UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 1:12-cv-22282-WJZ
Honorable Judge William J. Zloch

KARLA VANESSA ARCIA, et al.,

Plaintiffs,

v.

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

Defendant.
_____/

THE SECRETARY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

There is persuasive evidence that a significant number of non-citizens are on Florida's voter rolls. Under both state and federal law, Secretary of State Detzner ("Secretary") has a clear responsibility to protect the votes of citizens by preventing voter fraud. Here, the Secretary is using the most accurate information available to identify potentially ineligible voters. As a result of those efforts, no individual will be identified as even a *potential* non-citizen unless the Florida Department of State (FDOS) reaches that preliminary determination through a process involving a careful data match on *multiple* criteria, verification of unique identifiers through the Department of Homeland Security's rapidly updated database of legal aliens (the "SAVE" database), and a manual confirmation of the automated result. Such an individual, moreover, will then be provided with 30 days notice and an opportunity to respond, before a local election official will make an independent confirmation that the individual is a non-citizen. In short, it is difficult to imagine any more accurate method of protecting the integrity of the voter rolls, and Plaintiffs have suggested none.

In an eleventh hour motion, Plaintiffs argue that this process violates the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, by causing the removal of ineligible voters within 90 days of a federal election. Pls.' Mot. 9-17. And they seek both a preliminary and a permanent injunction based on their bald assertion that the Secretary's use of SAVE data "creates the risk that the Plaintiffs and similarly situated individuals will be removed from the voting rolls without justification." Pls.' Mot. 18.

Plaintiffs' unsupported hypotheticals of a "risk" of eligible voters being denied the right to vote cannot establish standing, let alone the irreparable injury needed to justify a preliminary injunction. Nor can the Organizational Plaintiffs demonstrate standing with vague assertions that they are "forc[ed]" to "divert scarce resources they would use for other purposes to educating, addressing, or otherwise protecting their members" against the Secretary's actions. Pls.' Memo. at 17. Such conclusory assertions are woefully inadequate to support an injunction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Moreover, any such diversion cannot create standing because it is based on Plaintiffs' own unfounded speculation about hypothetical harms.

In any event, as Judge Hinkle correctly concluded in *United States v. Florida*, No. 12 Civ. 285, 2012 WL 2457506 (N.D. Fla. June 28, 2012) ("DOJ Case"), Plaintiffs' claim clearly fails on the merits. Under the plain text of the NVRA, the only potential exceptions to the ban

on removing voters within 90 days of an election are the exceptions to the general ban on removing voters at any time, found in subsections (a)(3) and (a)(4). *Id.* The 90-day provision, found in subsection (c)(2)(A), incorporates all the exceptions from the general removal provision, save for change in residence. *Id.* Thus the NVRA either permits the exclusion of non-citizens from the rolls at any time, or never. Plaintiffs concede that removal of non-citizens *outside* of 90 days must be allowed under (a)(3) and (a)(4), as the NVRA surely does not permanently ban States from ever removing improperly registered non-citizens. Yet that necessarily means that the removal of non-citizens is also excluded from the 90-day provision.

Specifically, Plaintiffs propose a results-driven interpretation that an improperly registered voter is not a "registrant" at all—such that he is not protected under subsections (a)(3) and (a)(4)—because his registration was void *ab initio*. But the logic of that argument inexorably applies with equal force inside 90 days, as a *non*-registrant plainly cannot be a "voter" on the "list of eligible voters" subject to the 90-day provision. Plaintiffs' contrary reading not only is unprincipled, but also would produce the absurd result of placing greater restrictions on the exclusion of *fraudulently* registered individuals than on the removal of *properly* registered voters who later lose eligibility.

In short, the NVRA distinguishes between once-eligible voters who later lose their eligibility, and never-eligible individuals whose attempted registration is void *ab initio*. The former group is entitled to various procedural protections before "removal," including a 90-day quiet period for voters who have changed residence. The latter group, by Plaintiffs' own concession, is deemed never to have been registered and thus is never placed on the list of eligible voters at all. Such individuals are therefore not entitled to the protections governing removal, including the 90-day period.

BACKGROUND

A. Registry Maintenance Obligations Under State And Federal Law.

State and federal law both require the Secretary and county supervisors to review Florida's voter registry and remove improperly registered voters from the rolls. These laws serve well-established and deeply compelling public interests: preventing ineligible voters from participating in elections avoids the dilution of citizens' fundamental right to vote and protects the legitimacy of the democratic process. As the Department of Justice ("DOJ") recently emphasized in the Supreme Court, "the federal and state governments have a compelling interest

in excluding foreign citizens" from the political process. Motion of the United States to Dismiss or Affirm at 11, *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (No. 11-275), 2011 WL 5548718. Such exclusion is neither an "invidious attack" on these individuals nor "a deficiency in the democratic system"; rather, it is "a necessary consequence of the community's process of political self-definition." *Id.* at 15 (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1981)).

Specifically, Florida law, as precleared by the Justice Department under the Voting Rights Act, requires that the Secretary and county supervisors "protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records." Fla. Stat. § 98.075(1). As part of this duty, the Secretary may access information from state and federal officials "[i]n order to identify ineligible registered voters and maintain accurate and current voter registration records in the statewide voter registration system." Fla. Stat. § 98.093. If the Secretary or supervisor receives information that a registered individual is ineligible, Fla. Stat. § 98.075(7) provides that the supervisor must observe the following procedure to determine if the individual should be removed from the statewide voter rolls:

1. Notice and an opportunity to respond. The supervisor must provide notice by certified mail informing the individual of his or her potential ineligibility, disclosing that failure to respond within 30 days may result in removal from the rolls, and informing the recipient that he or she has a right to a hearing. The notice must further include a return form that requires the voter to admit or deny the basis for ineligibility.
2. Allow voter 30 days to respond.
3. Provide a hearing if requested by the voter.
4. Determine eligibility of the registered voter based on a preponderance of the evidence.

Federal law places a similar obligation on the Secretary. The Help America Vote Act ("HAVA") requires the Secretary to "ensure that voter registration records in the State are accurate and are updated regularly" in order to "remove registrants who are ineligible to vote." 42 U.S.C. § 15483(a). Moreover, the Secretary is required to review data from "the database of the motor vehicle authority" in order to verify the accuracy of voter registration information. *Id.*

The NVRA imposes additional restrictions on States' maintenance of voter registries. First, the NVRA requires that any state efforts aimed at "[c]onfirmation of voter registration" in order to "protect the integrity of the electoral process" must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965" and may not remove a voter based on the failure to vote absent certain procedural safeguards. 42 U.S.C. § 1973gg-6(b). The Act also

imposes additional restrictions on state efforts to "remove" "eligible voters from the rolls." *Id.* § 1973gg-6. Specifically:

- Subsection (a)(3) provides an exclusive list of the bases on which a registrant can be removed from the voting rolls: "[T]he 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)." (Emphasis added.)

- Subsection (a)(4), in turn, requires that States conduct a voter removal program, *i.e.*, "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 subsection (b), (c), and (d) of this section."

- Subsection (c) describes how states may operate the aforementioned "Voter removal programs" that are "require[d by] subsection (a)(4)." As relevant here, subsection (c)(2)A) provides that, "[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."

- However, the 90-day bar does not apply to removal on any enumerated ground for removal except change of residence. That is, subsection (c)(2)(A) "shall not be construed to preclude—(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) [by request] or (B) [as provided by State law, by reason of criminal conviction or mental incapacity]; or (4)(A) [death]."

Thus, at any time, the NVRA prohibits the "removal" of names from the list of "eligible voters" except for the reasons listed in subsections (a)(3) and (a)(4). Moreover, *one* of the permissible grounds for removal under (a)(3) and (a)(4)—change in residence—cannot be used as a basis for systematic removal within 90 days of an election.

B. The Secretary Obtains Screening Information From DHSMV.

Pursuant to the foregoing obligations, FDOS and county supervisors regularly engage in efforts to identify ineligible voters on the State's voter registration rolls. For example, FDOS receives monthly reports of: deceased adults from the Florida Department of Health; persons adjudicated mentally incompetent from each clerk of the circuit court; and persons who have become licensed to drive in other states from DHSMV. *See* Fla. Stat. §§ 98.075, 98.093.

In 2011, as required by federal law, the Secretary worked with the DHSMV to locate records in the "MDAVE" database of driver records pertaining to individuals on the voting rolls. *See* Secretary Exhibit 1, Declaration of Maria Matthews ("Matthews Decl.") ¶ 4. This matching

process produced DHSMV records for 11 million registered voters. Among those 11 million records, approximately 180,000, or 1.6%, contained information suggesting that registered voters had at some time provided DHSMV with identification, such as a foreign passport or green card, indicating that they were non-citizens. *Id.*

On August l, 2011, in an effort to obtain the most current and reliable information possible, FDOS sought access to DHS's SAVE database to determine the eligibility of voters to be registered. Matthews Decl. ¶5. SAVE is a rapidly updated federal database that allows state and local governments to check the most recent immigration status of non-citizens who lawfully entered the United States. *See* What Is SAVE, *available at* http://www.uscis.gov/save (last visited Sept. 26, 2012). However, after continued delay by DHS in granting FDOS access to SAVE, the Secretary proceeded in April 2012 to forward a sample of roughly 2,600 records to county supervisors for their additional review. Matthews Decl. ¶ 6.[1]

In distributing the initial sample of MDAVE data, FDOS reminded supervisors:

> The list that you will be receiving represents only non-immigrants initially identified in DHSMV's DAVE . . . . Please remember that you are still responsible for contacting these individuals and going through the process of verifying citizenship status before making a determination of eligibility for voter registration. You must follow the same procedures, in law, that you have in the past whenever you receive information that a registered voter of yours is ineligible to be registered to vote.

Exhibit 2 at 1. This process successfully uncovered improperly registered voters. Matthews Decl. ¶ 19. Nonetheless, in order to make its review as accurate as possible, in April 2012 FDOS stopped sending names of potential non-citizens to county supervisors based on the MDAVE data until the results could be confirmed through SAVE. Matthews Decl. ¶ 5-6.

[1] Plaintiffs and their "expert" attack the strawman that the list was a *random* sample and ascribe sinister motives to evidence that it was not. *See* Pls.' Mot. at 4 n.1; Smith Decl. ¶¶ 21-36. Yet the Secretary has never suggested that the sample was a statistically-drawn random one; rather, nearly half of the sample included the names of registered voters who, according to MDAVE, entered the country on non-immigrant visas and were therefore least likely to have recently become naturalized citizens. There is, of course, nothing improper about the Secretary focusing his limited resources on the individuals most likely to be improperly registered.

C. Florida Obtains Access To SAVE And Begins To Confirm MDAVE Results.

On July 14, 2012, FDOS announced that it had received permission from DHS to access SAVE and would confirm the results of its MDAVE search and resume transmitting the names of likely ineligible voters to county supervisors. Exhibit 3. FDOS entered a Memorandum of Agreement ("MOA") with DHS on August 14, 2012. Matthews Decl. ¶ 7.

In order to check the immigration status of an individual in SAVE, FDOS must have the individual's Alien Registration Number or "A-number," a unique 9-digit identifier given only to non-citizens. Matthews Decl. ¶ 17. Florida has A-numbers from some individuals based on identification they presented to DHSMV. *Id.* ¶¶ 14-15. To confirm that A-numbers from DHSMV match the individual on the voter registry, FDOS has conducted an automated match of the individual's first name, last name, and unique identifiers (*i.e.*, a social security number or driver's license number). *Id.* ¶¶ 9-10. Moreover, this automated check is then manually re-checked based on first name, last name, and address, signature, or photograph. *Id.* ¶ 11.

After confirming to a practical certainty that a given A-number corresponds to the name of an individual on the voter rolls, FDOS enters the A-number into SAVE. *Id.* ¶¶ 12-15. If the results of that query indicate that the individual in question has been naturalized, FDOS takes no further action to investigate his or her potential removal from the rolls. *Id.* ¶ 16. If the individual's A-number indicates that the individual remains a non-citizen, FDOS requests a second-level confirmation from SAVE. *Id.* ¶ 16-17. Once this confirmation is obtained, FDOS will transmit the name to the appropriate county supervisor who will then provide the individualized notice, opportunity to respond, and individualized determination outlined above. *Id.* ¶¶ 18.

To date, the Secretary's data matching program has identified at least scores of registered voters who have either personally attested to their lack of citizenship or who, after the data-matching process described above, appear to be ineligible registered voters based on non-citizenship. *Id.* ¶ 19.

Like Plaintiffs here, DOJ sought to enjoin removal of non-citizens because it purportedly violates the NVRA's 90-day provision. *See* DOJ Case, *supra*. Judge Hinkle denied the injunction on June 28, 2012, holding that "if, as both sides concede, [](a)(3) does not prohibit a state from removing an improperly registered noncitizen, then [](c)(2) does not prohibit a state from systematically removing improperly registered noncitizens during the [90-day] quiet

period." *Id.* at *3. DOJ did not appeal this decision and has made no effort to enjoin the Secretary's identification of non-citizens pursuant to the SAVE data.

D. Plaintiffs File Suit But Wait Months Before Seeking "Emergency" Relief.

Plaintiffs filed a Complaint on June 19, 2012, in which they challenged the Secretary's practice of transmitting the names of potentially ineligible voters to county supervisors. DE 1. Plaintiffs alleged that the practice was discriminatory in violation of the NVRA and Section 2 of the Voting Rights Act and would violate the NVRA by resulting in the removal of registered voters within 90 days of a federal election. *Id.*

Despite their belief that the Secretary's practice was sufficiently certain and imminent to create a case or controversy justifying their federal suit, Plaintiffs did not seek preliminary relief. Moreover, Plaintiffs attended a status conference with the Court on July 23 (DE 30), and filed Rule 26(f) reports on August 9 (DE 33–35), without ever moving for a preliminary injunction or suggesting they would do so. Likewise, even after FDOS signed its MOA with DHS on August 14, 2012—which, Plaintiffs emphasize, made clear that the Secretary would resume the transmission of names to county supervisors—Plaintiffs did not promptly seek preliminary relief.

Although Plaintiffs' motion and "expert" report speculate (without citing any actual evidence) that the Secretary's current efforts to maintain accurate voter rolls are discriminatory, Plaintiffs agreed on September 12, 2012, to dismiss all the claims in their complaint that asserted discrimination. DE 71. The only claim that remains in this case is Plaintiffs' assertion that the NVRA bars Florida from causing the systematic removal of registered voters, for any reason, within 90 days of a federal election. DE 57 ¶¶ 44-50. On September 19, *three months* after Plaintiffs filed their Complaint, and *two months* after the Secretary announced access to SAVE, Plaintiffs filed their motion for a preliminary injunction and summary judgment. DE 65.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). One crucial element of this limitation is the requirement that claimants "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Each claimant must prove a "personal injury fairly

traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief," *Allen v. Wright*, 468 U.S. 737, 751 (1984). A merely "conjectural or hypothetical" harm is insufficient. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

The Individual Plaintiffs—Ms. Arcia and Ms. Antoine (*see* Am. Compl. ¶ 9 n.1 (DE 57))—have obviously failed to meet this burden. Even in the Amended Complaint, the Individual Plaintiffs have simply conclusorily alleged that their "rights have been, and will continue to be, adversely affected by" the Secretary's SAVE data matching—yet they pled *no* supporting facts for that allegation. *Id.* ¶¶ 9–10. The Individual Plaintiffs repeat this failure on summary judgment: the *only* harm they allege is that the SAVE data matching "abridge[es] [their] right to vote" and "creates the risk that [they] will be removed from the voting rolls without justification and without time for recourse." Pls.' Memo. at 17–18. But Plaintiffs fail to offer *even a single citation* to an affidavit, deposition, or discovery response to support these hyperbolic allegations. *See id.* This failure would doom their standing allegations even if they were simply *resisting* summary judgment. *See, e.g.*, *Lujan*, 504 U.S. at 561 (holding that, on summary judgment, "the plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts" demonstrating standing). And, of course, Plaintiffs here seek *final* judgment in their favor, so their evidentiary burden is even greater. *See id.*

Moreover, Plaintiffs *cannot* credibly allege the likely injury needed to establish standing since the only "harm" they can or do allude to is, at the very best, "conjectural and hypothetical." *Lyons*, 461 U.S. at 102. Plaintiffs are *citizens* (*see* Am. Compl. ¶¶ 9-10), so the only way they run a "risk [of] be[ing] removed from the voting rolls" (Pls.' Memo. at 18) is if FDOS's data matching is likely to falsely identify them as non-citizens. Yet Plaintiffs provide *no* basis for inferring that they (or even people similar to them) will be mistakenly removed as non-citizens.

Plaintiffs do not even allege—and cannot prove—that there is any flaw in the Secretary's SAVE data matching, much less a systemic flaw likely to ensnare them or a substantial number of people. Plaintiffs do not contend that SAVE inaccurately identifies citizens as non-citizens. Nor do they explain how the Secretary's implementation of the straightforward comparison of the SAVE database and the voter rolls could produce such "false positives." The Secretary does not transmit results to a county supervisor unless, in addition to confirming the potential non-citizen's first name, last name, and address, he also has confirmed a host of unique identifiers, including social security number or driver's license number, signature, photograph, and A-

number. *See* Matthews Decl. ¶¶ 9-18. Thus, the *only* individuals against whom the county supervisors might initiate the notice-and-hearing procedure are those facing an overwhelming case that they are non-citizens whose registration and voting are criminal offenses—*i.e.*, those whom SAVE's records indicate are non-citizens and whose identity the Secretary has confirmed through a unique A-number and a unique social security number or driver's license number. *See id.*; *see also* §§ 97.041, 104.011, 104.15 Fla. Stat.; 18 U.S.C. §§ 611, 1015(f).

Thus, the only person who faces a risk of erroneous removal is a citizen who has the same first name, last name, address, social security number or driver's license number, and A number as a non-citizen—and who fails to respond to the notice with proof of citizenship or mistaken identity within 30 days. Since social security numbers, driver's license numbers, and A-numbers are *unique*, there is no meaningful possibility of this tortured hypothetical of unremedied mistaken identity coming to pass. There certainly is no "real and immediate" threat that this will occur to anyone, and certainly not to Plaintiffs. *Lyons*, 461 U.S. at 102. In short, the only persons facing a real and immediate threat of "injury" from the Secretary's activities are *non-citizens* who will now be detected. But, of course, that is not a *legally cognizable* injury since no one can claim a "right" to cast an illegal vote. Thus, Plaintiffs face the impossible task of having citizens allege injury because non-citizens will be excluded.

2. The Organizational Plaintiffs offer no argument or evidence that they have standing to sue on behalf of their members who "would otherwise have standing . . . in their own right," *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Nor could they do so because, as explained, no citizen member has standing. *See supra* Part I.A.

The Organizational Plaintiffs thus focus their standing allegations on the claim that the Secretary's SAVE data matching harms them "by forcing them to divert scarce resources they would use for other purposes to educating, addressing, or otherwise protecting their members" against the Secretary's actions. Pls.' Memo. at 17. Yet the Organizational Plaintiffs' perfunctory attempt to establish resource-diversion standing fails for numerous reasons.

First, and dispositively, the Organizational Plaintiffs offer *no specific facts* to demonstrate that they actually *will* divert resources on their alleged "educational" and "protection" campaigns. The Organizational Plaintiffs offer *no* evidence regarding the amount of money, personnel, or other resources they will expend on providing an education universally available on the internet and in the individual notices. *See* Pls.' Memo. at 17; *see also, e.g.*,

Rosario Decl. ¶¶ 3, 4 (DE 65–5); Ewart Decl. ¶¶ 4, 5 (DE 65–6); Seda Decl. ¶ 4 (DE 65-7). Plaintiffs' "conclusory allegations" that they will divert unspecified resources to unnecessary educational activities "have no probative value," *Leigh v. Warner Bros.*, 212 F.3d 1210, 1217 (11th Cir. 2000), and cannot discharge Plaintiffs' burden of proof to establish standing at for an injunction, *see, e.g.*, *Lujan*, 504 U.S. at 561; *cf. Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350–51 (11th Cir. 2009) (finding standing where organization produced evidence of "$20,000 or $30,000" that would be diverted to identified educational activities).

Second, Plaintiffs' inability to prove or allege their so-called "educational" or "protection" programs is not surprising because there are *no* such plausible programs. In all cases of resource-diversion standing, the plaintiffs alleged that the challenged practice *burdened eligible* voters and the organizations were diverting resources to overcome that *illegal barrier*. *E.g.*, *Billups*, 554 F.3d at 1350–51; *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1160–64 (11th Cir. 2008). Here, the Organization Plaintiffs understandably are not alleging they will "educate" *non-citizens* to cast (or register to cast) what Plaintiffs acknowledge to be illegal—indeed, criminal—votes. *See* Pls.' Memo. at 13–14. Thus, there is no legitimate "educational" or "protective" efforts that Plaintiffs could engage in, or allege they will engage in.

The only legitimate "protective" expenditures by the Organizational Plaintiffs could or would occur only when and if a *citizen* is wrongfully excluded. But, again, Plaintiffs have provided nothing "concrete" to show that this far-fetched hypothetical will occur. *Lujan*, 504 U.S. at 560. Article III standing cannot be premised on expenditures stemming from Plaintiffs' subjective concern for a speculative and conjectural possibility. *Laird v. Tatum*, 408 U.S. 1, 14 (1972) (standing to challenge chilling of speech cannot be based on plaintiffs' "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents."). Moreover, the Organizational Plaintiffs do not allege they are now expending funds to resist any erroneous exclusion that may potentially occur in the future to one of their members. *See* Pls.' Memo. at 17. Thus, their allegation of resource diversion is just as "conjectural" and "hypothetical" as their allegation of wrongful exclusion of a citizen member, and cannot establish standing (or ripeness). *Lyons*, 461 U.S. at 102.

In short, since the Organizational Plaintiffs are concededly not spending money to educate *non-citizens* how to stay on the voter rolls and since any effort to educate or protect erroneously excluded citizens can only be triggered by an implausible hypothetical *future* event,

they have not suffered any current injury sufficient to satisfy Article III. *See, e.g.*, *id.* This is particularly obvious because any educational effort would simply *parrot* information provided in the notice letters Plaintiffs are challenging, which document acceptable proof of citizenship and fully explain the statutory notice-and-hearing procedure. *See, e.g.*, Fla. Stat. §§ 98.075(6), (7).

3. Finally, in all events, Plaintiffs lack standing to seek the overbroad injunction they now request. Plaintiffs' Amended Complaint requested an injunction prohibiting the Secretary from removing any "[n]on-[c]itizen" from the voter rolls "based on use of the SAVE database." Am. Compl. ¶ B. Plaintiffs now stray far beyond that request, and seek to enjoin the Secretary from "conducting any systematic purges aimed at ineligible voters (*including* non-citizens) prior to the November 6 federal election." Pls.' Prop. Order ¶ 3 (emphasis added) (DE 65). Plaintiffs thus ask the Court to enjoin the Secretary from removing individuals on *any* basis of ineligibility, including death, felony conviction, or out-of-state move. *See id.* Plaintiffs, however, have not made a single allegation—let alone offered a shred of evidence—that they face any injury from any such removal. *See supra* Parts I.A–B. And, of course, this relief is directly at war with the National Voter Registration Act, which expressly *authorizes* states to remove individuals from the voter rolls, "systematically" or otherwise, within 90 days of a federal election for, among other reasons, the death or criminal conviction of the voter. 42 U.S.C. § 1973gg-6.

II. PLAINTIFFS CANNOT ESTABLISH AN IRREPARABLE INJURY

Plaintiffs' failure to establish *any* injury, *see supra* Part I, demonstrates, *a fortiori*, that they cannot establish an *irreparable* injury as required for a preliminary injunction. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868 (11th Cir. 2001).

As noted, the only individuals who can possibly be injured by the Secretary's faithful implementation of the program described above are *non-citizens*, who all agree cannot suffer *legally cognizable* injury. And Plaintiffs obviously cannot establish an irreparable injury justifying a statewide injunction against all applications of the Secretary's activities with unsupported speculation about potential, sporadic *misapplication* of the program to *citizens*. *See Keeton*, 664 F.3d at 868. If a case of mistaken citizen removal ever occurs, 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. And in the extraordinarily unlikely event all of these safeguards fail, the courthouse doors remain open to remedy any actual injury to a properly-

registered voter. There simply is no basis to grant a sweeping preliminary injunction now to redress a speculative harm that will likely never come to pass.

The Organizational Plaintiffs rely on inapposite cases establishing the unremarkable proposition that a deprivation of the right to vote may inflict irreparable injury. Pls.' Mot. 17–18. Yet the Organizational Plaintiffs do *not* have the right to vote, and, as noted, allegations of resource diversion are both unproven and based on Organizational Plaintiffs' own speculation.

Finally, Plaintiffs' own conduct demonstrates that they do not face any irreparable injury. Plaintiffs waited until *three months after* filing their Complaint and *47 days after* it was clear the Secretary was implementing SAVE data matching to move for a preliminary injunction. *See* Opp. To Mot. to Expedite at 1–5. Plaintiffs' unilateral delay in moving for a preliminary injunction alone refutes the allegation of irreparable harm and, thus, "justif[ies] denial of [the] preliminary injunction." *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001). Indeed, this Court and others have denied preliminary injunctions due to delays in filing for such relief similar to—or even shorter than—Plaintiffs' delay here. *See, e.g., Burger v. Hartley*, No. 11-62037-CIV, 2011 WL 6826645, *2 (S.D. Fla. Dec. 28, 2011) (denying preliminary injunction motion filed less than 2 months after complaint and 11 days after amended complaint); *Crawford & Co. Medical Ben. Trust v. Repp*, No. 11 Civ. 50155, 2011 WL 2531844, at *7 (N.D. Ill. June 24, 2011) (no irreparable injury where "plaintiff waited almost a month to notice up its Motion for Temporary Restraining Order, demonstrating that there is little urgency by plaintiff"); *Share Corp. v. Momar Inc.*, No. 10 Civ. 109, 2010 WL 933897, at *6 (E.D. Wis. March 11, 2010) (plaintiff's delay of three days between filing a complaint and seeking a TRO "'raises questions' regarding the plaintiff's claim that it will face irreparable harm") (quoting *Ty, Inc.*, 237 F.3d at 903)). As these courts have recognized, "a party cannot 'delay' . . . and then use an 'emergency' created by its own decisions regarding timing to support a motion for preliminary injunction." *U.S. Nat'l Bank Ass'n v. Turquoise Property Gulf, Inc.*, No. 10-0204, 2010 WL 2594866, *4 (S.D. Ala. June 18, 2010).

III. PLAINTIFFS' CLAIM FAILS ON THE MERITS.

As Judge Hinkle carefully explained in the DOJ Case, the NVRA provides that the *only* potentially permissible grounds for excluding voters *within 90 days* of an election are those grounds for removal listed in the general removal provision governing time periods *outside the*

90-day window. The *only* difference between the general removal prohibition and the 90-day prohibition concerns voters who have changed their residence—they may be removed outside the 90-day quiet period but not within it. Specifically, the 90-day quiet period, found in subsection (c)(2)(A), *incorporates by reference* the permissible grounds for removal described in the general removal provision, subsection (a)(3) (but then eliminates one potential ground for removal within 90 days—change in residence). Thus, by definition, if a criterion such as citizenship is not a permissible ground for removal under the 90-day quiet period, it cannot possibly be a permissible ground under the general removal provision.

Indeed, even Plaintiffs implicitly recognize that, under the *plain language* of the NVRA, there is no basis for prohibiting the exclusion of non-citizens within 90-days unless that prohibition also forecloses removal at any time under the general removal prohibition; they therefore ask the Court to *redefine* the plain language of the general removal provision—by redefining "registrants" to exclude people who are clearly "registrants" (because they are registered on the voting rolls)—solely on the ground that the registrants are not citizens. Pls.' Memo. at 13–14. Dispositively, Plaintiffs justify this alteration on the ground that, while non-citizens are technically "registrants," they are not "registrants" within the meaning of the NVRA because that statutory term encompasses only people who were eligible to register at the time of registration—which obviously excludes non-citizens. Thus, *all agree* that the NVRA cannot possibly protect people who are on the voter rolls when their registration was void at the outset.[2]

However, although Plaintiffs selectively invoke this principle to exclude non-citizens from the *general* removal provision, precisely the same principle dictates that removal of non-citizens is not prohibited by the *90-day* removal provision. If non-citizens can generally be removed from the voting rolls notwithstanding the prohibition against removing "registrants" because they were never legally registered on the voting rolls, then they necessarily can be removed under the 90-day provision because these non-citizens were never legally "voters" on the "list[] of eligible voters."

[2] Plaintiffs clearly acknowledge this, but then puzzlingly cite a *failed* amendment to the NVRA that would have confirmed that States may remove illegal aliens from the voter rolls. Pls.' Mot. 7. The apparent implication seems to be that, by rejecting the amendment, Congress intended to bar such removal; yet the idea that Congress intended to convey the franchise on improperly registered illegal aliens is of course absurd. Indeed, it is precisely that absurdity that likely convinced Congress that the amendment was unnecessary.

In short, while it could be argued (albeit absurdly) that the plain language of the NVRA precludes removing non-citizens *at any time*, it cannot reasonably be argued that the 90-day removal provision precludes their removal but the general removal provision does not. Once it is conceded that the prohibition against removing people from the voting rolls does not apply to removing non-citizens because they were never properly on the voting rolls—as Plaintiffs concede for the general removal provision—then it necessarily follows that the 90-day prohibition against removing people from the voting rolls also does not apply, since the non-citizens were never properly on the voting rolls.

Instead, the only sensible view, which avoids Plaintiffs' result-oriented inconsistencies, is that the NVRA draws a distinction between once-eligible voters who later lose their eligibility, and never-eligible individuals whose attempted registration is void *ab initio*. The former group is entitled to various procedural protections before "removal," including a 90-day quiet period for voters who have changed their residence. The latter group, under Plaintiffs' own reasoning, is deemed never to have been registered and thus is never placed on the list of eligible voters at all. Such voters are therefore not subject to the NVRA's protections governing removal from these rolls, including the 90-day period. For the reasons which follow, this result is dictated not only by common sense, but also the language, structure, and legislative history of the NVRA.

A. The Plain Text Of The NVRA Proves That Non-Citizens May Either Be Excluded At Any Time, Or Not At All.

The NVRA's plain text dictates that Florida is either permanently banned from excluding from the rolls improperly registered non-citizens, or may exclude such improper registrants at any time. Since Plaintiffs expressly disavow that former result, they cannot avoid the latter.

As noted, the NVRA's 90-day provision allows removal only on those grounds for removal expressly listed in the general removal provision (and denies it for change in residence). 42 U.S.C. § 1763gg-6(c)(2)(A). Accordingly, the only way that citizenship removal is prohibited during the 90-day period is if citizenship is *not* among the grounds permitted for removal in (a)(3) and (a)(4). If non-citizenship is not among the listed authorizations in (a)(3) and (a)(4), then individuals "may not be removed" on this basis at any time. If citizenship *is* a permitted ground included in (a)(3) and (a)(4), then it is excepted from the 90-day prohibition. Under the plain text of the NVRA, Plaintiffs cannot maintain that citizenship is a permitted ground for removal, but is not excepted from the 90-day provision. Simply put, if citizenship is a criterion included in subsections (a)(3) or (a)(4) when those provisions identify the grounds for permissible

removal outside a quiet period, then citizenship must be included in subsections (a)(3) or (a)(4) when those provisions identify exceptions to the removal ban within the quiet period. Since Plaintiffs concede that removal based on non-citizenship is not always banned, this conclusively shows that its 90-day argument must be wrong.

B. Plaintiffs' Fiction That A Non-Citizen Cannot Be A Registrant Necessarily Places Non-Citizens Outside The 90-Day Provision As Well.

Plaintiffs attempt to avoid the obvious textual consequences of their concession by inconsistently applying a fiction that non-citizens can never be considered "registrants." Pls.' Mot. 13-14. While an improperly registered voter falls squarely within the dictionary definition of a "registrant" in that he or she is "a person who registers or is registered," Am. Heritage Dictionary at 1041 (2d ed.n 1985), Plaintiffs reason that a non-absurd reading of the NVRA requires the fiction that non-citizens are not "registrants" under subsection (a)(3) "because they were not eligible to register in the first place." Pls.' Mot. 14. In other words, although a non-citizen who files a voter registration form and is added to the list of registered voters is obviously a "registrant" in any ordinary sense of the word, Plaintiffs maintain that an improper registration should effectively be deemed void *ab initio* for purposes of subsection (a)(3), such that the individual is never considered registered in the first place. But Plaintiffs then revert back to a cramped, textualist reading of subsection (c)(2)(A):

> Crucially, that conclusion would not govern the applicability of the 90-day provision because the 90-day provision does not use the term "registrant." Instead, the 90-day provision applies to any efforts "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). Non-citizens are incontrovertibly "ineligible voters."

Pls.' Mot at 14.

Plaintiffs narrow focus on the phrase "ineligible voters" in subsection (c)(2)(A), however, cannot obscure that the very logic of their "registrant" fiction applies with equal force to the 90-day provision. If a non-citizen's *registration* is void from the outset, such that they can never be *registered*, then obviously they never became a "voter" on the "list[] of eligible voters," such that they are protected from "remov[al]" under the 90-day provision. That is, Plaintiffs' position reduces to the bizarre proposition that, although an improperly registered individual is *deemed not* to have become a "registrant," (such that they are protected from removal under subsection (a)(3)), such an individual somehow *should be deemed* a "voter" on the "official list[] of eligible voters" (such that they are protected under subsection (c)(2)(A)). Obviously, however, if an

improper registration prevents a person from being considered a "registrant," there is no basis to consider them a "voter" on the "official list[] of eligible voters." That is the basis for Judge Hinkle's conclusion that never-eligible individuals fall outside the 90-day provision. DOJ Case at *3 ("What matters here is this: none of this applies to removing noncitizens who were not properly registered in the first place.").

Plaintiffs attack Judge Hinkle's reasoning, claiming that "[t]here is nothing about the term 'remove' that provides a remotely plausible basis for concluding that the general removal provision [and likewise the 90-day provision] bars removal of citizens but permits removal of non-citizens." Pls.' Mot. 15. But the answer is right in front of Plaintiffs: the very same principle they invoke to conclude that an improperly registered individual is not a registrant (that the registration is void *ab initio*) also means that the individual need not be "removed" from the registry, as they were never on it to begin with. Just as a non-registrant cannot become a "voter" on the "list of eligible voters," a non-registrant does not need to be "remove[d]" from a registry.

In fact, Plaintiffs' argument fails even if one accepts their blinkered and formalistic focus on the phrase "ineligible voters." Subsection (c)(2)(A) is a specific provision that regulates State "[v]oter removal programs." 42 U.S.C. § 1973gg-6(c). "Voter removal programs," in turn, are described in subsections (a)(3) and (a)(4) as a means of removing "*registrants*" from the rolls. *Id.* § 1973gg-6(a)(3), (a)(4). Thus, when the 90-day provision refers to removing "ineligible voters," it is necessarily referring to "ineligible voters" who are "registrants" under (a)(3) and (a)(4). In other words, the 90-day provision is simply a restriction on programs that remove "registrants" and Plaintiffs' distinction collapses even on its own terms.

Plaintiffs also argue that their reading is necessary to save subsection (c)(2)(A) from being "almost entirely superfluous." Pls.' Mot. 16. That is demonstrably false. The NVRA's 90-day provision excludes every single basis for removal mentioned in the Act, except for change in residence. § 1973gg-6. Thus, the sole purpose of the 90-day provision, as evidenced by its plain text, is to impose a quiet period on removal based on change in residence. That significant purpose is served just as much under the Secretary's interpretation as under Plaintiffs'.

Plaintiffs' reading, moreover, would produce its own absurd result. As noted, the 90-day prohibition allows removing even *validly registered* voters shortly before an election because of a request, mental incapacity, conviction, or death. 42 U.S.C. § 1973gg-6(c)(2)(A). Yet, on Plaintiffs' reading, if the Secretary's data matching program demonstrated that Fidel Castro had

fraudulently registered to vote in Florida and was preparing to vote absentee, Florida would be barred by the NVRA from removing Castro before the federal election. *See* Pls.' Mot. 14, n.9.[3] It simply cannot be the case that Congress explicitly blessed the removal of *properly registered* citizens within 90 days of an election based on criminal conviction or mental incapacity, but barred the removal of improperly registered voters, including those known *to a certainty* to be non-citizens, minors, out-of-state residents, or fictitious individuals.

C. Section 8 Of The NVRA Addresses Only The Removal Of Individuals Who Were Once Properly Registered And Does Not Regulate The Removal Of Improperly Registered Non-Citizens.

Plaintiffs' convoluted interpretation of the NVRA ignores several straightforward readings that would eliminate the absurdity of a ban on states removing non-citizens.

1. The most straightforward solution is to conclude that Section 8 of NVRA as a whole (codified at 42 U.S.C. § 1973gg-6), was simply not intended to address the removal of people who were never properly registered to begin with, but, rather, regulates only the removal of voters who were once properly registered, but then later lose their eligibility. This was the well-reasoned conclusion in the DOJ Case and is supported by numerous pieces of evidence.

First, the NVRA begins by stating that each State shall "ensure that any *eligible applicant* is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added). It next directs States to notify each such "applicant" of the result of his application. *Id.* 1973gg-6(a)(2). Then it sets out the conditions for removal of the resulting "registrants" from "the official list of *eligible voters*." *Id.* § 1973gg-6(a)(3); *see also id.* § 1973gg-6(c)(2)(A) (imposing the 90-day quite period on the removal of names from " the official lists of *eligible* voters"). This language suggests that, after providing for the placement of *eligible* applicants on the statewide registry, the NVRA contemplates only *eligible* voters who are in fact validly registered.

Second, it is quite telling that the NVRA addresses all of the likely reasons a *once-*

[3] Plaintiffs suggest that non-citizens may be removed within 90-days "as long as the removal is not part of a systematic program, as it is here." Pls.' Mot. 14, n. 9. Yet Plaintiffs appear to believe that any removal, no matter how individualized, is part of a "systematic program" so long as the Secretary collects the predicate information systematically. After all, a voter will only be removed based on SAVE data after individualized notice, an opportunity for an individualized hearing, and an individualized determination by the county supervisor. *See supra* at 3. Thus, the only thing saving Plaintiffs' position from being a completely empty promise is the possibility of an *accidental* discovery of an improperly registered voter.

eligible voter may be removed from the registry—a request from the registrant; by reason of criminal conviction or mental incapacity, death, or change in residence—yet addresses *none* of the obvious reasons a person may be improperly registered to begin with—non-citizenship, being underage, or never having resided in the state. As Plaintiffs' note, Congress was well aware that such individuals may improperly register to vote.[4] Since Congress plainly did not intend to condone such improper registrants, the NVRA's silence can only be taken as evidence that the statute does not address them at all.

Third, the legislative history makes clear that "[t]he [NVRA] should not be interpreted in any way to supplant th[e] authority" of election officials "to enroll eligible voters" and "continue to make determinations as to applicant's eligibility, *such as citizenship*, as are made under current law and practice." H.R. REP. NO. 103-9, at 112 (1993), 1993 U.S.C.C.A.N. 105, 112 (emphasis added). That is, the NVRA left to the states the question of who may be registered and limited only the removal of those people who were properly registered under state law.

Finally, inferring that the NVRA contemplates only *properly* registered voters is not inconsistent with the text of the Act. A fraudulent registration is simply deemed void *ab initio* for purposes of the NVRA; the ineligible individual was thus never actually a "registrant" on the list of "eligible voters" and has therefore not been "removed" from that list.

2. Assuming *arguendo* that the NVRA regulates the treatment of never-eligible voters, it does not regulate it through the removal provisions—general or 90-day. Rather, it is regulated under subsection (b)'s general provision governing "Confirmation of voter registration" programs that are intended to "protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll." 42 U.S.C. 1973gg-3(b).

As its terms suggest, subsection (b) can more fairly be read to speak to the elimination of improperly registered voters than can the "removal" provisions. That is, it refers to "confirmation" of an individual's registration, *i.e.*, confirming whether the registration itself was proper, in order to ensure the "integrity" and "accura[cy]" of the roll. *Id.* Thus, if it is

[4] *See* Pls.' Mot. 7 (citing 139 Cong. Rec. 2960 (Mar. 16, 1993) (Amendment No. 100), 139 Cong. Rec. 2970 (Amendment No. 141), and 139 Cong. Rec. 3066 (Mar. 17, 1993) (Amendment No. 169), which failed to add "citizenship status" to the permissible bases for removal on the likely assumption that the removal provision did not restrict removal on that basis to begin with).

"confirmed" that the registration was improper, the name may be eliminated under subsection (b) without confronting the "removal" restrictions of subsections (a) and (c). Rather, the NVRA's protections for the never-eligible must be limited to those contained in subsection (b), which independently requires that programs to "confirm[] voter registration" satisfy only the basic protections contained in subsection (b)(1)—uniformity and nondiscrimination— but not the more specific, onerous "removal" protections.[5] It obviously makes sense to provide less robust protections to individuals who never have been eligible to register, while providing the greater protections referenced in subsection (c) for those voters who have properly registered.

Moreover, this is the only interpretation of subsection (b) that gives it independent significance. If *all* elimination of names from voter rolls were exclusively governed by the removal provisions, it is quite difficult to understand why Congress bothered to enact a *separate* "confirmation" requirement with *distinct* prohibitions. The confirmation provision of subsection (b) must add *something* to (a) and (c)'s removal provisions, and the most natural inference is that it was intended to govern elimination of never-eligible individuals.

3. In the alternative, one could also read subsection (a)(3) to include an express reference to removal based on non-citizenship. Specifically, the NVRA provides that a state may remove voters from the rolls: "(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) [*i.e.*, because of death or change in residence]." § 1973gg-6(a)(3) (emphasis added). Thus, subsection (a)(3) could be read to authorize the removal of individuals who were not eligible to register "as provided by State law," *e.g.*, for non-citizenship. And because the 90-day ban does not apply to removals "as provided by state law," such removal may be conducted at any time.

To be sure, the NVRA is ambiguously worded: Congress could have intended the phrase "as provided by State law" to be modified by the clause that follows it—"by reason of criminal conviction or mental incapacity." However, had Congress intended that meaning, it would have been far simpler to state that voters may be removed "by reason of criminal conviction or mental incapacity as provided by state law." By placing the phrase "as provided by state law" first and separating it with a comma, Congress created a potential alternative inference that the two

[5] Even under this reading of the NVRA, Florida's state law provides for notice and an opportunity for a hearing before a county supervisor can remove an ineligible non-citizen from the statewide voter registration system. *See* Fla. Stat. § 98.075(6), (7).

clauses were intended to operate independently. If one were to adopt the notion that non-citizens are governed by the "removal" restrictions, the latter interpretation should be embraced because it is the only one that avoids the absurd result of permanently requiring States to accept *conceded* voter fraud by allowing people justifiably excluded from voting under "state law,"—*i.e.*, non-citizens or people voting in other states—to forever remain on the State's voter rolls.[6]

* * *

In short, Plaintiffs' sole argument for applying that 90-day provision to the Secretary's matching activities is as follows: an improperly registered non-citizen is deemed *not* to have become a "registrant" and therefore does *not* trigger subsection (a)(3)'s protections governing "removal" from the "official list[] of eligible voters"; however that same non-registrant *should* be deemed a "voter" who *does* trigger subsection (c)(2)(A)'s protections governing "removal" from the "official list[] of eligible voters." This unprincipled combination of fiction and hyper-literal formalism mangles the text, structure, and policies of the NVRA.

IV. THE BALANCE OF HARMS AND THE PUBLIC INTEREST TIPS DECISIVELY AGAINST GRANTING A PRELIMINARY INJUNCTION

State and federal law, *see supra* at 2-3, as well as the most basic principles of democracy, recognize that the Secretary has a compelling interest, and a duty, to prevent non-citizens from being on the voting rolls, to avoid their fraudulent efforts to cancel out *citizens'* votes. Contrary to Plaintiffs' conclusory assertions, Pls.' Mot. 8, this is not an insignificant problem. Plaintiffs, in contrast, have no cognizable interest in allowing non-citizens to commit voter fraud, and identify *no* legitimate voters who will lose the right to vote. Nor do Plaintiffs even identify a plausible mechanism by which this could happen. Finally, Plaintiffs' inexcusable delay in waiting *months* to seek a preliminary injunction both underscores the absence of any real injury to Plaintiffs and would make it particularly inequitable to grant them relief.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion.

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[6] Finally, in the event all of the foregoing plausible readings are rejected, the complete absurdity of permanently banning the removal of non-citizens could also be addressed by the NVRA provision expressly allowing the "correction of registration records" at any time. § 1973gg-6(c)(2)(B). Although he ultimately ruled in favor of the Secretary on other grounds, Judge Hinkle noted that it was "unclear why the exception in clause (ii) [correction of registration records] does not apply to the Secretary's program." DOJ Case at *2.

Dated: September 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2012, a true and correct copy of the foregoing will be sent electronically to the registered participants through the Court's CM/ECF system.

/s/ Daniel E. Nordby

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 1:12-cv-22282-WJZ
Honorable Judge William J. Zloch

KARLA VANESSA ARCIA, et al.,

Plaintiffs,

v.

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

Defendant.
_____/

DECLARATION OF MARIA I. MATTHEWS

Maria I. Matthews, pursuant to 28 U.S.C. § 1746, declares the following:

1. I am an individual over twenty-one years of age, and of sound mind, who has never been convicted of a felony, is capable of making this declaration, and am fully competent to declare as to the matters stated herein.

2. I am the Bureau Chief of the Bureau of Voter Registration Services for the Florida Department of State ("FDOS"). Florida's statewide voter registration system ("voter registry") contains the list of all individuals registered to vote in Florida. In my capacity as Bureau Chief, I oversee the maintenance of the voter registry.

3. I am personally acquainted with the facts herein stated by reason of performance of my service as Bureau Chief, or because of my prior position as Assistant General Counsel for FDOS.

4. In 2011, FDOS engaged in a matching process with the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") to locate records in the MAN Driver and

Vehicle Express ("MDAVE"), which is part of the Drivers and Vehicle Information Database ("DAVID"), pertaining to individuals on the voting rolls. This matching process identified DHSMV records for 11 million registered voters. Among those 11 million records, approximately 180,000, or 1.6%, contained information suggesting that individuals registered to vote had at some time provided DHSMV with proof of identification, such as a foreign passport, green card, or U.S. Visa, indicating that they were non-citizens.

5. In order to more accurately identify individuals for whom the statutory notice-and-hearing procedure should be instituted, on August 1, 2011, FDOS sought access to the Systematic Alien Verification Entitlement Program ("SAVE Program" or "SAVE") which is administered by the United States Citizenship and Immigration Service ("USCIS")—a Bureau of the United States Department of Homeland Security ("DHS"). FDOS's inquiries about the status of its request generally went unresolved for nearly a year.

6. In April 2012, not yet having received access to SAVE, FDOS forwarded a sample of roughly 2,600 records of potential non-citizens identified through this data matching as registered to vote to county Supervisor of Elections ("supervisors") for additional review and, if warranted, initiation of Florida's statutory notice-and-hearing procedure for removing ineligible individuals from the voter rolls. Since April 30, 2012, FDOS has not forwarded any more names based on this review.

7. On August 14, 2012, FDOS entered into an agreement with DHS' USCIS to access and use SAVE for verification of legal status. FDOS is using SAVE as part of the automated matching and manual review process to determine initially the citizenship status of the roughly 2,600 records. After SAVE verification, FDOS engages in a management review and then, where appropriate provides notice to the relevant Supervisor of Elections.

8. In the future, FDOS will do the same to review the citizenship status of all existing registration records and new registration records.

9. First, FDOS engages in an automated match. FDOS searches for matches between the voter registry and MDAVE. For the list of 2,600, FDOS searches for an indicator from MDAVE that shows the person is a non-immigrant and searches the two databases for one of the following three types of matches:

a. A match of an individual's full 13-digit driver's license number

b. A match of an individual's full 9-digit social security number as well as last name

c. An automated match of an individual's generated driver license number created from an algorithm using last name, first name, middle initial, birth month and day, and gender.

10. For records of registered voters that were not on the list of 2,600, the automated match process has been further refined. FDOS searches for an indicator from MDAVE that shows the person is a non-immigrant and identifies an alien registration number ("A Number") if one is available, and will search the two databases for one of the following three types of matches:

a. A match of an individual's full 13-digit driver's license number and a match of the first 4 letters of the first and last names

b. A match of an individual's full 9-digit social security number and a match of the first 4 letters of the first and last names

c. For all records without a full driver's license number or full social security number, or for records that did not match under paragraphs a or b, a match of an individual's generated driver license number created from an algorithm using last name, first name, middle initial, birth month and day, and gender, and match of the first 4 letters of the first and last names, and a match of the last 4 digits of a social security number if provided.

11. Second, for all record matches FDOS engages in a two-step manual review. First, FDOS confirms that the same person is identified in each database by checking, *e.g.*, last name,

first name, date of birth, full social security number or last four digits of the social security number and/or driver's license number (if available), signature array comparison, address history comparison, and photo (which may help in cases where the person's photo looks much older or much younger than person's stated age).

12. If, and only if, FDOS confirms that the MDAVE record refers to the same individual as identified on the statewide registry, FDOS will proceed to check the individual's citizenship status.

13. To check the individual's citizenship status, FDOS will review the MDAVE record for evidence of citizenship status to confirm that there is no document of U.S. citizenship, and to extract the legal status documentation available, other Alien Numbers, and name variations for purposes of SAVE verification.

14. If there is acceptable evidence of U.S. citizenship (e.g., U.S. Passport or Passport Card, U.S. Certificate of Citizenship, U.S. Certificate of Citizenship, U.S. issued birth certificate, court order of adoption), then FDOS does not proceed further. If there is insufficient documentation (*e.g.*, an invalid Alien Number) (e.g., A012345678 or A09999999) and/or no INS document or other document supporting legal status), then FDOS does not proceed further. If there is acceptable evidence of non-U.S. citizenship (e.g., a valid Alien Number associated with a Legal Permanent Resident Card), then FDOS will proceed to SAVE verification.

15. Finally, FDOS engages in SAVE verification. FDOS initiates verification through DHS's SAVE Verification Information System ("VIS") using the Alien Number to verify the citizenship status of the individual. There are three possible responses:

a. SAVE confirms the individual is a U.S. citizen,

b. SAVE verifies that the last available record indicates non-U.S. citizen status

c. SAVE cannot verify legal status because the Alien Number could not be found, citizenship status is indeterminate, and/or it cannot be linked to the individual.

16. In three to five seconds, FDOS usually receives an automated response to the initial verification. If the SAVE response confirms that the individual is a U.S. citizen, then FDOS does not proceed further. If the SAVE response verifies that the last available record indicates that the individual is a non-U.S. citizen or SAVE prompts for additional verification, then FDOS resubmits its initial verification with any additional information, if available (e.g., variation on name spelling or surname, date of birth, place of birth, other Alien Number, and specific identification of USCIS issued immigration documentation).

17. Additional verification generally takes three to five days. If the SAVE response confirms that the individual is a U.S. citizen, then FDOS does not proceed further. If the SAVE response verifies that the last available record still indicates that the individual is a non-U.S. citizen and cannot verify if the individual has become a U.S. citizen, then FDOS proceeds to final manual review by management. For unverifiable responses, FDOS will not proceed further.

18. FDOS management will review all the data available from the governmental databases, including the voter registry, MDAVE and SAVE to re-confirm that that the most current records indicate non-citizenship. Following management confirmation, FDOS will then initiate Florida's statutory notice procedure by notifying the Supervisors of Elections. FDOS has conducted the SAVE verification for the sample of approximately 2,600 individuals originally identified as potential non-citizens through the MDAVE data matching and for whom Alien numbers were available.

19. Both the prior and current matching processes have uncovered improperly registered voters. In particular, the comprehensive process consisting of the voter registry/MDAVE automated match, SAVE verification, and manual review has identified at least scores of registered voters who have either personally attested to their lack of citizenship or who, after the data-matching process described above, appear to be ineligible registered voters based on non-citizenship.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 26th day of September, 2012.

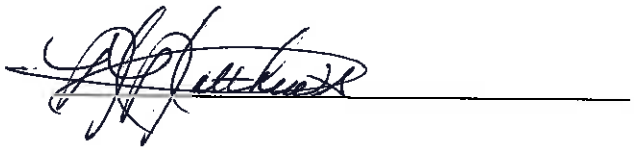

Exhibit 2

From: Sharp, Christopher R.

To: Madison County; madison county 2; madison county 3; ALA - Pam; Allen, Mary Anne; Amy Tuck Farrington; Ard, Mark; Aultman, Larry; BAK - Nita; BAY - Mark; Bishop, Shelby L.; Boynton, John; BRA - Terry; BRE - Lori; BRO - Brenda; Bronson, Kristi R.; Brown, Toshia; CAL - Margie; Cate, Chris; CHA - General E-mail; CHA - Paul; CIT - Susan; CLA - Chris; CLL - Jennifer; CLL - Jennifer; CLL - Mellissa; CLL - Tim; CLM - Elizabeth; DAD - Penelope; DES - Kelli; DES - Mark; DIX - Starlet; Drury, David R.; Durbin, Joyce A.; DUV - Jerry; DUV - Robert; DUV - Stan Bethea; ESC - David; FLA - Kimberle; FRA - Ida; FSASE - Ron Labasky; GAD - Shirley; GIL - Connie; Gisela.Salas@dos.myflorida.com; GLA - Holly; GUL - Linda; HAM - Laura; HAR - Jeff; HEN - Lucretia; HER - Annie; HIG - Joe; HIL - Cheryl Selvey; HIL - Craig; HIL - Dr. Lennard; HOL - Debbie; Holland, Gary J.; IND - Leslie; JAC - Sylvia; JEF - Marty; Johnson, Althera; Kennedy, Jennifer L.; LAF - Lana; LAK - Emogene; LEE - Sharon; LEO - Ion; LEO - Mark; LEO - TJ; LEV - Connie; LEV - Tammy; LIB - Marcia; MAD - Tommy; MAN - Bob; MAN - Nancy; MAR - Dee; Marconnet, Amber; Matthews, Maria I.; Milton, Brenda; MON - Harry; MON - Joyce; Money, Betty A.; MTN - Debbie; MTN - Vicki; NAS - Tamara; NAS - Vicki; Nordby, Daniel E.; OKA - Paul; OKE - Gwen; ORA - Bill; OSC - Mary Jane; PAL - Charmaine; PAL - Rachel; PAL - Susan; PAS - Brian; PAS - Tracy; Phillips, Eddie; PIN - Deb; PIN - Julie; PIN - Rick; POL - Barbara; POL - Lori; PUT - Kim; PUT - Susan; Raines, Terry; SAN - Ann; SAR - Kathy; SAR - Ron; SEM - Mike; SLC - Gertrude; STJ - Vicky; SUM - Karen; SUW - Glenda; TAY - Dana; UNI - Deborah; VOL - Ann; WAK - Celina; WAK - Henry; WAK - Lori; WAL - Bobby; WAS - Carol; Wood, Rebekah

Subject: List Maintenance information and webinar

Date: Monday, April 02, 2012 3:44:52 PM

Attachments: image002.png

To All Supervisors of Elections,

Please be advised that the Division of Elections has worked through a preliminary list of individuals identified as potential non-U.S. citizens. These files will be sent to you on CDs via FedEx on April 3, 2012. Once you receive them, please refer to the tabs on the bottom of the excel spreadsheet to pull up the list of registered voters in your county.

The Bureau of Voter Registration Services has vetted the list through the Department of Highway Safety and Motor Vehicles' DAVE database based on documentation made available to DHSMV to comply with the Real ID Act. That requirement means that every person who applies for or renews a driver's license or state ID card has to provide proof of his or her legal status (INS paperwork, Resident Alien card, Passport, birth certificate, etc.). The deadline by when all licensees and state ID cardholders in Florida have to provide such document is December 31, 2017.

The list that you will be receiving represents only non-immigrants initially identified in DHSMV's DAVE as not having presented any documentation of citizenship to date.

Please remember that you are still responsible for contacting these individuals and going through the process of verifying citizenship status before making a determination of eligibility for voter registration. You must follow the same procedures, in law, that you have in the past whenever you receive information that a registered voter of yours is ineligible to be registered to vote.

Additionally, a webinar is being created to assist you with processing these files, and to inform you of the process of vetting the files. This webinar is currently scheduled for April 10, 2012 at 2PM EST. Please be prepared to ask any questions after you have reviewed the files.

Regards,

Dr. Chris Sharp

Chief, Bureau of Voter Registration Services
Florida Division of Elections
(850) 245-6205
Christopher.Sharp@DOS.MyFlorida.com

Florida is headed in the right direction!
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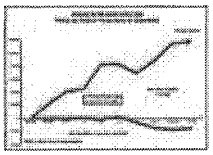

The Department of State is leading the commemoration of Florida's 500th anniversary in 2013. For more information, please go to www.fla500.com.

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Exhibit 3

FLORIDA DEPARTMENT of STATE

Florida Department of State » News » Communications » Press Release

Florida Department of State
Ken Detzner
Secretary of State

For Immediate Release
July 14, 2012

Contact:
Chris Cate
850.245.6522

Florida Department of State Receives Commitment from U.S. Department of Homeland Security to Provide Access to Citizenship Database

State and federal government working together to ensure non-citizens can't dilute ballot of eligible voters

TALLAHASSEE – Florida Secretary of State Ken Detzner and the Florida Department of State (DOS) have received a commitment from the U.S. Department of Homeland Security that Florida will be able to access the Systematic Alien Verification for Entitlements Program (SAVE) database. The SAVE database is the most accurate and comprehensive resource available to verify the status of potential non-citizens on Florida's voter rolls, making it an important tool to ensure voter rolls are current and accurate.

"I am very pleased that the federal government has committed to giving us the access necessary to identify noncitizens on the voter rolls and make sure these ineligible voters cannot cast a ballot," said Secretary Detzner. "Florida voters are counting on their state and federal governments to cooperate in a way that ensures elections are fair, beginning with ensuring the voter rolls are current and accurate. Now, we have a commitment to cooperate from DHS and we look forward to a partnership that improves our election process."

On June 11, 2012, DOS filed a lawsuit against the U.S. Department of Homeland Security (DHS) for failing to provide access to the SAVE database for nearly a year. Federal law expressly requires DHS to respond to state inquiries seeking to verify or ascertain the citizenship or immigration status of any individual within its jurisdiction for any purpose authorized by law.

In a separate lawsuit filed by the U.S. Department of Justice (DOJ) against DOS, a federal judge recently upheld Florida's right to remove non-citizens from the voter rolls whenever they are identified, despite DOJ claims to the contrary. Furthermore, the judge said that the state and federal government should work together because non-citizens voting in Florida's elections constitutes "irreparable harm" to Florida and its voters.

In 2011, the Florida Department of State received information from the Florida Department of Highway Safety and Motor Vehicles indicating that non-citizens may be registered to vote in Florida. However, while processing the new information, it became evident that the Department of State's ability to validate a person's current legal status using state-level resources alone was limited. In order to validate this information, the department sought access to the SAVE database.

Go Back

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 1:12-cv-22282-WJZ
Honorable Judge William J. Zloch

KARLA VANESSA ARCIA, et al.,

Plaintiffs,

v.

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

Defendant.
_____/

THE SECRETARY'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 56.1, Defendant Florida Secretary of State Kenneth W. Detzner ("Secretary") respectfully submits this statement of undisputed material facts in support of his opposition to Plaintiffs' motion for summary judgment:

RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Secretary admits that he is Secretary of State for the State of Florida. The remainder of paragraph 1 asserts legal conclusions to which no response is required. To the extent a response is required, denied.

2. Admitted.

3. The Secretary admits the first sentence of paragraph 3 and further states that the PowerPoint presentation referenced in paragraph 3 speaks for itself. To the extent Plaintiffs mischaracterize the content or import of that PowerPoint presentation, denied.

4. The Secretary admits that he suspended matching voter registration data with

records from the MAN Driver and Vehicle Express database ("MDAVE") maintained by the Department of Florida Department of Highway Safety and Motor Vehicles ("DHSMV"), but denies that there was a "program to purge alleged non-citizens." The Secretary further states that the statement quoted in paragraph 4 speaks for itself. To the extent Plaintiffs mischaracterize the content or import of that statement, denied.

5. The Secretary admits that, on August 14, 2012, he announced that the State of Florida had obtained access to the Systematic Alien Verification for Entitlements program (SAVE) maintained by the Department of Homeland Security (DHS), for the purpose of verifying the citizenship and immigration status information of potential non-citizens on Florida's voter registration rolls. The Secretary denies that the State "partnered" with DHS to conduct this SAVE review. The statement that the Secretary's SAVE data matching is "a new systematic program to remove alleged non-citizens from the voting rolls" is a legal conclusion to which no response is required. To the extent a response is required, denied.

6. Admitted, except the Secretary denies there was a "purge program."

7. The Secretary states that the PowerPoint presentation referenced in paragraph 7 speaks for itself. To the extent Plaintiffs mischaracterize the content or import of that PowerPoint presentation, denied.

8. The Secretary admits that SAVE is a compilation of databases that contains information on immigrants and aliens; that it contains unique numeric identifiers for those individuals; and that SAVE does not contain information regarding natural-born citizens.

9. The Secretary admits that the results of a SAVE query include confirmation of citizenship, confirmation of non-citizenship, and an indeterminate result. The Secretary states that the PowerPoint presentation referenced in paragraph 15 of the declaration referenced in

paragraph 9 speaks for itself. To the extent Plaintiffs mischaracterize the content or import of that PowerPoint presentation, denied. The Secretary specifically denies that the PowerPoint presentation directs county Supervisors of Elections to "seek additional verification" from a registered voter when the SAVE query produces an indeterminate result or any result other than "non-citizen."

10. Admitted, except to the extent paragraph 10 implies that a Supervisor's final determination of ineligibility could occur before the statutory notice-and-hearing process.

11. The Secretary admits that the individual Plaintiffs are registered voters in Florida and that their names appeared on the prior list of approximately 2,600 potential non-citizens. The Secretary denies the last sentence of paragraph 11. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining statements contained in paragraph 11 and therefore denies them.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the statements contained in paragraph 12 and therefore denies them.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the statements contained in paragraph 13 and therefore denies them.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the statements contained in paragraph 14 and therefore denies them.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the statements contained in paragraph 15 and therefore denies them.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the statements contained in paragraph 16 and therefore denies them.

17. The Secretary states that Plaintiffs' various pleadings speak for themselves. To the extent a further response is required, admitted.

18. Admitted.

THE SECRETARY'S STATEMENT OF UNDISPUTED MATERIAL FACTS

19. The Florida Department of State ("FDOS") and county supervisors regularly engage in efforts to identify ineligible voters on the State's voter registration rolls. For example, FDOS receives monthly reports of: deceased adults from the Florida Department of Health; persons adjudicated mentally incompetent from each clerk of the circuit court; and persons who have become licensed to drive in other states from DHSMV. FDOS also receives information from the United States Social Security Administration about registered voters who are deceased. And the Florida Department of Law Enforcement identifies persons on the voter rolls who have been convicted of a felony. *See generally* Fla. Stat. §§ 98.075, 98.093.

20. The Secretary's MDAVE data matching produced DHSMV records for 11 million registered voters. Among those 11 million records, approximately 180,000, or 1.6%, contained information suggesting that registered voters had at some time provided DHSMV with identification, such as a foreign passport, green card, or U.S. visa, indicating that they were non-citizens. Decl. of Maria Matthews ¶ 4.

21. FDOS and DHS executed an Memorandum of Agreement ("MOA") on August 14, 2012, regarding access to SAVE, and FDOS began cross-checking the results of its MDAVE search on August 16, 2012. *See id.* ¶ 7.

22. In order to check the immigration status of an individual in SAVE, FDOS must have the individual's Alien Registration Number or "A-number," a unique 9-digit identifier given only to non-citizens. *See id.* ¶ 15.

23. Florida has obtained A-numbers from some individuals based on the proof of identification they presented to DHSMV. *Id.* ¶ 10.

24. In order to confirm that the individual who presented an A-number to DHSMV is the same individual on the voter registry, FDOS has conducted an automated check to ensure that the individual had the same first name, last name, and a match of unique identifiers (*i.e.*, a social security number or driver's license number). *Id.* ¶¶ 9-10. Moreover, the results of this automated check are then manually re-checked based on first name, last name, and address, signature, or photograph. *Id.* ¶ 11.

25. After confirming to a practical certainty that a given A-number corresponds to the name of an individual on the statewide voter registry, FDOS enters the A-number into SAVE. *Id.* ¶¶ 15–17. If the results of that query indicate that the individual in question has been naturalized, or are in any way inconclusive, FDOS takes no further action to investigate his or her potential removal from the registry. *Id.* ¶ 17.

26. If the individual's A-number indicates that the individual remains a non-citizen, FDOS requests that DHS perform a second-level confirmation from SAVE. *Id.* ¶ 16-17. Once this confirmation is obtained, FDOS will transmit the name to the appropriate county supervisor who will then provide the individualized notice, opportunity to respond, and individualized determination in accordance with Florida law. *Id.* ¶¶ 18.

27. The Secretary's review of Florida's voter rolls has uncovered at least scores of registered individuals and who have either personally attested to their lack of citizenship or who, after the data-matching process described above, appear to be ineligible non-citizens. *See id.* ¶ 19.

Dated: September 26, 2012

Respectfully submitted,

/s/ Daniel E. Nordby

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*Admission *pro hac vice* pending

Counsel for Defendant
Secretary of State Ken Detzner

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2012, a true and correct copy of the foregoing will be sent electronically to the registered participants through the Court's CM/ECF system.

/s/ Daniel E. Nordby