IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

PROJECT VOTE/VOTING FOR AMERICA, INC. 737 ½ 8th St SE Washington, DC 20003 Plaintiff, v. **ELISA LONG**, *In Her Official Capacity as General Registrar of Norfolk, VA* City Hall Building, Room 808 810 Union Street Norfolk, VA 23510 **NANCY RODRIGUES**, *In Her Official Capacity as Secretary, State Board of Elections,* Washington Building, First Floor 1100 Bank Street Richmond, VA 23219 Defendants.	)	CIVIL ACTION NO.: 2:10cv75

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS AND SUPPORTING MEMORANDUM OF LAW

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiff Project Vote / Voting for America, Inc. ("Project Vote") brings this suit seeking access to inspect and copy completed voter registration applications as required by the National Voter Registration Act's ("NVRA") Public Disclosure Provision, codified at 42 U.S.C. § 1973gg-6(i)(1). Defendants move to dismiss the case and assert that Project Vote lacks standing and has failed to state a claim upon which relief can be granted.

Project Vote has standing to sue on its own behalf because it is well-established that an informational injury such as that alleged by Project Vote constitutes a concrete injury-in-fact sufficient to establish Article III standing. Moreover, Defendants misconstrue the plain language of the Public Disclosure Provision, and their obligations thereunder, and attempt to redefine its terms through their own misinterpretations. Since Virginia law prevents compliance with the Public Disclosure Provision, such law is invalid under the Supremacy Clause of the U.S. Constitution. By denying Project Vote access to records to which it is entitled under the NVRA, Defendants have violated Project Vote's rights, and Project Vote has therefore stated a claim upon which relief can be granted.

BACKGROUND

As part of its ongoing voter protection work with the Advancement Project, a social justice organization, and other local community organizations in Virginia, Project Vote learned that the applications of ostensibly qualified students at Norfolk State University, a historically African-American public university located in Norfolk, Virginia, had been rejected by Defendant Long's office in advance of the 2008 primary and general elections. (Compl. ¶ 14.) As permitted by the NVRA, Project Vote sought to inspect and copy the completed voter registration applications of individuals who had registered to vote from January 1, 2008 through October 31, 2008 and who were not registered to vote in time for the November 2008 election, as

well as related documents that might identify the reasons the applications were rejected. (Compl. ¶ 15.)

Defendant Long denied Project Vote's request on May 13, 2009, and an attorney at the Virginia State Board of Elections contacted Advancement Project to state that Defendant Long had correctly declined to permit inspection and copying of the requested records. (Compl. ¶¶ 17-18.) On May 15, 2009, Advancement Project and Project Vote representatives traveled to Defendant Long's office in Norfolk, Virginia, where they again requested and were again denied the opportunity to inspect or copy the materials. (Compl. ¶ 19.)

On June 22, 2009, Advancement Project and Project Vote wrote to Defendant Rodrigues to give notice of a violation of the NVRA and to request that Defendant Rodrigues undertake appropriate remedial measures.[1] (Compl. ¶ 20.) The State Board of Elections requested an informal opinion of the Attorney General of Virginia, and Project Vote received that opinion on September 25, 2009. (Compl. ¶¶ 21-22.) Contrary to the plain language of the NVRA, the opinion 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 . . . ." (Compl. ¶ 22.) The Defendants again denied Project Vote's request for access to the records and, to date, have not made any of the records available to Project Vote. (Compl. ¶ 22-23.) Project Vote initiated this action to vindicate its rights under the NVRA.

[1] Project Vote stated in this letter, and has repeatedly represented to Virginia officials, that it seeks only properly redacted copies of completed voter registration applications, with any Social Security Number information removed. Ex. A., Letter from Bradley E. Heard, Sr. Attorney to Nancy Rodrigues, Secretary, State Board of Elections at 6 (June 22, 2009).

STANDARD OF REVIEW

When ruling on a motion to dismiss for lack of standing, "trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). At the same time, the party bringing a case bears the burden to prove the existence of subject matter jurisdiction. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). The Fourth Circuit has distinguished among "two critically different ways in which to present a motion to dismiss for lack of subject matter jurisdiction." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). The first approach is to contend "that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Id*. The second is to challenge the jurisdictional allegations of the complaint as untrue. *Id*. Defendants take the first approach, asserting that Project Vote has failed to allege facts establishing either its own standing or representative standing.

When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, courts are to accept all well-pled facts as true and construe the facts in the light most favorable to the plaintiff. Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950-51 (2009); *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008). These alleged facts must simply "state a claim to relief that is plausible on its face" by producing "an inference of liability strong enough to nudge the plaintiff's claims across the line from conceivable to plausible." *Nemet Chevrolet, Ltd. v. Consumersaffairs.com, Inc.,* 591 F.3d 250, 256 (4th Cir. 2009) (internal citations and quotations omitted).

ARGUMENT

I. Project Vote Has Standing Because of the Direct Informational Injury Sustained by the Defendants' Denial of the Requested Records.

A. Project Vote Has Standing to Bring This Action Because It Suffered an Informational Injury.

Defendants' argument that Project Vote lacks representative standing is a red herring, because Project Vote has not asserted that it has representative standing. Instead, Project Vote has actually claimed that it suffered a direct informational injury when it was denied access to records to which it was entitled under federal law. (Compl. ¶ 23.) This assertion of an informational injury is enough to establish standing.

Clear and unambiguous Supreme Court and Fourth Circuit precedent establishes that informational injuries are sufficient for standing purposes. In *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440 (1989), the Supreme Court held that the denial of a Freedom of Information Act ("FOIA") request brought under the Federal Advisory Committee Act ("FACA") constituted an injury to confer Article III standing. The Court stated that "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue," and that the Court's prior decisions interpreting FOIA had never required more of a showing from those requesting information "than that they sought and were denied specific agency records." *Id.* at 449. Thus, where a statute mandates the disclosure of information, and that information is refused to a party who seeks it, the party has suffered a redressable harm that confers Article III standing.

The Supreme Court reaffirmed this principle in *FEC v. Akins*, 524 U.S. 11 (1998), a case that involved a request for records under the Federal Election Campaign Act ("FECA"). The plaintiffs in *Akins* asserted that their injury-in-fact consisted of the denial of their request to obtain information that FECA required to be made public. Again, the Court held that the injury

was "concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* at 21 (citing *Public Citizen*, 491 U.S. at 449-450).

Various federal circuit and district courts have acknowledged the *Public Citizen* and *Akins* informational injury doctrine. For example, in *American Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536 (6th Cir. 2004), the Sixth Circuit found informational injury in an agency's failure to comply with public disclosure requirements of the Clean Water Act. The Fifth Circuit held in *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383 (5th Cir. 2003), that "the 'inability to obtain information' required to be disclosed by statute constitutes a sufficiently concrete and palpable injury to qualify as an Article III injury-in-fact." *Id.* at 387 (quoting *Akins*, 524 U.S. at 21). Similarly, the D.C. Circuit held in *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999), that, as a member of a committee regulated by the Federal Advisory Committee Act, the plaintiff had a right of participation that created a right to information, and that "she suffered an injury under FACA insofar as the Commission denied her requests for information that it was required to produce." *Id.* at 290.

In the cases that have denied a plaintiff's claim based on an informational injury, the denial was grounded not in the fact that an informational injury is insufficient to confer standing, but in the fact that the statutes at issue did not create rights to information. *See, e.g., Bensman v. United States Forest Serv.*, 408 F.3d 945 (7th Cir. 2005) (denying plaintiff's informational injury claim by finding that the Appeals Reform Act does not provide any explicit right to information); *Chiron Corp. v. NTSB,* 198 F.3d 935 (D.C. Cir. 1999) (finding that nothing in the NTSB organic statute gave petitioners the rights of participation and information they sought to enforce); *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009) (finding that § 10(c) of the

Endangered Species Act contained a pubic disclosure requirement but that § 10(d) did not; permitting plaintiff to proceed on § 10(c) claim and denying claim under § 10(d)).

The Fourth Circuit embraced the *Public Citizen* test in *Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006). In *Salt Institute*, the plaintiff was seeking information under the Information Quality Act ("IQA"), a statute that lacks a public disclosure requirement. Finding that *Akins* and *Public Citizen* controlled, the Fourth Circuit focused on the IQA, and analyzed whether that statute created the type of right to information that is established by FACA or FECA. *Id.* The Fourth Circuit then distinguished *Akins* and *Public Citizen* on the grounds that the statutes in question there "clearly created a right to information," whereas the statute in *Salt Institute* did not. *Id.* at 159 and n.2. Concluding that the IQA was not intended to create a legal right to information, the Fourth Circuit affirmed the district court's dismissal of the suit for lack of standing. *Id.* at 159-160.

Like FACA and FECA, the NVRA's Public Disclosure Provision patently creates a right to information by requiring that certain records be made accessible to the public: "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. . . ." 42 U.S.C. § 1973gg-6(i)(1) (emphasis added). *Compare* FACA, 5 U.S.C. app. 2 § 10(b) ("[T]he records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection."); FECA, 2 U.S.C. § 434(a)(11)(B) ("The Commission shall make a designation, statement, report, or

notification that is filed with the Commission under this Act available for inspection by the public.").

Defendants maintain that Project Vote's injury is analogous to the injuries in reported cases that were found to be insufficient to confer standing because of (1) a "mere interest in a problem," *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (quotations omitted); (2) an injury to an organization's ideals or a "setback to its abstract social interests," *Harkless v. Blackwell*, 467 F. Supp. 2d 754, 761 (N.D. Ohio 2006), *rev'd on other grounds, Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008); or (3) a lack of any concrete involvement in registering voters who claimed NVRA violations, *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925, 934 (E.D. Mich. 2008). (Def. Mot. at 7-8.) But Project Vote has alleged a concrete injury distinct from these categories because it has asserted that it requested information to which it was entitled under the Public Disclosure Provision and that Defendants denied access to that information. The denial of Project Vote's request alone is enough of an injury to confer standing.

The Supreme Court stated in *EPA v. Mink*, 410 U.S. 73, 86 (1973), that FOIA does not "permit inquiry into particularized needs of the individual seeking the information," because of the public character of the informational right. The NVRA likewise grants an explicit public right to information. It is enough for Project Vote to allege that it has suffered an injury from being denied access to information to which it is entitled as a matter of right, without having to further allege any particularized interest in the documents or to assert the denial of a substantive right to register to vote under the NVRA. Indeed, Project Vote has neither asserted the denial of a substantive registration right nor any other injury, other than an informational injury caused by Defendants' denial of Project Vote's rights to obtain records.

Because the Public Disclosure Provision is a statute that clearly creates a right to information and because Defendants have denied Project Vote this right, Project Vote has sustained a concrete informational injury that confers Article III standing. Accepting Project Vote's well-pled facts as true and construing these facts in the light most favorable to Project Vote in weighing the legal sufficiency of the complaint, the court should deny Defendants' motion to dismiss for lack of standing.

II. Project Vote Has Stated a Claim Upon Which Relief can be Granted Because Defendants Have Withheld Information in Violation of the NVRA.

Project Vote alleges that Defendants have denied its requests for access to inspect or copy completed voter registration applications in Norfolk, Virginia. These denials are in direct violation of the Public Disclosure Provision of the NVRA, 42 U.S.C. § 1973gg-6(i)(1), and thus the NVRA's civil enforcement provision provides for a cause of action and relief for the injuries sustained. 42 U.S.C. § 1973gg-9(b)(1). Moreover, because the NVRA is a validly enacted federal law, Defendants' actions violate the Supremacy Clause of the U.S. Constitution. Project Vote has thus stated a claim upon which relief can be granted and Defendants' motion to dismiss must be denied.

A. Defendants' Refusal to Grant Access to the Requested Records Violates the NVRA Because Its Public Disclosure Provision Requires that Completed Voter Registration Applications be Made Available for Inspection and Copying.

The Public Disclosure Provision's plain language is unambiguous and requires that completed voter registration applications be made publicly available because such applications are records concerning the implementation of a program or activity conducted for the purpose of ensuring that official lists of eligible voters are accurate and current—specifically, the process by which Virginia evaluates potentially eligible individuals for inclusion on the official lists of eligible voters. The Defendants' proposed limitations on the Provision's plain language ignore

the significance of specifically-enumerated exceptions to its disclosure requirements, and would render this exceptions clause nonsensical as drafted by Congress. Other principles of statutory construction reinforce that the Provision's plain language mandates public access to completed voter registration applications. Defendants' arguments to the contrary ignore the plain language of the Public Disclosure Provision and misconstrue other provisions of the NVRA.

1. The Court's Analysis Should Focus on the Plain Language of the Public Disclosure Provision.

When interpreting a statute, a court should enforce the statute 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"). Thus, the first step in statutory interpretation 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). In fact, when the plain meaning of a statute is unambiguous, "this first canon is also the last [and] judicial inquiry is complete." *Id*.

In construing the Public Disclosure Provision's plain language, its terms should be afforded their "ordinary, contemporary, common meaning" unless Congress intended those terms 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)). Moreover, the proper breadth of such statutory terms is revealed by Congress's inclusion of modifiers in the text that imply that its terms should be construed expansively—such as the word "all." *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 290 (4th Cir. 1998).

Where Congress specifically exempts certain categories from otherwise applicable language, courts may 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 exlusio alterius* and would amount to the court performing a "legislative trick"); *United States v. Rocha*, 916 F.2d 219, 243 (5th Cir. 1990). Thus, when construing the breadth of the operative clause of a statute, courts may not limit its interpretation such that any of the exceptions thereto become 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.").

2. The Plain Language of the Public Disclosure Provision Requires Disclosure of Completed Voter Registration Applications.

The plain and common meaning of the Public Disclosure Provision's terms leaves no doubt that completed voter registration applications are records that must be made available for public inspection and copying. The Public Disclosure Provision 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) (emphasis added). The Provision provides only two exceptions to its requirement that "all records" be disclosed: 1) records that relate to an individual's declination to register to vote; or 2) records that identify a voter registration agency through which a particular voter was registered. *Id*. This exceptions clause, though a critical part of the Public Disclosure

Provision, is ignored by the Defendants, and that initial error taints their interpretation of their obligations under the statute.[2]

Since Congress provided 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."). In other words, the Court should not exclude completed voter registration applications from the term "all records" because the exceptions clause demonstrates Congressional intent to include those applications within the meaning of that term.

The exceptions clause also refutes Defendants' proposed interpretation that the Provision's disclosure requirements reach only those records "that prove the [S]tates are properly maintaining lists of registered voters." (Def. Mot. at 13.) That interpretation would render Congress's drafting of the exceptions clause nonsensical, because neither of the categories of records excluded from the public disclosure requirement are records that prove that Virginia is properly maintaining its list of registered voters. Thus, under the Defendants' interpretation, the exceptions clause would be meaningless, but no interpretation can be accepted that renders Congressional language meaningless. *Discover Bank*, 396 F.3d at 370. Moreover, both enumerated exceptions concern categories of records concerning the implementation of voter

[2] In fact, Defendants repeatedly quote the statute without noting the exception clause, replacing it instead with an ellipsis. (*See, e.g.,* Def. Mot. at 1,6, 13, 18.)

registration programs or activities and, as such, clearly show Congress's intent to include completed voter registration applications within the Provision's disclosure requirement.

Completed voter registration applications do not fall under the exceptions clause, and therefore must be included in the term "all records." *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."). On their face, the applications neither relate to an individual's declination to register to vote nor identify the voter registration agency through which an individual registered. (*See* Def. Mot. Ex. D.) Indeed, the exceptions clause refers to only a small category of records relating to specific voter registration agency public assistance programs mandated by the NVRA.[3] 42 U.S.C. § 1973gg-5. Thus, because 1) the process by which Virginia evaluates individuals for inclusion on the official lists of eligible voters is a "program or activity" conducted for the purpose of ensuring that such lists are accurate and current; and 2) completed voter registration applications are integral to that process, the Public Disclosure Provision requires that completed voter registration applications be made available for public inspection and copying. *Id.*

In what appears to be the only judicial treatment of this issue, a federal court has required the disclosure of completed voter registration applications under this Provision. *See, e.g., Jenkins v. Ousse et al.*, Case No. 96-2613, Dkt. No. 3 (W.D. La November 12, 1996) (imposing temporary restraining order requiring defendant state election officials to make completed voter

[3] 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. Ex. B, Commonwealth of Virginia, Voter Registration Agency Form. 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).

registration applications available for inspection and copying by Plaintiff who brought suit under the Public Disclosure Provision). It is clear from the district court's docket and a related Fifth Circuit opinion that access to the completed voter registration applications was sought and granted under the Public Disclosure Provision. *Jenkins v. Ousse,* 145 F.3d 359, 1998 WL 307588, * 2 (5th Cir. May 12, 1998) (District Court Docket Sheet with Minute Order attached hereto as Ex. C).

Since the exceptions clause clearly demonstrates Congressional intent to include all records related to voter registration activities not specifically excepted, the completed voter registration applications sought by Project Vote are covered by the plain language of the Public Disclosure Provision and must be disclosed.

3. Evaluating Voter Registration Applications is an Activity Conducted to Ensure the Accuracy and Currency of Official Lists of Eligible Voters.

The process of evaluating voter registration applications to determine whether persons should be included on the official list of eligible voters is the most central "program or activity" conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters. In Virginia, to be an eligible voter, an individual must be considered 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 and may either grant or deny that 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 only those individuals meeting the statutory requirements are added to the official eligible voter list and that individuals who do not satisfy

those requirements are excluded. *See, e.g.,* Va. Code § 24.2-101. The process also ensures that the official lists are current by providing all prospective voters the opportunity to be added to the list on an ongoing basis—for example, when they reach the minimum voting age of 18 or have their voting rights restored. *Id*. Most importantly, inspection of completed voter applications is key to determining whether otherwise eligible voters, who meet the statutory requirements and properly completed an application, are being improperly excluded from the official list of voters. Ensuring that otherwise eligible voters are not being improperly excluded is crucial to ensuring the accuracy and currency of the official lists.

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; *see United States v. Groce*, 398 F.3d 679, 681 (4th Cir. 2005) (citing Webster's as an authoritative source on a statutory term's common meaning). 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." (Def. Mot. Ex. D at 1.) Indeed, 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 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*. Finally, 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).

4. Other Principles of Statutory Construction Also Support the Conclusion that Voter Registration Applications Must Be Produced.

Other principles of statutory construction confirm that completed voter registration applications are included in the Public Disclosure Provision's requirement that "all records" be made publicly available. Specifically, both the applicable statutory titles and the NVRA's purpose indicate that Defendants' narrow interpretation of their obligations 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).

The NVRA's titles, section titles, and subsection titles indicate that the meaning of "all records" includes completed voter registration applications rather than merely records related to removal of voters from the rolls, as Defendants argue. First and foremost, the NVRA is a voter registration statute, not a voter removal statute. Indeed, it 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 in 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." 42 U.S.C. § 1973gg-6(i) (emphasis added).

Despite the decision of Congress to include the term "registration" multiple times in the titles and subtitles under which it placed the Public Disclosure Provision, Defendants argue that registration applications need not be produced because the Public Disclosure Provision comes up in the "context" of removing voters from the voting rolls. (Def. Mot. at 11.) This is simply not true. In fact, the NVRA sections cited by Defendants 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) (prohibiting a State from removing a voter from the voting rolls unless certain conditions are met). This is in keeping with the NVRA's purpose, which is to increase voter registration and voter participation. *See, e.g.,* 42 U.S.C. § 1973gg(b) (stating that the purpose of the NVRA is "to establish procedures that will increase the number of eligible citizens" able to vote in federal elections). Public inspection and copying of completed voter registration applications, as provided for by the Public Disclosure Provision, facilitates that goal by ensuring that otherwise eligible voters are not being improperly denied admission to official lists.

The legislative purpose and Congressional findings included in the NVRA also support the conclusion that completed voter registration applications must be disclosed publicly. Congress's stated purposes in enacting the NVRA demonstrate that it should be interpreted with the aim of ensuring that potentially eligible voters are not improperly excluded from the voting rolls. *See* 42 U.S.C. § 1973gg(b) (stating a purpose is to ensure that States "enhance the participation of eligible citizens as voters in elections for Federal office"). *See, e.g., 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). The Public Disclosure Provision is meant to shine a public light on any practice that causes such harm in order to prevent voter disenfranchisement. Excluding completed voter applications from the reach of the Public Disclosure Provision runs directly counter to that purpose. Without public disclosure of such applications, ascertaining whether individuals are being wrongly denied admittance to the official lists of eligible voters is not possible. Such a result runs counter to the NVRA's purpose and goals, and counter to the Public Disclosure Provision's plain language. Accordingly, completed voter registration applications must be made available for public disclosure and copying.

5. The Defendants' Narrow Interpretation of Their Obligations Runs Afoul of the Plain Language of the Public Disclosure Provision and Violates the NVRA.

The Defendants attempt to avoid the impact of the Public Disclosure Provision's plain language and instead look to other NVRA subsections in an attempt to constrain its meaning. (Def. Mot. at 11-13.) This tactic must fail because, when the language in a statute with regard to the particular dispute in a case is unambiguous, judicial inquiry regarding the language's meaning is complete. *Willenbring*, 559 F.3d at 235.

Defendants attempt to rely on 42 U.S.C. § 1973gg-§ 6(i)(2), claiming that this subsection describes the extent of records that must be disclosed under the Public Disclosure Provision.[4] (Def. Mot. at 14 (citing Section 1973gg-6(i)(2)).) But 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*. As discussed above, Defendants' interpretation must fail because accepting that Section 6(i)(2) describes all records to be disclosed under the Public Disclosure Provision would render the Provision's exceptions clause nonsensical. *Discover Bank*, 396 F.3d at 370. Under Defendants' interpretation, Congress intended to exclude from the Public Disclosure Provision many records—such as records relating to voters' declination of registration—that were never covered by the Provision in the first place.

Moreover, the Public Disclosure Provision is clear in that all records that are 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). This language in no way affects the Public Disclosure Requirement's command that all records that are maintained concerning pertinent programs or activities must be made publicly available. *Id*.

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[4]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). Section § 6(i)(2) thus speaks to a State's record maintenance requirement only—not its disclosure requirements under the Public Disclosure Provision.

Finally, the use of the term "include" in Section 6(i)(2) makes clear that the records described in that Section are but illustrative examples, not an exclusive list. *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); *United States v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005) (same); *Gordon v. Liberty Mut. Ins. Co.*, 675 F. Supp. 321, 324 (E.D. Va. 1987) (construing the term "include" disjunctively as used in Virginia's automobile insurance statute). Thus, Section 6(i)(2) does not limit the disclosure requirements of the Public Disclosure Provision.

Defendants also raise privacy concerns regarding the disclosure of individual Social Security Numbers ("SSNs"), in an attempt to avoid the Provision's disclosure requirements, but these arguments are meritless. (*See, e.g.,* Def. Mot. at 15, 19.) Most importantly, Project Vote has repeatedly requested that only properly redacted copies of the requested records be made available so as to avoid disclosure of any SSNs. *See* Ex. A. The remaining information contained on any disclosed applications would be similar to the information already publicly disclosed by the Defendants in their own Exhibit C. (*See* Def Mot. Ex. C.) Moreover, cases cited by Defendant in support of their argument are inapposite. The *Greidinger* decision merely held that States may not require individuals to consent to the public disclosure of their SSNs as a condition of voter registration. *Greidinger v. Davis*, 988 F.2d 1344, 1355 (4th Cir. 1993). Neither the Fourth Circuit opinion nor the District Court's subsequent consent decree addressed the Public Disclosure Provision's disclosure requirements—only the disclosure of SSNs. *Id.*; District Court Consent Decree (attached hereto as Ex. D). Thus, any pertinent privacy concerns are assuaged by Project Vote's request for applications with SSNs redacted. Even the Virginia Supreme Court agrees that redacted applications do not present such privacy concerns, as it has

previously ruled that such redacted applications must be disclosed under Virginia law. *Rivera v. Long*, No. 070274, slip op. (Va. Sup. Ct., Feb 8, 2008) (attached hereto as Ex. E). [5]

B. Project Vote Has Stated a Claim for Relief Under the NVRA Civil Enforcement Provision Based On Defendants' Continued Violation of the NVRA.

Defendants' continued refusal to grant Project Vote access to inspect and copy the requested voter registration applications violates the NVRA and supports a cause of action under the NVRA's civil enforcement proceeding. 42 U.S.C. § 1973gg-9. To the extent that compliance with the NVRA is not permitted by Virginia law, such law is invalid under the Supremacy Clause of the U.S. Constitution because it conflicts with the NVRA. U.S. Const. art. VI, cl. 2 ("The Constitution and the Laws of the United States . . . shall be the supreme Law of the Land"); *College Loan Corp. v. SLM Corporation*, 396 F.3d 588, 595 (4th Cir. 2005) ("As a result [of the Supremacy Clause] federal statutes and regulations properly enacted can nullify conflicting state or local actions."); *see, e.g., Jenkins*, at Dkt. No. 3 (granting Plaintiff access to completed voter registration applications under the NVRA despite State's refusal); *see also Young v. Fordice*, 520 U.S. 273, 286 (1997) (recognizing that the NVRA imposes "mandates" on the States by which they must abide).

Moreover, the Virginia Attorney General has no authority to substitute his interpretation of the Public Disclosure Provision's requirements for that which is required by the NVRA's plain language. *United States Student Ass'n Found. v. Land*, 546 F.3d 373, 382-383 (6th Cir. 2008) (holding that States have no power to interpret provisions of the NVRA because a "federal statute cannot adequately protect the rights of individuals from actions of the [S]tate" if States

[5] Defendants also rely upon a document issued by the Federal Election Commission ("FEC") entitled *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches and Examples* in support of their privacy arguments. (*See* Def. Mot. at 14; Def. Ex. E.) But, this document carries no interpretive weight—even its preface states that it is intended only as a "general reference" and its "suggestions" are "purely heuristic and are offered without the force of law, regulation or advisory opinion." (Def. Ex. E at P-1.) Accordingly, reliance on this document to interpret the NVRA is improper.

have such interpretive power). The NVRA's disclosure requirements are controlling. U.S. Const. art. VI, cl. 2; *College Loan Corp.*, 396 F.3d at 595; *see, e.g.*, *Jenkins* at Dkt. No. 3; *see also Young*, 520 U.S. at 286 (1997). As such, Project Vote has stated a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Respectfully submitted,

_____/s/_____
Ryan M. Malone (VA Bar # 48526)
Jason G. Idilbi (VA Bar #76869)
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 2010, I electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/
Ryan M. Malone

June 22, 2009

VIA ELECTRONIC MAIL TO:
nancy.rodrigues@sbe.virginia.gov

Ms. Nancy Rodrigues
Secretary, State Board of Elections
200 North 9th Street, Room 101
Richmond, VA 23219

Re: Notice of Violation of National Voter Registration Act

Dear Ms. Rodrigues:

Pursuant to Section 11(b) of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-9(b), and on behalf of Advancement Project, Project Vote, and all others who may be similarly aggrieved, we write to notify you that the Commonwealth of Virginia and its local election authorities are operating in violation of the public records disclosure provisions of Section 8(i) of the NVRA, 42 U.S.C. § 1973gg-6(i), by failing to permit public inspection and copying, upon request, of completed voter registration applications and other records related to voter registration activities. As civil and voting rights organizations that focus on increasing civic participation in low-income and minority communities and eliminating barriers to voter registration and voting, we rely heavily upon the ability to inspect and copy voter registration records to accomplish our missions and to provide effective assistance to our community partners. The Commonwealth's laws prohibiting public inspection and copying of completed voter registration applications and other voter registration records are antithetical to the NVRA and, therefore, are unenforceable.

To correct this violation, we request that your office immediately issue a written directive to all general registrars and all state election officials, advising them that they are required by federal law 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" — specifically including but not limited to copies of completed voter registration applications (redacted to exclude only the applicant's Social Security number and agency of registration, if applicable) — notwithstanding Va. Code §§ 24.2-444 and 2.2-3703(B) or any other law, rule, or regulation of the Commonwealth to the contrary. The directive should further advise all election officials that any requested voter registration records should be made available for inspection or copying within the same time frames that other public records are required to be made available for inspection and copying pursuant to the Virginia Freedom of Information Act (i.e., generally five working days). *See* Va. Code Ann. § 2.2-2704. Should the Commonwealth not correct these violations within 90 days after your receipt of this notice, we may seek to vindicate our rights as permitted by Section 11(b) of the NVRA.

Background

On May 11, 2009, Advancement Project sent an email to the General Registrar of Norfolk, Elisa Long, specifically requesting that she "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, in addition to several other documents (e.g., documents identifying the reasons the applications were rejected)." We advised Ms. Long that these records were required to be made available for public inspection and copying pursuant to Section 8(i) of the NVRA, notwithstanding any other law of the Commonwealth to the contrary.

On May 13, 2009, Registrar Long informed Advancement Project that she would not permit it to review or copy the forms, stating that "Virginia law does not permit voter registration applications to be inspected or copied," and citing Va. Code Ann. § 24.2-444 in support of her position. Later that day, Martha Brissette, an attorney and policy analyst with the Virginia State Board of Elections, sent an email stating that Registrar Long correctly declined to permit inspection and copying of the voter registration applications that we had requested.

On May 15, 2009, representatives from Advancement Project and Project Vote visited the General Registrar's office in Norfolk, where they again requested and were denied the opportunity to inspect or copy the requested voter registration applications. We made this request, in part, in an effort to assist one of our community partners, Democracy South, with several registration issues that they had encountered in Norfolk during the 2008 election season.

Analysis

The Commonwealth's refusal to permit inspection or copying of all records relating to voter registration, specifically including copies of completed voter registration applications (redacted to exclude only the applicant's Social Security number and agency of registration, if applicable), violates Section 8(i) of the NVRA, which states:

> (i) **Public disclosure of voter registration activities**
>
> (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) (emphasis added).

Applying the traditional canons of statutory construction, it is clear that Congress intended for state and local election officials to allow the public to inspect and copy **"all records"** relating to voter registration activities, including copies of completed voter registration applications, as a means of protecting the integrity of the registration process and ensuring that election officials are complying with their duty to register all eligible voters in a timely manner.

> In interpreting a statute, "a court should always turn first to one, cardinal canon [of construction] before all others": the plain meaning rule. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). We must presume that "Congress says in a statute what it means and means in a statute what it says. . . ." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N. A., 530 U.S. 1, 6 (2000) (internal quotation marks omitted). When the words of a statute are unambiguous, then, "this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Of course, in looking to the plain meaning, [courts] must consider the context in which the statutory words are used because "[courts] do not . . . construe statutory phrases in isolation; [they] read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).

Ayes v. United States Veterans Admin., 473 F.3d 104, 108 (4th Cir. 2006). See also *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997); *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 240-41 (1989); *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994). *United States v. Sheek*, 990 F.2d 150, 152-153 (4th Cir. 1993).

The plain language of Section 8(i) is clear and unambiguous, requiring state and local election officials to maintain and produce for public inspection *and copying* **"all records"** concerning voter registration activities. The process of registering voters (including receiving, evaluating, and processing completed voter registration applications) is an essential component of "ensuring the accuracy and currency of" the voter registration rolls and plainly constitutes a "program" or "activity" of state and local election officials within the meaning of Section 8(i)(1). Completed voter registration applications are, therefore, "records" that relate to the "program" or "activity" of registering voters and ensuring the accuracy and currency of the rolls. Had Congress intended to exempt completed voter registration applications from the broad definition of "records," they could and would have done so. Thus, under any reasonable plain-

language reading of Section 8(i), election officials are required to permit the public to inspect and copy completed applications upon request.

This reading of Section 8(i) is further supported when considered in context with the rest of the NVRA. Two of the four general purposes of the NVRA are "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(3) and (4). Allowing the public to inspect and copy "all records" concerning voter registration activities, including completed voter registration applications, as Section 8(i) does, is fully consistent with these two overall goals. It helps to ensure that election officials are complying with their obligations under the NVRA to register all eligible voters in a timely manner; it assists in the identification of potential problems in the administration of the NVRA; and it helps to instill public confidence in the voter registration process.

Advancement Project's and Project Vote's request to inspect copies of completed voter registration applications from individuals who were not registered to vote by the Norfolk General Registrar in advance of the 2008 general presidential election is exactly the type of public records request that is contemplated by Section 8(i) of the NVRA. By inspecting these types of records, nonprofit organizations such as ours can better determine whether election officials are properly carrying out their legal duty to register eligible voters in a timely manner, or whether they are intentionally or unintentionally erecting unlawful barriers to voting and voter registration. Without access to these records, the answers to these questions are simply impossible to know.

To the extent that any Virginia law, rule, or regulation conflicts with Section 8(i) of the NVRA, as is the case here, such laws are preempted. A conflict between state and federal law arises whenever a state statute or regulation creates an irreconcilable conflict with a federal law or regulation, or where a state law or regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal statute or regulation. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). *See also Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148, 1153 (4th Cir. 1992) (state labor-management relations law was in conflict with and impeded the purposes of the National Labor Relations Act and was therefore preempted.) When this occurs, the state law is rendered "constitutionally invalid as a violation of federal regulations enforceable through the Supremacy Clause" of the U.S. Constitution. *Rum Creek Coal Sales, Inc.,* 971 F.2d at 1154.

Section 24.2-444 of the Virginia Code attempts to define two subclasses of voter registration records: "registration records," as described in subsection (A) and "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of the registration records" as described in subsection (B). The "registration records" described in subsection (A) actually refer to secondary records such as "lists of registered voters" and "lists of persons registering" that are prepared by the State Board of Elections and distributed periodically to the general registrars. These secondary records may be inspected, but not copied. Va. Code Ann. § 24.2-444(A). The records described in subsection (B) appear to refer to list

maintenance records (i.e., the process of cancelling, updating, inactivating, verifying, correcting, or otherwise changing the status of already-registered voters). These list maintenance records may be inspected and copied. Va. Code Ann. § 24.2-444(B). All other voter registration records are specifically prohibited by Virginia law from being available for public inspection or copying: "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(C). Thus, according to Virginia law, primary records relating to the addition of new voters to the rolls, such as completed voter registration applications, may be neither inspected nor copied.

Virginia's statutory classification of voter registration records and the accompanying restriction of public inspection and/or copying rights to those classifications, is clearly at odds with federal law and frustrates the very purpose of Section 8(i) of the NVRA, which is to facilitate the "**public disclosure of voter registration activities**" (as the title of the subsection plainly states). The plain language of Section 8(i) does not provide for the distinctions and classifications set forth in Va. Code Ann. § 24.2-444. There is only one classification of records in Section 8(i) — **"all records"** — which undoubtedly includes not only secondary voter lists prepared by state or local election officials and list maintenance records, but also primary records, such as completed voter registration applications, rejection notices, and other documents and tangible things relating to the voter registration process. Section 8(i) allows the public the right to ***inspect and copy*** all of those records. Virginia's restriction of public inspection and/or copying rights to certain types of voter registration records frustrates an essential purpose and effect of Section 8(i) by allowing essential components of the voter registration process (and any accompanying omissions committed by voter registration officials) to remain cloaked in secrecy. This contributes to the destruction of the public's confidence in the process and actually facilitates greater non-compliance by election officials of their obligations under the NVRA. Because Va. Code Ann. § 24.2-444 conflicts with the plain language of Section 8(i) and frustrates at least two of the core purposes of the NVRA, it is preempted by federal law and, thus, invalid and unenforceable.

Registrar Long and Ms. Brissette assert that the Virginia statute and case law precluded the registrar's office from making the voter registration documents available. In particular, Ms. Brissette stated that the Virginia Supreme Court's unpublished decision in *Rivera v. Long*, No. 070274 (Va. Feb. 8, 2008), recognized a distinction between "registration records" (or what Ms. Brissette calls "voter registration application records") and "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of the registration records," and holds that election officials are not required to permit inspection or copying of "registration records," other than certain lists of registrants prepared by the SBE. Ms. Brissette also stated that a consent decree entered in the case of *Greidinger v. Davis*, No. 3:91-CV-476 (E.D. Va. Aug. 30, 1993), following the Fourth Circuit's decision in the case, *see* 988 F.2d 1344 (4th Cir. 1993), was responsible for the Commonwealth's

policy (later codified into law) that voter registration applications "would not be open to inspection by the public."

Neither the Virginia Supreme Court's unpublished decision in *Rivera v. Long,* nor the federal consent decree in *Greidinger v. Davis* supports the Commonwealth's refusal to permit inspection and copying of records relating to voter registration, in violation of Section 8(i) of the NVRA. *Rivera* dealt solely with the question of whether inspection and/or copying of certain voter registration records was required or permitted under the Virginia Freedom of Information Act, Va. Code Ann. § 2.2-3703. *Rivera v. Long,* No. 070274 (Feb. 8, 2008). *Rivera* did not address, and has no bearing on, whether that provision of the Virginia FOIA law complies with the NVRA and/or whether the inspection or copying of public records would have been permitted by Section 8(i) of the NVRA.

Similarly, the *Greidinger* consent decree neither authorizes nor stands as an impediment to complying with Section 8(i) of the NVRA. *Greidinger v. Davis* addressed the question of whether the unauthorized disclosure of a voter registration applicant's Social Security number in connection with a public records request to review voter registration applications or lists (which was then allowed by Virginia law) posed an unconstitutional burden on the right to vote. *See* 988 F.2d 1344 (4th Cir. 1993). The Fourth Circuit held that it did and ordered the Commonwealth either to abandon its practice of requiring the full SSN from voter registration applicants or to ensure that the applicant's SSN would not be subject to public disclosure. *Id.* at 1355. On remand, the Commonwealth entered into a consent decree wherein it agreed to revise the Privacy Act notice on its voter registration applications to state (in pertinent part): "this registration card will not be open to inspection by the public." *Greidinger*, No. 3:91-CV-476 (E.D. Va. Aug. 30, 1993) (Consent Order at ¶ 6 & Ex. A). However, the consent decree also specifically contemplated that there may be a need to alter the Privacy Act notice, providing simply that any such changes should comply with the Privacy Act and the Fourth Circuit's decision in *Greidinger*. *See* Consent Order at ¶ 6.

Advancement Project and Project Vote were aware of *Greidinger* when they made their request to review rejected applications in Norfolk. That is why we specifically stated that the applicants' SSNs could be redacted from the copies of voter registration applications made available for our inspection and copying. In addition, the *Greidinger* consent decree allows the Commonwealth to change the Privacy Act notice on future voter registration forms to state: **"The social security number that you supply on this registration card will not be made available for public inspection and copying"** (or something to that effect). This should resolve any *Greidinger* issues related to the disclosure of these applications. In addition, to ensure full compliance with Section 8(i) of the NVRA, to the extent any voter registration application identifies a voter registration agency through which a voter registered to vote (as contemplated in Section 7 of the NVRA), the name of the voter registration agency can be redacted from the application. These two redactions will permit the Commonwealth to comply with its obligations to make voter registration records available for public inspection and copying, as required by Section 8(i) of the NVRA, and also comply with *Greidinger.*

Conclusion

Voting is an essential element of our democracy. Many people have fought and bled for the right to vote. The right of the public to inspect and copy voter registration records must be preserved, because public scrutiny of the process increases faith in the process, helps to ensure that election officials adhere to their duties, and increases the likelihood that no eligible voter is illegally denied the right to vote. Accordingly, we urge the Commonwealth immediately to correct its violations of Section 8(i) of the NVRA by issuing the directive outlined at the beginning of this letter, making the appropriate changes to the Privacy Act notices associated with voter registration applications, and permitting inspection and copying of records in accordance with federal law.

We would be happy to meet with you to discuss these issues in greater detail, in an effort to reach an acceptable resolution to this issue. Should you have any questions or need additional information, please do not hesitate to contact us. We appreciate your attention to the concerns raised in this letter and look forward to your reply at your earliest opportunity. To ensure that we have sufficient time to resolve these issues within the time frames contemplated by Section 11(b) of the NVRA, we request a reply within the next 30 days.

Sincerely yours,

/s/ Bradley E. Heard

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** Licensed in the District of Columbia; not licensed in Virginia*

Cc: Ms. Elisa L. Long (General Registrar, City of Norfolk)
Martha Brissette, Esq. (Policy Analyst, Virginia State Board of Elections)

Commonwealth of Virginia
Voter Registration Agency Certification

If you are not registered to vote where you live now, would you like to apply to register to vote here today?
(Please check only one)

☐ I am already registered to vote at my current address, or I am not eligible to register to vote and do not need an application to register to vote.

☐ Yes, I would like to apply to register to vote. (please fill out the voter registration application form)

☐ No, I do not want to register to vote.

If you do not check any box, you will be considered to have decided **not to** register to vote at this time. Applying to register to vote or declining to register to vote will not affect the assistance or services that you will be provided by this agency.

If you decline to register to vote, this fact will remain confidential. If you do register to vote, the office where your application was submitted will be kept confidential, and it will be used only for voter registration purposes.

If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private if you desire.

If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, you may file a complaint with:

Secretary of the Virginia State Board of Elections
Washington Building
1100 Bank Street
Richmond, VA 23219-3497
(804) 864-8901

_____	_____	_____
Applicant Name	**Signature**	**Date**

for agency use only

Voter Registration form completed: ☐ Yes ☐ No

Voter Registration form given to applicant for later mailing (at applicant's request): ☐

_____	_____
Agency Staff Signature	Date

SBE 032-03-945 07/09

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Marc Alan Greidinger,

Plaintiff-Appellant,

v.

Civil Action No. 3:91CV00476
(Fourth Circuit No. CA-91-476-R)

Bobby W. Davis, Chairman;
John H. Rust, Jr., Vice-Chairman;
Michael G. Brown, Secretary
State Board of Elections

Defendants-Appellees.

CONSENT ORDER

Pursuant to the decision of the United States Court of Appeals for the Fourth Circuit, rendered in this case on March 22, 1993, and the mandate therein, filed April 12, 1993, Plaintiff and Defendants have agreed that:

1. The Commonwealth of Virginia may continue to require persons applying to register to vote to furnish their social security numbers, if they have one, as long as required by the Virginia Constitution or the Code of Virginia, but shall no longer permit public access to voter registration or election records containing those numbers.

2. Notwithstanding the provisions of Virginia statutes or regulations, including, but not limited to, The Virginia Freedom of Information Act, Va. Code Ann. §§ 2.1-340 through 2.1-346.1, and Va. Code Ann. § 24.1-30 or § 24.1-56, the Defendants shall direct all local voter registration and election officials to ensure that registration or election records containing voters' social security numbers are not made available for public inspection or copying, and shall further ensure that Defendants' own employees do not make such records available for public inspection

or copying. As soon as possible, but not later than September 15, 1993, the Defendants shall begin making available to the general registrar for each Virginia county and city lists of all registered voters, by precinct, containing the name, address, date of birth, gender and all election districts applicable to each registered voter, but without social security numbers. New lists shall be provided at least once each year, and supplements containing additions, deletions and changes shall be provided not less than monthly. Notwithstanding any other provision of law regarding the retention of records, within a reasonable time after receiving any new complete list, the general registrar shall destroy the obsolete list and its supplements.

3. Notwithstanding the provisions of Va. Code Ann. § 24.1-23(8)-(10), Defendants shall not include social security numbers on voter lists or computer tapes thereof furnished to candidates, political parties or officials, incumbent officeholders and nonprofit organizations promoting voter participation and registration, pursuant to that statute.

Social security numbers may be included only on computer tapes furnished to courts for jury selection purposes. Plaintiff consents to the distribution of such computer listings to courts based on his current understanding that neither federal nor state courts in Virginia currently make any public disclosure of the social security numbers on such lists. Defendants contend that the decision of the United States Court of Appeals in this case does not impose any limit on the distribution of the lists, including social security numbers, to courts for use in jury selection. Nevertheless, in the event plaintiff subsequently learns that federal or state courts have changed their current practice and are publicly disclosing social security numbers obtained from Defendants' lists, Plaintiff shall be entitled, after reasonable notice to Defendants or their successors in office, to file a motion in this Court for a determination of whether this Order should be

modified. Any such motion and modification shall be limited solely to the matter of Defendants' distribution to courts of the lists containing social security numbers.

All current subscribers maintaining systems listing voters and other persons, who within the last 24 months have received social security numbers from lists or tapes furnished by Defendants, shall delete or destroy that portion of their records containing those numbers, and shall certify to Defendants that they have done so. Defendants shall send copies of this order to all such current subscribers and other persons who within the past twenty-four months have received lists containing social security numbers,

4. Notwithstanding the provisions of Va. Code Ann. § 24.1-229, Defendant shall prescribe procedures to permit public inspection and copying of absentee ballot applications and lists of such applicants maintained by each general registrar in a manner that does not permit public access to social security numbers.

5. Defendants shall direct all local voter registration and election officials that voters' social security numbers may be used only for purposes related to administration of the Commonwealth's voter registration system by voter registration officials or to the conduct of elections by election officials, and may not be disclosed to any other person.

6. Defendants shall revise the federal Privacy Act notice on Virginia voter registration application forms as shown on Exhibit A attached to this Order, and shall order and distribute replacement forms to all local registrars as soon as possible, but not later than October 1, 1993. Any future revisions to the notice shall comply with the Privacy Act and be consistent with the decision of the United States Court of Appeals in this case.

7. Defendants shall pay Plaintiff's agreed attorneys' fees, as follows: to Eric M. Page, P.C., 316 West Broad Street, Richmond, Virginia, $24,010.85; and to Public Citizen Litigation

Group, Washington, D.C., $14,825.38, which sums include the taxable costs advanced in Plaintiff's behalf. Payment of the sums hereby ordered shall release and discharge Defendants from all liability to Plaintiff or his attorneys for any fees or costs incurred in this case to the date of entry of this order.

8. The State Board of Elections shall certify to the Court not later than October 15, 1993, that it has implemented or directed implementation of all of the foregoing measures.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: AUG 30 1993

Agreed:

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Virginia State Bar No. 18193
Counsel for Marc Alan Greidinger, Plaintiff

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Counsel for State Board of Elections,
Bobby W. Davis, John H. Rust, Jr., and
Michael G. Brown, Defendants

Exhibit A

PRIVACY ACT NOTICE

Article II, § 2 of the Constitution of Virginia (1971) requires that a person registering to vote provide under oath his or her social security number, if any. Therefore, if you do not provide your social security number, your application for voter registration will be denied. Section 7 of the federal Privacy Act (Public Law No. 93-579) allows the Commonwealth to enforce this requirement, but also requires that people seeking to register be advised that state and local voting officials will use the social security number as a unique identifier to insure that no person is registered in more than one place.

This registration card will not be open to inspection by the public. Your social security number will appear on reports produced only for official use by voter registration and election officials and, for jury selection purposes, by courts.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 8th *day of* February, 2008.

Andrew A. Rivera, Appellant,

against Record No. 070274
Circuit Court No. L05-2754

Elisa Long, General Registrar, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the judgment of the trial court should be affirmed in part, reversed in part, and the award of attorney's fees vacated and remanded for recalculation.

The General Registrar for the City of Norfolk rejected more than 55% of voter registration applications prior to the 2005 election. Andrew Rivera ("Rivera"), a citizen and registered voter of the Commonwealth of Virginia and a member of the Advancement Project, an organization that monitors voter registration, filed a request under the Freedom of Information Act ("FOIA") seeking copies of the invalid voter registration applications and copies of the letters sent by Elisa Long, General Registrar ("Registrar") to the rejected applicants. The Registrar did not produce these documents, stating that they were exempt from production under Code § 24.2-444.

Rivera then filed a petition for mandamus in the City of Norfolk General District Court. Upon denial of the petition, Rivera appealed de novo to the Circuit Court of the City of

Norfolk. The trial court held that Rivera should be permitted to inspect, but not copy, the correspondence to voters whose applications were rejected based on the language used in Code § 24.2-444, but denied Rivera access to the voter registration application forms pursuant to Code § 24.2-444(A) because they contain Social Security numbers. The trial court granted in part Rivera's request for attorney's fees, awarding $2,000 of the $5,167.50 requested, and denied Rivera's request for forty randomly selected denied applications to be produced and kept under seal for an appellate record. Rivera appeals the adverse rulings of the trial court.

Rivera's first assignment of error states that the trial court erred by sustaining an objection to Rivera's request for the production, under seal, of original documents and not making those documents part of the record. When a trial court refuses to make evidence that it considered part of the record, appellate review is frustrated. Bland v. Virginia State University, 272 Va. 198, 201-02, 630 S.E.2d 525, 527. Here, however, the court did not review the completed forms. Finding it sufficient to review the blank forms, the trial court did not abuse its discretion in refusing to make the completed forms a part of the record. Accordingly, Rivera's first assignment of error is without merit.

Rivera's second assignment of error states that "[t]he trial court erroneously ruled that Rivera has no right to copies of documents that are produced for his inspection." Code § 24.2-444 addresses two different types of records in subsections A and B. Subsection A addresses "registration records," whereas subsection B addresses "records concerning the implementation of programs and

activities . . . ." The version of Code § 24.2-444(A) in effect at the time provided, in pertinent part, "registration records shall be kept and preserved by the general registrar and shall be opened to inspection by any registered voter . . . ." Code § 24.2-444(B), on the other hand, explicitly provided for "public inspection and copying." "We determine the meaning of certain statutory language from the express words contained in the statute . . . and may not give the words a construction that amounts to holding that the General Assembly did not mean what it actually stated." Young v. Commonwealth, 273 Va. 528, 533, 643 S.E.2d 491, 493 (2007) (internal citations omitted). The General Assembly could have added "copying" to subsection A, just as it did to subsection B, but it did not. The voter registration records discussed in subsection A, therefore, were available only for inspection, not copying. Rivera's second assignment of error is without merit.

Rivera's third assignment of error states "[t]he trial court erroneously ruled that Rivera was not entitled to inspect and copy denied applications to register, after redaction of the applicants' Social Security numbers." Code § 24.2-444(A) provided, in pertinent part" "[n]o voter registration record containing an individual's social security number shall be made available for inspection or copying by anyone." Obviously, if the Social Security numbers are redacted from the registration records, the documents will no longer contain a Social Security number. Consequently, they will no longer be exempt from inspection. The trial court erred as to Rivera's third assignment of error and the registration records must be made available to Rivera after redaction of the Social Security numbers. The Registrar, of

course, may request payment related to this production pursuant to Code § 2.2-3704(H).

Rivera's fourth assignment of error states that the court erroneously denied part of his claim for attorney's fees. Code § 2.2-3713(D) provides for "reasonable costs and attorneys' fees" when a party "substantially prevails on the merits of the case, unless special circumstances would make an award unjust." In light of this reversal on appeal, Rivera has "substantially prevailed." On remand, the trial court must recalculate the award of attorney's fees. "Where, as here, a statute authorizes recovery of attorney's fees and expenses, the fact finder is required to determine from the evidence the amount of the reasonable fees under the facts and circumstances of each particular case. 'In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances.'" Tazewell Oil Co. v. United Virginia Bank, 243 Va. 94, 111-12, 413 S.E.2d 611, 621 (1992) (quoting Mullins v. Richlands National Bank, 241 Va. 447, 449, 403 S.E.2d 334, 335 (1991)). Additionally, the trial court is directed to include in its recalculation of attorney's fees, the additional fees necessitated by this successful appeal.

Accordingly, the judgment of the circuit court is affirmed in part, reversed in part, and remanded for further proceedings.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk