No. 24A407

In The
Supreme Court of the United States

SUSAN BEALS, COMMISSIONER, ET AL.,

Applicants,

v.

VIRGINIA COALITION FOR IMMIGRANT RIGHTS, ET AL.,

Respondents.

On Emergency Application for Stay Pending Appeal from the U.S. Court of Appeals for the Fourth Circuit

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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STATEMENT OF INTEREST[1]

The Republican National Committee ("RNC") is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the business of the Republican Party (the "Party") at the national level, including developing and promoting the Party's national platform; supporting Republican candidates for public office at all levels of government throughout the country; developing and implementing electoral strategies; educating, assisting, and mobilizing freedom-minded voters; and raising funds to support Party operations and candidates. The RNC is national in scope with committee members from all fifty States, five territories, and the District of Columbia.

The Republican Party of Virginia ("RPV") is the "State Committee" for the Republican Party in the Commonwealth of Virginia, as defined by 52 U.S.C. § 30101(15). RPV's mission is to elect Republican candidates in local, county, state, and federal elections in the Commonwealth, and to represent Republican voters throughout the Commonwealth.

The RNC and RPV both have an interest in making it easy for U.S. citizens to legally vote and ensuring that all Americans have confidence that their votes are not diluted by individuals who are not legally entitled to vote casting a ballot.

[1] No counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amici or their counsel contributed money intended to fund its preparation or submission.

INTRODUCTION

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). This precious right "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

This Court "has drawn a fairly clear line: The government may exclude foreign citizens from activities 'intimately related to the process of democratic self-government,'" including the right to vote. *Bluman v. Federal Election Commission*, 800 F.Supp.2d 281, 287 (D.D.C. 2011) (Kavanaugh, J.) (citation omitted); *see also Sugarman v. Dougall*, 413 U.S. 634, 648-649 (1973) ("This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.").

The National Voter Registration Act of 1993 ("NVRA") was passed to "increase the number of eligible *citizens* who register to vote in elections for Federal office," "protect the integrity of the electoral process," and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b) (emphasis added). The district court's ruling, affirmed by the Fourth Circuit, cuts directly against these purposes. Rather than increasing participation by eligible citizens and ensuring the

integrity of our elections, the ruling below prohibits states from preventing self-described non-citizens from illegally registering to vote. This is not, and cannot be, correct.

The district court and the Fourth Circuit erred in finding that the so-called "quiet period" in the NVRA precludes Virginia's actions to remove non-citizens from the voter rolls. A proper reading of the NVRA shows that the so-called "quiet period" does not apply to efforts to prevent voter registrations that were null *ab initio*. A close reading of the NVRA shows that when section 8(c) refers to a "program," it is referring back to the "program" that states are required to create under section 8(a)(4). Section 8(a)(4) does not include reviewing voter files for non-citizen voters. Thus, removing non-citizens—who cannot legally vote in either Virginia or federal elections—from the voter rolls is not an activity restricted under section 8(c).

Even if it were, Virginia's process is not "systematic" for purposes of section 8(c). Virginia's process requires reaching out to specific individuals, based on information that the individuals themselves provided to the Commonwealth identifying them as ineligible. Unlike the efforts of other states—such as mailing postcards to all registered voters and seeing which are returned as undeliverable—this is an individualized effort. As such, it is outside the scope of section 8(c).

Because the underlying merits favor Virginia, there is a "fair prospect that a majority of the Court will vote to reverse the judgment below" and the underlying merits are not, and cannot be, "entirely clearcut in favor of the plaintiffs." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *Merrill v. Milligan*, 142 S.Ct. 879,

881 (2022) (Kavanaugh, J., concurring). Moreover, because the 2024 General Election is less than a week away—indeed, voting is ongoing in Virginia now—there will be irreparable harm if there is not a stay in this case. Thus, this Court should grant an emergency stay.

SUMMARY OF THE ARGUMENT

First, as a matter of textual interpretation, efforts to remove illegally registered non-citizens from the voter rolls are not subject to the so-called "quiet period" in section 8(c)(2) of the NVRA. Pursuant to the consistent usage canon of statutory construction, the reference to a or any "program" in section 8(c) is properly understood as a reference to the program that states must establish under section 8(a)(4) of the NVRA. It is not a free-standing reference to any effort or process that may be colloquially termed a "program." Since removing non-citizens from the voter rolls is not a process covered by the mandatory programs under section 8(a)(4), this activity falls outside of the scope of section 8(c).

Second, even if section 8(c) applies to efforts to remove illegally registered non-citizens from the voter rolls, Virginia's process is sufficiently individualized that it does not constitute the kind of "systematic" effort to remove individuals from the voter rolls prohibited during the "quiet period."

Finally, due to the proximity to the 2024 election, there will be irreparable harm if the order below is permitted to stand unabated. The consequence of that order is that non-citizens—who all agree cannot legally vote—will be added back on the voter rolls at the last minute, diluting legitimate votes and exposing those non-

citizens to a substantial risk of criminal prosecution should they misunderstand the lower courts' order as a greenlight for them to vote unlawfully.

On the flip side, as the Commonwealth observes, there will be no harm to any legal voters if the order is stayed. Even if a person entitled to vote were erroneously removed from the voter rolls and unable to respond to the Commonwealth's outreach, they may still take advantage of same-day registration and cast a ballot. No legal voters could or would be disenfranchised.

ARGUMENT

I. Efforts to Remove Illegally Registered Non-Citizens from the Voter Rolls are Not "Programs" for Purposes of Section 8(c) of the NVRA.

The term "program" in section 8(c) is not a free-standing, colloquial reference. Rather, it is a reference to the specific programs the NVRA requires states to create under section 8(a)(4). Section 8(a)(4) does not address efforts to remove illegally registered non-citizens from the voter rolls. Thus, such efforts fall outside section 8(c)'s scope.

"As always, we start with the statutory text." *Garland v. Cargill*, 602 U.S. 406, 415 (2024). Section 8(a)(4) mandates that states create "programs" "to remove the names of ineligible voters from the official lists of eligible voters." Section 8(c)(2)(A) uses this same language, with its restrictions applying solely to "any program the purpose of which is to systematically *remove the names of ineligible voters from the official lists of eligible voters*." Tellingly, the phrase "remove the names of ineligible voters from the official lists of eligible voters" appears in only two places in section 8: section 8(a)(4) and section 8(c)(2)(1).

It is a basic canon of statutory interpretation that "[a] word or phrase is presumed to bear the same meaning throughout a text." Antonin Scalia & Bryan A. Garner, READING LAW 170 (2012). Thus, the use of the same phrase in both section 8(a)(4) and section 8(c) implies that Congress intended to encompass the same activities in each.

The use of the word "program" in section 8(c) confirms this. Section 8(c)(1) refers specifically to a "program" established to meet the requirements of section 8(a)(4). The only other place the word "program" appears in section 8(c) is the so-called "quiet period" provision in section 8(c)(2)(A). The appropriate inference, consistent with the presumption of consistent usage canon, is that "program" has the same meaning in section 8(c)(1) as in section 8(c)(2): a program required to be created by section 8(a)(4).

The exceptions within section 8(c)(2)(B) are not to the contrary. Section 8(c)(2)(B)(i)'s reference to section 8(a)(3)(A) and (B), but not section 8(a)(3)(C), can be read as confirming that only section 8(a)(4)'s activities fall within the scope of section 8(c)(2)—the only remaining part of section 8(a)(3), section 8(a)(3)(C), is a cross reference to section 8(a)(4).

The second exception, correction of registration records, clarifies what remains restricted from the section 8(a)(4) program. Section 8(c)(2)(B)(i) effectively exempts all section 8(a)(4) activities except those directed at a change in the residence of the registrant. Section 8 uses the phrase "registration records" three times. The other two uses outside of section 8(c)(2)(B)(ii) are in reference to address changes. *See* 52 U.S.C.

§§ 20507(c)(1)(B)(i), (e)(3). Thus, section 8(c)(2)(B)(ii) is best read as clarifying that the "quiet period" for section 8(a)(4) activities does not prevent the correction of registration addresses, only the removal of voters based on a systematic program to verify voter addresses.

The Eleventh Circuit erred in reaching a different conclusion in *Arcia v. Florida Secretary of State*, 772 F.3d 1335, 13343-48 (11th Cir. 2014). *Arcia* rejected three arguments in favor of Florida's removal effort. First, it rejected an argument that the structure of section 8(c)(2) indicated that either non-citizens may be excluded at any time or not at all. *Arcia*, 772 F.3d at 1346-47. Second, it rejected an argument that Congress intended the quiet period to apply only to programs for the removal of people who were once validly registered to vote, not people who never had eligibility. *Id*. at 1347. Third and finally, *Arcia* claimed that a contrary interpretation that would effectively limit the 90-day provision to programs concerning removals based on residency would render the word "any" in section 8(c) surplusage. *Id*. at 1348.

With respect to its first two arguments, two early Florida district court decisions highlight how *Arcia* erred. *See United States v. Florida*, 870 F.Supp.2d 1346 (N.D. Fla. 2012); *Arcia v. Detzner*, 908 F.Supp.2d 1276 (S.D. Fla. 2012), *vac'd by Arcia v. Detzner*, Case No. 12–22282–CIV–ZLOCH, 2015 WL 11198230 (S.D. Fla. 2015). As both courts note, section 8(a)(3) directs states to "provide that the name of a registrant may not be removed from the official list of eligible voters except" for one of three enumerated reasons. Lack of citizenship is not one of the criteria for removing a registrant under section 8(a)(3). Thus, taken at face value, *Arcia*'s strict reading of

the word "except" in section 8(a)(3) would prohibit states from removing individuals who are indisputably not citizens from the voter rolls.

Yet, noncitizens are plainly ineligible to vote in federal elections. *See* 18 U.S.C. § 611. The result is an "inescapable" conclusion: "section 8(a)(3)'s prohibition on removing a registrant except on specific grounds simply does not apply to an improperly registered noncitizen." *Florida*, 870 F.Supp.2d at 1349-50.

Both section 8(a)(3) and section 8(c)(2)(A) place limits on the ability of states to "remove" a registrant. "Surely 'removed' in 8(a)(3) and 'remove' in section 8(c)(2) mean the same thing." *Florida*, 870 F.Supp.2d at 1350. Thus, it follows that "if, as both sides concede, section 8(a)(3) does not prohibit a state from removing an improperly registered noncitizen, then 8(c)(2) does not prohibit a state from systematically removing improperly registered noncitizens during the quiet period." *Id*.

Arcia sidestepped this problem rather than engage directly with the text. The Eleventh Circuit concluded that it could separate section 8(c)(2) from section 8(a)(3) to avoid the serious constitutional problems posed by an interpretation of 8(a)(3) that would effectively prohibit states from keeping illegal non-citizen voters off of the voter rolls. *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. None of the parties before us have argued that we would reach an unconstitutional result *in this case* if we found that the 90 Day Provision prohibits systematic removals of non-citizens.")

(emphasis in the original). In doing so, the court never explained how the NVRA could be read as a consistent whole. It simply punted on the constitutional implications of its decision. *Id*. ("Constitutional concerns would only arise in a later case which squarely presents the question of whether the General Removal Provision bars removal of noncitizens altogether. And before we ever get that case, Congress could change the language of the General Removal Provision to assuage any constitutional concerns.").

This Court should break from *Arcia*'s myopic approach to statutory interpretation. There is a way to read the NVRA to avoid both absurd results and constitutional challenges, while also giving effect to all of its text: hold that the removal of illegally registered non-citizens is outside the scope of both sections 8(a)(3) and 8(c)(2).

With respect to the third point, the Eleventh Circuit's conclusion does not follow from its premise. Section 8(c)(1) is permissive. It uses the word "may" to indicate that states are allowed to satisfy section 8(a)(4) in the manner described therein. This suggests there are multiple ways by which a state can satisfy section 8(a)(4). The use of the word "any" in section 8(c)(2)(1) accounts for these different approaches. Putting these phrases together, section 8(c) is properly read to say: "states can satisfy section (a)(4) by taking the following steps, but, in any event, must complete their section (a)(4) program no later than 90 days before the date of the primary or general election if such program operates systematically." Use of the word "any" broadens "program" beyond just those that mean the conditions at (c)(1) but is

still limited by (a)(4). "Any" is not surplusage and the *Arcia* court erred in suggesting it would be.

This Court should reject *Arcia*. The text and context of the NVRA show that the removal of illegally registered non-citizens falls outside the scope of the 90 day "quiet period." Because removal of non-citizens is outside the scope of section 8(c)(2), the facts alleged by DOJ fail to state a claim upon which relief can be granted.

II. The Citizenship Check Does Not "Systematically Remove" Names from the Voter Registry.

Assuming *arguendo* that the removal of non-citizens falls within the scope of section 8(c)(2), Virginia's approach to removing non-citizens from the voter rolls based on their own admissions that they are not citizens (the "Citizenship Check") does not constitute a program that "systematically removes" registrants: the Citizenship Check relies solely upon first-hand information provided by individual voters coupled with their personal conduct instead of the kind of mass information collection by third parties that has led courts to invalidate other states' programs as "systematic."

A. Courts have correctly interpreted "systematically remove" to mean programs that make decisions about voters' eligibility based on mass information collected by third parties rather than individualized information or investigation.

Courts have recognized that the meaning of "systematically remove" under section 8(c)(2) is ambiguous because the phrase is "susceptible to multiple interpretations" and "the NRVA does not resolve this ambiguity by defining 'systematically remove' elsewhere in its text," "thus what constitutes a systematic removal is subject to debate." *N. Carolina State Conf. of NAACP v. Bipartisan Bd. of*

Elections & Ethics Enf't, No. 1:16CV1274, 2018 WL 3748172, at *6 (M.D.N.C. Aug. 7, 2018).

The handful of courts that have interpreted the meaning of "systematically remove" have agreed that it refers to a program that does "not rely upon individualized information or investigation to determine which names from the voter registry to remove." *See Arcia*, 772 F.3d at 1344 (11th Cir. 2014); *N. Carolina State Conf. of the NAACP v. N. Carolina State Bd. of Elections*, No. 1:16CV1274, 2016 WL 6581284, at *5 (M.D.N.C. Nov. 4, 2016) (relying on the 11th Circuit's interpretation in *Arcia*); *Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172 (same); *Forward v. Ben Hill Cnty. Bd. of Elections*, 509 F. Supp. 3d 1348, 1355 (M.D. Ga. 2020) (same); *see also Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1092-93 (D. Ariz. 2023), *judgment entered*, No. CV-22-00509-PHX-SRB, 2024 WL 2244338 (D. Ariz. May 2, 2024) (referring to *Arcia*'s definition that "an 'individualized removal program means one in which a state determines eligibility to vote with 'individualized information or investigation' rather than cancelling batches of registrations based on a set procedure").

Under this standard, state programs are "systematic" only when they rely on mass, unindividualized information about registered voters taken from third party sources; that is, on information that is neither first-hand nor otherwise personally acquired from the voters themselves.

In *Arcia*, the Eleventh Circuit found that a Florida program to cull the voter rolls of non-citizens was "systematic" because it "used a mass computerized data-

matching process to compare the voter rolls with other state and federal databases" to determine which registrants would be targeted for eligibility confirmation. *Arcia*, 772 F.3d at 1344. The court found particularly telling that the program relied on SAVE, the *Systematic* Alien Verification for Entitlements database, to determine which voters to target. *Id.*

In *N. Carolina State Conf. of NAACP*, the Middle District of North Carolina found that multiple North Carolina counties had engaged in "systematic removal" of registered voters when they allowed a handful of private individuals to successfully cause the cancellation of *thousands* of voter registrations based only upon the evidence that postcards the individuals sent to the voters' addresses en masse were returned to sender, even though many postcards had been improperly sent to the voters' residential addresses rather than voting addresses. *Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *6-7. In an earlier memorandum at the preliminary injunction stage, the court emphasized that there was "no evidence in the record that these third parties that challenged the voters had any reliable first-hand evidence specific to the voters challenged," and that most voters were targeted based on the irrelevant information that they were listed on the state website's "inactive voters list," which only meant that they had not voted for a certain period. *N. Carolina State Bd. of Elections*, No. 1:16CV1274, 2016 WL 6581284, at *5.

In *Ben Hill County Board of Elections*, the Middle District of Georgia found that registrants had been "systematically removed" when county election officials in

Georgia unilaterally made and sustained challenges to thousands of voters' registrations based solely on unverified information in the National Change of Address database. *Ben Hill County Board of Elections*, 509 F.Supp.3d 1353.

Each of these programs relied on mass information about registered voters from third party sources—regarding their citizenship status or their address—rather than the personal representations or conduct of the individual voters themselves.

B. Virginia's Citizenship Check does not "systematically remove" names because it relies solely upon the registered voters' own personally made statements and conduct.

Unlike the above-described programs, the Citizenship Check relies solely upon the personal representations and conduct of individual registered voters, and it requires two layers of personal inquiry before any individual's name is removed from the voter rolls.

First, the only voters identified for a follow-up under the Citizenship Check are those who personally represent to the Commonwealth that they are not citizens. App. 85 ¶¶ 4-8. Second, when a voter is identified for a follow-up because he informed the state he is not a citizen, his citizenship status is individually investigated by sending him a notice of the discrepancy and asking him to confirm his citizenship by signing and returning an attached Affirmation of Citizenship form. App. 85-86 ¶¶ 8-9. It is only if the voter chooses not to affirm his citizenship status within 21 days after this personal inquiry that his name is removed from the voter rolls. App. 86 ¶¶ 10-12.

Because of the Citizenship Check's reliance on both first-hand information about registered voters' citizenship status provided to the Commonwealth by the voters themselves and their personal conduct in choosing whether or not to affirm

their citizenship status, the Citizenship Check does not "systematically remove" names from the voter rolls within the standard established in *Arcia*. Nor does it resemble the programs invalidated under that standard in Florida, North Carolina, and Georgia, which used mass processes based on unindividualized third-party information. The Citizenship Check's process amounts to a series of brief investigations and determinations about individual voters' eligibility based on their personal representations to the Commonwealth about their citizenship status.

For these reasons, the Citizenship Check is not a program that "systematically remove" names from the voters rolls in a manner that violates section 8(c)(2).

III. Denying a Stay Will Result in Irreparable Harm

Virginia removed 1,600 people who self-identified as non-citizens from the voter rolls. Absent a stay, the consequence of the lower court's order is that the Commonwealth of Virginia will be compelled to readmit over one thousand people who are self-identified as being ineligible to vote to the voter rolls while voting is actively occurring. This harms confidence in our elections, as well as the law itself, which prohibits non-citizens from voting in federal elections. It also exposes each of those individuals to the very real risk of prosecution should they take their erroneous return to the voter rolls to be a green light for them to vote illegally.

On the other side of the ledger, there is little risk of harm from a stay: Virginia permits same-day voter registration. If any eligible voter was inadvertently removed from the voter rolls, he or she could still go to the polling place on election day, register, and cast a provisional ballot which, assuming his or her eligibility is

confirmed, would be counted. Contrary to some of the overheated rhetoric, no eligible voter would be denied the ability to vote.

CONCLUSION

For the foregoing reasons, this Court should grant a stay.

Respectfully submitted,

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