No. 12-_____

United States Court of Appeals

For the Eleventh Circuit

KARLA VANESSA ARCIA, ET AL.,
Plaintiffs-Appellants

v.

KEN DETZNER, IN HIS OFFICIAL CAPACITY AS FLORIDA SECRETARY OF STATE,
Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Florida

District Court Docket No. 12-22282-CIV-ZLOCH

APPELLEE SECRETARY OF STATE KEN DETZNER'S OPPOSITION TO APPELLANTS' MOTION TO EXPEDITE

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Eleventh Circuit Rule 26.1, counsel for Appellee Secretary of State Ken Detzner states that the following attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case:

Advancement Project – Counsel for Plaintiffs/Appellants

Melande Antoine – Plaintiff/Appellant

Karla Vanessa Arcia – Plaintiff/Appellant

Campaign Legal Center – Counsel for Plaintiffs/Appellants

Juan Cartagena – Counsel for Plaintiffs/Appellants

Michael A. Carvin – Counsel for Defendant/Appellee

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Ashley E. Davis – Counsel for Defendant/Appellee

John De Leon – Counsel for Plaintiffs/Appellants

Secretary of State Ken Detzner – Defendant/Appellee

Fair Elections Legal Network – Counsel for Plaintiffs/Appellants

Catherine M. Flanagan – Counsel for Plaintiffs/Appellants

Florida Immigration Coalition, Inc. – Plaintiff/Appellant

Florida New Majority, Inc. – Plaintiff/Appellant

Marc A. Goldman – Counsel for Plaintiffs/Appellants

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Diana Sen – Counsel for Plaintiffs/Appellants

1199SEIU United Healthcare Workers East – Plaintiff/Appellant

Appellee Florida Secretary of State Kenneth W. Detzner ("Secretary") respectfully submits this Opposition to Appellants' Motion To Expedite Appeal (filed October 9, 2012) ("Apps.' Mot."). Appellants provide no basis, let alone good cause, to expedite review of the district court's order preserving the status quo and rejecting Appellants' flawed claim that the National Voter Registration Act ("NVRA") "require[s] the State to idle on the sidelines until a non-citizen violates the law" by voting "before the State can act" to remove him from the voter rolls. D.C. Op. at 17 (Ex. A).

In fact, Appellants are responsible for the very alleged time pressure they now invoke for their request to expedite this Court's review. Appellants delayed filing their hybrid motion for a preliminary injunction and summary judgment in the district court until "three months after the June 19, 2012, filing of their initial Complaint" and "36 days after [they] allege the Secretary stated he would purge the state voter registry using . . . access" to the Department of Homeland Security's Systematic Alien Verification For Entitlements program ("SAVE"). *Id.* at 20. Appellants, moreover, did not move to expedite the appeal until five days after the district court's order—and they did not e-mail a courtesy copy of their Motion to the Secretary's general counsel, or serve it on the Secretary's outside counsel *at all*. *See* Apps.' Mot. at 12, Ex. A. This unilateral delay and lack of urgency "establish[]

that [Appellants'] purported injury is, in fact, not so serious as to warrant" an expedited appeal. *Id.* at 19.

Appellants nonetheless ask the Court to impose the harm caused by their delay on the Secretary, and to sanction their litigation-by-ambush tactics by expediting briefing, argument, and decision in this appeal. Yet fundamental fairness and due process require that Appellants bear the consequences of their own delay, and that their Motion be denied.

First, even accepting Appellants' allegations as true, the Court simply cannot provide any meaningful relief in the compressed time frame that Appellants propose. Appellants seek to conclude briefing of this appeal on October 26, *a mere eleven days* before Election Day, and demand that the Court hold *oral argument and issue a decision* within that eleven-day window. *See* Apps.' Mot. at 9. The Court cannot possibly meet this aggressive schedule. And even if the Court could accomplish this Herculean task to save Appellants from the consequences of their own delay, it would accomplish nothing.

Appellants *agree* that non-citizens are ineligible to vote and that registration and voting by non-citizens are criminal offenses. They therefore do not ask the Court to restore any proven non-citizen who already has been removed from the voter rolls. They also offer no evidence or argument that any *citizen* has been *removed* from the voter rolls. *See id.* at 6. Instead, the *only* harm they allege is

that "lawfully registered U.S. citizens are *at risk* of being purged from Florida's voting rolls without time to remedy the error, and consequently being denied their right to vote" on the November 6 Election Day. *Id.* at 6–7 (emphasis added). They therefore seek to bootstrap around this unsubstantiated "risk" a prospective order altering the status quo and prohibiting *all* removals until after the upcoming election. *Id.*

But the alleged "risk" to citizens created by the Secretary's SAVE verification cannot possibly be affected by this appeal for obvious reasons: (1) this Court cannot *prospectively affect* any "risk" created by the Secretary's use of the SAVE data, since any decision now comes *after* the Secretary and county Supervisors of Elections ("county supervisors") have used that data to send notices questioning registered individuals' citizenship status; (2) there can be no *retroactive curing* of any *mistakes* on the Secretary's SAVE-generated list, since such fact-specific "mistakes" can only be cured at the district court level (and have nothing to do with Appellants' legal theory on appeal); and (3) no one has sought, or rationally could seek, *retroactively undoing proper* application of the Secretary's efforts to exclude *non-citizens*, since Appellants (quite sensibly) do not ask this Court to facilitate a felony by requiring Florida to restore *actual non-citizens* to the voting rolls.

In short, the only legally cognizable injury remotely presented here—mistaken exclusion of a citizen from the rolls—cannot be properly be addressed on this expedited appeal and, even absent any expedition, will be addressed in the normal course, *i.e.*, Florida election officials would voluntarily, immediately, and retroactively reinstate any citizen mistakenly removed (and the district courts remain available to resolve any disputed citizenship questions pre-election).

Second, even assuming there would be a reason to expedite if there were a substantiated risk of excluding citizens, there is simply no credible *allegation* (much less evidence) that any citizen will be removed from the rolls. Appellants cannot credibly allege such risk because (1) they do not and cannot maintain that the SAVE data is inaccurate, (2) the Secretary has implemented elaborate procedures to ensure that the person checked through SAVE is the same person on the Florida voter rolls, and (3) any ambiguity in mistaken identity cases will not result, at this late date, in removal of the voter from the rolls given the careful notice-and-hearing process required by state law.

Under Florida law, county supervisors of elections, not the Secretary, are responsible for removing illegal registrants from the voter rolls—and they may do so only after providing 30 days notice and an opportunity for a hearing. *See* Fla. Stat. § 98.075(7). Given that November 6 is only 26 days away and the notices have only recently been provided, the only individuals who could possibly be

removed before Election Day are individuals who *do not dispute* the charge that they are *non-citizens* ineligible to vote. *See id.* Any party who objects must receive a hearing, which now necessarily will occur after Election Day. *See id.* Because Appellants' parade of horribles of a "risk" to citizens simply cannot come to pass, there is no basis for the Court to expedite this appeal. In stark contrast, any last-minute order granting relief to Appellants would unleash chaos and confusion in the administration of the election.

Finally, the district court here—in harmony with the district court that considered a parallel challenge to the Secretary's authority to identify and remove non-citizens from the voter rolls, *see United States v. Florida*, 2012 WL 2457506 (N.D. Fla. June 28, 2012)—correctly held that the NVRA does not require the State to sit idly by while non-citizens, through illegal voting, dilute the weight of citizens' votes. *See* D.C. Op. at 13–18. The Court should deny Appellants' Motion and resolve this unmeritorious appeal in the ordinary course.

BACKGROUND

Both federal and state law require that, in order to vote in any election in the State of Florida, an individual must be a citizen of the United States. *See, e.g.*, 18 U.S.C. §§ 611, 1015(f); 42 U.S.C. § 1973gg-3(C)(2)(C); Fla. Stat. § 97.041. As the Department of Justice ("DOJ") recently emphasized in the Supreme Court, "the federal and state governments have a compelling interest in excluding foreign

citizens" from the political process. Motion of the United States to Dismiss or Affirm at 11, *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (No. 11-275), 2011 WL 5548718; *see also* D.C. Op. at 20–21 (noting DOJ brief in *Bluman*). Such an exclusion is neither an "invidious attack" on these individuals nor "a deficiency in the democratic system"; rather, it is "a necessary consequence of the community's process of political self-definition." *Id.* at 15 (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1981)).

Florida law and federal law further obligate the Secretary and county supervisors to protect the votes of citizens by preventing voter fraud. In particular, Florida law requires that the Secretary and county supervisors "protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records." Fla. Stat. § 98.075(1). To implement this duty, the Secretary may access information from state and federal officials "[i]n order to identify ineligible registered voters and maintain accurate and current voter registration records in the statewide voter registration system." *Id.* § 98.093. If the Secretary or supervisor receives information that a registered individual is ineligible, the supervisor "shall" provide the individual notice, 30 days to respond, and the opportunity for a hearing, after which the supervisor makes a determination of eligibility based on a preponderance of the evidence. *Id.* § 98.075(7).

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

In April 2012, the Secretary began the process of matching voter registration data against the database of the State's motor vehicle authority ("MDAVE") to identify individuals who were registered to vote but might be non-citizens. *See* D.C. Op. at 3. At that time, the Secretary issued a press release stating that the Department of State was seeking access to SAVE "for further verification of immigration status." *Id.* The Secretary initially identified 180,000 names of potential non-citizens through the MDAVE data matching, and sent a sample of that list containing approximately 2600 names to county supervisors, who were to initiate the statutory notice-and-hearing procedure for each individual. *See id.* On April 30, 2012, the Secretary suspended forwarding to county supervisors the names of potential non-citizens identified by MDAVE data matching. *See id.*

Since that time, the Secretary has received access to SAVE. *See id.* at 3–4. SAVE is a rapidly updated federal database that allows state and local governments to check the most recent immigration status of non-citizens who

lawfully entered the United States. *See id.* The Secretary, like state and local officials across the country, can verify an individual's immigration status in SAVE using an Alien Registration Number ("A-number"), which is a unique 9-digit identifier given only to non-citizens. *See id.* at 4. The Secretary publicly announced the Department of State's decision to implement SAVE verification on August 14, 2012. *See id.* The Secretary now has identified, and made available to the public, the names of scores of registered individuals who have either attested to their lack of citizenship or who, after the data matching process, appear to be ineligible registered voters based on non-citizenship. *See id.*; D.C. DE 100-2.

Appellants filed their original Complaint on June 19, 2012. D.C. Op. at 2. Appellants alleged, in pertinent part, that the Secretary's MDAVE data matching violated the NVRA because it constituted a "systematic program" that might result in removal of individuals from the voter rolls within 90 days before an election. *Id.*; *see also id.* at 10. Appellants did not immediately amend their Complaint upon the Secretary's announcement of initiation of SAVE verification on August 14. *See id.* at 4. Instead, Appellants waited until September 12 to file an Amended Complaint challenging the SAVE verification under the NVRA. *See id.* Appellants waited another week before filing their hybrid motion for preliminary injunction and summary judgment. *See id.*

After the Secretary responded and the district court held oral argument, the district court entered an order denying the motion on October 4. *See* D.C. Op. Invoking Judge Hinkle's decision in the parallel NVRA suit filed by DOJ in the Northern District of Florida, the district court rejected Appellants' reading of the NVRA as "absurd." *See id.* at 14–15 (citing *United States v. Florida*, 2012 WL 2457506). Indeed, under Appellants' reading, "a state would be prohibited from removing from its voting rolls a registrant who was improperly registered for [certain] valid reasons" at any time, including "minors, fictitious individuals, individuals who in fact reside in a different state, and non-citizens." *Id.* at 14.

The district court, moreover, found "little assurance" in Appellants' position that while the State would be unable to remove ineligible non-citizens from the voter rolls, it could criminally prosecute them for registering or voting. *Id.* at 17. The district court reasoned:

> Certainly, the NVRA does not require the State to idle on the sidelines until a non-citizen violates the law before the State can act. And surely the NVRA does not require the State to wait until *after* that critical juncture—when the vote has been cast and the harm has been fully realized—to address what it views as nothing short of 'voter fraud.'

Id. at 17–18 (emphasis in original).

In addition to rejecting Appellants' position on the merits, the district court found that the equities weighed against granting Appellants a preliminary

injunction. *See id.* at 19–20. The district court pointed out that Appellants' delay in filing their hybrid motion until "three months after the June 19, 2012, filing of their initial Complaint . . . and 36 days after Plaintiffs allege the Secretary stated he would purge the state voter registry using its access to . . . SAVE . . . establishes that their purported injury is, in fact, not so serious as to warrant preliminary injunctive relief." *Id.* at 20. And, the district court concluded, Appellants had failed to establish "the the purported harms . . . outweigh the Secretary's interest in protecting the integrity of the electoral process." *Id.* at 21.

The district court therefore denied Appellants' hybrid motion and preserved the status quo of the Secretary's SAVE verification. *See id.* at 21–24. Appellants moved for entry of judgment in the district court on October 5. While that motion was pending, Appellants filed a notice of appeal to this Court. Appellants' Motion followed on October 9. Appellants did not e-mail a courtesy copy of the Motion to the Secretary's general counsel, and did not serve it on the Secretary's outside counsel at all.

ARGUMENT

I. THE COURT CANNOT CURE APPELLANTS' ALLEGED HARM BEFORE ELECTION DAY

The Court should deny Appellants' Motion because, even on Appellants' proposed timeline, it could not grant meaningful relief before Election Day. Appellants' sole alleged harm is that "*citizens are at risk* of being purged from

Florida's voting rolls without time to remedy the error, and consequently being denied their right to vote in the approaching general election." Apps.' Mot. at 6–7 (emphasis added). Yet even if Appellants could prove such a risk of unremedied mistaken identity—which they cannot—they ask the Court to order completion of briefing on October 26. *See id.* at 9. Appellants thus demand that the Court hold oral argument, issue a decision, and enter relief in their favor within the *last eleven days* before Election Day. *See id.* That is simply not enough time for the Court to resolve the merits of Appellants' appeal fairly and correctly.

Moreover, even if the Court could perform the task of completing appellate review in eleven days or less, it is simply too late for the Court to grant meaningful relief. Even if there were some "risk" to "citizens" as Appellants allege, it is simply too late, for the reasons described above (pp. 2–4), to *prevent* any such risk created by the Secretary's acts, since all of those acts will have *already occurred* by the time the Court issues any opinion on the eve of the election. Nor can there be retroactive relief, because the Court obviously will not order people who are *uncontested non-citizens* to be put back on the rolls and any *disputed* cases where the voter contends he is a citizen (1) cannot possibly be resolved on this appeal and (2) will not result in removal of the voter prior to election, under Florida's procedures for removing voters.

As noted, Appellants have not provided any argument or evidence that SAVE is flawed. Moreover, even if a citizen *has* been *misidentified* through the SAVE verification, there is *no chance* that a citizen will be erroneously *removed* from the voter rolls before Election Day. Florida law prohibits removal of an individual from the voter rolls until 30 days after the statutorily required notice is provided. *See* Fla. Stat. § 98.075(7). Given that November 6 is only 26 days away and the notices have only recently been provided, the *only* individuals identified through SAVE who could even conceivably be removed from the voter rolls before Election Day are those who *do not contest* the charge that they are ineligible *non-citizens*. *See id.* As a practical matter, no individual who objects to that allegation and demands a hearing can be removed before then. *See id.*

Finally, any order granting relief to Appellants on the eve of Election Day would invite chaos and confusion into the administration of the election, as the Secretary and county supervisors, already burdened by the enormous task of conducting the election, *see, e.g.*, *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335–40 (S.D. Fla. 2008), would also be compelled to find some way to comply with the Court's last-minute decree. There simply is no reason to court this result, particularly when Appellants are responsible for the delay they now complain of. *See, e.g.*, D.C. Op. at 19–21.

Appellants' cherry-picked cases (*see* App. Mot. at 7–8) are inapposite and, if anything, only underscore that there is no basis to rush to judgment at this late date resulting from Appellants' delay. None of these cases involved a party who was responsible for the delay seeking expedited review, and none involved an invalid NVRA challenge to removal of non-citizens from voter rolls. For example, *United Student Ass'n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008) (cited at Apps.' Mot. at 7), involved a motion to stay a preliminary injunction preventing rejection of certain voter identification cards under the NVRA—and the Sixth Circuit did not rush to complete review of the underlying merits prior to the imminent election. *See id.* at 388. *Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077 (D. Mont. 2008) (cited at Apps.' Mot. at 7), presented a systematic program to remove registered individuals based on change in address—which, unlike the Secretary's SAVE verification, *is* covered by the NVRA. *See* D.C. Op. at 15.

And cases that could dramatically affect the conduct of the upcoming election itself—such as redistricting cases that determine which candidates voters vote for, *see Brown v. State of Florida*, 668 F.3d 1271 (11th Cir. 2012) (cited at Apps.' Mot. at 8); *Page v. Bartels*, 248 F.3d 175, 184 (3d Cir. 2001) (cited at Apps.' Mot. at 8), ballot access cases that determine whether an initiative will appear on the ballot, *Delgado v. Smith*, 861 F.2d 1489, 1490 (11th Cir. 1988) (cited at Apps.' Mot. at 8), and reapportionment cases that determine how many

congressmen a state receives, *see U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 445 (1992) (cited at Apps.' Mot. at 8)—have no bearing on Appellants' request to protect them from the consequences of their own delay based on a non-existent "risk" that does not even implicate the NVRA.

II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' NVRA CLAIM

Finally, the Court should deny the Motion because the district court properly preserved the status quo and rejected Appellants' flawed NVRA claim. The court below was the second district court to consider whether the NVRA bars the Secretary and county supervisors from identifying and removing non-citizens from the voter rolls within 90 days of a federal election—and both courts have rejected that argument. *See* D.C. Op. at 11–19; *see also United States v. Florida*, 2012 WL 2457056, at *3. Quite significantly, in the parallel suit, the Justice Department—the federal entity responsible for enforcing the NVRA—*declined* to take an interlocutory appeal of Judge Hinkle's order denying its motion for a preliminary injunction and has taken no further action for pre-election relief in that district court. *See United States v. Florida*, 2012 WL 2457056, at *3. In fact, on the same day the Secretary received Appellants' Motion to Expedite this appeal, the district court in the *United States v. Florida* case granted a joint motion by the Justice Department and the Secretary to stay all proceedings in that action until after the

November 6 General Election. *See United States v. Florida*, No. 4:12-CV-00285-RH-CAS (N.D. Fla.), DE 47 (Sept. 27, 2012); DE 48 (Oct. 10, 2012).

The district courts' rejection of the flawed NVRA claim is clearly correct. The NVRA permits the removal of "registrants" from a state's voter rolls only on certain identified bases: "the request of the registrant," "as provided by State law, by reason of criminal conviction or mental incapacity," "death of the registrant," or "a change in residence of the registrant." 42 U.S.C. §§ 1973gg-6(a)(3)–(4). The NVRA further provides that "a state shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official list of eligible voters." *Id.* § 1973gg-6(c)(2)(A). This 90-day requirement allows all of the grounds of removal identified in the permanent removal provision except change in residence. *Id.* § 1973gg-6(c)(2)(B).

Thus, the 90-day removal prohibition *mirrors* that of the *permanent* removal prohibition (save for change in residence) and *neither* provision lists "non-citizenship" as a permissible basis for removal. Thus, if Appellants are correct that names can be deleted from the voting rolls only if explicitly listed as "exceptions" to the removal prohibitions, this necessarily means, as both district courts correctly recognized, that non-citizens can *never* be removed because, as with the 90-day provision, "non-citizenship" is not an explicitly listed permissible removal ground

in the permanent removal provision. D.C. Op. at 14; *United States v. Florida*, 2012 WL 2457056, at *3.

This absurd result—mandating State facilitation of the federal crime of having non-citizens register or vote, in order to dilute *citizens'* votes—leads even Appellants to concede that the NVRA permits deletion of registrants' names where, as here, they were never properly registered in the first place. *See* Pls.' Memo. In Support Of Mot. For Prelim. Injun. at 13–14 (D.C. DE 65-1); D.C. Op. at 17 ("Certainly, the NVRA does not require the State to idle on the sidelines until a non-citizen violates the law" by voting "before the State can act" to remove him from the voter rolls.). That fundamental concession, however, demonstrates that the district court's interpretation was clearly correct, since it rests on precisely the same principle Appellants embrace for the permanent removal provisions, *i.e.*, the removal provisions of the NVRA do *not* speak *at all* to removal of individuals, such as non-citizens, who were not eligible to be on the voter rolls when they registered. *See, e.g.*, D.C. Op. at 15–16.

The far better reading—adopted by both district courts to review the Secretary's authority to identify and remove non-citizens from the voter rolls—is that the NVRA applies *only* to the bases of removal it identifies, and does not cover removals on other bases. *See id.* Thus, the NVRA addresses only "the removal of once-eligible voters—those who were at one time *bona fide* registrants,

yet because of personal request, criminal conviction, mental incapacity, or change in residence, became ineligible." *Id.* at 16. The NVRA is inapplicable to removals of individuals "who were never *bona fide* registrants, and whose registration was void *ab initio* by virtue of their status as minors, non-citizens, or any other factor that would nullify their registration." *Id.* Under that sensible construction, the NVRA's 90-day provision applies only to "removals of registrants based on a change in residence." *Id.* at 15. The NVRA therefore does not cover the Secretary's SAVE verification, and Appellants' NVRA claim fails. *See id.* at 13–18.

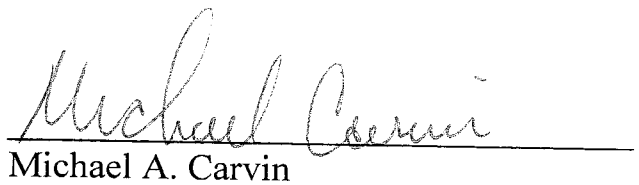
Thus, there is no merit to Appellants' legal claim, which provides another fundamental reason to deny expedited appeal.

CONCLUSION

The Court should deny the Motion to Expedite.

Dated: October 11, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2012, I caused one original and three copies of the foregoing APPELLEE SECRETARY OF STATE KEN DETZNER'S OPPOSITION TO MOTION TO EXPEDITE to be sent to the Court via overnight UPS. I also certify that on October 11, 2012, I served a copy of the foregoing via overnight UPS on the following counsel of record for Plaintiffs-Appellants:

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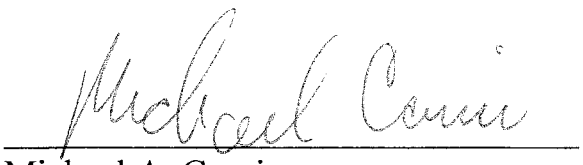

Michael A. Carvin

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-22282-CIV-ZLOCH

KARLA VANESSA ARCIA, et al.

Plaintiffs,

vs.

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

Defendant.
_____/

O R D E R

THIS MATTER is before the Court upon Plaintiffs' Motion For Preliminary Injunction And Summary Judgment (DE 65) and Defendant's Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction And Summary Judgment (DE 79), which the Court construes as a Motion to Dismiss for Lack of Standing. The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

I. Background

The above-styled cause concerns the implementation of the program known as "Processing Registered Voters - Non-Immigrants" (hereinafter "the Program") by Defendant Florida Secretary of State Ken Detzner (hereinafter "the Secretary"). Plaintiffs are comprised of two individual Plaintiffs and five organizational Plaintiffs who claim that their rights, and those of their members, "are affected by the program instituted by the Florida Department of State . . . to carry out a systematic purge of alleged non-citizens from the

Florida voter rolls." DE 57, p. 2. The individual Plaintiffs, Karla Vanessa Arcia (hereinafter "Arcia") and Melande Antoine (hereinafter "Antoine"), are United States citizens who are registered to vote in the State of Florida and were included on the Secretary's initial list of potential non-citizens. DE 71, p. 4. The five organizational Plaintiffs include a labor union and various Florida-based civic organizations. These organizational Plaintiffs allege that their members are at risk of being removed from the voting rolls or that based on the Program, the organizations themselves have had to divert their resources away from their regular business activities and toward addressing the implementation of the Program. DE 57, pp. 5-8.

On June 19, 2012, Plaintiffs initiated this case with the filing of their Complaint For Declaratory And Injunctive Relief (DE 1), alleging that the Program violated certain provisions of the Voting Rights Act (hereinafter "the VRA") and the National Voter Registration Act (hereinafter "the NVRA"). By this initial Complaint (DE 1), Plaintiffs alleged that in April of 2012, the Secretary began the process of identifying, with the intent of later purging, potential non-citizens from the rolls of registered voters in the State of Florida. To identify such potential non-citizens, the Secretary gained information from the Florida Department of Highway Safety and Motor Vehicles (hereinafter "DHSMV") indicating that a registered voter may not be a United States citizen, which

was then cross-checked against various other databases. At that time, the Secretary issued a press release which stated that the Department of State was "actively seeking access to federal Department of Homeland Security databases such as SAVE (Systematic Alien Verification for Entitlements) for further verification of immigration status." DE 1, pp. 7-8 (hereinafter "the SAVE database"). The Secretary initially identified 180,000 names of alleged "potential non-citizens," and sent a sample of that list, containing 2,625 names, to the Supervisors of Elections in Florida's 67 counties. DE 57, p. 1. The Secretary then directed these Supervisors to confirm whether any identified registered voter on the list was indeed a potential non-citizen, and if so, to begin the statutorily required notice and removal process to remove the individual from the voting rolls.

According to Plaintiffs, the Program—especially in its initial implementation—proved to be inaccurate, and the list of 2,625 "potential non-citizens" included at least some United States citizens, including the two individually named Plaintiffs: Arcia and Antoine. On April 30, 2012, implementation of the Program was temporarily suspended. Since that time, the Secretary has received access to the federal SAVE database from the Department of Homeland Security (hereinafter "DHS"), which the Secretary alleges "is a rapidly updated federal database that allows state and local governments to check the most recent immigration status of non-

citizens who lawfully entered the United States." DE 79, p. 6. By checking an individual's Alien Registration Number (hereinafter "A-number"), "a unique 9-digit identifier given only to non-citizens," against information in the SAVE database, Defendant maintains that it can accurately ascertain whether a registered voter has been naturalized as a United States citizen. Id., p. 7. The Secretary asserts that since its August 14, 2012, declaration to use the SAVE database in the implementation of the Program, "the Secretary's data matching program has identified at least scores of registered voters who have either personally attested to their lack of citizenship or who, after the data matching process, . . . appear to be ineligible registered voters based on non-citizenship." Id.

On September 12, 2012, the Parties filed a Stipulation Of Dismissal As To Counts I, II, And Part Of Count IV Of Complaint For Declaratory And Injunctive Relief (DE 56), dismissing the claims under the VRA, and the claim under paragraph (6)(b)(a) of section 8 of the NVRA, that the Program is not uniform, nondiscriminatory, and in compliance with the VRA. Thus, the sole claim that remains by Plaintiffs' First Amended Complaint (DE 57) is that the Program violates the NVRA's prohibition on completing "not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official list of eligible voters." 42 U.S.C. § 1973gg-6(c)(2)(A) (2002).

The Court held an evidentiary Hearing on the instant Motion (DE 65) on October 1, 2012. At the Hearing, the Court heard from two witnesses on behalf of Plaintiffs: Mr. Dale Ewart, the Assistant Regional Director of the Florida Region for 1199SEIU United Healthcare Workers East, and Mr. Wilfredo Seda, the Chair of the National Congress for Puerto Rican Rights. The Court then heard argument from Plaintiffs and the Secretary.

By this Motion (DE 65), Plaintiffs ask that the Court do essentially four things: (1) declare that the State's implementation of the Program, specifically in its recent use of the SAVE database, violates the NVRA; (2) enjoin the Secretary from conducting any systematic purge aimed at excluding ineligible voters prior to the November 6, 2012, election; (3) direct the Secretary to ensure that any individual who was removed after August 8, 2012, be restored to the voting rolls prior to October 15, 2012; (4) and instruct the Secretary to file with the Court a list of voters who have been so removed from the voting rolls and/or have been reinstated. DE 65, pp. 1-2.

II. Standing

By Defendant's Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction And Summary Judgment (DE 79), which the Court construes as a Motion to Dismiss for Lack of Standing, the Secretary argues that both the individual Plaintiffs and the organizational Plaintiffs lack standing to proceed in the above-

styled cause. Based on the testimony and evidence presented at the evidentiary Hearing held on October 1, 2012, and the facts set forth in Plaintiffs' Statement Of Undisputed Material Facts In Support Of Their Motion For Summary Judgment (DE 65-2), the Court finds that only some of the Plaintiffs have established standing. The instant Motion to Dismiss for Lack of Standing will therefore be granted in part and denied in part as detailed below.

At the October 1, 2012 Hearing, the Court heard testimony from Mr. Dale Ewart, the Assistant Regional Director of the Florida Region for 1199SEIU United Healthcare Workers East (hereinafter "1199SEIU") and Mr. Wilfredo Seda, the Chair of the National Congress for Puerto Rican Rights, regarding the standing of 1199SEIU, the National Congress for Puerto Rican Rights, as well as that of individual Plaintiffs Arcia and Antoine. No testimony or evidence was presented at the Hearing regarding the standing of organizational Plaintiffs Veye Yo, the Florida Immigration Coalition, Inc., or Florida New Majority, Inc.

Plaintiffs also set forth facts supporting their standing to proceed in the above-styled cause in their Statement Of Undisputed Material Facts In Support Of Their Motion For Summary Judgment (DE 65-2). In the context of a Motion For Summary Judgment, failure to controvert a fact alleged by the movant and supported by the record results in the same being deemed admitted. S.D. Fla. L.R. 7.5(d). Plaintiffs allege facts regarding all individual and organizational

Plaintiffs in paragraphs 11 through and including 16 of their Statement Of Undisputed Material Facts (DE 65-2). In response to each the facts alleged in paragraphs 11 through and including 16, Defendant responds in an identical fashion: that he is "without knowledge or information sufficient to form a belief as to the truth or falsity of the statements . . . and therefore denies them." DE 79-4. These bare and conclusory denials can hardly be understood to substantively challenge the facts alleged by Plaintiffs, supported by the record, and certainly do nothing to controvert[1] the same. The Court notes that this case was filed June 19, 2012. See DE 1. Defendant has had more than adequate time to engage in discovery regarding standing, and for whatever reason has chosen not to do so. The Court therefore finds it insincere for the Secretary to now complain that he has not been allowed sufficient time to address the standing issue.

Therefore, based in large part on the Eleventh Circuit's decision in NAACP v. Browning, 522 F.3d 1153 (11th Cir. 2008), the Court finds that the testimony presented at the October 1, 2012 evidentiary Hearing, in conjunction with the Declarations of Maria

[1] Mere denial of an opposing party's statement does not specifically controvert anything. Pursuant to the Local Rules of this District, an opposing party's statement needs to be supported "by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." S.D. Fla. L.R. 7.5(c). Thus, to the extent Plaintiffs' facts are supported by record evidence and not specifically controverted by Defendant, they are deemed admitted.

Del Rosario Rodriguez of Florida Immigration Coalition, Inc. (DE 65-5), Mr. Ewart of 1199SEIU (DE 65-6), and Mr. Seda of the National Congress for Puerto Rican Rights (DE 65-7), are sufficient—albeit minimally so—to establish the standing in the above-styled cause of individual Plaintiffs Arcia and Antoine, as well as organizational Plaintiffs the National Congress For Puerto Rican Rights, 1199SEIU United Healthcare Workers East, and Florida Immigrant Coalition, Inc. Accordingly, in so far as it challenges the standing of these Plaintiffs, Defendant's Motion to Dismiss for Lack of Standing (DE 79) will be denied.

However, the Court recognizes that, even where not successfully controverted, only those facts supported by specific record evidence shall deemed admitted. See S.D. Fla. L.R. 7.5(c) and 7.5(d). As to organizational Plaintiffs Veye Yo and Florida New Majority, Inc., the Court reiterates that no testimony or evidence regarding the standing of these two Plaintiffs was presented to the Court at the evidentiary Hearing on October 1, 2012. While Plaintiffs do make statements of fact regarding these two organizational Plaintiffs in their Statement Of Undisputed Material Facts (DE 65-2), in support of those statements Plaintiffs cite only to the allegations made in various paragraphs of their First Amended Complaint. See DE 65-2, ¶¶ 12, 15. While Defendant's failure to controvert the statements remains, the Court cannot and will not deem facts admitted where there is not sufficient evidence in the record to support them.

Beyond the bald allegations made in the First Amended Complaint (DE 57), the Court finds no record evidence supporting the standing of organizational Plaintiffs Veye Yo and Florida New Majority, Inc. to proceed in the above-styled cause. Accordingly, in so far as it challenges the standing of Plaintiffs Veye Yo and Florida New Majority, Inc., Defendant's Motion to Dismiss for Lack of Standing (DE 79) will be granted.

III. Preliminary Injunction

The Court next considers Plaintiffs' request for the issuance of a preliminary injunction. A district court may grant a preliminary injunction if the movant demonstrates

> (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest.

Keeton v. Anderson-Wiley, 664 F.3d 865, 868 (11th Cir. 2011) (citing BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC, 425 F.3d 964, 968 (11th Cir. 2005)). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." ACLU of Florida v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009) (internal citation and quotation marks omitted). Further, a "[f]ailure to show any of the four factors is fatal, and the most common failure is not showing

a substantial likelihood of success on the merits." Id. The Court will thus first consider whether Plaintiffs are likely to succeed on the merits of the sole remaining claim in their First Amended Complaint—that the Program "violates Section 8(c)(2)(A) of the NVRA, [codified at] 42 U.S.C. § 1973gg-6(c)(2)(A)." DE 57, p. 17.

Subparagraph (c)(2)(A) of section 8 of the NVRA (hereinafter "the 90-day Provision") reads as follows: "A state shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official list of eligible voters." § 1973gg-6(c)(2)(A). Plaintiffs argue that the Program "violates the plain language" of the 90-day Provision and that no part of section 8 excepts the removal of non-citizens by a "systematic program" such as that which the Secretary is implementing here. See DE 65-1, p. 9 & p. 14 n.9. The Secretary posits several competing interpretations of section 8 of the NVRA. The Secretary first argues that section 8 of the NVRA simply does not concern the removal of individuals who were never properly registered in the first instance, or if it does, subsection (b) addresses, generally, the removal of those individuals. DE 79, p. 17. He then argues, in the alternative, that subparagraph (a)(3)(B) excepts from the 90-day provision the removal of registrants "as provided by State law," which would necessarily include the State's statutory proscription against a non-citizen registering to vote.

DE 79, p. 20. The Court considers each of these arguments in turn.

A. The General Removal Provision: Subsection (a)(3)

In order to understand the meaning of the 90-day provision, the Court must first look to paragraph (a)(3) (hereinafter "the General Removal Provision"). Paragraph (a)(3) deals with the types of "registrants" that may be removed from "the official list of eligible voters." § 1973gg-6(a)(3). This provision provides:

> (a) In general. In the administration of voter registration for elections for Federal office, each State shall-
> ...
> (3) provide that the name of a registrant may not be removed from the official list of eligible voters except-
> (A) at the request of the registrant;
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
> (C) as provided under paragraph (4).

Id. Paragraph (4) then addresses the removal of names of "ineligible voters" by reason of: "(A) the death of the registrant; or (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section." § 1973gg-6(a)(4)(A)-(B).

This General Removal Provision found in (a)(3) is later referenced in paragraph (c)(2), which also contains the 90-day Provision. Paragraph (c)(2) explicitly exempts from the 90-day period certain "removals" that are enumerated in subparagraphs (a)(3)(A)-(C). Subparagraph (c)(2)(B) provides:

> (B) Subparagraph (A) shall not be construed to preclude -
> (i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or

> (B) or 4(A) of subsection (a) of this section; or (ii) correction of registration records pursuant to this subchapter.

Thus, the Secretary's Program is not subject to the 90-day provision if it "remov[es] [] names from official lists of voters on a basis described in paragraph (3)(A) or (B) or 4(A) of subsection (a) of this section" or corrects "registration records pursuant to this subchapter." § 1973gg-6(c)(2)(B)(i)-(ii).

Taking these two provisions together, then, four classifications of "removals" are explicitly excepted from the 90-day provision, meaning that a removal on these grounds may be effected at any time. These grounds include: (1) removals at the request of the registrant; (2) those "provided by State law, by reason of criminal conviction or mental incapacity"; (3) removals based on the death of the registrant; and (4) "correction of registration records pursuant to this subchapter." § 1973gg-6(a)(3)(A)-(B), (4)(A); (c)(2)(B)(ii). The Secretary states in a footnote that clause (ii), "correction of registration records," may pertain to the Program and allow it to be implemented at any time; yet, because the Parties have not thoroughly explored an interpretation of this clause, and because it was not raised at the Hearing, the Court will not address it now. See DE 79, p. 20 n.6.

At first blush, it would appear that implementation of the Program would be excepted from the 90-day provision, because it is "provided by State law." By Florida Statute, individuals who are

"not [] United States citizen[s]" yet are registered to vote may be removed from "the statewide voter registration system." Fla. Stat. § 98.075(6) (2011). This statute then provides for the "procedures for removal" that must be followed in order to remove such an individual. § 98.075(7).

Yet, subparagraph (a)(3)(B) cannot reasonably be read to create three independent categories for removals—those based on State law, criminal conviction, and mental incapacity. Indeed, the wording of this subparagraph is puzzling, and if Congress wanted to clearly indicate that this subparagraph dealt exclusively with criminal convictions or mental incapacity based on State law, it could have stated as much. However, if this subparagraph were intended to set forth three distinct categories for removal, then indeed any removals "based on State law" would render the 90-day provision at best superfluous, and at worst, directly inconsistent with subparagraph (a)(3)(B). In other words, removals under state law based on a change in residence cannot be allowed during the 90-day period under a reading of subparagraph (a)(3)(B), yet also prohibited in the 90-day period based on subparagraph (c)(2)(A). Thus, the Court does not find that the Program's implementation is permitted based on this understanding of subparagraph (a)(3)(B).

B. The Program Is Not Subject to the General Removal Provision or the 90-day Provision

As set forth above, paragraph (a)(3) provides the exclusive grounds upon which a "registrant" may be removed from the "official

list of eligible voters." § 1973gg-6(a)(3) ("[T]he name of a registrant may not be removed from the official list of eligible voters except" under three enumerated grounds.") Therefore, if one were to read this provision literally and without reference to any other portion of section 8 of the NVRA, the only grounds by which a State could remove a "registrant," would be: (1) if the registrant requests to be removed; (2) the registrant becomes ineligible to vote under State law by reason of criminal conviction or mental incapacity; (3) the registrant dies; or (4) the registrant changes his residence.

It would necessarily follow, then, that a state would be prohibited from removing from its voting rolls a registrant who was improperly registered for other valid reasons. So a state could therefore not remove from its voting rolls minors, fictitious individuals, individuals who in fact reside in a different state, and non-citizens. Not only would this interpretation stand in direct contravention of Florida law, see Fla. Stat. § 98.075(6), but it would produce an absurd result. See United States v. Ballinger, 395 F.3d 1218, 1237 (11th Cir. 2005) ("[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion.") Therefore, paragraph (a)(3) cannot apply to the removal of non-citizens. See also United States v. Florida, 2012 WL 2457506, at *3 (N.D. Fla. June 28, 2012)

("This conclusion is inescapable: section 8(a)(3)'s prohibition on removing a registrant except on specific grounds simply does not apply to an improperly registered non-citizen.").

As stated above, subparagraph (c)(2)(A) lists the removals that are excepted from the 90-day provision: (1) removals at the request of the registrant; (2) those "provided by State law, by reason of criminal conviction or mental incapacity"; (3) removals based on the death of the registrant; and (4) "correction of registration records pursuant to this subchapter." § 1973gg-6(a)(3)(A)-(B), (4)(A); (c)(2)(B)(ii). Therefore, the only removal under paragraph (a)(3) that is subject to the 90-day Provision is a removal based on "a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section." § 1973gg-6(a)(4)(B).

The Court finds no reason to conclude that the 90-day Provision applies to anything other than removals of registrants based on a change in residence. The 90-day Provision is found in subsection (c), which is entitled "Voter removal programs." Paragraph (1) of subsection (c) then details how a state is to implement the requirements of subsection (a)(4) ["a change in residence of the registrant"], such as by "establishing a program" to address the change-of-address of a registrant who moves inside, or outside, the state. Paragraph (2) of course <u>includes</u> the 90-day Provision, which, when read in conjunction with paragraph (a)(3) reveals that registrants who become ineligible because of a change in residence

may not be removed in the 90-day period. Finally, not only does subparagraph (2)(A) incorporate by reference paragraph (a)(3) in setting forth those removals excepted from the 90-day period, but the language of the two provisions track one another. Thus, these two provisions are indeed "inextricably linked." DE 105, p. 70. See also United States v. Florida, 2012 WL 2457506, at *3 ("'[R]emoved" in 8(a)(3) and 'remove' in 8(c)(2) mean the same thing. And there is no reason to believe the reference to removing a 'registrant' in 8(a)(3) means something different than removing 'ineligible voters' in 8(c)(2) . . .).

Another way to understand these two sets of provisions is that they only address the removal of once-eligible voters—those who were at one time bona fide registrants, yet because of personal request, criminal conviction, mental incapacity, or change in residence, became ineligible. It is indeed notable these provisions are silent as to the removal of those registered voters who were never bona fide registrants, and whose registration was void ab initio by virtue of their status as minors, non-citizens, or any other factor that would nullify their registration.

Put simply, these two provisions are meant to be read in conjunction with one another and when read together, the 90-day provision is meant only to proscribe the removal within 90 days of a federal election of registrants who become ineligible to vote based on a change in residence. Plaintiffs seem to argue that the

90-day Provision's use of the word "systematically" distinguishes some voter removal programs from others. See DE 65-1, p. 14 n.9 ("the Plaintiffs believe non-citizens may be removed from the voting rolls within 90 days of a federal election - as long as the removal is not party of a systematic program.") To be sure, subsection (c) sets forth mere "voter removal programs," as opposed to systematic ones. Yet, this does not change the fact that Plaintiffs cannot direct the Court to any provision of section 8 that differentiates a systematic program from a non-systematic one; nor can Plaintiffs direct the Court to a provision of section 8 that provides guidance on how to properly remove an individual from the voting rolls who was never eligible to vote.

At the Hearing, Plaintiffs explored several measures that they aver should deter non-citizens from registering to vote, or at least from voting, despite their lack of citizenship. Because it is a federal offense for a non-citizen to both register to vote and cast a vote in a federal election, such individuals should be deterred from breaking the law. And if those individuals do succeed in casting a vote despite their non-citizenship, they can be criminally prosecuted. See 42 U.S.C. § 1973gg-3(C)(2)(B)(ii); § 1973gg-3(C)(2)(C); 18 U.S.C. § 1015(f). These suggestions give the Court little assurance. Certainly, the NVRA does not require the State to idle on the sidelines until a non-citizen violates the law before the State can act. And surely the NVRA does not require the State

to wait until after that critical juncture—when the vote has been cast and the harm has been fully realized—to address what it views as nothing short of "voter fraud." DE 79, p. 2.

C. Subsection (b): Confirmation of Voter Registration

This only leaves one statutory proscription under section 8 that relates to the removal of non-citizens from the voting rolls. Subsection (b), "[c]onfirmation of voter registration," provides that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 . . ." § 1973gg-6(b)(1). The only consistent reading of section 8 of the NVRA is that subsection (b) alone applies to programs such as the Secretary's. Further, it is hard to understand why Congress would create a distinct subsection, markedly set apart from subsection (c)'s "[v]oter removal programs," which provides direction regarding the "confirmation" of voter registration. By creating two distinct subsections, Congress meant to differentiate the removal of once-eligible voters from those who were never eligible in the first instance. Finally, subsection (b) is consistent with Congress' finding that "the right of citizens of the United States to vote is a fundamental right" and one of the purposes of the NVRA is "to ensure that accurate and current voter registration rolls are

maintained." § 1973gg(a)(1), (b)(4) (emphasis added).

It must follow that subsection (b) was meant to apply to programs aimed at removing those voters whose status as registered voters was void ab initio. See also United States v. Florida, 2012 WL 2457506, at *4 (holding that pursuant to subsection (b), and in regard to "non-citizens, the state's duty is to maintain an accurate voting list. . . . But the NVRA does not require a state to allow a non-citizen to vote just because the state did not catch the error more than 90 days in advance.")

D. The Other Preliminary Injunction Factors

The Court thus finds that Plaintiffs have failed to demonstrate "a substantial likelihood of success on the merits" on both Counts I and II of the First Amended Complaint (DE 57). This failure to satisfy one of the four-factors requisite to obtaining a preliminary injunction is fatal to Plaintiffs' Motion (DE 65), and therefore, the Court need not consider the other three factors. However, because they are similarly of no help to Plaintiffs, the Court will briefly address them.

The Court seriously questions whether Plaintiffs can establish that "irreparable injury . . . will be suffered unless the injunction is issued," based on their own 3-month delay in filing the instant Motion (DE 65). Keeton, 664 F.3d at 868. Such "a pattern of delay is fundamentally inconsistent with . . . allegations of irreparable injury." Burger v. Hartley, 2011 WL

6826645, at *2 (S.D. Fla. Dec. 28, 2011). This is because "the failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary injunction and suggests that there is, in fact, no irreparable injury." Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 968 (2d Cir. 1995). Here, Plaintiffs filed the instant Motion (DE 65) three months after the June 19, 2012, filing of their initial Complaint (DE 1), and 36 days after Plaintiffs allege the Secretary stated he would "purge the state voter registry using its access to the SAVE database." DE 57, p. 12. Thus, if the Court were to reach a substantive consideration of this factor, the Court would find that Plaintiffs' delay in filing the instant Motion (DE 65) establishes that their purported injury is, in fact, not so serious as to warrant preliminary injunctive relief.

The Court next considers the third and fourth factors—that "the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party" and that "if issued, the injunction would not be adverse to the public interest." Keeton, 664 F.3d at 868. By both state and federal law, the Secretary is charged with "protect[ing] the integrity of the electoral process" and promoting "the right of citizens of the United States to vote . . ." See § 1973gg(a), 1973gg-6(b); Fla. Stat. § 98.075(1)-(8). Even the Department of Justice has recently recognized that "federal and state governments have a compelling

interest in excluding foreign citizens from activities intimately related to the process of democratic self-government." Brief of the United States Bluman v. Fed. Election Comm., 130 S. Ct. 1087 (2012) (No. 11-275), 2011 WL 5548718, at *11 (internal citations and quotation marks omitted). The Court finds that the Secretary has a compelling interest in ensuring that the voting rights of citizens are not diluted by the casting of votes by non-citizens. Alternatively, and at the very least, Plaintiffs have failed to convince the Court that the purported harms—that voters' exercise of their rights will be chilled based on the Program, or that the organizational Plaintiffs will be forced to divert their resources toward addressing the effects of the Program—outweigh the Secretary's interest in protecting the integrity of the electoral process.

Therefore, the Court finds that Plaintiffs have failed to establish a substantial likelihood of success on the merits of the two-Count First Amended Complaint (DE 57). Further, even if Plaintiffs were able to establish this factor, the Court finds that Plaintiffs cannot establish any of the other three factors requisite to the Court's issuance of a preliminary injunction. Thus, to the extent the instant Motion (DE 65) seeks the issuance of a preliminary injunction, the Motion is denied.

IV. Summary Judgment

The Court next turns to Plaintiffs' request that the Court

grant summary judgment in favor of Plaintiffs on all Counts in the First Amended Complaint (DE 57).

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990). The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)(quotation omitted). Indeed,

> [t]he moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991).

The moving party is entitled to "judgment as a matter of law" when the non-moving party fails to make a sufficient showing of an essential element of the case to which the non-moving party has the burden of proof. Celotex Corp., 477 U.S. at 322; Everett v. Napper,

833 F.2d 1507, 1510 (11th Cir. 1987). Further, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The Parties stipulated, prior to the October 1, 2012, Hearing, that "this action involves a pure question of law under Section 8(c)(2)(A) of the NVRA, 42 U.S.C. § 1973gg-6(c)(2)(A)." See DE 71, p. 5. Therefore, there are no disputed issues of material fact for the Court to consider at this time. Applying the same reasoning justifying the Court's denial of Plaintiffs' request for a preliminary injunction, the Court finds that Plaintiffs have failed to establish that the Program violates the 90-day Provision of section 8 of the NVRA. Consequently, to the extent the Motion (DE 65) seeks entry of summary judgment in Plaintiffs' favor, it will be denied.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiffs' Motion For Preliminary Injunction And Summary Judgment (DE 65) be and the same is hereby **DENIED;**

2. Defendant's Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction And Summary Judgment (DE 79), which the Court construes as a Motion to Dismiss for Lack of Standing be and the same is hereby **GRANTED** in part and **DENIED** in part, consistent with the terms of this Order. To the extent the Motion (DE 79)

seeks dismissal of the First Amended Complaint (DE 57) as it relates to Plaintiffs Veye Yo and Florida New Majority, Inc., the Motion be and the same is hereby **GRANTED**. To the extent the Motion seeks dismissal as it relates to any other Plaintiff, the Motion (DE 79) be and the same is hereby **DENIED**; and

3. The First Amended Complaint (DE 57) be and the same is hereby **DISMISSED** as it relates to Plaintiffs Veye Yo and Florida New Majority, Inc.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4th day of October, 2012.

WILLIAM J. ZLOCH
United States District Judge

Copies Furnished:

All Counsel of Record