No. 24A407

In the Supreme Court of the United States

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

Applicants,

v.

VIRGINIA COALITION FOR IMMIGRANT RIGHTS, ET AL.,

Respondents.

ON EMERGENCY APPLICATION FOR STAY PENDING APPEAL FROM THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief of the Honest Elections Project as *Amicus Curiae* in Support of Applicants

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INTEREST OF *AMICUS CURIAE*[1]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends fair and reasonable measures that legislatures put in place to protect the integrity of voting. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, as it implicates the states' preeminent role in setting the rules for elections.

INTRODUCTION

This Court should stay the district court's preliminary injunction, which—only days away from a general election—requires Virginia to upend the status quo and reinstate non-citizens to its voter rolls. *See Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (it is a "bedrock tenet of election law" that requires "[w]hen an election is close at hand, the rules of the road must be clear and settled"). But those individuals were properly removed based on their own documentation indicating their non-citizenship or because they voluntarily submitted forms to the DMV that they were not citizens. In doing so, the district court's extraordinary ruling needlessly undermines democracy and public faith in the electoral process; and it does so based on critical legal errors. *Amicus* respectfully submits that the legal and practical consequences of the ruling warrant an emergency stay.

[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to its filing.

First, the preliminary injunction will undermine the electoral process by vitiating safeguards that prevent non-citizens from voting in U.S. elections. This was not what Congress intended in enacting the National Voter Registration Act of 1993 ("NVRA"). Contrary to the district court's analysis, the NVRA does not apply to removal of non-citizens from voter rolls at all as the text, history, and purpose of the NVRA all make clear.

Second, even assuming the NVRA applied to removal of non-citizens from voter rolls, the process at issue here was not a "systematic" program subject to the NVRA's 90-day "Quiet Period." The process was instead individualized, as it was based on each person's own *individualized documentation* indicating his non-citizenship or his choice to check a box affirming that he is not a citizen, and then followed by a manual and discretionary review by the local registrar. This highly tailored process cannot be deemed intentionally "systematic" merely because an *initial* step involved a computer for threshold matching of improper non-citizen registrations. Nor does it make practical sense to categorize such processes as such. Under Plaintiffs' illogical interpretation, any review within 90 days of an election would be permissible only if human reviewers had screened Virginia's 6.3 million registered voters themselves—something that would take years of work. Congress intended no such absurdity.

Third, Plaintiffs unjustifiably delayed the suit. Governor Youngkin announced the challenged program in August, but Plaintiffs waited to file suit until October 7—mere weeks before the 2024 General Election. Such delay is unjustifiable and unduly prejudicial. It should have precluded the district court's injunction.

Fourth, Virginia's actions cause little, if any, harm. Virginia law explicitly provides for same-day registration and casting provision ballots. So even if voters were wrongly removed from the voter rolls by Virginia's actions, they could still cast a provisional ballot and avoid any material harm. The district court handwaved away this critical point by describing Virginia's same-day registration ballots as somehow "discounted" or "suspect." App. 252. But that premise is legally incorrect, and it needlessly sows distrust in elections by erroneously implying that provisional ballots cast by lawful voters are somehow discounted (or not counted at all). This is a fundamental error that could dissuade voters from utilizing Virginia's safe and effective provisional ballots. The error alone warrants an emergency stay.

ARGUMENT

I. The NVRA Does Not Govern Removal of Non-Citizens from Voter Rolls

The district court's ruling incentivizes foul play by creating an opportunity for non-citizens not only to register to vote, but also to cast illegally obtained ballots, so long as they register to vote within 90 days of an election. Reading the NVRA this way directly contravenes Congress' intent and should be rejected by this Court.

A. Congress Did Not Intend To Limit The States' Ability to Remove Non-Citizens from Voter Rolls

The district court's flawed interpretation contravenes the NVRA's text and purpose. Congress enacted the NVRA with two overarching goals in mind: registering *eligible voters* and removing *ineligible voters*, all while maintaining the states' constitutional authority to best accomplish those two important goals. During the passage of the NVRA, Congress carefully ensured that "[t]he [NVRA] should not be

interpreted in any way to supplant th[e] authority" of election officials "to enroll eligible voters" and to "continue to make determinations as to applicant's eligibility, *such as citizenship*, as are made under current law and practice." H.R. Rep. No. 103-9, at 112 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 105, 112 (emphasis added).

These goals are manifest in the NVRA's plain text. On one hand, the NVRA requires that the states ensure that "any eligible applicant is registered to vote." 52 U.S.C. § 20507(a)(1). And, on the other hand, Congress provided mechanisms "to protect the integrity of the electoral process," *id.* § 20501(b)(3), such as "ensur[ing] that accurate and current voter registration rolls are maintained[,]" *id.* § 20501(b)(4).

To promote the integrity of elections, the NVRA imposes a duty on states to create a uniform system of maintenance for voter rolls. Section 8 of the NVRA obligates states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." *Id.* § 20507(a)(4). For example, Section 8 requires states to remove individuals from the voter rolls who have become ineligible due to "death" or due to "a change in . . . residence" outside their current voting jurisdiction. *Id.* § 20507(a)(4)(A)–(B).

The Help America Vote Act ("HAVA"), which was intended to supplement and improve the NVRA,[2] requires states to adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. *Id.* § 21083(a)(2)(A). States must "ensure that voter registration records in the State are accurate and are updated regularly"—an obligation that includes a

[2] *See, e.g.*, United States Election Comm'n, *Help America Vote Act* (June 7, 2023), EAC.GOV, https://www.eac.gov/about/help_america_vote_act.aspx.

"reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* § 21083(a)(4)(A).

The NVRA also prohibits the *systematic* removal of certain, previously eligible voters in the 90 days within a federal election. Specifically, the NVRA 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 lists of eligible voters." *Id.* § 20507(c)(2)(A). There are only three exceptions to this Quiet Period (*i.e.*, three reasons an "ineligible voter" may be removed within 90 days of an election): (1) request, (2) criminal conviction or mental incapacity, or (3) death. *Id.* § 20507(c)(2)(B).

Critically, the distinction between "ineligible *voters*" and "eligible *voters*" does not capture noncitizens who cannot be and were never even *voters* in the first place. *See United States v. Florida*, 870 F. Supp. 2d 1346, 1350 (N.D. Fla. 2012) ("In short, 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.")[3]; *see also Bell v. Marinko*, 367 F.3d 588, 591–92 (6th Cir. 2004) ("In creating a list of justifications for removal, Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place."). Indeed, the NVRA specifically requires that every

[3] Although *United States v. Florida* was abrogated in part by *Arcia v. Fla. Sec'y of State*,772 F.3d 1335, 1339 (11th Cir. 2014), this Court is not bound by *Arcia* and as explained below, *Acia* was wrongly decided. *Amicus* respectfully submits that the reasoning of *United States v. Florida* is correct.

individual must swear an oath that they are a citizen as a condition of registering to vote. 52 U.S.C. § 20504(c)(2)(C)(i).

Felons, deceased individuals, and those who have moved to another jurisdiction may *become* "ineligible voters" by virtue of a change in their status—but they were, at one point, eligible. A non-citizen, by contrast, was *never* an "eligible voter" because they cannot be a *voter* at all. *See Bell*, 367 F.3d at 592 (explaining that the NVRA "protects only 'eligible' voters from unauthorized removal" and that "[e]ligible voters, at a minimum, are those who qualify as bona fide" voters).

Yet the district court ruled that, because the NVRA's exemptions to the Quiet Period did not expressly include non-citizenship as an exemption, Congress clearly intended to make non-citizenship a category of *voters* that cannot be removed. D.C. App. 248–49 ("It cannot be that Congress would carve out exceptions for those individuals who are felons or who were declared mentally incapacitated and then failed to include the exception for noncitizens."). This is a categorical error. Non-citizens are not *voters* and, consequently, Congress had no need to list them in the exemption for "ineligible voters" who may be removed in the Quiet Period. *See Florida*, 870 F. Supp. 2d at 1350 ("During the 90–day quiet period, a state may pursue a program to systematically remove registrants on request or based on a criminal conviction, mental incapacity, or death, but not based on a change of residence. What matters here is this: none of this applies to removing noncitizens who were not properly registered in the first place."). A non-citizen is necessarily not a "voter" at all, and hence cannot be an "ineligible voter."

Plaintiffs have argued, incorrectly, that *Public Interest Legal Foundation v. North Carolina State Board of Elections (PILF)*, 996 F.3d 257, 260 (4th Cir. 2021) foreclosed the above statutory analysis of the NVRA. *See* Pls.' 4th Cir. Opp. Br. at 18. It did not. The sole issue in *PILF* was whether the state had properly complied with the NVRA's disclosure requirements. *See* 996 F.3d at 260. The *PILF* Court did not address the appropriateness of removing noncitizens from voter rolls—within a Quiet Period or at any other time. Nor did it even include *dictum* supporting Plaintiffs' argument. Plaintiffs' citation is entirely misplaced. But even if the Fourth Circuit had held as much, this Court is hardly bound by any such error.

Plaintiffs also rely on *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1339 (11th Cir. 2014). That decision is not binding here and was wrongly decided. *Arcia* premised its conclusions on the faulty assumption that the State's "program to remove non-citizens was a program to remove 'ineligible voters.'" *Id.* at 1344. As explained, non-citizens simply are not "ineligible voters" because they never were *voters*.

In sum, removal of non-citizens is not prohibited, at any time, by the NVRA. Deceased voters were voters when they were still alive. Voters who commit a felony and have their voting rights revoked were still citizens eligible to vote before their convictions. But non-citizens were *never* eligible to vote and hence were never voters at all. The district court's conclusion that Congress clearly intended to keep non-citizens on the voter rolls—during the Quiet Period or otherwise—is thus legally erroneous.

Moreover, it has long been established that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). But Plaintiffs' interpretation of the NVRA "would effectively grant, and then protect, the franchise of persons not eligible to vote." *Bell*, 367 F.3d at 592. This interpretation would make it incredibly difficult—if not impossible—for the States to prevent the unconstitutional dilution of their citizens' right to vote. *See Purcell v. Gonzalez*, 549 U. S. 1, 4 (2006) (per curiam) ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."). States must have the ability to prevent "the diluting effect of illegal ballots." *Gray v. Sanders*, 372 U. S. 368, 380 (1963); *see also Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge district court) (Kavanaugh, J.) ("It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.").

The district court's interpretation creates grave doubts as to the NVRA's constitutionality by severely undermining the authority of States to prevent vote dilution of their own citizens. "It is therefore incumbent upon [this Court] to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress." *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994).

B. The District Court's Ruling Undermines Election Law and Yields Perverse Policy Results

The district court's ruling not only runs directly contrary to the NVRA's text and express purpose, but it also leads to bad policy that Congress would not have

intended. It creates a loophole for non-citizens to vote illegally by exploiting the 90-day Quiet Period and this Court's ruling.

Generally, Virginia law permits voter registration if done at least 22 days before the election in question—either in a primary or general election. *See* Va. Code § 24.2-416. Registration can even occur on election day, as discussed below. *See* Va. Code § 24.2-420.1. Accordingly, under the district court's ruling, an individual can first register to vote in Virginia within the 90-day NVRA's Quiet Period. But even if that individual later discloses his or her status as a non-citizen, or it is discovered that the individual provided false information regarding his or her citizenship status when registering to vote, there is nothing that can be done to cancel this individual's registration within the 90-day period—the individual *must* remain registered for the upcoming election and *must* be permitted to cast a ballot. Plaintiffs would likely concede that individualized removals in this situation would still be permitted; but, as discussed below, their reading of the NVRA would effectively preclude any such remedial measures and therefore prevent appropriate removal.

Paradoxically, the district court's ruling creates a situation in which American voters who are deemed ineligible by virtue of mental incapacity or a felony conviction have *less* statutory protection from being purged from voter rolls than non-citizens—who were never eligible to vote in the first place. This was not Congress' intent, nor does that interpretation comport with the NVRA's plain text.

II. Even if the NVRA Governed Non-citizen Removals, Virginia Removed Them Individually—not Systematically—and Thus Did Not Violate the NVRA's Quiet Period

While the Quiet Period is wholly inapplicable to the removal of non-citizen voters, it also only prevents removals that are "systematic," as opposed to individualized. *See* 52 U.S.C. § 20507(c)(2)(A). Here, Virginia's removal of noncitizens was intended to be individualized and therefore is permissible under the NVRA even during the Quiet Period. Even the Eleventh Circuit in *Arcia* recognized that "the 90 Day Provision would not bar a state from investigating potential non-citizens and removing them on the basis of individualized information, even within the 90-day window." *Arcia*, 772 F.3d at 1348.

Unlike *Arcia*, Virginia's removal of non-citizens was individualized, not systematic. As Virginia explained its process: the Department of Elections ("ELECT") has a statewide voter registration system called VERIS, which flags individuals who self-identified as non-citizens in DMV forms but are also registered to vote in federal elections. App. 45–46. When there are such matches between non-citizens and registered voters, ELECT sends the records to the local registrar for individualized review. App. 47. The registrar then manually reviews each potential match and has discretion to correct errors and refuse to remove individuals from voter rolls. *Id.* If the registrar determines that particular non-citizens and the person registered to vote are the same person, the registrar then mails a "Notice of Intent to Cancel." App. 47–48. The individual then can easily rectify the potential removal, simply by attesting to his or her citizenship by return mail, without having to append documents or any other form of proof. *Id.*

As noted, this process involved *individualized* determinations—not only the self-identification at the DMV, but also the individualized review by the local registrar to ensure appropriate matches, and the person's opportunity to attest to citizenship to prevent removal. Critically, and unlike here, the Secretary in *Arcia* "[did] not deny that his program was an attempt to 'systematically' remove ineligible voters from the voter rolls." *Arcia*, 772 F.3d at 1344. The Eleventh Circuit agreed only because the "program did not rely upon individualized information or investigation to determine which names from the voter registry to remove. Rather, the Secretary used a mass computerized data-matching process to compare the voter rolls with other state and federal databases, *followed by the mailing of notices*." *Id.* (emphasis added). Here, the local registrar made individualized determinations *after* receiving records from ELECT and before the mailing of notices.

The district court appears to have held that the mere use of the VERIS computer program at the outset somehow renders the entire process "systematic." Not so. That Virginia used a computer system used to identify non-citizens at the threshold does not mean that the overall process was a systematic removal. 52 U.S.C. § 20507(c)(2)(A). The use of a computer to identify potential non-citizen voters was a necessary and convenient step in an otherwise individualized process.

Nor does the district court's position make practical sense, as it would make it effectively impossible for Virginia to *ever* remove such non-citizen voters within 90 days of an election—even through individualized assessments. That is because there

are 6.3 million registered voters in Virginia,[4] so the entire process can never be purely manual. For officials to review each record would take hundreds of thousands of work hours and make the task impossible. For that reason, the state has automated the initial step—identifying potentially ineligible individuals on the voter rolls—but the processes is completely individualized from then on, including an individualized assessment and personal opportunity to avoid removal by mere attestation of citizenship. *See* App. 85; App. 94–96. Put another way, the initial screening step did not result in any systematic removals but instead merely identified people who *might* need to be removed; from then on, all determinations were individualized.

Importantly, such individualized removals are critical to the integrity of the electoral process. Accurate voter rolls prevent voter fraud and protect the weight of each legitimate vote. Removing ineligible voters ensures compliance with both federal and state laws. 52 U.S.C. § 20501. And individualized removals balance the rights of voters with the needs of election integrity.

III. Plaintiffs Unjustifiably Delayed This Lawsuit

On August 7, 2024, Virginia Governor Glenn Youngkin issued Executive Order 35 ("E.O. 35"), directing the implementation of a program to remove non-citizens from the voter registration rolls pursuant to Virginia Code § 24.2-427. E.O. 35 requires the Commissioner of the Department of Elections to certify to the Governor that procedures are in place for daily updates to the statewide voter registration list to "[r]emove individuals who are unable to verify that they are [U.S.] citizens to the

[4] *See* Virginia Dep't of Elections, *Registration Statistics & Polling Places*, ELECTIONS.VIRGINIA.GOV, https://www.elections.virginia.gov/resultsreports/registration-statistics/ (last accessed Oct. 28, 2024).

Department of Motor Vehicles[.]" This initiative aims to ensure that only eligible U.S. citizens are registered and able to vote, upholding the integrity of Virginia's elections.

Despite the public announcement of this program in early August and widespread coverage by local and national media outlets, Plaintiffs did not file their complaint challenging the legality of Virginia's non-citizen removal process until October 7—less than a month before the 2024 general election.[5] This two-month delay is both unjustifiable, and it is detrimental to the electoral process. By waiting until the last possible moments, Plaintiffs seek to prevent Virginia from successfully appealing and implementing the removal of illicit voters from the registration before the November general election.

Courts have consistently held that undue delay in seeking preliminary injunctive relief weighs heavily against granting such relief, especially when elections are imminent. The *Purcell* principle is a "bedrock tenet of election law" that requires "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring). In *Purcell*, the Supreme Court emphasized that court orders affecting elections can result in voter confusion and consequent incentive to remain away from the polls. 549

[5] Press Release, Governor Glenn Youngkin Issues Executive Order to Codify Comprehensive Election Security Measures to Protect Legal Voters and Accurate Counts, GOVERNOR GLENN YOUNGKIN (Aug. 7, 2024), https://www.governor.virginia.gov/newsroom/news-releases/2024/august/name-1031585-en.html; Jason Hopkins, Glenn Youngkin Issues Executive Order To Better Prevent Noncitizens From Voting, THE DAILY CALLER (Aug. 7, 2024), https://dailycaller.com/2024/08/07/glenn-youngkin-executive-order-prevent-noncitizens-voting/; Sarah Roderick-Fitch, Youngkin Issues Executive Order to Strengthen Election Security, THE WASHINGTON EXAMINER (Aug. 8, 2024), https://www.washingtonexaminer.com/news/3114829/youngkin-issues-executive-order-to-strengthen-election-security/; Timothy H.J. Nerozzi, Youngkin Mandates All Paper Ballots for Presidential Elections in Virginia, FOX 5 WASHINGTON DC (Aug. 8, 2024), https://www.fox5dc.com/news/youngkin-mandates-all-paper-ballots-presidential-elections-virginia.

U. S. at 4–5. Nothing could be more confusing to a voter than this "on again, off again" approach to voter registration. Equity demands that those seeking relief act diligently to avoid such disruptions. *Warner Chappell Music, Inc. v. Nealy*, 601 U. S. 366, 373 (2024).

When Plaintiffs initially brought their suit, the 2024 election was less than one month away. Today, it stands less than two weeks away. The closer an election is, the greater the potential for disruption caused by judicial intervention. *Purcell*, 549 U. S. at 4–5. To *potentially* overcome the presumption against last-minute injunctions, a plaintiff must establish "*at least* the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (emphasis added). Undue delay in seeking preliminary injunctive relief weighs heavily against the grant of such relief. *Id.* at 880–81.

In its ruling, however, the district court reasoned that the standard established in *Milligan* "is not appropriate here in this case. This case involves challenges on the violations of the quiet provision of the NVRA, which, by its very nature, these types of challenges are always going to be close to elections." App. 243. In doing so, the district court effectively granted blanket immunity to NVRA Quiet Period actions, implicitly holding that Plaintiffs can unnecessarily and unjustifiably delay suit simply because such suits will typically arise close to elections.

This reasoning overlooks the relative nature of proximity to an election. Just because some NVRA suits will necessarily need to be filed close to elections does not mean that NVRA Plaintiffs are completely immune from the consequences of their own needless delays. *Purcell* doctrine, as well as general principles of equity, recognize no such exception.

Closeness to elections is a relative metric, as is the defensibility of any delay that produced it. It will be different in every context. The NVRA has established a 90-day window where certain state actions are precluded. However, within the 90 days are days that are closer and further from an election. It is incomprehensible that the *Purcell* principle, which exists explicitly to prevent "late judicial tinkering with election laws," *Merrill*, 142 S. Ct. at 881, would not apply precisely to such an instance—particularly where lateness of the judicial intervention is necessitated by Plaintiffs' own unjustified (and unjustifiable) delay. NVRA plaintiffs are uniquely immune from the truism that their actions (and inactions) have consequences.

In the present case, Plaintiffs' failure to act promptly is particularly vexing. By waiting until October 7 to file their lawsuit and seek a preliminary injunction, Plaintiffs have created a scenario where the Court is asked to intervene mere weeks, and soon mere days, before an election. Adjusting voter rolls by removing and adding back thousands of registrants at this juncture is a recipe for chaos. The election is not just near—it is at the doorstep.

The balance of equities and the public interest thus weigh heavily against granting the preliminary injunction due to Plaintiffs' undue delay. Courts must be

cautious in altering election procedures on the eve of an election, lest changes cause voter confusion and administrative chaos. *Purcell*, 549 U. S. at 4–5. A preliminary injunction at this point runs contrary to clearly established guidelines laid out in *Milligan* and *Purcell*. This Court should accordingly grant Virginia's request for a stay. *See*, *e.g.*, *RNC v. DNC*, 589 U. S. 423, 425 (2020) ("[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.").

IV. Virginia's Extensive Safeguards Undermine Plaintiffs' Harms

An emergency stay is also warranted because the equities weigh heavily in favor of it. Plaintiffs failed to demonstrate that they would suffer irreparable harm without the preliminary injunction. Moreover, as Virginia explained, in the highly unlikely scenario in which an eligible voter was improperly removed (despite the procedural safeguards and their individual documentation or submission indicating they are a non-citizen[6]), those citizen voters can still cast a ballot on election day because Virginia permits same-day registration. Va. Code § 24.2-420.1. Thus, even if Virginia's actions resulted in wrongful removals—a proposition for which there is no convincing evidence—such erroneous removals can be readily remedied by same-day registration and the casting of a provisional ballot.

[6] Virginia has established procedures that offer multiple opportunities for voters to verify and correct their registration status before election day. Before a voter is removed from the rolls, Virginia law requires that the registrar send notice to the voter, providing an opportunity to verify their eligibility to vote. Va. Code § 24.2-427(b)-(c). When an individual is flagged for potential non-citizenship, the registrar must "promptly" mail notice informing the person and "allow the person to submit a sworn statement that he is a United States citizen within 14 days." Va. Code § 24.2-427(c). If the individual fails to confirm their citizenship within 14 days, they are removed from voter registration rolls. *Id*.

Nonetheless, the district court found irreparable harm to those hypothetical voters based on the specious argument that same-day registration for eligible voters was insufficient. According to the court, Virginia's provisional ballots are "suspect" and "subject to being discounted." App. 252. But the Court failed to cite any support for that proposition, and the Plaintiffs identified none. Properly submitted provisional ballots are not "discounted." They do not, for example, count as only half a vote. They are designed to create time for election officials to verify eligibility. Instead, if the person at issue is indeed an eligible voter, the vote is counted precisely as much as other votes.

The dangers of the district court's reasoning exacerbate its legal error, however. Castigating provisional ballots as "suspect" and engaging in evidence-free speculation that they will not be counted needlessly fuels election-related conspiracies, discourages individuals from casting safe and effective provisional ballots, and ultimately undermines the democratic process. The district court's balance-of-harms reasoning is thus erroneous and dangerous.

First, in Virginia, "any person who is qualified to register to vote" is "entitled to register in person up to and including the day of the election." Va. Code § 24.2420.1. That person may same-day register at either at (1) "the office of the general registrar" where they reside, or (2) "the polling place for the precinct in which such person resides." *Id.* Once that person same-day registers, he is permitted to cast a provisional ballot, which involves providing identifying information and—if necessary—signing a statement subject to felony penalties for false statements Va. Code § 24.2-653. The

electoral board will then determine the validity of the provisional ballot after the election. Va. Code § 24.2-653.01(A).

The result is that *ninety-eight percent* of same-day-registration provisional ballots are counted—with the rejected two percent resulting from voting in the wrong precinct, failing to provide complete registration data, or similar voter errors. *See, e.g.*, App. 86–87.[7] In sum, a voter who is wrongfully removed from Virginia's rolls may register at her precinct, cast a provisional ballot, and—so long as she provides all the required information and is eligible to vote—her vote will be counted.

Second, federal law itself recognizes that provisional votes are useful and effective. Under HAVA, for example, Congress required that provisional ballots be federally mandated mechanisms to prevent disenfranchisement from administrative errors or questions regarding a voter's eligibility. *See* 52 U.S.C. § 21082(a) ("If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot[.]").

HAVA requires that any individual who claims to be registered to vote in the district in which they are attempting to vote but whose eligibility is not immediately

[7] *See also* VA. DEP'T OF ELECTIONS, 2023 ANNUAL VIRGINIA ELECTION RETROSPECTIVE & LOOK AHEAD 25–26 (2024), available at https://www.elections.virginia.gov/media/formswarehouse/maintenance-reports/2023_Post-Election-Report_final.pdf.

verifiable must be allowed to cast a provisional ballot. *Id.* Critically, after being cast, these ballots are subject to verification by election authorities. If the voter is confirmed to be eligible, the provisional ballot is counted *exactly the same* as a regular ballot. There is no legal distinction between a counted provisional ballot and a regular ballot. *Id.* § 21082(a)(4). A properly submitted provisional ballot is thus not "suspect" at all—let alone being "subject to being discounted." App. 252.

Unlike the district court here, courts have consistently recognized provisional ballots as a valid and effective method of voting. *Crawford v. Marion Cnty. Election Bd.*, 553 U. S. 181, 198 (2008) (finding that presenting evidence in support of a provisional ballot is not an identifiable "legal obstacle inhibiting . . . opportunity"). Yet, the district court erroneously referred to provisional as voting "suspect," and implied provisional ballots are somehow worth less than an indistinguishable vote by any other means. This Court should stay the resulting injunction to correct this fundamental misunderstanding of provisional ballots.

Incorrectly characterizing provisional ballots in this way, as inferior, unreliable, or "suspect," less than two weeks before one of the most closely contested elections in modern history undermines voter confidence and adds fuel to the fire of election misinformation. Such mislabeling will discourage eligible voters from casting provisional ballots if they encounter issues at the poll. Other voters, fueled by greater levels of distrust in the electoral process as a result of this ruling, will refuse to vote at all.[8] At a time of historic distrust in the electoral process, it is unconscionable that

[8] Cary Wu, *Why Would Any US Voter Sit out This Election? Low Trust in Others*, THE TYEE (Nov. 2, 2020), https://thetyee.ca/Analysis/2020/11/02/US-Voter-Turnout-Low-Trust/.

the district court seems to believe that millions of votes cast provisionally each cycle are "subject to being discounted."[9] If the district court is going to premise an injunction on the belief that mass disenfranchisement of provisional ballots is occurring in the U.S., it is obliged to point to at least *some* evidence for that alarming proposition. None was cited here.

This mischaracterization of provisional ballots undermines public confidence in the election and will disproportionately hurt the very people Plaintiffs claim to represent. Studies indicate, and courts have recognized, that provisional ballots are disproportionately used by minority voters and individuals from marginalized communities, who may be more likely to encounter obstacles when voting on election day. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 233 (4th Cir. 2014). Not only do minority voters use provisional ballots at higher rates than other groups, but they are also more likely to not vote when they experience high levels of distrust.[10]

Rather than vindicating the democratic process, the district court's injunction needlessly sows doubt in it. And it wantonly risks further erosion in trust in the

[9] Tony Dokoupii, *Democratic and Republic Voters Share a Mistrust in the Electoral Process*, CBS NEWS (Jan. 6, 2022), https://www.cbsnews.com/news/democratic-and-republican-voters-share-their-mistrust-in-the-electoral-process/; U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey – 2016 Comprehensive Report*, EAC.GOV, https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf (last accessed Oct. 25, 2024).

[10] Wu, *supra* note 8.

electoral system by undermining the legitimacy of more than two million provisional ballots expected to be cast nationwide.[11]

CONCLUSION

For the foregoing reasons, the Court should grant the emergency stay.

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Respectfully submitted,

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[11] U.S. Election Assistance Comm'n, *EAVS Deep Dive*, EAC.GOV, https://www.eac.gov/sites/default/files/document_library/files/EAVSDeepDive_provisionalballot.pdf (last accessed Oct. 28, 2024) (noting that nearly 2 percent of ballots cast during presidential election years are provisional ballots).

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