No. 12-15738

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KARLA VANESSA ARCIA, *et al.*,
Plaintiffs-Appellants,

v.

FLORIDA SECRETARY OF STATE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida, No. 12-22282-CIV-ZLOCH, Hon. William J. Zloch, United States District Judge

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BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. 26.1 and 11th Cir. R. 26.1-1, *amici* certify that the persons interested in this case are those listed in the first brief filed in this case (Plaintiffs-Appellants' Initial Brief), plus the Members of the United States Congress whose names are listed in the Appendix ("Members of Congress") and undersigned counsel. *Amici* are not aware of any other person or entity that has an interest in the outcome of this case or appeal.

TABLE OF CONTENTS

Page(s)

TABLE OF CITATIONS

STATUTES AND RULES

TABLE OF CITATIONS
(continued)

Page(s)

LEGISLATIVE HISTORY

TABLE OF CITATIONS
(continued)

Page(s)

ARTICLE

INTEREST OF THE *AMICI CURIAE* [1]

Amici are current and former Members of Congress whose names are listed in the Appendix. Members of Congress have a particular interest in the proper interpretation and implementation of federal statutes. Because this case involves the purpose of certain language in the National Voter Registration Act of 1993, the views of *amici* regarding Congress's intent are particularly relevant. *Amici* include the lead sponsors of the bill that became the Act, members of the committee of conference between the two Houses that agreed to the final version of the Act, and the Chair, Ranking Member, and members of the House subcommittee responsible for federal elections.

STATEMENT OF THE ISSUE

Whether the Florida Secretary of State's program to remove alleged non-citizens from the State's voter rolls violates the NVRA's requirement that systematic voter removal programs be completed at least 90 days prior to a federal election.

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[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a). No counsel to any party to this lawsuit authored this brief in whole or in part, nor did any party, party's counsel, or other person contribute money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, was enacted to provide citizens with a simple and uniform method for registering to vote.[2] Congress believed that it was the duty of the federal government to promote the exercise of the right to vote and to increase the voting participation of eligible citizens. Congress also believed that those goals must be balanced by continued focus on the accuracy of voter rolls and integrity of the electoral process.

After long negotiations with, and eventual support from, state election administrators, Congress adopted the NVRA to create a national voter registration system with uniform standards that encouraged states to make use of best practices with respect to the administration of voter registration systems. One of these best

[2] The NVRA originally was introduced in 1989 by *amicus* Congressman Swift in the 101st Congress as H.R. 15. Following a spring filled with hearings, a similar bill (H.R. 2190) was introduced and passed by the House of Representatives, but was filibustered in the Senate. In the 102nd Congress, a version of the Act (S. 250) sponsored by *amicus* Senator Ford in early 1991 passed both Houses but was vetoed by the President in 1992. H.R. 2 and S. 2, the companion bills introduced in the 103rd Congress by Congressman Swift and Senator Ford in early 1993, contained the same basic concepts as H.R. 2190 and S. 250. *See Voter Registration: Hearing Before the Comm. on H. Admin.*, 103d Cong. 2 (1993) (introductory remarks by Rep. Swift). Because the testimony received in connection with H.R. 15 in 1989 continued to inform the views of the drafters of the NVRA, *amici* cite to that hearing in addition to the hearing relating to H.R. 2 in 1993.

practices is not to purge voters from the election rolls close to the time of a federal election.

Over the course of the four-plus years that Congress considered the legislation that ultimately became the NVRA, many election administration experts provided Congress with their views on voter registration administration. With respect to purges, two main concerns emerged: that purges are notoriously error-prone, and that they drain the resources of already thinly-stretched election administrators. Therefore, Congress felt it important to create a buffer—eventually settling on a 90-day time frame—between the conclusion of a purge program and a federal election. By doing so, eligible voters who were purged in error would still have time to re-register, and election administrators would have the ability to process such requests and make necessary adjustments to the voter rolls.

Congress's intent was to protect the integrity of the voting process while preserving the franchise for eligible voters. The NVRA, and specifically the 90-day provision, reflects Congress's attempt to strike that proper balance. The Florida Secretary of State's program is subject to the same concerns as those programs addressed during the Congressional hearings. In particular, the program has been shown to have falsely identified eligible voters as suspected non-citizens. If the program is allowed to operate in the period close to an election, those eligible voters might be purged from the rolls without adequate time to correct the record and

register to vote. This is precisely the type of situation that Congress had in mind when it determined that programs that systematically remove ineligible voters from the rolls should not be conducted within 90 days of a federal election.

ARGUMENT

A. The NVRA Reflects Congress's Belief That Registration Requirements Adequately Preclude Ineligible Persons from Voting

At the time the NVRA was enacted, Congress believed that the stringent requirements placed on the states in administering voter registration were sufficient to preclude ineligible persons from being added to the voter rolls and, in turn, voting. *See* H.R. Rep. No. 103-9, at 10 (1993) ("The Committee [on House Administration] believes that these provisions [discussed below] are sufficient to deter fraudulent registrations."); S. Rep. No. 103-6, at 13 (1993) ("[T]he bill also provides that there will be sufficient safeguards to prevent an abuse of the system with fraudulent registrations.").[3] Among other things, the Act requires states to inform

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[3] As one witness explained,

> If you implement motor voter, you can forget worrying about purging because those people are going to be kept up to date and if they die, they are going to go off the system. . . . When you really analyze it, and if you really want to register voters, and if you really want to talk about how to keep the system up to date, and if you really want to eliminate fraud … , motor voter is the answer.

Voter Registration: Hearing Before the Comm. on H. Admin., 101st Cong. 122 (1989) (testimony of Ralph Munro, Sec'y of State of Wash.). *See also id.* at 177 (cont'd)

applicants of the requirements to be eligible to vote, as well as the penalties for submitting a false voter registration application. 42 U.S.C. § 1973gg-6(a)(5). *See also id*. § 1973gg-3(c)(2)(C)(i) (voter registration application must state "each eligibility requirement (including citizenship)"); *id*. § 1973gg-5(a)(6)(A)(i)(I) (same); *id*. § 1973gg-7(b)(2)(A) (same). The NVRA also directs states to require an applicant to attest that he or she meets the requirements, including citizenship, and to sign the voter registration application, under penalty of perjury. *Id*. § 1973gg-3(c)(2)(C)(ii)-(iii), -5(a)(6)(A)(i)(II)-(III), -7(b)(2)(B)-(C). It is even mandatory for mail-in voter registration forms to contain the question "'Are you a citizen of the United States of America?' and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States." *Id*. § 15483(b)(4)(A)(i).

The penalties for lying on a voter registration form are severe. It is a federal crime to submit "voter registration applications that are known by the person to be materially false." 42 U.S.C. § 1973gg-10(2)(A). And most states, including Florida, have their own harsh criminal penalties for false registration. *See, e.g.*, Fla. Stat. § 104.011(2) ("A person who willfully submits any false voter registration information commits a felony of the third degree[.]"). The NVRA reflects Con-

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(testimony of Emmett H. Fremaux, Jr., Exec. Dir., D.C. Bd. of Elections & Ethics) (explaining how motor voter procedures could make negative purges unnecessary).

gress's judgment that these provisions promote integrity in the registration process while minimizing barriers to registration.

Therefore, a person seeking to register to vote will, at the time of registration, have to affirm that he or she is a citizen who is eligible to vote, and swear to that fact under penalty of law. The state then has the immediate ability to review the information contained on the application to determine eligibility. For example, if an applicant failed to check the box affirming that he or she is a citizen, his application can be rejected. A voter registration application likewise may be rejected if an applicant entered a birth date indicating that he or she is a minor, or listed an ineligible address. The NVRA requires the state to notify each applicant of "the disposition of the application"—that is, whether or not it has been accepted and the applicant is registered to vote. 42 U.S.C. § 1973gg-6(a)(2).

Under the NVRA, if a person is eligible to register to vote but his or her application is not accepted, he or she is given an opportunity to correct the deficiency, as long as the correction is made at least 30 days before an election (or less, if allowed by state law). 42 U.S.C. § 1973gg-6(a)(1). The interaction of this provision with the 90-day provision reflects Congress's goal of making it easier for eligible voters to register to vote. *See id*. § 1973gg(b)(1). As explained more fully below, if a systematic purge is completed 90 days or more before an election, an eligible voter who erroneously is purged from the rolls has a minimum of two

months to re-submit his or her application and be re-registered. It thus is a central purpose of the NVRA that both the eligible voter whose application is rejected and the wrongfully purged voter will have an opportunity to correct the error. Congress was, and is, most concerned with not disenfranchising any eligible voters.

B. The NVRA Does Not Create Any Exception to the 90-Day Purge Window

When drafting the NVRA, Congress was committed to maintaining the accuracy of voter rolls, as evidenced by the built-in safeguards described above.[4] On the one hand, if an ineligible non-citizen accidentally registered to vote, for example when applying for a driver's license, he or she could voluntarily request removal from the rolls; on the other, willful mis-registration could result in a felony prosecution. Either way, the non-citizen would be quickly removed from the rolls. There was no indication of any need to permit systematic purges to remove non-citizens or others whom NVRA helped ensure would not be on the rolls in the first place.

In this context, when Congress discussed protecting states' ability to conduct some voter purges in the process of enacting the NVRA, it was focused principally

[4] When discussing purges, the Senate Committee on Rules and Administration noted that "[a]n important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis." S. Rep. No. 103-6, at 18 (1993).

not on fraud or other wrongful mis-registration, but on the removal of "deadwood" from the voter rolls. *See* S. Rep. No. 103-6, at 20. The testimony regarding the need to permit some purges was uniformly related to maintaining the accuracy of the information in the rolls—specifically those individuals who became ineligible to vote at some point after registering—not with ferreting out those who should not have been registered in the first place. For example, one witness described purges as "questions of people dying; people moving, and then people that don't vote. Purging is commonly considered as affecting just the people who don't vote but I am just as enthused about keeping people voting in the right spot or the right location." *Voter Registration: Hearing Before the Comm. on H. Admin.*, 101st Cong. 131 (1989) (testimony of Ralph Munro, Sec'y of State of Wash.).

States accordingly are directed to maintain "an accurate and current voter registration roll." 42 U.S.C. § 1973gg-6(b). They should, at a minimum, work to ensure that a voter who requests to be removed, dies, becomes mentally incapacitated, moves out of state, or otherwise becomes ineligible to vote, is not maintained on the roll of voters. If such a removal is done on a one-off basis, it is allowed at any time, right up to a federal election. *Id.* § 1973gg-6(c)(2)(B). However, any systematic effort to remove those categories of people must be completed more than 90 days before a federal election. *Id.* § 1973gg-6(c)(2)(A). The rationale for such a requirement is to protect against predictable mistakes in systematic pro-

grams that would lead to disenfranchisement if a voter did not have an opportunity to re-register. *See infra* Section C. There is no reason that a state cannot comply with its obligation to maintain an accurate list, including periodic cleaning, without having to conduct voter removal programs within the 90-day window. *See Voter Registration: Hearing Before the Comm. on H. Admin.*, 103d Cong. 122 (1993) (statement of Edward A. Hailes, Counsel, Washington Bureau, NAACP).

The 90-day provision does not relate only to programs seeking to remove the enumerated classes of ineligible voters; by its plain language, it also applies to "any program." 42 U.S.C. § 1973gg-6(c)(2)(A). Congress did not include, nor did it intend to include, an exception for persons who were not eligible to register to vote in the first place, such as non-citizens. Despite years of testimony, statements, letters, articles and reports, no one suggested to Congress that non-citizens existing or persisting on state voter rolls presented a problem that justified exceptional treatment. To be sure, Congress heard from some who were concerned with non-citizens getting onto the rolls, but that was in the context of motor voter registration procedures which, as explained above, contain their own adequate safeguards.[5]

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[5] *See, e.g., Voter Registration: Hearing Before the Comm. on H. Admin.*, 101st Cong. 168 (1989) (statement of Dorothy Joyce, Dir., Div. of Elections, Fla. Dept. of State); *id*. at 174 (statement of Betty Carter, Dir. at Large, Int'l Ass'n of Clerks, Records, Election Officials & Treasurers); *id*. at 178 (statement of Emmett H. Fremaux, Jr., Exec. Dir., D.C. Bd. of Elections & Ethics); *id*. at 344 (letter from (cont'd)

Nothing in the legislative language or background indicates that Congress contemplated *any* exception to the 90-day purge window.

Congress struck a balance to ensure that states could maintain accurate voter registration rolls without risking the disenfranchisement of eligible voters, and this balance has proven effective over the last twenty years. Florida's program is an overreaction to a nonexistent problem, and an overreach under the law carefully crafted by Congress.

C. The NVRA Reflects Congress's Concerns with Purges Causing Problems If Conducted Too Close to an Election

Congress included the 90-day provision at the urging of voting rights groups and election administrators, who explained the multitude of problems caused by purge activities that continue into the time period immediately preceding an election. When the provision was being drafted, Congress was not concerned with the reasons or motivations behind any purge, or the categories of registrants targeted;[6]

Joan Anderson Growe, Sec'y of State of Minn.). Other concerns were raised in the context of same-day voter registration, which was not at issue. *See id*. at 317 (statement of Erich Pratt, Exec. Dir., U.S. Border Control). *See also Voter Registration: Hearing Before the Comm. on H. Admin.*, 103d Cong. 62 (1993) (testimony of Ronald A. Rasmus, Cnty. Clerk & Recorder, Ford Cnty., Ill.).

[6] *See* H.R. Rep. 103-9, at 15 (1993) (stating Congress's intent to impose standards on "any activity that is used to start, or has the effect of starting, a purge of the voter rolls, without regard to how it is described"); S. Rep. No. 103-6, at 31 (1993) (same).

it was concerned only with the potential for disenfranchisement of eligible voters and the need for time to correct any purging errors before an election.[7]

There are two main problems with systematic voter purges, as described to Congress in the course of crafting the NVRA: errors and resources. Regarding errors, there simply are too many ways to misidentify an eligible voter as deserving of purge, resulting in "false positives" that could wrongfully disenfranchise voters. *See, e.g.*, *Voter Registration: Hearing Before the Comm. on H. Admin.*, 101st Cong. 202-03 (1989) (testimony of Deborah H. Karpatkin, Legal Dir., Human SERVE Campaign) (discussing problems with a New York City non-voting purge, concluding that "[e]rrors like this are inevitable" and questioning "whether a purge statute should ever be allowed, particularly in light of the burden on exercising the franchise"); *id*. at 238, 311-12 (testimony of Frank R. Parker, Dir., Voting Rights Project Lawyers' Comm. for Civil Rights Under Law) ("[C]lerical errors and misdelivered mail[] result in large numbers of people being disenfranchised[.]"). In fact, Florida has a particularly troubled history of making errors in pre-election purges, *see* Plaintiffs-Appellants' Initial Br. at 11; the instant case arose in part be-

[7] This Court recognized the concern in earlier proceedings in a related case. *See* Order Denying Mot. to Expedite Appeal, *Arcia v. Detzner*, No. 12-15220-E, at 2 (11th Cir. Oct. 16, 2012) ("The purpose of [42 U.S.C. § 1973gg-6(c)(2)(A)] appears to be to ensure that no mistakes that a State might make in implementing any such program will result in disenfranchisement of a lawfully-registered eligible voter.").

cause Plaintiffs Karla Arcia and Melande Antoine were included on a list of "potential non-citizens," when in fact they are both United States citizens. *See id*. at 14.[8] Congress made a judgment that purges are too error-prone to allow them to take place without reserving enough time to remedy their inevitable mistakes.

In terms of resources, the process of running an election itself places great demands on election administrators. *See Voter Registration: Hearing Before the Comm. on H. Admin.*, 101st Cong. 166 (1989) (testimony of Dorothy Joyce, Dir., Div. of Elections, Fla. Dept. of State) (explaining the "administrative nightmare" involved in administering elections in Florida). Conducting a systematic purge, and dealing with the necessary follow-up work, is too much of a drain on already strained resources in the run-up to an election. Therefore, "best practices" are not to conduct purges close to elections. *See* Nat'l Ass'n of Sec'ys of State, *Barriers to Voting* 15, *reprinted in Voter Registration: Hearing Before the Comm. on H. Admin.*, 101st Cong. 73 (1989) ("Purges should never be conducted immediately before an election.").

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[8] A recent review of at least four states (Florida, Colorado, North Carolina, and Michigan) that had conducted, or were planning on conducting, a purge of suspected non-citizens from their voter rolls, showed that significant numbers of legitimate citizens eligible to vote were erroneously included on lists of targets. *See* Ivan Moreno, *Republicans Look for Voter Fraud, Find Little*, Associated Press, Sept. 24, 2012, *available at* http://bigstory.ap.org/article/republicans-look-voter-fraud-find-little.

More than 90 days before a federal election, states may conduct programs intended specifically to deal with the "deadwood" that was the concern of election administrators and Congress. While the actual time frame was the subject of debate—an earlier version of the bill, H.R. 2190, 101st Cong. § 106(f) (1989), included a 60-day provision—the key was providing purged voters an opportunity to re-register if they were removed in error. As the Senate Committee on Rules and Administration explained:

> [I]n cases where errors in removing legitimate voters from the lists occur . . . such notification often comes too late for legitimate voters and citizens to act to correct the error or to re-register. In many States registration closes 30 days before a general election. If the notification fails to reach a citizen in time, he or she will be unable to re-register for the election. It follows that removal of names from registration lists should be timed so that individuals will have an opportunity to appeal or re-register before the next election[.]

S. Rep. No. 101-140, at 13 (1989). Numerous witnesses testified about the importance of providing procedures for re-registration following a purge. *See Voter Registration: Hearing Before the Comm. on H. Admin.*, 101st Cong. 108 (1989) (testimony of Ken Hechler, Sec'y of State of W. Va.); *id*. at 149 (statement of Nancy M. Neuman, President, League of Women Voters of the U.S.) ("[P]urges sometimes are conducted so close to elections that voters whose names are removed either do not receive adequate notification and explanation of how to be reinstated, or, even with such notice, they do not have sufficient time to reregister before the deadlines."); *id*. at 157 (testimony of Sonia R. Jarvis, Exec. Dir., Nat'l Coal. on Black

Voter Participation); *id*. at 206 (statement of Deborah H. Karpatkin, Legal Dir., Human SERVE Campaign) (explaining that the purpose of many purge statutes is "to have the purge process implemented at the point in the election cycle where it is least likely to affect an election" because "[d]elay is inevitable in many situations," and people need time to re-register before an election).

Preventing purges like the Florida one at issue here was the precise reason Congress included the 90-day provision in the NVRA. States should not be allowed to purge suspected non-citizens from their voter rolls without providing adequate time for the inevitable eligible voters mistakenly entangled in the web to re-register, and for already harried election administrators to make the necessary adjustments to their lists.

CONCLUSION

The judgment of the district court should be reversed.

Dated: December 24, 2012

Respectfully submitted,

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Congressman Robert A. Brady (Pa.)

Ranking Member, House Administration Committee (112th Congress); Member, Subcommittee on Elections (112th Congress)

Congressman John Conyers, Jr. (Mich.)

Co-Sponsor of the NVRA (H.R. 2); appointed to conference committee

Congressman Charles A. Gonzalez (Tex.)

Member, House Administration Committee (112th Congress);
Ranking Member, Subcommittee on Elections (112th Congress)

Congressman John R. Lewis (Ga.)

Co-Sponsor of the NVRA (H.R. 2)

Congresswoman Zoe Lofgren (Cal.)

Member, House Administration Committee (112th Congress);
Chair, Subcommittee on Elections (110th and 111th Congress)

Congresswoman Eleanor Holmes Norton (D.C.)

Co-Sponsor of the NVRA (H.R. 2)

Former Congressman Allan B. Swift (Wash.)

Lead sponsor of the NVRA (H.R. 2); Chair, Subcommittee on Elections of the House Administration Committee (103rd Congress);
appointed to conference committee

Former Senator Wendell H. Ford (Ky.)

Lead sponsor of the NVRA (S. 2); appointed to conference committee

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B) and 29(d). The brief contains 3,469 words, not counting the certificate of interested persons, table of contents, table of citations, appendix and certificates.

Dated: December 24, 2012

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CERTIFICATE OF SERVICE

I certify that, on December 24, 2012, I served one copy of the foregoing Brief of Members of Congress as *Amici Curiae* in Support of Plaintiffs-Appellants and Urging Reversal on all counsel of record via the CM/ECF system.

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