UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:12-cv-22282-WJZ
Honorable Judge William J. Zloch

KARLA VANESSA ARCIA, an individual, MELANDE ANTOINE, an individual, VEYEYO, a civic organization based in Miami-Dade County, FLORIDA IMMIGRANT COALITION, INC., a Florida non-profit corporation, NATIONAL CONGRESS FOR PUERTO RICAN RIGHTS, a Pennsylvania non-profit corporation, and 1199SEIU UNITED HEALTHCARE WORKERS EAST, a Labor Union,

Plaintiffs,

v.

KEN DETZNER, in his official capacity as Florida Secretary of State,

Defendant.

MOTION OF BIPARTISAN GROUP OF VOTERS LUIS I. GARCIA, DIANA K. WHITEHURST, HAL DAVID RUSH, AND BARBARA A. DEREUIL FOR INTERVENTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 24

Pursuant to Fed. R. Civ. P. 24, Luis I. Garcia, Diana K. Whitehurst, Hal David Rush, and Barbara A. Dereuil (collectively, "Intervenors") move for intervention in this action. In accordance with Fed. R. Civ. P. 24(c), Intervenors attach their proposed Answer as Exhibit 1 to this Motion.

Intervenors are a bipartisan group of properly registered and duly qualified voters of the State of Florida who intend to vote in the November 6, 2012 general election (the "General

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Election"). Intervenors are entitled to intervene in this action because the outcome of the action may impair their constitutional right to vote by allowing their votes to be diluted, cancelled out, or effectively nullified by votes from non-citizens who are otherwise ineligible to vote but remain on the voter rolls.

THE UNDERLYING LITIGATION

In February 2012, an investigative report by NBC2 news in Florida revealed that approximately 100 non-citizens were registered to vote in two counties in Southwest Florida. *See* Andy Pierotti, *NBC2 Investigates: Voter Fraud – Part 2*, NBC-2.Com (Feb. 2, 2012, 8:58 PM) available online at: http://www.nbc-2.com/ story/16666098/2012/02/02/nbc2-investigates-voter-fraud-part-2 (last visited Sept. 18, 2012). The reporter uncovered the non-citizen registered voters by comparing jury excusal forms, on which the putative voters sought to be excused from jury duty on the grounds that they were not U.S. citizens, with the voter registration rolls, which both state law and state constitution require to be limited to U.S. citizens. FLA. CONST., art. VI, § 2; Fla. Stat. § 97.041(1)(a)(2) (2011). Several of the non-citizen registered voters reportedly have a history of voting in federal elections. *See* Andy Pierotti, *NBC2 Investigates: Voter Fraud*, NBC-2.Com (Feb. 2, 2012, 2:34 PM), available online at: http://www.nbc-2.com/story/16666098/2012/02/02/nbc2-investigates-voter-fraud (last visited Sept. 18, 2012).

Consistent with this revelation, the Florida Secretary of State ("the SOS") subsequently identified thousands of registered voters who had submitted official documents declaring they are not U.S. citizens.[1] The self-identified non-citizen registered voters submitted these

[1] Under Fla. Stat. § 92.012, the SOS is the chief elections officer of the State of Florida and is therefore responsible for administration of state laws that affect voting, and for ensuring that elections in Florida are conducted in accordance with federal law. Additionally, the SOS is

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documents, including driver's license applications, under oath or under the penalty of perjury. In April 2012, the SOS forwarded a sample of roughly 2,600 such records to Florida county election supervisors for their additional review ("the April List"). In accordance with Florida law, the county election supervisors provided notice to the registered voters identified on the April List. *See* Fla. Stat. § 98.075(7). In part, the notice informed each of the registered voters on the April List of his or her potential ineligibility to vote, and also that failure to respond to the notice may result in the otherwise registered voter's removal from the voter rolls.

Although the April List indicated that a substantial amount of voting by non-citizens had occurred in Florida, it also demonstrated that a number of eligible voters became naturalized citizens after submitting the official documents from which the April List was created. *See* First Amended Compl., D.E. #57, ¶ 25. Accordingly, the SOS requested access to more recent citizenship information contained in the Department of Homeland Security's Systematic Alien Verification for Entitlements ("SAVE") database. *Id.* The Department of Homeland Security initially denied the SOS's request, and eventually litigation ensued. *See Florida Dept. of State v. United States Dept. of Homeland Security et al.,* Case No. 1:12-CV-00960 (D.D.C.).

On June 6, 2012, Plaintiffs filed this action against the SOS, alleging the SOS's actions in identifying ineligible voters through the April List violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and §§ 8(b)(1) and 8(c)(2)(A) of the National Voting Registration Act ("NVRA"), 42 U.S.C. § 1873gg. *See* Complaint, D.E. #1, ¶ 1-3. After Plaintiffs filed their Complaint, the SOS received access to the SAVE database, and subsequently agreed to use the SAVE database to verify the accuracy of the April List. First Amended Compl., D.E. #57, ¶ 28-

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responsible for coordinating Florida's duties and responsibilities under the National Voter Registration Act of 1993 ("NVRA"). 42 U.S.C. § 1873gg.

30. As a result, Plaintiffs dismissed the bulk of their claims in this suit and amended their Complaint. *See* Stipulation of Dismissal, D.E. #56; First Amended Compl., D.E. #57.

Plaintiffs' First Amended Complaint alleges that the SOS resumed efforts to identify non-citizens on the voter rolls after receiving access to the SAVE database. *See* First Amended Compl., D.E. #57, ¶ 28-33. Plaintiffs now claim that the SOS's actions violate § 8(c)(2)(A) of the NVRA, which requires the State of Florida to "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 list of eligible voters." 42 U.S.C. § 1973gg-6(c)(2)(A).

ARGUMENT

Rule 24 provides for a third party's intervention into an existing action. There are two distinct types of intervention: intervention as of right, governed by Rule 24(a); and intervention with permission from the Court (permissive intervention), governed by Rule 24(b). *See* Fed. R. Civ. P. 24.

I. Intervenors Have a Right to Intervene in This Action

Rule 24(a)(2) provides for intervention as of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The Rule thus creates a four-part test for non-statutory intervention as of right. A proposed intervenor must show (1) timeliness of their motion; (2) a sufficient protectable legal interest; (3) impairment of that interest absent intervention; and (4) inadequate

representation by the existing parties. *See Athens Lumber Co., Inc. v. Federal Election Comm'n,* 690 F.2d 1364, 1366 (11th Cir. 1982).

Once these prerequisites to intervention are established, no discretion exists to deny Intervenors' motion. *United States v. Georgia*, 19 F.3d 1388, 1393 (11th Cir. 1994) (per curiam). Any doubts about satisfaction of Rule 24(a)(2)'s prerequisites should be "resolved in favor of the proposed intervenor." *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008).

Here, Intervenors satisfy the requirements of Rule 24(a)(2).

A. Intervenors Have a Legally Protectable Interest in this Case —The Constitutional Right to Prevent Vote Dilution

"[A] legally protectable interest is something more than an economic interest." *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005) (internal quotation marks omitted). "[A] legally protectable interest is an interest that derives from a legal right," *i.e.*, an interest "which the substantive law recognizes." *Id*.

Here, Intevenors' legally protectable interest derives from their constitutional right to vote. The "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see Anderson v. United States*, 417 U.S. 211, 226 (1974) ("The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States."); *accord Touchston v. McDermott*, 234 F.3d 1133, 1145 (11th Cir. 2000). Indeed, claims of vote dilution present sufficiently concrete and personalized injuries as to impart Intervenors with personal standing. *See Baker v. Carr*, 369 U.S. 186, 207-08 (1962).

The question whether personalized injury sufficient to satisfy Article III standing is also sufficient to satisfy Rule 24(a)(2)'s legally protectable interest has split the Circuits. *Compare United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) ("The interest of a proposed intervenor . . . must be greater than the interest sufficient to satisfy the standing requirement.") *with Southern Christian Leadership Conference v. Kelly,* 747 F.2d 777, 779 (D.C. Cir. 1984) (stating that an interest necessary to intervene is equivalent to interest necessary to confer standing).

The Eleventh Circuit has noted this split of authority, but has not weighed in on the issue. *Chiles v. Thornburgh*, 865 F.2d 1197, 1212-13 (11th Cir. 1989). Even so, the Eleventh Circuit has used standing cases to help define the legally protectable interest an intervenor must assert. *See Dillard v. Chilton*, 495 F.3d 1324, 1333 (11th Cir. 2007); *Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir.1986) (finding that a movant who shows standing has a sufficiently substantial interest to intervene). In so doing, the Eleventh Circuit has acknowledged that vote dilution is a sufficiently particular interest to support intervention as of right. *Dillard*, 495 F.3d at 1333 ("The distinction referenced in *Lance* refers to the difference between plaintiffs such as those in *Baker* and *Whitcomb v. Chavis*, who alleged concrete and personalized injuries in the form of denials of equal treatment or of vote dilution, and plaintiffs like those in the instant case, *Baldwin III*, or *Lance* itself, who merely seek to protect an asserted interest in being free of an allegedly illegal electoral system") (internal citation omitted); *Clark v. Putnam Cty.*, 168 F.3d 458, 461 (11th Cir. 1999) (allowing African-American voters to intervene in support of county commissioners to defend a single-member district voting system). Other courts agree. *See League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 434-35 (5th Cir. 2011) (holding that right to vote is sufficient to satisfy Article III standing, as well as Rule

24(a)(2)'s legally protectable interest requirement); *Johnson v. Mortham*, 915 F. Supp. 1529, 1536 (N.D. Fla. 1995) ("Registered voters have standing, and a sufficiently substantial interest to intervene, in an action challenging the voting district in which the voters are registered.").

B. Denial of Intervenors' Motion Would Impair Intervenors' Right to Vote

Intervenors are "so situated that the disposition of the lawsuit will, as a practical matter, impair their ability to protect their interests." *Chiles*, 865 F.2d at 1214. Plaintiffs seek a declaration that the SOS's actions violate § 8(c)(2)(A) of the NVRA, and an injunction compelling the SOS to halt "plans to remove additional voters based on use of the SAVE database." First Amended Compl., D.E. #57, Prayer for Relief. If granted, such relief may preclude the SOS from identifying non-citizens on the voting rolls before the General Election. This will dilute the effect of Intervenors' votes by allowing otherwise ineligible voters to participate in the General Election.

It is of no moment that any declaration or injunction granted in this case will be directed only at the SOS, as opposed to Intervenors. Federal statutory cases frequently pit private, state, and federal interests against each other. In such circumstances, private parties may ensure their position is heard by intervening. To this end, *Kleisser v. United States Forest Service* is instructive. 157 F.3d 964, 971 (3d Cir. 1998). There, the Third Circuit permitted timber companies to intervene as a matter of right, on the side of the U.S. Forest Service, even though the Forest Service was the only party able to comply with the federal statute at issue. *Kleissler*, 157 F.3d at 971. The Third Circuit allowed intervention because the Government might have been tempted to agree to a settlement that excluded the would-be intervenors from competing for future logging contracts. In so doing, the Third Circuit noted as follows: "We are reluctant to endorse a narrow approach that makes the onus of compliance [with a federal statute] the litmus

test for intervention. . . . Rigid rules in such cases contravene a major premise of intervention—the protection of third parties affected by pending litigation. Evenhandedness is of paramount importance." *Id.*

Nor is it a bar to intervention that Intervenors could litigate in a separate action, or in the future. *See Natural Res. Defense Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977). "The central purpose of the 1966 amendment [to Rule 24] was to allow intervention by those who might be practically disadvantaged by the disposition of the action and to repudiate the view, [under the former rule], that intervention must be limited to those who would be legally bound as a matter of res judicata." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1908.2, at 301 (3d ed.). Indeed, the need for resolution of this suit—and Intervenors' interests in this suit—before the General Election counsels in favor of intervention. It is more efficient to resolve this dispute in one lawsuit rather than two.

C. Intervenors' Interest is Not Adequately Represented by the Existing Parties

Intervenors' interest in this case is not adequately represented by the existing parties. *See Georgia v. Ashcroft*, 539 U.S. 461, 462 (2003) (considering and affirming, over the United States' objections, the District Court's grant of a motion to intervene because the "intervenors' analysis. . . identifies interests that are not adequately represented by the existing parties.")

First, Intervenors obviously disagree with the premises and claims in Plaintiffs' Amended Complaint.

Second, Intervenors' incentives and interests do not necessarily align with those of the SOS. On August 24, 2012, this Court ordered "all Parties . . . to participate in mediation." Amended Order of Referral to Mediation, D.E. #47, ¶ 1. At mediation, each party must appear "with full authority to enter into a full and complete compromise and settlement," otherwise "the

Court may impose sanctions." *Id*. at ¶¶ 4, 7. In order to reach such a compromise and settlement, the SOS may cease or halt any existing efforts he is making to identify non-citizens on the voter rolls. Alternatively, the SOS may agree to postpone existing efforts to identify non-citizens on the voter rolls in order to moot this case. Under either scenario, Intervenors' rights will be impaired as explained above. Indeed, the SOS's past actions demonstrate an openness to ceasing activities related to identifying non-citizens on the voter rolls and settling similar voter litigation. *See League of Women Voters of Florida v. Detzner,* Case No. 4:11-cv-628-RH/CAS, D.E. #84, (N.D. Fla. Aug. 31, 2012) (third-party voter registration litigation); *Florida v. United States*, Case No. 1:11-cv-01428-CKK-MG-ESH, D.E. #158, (D.D.C. Sept. 5, 2012) (preclearance litigation).

D. Intervenors' Motion is Timely

Finally, Intervenors' motion is timely. In determining whether a motion to intervene is timely, the Court considers the following four factors: (1) the length of time during which Intervenors knew, or should have known, of their interest in the case before moving to intervene, (2) the extent of the prejudice to existing parties as a result of Intervenors' failure to move for intervention as soon as they knew, or reasonably should have known, of their interests, (3) the extent of prejudice to Intervenors, and (4) the existence of unusual mitigating circumstances militating either for or against a determination that Intervenors' motion was timely. *See Chiles*, 865 F.2d at 1213. "Timeliness is not a word of exactitude or of precisely measurable dimensions." *Id*. (quoting *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)).

Here, there is not an extended length of time in which Intervenors knew, or should have known, of their interest in this case. This case is but three months old. Moreover, Plaintiffs' initial claims related to the April List and were seemingly moot after the SOS received access to

the SAVE database. Plaintiffs' current claim—challenging the validity of the SOS's actions involving the SAVE database—did not materialize until September 12, 2012. Nor will Plaintiffs suffer prejudice from any purported delay in Intervenors' filing of this motion four business days after Plaintiffs amended their Complaint.

II. In the Alternative, the Court Should Exercise Its Discretion Under Rule 24(b) and Permit Intervenors to Intervene in this Action

Federal Rule of Civil Procedure 24(b) provides, "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

"[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b)." *Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 595 (11th Cir. 1991). "Rule 24(b) is just about economy in litigation. Because less is at stake for a party seeking intervention under Rule 24(b) than under Rule 24(a), . . . the standard of appellate review is more deferential ("abuse of discretion") under Rule 24(b)." *City of Chicago v. FEMA*, 660 F.3d 980, 987 (7th Cir. 2011) (Posner, J.); *see also Medical Liab. Mutual Ins. Co. v. Alan Curtis LLC,* 485 F.3d 1006, 1008 (8th Cir. 2007) (employing abuse of discretion standard).

As described above, Intervenors have "an interest that is relating to the action pending before the court." *United States v. Lee Cty.*, No. 2:12-CV-67-FtM-29SPC, 2012 U.S. Dist. LEXIS 66887, at *9 (M.D. Fla. Apr. 19, 2012). Intervenors are a bipartisan group of properly registered and duly qualified voters who intend to vote in the November 6, 2012 general election. Plaintiffs are attempting to stop the SOS both from confirming the citizenship status of self-identified non-citizens, and from removing confirmed non-citizens from the voter rolls. If Plaintiffs are successful, Intervenors' properly cast votes will be diluted by votes from ineligible electors in derogation of Intervenors' constitutional right to vote. Intervenors wish to participate

in this lawsuit to assist in interpreting § 8(c)(2)(A) of the NVRA in accordance with its plain text, structure and legislative history. *See Johnson v. Gov. of Florida*, 405 F.3d 1214, 1229 (11th Cir. 2005) (applying the cannon of constitutional avoidance to the Voting Rights Act).

The interests of Intervenors and the SOS are not coextensive; neither are the arguments each may potentially make before the Court. Previously, Intervenors moved to intervene in a similar case in the Northern District of Florida. There, the Department of Justice sued the SOS, arguing for the same interpretation of § 8(c)(2)(A) of the NVRA as Plaintiffs put forward here. Even though the SOS and Intervenors took the same side in the action, their arguments in defense of the SOS's actions were, in part, different. The Northern District court allowed Intervernors to intervene and then considered all arguments, before adopting an interpretation of the NVRA consistent with the positions advocated by the SOS and Intervenors. *See United States v. Florida*, Case No. 4:12-CV-285-RH/CAS, D.E. #34 (N.D. Fla. June 28, 2012) (attached hereto as Exhibit 2).

For example, Intervenors argued that the NVRA distinguishes between "programs" and "activities," with the statute's 90-day exclusion applying to the former and the SOS's activities falling under the latter. Intervenors also argued that the NVRA's 90-day exclusion contains an exception for "correction of registration records," 42 U.S.C. § 1973gg-(6)(c)(2)(B)(ii), applicable to the SOS's actions. The SOS did not make either statutory argument.

Intervenors also advanced constitutional arguments in the Northern District of Florida that the SOS did not pursue. Intervenors argued that a proper reading of the NVRA avoids vote dilution, which is an inevitable consequence of the statutory interpretation put forward by Plaintiffs in this action. Intervenors further argued that Plaintiffs' interpretation of the NVRA would exclude maintenance of voter registration rolls for 180 days in every election year (when

people are most inclined to register to vote), thus endangering Florida's obligation to determine electors to Congress under Article I, § 2 and the Seventh Amendment. Moreover, such a protracted exclusionary period would jeopardize Florida's obligation under state law to "protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records," Fla. Stat. § 98.075(1), and obligation under federal law 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).

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(a)(3)

The undersigned counsel certifies that she has conferred with counsel for Defendant Ken Detzner, who indicated that Defendant Detzner does not oppose the relief sought herein; and that her office has made reasonable efforts to confer with counsel for Plaintiffs, which efforts included leaving multiple messages for Plaintiffs' local counsel and counsel at the Fair Elections Legal Network, the latter of whom indicated that he would consult with his co-counsel and inform the undersigned counsel's office of Plaintiffs' position but has yet to do so.

CONCLUSION

This action against the SOS threatens to substantially burden Intervenors' constitutional right to vote by allowing their votes to be diluted, cancelled out, or effectively nullified by votes from non-citizens who are ineligible to vote. Intervenors' right to vote is a significant protectable interest that could be detrimentally impaired by the resolution of this suit, either in settlement or by the Court. As a result, Intervenors request that this Court grant their Motion to Intervene as of Right under Rule 24(a)(2), or permissively under Rule 24(b)(2). Intervenors also

respectfully request that the Court set an expedited briefing schedule that will allow them to fully participate in this action, given the compressed nature of the proceedings.

DATED: September 20, 2012

Respectfully submitted,

/s Raquel A. Rodriguez
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 20, 2012, a true and correct copy of the foregoing was filed with the Clerk of Court via the CM/ECF system, causing a Notice of Electronic Filing to be sent to all counsel of record.

s/ Raquel A. Rodriguez
Raquel A. Rodriguez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:12-cv-22282-WJZ
Honorable Judge William J. Zloch

KARLA VANESSA ARCIA, an individual, MELANDE ANTOINE, an individual, VEYEYO, a civic organization based in Miami-Dade County, FLORIDA IMMIGRANT COALITION, INC., a Florida non-profit corporation, NATIONAL CONGRESS FOR PUERTO RICAN RIGHTS, a Pennsylvania non-profit corporation, and 1199SEIU UNITED HEALTHCARE WORKERS EAST, a Labor Union,

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KEN DETZNER, in his official capacity as Florida Secretary of State,

Defendant,

LUIS I. GARCIA, DIANA K. WHITEHURST, HAL DAVID RUSH, and BARBARA A. DEREUIL,

Defendant-Intervenors.

DEFENDANT-INTERVENORS' ANSWER

Defendant-Intervenors Luis I. Garcia, Diana K. Whitehurst, Hal David Rush, and Barbara A. Dereuil, a bipartisan group of eligible Florida voters (hereafter, "Intervenors"), by and through undersigned counsel, hereby Answer the Plaintiffs' First Amended Complaint (D.E. #57) as follows:

Exhibit 1

1. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

2. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

3. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

4. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

5. To the extent this paragraph purports to cite the NVRA, the NVRA speaks for itself and this paragraph does not require a responsive pleading. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

6. To the extent this paragraph purports to cite federal statutes, the statutes speak for themselves and this paragraph does not require a responsive pleading. To the extent this paragraph contains legal conclusions, no responsive pleading is required.

7. To the extent this paragraph purports to cite the NVRA, the NVRA speaks for itself and this paragraph does not require a responsive pleading.

8. Admitted.

9. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

10. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

11. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

12. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

13. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

14. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

15. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

16. Admitted.

17. Admitted that the there is a press release dated May 9, 2012, issued by the Florida Secretary of State, which speaks for itself. To the extent this paragraph contains other factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

18. Admitted that the there is a press release dated May 9, 2012, issued by the Florida Secretary of State, which speaks for itself. To the extent this paragraph contains other factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

19. Intervenors admit that in early April 2012, the Florida Division of Elections ("DOE") sent to the 67 Florida county Supervisors of Elections a list of voters identified as potentially

ineligible due to lack of citizenship and that the document speaks for itself. To the extent this paragraph contains other factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

20. Admitted that in late April of 2012, the Florida Secretary of State conducted a Webinar with the County Supervisors of Elections, which included a PowerPoint document entitled "Processing Ineligible Registered Voter-Non-Immigrants," and that the Webinar and PowerPoint documents speak for themselves. To the extent the paragraph contains other factual allegations, Intervenors are otherwise without knowledge and the allegations are therefore denied.

21. The May 9 Press Release and Webinar speak for themselves, and therefore do not require a responsive pleading. To the extent the paragraph contains other factual allegations, Intervenors are otherwise without knowledge and the allegations are therefore denied.

22. As to the first and third sentences, the Webinar speaks for itself. To the extent the first and third sentences contain other factual allegations, Intervenors are otherwise without knowledge and the allegations are denied. As to the second sentence, Intervenors admit that there were media reports of citizens on the sample list created by the Florida Secretary of State; those reports speak for themselves. To the extent the second sentence contains other factual allegations, Intervenors are otherwise without knowledge and the allegations are therefore denied.

23. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and the allegations are therefore denied.

24. To the extent this paragraph purports to characterize the contents of letters sent by individual Florida Supervisors of Elections, the letters speak for themselves and do not require a

responsive pleading. To the extent this paragraph contains other factual allegations, Intervenors are otherwise without knowledge and the allegations are therefore denied.

25. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and the allegations are denied.

26. The NVRA speaks for itself and does not require a responsive pleading. To the extent this paragraph contains other factual allegations, Intervenors are otherwise without knowledge and the allegations are denied.

27. Admitted as to the timing of the November 6, 2012 election. To the extent this paragraph contains other factual allegations, Intervenors are otherwise without knowledge and the allegations are denied.

28. To the extent this paragraph purports to characterize certain letters, the letters speak for themselves and do not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and the allegations are denied.

29. Admitted that the SAVE database is a compilation of databases containing information on legal immigrants. To the extent this paragraph contains allegations about the purpose for which the SAVE database was designed, Intervenors are otherwise without knowledge and therefore the allegations are denied.

30. To the extent this paragraph purports to characterize a MOA, the MOA speaks for itself and does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and the allegations are denied.

31. To the extent this paragraph purports to characterize the contents of a website, the website speaks for itself and the paragraph does not require a responsive pleading. To the extent

this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

32. To the extent this paragraph purports to characterize the contents of a website, the website speaks for itself and the paragraph does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

33. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

34. The NVRA speaks for itself and does not require a responsive pleading.

35. The NVRA and the House Report on the NVRA speak for themselves and do not require responsive pleadings. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading.

36. The NVRA speaks for itself and does not require a responsive pleading. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading.

37. The NVRA speaks for itself. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

38. The cited case, *Andrus v. Glover Constr. Co.,* 46 U.S. 608 (1980), speaks for itself and does not require a responsive pleading. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

39. Admitted.

40. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

41. Admitted as to the timing of the November 6, 2012 election. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

42. The NVRA speaks for itself and does not require a responsive pleading. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, Intervenors are otherwise without knowledge and therefore the allegations are denied.

43. The NVRA speaks for itself and does not require a responsive pleading. To the extent this paragraph contains legal conclusions, it does not require a responsive pleading. To the extent this paragraph contains factual allegations, they are denied.

COUNT ONE

44. Intervenors incorporate by reference their answers to paragraphs 1 through 43 as if fully set forth herein.

45. Admitted that Plaintiffs have filed an action for declaratory relief. To the extent this paragraph purports to cite the NVRA, the NVRA speaks for itself and does not require a responsive pleading. To the extent this paragraph contains factual allegations, they are denied.

46. Denied.

47. Denied.

COUNT TWO

48. Intervenors incorporate by reference their answers to paragraphs 1 through 43 as if fully set forth herein.

49. The NVRA speaks for itself and therefore does not require a responsive pleading.

50. Denied.

51. Denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 20, 2012, a true and correct copy of the foregoing was filed with the Clerk of Court via the CM/ECF system, causing a Notice of Electronic Filing to be sent to all counsel of record.

s/ Raquel A. Rodriguez
Raquel A. Rodriguez

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 4:12cv285-RH/CAS

STATE OF FLORIDA and KEN DETZNER, Secretary of State, in his official capacity,

Defendants.

_____/

ORDER DENYING A TEMPORARY RESTRAINING ORDER

This case arises from a program that the Florida Secretary of State began and then voluntarily abandoned to identify and remove noncitizens from the Florida voter-registration rolls. The United States has sued the Secretary and the State of Florida, asserting violations of the National Voter Registration Act. The United States has moved for a temporary restraining order. In substance, the motion may seek a preliminary injunction, but the nomenclature makes no difference. This order confirms the ruling announced at greater length on the record at the conclusion of a hearing on the motion. The order denies the motion primarily because the Secretary has abandoned the program.

Exhibit 2

I

The Secretary is Florida's chief elections officer, but each county has its own Supervisor of Elections. A Supervisor of Elections is a constitutional officer who operates not entirely within the Secretary's control.

The Secretary compiled a list of roughly 180,000 registered voters who he said might be noncitizens. The Secretary sent a sample of names drawn from the list to the Supervisors with a detailed set of instructions—or at least suggestions—on how to use the list. The instructions included sending a letter to each person on the list directing the person to send back a form swearing, under penalty of perjury, that the person was or was not a citizen, and, if a citizen, either requesting a hearing or attaching documents showing citizenship. The proposed letter included a statement that if the person failed to respond within 30 days, the person might be removed from the voter roll.

There were major flaws in the program. The Secretary compiled the list in a manner certain to include a large number of citizens. At least insofar as shown by this record, the list included any person who (1) as a noncitizen, obtained a driver's license and accurately disclosed to the Department of Highway Safety and Motor Vehicles that the person was not a citizen, (2) became a naturalized citizen, (3) registered to vote, accurately disclosing to the Supervisor of Elections that the

person was a citizen, and (4) had not yet renewed the driver's license and so had not updated DHSMV's records to reflect the new citizenship status.

Florida driver's licenses are renewed every six years. One thus would expect the average lag between naturalization and driver's-license renewal to be three years. Tens of thousands of Florida residents become naturalized citizens each year. Homeland Security records put the number at nearly 240,000 for the last three years.[1] If just over three-fourths of those were already licensed drivers and, upon becoming citizens, registered to vote, one would expect the Secretary's list to include 180,000 properly registered new citizens. And the Secretary's methodology had other possible flaws as well, including, for example, the possibility that the clerk issuing a driver's license improperly listed a citizen as a noncitizen; the record does not indicate whether a driver has an opportunity to review or correct such an entry. The suggestion that there was a list of 180,000 improperly registered noncitizens was plainly wrong.

[1] The numbers are 82,788 for 2009, and 67,484 for 2010, and 87,309 for 2011, for a total of 237,581. James Lee, *Annual Flow Report: U.S. Naturalizations: 2011*, Dep't of Homeland Security 3 (April 2012), http://www.dhs.gov/files/statistics/publications/us-naturalizations-2011.shtm. This appears to be information that can be judicially noticed. Taking notice would be proper only if the parties have an opportunity to be heard. *See* Fed. R. Evid. 201. But it makes no difference whether this information is judicially noticed or even considered at all. It is common knowledge than many thousands of Floridians are naturalized each year. At argument, the Secretary did not deny it, and nobody could reasonably do so. The numbers are set out here just to illustrate the point.

Still, the Supervisors who received the Secretary's sample list identified a small number of noncitizens who were on the list and were registered to vote. The record is less than conclusive but suggests that some actually voted in past elections.

II

In order to obtain a temporary restraining order or preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that it will suffer irreparable injury unless the injunction issues, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest. *See, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005).

III

In support of its motion, the United States asserts it is likely to prevail on the merits of two claims, both arising under the National Voter Registration Act. First, the United States says the NVRA prohibits a state from pursuing a program to systematically remove noncitizens from the voting rolls within 90 days before a federal election. And second, the United States says the Secretary's program violates the NVRA's requirement that any such program be uniform and nondiscriminatory.

A

The United States bases its 90-day argument on NVRA section 8(c)(2)(A):

> 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.

42 U.S.C. § 1973gg-6(c)(2)(A). Section 8(c)(2)(B) sets out exceptions:

> Subparagraph (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) or (B) or (4)(A) of subsection (a) of this section; or
> >
> > (ii) correction of registration records pursuant to this subchapter.

42 U.S.C. § 1973gg-6(c)(2)(B). It is unclear why the exception in clause (ii) does not apply to the Secretary's program, but neither side says it does. The exceptions in clause (i) do not apply here; they deal with removal of an individual who requests removal, or has a felony conviction or mental incapacity, or has died. Thus paragraph (a)(3) deals with removal of names from the voter list:

> (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) . . . .

42 U.S.C. § 1973gg-6(a)(3). Paragraph (a)(4)(A) in turn deals with removal on one additional ground:

(A) the death of the registrant . . . .

42 U.S.C. § 1973gg-6(a)(4). The Secretary says subparagraph (a)(3)(B) allows removal on any ground "provided by State law," but that plainly is incorrect, first because that reading would render the rest of paragraph (a)(3)—and also section 8(c)(2)(A)—virtually superfluous, and second because in the vertical list with separate entries separately numbered and separated by semicolons, each separately numbered entry must be read as an integrated whole. The reference to removal "as provided by State law, by reason of criminal conviction or mental incapacity" thus means removal based on a criminal conviction or mental incapacity—but only to the extent state law provides for removal on those grounds. The suggestion that two wholly unrelated grounds for removal—"as provided by state law" and "by reason of criminal conviction or mental incapacity"—were set out in subparagraph (B), separated by a comma instead of a semicolon, is wrong.

The United States says the Secretary's program is a "program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters," that none of the listed exceptions applies to the removal of noncitizens, and that section 8(c)(2)(A) thus prohibits the Secretary from continuing his program into the 90-day quiet period. The quiet period began on May16, 2012, which was 90 days before the scheduled August 14, 2012 primary.

On first reading, section 8(c)(2)(A) seems to say precisely what the United States claims. But a parallel NVRA provision indicates that this first reading is incorrect. Section 8(a)(3) requires a state to provide that "the name of a registrant may not be removed from the official list of eligible voters" with the specific exceptions quoted in part above—exceptions for the registrant's own request, criminal conviction or mental incapacity, death, or change of residence. 42 U.S.C. § 1973gg-6(a)(3). On first reading, this section—which applies at all times, not just in the 90 days before an election—seems to prohibit a state from ever removing from its voting list a noncitizen, even though the noncitizen should never have been registered in the first place.

But this is not what this section means. Both sides agree that a state can remove an improperly registered noncitizen; the United States challenges only a state's ability to do so as part of a systematic program during the 90-day quiet period. This conclusion is inescapable: section 8(a)(3)'s prohibition on removing a registrant except on specific grounds simply does not apply to an improperly registered noncitizen.

So section 8(a)(3)'s list of the grounds on which a "registrant" may be "removed" does not apply to removing an improperly registered noncitizen. Section 8(c)(2) provides a quiet period—90 days—during which a state cannot pursue a program to systematically "remove . . . ineligible voters." Surely

"removed" in 8(a)(3) and "remove" in 8(c)(2) mean the same thing. And there is no reason to believe the reference to removing a "registrant" in 8(a)(3) means something different than removing "ineligible voters" in 8(c)(2); by definition, someone who is being "removed" has already registered, so an "ineligible voter" is a "registrant." In short, if, as both sides concede, section 8(a)(3) does not prohibit a state from removing an improperly registered noncitizen, then 8(c)(2) does not prohibit a state from systematically removing improperly registered noncitizens during the quiet period.

This indicates that what Congress had in mind when it drafted these sections was removing a person on grounds that typically arise *after* an initial proper registration. Congress was not addressing the revocation of an improperly granted registration of a noncitizen. A person who was once properly registered can be removed from the voting list under section 8(a)(3) only for specific reasons: the person asks to be taken off the list, becomes ineligible under state law because of a criminal conviction or mental incapacity, dies, or changes residence. During the 90-day quiet period, a state may pursue a program to systematically remove registrants on request or based on a criminal conviction, mental incapacity, or death, but not based on a change of residence. What matters here is this: none of this applies to removing noncitizens who were not properly registered in the first place.

For noncitizens, the state's duty is to maintain an accurate voting list. *See*, *e.g.*, 42 U.S.C. § 1973gg-6(b). A state can and should do that on the front end, blocking a noncitizen from registering in the first place. And if a state finds it has made an error—or a number of errors—and wishes to correct the problem, it should do so well in advance. But the NVRA does not require a state to allow a noncitizen to vote just because the state did not catch the error more than 90 days in advance.

B

The United States bases its second challenge on NVRA section 8(b), which requires a state program that is intended "to protect the integrity of the electoral process"—by providing an "accurate" voter roll—to be "uniform" and "nondiscriminatory." 42 U.S.C. § 1973gg-6(b).

The Secretary's program, while he was pursuing it, probably ran afoul of this provision. The record indicates that the Secretary's program identified many properly registered citizens as potential noncitizens. Given the methodology, that is hardly surprising. The Secretary's proposal was to send letters to the listed individuals requiring a response and ultimately to require them to provide documentation of their citizenship. The Secretary's methodology made it likely that the properly registered citizens who would be required to respond and provide documentation would be primarily newly naturalized citizens. The program was

likely to have a discriminatory impact on these new citizens. And while the Secretary suggests that having to respond to this kind of inquiry is of little import, that is not so. A state cannot properly impose burdensome demands in a discriminatory manner.

III

The Secretary says, though, that he has suspended the program and will not resume it. He says he is seeking better information, specifically access to a database maintained by the United States Department of Homeland Security that, if used properly, should exclude from the Secretary's list the newly naturalized citizens, and perhaps others included on the Secretary's list in error. A program that accurately identifies noncitizens who are registered to vote without unnecessarily challenging citizens could meet the requirement of uniformity and nondiscrimination. And because, as set out above, such a program could be pursued even within 90 days of an election, there is no reason to believe, at this point, that the Secretary will engage in any future violation of the NVRA.

There is no need for an injunction prohibiting the Secretary from continuing with a program he has unequivocally said he will not continue. Support for this conclusion comes from the four-part test governing preliminary injunctive relief, as set out above, including the requirement that any such injunction be necessary to avoid irreparable harm. And support also comes from the voluntary-cessation

doctrine as applied to public defendants. In this circuit a government entity that has discontinued challenged conduct enjoys a rebuttable presumption that the conduct will not recur. *See, e.g.*, *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1351-52 (11th Cir. 2011) (collecting earlier cases). If the Secretary or the supervisors of elections go forward with the program the Secretary says he has abandoned, the issue can be revisited.

IV

For these reasons,

IT IS ORDERED:

The motion for a temporary restraining order, ECF No. 7, is DENIED.

SO ORDERED on June 28, 2012.

s/Robert L. Hinkle
United States District Judge