No. 24A407

In The Supreme Court of the United States

SUSAN BEALS, COMMISSIONER, ET. AL,
Applicants,

v.

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

On Emergency Application for Stay Pending Appeal
From the United States Court of Appeals for the Fourth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPLICANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including election integrity and security in the electoral process. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024) (unanimously holding that states have no power under the U.S. Constitution to enforce Section Three of the Fourteenth Amendment with respect to federal offices); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); or as *amici*, e.g., *Fischer v. United States*, 144 S. Ct. 2176 (2024); *McDonnell v. United States*, 579 U.S. 550 (2016); and *Bush v. Gore*, 531 U.S. 98 (2000). The ACLJ has a fundamental interest in defending the right of states to set election qualifications and in ensuring that states can maintain security in their elections.

INTRODUCTION

Federal law prohibits systematic programs that remove voters from voter rolls within 90 days of a federal election. It does not purport to prohibit states from removing individuals based on specific information received directly from that individual that disqualifies that person from voting. For almost twenty years, the

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. This brief has been filed before the period required for notice in Supreme Court Rule 37.2.

Commonwealth of Virginia has maintained election security by verifying people's affirmative assertions that they are not citizens, and removing these self-identified noncitizens from the voter rolls. By definition, such a program does not and cannot constitute a systemic removal of voters; government officials are removing individuals based on the specific information that those people are providing. Federal law does not prohibit protecting voter rolls from noncitizens on an individualized basis. In fact, the Constitution demands that noncitizens must not vote. Virginia is fulfilling its constitutional responsibility and authority that it possesses to protect and enforce election qualifications. This Court should immediately grant a stay of the district court's preliminary injunction; otherwise, Virginia will be obligated to maintain on its voter rolls individuals who have affirmatively denied their own citizenship.

ARGUMENT

I. This Court Should Issue a Stay Because Virginia is Properly Assessing Individual People Who Affirmatively Identify Themselves as Non-citizens.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). Here, the crucial first part of the inquiry into the propriety of an injunction, likelihood of success on the merits, should lead this Court to issue a stay of the District Court's injunction. No statute prohibits Virginia from maintaining election security by individually assessing those people who affirmatively identify themselves to be noncitizens. On the contrary, the Constitution preserves the authority of states to determine election qualifications and

to ensure that only American citizens vote in federal elections.

A. Virginia is Not Engaging in Systematic Voter Purges, but is Instead Performing Individualized Removals, Necessary for Election Integrity.

Section 8(c)(2) of the National Voter Registration Act (NVRA), also known as the Quiet Period Provision, does not prevent states from protecting election qualifications or ensuring that only citizens can vote in federal elections. Instead, it only contains a specific requirement that states must complete their systematic removal of ineligible voters from registration lists by no later than 90 days before federal elections. 52 U.S.C. § 20507(c)(2). The NVRA does not prohibit the removal of those registered who are individually identified as unqualified to vote.

Courts have regularly emphasized that the law "does not in any way handcuff a state from using its resources to ensure that non-citizens are not listed in the voter rolls." *Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1348 (11th Cir. 2014). The NVRA simply does not and cannot "bar a state from investigating potential non-citizens and removing them on the basis of individualized information." *Id.* This strikes a careful and precise balance: the provision "permits systematic removal programs at any time *except* for the 90 days before an election because that is when the risk of disfranchising eligible voters is the greatest." *Id.* at 1346.

But in no circumstance or at any time does the NVRA purport to interfere with distinct removals based on particular, specific information. On the contrary, courts have consistently recognized the propriety and necessity of individualized removals based on distinct information. "An 'individualized' removal program means one in

which a state determines eligibility to vote with 'individualized information or investigation' rather than cancelling batches of registrations based on a set procedure." *Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1092 (D. Ariz. 2023). Another case emphasized that an individual assessment looks for "first-hand evidence specific to that voter." *N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections*, 2016 U.S. Dist. LEXIS 153249, *16 (M.D. N.C. 2016).

What distinguishes a "systematic" removal that is prohibited by the NVRA is whether the government's action relies "upon individualized information or investigation to determine which names from the voter registry to remove." *Arcia*, 772 F.3d at 1344. A "systematic" program does not conduct any such individualized assessment, but instead uses a formula that does not rely on individual information: for example, the state in *Arcia* "used a mass computerized data-matching process to compare the voter rolls with other state and federal databases." *Id.*

This crucial distinction between systematic removal and individualized assessment is not in dispute. In fact, the United States' own complaint in the court below conceded that only systematic removal programs, not individual assessments, are prohibited by the statute. *See United States v. Virginia*, No. 1:24-cv-01807-PTG-WBP (E.D. Va. 2024, ECF No. 1), ¶ 6 ("[S]ystematic removal programs are more error-prone than other forms of list maintenance[.]"); *id.* ¶ 18 ("The Quiet Period Provision applies to systematic programs intended to remove the names of ineligible voters based on failure to meet initial eligibility requirements—including citizenship—at the time of registration.").

Applying this crucial distinction between systematic and individual removals illustrates clearly that Virginia is engaging in legally authorized removals of individuals based on individual information. Virginia's method for determining whether a person is a citizen is an "individualized" assessment by the plain definition of the term. *Arcia*, 772 F.3d at 1348.

Virginia is not canceling a "batch" of voters here; it only determines eligibility when it receives information from the particular voter affirmatively indicating that the voter is not eligible to vote. By law, Virginia's actions only apply to "persons who have indicated a noncitizen status to the Department of Motor Vehicles in obtaining any document, or renewal thereof." Va. Code Ann. § 24.2-410.1. In other words, action is taken only if a person answered "no" to a citizenship question on DMV paperwork. The statement of a voter themselves is undoubtedly "first-hand evidence" directly from that voter and "specific to that voter," of the very kind the courts have sought. *N.C. State Bd. of Elections*, 2016 U.S. Dist. LEXIS 153249, at *16. Each removal conducted by Virginia is only triggered by individualized information provided directly by an individual to Virginia.

The only action that could possibly occur under the program at issue here is an individual one, based on a person's discrete statement to the DMV. The United States conceded this crucial point repeatedly in its own complaint: "[v]oters are identified as possible noncitizens under the Program if they chose 'No' in response to questions about their United States citizenship status on certain forms submitted to the DMV." *United States v. Virginia*, No. 1:24-cv-01807-PTG-WBP (E.D. Va. 2024, ECF No. 1),

¶ 25. It is only when an individual provides that response that Virginia takes action, comparing that person's information with the list of existing voters. *Id.* at ¶ 24. By the United States' own allegations, then, Virginia only acts to examine a voter's registration after individualized information is received directly from a particular voter. Virginia is doing precisely what was required for individual removal in *Arcia*; it relies "upon individualized information or investigation to determine which names from the voter registry to remove." 772 F.3d at 1344. Virginia has the right and responsibility to utilize this individual information to maintain electoral security.

The Notice of Intent to Cancel sent out by Virginia to the individuals being removed, cited in the complaint, likewise makes clear that it is only after an individual provides specific information that he or she might be removed. That Notice reads: "[w]e have received information that you indicated on a recent DMV application that you are not a citizen of the United States." *United States v. Virginia*, No. 1:24-cv-01807-PTG-WBP (E.D. Va. 2024, ECF No. 1), ¶ 34. This Notice makes very clear that an individual only faces removal based on his or her own discrete acknowledgement to Virginia that he or she is not a citizen. Virginia is certainly removing people from voter rolls; but it is only doing so after receiving *individualized information from specific people* that they are not citizens.

The United States' Memorandum in Support of a Preliminary Injunction likewise contained language that conceded this crucial point, acknowledging that "[t]he Program identifies voters as possible noncitizens if they choose 'No' in response to questions about their United States citizenship status on certain forms submitted

to the DMV." *United States v. Virginia*, No. 1:24-cv-01807-PTG-WBP (E.D. Va. 2024, ECF No. 9-1), 4. This is, by definition, an individualized inquiry, not a systematic process. Only an individual action can lead to the application of Virginia's statute. The United States' argument that this program is systematic ignores the fact that this removal is necessarily premised on and requires individualized information from the voter. Voters are not removed merely for their presence in a database; after providing an affirmative statement to the State, they are addressed on a case-by-case basis.

The Fourth Circuit made the same error: it ruled that Virginia's process is "most certainly" systematic, App. 2, while citing and acknowledging *Arcia*'s emphasis on the permissibility of removal based on "individualized information." *Arcia*, 772 F.3d at 1344. In fact, the Fourth Circuit claimed that "the challenged program does not require communication with or particularized investigation into any specific individual," App. 2, but that is *precisely* what the program requires; it only operates if and when an individual communicates directly with Virginia and provides specific information.

The United States argued below that an inquiry must not only be an individual one, but a "rigorous individualized inquiry" to not constitute a systematic removal under the Quiet Period Provision. *Id.* at 14. However, its memorandum failed to identify any case law to support the presupposition that the statement of a specific person does not constitute individualized information. We are unaware of any court making such an assertion. The United States claims that "individualized inquiry"

should be a "meaningful" process and reduces Virginia's process to "two contradictory data points about the citizenship status of any registered voter snared by the Program." *Id.* But only systematic removals are prohibited by the NVRA, and individualized removals are not barred by the statute. The definition of "systematic" does not depend on whether conduct is sufficiently "rigorous" or sufficiently "meaningful"; those assertions of the United States instead attacked Virginia's decision as a policy matter. Despite the falsity of these attacks, this Court need not even address them. Congress has simply not prevented individual removals. The United States is making a novel argument that an individual removal might be systematic if it is not meaningful enough. This argument is not found in precedent and infringes upon the constitutional right of a state to prevent noncitizen voting.

The standard here is far simpler; this Court need only assess whether Virginia is conducting an individualized assessment of the voters. And by the United States' own admission, Virginia's assessment is only triggered when "a person indicated on certain forms submitted to the DMV that the person is not a U.S. Citizen." *Id.* at 15. Only on the basis of an individualized assessment as a result of individual information that has been received from the voter themselves, does Virginia take any action. Nothing more is required.

The United States did not attempt to explain why an individual's specific affirmative statement that he or she is not a citizen does not satisfy the requirement for individualized information. As a simple matter of common sense, an individual's statement directly to the government telling the government that he or she is not a

citizen provides individual information of the very kind the cases have recognized.[2] The NVRA does not prohibit states from protecting elections by individual assessments because of information received from particular voters. Any removal that does occur relies upon the registrant's own information, and the NVRA contains no prohibition against protecting the voter rolls by such individualized assessments.

B. The Constitution Reserves Election Qualifications to the States Alone; Federal Law Does Not Prevent States from Protecting Their Voter Rolls from Noncitizens.

The Constitution reserves to the states the authority to determine electoral qualifications. It carefully specifies that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1; (providing qualifications for the House of Representatives); *see* U.S. Const. amend. XVII (providing the same qualifications for the Senate). "Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause[.]" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (quoting The Federalist No. 60, at 371 (A. Hamilton)).

States have authority to set election qualifications, and this Court has emphasized that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter

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[2] The argument of the United States that Virginia's action in responding to the statement of an individual is not an individualized assessment of that individual may remind of Humpty Dumpty, who preferred to use words idiosyncratically and "used a word to mean 'just what [he chose] it to mean—neither more nor less.'" *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) (quoting Lewis Carroll, *Alice in Wonderland and Through the Looking Glass* 198 (Messner 1982)).

qualifications." *Id.*; *see Williams v. Rhodes*, 393 U.S. 23, 34 (1968) ("[T]he State is left with broad powers to regulate voting, which may include laws relating to the qualifications and functions of electors."). Ultimately, Congress only possesses a narrow, limited power "to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal Council of Arizona, Inc.*, 570 U.S. at 16.

In fact, the authority to set electoral qualifications is not merely a right of the states, but an obligation. This Court has noted that "the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States. . . . These Clauses are express delegations of power to the States to act with respect to federal elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (emphasis added). The Elections Clause's assignment of comprehensive, primary authority to the States to regulate the times, places, and manner of elections—while providing Congress with a residual power to curb any abuses—is a reflection of the Constitution's overall system of federalism. This Court has explained that

> [o]utside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

Shelby Cnty. v. Holder, 570 U.S. 529, 543 (2013) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

In short, the Constitution leaves the states with the authority to decide and

govern election qualifications. *See Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 774 (2018). As Justice Story emphasized,

> among a free and enlightened people, convened for the purpose of establishing their own forms of government and the rights of their own voters, the question as to the due regulation of the qualifications has been deemed a matter of mere State policy, and varied to meet the wants, to suit the prejudices, and to foster the interests of the majority.

1 Joseph Story, *Commentaries on the Constitution of the United States* § 582 (Thomas Cooley ed., 4th ed. 1873).

A basic principle of statutory construction is that courts seek to avoid interpretations that pose constitutional problems. When it comes to the First Amendment, for example, "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). The same principle protects federalism and the role of the states: we must "interpret a statute to preserve rather than destroy the States' 'substantial sovereign powers.'" *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 209 (1998) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). These are "powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

The NVRA is not immune from this consideration. Accordingly, courts interpreting the NVRA have emphasized the need for attention to "constitutional concerns regarding Congress's power to determine the qualifications of eligible voters in federal elections." *Arcia*, 772 F.3d at 1346. When properly interpreted, the NVRA reflects Congress's legitimate authority to regulate the time, place, and manner of

elections. But if the NVRA were to apply so broadly as to prevent the removal of individuals based on their individual representations that they are not citizens, it would raise serious constitutional concerns and threaten the right of states to determine election qualifications. The district court's preliminary injunction, if left standing, will prevent Virginia from being able to secure its voter rolls from those who have identified themselves as noncitizens.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the American Center for Law and Justice respectfully asks this Court to issue a stay of the District Court's preliminary injunction.

Respectfully submitted,

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