No. 12-15738

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Karla Vanessa Arcia, Melande Antoine, 1199SEIU United Healthcare Workers East, National Congress for Puerto Rican Rights, and Florida Immigrant Coalition, Inc.,

Plaintiffs-Appellants,

v.

Ken Detzner, in his official capacity as Florida Secretary of State,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CIVIL ACTION NO. 12-CV-22282-ZLOCH

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Defendant's interpretation of the 90-day provision of the National Voter Registration Act (NVRA) would read that provision out of the statute. For a limited 90-day period prior to federal elections, the 90-day provision precludes "*any* program the purpose of which is to systematically remove the names of *ineligible voters* from the official lists of eligible voters." 42 U.S.C. § 1973gg-6(c)(2)(A) (emphasis added). Defendant's program to systematically remove non-citizens violates that provision's plain language, because non-citizens are indisputably ineligible voters. It also violates the provision's purpose: to protect *eligible* voters from the collateral consequences of an election-eve purge, something that does not depend on the type of ineligible voters at whom a purge is aimed.

Despite this plain language, Defendant contends that the only programs subject to the 90-day provision relate to once-eligible voters who have become ineligible. According to Defendant, programs like his, which remove non-citizens and other never-eligible voters, do not fall within the provision's plain stricture forbidding "any" systematic program to "remove . . . ineligible voters."

Indeed, Defendant says, the only programs uniquely subject to the 90-day provision are those aimed at once-eligible voters who have changed their residence and who have not received the notice and opportunity to respond required by 42

U.S.C. § 1973gg-6(d)(1). Def.Br.6. The other programs subject to the 90-day provision have *already* been barred by a different provision – the general removal provision (*Id.* § 1973gg-6(a)(3)). But the programs Defendant specifies as uniquely barred by the 90-day provision are themselves also *already* barred by a different provision, as *all* removals related to change of residence must meet the requirements of 42 U.S.C. § 1973gg-6(d)(1) – regardless of whether they occur within 90 days of a federal election. Thus, under Defendant's interpretation, the sweeping language of the 90-day provision *bars nothing at all*. This Court should not accept Defendant's invitation to read the 90-day provision out of the statute.

Defendant's principal response is based on the general removal provision, which bars removal of "registrants" except in certain instances. Plaintiffs interpret the general removal as applying only to removals of never-eligible voters and thus as different from the 90-day provision. That makes sense of both provisions. In contrast, Defendant argues that the two removal provisions must, "by definition" or "of necessity," be interpreted the same way because their language is purportedly parallel. *E.g.*, Def.Br.20, 33, 35.

That mantra is not correct no matter how many times Defendant repeats it. Even provisions with *identical* language can be interpreted differently depending on context. *See, e.g., United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212 (2001). And, here, Congress did not use identical terms. The general

removal provision applies only to removal of "registrants." Thus, the ordinary inference is that Congress intended the provisions to have a different scope. Pl.Br.43; Def.Br.56. The term "registrants" in the general removal provision can reasonably be interpreted to exclude never-eligible voters, and it makes sense to so interpret it because the general removal provision would otherwise preclude never-eligible voters from *ever* being removed from the voter lists. It is unlikely Congress intended to preclude states from removing never-eligible voters altogether. The legislative history and statutory provisions Defendant cites support this interpretation as they confirm that another of Congress's goals in the NVRA (and other statutes) was to maintain accurate voter rolls.

Defendant disagrees that the general removal provision is ambiguous. He says that provision also plainly bars his program. But if that were right, it would hardly provide a basis for interpreting the 90-day provision to *permit* his program.

According to Defendant, non-citizens are "indisputably 'registrants,' under that word's plain meaning," but Plaintiffs "ask the court to *redefine* the plain language of the general removal provision" when they say "registrants" should be interpreted to exclude non-citizens and other never-eligible voters. Def.Br.33; *see also id.* at 21, 36-37. That misstates Plaintiffs' position. The only basis to depart from plain language is true absurdity. Defendant has in no way met that standard for the general removal provision (or otherwise). Thus, Defendant's surprising

conclusion – that the plain language of both removal provisions bars his program – would, if correct, simply mean that the program is illegal on two grounds, and not just one.

More important, any need to depart from the plain language of the general removal provision in no way requires the Court to depart from the plain language of the 90-day provision. Indeed, principles of statutory interpretation forbid it. Defendant's own position is that the language of the 90-day provision *is* plain, and he makes no attempt to show that following it would be truly absurd. And, it would not be. States can continue to conduct systematic removals for three-fourths of every election cycle and individual removals throughout. However, Congress reasonably included the 90-day provision in the NVRA as a prophylactic means to protect *eligible* voters from the inevitable inaccuracies of election-eve purges, as shown by the *amicus* briefs from 13 election officials and eight members of Congress, including lead sponsors of the NVRA. That is the obvious explanation for why Congress banned such belated purges at all. Defendant offers no explanation for why Congress did so.

For those reasons, Plaintiffs' interpretation would be correct even if the language of the 90-day provision were ambiguous (something Defendant does not and cannot assert). Certainly, Defendant's interpretation is not consonant with

Congress's prophylactic purpose, as it reads the 90-day provision out of the statute altogether.

Finally, this case is justiciable. By the time Plaintiffs sued, Defendant's program had *already* forced the individual Plaintiffs to take steps to ensure that they remained on the voter rolls, and had forced organizational Plaintiffs to divert resources to protect members such as individual Plaintiffs. Nor has this case been mooted because the primary and general elections have passed. Forty years of precedents show that this case is one "capable of repetition yet evading review."

I. THE 90-DAY PROVISION'S PLAIN LANGUAGE BARS DEFENDANT'S PROGRAM, AND THERE IS NO BASIS TO DEPART FROM IT.

A. Defendant Does Not Dispute That The Plain Language Of The 90-Day Provision Bars His Program.

While Defendant's arguments make clear that he believes the plain language of the 90-day provision encompasses his program, he nonetheless asserts that three "straightforward" readings of the provision render his program lawful. Def.Br.44. That contradictory position has no basis.

One of these readings – based on subsection (b) of the NVRA (Def.Br.54-58) – does not even reference the text of the 90-day provision and is wrong on its own terms. *See infra* 17. A second, based on subsection (a)(3) of the NVRA

(Def.Br.58-60), was correctly rejected by both district courts to consider it. RE124 at 11; *United States v. Florida*, 870 F. Supp. 2d 1346, 1349 (N.D. Fla. 2012).

Defendant's remaining "reading" is that the 90-day provision applies only to removals of once-eligible voters under a void *ab initio* principle. Def.Br.46. This reading is simply not rooted in plain meaning as evident from Defendant's argument that the "NVRA contemplates only *eligible* voters" – something that is plainly not true of the 90-day provision which focuses on purges directed at ineligible voters. *Id.*

In making his argument, Defendant fails even to settle on a particular term in the 90-day provision on which to rely. Defendant first points to the term "voters," and argues that the term does not include never-eligible voters. Def.Br.37-38. However, the 90-day provision refers to "ineligible" voters, not just voters. "Ineligible voters" cannot mean only those lawfully qualified to vote. Moreover, under the 90-day provision, ineligible voters are those on "the official lists of eligible voters," making plain the term applies to anyone on the list.

Defendant thus shifts course and contends that "eliminating the name of a never-eligible non-citizen from the voting rolls does not technically constitute '*removal*.'" Def.Br.39, 46. However, removal has a well-defined meaning, plainly encompassing "eliminating" names from the rolls. *See, e.g., ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1219 (11th Cir. 2009) ("'remove'

means 'to move from a place or position; take away or off.'"). Defendant then argues that, if non-citizens are not "registrants," their "names" cannot be on the "official list of eligible voters." Def.Br.38. That is absurd. If one looks at the list and a name appears there, the name is on the list.

As noted above, Defendant's own conclusion from his linguistic arguments is not that his program fits within the plain language of the 90-day provision. Instead, he uses these arguments merely to assert that the language in the 90-day provision parallels that in the general removal provision and the language in both is "trumped by" some other principle. *Id.* 37.

B. There Is No "Principle" Warranting Departure From The Plain Language Of The 90-Day Provision.

Defendant's position that the plain language of both provisions encompasses his program does not help him. Defendant is wrong about the general removal provision. But even if he were right, that would not require departure from the plain language of the 90-day provision.

1. The Language Of The Two Provisions Is Not Parallel.

The general removal provision's ban on removal of "registrants" can be interpreted to apply only to once-eligible voters without departing from its plain language, which is one reason it has no bearing on the 90-day provision. As discussed, the 90-day provision uses very concrete, everyday language in referring

to names on the "lists of eligible voters." It also emphasizes its breadth through use of the term "any." In contrast, the general removal provision applies only to removal of "registrants," an abstract legal term with specified preconditions, subject to multiple interpretations. Pl.Br.42; Election Officials'Br.13 n.6.

Defendant disagrees that "registrant" is ambiguous. But his own arguments show otherwise. Defendant compares "registrant" to a contract, Def.Br.37, and also to marriage, Def.Br.20, 46. He states, "[W]here 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." Def.Br.46. Similarly, he adds, it is "entirely consistent with normal usage to say that the 'registration' [of a non-citizen] was void *ab initio*, and that the individual was never actually a 'registrant' . . . . " Def.Br.46.[1] That is precisely why Plaintiffs believe the general removal provision is ambiguous.

The same analogy underscores the important difference in the language of the two removal provisions. The general removal provision is analogous to a

[1] *See Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1277, 1279 (D. Colo. 2010); *cf. U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382, 384 (6th Cir. 2008) (in part suggesting that those who have not met the "requirements for eligibility" are not registrants); 546 F.3d at 393 (Vinson, J., dissenting).

statute applicable to married persons that leaves uncertain whether it applies to everyone who participated in a wedding or only to those who were validly married. The 90-day provision is analogous to statute that makes explicit it applies to the former category. It is analogous to a statute applicable to those who "participated in a wedding" or those "who appeared on a list of married persons."

Thus, the term "registrant" in the general removal provision does not parallel the unambiguous reference in the 90-day provision to those on the voting lists. One court has noted that Congress "specifically contemplated" that voter lists "might include voters who are not actually eligible *or not actually 'registered*.'" *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1277 (D. Colo. 2010) (emphasis added). The court cited 42 U.S.C. § 15483(a)(2)(B), which refers to removal of individuals who are "not registered" from the voter lists.[2]

2. Even If The Language Of The Two Provisions Were Parallel, There Would Be No Basis To Depart From The Plain Language Of The 90-Day Provision.

If Plaintiffs were wrong that the language of the two removal provisions is meaningfully different, that could only be because the plain meaning of *both*

[2] *Cf. Land*, 546 F.3d at 384-85 (referring to never-eligible voters who are on the lists of eligible voters); *id.* at 393 (Vinson, J., dissenting) ("question of who is a 'registrant' ultimately turns on who is a qualified voter *legitimately* on the voting rolls of the state").

provisions bars Defendant's program. If the general removal provision plainly bars Defendant's program, that would provide a second reason the program is unlawful, not a reason to uphold it. Pl.Br.44-45. *Cf. U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382 (6th Cir. 2008) (precluding removal of individuals after concluding they were registrants).

More important, if Defendant were right that the plain meaning of the general removal provision bars his program and also right that there were a need to depart from it, this could only be because the true-absurdity standard has been met. Pl.Br.29, 44-45. Defendant says that it has been. *E.g.*, Def.Br.19. That would provide one explanation of why Defendant's program is not barred by the general removal provision and is thus permitted *outside* the 90-day period. But it would not show that the program is permissible under the 90-day provision, because it would not show that application of the literal terms of *the 90-day provision* is absurd. Pl.Br.44-48. *Cf. Broward Gardens Tenants Ass'n v. U.S. EPA*, 311 F.3d 1066, 1075-76 (11th Cir. 2002) (tension between subsections does not justify departure from plain meaning). The Supreme Court has made clear that, where a provision uses the term "any," as the 90-day provision does, there is no basis to rely on inferences from other statutory provisions to depart from the instant provision's plain meaning. Pl.Br.29 (citing *United States v. Gonzales*, 520 U.S. 1 (1997); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-20 (2008)). This

Court should thus reject Defendant's argument that a purported need to read the general removal provision contrary to its plain meaning somehow justifies also doing so for the 90-day provision.

II. IF BOTH REMOVAL PROVISIONS WERE AMBIGUOUS, THAT WOULD NOT HELP DEFENDANT.

Defendant's interpretation of the 90-day provision would be wrong even if there were ambiguity about whether non-citizens can constitute "ineligible voters . . . [on] the official lists of eligible voters" – something Defendant never even argues. In that case, the provision's structure and purpose govern. Those support Plaintiffs' interpretation, not Defendant's.

A. Defendant's Interpretation Renders The 90-Day Provision Superfluous.

Defendant's analysis reads the 90-day provision out of the statute and must be rejected. Under his reading, the only removals barred by the 90-day provision are those that would be barred even absent the 90-day provision, *i.e.*, those that both (1) relate to change of residence; and (2) do not comply with the terms of § 1973gg-6(d)(1), requiring that, before a state removes a voter for ineligibility due to residence, it must notify the voter asking for an address confirmation, and, if no response is received, must wait for two federal elections during which the voter

may be inactive. Def.Br.6.[3] However, such removals are barred *regardless* of the 90-day provision, as *all* removals related to change of residence (even those outside the 90-day period) must comply with the notice requirements of § 1973gg-6(d)(1).

Thus, under Defendant's view, *the 90-day provision is entirely superfluous*. It does not bar anything that is not barred by another statutory provision. That cannot be right.

B. Defendant Fails To Adequately Address Plaintiffs' Arguments About The Purpose Of The 90-Day Provision.

Defendant's interpretation would be wrong even if there were some narrow subset of systematic purges to which it uniquely applied. Like its language, the purpose and structure of the 90-day provision show that it is best interpreted to encompass systematic programs to remove both once-eligible and never-eligible voters. Election-eve purges aimed at never-eligible voters pose the exact same threat to eligible voters as those aimed at other voters. Plaintiffs' interpretation reflects that reality, while Defendant's does not.

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[3] Defendant points to the correction provision in § 1973gg-6(c)(2)(B) as the basis for the conclusion that removals for address changes that comply with the terms of § 1973gg-6(d)(1) are permissible during the 90-day period. Def.Br.6. To be clear, Plaintiffs disagree that removals that meet the conditions in subsection 6(d)(1) constitute corrections (a separate category).

In arguing for a narrow interpretation, Defendant fails to explain why Congress included a special rule applicable within 90 days of a federal election *at all* and why that rule applies to purges aimed at *ineligible* voters. The only reasonable explanation is that Congress sought to include a prophylactic rule that avoided the collateral consequences to *eligible* voters of systematic, election-eve purges aimed at *ineligible* voters. Legislative history supports this conclusion. Congress enacted the provision after receiving testimony on the harmful impact of election-eve purges. It did so despite protests that the NVRA would limit states' ability to remove non-citizens, and in light of its overarching purpose of enhancing participation of eligible citizens by eradicating "list cleaning mechanisms" that have "been used to violate the basic rights of citizens." S. Rep. No. 103-6, at 18 (1993); *see also* Pl.Br.5-10, 34-35; Members'Br.10-14.

Plaintiffs agree that Congress had a secondary purpose of ensuring removal of ineligible voters. That is why the NVRA should be read to permit removals of all ineligible voters at some point in time. But by barring purges in the 90-day quiet period (without distinguishing among voters), Congress struck the balance in

favor of protecting eligible voters.[4] It did not suggest that the balance should differ when a purge targets ineligible voters who had never been eligible.

Defendant's crimped interpretation also fails to explain why, if Congress had intended to bar only a narrow subset of removals related to address changes, it did not simply say so. *See* Pl.Br.38, 48-49. Defendant himself asserts the importance of the structure Congress adopted. Def.Br.55-56. Yet his interpretation ignores that principle – even if it did not altogether nullify the 90-day provision, as it does.

Defendant also fails to explain Congress' use of "any." Congress surely did not adopt a bar on "any" systematic removals to ban only a tiny subset aimed at address changes (or none at all). The Supreme Court has emphasized the breadth of this term. *See supra* 11. Terms of "great breadth" show Congress intended an expansive meaning. *Cf. Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (quotation marks omitted).

Defendant's only response is that § 1973gg-6(c)(2)(B) includes a list of permissible systematic removals, which Defendant terms "exceptions." Def.Br.40-

[4] As discussed in § II.F *infra*, this does not supplant a state's ability to make eligibility determinations. Def.Br.47. Defendant mis-cites a statement in the Members' Brief which says that the testimony Congress heard on the need for systematic programs concerned purges of once-eligible individuals. Def.Br.47. Harms caused by election-eve purges cited in the testimony exist regardless of whom the purges target. Members'Br.3, 10-14.

44. As discussed below, there are no such exceptions. Even if there were, that would not alter the all-encompassing scope of the term "any." To the contrary, the inclusion of express exceptions would be an additional reason to avoid reading a separate, unenumerated exception into the statute. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001). That principle is particularly apposite here, since the additional "exception" Defendant proposes would eviscerate the provision altogether.

C. Defendant's Argument Based On Permissible Removals Fails.

Defendant argues that Congress could not reasonably have permitted the removals listed in § 1973gg-6(c)(2)(B), which purportedly concern only once-eligible voters, while barring systematic removals aimed at never-eligible voters. Def.Br.21, 41-42. That is wrong for two reasons.

First, Congress barred *all* systematic removals within the 90-day period without any exceptions. Section 1973gg-6(c)(2)(B), unlike the general removal provision, does not refer to listed permissible removals as exceptions, but instead states that the language banning systematic removals during the quiet period should not be "construed" to exclude removals "on a basis" of death or felony conviction, for example. It thus merely underscores that these types of removals can be accomplished in a *non-systematic* manner, and can continue during the quiet

period.[5] *See* Pl.Br.31 n.9; Election Officials'Br.11-13; *cf.* Members'Br.9; Election Officials'Br.8.

Second, contrary to Defendant's claim, Congress could reasonably have believed that there was more reason to permit systematic removals of voters referenced in Section 6(c)(2)(B) than to permit systematic removals of never-eligible voters.[6] The Congressional testimony about deadweight on the rolls all concerned the former category (Members'Br.8), as the *number* of voters on the rolls who become ineligible due to change of residence, death, or conviction is almost certain to substantially exceed the *number* of voters who were never eligible. *See* Pl.Br.33; *see also id.* 9 n.2. Congress could also reasonably have believed that purges based on information routinely gathered by state agencies (such as deaths) were less likely to cause collateral impacts on eligible voters.

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[5] Defendant's related comparison (Def.Br.6, 43-44) of Florida's procedures with those in 42 U.S.C. § 1973gg-6(d) is inapposite. First, the removals in § 1973gg-6(d) are not corrections authorized during the 90-day period. Corrections are limited to updating address information provided by the individual. *See, e.g.*, 42 U.S.C. § 1973gg-6(e)(2)(A). Second, Florida's procedural protections are not as great as those in § 1973gg-6(d), which permits removal only if individuals do not respond to a notice *and* have not voted in two consecutive elections after notice is sent. Florida permits removal prior to the current election after failure to respond to a notice questioning eligibility. Pl.Br.15; Fla. Stat. § 98.075(7)(a)(3).

[6] Indeed, voters listed in that section include never-eligible voters, Pl.Br.37-38, and convicted felons. In contrast, many never-eligible voters likely are individuals whom the state accidentally put on the rolls during the driver-licensing process.

D. Subsection (B) Is Not The Only One That Relates To Never-Eligible Voters.

Defendant contends that the NVRA regulates removal of never-eligible voters only through Subsection (b), which imposes upon all list-maintenance activities requirements of "uniform[ity], nondiscriminat[ion] and . . . compliance with the Voting Rights Act of 1965." Def.Br.54-55 (citing 42 U.S.C. § 1973gg-6(b)). But Defendant does not dispute that programs to remove once-eligible voters must satisfy both Subsection (b) and the 90-day provision (Def.Br.57-58), as Plaintiffs showed (Pl.Br.53-54). It follows that programs to remove never-eligible voters are also subject to both provisions, as nothing in the text of Subsection (b) distinguishes once-eligible and never-eligible voters.

That does not eliminate the "independent significance" of Subsection (b), which uniquely imposes the nondiscrimination and other requirements referenced above. Def.Br.55-56. Subsection (b) imposes these requirements not just for removal programs, but also for other list-maintenance programs such as those to update eligible voters' addresses or personal information. That explains why Congress put these requirements in a subsection distinct from those applicable only to removals.

E. Defendant's Policy Arguments Also Fail.

Defendant's policy arguments (Def.Br.41-43) about precluding accurate removals within 90 days of a federal election attack the existence of the 90-day provision, not a particular interpretation of it. They are also wrong.

The NVRA permits states to conduct systematic removals for more than three-quarters of every two-year federal election cycle, and on an individual basis even within the 90-day period.[7] Eighteen months is more than adequate given that few non-citizens are likely to be on the rolls, and even fewer are likely to vote when faced with a potential felony conviction for doing so. Members'Br.4-6, 9; Pl.Br.9 n.2, 12.

Congress reasonably concluded that any minimal advantage of permitting systematic purges 90-days immediately prior to a federal election was more than offset by the disadvantages. Based on testimony from the National Association of Secretaries of State, among others, Congress concluded that purges invite error if conducted in the pre-election rush; that it will be more difficult to evaluate, much

[7] Not every removal the state conducts is systematic, but Defendant has rightly never disputed that his program here is. Defendant methodically set out to remove non-citizens and used automated databases to generate information that could lead to removal without any additional information if a voter did not respond to a mailing questioning his ineligibility. Pl.Br.15; RE 57 at 10; Fla. Stat. § 98.075(7)(a)(3).

less adjudicate, their accuracy; that they will divert resources in the critical pre-election period; and that it may be impossible to timely correct any errors that do occur. *See, e.g.*, Members'Br.10-14. Pl.Br.7. The *amicus* brief from 13 election officials with many decades of experience in administering elections explains the many reasons a "pencils down" period remains a critical best practice today. *See* Election Officials'Br.3-6, 14-22.

That Congress adopted a prophylactic rule also renders irrelevant Defendant's attempt to show the accuracy of his 2012 general-election purge. A case-by-case evaluation of purges is not what the 90-day provision mandates or envisions. Nonetheless, the limited record here belies Defendant's claim of accuracy. First, Plaintiffs' claims encompass Defendant's purge within 90 days of the 2012 *primary*. The primary purge was indisputably inaccurate (Pl.Br.15-18). Second, Plaintiffs showed likelihood of errors in Defendant's general-election purge using the SAVE database, as is virtually inevitable in any systematic process. Pl.Br.19-20. More was not possible, as the district court precluded expedited responses to discovery and the record closed before anyone (citizens or noncitizens) was removed. Pl.Br.20, 22-23. Defendant told the district court that "Plaintiffs are correct that their purported claim presents a pure question of law on the *merits*." DE100 at 2.

These difficulties show one compelling reason Congress adopted a prophylactic rule. The historical record, including the history in Florida (and other states) of inaccurate systematic purges, presents another reason. *See, e.g.*, Brennan/LeagueBr.9-11. Regardless, that Congress adopted such a rule renders Defendant's policy arguments irrelevant.

F. There Is No Serious Constitutional Question.

Plaintiffs' interpretation of the NVRA raises no constitutional concerns. Article I, Section 4 grants Congress the authority to "make or alter" "The Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4 ("Elections Clause"). The Supreme Court has read the Elections Clause broadly to grant Congress the "'authority to provide a complete code for congressional elections.'" *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-14 (9th Cir. 1995) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). Thus, Congress has the power to forbid systematic voter purges within 90 days of a federal election. Every court to consider the NVRA's constitutionality has found it passes muster. *See, e.g.*, *Wilson*, 60 F.3d at 1414; *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836-37 (6th Cir. 1997).

Indeed, Defendant fails to explain how the Plaintiffs' reading places any restrictions on a state's right to determine the "qualifications of voters."

Def.Br.52. The 90-day provision does not dictate who may vote; "giv[e] an additional vote to non-citizens"; or otherwise make it lawful for them to vote. Def.Br.54. It merely limits when states may purge their voter rolls. While that limitation may have an indirect effect on who might vote, so does every conceivable limitation on the "Times, Places, and Manner" of a federal election. A ruling that such an indirect effect unacceptably impinges on states' rights would render the Elections Clause meaningless.

In any event, the doctrine of constitutional avoidance has no applicability here because there is no interpretation of the 90-day provision that would give it meaning but still avoid the purported issue Defendant raises. Under Defendant's view, any restriction of systematic removals would improperly restrict a state's right to determine voter qualifications, and potentially dilute the votes of eligible voters by permitting out-of-state voters to vote. Under the Elections Clause and existing case law, that cannot be right.

III. THE PLAINTIFFS HAVE STANDING.

The district court correctly found that both the individual and organizational Plaintiffs have standing. DE111, 7-8. In the voting rights context, "[a]ny concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). "A plaintiff need not have the franchise wholly denied to suffer injury." *Id.*

A. Plaintiffs Have Standing To Challenge The Primary Purge.

Plaintiffs challenge *both* the general-election and the primary-election purges. The operative complaint for the primary challenge is the original complaint, as the standing inquiry is assessed based on the complaint that first sets forth the operative claims. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275-76 (11th Cir. 2003).[8] Plaintiffs filed the original complaint after the individual Plaintiffs had *already* been wrongly identified as "potential noncitizens" and targeted for purge prior to the federal primary election; after Ms. Antoine had received a letter to this effect; and after they had been burdened with coming forward to prove their citizenship. DE65-2, ¶¶ 2, 11; DE65-6, ¶¶ 3-5. Those facts suffice to confer standing. *Charles H. Wesley*, 408 F.3d at 1352 (extra process regarding address form conferred standing); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009); *Florida*, 870 F. Supp. 2d at 1350-51.

The organizational Plaintiffs also had standing to challenge the primary purge. All three submitted affidavits showing they had *already* diverted resources from other projects to address Florida's primary purge. SEIU's affidavit, for

[8] Plaintiffs continued to challenge the primary purge in their amended complaint. RE57 at 3, 15-16,

example, specified resources it had diverted. *See* DE65-6 ¶ 3; DE65-6 ¶¶ 4-5; DE65-7 ¶ 4; *see also* DE 105 at 12-13. Resource diversion is sufficient to confer standing. *See Billups*, 554 F.3d at 1350; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008); *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999). The organizational Plaintiffs also have standing because they have members who they reasonably anticipated to be – or in the case of the SEIU, already were – affected by the Defendant's purge. *See Browning*, 522 F.3d at 1160, 1163; *see also* DE65-6, ¶ 3 (noting that Ms. Arcia and Ms. Antoine are members of SEIU1199).

B. Plaintiffs Have Standing To Challenge The General-Election Purge.

Plaintiffs' standing to challenge Florida's general-election purge is assessed as of the time of their amended complaint. The same flawed list of "potential noncitizens" containing the names of the individual Plaintiffs formed the basis of the State's general-election purge. Pl.Br.19. That posed a "realistic danger," *Browning*, 522 F.3d at 1160, to the rights of both the individual Plaintiffs and the organizational Plaintiffs, which they testified caused them to divert resources. *See* DE65-5 ¶ 3; DE65-6 ¶¶ 4-5; DE65-7 ¶ 4. Defendant's assertion that this testimony is conclusory (Def.Br.26) ignores the district court's determination that Defendant

admitted that the organizational Plaintiffs would divert resources. *See* DE111 at 7-8. As this Court has explained, "[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Browning*, 522 F.3d at 1165-66 (quotation marks omitted; bracket in original).

Defendant responds that Plaintiffs faced no legitimate threat of injury as his planned purge methodology would produce accurate results. However, Congress concluded that all systematic, election-eve purges pose an unacceptable risk. Defendant cannot manufacture a standing inquiry to force Plaintiffs and the Court to engage in precisely the sort of case-by-case inquiry of accuracy that Congress intended to foreclose, particularly because Congress expressly provided a private right of action for statutory violations (17 U.S.C. § 1976gg-9). *Cf. Charles H. Wesley*, 408 F.3d at 1352 ("alleged injury to a statutory right" is judicially cognizable). Given Florida's flawed history of systematic purges, including the inaccurate primary purge, and the specific evidence Plaintiffs submitted on the potential risks of the planned general-election purge (*see* Pl.Br.16-18), they had more than a sufficient basis at the time of their amended complaint to believe that at least one of their members faced a "realistic danger" under Defendant's plan. They therefore established a "need to 'counteract' the defendants' assertedly illegal

practices." *Browning*, 522 F.3d at 1163, 1166 (quotation marks omitted); *see also Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 575 (6th Cir. 2004).

Clapper v. Amnesty International, U.S.A., No. 11-1025, slip op. (U.S. Feb. 26, 2013) cited in Defendant's 28(j) letter, is inapposite. The Supreme Court has "often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." Slip Op. at 9. This is not such a case. And here there was concrete harm. First, the individual Plaintiffs (and SEIU to which they belonged) had *already* been harmed by the State's notice requiring them to take steps to remain on the voter rolls. *Compare id.* at 21. Second, Plaintiffs' complaint concerned an illegal action that was certain to occur (and already occurring), whereas the statute in *Clapper* merely *authorized* possible actions that plaintiffs challenged. *Compare id.* at 13, 20. Third, strong evidence of the inaccuracies in the primary purge provided at least a "significant risk" (*id.* at 15 n.5, 21) and strong reasons for organizational Plaintiffs to expend resources; doing so was not based on speculative inferences (*compare id.* at 11-15), much less on decisions of actors independent of Defendant (*compare id.* at 14-15). Doing so was also directly "traceable" to Defendant's actions. *Compare id.* at 14. Fourth, the threat to voters was imminent. *Compare id.* at 11, 13. Some harm had already occurred, and the rest by necessity had to occur prior to the general election. *Browning*, 522

F.3d at 1160. Finally, this is not a case challenging the constitutionality of a federal action, much less one in the areas of intelligence-gathering, where *Clapper* made clear that the standing inquiry is particularly rigorous. Slip op. at 9.

IV. PLAINTIFFS' CLAIMS ARE NOT MOOT.

Election Day has not mooted this appeal because Defendant's actions are "capable of repetition, yet evading review." *Davis v. FEC*, 554 U.S. 724, 735-36 (2008) (quotation marks omitted).

A. Defendant's Illegal Voter Purge Was Too Short In Duration To Be Fully Litigated Prior To Election Day.

For nearly 40 years, both the Supreme Court and this Court have consistently held that election-related cases are capable of repetition yet evade review. As this Court has explained, "in cases challenging rules governing elections there is not sufficient time between the filing of the complaint and the election to obtain judicial resolution of the controversy before the election." *Teper v. Miller*, 82 F.3d 989, 992 n.1 (11th Cir. 1996); *see also Storer v. Brown*, 415 U.S. 724, 737 (1974); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Davis*, 554 U.S. 724; *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213 (11th Cir. 2009); *Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001).

The general rule that election cases evade review applies with even more force here. Victims of voter-purge programs unlawfully conducted during the 90-day quiet period have at most 90 days in which to litigate their claims before the election occurs. The actual period for review is shorter, since 42 U.S.C. § 1973gg-9(b) requires plaintiffs to provide 20-days' notice of their claim before filing suit.

That Florida schedules its primary and general elections in close proximity does not lengthen the period as Defendant suggests. Def.Br.29-30. Florida's primary- and general-election purges must be considered separately. Because each was subject to challenge, each became unlawful only within 90 days of the particular election at issue. But even if Plaintiffs had 243 days as Defendant argues (*id*.), his actions would evade review. This Court has determined that "one year is an insufficient amount of time for a district court, circuit court of appeals, and Supreme Court to adjudicate the typical case." *Bourgeois v. Peters*, 387 F.3d 1303, 1308-09 (11th Cir. 2004). Other courts have found even longer periods too short to litigate a dispute. *See, e.g.*, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months "too short"); *Southern Co. Servs., Inc. v. FERC*, 416 F.3d 39, 43-44 (D.C. Cir. 2005) (periods "less than two years' duration ordinarily evade review" (quotation marks omitted)).

These cases render irrelevant Defendant's arguments about Plaintiffs' purported delay. Nothing Plaintiffs could have done would have led to entry of

final judgment regarding Defendant's purges, and review by this Court, and potentially the Supreme Court, before either the primary or the general elections in 2012. The only thing Defendant says Plaintiffs could have done differently was file for a *preliminary* injunction earlier. Def.Br.30. But unlike the cases Defendant cites, *e.g.*, *City of Houston v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1427 (D.C. Cir. 1994), filing for a preliminary injunction earlier would not have preserved the status quo long enough to provide an opportunity for a full and final review of the merits of the legal issues here. When Plaintiffs sought such a preliminary injunction, the court below denied it. Moreover, since Plaintiffs' 90-day claim applies only in the period leading up to an election, any preliminary injunction they obtained would not have lasted past the election and thus would not have extended the period for review past 90 days.

In addition, this case simply does not involve the long periods of delay present in cases Defendant cites. *See Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1257-58 (11th Cir. 2001) (one-and-a-half years); *Houston*, 24 F.3d at 1427 (two years). The pre-primary 90-day quiet period began on May 16, 2012. Plaintiffs sent their pre-suit notice letter, waited the statutorily-required 20 days, and filed their initial Complaint on June 19. *See* DE44, Ex. 2 at 1. Plaintiffs also proposed shortened discovery response times and an expedited trial schedule. *See* Rule 26(f) Conference Report, DE33 at 7, 9. They did not seek a preliminary injunction

regarding the primary only because the Northern District of Florida found in a different case that Defendant had suspended his primary-election purge, rendering it pointless for Plaintiffs to seek a preliminary injunction at that stage. *See Florida*, 870 F. Supp. 2d at 1347, 1350–51.

Nor did Plaintiffs delay in prosecuting their claims regarding the general election's 90-day quiet period, which began August 8, 2012. Defendant obtained the Memorandum of Agreement that allowed Florida to access the SAVE database and resume its purge on August 14, *see* Def.-Appellee's Opp. Mot. to Expedite at 8, and it was only on September 10 that Defendant presented to Florida's Supervisors of Elections a concrete plan to proceed. *See* 65-3, ¶¶ 12-13; *id.*, Exs. A6-A7. Plaintiffs moved for a preliminary injunction nine days later. DE65. They then obtained expedited consideration of their Motion for Preliminary Injunction and Summary Judgment and promptly sought an expedited interlocutory appeal of the order denying a preliminary injunction.[9] *See* DE65, 66, 74, 114. In an attempt to obtain review of a final judgment pre-election, they also moved for entry of final judgment in Defendant's favor after the district court had resolved all

[9] Plaintiffs' later decision to dismiss their interlocutory appeal after this Court found no need to expedite it does not support a conclusion that Plaintiffs' claims did not evade review. *See Baldwin v. Cortes*, 378 F. App'x 135, 137-38 (3d Cir. 2010).

dispositive questions of law against Plaintiffs in their own summary judgment motion. *See* DE113, 126. This is thus not a case that evaded review because Plaintiffs declined to act.[10]

B. Plaintiffs Reasonably Expect To Be Subject To Unlawful Purges Within 90 Days Of A Future Election.

This case satisfies the requirement that there be a "reasonable expectation that the wrong will be repeated." *Bourgeois*, 387 F.3d at 1309. The Supreme Court and this Circuit have determined that this "requires . . . far less than absolute certainty," *Bourgeois*, 387 F.3d at 1309 (citation omitted), and that "it is sufficient to show that likelihood exists" that the Plaintiffs "potentially can be deprived 'in a similar way' in the future." *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1507 (11th Cir. 1991). Such a likelihood exists here.

Defendant "bears a 'heavy burden' in demonstrating" that Plaintiffs' expectation that this is so "is fanciful or unreasonable." *Bourgeois*, 387 F.3d at 1309. Defendant has not represented that he is no longer concerned that non-citizens may be placed on the voter rolls. *Compare id.* at 1303. Nor has he represented that he would refrain from future purges within 90 days of a federal election. *Compare id.*; *Christian Coal. of Ala.*, 355 F.3d 1288, 1292-93 (11th Cir.

[10] For a more detailed explanation, see Plaintiffs-Appellants' Reply in Support of Motion To Expedite Appeal, App. No. 12-15220-E (11th Cir. Oct. 15, 2012).

2004). To the contrary: Defendant has consistently maintained that he is fully entitled to undertake such purges within 90 days of a federal election. Moreover, Florida's penchant for conducting voter purges (Pl.Br.11-12) strongly suggests that there will be future purges. *See Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984) ("Past wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury . . . .").

As a result, a "likelihood exists" that the Plaintiffs "potentially can be deprived 'in a similar way' in the future." *News-Journal Corp.*, 939 F.2d at 1507 (quotation marks omitted). Organizational Plaintiffs all have a continued interest in protecting eligible voters from the impact of election-eve purges and thus would be forced to expend limited resources in future elections should the State undertake similar purges in the future. *See* DE105, Hr'g. Tr. 9:16-11:18; 28:18-29:5; 29:18-29:22; *compare Bourgeois*, 387 F.3d at 1303. And if past is prologue, the individual Plaintiffs are reasonably likely to be affected by any future systematic purge aimed at noncitizens.

Without judicial guidance, disputes over the meaning of the 90-day provision will undoubtedly arise in future elections. An understanding of the NVRA's construction and operation "'will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated

before an election is held.'" *Teper*, 82 F.3d at 992 n.1 (quoting *Storer*, 415 U.S. at 737-38). This appeal remains justiciable.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the type-volume limitation of this Court of 7,000 words and contains 6,998 words as determined by the word counting function of the word-processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of March, 2013, a true and correct copy of the foregoing Plaintiffs-Appellants' Reply Brief was served on all counsel of record via CM/ESF.

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