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

APPELLANTS' BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 11-1809 Caption: Project Vote/Voting for America, Inc. v. Elisa Long and Donald Palmer

Pursuant to FRAP 26.1 and Local Rule 26.1,

Donald Palmer who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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I certify that on September 12, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 11-1809 Caption: Project Vote/Voting for America, Inc. v. Elisa Long and Donald Palmer

Pursuant to FRAP 26.1 and Local Rule 26.1,

Elisa Long, General Registrar who is Appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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/s/ Jeff W. Rosen September 12, 2011
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JURISDICTIONAL STATEMENT

Plaintiff Project Vote/Voting For America brought a single count complaint alleging violations of Section 8(i) of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg – 6(i) (2006). (J.A. 12-23). As a consequence, the district court had jurisdiction pursuant to 28 U.S.C. § 1331.

The district court entered final judgment against Defendants on July 20, 2011 (J.A. 439). A timely Notice of Appeal was filed on July 25, 2011 (J.A. 440-42), and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does the NVRA require that voter applications be made available to the public?

STATEMENT OF THE NATURE OF THE CASE

Following service of the Complaint, Defendants filed a timely motion to dismiss. (J.A. 26-28). Plaintiffs had demanded from the General Registrar of Norfolk "'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'" together with "other documents, such as 'documents identifying the reasons the applications were rejected.'" (J.A. 19). The theory underlying the Motion to Dismiss was that the following language from Section 8(i) of the NVRA, does not apply to voter applications:

> (1) Each state shall maintain for at least two years and shall make available for public inspection, and when 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 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) are sent, and information concerning whether or not such person has responded to the notice as of the date that inspection of the records is made.

Plaintiff filed a memorandum in opposition, (J.A. 82-133), and Defendants replied. (J.A. 134-91).

Oral argument was conducted on July 30, 2010. (J.A. 192-230). On October 29, 2010, the district court issued its written opinion denying the motion. (J.A. 235-70). In construing the phrase "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 district court applied plain meaning, contextual, and statutory purpose analysis to conclude that the provision covered the applications, even though they had never been used to qualify a person to be on an official list. (J.A. 252-68).

Thereafter Defendants answered (J.A. 272-85), and Plaintiff moved for summary judgment, (J.A. 292-94), based upon the district court's analysis in its order on the Motion to Dismiss. (J.A. 295-305). The Secretary of the State Board of Elections, Donald Palmer, filed an opposition advancing three points: (1) the language "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" does not encompass the documents sought by Plaintiff (J.A. 308); *See also* (J.A. 296) (Plaintiff seeks access "to completed voter registration applications and related records, as requested in the complaint, concerning prospective registrants who were denied registration in the City of Norfolk, Virginia in advance of the November 2008 general election (collectively the 'Requested Records.')");

(2) Plaintiff's interpretation conflicts with provisions of the Military and Overseas Voter Empowerment ("MOVE") Act, 42 U.S.C. § 1973ff *et seq*., (2006) and the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq*., (2006) requiring that personal information on certain voter applications be kept confidential. (J.A. 309). Defendants argued that their interpretation should be preferred because it harmonizes NVRA with the MOVE Act and HAVA. (J.A. 313) (citing *Cooper v. B&L, Inc.*, 66 F.3d 1390, 1395 (4th Cir. 1995) (harmonization required); (3) Defendants maintained that disclosing all information on voter applications, including crimes and mental condition, will chill voting participation contrary to the declared intent of Congress. *See* 42 U.S.C. § 1973gg(b)(1). (J.A. 309-17). The Registrar filed an opposition premised on substantially the same grounds. (J.A. 328-41). Plaintiff filed a reply joining issue on all arguments. (J.A. 374-89).

On June 10, 2011, the district court held a status conference. Finding that all parties agreed that the matter was ripe for decision, the Court entered its Memorandum Order requiring any supplemental submissions be filed on or before July 1. (J.A. 390). Plaintiff and

Defendants filed supplemental materials either pursuant to the Memorandum Order or with further leave of court. (J.A. 392-423).

The district court filed its Opinion on July 20, 2011. (J.A. 424-439). The Defendants' supplemental filings had tended to show that there were procedures in place to permit all of the applicants whose applications had been rejected to challenge the denial of their applications or to correct them (J.A. 392-401) – demonstrating that "eligible Norfolk State University students were not prevented or discouraged from voting in Virginia's 2008 general election." However, the Court deemed this issue irrelevant. (J.A. 425 n. 1). In construing the NVRA, the district court adhered to its reasoning on the Motion to Dismiss. (J.A. 430). With respect to the MOVE Act and HAVA, the court found that there was no conflict with the NVRA (J.A. 431-33), and that having construed the NVRA as it had on the Motion to Dismiss, "'the court's inquiry is complete and it will enforce the statute as written.'" (J.A. 433 n. 6).

Although the district court granted injunctive relief (J.A. 434-38), it made such relief prospective only because of public reliance on prior assurances of confidentiality. (J.A. 436-38). After the filing of the

Notice of Appeal (J.A. 440-42), the court took up Defendants motion for a stay. (J.A. 443-44). On August 1, 2011, the district court entered its Order granting a stay of the judgment pending appeal. (J.A. 449-52). In doing so, the Court analyzed the four factors set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). First, it found that "as this case is one of first impression, that touches on matters of substantial importance, there is certainly a 'substantial case on the merits.'" (J.A. 450). Second, it found that "[t]he defendants have demonstrated that, considering the time and expense required to implement the changes necessary to comply with this court's July 20, 2011 judgment, they would suffer irreparable harm absent a stay." (*Id.*) With respect to the third factor, the court determined that while a stay would injure Plaintiff by delaying the exercise of its statutory rights, a stay would not interfere with Plaintiff's core mission. Finally, the district court ruled that the public interest would be served by a stay for three reasons: (i) it would mitigate the burden on Defendants during the pending state elections; (ii) it would give time to Defendants to prepare to implement the decree while also giving the Congress and the General Assembly time to consider changing the law; and (iii) it would keep

confidential that which otherwise should not have been released in the event that this Court finds error. (J.A. 451-52).

STATEMENT OF FACTS

This suit rises out of the declared concerns of Plaintiff that students at Norfolk State University ("NSU") – a historically African-American public university located in Norfolk, Virginia – experienced difficulties in registering to vote in the November 2008 primary and general elections. (J.A. 296). Project Vote concluded that many applications submitted by apparently qualified on-campus NSU students were denied by the Registrar, Defendant Long. (J.A. at 296-97).

On May 11, 2009, an affiliate of Plaintiff requested that Defendant 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."

(J.A. 297). The claimed right of inspection was founded on the public disclosure provision of the NVRA.

On May 13, 2009, Defendant Long refused the request. (*Id.*) Martha Brissette, an attorney and policy analyst with the Virginia State Board of Elections, emailed the affiliate in support of the refusal. (*Id.*)

Representatives of the Plaintiff and its affiliate traveled on May 15, 2009, to Defendant Long's office in Norfolk, Virginia, where they repeated their request. (*Id.*) This request also was refused. (*Id.*) On July 22, 2009, Plaintiff and its affiliate, purporting to act on behalf of themselves and of all others similarly aggrieved, wrote to the Secretary of the State Board of Elections, pursuant to Section 11(b) of the NVRA, giving notice of an alleged violation of the public disclosure provision and requesting remedial measures. (*Id.*) In addition, Plaintiff and its affiliate requested the State Board of Elections to issue a written directive to all General Registrars and state election officials advising them of their alleged obligation under the NVRA to permit inspection and copying, upon request, of "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," allegedly including copies of completed voter registration applications. (J.A. at 297-98).

On July 22, 2009, Brissette informed Plaintiff and its affiliate 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. (J.A. 298). On September 25, 2009, Brissette forwarded to Plaintiff and its affiliate the Attorney General's informal opinion concluding 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" Section 11(b) of the NVRA. (*Id.*).

The rejected applications which concerned Plaintiff can be explained by the use of the NSU address on applications. Because NSU occupies two precincts, an NSU address without more is insufficient. Incomplete applications were handled administratively by sending a letter notifying the applicant of the identifiers necessary for a valid address. The applicant was also informed of a right of administrative

appeal. The applications of those who resubmitted valid addresses were processed. Because many students did not receive the mailed letter because their addresses were insufficient for delivery, provisional ballots were offered on election day to students whose names did not appear on the poll books. At the canvas following the election, the Electoral Board voted to count all ballots cast by otherwise qualified students who provided their complete residence address on the provisional ballot affirmation, if the address was located within the precinct where the provisional ballot was cast. (J.A. 395-401).

No documents have been provided owing to the entry of the stay pending appeal.

SUMMARY OF THE ARGUMENT

The plain and ordinary meaning of the phrase "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of eligible voters" does not encompass voter applications, much less the rejected applications initially sought. The language "shall include" in Section 8(i)(2) of the NVRA are words of limitation, not of enlargement, limiting the public access documents to the documents relating to the purging of voter lists

enumerated in that subsection. The architecture of the NVRA demonstrates that the "programs and activities" referred to in Section 8(i)(1) of the NVRA are programs and activities related to the purging of voters from the list of registered voters. The district court's interpretation of the NVRA brings it into tension and conflict with HAVA and the MOVE Act. Finally, because voter applications contain criminal and mental health information, the district court's interpretation discourages registration and voting contrary to express congressional intent. This burden on voting from the district court's interpretation rises to constitutional dimensions and should be rejected under the doctrine of constitutional avoidance.

ARGUMENT

I. Standard of Review.

Because this case involves a pure issue of law, decided on summary judgment, the standard of review is *de novo*. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (questions of law reviewed *de novo*); *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir. 2003) (summary judgment reviewed *de novo*).

II. The Applications At Issue Do Not Fall Within Section 8(i) of the NVRA.

The records required to be maintained, made available for public inspection, "and, where available, photocopying at a reasonable cost," are limited to 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." NVRA Section 8(i)(1). The ordinary and natural reach of that language extends to records dealing with the maintenance and purging of the voter rolls, not with applications. In particular, the rejected applications initially sought have nothing to do with "official lists of eligible voters" because they did not place the rejected applicants on such a list.

The only records expressly included within Section 8(i)(1) are those listed in Section 8(i)(2) of the NVRA. Section 8(i)(2) provides: "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) are sent, and information concerning whether or not

each such person has responded to the notice as of the date that inspection is made." These records have to do solely with purging voter rolls. They have nothing to do with registration, much less with rejected registration applications. Hence, under general principles of *ejusdem generis*, Section 8(i)(2) militates against construing the rejected applications at issue as falling within Section 8(i)(1) of the NVRA.

The district court concluded that the exclusion in Section 8(i)(1) for records relating "to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered" supported its decision that applications were covered. (J.A. 431 n. 5) (citing *Project Vote/Voting For Am., Inc. v. Long*, 752 F. Supp. 2d 697, 706-08 (E.D. Va. 2010)). Although the district court found that the exceptions deal with the registration process generally, they actually apply to Voter Registration Agencies specifically. Section 7 of the NVRA, 42 U.S.C. § 1973gg-5, requires states to appoint certain public assistance agencies as Voter Registration Agencies under the NVRA. With respect to those agencies, in addition to public assistance, they must offer registration services.

Section 7 (a)(6)(B) of NVRA, 42 U.S.C. § 1973gg-5(a)(6)(B) requires a separate form for use by a person who declines registration assistance from such an agency. The first exemption contained in Section 8(i)(1) simply makes clear that those forms need not be retained or made public.[1] The second exemption in Section 8(i)(1) makes the identity of public assistance offices that are voter registration agencies confidential. This actually militates against the public availably of registration applications because such an office is permitted to use its "own form if it is equivalent to the form described in Section 9(a)(2)." Because such an application would likely disclose the identity of such an office in contravention of Section 8(i)(1), the district court's interpretation should be rejected.

Rather than applying the plain meaning of the operative provisions of the NVRA, the district court went on to define the terms "eligible," "current," and "accurate" in subsection (1) to conclude that "a program or activity covered by the Public Disclosure Provision is one

[1] There is another reference to declining to vote in Section 5(c)(2)(D) of the NVRA, § 1973gg-3(c)(2)(D), the so-called motor-voter law. But a license application that does not include a completed registration component – i.e., a declination – is not intended to be transmitted to a voting official and will therefore never become available for retention or public inspection. *See* Section 5(e) of the NVRA, § 1973gg-3(e).

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."[2] (J.A. 253). This does not explain how an application, much less a rejected one, is a record of a program or activity conducted to ensure the accuracy of official voting lists.

III. The "Shall Include" Language in Subsection (2) of the Public Disclosure Provision Serves as a Limitation on Subsection (1).

When ruling on Defendants' Motion to Dismiss, the district court erroneously concluded that the second part of the public disclosure provision, Section 8(i)(2), does not limit the records subject to disclosure under Section 8(i)(1). Section 8(i)(1) states:

> (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) 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.

[2] The court stated further that, "official lists of eligible voters would be inaccurate and obsolete if eligible voters were improperly denied registration." (J.A. 254). Then, defining the terms "concern" and "implementation," the Court concluded that "records which relate to carrying out voter registration procedures are subject to the Public Disclosure Provision's requirements." (J.A. 256).

In brief, under Section 8(i)(2), Congress sought to ensure that records pertaining to the notices required to be given before voters may be removed from the lists (part of the mandated list maintenance program) are subject to disclosure. The records specifically identified by Congress in Section 8(i)(2) are those which should be disclosed under Section 8(i)(1). Because voter registration applications are not such records, they are not subject to the public disclosure provision.

In the context of this statute, the term "shall include" acts as a limitation, not an enlargement. *See Blankenship v. Western Union Tel. Co.*, 161 F.2d 168, 169 (4th Cir. 1947) (interpreting the use of "includes" "as a *term of limitation* indicating what belongs to a genus, rather than as a term of enlargement" (emphasis added)); *see also Montello Salt. Co. v. Utah*, 221 U.S. 452, 466 (1911) (rejecting conclusion that the word "including" is "a word of enlargement" in "its ordinary sense," finding that it is used that way only in "its exceptional sense").

At the hearing on the Motion to Dismiss, the district court stated that rather than seeing Section 8(i)(2) as a "ceiling," the court viewed it as a "floor." (J.A. 223). That interpretation renders Section 8(i)(1)

superfluous because if the plain meaning of Section 8(i)(1) is as broad as the district court says, Section 8(i)(2) is unnecessary.

The Fourth Circuit's rules of statutory construction discourage any interpretation of a statute in a manner that renders words meaningless. A court must "begin with the premise that all parts of the statute must be read together, neither taking specific words out of context . . . nor interpreting one part so as to render another meaningless." *United States v. Snider,* 502 F.2d 645, 652 (4th Cir. 1974) (citing *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934)).

IV. The Terms "Programs and Activities" in the NVRA Only Relate to Voter List Maintenance, Not Voter Registration.

Although the district court concluded that "programs and activities" in subsection (1) includes those related to voter registration, not just list maintenance, (J.A. 431), the use of the terms "programs and activities" in the NVRA shows they have a specific meaning related directly to its mandate that states "ensure that accurate and current voter **registration rolls** are **maintained**." Section 2(b)(4) of the NVRA, 42 U.S.C. § 1973gg(b)(4) (emphasis added).

Most broadly, the NVRA sets forth four Congressional purposes:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

Section 2(b) of the NVRA, 42 U.S.C. § 1973gg(b)(1)-(4). Very importantly, the public disclosure provision relates *only* to the fourth objective, list maintenance.

This can be confirmed by the structure of the Act. Section 8 outlines for the states the statutory scheme to promote the NVRA's dual purposes of voter registration and list maintenance. The words "program" or "activities," other than in the public disclosure provision, only occur in three subsections of Section 8; always in connection with the list maintenance.

- Section 8(a)(4) requires all states to have a "*program* that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters";
- Section 8(b) deals with "confirmation of voter registration," which establishes guidelines for "[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 for elections for Federal office"; and
- Section 8(c) deals with "Voter removal *programs*."

Section 8(i), which follows the above-cited subsections, therefore refers back to the programs and activities included by Congress in Sections 8(a)(4), (b), and (c) to ensure that the states *maintain* the voter lists in accordance with the statute. By ignoring the contextual meaning of the phrase "programs and activities" in Section 8(i), the district court ascribed to Congress an intent to require the states to disclose all documents related to voter registration and list maintenance, rather than only those related to list maintenance.

In sum, the plain meaning and context of the terms "program" and "activities" in the NVRA concern list maintenance, *not* voter

registration. Consequently, voter registration applications are not subject to the public disclosure.

V. The District Court has Construed the NVRA in a Manner which Causes it to Conflict with HAVA and the MOVE Act.

Section 302(a) of HAVA, 42 U.S.C. § 15482, provides strong and direct evidence that Congress does not believe that Section 8(i)(1) of the NVRA applies to registration applications, which necessarily contain personal identifiers. Section 302(a) of HAVA requires states to establish a system for casting a provisional ballot by those who certify that they are registered voters in the precinct where they seek to vote when their names do not appear on the poll books. Section 302(a) cross-references Section 4(b) of the NVRA which exempts states from Section 4 of the NVRA if they do not require registration at all or if they permit election day registration. Section 302(a) permits state law to trump Section 302(a) of HAVA for those States. The remaining States are required to devise a free access system through which provisional voters can determine whether their votes were counted. Section 302(a) continues: "The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security,

confidentially, and integrity of personal information collected, stored, or otherwise used by the free access system . . ." This requirement would make no sense if Congress intended the same type of personal information to be publicly available under Section 8(i)(1) of the NVRA from voter applications.

Similar evidence of congressional intent is provided by the privacy provisions of the MOVE Act. 42 U.S.C. § 1973ff-1(e)(6)(B). Those provisions provide: "To the greatest extent practicable, the procedures established under subsection (a)(6) shall ensure 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 under such subsection is protected throughout the process of making such request or being sent such application." Once again, it would make no sense to require these privacy protections if Congress understood and expected that the registration applications at the end of "the process" would be made publicly available under Section 8(i)(1) of the NVRA.

VI. The District Court Has Interpreted NVRA in a Manner that Defeats One of its Prime Purposes and in a Manner that Raises Constitutional Questions Best Avoided.

Section 2(b)(1)-(2) declares the first two purposes of the NVRA to be

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; [and]
>
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office[.]

Because the Virginia Voter Registration Application Form requires information on felony convictions and mental incapacity (J.A. 324), it must be reasonably supposed that conditioning voting on the public release of such information will suppress registration contrary to congressional intent. Indeed, this concern may rise to constitutional dimensions.

In *Greidinger v. Davis*, 988 F.2d 1344, 1352-53 (4th Cir. 1993), this Court struck down a Virginia law that had the effect of conditioning voting on public release of a voter's social security number. Plaintiff's interpretation of the NVRA suffers from similar infirmities and Plaintiff's interpretation should be rejected under the doctrine of

constitutional avoidance. *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

CONCLUSION

Wherefore this Court should reverse the judgment for Plaintiff and enter final judgment for Defendants.

Respectfully submitted,

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September 12, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Century Schoolbook, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 4,237 words.

/s/ E. Duncan Getchell, Jr.
Counsel for Appellant Donald Palmer

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I hereby certify that on this 12th day of September, 2011, I electronically filed the foregoing APPELLANTS' 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:

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I further certify that on this 12th day of September, 2011, eight copies of the Appellants' Brief and six copies of the Joint Appendix will be hand-delivered to the Clerk of Court, and two copies of Appellants' Brief and one copy of the Joint Appendix mailed by U.S. Mail, postage prepaid to Counsel for the Plaintiff at the address listed above.

/s/ E. Duncan Getchell, Jr.
Counsel for Appellant Donald Palmer