UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI CIVIL DIVISION

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

KARLA VANESSA ARCIA, an individual, MELANDE ANTOINE, an individual, VEYE YO, 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, FLORIDA NEW MAJORITY, INC., a Florida 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.

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT

The Defendant provides no basis to conclude that implementation of its plan to remove non-citizens from the voter rolls is anything other than "a program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" fewer than 90 days prior to a federal election. 42 U.S.C. § 1973gg-6(c)(2)(A). Its opposition is not based on any of the terms in this statutory provision. Instead, Defendant argues there is a need to read an exception into a different statutory provision. But even if that were so, that would have no bearing on the 90-day provision, which bars Defendants' actions.

Based on the purported accuracy of its novel program, Defendant also denies Plaintiffs have standing or will suffer irreparable harm. But Congress made the judgment through the 90-day provision that such claims of accuracy would not be assessed on a case-by-case basis, because all systematic programs carried out this close to an election carry too high a risk of impeding the rights of *eligible* voters. Moreover, Plaintiffs have provided direct evidence of the risks here. As a result, Plaintiffs are entitled to a preliminary injunction. And indeed, Plaintiffs' showing of a legal violation entitles them to summary judgment without even the need to assess the other preliminary injunction factors.[1]

I. The Plaintiffs Have Established Standing

Both the individual and organizational Plaintiffs have standing to bring this suit. In April of this year, Florida began an illegal systematic purge effort during which the State wrongly identified the two named Plaintiffs in this case – Ms. Arcia and Ms. Antoine – as potential non-citizens and placed them on a list with 2,625 other individuals suspected of being non-citizens. SUF ¶¶ 2, 11. The State is now relying on that same list as the starting point for its revised purge operation. *Id.*; *see also* SUF ¶¶ 5-6, 11. Ms. Arcia and Ms. Antoine thus are *already* the subject of an unlawful systematic program designed to remove non-citizens from the rolls in contravention of the NVRA. That is sufficient to confer standing here. *See Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) ("where an alleged injury is to a statutory right, standing exists 'even where the plaintiff would have suffered no judicially

[1] Out of an abundance of caution, given the expedited nature of these proceedings, Plaintiffs here also respond to the arguments of Proposed Intervenors. As a result of the need to answer two briefs, Plaintiffs have taken 15 pages for their reply. Plaintiffs decided this was the best course given that this Court has not yet ruled on their motion to either strike Intervenors' filing or alternatively to give Plaintiffs extra pages.

cognizable injury in the absence of the statute'") (quoting *Warth v. Seldin*, 422 U.S. 490, 514 (1975)).

Moreover, because of their presence on the list, Ms. Arcia and Ms. Antoine are at a much higher risk than other citizens of (a) receiving letters requiring them to go through additional processes to ensure they are able to vote, and (b) being erroneously deleted from the rolls. This elevated risk of having to satisfy additional requirements to vote is another independent injury sufficient to confer standing. *See id.* ("[a] plaintiff need not have the franchise wholly denied to suffer injury"); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008) (discussing danger of being adversely affected as source of standing)

The organizational Plaintiffs also have standing. "An organization has standing to enforce the rights of its members 'when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). "To satisfy" these requirements, "all that plaintiffs need to establish is that at least one member faces a realistic danger" of being adversely affected by state action that the plaintiffs seek to enjoin. *Id.* at 1163. Ms. Arcia and Ms. Antoine are both members of Plaintiff 1199SEIU. Decl. of Dale Ewart, No. 12-cv-22282, ¶ 3, (S.D. Fla. Sept. 19, 2012), ECF No. 65-6. Because they face a realistic danger of being adversely affected by the planned purge, 1199SEIU has standing.

The other organizational Plaintiffs also face a realistic danger of having at least one member who is adversely affected. The Eleventh Circuit found standing in *Browning* where the state was employing a data-matching process before accepting voter-registration forms and there was some risk of error. Based on the size of the organizations in question and this risk of error, the court found it was "highly unlikely . . . that not a single member will" suffer the alleged injury. *Browning*, 522 F.3d at 1163. The court also rejected the argument – like the Defendant's argument here, *see* Opp. at 8 – that there was not an "immediate threat" to the plaintiffs, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), finding that the imminence of the upcoming elections satisfied that requirement. *Browning*, 522 F.3d at 1161.[2] Those holdings control here.

[2] The court also distinguished *Lyons* on other bases applicable here. *See id.* at 1162.

Similarly, in a case in which organizations challenged a state law that in some circumstances could prevent individuals from being able to vote provisional ballots, the Sixth Circuit held:

> Appellees have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus, a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there will be such mistakes. The issues Appellees raise are not speculative or remote; they are real and imminent.

Sandusky County Dem. Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004)

The Defendant responds that no one has standing because the planned purge will only remove non-citizens from the rolls. *See* Opp. at 9; *see also* Intervenors' Opp. at 16. But if defendants could avoid suit under the 90-day provision by submitting declarations predicting absolute accuracy, that would make it virtually impossible to enforce the 90-day provision – even though Congress expressly provided a private right of action for statutory violations. *See* 42 U.S.C. § 1973gg-9(b). And the whole point of the 90-day provision is to foreclose the need to make such individualized evaluations by categorically prohibiting systematic purges implemented too close to an election.

In any event, despite only having ten days of discovery after the State gave its first PowerPoint presentation on the new purge process, the Plaintiffs introduced more than enough evidence to establish standing under *Browning*. The Plaintiffs provided two Declarations explaining that the new purge program will inevitably be inaccurate, as they explain in more detail below. *See* Pl. Memo at 5-6 (citing Sancho Decl. and Smith Decl. and Rpt.); *infra* pp. 13-14. And they provided evidence that the organizational Plaintiffs represent thousands of individuals throughout Florida, many of whom were already injured by Florida's pre-SAVE purging, SUF ¶¶ 12-15, and therefore likely to be injured by the new purge based on the same list of "non-citizens."

Organizational Plaintiffs have standing for another reason as well: they will have to spend resources to confront the effects of the unlawful voter purge. *See* Rodriguez Decl. ¶¶ 3-4; Ewart Decl. ¶¶ 4-5; Seda Decl. ¶ 4. To establish standing, the organizational Plaintiffs need not – as the Defendant claims, *see* Opp. at 11 – aver exactly how much time and money they will expend in response to the planned purge. Instead, they must only "'reasonably anticipate[] that

they [will] have to divert personnel and time to educating volunteers and voters on compliance' with the new voting requirements" to possess standing to litigate a voting rights claim. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting *Browning*, 522 F.3d at 1165-66)).[3] Thus, "[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Id.* at 1165; *accord AFSCME Council 79 v. Scott*, 2012 WL 1449644, *2 (S.D. Fla. Apr. 26, 2012).[4]

II. The Plaintiffs Have Shown a Substantial Likelihood of Success on the Merits, Which Entitles Them to Summary Judgment As Well.

Remarkably for a case about statutory interpretation, the Defendant's entire brief barely discusses the text of the 90-day provision or the legislative history showing Congress' intent to promote voting even at some risk of inaccuracies in the voter rolls. The Defendant claims that "[t]he plain text of the NVRA proves that non-citizens may *either* be excluded at any time, or not at all." Opp. at 14 (emphasis added). But the Defendant offers no support for the first of these two propositions. Instead, the Defendant attempts to show that the plain text of the general removal provision, like that of the 90-day provision, *bars* removal of non-citizens – a peculiar starting point for the Defendant's effort to show that both provisions actually *permit* the purge in question. The Defendant then argues that this is an absurd result, and that this Court should therefore read *both* the general removal provision and the 90-day provision as concerned only with the "removal of people who were never properly registered to begin with." Opp. at 17. That is a non sequitur. Any absurdity that would result from following the plain language of the general removal provision would at most justify reading an exception into *that* provision; it would not justify reading another exception into the 90-day provision to permit systematic purges aimed at never-eligible voters within 90 days of an election. This is not a case where reading the 90-day provision as written would demonstrably be at odds with the intention of its

[3] *Leigh v. Warner Bros. Inc.*, 212 F.3d 1210 (11th Cir. 2000), which the Defendant cites for the proposition that "'conclusory allegations' . . . 'have no probative value," is entirely inapposite. In that *trademark* case, the non-moving party opposed evidence offered on summary judgment by offering a single statement as to when he first used a trademarked image. *Id.* at 1217. Under Eleventh Circuit precedent, that was insufficient to *rebut* the movant's affidavits. *Id.* But that case says nothing about the allegations necessary to assert standing in *any* case, let alone in this NVRA-specific voting rights case.

[4] The organizational plaintiffs' expenditure of time and resources constitutes cognizable injury despite Defendant's proclamation that the planned purge is permissible. The Defendant's argument goes to the merits of the dispute, not the Plaintiffs' standing.

drafters. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). It is entirely plausible that Congress would ban systematic purges aimed at non-citizens, just as it barred other systematic purges, in order to protect *eligible* voters from the inevitable inaccuracies of such purges too close to an election.

The Defendant makes only a token effort to support its claim that the plain language of the 90-day provision can be read to permit systematic purges aimed at non-citizens and other never-eligible voters. He claims there are three "straightforward readings" that would support his view. Opp. at 17. But none makes sense of the text.

The Defendant's first "reading" ends with the assertion that only some of the ineligible voters included on the official list of eligible voters are actually "on the official list of eligible voters" within the meaning of the 90-day provision. Opp. at 18. The conclusion that only some of the names on the list should be read as "on the list" is certainly not a textual one. The Defendant's second reading – grounded in subsection (b) of the NVRA – does not even reference the text of the 90-day provision. *Id.* Only his third reading even attempts to provide an explanation of how the terms of the 90-day provision justify the Defendant's conclusion. *Id.* at 19. And that reading was rightly rejected by the Northern District of Florida decision on which Defendant otherwise relies:

> The Secretary says subparagraph (a)(3)(B) allows removal on any ground "provided by State law," but that plainly is incorrect, first because that reading would render the rest of paragraph (a)(3)—and also section 8(c)(2)(A)—virtually superfluous, and second because in the vertical list with separate entries separately numbered and separated by semicolons, each separately numbered entry must be read as an integrated whole. The reference to removal "as provided by State law, by reason of criminal conviction or mental incapacity" thus means removal based on a criminal conviction or mental incapacity—but only to the extent state law provides for removal on those grounds.

U.S. v. Florida, 2012 WL 2457506, at *2 (N.D. Fla. June 28, 2012).

Defendant's " straightforward" readings also fail on their own terms. That the NVRA requires states to "ensure that any eligible applicant is registered to vote," Opp. at 17 (quoting 42 U.S.C. § 1973gg-6(a)(1)), and permits states to deny ineligible voters the ability to register, *id.* (quoting H.R. Rep. No. 103-9), does not mean the NVRA is only concerned with systematic *removals* aimed at individuals who were once eligible to vote. The 90-day provision explicitly applies to the systematic removal of any "ineligible voters," regardless of whether they were eligible when they initially registered. 42 U.S.C. § 1973gg-6(c)(2)(A). This reflects Congress'

concern about erroneous removals of *eligible* voters immediately before an election – which applies equally regardless of whether the individuals targeted were once eligible. Moreover, while the NVRA enumerates certain bases for removal that may apply to once-eligible voters, these bases could each apply to never-eligible voters as well; voters could be removed for "mental incapacity," for example, even if they were incapacitated when they initially registered. Rather than trying to infer the scope of the 90-day provision from irrelevant language elsewhere in the NVRA, the Court should discern that intent from the plain language of the 90-day provision itself.[5]

The Defendant's second proposed path is through subsection (b). But the Defendant does not even attempt to reconcile his argument here with the text of the 90-day provision. Moreover, subsection (b) imposes *additional* requirements on states with respect to programs to maintain "accurate and current" voter rolls, including that they be "uniform" and "non-discriminatory." 42 U.S.C. § 1973gg-6(b). It does not lower the restrictions imposed by the 90-day provision. Furthermore, to read the list-maintenance programs described in subsection (b) as exempt from the 90-day provision would be to read the 90-day provision right out of the statute. That is because list-maintenance programs are not limited to those programs applicable to never-eligible voters. They also include programs applicable to once-eligible voters – programs to maintain "*current* voter registration roll[s]." *Id*.

Thus, the Defendant provides no plausible argument that the text or purpose of the 90-day provision distinguishes between systematic removals aimed at once-eligible voters and those aimed at never-eligible voters. Nor can he. The original status of the voters targeted by the removal is irrelevant to the danger of erroneous removal which underlies the 90-day provision.

The Plaintiffs' alternative reading of the 90-day provision does not produce any "absurd result[s]." Opp. at 16. Under the Plaintiffs' view, the NVRA permits non-systematic removals during the 90-day quiet period regardless of who is being removed (Pl. Memo. at 10, 14) but bars

[5] In that vein, the legislative history on which Defendant relies, *see* Opp. at 18, merely shows that Congress wanted election officials to ensure that non-citizens were not registered in the first place. It reflects Congress' understanding that States would deal with the citizenship problem at the registration stage, rather than through voter purges conducted on the eve of elections.

all systematic removals within that same time period.[6] This view is entirely consistent with Congress' intent to protect eligible voters even at the potential cost of allowing some ineligible voters to remain on the rolls. *See* Pl. Memo. at 6-8. It is the Defendant's view that is absurd. Under Defendants' view, Congress barred during the quiet period systematic removal of individuals who were once eligible to vote – including those who moved to another state and thus were no longer Florida citizens – but permitted systematic removal of individuals who were not eligible in the first place. The harms if such individuals vote are identical. The risks to eligible voters from a systematic purge aimed at removing such individuals are also identical.

The Defendant nonetheless propounds an interpretation that leads to this absurd result and that is also inconsistent with the NVRA's text and legislative history, because for some reason he believes this is necessary to avoid a different absurd result. The Defendant argues that if the 90-day provision is read to prohibit systematic purges aimed at never-eligible voters within 90 days of an election, (1) the general removal provision would have to be read to prohibit all removals of never-eligible voters, (2) that would be absurd, and (3) both provisions must therefore be read to permitted as pertaining only to once-eligible voters. *See* Opp. at 14.

But Defendant's policy argument as to how the general removal provision must be read is unaffected by the Plaintiffs' reading of the 90-day provision on its terms. The Defendant's argument with respect to the general removal provision is not based on any specific terms in that provision and thus cannot possibly be undermined by the interpretation of terms in a different section. Instead, the Defendant essentially argues that an exception should be read into the general removal section in order to avoid an absurd result. But even if this were necessary, it could not possibly justify reading an exception into the 90-day provision when application of that section's literal terms would not lead to an absurd result and, indeed, where reading in the exception would itself create an absurd result.

The Plaintiffs agree with the Defendant to this extent: they believe that if there is a reasonable interpretation of the general removal provision that permits states to remove never-eligible voters, this Court should adopt it. The Defendant has the temerity to describe Plaintiffs' position as "result-oriented," Opp. at 14; *see also, id.* at 2, when the Plaintiffs merely propose

[6] In the unlikely event Florida discovers Fidel Castro's voter registration through a systematic voter removal program conducted within 90 days of a federal election, *see* Opp. at 16-17, it can always inform him that he will face felony prosecution if he actually votes, *see* 18 U.S.C. § 1015(f).

that interpretive consequences should be considered *if* the language of the NVRA reasonably permits it. In contrast, to reach a particular result, the Defendant argues for an interpretation he does not ground in the statutory language and that undermines a clear Congressional purpose written into the language of a second provision – the 90-day provision.[7] The Defendant's position is not warranted. But the Court need not resolve that question because there is a much more sensible way to arrive at the conclusion that the general removal provision permits removal of non-citizens.

The general removal provision states that "the name of a *registrant* may not be removed from the official list of eligible voters except" in certain circumstances. 42 U.S.C. § 1973gg-6(a)(3) (emphasis added). As Plaintiffs explained, the term "registrant" should be interpreted to apply only to individuals who were eligible to vote when placed on the rolls. The Defendant says this is not the ordinary meaning of the term. But it is a plausible meaning. And it provides a far stronger basis to conclude that the general removal provision permits removal of non-citizens than does Defendant's proposed alternative.

First, unlike the Defendant's interpretation, the Plaintiffs' interpretation is grounded in a statutory term: "registrant." The Defendant claims to be offering an "interpretation" of the general removal provision and the 90-day provision, but he does not actually interpret any specific terms in those provisions. He simply posits a distinction between once-eligible and never-eligible voters that he reads to exist throughout the NVRA. *See* Opp. at 14.

The Defendant responds that he could rely on the same sort of textual analysis as Plaintiffs. He contends that if a non-citizen is not a "registrant" under the general removal provision, then a non-citizen is also not a "voter[]" under the 90-day provision. Opp. at 15-16. That argument fails. The 90-day provision applies to any effort "to systematically remove the names of ineligible voters from the official lists of eligible voters." 42 U.S.C. § 1973gg-

[7] Plaintiffs believe that the general removal provision permits removal of non-citizens, but that is because they believe the term "registrant" can reasonably be read to permit this. But if, as Defendant posits, the plain meaning of the general removal provision bars removal of non-citizens at all times, that would in fact be an additional argument that the purge here is *prohibited*. Moreover, if the goal of permitting removal of non-citizens were deemed sufficiently critical to justify reading an exception into the general removal provision, that would not be an argument for also reading an exception into the 90-day provision – especially since doing so would undermine the 90-day provision's the clear purpose.

6(c)(2)(A). By its terms, therefore, the 90-day provision makes clear that "voters" refers to anyone on the official lists of eligible voters, including ineligible voters.[8]

Second, the Plaintiffs' interpretation of the general removal provision is superior to the Defendant's because it gives different meanings to provisions that use different terms. While the general removal provision uses the term "registrant," the 90-day provision applies to any systematic program "remov[ing] the names of *ineligible voters* from the official lists of eligible voters." *Id.* § 1973gg-6(c)(2)(A) (emphasis added). "[W]hen Congress uses different language in similar sections, it intends different meanings." *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004) (quoting *Iraola & CIA S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000)). Here, the most logical way to give the provisions different meanings is to read the general removal provision to place limitations on the bases on which states can remove "registrants" – those who were initially registered properly – and read the 90-day provision to limit a state's ability to conduct any systematic program to remove "ineligible voters" – individuals on the voting rolls that are currently ineligible whether they were initially eligible or not. The Defendant ignores the Plaintiffs' argument on this point altogether.

Third, as the Plaintiffs argued in their initial brief, the Defendant's reading also renders the 90-day provision almost entirely superfluous. Pl. Memo. at 16. Defendant admits that under his reading "the sole purpose of the 90-day provision . . . is to impose a quiet period on removal based on change in residence." Opp. at 16. Indeed, under Defendant's reading, the 90-day provision does not even do that much, since subsection (c)(2)(B)(ii) makes clear that certain types of removals based on a change in residence can occur within the quiet period. *See* 42 U.S.C. § 1973gg-6(d)(1)(B)(ii), *id.* § 1973gg-6(f); Pl. Memo. at 10-11. In enacting a sweeping bar on "any program the purpose of which is to remove ineligible voters" within 90 days of an

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[8] Defendant also submits that non-citizens "need not be 'removed' from the registry" because as non-"registrants," they were "never on [the registry] to begin with." Def. Br. 16. That is sophistry. The Defendant is only implementing the planned purge because he believes there are non-citizens on the list of eligible voters and he wishes to remove them.

The Defendant further asserts that the Plaintiffs' interpretation of the 90-day provision "collapses even on its own terms" because the provision is "simply a restriction on [the] programs that remove 'registrants'" under subsections (a)(3) and (a)(4) of the NVRA. Opp. at 16. But subsection (a)(3) says nothing about voter removal "programs," and subsection (a)(4) only describes one voter program states "shall" conduct. 42 U.S.C. § 1973gg-6(a)(4). By its terms, the 90-day provision applies to "*any* program," not just the one type of program to remove "registrants" set forth in subsection (a)(4).

election, Congress surely did not intend to impact only a narrow subcategory of scenarios involving changes in residence. The Plaintiffs' reading resolves that problem by interpreting the 90-day provision to apply to voter-removal programs beyond those discussed in the general removal provision – including voter-removal programs based on non-citizenship.

Most importantly, the Plaintiffs' interpretation avoids the need to read a gaping exception into the 90-day provision that is not warranted by either the text or purpose of that section. Whatever the merits of the Defendant's distinction between once-eligible and never-eligible voters with respect to the general removal provision, the Defendant does not even attempt to ground his preferred distinction in the text of the 90-day provision. He must thus show that this is the "rare case[] [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Ron Pair Enterprises, Inc.*, 489 U.S. at 242 (internal quotation marks omitted). He fails to meet that demanding burden. Indeed, he does not even dispute the Plaintiffs' claim that the literal application of the 90-day provision effectuates Congress' purpose in enacting the NVRA by protecting eligible voters from the errors inherent in election-eve purges. *See* Pl. Memo. at 7-8. Nor does he explain why Congress would attempt to protect the interests of eligible voters by prohibiting certain election-eve purges of once-eligible voters, but not such purges of never-eligible voters, when the threat to eligible voters from the two kinds of purges is the same.

Finally, the Proposed Intervenors' reading of the 90-day provision fares no better than the Defendant's. Their argument that the State's deliberate implementation of a multi-step methodology designed to remove non-citizens from the rolls does not constitute a "program" is on its face absurd. A program is a "plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done." Oxford English Dictionary (September 2012, online ed.); *see also* Free Merriam-Webster Dictionary (defining program as "a plan or system under which action may be taken toward a goal.")

Proposed Intervenors' reading depends on an artificial distinction between "programs" and "activities," and invented definitions for "programs" and "activities" that have no basis in the statutory text. Federal statutes frequently define programs or activities interchangeably. *See* 20 U.S.C. § 1687(1(A) (Title IX) (defining "program or activity" to mean "all of the operations of . . . [any] instrumentality of a State or of a local government"); 29 U.S.C. § 794(b)(1)(A) (Rehabilitation Act) (same). Moreover, when statutory terms are part of a list, they are generally

"given more precise content by the company [they] keep[]." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012).

As their only evidence that the NVRA distinguishes between "programs" and "activities," the Proposed Intervenors point to the language of subsections (a)(4) and (b). *See* Intervenors' Opp. at 6. But they misquote subsection (a)(4): the NVRA does not require States to "make[] a reasonable effort to remove the names of ineligible voters from the official lists" through either "programs" or "activities," as they claim; it requires States to "*conduct a general program* that makes a reasonable effort to remove the names of ineligible voters by reason of," death or a change in residence in accord with subsections (b), (c), or (d), 42 U.S.C. § 1973gg-6(a)(4) (emphasis added), and then separately requires States to ensure that any "program or activity" complies with the Voting Rights Act and does not remove voters for not voting, *see id.* § 1973gg-6(b). That statutory language does not even imply a distinction between the two terms. To the contrary, the programs referred to in subsection (a)(4) include what is specified in subsection (b), which uses both the term "program" and the term "activities."

Other parts of the statutory language also suggest Congress used the two terms interchangeably. Subsection (i) is entitled, "Public disclosure of voter registration *activities*." *Id.* § 1973gg-6(i) (emphasis added). The subsection then mandates that States "maintain . . . all records concerning the implementation of *programs and activities* conducted for the purpose of ensuring the accuracy and currency of official lists . . . ." *Id.* (emphasis added).[9] That is far better evidence of Congress' intent than anything the Proposed Intervenors can conjure.

Even if the NVRA did distinguish between the two terms, the Proposed Intervenors' definitions of the terms are baseless. The Intervenors provide no citation for their assertion that "a 'program' describes the implementation of a system under which the [SOEs] have no discretion," and that "'programs' are often systematic, jettisoning case-by-case inquiries in favor of formulaic processes." Intervenors' Opp. at 7. Implementation of programs often includes an element of discretion. *See Nev. Dep't of Human Res. V. Hibbs*, 538 U.S. 721, 734 (2003) discussing "discretionary family-leave programs"); *Saenz v. Roe*, 526 U.S. 489, 509 (1999) (stating that "TANF program gives the States broader discretion than did AFDC"); *Bowen v. Gillard*, 483 U.S. 587, 632 (1987) (referencing "the discretion that program officials must

[9] The Proposed Intervenors also misquote this section, omitting the mention of the term "programs." *See* Intervenors' Op. at 7.

inevitably exercise"); *Batterton v. Francis*, 432 U.S. 416 (1977) (discussing regulation authorizing states to exercise discretion under particular program). To the extent there is a distinction between activities and programs, the actions of an individual official, including SOEs, would constitute activities implementing the program. But there is no basis whatsoever to conclude that the overarching plan of the state is not a program.[10]

Thus, the Court should give effect to the plain meaning of the 90-day provision, and reject the Defendant's and the Proposed Intervenors' readings. It should therefore conclude Plaintiffs have shown a likelihood of success on the merits – and also that they are entitled to summary judgment.

III. The Plaintiffs Also Have Made the Required Showing on the Remaining Preliminary Injunction Factors.

The Plaintiffs have demonstrated that they will suffer irreparable harm if the Court does not enjoin the planned purge, and that the balance of harms and the public interest are in their favor.

Starting with irreparable harm, the State's planned purge threatens *citizens* who are eligible to vote and the organizations they belong to. The Defendant's suggestion that only non-citizens could be harmed by the State's unlawful purge is baffling. The NVRA's 90-day provision is a procedural protection designed to preserve citizens' fundamental right to vote based on Congress' determination that systematic purges conducted too close to an election are inherently – and categorically – too risky. The Plaintiffs have a statutory right to seek an injunction for a violation of the NVRA, 42 U.S.C. § 1973gg-9(b)(2), and their demonstration of an NVRA violation entitles them to a presumption of irreparable harm. *See United States by Mitchell v. Hayes International Corporation,* 415 F.2d 1038, 1045 (5th Cir.1969); *Gresham v.*

[10] The canon of constitutional avoidance has no relevance. The Florida statutes Proposed Intervenors cite have no bearing on the NVRA, and, in any event, there is nothing characterizing Fla. Stat. 98.065 as a program and Fla. Stat. 98.075 as an activity. If anything, the canon of constitutional avoidance counsels against the interpretation of Proposed Intervenors. The risk they claim to face is that their votes might be minutely diluted – something not recognized as a constitutional injury outside of specific types of claims – whereas the risks if the purge goes forward is that individuals will be denied their right to vote altogether. Congress struck the balance in the NVRA. Moreover, no interpretation could avoid the constitutional problem the Proposed Intervenors see, as the 90-day provision clearly limits *some* removals and any such limit would pose the risk they see.

Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984).[11]

The Defendant asserts that there will be no actual harm here because even if a citizen is wrongfully removed from the rolls between now and Election Day, "that individual can be immediately and retroactively restored to the voter rolls by the county supervisor. Even on election day, any person who has been removed from the voter rolls will be provided the opportunity to cast a provisional ballot." Opp. at 11. Defendant's "no harm, no foul" approach to voter removal misses the point that the NVRA does not require evaluation of harm for each particular purge. His approach also requires this Court to accept that the State will execute the purge with flawless precision, or be able to quickly remedy resulting errors before an eligible voter's right to vote is infringed.

Florida's rocky history with election administration provides ample evidence that this will not be the case. Every purge that the State has undertaken since 2000 has been rife with error, purging thousands of eligible voters. *See* Pl. Ex. B, ¶ 44; Pl. Br. 2-3. The State's April 2012 purge effort was no different – of more than 180,000 individuals initially targeted as alleged non-citizens, the vast majority turned out to be legitimate voters. *See id*. ¶ 39. The Court has no reason to credit the State's proclamation that this purge will be different from all the rest – particularly since the State's prior representations regarding its purge process have proved inaccurate. *Id*. ¶¶ 9, 17-29.

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[11] Proposed Intervenors' assertion (Intervenors' Op. at 14) that *Hayes International Corp.* is not binding on this Court is wrong. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981). Proposed Intervenors instead cite to the unpublished opinion in *C.B. v. Board of School Com'rs of Mobile Co., AL*, 261 F. App'x 192 (11th Cir. Jan. 7, 2008) for the proposition that no such presumption is warranted. But *C.B.* did not even cite *Hayes Int'l Corp.* or *Gresham* in apparent violation of the 11th Circuit's prior panel precedent rule. *See United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir.1997). *C.B.* should also be distinguished from the present case, which is closer to *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103 (11th Cir. 1994), which *C.B.* upheld. 261 F. App'x at 194. As in *Alabama-Tombigbee*, if Defendant improperly removed citizens from the voting rolls in violation of the NVRA's 90-day quiet period, "[a] simple 'excuse us' cannot be sufficient." 26 F.3d at 1106. As was the case in *Alabama-Tombigbee*, here "to allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act." *Id.* at 1107. Even under the more restrictive test outlined in *C.B.*, therefore, this Court has "the authority to grant injunctive relief" even without applying the irreparable harm test because "a federal statute has been violated and . . . the statute at issue . . . would be eviscerated if such relief were not granted." 261 F. App'x at 194.

In fact, the procedures for the SAVE purge outlined in the Matthews Declaration do not squarely address the high likelihood of error that Plaintiffs identified. While the Matthews Declaration purports to outline the steps that the 67 SOEs should take to effectuate the purge, the SOEs remain confused as to how to implement it. *See* Pl. Ex. A (Decl. of Ion V. Sancho), ¶¶ 18-24. The Florida Department of State's presentation to SOEs concerning the purge process resulted in a proliferation of questions without clear answers. *See id.* at ¶ 21. The fact that a current SOE remains confused about the purge process is itself proof that, despite the Secretary's protestations to the contrary, the policy will engender confusion and increase the likelihood of citizens being erroneously removed from the rolls. *See id.* at ¶¶ 18-24. And the SOEs certainly will not have time to conduct investigations to determine the accuracy of information they obtain from the State before sending letters to those the State deems to be potential non-citizens, since such letters must go out at least 30 days before the election. At bottom, the strong likelihood of error, combined with the lack of sufficient time to carefully and thoroughly correct all such errors, presents "a risk too weighty to bear this close to a major election." *Id.* at ¶ 25.[12]

Moreover, the remedies the Defendant suggests – "immediately and retroactively restor[ing]" a wrongfully purged voter to the rolls or permitting such a voter to cast a provisional ballot, Opp. at 11 – are insufficient to prevent harm. Once a citizen is removed from the rolls as part of the purge, that voter will have to undertake the burden of proving his or her citizenship in order to be restored to the rolls. The imposition of this burden is itself an injury. *See supra* p. 2 (citing *Common Cause/Georgia*, 554 F.3d at 1351). Additionally, a voter may not know he has been purged until he shows up on Election Day. Requiring that voter to then cast a provisional ballot is again a burden on his right to vote. *See Common Cause/Georgia*, 554 F.3d at 1351-52 ("Requiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing.") No matter how the

[12] In suggesting that there is no problem of matching among databases, the Matthews Declaration fails to account for the fact that one of the bases for automated matches does not require either a driver's license number or a social security number but instead relies on a "generated number using an algorithm incorporating FVRS registration data." Pl. Ex. A, Tab 6, p.6. *See also* Matthews Decl. ¶ 9. In addition, it relies on a manual review process including factors such as "photo." Pl. Ex. A, Tab 6, p. 7. Thus, the potential remains for mismatches of the type Plaintiffs identified. *See Id.* ¶ 23; Pl. Ex. B, ¶ 42. Moreover, the declaration presumes initial matching between voter rolls and driver's license databases, but as the Smith Declaration explains, half of the names on the list of 2,625 did not even come from this matched list. Pl. Ex. B, ¶¶ 28-34.

Defendant tries to slice the issue, the Plaintiffs have made the required showing of irreparable harm in this case.[13]

As for the balance of harms and the public interest, the Defendant's argument is based entirely on the premise that the Plaintiffs are seeking to protect non-citizens. *See* Opp. at 20. But as the Plaintiffs have made clear throughout these proceedings, the State's planned purge threatens to strip *eligible* voters – including the individual Plaintiffs – of their fundamental right to participate in the upcoming election. That is both a significant harm to the Plaintiffs and a detriment to the public interest. *See, e.g.*, *Summit County Democratic Central & Exec. Committee v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("There is a strong public interest in allowing every registered voter to vote freely."). The harm to the State, on the other hand, is relatively minor and purely speculative: even in the Defendant's telling, the potential number of non-citizens is a miniscule percentage of the total number of eligible voters, and of those potential non-citizens, there is no evidence that any of them will risk felony prosecution to actually cast a vote in November. Indeed, by banning systematic purges within 90 days of an election, Congress expressed its view that the elevated risk of disenfranchising eligible voters on the eve of an election outweighed any theoretical reduction in voter fraud. The Court should reach the same conclusion.

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[13] The Court should not deny the Plaintiffs preliminary relief simply on the basis of Plaintiffs' purportedly inexcusable delaying in filing their motion. *See* Opp. at 12. Courts deny preliminary injunctive relief when a party uses "an emergency created by its own decisions concerning timing to support a motion for preliminary injunction." *U.S. Bank Nat'l Ass'n v. Turquoise Properties Gulf, Inc.*, No. 10-cv-0204-WS-N, 2010 WL 2594866, *4 (S.D. Ala. June 18, 2010). Alternatively, courts deny preliminary injunctive relief when the defendant has been "lulled into a false sense of security and acted in reliance on the plaintiff's delay.'" *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) (quoting *Ideal Industries, Inc. v. Gardner Bender, Inc.*, 612 F.2d 1018, 1025 (7th Cir. 1979)).

Neither of those conditions is met here. The Plaintiffs filed this motion one week after learning that the Defendant re-initiated the purge program by conducting a statewide training program for SOEs on the SAVE database. Because the purge program has gone through various incarnations and stops-and-starts since the filing of the initial Complaint in this case, the Plaintiffs reasonably waited until the Defendant took affirmative steps to re-engage the program before seeking injunctive relief. And the Plaintiffs have consistently communicated to the Defendant their belief that any execution of the Defendant's planned purge based on notification sent to voters after August 8, 2012 would violate the 90-day provision with respect to the November 6 election. *See* First Am. Compl. ¶ 39; *see also* Letter from Marc Goldman to Dan Nordby (Aug. 3, 2012) (Exhibit A). In any case, Defendant's argument about preliminary relief has no bearing on Plaintiff's motion for *summary judgment*.

Dated: September 28, 2012

Respectfully submitted,

/s/ John De Leon

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 28, 2012, a true and correct copy of the foregoing was served on all counsel of record via CM/ECF.

Dated: September 28, 2012

By: /s/ John De Leon
John De Leon

EXHIBIT A

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August 3, 2012

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VIA EMAIL AND UPS

The Honorable Ken Detzner
Secretary of State
Florida Department of State
c/o Daniel Elden Nordby, Esq.
Ashley Davis, Esq.
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RE: *Arcia v. Florida Secretary of State*, No. 12-cv-22282 (S.D. Fla. filed June 19, 2012).

Dear Secretary Detzner:

We are writing on behalf of our members, constituents, clients and ourselves in the above-captioned matter and those similarly situated – *i.e.*, organizations and individual U.S. citizens registered to vote in the State of Florida who have been and continue to be effected by the State's systematic efforts to remove alleged noncitizens from the voting rolls in advance of the August 14 and November 6, 2012, federal elections, to once again notify you of ongoing violations of the National Voter Registration Act of 1993 (NVRA) in your State.

On May 24, 2012, certain co-counsel in this matter wrote to notify you that the process by which the State of Florida was removing voters whom it alleges are noncitizens violates the NVRA. Specifically, Florida's removal program violates NVRA in two ways. First, it is a program to "systematically remove ineligible voters" from the rolls within 90 days of a federal election as is prohibited by the NVRA. *See* 42 U.S.C. § 1973gg-6(c)(2). Second, it has employed a flawed and inaccurate matching system that relies on information contained in the Department of Highway Safety and Motor Vehicles (DHSMV) database and on juror questionnaires and produced an egregiously over-inclusive purge list that included numerous duly registered U.S. citizens. In addition to being inaccurate, this matching system resulted in the targeting of Latinos, Haitian Americans, and other minority voters in Florida in violation of NVRA Section 8(b)(1)'s requirement that any state program to maintain an accurate and current voter roll must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." *Id.* § 1973gg-6(b)(1).

Plaintiffs in *Arcia v. Florida Secretary of State*, No. 12-cv-22282 (S.D. Fla. filed June 19, 2012), have been harmed by Florida's violations of the NVRA described above. Individual Plaintiffs Karla Vanessa Arcia and Melande Antione are U.S. citizens and duly registered Florida voters. Ms. Arcia and Ms. Antione are Nicaraguan-American and Haitian-American, respectively. Both

were inaccurately and improperly identified as potential noncitizens by Florida's removal program within 90 days of a federal election – *i.e.,* the August 14, 2012, primary election. Organizational Plaintiffs Veye Yo, Florida Immigrant Coalition, Inc., National Congress for Puerto Rican Rights, Florida New Majority, Inc., and 1199SEIU United Healthcare Workers East all, in accordance with their organizational purposes, devote energy and resources to ensuring that their U.S.-citizen members are able to lawfully exercise their civic and democratic rights, including the right to vote. As a result of Florida's systematic program to remove alleged noncitizens from the voting rolls in advance of the upcoming federal elections, Organizational Plaintiffs have been forced to take action to mitigate problems caused by Florida's failures under the NVRA and to divert resources from their other normal activities to ensure that their members are not deprived of their voting rights.

Since first notifying you in May that Florida's registered voter removal program violates the NVRA, Plaintiffs have on multiple other occasions expressed their concern over the ongoing unlawful nature of the program, including by filing the above-captioned case on June 19, 2012, at a status hearing before the United States District Court for the Southern District of Florida on July 23, 2012, and by letter on July 27, 2012.

Although Plaintiffs have thus already provided notice of Florida's violations under the NVRA in accordance with 42 U.S.C. § 1973gg-9(b), with ample time to cure them, and despite the apparent futility of doing so again, given the First Affirmative Defense pled in your July 12, 2012 Answer, and in light of recent reports that Florida intends nevertheless to resume its program to remove noncitizens from its voter rolls, Plaintiffs are compelled to again express our concerns.

It is our understanding, from reports in the press, that Florida intends to proceed with its program to remove additional voters from the rolls prior to at least the November 6, 2012, general election. To the extent Florida intends to seek to conduct a program to remove voters from the State's rolls based on their alleged noncitizenship prior to the August 14, 2012, primary election, doing so will violate the NVRA's prohibition on systematic purges within 90-days of a federal election. As the deadline for completing any such voter removal program in advance of the November 6 general election is August 8, 2012, any actions the State takes to systematically remove voters from the rolls after date will also violate the NVRA. *See* 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.").

Additionally, in light of reports that Florida is in negotiations with the U.S. Department of Homeland Security to finalize the terms of the State's access to DHS' Systematic Alien Verification for Entitlements (SAVE) database, Plaintiffs hereby notify you of their belief that use of this database will not cure the violations under Section 8(b)(1) of the NVRA identified in our letter of May 24 but instead will itself constitute a violation. It is our understanding that to utilize the SAVE database in a voter removal program, Florida must first prepare a list of alleged noncitizen registered voters. To the extent such a list is prepared by matching names of

registered voters with information contained in the DHSMV database or on juror questionnaires, Plaintiffs believe the program will inevitably run afoul of the NVRA's requirement that voter removal programs be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," 42 U.S.C. §§ 1973gg-6(b)(1), as well as Section 2 of the Voting Rights Act, *id.* § 1973. Should Florida instead seek to develop a preliminary list of alleged noncitizens to compare with the SAVE database through other means, Plaintiffs do not believe it possible that any such action, taken this close to the Election, could be completed in a nondiscriminatory fashion, with the level of accuracy and reasonableness required by the NVRA.

Plaintiffs therefore submit this supplemental letter to provide you with further notice of a continuing violation of the NVRA – expressly including systematic efforts to remove non-citizens going forward. As you are no doubt aware, Congress enacted the NVRA for the express purpose of reinforcing the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements. *See* 42 U.S.C. § 1973gg(a), (b). The voter removal program that Florida has recently pursued, and the one with which the State has indicated it will proceed prior to the coming general election, are inconsistent with this stated purpose as well as with the specific provisions of the Act identified above. We therefore respectfully request that as Florida's Secretary of State, you take action to remedy the harms incurred as a result of the voter removal program and stop any future NVRA violations within 20 days of the date of this letter. As we informed your counsel, Mr. Daniel Nordby, at the July 23 status hearing in this matter, Plaintiffs intend to amend their Complaint and to continue to prosecute their claims to ensure that all duly registered voters in the State of Florida are permitted to exercise their right to vote on Election Day. We appreciate your cooperation and thank you for your prompt attention to this matter.

Sincerely,

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