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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALABAMA COALITION FOR IMMIGRANT JUSTICE, *et al.*, *Plaintiffs*, v. WES ALLEN, in his official capacity as Alabama Secretary of State, *et al.*, *Defendants*.	)	Case No.: 2:24-cv-01254-AMM
UNITED STATES OF AMERICA, *Plaintiff*, v. STATE OF ALABAMA and WES ALLEN, in his official capacity as Alabama Secretary of State, *Defendants*.	)	Case No.: 2:24-cv-01329-AMM

STATE DEFENDANTS' REPLY
IN SUPPORT OF MOTION TO DISMISS BOTH COMPLAINTS

ARGUMENT

I. All Private Plaintiffs Lack Standing.

A. The individual private Plaintiffs lack standing to seek prospective relief because any alleged injuries are not ongoing. All four are registered Active voters and can vote in the 2024 General Election without completing additional paperwork. One of them already voted by absentee ballot. *See* DE81. The harm they fear is not "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). The Secretary will not conduct further reviews before the election and future reviews will pull only more recent data from State agencies. DE 11-1 (Helms Decl.) at 26-27. It is not plausible that the private Plaintiffs alleging they are citizens will someday in the future identify themselves to the State as noncitizens and be subject to a similar (not-yet-extant) process. Private Plaintiffs assert that the Court must decide standing based on their allegations, but the State Defendants have brought a "factual attack." *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003).[1]

The individual Plaintiffs also lack statutory standing to bring NVRA claims because they did not provide notice. The NVRA provides an aggrieved party with a

[1] Unlike *Farmworker Ass'n of Fla., Inc. v. Moody*, cited by the response brief (at 10), the State Defendants are not advancing here an "untested, non-binding interpretation" of a State statute in opposition to a preliminary injunction. No. 23-CV-22655, 2024 WL 2310150, at *7 (S.D. Fla. May 22, 2024). *Contra* ACIJ Resp. at 10.

private right of action only after that party has provided notice. 52 U.S.C. §20510. Without providing notice, the individuals lack authority to sue. Private Plaintiffs' reading of the NVRA, permitting them to sidestep the notice requirement, is "wholly devoid of textual support." *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014). Further, they cannot gain standing retroactively on the ground that the NVRA permits suits without notice within 30 days of an election (52 U.S.C. §20510 (b)(3)) because (1) it's not at all clear what NVRA violations the complaint alleges occurred within the 30-day window, especially when all four individuals are Active and the Secretary has stated that no further reviews will be conducted before the election, and (2) Plaintiffs must have standing at the time they sue.

B. Organizational plaintiffs lack standing to sue on behalf of their members. If members of each organization received letters, then the analysis would be the same as above—there is no ongoing or future injury to them. But the organizations haven't even alleged that much. They've said they can identify members who are naturalized citizens. ACIJ Resp. 13. But not just any naturalized citizen has a concrete and particular injury-in-fact traceable to the State Defendants. The vast majority of naturalized citizens in Alabama are not subject to the letter process whatsoever. The sheer possibility that one of their members might have standing is not enough. *See Ga. Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018).

Each Organizational plaintiff also lacks standing to sue on its own behalf. They appear to concede that diversion of resources is no longer viable for standing, so they cloak their argument in the language of *Havens,* claiming direct interference with their "core business activities." *FDA. v. All. for Hippo. Med.*, 602 U.S. 367, 395 (2024). But in *Havens*, the defendant provided the plaintiff with false information that the plaintiff needed for its business. *Id.* While that type of "direct[]" interference is "unusual," *id.* at 395, 396, Organizational Plaintiffs claim interference with "voter registration assistance" activities because the process creates more work for them, ACIJ Resp. at 14-15, an effect likely shared by any and every voting group whenever laws or processes change. Unlike *Havens*, the so-called interference is not from the State Defendants acting directly on the Organizational Plaintiffs. Rather, their complaint seems to be that the State has acted toward others in ways that lead Plaintiffs to take new steps to meet their goals. That is the "expansive" diversion-of-resources theory the Supreme Court rejected in *FDA*. 602 U.S. at 395.

C. Secretary Allen is not a proper Defendant as to the private Plaintiffs because an order against him may not redress the alleged injuries. Private Plaintiffs insist that the Secretary caused their injuries, but their claims are not redressable if the power to provide relief rests with "absent nonparties who are not under the Secretary's control." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th

Cir. 2020). The United States addressed standing as well, but it need not have. The United States has sued the State of Alabama. The Secretary is superfluous, and there are no jurisdictional issues as to that litigation. On the merits, however, the United States is wrong to believe that State law empowers the Secretary "to direct local officials" to carry out the noncitizen letter process, U.S. Resp. at 29, and their suggestion raises commandeering concerns.

Nor is Attorney General Marshall a proper defendant. Private Plaintiffs need a concrete injury in fact that is redressable and traceable "to the challenged action." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) The focus of the complaint with respect to the Attorney General is a tweet that violations of the law would be prosecuted. DE1 ¶119. That tweet has not created an "objective" chill. DE64 at 19. At best, any harm is traceable to the noncitizen letter process or laws barring noncitizen voting. But the Attorney General is not responsible for the "referral," and he lacks control over the letter process. *Id.* Crucially, Private Plaintiffs do not challenge any of the election laws, like the qualifications to vote, and there is no reason to believe those laws would be enforced against citizens who have not violated them. *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-61 (2014). Whatever "interest" the Attorney General has in "enforcing an unconstitutional law" is beside the point here, ACIJ Resp. 19-10, as Private Plaintiffs want an injunction barring investigations of violations of unchallenged State criminal laws.

II. Both 90-Day Counts Should Be Dismissed.

A. Section 8(c) of the NVRA does not define what it means to "complete" a program. Private Plaintiffs say it means that no "steps" can be taken during the 90 days, and the United States says no programs can be "conducted" during that period. Because *Arcia* involved removal, it did not squarely answer the question here—whether anything less than removal is allowed during the 90 days. The answer must be yes, States can take certain steps short of removal during the 90 days pursuant to general programs. We know this for several reasons.

1. The 90-day bar is concerned with when States "complete" removal programs because removal is the step that requires action by the voter before an election. 52 U.S.C. §20507(c)(2)(A). Other steps in a program like analyzing data, compiling lists, talking to voters, and even changing status from Active to Inactive (or vice versa) do not require voters "to correct the State's errors [if any] in time" for an election. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014).

2. The NVRA requires that States continue to operate a general program to deal with change of residence even during the 90 days. As the United States admits, the NVRA's mandatory "process of removing unconfirmed movers" "*would not be possible to complete* … before each federal election, creating an inconsistency within the NVRA." U.S. Resp. 12 (emphasis added). The United States further admits that Alabama's interpretation of the 90-day bar is one

"solution to this potential problem." *Id.*[2]The United States urges a different "solution," which is to distinguish between an "entire process" and a "single 'program.'" *Id.* It says that "identification of suspected ineligible registrants" alone can be a "program" *within* a larger "process." *Id.* Citing no authority, pages 12-13 of the brief appear to be the first time anyone has ever read the NVRA this way. To "confirm[]" its view, *id.*, the United States proceeds to badly misread the statute.

The United States discusses the Safe-Harbor Provision of 52 U.S.C. §20507(c)(1), which provides one way that a State program can comply with the NVRA by using change-of-address information from the U.S. Post Office. That is where the United States stops, saying this "identification" is a "standalone 'program.'" U.S. Resp. 12. However, the Safe Harbor Provision continues. A Safe Harbor Program uses that information "and (B) if it appears from information provided by the Postal Service that" the registrant has moved, the State must take additional steps. 52 U.S.C. § 20507(c)(1)(B). Importantly here, if it appears the registrant has moved outside the county, then the registrar is to send a Section 8(d)(2) notice. 52 U.S.C. § 20507(c)(1)(B)(ii). Thus, Subsection (c)(1) refers to subsection (d), which is titled "REMOVAL OF NAMES FROM VOTING ROLLS" and true

[2] The mere fact that the United States admits there could be other solutions to the apparent contradiction created by its reading of Section 8(c) undermines its assertion that the "plain text" resolves the inquiry here. *Id.* at 10. And as the United States notes two pages later, statutes must be read to avoid "absurd results and internal inconsistencies" too. *Id.* at 12.

to its name, provides for notice and removal after address confirmation or a multiyear period of inactivity. It is apparent from the text that there is no "standalone" program "to find suspected movers," which would be pointless on its own. *Contra* U.S. Br. 12. Rather, there is "a program" under which registrars *find*, *contact*, and *remove* voters.

If the United States were right that "using Postal Service data to find suspected movers," without more, constitutes a removal program, then it too would be subject to the 90-day bar, according to all Plaintiffs. U.S. Br. 12-13. But that renders the United States's view even more absurd. Does the statute really mean that States cannot "simply identify" people for future mailings during the 90 days? *Id.* at 12. No, Congress did not instruct States to stop completely anodyne and routine steps, like *analyzing residence data*, for 90 days every time there's a federal election. The United States can find no support for its view, even in the legislative history.

Moreover, other systematic removal programs can operate within the 90 days, undercutting characterization of the 90-day bar as a "quiet period." For example, in Alabama, "No person convicted of a felony involving moral turpitude … shall be qualified to vote." Ala. Const. art. VIII, §177. There is nothing in the NVRA stopping the State from processing felony disqualifications *en masse*—even during the 90 days. The State recently amended its definition of "moral turpitude"

to include inchoate crimes, Ala. Act No. 2024-341, a change which will take effect *after* this election. One can easily imagine a change in State law prompting a State to make Inactive or remove thousands of felons in systematic fashion; under the 90-day bar, it could do so—even loudly, even using database matching, and even through confusing or frustrating letters. The NVRA's permission for such actions militates against viewing the 90-day bar as an absolute quiet time or right against voter "confusion." U.S. Resp. 17.[3] And it supports a reading focused on actual removals—which might require voter correction—in the days before an election.

For their part, Private Plaintiffs argue (without the support of the United States) that the statute created a massive exception to the 90-day bar (for the NVRA's mandatory general program) without so much as mentioning the apparent contradiction. *See* ACIJ Resp. 20-21. That reading is absurd, especially since the NVRA included express exemptions for certain categories of removal. If Congress also meant to exempt State non-removal activity pursuant to the general program, it knew exactly how to do so. The absence of such an exception is not a reason to inject one when there is a perfectly sensible reading of "complete" on the table.[4]

[3] Alternatively, all Plaintiffs would be stuck reading the statute to mean voters convicted of a disqualifying felony may be *removed* during the 90 days, yet the State cannot communicate with them in any way or inactivate them. That would be quite bizarre, but it seems to be the consequence of the view that the State must be quiet though it can remove felons at any time.

[4] Private Plaintiffs also stress that the "purpose" of the noncitizen letter process is ultimately the removal of noncitizens, ACIJ Resp. 20, but that would not distinguish the process from the NVRA's general program. Moreover, the State's purposes are plainly broader than removal;

3. Another reason the 90-day bar cannot be read to bar all changes to a voter's status is that the NVRA requires such changes. The United States admits that in a State operating the general program, a voter's status (Active or Inactive) may be changed as late as *November* or whenever registration closes. *See* U.S. Resp. 15. By the plain text, when a voter is "deemed potentially ineligible" (*id.*) for failing to return a change-of-address card, a State may then require "affirmation or confirmation of the registrant's address … before the registrant is permitted to vote … ." 52 U.S.C. §20507(d)(2)(A).[5] The United States calls this a "correction of registration records," but there's no difference between what Alabama has required of voters "deemed potentially ineligible" on its list of 3,251 and the effect of a change in status under subsection (d)(2)(A).

4. *Arcia* supports the State Defendants because the Eleventh Circuit understood the 90-day bar to be a bar on removals. The United States argues that Florida "did not immediately remove voters from the rolls" but permitted removal after 30 days past without a response from the voter. U.S. Br. 15-16. Of course, that 30-day trigger could occur during the 90-day period, so the entire case was about

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some letter recipients who are ineligible should remove themselves, but other letter recipients should confirm their eligibility to vote via a voter registration or update form.

[5] Elsewhere, the United States relies on a report by the National Association of Secretaries of State (NASS), which recognizes that address programs "must inform the voter that if s/he … does not return the notice by the stated deadline, the voter may need to affirm their address before voting." *NASS Report: Maintenance of State Voter Registration Lists* at 5 (Dec. 2017), perma.cc/CU7K-2GBL. The statute makes that deadline the registration deadline, 52 U.S.C. §20507(d)(2)(A), *inc'g by ref.* §20507(a)(1)(C), which is within the 90 days in every State.

whether removals could occur in the 90-day period. That's how it was pleaded by the plaintiffs, *see* DE25-1 ¶27, 30-31, 35, 41-42, 50, how it was argued on appeal, *see, e.g.*, DE25-2 at 41-70; DE25-3 at 9, 12-13, and how the Eleventh Circuit understood the program, 772 F.3d at 1346. The issue was whether noncitizen removals are exempt from the 90-day bar. *Arcia* thus could not have decided whether any action short of removal would violate the 90-day bar because it was uncontested on appeal that Florida, in fact, removed noncitizens during the 90 days. *Accord* ACIJ Resp. 21-22.

B. Apart from the proper interpretation of what it means to "complete" a program, the State Defendants maintain that any removal pursuant to the noncitizen letter process would be individualized, not systematic. The United States says that to be individualized, the process needed to "identify voters, supplement databases, or confirm non-citizenship." U.S. Resp. 17. Even as alleged, the process did all of those things. Voters are not removed merely for their presence in a database; they are asked to engage on a case-by-case basis with the State about their status. *Arcia*, 772 F.3d at 1346.

C. Finally, the Court can decide on the pleadings whether the 90-day bar (as interpreted by Plaintiffs or in general) poses an unconstitutional obstacle to the State's enforcement of its voter qualifications. *Contra* U.S. Br. 23; ACIJ Br. 24. Congress can regulate the "Times, Places, and Manner of holding Elections," U.S.

Const. art. I §4 cl. 1, but States retain the power to adopt and enforce voter qualifications, *e.g.*, U.S. Const. art. I, § 2, cl. 1. If Plaintiffs are correct, the 90-day bar is a serious impediment to verifying and enforcing eligibility because only "rigorous individualized inquiry," whatever that means, is allowed for much of an election year. The United States never identifies what "five alternative means [are] available to the states to enforce their laws." U.S. Br. 22-23 (citation omitted). At the end of the day, the Elections Clause does not authorize the United States to interfere with the States' power to decide who can vote on Election Day.

III. Private Plaintiffs' Other Counts Should Be Dismissed.

A. Counts Two and Four do not state viable discrimination claims. As the response brief makes clear, Private Plaintiffs rest their discrimination claims on the allegation that the noncitizen letter process was "designed to affect only naturalized ... citizens" and burden them "exclusively." ACIJ Resp. 22. What States cannot do, Private Plaintiffs say, is "discriminatorily single out … naturalized citizens[] for purging." *Id.* at 23. The State, they say, "ultimately seeks to remove *all* naturalized citizen voters." *Id.* at 26. The allegations are implausible on their face, and the Court need not rely on matters outside the pleadings to say so. In *Iqbal*, the Supreme Court properly considered "more likely explanations" than discrimination for allegations that a defendant "arrested and detained thousands of Arab men" after the September 11th terrorist attacks. *Ashcroft v. Iqbal,* 556 U.S.

662, 681 (2009). Here, the more likely explanation than discrimination is exactly what the Secretary has said—that he has an interest in protecting election integrity and ensuring only lawful votes are cast.

The response brief fails to distinguish *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Private Plaintiffs say "pregnancy did not constitute gender discrimination because 'nonpregnant persons' included 'members of both sexes.'" ACIJ Resp. 26. Likewise here, the class of people not subject to the noncitizen letter process includes U.S.-born citizens, naturalized citizens, and noncitizens. Ergo, the State has not targeted naturalized citizens, and that conclusion remains true even if Secretary Allen were aware that some naturalized citizens would be asked to update their information. Of course, any election law or procedure might affect persons of one group or another, but foreknowledge of that fact does not render such actions discriminatory.

As Private Plaintiffs have admitted, the "sole criterion" for inclusion in the noncitizen letter process (DE1 ¶100; ACIJ Resp. 30) was whether a registered voter had self-identified as a noncitizen in recent data available to the Secretary. That's not discrimination based on protected status. *Cf.* ACIJ Resp. 27 (citing *Craig v. Boren*, 429 U.S. 190 (1976), which involved a law that facially discriminated by gender). Private Plaintiffs attempt to restrict the inquiry to whether only naturalized citizens "within Defendants' data set are included" in the

process, *id.* at 26-27, but that omits the key fact that the data set's limited range is part of what makes it nondiscriminatory. Private Plaintiffs cannot explain why, if the Secretary were discriminating, he ignored the vast majority of naturalized citizens in Alabama. Additionally, for the claim that the Secretary targeted only naturalized citizens to make any sense, Private Plaintiffs must have plausibly alleged that there were *zero* noncitizens on the list of 3,251. They did not. And the admission that the process was aimed at those *who identified as noncitizens* (DE1 ¶100) is enough to dismiss because it evinces a neutral purpose. Private Plaintiffs failed to show how their complaint alleged direct evidence of discriminatory intent. *GBM v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021).

B. The alleged violation of the requirement to "ensure that any eligible applicant is registered" can be dismissed as a matter of law. Private Plaintiffs advance a novel interpretation under which any applicant registered must "remain registered to vote," ACIJ Resp. 25, which cannot be squared with, e.g., the NVRA's general program for change-of-address removals. The State is permitted to verify and act upon registrations after the fact; otherwise, any person erroneously or fraudulently registered to vote would be impervious to removal. It is not "outrageous" (*id.* at 25) to think that Private Plaintiffs have identified the wrong cause of action for their spurious allegations of coercion. And, again, their

interpretation would raise serious constitutional questions given the States' authority to set voting qualifications.

C. There is no plausible pleading that the State Defendants have violated the right to vote by a disparate "allocation of the franchise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). It is private Plaintiffs who misunderstand *Bush v. Gore*, which in the quoted passage (ACIJ Resp. 28) was speaking of assigning the vote to persons, rather than to State Legislatures. Private Plaintiffs quote the phrase "the manner of [the franchise's] exercise," but omit the next sentence: "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104-05. That's also what the Supreme Court decided—whether a vote counts should not depend on whether he or she happens to live in a county that views physical marks, holes, scratches, and dimpled chads one way or another. *Id.* at 106-07. We're very far from that scenario here; there's no plausible allegation that inclusion on the list of 3,251 will determine whether one's vote counts.

D. The *Anderson/Burdick* test might sometimes be "difficult to apply" on motion to dismiss, ACIJ Resp. 32, but not when the alleged burden is completing a simple form at any time, online or in-person, as late as on Election Day at the polls. The forms are one page and ask for very basic information. *See* Helms Decl. at Ex. 2; Ex. 21. More than 150,000 forms have been

submitted this year. *Id.* ¶87; 2nd Helms Decl. ¶18. In their brief, Private Plaintiffs say that the burden is not "mere paperwork" but also "the threat of prosecution," ACIJ Resp. at 32, so their claim should rise or fall with the plausibility of their highly speculative allegation that eligible voters will be prosecuted for lawfully voting. There can be no burden on the right to vote stemming from the Attorney General tweeting that *violators* of election laws will be prosecuted. Prosecuting crimes is his job.

E. A generalized allegation of statewide fear, Resp. 35, is not enough to state a voter-intimidation claim. Private Plaintiffs do not allege fears that are specific, concrete, and objectively reasonable. Cases of unlawful intimidation involve threats of violence or pretextual enforcement actions, *see* DE38 at 27-29, none of which can be remotely inferred from the Attorney General's tweet.

Aside from the constitutional standing problems, Private Plaintiffs fail to show statutory standing because new rights are not inferred absent Congress speaking with a "clear voice." *31 Foster Child. v. Bush*, 329 F.3d 1255, 1270 (11th Cir. 2003). The "aggrieved person" language in Section 3 of the VRA is not unambiguous (*contra* ACIJ Resp. 34-35) because it could be understood to refer to preexisting rights. *Morse v. Republican Party of Va.*, 517 U.S. 186, 289 (1996) (Thomas, J., dissenting). Private Plaintiffs cite dicta from a decision in this District that did not address whether there was a private cause of action in the first place.

CONCLUSION

The complaints should be dismissed.

Respectfully Submitted,

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