IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 12-15738-EE

KARLA VANESSA ARCIA, et al.,
Plaintiffs-Appellants

v.

FLORIDA SECRETARY OF STATE,
Ken Detzner, in his official capacity,
State Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF CURRENT AND FORMER ELECTION OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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Arcia v. Detzner, No. 12-15738
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, *Amici Curiae* hereby certify that the following persons and entities have or may have an interest in the outcome of this case:

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INTEREST OF THE AMICI CURIAE[1]

Amici are current and former local officials with the front-line responsibility for administering elections.[2] Some *amici* were elected to office as Democrats, some were elected as Republicans, and some were elected in nonpartisan races; other *amici* were appointed or selected by Democrats, or Republicans, or bodies with membership from both parties. Collectively, *amici* have 239 years of experience directly administering elections, in addition to many decades of expertise advising and consulting on election matters, and many decades of service in leadership positions of local, national, and international election-related commissions, boards, and professional associations. *Amici* have implemented state and federal election laws in jurisdictions that today represent nearly 35 million voting-age citizens spread across thirteen different states, including some of the most populous counties in the country and some that are significantly less sizable. Some *amici* have been supervising elections since well before the National Voter Registration Act was passed, and have remained engaged with the election process throughout the entire lifespan of the NVRA.

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[1] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief, in whole or in part, and no person other than counsel for *amici* has contributed money intended to fund its preparation or submission.

[2] *Amici* are listed individually in an Appendix to this Brief.

As current and former elections officials closest to the voting public, *amici* have special insight into the issues raised by these cases. *Amici* have a strong interest in preserving and defending the integrity of the electoral process that lies at the core of our democratic system of government, including the maintenance of accurate voter registries. *Amici* are concerned that the resolution of the case by the court below could have a profound effect on election administration well beyond the instant case.

Amici take no position herein on the advisability or legality of the Florida list maintenance program that has generated the instant dispute. Rather, *amici* provide more broadly applicable insight into the impact of the statutory interpretation question at the heart of this case. In particular, *amici* offer firsthand experience from the front lines of the election process, confirming that a plain reading of the provision of the National Voter Registration Act at issue facilitates, not detracts from, effective election administration.

SUMMARY OF ARGUMENT

The court below has construed a provision of the National Voter Registration Act ("NVRA") in a manner at war with the plain text of the provision, undermining its primary purpose. Although the court did so in order to resolve purported gaps and ambiguities in the statute, the construction offered is neither appropriate given the statutory text, nor necessary to give the legislation full and meaningful effect. Moreover, applying the statute according to its own clear terms facilitates, rather than detracts from, the effective administration of elections.

The provision in question is 42 U.S.C. § 1973gg-6(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." The district court rewrote that text, ignoring the key word "systematically," and applying the 90-day bar not to "any program," but solely and exclusively to programs targeting voters who become ineligible to vote in a jurisdiction because they have moved.

In contrast, *amici* — current and former election officials charged with, *inter alia*, implementing the NVRA — have always understood this provision of the statute to mean precisely what it says. A state shall complete, not later than 90 days before a federal election, any program designed to systematically remove ineligible voters from the list. During this 90-day "pencils down" period, officials

can and do correct individual registration errors, respond to individual voters' requests, and remove from the rolls the records of ineligible persons based on individualized information known definitively to be accurate. Officials also can, and do, screen incoming registration applications during this period, pursuant to regular practice. However, *amici* understand the 90-day provision to protect against systematic programs to remove names *en masse* from the official rolls in the few days before Election Day. Far from a burden on effective election administration, this provision actually protects election officials from undue pressure to introduce last-minute error into the process.

Even when executed with impeccable care, systematic purges of the voter rolls — usually executed through attempts to match computerized voter records to other computerized data sources — are subject to error. In some instances, the records suggesting ineligibility are erroneous: a targeted voter is not actually dead, is not actually a noncitizen, is not actually disenfranchised by a conviction, or has not actually moved. In some instances, the underlying records of ineligibility are correct, but the matching process goes awry: the person on the list of ineligible individuals is not the same individual represented on the voter rolls. Despite the best efforts of election administrators, errors in mass removals are inevitable.

In this context, the NVRA's 90-day "pencils down" period was carefully designed to balance two interests: administrators' interest in ensuring clean and

accurate voter rolls, and the due process rights of eligible voters. Administrators need to engage in systematic list maintenance in order to ensure that the rolls are accurate; yet even the most precise list maintenance may unintentionally remove the names of some eligible voters. In order to cast a valid ballot in many states, eligible electors who have been erroneously removed from the rolls by a mass purge will have to check their registration status and either petition to correct the error or re-register before the deadline for the upcoming election. For most of an election cycle, officials have plenty of time to notify those affected by a purge, and eligible electors who have been erroneously removed from the rolls have time and opportunity to correct the problem before the next election.

However, in the final days before an election, there is substantial risk that an erroneously removed elector will not receive notice of the change and be able to correct it in time. In a politicized election environment, *amici* have become familiar with public calls for widespread and showy last-minute purges. But if electors were wrongfully removed from the rolls at the eleventh hour, we would be the officials on the front lines of election administration who would receive the brunt of the voters' entirely legitimate anger. Moreover, a mass purge on the eve of Election Day could leave eligible electors dependent on post-election relief to secure their right to vote, fostering enormous disruption to our ability to smoothly and efficiently conduct the election. As Judge Barkett has already astutely

determined, "The purpose of this [90-day] section appears to be to ensure that no mistakes that a State might make in implementing any such program [of systematic list maintenance] will result in disenfranchisement of a lawfully-registered eligible voter." Order, *Arcia v. Detzner*, No. 12-15220-E (11th Cir. Oct. 16, 2012). The NVRA's 90-day window represents Congress's considered judgment as to the appropriate window to ensure that the unanticipated side effects of a systematic purge do not catch erroneously removed eligible electors by surprise — and it is a judgment that ultimately benefits the administration of the election process.

The court below impermissibly discarded that judgment. Despite the clear statutory text, the court removed 90-day "pencils down" protection from many last-minute systematic purges, including those conducted by officials farther removed from voters than we are. We fear that this unwarranted statutory edit will foster undue political pressure to sweep names from the rolls unreliably, to the jeopardy of the eligible electors we serve — with negative consequences not only for voters unduly removed, but for the public's perception of the legitimacy of the electoral process. Accordingly, *amici* urge the Court to hold that the statutory text means what it says.

ARGUMENT

I. THE LOWER COURT'S CONSTRUCTION OF THE NVRA CONFLICTS WITH THE STATUTE'S CLEAR TEXT

In its opinion below, the district court ultimately found "no reason to conclude that the [NVRA's] 90-day Provision applies to anything other than removals of registrants based on a change in residence." *Arcia v. Detzner*, ___ F. Supp. 2d ___, 2012 WL 6212564, at *6 (S.D. Fla. Oct. 29, 2012). Juxtaposing this conclusion with the actual statutory text reveals the plain error of the court's holding. The text of the "90-day Provision," § 8(c)(2)(A) of the NVRA, states in its entirety:

> 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). The clear reason to conclude that the 90-day provision applies to anything other than removals of registrants is that the text states unambiguously that it applies to "any program" of systemic purges, without limitation. That should be the only reason necessary.

Yet there is further evidence that the 90-day provision applies as broadly as its plain text provides. For example, in the conference report describing the effort to resolve House and Senate versions of the National Voter Registration Act, Congress addressed a House bill with a 90-day provision identical in all respects to

the provision finally enacted. H.R. 2, § 8(c)(2), 103d Cong., 1st Sess. (1993). The conferees stated, without qualification, that the provision "does not permit a State to conduct a systematic procedure to confirm voting lists within 90 days before a Federal election." H.R. Rep. No. 103-66, 139 Cong. Rec. H2078-02 at H2083, 1993 WL 133442 (1993) (Conf. Rep.). The conference committee — and, later, the Congress — adopted this provision as is.[3] *Id.*

Amici also understand Congressional intent to be reflected in the statutory text immediately following the 90-day provision. When Congress intended to regulate list maintenance programs based only on change of residence, it devoted an entire subsection to the topic, and said so clearly. *See, e.g.*, 42 U.S.C. § 1973gg-6(d) ("A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless [several conditions apply].") (emphasis added). If in the 90-day provision Congress had intended to prohibit only purges of registrants who move, it would not have prohibited "any program" of systematic purges.

The lower court's error appears to stem from its attempt to construe several distinct subsections of the NVRA beyond the 90-day provision. Its logic appears

[3] The conference did adopt two unrelated changes to other provisions in the section, pertaining to the locations at which voters might vote after moving, and not relevant to this case.

superficially plain. But the end result contravenes the clear text of the most relevant provision at issue.

Two other provisions seem to have fostered the court's confusion. The first is § 8(a)(3) of the NVRA, which provides that "the name of a registrant may not be removed from the official list of eligible voters except" under certain conditions: the registrant's request, the registrant's criminal conviction or mental incapacity (depending, of course, on state law providing for such disenfranchisement), the registrant's death, or a change in the registrant's residence.[4] The second is § 8(c)(2)(B), which sets out a rule of construction for the 90-day provision, stating that the 90-day provision "shall not be construed to preclude" "correction" of

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[4] The relevant portions of Section 8(a) are as follows:

> In the administration of voter registration for elections for Federal office, each State shall-- . . .
>
> (3) provide that the name of a registrant may not be removed from the official list of eligible voters except--
>
> (A) at the request of the registrant;
>
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
>
> (C) as provided under paragraph (4);
>
> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--
>
> (A) the death of the registrant; or
>
> (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d).

42 U.S.C. § 1973gg-6(a)(3)-(4).

registration records, or "removal" of ineligible voters from the voter registration lists based on the registrant's request, the registrant's conviction or incapacity, or the registrant's death.[5]

For the lower court, the right answer seemed to be a matter of simple subtraction. Section 8(a)(3) allows the removal of a registrant based on request, conviction, death, or changed residence; section 8(c)(2)(A) prohibits systematic programs for removing any ineligible voters within 90 days of an election; section 8(c)(2)(B) says that the 90-day limitation should not be construed to preclude removal based on request, conviction, or death. The district court reasoned that the 90-day limitation therefore applies only to change of residence. Yet this calculation leads to an implausible conclusion. According to the district court, Congress's approach to prohibiting purges based on change of residence was inordinately convoluted: a blanket prohibition, followed by a rule of construction containing substantive exceptions in a cross-reference swallowing the vast majority of the blanket prohibition. That is, the court assumed that when Congress wrote

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[5] Section 8(c)(2)(B) states:

> Subparagraph (A)[, the 90-day provision,] 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); or
>
> (ii) correction of registration records pursuant to this Act.

Id. § 1973gg-6(c)(2)(B).

"any program" of systematic removal, it meant "only removal related to change of residence" — despite the fact that the very next sentence in the very next section shows that when Congress intends to target removal programs "on the ground that the registrant has changed residence," it says so. 42 U.S.C. § 1973gg-6(d).

This contorted construction conflicts with the clear text of the statute. "Any program" means what it says.

II. AN ALTERNATIVE CONSTRUCTION BETTER COMPORTS WITH THE TEXT AS WE HAVE ALWAYS UNDERSTOOD IT

The district court's error is compounded by the fact that there is no pressing need to rewrite the plain text. A more straightforward reading of the statute, hinging on the "systematic" nature of a purge program, gives effect to each provision without undue abridgment.

Section 8(c)(2)(A) sets out a blanket 90-day prohibition on any program designed to systematically remove ineligible voters from the voter registration lists. Section 8(c)(2)(B) expressly provides a rule of construction — not a substantive limitation — for that blanket prohibition. 42 U.S.C. § 1973gg-6(c)(2)(B) ("Subparagraph (A) shall not be construed to preclude" certain action) (emphasis added).

These two provisions are easily reconciled, without gutting one at the expense of the other. Section 8(c)(2)(A) prohibits all systematic programs to remove voters from the official rolls within the 90 days before an election, whatever the basis for the mass purge. Section 8(c)(2)(B) reminds officials that the ban on systematic mass purge programs does not preclude our ability to correct individual records based on individualized information, including the specific examples enumerated in the subsection.

Some of the specific examples in subparagraph B imply correspondence with individual voters: for example, removal "at the request of a registrant." *Id.* § 1973gg-6(a)(3)(A) (incorporated by reference in § 1973gg-6(c)(2)(B)(i)). Some imply individualized recognition of individualized mistakes: for example, "correction of registration records." *Id.* § 1973gg-6(c)(2)(B)(ii). And some imply recognition that individual circumstances may change, rendering particular individuals newly ineligible within the 90-day window: for example, by reason of "criminal conviction" or "death." *Id.* § 1973gg-6(a)(3)(B), -6(a)(4)(A) (both incorporated by reference in § 1973gg-6(c)(2)(B)(ii)).

That is, Congress made clear that the prohibition on systematic mass purges should not be construed to prohibit adjustment of individualized records on the list based on individualized information. Subparagraph (A) focuses on the systematic — and, as described below, potentially error-laden — nature of a last-minute purge

program; subparagraph (B) cautions that the prohibition on systematic purges on the eve of an election need not preclude individualized — and, as described below, therefore more reliable — correction of individual records. Both coexist, without artificial abridgment.

This Court need not decide more in order to resolve the case at this stage. Florida's list maintenance was challenged under section 8(c)(2)(A) of the NVRA: the 90-day "pencils down" period for systematic purges. This Court should construe that provision in accordance with its plain text. And that should suffice to decide the principal issue on appeal.[6]

[6] If the Court deems it necessary, it may also respond to a related issue raised by the court below. As mentioned above, that court construed § 8(a)(3) of the NVRA, which provides that the name of a "registrant" may not be removed from the official list of eligible voters except under certain conditions: the registrant's request, the registrant's criminal conviction or mental incapacity (depending, of course, on state law providing for such disenfranchisement), the registrant's death, or a change in the registrant's residence. 42 U.S.C. § 1973gg-6(a)(3)-(4). All of these represent bases for removing eligible individuals who either become ineligible or wish to be removed from the list. The district court reasoned that this provision of the NVRA could not reasonably be construed to prohibit states from removing other entries that should never have been placed on the voting rolls in the first instance — including the names of minors, noncitizens, and fictitious entries. The court therefore seems to have determined that such individuals were not "registrants" for the purposes of § 8(a)(3). *Id.*

This conclusion seems entirely correct. But it is also essentially irrelevant for the purposes of construing the 90-day provision. The 90-day provision prohibits any program designed to systematically remove the names of "ineligible voters," a category both distinct from and broader than those ineligible "registrants" who may be subject to removal under § 8(a)(3).

III. A FAITHFUL READING OF THE STATUTORY TEXT FACILITATES EFFECTIVE ELECTION ADMINISTRATION

The court below identified no ostensible Congressional rationale for its reading of the 90-day provision: no reason why Congress might have imposed a 90-day ban on removing individuals from the voter rolls, limited only to removals based on a change of address. Indeed, it would be difficult to understand the logic behind such a provision.

In contrast, the provision that Congress actually wrote — a ban on all programs designed to systematically remove registration entries in the waning days of the election cycle — is entirely logical, and entirely consistent with the basic structure of effective election administration. As the National Association of Secretaries of State flatly told Congress in hearings leading up to the NVRA: "Purges should never be conducted immediately before an election." NAT'L ASS'N SEC. STATE, BARRIERS TO VOTING 15, *reprinted in Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. 54, 73 (1989). Congress listened. The 90-day provision represents a careful balance of the need to ensure clean and accurate voter rolls with the due process rights of every eligible voter.

Amici understand based on firsthand experience that systematic purges of the voter rolls carry the inevitable potential for error. As distinguished from error

correction based on individual correspondence or rigorous individualized inquiry, it is most efficient to conduct systematic programs of mass list maintenance by attempting to match records from our computerized voter registration lists with names on other computerized data records.

There is nothing inherently wrong with such an effort, conducted carefully and as a first pass for further investigation. Indeed, Congress has directly encouraged officials to employ computerized record matching as a tool for list maintenance in some circumstances. *See* 42 U.S.C. § 15483(a)(2)(A)(ii) (requiring states to "coordinate" voter registration rolls with state agency records on felony status and death); *but cf. id.* § 15483(a)(2)(A)(i) (specifying that any individual may be removed from the registration rolls only in accordance with the provisions of the NVRA). And we have long done so — under the proper conditions.

However, we have also recognized that such mass matching is not free from error. In some instances, the lists suggesting ineligibility are erroneous, or have been misinterpreted. Individuals who are alive have been thought to be dead.[7] Individuals who are citizens have been thought to be noncitizens.[8] Individuals who

[7] *See, e.g.*, Mike Morris, *Voter Purge Delayed Over Faulty Data*, HOUS. CHRON., Sept. 10, 2012; Scripps Howard News Service, Grave Mistakes: Has Social Security Killed You? (2011), at http://projects.scrippsnews.com/magazine/grave-mistakes/ (noting that "The Social Security Administration each month falsely reports that nearly 1,200 living Americans have died.").

[8] *See, e.g.*, Sara Burnett, *Database: 88% of Questioned People on the Voter Rolls Are U.S. Citizens*, DENVER POST, Aug. 30, 2012; John Lantigua, *World War II*

are not disenfranchised by conviction have been thought to be disenfranchised by conviction.[9] Individuals whose legal residence remains firmly in place have been thought to have moved.[10] Individuals who reside at legal addresses have been thought to be listed at improper locations.[11]

In other instances, the underlying information on the reference list is accurate, but the matching effort goes awry: the person on the list of ineligible individuals is not the same individual thought to be represented on the voter rolls. The most common such error, and one frequently reflected in pre-election press by groups seeking publicity about the state of the voter rolls, is caused by attempts to compare one list to another by matching individuals' names and birthdates. Statistical science shows that most individuals will dramatically underestimate the prevalence of individuals with the same name and birthdate. Given any 460 random voting-age people, there is a 99% chance that at least two share the same

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Bronze Star Winner Resents Fla. Letter Questioning Citizenship, Right to Vote, PALM BEACH POST, May 29, 2012; Ivan Moreno, *Voter-Fraud Search Yields Few Examples*, J.-GAZETTE (Fort Wayne, Ind.), Sept. 25, 2012.

[9] *See, e.g.*, Christopher Goffard, *Error May Have Taken Voters Off Rolls*, ST. PETERSBURG TIMES, July 10, 2000; Scott Hiaasen *et al.*, *Felon Purge Sacrificed Innocent Voters*, PALM BEACH POST, May 27, 2001.

[10] *See, e.g.*, John S. Adams, *Registration Challenge Frustrates Voters, Officials*, TRIB. (Great Falls, Mont.), Oct. 4, 2008.

[11] *See, e.g.*, Dexter Filkins *et al.*, *Accusations of Double Voting Fail to Pan Out*, L.A. TIMES, Apr. 6, 1997; Michael Finnegan, *In Ohio, Black Voters Resist Challenges to Eligibility*, THE BULLETIN (Bend, Ore.), Sept. 26, 2012; Emily Heffter, *Challenged Ballots Annoy Some Voters*, SEATTLE TIMES, Nov. 9, 2005.

full date of birth. *See* Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111 (2008).[12] This means that among any 460 voting-age individuals with the same name, it is virtually guaranteed that at least two will share the same full date of birth. In registries of any size, this leads to many "birthdate twins." For example, Florida's 2011 registration list contained 1729 entries for James Smith, 1710 entries for Maria Rodriguez, and 1194 entries for Robert Johnson;[13] from these selections alone, statistics predicts hundreds of individuals with the same name and birthdate.

This, in turn, means that a list maintenance program based on matching names and birthdates from one large list to another is virtually guaranteed to yield mistakes. Experience demonstrates that this is not merely speculation: would-be purge lists and some actual purges have indeed fallen victim to these errors, despite the best efforts of election officials.[14] One such example is particularly salient in Florida: in 2006, Governor Rick Scott was mistakenly removed from the voter rolls

[12] This publication was subject to peer review.

[13] These statistics were compiled using a datafile representing the Florida Voter Registration Statewide Database as of January 31, 2011, produced by the State of Florida pursuant to a public records request.

[14] *See, e.g.*, Lise Olsen, *Texas' Voter Purge Made Repeated Errors*, HOUS. CHRON., Nov. 1, 2012; Kelly Poe, *List of Purportedly Dead N.C. Voters Includes Some Live Ones*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 2, 2012; Scott Powers, *Woman Cut Twice From Voter Rolls Is Dead Certain She's Alive*, ORLANDO SENTINEL, July 18, 2012, at A1; *see also* Jeannine Koranda, *Dead Folks Voting? At Least One's Still Alive*, WICHITA EAGLE, Oct. 29, 2010.

by a purge, because he was confused for another Floridian with the same name and date of birth. Michael Peltier, *Scott Was "Dead" For Elections*, SUN-SENTINEL (Fort Lauderdale, Fla.), June 15, 2012, at 6B.

Amici do not blithely relate incidents of data errors like those above. We do our level best to serve our constituents by ensuring that list maintenance is conducted as accurately as possible, and we presume that colleagues around the country do the same. But as a practical matter, we also understand such errors to be inevitable in a systematic mass purge, even when the purge is designed to be reliable and conducted with the utmost care. And it is much more difficult to conduct such a purge with the utmost care when it is imposed at the last minute.

Amici also understand that, at most points in an election cycle, eligible voters have ample opportunity to rectify the errors that we are not able to squeeze out of a systematic program of list maintenance, before they are next asked to vote. This process is not cost-free: eligible electors who have been unintentionally removed by a purge must have cause to check their registration status, recognize the error, and either petition to correct the error or re-register before the deadline for the upcoming election. But it is the regrettable price of maintaining clean rolls — for most of the year.

In the final days before an election, the calculus changes. In these waning days, there is substantial risk that despite our best efforts, an erroneously removed

elector will not receive timely notice of the removal. Even if notice is timely, there may nevertheless be insufficient time for the elector to correct the error before Election Day. If the error generates a dispute, it may be necessary to collect and review incremental documentation or hold a hearing, without the benefit of time to ensure that the proceedings are adequate for the task. This means that a last-minute program of systematic list maintenance does not clean the rolls: to the contrary, it makes them dirtier.

The impact is most clear in the extreme. A mass purge on November 3, 2014 — the night before Election Day — would inevitably remove some eligible electors from the rolls by mistake. The likelihood of error would exist whether the purge attempted to target those who moved or those who were ineligible for some other reason. Electors wrongfully removed would be entirely dependent on post-election process to secure their right to vote — either provisional ballot review, for those who were able to cast provisional ballots, or litigation for those who were not. And expertise in election administration is no longer necessary to appreciate the enormous disruption that post-election process can cause.

This risk dissipates, but does not disappear, with increasing distance from Election Day. Some eligible citizens will attempt to vote early, in accordance with state law. Others will be away from home, by choice or by obligation, and will seek to vote with an absentee ballot substantially before Election Day, to ensure

that their ballots are received in time to count. Indeed, Congress recently required absentee ballots to be sent to servicemembers and civilians overseas, no fewer than 45 days before an election. Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, Subtitle H, 123 Stat. 2190, codified at 42 U.S.C. § 1973ff-1 et seq. Last-minute list maintenance affects these voters far before Election Day itself.

Moreover, last-minute systematic purges ripple far beyond the voters purged. Electors erroneously removed from the rolls who arrive at their polling places on Election Day will not find themselves on the poll books, for reasons neither they nor their poll workers are likely to understand readily. Some will attempt to phone local officials to resolve the problem; some will vote provisional ballots. These procedures take incremental time, disrupting the election process for other voters and increasing the length of lines and the time that every voter will stand and wait to cast a ballot. In addition, a glut of provisional ballots increases the time required to tabulate and report accurate election returns; warranted or not, that post-election delay may undermine all voters' trust in the integrity of the system.

The foregoing paragraphs properly prioritize the impact to voters of systematic last-minute attempts to remove individuals from the voter rolls. But *amici* also keenly understand the existing burdens on local election administrators

in the run-up to Election Day. In the final period before an election, we are asked to: verify petitions for candidates and ballot measures; review, screen, and process the increasing volume of legitimate incoming voter registration applications and changes to past voter registration entries; design, proofread, and print ballots; review and respond to requests for absentee ballots; prepare, test, and distribute voting systems; prepare for any early voting process permitted in our jurisdictions; recruit and train poll workers; prepare and distribute precinct registers; seek and secure legally compliant polling places, and ensure that they have sufficient equipment and resources; respond to inquiries from candidates and the voting public; and prepare contingency plans … and respond to contingencies that no reasonable person could foresee. Occasionally — and for some of us, quite frequently — we must also contend with legal challenges that change the way we conduct any of the tasks above.

Adding systematic list maintenance to the list decreases our ability to perform all of these other activities. It also decreases our ability to perform the systematic purges with appropriate quality control. Moreover, because we know that systematic list maintenance contains inevitable errors, we have to not only perform the mass program, but also ensure adequate notice to those affected — sometimes with multiple mailings and/or phone calls — and accommodate the incremental responses from eligible citizens wrongly purged. The NVRA's 90-day

provision provides welcome relief from these unwanted and unwarranted extra burdens.

In these waning days of an election cycle, Congress recognized what we have long understood: that errors in a systematic program of mass purges might unduly jeopardize the votes of eligible citizens and disrupt the smooth progress of an election. The NVRA's 90-day "pencils down" provision represents Congress's considered judgment as to the period of time appropriate to ensure that the unanticipated side effects of a systematic purge do not catch erroneously removed eligible electors by surprise — and it is a judgment we heartily support.

This judgment does not leave *amici* cause for concern about the accuracy of the voter rolls. Under the NVRA as we have always understood it, we have ample control over our list maintenance. There is no federal statutory bar to an accurate systematic purge of the voter rolls at any point in the election cycle other than the 90 days before Election Day. And there is no federal statutory bar to an individualized correction or removal of individual registration records, based on individualized information beyond any systematic removal program, at any point. The NVRA's 90-day provision simply prohibits the least accurate form of list maintenance precisely when it is likely to do the most damage.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

December 24, 2012

Respectfully submitted,

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APPENDIX

The foregoing brief was submitted by the following election officials:

- **Steve Druckenmiller** has administered 143 elections for Linn County, OR; he has served as the County Clerk since 1986, and was the Elections Supervisor in Linn County for two years before that. Among other positions, Mr. Druckenmiller has served as the President of the Oregon Association of County Clerks, and was appointed to Oregon's National Voter Registration Act State Compliance Council.
- **George Gilbert** has been the Director of Elections for Guilford County, NC, since 1988. Mr. Gilbert is a nationally Certified Election/Registration Administrator (CERA) through the Election Center and Auburn University. He also served during 2001 and 2005 on the Election Center's Ad Hoc Task Force on Election Law Reform, and co-chairs the Legislative Committee of the National Association of Election Officials.
- **Ernest Hawkins** served Sacramento County, CA, for 27 years; he was the Registrar of Voters from 1980-2003, and a Senior Administrative Analyst in the Registrar's office from 1976-1980. Mr. Hawkins has been deeply involved with the Election Center — a national nonprofit organization of election officials offering research, information, training, and certification — since the organization's inception, and has been the chair of the Board of

Directors for the last 20 years. Mr. Hawkins has also served in leadership positions with the National Association of County Recorders, Election Officials and Clerks; the California Association of Clerks and Election Officials; the California Voter Foundation; and Electionline.org; he has further served on the Federal Election Commission's Advisory Panel and is currently a member of the Advisory Board for the U.S. Election Assistance Commission. In July 2000, he was inducted into the Election Hall of Fame.

- **Sherril Huff** has served King County, WA, voters since 2005, first as the Assistant Director of King County Records, Elections, Animal Control, and Licensing; and more recently as the Director of Elections, which was an appointed position before it became an elected position in 2009. Previously, Ms. Huff served as the elected County Auditor for eight years in Kitsap County, with responsibility for supervising elections among her other duties.
- **Margaret Jurgensen** has been the award-winning Election Director for Montgomery County, MD, since 2001. Before that, she served the voters of Douglas County, NE, for twelve years, as both Deputy Election Commissioner and then Election Commissioner.
- **Scott Konopasek** has administered elections in three different jurisdictions, serving first as the County Auditor of Snohomish County, WA, from 1997-2002; then as the Registrar of Voters for San Bernardino County, CA, from

2002-2004; and most recently as the County Clerk of Salt Lake County, UT, from 2008 to the present. He also serves on the Standards Board for the U.S. Election Assistance Commission, and is a member of the National Task Force for Election Reform; the National Association of County Recorders, Election Officials and Clerks; and the International Association of Clerks, Recorders, Election Officials, and Treasurers.

- **Dean Logan** has been involved with administering elections since 1993, including positions as the Chief Deputy Auditor of Kitsap County, WA; the Director of Records, Elections, and Licensing Services of King County, WA; and the Director of Elections for the Washington Secretary of State. He now serves as the Registrar-Recorder/County Clerk for Los Angeles County, CA, the nation's largest and most diverse local election jurisdiction. Among other positions, Mr. Logan serves on the Executive Board for the California Association of Clerks and Election Officials, and was the past Chair of the Legislative Committee of Washington's Association of County Officials.
- **Conny McCormack** served six years as the Elections Administrator of Dallas County, TX; seven years as the Registrar of Voters for San Diego County, CA; and twelve years as the Registrar-Recorder/County Clerk for Los Angeles County, CA. Ms. McCormack has also been an Elections

Specialist with the International Foundation for Electoral Systems, with extensive experience consulting on elections abroad. Among her other affiliations, she was the President of the Texas Association of Election Administrators and of the California Association of Clerks and Election Officials.

- **Helen Purcell**, the second woman elected to the office of Recorder for Maricopa County, AZ, since 1871, has been supervising elections in Maricopa since 1988. She has served on the Board of Directors of the National Association of Counties, and was appointed to both the Board of Advisors and the Technical Guidelines Development Committee of the U.S. Election Assistance Commission. In 2000, the vote-by-mail technology developed by Ms. Purcell's office became part of the collection at the Smithsonian's National Museum of American History in Washington, D.C.
- **Connie Schmidt** served as the Election Commissioner for Johnson County, KS, from 1995 to 2004, after a long career in various aspects of local government. During her tenure, Johnson County pioneered several new, and award-winning, election programs that have been replicated around the country; after stepping down as commissioner, Ms. Schmidt served as co-project manager for several best practices programs of the U.S. Election Assistance Commission. Ms. Schmidt has served as the chair of the

Professional Education Program Certification Board for The Election Center, and as a member of the NASED Voting Systems Standards Board; she has received the National Association of Secretaries of State Medallion Award for outstanding service to American democracy, and has been inducted into the Elections Hall of Fame.

- **Stephanie Singer** is one of Philadelphia's three City Election Commissioners, defeating a 36-year incumbent in her first run for citywide office. With a Ph.D. in mathematics, Dr. Singer's background is in data, bringing extensive private-sector analytical expertise to bear on the management of elections.
- **Gary Smith** also leveraged extensive business experience and an engineering background in more than twelve years of service as the Chairman of the Board, Election Director, and Chief Voter Registrar for Forsyth County, GA. He has also served for the last four years as a Director for Operation Bravo Foundation, devoted to improving the voting process for UOCAVA voters; its Military Heroes Initiative, funded by the Election Assistance Commission, has assisted those with polytrauma injuries from combat in Iraq and Afghanistan in exercising the franchise. Among his other professional associations, Mr. Smith sat on the Executive Board of the Georgia Election Officials Association.

- **Tom Wilkey** has been active in improving the administration of elections since 1968 — at first, with the Erie County, NY, Board of Elections, and then with the New York State Board of Elections, becoming Executive Director of the state Board in 1992. After stepping down from the New York State Board in 2003, Mr. Wilkey was appointed Executive Director of the U.S. Election Assistance Commission, the federal institution devoted in part to research on and dissemination of best election practices. Mr. Wilkey has also served as secretary, treasurer, vice president, and president of the National Association of State Election Directors; in various capacities on advisory boards and committees of the Federal Election Commission; on the State and Local Alliance Board of the Secretary of Defense's Federal Voting Assistance Program; and as a member of the Board of Directors of the International Center on Election Law.

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 14-point Times New Roman and complies with the type-volume limitation of the rule, containing 6,410 words, excluding those sections of the brief that do not count towards that limitation, in accordance with Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.

December 24, 2012

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that I have this day caused a true and correct copy of the foregoing BRIEF OF CURRENT AND FORMER ELECTION OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL to be served on the clerk of the court electronically and by First-Class U.S. Mail, and on all counsel of record by email, as follows:

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