from disclosure of an individual's SSN); *IBEW Local Union No. 5 v. U.S. Dep't of Housing & Urban Development*, 852 F.2d 87, 89 (3d Cir. 1988) (quoting S. Rep. No. 1183, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6916, 6943) (characterizing the use of SSNs as "one of the most serious manifestations of privacy concerns in the Nation"). "Unlike a telephone number or a name, an individual's SSN serves as a unique identifier that cannot be changed and is not generally disclosed by individuals to the public." *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). Because SSNs serve as a "unique identifier" that guards a multitude of highly sensitive material, its disclosure is unlike the disclosure of already-public records at issue here.[8]

For these reasons, disclosing completed voter registration applications—with Social Security Numbers redacted—does not implicate the concerns raised in *Greidinger*. Moreover, such disclosure does not frustrate the purpose of the NVRA. As discussed above, the Public Disclosure Provision is a key part of a larger statutory scheme designed to facilitate voter enfranchisement through registration and participation in federal elections. The Provision serves as a crucial

[8] Additionally, congress enacted the NVRA years after both the Freedom of Information Act, 5. U.S.C. § 552, and the Privacy Act, 5 U.S.C. 552a, already established strong protections against the public disclosure of social security numbers. *See id.* That Congress did not exempt their disclosure from the Public Disclosure Provision is of no moment here because Congress had every reason to believe that social security numbers were already protected.

mechanism by which the public can ensure that States are carrying out their registration obligations in a fair and non-discriminatory manner compliant with federal law. The district court's ruling on the Public Disclosure Provision's plain language only furthers that purpose.

CONCLUSION

For the foregoing reasons, Appellee Project Vote respectfully requests that this Court affirm the district court's ruling.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using a fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Times New Roman, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains ____ words.

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 2011, I electronically filed the foregoing APPELLEE'S BRIEF upon the United States Court of Appeals for the Fourth Circuit via the Court's CM/ECF system, which will send notice of such filing to the following, who are registered CM/ECF users.

I further certify that on this ____ day of October, 2011, eight copies of the APPELLEE'S BRIEF will be sent via Federal Express to the Clerk of Court.

____