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, General Registrar of Norfolk, Virginia and DONALD PALMER, Secretary, State Board of Elections,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Virginia, Norfolk Division, No. 2:10-cv-0075-RBS-DEM

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWS EDITORS, THE ASSOCIATED PRESS, ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, ATLANTIC MEDIA, INC., CITIZEN MEDIA LAW PROJECT, LIN MEDIA, THE NATIONAL PRESS CLUB, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NEWSPAPER ASSOCIATION OF AMERICA, NORTH JERSEY MEDIA GROUP INC., RADIO TELEVISION DIGITAL NEWS ASSOCIATION, THE SEATTLE TIMES COMPANY, SOCIETY OF PROFESSIONAL JOURNALISTS, STUDENT PRESS LAW CENTER, USA TODAY AND VIRGINIA COALITION FOR OPEN GOVERNMENT IN SUPPORT OF PLAINTIFF-APPELLEE URGING AFFIRMANCE

Lucy A. Dalglish
Counsel of Record
Mark R. Caramanica
You-Jin J. Han
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

*(*Additional counsel for* amici *listed on pages following)*

* Additional *amici* counsel:

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors and Association of Capitol Reporters and Editors

Karen Kaiser
Associate General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

Bruce L. Gottlieb
General Counsel
Atlantic Media, Inc.
600 New Hampshire Ave., NW
Washington, DC 20037

Jeffrey P. Hermes
Citizen Media Law Project
Berkman Center for
Internet & Society
23 Everett St., 2nd Floor
Cambridge, MA 02138

Joshua N. Pila
Regulatory Counsel
LIN Media
1 W. Exchange St. – 5A
Providence, RI 02903

Charles D. Tobin
Holland & Knight LLP
2099 Pennsylvania Ave., NW
Suite 100
Washington, DC 20006
Counsel for The National Press Club

Mickey H. Osterreicher
40 Wagon Wheel Drive
East Amherst, NY 14051
Counsel for National Press Photographers Association

René P. Milam
Vice President/General Counsel
Newspaper Association of America
4401 Wilson Blvd., Suite 900
Arlington, VA 22203

Jennifer Borg
General Counsel
North Jersey Media Group Inc.
P.O. Box 75
Hackensack, NJ 07602

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

Bruce W. Sanford
Bruce D. Brown
Laurie A. Babinski
Baker Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

Frank D. LoMonte
Student Press Law Center
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209

Barbara W. Wall
Vice President
Senior Associate General Counsel
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
Counsel for USA TODAY

Megan Rhyne
Virginia Coalition for Open Government
P.O. Box. 2576
Williamsburg, VA 23187

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Attorney General Opinions

Other Authorities

IDENTITY OF *AMICI CURIAE*

Amici curiae comprise national and regional news organizations, nonprofit First Amendment and freedom of information ("FOI") groups, trade associations and news media representatives that disseminate important news and information to the public through a variety of media, or otherwise support and defend such efforts.[1]

STATEMENT OF INTEREST/SUMMARY OF ARGUMENT

Amici curiae regularly investigate and report on public elections and provide a valuable oversight function for the voting process. This activity aids in increasing the openness of the electoral process, thereby allowing the public to better assess its integrity. To this end, journalists often rely on voter registration information to expose potential inconsistencies, fraud, and errors in voter registration, and their ability to investigate and report on registration deficiencies is critical to the health and legitimacy of the system. Consequently, *amici* have a vested interest in the public availability of information such as voter registration data.

The National Voter Registration Act (hereinafter "NVRA") requires states to make available to the public "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…." *See* 42 U.S.C.A. § 1973gg-6(i)(1).

[1] A complete description of each *amici* is set forth in the addendum to this brief.

Given the necessity of public access to all relevant information in investigating lists of "eligible voters," voter registration applications must be disclosed to the public. The NVRA's stated purposes support this interpretation, as it states that it should operate in part "to protect the integrity of the electoral process." 42 U.S.C.A. § 1973gg(b)(3).

Further, the information contained in a completed Virginia voter registration application—with the exception of the applicants' complete social security numbers (hereinafter "SSN")—is already public record. Any purported privacy concerns for individuals listed on applications are negated by the fact that release would only disclose a discrete amount of information—available elsewhere in the public domain—about each applicant. That such minimal information may be disclosed for an aggregated class of individuals raises no legitimate privacy concerns.

Finally, while *amici* urge this court to uphold the lower court's decision that future registration applications are public, we also urge it to go further. With respect to the originally requested registration applications from 2008, *amici* are concerned with the district court's willingness to accept that state administrators can unilaterally create an expectation of privacy in public information merely by making a pledge of privacy. *Amici* respectfully request that this court, should it choose to address the issue, reject a state's power to withhold public data without

direct legal basis. To overlook the lower court's decision to grant prospective relief only based on an "expectation of privacy" allegedly created by the state's privacy statement would run the risk of implicitly sanctioning such actions, thereby potentially foreclosing disclosure of public information in like, future circumstances.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

RULE 29(c)(5) COMPLIANCE

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (c) no person—other than *amici*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief.

ARGUMENT

I.
Public Access to Complete Voter Registration Applications Allows Journalists to Conduct their Constitutionally Protected Watchdog Role, Thereby Furthering the Purposes of the NVRA and Helping Maintain Public Confidence in the Electoral Process

A. Journalists rely on full and complete voter registration information to investigate and report on errors and fraud in the voter registration process

Journalists have often turned to voter registration information to identify deficiencies in voter registration processes. Access to voter-related records, such as registration applications and voter rolls, has proven critical in enabling journalists to monitor the accuracy of the information state officials use to determine who will be allowed to vote.

In 2006, the *Atlanta Journal-Constitution* conducted an analysis of registered voters in the metro Atlanta area and subsequently reported its findings: rampant instances of erroneous voter registrations. Alan Judd, *Registration in Georgia: Bogus Addresses Clutter Voter Rolls*, ATLANTA J. CONST., Jan. 10, 2006, at A1, *available at* 2006 WLNR 494499.[2] Despite Georgia election law requirements that applicants provide true home addresses on voter registration applications, the newspaper found more than 2,000 registered voters in metro

[2] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided whenever possible.

Atlanta counties who submitted the addresses of non-residential locations as their home addresses, including a jail and even the newspaper's own headquarters. *Id*.

In 2000, *The Indianapolis Star* examined Indiana's voter registration rolls and revealed extensive inaccuracies within the records. *See* Bill Theobald, *Bogus Names Jam Indiana's Voter List: Invalid, Repeat Entries Damaging Credibility*, THE INDIANAPOLIS STAR, Nov. 5, 2000, at A1, *available at* 2000 WLNR 10468875. The newspaper found "hundreds of thousands" of the registered names were "bogus," a problem that the newspaper said arose in part from the state's failure to create a statewide database of its voter rolls to filter out duplicate and erroneous registrations after the NVRA's implementation in the state, which allowed people to register to vote by mail and when obtaining a driver's license. *Id*.

Similarly, in 2010, *Sun-Sentinel* journalists reported that Florida's voter registration rolls erroneously included thousands of possible felons and dead people.[3] The *Sun-Sentinel* obtained this information by comparing voter rolls to other databases, such as one maintained by the Florida Department of Corrections. *Id*. Elections officials thereafter admitted to gaps in efforts to conduct cross-referencing checks for felons. *Id*.

[3] Sally Kestin et al., *Thousands of Felons, Dead People Still Registered to Vote in Fla.*, SUN-SENTINEL, Sept. 19, 2010, *available at* http://www.tcpalm.com/news/2010/sep/19/thousands-of-felons-and-dead-people-still-to-in/.

Finally, in 1995, Denver's former *Rocky Mountain News* found that state records revealed at least 12,000 people were registered to vote in more than one location. Lynn Bartels, *Duplications Riddle Voter Records; At Least 12,000 in State Are Registered More Than Once, and Sloppy Records Get the Blame*, ROCKY MOUNTAIN NEWS, June 26, 1995, at 4A, *available at* 1995 WLNR 626397. The newspaper found that some voters had not been removed from the registration rolls of counties in which they had previously lived, yet were still permitted to register in their new county of residence. *Id*.

These select stories exemplify the extent to which journalists rely on voter registration information in identifying errors in the electoral process. Without such oversight, eligible voters could be erroneously or fraudulently barred from registering to vote, while ineligible voters remain on voter registration lists, potentially diluting the effect of legitimate votes cast. Project Vote's interests in this case mirror those of *amici*.

B. The plain language and statutory purpose of the NVRA support disclosure of voter registration applications

First, as the district court found, the NVRA's Public Disclosure Provision provides a right to access voter registration applications once full SSNs are redacted. (J.A. 434). The Public Disclosure Provision mandates that states permit public inspection 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." 42 U.S.C.A. § 1973gg-6(i)(1). Notably, the provision exempts only two types of information from disclosure under this subsection: those that "relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered." *Id*.

An examination of the information Virginia's registration application form requires shows that the state's purpose in reviewing submitted applications is to properly maintain its list of eligible voters and, therefore, the applications fall within the scope of the Public Disclosure Provision. Voter applicants in Virginia must submit the following information: name, verification of U.S. citizenship, whether they will be 18 years of age by the following General Election day, SSN, gender, date of birth, phone number, residence, signature, and whether they are currently registered to vote elsewhere. (J.A. 66). Applicants must also disclose whether they have been convicted of a felony, and whether and/or when their voting rights were restored. *Id*. Finally, applicants must disclose whether they have ever been adjudicated mentally incapacitated, and, if so, if and/or when a court restored them to capacity. *Id*. Some of the information is required as an identifier, such as a full SSN, while some questions are directly related to an applicant's legal eligibility to vote, such as the last two questions above. *Id.* at 64, 66.

Second, the district court correctly held that reading the public disclosure provision to require disclosure of the registration applications would best further the purposes of the NVRA. (J.A. 262). Those purposes include "establish[ing] procedures that will increase the number of eligible citizens who register to vote," facilitating officials' ability to "enhance[] the participation of eligible citizens as voters in elections for Federal office," "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C.A. § 1973gg(b).

Releasing the voter registration applications would advance all four purposes. As the district court stated, the first three purposes "clearly point toward increasing voter registration and ensuring that the right to vote is not disrupted by illegal and improper impediments to registering to vote or to casting a vote." (J.A. 262). And, "where those [three] purposes are met, voter rolls may be deemed accurate and current," consistent with the fourth purpose. *Id*.

Providing the public with access to the applications therefore effectuates the plain language and purpose of the NVRA and facilitates greater public oversight and legitimacy in the integrity of the voter registration process.

C. Permitting release of the voter registration applications helps foster the public's trust in the integrity of the electoral system

Ordering disclosure of the voter registration applications would comport with U.S. Supreme Court precedent upholding the disclosure of information as necessary in safeguarding the transparency and honesty of the electoral system.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Reynolds v. Sims*, 377 U.S. 533, 560 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). It is therefore critical that the public be able to review the state's decision to accept or reject a registration application.

The Supreme Court has emphasized the role of transparency of voter-submitted information in upholding the integrity of the electoral process. In *Doe v. Reed*, 130 S.Ct. 2811 (2010), the state of Washington sought to release referendum petitions that disclosed the petition signers' names, addresses, counties of voting registration, and signatures. *Id*. at 2816. The state argued the petitions were public records, available to the public through the state's Public Records Act. *Id*. The Court agreed that disclosure of referendum petitions in general did not facially violate the First Amendment. *Id*. at 2821.[4]

[4] The U.S. District Court for the Western District of Washington recently held that the petition signers' as-applied constitutional challenge failed as well as there was no significant evidence that the signers would face any serious retaliation as a

In reaching its decision, the Court discussed the threat of fraud in the petition-signing process, and explained that "[p]ublic disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot." *Id*. at 2820. For example, "the secretary's verification and canvassing will not catch all invalid signatures: The job is large and difficult . . . and the secretary can make mistakes, too. . . . Public disclosure can help cure the inadequacies of the verification and canvassing process." *Id*.

However, the Court's rationale is not limited in its application to ballot petitions, as it stated: "'States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.'" *Id*. at 2819 (quoting *Buckley v. Am. Constitutional Law Found., Inc*., 525 U.S. 182, 191 (1999)). As previously discussed, the threat of fraud or error going unchecked is an ever-present concern, and the party seeking here to "protect the integrity and reliability" of an "election process" should have such "leeway" to protect this process.

Project Vote's reason for seeking access to the records is wholly consistent with the Supreme Court's concern with preserving the right to vote and "the integrity and reliability of . . . election processes…." *Id*. at 2819. Project Vote

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result of the disclosure of their identities. *See Doe v. Reed*, No. C09-5456BHS (W.D. Wash. Oct. 17, 2011) (order granting summary judgment in favor of defendants and intervenors and denying plaintiffs' motion for summary judgment) *available at* http://rcfp.org/x?DvR1.

requested the documents after the state rejected the voter registration applications of some students at an historically African-American university, and the organization was "[s]uspicious that these students' applications were incorrectly rejected." (J.A. 236-37). However, the government avers it rejected the applications because the students had used the university's address on their applications. Appellants' Br. 9-10. Without access to the voter registration applications, Project Vote cannot verify the government's rationale for rejecting the applications.

The government erroneously asserts that because the application form "requires information on felony convictions and mental incapacity . . . it must be reasonably supposed that conditioning voting on the public release of such information will suppress registration contrary to congressional intent." Appellants' Br. 22. However, the government at best overestimates this effect and provides no evidence to support the claim.[5]

In considering any possible burden of disclosure in the electoral process on expressive rights in *Reed*, the Supreme Court found that "disclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from

[5] *See also Lardner v. Dep't of Justice*, 638 F.Supp.2d 14, 25 (D.D.C. 2009) (emphasizing the government's admission that while applicants for presidential pardon express discomfort in knowing that their convictions may be publicized as a result of their application for clemency, most of these applicants continue with the application process regardless).

speaking." *Reed*, 130 S.Ct. at 2818 (quoting *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 914 (2010). Additionally, the Court explained the negative effects of non-disclosure:

> [Fraud] 'drives honest citizens out of the democratic process and breeds distrust of our government'…. *Id*. at 2819 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). But the state's interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out…simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. *Id*.

Here, as in the ballot petitions in *Reed*, disclosure of the voter registration applications is necessary to allow the public to verify that the voting registration process is functioning properly. Given the importance of a transparent system, any of the unsupported countervailing concerns expressed by the state are at best minimal, as release of the information sought would result in no legitimate invasion of personal privacy.

II.
Release of the Voter Registration Applications Does Not Constitute an Invasion of Privacy that Impermissibly Burdens the Right to Vote, as the Information Consists of Discrete Amounts of Already Public Information

A. The claimed "private" information sought by Project Vote is already a matter of public record, for which no reasonable expectation of privacy lies

The information on Virginia voter registration applications, with the exception of complete SSNs, is of a public nature and its release would not constitute an invasion of privacy, either in the disclosure of a single application or in the aggregate. Therefore, disclosure would not serve as an impermissible infringement on the right to vote.

In *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993), this court noted the value of the disclosure of Virginia voter registration applications. *See id*. at 1354-55. The plaintiff there "argue[d] that the privacy interest in his SSN [was] sufficiently strong that his right to vote [could not] be predicated on the disclosure of his SSN to the public or political entities." *Id*. at 1348. The court stated that "[b]ecause Virginia's voter registration scheme conditions Greidinger's right to vote on the public disclosure of his SSN, we must examine whether this condition imposes a substantial burden." *Id*. at 1352. Citing "the potential harm that the dissemination of an individual's SSN can inflict," such as identity theft, the court

held that requiring SSNs to register to vote inflicted a substantial burden on the right to vote. *Id*. at 1354.

Notably, this court did not find a privacy interest in the remaining information on the form meriting nondisclosure. *Id.* at 1354-55. In explaining why the state had not advanced a compelling state interest sufficient to justify the disclosure of the SSNs, the court reasoned that even without the release of applicants' SSNs, "Virginia's interest in preventing voter fraud and voter participation could easily be met." *Id*. at 1354. For example, the court determined that information such as "an address or date of birth would sufficiently distinguish among voters that shared a common name." *Id*. at 1355. Likewise, public access to information relating to the applicants' legal qualifications to vote is necessary to allow third parties to conduct oversight into the government's decision to accept or reject a particular application.

The government asserts that "Plaintiff's interpretation of the NVRA suffers from similar infirmities" as this court found in the disclosure of full SSNs in *Greidinger*. Appellants' Br. 22. However, this expansion of *Greidinger*'s holding to bar disclosure of additional information on voter registration applications runs counter to both a plain reading of the case and other interpretations of *Greidinger*'s scope, which rightfully view its holding as relating solely to the concerns regarding disclosure of SSNs. *See, e.g., Ostergren v. Cuccinelli,* 615 F.3d 263, 279 (4th Cir.

2010) (explaining that this court had "previously considered [the] privacy interest" of SSNs in *Greidinger*); *Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 365 (5th Cir. 2001) (citing *Greidinger* as an example of "[o]ther circuits . . . [which] have concluded that the privacy interest in SSNs is significant"); In re *Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (discussing concerns with SSN-related identity theft raised by the court in *Greidinger*); *Beacon Journal Publ'g Co. v. City of Akron*, 640 N.E.2d 164, 168-69 (Ohio 1994) (permitting release of the city's employee master files with the SSNs redacted, and interpreting *Greidinger* as standing for the proposition that "Virginia's interest in internal use of SSNs did not justify disclosure and that other data such as voter registration numbers or addresses would provide the state with enough information to distinguish voters with the same name").

Therefore, this court should likewise limit *Greidinger's* application to the disclosure of SSNs, rather than to other information on the application, which constitutes matters of public record.

i. An individual has no legitimate expectation of privacy regarding matters of public record such as information about felony convictions or adjudications of mental incompetency

The government appears especially opposed to the release of information regarding whether applicants have been adjudicated mentally incompetent or convicted of a felony. *See* Appellants' Br. 22. However, as both events are

documented in public courtrooms and court records, they are public matters and carry no legitimate privacy interest.

The Supreme Court long ago emphasized the public nature of court proceedings in *Craig v. Harney*, 331 U.S. 367, 374 (1947), saying, "What transpires in the court room is public property." In turn, "the interests in privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975).

Specifically, records indicating whether a person has been convicted of a felony are public records. *See, e.g.*, *Trade Waste Mgmt. Ass'n, Inc. v. Hughey*, 780 F.2d 221, 234 (3d Cir. 1985) (describing "records of criminal conviction and pending criminal charges" as "by definition public"); *Eagle v. Morgan*, 88 F.3d 620, 625-26 (8th Cir. 1996) ("Far from being 'inherently private,' the details of [appellee's] prior guilty plea are by their very nature matters within the public domain . . . . In reaching this conclusion, we underscore that [appellee] pleaded guilty to a felony in open court.").

This principle was again recently highlighted in *Am. Civil Liberties Union v. U.S. Dep't of Justice*, Nos. 10-5159, 10-5167, 2011 WL 3890837 (D.C. Cir. Sept. 6, 2011), where the Department of Justice (hereinafter "DOJ") sought to withhold docket information related to criminal prosecutions of certain individuals. *Id*. at *1. The docket information included the case names, docket numbers, and the courts in

which the prosecutions had taken place. *Id.* at *4. In response to "the question of just how much of a privacy interest a defendant retains regarding the facts of his or her conviction or public guilty plea," the court concluded that "the disclosure of convictions and public pleas is at the lower end of the privacy spectrum." *Id.*

Likewise, courts have held that the issue of whether a person has been adjudicated mentally incompetent is a matter of public record, and there are minimal privacy rights in such information. *See, e.g.*, *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 77-78 (8th Cir. 1976) (holding that a newspaper was not liable for constitutional invasion of privacy in publishing portions of a confidential psychiatric report not read in court, as "substantial information regarding [appellant's] mental competency was a matter of public record"); *United States v. District of Columbia*, 44 F.Supp.2d 53, 61 (D.D.C. 1999) (finding no violation of patients' constitutional right to privacy where "patients in the instant case have, to some extent, made their mental conditions matters of public record by pleading not guilty to federal crimes by reason of insanity").

Therefore, as records relating to the adjudication of a person as mentally incompetent and a person's criminal convictions have been held to constitute public records, disclosure of these very same facts cannot be the basis to keep the records at issue private. And, as affirmed in *Greidinger*, this court should order

disclosure of all of the information available on the registration application, as only full SSNs could potentially threaten a protectable privacy interest.

ii. The disclosure of the requested information in the aggregate does not constitute a violation of any applicants' expectations of privacy

Moreover, bulk disclosure of publicly available information on voter application records would likewise carry at best an insignificant privacy interest, as only a relatively small amount of easily attainable information would be disseminated about each individual. Further, at least one court has held that in the context of aggregate disclosures of the names of individuals whose clemency applications were denied, "an individual applicant's privacy interest is not somehow magnified simply because other individual applicant's [*sic*] privacy interest may be implicated as well." *Lardner*, 638 F.Supp.2d at 26.

The recent D.C. Court of Appeals ruling upholding mass disclosure of publicly available information is again instructive in this case. In *ACLU*, the DOJ unsuccessfully argued that disclosure of docket information was barred under the holding in *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). *ACLU*, 2011 WL 3890837 at *6.

In *Reporters Committee*, the FBI refused to release compiled criminal "rap sheets," which the agency maintained on more than 24 million people, and which contained detailed, nationwide criminal history information about individuals.

Reporters Committee, 489 U.S. at 751-52. The rap sheets included the individuals' "date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations." *Id*. at 752. The Court there found that while much of the information contained in the rap sheets was "a matter of public record, the availability and dissemination of the actual rap sheet to the public [was] limited." *Id*. at 753. Additionally, an individual seeking to replicate the amount of information available in a FBI rap sheet at that time would have had to conduct nationwide searches of files in courthouses, county archives, and police stations. *Id*. at 764. The Court found that there was a "distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." *Id*. at 764. On these grounds, the Court ultimately held that disclosure was barred under an exemption to the federal Freedom of Information Act ("FOIA"), as production of the documents could reasonably be expected to constitute an unwarranted invasion of personal privacy.

However, the court in *ACLU* read the *Reporters Committee* holding narrowly, citing the greater availability and accessibility of criminal information, particularly on the Internet and publicly accessible government websites. *ACLU*, 2011 WL 3890837 at *7-*8.

The court upheld disclosure of docket sheet information, stating:

> [C]omputerized government services like PACER make it possible to access court filings concerning any federal defendant from the

> comfort of one's home or office, quite unlike the 'diligent search of courthouse files, county archives, and local police stations throughout the country'. . . . If someone wants to know whether his neighbor or potential employee has been indicted for, convicted of, or pled guilty to a federal offense, he may well find out by simply entering a Google search for that person's name." *Id*. at *6 (quoting *Reporters Committee*, 489 U.S. at 764).

For those reasons, the court found that while disclosure "would compromise more than a de minimis privacy interest, it would not compromise much more." *ACLU*, 2011 WL 3890837 at *8.

The court also emphasized that the privacy intrusion was low because a search conducted using the docket number "would disclose only information concerning a conviction or plea . . . . [and] information that is available in public records. . . . The fact that information about these proceedings is readily available to the public reduces further still the incursion on privacy resulting from disclosure." *Id*. at *5.

Here, too, the information sought has already been the subject of public proceedings, namely, a trial or guilty plea resulting in an applicant's conviction for a felony charge or public court hearings and documents reflecting an applicant's adjudicated mentally competency. In fact, noting the established public nature of competency hearings in the state, the Virginia Attorney General has specifically stated that mental competency evaluation reports are open to public inspection.

See 08 Op. Va. Att'y Gen. 099 (2009), *available at* 2009 WL 570958. Consequently, there is no significant privacy violation.

Courts elsewhere have upheld the dissemination of aggregate amounts of publicly available information, citing the minimal privacy interest accompanying such disclosures. *See, e.g., N.Y. Times Co. v. U.S. Dep't of Treasury*, No. 09 Civ. 10437 (FM), 2010 WL 4159601 at *4, *6 (S.D.N.Y. Oct. 13, 2010) (rejecting the Treasury's argument that disclosure of the identities of 9,000 individuals who were issued licenses to engage in activities otherwise prohibited by U.S. economic sanction programs "'would associate [the licensees] with sanctioned nations or entities and could result in unwarranted contact . . . or a stigmatizing effect,'" and explaining that "the fact that there are 9,000 similarly-situated individuals reduces the risk of harm resulting from disclosure of the licensees' identities," since "no individual licensee will be singled out by appearing on this list"); *Wash. Post v. U.S. Dep't of Agric*., 943 F.Supp. 31, 34 (D.D.C. 1996) (disclosure of names, amounts paid to, and business addresses of tens of thousands of recipients of federal cotton subsidies in a year did not constitute unwarranted invasion of personal privacy as "[i]ndeed, it is precisely because the list is so large and the information so generic that the individual privacy interests are so small"); *Lardner*, 638 F.Supp.2d at 22, 34 (D.D.C. 2009) (court holding Office of the Pardon

Attorney must grant FOIA request for lists containing the identities of more than 7,000 applicants for clemency whose requests were denied).

Additionally, at least two other courts have upheld the dissemination of aggregate voter data specifically. In *Avondale Indus., Inc. v. Nat'l Labor Relations Bd.*, 90 F.3d 955 (5th Cir. 1996), a company sought through a FOIA request to the National Labor Relations Board (NLRB) a list containing the names and addresses of certain employees and identifying which of them voted at NLRB elections. *Id*. at 957.

The court held the lists were not exempt from disclosure, saying that the "voters [did] not have a viable privacy interest in the marked voting lists." *Id*. at 961. In reaching its decision, the court emphasized the importance of releasing the information sought to permit oversight of the voting process, saying, "If Avondale's suspicions of fraud and corruption are true, the disclosure of the marked voting lists will likely enable Avondale to prove such allegations. It is axiomatic that, to prove voter fraud, you must know who voted." *Id*. at 962.

Likewise, in *State v. Mack*, 65 So.3d 897 (Ala. 2010), the Alabama Supreme Court held that Mack, a convicted murderer, should be permitted to access state voter registration applications in order to gather data on county jurors' races and genders during a 17-year period. Mack sought this information for the purpose of pursuing his claim that his trial counsel had failed to challenge African-Americans'

underrepresentation on county juries. *Id*. at 898. As some of the venire lists provided by the circuit clerk's office lacked the information Mack sought, Mack requested that the county's Department of Voter Registration provide him with access to its voter registration applications. *Id*. at 899. While the state did not argue against disclosure of those applications specifically on the grounds that the information was confidential, the Court nonetheless addressed the issue, saying that "the materials before this Court belie any concern that the voter-registration applications contain confidential information," as the applications required only the last four digits of applicants' SSNs. *Id*. at 901.

The rationale in those cases is instructive here, where access to this information is vital to those who seek to examine the integrity of the voter registration process, such as Project Vote, while the privacy interest in the information sought is insignificant. Since the information at stake is comprised wholly of matters of public record, as discussed above, there are negligible interests implicated, and the information should be made available to the public.

III.
The State Cannot Defeat the Public's Right to Government Records by Simply Pledging Confidentiality

The government should not have been permitted to remove records from the public domain by relying on the privacy statement it simply inserted on a public document and this court should not sanction a refusal to disclose retrospective

records because of such action. Confidentiality pledges such as the one made in this case should have no effect. If this court were to accept this practice, agencies may well be emboldened to flout the public's right to know at their discretion. Such actions are erroneous for at least two reasons: one, the state cannot unilaterally create an expectation of privacy in public information; and two, the nature of the information requested was at all times public, so applicants suffer no privacy invasion through disclosure.

A. The privacy policy on the voter registration application cannot trump disclosure requirements

Courts have widely held in other areas of law that a party cannot rely on a promise of confidentiality in attempting to make private that which the public has a legal right to access. Courts have recognized that there is a broad right of access to public records, and have closely scrutinized attempts to independently privatize such information. In the same vein, parties may not assert a right to secrecy in non-secret information. These principles appear throughout cases related to materials subject to public records laws, attempts to keep court records secret, and allegations of trade secret misappropriation.

i. Public records

Courts have routinely declined to enforce confidentiality provisions or agreements which would block access to information which would otherwise be publicly accessible under state public record laws.

In *Robles v. Envtl. Prot. Agency*, 484 F.2d 843 (4th Cir. 1973), this court held that an Environmental Protection Agency ("EPA") promise to homeowners to keep certain environmental survey information confidential was not sufficient to override the presumption of disclosure under the FOIA, and ordered disclosure of the information. *Id*. at 845-46. The plaintiffs in that case made a request for survey data gathered by the EPA and the Colorado Department of Health that detailed radiation levels in homes that had possibly been constructed with uranium-infected materials. *Id*. at 844. The EPA claimed the requested materials should be exempt from disclosure because it had promised some of the homeowners that the survey results would be kept confidential. *Id*. at 846.

The court rejected the lower court's holding that the promise of confidentiality was relevant to the question of whether disclosure should be ordered pursuant to a FOIA request, stating, "[w]hile, perhaps, a promise of confidentiality is a factor to be considered, it is not enough to defeat the right of disclosure that the agency 'received the file under a pledge of confidentiality to the one who supplied it.'" *Id*.

Similarly, in *Wash. Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252 (D.C. Cir. 1982), the court held that a government promise of confidentiality did not bar disclosure of information sought under FOIA. *Id*. at 262-64. In that case, the *Washington Post* requested forms that agency consultants

had submitted to allow the agency to determine possible conflicts of interest. *Id*. at 255-56. The form said the information would not be disclosed absent a showing of "good cause." *Id*. at 256. In examining whether disclosure would "constitute a clearly unwarranted invasion of personal privacy" under FOIA, the court initially noted that "[o]ther things being equal, release of information provided under a pledge of confidentiality involves a greater invasion of privacy than release of information provided without such a pledge."[6] *Id*. at 263. However, the court rejected the government's reliance on its confidentiality pledge to justify nondisclosure, noting that, "[o]n the other hand, to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Id*. The same rationale applies here, given the NVRA's stated purpose and mandates.

Other courts have likewise upheld the disclosure of public documents pursuant to an open records request in the face of improper state-issued confidentiality promises. *See, e.g.*, *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 n.3 (6th Cir. 1998) (holding city's confidentiality promise in police personnel files was irrelevant to a discussion of whether the privacy interest in the

[6] *Contra. Int'l Union, United Plant Guard Workers of Am. v. Dep't of State Police*, 373 N.W.2d 713, 720 n.39 (Mich. 1985) ("The reasons for this belief are not compelling . . . . [W]hile a pledge of confidentiality might induce an expectation that information will not be released, a pledge does not enhance or change the 'quality' of the information and make it '[i]nformation of a *personal nature*'").

information deserved constitutional protection.); *Wash. Post Co. v. N.Y. State Ins. Dep't*, 463 N.E.2d 604, 607 (N.Y. 1984) (state ordered to release the minutes from an insurance department meeting, as the department's "long-standing promise of confidentiality" to the companies was "irrelevant" in the determination of whether the documents fell under the scope of the state open records law); *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1208 (Fl. Dist. Ct. App. 2009) (holding that NCAA access-restricted records were public records despite the existence of a confidentiality agreement, as "[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private . . . . Nor is it material that the NCAA had an expectation that the documents would remain private").

ii. Court records

Courts have consistently held that the heavy presumption that court documents are public records cannot be overcome by mere agreements to keep such documents confidential. Accordingly, the court in *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co*., 178 F.3d 943 (7th Cir. 1999) held that the lower court had improperly delegated to the parties the task of determining good cause to seal part of the case record. *Id*. at 944. The district court's order to the parties authorizing them to make confidential "any document 'believed to contain trade secrets or other confidential . . . information" was too broad, as the order was not

limited to secret matters, such as true trade secrets, but rather, "amount[ed] . . . to giving each party carte blanche to decide what portions of the record shall be kept secret." *Id*. at 944-45.

Likewise, in *In re Cendant Corp*., 260 F.3d 183 (3d Cir. 2001), the court held that the district court improperly issued a confidentiality order in requiring attorneys seeking to be appointed lead counsel for a class action lawsuit to submit their bids under seal. *Id*. at 187. The court stated, "in deciding to seal the bids, the District Court failed to recognize that the bids were judicial records, subject to the common law presumption of public access." *Id*. at 192. That is, "the District Court's auction procedure transformed the bids into judicial records," as "the bids were essentially submitted in the form of motions" at the direction of the court. *Id*. at 193.

iii. Trade secret cases

Courts have also followed the principle that one cannot conceal information from disclosure by claiming such information constitutes a "secret" when it does not. This principle appears widely in the context of trade secret litigation, where courts have routinely refused to hold a party guilty of trade secret misappropriation when the "secret" information allegedly misappropriated is not a true secret.

In *Hickory Specialties, Inc. v. Forest Flavors Int'l, Inc*., 26 F.Supp.2d 1029 (M.D. Tenn. 1998), the court emphasized that in order for a party to claim

information is secret, and thereby protectable from public disclosure under a trade secret doctrine, the information must at the outset truly be confidential. *Id*. at 1031-32. The court affirmed its decision to enforce a nondisclosure agreement between the parties only to the extent that the information qualified as a trade secret, explaining that "[a] promise not to divulge information that is not actually secret is per se unreasonable and therefore unenforceable." *Id*. at 1032. *See also DTM Research, L.L.C. v. AT&T Corp*., 245 F.3d 327, 332 (4th Cir. 2001) ("While the information forming the basis of a trade secret can be transferred . . . its continuing secrecy provides the value, and any general disclosure destroys the value").

Likewise, the state cannot here convert records into confidential materials by attaching a privacy statement to a state document soliciting publicly available information.

These cases demonstrate the pervasive recognition of the principle that neither can public information be made private through agreements, promises, or orders of confidentiality, nor can that which is public information be converted to a secret. Likewise, the information on Virginia's voter registration applications, with the exception of complete SSNs, consists of wholly public information, and the state cannot unilaterally create a privacy right in the disclosure of such information. Therefore, this court should not sanction the district court's ruling denying retrospective relief.

CONCLUSION

For the foregoing reasons, the decision of the district court to order disclosure of all future voter registration applications with full SSNs redacted pursuant to the NVRA's Public Disclosure Provision should be affirmed. In so affirming, this court should not sanction the state's ability to unilaterally create an expectation of privacy in the 2008 voter registration applications, and, should this court choose to address the issue, it should reject such a position.

Dated: Arlington, VA
October 21, 2011

Respectfully submitted,

/s/ Lucy A. Dalglish
Lucy A. Dalglish
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

Counsel for amicus curiae *The Reporters Committee for Freedom of the Press*, et al.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,627 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further, I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: Arlington, VA
October 21, 2011

/s/ Lucy A. Dalglish
Lucy A. Dalglish
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

Counsel for amicus curiae *The Reporters Committee for Freedom of the Press, et al.*

ADDENDUM

Identity of *amici*:

The Reporters Committee for Freedom of the Press

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

American Society of News Editors

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press

The Associated Press ("AP") is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. AP's

members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP reports news in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

Association of Capitol Reporters and Editors

Association of Capitol Reporters and Editors was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

Atlantic Media, Inc.

Atlantic Media, Inc. is a privately held, integrated media company that publishes *The Atlantic*, *National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Citizen Media Law Project

Citizen Media Law Project ("CMLP") provides legal assistance, education and resources for individuals and organizations involved in online and citizen

media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

LIN Media

LIN Television Corporation d/b/a LIN Media, along with its subsidiaries, is a local multimedia company that owns, operates or services 32 network-affiliated broadcast television stations, interactive television stations and niche websites and mobile platforms in 17 U.S. markets, including properties in Buffalo, N.Y., and New Haven, Conn. LIN is the parent of WAVY-TV (NBC) and WVBT-TV (Fox) in the Norfolk, Virgina market area.

The National Press Club

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

National Press Photographers Association

The National Press Photographers Association ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation,

editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

North Jersey Media Group Inc.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The* (Bergen County) *Record*, the state's second-largest newspaper, and *The* (Passaic County) *Herald News*. NJMG also publishes more than 40 community newspapers serving towns across five counties, including some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines, including *(201) Best of Bergen*, nearly a dozen community-

focused titles and special-interest periodicals, such as *The Parent Paper*. The company's Internet division operates many news and advertising websites and online services associated with the print publications.

Radio Television Digital News Association

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Seattle Times Company

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Society of Professional Journalists

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta

Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

USA Today

USA TODAY is the nation's No. 1 newspaper in print circulation and, with USATODAY.com, reaches a combined 5.9 million readers daily.

Virginia Coalition for Open Government

Founded in 1996, the Virginia Coalition for Open Government ("VCOG") is a non-partisan organization dedicated to making access to records and meetings of state and local government in Virginia as open and accessible as possible. VCOG has more than 150 individual and institutional dues-paying members; membership is open to anyone.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2011, the foregoing brief *amici curiae* was filed with the Court's CM/ECF system, providing electronic service. I further certify that I caused to be served 2 true and correct copies of the foregoing brief *amici curiae* by first-class mail, postage prepaid on the following counsel of record for all parties:

Ryan Morland Malone
Ropes & Gray, LLP
Suite 900
700 12th St. NW
Washington, DC 20005

Jeff W. Rosen
Pender & Coward, PC
222 Central Park Avenue, #400
Virginia Beach, Virginia 23462

E. Duncan Getchall, Jr.
Stephen M. Hall
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Thomas E. Perez
Assistant Attorney General
Diana K. Flynn
Erin H. Flynn
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403

I further certify that on this 21st day of October, 2011, I caused to be served for filing with the Court, 1 original and 7 true and correct copies of the foregoing

brief *amici curiae* by first-class mail, postage prepaid at the following address:

Patricia S. Connor
Clerk of the Court
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Dated: Arlington, VA
October 21, 2011

/s/ Lucy A. Dalglish
Lucy A. Dalglish
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

Counsel for amicus curiae *The Reporters Committee for Freedom of the Press, et al.*