No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

SUSAN BEALS, IN HER OFFICIAL CAPACITY AS VIRGINIA COMMISSIONER OF ELECTIONS; JOHN O'BANNON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE STATE BOARD OF ELECTIONS; ROSALYN R. DANCE, IN HER OFFICIAL CAPACITY AS VICE-CHAIRMAN OF THE STATE BOARD OF ELECTIONS; GEORGIA ALVIS-LONG, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE STATE BOARD OF ELECTIONS; DONALD W. MERRICKS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; MATTHEW WEINSTEIN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JASON MIYARES, IN HIS OFFICIAL CAPACITY AS VIRGINIA ATTORNEY GENERAL; COMMONWEALTH OF VIRGINIA; VIRGINIA STATE BOARD OF ELECTIONS,
Applicants,

v.

VIRGINIA COALITION FOR IMMIGRANT RIGHTS; LEAGUE OF WOMEN VOTERS OF VIRGINIA; LEAGUE OF WOMEN VOTERS OF VIRGINIA EDUCATION FUND; AFRICAN COMMUNITIES TOGETHER; UNITED STATES OF AMERICA
Respondents.

EMERGENCY APPLICATION FOR STAY

To the Honorable John G. Roberts, Jr.
Chief Justice of the Supreme Court of the United States and
Circuit Justice for the Fourth Circuit

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PARTIES TO THE PROCEEDING BELOW

Applicants (defendants-appellants below) are Susan Beals, in her official capacity as Virginia Commissioner of Elections; John O'Bannon, in his official capacity as Chairman of the State Board of Elections; Rosalyn R. Dance, in her official capacity as Vice-Chairman of the State Board of Elections; Georgia Alvis-Long, in her Official capacity as Secretary of the State Board of Elections; Donald W. Merricks, in his official capacity as a member of the State Board of Elections; Matthew Weinstein, in his official capacity as a member of the State Board of Elections; Jason Miyares, in his official capacity as Virginia Attorney General; the Commonwealth of Virginia; and the Virginia State Board of Elections.

Respondents (plaintiffs-appellees below) are:

(1) The United States of America, and

(2) Virginia Coalition for Immigrant Rights, League of Women Voters of Virginia, League of Women Voters of Virginia Education Fund, and African Communities Together.

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EMERGENCY APPLICATION FOR STAY

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Less than two weeks before the 2024 Presidential Election, and more than a month into early voting, the district court below ordered Applicants, Virginia and its election officials, to place over 1,600 *self-identified noncitizens* back onto Virginia's voter rolls, in violation of Virginia law and common sense. About 600 of these individuals personally informed Virginia's Department of Motor Vehicles (DMV) that they are not citizens, and about 1,000 presented noncitizen residency documents to DMV and were then positively identified as noncitizens through the United States' own Systematic Alien Verification for Entitlements (SAVE) database. The United States itself has explained that SAVE "accurately report[s] the applicant's status 99 percent of the time." See U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-204, IMMIGRATION STATUS VERIFICATION FOR IMMIGRANTS: ACTIONS NEEDED TO IMPROVE EFFECTIVENESS AND OVERSIGHT 16 (2017), https://bit.ly/40hexxb.

The district court based the injunction, which mandates a variety of disruptive measures in addition to forcing noncitizens back on the ballot, on a provision of the National Voter Registration Act (NVRA) that does not even apply to the removal of noncitizens and other voter registrations that are void *ab initio*. And even if it did apply to the removal of noncitizens, Virginia's program complied with it anyway. This election-eve injunction is thus based on legal error. The injunction, which prohibits the application of a law that has been on the books since the Justice Department

precleared it in 2006, will also irreparably injure Virginia's sovereignty, confuse her voters, overload her election machinery and administrators, and likely lead noncitizens to think they are permitted to vote, a criminal offence that will cancel the franchise of eligible voters.

This burdensome mandatory injunction patently violates this Court's *Purcell* doctrine. *Purcell* v. *Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). This Court has repeatedly instructed that *Purcell* bars federal courts from enjoining the enforcement of state election laws with an election impending. See *Merrill* v. *People First of Ala.*, 141 S. Ct. 25 (Mem.) (2020); *Andino* v. *Middleton*, 141 S. Ct. 9 (2020); *Merrill* v. *People First of Ala.,* 141 S. Ct. 190 (Mem.) (2020); *Clarno* v. *People Not Politicians*, 141 S. Ct. 206 (2020); *Little* v. *Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Republican Nat'l Comm.* v. *Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Democratic Nat'l Comm.* v. *Wis. State Legislature*, 141 S. Ct. 28 (2020) (declining to vacate stay). This principle recognizes the critical interests that state officials have in protecting their elections and avoiding voter confusion. See *Wis. State Legislature*, 141 S. Ct. at 29 (Gorsuch, J., concurrence); *id.* at 31 (Kavanaugh, J., concurrence). The Fourth Circuit refused to apply *Purcell* and declined to stay the injunction, holding that "appellees do not challenge a state election law" and that *Purcell* is inapplicable to the NVRA. This ruling is incorrect and violates this Court's precedent. The district court enjoined enforcement of Virginia Code §§ 24.2-410.1 and 427. And *Purcell* applies to eleventh-hour injunctions under the NVRA, particularly where, as here, they order

mandatory retrospective relief of adding numerous individuals to a State's voter rolls past the State's deadline for doing so and imminently before an election.

Applicants thus respectfully move for an emergency stay of the district court's injunction. Because the district court ordered Applicants to comply with the injunction **by Wednesday, October 30, 2024**, Applicants respectfully request that the Court issue the stay by Tuesday, October 29, 2024, or that the Court issue an immediate administrative stay to permit the orderly resolution of this motion. The relief sought is not available from any other court or judge; both the district court and the Fourth Circuit have denied the requested stay.

ORDERS BELOW

The district court issued an order enjoining enforcement of certain Virginia election laws on October 25, 2024. App. 7–10. The district court orally denied Applicants' motion to stay the preliminary injunction order pending appeal. App. 269–70. Applicants promptly filed an emergency motion to stay the preliminary injunction pending appeal in the United States Court of Appeals for the Fourth Circuit that same day, which the Fourth Circuit denied in part by order on October 27, 2024. App. 1–6.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Application pursuant to 28 U.S.C. § 1254(1), and it has authority to grant the Applicants relief under the All Writs Act, 28 U.S.C. § 1651(a). The Applicants contend that the Organizational Plaintiffs lack Article III standing, but it is undisputed that the United States has standing to bring

this suit. Each Applicant was a party to the judgment sought to be reversed, and the relief now requested was first sought in the courts below.

STATUTORY PROVISIONS INVOLVED

This case involves Sections 20501, 20503, and 20507 of Title 52 of the United States Code and Sections 24.2-410.1 and 24.2-427 of the Code of Virginia. All are reproduced in the Appendix beginning at App. 11.

STATEMENT

I. Legal and Factual Background

Based on its finding that "the right of citizens of the United States to vote is a fundamental right," Congress enacted the National Voter Registration Act, 52 U.S.C. §§ 20501 *et seq*. Among other things, the NVRA is intended to "enhance[] the participation of eligible *citizens* as voters in elections for Federal office," to "protect the integrity of the electoral process," and to "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. §§ 20501(a)(1), (b) (emphasis added).

To promote eligible citizens' participation in federal elections, the NVRA requires "each State [to] establish procedures to register to vote . . . by application made simultaneously with an application for a motor vehicle driver's license." *Id.* § 20503(a)(1); see generally *id.* § 20504. These procedures require that "each State shall . . . ensure that any *eligible applicant* is registered to vote in an election." *Id.* § 20507(a)(1) (emphasis added). "[I]f the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority," then the applicant must be "registered," *id.* § 20507(a)(1)(A), and added to the "list of eligible

voters," *id.* § 20507(a)(3). The substantive qualifications for a "valid application," such as citizenship status, is a question for the States. See *Arizona* v. *Intertribal Council of Ariz.*, 570 U.S. 1, 16 (2013) (explaining that States determine and oversee *who* is eligible to vote).

At the same time the NVRA required States to allow "eligible applicants" to "register[]," it imposed restrictions on removing these "registrants" from the rolls. 52 U.S.C. § 20507(a)(3). Under the NVRA's General Removal Provision, a person who is an "eligible applicant" and has submitted a "valid" registration form to vote "may not be removed from the official list of eligible voters except" in four enumerated circumstances: voter request, death of the voter, voter felony conviction or mental incapacity, and change in voter residence (if certain procedures are followed). *Id.* § 20507(a)(3)–(4).

In addition to the General Removal Provision's blanket ban on removing "registrants" from the list of "eligible voters," which applies at all times, the NVRA also contains a special prohibition on certain removals close to federal elections. Section 8(c)(2), the Quiet Period Provision, prohibits States from "systematic[ally]" removing "ineligible voters" from the rolls within 90 days of a federal election. It incorporates by cross-reference three of the four exceptions for removals under the General Removal Provision—voter request, death of the voter, and voter felony conviction or mental incapacity. *Id.* § 20507(c)(2).

To ensure that the Commonwealth's rolls remain clean while also complying with the NVRA, Virginia amended its election code in 2006 to require the DMV to

send the information of any individual who declares himself to be a noncitizen on a DMV form to the Virginia Board of Elections (ELECT). Va. Code Ann. § 24.2-410.1. ELECT checks that person's information against the Virginia Election and Registration Information System (VERIS) to ensure that these self-declared noncitizens are not mistakenly included on the voter rolls. App. 85 ¶ 6. Only if there is a match does ELECT forward the information to the local registrars to continue the verification process. *Id.*

ELECT's general policy is to send local registrars only the records of persons who affirmatively and contemporaneously declare that they are not citizens on a DMV form. App. 88 ¶ 22. It did, however, also recently work with the DMV in an ad hoc review of records to ensure that persons who engaged in DMV transactions between July 1, 2023, and June 30, 2024, and who had documents on file with DMV showing noncitizen status were not improperly on the voter rolls. *Id.*; App. 96 ¶ 21. To accurately ensure that any such individuals who had subsequently become naturalized citizens were not mistakenly removed, the DMV ran these individuals' information through the Department of Homeland Security's SAVE database. See Va. Code Ann. § 24.2-404(E) (requiring ELECT to use SAVE "for the purposes of verifying that voters listed in the Virginia voter registration system are United States citizens"); App. 96 ¶ 22; App. 88 ¶ 23.

The SAVE database shows whether a legal alien resident has subsequently obtained citizenship. Only those persons registered to vote who had noncitizen documents on file with the DMV and who also were confirmed as current noncitizens in a

fresh SAVE search were transmitted to the local registrars for each jurisdiction to act upon. App. 96–97 ¶¶ 19, 22–23; App. 88–89 ¶¶ 24–29. ELECT's transmissions of individuals' information to the local registrars from this ad hoc process occurred in late August 2024. App. 88 ¶ 25. ELECT's individualized approach, which confirmed noncitizen status with a SAVE search within the previous 30 days, ensured that no naturalized citizens were removed from the voter rolls based on outdated DMV documents during the ad hoc process. App. 96 ¶¶ 19, 22; App. 88–89 ¶¶ 22–24; 30–31.

When ELECT finds that a person who has declared himself to be a noncitizen on a DMV form or has failed a recent SAVE search matches a person on the VERIS voter rolls, ELECT sends the person's information to the local general registrar for individualized review. App. 85 ¶ 7. Virginia law requires "general registrars to delete . . . the name of any voter who . . . is known not to be a United States citizen by reason of" that person's self-declaration of noncitizen status or from information ELECT receives from a SAVE verification. Va. Code Ann. § 24.2-404(A)(4); see *id.* § 24.2-427(C). Accordingly, the registrar *manually* reviews each potential match on an individual basis to confirm that the noncitizen and the registered voter identified in VERIS are the same person. App. 85 ¶ 7. The registrar has discretion in this process to correct any errors she spots, such as that the person identified in the DMV file and the registered voter in VERIS are not the same individual, or that the registrar has superior information as to the person's citizen status. App. 176; see Va. Code Ann. § 24.2-427(B) (registrar is to act based on information "known by him"). If the registrar determines that the noncitizen and the registered voter are the same person, then the

registrar will mail the individual a "Notice of Intent to Cancel" that individual's registration to vote. Va. Code Ann. § 24.2-427(C); App. 213.

The Notice of Intent to Cancel explains that ELECT recently received information from the DMV that the recipient may not be a citizen and asks the recipient to affirm within 14 days that he is a citizen in order to stay on the voter rolls. App. 221. If the recipient fails to return the printed affirmation of citizenship in the pre-addressed envelop within the 14-day period, he is sent another notice advising him of his removal from the rolls and providing a number to call if he thinks there has been a mistake. By default, Virginia also provides a grace period and does not actually cancel registrations until 21 days after the Notice of Intent to Cancel is sent. App. 214; App. 86 ¶¶ 10–11. Even if the person fails to respond to either of these notices, he can still reregister with no impediments. Even after Virginia's ordinary registration process closes on October 15, he can use in-person same-day registration to re-register and vote, either during Virginia's early voting period or on Election Day. App. 86 ¶ 14; see Va. Code Ann. § 24.2-420.1.

Governor Youngkin's Executive Order 35, issued on August 7, 2024, did not create these longstanding statutory processes. That order simply required the DMV and ELECT to share data on a daily, instead of monthly, basis and certify that they were following pre-existing law. App. 228.

II. Procedural Background

The Plaintiffs in these consolidated cases—the United States and an assortment of advocacy organizations ("Organizational Plaintiffs")—asked the district court

to inject itself into the Commonwealth's reasonable and longstanding election processes within a month of the election, and weeks after early voting had begun, by ordering Virginia, among other disruptive measures, to wholesale "restore voter registrations of registrants cancelled" since August 7, whether or not they are citizens. App. 8 ¶ 3. Despite *Purcell* and its progeny, the district court obliged.

The court first concluded that *Purcell* actually *supported* adding the self-identified noncitizens back to the ballots because claims under the Quiet Period Provision are inherently close to an election, and because it concluded—without explanation—that "this is not a case where the plaintiffs are seeking to enjoin the enforcement of Virginia's election laws." App. 244. The court thus "applied . . . the *Winter* factors" for entering preliminary relief, as if there were not an election looming. *Id.*

The court held that the NVRA's Quiet Period Provision applies to noncitizens because the NVRA contains no explicit exception for them and that Virginia's program was "systematic." App. 249–50. At the same time, the district court held that noncitizens could be removed under the General Removal Provision, despite that provision not containing an explicit exception for noncitizens either. Balancing the equities, the district court relied on hearsay and a smattering of anecdotal evidence to conclude that Virginia's program would cause irreparable harm and was against the public interest because that evidence showed only that the self-identified noncitizens it ordered Virginia to add to its voting rolls "failed to return a form and attest that they were citizens." App. 254–55.

Thus, on October 25, only 10 days before election day, the district court ordered Virginia to, within five days, restore the approximately 1,600 self-declared or SAVE-confirmed noncitizens to the voter rolls, initiate a mass mailing notifying them that they had been placed back on the rolls, promulgate guidance for the local registrars to follow, issue public statements retracting the previously mailed cancellations, and "educate local officials, poll workers, and the general public" about the order, including "the tracking of poll worker training in all 95 counties and independent cities in the Commonwealth." See App. 8–10 ¶¶ 2–9. The district court denied Applicants' motion for a stay of the injunction. App. 269–70.

Applicants moved later that day for a stay from the Fourth Circuit. The Fourth Circuit denied the stay on October 27, except with respect to paragraph 7 (which required the Applicants to "educate local officials, poll workers, and the general public" about the injunction). App. 1. The Fourth Circuit held that *Purcell* is inapplicable because "appellees do not challenge a state election law," and because the NVRA "imposes limits that apply only within the immediate period before an election." App. 3–4. The Fourth Circuit also held that the Quiet Period Provision applies to removal of noncitizens, concluding that Virginia's construction would "collaps[e] the distinction between 'voters' and 'eligible voters.'" App. 3. It also held that noncitizens are "registrants" under "the plain-meaning rule," which would necessarily mean that the General Removal Provision would prohibit the removal of noncitizens from the voter rolls at any time. App. 3–4. The Fourth Circuit further held that Virginia's process was

"systematic" because it uses a "computerized data-matching process" and "does not require communication with . . . any specific individual." App. 2–3, 5–6.

With both the district court and the Fourth Circuit having denied motions for a stay pending appeal, "the relief sought" in this Court "is not available from any other court or judge." Sup. Ct. R. 23.3. Applicants thus move for this Court to stay the injunction pending appeal in accordance with well-settled principles of election law.

LEGAL STANDARD

This Court will stay a district court's order, including in a case still pending before the court of appeals, if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010).

This Court has applied more searching review of election-eve injunctions. *Merrill* v. *Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays); see also *id.* at 883 (Kagan, J., dissenting) (acknowledging that the Supreme Court has "given less attention to the merits in cases involving eleventh-hour election changes."); see generally *Purcell* v. *Gonzales*, 549 U.S. 1 (2006). It has stayed injunctions against state election officials issued close to an election unless plaintiffs have demonstrated "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 (opinion of Kavanaugh, J.).

REASONS FOR GRANTING THE STAY

The district court entered a burdensome mandatory injunction on the eve of an election. The injunction is based on a misinterpretation of the NVRA, which does not prohibit Virginia from removing noncitizens from its voter rolls. Plaintiffs will not suffer any irreparable injury absent the injunction: Virginia's process removed noncitizens, who are ineligible to vote. To the extent any individuals misidentified themselves as noncitizens to DMV and then failed to attest to their citizenship upon the registrar's request, any such individuals can still vote by using Virginia's same-day registration process and attesting to their citizenship, including on Election Day. Both Plaintiffs unduly delayed bringing suit: Virginia's law creating its noncitizen roll removal process has been in place since 2006, and Plaintiffs waited until 60 days into the 90-day "quiet period"—less than a month before the election—before bringing suit. The mandatory injunction will also impose significant cost, confusion, and hardship upon Virginia, creating a massive influx of work for its registrars in the critical week before the election, and likely confusing noncitizens into believing that they are eligible to vote.

Finally, if this Court considers the likelihood that it would grant review and reverse the ruling below, it is likely to do so. Courts of Appeals have disagreed as to

the proper interpretation of the relevant NVRA provisions, and the courts below erred on this highly important question. This Court should therefore grant the stay.

I. The underlying merits favor Virginia, so they cannot be "entirely clearcut" in favor of the Plaintiffs

Purcell applies, and the Plaintiffs fail to establish a single factor, much less all four. The Fourth Circuit refused to apply *Purcell* for two reasons, but both are erroneous. First, it held that *Purcell* does not apply because "appellees do not challenge a state election law. Instead, they challenge the implementation of an executive order." App. 5. That assertion is simply wrong. Plaintiffs are challenging the Virginia election laws that create Virginia's process for removing noncitizens from its voter rolls, Virginia Code §§ 24.2-410.1 and 427. See First Am. Compl. ¶ 13 (Dkt. 23) (Organizational Plaintiffs stating that "Va. Code Ann. § 24.2-427(C) and the Purge Program violate the NVRA."). The injunction bars Virginia from enforcing those provisions during the quiet period—as Virginia has done since at least 2010. App. 87 ¶ 17. Executive Order 35 did not create this process; it simply increased the frequency of interagency data sharing from monthly to daily. See App. 228; see 8, *supra*. Lower courts cannot repackage claims against statutes into claims against executive orders to dodge the *Purcell* doctrine.

Second, the Fourth Circuit held that *Purcell* cannot apply to claims concerning provisions of the NVRA "that apply only within the immediate period before an election." App. 5. But this Court has never held that *Purcell* does not apply when the nature of the claim will tend to lead to suit near an election. Indeed, many election law issues inherently arise near an election. Additionally, as explained below,

Plaintiffs unjustifiably delayed bringing their claims once the 90-day period started. They cannot point to the nature of the Quiet Period Provision when they slept on their rights for well over a month, then sought an injunction less than a month before the election. See 29–31, *infra*.

Purcell therefore applies, and Plaintiffs cannot satisfy it here. First, Plaintiffs cannot show that the merits are "entirely clearcut" in their favor. *Merrill*, 142 S. Ct. at 881 (opinion of Kavanaugh, J.). To the contrary, the merits decisively favor Virginia; as several federal judges have concluded, "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." *Bell* v. *Marinko*, 367 F.3d 588, 591–92 (6th Cir. 2004); see *Arcia* v. *Fla. Sec'y of State*, 772 F.3d 1335, 1348–49 (11th Cir. 2014) (Suhrheinrich, J., dissenting); *United States* v. *Florida*, 870 F. Supp. 2d 1346, 1349 (N.D. Fla. 2012).

A. The NVRA's Quiet Period Provision does not apply to removal of noncitizens

The NVRA's Quiet Period Provision does not apply to the removal of individuals, such as noncitizens, whose registrations were void *ab initio* and thus who were never eligible to vote in the first place. Virginia's removal of noncitizens within 90 days of the election therefore did not violate the law.

When interpreting a statute, the Court's "job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute." *Wis. Cent. Ltd.* v. *United States*, 545 U.S. 274, 277 (2018) (citation omitted). Courts thus "begin with the text." *Sw. Airlines Co.* v. *Saxon*, 596 U.S. 450, 457 (2022).

The context and structure of the statute provide invaluable tools to understand the text. See *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.). Additionally, this Court has explained that absurd or unconstitutional interpretations of statutes should be disfavored if the language is fairly susceptible to another reading. See *Bond* v. *United States*, 572 U.S. 844, 856–57 (2014).

Section 8 of the NVRA governs "the administration of voter registration for elections for Federal office." 52 U.S.C. § 20507(a). It provides that "State[s] shall . . . ensure that any *eligible applicant* is registered to vote." *Id.* § 20507(a)(1) (emphasis added). The instruction is simple: applicants who are "eligible" must be "registered" by the State. *Id.* Section 8 then provides different ways that an applicant with a "*valid* voter registration form" can register, such as through the DMV. See *id.* § 20507(a)(1)(A)–(D) (emphasis added). Once the "eligible applicant['s]" "valid voter registration form" is accepted, the statute refers to him as a "registrant," and provides him certain protections. See *id.* § 20507(a)(3).

After prescribing how an "eligible applicant" becomes a "registrant" through submitting a "valid voter registration form," Section 8 provides in the General Removal Provision how a "registrant" can be removed from the list of "eligible voters." *Id.* The "name of a registrant may not be removed from the official list of eligible voters" *at all* except in four enumerated circumstances: voluntary removal of the registrant, felony conviction or adjudication of mental incapacity, death of the registrant, or change in residence (if certain procedures are followed). *Id.* § 20507(a)(3)–(4). In

short, once an "eligible applicant" becomes a "registrant," Section 8 of the NVRA narrowly specifies the four exclusive reasons he can be removed. *Id.* § 20507(a)(1).

The removal restrictions become stricter in the 90 days before a federal election. At that point, the Quiet Period Provision prohibits "systematic," as compared to individualized, removal programs targeting "ineligible voters." 52 U.S.C. § 20507(c)(2). The Quiet Period Provision incorporates three of the four exceptions from the General Removal Provision: request of the registrant, criminal conviction or mental incapacity, and death of the registrant. *Id.* § 20507(c)(2)(B). It does not permit removing registrants based on a change in residence.

In short, an "eligible applicant" becomes a "registrant" upon filing a "valid voter registration form," and is then protected from removal from the "list of eligible voters" at all times, unless such removal is pursuant to one of four enumerated exceptions. Within 90 days of an election, the rules get stricter, with the "systematic" removal of "ineligible voters" being prohibited, subject to three exceptions. *Id.*

But the NVRA does not prohibit the removal from the voter rolls of persons, such as noncitizens and minors, who were never "eligible applicant[s]" and thus could not become "registrant[s]" or "voters" in the first place. *Id.* § 20507(a)(1), (3), (c)(2)(B). The Quiet Period Provision does not cover noncitizens at all, and thus Virginia's removal of noncitizens within 90 days of the election did not violate federal law.

This understanding of the NVRA's text is confirmed by its structure, for concluding that a noncitizen is a "registrant" protected under the NVRA would lead to absurd and unconstitutional results. Again, there are only four exceptions from the

Act's blanket prohibition on removing a "registrant." See 52 U.S.C. § 20507(a)(3)–(4). A noncitizen who invalidly registers is not one of them. Therefore, if "registrant" includes noncitizens who end up on the rolls, then the NVRA bars States from removing noncitizens from its rolls *at any time*. See *Florida*, 870 F. Supp. 2d at 1349 (explaining that if a noncitizen is a registrant, "[the General Removal Provision]—which applies at all times, not just in the 90 days before an election—seems to prohibit a state from ever removing from its voting list a noncitizen, even though the noncitizen should never have been registered in the first place"). The Fourth Circuit below held that "registrant" includes noncitizens under "the plain-meaning rule." App. 3–4. But it did not examine the text of Section 8 showing that a "registrant" under that section is an applicant who has submitted an initially "valid voter registration form." See 52 U.S.C. § 20507(a); see 4–5, 15, *supra*. Nor did it discuss—or even appear to recognize—the result of that interpretation: that no State can *ever* remove noncitizens from their voter rolls because of their noncitizen status.

This error alone is sufficiently important for this Court to grant the stay. Not only would such a restriction on a State's removal power be facially absurd, it would also render the provisions unconstitutional. This Court has made clear that the "Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them," and forcing States to keep noncitizens on their voter rolls would cross the line into regulating "who" may vote in federal elections. *Intertribal Council*, 570 U.S. at 16. Indeed, "a serious constitutional question" would be raised if Congress interfered with voter eligibility in a lesser way, such as restricting how

States can gather information related to their eligibility requirements. *Id.* at 17. The text and structure of the General Removal Provision thus make clear that "registrant" only refers to those who were originally "eligible applicants." 52 U.S.C. § 20507(a)(1). Noncitizens do not qualify; the right to vote is limited to U.S. citizens. VA. CONST. art. II, § 1; Va. Code Ann. § 24.2-404.4; 18 U.S.C. § 611.

The district court and Plaintiffs—although not the Fourth Circuit—agreed that noncitizens can be removed under the General Removal Provision, presumably because they are not "registrants." See App. 250 ("the Commonwealth . . . ha[s] the authority to investigate and remove noncitizens from the registration rolls."). Yet there is no textual basis to divorce the Quiet Period Provision from the General Removal Provision. Given that the General Removal Provision does not apply to the removal of noncitizens, who were never "eligible applicants" or "registrants" to begin with, it follows that the adjacent Quiet Period Provision does not apply to noncitizens either.

The Quiet Period Provision states 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." 52 U.S.C. § 20507(c)(2)(A). As noted previously, it then incorporates by cross-reference three of the four exceptions from the General Removal Provision: "request of the registrant," "criminal conviction or mental incapacity," and "the death of the registrant." *Id.* § 20507(c)(2)(B)(i).

The provision only limits the removal of "ineligible voters," *id.* § 20507(c)(2)(A), and only a "registrant" can become a "voter" in the first place.[1] And becoming a voter, eligible or otherwise, requires one to be a "registrant" because the cross-references refer to "ineligible voters" as "registrants." See *id.* § 20507(c)(2)(B)(i) (referencing *id.* §§ 20507(a)(3)–(4)). Despite the complexity of the statutory scheme, the logic behind this conclusion is simple: If a person cannot become a "registrant" because he is not and cannot be an "eligible applicant," then he cannot become a "voter." And if the person is not a "voter," eligible or otherwise, then he is not protected under the Quiet Period Provision.

The plain text of the Quiet Period Provision confirms this logical chain. The term "voter," standing alone, excludes noncitizens. A "voter" is a person who "votes or has the legal right to vote." *Voter*, Merriam-Webster, https://bit.ly/3NETgWy (last accessed Oct. 27, 2024). The adjectives "eligible" or "ineligible" then divide the term "voters" into two subsets of "voters." An "eligible voter" is a person who is "qualified to participate" in a given election. *Eligible*, Merriam-Webster, https://bit.ly/4e1ydZ1 (last accessed Oct. 27, 2024). On the other hand, an "ineligible voter" is a person who had "vote[d] or ha[d] the legal right to vote" but is "not qualified" in a given election.

[1] The Fourth Circuit thus erred in concluding that "voter" and "registrant" cannot mean the same thing; § 20507 uses the terms interchangeably. Compare, *e.g.*, 52 U.S.C. § 20507(a)(3) (referring to when a "registrant" may "be removed" from the "list of eligible voters") and (a)(4) (referring to when "ineligible voters" may be removed from the "list of eligible voters," including upon "death of the registrant" or "change in residence of the registrant"); see *Luna Perez* v. *Sturgis Pub. Schs.*, 598 U.S. 142, 148 (2023) (holding that "contextual clues persuade us" that federal statute used two different terms "as synonymous"). Additionally, the Fourth Circuit never explains what differing meanings the two terms could have in this context.

Ineligible, Merriam-Webster, https://bit.ly/4fkY7b4 (last accessed Oct. 27, 2024). For example, a voter or registrant could become ineligible because he has moved away, been convicted of a felony, or been declared mentally incapacitated. See 52 U.S.C. § 20507(a)(3)(B), (a)(4)(B). The Fourth Circuit thus erred in concluding that Virginia's interpretation would somehow "render[] language in the Quiet Period Provision superfluous by collapsing the distinction between 'voters' and 'eligible voters.'" App. 3.[2]

Thus, the Quiet Period Provision restricts programs with the "purpose" of "systematic[ally]" removing voters—those who "vote[d] or ha[d] the legal right to vote," but who are no longer "qualified" to vote in a given election (for instance, because they moved to a different jurisdiction). The plain text of the Quiet Period Provision therefore does not prohibit removing from the rolls persons who never could have validly registered in the first place because such persons were never "eligible voters" or even "ineligible voters." 52 U.S.C. § 20507(c)(2)(A). They are not "voters" or "registrants" at all. Therefore, States are free to systematically remove noncitizens, as well as minors and fictitious persons, at any time, including within 90 days of an election, without running afoul of the NVRA.

[2] The Organizational Plaintiffs contend that Virginia's definition of "ineligible voter" leads to the "absurd[ity]" that a person is both eligible and ineligible to vote at the same time. Org. Pl. Br. at 20 & n.8 (Dist. Ct. Dkt. 18-1). But a person can be eligible to vote in one jurisdiction, and thus a "voter," while being "ineligible" in other jurisdictions. 52 U.S.C. § 20507(c)(2)(A). Indeed, a person who has moved his residence will be an "ineligible voter" in his old jurisdiction, while also being an "eligible voter" in his new jurisdiction. *Id.* Far from being contradictory, this definition of "ineligible voter" perfectly describes the people the NVRA is seeking to protect.

The statutory-purpose section of the NVRA further indicates that the Quiet Period Provision does not protect noncitizens. The "Findings and Purposes" section of the NVRA declares that the goal of the statute is to "promote the exercise of" the "right of *citizens* of the United States to vote" and to "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(a)–(b) (emphasis added). Interpreting the NVRA to restrict the removal of noncitizens, who Section 8(a)(1) makes clear are not allowed even to become "registrants," would make a mockery of the goal of ensuring "accurate and current voter registration rolls." *Id.* It would also inevitably result in diluting the "right of citizens of the United States to vote." See *Reynolds* v. *Sims*, 377 U.S. 553, 555 (1964).[3]

To be sure, some courts, including the Fourth Circuit below, have come out the other way. See *Arcia*, 772 F.3d at 1348; *Mi Familia Vota* v. *Fontes*, 691 F. Supp. 3d 1077, 1092–93 (D. Ariz. 2023). But other judges have correctly concluded that "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." *Bell*, 367 F.3d at

[3] The legislative history of the NVRA also indicates that the Quiet Period Provision applies only to the removal of originally valid registrations. The Senate Report described the Provision's goal as forcing "[a]ny program which the States undertake to *verify addresses*" to be "completed not later than 90 days before a primary or general election." See S. Rep. 103-6, at 18–19 (1993) (emphasis added). Likewise, the House Report stated that the Quiet Period Provision simply "applies to the State outreach activity such as a mailing or a door to door canvas." H.R. Rep. No. 103-9, at 16 (1993). The Report specifically confirms that the NVRA "should not be interpreted in any way to supplant th[e] authority" of election officials "to make determinations as to [an] applicant's eligibility, such as citizenship, as are made under current law and practice." *Id.* at 8.

591–92. And while the Eleventh Circuit concluded, over a dissent, that the Quiet Period Provision applies to noncitizens, it failed to analyze the plain meaning of the terms "registrant" and "voter," or the statutory language making clear that only "eligible applicant[s]" can become "registrants" or "voters." *Arcia*, 772 F.3d at 1347. The Eleventh Circuit also recognized that the logical conclusion of its interpretation was the absurdity that Congress had banned States from *ever* removing noncitizens from their voter rolls under the General Removal Provision, a reading that would likely render the provision unconstitutional. *Id*. Yet it brushed these concerns aside by declaring that "Congress could change the language of the General Removal Provision to assuage any constitutional concerns." *Id.*

Ignoring the implications of its interpretation reflects a serious error in *Arcia*'s reasoning. Although the General Removal Provision was not directly at issue in that case (much like this one), courts must read statutes as a "harmonious whole." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012). If a court's interpretation of one statutory phrase means that another part of the statute plainly violates the Constitution, that is strong evidence that the interpretation of the first phrase is incorrect. Because the meaning of the General Removal Provision bears on the meaning of the Quiet Period Provision, *Arcia* was wrong to brush it off as a problem for another day.

Like *Arcia*, neither the Plaintiffs nor the courts below seriously attempted to grapple with the meaning of the terms "registrant" and "voter." Instead, they relied on the *expressio unius* canon of interpretation. Because the Quiet Period Provision contains three exceptions, Plaintiffs argued, it cannot contain one for noncitizens.

This argument has two flaws that render the canon inapposite. First, as explained above, noncitizens do not fit within the Quiet Period Provision to begin with, so there was no need to create an exception to exclude them. The second flaw is that if the *expressio unius* canon applies to the Quiet Period Provision, there is no reason it would not also apply to the General Removal Provision. Both provisions contain a blanket prohibition followed by a list of enumerated exceptions. And there is no textual or logical basis for distinguishing the two identically structured provisions. Because the canon cannot constitutionally apply to the General Removal Provision, it cannot apply to the Quiet Period Provision either.[4]

There is no doubt that the NVRA is a complicated statute with many interlocking parts and thus requires careful parsing to understand. What is clear, however, is that the Plaintiffs have failed to meet their burden of showing that it is "entirely clearcut" (or even likely) that the NVRA applies to removals on the basis of noncitizenship.

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[4] Further, although the Quiet Period Provision applies only in the three months preceding an election, the Constitution contains no clause that permits the federal government to place a time limit on a State's power to control who may vote as the election approaches. As this Court has stated, it would raise "serious constitutional doubts" if the federal government even restricted States' authority to enforce their ballot-access requirements by making it more difficult to gather information. *Intertribal Council*, 570 U.S. at 16. This restriction is surely greater than that one. If the Quiet Period is interpreted as applying to a noncitizen removal process like Virginia's, it would violate Article I, Section 2 of the Constitution by impermissibly infringing on a State's ability to choose qualifications of voters. In this case, the federal government is quite literally telling Virginia "*who*" may participate in elections, ordering it to place particular individuals onto its voter rolls even though they are not eligible to vote under Virginia law. *Id.*

B. Virginia's noncitizen removal process is individualized, not systematic

Even if the Quiet Period Provision were read to apply to noncitizens, Virginia did not violate it. The Quiet Period Provision does not bar all removals from the rolls within 90 days of a federal election. It prohibits only those done "systematic[ally]." 52 U.S.C. § 20507(c)(2)(A). All parties agree that a removal based on individualized information is not "systematic" within the meaning of the NVRA. See App. 248; Org. Pl. Br. at 16–17 (Dist. Ct. Dkt. 18-1); U.S. PI. Br. at 14 (Dist. Ct. Dkt. 9-1) (same); see *Arcia*, 772 F.3d at 1348 ("[T]he 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.").

Virginia's removal of noncitizens here falls on the "individualized" side of the line. *Arcia*, 772 F.3d at 1348. As detailed above, 6–7, *supra*, DMV forwards the names of individuals who have newly declared themselves to be noncitizens to ELECT, which forwards those self-identified noncitizens who appear on voter rolls to local registrars. App. 85 ¶¶ 3–8; App. 94–96 ¶¶ 5, 12–20. There is another step of individualized review when the local registrar conducts a *manual*, person-by-person verification to confirm that the two people are the same. The registrar then contacts each self-declared noncitizen by mail, providing an opportunity for the individual to correct an error by mailing back within 14 days a pre-printed form affirming his citizenship. As this Court has noted with respect to this very type of procedure, "a reasonable person with an interest in voting is not likely to ignore notice of this sort," and thus can be expected to "take the simple and easy step of mailing back the pre-addressed"

card. *Husted* v. *A. Phillip Randolph Inst.*, 584 U.S. 756, 779 (2018). And if he does not return the pre-printed affirmation of citizenship, he is sent a Notice of Cancellation that invites him a second time to contact the local registrar to correct any mistake concerning his citizenship. The process thus begins with a personal attestation of noncitizenship and ends in the removal of that person from the voter rolls only when he is sent two individualized letters offering opportunities for an individual corrective response. This is the very definition of an individualized process.

The ad hoc process was similarly, if not more, individualized. The process was limited to individuals who had provided legal alien residency documents to the DMV demonstrating a lack of citizenship, which DMV confirmed with a SAVE search. App. 88 ¶ 24. These documents include a unique Alien Registration Number that can be used to verify the individual's status. To ensure that people who had subsequently obtained citizenship would not be removed based on old data, ELECT required an additional, fresh SAVE search confirming that each person remained a noncitizen before sending the individual's information to the local registrar. App. 88–89 ¶¶ 22–24, 29–31; App. 96 ¶¶ 21–22. Even then, the registrar again conducted an individualized review and followed the above-described process, provid[ing] each person an opportunity to affirm his citizenship to remain on the rolls. App. 214; App. 85–86 ¶¶ 7, 10–11.

The district court and the Fourth Circuit put great weight on the fact that "electronic comparison[s]" of databases were used in the matching process to conclude that the process was "systematic." See App. 247; App. 3 ("inclusion of a person's name

on a list electronically compared to another agency database is enough for removal from the voter rolls"). But the use of electronic tools in a larger process does not automatically make the process "systematic," particularly where, as here, the process involved several layers of individualized review and contact with each person. Indeed, if merely using a computerized database is enough to render a process "systematic," then nearly every modern process would qualify. See *Intertribal Council*, 570 U.S. at 16. It is telling that, while the Fourth Circuit asserted that Virginia "remain[s] able to prevent noncitizens from voting by canceling registrations on an individualized basis," it gave no explanation of what "an individualized basis" would be. App. 5.

The Fourth Circuit's additional reasoning for why the noncitizen removal process is "systematic" is even less persuasive. It concluded that "the challenged program does not require communication with or particularized investigation into any specific individual." App. 2. But a letter is a "communication," and registrars sent two of them to each "specific individual" affected. *Id*. And a SAVE search using an individual's Alien Identification Number is certainly "particularized."

II. Virginia will be irreparably harmed absent a stay, not the Plaintiffs

Next, a stay is warranted because Virginia will be irreparably harmed absent a stay, while Plaintiffs will not be irreparably harmed if a stay is granted. Enjoining a State from enforcing its "duly enacted" laws necessarily inflicts "a form of irreparable injury." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). That is exactly what the courts below did here, enjoining Virginia from

enforcing Va. Code Ann. §§ 24.2-410.1 and 427, laws passed in 2006 and followed in elections, including in the 90-day period, ever since.

Not only will the Commonwealth of Virginia be irreparably harmed absent a stay, so will its voters and the public at large. The injunction requires Virginia to restore over 1,600 self-identified noncitizens to Virginia's voter rolls. The Fourth Circuit concluded that it could not "know that the people removed from the voter rolls . . . were in fact noncitizens, and that at least some eligible citizens have had their registrations cancelled." App. 4. But the court failed to consider Virginia's thorough efforts to ensure that citizens would not be removed. Over 1,000 of the removed self-identified noncitizens were confirmed as noncitizens by fresh SAVE searches. See App. 88 ¶ 25. United States Customs and Immigration Services itself claims that the SAVE database has a 99 percent accuracy rate. U.S. GOV'T ACCOUNTABILITY OFF., IMMIGRATION STATUS VERIFICATION FOR IMMIGRANTS, *supra*, at 16. The others recently voluntarily declared themselves to be noncitizens to a Virginia state agency. The vast majority of the 1,600 self-identified noncitizens that Virginia is required to place on the voter rolls are in fact noncitizens who cannot vote without committing a felony. See 18 U.S.C. § 611.

The district court minimized these concerns by wholly ignoring the SAVE-verification aspect to the noncitizen removal process and concluding that "this Court does not know that all the persons who were removed pursuant to the Defendants' program were noncitizens." App. 254. But in the preliminary-injunction stage, doubt counsels for caution. Noncitizen voting "drives honest citizens out of the democratic

process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 549 U.S. at 4. Citizens' "'right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (quoting *Reynolds*, 377 U.S. at 555). Once this dilution occurs, there can be no remedy for legitimate voters. There is "no do-over and no redress" after "the election occurs." See *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). And despite the Fourth Circuit's assertions to the contrary, prosecuting noncitizens who vote does not remedy the harm of allowing them to vote in the first place. App. 5.

Plaintiffs contend that they will suffer irreparable harm without an injunction because any potential citizens removed from the rolls will lose the right to vote. Not so. Even if a citizen was removed from the voter rolls because he mistakenly checked the wrong box at the DMV and somehow missed both notices, he can still same-day register, including on Election Day itself, and cast a provisional ballot. See Va. Code Ann. § 24.2-420.1. Ninety-eight percent of provisional ballots are counted, and a person's prior removal from the rolls provides no basis to reject a provisional ballot, so long as the person attests to his citizenship in his same-day registration. ELECT, 2023 Annual Virginia Election Retrospective & Look Ahead at 25–26 (Mar. 6, 2024), https://tinyurl.com/229x8z8u; App. 86–87 ¶¶ 13–16. The ability to cast a provisional ballot "provides an adequate remedy" in these circumstances, meaning that any harm is not "irreparable." *Crawford* v. *Marion Cnty. Elec. Bd.*, 553 U.S. 181, 197–98 (2008)

(opinion of Stevens, J.). Indeed, Organizational Plaintiffs identified only three named persons as citizens removed from the rolls. And of those three, one has already voted, one has re-registered to vote, and one plans to same-day re-register and vote in-person on Election Day. *See* Ex. CC (declaration of Carolina Diaz Tavera), DD (declaration of Anna J. Dorman) (describing two individuals she spoke with) (Dist. Ct. Dkt. 108). Plaintiffs' scanty evidence is far from demonstrating either that Virginia's process was unreliable, or that any eligible voters would be irreparably harmed in the absence of the preliminary injunction.

III. The Plaintiffs unreasonably delayed filing suit

A Plaintiff cannot overcome the *Purcell* principle if he has "unduly delayed" bringing his complaint. *Merrill*, 142 S. Ct. at 881 (opinion of Kavanaugh, J.). Because both Plaintiffs here chose to bring their complaints at the last minute, Plaintiffs cannot satisfy this prong of *Purcell* either.

Virginia's statutory noncitizen removal process was enacted and precleared in 2006, and the Commonwealth has been removing noncitizens during the so-called quiet period in elections since at least 2010. App. 87 ¶ 17. Yet even after Governor Youngkin issued Executive Order 35 on August 7, at the beginning of the 90-day quiet period, the Organizational Plaintiffs waited to sue until October 7, two months into the three-month quiet period. The district court ignored their failure because they claimed (wrongly) that they did not have enough information to sue in August and that Virginia "stonewalled" their information-gathering efforts. But the claim they have asserted under the NVRA accrued at the beginning of the quiet period. And

Executive Order 35 made clear that noncitizen removals would continue; no other information mattered under Plaintiffs' theory.

The Organizational Plaintiffs also assert that they filed on the "first day that was permissible under the NVRA's 30-day preelection period." Org. Pl. Opp. at 9 (Dist. Ct. Dkt. 18-1). The Fourth Circuit appeared to agree. App. 5. But if an alleged violation of the NVRA occurs within 120 days of an election, an aggrieved person may file suit 20 days after they provide notice to the State. 52 U.S.C. § 20510(b). Suit therefore could and should have been filed by the end of August. Indeed, the Organizational Plaintiffs admit that they put Virginia "on notice about the potential NVRA violations in August," Org. Pl. Opp. at 18 (Dist. Ct. Dkt. 18-1), and so there was no reason to wait until October 7 to sue.

The United States' only excuse for its tardiness is that the voting-rights section of the Department of Justice was somehow unaware of the removals until October of 2024. Dist. Ct. Dkt. 20 at 28–29. Given that the media was widely reporting on this controversy,[5] the United States surely could have become informed earlier by exercising a modicum of diligence.

The Fourth Circuit also adopted Plaintiffs' argument that *Purcell* cannot apply to quiet period claims because, by their nature, violations can only occur within 90 days of an election. U.S. Br. 21–22 (Dist. Ct. Dkt. 9-1). But that argument cannot excuse Plaintiffs' decision to wait until the eve of the election to seek relief, even

[5] *See, e.g.*, Suzanne Gamboa, *Virginia Removes 6,303 'Noncitizens' from Voter Rolls, Fueling Fraud Allegations*, NBC NEWS (Aug. 23, 2024), https://nbcnews.to/4fmBJhA.

though there was nothing stopping them from bringing the claims at least 40 days earlier. See 52 U.S.C. § 20510(b). The decision to wait has serious and deleterious consequences for Virginia. By the time that the preliminary-injunction hearing in this case took place, early voting had been ongoing for a month, registration had closed, and the deadline to request a mail-in ballot had passed. None of these dates would have been an issue if either party had sued in August.

At most, the Court could consider the nature of the 90-day Quiet Period as part of the balancing inherent in a *Purcell* analysis. See *Merrill*, 142 S. Ct. at 881 n.1 (opinion of Kavanaugh, J.) (explaining that *Purcell* can factor in "the nature of the election law at issue"). Yet that balancing must also account for the delay. The Plaintiffs cannot claim that *Purcell* is inapplicable to the 90-day quiet period when they did not bring their case until 60 days into that window.

IV. The changes required by the district court's injunction will create significant costs, confusion, and hardship

"Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges." *Merrill*, 142 S. Ct. at 880 (opinion of Kavanaugh, J.). In large part because these burdens increase as Election Day draws closer, Virginia closes its registration system 21 days before the election. App. 89 ¶ 33. Yet the district court's injunctions will reopen it, forcing local registrars to re-enroll around 1,600 self-identified noncitizens, most of whom have had their status recently confirmed by the United States' own database.

Not only does the injunction force the various registrars to re-enroll self-identified noncitizens past the registration deadline, it also requires ELECT to take a variety of burdensome actions. Again, the district court ordered officials to send letters rescinding the removal notices and to draft and "issue guidance to county registrars in every local jurisdiction." See App. 8–9. Attempting to send such notices and to give last-minute guidance to general registrars will create confusion and make even-handed administration of the election much more difficult. App. 91–92 ¶¶ 44–46. There is no way to guarantee that the 133 registrars in Virginia will uniformly apply such newly promulgated guidance. Indeed, it is almost certain that they will not, despite the Applicants' best efforts. The potential for confused and nonuniform treatment across jurisdictions is exactly what *Purcell* is designed to avoid. See *Wis. State Legislature*, 141 S. Ct. at 29 (Gorsuch, J., concurrence); *id.* at 31 (Kavanaugh, J., concurrence); *Merrill*, 142 S. Ct. at 881 (opinion of Kavanaugh, J.).

And all of these requirements will entail a massive influx of work for the registrars and confusion among voters just days before a presidential election. App. 91–92 ¶¶ 44–46. Every minute spent on compliance with this injunction is a minute that could have been spent on ensuring a smooth and trustworthy election.

Finally, the court-ordered remedial mailings informing people that they have been improperly removed from the voter rolls and are being restored to the rolls carries a risk of confusing noncitizens into thinking that they can vote. It is true that the mailing will state that noncitizens are not eligible to vote, see App. 9 ¶ 5(d), but the Plaintiffs' entire legal theory is that people accidentally end up removed from the

rolls because they did not carefully read prior communications from state agencies. The injunction also requires the Commonwealth to issue a press release stating that it was not allowed to remove the self-identified noncitizens from the ballot. App. 9 ¶ 6(b). It would not be surprising if some noncitizens understood these statements as an authorization for them to vote.

Not only would such a mistake potentially expose the noncitizens to criminal charges, such court-introduced errors would severely undercut the public's faith in our electoral system. The point of *Purcell* is that election administration is a complicated endeavor even without judicial intervention. "Late judicial tinkering with election laws," even with the best of intentions, "can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill*, 142 S. Ct. at 881 (opinion of Kavanaugh, J.). The Court should therefore stay the injunction.

V. This Court is likely to grant review

Finally, to the extent the Court considers whether there is "a reasonable probability" that it would grant certiorari if the district court's judgment were affirmed by the Fourth Circuit, a stay is also warranted on that ground. *Merrill*, 142 S. Ct. at 880 (opinion of Kavanaugh, J.). Whether the NVRA shields noncitizens from removals has divided the circuits. The Eleventh Circuit held that noncitizens are "registrants" within the meaning of the NVRA, and thus that the NVRA protects noncitizens from removal from the voter rolls. See *Arcia*, 772 F.3d at 1346–47. The Fourth Circuit agreed. App. 3–4. But the Sixth Circuit has held that "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." *Bell*, 367 F.3d at 591–92 ("The National Voter Registration Act protects only 'eligible' voters.'"); see also *Florida*, 870 F. Supp. 2d 1346 (adopting the *Bell* view pre-*Arcia*); *Mi Familia Vota*, 691 F. Supp. 3d 1077 (adopting the *Arcia* view). The lower courts are thus divided on an important issue of election law. And, as discussed above, the Fourth Circuit's ruling here adopted an incorrect interpretation of the statute.

This Court has routinely granted certiorari on important and recurring issues of election law, especially when the circuits disagree. See, *e.g.*, *Brnovich* v. *DNC*, 141 S. Ct. 2321 (2021). Indeed, in the past few years, this Court granted *Intertribal Council*, 507 U.S., and *Husted*, 584 U.S. 756 (2018), both of which were NVRA cases, without a circuit split. The fact that a split exists here only serves to confirm that there is a reasonable likelihood of certiorari.

Not only has the scope of the NVRA's removal provisions divided lower courts, but it is also an especially important issue. See Sup. Ct. R. 10. The rules surrounding elections should be stable and knowable for voters, election officials, and States themselves. But the current confusion surrounding the NVRA makes the rules anything but clear. States are unaware of when, or whether, they can remove noncitizens from the voter rolls. They need to know with certainty whether they can remove noncitizens at any point, only outside of the Quiet Period, or never.

CONCLUSION

The application for a stay of the preliminary injunction should be granted before October 30, 2024, or following an immediate administrative stay to permit the orderly resolution of this motion.

October 27, 2024

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