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.

BIPARTISAN GROUP OF VOTERS LUIS I. GARCIA, DIANA K. WHITEHURST, HAL DAVID RUSH, AND BARBARA A. DEREUIL'S NOTICE OF FILING PROPOSED RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT (D.E. #65)

Bipartisan Group of Voters Luis I. Garcia, Diana K. Whitehurst, Hal David Rush, and Barbara A. Dereuil, by and through undersigned counsel, hereby gives notice of filing its Proposed Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and Summary Judgment (D.E. #65), attached hereto as Exhibit 1.

DATED: September 26, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 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

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
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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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RESPONSE BY BIPARTISAN GROUP OF VOTERS LUIS I. GARCIA, DIANA K. WHITEHURST, HAL DAVID RUSH, AND BARBARA A. DEREUIL IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT (D.E. #65)

Plaintiffs initially filed this action to address concerns about the accuracy of a list of non-citizens on the voter rolls produced by the Florida Secretary of State ("SOS") in April of this year ("April List"). Plaintiffs alleged that the April List posed a threat to them because the names of two Plaintiffs who are citizens appeared on the list. *See* Complaint at ¶ 4-5, D.E. #1.

But with Plaintiffs' amendment of their pleading, the April List is no longer at issue. Now a different list is at issue, and there is no evidence that any Plaintiff's name appears on it.

Plaintiffs proceed with this action nonetheless, asking this Court for the "extraordinary and drastic remedy" of a preliminary injunction. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir .2000). Plaintiffs argue the SOS's new efforts to identify non-citizens on Florida's voter rolls violates § 8(c)(2)(A) of the National Voting Registration Act ("NVRA"). 42 U.S.C. § 1973gg-6(c)(2)(A). But Plaintiffs' legal argument is as outdated as their factual allegations that originally motivated this action. The Northern District of Florida recently rejected the same claim brought by the United States. *See United States v. Florida,* Case No. 4:12-CV-285-RH/CAS, 2012 WL 2457506, *3-4 (N.D. Fla. June 28, 2012). The Northern District did so for good reason. The construction of the NVRA advanced by the SOS is the best reading of the statute's text, and the only reading that avoids constitutional problems and absurd results.

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 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 SOS subsequently identified thousands of registered voters who had submitted official documents declaring they are not U.S. citizens. The self-identified non-citizen registered voters submitted these documents, including driver's license applications, under oath or under the penalty of perjury. The initial list contained approximately 180,000 names that were significantly pared down. In April 2012, the SOS forwarded a sample of roughly 2,600 such records to Florida county election supervisors for their additional review. 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 voter's removal from the voter rolls.

Although the April List indicated that 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 NVRA, 42 U.S.C. § 1873gg-6. *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, ¶¶ 28-34. As a result, Plaintiffs dismissed their claims and amended their Complaint. *See* Stipulation of Dismissal, D.E. #56; First Amended Compl., D.E. #57.

Plaintiffs' First Amended Complaint claims that the SOS's resumed efforts to identify non-citizens on the voter rolls after receiving access to the SAVE database 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); First Amended Compl., D.E. #57, ¶¶ 28-34. On September 19, Plaintiffs moved for a preliminary injunction and summary judgment on this claim, arguing that "there are no material facts in dispute." *See* Plaintiffs' Motion for Preliminary Injunction And Summary Judgment at 1, D.E. #65.

ARGUMENT

An injunction is appropriate only where Plaintiffs can demonstrate all four of the following: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to [Plaintiffs] outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest." *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868 (11th Cir. 2011) (citation omitted).

I. Plaintiffs Are Unlikely To Succeed On The Merits Because The NVRA Does Not Prohibit the SOS's Efforts To Identify Non-Citizens On The Voter Rolls.

A. The NVRA's 90-Day Quiet Period Applies Only To "Programs," Not "Activities," And The SOS's Efforts Are Clearly "Activities."

The NVRA distinguishes between State "programs" and State "activities" relating to the administration of voter registration for elections for Federal office.

Under Section 8(a)(4), a State must "make[] a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters . . . ." 42 U.S.C. § 1973gg-6(a)(4). To do so, a State may confirm voter registration by enacting any "*program or activity* to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office." 42 U.S.C. § 1973gg-6(b) (emphasis added).

The phrase "program or activity" is not drafting redundancy. First, it is "[a] basic premise of statutory construction [] that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage." *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991).

Second, federal and state law both maintain the distinction between state "programs" and state "activities." The NVRA, for example, requires a state to conduct two types of "programs." A state must conduct a change-of-address "program," such as that established by Fla. Stat. § 98.065, which describes a "registration list maintenance program." *See* 42 U.S.C. § 1973gg-6(a)(4)(B). In addition, a state must engage in a "program" to update voter rolls based on death records. *See* 42 U.S.C. § 1973gg-6(a)(4)(A). The NVRA separately provides for state "activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 42 U.S.C. § 1973gg-6(i)(1). Those "activities" include efforts to update or correct the voter rolls based on information that particular registered voters are not qualified to vote due to age, citizenship, or fraud, such as those require by Fla. Stat. § 98.075, which describes "list maintenance activities" by the SOS. Fla. Stat. § 98.075(1). "Activities" also include efforts by the Supervisors of Election in each Florida County to remove ineligible voters form the voter rolls. *Id.* § 98.075(8)(a).

The provision at issue here, § 8(c)(2)(A) of the NVRA, provides:

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

42 U.S.C. § 1973gg-6(c)(2)(A) (emphasis added). Maintaining the distinction between "programs" and "activities," § 8(c)(2)(A) applies exclusively to "any program." *Id.*

The difference between a "program" and "activity" is real. A "program" describes the implementation of a system under which the Supervisors of Elections have no discretion. In this regard, "programs" are often systematic, jettisoning case-by-case inquiries in favor of formulaic processes. For example, under the SOS's change-of-address program, a Supervisor of Elections identifies voters who have moved by one of three means, Fla. Stat. § 98.065(2)(a)-(c), updates

the voter registration, Fla. Stat. § 98.065(4)(a), sends the voter an address change notification, Fla. Stat. § 98.0655(2), and then follows specific procedures depending on whether the voter returns the notice or not, Fla. Stat. § 98.065(4)(c). At no point in the change-of-address program does the Supervisor of Elections exercise his or her discretion. Moreover, under Florida law and consistent with the program/activity distinction in the NVRA, a Supervisor of Elections may not remove a voter's name from the voter rolls due to a possible change-of-address within 90 days of a federal election. *See* Fla. Stat. § 98.065(5).

On the other hand, a "list maintenance activity" is a case-by-case inquiry rather than a formulaic process. Specifically, Florida law distinguishes between the "registration list maintenance program" regarding changes of address and inactive voters under Fla Stat. § 98.065 and the removal of voters due to a determination of ineligibility under Fla. Stat. § 98.075(6). Upon receiving information about a potential ineligible voter on the voter rolls, the Supervisor of Election must notify the potentially ineligible voter of the discrepancy and then "make a final determination of ineligibility." Fla. Stat. § 98.075(7)(a)(4). The determination of ineligibility is made only after an evidentiary hearing governed by the preponderance of the evidence standard of proof. Fla. Stat. § 98.075(7)(b)(1). Moreover, the potentially ineligible voter may appeal the Supervisor of Election's decision in court. Fla. Stat. § 98.075(7)(b)(5). The case-by-case nature of the Supervisor of Election's removal of potentially ineligible voters, as well as the procedural safeguards afforded thereunder, distinguish the "list maintenance activities" under Fla. Stat. § 98.075 from "list maintenance programs" under Fla. Stat. § 98.065.

Because the SOS's current efforts to identify non-citizens on the voter registration rolls falls squarely within "list maintenance activities" under Fla. Stat. § 98.075, the NVRA's 90-day quiet period for "programs" does not apply.

B. The Canon Of Constitutional Avoidance Requires The Same Result.

The canon of constitutional avoidance requires the Court—to the extent it finds the NVRA's 90-day quiet period provision to be ambiguous—to construe the provision "in a manner which avoids any constitutional problems," *Southlake Property Associates, Ltd. v. City of Morrow, Georgia*, 112 F.3d 1114, 1119 (11th Cir. 1997), or "lead[s] to an absurd, unjust, or unintended result." *Hughey v. JMS Development Corp.,* 78 F.3d 1523, 1529 (11th Cir. 1996) (citation omitted). Plaintiffs' proposed reading of the statute is untenable, because it results in both constitutional problems and absurd results.

First, Plaintiffs proffered reading of the NVRA provokes clear constitutional problems. 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 also 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.") (citations omitted). Permitting illegal votes to be cast by non-citizens is no different than stuffing the ballot box with fake ballots—the result is the cancelling out, or dilution, of legitimate votes by illegal ones. *See Anderson*, 417 U.S. at 227 ("Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted without it being distorted by fraudulently cast votes."). At present, the SOS's efforts to identify non-citizens using the SAVE database have identified approximately 200 non-citizens on Florida's voter rolls. *See* Ken Detzner, *Florida's Voter Eligibility Initiative Confirms 207 Non-Citizens on Voter Rolls Using SAVE Database, Around 8 Percent of Voters Checked* ("SOS Press Release") at 1, available

online at:

http://www.dos.state.fl.us/news/communications/pressRelease/pressRelease.aspx?id=604 (last visited Sept. 25, 2012). Interpreting the NVRA to prohibit the SOS from passing this information on to the Supervisors of Elections guarantees the violation of Intervenors' constitutional right to vote, as well as the constitutional right to vote of all other properly registered and duly qualified Florida voters.

Second, Plaintiffs' proposed construction would require the SOS to ignore his obligations under Florida law. Florida law requires the SOS to "protect the integrity of the electoral process." Fla. Stat. § 98.075(1) (describing SOS's "list maintenance activities"). That obligation is triggered when the SOS "receives information . . . that a registered voter is ineligible because he or she . . . is not a United States citizen." *Id.* at § 98.075(6). Unlike Fla. Stat. § 98.065, Fla. Stat. § 98.075 does not contain a 90-day quiet period; moreover, it is exempted from the 90-day prohibition under Fla. Stat. § 98.065(5). This distinction underscores the Florida Legislature's understanding of the difference between "programs" and "activities."

Plaintiffs' proposed interpretation of the NVRA would thus prohibit the SOS's "list maintenance activities" during the 90-days preceding each federal election. An unintended consequence is that the SOS would have to forego his statutory obligation under Florida law for nearly half of each election year, because there would be one 90-day quiet period before each primary election, and then another 90-day quiet period before each general election. That the laws from which the SOS's obligations derive were enacted "in compliance with the Voting Rights Act of 1965, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002," Fla. Stat. §§ 98.065(1), 98.075(1), only highlights the absurdity of this result.

C. Plaintiffs' Arguments Against The Northern District of Florida's Prior Ruling Fail.

Recently, the Northern District of Florida held that the NVRA's 90-day quiet period did not "appl[y] to removing non-citizens who were not properly registered in the first place." *See United States v. Florida,* Case No. 4:12-CV-285-RH/CAS, 2012 WL 2457506, *3-4 (N.D. Fla. June 28, 2012). The Northern District did so after hearing many of the same arguments presented by the parties in this action.

Plaintiffs contend the Northern District's holding was improper. Yet each of Plaintiffs' three arguments fails to withstand scrutiny. First, Plaintiffs argue that the Northern District's distinction between individuals properly registered in the first instance and those who are not reads into the 90-day quiet period an exception not found in the statutory text. *See* Plaintiffs' Memorandum of Law In Support of Their Motion for Preliminary Injunction And Summary Judgment ("Pltfs' Mem.") at 11-14, D.E. #65-1. Plaintiffs contend the flaw underlying the Northern District's distinction is the assumption that the NVRA permits removal of non-citizens from the voting rolls.[1] *Id.* at 12.

As explained above, the "exception" the Northern District allegedly read into the NVRA is properly understood as the statute's distinction between "programs" and "activities." *Compare* 42 U.S.C. § 1973gg-6(b) (discussing "State program or activity to protect the integrity

[1] At the same time, Plaintiffs admit (without citing to a particular statutory provision) that the NVRA permits removal of non-citizens; and that the statute does so up through the day of the election. *See* Pltfs' Mem. at 14 n.9, D.E. #65-1. Plaintiffs take issue with whether or not the removal is part of a "program." *Id.* Answering that question, however, requires an understanding of certain facts about the SOS's activities and belies the notion that the record is suitable for summary judgment. For example, Plaintiffs do not come forward with any evidence demonstrating whether the SOS's efforts to identify non-citizen voters were for the "purpose" of "systematically remov[ing] the names of ineligible voters," given that the Supervisors of Elections are the administrative actors properly tasked with actually removing ineligible voters from the voter rolls. See Fla. Stat. § 98.075(6) (requiring the "supervisor" to adhere to the procedures for removal).

of the electoral process"); *with Id.* § 1973gg-6(c)(2)(A) (applying 90-day quiet period to "any program"). Moreover, the assumption upon which Plaintiffs find fault is no assumption at all; it is the law of the United States. *See* 18 U.S.C. § 611(a) ("It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, . . ."). Nor does it make sense to have expected Congress to recant voter eligibility requirements in the NVRA, as such requirements are byproduct of state law. *See* 42 U.S.C. § 15482(a)(2) (A)-(B) (incorporating state law on the issue of voter eligibility); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1171 (11th Cir. 2008) ("[A]n equally plausible textual interpretation that is more consistent with congressional intent evidenced by the rest of HAVA is that by the term "eligible under State law," Congress intended to incorporate state law on the issue instead of creating a federal standard.")

Second, Plaintiffs suggest the Northern District's holding ignored the supposed statutory distinction between a "registrant" and an "ineligible voter." *See* Pltfs' Mem. at 14-15, D.E. #65-1. According to Plaintiffs, the NVRA allows for the removal of non-citizens because the NVRA's general removal provision "does not impose any limitations on the bases on which states can remove *non-registrants*." *Id.* at 14 (emphasis in original). On the other hand, the 90-day quiet period does impose such limitations because it applies to "ineligible voters." *Id.* Aside from convenience, however, Plaintiffs give no reason for why a non-citizen on the voter rolls is not a "registrant." In fact, Plaintiffs do not provide a definition of the term at all. Given the lack of a modifying adjective limiting the term "registrant" in some way, it is unclear why any individual registered on the voting rolls—citizen or not—would not be a "registrant" under the

NVRA. Indeed, Plaintiffs criticize the Northern District's reasoning for reading into a different statutory term the same exact limitation.

Finally, Plaintiffs contend the Northern District's holding rendered the 90-day quiet period "entirely superfluous." *See* Pltfs' Mem. at 16, D.E. #65-1. But Plaintiffs themselves acknowledge that this conclusion does not account for certain removals on the basis of changes in residency. *Id.* Moreover, Plaintiffs argument narrowly focuses on the potential overlap between the "categories of voters," ignoring the types of removal proceeding to which the category of voters are subjected. The NVRA's 90-day quiet period still applies to all state "programs," systematic in nature, and lacking the case-by-case inquiry and procedural safeguards afforded by state "activities."

II. Plaintiffs Cannot Demonstrate Irreparable Harm.

It is not enough for Plaintiffs to show (if they could, which they cannot) likelihood of success on the merits. They must also show, among other things, that they are likely to suffer irreparable harm absent preliminary relief. *Keeton*, 664 F.3d at 868. *See also Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

Plaintiffs' suggestion that a legal presumption relieves them of this burden is without merit. And to the extent Plaintiffs make any showing at all, the injuries they allege are too speculative.

A. The Supreme Court And The Eleventh Circuit Have Rejected Plaintiffs' Argument That A Presumption Of Irreparable Harm Applies.

Contrary to Plaintiffs' assertions, irreparable injury cannot be presumed upon their (supposed) showing of a likelihood of success on the merits. Both the Supreme Court and Eleventh Circuit have held as much. *See id*; *Siegel*, 234 F.3d at 1176 . "Even if [Plaintiffs]

establishe[] a substantial likelihood of success on the merits, [their] failure to establish irreparable injury 'would, standing alone, make preliminary injunctive relief improper.' '[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent.'" *C.B. v. Board of School Com'rs of Mobile Co., AL*, 261 Fed. App'x. 192, 193 (11th Cir. 2008) (quoting *Siegel*, 234 F.3d at 1176).

Nevertheless, Plaintiffs argue "the Court should presume they will be irreparably harmed" because they "have shown a substantial likelihood of success on their NVRA claims." *See* Pltfs' Mem. at 17, D.E. #65-1. In support, Plaintiffs rely upon a 1969 Fifth Circuit opinion and a 1984 opinion from the Middle District of Alabama. *Id.* Yet neither is controlling here. More on point is the Eleventh Circuit's recent opinion in *C.B. v. Board of School Com'rs of Mobile Co., AL*. 261 Fed. App'x. at 194. There, the Eleventh Circuit rejected an invitation to "follow other courts, . . . which have held that where the plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm." *Id.* (internal citations omitted). Instead, the Eleventh Circuit affirmed the district court's denial of plaintiff's request for injunctive relief because the plaintiff "d[id] not provide any evidence that the district court's decision to maintain the status quo in the present case constitutes irreparable harm." *Id.*

Furthermore, Plaintiffs' dubious assertions that "there are no material facts in dispute" (more fully addressed below) underscore that Plaintiffs' supposed "showing" of irreparable injury is really just a faulty legal argument, as opposed to an actual "showing" based on any evidence. *See Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682-83 (7th Cir. 2012) (Easterbrook, CJ.) ("Until evidence has been submitted, it is not possible to know whether [Plaintiff] really is suffering irreparable harm and otherwise has a good claim for relief.")

B. Plaintiffs' Alleged Harm Is Speculative.

Plaintiffs' unsupported allegations of irreparable harm cannot justify injunctive relief.[2] Plaintiffs argue that the SOS's activities of identifying non-citizens on the voter rolls "harms Plaintiffs by abridging the individual Plaintiffs' right to vote, and irreparably harms the organizational Plaintiffs by forcing them to divert scarce resources they would use for other purposes . . ." Pltfs' Mem. at 17, D.E. #65-1.

No facts support this argument, however. Plaintiffs rely on their allegation that certain individual Plaintiffs are "U.S. citizens and legally registered Florida voters" yet are "on the list of 2,625 potential non-citizens that [the SOS] sent to the [Supervisors of Elections] in April." Plaintiffs' Statement of Undisputed Material Facts at ¶ 11, D.E. #65-2. But by Plaintiffs' own admission, the SOS suspended his activities relating to the April List at the end of April. *Id.* at ¶ 4. That is why Plaintiffs amended their pleading in this action to address only the SOS's current efforts to identify non-citizens of the voter rolls using the SAVE database. *See* First Amended Complaint at ¶¶ 27-28, D.E. #57. And that is why the SOS's past actions with regard to the April List are no longer at issue here.

Meanwhile, the SOS's efforts to identify non-citizens using the SAVE database have identified approximately 200 non-citizens on Florida's voter rolls. *See* SOS Press Release at 1. Plaintiffs, meanwhile, have not come forward with any evidence showing that the SAVE database wrongly identifies any citizen (including any individual Plaintiff) as a non-citizen.

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[2] The Federal Rules of Civil Procedure require that any affidavit or declaration filed in support of a motion for summary judgment "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). Here, Plaintiffs rely upon the declarations of Ion V. Sancho and Professor Smith. *See* Declaration of Ion V. Sancho, D.E. #65-3; Declaration and Expert Report of Daniel A. Smith at, D.E. #65-4. Yet it is not clear that the facts set out in either Sancho's or Smith's declarations would be admissible. Sancho's declaration attaches documents that have not been authenticated. Smith's declaration discusses at length documents, emails, and twitter feeds that are not contained in the record, and would constitute rank hearsay if they were.

Plaintiffs' speculation that the SAVE database does contain "false positives" is just that – speculation.[3] The evidentiary value of such speculation is not enhanced when it is offered by a purported "expert," even assuming the professional witness is qualified in some relevant discipline and that his proffered opinions are admissible. With only speculation to support their argument that the SOS's use of the SAVE database threatens their right to vote, Plaintiffs have no case. Plaintiffs will not suffer any harm at all, much less any irreparable harm, because they will not appear on any list remitted by the SOS, will not receive a notification from a Supervisor of Election, and will not be subject to removal from the Florida voter rolls.

The alleged harm suffered by the organizational Plaintiffs is too remote. Each organizational Plaintiff states that "[g]iven the inaccuracies of the [SOS's] initial list of potential non-citizens, the [organizational plaintiff] will also have to expend additional resources to verify the accuracy of the [SOS's] latest attempts to identify non-citizens on the voter rolls." *See* Declaration of Maria Del Rosario Rodriguez at ¶ 4, D.E. #65-5; Declaration of Dale Ewart at ¶ 5, D.E. #65-6. But there is no evidence the SAVE database and the procedures employed by the SOS are likely to produce false-positives as with the abandoned April List. The SAVE database queries data from multiple sources, some of which are updated in real time and some of which are updated daily. *See Florida Dept. of State v. U.S.*, Case No. 1:12-cv-00960-JDB, D.E. #1-2 (D.D.C. June 11, 2012) (attaching Department of Homeland Security website to Florida's Complaint in suit seeking access to SAVE database). The Plaintiffs have come forward with no

[3] In suggesting otherwise, Plaintiffs cite paragraph 42 of the expert report of Daniel A. Smith, a Professor of Political Science at the University of Florida. *See* Declaration and Expert Report of Daniel A. Smith at ¶ 42, D.E. #65-4. But that paragraph does not contain any description of the SAVE database. *Id*. Professor Smith does not claim to have any experience with, or knowledge of, the SAVE database. *Id*. at ¶¶ 1-6. Nor does Professor Smith claim even to have relied on official documents detailing the SAVE database. *Id*. at ¶¶ 7-8 (describing the documents, emails, and twitter feeds reviewed in forming expert opinion).

evidence that the SOS is doing anything other than placing on the list of potential non-citizens only those individuals whom the SAVE database confirms are not U.S. citizens after cross-checking the information against other databases. As a result, there is no real or imminent threat of a citizen appearing on the SOS's list of non-citizens, and the organizational Plaintiffs alleged need to expend extra resources to verify the list's accuracy is not warranted, let alone the source of any irreparable harm.

III. The Balance of Harms Does Not Favor Plaintiffs Because The Harm To Intervenors—And Other Florida Voters—Is Not Speculative

Plaintiffs' failure to make a showing of irreparable harm also undermines their argument with regard to the third preliminary injunction factor—the weighing of the Plaintiffs' alleged harm against the harm that the injunction will cause to non-movants.

Plaintiffs again contend their risk of removal from the voter rolls as a result of the SOS's activities is sufficient threatened injury to outweigh whatever damage the proposed injunction might cause. *See Keeton*, 664 F.3d at 868. But as described above, Plaintiffs have no such risk, while there is a real risk of harm to the Intervenors and other Florida voters if this Court issues the injunction that Plaintiffs request.

The SOS's efforts to identify non-citizens using the SAVE database have identified approximately 200 non-citizens on Florida's voter rolls. *See* SOS Press Release at 1. Those non-citizens will have the opportunity to vote in the coming election if the Court grants the relief Plaintiffs seek. As history shows, when given the opportunity, vote dilution is more than mere speculation. *See, e.g. U.S. v. Sever*, Case No. 1:12-cr-20598-UU-1, D.E. #16 (S.D. Fla. entered Sept. 4, 2012) (factual proffer of non-citizen admitting to have voted in the 2008 presidential election); U.*S. v. Knight,* 490 F.3d 1268, 1269 (11th Cir. 2007) (describing conviction of an alien resident for improperly voting in a federal election). Legitimate voters, like the Intervenors here,

have no remedy for the damage done to their vote as a result of illegally cast ballots by non-citizens. Once votes are counted, there is no ability to "unring the bell." The balance of harms thus favors denial of injunctive relief.

IV. The Public Interest Does Not Favor Plaintiffs.

The Intervenors agree with Plaintiffs that vindication of constitutional rights and the enforcement of a federal statute serve the public interest. *Accord* Pltfs' Mem. at 19, D.E. #65-1 (quoting *League of Women Voters of Florida v. Browning*,2012 WL 1957793, at *11 (N.D. Fla. May 31, 2012).

Here, however, such vindication will occur only if the Court denies Plaintiffs' request for a preliminary injunction and prevents the vote dilution that will result from halting the SOS's activities of ensuring the accuracy of Florida's voting rolls. Dilution of legitimate votes is against the public interest. *Reynolds v. Sims*, 377 U.S. 522, 555 (1964).

CONCLUSION

For the foregoing reasons, Intervenors request that the Court deny Plaintiffs' motion for a preliminary injunction and summary judgment. The NVRA's 90-day quiet period does not prohibit the SOS's current efforts to identify non-citizens on Florida's voter rolls. Plaintiffs are therefore not likely to succeed on the merits. Nor have they met any of the other criteria, including the requisite showing of "irreparable harm" necessary to justify the "extraordinary and drastic" relief they seek.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 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