No. 12-15738

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

KARLA VANESSA ARCIA, ET AL.,
Plaintiffs-Appellants,
v.
KEN DETZNER, FLORIDA SECRETARY OF STATE,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida
No. 12-cv-22282 (Hon. William J. Zloch)

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW, THE LEAGUE OF WOMEN VOTERS OF FLORIDA, AND THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, *Amici Curiae* The Brennan Center for Justice at N.Y.U. School of Law, The League of Women Voters of Florida, and The League of Women Voters of the United States furnish a complete list of the following persons that have an interest in the outcome of this case:

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STATEMENT OF INTEREST

The Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center") is a not-for-profit, nonpartisan public policy and law institute that focuses on issues of democracy and justice.[1] Through its Democracy Program and Voting Rights and Elections Project, the Brennan Center seeks to eliminate barriers to full and equal political participation. Of particular relevance here, the Brennan Center has extensively studied, litigated, and consulted on issues relating to election administration, voter list maintenance, and the National Voter Registration Act of 1993 (the "NVRA"). The Brennan Center issued one of the first comprehensive reports on voter purges and on matching the voter rolls to other databases. The Brennan Center also regularly provides legal assistance to government officials and advocates seeking to ensure that voter purges are accurate, uniform, and nondiscriminatory.

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages Americans to participate actively in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 150,000 members and supporters, and is organized in approximately 800

[1] This brief does not purport to convey the position of N.Y.U. School of Law.

communities and in every State. For over 90 years, the League has led efforts to remove the unnecessary barriers that too many Americans face in registering to vote and casting a ballot. The League of Women Voters of Florida is the Florida affiliate of the national League, with over 13,000 members, supporters, and volunteers and 29 chapters across the State. Over the years, it has reached out to increase political participation among women, youth, and traditionally underrepresented communities, including new citizens, the poor, and minorities.

No party's counsel has authored any part of this brief. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person other than the *amici*, their members, and their counsel, has contributed money to fund preparing or submitting this brief.

STATEMENT OF THE ISSUES

1. Did the District Court err by limiting the 90-Day Rule of the National Voter Registration Act, 42 U.S.C. § 1973gg-6(c)(2)(A), to apply only to a program to purge voters suspected of having changed address?
2. Did the District Court err in going beyond this case and interpreting the application of the 90-Day Rule to purges of voters for reasons other than supposed noncitizenship?

SUMMARY OF ARGUMENT

The District Court's interpretation of section 8(c)(2)(A) of the National Voter Registration Act, 42 U.S.C. § 1973gg-6(c)(2)(A), reached beyond the issues presented in this case. Congress barred "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" within the 90 days prior to a federal election, 42 U.S.C. § 1973gg-6(c)(2)(A) (the "90-Day Rule"), in order to guard against the inherent risk that large-scale purges will erroneously remove eligible voters. The District Court incorrectly restricted the 90-Day Rule to protect only voters believed to be ineligible because of a change in address. This conclusion disregards the plain meaning of the statute and deprives eligible voters of a critical protection against wrongful disenfranchisement. This Court should correct the District Court's error, hold that the 90-Day Rule applies in the circumstances of this case, and remand to the District Court for a determination as to whether the purge contemplated by the State can proceed on any other basis.

Large-scale purges of voter rolls are prone to error. For reasons including poorly designed search criteria, faulty database matching, and the sheer volume of voter records to be compared, large-scale purges risk removing numerous eligible voters from the rolls. In 2000 and 2004, Florida purged thousands of eligible

voters from its rolls through flawed methods that swept eligible voters onto purge lists.[2] Other examples abound, with documented cases of erroneous removal of voters appearing in Louisiana, Indiana, Colorado, Ohio, Michigan, Nevada, North Carolina, Alabama, and Georgia in the 2008 election cycle alone.[3] Unless such errors are detected well in advance of an election, voters erroneously struck from voter rolls may lack sufficient time to correct any mistakes and to have their names reinstated.

The District Court erroneously construed the 90-Day Rule as a limitation on the *grounds* for which a State may remove a voter from its rolls during the 90-day quiet period, rather than as a limitation on the voter-removal *methods* that a State may pursue during that period. Having made that mistake, the District Court concluded that the NVRA's silence regarding removal of noncitizens from voter rolls meant that the 90-Day Rule did not protect eligible voters against large-scale purges of alleged noncitizens. Although *amici* posit this was an incorrect ruling, if accepted, that conclusion was sufficient to decide the case. The District Court, however, unnecessarily and erroneously reached outside the scope of this case and

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[2] *See* Myrna Perez, Brennan Center for Justice, *Voter Purges*, at 1, 3 (2008) *available at* http://brennan.3cdn.net/5de1bb5cbe2c40cb0c_s0m6bqskv.pdf.

[3] *See* Ian Urbina, *States' Actions to Block Voters Appear Illegal*, N.Y. Times, Oct. 9, 2008, at A1.

held that the 90-Day Rule applied *only* to the removal of voters rendered ineligible due to a change of address.

Because it would permit any purge of voters within the 90-Day period other than a purge of voters who have changed address, the District Court's interpretation of the 90-Day Rule is contrary to the purpose, text, and structure of the NVRA and should be rejected.

FACTUAL BACKGROUND

On May 9, 2012, the Florida Secretary of State announced a special initiative attempting to purge noncitizens from Florida's list of eligible voters.[4] To identify potential noncitizens registered to vote, Florida election officials compared names on the registration rolls (the Florida Voter Registration System) with names on a Department of Highway Safety and Motor Vehicles (DHSMV) database, which includes information on persons who presented noncitizen identification to obtain a driver's license. Through this database match, the Department of State initially identified as many as 182,000 potential noncitizens on the voter rolls, and

[4] Press Release, Ken Detzner, Fla. Sec'y of State (May 9, 2012), *available at* http://www.dos.state.fl.us/news/communications/pressrelease/pressRelease.aspx?id=577.

then, in April 2012, sent county election supervisors the names of registered voters from a list of approximately 2,700 potential noncitizens.[5]

On June 12, 2012, the United States Department of Justice filed a civil action in the Northern District of Florida seeking, *inter alia*, an injunction barring implementation of the Secretary's program.[6] The record developed in that case revealed "major flaws" in the program. *United States v. Florida*, 870 F. Supp. 2d 1346, 1347 (N.D. Fla. 2012). Because the DHSMV database only captures individuals' immigration status at the time they applied for or last renewed their driver's licenses, citizens naturalized since their application or latest renewal are recorded as noncitizens. And because Florida driver's licenses are renewed every six years, the DHSMV database would be expected to identify many thousands of citizens as noncitizens. Judge Hinkle of the Northern District of Florida concluded that the Secretary's initial purge list was "compiled . . . in a manner certain to include a large number of citizens." *Id*. Media accounts indicate that more than

[5] Marc Caputo, *How Rick Scott's noncitizen voter purge started small and then blew up*, Miami Herald, June 12, 2012.

[6] *United States v. Florida*, No. 12-cv-00285-WS-CAS, Complaint, Dkt. No. 2 (N.D. Fla. June 12, 2012).

500 of the approximately 2,700 registered voters on the initial purge list—nearly 20 percent—had been confirmed as citizens as of June.[7]

On June 28, 2012, Judge Hinkle denied the Department of Justice's motion for a temporary restraining order, noting that the Secretary had suspended the program. *United States v. Florida*, 870 F. Supp. 2d at 1350-51.

In the meantime, Florida was seeking access to the U.S. Department of Homeland Security's (the "DHS") Systematic Alien Verification for Entitlements ("SAVE") database. According to DHS, the SAVE database indexes individuals using their Alien Registration Number ("A-number") and provides "timely immigration status information" for the individuals listed in the database. *See* U.S. Citizenship and Immigration Serv., *What is SAVE?*, http://www.uscis.gov/save (follow "What is Save" hyperlink) (last updated Nov. 28, 2012).

The Secretary received permission to access the DHS SAVE database on July 14, 2012.[8] The purge program then resumed in a modified form. After identifying potential noncitizens using state records, based on matches of information such as first and last names, social security numbers, and driver's license numbers, Florida cross-referenced certain information of those so identified

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[7] Caputo, *Rick Scott's noncitizen voter purge*.

[8] *See* Michael Schwirtz, *U.S. to Let Florida Use Its Data for Voter Check*, N.Y. Times, July 14, 2012, at A15.

with the SAVE database. The Secretary continued to pursue this program through July 2012.

Florida held a primary election for federal office on August 14, 2012 and the general election for federal office on November 6, 2012. The 90-Day Rule therefore began to operate on May 16, 2012 and on August 8, 2012, respectively, with the 90-day periods overlapping.

Plaintiffs filed this action on June 19, 2012. The District Court denied plaintiffs' motion for a preliminary injunction and summary judgment on October 4, 2012 and entered final judgment for defendants on October 29, 2012. Plaintiffs filed a Notice of Appeal on November 1, 2012.

ARGUMENT

I. Past Purges in Florida and Elsewhere Show that Congress was Correct in Establishing the NVRA's 90-Day Rule as an Essential Safeguard Against Erroneous Disenfranchisement of Eligible Voters

Any large-scale purge just before an election poses a significant risk that voters will be purged erroneously and that such voters will be unable to reinstate their names before they effectively lose their right to vote. Because they are so often flawed, Congress directed States to complete systematic purges well in advance of an election:

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

42 U.S.C. § 1973gg-6(c)(2)(A). Congress adopted the 90-Day Rule to ensure that large-scale purges of voter names are "completed" sufficiently before an election to address the inevitable errors. The legislative history of the NVRA confirms this purpose, as Congress recognized that purge programs "can be abused" both "in [] design . . . as well as in [] implementation." S. Rep. No. 103-6, at 32 (1993).

Numerous examples of States incorrectly targeting eligible voters illustrate the prudence of Congress's decision to bar error-prone systematic purges during the quiet period. *See generally* Myrna Perez, Brennan Center for Justice, *Voter Purges* (2008). In 2000, Florida engaged in a large-scale effort to purge individuals with criminal convictions from its voter rolls by matching the names of registered voters against a database of individuals with criminal convictions. By conservative estimates, Florida incorrectly identified as ineligible at least 12,000 eligible voters. Florida's faulty matching system was blamed, in large part, for these errors: among other flaws, this system targeted some registered voters for removal if only 80 percent of the letters in their last names matched those of persons with criminal convictions. *See Voter Purges* at 3; *see also NAACP v. Smith*, No. 1:01-cv-00120-ASG, Joint Notice of Settlement and Motion for

Dismissal with Prejudice (S.D. Fla. Sept. 4, 2002) (Dkt. No. 605) (settlement of NAACP lawsuit in which Florida agreed to use better matching criteria). This faulty purge required voters and officials to expend significant efforts, as Florida's Department of Law Enforcement fielded over 2,500 appeals from people erroneously notified that they were in danger of being purged based on a criminal conviction.[9]

In 2004, Florida attempted to purge its voter rolls of convicted felons through a systematic matching program that identified 48,000 registered voters as potentially ineligible because of a felony conviction. Many of those identified—nearly half of whom were African Americans—were eligible to vote, including thousands whose voting rights had previously been restored under Florida law. A systematic flaw in the matching system also "automatically exempted all felons who identified themselves as Hispanic" from identification in the purge.[10] Florida abandoned the list after civil rights organizations brought national attention to the issue.[11]

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[9] Scott Hiaasen, Gary Kane & Elliot Jaspin, *Felon Purge Sacrificed Innocent Voters*, Palm Beach Post, May 27, 2001, at 1A.

[10] Ford Fessenden, *Florida List for Purges of Voters Proves Flawed*, N.Y. Times, July 10, 2004.

[11] *Fla. scraps flawed felon voting list*, Assoc. Press, USA Today, July 10, 2004.

Outside of Florida, purges based on changes of address have led to thousands of eligible voters being struck from the rolls. In 2006, Kentucky compared its registration list with the lists of South Carolina and Tennessee and purged those voters who appeared on either list if they had registered outside of Kentucky more recently, on the assumption that the voters had permanently moved out of Kentucky. Unfortunately, many of those voters had returned to Kentucky in the interim and were purged in error.[12] In 2007, Louisiana purged more than 21,000 people from its rolls, including voters living in areas hard-hit by hurricanes, on the suspicion that these voters had moved out of state. Voters could only challenge the purge by proving they had cancelled their supposedly active registrations in other States—recourse which was, of course, unavailable to voters who had never registered elsewhere.[13] And a number of purges during the 2008 election cycle generated additional examples of voters being erroneously purged due to bad data and poor matching criteria.[14]

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[12] Brennan Center for Justice, *Voter Purges* Appendices, at 25 (2008), *available at* http://brennan.3cdn.net/4c38d379edab57ecf9_nnm6iive7.pdf.

[13] *Voter Purges* at 6.

[14] *Id*. at 22 (voters in Georgia erroneously purged on suspicion of being convicted felons); Ian Urbina, *States' Actions to Block Voters Appear Illegal*, N.Y. Times, Oct. 9, 2008, at A1 (discussing purges that appeared to violate federal law in Indiana, Colorado, Ohio, Michigan, Nevada, North Carolina, Alabama, Georgia, and Louisiana).

Large-scale voter purges are likely to generate a substantial number of false positives.[15] Even though section 8(b) of the NVRA, 42 U.S.C. § 1973gg-6(b)(1), bars discriminatory purges,[16] Congress determined that this protection is not enough. Without the 90-Day Rule, voters would remain vulnerable to the errors inherent in systemic purge programs, even if a purge were nondiscriminatory.

II. The District Court's Crabbed Reading of the 90-Day Rule Is Erroneous and Conflicts with the Rule's Plain Text

In reaching its conclusion that the 90-Day Rule protects only voters suspected of moving, the District Court made two errors: (1) it incorrectly interpreted the 90-Day Rule, and (2) it reached outside the scope of the matter before it.

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[15] In sufficiently large populations, name-and-birthdate-based matches are practically certain to result in false positives. *See* Fatma Marouf, *The Hunt for Noncitizen Voters*, 65 Stan. L. Rev. Online 66, 69 n.13 (2012) (describing the underlying statistical phenomena); Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L. J. 111, 112 (2008) ("In a sufficiently large population, two entries listing the same name and birthdate are likely to demonstrate statistical coincidence rather than fraud.").

[16] The text of NVRA § 8(b) directs that "Any State *program* or *activity* to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 42 U.S.C. § 1973gg-6(b)(1) (emphases added). The phrasing of this provision indicates that Congress chose to distinguish between "programs" and ongoing list maintenance "activity." *See* discussion *infra* at Section IV.

The text of the 90-Day Rule is clear: "*Any* program" intended "to *systematically* remove" individuals from official lists of eligible voters is impermissible during the 90-day quiet period before a federal election (emphases added). Because the 90-Day Rule bars particular procedures or methods for voter removal, the District Court's inquiry should have focused on whether the Secretary's program removed voters "systematically" or on an individualized basis. "Unless the statute is ambiguous, our inquiry begins and ends with the statute's plain language." *Shockley v. Comm'r of IRS*, 686 F.3d 1228, 1235 (11th Cir. 2012).

Instead, the District Court erroneously interpreted the 90-Day Rule as barring States from removing voters for specific grounds during the 90-day period. That mistaken focus on the grounds or basis for removal rather than the methods or procedures led the District Court to yoke its analysis of the 90-Day Rule to its analysis of a separate provision of the NVRA, the "General Removal Provision," 42 U.S.C. § 1973gg-6(a), which directs that States shall "provide that the name of a registrant may not be removed from the official list of registered voters" except for one of four reasons: the registrant's request; the registrant becoming ineligible to vote under state law due to criminal conviction or mental incapacity; the registrant's death; or a change in the registrant's residence, 42 U.S.C. §§ 1973gg-

6(a)(3), (a)(4). This list does not specify noncitizenship as a basis for removal. The General Removal Provision, however, is simply inapposite because it does not govern the *procedures* to be followed when removals take place close to an election—the 90-Day Rule does.

The District Court's interpretation that the 90-Day Rule only applies to movers must be rejected. Initially, it is an implausible reading of the statute given the structure of its text. The statute sets forth a broad principle in 42 U.S.C. § 1973gg-6(c)(2)(A) and clarifies the scope of that principle in subsection (2)(B). It is evident that several lines of text and internal references to three other provisions were not used by Congress to convey the idea that "this provision only applies to changes of address." Instead, Congress intended the 90-Day Rule to apply broadly as evidenced by the use of a term as far-reaching as "any program." Congress's decision to use terms of "great breadth" such as "all," or here, "any," to define the scope of a provision indicates that Congress gave that provision an "expansive meaning." *Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d. 331, 336 (4th Cir. 2012) (interpreting the NVRA's disclosure requirements, 42 U.S.C. § 1973gg-6(i)).

Additionally, the District Court's interpretation conflicts with the text by failing to give meaning to the statutory language applying the ban to programs that

"*systematically* remove" voter names within the 90-day period. 42 U.S.C. § 1973gg-6(c)(2)(A). The 90-Day Rule applies to "any *program* . . . to *systematically* remove" voters, but section 8(c)(2)(B) clarifies that the section 8(c)(2)(A) prohibition on "systematic" programs does not "preclude" the routine and individualized "removal" of names or "correction" of voter rolls within the 90-day period. 42 U.S.C. § 1973gg-6(c)(2)(A), (B) (emphases added). Had Congress intended the 90-Day Rule to bar only the removal of voters rendered ineligible due to a change of address, there would be no need to include either "program" or "systematically" in the 90-Day Rule. That these words appear only in the text of the Rule—and not in the subsequent subsection permitting routine list maintenance during the quiet period—demonstrates Congress's intent to prohibit systematic programs, not to limit grounds for removal. Any other interpretation renders the word "systematically" a nullity.

It is true that no other provision in the NVRA defines "systematically" or addresses "systematic" programs—but this poses no obstacle to giving these words their ordinary meaning. The words "systematic" or "systematically" appear in a number of sections of the United States Code and Code of Federal Regulations to denote processes carried out according to a general plan. *See, e.g.*, 15 U.S.C. § 7266(a) (directing the Securities and Exchange Commission to review

the disclosures of certain issuers "on a regular and systematic basis for the protection of investors"); 29 C.F.R. § 2510.3-2(c) (providing that an employee bonus plan is not an "employee pension benefit plan" or "pension plan" under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq*., unless bonuses are "systematically deferred" until termination of employment or to provide retirement income). Courts interpret "systematically" to distinguish between a result that flows from a general scheme or program and a result that occurs due to individualized circumstances. *See, e.g.*, *McKinsey v. Sentry Ins.*, 986 F.2d 401, 406 (10th Cir. 1993) (finding that a plan did not provide for "*systematic* deferral of payment" even though individuals could defer payments by not exercising a right to withdraw vested bonuses) (emphasis in original); *Houston v. Saracen Energy Advisors LP*, C.A. No. H-08-1948, 2009 U.S. Dist. LEXIS 26307, at *19-*20 (S.D. Tex. Mar. 27, 2009) (holding that a plan designed to distribute bonuses by the third year after grant did not defer payments "systematically" since deferral of distributions to certain participants was "merely coincidental").

Here, Congress used the word "systematically" to distinguish between processes that purge ineligible voters through automated, mail-based, computer matching, or other "systematic" methods from individualized removals not subject

to the 90-day quiet period.[17] The District Court's reading gives no content to the word "systematically," effectively writing "systematically" out of the statute. Courts reject statutory interpretations that do this kind of violence to a text's clear meaning. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125 (2001) (rejecting construction that would render a word "insignificant, if not wholly superfluous . . . . It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (quoting *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 520 (1955)); *In re Whitley*, 772 F.2d 815, 817 (11th Cir. 1985) (rejecting an interpretation of a regulation that would render one of its provisions a "nullity" and therefore "contravene the purpose" of the authorizing statute).

Congress's worry that a "program" of purges may be abused or is prone to error demonstrates that the 90-Day Rule must be read as a moratorium on systematic purges, rather than as a ban on removals for certain grounds. This interpretation upholds the NVRA's purpose in protecting the franchise of eligible voters by placing restrictions on the timing and processes a State may use to remove ineligible voters from the rolls while still allowing the accurate removal of ineligible voters. *See, e.g.*, *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d

[17] *Amici* argue that 42 U.S.C. § 1973gg-6(c)(2)(B), a subsection of the 90-Day Rule, authorizes this kind of routine list maintenance. *See* discussion *infra* at Section IV.

1077, 1081 (D. Mont. 2008) ("The Act recognizes as well that if such programs are not tailored to protect the right of citizens to vote, eligible voters might be improperly removed from official voter lists. So, the Act establishes limits on the processes States may use to purge their voter rolls of ineligible voters.").

III. The District Court's Limitation of the 90-Day Rule Was Unnecessary to Its Ruling

The only question before the District Court was whether the Secretary's program to remove purported noncitizens violated the 90-Day Rule. Yet, the District Court reached beyond its conclusion on that question, and went on to determine whether the 90-Day Rule's protections extended to *other* classes of voters not at issue in this case. If it were correct to conclude—as the District Court concluded— that the NVRA's silence regarding suspected noncitizens means that voters are afforded no protections against allegations that they lack U.S. citizenship, that holding is enough to decide that the Rule does not bar the Secretary's program. Thus, there was no need for the District Court to reach beyond the narrow category of noncitizens and unnecessarily—and erroneously—conclude that the 90-Day Rule did not apply to *any* other category of ineligible voters suspected of ineligibility except for those who have recently moved. Prudence dictates that a court should rule on the issues presented in the case before it and not reach beyond the facts of the case at hand. Regardless of this Court's

decision on the question of how the NVRA applies to suspected noncitizens, this Court should reject the District Court's unnecessary enervation of one of the NVRA's key protections.

IV. The 90-Day Rule Provides Mechanisms for States to Remove Ineligible Voters, Such as Noncitizens

The District Court erred in interpreting the 90-Day Rule to apply only to presumed movers, and further erred by ignoring the rule's distinction between "systematic" and individualized removal of voters. Thus, the District Court apparently reasoned that unless the Secretary could remove noncitizens from voter rolls at any time, by any means—systematically or not—the Secretary might be prohibited from removing the names of noncitizens altogether.

A correct interpretation of the 90-Day Rule shows that this dilemma is false: The 90-Day Rule bars programs to *systematically* remove voters from the rolls during the quiet period, but the NVRA affords States mechanisms to strike ineligible voters during that time if certain protections are satisfied, namely if the removals are individualized and would make the rolls more accurate.

Although systematic purges are prohibited in the 90 days prior to an election, States may, subject to certain limitations, strike ineligible persons from the registration rolls during the quiet period. For instance, removals of noncitizens

during the 90-day period may be permissible if it is established that the removals are individualized, as opposed to systematic. 42 U.S.C. § 1973gg-6(c).

An example helps illustrate the point. If it came to the attention of State officials that a 16-year-old individual had been inadvertently added to the voter rolls when the individual obtained a valid driver's license, and the State confirmed the accuracy of this information, then the individual's name could be removed within the 90-day quiet period because the removal was not part of a systematic program.[18]

Moreover, the individualized removal of a voter who was never eligible, like a noncitizen, may be a "correction" within the meaning of the 90-Day Rule. Section 8(c)(2)(B)(ii) of the NVRA (the "Corrections Clause") states that the 90-Day Rule "shall not be construed to preclude correction of registration records pursuant to this subchapter." 42 U.S.C. § 1973gg-6(c)(2)(B)(ii). The District Court recognized that the Corrections Clause "may pertain" to the purge program, but did not address the Clause because "the Parties have not thoroughly explored an interpretation of this clause, and because it was not raised at the October 1,

[18] This is true notwithstanding the General Removal Provision, 42 U.S.C. § 1973gg-6(a), which applies to voters who later become ineligible to vote. Similarly, "Donald Duck" and "Minnie Mouse" could be removed after a determination that an eligible individual has not changed his or her legal name to one of these.

2012, hearing." *Arcia v. Detzner*, No. 12-22282-CIV-ZLOCH, 2012 U.S. Dist. LEXIS 176463, at *14 (S.D. Fla. Oct. 29, 2012).[19] While this provision gives States the ability to correct mistakes in their voting rolls, they can only do so subject to certain limitations. For example, a program of "correction" cannot, by definition, include inaccurate removals. According to Black's Law dictionary, a correction is defined as "[g]enerally, the act or an instance of making right what is wrong." Black's Law Dictionary (9th ed. 2009). Inherent in the definition of "correction" is a command that any "correction" be accurate. A noncitizen removal process that captures eligible citizens cannot qualify as a "correction" of registration records.

Additionally, a "correction," as contemplated in section 8(c)(2)(B)(ii) of the NVRA demands an individualized investigation. Various provisions of the NVRA refer to procedures whereby individual registrants or election officials may "correct" the voting rolls. *See* 42 U.S.C. §§ 1973gg-6(c)(1)(B)(i), (d)(1)(B)(ii), (d)(3), (e)(2)(A)(i)-(iii), and (f). These provisions recognize that election officials will occasionally have to engage in individualized updates of voter records in order to keep the records accurate.

[19] A sister court in Florida also noted that the Corrections Clause could permit removal of noncitizens from voter rolls. *United States v. Florida*, 870 F. Supp. 2d 1346, 1349 (N.D. Fla. 2012) ("It is unclear why the exception in clause (ii) does not apply to the Secretary's program . . .").

The Corrections Clause offers a straightforward way to harmonize the absence of a specified basis for "removal" of noncitizens (or other classes of individuals never eligible to vote) in the General Removal Provision within the NVRA's overall scheme of protecting eligible voters from erroneous purges. Within the quiet period established by the 90-Day Rule, however, the NVRA permits only individualized removal or "correction."

CONCLUSION

The District Court's holding that the 90-Day Rule applies only to those who have recently moved is therefore error twice-over: first, because it is wrong as a matter of statutory interpretation; and second, because it was unnecessary to the Court's holding. Because the 90-Day Rule is a moratorium on systematic purge programs, whether the Secretary's program in this case may continue within 90 days of a federal election turns on whether it is "systematic," or, instead, whether it is sufficiently individualized, specific, and accurate to ensure that only a confirmed noncitizen is removed from the rolls as a possible correction. This is necessarily a fact-bound determination that will require additional evidence about the scope of the Secretary's program and how it operates. Consequently, this Court should remand for additional fact-finding under a correct interpretation of the NVRA's 90-Day Rule.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the type-volume limitation of this Court of 7,000 words. This brief contains 4,849 words as determined by the word-counting function of the word-processing program used to prepare the brief.

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