No. 24A407

In the Supreme Court of the United States

SUSAN BEALS, IN HER OFFICIAL CAPACITY AS VIRGINIA COMMISSIONER OF ELECTIONS, *ET AL.*,
Applicants,

v.

VIRGINIA COALITION FOR IMMIGRANT RIGHTS, *ET AL.*,

Respondents.

PRIVATE PLAINTIFFS-RESPONDENTS' RESONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY

On Application for a Stay to the Honorable John G. Roberts, Jr.
Chief Justice of the Supreme Court of the United States
and Circuit Justice for the Fourth Circuit

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INTRODUCTION

In the National Voter Registration Act of 1993 ("NVRA"), Congress recognized that systematic programs to purge voter rolls on the eve of an election inevitably threaten the rights of eligible voters. Congress thus prohibited "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" fewer than "90 days prior to the date of a primary or general election for Federal office." 52 U.S.C. § 20507(c)(2)(A). Flouting this prohibition, Governor Glenn Youngkin issued Executive Order 35 ("E.O. 35") exactly 90 days before Election Day, creating a process that is "most certainly" systematic and relies on faulty data to purge allegedly ineligible voters from the rolls (the "Purge Program"). App. 246.

Between August 7 and October 21, a period entirely within the NVRA's 90-day "Quiet Period," over 1,600 voters were removed from the rolls because of the Purge Program. Supp. App. 314. Applicants' arguments—ranging from their theory of statutory interpretation to their assessment of Respondents' harm and the public interest—all hinge on their assertion that these purged individuals were all noncitizens. *See*, *e.g.*, Stay App. 12 ("Plaintiffs will not suffer any irreparable injury absent the injunction: Virginia's process removed noncitizens, who are ineligible to vote."); Stay App. 14 ("The NVRA's Quiet Period Provision does not apply to the removal of individuals, such as noncitizens, whose registrations were void *ab initio* and thus who were never eligible to vote in the first place."). These arguments fail at the outset because Applicants' *beliefs* about the purged voters' citizenship status are not supported by the record *evidence*. App. 269.

As the Fourth Circuit found, "Appellants err in asserting that the district court ordered them to 'restore approximately 1,600 noncitizens to the voter rolls.'" App. 4 (internal citation omitted). Rather, "[w]hat the district court actually found was that 'neither the Court nor the parties . . . know' that the people 'removed from' the voter rolls under the challenged program 'were, in fact, noncitizens,' and that at least some 'eligible citizens . . . have had their registrations canceled and were unaware that this was even so.'" App. 4. Applicants may refuse to "acknowledge these factual findings," *id.*, but they cannot refute them with anything more than baseless assertions, because the record makes clear that citizens *are* being removed from the voter rolls as a result of their Program. It is those eligible voters that the 90-Day Provision is designed to protect.

Applicants fail to understand this fundamental point by arguing that their definition of "ineligible voter" as limited to people who have moved to another jurisdiction "perfectly describes the people the NVRA is seeking to protect." Stay App. at 20. While the 90-Day Provision requires the halt of systematic list maintenance to remove *ineligible voters*, it does so not to protect those ineligible voters (regardless of whether they are ineligible because they moved or because they are noncitizens or for some other reason) but rather the *eligible* voters undeniably caught in the net of such systematic maintenance.

Within 36 hours of receiving the list of purged voters, Respondents uncovered numerous eligible citizens, including Respondents' own members, wrongfully purged from the rolls. Supp. App. 299 (identifying eligible, purged LWVA member); Supp.

App. 303-04 (identifying 14 eligible purged voters including three ACT members); Supp. App. 306-07 (declaration from wrongfully removed voter); Supp. App. 309-12 (identifying two additional wrongfully purged voters). And these voters are just the tip of the iceberg.[1]

The Commonwealth's Attorney for Arlington County and the City of Falls Church recently explained that her office's investigation of alleged noncitizen voters referred by the Purge Program "served as one more data point that the incidence of intentional voting by non-citizens is vanishingly rare to the point of being nonexistent."[2] She warned that, rather than removing ineligible voters, "the blanket approach in removing people from the voting rolls poses grave risk in disenfranchising voters." *Id*. That risk is being borne out across Virginia. For example, the Director of Elections and General Registrar of Prince William County has explained that E.O. 35 required him to cancel the registration of 43 individuals he believed to be citizens (because they had verified their citizenship as many as five times).[3] One of the voters removed in Loudoun County even had a "NEW CITIZEN" stamp on their 2015 voter registration application. Supp. App. 249. Several more from

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[1] *See*, *e.g.* Elizabeth Beyer, et al., *Meet some Virginians who almost lost their right to vote after being declared 'noncitizens'*, Cardinal News (Oct. 25, 2024), https://cardinalnews.org/2024/10/25/meet-a-few-virginians-who-almost-lost-their-right-to-vote-after-being-declared-noncitizens/ (profiling two additional wrongfully purged voters); NBC Washington, *Virginia resident's voter registration wrongly purged* (Oct. 28, 2024), *available at* https://www.nbcwashington.com/news/politics/virginia-residents-voter-registration-wrongly-purged/3752572/"https://www.nbcwashington.com/news/politics/virginia-residents-voter-registration-wrongly-purged/3752572/ (interviewing wrongfully purged voter).

[2] Parisa Dehghani-Tafti (@parisa4justice), X (Oct. 25, 2024, 7:01PM), https://x.com/parisa4justice/status/1849949556139540508.

[3] *See* Prince William County Electoral Board, Meeting Recording for September 30, 2024 at 29:25-29:47, https://www.youtube.com/watch?v=Zr0LSt3xwCk. Mr. Olsen has explained that his research revealed "NO basis that any 'illegal ballots' have been cast by individuals" and "[i]f anything, there is ample and consistent that these individuals are fully qualified U.S. citizens who have had their voter registration cancelled due to an honest mistake and poor form design." Supp. App. 193.

Loudoun County alone have returned attestations re-affirming their citizenship. Supp. App. 246-67.

There *are* significant checks in place to prevent noncitizens from voting, including the requirement that voters attest to their citizenship when registering, criminal penalties for ineligible voters who attempt to cast a ballot, and provision for individualized investigations and removals even within the NVRA's 90-day Quiet Period. But E.O. 35's Purge Program is emblematic of why Congress banned systematic voter purges during the Quiet Period. The fundamental right of eligible Virginians to vote is not protected by this Program, but rather is undermined by it.

With this factual and legal background, there is no reasonable probability that "four Justices will consider the issue sufficiently meritorious to grant certiorari," nor is there "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Applicants' position rests not just on a faulty factual footing, but also on a reading of the statute that ignores the plain text and contradicts settled precedent in circuits across the country. Applicants urge the Court to apply the *Purcell* principle, but here that principle counsels against a stay, in large part because Congress explicitly provided standing for private plaintiffs to challenge unlawful Purge Programs beginning 30 days before an election. Despite Applicants' stonewalling of Respondents' efforts to obtain information about the Program, Respondents did their "due diligence" in gathering evidence, App. 253, and filed suit on the first day permissible in the NVRA's preelection period. No court has ever applied *Purcell* to bar suit under such

circumstances, and doing so would override express congressional intent permitting injunctive relief to halt unlawful purges within 30 days of an election.

There is also no "likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190. Applicants' objections to the supposed burdens created by the district court's injunction are contradicted by the fact that they re-registered nearly 3,400 voters—more than twice the number at issue here—just last year on October 27, 2023, shortly before an election.[4] In contrast, Respondents, their members, and the hundreds of unlawfully purged, eligible Virginian voters, *will* be irreparably harmed if the stay is *granted*. The public interest will not, therefore, be served by a stay.

Finally, Applicants argue that the "rules surrounding elections should be stable and knowable for voters, election officials, and States themselves." Stay App. at 34. Respondents agree. That is why this Court should decline Applicants' suggestion that this Court—seven days before an election—upend settled law governing the 90-Day Provision and give states permission to purge voters (except with respect to residency) just days before the Presidential election. That type of disruption is what *Purcell* does not permit.

This Court should deny the Emergency Application for Stay.

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[4] *See* Ben Pavious, *Virginia reinstates nearly 3,400 voters after accidental purge*, VPM.org (Oct. 27, 2023), https://www.vpm.org/news/2023-10-27/virginia-reinstate-3400-voters-accidental-purge-youngkin-election.

BACKGROUND

The Virginia Code provides that the general registrar shall cancel the registrations of all persons who are known not to be U.S. citizens by reasons of report from the Department of Motor Vehicles ("DMV") or from the Department of Elections ("ELECT") based on information received from the Department of Homeland Security's Systematic Alien Verification for Entitlements Program ("SAVE"). Va. Code Ann. § 24.2-427. Section 24.2-410.1(A) of the Virginia Code requires the DMV to provide a list of people "who have indicated a noncitizen status" to ELECT monthly. These provisions are silent as to their applicability during the NVRA's 90-Day Provision.

On August 7, 2024, exactly 90 days before the November Presidential Election, Governor Youngkin issued E.O. 35. Supp. App. 182-86. In addition to the monthly process laid out in state law, E.O. 35 directed the DMV to expedite interagency data sharing with ELECT by "generating a daily file of all non-citizen[] transactions." Supp. App. 185; App. 87 ¶ 18. Despite the start of the NVRA's 90-Day Quiet Period, E.O. 35 mandated that the following "procedures are in place" for the daily updates to the voter registration list: (1) that ELECT "remove[s] individuals who are unable to verify they are citizens to the [DMV] from the statewide voter registration list;" and (2) that ELECT "compares the list of individuals who have been identified as non-citizens to the list of existing registered voters" and "registrars notify any matches of their pending cancellation unless they affirm their citizenship within 14 days." Supp. App. 184-85. Nothing in E.O. 35 explained that the Commonwealth

would also be engaging in an "ad hoc" process of SAVE verifications during the 90-Day Quiet Period, nor did Applicants clearly explain that process to the court below.

I. Specific procedures in place to implement Virginia's Purge Program.

Under the Purge Program, the DMV aggregates the data of individuals who were deemed to be noncitizens at some point in time. *See* App. 84; App. 93; App. 111; Supp. App. 225-45. Data are then transferred to ELECT, which uses an electronic data matching process to determine solely whether the purported noncitizens are on the voter rolls. Supp. App. 163-64. ELECT identifies the locality where matched individuals are registered and sends that person's information to the appropriate general registrar. *Id.*

The registrars then verify only that the purported noncitizen flagged from the ELECT data is the same person as the one listed on the voter rolls. *Id.* at 164. Despite Applicants' misleading claim to the contrary in their Application for Stay, state law does not allow registrars to conduct any further inquiry into the individual's citizenship status, and the record reflects that in fact registrars have been conducting no such further inquiry. Supp. App. 493-96; *see* Va. Code Ann. § 24.2-427(C) ("The general registrar shall mail notice promptly to all persons *known by him* not to be United States citizens *by reason of a report* from the [DMV or ELECT]") (emphasis added).

When there is an identity match, the registrars send a letter to the list of matched individuals stating that they have been identified as potential noncitizens. The letter is created in the VERIS system via an automated process. The notices direct the recipient that he or she has 14 days to respond and complete and attach an

attestation of citizenship. If the person does not respond, the registrar can manually cancel that person's registration starting 14 days from the date the letter was mailed by the registrar. The person is automatically canceled and removed from the voter rolls by the VERIS system after 21 days. Supp. App. 163-64.

A. Removals based on citizenship question responses.

Prior to E.O. 35, the DMV sent monthly to ELECT a list of Virginians who had answered "no" to a citizenship question on DMV paperwork, so that ELECT could initiate the removal process. Supp. App. 101-03. According to a 2024 memorandum of understanding between the DMV and ELECT implementing E.O. 35, the DMV now also sends daily to ELECT a list of Virginians who have answered "no" to a citizenship question on DMV paperwork.[5] Supp. App. 92. The Commonwealth does not attempt to verify the status of people who respond negatively to citizenship question, but who have documents indicative of citizenship (such as a passport) on file with the DMV or who have previously indicated they are citizens. Thus, the DMV refers individuals to ELECT for removal even if they provide contradictory indicators of citizenship within the same transaction. Removals based on answers to the citizenship question have improperly purged not only naturalized citizens, but also natural born citizens.[6] Supp. App. 310-12.

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[5] The 2024 memorandum of understanding also requires the DMV to send daily to ELECT a list of voters who, regardless of how they respond to the citizenship question on DMV paperwork, have "legal presence documents [with the DMV] indicating non-citizenship status." Supp. App. 92. Applicants claim they do not use this list of voters in their Purge Program, but the *ad hoc* process used this type of information to initiate the removal process for such voters who transacted with the DMV between July 1, 2023 and June 30, 2024. *See* Background, Part I.B., *infra*.

[6] *Virginia Resident's Voter Registration Wrongfully Purged*, NBC4 Washington (October 28, 2024), https://www.nbcwashington.com/news/politics/virginia-residents-voter-registration-wrongly-

B. Removals based on matching DMV data with the Systemic Alien Verification for Entitlements database.

Apparently, Applicants engaged in further list maintenance activities within the 90-Day Quiet Period that were not outlined in the executive order (or anywhere publicly). Respondents' knowledge of this process is limited to the opaque declarations submitted by Applicant below. According to those declarations, on August 28, 2024, within the 90-Day Quiet Period, Applicants referred to registrars 1,274 individuals for removal for purported noncitizenship after electronically matching DMV data with the Department of Homeland Security's Systemic Alien Verification for Entitlements ("SAVE") database. Applicants first aggregated individuals who had indicated that they were citizens during DMV transactions that occurred between July 1, 2023 and June 30, 2024 but had noncitizenship documentation on file with the DMV. App. 88 ¶ 22, 25. These types of transactions are common because the "DMV does not require new legal presence documentation for many transactions subsequent to the initial driver's license/identification case transaction." App. 96 ¶ 19.

Applicants have explained that these individuals were then apparently matched electronically with the SAVE database and those with noncitizenship matches were referred to registrars for removal. App. 88 ¶ 22-25, 96 ¶ 19. Neither ELECT nor the DMV investigated any individual affected voter to fill the gaps in the process before removing voters from the voter registration list. Because the SAVE

purged/3752572/; *Meet some Virginians who almost lost their right to vote after being declared 'noncitizens'*, Cardinal News (October 25, 2024), https://www.cardinalnews.org/2024/10/25/meet-a-few-virginians-who-almost-lost-their-right-to-vote-after-being-declared-noncitizens/.

program is a systematic matching program, its results are sometimes inconclusive or incorrect, and the program provides individuals an opportunity to correct SAVE records and for additional manual individual investigation by USCIS (a process not employed here). *See* Argument Part II, *infra* (addressing Applicants' claims that SAVE is highly accurate). A factsheet published by USCIS explains that "there are a number of reasons why the SAVE Program may not be able to verify your citizenship." Supp. App. 126.

II. Impact of E.O. 35.

Since E.O. 35 was issued on August 7, 2024, more than 1,600 people have been removed from the voter rolls under the Purge Program. *See* Supp. App. 314-98. In Prince William County, during the September 30, 2024 Board of Elections meeting, General Registrar Eric Olsen described 162 individuals as being listed as noncitizens in the VERIS system. Supp. App. 176; *see also* Supp. App. 190-96. Of those individuals, 43 had voted, all 43 had verified their citizenship previously (some as many as five times). *Id.* Yet, the county still was forced to cancel their registrations to follow the dictate of E.O. 35. Olsen noted that being identified as a

> non-citizen in the VERIS system does not mean someone is not dispositively not a citizen. It is a categorization that largely comes from the DMV transfer of data and what it has done, if anything, is more likely has trapped a lot of people who are valid citizens who are being canceled from the process.

Supp. App. 176. In Loudoun County, one of the individuals removed even had a "NEW CITIZEN" stamp on their 2015 voter registration application. Supp. App. 249.

Several more from the County have returned attestations re-affirming their citizenship. Supp. App. 246-67.

Additionally, within 36 hours of receiving Applicants' discovery responses, Respondents discovered and corresponded with at least 18 U.S. citizens removed by Virginia's Purge Program, including one who was turned away from the polls. Supp. App. 301-304, 308-313.

PROCEDURAL HISTORY AND KEY FACTUAL FINDINGS

I. Pre-suit investigation and district court proceedings.

Immediately after the announcement of E.O. 35 in August, Respondents began trying to understand the Program, and initially requested information from Applicants on August 13th and 20th. Supp. App. 76-85. In August and September, Respondents attended meetings local Boards of Registrars meetings to learn how the Purge Program was operating, whether local registrars could exercise discretion, and whether voters were being systematically removed from the rolls.[7]Respondents filed suit after it became clear that Applicant Beals would stonewall Respondents' requests and would continue to refuse to provide information about the Purge Program despite the August letters and an additional NVRA request sent in early October, and after diligent pre-suit investigation revealed that U.S. citizens were being removed from the voter rolls. Further, Respondents filed their complaint the first day that was

[7] *See*, e.g., Arlington County Electoral Board Meeting Minutes (Sept. 10, 2024), https://vote.arlingtonva.gov/files/assets/vote/v/1/electoral-board/2024/minutes-amp-other/approved-minutes-9.10.24.pdf (noting attendance of Plaintiff-Respondent League of Women Voters of Virginia).

permissible under the NVRA's 30-day preelection period, following the October letter. *See* 52 U.S.C. § 20510(b)(3).

Respondents filed an emergency motion for expedited discovery the day after the complaint, and only eight days later, they amended their complaint and moved for a preliminary injunction. Supp. App. 41, 56; App. 22. The district court held a hearing on Respondents' emergency motion for expedited discovery on Monday, October 21st and ordered Applicants to provide some of the information requested by Respondents within 48 hours. Based on the expedited discovery provided by Applicants, Respondents identified multiple citizens harmed by the Purge Program. Supp. App. 246-313.

The district court held a full day hearing on Respondents' Motion for Preliminary Injunction on October 24th. The court heard the parties' legal arguments and reviewed evidence provided by Applicants related to the administration of the Purge Program, both before and after E.O. 35, and the lists of voters purged by the Program. The district court also reviewed declarations provided by Respondents showing that citizens were improperly purged by the Program. Supp. App. 246-313. On October 25th, the court granted Respondents' preliminary injunction motion only as to the 90-Day Provision claim.

II. The district court's factual findings and ruling.

The district court made several critical factual findings. *First*, it concluded that the Purge Program "involved just matching data fields" because, as Applicants' own declarant observes, the DMV collects customer data—name, social security number—

and sends it to ELECT to conduct a computerized data matching process. App. 85, 247-248.

Second, the district court found that the program "left no room for individualized inquiry." App. 248. Registrars are required to mail notices of intent to cancel, and as the court noted, "[t]he [Applicant] conceded . . . that the processes for matching the records by ELECT and the registrars is limited to identification purposes. A registrar may only confirm that the person identified by ELECT matches the record." App. 248-449.

Third, the court found that the "program has curtailed the right of eligible voters to cast their ballots in the same way as all other eligible voters." App. 252. Critically, while Applicants failed to show that any of the 1,610 people removed from the rolls from the Purge Program were in fact noncitizens, the court credited Respondents' "evidence that revealed that citizens have been removed from those rolls." App. 255. The district court found that these citizens had already suffered irreparable harm. In particular, Applicants "conceded that eligible voters who have had their registrations canceled can no longer vote absentee or by mail if they had planned to." App. 252.

Fourth, the court found that Respondents did not unreasonably delay in bringing the case, pointing out that the Private Respondents began communicating with Applicants in August, shortly after E.O. 35 was issued, and were delayed in bringing suit by Applicants' refusal to produce documents and information that the Private Respondents had requested in an August public records request. *See id.*

III. Motion for stay at the Fourth Circuit Court of Appeals.

After the district court denied their Motion to Stay, Applicants moved to stay the district court's preliminary injunction at the Fourth Circuit Court of Appeals. A panel of the Fourt Circuit denied Applicants' Motion to Stay in all respects except the district court's order requiring Applicants to educate local officials, poll workers, and the general public about the impact of the district court's order. App. 6.

With regard to the factual findings showing that at least some "eligible citizens . . . have had their registrations canceled and were unaware that this was even so," App. 254, the Fourth Circuit panel held that Applicants' Motion to Stay did not "acknowledge these factual findings (much less attempt[] to show they are clearly erroneous), and any casual suggestion to that effect in [Applicants'] reply brief is too little and comes too late to preserve such an argument for our consideration." App. 6.

LEGAL STANDARD

Applicants must carry a heavy burden to prevail, and they fail to do so here. *See Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971). "A stay is an 'intrusion into the ordinary processes of administration and judicial review,'" *Nken v. Holder*, 556 U.S. 418, 427, 433-34 (2009) (quoting *Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)), and granting a stay pending appeal is "extraordinary relief," *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979). Applicants must show each of the following: that (1) they will likely prevail on appeal, (2) they will suffer irreparable injury absent the stay, (3) other parties will not be substantially harmed by the stay, and (4) the public interest will be served by granting the stay. *Nken*, 556 U.S. at 434. In fact, a stay "is not a matter of right, even

if irreparable injury might otherwise result to the appellant." *id.* at 433 (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). A district court's findings when granting or denying a preliminary injunction "must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a)(6).

Applicants ask the Court to stay the injunction based on *Purcell v. Gonzalez*, 549 U.S. 1 (2006), but that would be wholly improper here. In *Purcell,* this Court cautioned against district court orders affecting state election laws close to an election, but specifically those orders which would "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. As explained in *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (emphasis in original),[8] the *Purcell* principle does not mean that "a district court may *never* enjoin a State's election laws in the period close to an election." Injunctive relief is appropriate close to an election, "particularly where there has been a last-minute change that imposes a substantial burden on the right to vote" or "that disrupts the status quo . . . ." *League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59, 70, 78 (D.S.C. 2020), *appeal dismissed and remanded*, 849 F. App'x 39 (4th Cir. 2021) (holding that county boards engaging in novel signature matching procedures disrupted the existing status quo and issuing injunction). *See also* App. 5.

[8] Indeed, even if this Court applied *Purcell* and the factors identified in Justice Kavanaugh's concurrence to the stay decision in *Merrill*, Applicants would prevail because the merits are clear-cut, Respondents and eligible Virginia voters face irreparable harm, Respondents did not delay, and the relief ordered is eminently reasonable. *See infra*.

Here, the NVRA specifically applies to the immediate period before an election, imposing limitations on government actions within 90 days before an election and authorizing litigation to commence within 30 days of an election for NVRA violations. *See* 52 U.S.C. § 20510(b)(3); *see also* App. 5. No case applying *Purcell* has ever suggested that the doctrine can override a federal statute permitting lawsuits within the timeframe, and Applicants cannot cite to any case applying *Purcell* to a suit authorized under section 20510(b)(3). More fundamentally, the *Purcell* principle is intended to prevent chaos and confusion just before an election—just like the 90-Day Provision. But under Applicants' construction, the 90-Day Provision would become entirely unenforceable, and *Purcell*'s own purpose would be thwarted. The last-minute nature of these proceedings is entirely of Applicants' making, and *Purcell* cannot be construed to reward their violation of the NVRA.

ARGUMENT

I. Applicants are unlikely to succeed on the merits.

A. The 90-Day Provision applies to Virginia's Purge Program.

The NVRA's 90-Day Provision undoubtedly applies to Virginia's Purge Program. Applicants' argument to the contrary ignores the plain text of the statute, relies largely on a different provision of the NVRA that uses different key terms, and conflicts with *all* existing precedent.

The 90-Day Provision prohibits "*any program* the purpose of which is to systematically remove the names of ineligible voters" from the rolls unless it is completed more than 90 days before an election. *Id.* § 20507(c)(2)(A) (emphasis

added). The statute then provides several exceptions to that prohibition: it does not apply to removals at "the request of the registrant," "by reason of criminal conviction or mental incapacity," or due to "the death of the registrant." *Id.* § 20507(a)(3)-(4).[9]

As they began to operate the accelerated Purge Program, Applicants asserted that the Program was exempt from the 90-Day Provision because it qualified as "correction of registration records." Supp. App 187-89. They made that argument to the district court as well, App. 64, but have wisely abandoned it here. *See* App. 22-26.

Applicants now turn to a different argument for why their Program is exempt from the law: they maintain that despite its use of the term "any program," the 90-Day Provision prevents *only* "removing registrants based on a change in residence." Stay App. at 16. But this Court has explained that it must "respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 765 (2019) (Gorsuch, J. lead opinion); *see also Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Here, Applicants' understanding relies on ignoring some terms of the statute while redefining others, and for that reason has been roundly rejected by the lower courts. *See* App. 3; *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1348 (11th Cir. 2014); *Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1093 (D. Ariz. 2023).

[9] The statute also allows for "correction of registration records pursuant to this chapter." *Id.* § 20507(c)(2)(B)(ii). As explained just below, Applicants have abandoned their initial claim that the "correction of registration records" exception applies here.

First, Applicants gloss over the fact that the law prohibits "*any* program" to systematically remove ineligible voters, aside from the enumerated exceptions. To read the phrase "any program" to apply to just *one* type of program—that which removes registrants based on a change in residence— "would functionally eviscerate the meaning of the phrase 'any program' in the 90 Day Provision." *Arcia*, 772 F.3d at 1348.

Instead of focusing on the text of the 90-Day Provision, Applicants rely on their interpretation of a different part of the NVRA—the "General Removal Provision," 52 U.S.C. § 20507(a)(3)—to reach their preferred interpretation. In essence, they claim that the General Removal Provision prohibits removal of "registrants" unless an enumerated exception applies; and because none of those exceptions relates to noncitizenship, the term "registrants" cannot be read to include noncitizens. *See* Stay App. at 16. And they maintain that because "registrants" must exclude noncitizens, the 90-Day Provision's reference to "ineligible voters" *also* cannot be read to include noncitizens.

Applicants' argument should be rejected outright—this case is not about the General Removal Provision, and any perceived flaw in its language is not at issue here. *See Arcia*, 772 F.3d at 1347 ("We are not convinced, however, that the Secretary's perceived need for an equitable exception in the General Removal Provision also requires us to find the same exception in the 90 Day Provision.");[10]

[10] If it were appropriate to apply the canon of constitutional avoidance to the General Removal Provision, that would not counsel for applying it to a completely different provision—Applicants' generalized assertion that statutes must be read "as a harmonious whole," Stay App. at 22 (internal

App. 4. Indeed, all parties and courts agree that the NVRA allows Applicants (and all states) to remove noncitizens.[11] That is likely because, as Applicants point out, there are valid reasons to understand the word "registrant" to refer only to an "*eligible* applicant" who submitted a "*valid* voter registration form," *see* Stay App. at 15 (quoting 52 U.S.C. § 20507(a)) (emphasis added)—a description that does not apply to most noncitizens.

In any event, Applicants' comparison between the General Removal Provision and the 90-Day Provision fails. Most obviously, Applicants cannot explain why the two provisions should be read to apply to the same class of people: the General Removal Provision concerns removal of "registrants," while the 90-Day Provision concerns removal of "ineligible voters." 52 U.S.C. § 20507(a)(4), (c)(1)(A). Congress' decision to use different words in different sections of the same statute is a strong reason to conclude they should be given different meanings. *See Pulsifer v. United States*, 601 U.S. 124, 149 (2024) ("In a given statute, the same term usually has the same meaning and different terms usually have different meanings."); App. 3.

In a footnote, Applicants contend that section 20507 uses the terms "registrant" and "voter" "interchangeably," Stay App. at 19 n.1, but it does not. Where that section refers to removals stemming from individualized requests or adjudications, it refers to "remov[al]" of "a registrant," *id.* § 20507(a)(3) (removal based on individual request, criminal conviction, or incapacity determination)—but

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quotations omitted), is unhelpful, especially here, where the General Removal Provision and the 90-Day Provision use different terms, *see infra*.

[11] *See Arcia*, 772 F.3d at 1348; *Mi Familia Vota*, 691 F. Supp. 3d at 1092-1093; *Bell*, 367 F.3d at 592.

where it refers to removals stemming from "general" or "systematic[]" "programs," it refers to "remov[als]" of "ineligible voters," *id.* §§ 20507(a)(4), (c)(2)(A). Registrants—who have completed the valid-voter-registration-form process, *see id.* § 20507(a)(1)—can only be removed for specified reasons and through specified procedures, *see id.* § 20507(c)(2)(B), whereas other ineligible voters—who have not completed that process—do not receive those protections, *see id.* §§ 20507(b)(1), (c)(2)(A).[12]

When Applicants finally turn to analysis of the 90-Day Provision itself, they are on no firmer ground. They assert that the term "ineligible voter" cannot apply to noncitizens; under their proposed reading, the term "ineligible voter" in fact means "someone who once had the legal right to vote but is no longer qualified." *See* Stay App. at 19-20. But again, Congress chose a different phrase: ineligible voter. Clearly the concern animating Applicants' removal program is a risk of "*voting*" by "*ineligible voters*." Their interpretation of the NVRA suggesting that such persons would not be "voters" therefore fails as a matter of statutory interpretation and logic. And there is no question that the plain meaning of "ineligible voter" includes noncitizens, who are certainly not eligible to vote in Virginia.

Applicants purport to rely on the dictionary definition of "voter" to support the conclusion that noncitizens do not qualify as "ineligible voters." *See* Stay App. at 19. But as they are forced to acknowledge, "voter" is defined either as (1) *someone who*

[12] Contrary to Applicants' unsupported assertion, Stay App. at 19, the 90-Day Provision exceptions' cross-references to other parts of the statute that use the term "registrants" is irrelevant—the exceptions apply to "*removal of names* from official lists of voters *on a basis* described" in the General Removal Provision and do not incorporate the use of the term "registrants." *Id.* § 20507(c)(2)(B)(i) (emphasis added).

votes; or (2) someone who "has the legal right to vote." *Id*. Thus, under the first definition, an "ineligible voter" is "someone who votes" but is not eligible—for example, a noncitizen who has voted.[13] Applicants simply ignore this problem when claiming that an "ineligible voter" must be someone who was *once eligible*—as they would readily admit, most noncitizens, even if they voted, have never been eligible.[14]

Meanwhile, the second dictionary definition of a "voter"—someone who "has the legal right to vote"—cannot make sense in the context of the statutory sentence, which refers specifically to "ineligible voters." Importing Applicants' proposed definition of "voter" into the statute would result in a direct contradiction in terms: the phrase "ineligible voters" would become "a person not qualified to vote who has the legal right to vote." That cannot be what Congress meant.

Applicants also maintain that the categories of people the 90-Day Provision addresses fits with their understanding of "ineligible voter," arguing that someone who has been convicted of a felony or declared mentally incapacitated was once eligible, while noncitizens "never could have validly registered in the first place." Stay App. at 20. But as the *Arcia* Court pointed out, that premise is faulty: some people may be ineligible to register "at the time of their registration" due to a felony conviction or mental incapacity. 772 F.3d at 1347-48. Moreover, "a citizen could also lose his citizenship after registering, thereby losing his eligibility to vote." *Id*. at 1348.

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[13] There is no question that many alleged noncitizens removed from Virginia's rolls as part of the Purge Program have voted before. *See, e.g.*, Supp. App. 175 (43 individuals with voting records purged in Prince William County); Supp. App. 310-11 (identifying purged citizens with voting history).

[14] This conclusion lays bare another reason Applicants' understanding of the statute is nonsensical if it acknowledges that a "voter" includes "someone who votes"—under that logic, a noncitizen who *has* voted qualifies as a "voter" and may not be removed under the 90-Day Provision. But a noncitizen who has not voted would not qualify as a "voter" and therefore may be removed.

Aside from their textual argument, Applicants correctly point out that the NVRA was intended to protect the "right of *citizens* of the United States to vote." Stay App. at 21 (quoting 52 U.S.C. § 20501(a)(1)). But they are wrong to contend that the prevailing interpretation of the 90-Day Provision fails to serve that goal—Applicants refuse to confront the fact that courts, studies, and the record in this case have uniformly found that last-minute, systematic purge programs are rife with errors and lead to the removal of eligible U.S. citizens. *See, e.g.*, App. 4; *Arcia*, 772 F.3d at 1346; *United States v. Florida,* 870 F. Supp. 2d 1346 (N.D. Fla. 2012); *Texas League of United Latin Am. Citizens v. Whitley*, No. SA-19-CA-074-FB, 2019 WL 7938511 (W.D. Tex. Feb. 27, 2019); *Ala. Coal. for Immigrant Justice v. Allen* (*ACIJ*), No. 2:24-cv-1254, 2024 WL 4510476 (N.D. Ala. Oct. 16, 2024); Supp. App. 246-249, 250-267, 268-296, 297-300, 301-304, 305-307, 308-313. Applicants likewise also fail to acknowledge that the 90-Day Provision allows them to investigate and remove noncitizens on an individualized basis.

For all of these reasons, *all* relevant precedent supports Respondents' common-sense reading that when the 90-Day Provision uses the term "any program," it in fact means "any program." *See* App. 2-4; *Arcia*, 772 F.3d at 1343-48; *Mi Familia Vota*, 691 F. Supp. 3d at 1093 (rejecting defendants' argument that "the 90-day Provision does not 'apply to removing noncitizens who were not properly registered in the first place'") (quotation marks omitted); *see also ACIJ*, 2024 WL 4510476. As discussed in Argument Part V, *infra*, there is no circuit split—the decision in *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004), was not about the 90-Day Provision and simply

confirmed the universally-held view that the NVRA allows removal of ineligible voters outside the 90-day pre-election window.[15]

B. Virginia's program is systematic.

The evidence also established that Virginia's Purge Program is systematic: as described in the Governor's executive order, "[t]he Department of Elections compares the list of individuals who have been identified as non-citizens to the list of existing registered voters and then registrars notify any matches of their pending cancellation unless they affirm citizenship within 14 days." Supp. App. 179. As the Fourth Circuit explained, "the inclusion of a person's name on a list electronically compared to other agency databases is enough for removal from the voter rolls." App. 2-3.

Every court that has reviewed a voter purge similar to Virginia's has concluded that it is systematic. In *Arcia*, for example, Florida relied on database matching, including a SAVE check, to create a list of names, and then mailed notices to each person on that list. The Eleventh Circuit concluded that the "program was a 'systematic' program under any meaning of the word." 772 F.3d at 1344.[16] Likewise, less than two weeks ago, the Northern District of Alabama held that a similar

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[15] In a footnote, Applicants contend that the 90-Day Provision is unconstitutional if it applies to removals based on alleged noncitizenship, as all existing precedent has found it does. *See* Stay App. at 23 n.4. But that argument proves too much—it would apply to removals on the basis of any ineligibility ground, and thus would apply to the 90-Day Provision as a whole. And that argument is foreclosed by this Court's precedent. In *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 19 (2013), this Court made clear that Congress has broad power to govern the manner of federal elections and that power is "paramount, and may be exercised at any time, and to any extent which it deems expedient." *Id.* at 9. While the Commonwealth retains the right to set qualifications, it cannot argue that a law governing the manner of conducting elections is unconstitutional unless it is so severe it renders it unable to enforce its qualifications. A simple 90-day pause on list maintenance available the rest of the year plainly cannot meet that burden.

[16] Florida's program was more individualized than Virginia's because the Secretary of State instructed local officials to "conduct additional research" using any resources available before initiating removal. *Id*. at 1339.

program was "systematic" despite its use of follow-up letters. Supp. App. 214; *see also Mi Familia Vota*, 691 F. Supp. 3d at 1092-93; *Forward v. Ben Hill Cnty. Bd. of Elections*, 509 F. Supp. 3d 1348, 1355 (M.D. Ga. 2020); *N.C. State Conf. of NAACP v. N.C. State Bd. of Elections*, 1:16-cv-1274, 2016 WL 6581284, at *6-7 (M.D.N.C. Nov. 4, 2016).

Applicants assert that their program is "individualized" because it involves the DMV forwarding the names of individuals who have "declared themselves to be noncitizens" to Virginia's Department of Elections (ELECT), which then compares that list to the voter rolls. ELECT then "forwards" each match to local registrars, who "confirm that the two people are the same." Stay App. at 24. But forwarding a list of names multiple times for comparison with other lists certainly does not make a process individualized, and nor does a local registrar's confirmation of a voter's *identity*. The key fact, which Applicants elide, is that at no point during this process does any official from ELECT or a local registrar's office review names individually to investigate voters' *citizenship* before initiating the purge process. In fact, even if the DMV has a voter's passport or other citizenship documentation on file, it does not send that to ELECT in the database matching process, further showing how the Program is systematic. App. 84.[17]

Virginia's mass mailing to affected voters does not make the process "individualized," as courts have uniformly held. *See, e.g.*, *Arcia*, 772 F.3d at 1344;

[17] Applicants' implication that that the Program is individualized because it starts with an individual's interaction with DMV fails. A program based on the national change of address (NCOA) system undoubtedly starts with an individual submitted a change of address, yet no one would doubt that an NCOA removal process is systematic. *See* 52 U.S.C. § 20507(d)(1)(B)(ii).

Supp. App. 214. (rejecting Alabama's argument that follow-up letters rendered program individualized because that interpretation "would allow mass computerized data-matching programs to completely evade the 90-day provision, which is inconsistent with the text and purpose of the statute"); *N.C. NAACP*, 2016 WL 6581284, at *6-7.[18] Mailing a notice and removing voters from the rolls without receiving any response does not constitute an individualized inquiry that protects against error. That reality was demonstrated in *ACIJ*, *see* Supp. App. 214-218, and in this case, where the evidence that was gathered just in the two days after production of the Purge List in already began to show that voters who were removed are naturalized citizens who were unaware of any removal letter. Supp. App. 299, 303.

Nor can Virginia's use of the SAVE database for *some* of the purged voters render its program individualized. As the *Arcia* Court noted, "it is telling" that the SAVE database has the word "Systematic" in its name. 772 F.3d at 1344; *see also Mi Familia Vota*, 691 F. Supp. 3d at 1092-1093 (holding that matching process involving SAVE was "systematic" and violated 90-Day Provision). The use of a person's "unique Alien Registration Number," Stay App. at 25, does not alter that conclusion: Virginia's process still involved comparing an existing list of registered voters against the SAVE database—in any such comparison, each targeted individual would need to

[18] *Husted v. A. Philip Randolph Institute*, 584 U.S. 756, 779 (2018), *see* Stay App. at 25, is inapposite here. That case did not involve the 90-Day Provision, but a cancellation system explicitly provided for in the NVRA, *see* 584 U.S. at 765, which is only triggered after a voter does not vote in two consecutive federal elections, *see* 52 U.S. C. § 20507(d)(1)(B)(ii). That provision demonstrates that Congress did not think a notice and failure to respond alone was nearly enough to justify immediate removal (even for those appearing on the NCOA list).

be uniquely identified in some manner. Moreover, Applicants in fact do not perform the "additional verification" procedures that can render use of SAVE more individualized. Argument Part II, *infra*. And while Applicants fruitlessly attempt to bolster SAVE's reliability based on material not in the record, *see* Argument Part II, *infra*, the 90-Day Provision prohibits *all* systematic removal programs, without contemplating an assessment of their accuracy.[19]

* * *

For these reasons, Applicants are very unlikely to succeed on the merits.

II. Respondents and eligible Virginia voters face irreparable harm.

Virginia will suffer no irreparable harm because of the district court's narrow injunction (which lapses in one week) enforcing the plain language of a decades-old federal law. *See* App. 5 ("Appellants' claims of irreparable injury absent a stay are weak."); *see also United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest.")

Contrary to Applicants' suggestions, the district court's injunction did not enjoin enforcement of any Virginia law most days of the year; it merely requires a pause in Virginia's systematic list maintenance in the days immediately preceding a federal election. That has been the law for all states for over thirty years. Moreover, as Applicants must concede, most of the removals that have occurred during the 90-day Quiet Period were pursuant only to E.O. 35, not Virginia statutes. Applicants'

[19] Applicants complain that the Fourth Circuit "gave no explanation of what 'an individualized basis' would be." Stay App. at 26 (quoting App. 5). But as explained in Argument Part II, *infra*, some examples are apparent: ELECT could have asked the DMV whether voters on the Purge List had previously provided proof of citizenship, such as a passport. It also could have performed more individualized procedures within the SAVE system, rather than simply comparing databases.

"ad hoc" SAVE process plainly is not required by the relevant Virginia statutes given that it has not been performed for *any* DMV transactions outside a one-year period chosen seemingly at random by the Commonwealth. App. 88 ¶ 22; App. 96 ¶ 21. Finally, for this same reason, the 90-day violation for the SAVE-related removals was entirely of the Commonwealth's own making. If Applicants had simply engaged in this "ad hoc" process of its own invention a month earlier, they would have avoided running afoul of the 90-Day Provision (of which it was certainly aware). As the district court found, this was "not happenstance," App. 253, and Applicants should not be rewarded for their intentional choice to conduct this "ad hoc" process within the 90-day Quiet Period rather than any other time of the year.

It is Respondents, their members, and other eligible citizens who face irreparable harm if this Court stays the district court's injunction. Respondents have already uncovered evidence of *many* eligible citizens removed from the rolls, including members of Respondents' organizations, other voters who quickly responded to phone calls and could verify their citizenship, a voter with a "new citizen" stamp on the face of his voter registration application, and voters whose citizenship has been verified by election officials. *See* Supp. App. 246-313. This is information Applicants could have uncovered themselves if they had engaged in individualized inquiries rather than systematic list maintenance.

The likely high error rate of Applicants' program undermines their claims of irreparable harm and should come as no surprise.

First, some people removed under Applicants' program were removed because they checked a box indicating noncitizenship during a DMV transaction. Virginia repeatedly stresses that this means their program reports only "self-identified noncitizens" and thus must be accurate. But its factual assertions blink reality: the fact is that many U.S. citizens check the wrong box. *See supra*. As the Prince William County Director of Elections and General Registrar has explained, this is largely a problem of form design. Supp. App. 191-95. When Alabama engaged in a similar system based on checkboxes on forms from the Alabama Department of Labor, the error rate was astronomical. After a lawsuit was filed, the Secretary cross-checked the checkbox data with documents on file with the driver's license agency and immediately confirmed the citizenship of 93.8% of them.[20] Supp. App. 197-200.[21]

It appears Applicants have made little effort to uncover errors. As established by the *other* method by which individuals find themselves removed under the Program (that is based on documents indicating noncitizenship), the DMV collects records pertaining to citizenship status during certain DMV transactions. *See* App. 87. Yet, when voters are purged based on the DMV checkbox, Applicants do not even

[20] To be clear, the data did not confirm noncitizenship among the remaining 6.2 percent. Rather, the driver's license agency just could not verify citizenship because it either had no match or it had potentially outdated noncitizenship data on file for those remaining individuals.

[21] Evidence from other states underscores the point that such checkbox evidence is faulty. Recent reporting revealed numerous citizens in Texas that were erroneously removed from the rolls based on faulty evidence of noncitizenship. One such individual appears to have been removed based on purported evidence that she reported noncitizenship in response to a jury summons, but she explains that she intended to seek excusal based on her guardianship of three grandchildren. *See She supports Trump's anti-immigration policies. Texas incorrectly flagged her as a 'noncitizen' on its voting rolls*, VoteBeat, ProPublica, and the Texas Tribune (Oct. 29, 2024), https://www.votebeat.org/texas/2024/10/29/noncitizen-voting-greg-abbott-mary-howard-elley-trump-supporter-removed-from-voter-rolls/.

bother to check with the DMV or ELECT to determine if they already have documentation proving a voter's citizenship. Thus, individuals can be purged based on a checkbox error even when they showed documentary proof of citizenship prior to or contemporaneously with that error. That bears repeating: Under Virginia's system, an individual who checks the wrong citizenship box **but presents a U.S. passport or birth certificate at the same time** will be removed. Disenfranchisement based on such a flimsy rationale cannot be permitted, particularly within the 90-day period. *See Mi Familia Vota v. Fontes,* 691 F.Supp. 3d 1077, 1100 (D. Ariz. 2023) ("[W]hen an applicant includes [documentary proof of citizenship], it makes little sense to accept an incomplete citizenship checkbox on her registration form as 'true and correct' when it is clearly not[.]").

Second, Applicants tout their use of "fresh SAVE searches" for over 1,000 of the removed individuals as confirmation of noncitizenship. App. 27. But not only did Applicants' declarations fail to provide clarity on the precise timing of these searches, other cases involving systematic SAVE searches of large datasets have shown significant error rates. In *Public Interest Legal Foundation v. North Carolina State Board of Elections*, the Fourth Circuit considered PILF's attempt to uncover records related to a similar program in North Carolina. 996 F.3d 257 (4th Cir. 2021). In that case, the Fourth Circuit explained that the elections board ultimately "found that the DMV and SAVE information had a high rate of inaccuracy." *Id. a*t 261. Indeed, it "determined that 97.6% of persons identified by the DMV as noncitizens, in fact were citizens, and that about 75% of individuals who later provided proof of citizenship

continued to be listed as noncitizens in the SAVE system." *Id.*; *see also Arcia*, 772 F.3d at 1341 (finding standing based on "potential errors that could occur when the Secretary attempted to confirm their immigration status in various state and federal databases in the hurried 90-day window before the election"). Such figures hardly inspire confidence.

While Applicants tout SAVE's alleged 99 percent accuracy (a figure that is untested and not in the record), Stay App. 27, Applicants flatly misrepresent the report from which they draw that figure. In fact, the report supports Respondents because that figure corresponds to individualized inquiries *not* automated electronic SAVE results. The Government Accountability Office study that Applicants cite explains that "USCIS reports that SAVE status verifiers, who manually research a benefit applicant's immigration status *during a process known as additional verification*, accurately reported the applicant's status 99 percent of the time." U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-204, IMMIGRATION STATUS VERIFICATION FOR BENEFITS: ACTIONS NEEDED TO IMPROVE EFFECTIVENESS AND OVERSIGHT 16 (2017), https://bit.ly/40hexxb (emphasis added). Additional verification can be prompted by the system directly, but also is required whenever the applicant contends that the automated SAVE result is inaccurate. This additional verification system—which requires manual research by human USCIS verifiers—is simply *not* the systematic database searches to which Applicants refer. App. 88 ¶¶ 26-29. Therefore, the 99 percent accuracy figure is irrelevant to the solely automated system the Commonwealth undertook. To the contrary, that report explains that SAVE requires

"a multistep process to ensure an accurate response, since not all relevant immigration records can be captured in the initial verification search." *Id.* at 10. Indeed, a key finding of the report is that user agencies are concerningly not utilizing additional verification where they should. *Id.* at 15. One would think that where the Commonwealth already has a conflicting affirmation of citizenship from a voter and SAVE verification provides a contrary result, that would prompt additional verification. Apparently, not so.

Unsurprisingly then, we now know that despite Applicants' assertions, their SAVE checks did *not* "ensure[] that no naturalized citizens were removed from the voter rolls based on outdated DMV documents." Supp. App. 543; *see, e.g.*, Supp. App. 297-300 (LWVVA declaration identifying naturalized member removed); Supp. App. 301-304 (ACT declaration identifying 14 eligible voters removed); Supp. App. 246-249 (registration with new citizen stamp).

None of this should be surprising to Applicants. Every time such a program has been tried before, it has resulted in high error rates that remove eligible U.S. citizens (largely naturalized citizens). *See, e.g.*, *Florida*, 870 F. Supp. 2d 1346; *Whitley*, 2019 WL 7938511; *ACIJ*, 2024 WL 4510476. And while Applicants complain that the Fourth Circuit did not explain what an "individualized basis" for removal would be, the foregoing suggests an obvious start, including checking the Commonwealth's own DMV records for proof of citizenship and requesting additional verification procedures with USCIS. Given that Virginia failed to do either, it cannot claim irreparable harm.

The 90-Day Provision is designed not to protect ineligible voters—be they noncitizens or nonresidents—but the inevitable *eligible* voters caught up erroneously in systematic list maintenance. As to those individuals, irreparable injury is plain. "Courts routinely deem restrictions on fundamental voting rights irreparable injury," especially "discriminatory voting procedures." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). And while Applicants argue that these voters can cast provisional ballots, the district court correctly determined that does not extinguish their irreparable injury, because there is no guarantee a provisional ballot will be counted. Further, as a result of the program, these voters are prevented from "cast[ing] their ballots in the same way as all other eligible voters." App. 252; *see N.C. Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172 at *13 n.11 (M.D.N.C. Aug. 7, 2018) (being offered a provisional ballot could not cure violation caused by cancellation of voter's registration in violation of the NVRA).

That response also wrongly assumes voters will understand this option and ignores the intimidation voters experience after receiving a letter accusing them of noncitizenship and potentially referring them for criminal prosecution. Notably, although Applicants rely primarily on the provisional ballot option to allege no irreparable harm despite the undeniable fact that eligible U.S. citizens have been cancelled, the notices they send to these voters conspicuously omit that option.

The notice of intent to cancel states as follows:

We have received information that you indicated on a recent DMV application that you are not a citizen of the United States. If the information provided was correct, you are not eligible to register to vote. If the information is incorrect and you are a citizen of the United States, please complete the Affirmation of Citizenship form and return it using the enclosed envelope. If you do not respond within 14 days, you will be removed from the list of registered voters.

If you believe this notice has been issued in error or have any questions about this notification, please call the Office of General Registrar.

Supp. App. 171-172.

And the cancellation notice itself states as follows:

This office has cancelled the voter registration of [redacted] (date of birth [redacted]). That action was taken on the basis of official notification from the Virginia Department of Elections that you failed to timely respond to a request to affirm your United States Citizenship within the 14 days allowed by the Code of Virginia (§24.2-427). Therefore, this office has stricken your name from the Voter Registration List of ARLINGTON COUNTY.

If you believe the removal of [redacted] from the Voter Registration List is incorrect, please contact this office at 703-228-3456.

Supp. App. 173-174.

Further, the record is replete with evidence that numerous individuals have been referred for prosecution on the basis of this ham-handed last-minute program. Supp. App. 75. In a similar case in Alabama (albeit one where Alabama did not actually remove anyone from the rolls during the 90-day period, but did "inactivate" them), the State argued affected voters could still cast ballots on Election Day, but the district court nonetheless had "no difficulty" finding irreparable harm for the voters whose registration were affected and those were referred for criminal prosecution. Supp. App. 216. The district court did not clearly err in finding irreparable harm here as well.

III. Respondents did not unreasonably delay, and the *Purcell* principle does not weigh in favor of a stay.

Applicants ask the Court to stay the injunction based on *Purcell v. Gonzalez*, 549 U.S. 1 (2006), but that would be wholly improper here. As explained *supra*, the NVRA specifically authorizes litigation to commence within 30 days of an election, 52 U.S.C. § 20510(b)(3), and Respondents filed suit on the *first day* of that window. And no case applying *Purcell* has ever suggested that it can override express congressional intent permitting lawsuits within this timeframe. Furthermore, *Purcell*'s application would be inappropriate because, as the district court and the Fourth Circuit acknowledged, "appellees do not challenge a state election law" but are challenging "the implementation of an executive order that itself was issued 44 days before the start of early voting and only 90 days before the end of the election." App. 5.[22]

Regardless, *Purcell* cannot be construed to reward Respondents' violation of the NVRA. Both the 90-Day Provision and the *Purcell* principle are intended to prevent chaos and confusion just before an election. Here, it is *the Commonwealth* that disrupted the status quo, creating chaos and confusion by removing these voters during a period when federal law expressly forbids it. If Applicants could reward their own legal violation by protesting the remedy as too burdensome close to the election, it would render the 90-Day Provision unenforceable, and *Purcell*'s own purpose would

[22] Applicants assert that "Plaintiffs are challenging the Virginia election laws that create Virginia's process for removing noncitizens from its voter rolls." Stay App. at 13. Respondents do challenge Virginia's statute, *but* not in their claim against the 90 Day Provision. *See* Supp. App. 82-84. The district court expressly *declined* to address other claims and issued its injunction only in relation to Respondents' 90-Day Provision claim. App. 237 ("[M]y ruling today only speaks to the 90-day provision."). That claim, which is the only one relevant to the matters before this Court today, exclusively challenges the execution of E.O. 35 and does not challenge any Virginia statute. *See* Supp. App. 81-82.

be thwarted. But *even if* this Court applied *Purcell* and the factors identified in Justice Kavanaugh's concurrence to the stay decision in *Merrill v. Milligan*, Respondents would prevail. *See* 142 S. Ct. at 881. The merits are clear-cut, *see supra*; Respondents and eligible Virginia voters face irreparable harm, *see supra*; Respondents did not delay, *see infra*; and the relief ordered is eminently reasonable, *see infra*.

Regarding delay, the last-minute nature of these proceedings is entirely of Applicants' own making. With respect to Applicants' claim that Virginia has been removing alleged noncitizens during the Quiet Period since 2010, App. 29, Respondents would have had no reason to suspect such violations. While many states have routine list maintenance procedures on the books that may not specifically reference the 90-day Quiet Period, states nonetheless pause those programs during that time. Respondents had no reason to suspect otherwise until "this executive order intensifying these efforts was announced exactly on the 90th day," timing that was "not happenstance." App. 253. And since Applicants "started down this road" by issuing E.O. 35, Respondents have acted with "due diligence," "gathering evidence," as is required when seeking an injunction. App. 253.

Respondents' evidence-gathering process took longer than necessary because *Applicants* obstructed their access to information, refusing to grant Respondents' requests for information about the Program until after the election. Supp. App. 21-25, 26-38, 39-40. Despite Applicants' stonewalling,[23] Respondents' investigation

[23] While Applicants quote Respondents' use of the term "stonewalled," Stay App. at 29, they notably do not deny it.

yielded the evidence necessary to establish the requisite violations and standing, including evidence from local electoral boards supporting the requisite finding that E.O. 35's Purge Program is, indeed, systematic. *See*, *e.g.*, App. 242-43 (noting that in Loudoun County "in August there had only been eight people canceled, but there were 90 alone in September"). Respondents cannot be punished for their efforts, made more difficult by Applicants, to ensure they were not rushing to the courthouse with a frivolous or unsupported claim. As the district court found, "there was no unreasonable delay in bringing suit." App. 4.

IV. The balance of equities favors respondents, and the district court's order will not impose unreasonable costs on Applicants.

The right to vote is a "precious" and "fundamental" right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). The Purge Program threatens this sacred right, and the district court's injunction protects eligible voters from being disenfranchised with very little time to correct the Commonwealth's errors, which outweighs any interest Applicants may have in implementing the Purge Program.

The NVRA was designed to ensure that eligible voters can participate in elections and exercise their fundamental right to vote. *See* 52 U.S.C. § 20501. Understanding that list maintenance programs intended to remove ineligible voters may also remove eligible voters, Congress made the policy decision that ensuring eligible voters can vote outweighs a state's interest in having flawless voter rolls. *See Common Cause Ind. v. Lawson*, 937 F.3d 944, 962 (7th Cir. 2019) ("The NVRA is designed to ensure that the competing interests in preventing abuse does not wind up disenfranchising American voters."); *U.S. Student Ass'n Found. v. Land*, 546 F.3d

373, 388 (6th Cir. 2008) ("Though the public certainly has an interest in a state being able to maintain a list of electors that does not contain any false or erroneous entries, a state cannot remove those entries in a way which risks invalidation of properly registered voters."). This policy decision is most clearly exemplified in the 90-Day Provision.

Given the record evidence unequivocally establishing that eligible citizens were wrongfully removed by the Purge Program, especially this close to an election and in cases such as these, "the public interest favors permitting as many qualified voters to vote as possible." *League of Women Voters of N.C.*, 769 F.3d at 247.

The balance of equities favors Respondents because a stay guarantees that eligible voters will be remain purged from the rolls, and there is "no do-over and no redress" for those unable to exercise their fundamental right to vote. *Id.* While Applicants certainly have an interest in removing ineligible voters from the rolls, the Commonwealth has "other procedures available to it to protect the public interest that do not violate the NVRA." *Common Cause Ind.*, 327 F. Supp. 3d at 1156; App. 5. As both the district court and the unanimous Fourth Circuit panel found, the balance of equities favors Respondents, and the public interest is best served with this Purge Program enjoined. App. 5-6.

The district court's remedy is proper and precisely tailored to the violation. Congress designed the 90-Day Provision to avoid the inevitable chaos and disruption caused by purges conducted on the threshold of an election. *See Arcia*, 772 F.3d at 1346. The wisdom in enacting the provision has certainly been borne out here.

Nor is the cost of restoring people's fundamental rights too high. The district court ordered targeted relief aimed at restoring a discrete group of 1,600 voters and notifying them of their restoration, and rejected the broader relief requested. This order closely mirrors the injunction issued in *ACIJ* just over a week ago requiring restoration of over 3,000 registrants. *ACIJ*, 2024 WL 4510476 at *1-2. The Alabama injunction has not created any widespread confusion or disruption for election administrators or for the public. To the contrary, Alabama has declined to appeal, simply complying with the injunction without incident.

Recent experience demonstrates that Applicants can administer the proper remedy because they took nearly identical steps just last year even closer to an election. On October 27, 2023, ELECT acknowledged that 3,400 eligible voters were improperly removed from voter rolls.[24] These purges were more complex because they involved erroneous removals of people with felony convictions whose rights had been restored. Nevertheless, ELECT worked with county registrars to ensure that nearly twice as many voters were restored to the rolls. *See id*. Applicants' representations about disruptions caused by late registrations are also inconsistent with Virginia law, which expressly contemplates that "any person who is qualified to register to vote shall be entitled to register in person up to and including the day of the election at the office of the general registrar in the locality in which such person resides or at the polling place for the precinct in which such person resides." Va. Code Ann. § 24.2-

[24] Sarah Rankin, *Youngkin administration says 3,400 voters removed from rolls in error, but nearly all now reinstated*, NBC Washington (Oct. 27, 2023), https://www.nbcwashington.com/news/local/youngkin-administration-says-3400-voters-removed-from-rolls-in-error-but-nearly-all-now-reinstated/3455577/.

420.1. The district court's order simply requires Applicants to restore half the number of people restored just last year on a comparable timeline. And while Applicants suggest that any notice might confuse ineligible persons into voting, the court's order already safeguards against any such risk by requiring the mailer to explain that noncitizens are ineligible to vote.

V. This Court is unlikely to grant review.

A stay is further unwarranted because there is an existing and growing consensus among lower courts on the interpretation of pertinent provisions of the NVRA. And despite Applicants' contortions, there is certainly no circuit split.

The Fourth and Eleventh Circuits agree that the NVRA's 90-Day Provision encompasses "any" systematic voter removal program, including those like Applicants'. App. 2; *Arcia*, 772 F.3d at 1344. District courts in Arizona, Alabama, and North Carolina concur. *Mi Familia Vota*, 691 F. Supp. 3d at 1093, *ACIJ*, 2024 WL 4510476 at *1; *N.C. NAACP*, 2016 WL 6581284 at *5. Meanwhile, no court has construed the General Removal Provision to prevent states from enforcing their voter qualifications. The 90-Day Provision simply governs *when* states must complete systematic removal programs, not *whether* they may remove certain types of ineligible voters. No circuit has issued a contrary holding. Thus, there is no "reasonable probability" that this Court would grant certiorari, particularly at this stage on such an incomplete record. *Hollingsworth*, 558 U.S. at 190.

Applicants' contention that a "split exists here," Stay App. at 34, is a misrepresentation. As Applicants admitted in oral argument before the district court,

Supp. App. 477, *Bell* concerns only the General Removal Program and did not involve the 90-Day Provision. 367 F.3d at 591. *Bell* simply reaffirms that states may establish programs to remove ineligible voters even if they were never eligible—a proposition with which all parties to this suit agree. *Id*. The Sixth Circuit reached no holding on the question addressed in *Arcia* and presented here: whether states may conduct systematic purges within 90 days of an election.

Moreover, on the merits, *Bell* supports Respondents—not Applicants. The eligibility issue in *Bell* was whether certain individuals were nonresidents of an Ohio island district. 367 F.3d at 589. The Sixth Circuit noted that the state election "Board investigated and examined the residence of each appellant through challenge hearings" and then concluded that they "*were improperly registered in the first place*." *Id*. at 592 (emphasis added). *Bell* held that the *General Removal Provision* is "not intend[ed] to bar [removal of those] who were ineligible and *improperly registered to vote in the first place*." *Id*. at 591-92. In other words, *Bell* is an example involving individuals "whose registrations were void *ab initio* and thus who were never eligible to vote in the first place." Stay App. at 14. Because they were not valid "registrants," the General Removal Provision does not restrict their removal any more than it would restrict removal of noncitizens. But nothing in *Bell*'s analysis suggests that such removals would be exempt from the 90-Day Provision's distinct, broader language covering "any program" to remove "ineligible voters." *Bell* is further distinguishable because the removals followed investigations and hearings in which ineligibility was

individually determined. Applicants' removal program provides no such individualized process.

In endeavoring to manufacture a circuit split, Applicants misstate the legal issue. They contend that "[w]hether the NVRA shields noncitizens from removals has divided the circuits" and that *Arcia* held that "the NVRA protects noncitizens from removal from the voter rolls." Stay App. at 33. But *Arcia* reached no such conclusion. Quite the contrary, *Arcia* agreed that "[c]ertainly an interpretation of the General Removal Provision that prevents Florida from removing non-citizens would raise constitutional concerns[.]" 772 F.3d at 1346. The Eleventh Circuit merely declined to opine on the constitutionality of the General Removal Provision because—as here—that provision was not before it. *Id.* at 1346-47; *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.") (cleaned up). And like the Fourth Circuit, *Arcia* "emphasize[d]" that a state can still "use[] its resources to ensure that noncitizens are not listed in the voter rolls" by "investigating potential non-citizens and removing them on the basis of individualized information, even within the 90-day window." 772 F.3d at 1348.

Accordingly, there is no circuit split. *Arcia* and *Bell* are not "decision[s] in conflict" with one another and do not concern "the same important matter." U.S. Sup. Ct. R. 10.[25] Rather, the conclusion from case precedent is united: The NVRA permits

[25] The only other case cited by Applicants is *United States v. Florida*, 870 F. Supp. 2d 1346 (N.D. Fla. 2012). But (in addition to not being a decision by a court of appeals) *Florida*'s holding was superseded by the Eleventh Circuit's subsequent decision in *Arcia*. *See Mi Familia Vota*, 691 F. Supp. 3d at 1093. And contrary to Applicants' suggestions, *Florida* did not rely on *Bell* or even cite the case.

states to remove noncitizens and other ineligible voters from its rolls, but it requires that any systematic purge programs be completed 90 days before an election. The only courts to adopt Applicants' proposed statutory interpretation were overruled by *Arcia*. The remaining relevant court decisions are unanimous.

This case would also be a poor vehicle for taking up Applicants' arguments given the many factual and threshold issues yet to be resolved. At this point, Applicants have only provided a list of purged voters from a discrete timeframe, manuals detailing their policies and procedures, and two untested declarations by ELECT officials. The limited record establishes both that Applicants are engaged in a systematic removal program and that many of the individuals purged have been eligible citizens. But many unanswered questions remain, including the timeframe of DMV forms ELECT is reviewing to flag potentially ineligible voters, as well as how state officials are (or are not) evaluating conflicting information about an individual's citizenship. In other cases, development of that factual record has uncovered that the vast majority of individuals swept up in comparable purge programs are in fact eligible citizens. *See e.g.* Supp. App. 218 (similar program led to more than 2,000 eligible voters mistakenly being identified as noncitizens). Applicants have also raised threshold defenses such as sovereign immunity that are antecedent to resolving the merits and on which no final judgment yet exists. All of these factors counsel against granting certiorari at this juncture.

CONCLUSION

For all the foregoing reasons, the application for a stay should be denied.

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Respectfully Submitted,

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