No. 12-15738-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KARLA VANESSA ARCIA, ET AL.,

Plaintiffs-Appellants,

v.

FLORIDA SECRETARY OF STATE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (NO. 12-22282-CIV-ZLOCH)

APPELLEE'S RESPONSE BRIEF

Ashley E. Davis
Assistant General Counsel
Florida Department Of State
R.A. Gray Building
500 South Bronough Street, Suite 100
Tallahassee, FL 32399-0250
(850) 245-6536
Ashley.Davis@DOS.MyFlorida.com

Michael A. Carvin
Warren D. Postman
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879 3913
macarvin@jonesday.com

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, I hereby certify that the Certificate of Interested Persons contained in Appellants' initial brief is, to the best of my knowledge, accurate and complete.

/s/ Michael A. Carvin

Michael A. Carvin

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Secretary of State Detzner ("Secretary"), agrees with both courts to have addressed the issue that the National Voter Registration Act of 1993 ("NVRA") plainly allows Florida to strike invalidly registered non-citizens from the voting rolls at any time. However, because the contrary position of Plaintiffs-Appellants threatens Florida's fundamental duty to protect the integrity of its voting rolls and implicates important questions of Article III standing, the Secretary agrees that oral argument would be appropriate in this case.

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STATEMENT OF JURISDICTION

This case arises under Section 8(c)(2)(A) of the NVRA, 42 U.S.C. § 1973gg-6(c)(2)(A). The district court had statutory jurisdiction under 28 U.S.C. § 1331 and entered final judgment on October 29, 2012. RE124. This Court has statutory jurisdiction under 28 U.S.C. § 1291.

As explained further below, however, Plaintiffs lack constitutional standing because they failed to demonstrate any Article III injury. Moreover, even assuming that Plaintiffs had standing initially, Plaintiffs' suit is now moot because the election that was the basis of Plaintiffs' complaint has passed and no exception to mootness applies in this case.

STATEMENT OF THE ISSUES

Whether this Court has Article III jurisdiction.

Whether Section 8(c)(2)(A) of the NVRA bars the Secretary from removing non-citizens from the voting rolls within 90 days of a federal election.

STATEMENT OF THE CASE

Plaintiffs filed the initial complaint in this case on June 19, 2012, alleging that the Secretary's efforts to notify county supervisors of elections of likely non-citizens for potential removal from the voting rolls within 90 days of a federal election violated the NVRA. DE1. A full three months later, on September 19, 2012, Plaintiffs filed a combined motion for a preliminary injunction and summary judgment. DE65. The district court promptly conducted an evidentiary hearing on October 1, 2012, and held, on October 4, 2012, that the Secretary's activities did not violate the NVRA. RE111. To facilitate an immediate appeal, Plaintiffs requested that the district court enter final judgment. DE113. The Secretary did not object to the entry of final judgment in his favor, although he clarified that this judgment should be based on Plaintiffs' lack of standing. DE120. The district court entered final judgment on October 29, 2012. RE125. Plaintiffs filed a timely Notice of Appeal on November 1, 2012. DE126.

STATEMENT OF FACTS

A. Federal And State Laws Governing Electoral Integrity.

As explained by the Amicus Brief of Members of Congress ("Members Brief"), numerous federal (as well as State) laws prohibit non-citizens from registering to vote, or voting, in Florida's elections; indeed such actions are federal felonies. *See* Mem.Br.4-7; 18 U.S.C. §§ 611, 1015(f); 42 U.S.C. § 1973gg-3(C)(2)(B)(ii); § 1973gg-3(C)(2)(C); Fla. Stat. §§ 97.041, 104.011, 104.15. These laws serve well-established and compelling public interests: preventing ineligible voters from participating in elections avoids the dilution of citizens' fundamental right to vote and protects the legitimacy of the democratic process. As the Department of Justice ("DOJ") recently emphasized in the Supreme Court, "the federal and state governments have a compelling interest in excluding foreign citizens" from the political process. Motion of the United States to Dismiss or Affirm at 11, *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (No. 11-275), 2011 WL 5548718. Such exclusion is neither an "invidious attack" on these individuals nor "a deficiency in the democratic system"; rather, it is "a necessary consequence of the community's process of political self-definition." *Id.* at *15 (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1981)).

Relatedly, state and federal law both require the Secretary, together with Florida's independent county supervisors of elections, to review Florida's voter

registry and eliminate improperly registered voters from the rolls. Specifically, Florida law, as precleared by the Justice Department under the Voting Rights Act, requires that the Secretary and county supervisors "protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records." Fla. Stat. § 98.075(1). If the Secretary or a supervisor receives information that a registered voter is ineligible, Section 98.075(7) requires that the supervisor observe the following procedure to determine if the individual should be removed from the voter rolls:

1. Notice and an opportunity to respond. The supervisor must provide notice to the registered voter by certified mail informing him or her of his or her potential ineligibility, disclosing that failure to respond within 30 days may result in removal from the rolls, and informing the recipient that he or she has a right to a hearing. The notice must further include a return form that requires the voter to admit or deny the basis for ineligibility.
2. Allow voter 30 days to respond and, in the absence of a response, provide an additional 30 days' notice by publication.
3. Provide a hearing if requested by the voter.
4. Determine eligibility of the registered voter based on a preponderance of the evidence.

Federal law places similar obligations on the Secretary. The Help America Vote Act ("HAVA") requires the Secretary to "ensure that voter registration records in the State are accurate and are updated regularly" in order to "remove registrants who are ineligible to vote." 42 U.S.C. § 15483(a)(4). Moreover, the

Secretary "shall" review data from "the database of the motor vehicle authority" to "verify the accuracy of [voter registration] information." *Id.* § 15483(a)(5)(B).

Section 8 of the NVRA imposes additional requirements on States' maintenance of voter registries. Although "the words of a statute must [always] be read in their context and with a view to their place in the overall statutory scheme," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotation marks omitted), that maxim is particularly relevant here, as the various provisions in Section 8 use repeated cross-references and are by no means a model of drafting clarity. These provisions are therefore described in some detail below.

As a general matter, the NVRA requires that any state efforts aimed at "[c]onfirmation of voter registration" to "protect the integrity of the electoral process" must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965" and may not remove a voter based solely on the failure to vote absent certain procedural safeguards. 42 U.S.C. § 1973gg-6(b).

In addition, the Act also contains several provisions restricting state efforts to "remove" "eligible voters" from the rolls. *Id.* § 1973gg-6:

- Subsection (a)(3) imposes a general ban on a State *ever* "remov[ing]" a registrant from the "official list of eligible voters," subject to an exclusive list of exceptions:

> "[T]he name of a registrant *may not be removed* from the official list of eligible voters *except*—(A) at the request of the registrant; (B) as provided by State law, by reason of criminal conviction or mental incapacity; or (C) as provided under paragraph (4)." (Emphasis added.)

- Subsection (a)(4), in turn, requires that States conduct a voter removal program, *i.e.*, "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—(A) the death of the registrant; or (B) a change in the residence of the registrant in accordance with subsection (b), (c), and (d) of this section."

- Subsection (c) describes how states may operate the aforementioned "Voter removal programs" that are "require[d by] subsection (a)(4)." Subsection (c)(2)(A) provides:

> [a] State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

- Contrary to the assertions of Plaintiffs and their Amici, Pls.Br.7-8, 25; Mem.Br.9-14, subsection (c) does not remotely reflect an aggressive attempt to categorically bar "any" and all "voter purges" during 90 days before a federal election. Rather, subsection (c)(2)(B) provides that (c)(2)(A):

> shall not be construed to preclude—(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) [by request] or (B) [as provided by State law, by reason of criminal conviction or mental incapacity]; or (4)(A) [death].

Thus, for *every* ground of removal that is ever permitted under the NVRA, except change in residence, the NVRA expressly allows systematic removal even within 90 days.

- Moreover, systematic removal is permitted even with regard to change in residence—the sole ground for removal subject to the 90-day provision—so long as the state provides notice and an opportunity to respond. Specifically, subsection (c)(2)(B) allows a State to engage in "correction of registration records pursuant to this subchapter" even with 90 days of an election. As described in subsection (d), this authority allows a State to send a notice to any voter requesting that the voter confirm whether he or she has changed residence. *Id.* § 1973gg-6(d). Voters who respond that they have moved may have their names removed from the list immediately, even within 90 days of an election. *Id.* § 1973gg-6(d)(1). Moreover, voters who fail to respond may also be prevented from voting unless they provide "oral or written affirmation" of their residence before an election official, and may have their names permanently removed from the rolls if they have not voted in two successive elections following a notice. *Id.* § 1973gg-6(e)(2)(A).

In sum, the NVRA prohibits the "removal" of names from the list of "eligible voters" at any time, except for the reasons listed in subsections (a)(3) and (a)(4)—by request, as provided by State law, by reason of criminal conviction or mental incapacity, death, or change in residence. One, and only one, of these permissible grounds for removal under (a)(3) and (a)(4)—change in residence—is subject to a 90-day "quiet period" prior to a federal election. However, even with regard to change in residence, voters may be barred from voting within 90 days if they are provided with notice and an opportunity to respond.

B. The Secretary's Efforts To Protect The Integrity Of Florida Elections.

Plaintiffs in this case are challenging an effort by the Secretary to identify non-citizens who have improperly registered to vote by carefully matching data from state databases and then cross-checking that data using the Department of Homeland Security's rapidly updated database of legal aliens (the "SAVE" database). RE57 ¶4. Because they cannot identify any flaws in this process that make it likely to cause an Article III injury to anyone, Plaintiffs focus extensively on Florida's *prior* registry maintenance programs, particularly a pilot program in which the Secretary attempted to identify potential non-citizens based on state data alone. Pls.Br.11-18. The Secretary voluntarily discontinued this pilot program more than a month-and-a-half *before* either Plaintiffs or DOJ filed their lawsuits. DE79-1 ("Matthews Decl.") ¶5. However, to clarify several mischaracterizations

by Plaintiffs and to provide a broader context for this suit, the Secretary will describe Florida's prior efforts to protect voting integrity as well as the process that is actually challenged in this case.

The Florida Department of State ("FDOS") regularly engages in efforts to identify ineligible voters on the State's voter registration rolls. For example, FDOS receives monthly reports of: deceased adults from the Florida Department of Health; persons adjudicated mentally incompetent from each clerk of the circuit court; and persons who have become licensed to drive in other states from the Florida Department of Highway Safety and Motor Vehicles ("DHSMV"). *See* Fla. Stat. §§ 98.075, 98.093. In 2011, as required by federal law, the Secretary worked with the DHSMV to locate records in DHSMV's "MDAVE" database indicating that individuals on the voting rolls had provided DHSMV with identification, such as a foreign passport or green card, indicating that they were non-citizens. *See* Matthews Decl. ¶4.

On August l, 2011, in an effort to obtain the most reliable information possible, FDOS sought access to DHS's SAVE database to determine the eligibility of voters to be registered. *Id.* ¶5. SAVE is a rapidly updated federal database that allows state and local governments to check the most recent immigration status of non-citizens who lawfully entered the United States. *See* What Is SAVE, *available at* http://www.uscis.gov/save (last visited Jan. 22, 2013).

However, after continued delay by DHS in granting access to SAVE, the Secretary proceeded in April 2012 to forward a sample of roughly 2,600 records to county supervisors for their review. Matthews Decl. ¶6.

In distributing the sample of MDAVE data, FDOS reminded supervisors:

> The list that you will be receiving represents only non-immigrants initially identified in DHSMV's DAVE … . *Please remember that you are still responsible for contacting these individuals and going through the process of verifying citizenship status before making a determination of eligibility for voter registration*. You must follow the same procedures, in law, that you have in the past whenever you receive information that a registered voter of yours is ineligible to be registered to vote.

DE79 Ex. 2 at 1. Thus, the list was explicitly described as an intermediate screening tool, and the fact that it included the names of some citizens by no means demonstrated, as Plaintiffs assert (Pls.Br.15, 20), that the effort "failed" or was "flawed."

This process successfully uncovered improperly registered voters. Matthews Decl. ¶19. Nonetheless, in order to make its review as accurate as possible, in April 2012, FDOS stopped sending names of potential non-citizens to county supervisors based on the MDAVE data until the results could be confirmed through SAVE. Matthews Decl. ¶5-6.

C. DOJ Unsuccessfully Challenges The Secretary's Efforts Under The NVRA And Chooses Not To Appeal.

Like Plaintiffs here, DOJ sought to enjoin the Secretary's efforts to identify improperly registered non-citizens on the theory that it violated the NVRA's 90-day provision. *See United States v. Florida*, 870 F. Supp. 2d 1346 (N.D. Fla. 2012) ("DOJ Case"). Judge Hinkle denied the injunction on June 28, 2012, concluding that "if, as both sides concede, [](a)(3) does not prohibit a state from removing an improperly registered noncitizen, then [](c)(2) does not prohibit a state from systematically removing improperly registered noncitizens during the [90-day] quiet period." *Id.* at 1350. DOJ did not appeal that decision, made no effort to enjoin the Secretary's identification of non-citizens pursuant to the SAVE data, and voluntarily dismissed its suit. *See* DOJ Case, Dkt 54.

D. The Secretary Obtains Access To SAVE And Begins To Confirm MDAVE Results.

After initiating its own lawsuit to obtain access to SAVE, FDOS announced on July 14, 2012, that it had received permission from DHS to access SAVE and would institute a new process to cross-check MDAVE data against SAVE and send the names of confirmed ineligible voters to county supervisors. DE79-3. The Secretary then cross-checked the names of those in the original sample of roughly 2,600 records and updated county supervisors on the result. *See* Matthews Decl. ¶¶7-8.

In order to check the immigration status of an individual in SAVE, FDOS must have the individual's Alien Registration Number or "A-number," a unique 9-digit identifier given only to non-citizens. Matthews Decl. ¶17. Florida has A-numbers from some individuals based on identification they presented to DHSMV. *Id.* ¶¶14-15. To confirm that A-numbers from DHSMV matched the individual on the voter registry, FDOS conducted an automated match of the individual's first name, last name, and unique identifiers (*i.e.*, a social security number or driver's license number). *Id.* ¶¶9-10. Moreover, this automated check was then manually re-checked based on first name, last name, and address, signature, or photograph. *Id.* ¶11. After confirming to a practical certainty that a given A-number corresponds to the name of an individual on the voter rolls, FDOS entered the A-number into SAVE. *Id.* ¶¶12-15. Only if SAVE confirmed that the individual was not a citizen did FDOS transmit the name to the appropriate county supervisor who then provided the individualized notice, opportunity to respond, and individualized determination outlined above. *Id.* ¶18.

To this day, Plaintiffs have never identified *a single citizen* who has been removed from the voting rolls after being misidentified as a non-citizen based on the SAVE data. On the other hand, the Secretary's data matching program has identified scores of registered voters in the original sample of roughly 2,600

records who have personally attested to their lack of citizenship or been identified as non-citizens in SAVE. Matthews Decl. ¶19.

E. Plaintiffs File Suit But Wait Months Before Seeking "Emergency" Relief.

Although Plaintiffs' complaint of June 19, 2012, asserted that the Secretary's practice was sufficiently certain and imminent to justify their federal suit, Plaintiffs did not seek preliminary relief. Likewise, even after FDOS announced on July 14, 2012, that it had obtained access to SAVE and would resume the transmission of names to county supervisors, Plaintiffs did not promptly seek preliminary relief.

Moreover, although Plaintiffs continue to insinuate that the Secretary's efforts to maintain accurate voter rolls were somehow discriminatory (presumably because a disproportionate number of non-citizens in Florida are minorities), Pls.Br.16-17, Plaintiffs moved on September 12, 2012, to dismiss all claims in their complaint that asserted discrimination. DE71.

Finally, on September 19, *three months* after Plaintiffs filed their Complaint, *three months* after DOJ had brought the same claim, and *two months* after the Secretary announced access to SAVE, Plaintiffs filed their motion for a preliminary injunction and summary judgment. DE65. In describing their asserted injuries, Plaintiffs stated merely that the Secretary's activities would "abridg[e] the individual Plaintiffs' right to vote" and force the organizational Plaintiffs to "divert

scarce resources they would use for other purposes" to protect their members from being removed from the rolls. DE74 at 17.

Plaintiffs have not asserted that even a single citizen has been removed from the voter rolls as a consequence of being identified as a non-citizen in SAVE, or even described a plausible mechanism by which legitimate voters could be injured. Nor did any organizational plaintiff identify an expenditure of staff time that detracted from other specific efforts (let alone an expenditure of money) in response to the Secretary's activities. For example, the declaration of Ms. Rosario Rodriguez, a representative of the Florida Immigrant Coalition, simply assumed that "[g]iven the inaccuracies of the Department of State's *initial list* of potential non-citizens [prior to SAVE], the Coalition will also have to expend additional resources to verify the accuracy of the Department of State's latest attempts to identify non-citizens on the voter rolls [pursuant to SAVE]." DE65-4 ¶4 (emphasis added); *see also* DE65-5 ¶5 (virtually verbatim assertion by SEIU representative). In short, Plaintiffs simply *assumed* that, because the prior matching process based on state data alone was supposedly "flawed," the new SAVE process would result in the removal of citizens from the rolls.

On October 1, 2012, the district court held an expedited and brief evidentiary hearing to assess Plaintiffs' standing solely for purposes of a preliminary injunction. *See* Pls.Br.Add.32a. Mr. Ewart, a representative of the

SEIU, testified that four SEIU staff members had spent "roughly a week" "trying to track down" the three SEIU members who appeared on the initial, publicly available list of 2,600 names and advise them on how to mail back the form provided with the notice. *Id.* at 37a-38a. Likewise, he asserted that his organization would be forced to spend time investigating whether any of its members might be improperly excluded from the rolls as a result of the SAVE process. *Id.* at 41a. However, Mr. Ewart admitted that, even though the Secretary began the SAVE matching process a month and a half earlier, his organization had not so much as requested a copy of the results from FDOS. Pls.Br.Add.44a. Likewise, Mr. Ewart could identify no other program or activity that SEIU was unable to conduct as a result. *Id.* at 48a.

Mr. Seda, a representative of the National Congress for Puerto Rican Rights—an organization with 60 to 70 members in Florida—testified that he was concerned that the Secretary's efforts might threaten Puerto Rican residents with a risk of being removed from the rolls and that his organization had therefore engaged in "community outreach." *Id.* at 58a. However, he conceded that he was "just speculating" that Puerto Ricans (who are of course citizens by birth) would somehow be misidentified as non-citizens in SAVE (a database of immigrants), and then have difficulty demonstrating their citizenship.

In a preliminary order issued October 4, 2012, and a final order issued October 29, 2012, the district court denied Plaintiffs' motion for a preliminary injunction and summary judgment. The court concluded that Plaintiffs Veye Yo and Florida New Majority, Inc. had failed to present any evidence that would support standing. RE111 at 8-9. However, the court held that "based in large part on the Eleventh Circuit's decision in *NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), … the testimony presented at the October 1, 2012 evidentiary Hearing, in conjunction with the Declarations [submitted by the plaintiffs']" was "sufficient—albeit minimally so—to establish … standing" for the remaining plaintiffs. RE111 at 7-8.

Reaching the merits, the district court agreed with Judge Hinkle that the NVRA allows States to strike invalidly registered non-citizens from the rolls at any time. The court explained that, despite the categorical statement of the permanent removal ban, that provision could not possibly have been intended to bar a State from "remov[ing] from its voting rolls minors, fictitious individuals, individuals who in fact misrepresent their residence in the state, and non-citizens." RE124 at 12-14. Moreover, because subsection (c)(2)(A) simply qualifies the broader removal provisions of subsections (a)(3), (a)(4), and (c)(1), and because it excludes every remaining ground of removal contained in subsection (a)(3), the court concluded that "the only removal allowed under paragraphs (a)(3) and (a)(4) that

remains subject to the 90-day Provision is a removal based on 'a change in the residence.'" *Id.* at 14. Subsections (a) and (c) simply do not apply at all, the court explained, where a state removes "registered voters who were never *bona fide* registrants, and whose registration was void *ab initio*." *Id.* at 15. Rather, the NVRA's removal provisions "only address the removal of once-eligible voters—those who were at one time *bona fide* registrants, yet because of personal request, criminal conviction, mental incapacity, or change in residence, became thereafter ineligible." *Id.*

To the extent the NVRA regulates the removal of registrants whose registration is void *ab initio*, the court added, such removals would, at most, be subject to subsection (b)'s requirements governing "any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll." *Id.* at 17-18.

F. Standard of Review.

This appeal presents mixed questions of law and fact regarding Plaintiffs' standing and a question of law regarding whether non-citizens may be removed from the rolls within 90 days of a federal election. Both issues are subject to *de novo* review in this Court. *See United States v. Diaz*, 630 F.3d 1314, 1330 (11th Cir. 2011).

SUMMARY OF ARGUMENT

In performing his fundamental duty to protect the votes of citizens, the Secretary is using the most accurate information humanly possible to identify the ineligible voters that are known to be on Florida's voting rolls. Pursuant to those efforts, no individual will be identified as even a *potential* non-citizen unless FDOS matches *multiple* unique identifiers, matches those identifiers in SAVE, and then manually re-confirms those results. Such an individual, moreover, will then be provided with 30 days notice and an opportunity to respond, before a county supervisor will make an independent determination that the individual is a non-citizen based on a preponderance of the evidence. In short, it is difficult to imagine any more accurate method of protecting the integrity of the voter rolls. Plaintiffs have certainly not suggested any, and have not alleged that any citizen has been removed based on SAVE.

Months after filing their initial complaint, Plaintiffs filed a last-minute motion claiming that the Secretary's efforts violated subsection (c)(2)(A) by causing voters to be removed from the rolls within 90 days of the 2012 general election. While Plaintiffs could have suffered no cognizable injury from the removal of invalidly registered *non-citizens* from the voting rolls, they baldly asserted that the Secretary's use of SAVE data "create[d] the risk that the Plaintiffs

and similarly situated [citizens would] be removed from the voting rolls without justification." DE65 at 18.

Plaintiffs' unsupported speculation that there was a "risk" of eligible voters being denied the right to vote cannot establish standing (particularly since there is no allegation that this risk ever occurred). Nor can the organizational plaintiffs demonstrate standing with vague, conclusory assertions that they are "forc[ed]" to "divert scarce resources they would use for other purposes to educating, addressing, and otherwise protecting their members." DE65 at 17. Moreover, even had the organizational plaintiffs proved that they had diverted specific resources, such resource diversion cannot create standing because it is based on Plaintiffs' own unfounded speculation about hypothetical harms. Ideological plaintiffs who face a highly speculative and unproven risk of harm cannot circumvent core standing principles by needlessly and pretextually spending money to address that risk.

Furthermore, because Plaintiffs' standing was based on supposed injuries leading up to the 2012 election, their suit is now moot. And although an exception to mootness sometimes exists for cases that are "capable of repetition yet evading review," Plaintiffs cannot satisfy this doctrine, particularly given their delay in seeking preliminary relief in advance of the 2012 election.

In any event, Plaintiffs' claim clearly fails on the merits. This case turns on a single question: are the exceptions listed in subsections (a)(3) and (a)(4) the *exclusive* grounds for removing names from the official list of eligible voters or, alternatively, may a State also remove those who are never eligible to be on the list in the first place? The NVRA expressly enumerates only the following grounds for removal: subsection (a)(3) authorizes removal at the "request of the registrant" or "as provided by State law, by reason of criminal conviction or mental incapacity" and subsection (a)(4) authorizes removal because of death or a change in residence. Dispositively, these are the *only* grounds for removal for *both* the general removal ban (subsection (a)(3) and (a)(4)) and the 90-day removal ban (subsection (c)(2)(A)). (The only difference between these two sections—*i.e.*, removal based on change in residence is more limited within 90 days of an election—is not relevant here.)

If the enumerated grounds for removal are the sole grounds for removing names from voter rolls, thereby precluding removal of those who were never eligible to be on voter rolls in the first place, then the NVRA imposes an absurd and unconstitutional restriction on states' ballot integrity efforts; *i.e.*, it precludes removing those who improperly and illegally obtain access to the voter rolls, such as non-citizens and minors. Recognizing that such an absurd and unconstitutional result must be avoided, even Plaintiffs agree that the enumerated exceptions cannot

be interpreted to be the exclusive grounds for removal; rather, the NVRA's removal restrictions must be viewed as also allowing removal of never-eligible non-citizens. Pls.Br.42. Just as statutorily enumerated grounds for dissolving marriages between eligible participants (*e.g.*, adultery) are not interpreted to preclude dissolution of a marriage between never-eligible participants (*e.g.*, siblings), the enumerated grounds for removing once-eligible voters do not permanently bar removal of voters who were never legally on the voting rolls. *Cf. Wright v. Wright*, 778 So.2d 352, 354 (Fla. Dist. Ct. App. 2001) (Florida statute prohibiting dissolution of marriage unless the marriage was "irretrievably broken" or in certain cases of "mental incapacity" did not preclude Florida courts from exercising common law "jurisdiction to declare the nullity of a void marriage.") (internal quotation marks omitted).

In order to achieve their desired results for 90-day removals, however, Plaintiffs illogically reverse their position and claim that the enumerated grounds for removal somehow become exclusive grounds within 90 days of an election, precluding the removal of never-eligible voters. But it is not possible for the removal exceptions to have a different scope for the 90-day removal provision than they do for the permanent removal ban since (save for the irrelevant change of residence difference) the exceptions are the *same* for both provisions.

Plaintiffs attempt to reconcile this absurdity by noting that the general removal ban precludes removing "registrants" from "the official list of eligible voters," while the 90-day removal provision limits removing the "names of eligible voters from the official list of eligible voters." *Id.* But this is a distinction without a difference. Notwithstanding their selectively invoked paean to "plain language," Plaintiffs correctly acknowledge that the plain meaning of the word "registrant" must be altered or interpreted to exclude those "registrants" that were never eligible to register on the voting rolls. Thus, all agree that the language of the NVRA's removal provisions must be interpreted to exclude those who improperly register in the first place.

This principle, when *consistently* applied to the 90-day removal provision, means that the prohibition against removing names "from the official list of eligible voters" does not apply to those who have improperly registered to get on those rolls, since they are only there because of an illegal and invalid registration. An invalidly-registered individual who is deemed never to have become a "registrant" at all plainly cannot be a "voter" on the "list of eligible voters" subject to the 90-day provision. Plaintiffs' contrary reading is not only unprincipled, but also would produce the absurd result of placing greater restrictions on the exclusion of *fraudulently* registered individuals than on the removal of *properly* registered voters who later lose eligibility. Worse still, Plaintiffs' position creates

a bizarre and perverse regime whereby a State may not check whether non-citizens are on the voting rolls through an orderly process before an election, but can arrest suspected non-citizens for attempting a federal felony if they try to vote.

In short, the NVRA must be read to draw a distinction between once-eligible voters who later lose their eligibility, and never-eligible individuals whose attempted registration is void *ab initio*. There are three straightforward readings of the NVRA, all fully consistent with the Act's plain language, which authorize drawing this distinction. First, Section 8 of the NVRA can and should be read to apply only to validly-registered voters, not to improperly and illegally registered voters. Second, to the extent the NVRA regulates the elimination of invalid voter registrations at all, it does so only through the "confirmation of voter registration" provision contained in subsection (b)(2). Third, if the foregoing interpretations are rejected, the absurdity of banning states from ever removing invalid registrants can also be avoided by reading subsection (a)(3) to authorize removal for any ground "provided by State law."

ARGUMENT

I. THERE IS NO ARTICLE III CASE OR CONTROVERSY HERE.

A. Plaintiffs' Speculation That Some Citizens Might Be Improperly Removed From the Rolls Is Not Supported By The Record And Is No Basis for Standing.

To establish standing, each claimant must prove a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). A merely "conjectural or hypothetical" harm is insufficient. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). None of the plaintiffs in this case came close to showing more than a "conjectural or hypothetical" harm.

1. The Individual Plaintiffs Clearly Failed To Demonstrate Any Risk Of Injury.

The individual plaintiffs obviously failed to meet this burden. On summary judgment, they alleged only that the SAVE data matching "abridge[d] [their] right to vote" and "create[d] the risk that [they] will be removed from the voting rolls without justification and without time for recourse." DE65 at 17–18. But Plaintiffs failed to offer even a single statement in an affidavit, deposition, or discovery response to support these allegations. *See id.* This failure was not surprising, since the individual plaintiffs are *citizens*. RE57 ¶¶9-10. Accordingly, the only way they ran a "risk [of] be[ing] removed from the voting rolls" (DE65 at 18) was if (a) the Secretary's data matching was likely to falsely identify them as

non-citizens, (b) they would have failed to respond to a letter from a county supervisor to establish that they are citizens, and (c) their county supervisor would have made a final determination by a preponderance of the evidence that they were ineligible.

As to the first point, Plaintiffs did not offer any evidence of any flaw in the Secretary's SAVE data matching, much less a systemic flaw such that they were likely to be mistakenly identified as non-citizens. Plaintiffs never tried to show that SAVE inaccurately identifies citizens as non-citizens. Indeed, Plaintiffs now concede that, despite their bald speculation that "information in SAVE may itself be inaccurate," they have no evidence of any such inaccuracy. Pls.Br.19 & n.7.[1] And, in fact, although the Secretary has provided Plaintiffs with the results of the SAVE matching process, they have not alleged that either of the individual plaintiffs (or any other citizen) was improperly identified as a non-citizen by the process.

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[1] Plaintiffs tendentiously formulate this point to state that "[d]ue to the expedited nature of this litigation, and resulting lack of effective discovery, the record includes no evidence of SAVE's accuracy." Pls.Br.19 & n.7. But, of course, it is *Plaintiffs*' burden to show that SAVE might be inaccurate, and it was *Plaintiffs'* delay in bringing suit and haste to seek a final judgment that deprived the parties of "effective discovery." Accordingly, Plaintiffs' phrasing cannot conceal that they have no evidence of any inaccuracies in SAVE.

Instead, Plaintiffs simply speculated that "*if* the State had not correctly matched voter rolls and driver's license information, it would check the wrong person (*e.g.*, the wrong Karla Arcia) in SAVE." Pls.Br.19 (emphasis added). Nor have Plaintiffs explained how a straightforward comparison of the SAVE database and the voter rolls could introduce a meaningful likelihood of error. The Secretary did not transmit results of the SAVE process to a county supervisor unless, in addition to confirming the potential non-citizen's first name, last name, and address, he also has confirmed a host of unique identifiers, including social security number or driver's license number, signature, photograph, and A-number. *See* Matthews Decl. ¶¶9-18. Since social security numbers, driver's license numbers, and A-numbers are *unique*, there was never a meaningful possibility of a citizen being mistakenly identified as a non-citizen in SAVE. And there certainly was no "real and immediate" threat that this would occur to anyone, and certainly not to the individual plaintiffs, who are citizens. *Lyons*, 461 U.S. at 102.

As to the second point, even if the foregoing hypothetical were plausible, all the individual plaintiffs would have needed to do to avoid any injury would have been to return the form enclosed with their notice and affirm their citizenship to their county supervisor. Of course, it is absurd to suggest that, despite having the energy and resources to bring a federal lawsuit, the individual plaintiffs were incapable of simply returning a form to their county supervisor.

2. The Organizational Plaintiffs Have No Standing.

The organizational plaintiffs contended that the Secretary's SAVE data matching would harm them directly "by forcing them to divert scarce resources they would use for other purposes to educating, addressing, or otherwise protecting their members." DE65 at 17. Yet the organizational plaintiffs' perfunctory attempts to establish resource-diversion standing failed for two independent reasons.

First, the organizational plaintiffs offered no *specific* facts to demonstrate that they actually would divert money, personnel, or other resources prospectively on educating their members. *See* DE65 at 17; *see also, e.g.*, DE65-5 ¶¶3, 4; DE65-6 ¶¶4, 5; DE65-7 ¶4. And the organizational plaintiffs' "conclusory allegations" that they would divert some unspecified resources "have no probative value," *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000) (internal citation omitted).

Second, even if they had identified specific resources that they planned to divert, Plaintiffs could not bootstrap themselves into standing simply by spending time on "education" about a purely speculative and conjectural harm. Critically, in cases such as *Browning* that find standing based on the plaintiffs' diversion of resources, the plaintiffs alleged that the challenged practice burdened eligible voters *when implemented as intended* and that the organizations were diverting

resources to overcome that *certain barrier*. *See, e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350–51 (11th Cir. 2009) (voter ID law challenged under the 14th Amendment was certain to apply to all NAACP members on election day); *Browning*, 522 F.3d at 1160–64 (voter registration procedure challenged as unduly restrictive was certain to apply to all NAACP member who attempted to register).

Here, the organizational plaintiffs understandably did not allege that they wish to prevent the intended and certain effects of the matching program—the removal of invalidly registered non-citizens from the rolls. *See* DE65 at 13–14. Rather, the organizational plaintiffs asserted that they intended to spend time attempting to remedy the highly speculative and conjectural possibility that a *citizen* might be mistakenly excluded. But, again, Plaintiffs provided nothing "concrete" to show that this far-fetched hypothetical will occur. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Thus, there was no objective need for Plaintiffs to divert their resources to the voter education activities they allegedly planned. That is particularly true given that the information Plaintiffs supposedly planned to disseminate to members—that members should return the form included in any notice they received and affirm that they are citizens—was *already included in the notice*. In short, Plaintiffs' supposed need to divert

resources to voter education regarding the SAVE matching program was caused by Plaintiffs' unsubstantiated speculation, not the Secretary's actual conduct.

As the Supreme Court has recognized, Article III standing cannot be premised on expenditures stemming from Plaintiffs' subjective concern for a speculative and conjectural possibility. *Laird v. Tatum*, 408 U.S. 1, 13 (1972) (standing to challenge chilling of speech cannot be based on plaintiffs' "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents."). Were the rule otherwise, *any* organization could circumvent the bar on suits to address conjectural harms if it were paranoid enough to "divert resources" to educate about that harm (or ideologically motivated enough to expend such resources pretextually). Under that approach, an organization that wanted to sue the CIA for participating in alien surveillance could bootstrap itself into standing by purchasing tinfoil hats for its members. That is obviously not the law.

B. Plaintiffs' Suit Is Moot.

Plaintiffs' asserted injuries were based solely upon the Secretary's activities leading up to the 2012 election. RE57 ¶41; DE65 at 1,18; Pls.Br.Add.41a-42a. Thus, Plaintiffs' asserted risk of injury has passed and cannot be remedied by the purely prospective relief they seek.

Recognizing this fact, Plaintiffs argue that the Court may retain jurisdiction because their supposed injury is "capable of repetition yet evading review." Pls.Br.3. However, "[t]he narrow capable-of-repetition exception only applies in 'exceptional situations,' where '1) the challenged action is too short in duration to be fully litigated prior to its cessation or termination, and 2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1256 (11th Cir. 2001) (quoting *B&B Chem. Co. v. Envtl. Protection Agency*, 806 F.2d 987, 990 (11th Cir. 1986)).

According to Plaintiffs, this doctrine applies "because cases asserting a violation of the NVRA's 90-day provision always arise within 90 days of a federal election, precluding full litigation of the cases prior to the election, and because there is a reasonable expectation that at least the organizational Plaintiffs will be subject to the same action again." Pls.Br.4 (internal citations omitted). However, both assertions are false.

First, because the so-called 90-day provision applies in advance of federal primary as well as general elections, and because Florida's primary elections are held 12 weeks (*i.e.*, 84 days) in advance of its general elections, Fla. Stat. § 100.61, the 90-day provision in fact applies for 174 days before a general election. Moreover, the 90-day provision requires that a removal program be "completed" prior to 174 days before the general election, and Florida law imposes a notice and

hearing process that can take 30-60 days to complete. *See supra* at 3. Thus, a plaintiff could challenge any future efforts by the Secretary at least 204 to 234 days before a general election. Given that the district court conclusively resolved the legal issues in this case a mere 15 days after Plaintiffs moved for summary judgment, there should be ample time for a prompt challenge to any future actions by the Secretary to be adjudicated by a district court as well as this Court prior to an impending election.

Indeed, Plaintiffs themselves could have obtained full review of their claims had they sought relief promptly rather than a full three months after filing their complaint and two months after the Secretary had announced the new SAVE matching program. That alone precludes application of the "capable of repetition" exception. "The capable-of-repetition doctrine is not meant to save mooted cases that may have remained live but for the neglect of the plaintiff." *Newdow v. Roberts*, 603 F.3d 1002, 1009 (D.C. Cir. 2010). Accordingly, as this Court has explained, the doctrine applies only if the plaintiff "immediately challenged" the action in question, not where the "appeal has become moot … because of the inaction of the parties." *Dow Jones & Co.*, 256 F.3d at 1257. As the D.C. Circuit explained in language that is equally applicable to this case: "If appellant had acted expeditiously, it could have preserved its rights. The situation presented in the instant case is perhaps 'capable of repetition,' but it can be reviewed in the

future if [Appellant] or another [plaintiff] files a timely suit and seeks a preliminary injunction." *City of Houston v. HUD*, 24 F.3d 1421, 1427 (D.C. Cir. 1994).

Second, contrary to Plaintiffs' bald assertion, there is no basis to conclude that "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Dow Jones & Co.*, 256 F.3d at 1256. As explained above, the organizational plaintiffs claim they will be forced to incur costs because their members would be harmed not by any *intended* result of the SAVE matching process, but, rather, from *unintended flaws* in that process, which cause the removal of citizens from the voting rolls. To date, Plaintiffs have offered no explanation of what such flaws might be, and have not identified a single citizen who has been improperly removed from the rolls based on the SAVE process. Nonetheless, were any such flaws ever to be identified, the Secretary would work promptly to correct them, and Plaintiffs have certainly offered no reason to conclude that such hypothetical flaws would continue to create a realistic chance of improper removal in 2014.

II. THE NVRA ALLOWS THE REMOVAL OF INVALIDLY REGISTERED NON-CITIZENS AT ANY TIME.

Plaintiffs' claim turns on a single question: does the NVRA's ban on "removing" "registrants" from the "list of eligible voters" prevent States from taking invalidly-registered individuals off the rolls, or are such individuals deemed

never to have been registered in the first place, such that the Act's removal provisions do not apply? The answer is clear: unless one believes that Congress intended to forbid States from *ever* striking non-citizens (and other facially ineligible voters) from the rolls, and thereby required States to facilitate the federal felony of non-citizen voting, the NVRA's removal provisions simply do not apply to "registered voters who were never *bona fide* registrants, and whose registration was void *ab initio* by virtue of their status as minors, non-citizens, fictitious persons, or any other factor nullifying their registration." RE124 at 15.

This answer dooms Plaintiffs' claim because any interpretation of the permanent removal provision that permits removal of non-citizens equally permits their removal under the 90-day provision. As Judges Hinkle and Zloch both explained, the NVRA provides that the *only* potentially permissible grounds for excluding voters *within 90 days* of an election are those grounds for removal listed in the general removal provision governing time periods *outside the 90-day window*. The *only* difference between the general removal prohibition and the 90-day prohibition concerns voters who have changed their residence—they may be freely removed outside the 90-day period but not within it. Specifically, the 90-day provision, found in subsection (c)(2)(A), incorporates by reference the permissible grounds for removal described in the general removal provision (but then eliminates one potential ground for removal within 90 days—change in

residence). Thus, by definition, if a criterion such as non-citizenship is not a permissible ground for removal under the 90-day quiet period, it cannot possibly be a permissible ground under the general removal provision.

Plaintiffs recognize that, under the *plain language* of the NVRA, there is no basis for prohibiting the exclusion of non-citizens within 90 days unless that prohibition also forecloses removal at any time under the general removal prohibition. They therefore ask the Court to *redefine* the plain language of the general removal provision—by redefining "registrants" to exclude people who are clearly "registrants" (because they are registered on the voting rolls)—solely on the ground that the registrants are not citizens. Pls.Br.41-42. Dispositively, Plaintiffs justify this alteration on the ground that, while registered non-citizens are indisputably "registrants," under that word's plain meaning, they are not "registrants" within the meaning of the NVRA because that statutory term encompasses only people who were validly registered. Thus, *all agree* that the NVRA cannot possibly protect people who are on the voter rolls when their registration was void at the outset.

However, although Plaintiffs selectively invoke this principle to exclude non-citizens from the *general* removal provision, precisely the same principle dictates that removal of non-citizens is not prohibited by the *90-day* removal provision. If non-citizens can generally be removed from the voting rolls

notwithstanding the prohibition against removing "registrants" because they were never legally registered on the voting rolls, then they necessarily can be removed under the 90-day provision because these non-citizens were never legally "voters" on the "list[] of eligible voters."

In short, the only sensible view is that the NVRA draws a distinction between once-eligible voters who later lose their eligibility, and never-eligible individuals whose attempted registration is void *ab initio*. For the reasons that follow, this result is dictated not only by common sense, but also the language, structure, and legislative history of the NVRA.

A. The Plain Text Of The NVRA Proves That Non-Citizens May Either Be Excluded At Any Time, Or Not At All.

As a purely textual matter, the NVRA either permanently bans Florida from excluding from the rolls improperly registered non-citizens, or allows Florida to exclude such improper registrants at any time.

The NVRA's 90-day provision allows removal only on those grounds for removal expressly listed in the general removal provision (and denies it for change in residence). 42 U.S.C. § 1973gg-6(c)(2)(A). Accordingly, the only way that citizenship removal is prohibited during the 90-day period is if such removal is prohibited permanently by (a)(3) and (a)(4). Such a result, however, would be absurd. Congress clearly did not intend to grant the franchise to fraudulently registered non-citizens. *See Bell v. Marinko*, 367 F.3d 588, 592 (6th Cir. 2004)

("Were we to find that the Board's removal of these voters [who were ineligible nonresidents] does violate the Act, we would effectively grant, and then protect, the franchise of persons not eligible to vote."). Moreover, such a result would unconstitutionally override the State's authority to set the qualifications of voters and would require the State to dilute the votes of eligible voters. *See infra* at 56-60.

By the same token, if the permanent removal provision permits removal of non-citizens, so too does the 90-day provision. If non-citizen removal is permissible under the general removal provision, even though non-citizenship is not expressly listed as an exception to the ban on removal in subsections (a)(3) or (a)(4), this necessarily means that the non-citizen removal is likewise permitted under the 90-day provision. Plaintiffs avoid this necessary conclusion only through inconsistent, illogical reasoning.

B. Reading The NVRA To Assume That A Non-Citizen Cannot Be A "Registrant" Necessarily Places Non-Citizens Outside The 90-Day Provision As Well.

With respect to the general removal provision, Plaintiffs concede that the permissible grounds for removal are not just those set forth in subsections (a)(3) and (a)(4)'s enumerated exceptions, but also include the exclusion of those persons who were never properly on the voter rolls, such as non-citizens. But then, when interpreting the 90-day removal provision, Plaintiffs reverse course and contend that all the exclusive permissible grounds for removal *are* set forth in subsections

(a)(3) and (a)(4), which therefore preclude the removal of those who were never properly on the voting rolls. There is no logical basis for this approach; Plaintiffs' concession that the subsections (a)(3) and (a)(4) exceptions are not exhaustive for general removal purposes necessarily means that they are similarly not exhaustive for the 90-day provision.

Attempting to reconcile this blatant inconsistency, Plaintiffs point out that the permanent removal ban precludes removing "registrants" from the "official list of eligible voters," while the 90-day ban limits removal of the "names of ineligible voters from official list of eligible voters." Pls.Br.42-43. According to Plaintiffs, this difference somehow authorizes removal of never-eligible non-citizens under the former, but not the latter. That makes no sense for a number of reasons.

First, of course, the logic of Plaintiffs' "registrant" argument applies equally to the 90-day provision. Although a non-citizen is a "registrant" under any plain meaning of that term—since he is a "person who registers or is registered" (American Heritage Dictionary at 1041 (2d ed. 1985))—Plaintiffs sensibly recognize that subsection (a)(3)'s explicit prohibition against removing such "registrants" does not apply to non-citizens. This must be so because the statute obviously contemplates protecting only those *properly* registered—it would not forever protect those who illegally secured their fraudulent registration. Just as a law prohibiting "removal" of a "public officer" except on enunciated grounds—

e.g., gross malfeasance—does not preclude removal of an officer who fraudulently or improperly secured the office (and is thus not truly an "officer"), the general removal provision's prohibition against eliminating names from the voter rolls except on the enunciated grounds does not preclude removing people whose presence on the voting rolls was improperly secured. *Cf. Wood v. New York Life Ins. Co.*, 783 F.2d 990, 966 (11th Cir. 1986) (statute providing that insurer could not contest policy's validity after two years except for "nonpayment of premiums" did not bar challenge to policy on grounds that it was unsigned because "an insurance contract that is void *ab initio* … is never 'in force.'").

Accordingly, Plaintiffs concede that the "plain language" of the NVRA's prohibition against removing "registrants" is trumped by, or must be interpreted in light of, the antecedent principle that only those who have properly secured protected status are actually protected by restrictions on altering that status.

This void *ab initio* principle obviously applies with equal force to the 90-day provision. If non-citizens' *registration* is invalid from the outset, such that they can never be "registrants" under the general provision, then they cannot possibly become "voters" on the "list[] of eligible voters," such that they are protected from "remov[al]" under the 90-day provision. Plaintiffs' contrary position reduces to the bizarre proposition that, although an improperly registered individual is *deemed not* to have become a "registrant," (such that they are not

protected from removal under subsection (a)(3)), such an individual somehow *should be deemed* a "voter" on the "official list[] of eligible voters" (such that they are protected under subsection (c)(2)(A)). Obviously, however, if an improper registration prevents a person from being considered a "registrant," there is no basis to consider him or her a "voter" on the "official list[] of eligible voters." *See also* DOJ Case, 870 F. Supp. 2d at 1350 ("What matters here is this: none of this applies to removing noncitizens who were not properly registered in the first place."); RE124 at 15 ("[T]hese two sets of provisions … only address the removal of once-eligible voters.").

Relatedly, Plaintiffs' entire argument is premised on the notion that the NVRA perceives some difference between removing "registrants" and removing "the names of ineligible voters" from the "official list of eligible voters." But there is no cognizable difference between these two phrases and the NVRA treats them as synonyms. Because *only* "registrants" can be the "names" on the "official list of eligible voters," the NVRA consistently uses removing the "names of ineligible voters" and removing "registrants" interchangeably. Most obviously, the second part of the general removal provision—subsection (a)(4)—says nothing about "registrants," but only discusses "remov[ing] the names of ineligible voters from the official lists of eligible voters." This is precisely the language used in (c)(2)(A), the 90-day provision, which is quite logical since the 90-day provision instructs the

State when it must "complete" the "general" removal program required by subsection (a)(4). Under Plaintiffs' logic, however, removal of a non-citizen 91 days before an election is a permissible removal of a "registrant" while removing the same non-citizen pursuant to the same program 89 days before the election is somehow transformed into an impermissible removal of an "ineligible voter." Similarly, subsection (d), entitled "removal of *names from voting rolls*," describes when a State may not "remove the name of a *registrant*" from the voting rolls.

Finally, the term "registrant" is entirely beside the point. This is because *both* the permanent and the 90-day removal provision preclude "*removal*" from the "list of eligible voters." Under the void *ab initio* principle, as interpreted by Plaintiffs themselves, eliminating the name of a never-eligible non-citizen from the voting rolls does not technically constitute "*removal*" because, in the eyes of the law, that person was never *on* the official voter list. Consequently, the prohibition against "removal" in both the general and 90-day provisions does not apply to elimination of never-eligible voters.

1. Apparently recognizing the deficiencies in their "registrant" argument, Plaintiffs advance the even more sweeping, but equally meritless, contention that the 90-day provision prohibits virtually all removals on any grounds within 90 days of an election. Plaintiffs repeatedly insist that subsection (c)(2)(A)'s requirement that States complete "*any* program" before 90 days of an election is

somehow a broader prohibition than the general removal ban, and, indeed, reflects some clear "prophylactic" purpose to bar all "purges" in that time period. Pls.Br.26, 32. But the *express language* of the 90-day provision says that its prohibition "shall not be construed to preclude" removals that are proper under the general removal provision, except for change in residence. 42 U.S.C. § 1973gg-6(c)(2)(B). Moreover, *even with regard to change in residence*, the statute allows removal within 90 days where an individual is given notice and an opportunity to respond similar to that provided by the Secretary's program. *See supra* at 6. Given these expansive and nearly identical exceptions, there is nothing to Plaintiffs' contention that the 90-day ban is markedly broader than the general removal provision, or somehow evinces a congressional judgment that "[p]urges should never be conducted immediately before an election," Pls.Br.34 (quoting testimony of National Association of Secretaries of State); *see also* Brennan Br.9.[2] Moreover, contrary to Plaintiffs' contention (Pls.Br.26-27), stating a categorical prohibition and then enumerating specific exceptions is a common approach to legislative

[2] Ironically, many of the historical examples used by Plaintiffs and their amici to illustrate why Congress must have intended to impose a categorical ban on removal programs within 90 days involved removal on grounds such as criminal conviction, which are explicitly *exempted* from the 90-day provision. Pls.Br.11; Brennan Br.9-10; Mem.Br.11.

drafting and is precisely the same mechanism used in the *general* removal provision.

2. Plaintiffs' reading, moreover, would produce absurd results. As noted, the 90-day prohibition allows removing even *validly registered* voters on a number of grounds. 42 U.S.C. § 1973gg-6(c)(2)(A). Moreover, a State may even remove voters based on change in residence within 90 days of an election if it has provided notice and an opportunity to be heard similar to the Secretary's process here. Yet, as Plaintiffs conceded below, their interpretation would prohibit the Secretary from excluding Fidel Castro or other *conceded* non-citizens within 90 days of a federal election. *See* DE65 at 14, n.9.[3] It cannot be that Congress explicitly blessed the removal of *properly registered* citizens within 90 days of an election based on criminal conviction or mental incapacity, *and even change in residence in some circumstances*, but barred the removal of improperly registered voters, including

[3] Plaintiffs suggest that non-citizens may be removed within 90-days if removed through "non-systematic, or individual, removals." Pls.Br.33. But according to Plaintiffs, any removal, no matter how individualized, is part of a "systematic program" if the Secretary collects the predicate information systematically. *But see* Brennan Br.17 (suggesting that "systematic" programs are limited to automated purges that do not include the sort of individualized determination used in this case). After all, a voter will only be removed based on SAVE data after an *individualized* notice, hearing, and determination by his or her county supervisor. *See supra* at 3; Thus, as Judge Zloch noted (RE124 at 16), Plaintiffs would permit removal only for *accidental* discovery of an improperly registered voter.

those known *to a certainty* to be non-citizens, minors, out-of-state residents, or fictitious individuals.

Perhaps even more absurdly, Plaintiffs' position would require States to eschew an orderly process to confirm citizenship in advance of elections in favor of aiding and abetting federal felonies and then criminally prosecuting the very people that Plaintiffs purport to represent. Apparently not even Appellants contend that the NVRA requires States to actually *count* the votes of non-citizens whom federal law prohibits from voting. Thus, they seem to envision a regime whereby States maintain a list of those whom SAVE has identified as non-citizens on their voting rolls and then arrest them after they have cast their felonious vote (the SAVE data would clearly provide probable cause for arrest; any adjudication of the voter's citizenship status would only be done in the criminal prosecution). Such after-the-fact prosecutions would be far more burdensome on both States and non-citizens—and would impose far greater chill on the citizens that Plaintiffs claim would fear being mistaken for non-citizens—than an orderly process to sort out citizenship prior to elections. And it would more gravely threaten dilution of citizens' votes. Surely Congress never contemplated, much less mandated, this cruel and unwieldy scheme.

3. Plaintiffs' policy argument that a "90-day ban" on "purges" is somehow needed to preclude mistaken exclusion of citizens from the voting booth

is similarly flawed. First, Plaintiffs' legal position is in no way limited to precluding potentially *inaccurate* removal of non-citizens from voting lists. Rather, they contend that a State cannot exclude non-citizens from voting rolls even if it is conceded or otherwise indisputable that the excluded voter is not a citizen. For example, if the registrant *confirms* on the return form provided by their county supervisor that he or she is *not* a citizen 89 days before an election, Florida is nonetheless obligated to deem this confirmed non-citizen an eligible voter on its rolls.

Moreover, Florida's accuracy protections for non-citizens are just as protective as those provided for the *only* group—voters who change their residence—that the NVRA conditionally protects against removal within 90 days. Under the NVRA, citizens may be blocked from voting within 90 days of an election if they fail to affirm their residence (and can be permanently removed if they fail to vote in two successive federal elections). 42 U.S.C. § 1973gg-6(d). Florida provides non-citizens at least the same due process protection. Moreover, there is a far stronger basis for concluding that someone is not a citizen if they are on the indisputably accurate SAVE database and fail to contest their non-citizenship than there is for concluding that someone has changed their address simply because they failed to respond to the NVRA address verification inquiry. Given these meticulous procedures, it is quite unsurprising that, notwithstanding

their hyperbolic rhetoric, Plaintiffs even now cannot allege that a *single* person has been misidentified and removed as a non-citizen by the SAVE process.

Equally fallacious is Plaintiffs' contention that their 90-day rule would only bar citizen verification efforts for a short period on the eve of elections. In fact, given that the 90-day rule applies to general and primary elections, given that Florida's primaries are held 84 days before its general elections, and given the time needed to have county supervisors provide suspected non-citizens with the requisite notice and hearing opportunities, the "90-day" ban would actually preclude citizen verification efforts for a substantial majority of all federal election years. *See supra* at 29. Thus, what Plaintiffs' portray as a modest restriction to preclude last-minute mistakes in an unreliable system is, in fact, a very significant restriction on a system that Plaintiffs cannot and do not contend is inaccurate.

C. The NVRA Addresses Only The Removal Of Individuals Who Were Once Properly Registered And Does Not Regulate The Removal Of Improperly Registered Non-Citizens.

Plaintiffs' convoluted interpretation of the NVRA ignores several straightforward readings that would eliminate the absurdity of a ban on states removing non-citizens.

1. The NVRA Was Never Intended to Regulate The Removal Of Registrations That Were *Void Ab Initio*.

The most straightforward solution is to conclude that Section 8 of NVRA as a whole was simply not intended to address the removal of people who were never

properly registered to begin with, but, rather, regulates only the removal of voters who were properly registered, but then later lost their eligibility. This reading has been adopted by every court to consider the question. *See* RE124 at 16-17; DOJ Case, 870 F. Supp. 2d at 1350; *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1265, 1274 (D. Colo. 2010) (holding that, when "place[d] in the overall context of the states' federally mandated [election] obligations," the NVRA was intended only to regulate how "duly registered voters are removed"); *Bell*, 367 F.3d at 591-92 ("In creating a list of justifications for removal, Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place."). The uniform conclusion of these courts is supported by numerous pieces of evidence.

(a) Statutory Text

The NVRA begins by stating that each State shall "ensure that any *eligible* applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added). It next directs States to notify each such "applicant" of the result of his application. *Id.* 1973gg-6(a)(2). Then it sets out the conditions for removal of the resulting "registrants" from "the official list of *eligible voters*." *Id.* § 1973gg-6(a)(3) (emphasis added); *see also id.* § 1973gg-6(c)(2)(A) (imposing the 90-day removal restriction on names from " the official lists of *eligible* voters") (emphasis added). This language clearly suggests that, after providing for the

placement of *eligible* applicants on the statewide registry, the NVRA contemplates only *eligible* voters who are in fact validly registered.

Likewise, although the term "registrant" taken in isolation would encompass any individual who has registered, reading the term to refer only to *properly* registered voters is a permissible reading of the term once one considers the statutory context. Where a legally constitutive act is fundamentally flawed, it is not uncommon to treat it as a nullity. For example, where a marriage ceremony is conducted without proper consent, it is perfectly natural to say that, in one sense, the couple was "married" (*i.e.*, they participated in a wedding), but that, in a legal sense, a valid marriage never occurred. *See Wright*, 778 So.2d at 354. In the same way, where a non-citizen is placed on the voter rolls due to an invalid registration, it is, as Plaintiffs recognize, entirely consistent with normal usage to say that the "registration" was void *ab initio,* and that the individual was never actually a "registrant" on the list of "eligible voters."

Likewise, the word "remove" can naturally be read to refer only to an individual who has properly been placed on the rolls to begin with. Where an ineligible person has submitted an improper registration, that invalid act never results in his becoming a "registrant" on the list of "eligible voters." Accordingly, although a State may correct the rolls to exclude such a non-registrant, such a correction would not be considered a "removal" given the statutory context.

Finally, what the removal provisions do *not* address is also quite telling. Although the removal provisions regulate all of the likely reasons a *once-eligible* voter may be removed from the registry—a request from the registrant, by reason of criminal conviction or mental incapacity, death, or change in residence—they address *none* of the quite obvious reasons a person may be improperly registered to begin with—non-citizenship, being underage, or never having resided in the state.

(b) Legislative History

The legislative history repeatedly shows that the removal provisions were intended to apply only to properly-registered voters. Indeed, the House Report explicitly states that "[t]he [NVRA] should not be interpreted in any way to supplant th[e] authority" of election officials "to enroll eligible voters" and "continue to make determinations as to applicant's eligibility, *such as citizenship*, as are made under current law and practice." H.R. Rep. No. 103-9, at 8 (1993), 1993 U.S.C.C.A.N. 105, 112 (emphasis added). More generally, as the Members Brief emphasizes, discussions regarding the removal provisions were "uniformly related to maintaining the accuracy of the information in the rolls—specifically those individuals who became ineligible to vote at some point *after* registering—not with ferreting out those who *should not have been registered in the first place*." Mem.Br.4-7 (emphases added); *see also* S. Rep. No. 103-6, 1993 WL 54278, at *17 ("One of the purposes of this bill is to ensure that once *a citizen* is registered to

vote, he or she should remain on the voting list so long as he or she *remains eligible* to vote in that jurisdiction.") (emphasis added).

(c) Congressional Intent

Reading the NVRA's removal provisions to apply to never-eligible voters would be clearly contrary to the intent of Congress as manifested elsewhere in the NVRA and related federal laws. As described above, *supra* at 2, and by the Members Brief, the NVRA and other laws require voters to affirm under oath their citizenship prior to registering and impose "severe" penalties on non-citizens who falsely register and/or vote in Florida's elections, Mem.Br.5. Incredibly, Plaintiffs and their Amici contend that the NVRA's own strong measures to preserve citizens' voting power by keeping non-citizens off States' voter rolls somehow reflects an intent to *prevent* States from protecting *their* citizens' votes by checking whether such illegal dilution has occurred. This is because, according to the Members Brief, Congress intended to enforce its criminal prohibitions through an *honor system*, under which those who had criminally perjured themselves to gain access to the voter rolls would then turn around and "voluntarily request removal from the rolls." *Id.* at 7. In the real world, however, the stiff penalties for non-citizen registration and voting obviously reflect a congressional recognition that allowing invalid votes is anathema to the democratic process, and, for that same reason, it would be absurd to infer that Congress intended to bar States from removing non-citizens.

See also RE124 at 17 ("Certainly, the NVRA does not require the State to sit idle on the sidelines until a non-citizen violates the law before it can act."). Plaintiffs' contrary suggestion is the equivalent of arguing that because Congress imposes strong measurers to keep illegal aliens out of the country, this shows that it does not want to check whether these aliens are present *in* the country.

Indeed, reading the NVRA to permanently ban the removal of non-citizens would be so absurd that a more limited reading would be justified even without the strong textual and structural evidence outlined above. That is, although this is not a case in which the Court must create an "unwritten exception to a federal statute," Pls.Br.36, even an unwritten exception would be justified given that permanently banning the removal of non-citizens would be "a result demonstrably at odds with the intentions of [the] drafters," *id.* (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989)).

(d) Canons of Avoidance

Even were there any doubt that the removal provisions do not apply to non-citizens, a contrary reading of the Act would have to be avoided due to its impact on the traditional role of the States and the constitutional rules governing elections.

First, the NVRA does not provide a sufficiently clear statement to justify an intrusion into the traditional State role of setting the qualifications for voting. The Constitution unambiguously recognizes that the qualifications for voters are to be

determined by the States. *See* U.S. Const. art. I, § 2, cl.1; U.S. Const. amend. XVII; *Carrington v. Rash*, 380 U.S. 89, 91 (1965) ("There can be no doubt … of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, … qualifications for the exercise of the franchise."). The Supreme Court has repeatedly noted that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted). Here, as already described, the NVRA is silent with regard to the registration of never-eligible voters, and the terms "registrant," "eligible voters," and "remove" can easily be read to exclude invalidly registered individuals. Accordingly, given the absence of "unmistakably clear" statutory language, the NVRA cannot be read to "alter the usual constitutional balance" by requiring states to grant the franchise to individuals who have attempted to register in violation of the State's voting requirements.

Second, a reading of the NVRA that banned States from removing non-citizens would raise at least two constitutional problems. Consequently, this interpretation is unacceptable under the doctrine of constitutional avoidance. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction

of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

To begin with, it is highly doubtful that "Congress has the right so to deprive the states of their authority, pursuant to Article I, Section 2 of the Federal Constitution, to determine the qualifications of eligible voters in Federal elections." RE124 at 19. Article I, Section 4 of the Constitution provides that Congress may regulate "[t]he times, places and manner of holding elections for Senators and Representatives." However, Article I, Section 2, Clause 1 of the Constitution (the "Qualifications Clause") states that:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

The Seventeenth Amendment creates an equivalent rule for the election of Senators. Thus, the Constitution draws a fundamental distinction: Congress may regulate the administration of federal elections, *i.e*, *how and when* voters vote. But only the States may regulate the qualifications of electors, *i.e., who* votes. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 34 (1968) (noting that, subject, of course, to the Equal Protection Clause, "the State is left with broad powers to regulate voting," which include the power to pass "laws relating to the qualification and functions of electors"); *see also The Federalist No. 60* at 408-09 (Alexander Hamilton) (J.

Cooke ed. 1961) ("prescribing qualifications" for voters in federal elections "forms no part of the power … conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections") (emphasis in original).

Were the removal provisions of the NVRA read to apply to never-eligible voters, the Act would plainly regulate *who* may vote, rather than simply how and when the vote is conducted.[4] Plaintiffs assert that, in fact, "Congress has the power to supersede state determinations as to the qualifications of voters." Pls.Br.55. That position is truly remarkable, as it would make the Qualifications Clause a complete nullity; an entire Clause of the Constitution would stand for nothing more than the default proposition, already assumed by the Constitution, that the States are free to regulate in areas not regulated by Congress. Not surprisingly, therefore, not one of the cases cited by Plaintiffs remotely addresses the ability of Congress to trump States' voter qualifications pursuant to its authority to regulate the time,

[4] To the extent Plaintiffs suggest that the 90-day provision does not require that non-citizens be allowed to *vote*, but requires simply that they be retained on the rolls, their position has descended to a new level of absurdity, in which Congress was protecting not the right to vote, but some platonic interest in having one's name on the voter rolls.

place, and manner of elections (as opposed to the Fourteenth Amendment).[5] *See also ACORN v. Edgar*, 56 F.3d 791, 794-95 (7th Cir. 1995) (holding that the NVRA was constitutional because it "does not purport to alter the qualifications fixed by the State of Illinois for voters" but that if the law "ma[d]e it impossible for the state to enforce its voter qualifications … we might have a different case.").

Moreover, in addition to impinging on the State's constitutional role in setting voter qualifications, a permanent ban on States removing non-citizens

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[5] *See United States v. Classic*, 313 U.S. 299, 314-15 (1941) (holding simply that, because "Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes," counting fraudulent ballots violates a right "secured by the Constitution" for purposes of federal criminal law); *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966) (literacy requirement could be prohibited by Voting Rights Act pursuant to the Fourteenth Amendment); *Dunn v Blumstein*, 405 U.S. 330, 333-34 (1972) (durational residency requirement violated the Fourteenth Amendment); *Carrington*, 380 U.S. at 96 (residency requirement for service members violated the Fourteenth Amendment); *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (noting only that the Constitution "gives a broad grant of power to Congress" "[w]hen it comes to time, place, and manner regulations for federal elections"); *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836-37 (6th Cir. 1997) (rejecting Tenth Amendment challenge to the NVRA's requirements without mentioning the Qualifications Clause); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (holding in a pre-implementation challenge to the NVRA that the Act was constitutional "inasmuch as Congress only sought to regulate the times, places, and manner of electing Representatives and Senators"); *Condon v. Reno*, 913 F. Supp. 946, 963 (D.S.C. 1995) (rejecting "South Carolina's sole claim" that the NVRA's commandeering of state officials "violates the Tenth Amendment").

would violate the constitutional right to an undiluted vote. The Supreme Court has long held that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote" and that this right includes a right against "dilution and undervaluation of the vote[]." *Reynolds v. Sims*, 377 U.S. 533, 554, 563 (1964). Thus, the Court explained, a law allowing some citizens' votes to be worth more than other citizens' votes is unconstitutional. *Id.* at 562. *A fortiori*, a law giving an additional vote to *non*-citizens, thereby diluting the votes of citizens to the same degree, is unconstitutional. Since Congress could plainly not require Florida to allow *Georgia's* citizens to remain on their voter rolls or cast votes, it obviously cannot require it to accept citizens of foreign countries.

Thus, even if text, structure, legislative history, and the canon of avoiding absurd consequences did not preclude reading the NVRA to ban the removal of non-citizens, such a result must also be rejected in order to avoid impinging on a traditional State function and raising grave constitutional concerns.

2. If Any Provision Of The NVRA Limits The Correction Of Invalid Registrations, It Is The "Confirmation" Provision of Subsection (b).

Assuming *arguendo* that the NVRA regulates the treatment of never-eligible voters, it does not regulate it through the "*removal*" provisions—general or 90-day. Rather, it regulates such treatment under subsection (b)'s general provision governing "*Confirmation* of voter registration" programs that are intended to

"protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll." 42 U.S.C. § 1973gg-6(b) (emphasis added).

As Judge Zloch observed, subsection (b) is more fairly read to address the elimination of improperly registered voters than the "removal" provisions. That is, it refers to "confirmation" of an individual's registration, *i.e.*, confirming whether the registration itself was proper, in order to ensure the "integrity" and "accura[cy]" of the roll. *Id.* Thus, if it is "confirmed" that the registration was improper, the name may be eliminated under subsection (b) without confronting the "removal" restrictions of subsections (a) and (c). The NVRA's protections for the never-eligible therefore must be limited to those contained in subsection (b). Those protections, contained in (b)(1), require that programs to "confirm[] voter registration" be uniform and nondiscriminatory. The more specific, onerous "removal" protections do not apply. Although Plaintiffs claim that no purpose could be served by such a distinction, Pls.Br.39, it makes obvious sense to provide less robust protections to individuals who never have been eligible to register, while providing the greater protections referenced in subsection (c) for those voters who have properly registered.

Moreover, this is the only interpretation of subsection (b) that gives it independent significance. As the district court observed, RE124 at 17-18, if *all*

elimination of names from voter rolls were exclusively governed by the removal provisions, it is quite difficult to understand why Congress bothered to enact a separate provision using the separate terms "confirmation" and "accurate and current voter registration roll." The confirmation provision of subsection (b) must add *something* to (a) and (c)'s removal provisions. *See Abbott v. Abbott*, 130 S. Ct. 1983, 2003 (2010) ("In interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (rejecting an interpretation that "would render [a statutory term] insignificant, if not wholly superfluous" because "[i]t is our duty to give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted). The most natural inference is that the distinct provision for "confirmation" was intended to govern elimination of never-eligible individuals.

In short, the removal provisions deal with removing once-eligible voters from the list because of a change in circumstance, and therefore do not apply to people who were never eligible to be on the list. The NVRA deals with that never-eligible issue (if at all) through subsection (b)'s confirmation programs. Of course, subsection (b) programs can also be used to eliminate the names of the once-eligibles: subsection (b) *supplements* and overlaps with the removal provisions—it does not limit or restrict them. The district court's point, clearly expressed, was

that the removal provisions do not reach never-eligibles, it never suggested that the confirmation provision does not reach once-eligibles.

In response, Plaintiffs contend that subsection (b) does not deal with different issues than the removal provisions; it purportedly deals with precisely the same groups and its only significance is adding uniformity and nondiscrimination requirements to the removal provisions. Pls.Br.53-54. But if that is so, then creating a different subsection with different words was wholly meaningless. Plaintiffs' result would have been accomplished by just directly adding the uniformity and nondiscrimination requirements to the removal provisions.

Plaintiffs cannot and do not explain why Congress added a superfluous section with a different title if it was only adding another substantive restriction on removal programs. They therefore pretend that the district court found that subsection (b) somehow "eliminates … requirements" found in the removal provisions and found that it was a completely separate provision with no overlap with the removal provisions. *Id.* at 53. They then attack that strawman by arguing that subsection (b) does not restrict the removal provisions and somewhat overlaps with those sections through cross-references. *Id.* at 53-54.

Again, however, the district court's point is that subsection (b)'s confirmation provision deals with an issue *in addition to* that dealt with by the removal provisions—*i.e.*, elimination of never-eligibles. There is no inconsistency

between that point and the fact that, like the removal provisions, it also affects elimination of once-eligibles. Similarly, contrary to Plaintiffs' contention (Pls.Br.54), the fact that subsection (b) applies to "current rolls" is fully consistent with Congress' desire to make sure that the voter rolls currently used do not contain never-eligibles (or once-eligibles).

In sum, Plaintiffs' irrelevant arguments that subsection (b) somewhat overlaps with, and does not limit, the removal provisions does not address or refute the district court's point that the removal provisions do not reach never-eligibles, that subsection (b) more naturally reaches them, and that subsection (b) must do *something* more than add a substantive restriction to the removal provisions.

3. If The Foregoing Readings Are Rejected, The NVRA Must Be Read To Allow Removal At Any Time For Any Ground Permitted Under State Law.

In the alternative, one could also read subsection (a)(3) to include an express reference to removal based on non-citizenship. Specifically, the NVRA provides that a state may remove voters from the rolls: "(A) at the request of the registrant; (B) *as provided by State law*, by reason of criminal conviction or mental incapacity; or (C) as provided under paragraph (4) [because of death or change in residence]." § 1973gg-6(a)(3) (emphasis added). Thus, subsection (a)(3) could be read to authorize the removal of individuals who were not eligible to register "as provided by State law," *e.g.*, for non-citizenship. And because the 90-day ban does not

apply to removals "as provided by state law," such removal may be conducted at any time. *See also* RE124 at 11 ("At first blush, it would appear that implementation of the Program would be excepted from the 90-day Provision, because it is 'provided by State law' under subparagraph (a)(3)(B).")

To be sure, the NVRA is ambiguously worded: as the district court ultimately concluded, Congress could have intended the phrase "as provided by State law" to be modified by the clause that follows it—"by reason of criminal conviction or mental incapacity." However, had Congress intended that meaning, it would have been far simpler to state that voters may be removed "by reason of criminal conviction or mental incapacity as provided by state law." By placing the phrase "as provided by state law" first and separating it with a comma, Congress created a potential alternative inference that the two clauses were intended to operate independently. Nor would reading "as provided by state law" to be an independent ground for removal under subsection (a)(3) render the 90-day provision "superfluous," RE124 at 11, as the 90-day provision could still apply where state agencies attempt to systematically correct the voting rolls for change in residence through a procedure *not* laid out in a state statute.

Thus, although "the wording of this subparagraph is puzzling," RE111 at 13, if one were to adopt the notion that non-citizens are governed by the "removal" restrictions, the provision must be interpreted to avoid the absurd result of

permanently requiring States to accept conceded voter fraud by allowing people justifiably excluded from voting under "state law,"—*i.e.*, non-citizens or people voting in other states—to forever remain on the State's voter rolls.

* * *

In short, Plaintiffs' sole argument for applying that 90-day provision to the Secretary's matching activities is as follows: an improperly registered non-citizen is deemed not to have become a "registrant" and therefore does not trigger subsection (a)(3)'s protections governing "removal" from the "official list[] of eligible voters"; however that same non-registrant should be deemed a "voter" who does trigger subsection (c)(2)(A)'s protections governing "removal" from the "official list[] of eligible voters." This unprincipled combination of fiction and hyper-literal formalism mangles the text, structure, and policies of the NVRA.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Dated: January 22, 2013

Respectfully submitted,

/s/ Michael A. Carvin

Michael A. Carvin
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879 3913
macarvin@jonesday.com

Ashley E. Davis
Assistant General Counsel
Florida Department Of State
R.A. Gray Building
500 South Bronough Street, Suite 100
Tallahassee, FL 32399-0250
(850) 245-6536
Ashley.Davis@DOS.MyFlorida.com

Counsel for Defendant-Appellee
Secretary of State Kenneth W. Detzner

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, as counted using the word-count function on Microsoft Word 2007 software. I further certify that the brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5), (a)(6), because it has been prepared in proportionally spaced typeface using Times New Roman, font size 14.

/s/ Michael A. Carvin
Michael A. Carvin

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2013, I caused the foregoing brief to be filed with the court and served on all parties by filing through the Court's CM/ECF system and further caused seven copies of the brief to be sent to the Court by United States Mail.

/s/ Michael A. Carvin
Michael A. Carvin