

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

THE PUBLIC INTEREST LEGAL)
FOUNDATION, INC.,)
)
Plaintiff,)
)
v.)
)
LARRY HAAKE, in his official capacity as)
General Registrar for Chesterfield County,)
)
Defendant.)
_____)

Civil Action No. 3:16-cv-836

**BRIEF AMICUS CURIAE OF REPUBLICAN PARTY OF VIRGINIA IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS**

IDENTITY AND INTEREST OF AMICUS CURIAE

The Republican Party of Virginia, Inc. (hereinafter, "RPV") is a Virginia domestic non-stock corporation and one of the two major political party committees in Virginia.

As a political party that nominates candidates for public office, RPV has two critical interests in this litigation. First, RPV supports the purposes of the National Voter Registration Act (hereinafter, "NVRA"), specifically, protecting the integrity of the electoral process and ensuring accurate and current voter registration rolls. 52 U.S.C § 20501. When RPV's nominees are elected, they can only be effective if the public has confidence in the electoral process. A credible election requires accurate and current voter rolls so that all those who are qualified voters may vote without having their votes diluted by ineligible voters who appear on the voter rolls.

Second, RPV's electioneering and party-building activities principally target registered voters in Virginia. So, RPV has an interest not only in accurate and current voter rolls, but also in the availability of voter registration data to political parties, candidates and office holders. RPV

and its nominees use voter registration data to develop plans for winning election campaigns, to effectively target communications to likely voters, and to ensure that only qualified voters participate in party-run nominating processes.

Both of these interests are implicated by Defendant's motion to dismiss, and neither party to the litigation shares RPV's second interest in the availability of voter registration data to political parties, candidates and officeholders.

Neither party's counsel authored the brief in whole or in part. Neither the parties, their counsel, nor any other person outside the membership of RPV contributed money to fund preparation of this brief.

SUMMARY OF ARGUMENT

Defendant's theory that the Driver Privacy Protection Act of 1994 (hereinafter, "DPPA") prohibits election officials from discharging their disclosure duties would undermine the National Voter Registration Act and the rights of political parties under Virginia's election code. A careful reading of the DPPA belies Defendant's contention. The DPPA does not cover voter registration records or noncitizen cancellation reports. Even if the DPPA covered such records, it includes an exception that would allow election officials to discharge their disclosure obligations.

ARGUMENT

I. APPLYING DPPA TO PROHIBIT RELEASE OF VOTER REGISTRATION DATA UNDERMINES VIRGINIA'S ELECTION CODE AND NVRA.

Defendant claims that the requested records at issue in this case, the noncitizen cancellation report, which the NVRA requires her to make available for inspection and copying, is "replete with personal information derived from the Department of Motor Vehicles' records"

and, as such, may not be disclosed because of the Driver Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq.* (hereinafter, “DPPA”) (Def.’s Mot. to Dismiss ¶ 19.)

If Defendant is correct, the name, address, and voter registration identification number included in the noncitizen cancellation report are all protected as “personal information ... obtained ... in connection with a motor vehicle record.” 18 U.S.C. § 2721(a)(1). This is the same information maintained in the voter registration system for any voter who applies to register at the Department of Motor Vehicles (hereinafter, “DMV”).

Section 24.2-405 of the Code of Virginia requires the Department of Elections to provide the list of registered voters to, among others, political party committees, candidates and elected officeholders. As the Supreme Court has noted, the State has a legitimate interest in providing voter information to parties in support of their electioneering and party-building efforts.

Clingman v. Beaver, 544 U.S. 581, 594 (2005) citing *Nader v. Shaffer*, 417 F. Supp. 837, 845 (Conn.), *aff’d*, 429 U.S. 989.

If Defendant’s contention that voter registration information that comes to registration officials by way of the DMV is covered by DPPA and that DPPA prohibits election officials from disclosing that information to non-government entities, RPV will be unable to acquire and use the voter registration list to which it is entitled under Virginia’s election laws.

A substantial number of registered voters made application at the Department of Motor Vehicles. According to the Department of Election’s NVRA Statistics Report for January 2016, 34,855 of the 81,771 voters, or 43 percent, who registered in that month did so through the DMV.¹ Under Defendant’s theory, none of these voters could be included in the voter registration lists made available under section 24.2-405 of the Code of Virginia.

¹ http://www.elections.virginia.gov/Files/Registration-Statistics/2016/01/NVRA_Statistics.pdf (visited Dec. 3, 2016)

Separately, the local party chairs of RPV are entitled to notice of all voter registrations that general registrars propose to cancel. General registrars must also notify the public, either through publication in a newspaper or posting at the courthouse, of proposed cancellations. Under section 24.2-429 of the Code of Virginia, these disclosures are a necessary precondition to cancelling a voter registration. If Defendant is correct, general registrars would have violated DPPA and be subject to its sanctions whenever they followed the statutory procedures to cancel non-citizen registrations, or the registration of any registrant who made application through DMV.

Under Defendant's reasoning, the Department of Elections and the general registrars would be unable to discharge their obligations under NVRA, and sections 24.2-405 and 24.2-429 of the Code of Virginia, and, in fact, have been consistently violating DPPA.

Defendant's theory creates a conflict between DPPA on the one hand and NVRA and Virginia's election laws on the other and urges this Court to find that DPPA prevails under every circumstance. Defendant is wrong, no conflict exists.

II. ELECTION OFFICIALS DO NOT VIOLATE DPPA BY DISCLOSING NONCITIZEN CANCELLATION REPORTS OR VOTER REGISTRATION LISTS.

The requested noncitizen cancellation reports would include information derived primarily from voter registration records and list maintenance programs, not from "motor vehicle records." The only information requested as part of the report that would be derived from DMV records, citizenship status, is not protected by DPPA.

The Driver's License and Identification Card Application² used by the DMV includes three questions above the title of the form with an explicit notice that the information is not required to apply for a license or identification card:

- The first question is "Are you a citizen of the United States of America?"
- The second question is "Do you want to apply to register to vote or change your voter registration address?"³

The answers to these first two questions determine the interactions between the applicant, the DMV and voter registration officials.

A. Voter registration applications are not "motor vehicle records" protected by DPPA.

If the applicant answers "yes" to the second question, they are offered a voter registration application which they must complete. Once completed, the DMV forwards it to voter registration officials. It is the voter registration application, not the DMV application that is provided to the voter registration officials.

Although the two applications contain similar data, that fact does not make the voter registration application a motor vehicle record protected by DPPA. *Lake v. Neal* addressed this issue directly:

The plain language of both statutes makes it clear that a voter registration form filled out pursuant to the NVRA does not "pertain" to any of the listed DMV documents. The dictionary tells us that "pertain" means "to belong as a part, member, accessory, or product." The voter registration form, which is filled out separately and at the applicant's option, is not a part, member, accessory, or product of a motor vehicle operator's permit. Other than the fact that it is filled out simultaneously with a driver's license application, the voter form has nothing to

² Driver's License and Identification Card Application, Virginia Department of Motor Vehicles Form DL 1P (07/01/2016) is attached as Exhibit A.

³ The third question relates to becoming an organ donor.

do with, nor does it “pertain” to, a motor vehicle operator's permit. 585 F.3d 1059, 1061 (7th Cir., 2009).⁴

Data in the voter registration database, even if it is derived from a voter registration application offered by an applicant at a DMV office, is not a motor vehicle record protected by DPPA.

B. DPPA does not preclude disclosure of noncitizen cancellation reports.

Returning to the DMV application, when an applicant responds “no” to the citizenship question, the DMV sends a report to the Department of Elections indicating that the applicant has declared himself not to be a citizen. The Department compares the non-citizen’s information to the registered voter list. If the comparison produces a match to an existing voter registration record, the general registrar in whose jurisdiction the non-citizen is registered receives notification for follow up. If the general registrar confirms the match, after completing the statutory notice process, he proceeds to cancel the registration.⁵

1. Noncitizen cancellation reports do not include “personal information” protected by DPPA

The noncitizen cancellation report lists individuals whose registrations were cancelled pursuant to this process, including the following information from the cancelled voter registration record—precinct, name, address, voter registration identification number, date of cancellation and type of cancellation.

Although the decision to cancel these non-citizens’ records was made upon investigation of a response to a question on the DMV application, none of the information on the noncitizen cancellation report “pertains” to the DMV application. In order to appear on a noncitizen

⁴ DPPA defines motor vehicle record as “any record that pertains to a motor vehicle operator’s permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles” 18 USC 2725(1).

⁵ This process is described in the Department of Elections Annual List Maintenance Report: July 1, 2015-June 30, 2016, p 6.

cancellation report, an individual must have had a record in the voter registration system. Had no such record existed, there would be no registration to cancel.

2. *Citizenship status is not information protected by DPPA.*

The only piece of information disclosed on the noncitizen cancellation report derived from the DMV application is the formerly registered voter's citizenship status. Citizenship status is not the type of "personal information" protected by DPPA.

DPPA explicitly lists the type of personal information protected by the Act from disclosure:

"personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information.... 18 U.S.C. § 2725(3).

Citizenship status is not among the types of information that DPPA protects. The only information included in the noncitizen cancellation report that could conceivably "pertain" to the DMV application is not protected from disclosure by DPPA.

3. *Disclosure of voter registration records would be permissible use under DPPA.*

Even if noncitizen cancellation reports are subject to DPPA, that Act includes several permissible uses for which protected personal information can be disclosed. General registrars and the Department of Elections may release information relying on the exception for use by a government agency or private entity acting on behalf of an agency.

Information otherwise protected by DPPA may be disclosed "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1).

The Department of Elections and the general registrars are government agencies. Information disclosed to them can be used to carry out their functions. Among those functions are statutory disclosure requirements. Section 8(i) of NVRA requires the disclosure of list maintenance records, such as cancellation of registration for non-citizenship. Section 24.2-429 of the Code of Virginia requires general registrars to provide public notice of proposed cancellations. “[T]he registrar shall post at the courthouse or publish in a newspaper of general circulation the name of the registered voter on a list of persons whose registrations are to be cancelled.” Va. Code Ann. § 24.2-429 (2016).

These disclosures are critical functions carried out to maintain the integrity of the voting rolls. DPPA allows for otherwise protected information to be disclosed to carry out these functions. To hold otherwise would prevent the cancellation of noncitizen registrants.

In considering a similar conflict, the Connecticut Supreme Court has held that disclosure of records compiled from DMV records are publicly accessible where another statute requires it of another agency. In *Davis v. Freedom of Information Commission*, the Court held that DPPA does not apply to other government agencies that disclose personal information received from DMV in the course of their normal government functions. 259 Conn. 45, 55 (2001).

Finally, in addition to these required disclosure provisions in federal and state law, NVRA provides for a private right of action to enforce its provision. In pursuing a private right of action, a private entity is acting on behalf of a government agency. The permissible use under DPPA should apply with equal force to private entities pursuing a private right of action. Blocking disclosure of information prevents private entities from having the necessary information to make effective use of the private right of action.

If Defendant prevails, RPV's rights under Virginia's election code and the purposes of the NVRA would be undermined. That outcome can be avoided. Defendant's reading of DPPA is erroneous. Voter registration records are not motor vehicle records and, as such, not covered by DPPA. Noncitizen cancellation reports, to the extent they may include data pertaining to motor vehicle records do not include personal information covered by DPPA. Even if all of these records were covered by DPPA, a permissible use under that statute allows voter registration officials to disclose them in carrying out their functions.

CONCLUSION

For the reasons stated above, Defendant's motion for summary judgement should be denied.

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Respectfully submitted,

Christopher M. Marston
General Counsel
Republican Party of Virginia
115 E Grace St
Richmond VA 23218
Telephone: (571) 482-7690
Facsimile: (703) 997-2549
Email: cmarston@rpv.org

*Counsel for Amicus Curiae
Republican Party of Virginia*