No. 18-11808-GG

In the United States Court of Appeals for the Eleventh Circuit

AMERICAN CIVIL RIGHTS UNION,
Plaintiff- Appellant,
v.
BRENDA SNIPES, in her official capacity as the Supervisor of Elections of Broward County, Florida,
Defendant-Appellee,
1199 SEIU UNITED HEALTHCARE WORKERS EAST,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida, in Case No. 16-cv-61474 (Hon. Beth Bloom)

BRIEF FOR APPELLANT AMERICAN CIVIL RIGHTS UNION

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CERTIFICATE OF INTERESTED PERSONS AND FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellant American Civil Rights Union furnishes the following Certificate of Interested Persons and Corporate Disclosure Statement:

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CORPORATE DISCLOSURE STATEMENT

The American Civil Rights Union is a non-profit 501(c)(3) organization incorporated under the laws of the District of Columbia. The organization is not publicly held and issues no stock. Therefore, no person or corporation owns 10 percent or more of its stock.

STATEMENT REGARDING ORAL ARGUMENT

Appellant American Civil Rights Union requests oral argument. This case presents questions of first impression for this Court, and raises questions of interpreting the federal statute at issue here that have not been decided by any United States Court of Appeals.

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STATEMENT OF JURISDICTION

The American Civil Rights Union brought this suit, invoking the district court's jurisdiction under 28 U.S.C. § 1331 because this case involves federal questions arising from an Act of Congress. Following a bench trial, the district court issued a final judgment on March 30, 2018, resolving all claims in this case. The American Civil Rights Union timely appealed on April 29, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred as a matter of law in holding that the list-maintenance obligations imposed by the National Voter Registration Act ("NVRA"), as clarified by the Help America Vote Act ("HAVA"), are limited to removal of voters who have become ineligible by reason of death or change of address.

2. Whether the district court erred as a matter of law in holding that the NVRA's mandate for election officials to "conduct a general program that makes a *reasonable* effort to remove the names of ineligible voters from the official lists" by reason of death or relocation is met by compliance with minimum requirements established by state law instead of a professional standard or care.

3. Whether the district court erred as a matter of law in holding that HAVA's mandate for election officials to "coordinate the computerized [voter] list with State

agency records on death" creates a safe harbor for meeting the NVRA's requirement of "conduct[ing] a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists" by reason of death, when state agency records do not include out-of-state deaths.

STATEMENT OF THE CASE

Congress enacted the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (now codified at 52 U.S.C. § 20501 *et seq.*), to codify a careful balance. On one side, Congress made it easier to register to vote. On the other side, Congress required election officials to maintain accurate voter rolls by removing ineligible voters from those expanded rolls. A decade later, Congress enacted the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (now codified at 52 U.S.C. § 20901 *et seq.*) ("HAVA"), which was designed in part, as the Supreme Court itself has recently recognized, to "clarify" the obligations imposed by the NVRA.

Protecting the integrity of America's electoral systems is a primary focus of the American Civil Rights Union ("ACRU"), as a central component of the ACRU's mission to protect the civil rights of all Americans by educating the public about constitutional government. The ACRU is a 501(c)(3) nonprofit organization incorporated in Washington, D.C., that in recent years has primarily focused on voting rights and election integrity.

ACRU's research revealed that in Broward County, Florida, there was an implausibly high number of names on the County's voter rolls relative to the number of voting-age residents in the County—in fact, the data showed voter registrations at approximately 100 percent of the County's voting-age population, which is far above the national average. *See* Doc. 217-9 at 5. An expert analysis showed this unrealistic 100 percent registration rate persisted through 2010, 2012, and 2014. *Id.* at 6-7. This data from the U.S. Election Assistance Commission and the U.S. Census Bureau (in its American Community Survey) is the "gold standard" used as the basis for many federal programs that consider population. Doc. 229 at 84:5-18.

Pursuant to the requirements of the NVRA, ACRU sent a letter on January 26, 2016, to Brenda Snipes, who is the Broward County Supervisor of Elections, a position authorized by Florida statute. FLA. STAT. § 98.015. ACRU informed Snipes that Broward County had "an implausible number of registered voters," and that the County was thus in violation of the NVRA. Doc. 1-1.[1] ACRU offered to work with the County to cure that deficiency, and gave notice of intent to litigate if the situation were not remedied. *Id.*

When Snipes rebuffed ACRU's efforts to assist, Doc 1-2, ACRU filed this suit on June 27, 2016 under Section 8 of the NVRA, 52 U.S.C. § 20510, both in its

[1] The letter also contends that the County is in violation of 52 U.S.C. § 21083(a)(2)(A), which is part of the Help America Vote Act (HAVA).

corporate capacity and on behalf of its members in Broward County. Doc. 1, 1-2. 1199 SEIU United Healthcare Worker East intervened in the lawsuit on the side of Snipes.

The district court held a five-day bench trial from June 25 to August 2, 2017, during which the specific facts of Broward County's noncompliance became clear.

The testimony of ACRU's population and voter registration statistics expert, Dr. Steven Camarota, showed that the registration rate was above or very close to 100% for the election cycles of 2010, 2012, and 2014. Doc. 217-9 at 6-7. Although SEIU's expert challenged ACRU's analysis on the ground that the registration figures and population figures were not exactly contemporaneous—population data for each year was based on July estimates from the U.S. Census Bureau, while voter registration data was based on October voter statistics from the Florida Secretary of State—he did not provide any data that would lead to a different result or contend that any differences would have been material to ACRU's expert's conclusion that voter registration rates in Broward County were extraordinarily high. Doc. 233 at 169-173.

ACRU's election administration expert, former Colorado Secretary of State Scott Gessler, examined the condition of the County's rolls and Snipes's procedures in light of Florida law, concluding that the Snipes's list maintenance efforts are not reasonable and do not constitute a general program of list maintenance. Doc. 229 at

145:6-10; Doc. 217-10 ¶ 17; Doc. 217-3 ¶ 13. Based on his review, he determined that Snipes does not perform even the minimum list maintenance procedures required by Florida law. Doc. 229 at 182:2-191:13.

In addition, uncontested evidence showed that Snipes does nothing to verify whether voter registration applicants are citizens and thus eligible to vote, and that she has no program in place to identify and remove non-citizens already on the voter rolls. Doc. 232, at 35, 90-92. It also showed that Snipes does not have any program in place to identify and remove voters who become ineligible by registering and voting in other states, or who die in other states. Doc. 232 at 35, 88-89. Snipes also admitted that she had received information on 1,200 voters who were improperly registered at commercial addresses, but that those individuals' addresses were simply changed to the elections office address rather than being placed in the pipeline for cancellation. Doc. 232 at 158-59; Doc. 231 at 150-54.

The weight of the evidence also showed that Snipes did not properly utilize any one of the three alternative procedures required by Florida law. Snipes and her staff admitted that the office does not obtain change-of-address information from a licensed USPS vendor. Doc. 229 at 184:3-25.; Doc. 217-7 at 7; Doc. 217-10 ¶¶ 23, 24 (citing Def. Resp. to Interrogatory No. 17). Contemporaneous certifications of list maintenance do not claim to have done any mass *nonforwardable* mailings, as Florida law requires. Doc. 217-5; FLA. STAT. § 98.065(2)(b)-(c). And although

Supervisor Snipes "amended"—doctored is the more appropriate word—the certificates after this litigation was underway to claim that she had done mass *nonforwardable* mailings, Doc. 217-6, the actual documentary evidence of the mailings themselves demonstrate that all of the large mailings done by her office are clearly marked as *forwardable* or not marked at all (and the default for unmarked First Class mailings is *forwardable*, per postal regulations), Doc. 217-13—a point about which Snipes and her staff were confused at trial. *Compare* Doc. 232 at 59 (Mary Hall, contending that they did "non-forwardable mailings" of vote by mail ballots), *with id.* at 74 (acknowledging the ballots were sent by First-Class mail [which is, by default, forwardable], and not recalling whether non-forwarding was requested); *compare also id.* at 59 (Mary Hall contending that voter registration cards were sent by forwardable mail) *with id.* at 87 (Snipes stating that she thought the voter registration cards were "non-forwardable," but that she might "be wrong").

Gessler's expert opinion also included that a reasonable list maintenance program under the NVRA must feature consistent and written policies and procedures. Doc. 229 at 110:1-112:25. Snipes had no written policies and procedures other than the online software help system that is part of the Voter Registration System ("VR System"), a proprietary third-party software program used by most supervisors of election in Florida. Doc. 217-10 ¶¶ 16-17; Doc. 244 at 22-23. The third-party VR System manual does not include procedures for all of the

County's list maintenance-related activities, such as how to handle ineligibility information received from a third party under FLA. STAT. § 98.075(6) or how to respond registrations at invalid commercial addresses. Doc. 231 at 153:22-154:24. The VR System manual is proprietary and not open to public inspection. Doc. 233 at 6:8-12.

Finally, Gessler concluded that the fluctuating numbers of registrations moved into inactive status and then also the numbers moved from inactive to ineligible were not consistent with a reasonable industry standard program of list maintenance, Doc. 229 at 163:12-18, 164:16-166:4, examining the evidence, Doc. 217-3 at 8. It is common for consistent list maintenance activities to result in consistent and regular removals due to population mobility, Doc. 229 at 140:24-25, and the Florida Division of Elections requires expired inactive registrations to be removed before the end of the year following general elections, Doc. 217-13.

Third parties also contacted Snipes' office regarding invalid registrations and testified at trial. In 2012, Richard DeNapoli contacted Snipes regarding decedents from the Social Security Death Index who were still active on County rolls. Doc. 230 at 246:22-247:5, 247:8-248:3, 250:12-15. In December 2013, Gregg Prentice gave Snipes information regarding 1,200 registrations potentially at invalid commercial addresses on the official Broward County voter roll. Doc. 231 at 149, 153. Those voter addresses were eventually updated, not to residential addresses but

to the election office itself, in mid-2015—after the intervening federal midterm election. In 2014, Mr. Richard Gabbay catalogued inaccurate and non-current information on the rolls in his community. Doc. 231 at 99:8-100:9, 103:11-105:19; Doc. 223-29. In 2016, William Skinner and Kirk Wolak found names on County rolls that were also registered in New York and sent this information to Snipes in August 2016, with no response until 2017 after this suit commenced. Doc. 230 at 164:4-9, 167:12-16, 168:6-10, 169:7-10, 170:11-15; Doc. 217-1; Doc. 217-2.

Snipes does not use information from the Department of Highway Safety and Motor Vehicles database for list maintenance purposes. Doc. 233 at 92:5-6. And she does not attempt to obtain or use out-of-state registration information for list maintenance purposes, as authorized by FLA. STAT. § 98.045(2)(b), even though she is aware of potential inaccuracies in the voter rolls based on out-of-state registrations. Doc. 232 at 35:1-4; Doc. 230 at 170:10-172:8.

Subsequent to the bench trial, the district court issued a judgment in favor of the County on March 30, 2018. Doc. 244. ACRU then timely appealed to this Court on April 29, 2018. Doc. 246.

STANDARD OF REVIEW

This Court reviews *de novo* conclusions of law following a bench trial, and reviews factual findings for clear error. *Fla. Int'l Univ. Bd. of Trs. V. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1253 (11th Cir. 2016). This Court also reviews *de novo*

a district court's application of law to facts. *Holston Invs., Inc. v. Lanlogistics, Corp.*, 677 F.3d 1068, 1070 (11th Cir. 2012). The issues presented in this appeal are either pure questions of law or of how the law applies to specific facts, all subject to *de novo* review here.

SUMMARY OF ARGUMENT

The district court erroneously held that the list-maintenance obligations imposed on state and local election officials by the NVRA only require removal of voters who have become ineligible by reason of death or change of address, not on any other ground. This holding fails to take account of both the statutory purpose and other text of the NVRA, as well as the explicit text of HAVA, which, as the Supreme Court has recently recognized, clarifies the NVRA. Uncontested evidence clearly demonstrated, among other problems, that Supervisor Snipes did not verify the citizenship eligibility of voter registration applicants, or have any program to identify and remove non-citizen voters already on the rolls.

With respect to list-maintenance to remove voters who had become ineligible by reason of death or relocation, the district court erroneously held that the "reasonable effort" standard mandated by federal law could be met by partial compliance with requirements set forth in state law, rather than a professional standard of conduct. And even there, it ignored Supervisor Snipes's numerous failures to comply with state law.

Finally, the district court erroneously held that a mandate in HAVA that election officials coordinate their voter list with State agency records on death created a safe harbor, exonerating election officials from taking reasonable steps to identify and removed deceased voters who had died in other states.

ARGUMENT

I. SUPERVISOR SNIPES FAILED TO CONDUCT LIST MAINTENANCE TO REMOVE INELIGIBLE VOTERS, AS REQUIRED BY FEDERAL LAW, OTHER THAN FOR THOSE WHO BECAME INELIGIBLE BY REASON OF DEATH OR RELOCATION.

Pursuant to its authority under the Elections Clause to regulate the "Times, Places and Manner of holding Elections" for federal officers, U.S. CONST. art. I, § 4, cl. 1, Congress enacted the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (now codified at 52 U.S.C. § 20501 *et seq.*) ("NVRA"), and the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (now codified at 52 U.S.C. § 52 U.S.C. § 20901 *et seq.*) ("HAVA").

Congress explicitly declared its twin purposes in enacting the NVRA, codified in the "Purposes" section of that statute. The first is to make it easier for eligible citizens to register to vote in federal elections. Congress then balanced that objective with the second: helping to ensure the integrity of the election process by providing for clean, current, and secure voter rolls, codified in purpose statements (3) and (4). Specifically, Congress declared in the first section of the statute that:

> The purposes of this chapter are—

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
> (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
> (3) to protect the integrity of the electoral process; and
> (4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501(b); *see also Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018) ("The Act has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls").

These are the purposes that inform the NVRA's operative provisions, including the list-maintenance provisions and requirements codified at 52 U.S.C. § 20507, enforceable by a private right of action provided for in Section 8 of the NVRA, and codified at 52 U.S.C. § 20510.

A. Federal law requires that state election officials conduct reasonable list maintenance procedures to remove *ineligible* voters from the voter rolls, not just voters who have become ineligible because of death or relocation.

Section 8, subsection (a) of the NVRA provides, in relevant part, that:

> (a) In the administration of voter registration for elections for Federal office, each State shall—
> (1) Ensure that any *eligible* applicant is registered to vote …
> …
> (3) provide that the name of a *registrant* may not be removed from the official list of eligible voters except—
> (A) at the request of the registrant;
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
> (C) as provided under paragraph (4);

> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of *eligible voters* by reason of—
>
> (A) the death of the registrant; or
>
> (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section; ….

52 U.S.C. § 20507(a) (emphasis added). In addition, subsection (c)(2) provides:

> (A) 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.*
>
> (B) Subparagraph (A) shall not be construed to preclude—
>
> (i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) [relating to voter requests for removal] or (B) [relating to removals for felony conviction or mental incapacity, if required by state law] or (4)(A) of subsection (a) of this section [relating to the death of the voter]; or
>
> (ii) correction of registration records pursuant to this subchapter.

Id. § 20507(c)(2) (emphasis added).

The NVRA's list maintenance requirements were then clarified and bolstered by Section 303 of the Help America Vote Act ("HAVA"). 52 U.S.C. § 21083; *cf. Husted*, 138 S. Ct. at 1840 (noting, in a case dealing with another NVRA provision, that HAVA "explains the meaning" of the NVRA); *id.* at 1842 (noting that HAVA "amended" and "clarified" the NVRA by "mak[ing] explicit what was implicit" in the NVRA); *see also* Doc. 244 at 9 ("*HAVA sheds further light* on what constitutes a reasonable program to remove voters who have died or changed residence" (emphasis added)). That provision of HAVA requires each state to implement and maintain a single statewide computerized voter database "that contains the name and

registration information of every *legally registered voter* in the state," 52 U.S.C. § 21083(a)(1)(A) (emphasis added), and mandates that election officials, both state and local, "shall perform list maintenance with respect to the computerized list on a regular basis," *id.* § 21083(a)(2)(A).

Removals are to be done "in accordance with the provisions of the" NVRA, which sets out some specific constraints on removals for changes of address, *id.* § 21083(a)(2)(A)(i), but the HAVA statute, like subsection (c)(2) of the NVRA, also provides for the removal of voters who are ineligible on grounds other than death or changes of address:

> the "list maintenance … shall be conducted in a manner that insures that—(i) the name of each *registered voter* appears in the computerized list; (ii) only *voters who are not registered or who are not eligible to vote are removed* from the computerized list; and (iii) *duplicate names are eliminated from the computerized list*."

Id. § 21083(a)(2)(B) (emphases added). And then, confirming that the list maintenance removal obligations are not limited to voters who have become ineligible by reason of death or relocation, HAVA further provides:

> The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> (A) A system of file maintenance that makes a reasonable effort to *remove registrants who are ineligible to vote* from the official list of eligible voters. Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office *shall be removed* from

> the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

52 U.S.C. § 21083(a)(4) (first emphasis added). Finally, with respect to the removal of voters who have died, the states are required to "coordinate the computerized list with State agency records on death." *Id.* § 21083(a)(2)(A)(ii)(II).

All of these provisions are designed to further the third and fourth of the purposes set out in the NVRA, namely, "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." *Id.* § 20501(b)(3), (4).

In sum, the NVRA, as "clarified" by HAVA, mandates list maintenance that includes the following:

1. A general program that includes a reasonable effort to remove voters who become ineligible because of death or relocation (NVRA subsection (a)(4));
2. Ensuring that voter registration lists are comprised only of "eligible" voters (NVRA section 8(a)(1); HAVA subsections (a)(1)(A) and (a)(2)(B);
3. Removal of voters who are "ineligible"/"not eligible to vote" (NVRA section 8(c)(2); HAVA subsections (a)(2)(B)(ii) and (a)(4)); and

4. Elimination of duplicate registrations (HAVA subsection (a)(2)(B)(iii).[2]

B. The District Court Erroneously Held That The List-Maintenance Obligations Were Limited to Removal of Voters Who Have Become Ineligible Because of Death or Relocation.

The district court held that "the list maintenance requirement [of the NVRA] is only as to death or change of address, nothing more." Doc. 244 at 56 n.20; *see*

[2] The NVRA also requires states to "provide that the name of a *registrant* may not be removed from the official list of eligible voters except—(A) at the request of the registrant; (B) as provided by State law, by reason of criminal conviction or mental incapacity; or (C) as provided under paragraph (4)." 52 U.S.C. § 20507(a)(3) (emphasis added). One circuit court has held that, by virtue of this provision, states are prohibited from removing (or at least not required to remove) voters who are ineligible on other grounds. *ACRU v. Philadelphia City Comm'rs*, 872 F.3d 175, 182 (3d Cir. 2017). But in each case specified (voter's request, criminal conviction or mental incapacity, death, and relocation), the statute is addressing the removal of voters who have *become* ineligible, not voters who *never were* eligible. The word "registrant," which by virtue of the obligation imposed in NVRA subsection (1) is defined as "eligible" voters, makes that clear. It is therefore ludicrous to read these provisions of the NVRA as prohibiting the states from removing from the voter rolls individuals who were never eligible to vote in the first place, or from excluding the removal of such ineligible voters from the state's obligation "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. 20501(b)(4); *see also* 52 U.S.C. § 20507(c)(2)(B)(ii) (specifying that the 90-day-prior-to-election freeze on systematic removal programs "shall not be construed to preclude … correction of registration records pursuant to this subchapter"). This Court has already recognized that "an interpretation of the General Removal Provision that prevents Florida from removing non-citizens would raise constitutional concerns regarding Congress's power to determine the qualifications of eligible voters in federal elections." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014). And even if the NVRA could plausibly be so read, such a reading would be erroneous under the clarification provided by HAVA, which quite unambiguously requires the states to have "A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 21083(a)(4).

also id. at 5 ("The Court's focus, and its resulting analysis in this Opinion, center on whether Snipes . . . conducted a general program that makes a reasonable effort to remove ineligible voters by reason of death or change of address"); *id.* at 34 ("The Court emphasizes that its focus remains on the list maintenance required under Section 8 of the NVRA – removal of citizens ineligible to vote by reason of death or change of address); *id.* at 52 ("Throughout this Order, the Court has focused on the one issue properly before it: whether Snipes, as the SOE for Broward County, conducts a general program that makes a reasonable effort to remove the names of ineligible voters from its voter rolls *by reason of (1) the registrant's death or (2) a change in residence of the registrant.*" (emphasis in original)). The district court therefore "limit[ed] its inquiry to" what it perceived as "the two list-maintenance requirements of the NVRA," the removal pursuant to § 8(a)(4) of voters who had become ineligible to vote by reason of death or relocation. *Id.* at 56 n.20. The court deemed irrelevant ACRU's substantial and unrebutted evidence that Snipes did not conduct list maintenance to remove from the voter rolls individuals who were ineligible for other reasons. *See id.* at 31 ("the possibility of duplicate registrations is not material to the Court's analysis"); *id.* at 34 ("The vast majority of Mr. Churchwell's spreadsheets pertained to list maintenance falling outside the purview of the NVRA's list-maintenance requirement, such as duplicate voter registrations, underage voters, and voters residing at a commercial address"); *id.* ("[T]he relevant

portions of Mr. Churchwell's data are limited to deceased voters and those of a voting age of 105 or older to the extent those voters may be deceased"); *id.* at 35 ("Looking at Mr. Prentice's testimony in light of the NVRA's list-maintenance requirements, the Court concludes that the first submission—a voter's use of a non-residential address—is not relevant. A voter's listing of a UPS store as his or her address does not make the voter ineligible to vote *by reason of death or change of address*" (emphasis in original)); *id.* at 56 n.20 (rejecting as irrelevant ACRU's "evidence relating to a purported lack of list-maintenance procedures for the removal of voters ineligible to vote because they are underage, not a United States citizen, failed to supply their legal residence, or are registered to vote in another state"); *id.* at 59 ("the Court limits its focus to those citizen complaints disclosing voter ineligibility by reason of change of address or death").

In so holding, the District Court overlooked the statutory language in both NVRA subsections 8(a)(1) and (4) limiting the voter lists to "eligible" voters; the fact that subsection 8(a)(4) deals with the removal of "registrants"—that is, "eligible" voters; and the mandate in subsection 8(c)(2) that a state "shall complete, not later than 90 days [before federal elections] 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(a)(1), (4), (c)(2) (emphasis added).

More fundamentally, the district court's holding overlooks entirely the requirements of HAVA, which, as the Supreme Court has recently recognized, both clarify and bolster the list maintenance obligations mandated by the NVRA. HAVA makes explicit what was already implicit in the NVRA, namely, that in order to further the NVRA's purpose "to ensure that accurate and current voter registration rolls are maintained," 52 U.S.C. § 20501(b)(4), state election officials must conduct list maintenance to ensure that individuals who are not eligible to vote are not on the voter rolls. HAVA requires a "system of file maintenance that makes a reasonable effort to *remove registrants who are ineligible to vote* from the official list of eligible voters," for example, making explicit what was already at least implicit in NVRA's section 8(c)(2) requirement that states "shall complete [90 days before federal elections] any program … to *systematically remove the names of ineligible voters* from the official lists of eligible voters." HAVA, 52 U.S.C. § 21083(a)(4); NVRA, 52 U.S.C. § 20507(c)(2)(A). Similarly, HAVA, like the NVRA, requires that state voter lists are comprised only of *eligible* voters. HAVA, 52 U.S.C. § 21083(a)(1)(A); NVRA, 52 U.S.C. § 20507(a)(1). But HAVA also makes explicit what was already implicit in the NVRA, namely, that state election officials must conduct list-maintenance activities reasonably designed to ensure that only eligible voters are on the rolls. *See* 52 U.S.C. § 21083(a)(2)(A) ("The appropriate State or local election official shall perform list maintenance with respect to the

computerized list on a regular basis"); *id.* § 21083(a)(2)(B) ("list maintenance … shall be conducted in a manner that insures that—(i) the name of each registered voter appears in the computerized list; (ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and (iii) duplicate names are eliminated from the computerized list").

Because the district court erroneously interpreted the list-maintenance requirements of federal law as limited to the removal of voters who have become ineligible only by reason of death or change of address, its ruling below did not address whether Supervisor Snipe's list-maintenance efforts with respect to other categories of ineligible voters were reasonable, or even whether they were conducted at all. At the very least, ©herefore, © remand would be required to consider that issue. But because ACRU's evidence that Supervisor Snipes did not conduct list maintenance to ensure that the voter rolls did not contain individuals who were ineligible to vote on several grounds other than death or relocation was unrebutted (and, indeed, admitted in many cases), *see infra*, Part I.C, a remand should not be required. As explained more fully below, the existing record conclusively demonstrates that no such list maintenance occurred. ACRU's request for a declaratory judgment that Supervisor Snipes failed to comply with the list-maintenance obligations of federal law, and for an injunction requiring that she conduct and execute reasonable voter list maintenance programs to ensure that only

eligible voters are registered to vote in Broward County, Florida, should therefore be granted by this Court without the need for a remand.

C. ACRU's unrebutted evidence, and Defendant's own admissions, conclusively demonstrate that Supervisor Snipes does not have proactive list-maintenance programs in place to remove from the voter rolls individuals who were ineligible to vote for reasons other than death or change of address.

As noted above, both the NVRA and HAVA require that only "eligible" voters appear on the voter rolls. NVRA, 52 U.S.C. § 20507(a)(1); HAVA, 52 U.S.C. § 21083(a)(1)(A). They also require election officials to have a "program," a "system of file maintenance that makes a reasonable effort to *remove registrants who are ineligible to vote* from the official list of eligible voters." NVRA, 52 U.S.C. § 20507(c)(2)(A); HAVA, 52 U.S.C. §§ 21083(a)(2)(A), 21083(a)(2)(B); 21083(a)(4).

Individuals can be "ineligible" to vote for a number of reasons. Both federal and Florida law require that one be a citizen, for example. 52 U.S.C. § 10101(a)(1); FLA. STAT. § 97.041(1)(a)(2). Non-citizens are therefore "ineligible" to register and to vote, and should not be on the voter rolls. Florida law also requires that one be at least 18 years of age and a legal resident both of the State of Florida and of the county in which the person wishes to vote. FLA. STAT. § 97.041(1)(a)(1), (3)-(4). In addition, under Florida law, anyone who has been adjudicated mentally incapacitated with respect to voting in Florida or another state or who has been

convicted of a felony, and has not had his or her right to vote restored, is ineligible to register or vote in Florida. FLA. STAT. § 97.041(2)(a)-(b). All of these eligibility requirements are covered by the mandates in the NVRA and HAVA that only "eligible" voters be on the rolls, and that "ineligible" voters be removed from the rolls.

Beyond the limited programs dealing with the removal of voters who have become ineligible by reason of death or relocation (which, as discussed in Part II below, do not themselves even meet the "reasonable effort" standard mandated by federal law), the unrefuted evidence introduced in the district court below demonstrated that Supervisor Snipes has not implemented *any* program, much less a reasonable one, to identify and remove individuals from the voter rolls who are ineligible on at least some of these other grounds.

1. The unrefuted evidence below demonstrates that Supervisor Snipes does nothing proactively to ensure that noncitizens are not registered or, if registered, are removed from the voter rolls.

The most glaring example of Supervisor Snipes's failure to make a "reasonable effort" to prevent ineligible individuals from registering to vote, or to remove them if already on the voter rolls, involves non-citizens, an issue that ought to be of particular concern in areas such as Broward County with large non-citizen populations. As reported by Data USA, the U.S. Census Bureau's Annual Community Survey 1-year estimate indicates that, as of 2016, 13.5 percent of the

residents of Broward County are not citizens, six and a half percentage points higher (or nearly double) than the national average.[3] At trial, Supervisor Snipes admitted that non-citizens are registered to vote and have voted in Broward County, yet she and her Director of Voter Services, Mary Hall, also admitted that they have taken no action to prevent this or proactively attempt to remove noncitizens from the voter rolls. Doc. 232 at 91:25-92:1; 35:14-36:3.

Instead, as the district court recognized, on the front end, Supervisor Snipes passively relies on voter registration applicants checking a "citizen" box on the voter registration form without doing anything to verify that the applicant is actually a citizen. Doc. 244 at 50 (citing Doc. 232, Tr. D4/35-36). Indeed, in response to a question at trial whether her office "independently verif[ied] citizenship," Snipes admitted not only that they did not, but that there was no system in place for [them] to verify citizenship." Doc. 232, Tr. D4/151:11-13. Supervisor Snipes called this the "honor system." Doc. 232, Tr. D4/151:24.

Supervisor Snipes also had no system in place on the back end to proactively identify non-citizens already registered to vote and then to remove them from the voter rolls. Rather, as the district court recognized, she merely reacts to the limited amount of information about non-citizens she receives. Doc. 244 at 50 (citing Doc. 232, Tr. D4/90-91) ("Occasionally, the U.S. Department of Homeland Security

[3] https://datausa.io/profile/geo/broward-county-fl/#category_heritage.

sends individuals applying for citizenship to the BCSEO to obtain documentation indicating whether they have registered to vote as non-citizens.… Those non-citizens who registered to vote are then removed from the voter rolls."); *see also* Doc 232 at 56 (testimony of Mary Hall) ("They request to be removed themselves, whether it's ---t could be a voter that comes in and say: 'I'm no longer a citizen. I'm'a non-citizen. Please remove me.'"); Doc. 232 at 104:8-10 (Snipe's admission that they've had registered voters self-remove because they are not citizens). The information is so limited that in the three year period between January 1, 2014 and December 31, 2016, Snipes removed only 4 registered voters who were ineligible non-citizens. Doc. 244 at 50; Doc. 217-5 at 2-13.

Neither the "honor system" on the front end, nor the reactive effort on the back end to remove the few non-citizens brought to her attention, qualifies as a program of list maintenance designed to protect the integrity of the electoral process and to ensure that accurate and current voter registration rolls are maintained, as the NVRA and HAVA require.

It is not as though the tools to implement such a system do not exist. As ACRU's expert noted, two such tools are readily available. First, Florida has had access to the federal Systematic Alien Verification for Entitlements ("SAVE") program since 2012, which allows authorized users to determine the citizenship of legal and formerly-legal residents. Snipes and her staff admitted that they do not use

the SAVE program or request any other type of information from the Department of Homeland Security regarding ineligible noncitizen registrants. Doc. 217-10 ¶ 70 (citing Def. Resp. to Request for Admission No. 4; Def. Resp. to Production Request No. 6); Doc. 232 at 35:14-36:3.[4]

Second, Florida's own Department of Motor Vehicles verifies the citizenship status of all non-citizen driver's license applicants. Doc. 217-10 ¶ 72 (citing Florida Department of Motor Vehicles, Florida DMV Online Guide, available at http://www.dmvflorida.org/drivers-license-nc.shtml). But here again, Snipes's Director of Voter Services, Mary Hall, admitted at trial that unless the voter actually checked the "not a citizen" box on the DMV voter registration form, they are sent a new voter application. Doc. 232 at 35:21-36:3. No effort is made to tap in to the citizenship verification process that the DMV already undertakes.

None of this uncontroverted evidence was credited by the district court, however, because of its erroneous view that the NVRA and HAVA do not require list maintenance to remove ineligible non-citizens from the rolls. Doc. 244 at 7 ("while the NVRA undoubtedly permits states to remove any non-citizen who

[4] SEIU's own expert did not dispute the availability of the SAVE program, but rather cautioned that its use might lead to "false positives." But Plaintiff is not suggesting that the SAVE program be used to automatically bar acceptance of a voter registration application, or to automatically cancel voters already on the voter rules. Rather, it should be used to identify those who are potentially non-citizens and therefore ineligible to vote, triggering further investigation as necessary.

somehow becomes registered to vote when such individuals come to the state's attention, it does not require a generalized program that attempts to identify such voters" (citing *ACRU*, 872 F.3d at 182; *Arcia v. Detzner*, 772 F.3d 1335, 1346-47 (11th Cir. 2014))).

2. **The unrefuted evidence below demonstrates that Supervisor Snipes does nothing proactively to ensure that Broward County voters who register in other states are removed from the voter rolls.**

The next most glaring example of Supervisor Snipes's failure to remove ineligible voters from the voter rolls involves people who are registered in multiple jurisdictions. Voters who register in another state are ineligible to remain registered to vote in Broward County.[5] Although Mary Hall testified at trial that they obtain duplicate registration information from the state department of elections and process those by merging the duplicates together, Doc. 232 at 66:18-67:25, she admitted that they do not have "any kind of process to ascertain whether or not there are duplicate registrations between Florida and other states," *id.* at 34:25-35:2.

Supervisor Snipes admitted that she was aware of many duplicate registrations between Florida and New York, Doc. 217-10 ¶ 59 (citing Snipes Deposition Exh. 7; Plaintiff's Production ACRU00165-00166, 00183, 00185.). ACRU's expert noted

[5] The district court claimed that, at trial, Plaintiff's witnesses "recognized that there is no prohibition in Florida to be registered in two states at one time." Doc. 244 at 31 (citing Doc. 230 at 141-142, 183). But Mr. Wolak made no such statement, and Mr. Skinner actually stated the opposite, namely, that being registered in two states at one time "can be fine in some states, but not Florida." Doc. 230 at 183:9.

that the information necessary to compare duplicate registrations across jurisdictions is easily obtained, and that doing so is expressly authorized by Florida law. Doc. 217-10 ¶ 61 (citing FLA. STAT. 98.045(2)(b)). But despite that, and despite her knowledge of the significant problem between dual registrations in New York and Florida, Supervisor Snipes does not seek information regarding potential duplicate registrations in Broward County and other states. Doc. 217-10 ¶ 59 (citing Hall Deposition 54:11-22).

ACRU's expert concluded that obtaining the New York voter registration database and comparing it to the Broward County database is a reasonable step that will reduce the bloated registration rolls and address a known problem. Doc. 217-10 ¶ 61. On that point, Defendants offered no rebuttal expert.

The problem here is even worse than failure to have a *proactive* program of list maintenance to identify and remove voters who have become ineligible by virtue of registering to vote in another state, however. Two of Plaintiff's witnesses, Mr. William Skinner and Mr. Kirk Wolak, obtained information on dual New York and Broward County voters themselves. They compared the voter rolls from Broward County with those of New York. Doc. 230 at 167:12-16; 169:7-10. They catalogued duplicates between the lists based on exact matching first name, middle initial or name, last name, and data of birth, totaling 7,635 matches. Doc. 230 at 164:4-9. Mr. Skinner sent this information to Supervisor Snipes in August 2016 under FLA. STAT.

§ 98.075(6). Doc. 230 at 168:6-10; Doc. 217-1; Doc. 217-2. He received no response until February 2017, after this lawsuit had commenced. Doc. 230 at 170:11-15. There is no evidence in the record regarding any action taken by Supervisor Snipes regarding Mr. Skinner's submission, and the district court itself "recognize[d] that Snipes failed to adequately respond to information of potential duplicate voters provided by Mr. Skinner." Doc. 244 at 31. So, apparently, not only does Supervisor Snipes not have a *proactive* program of list maintenance to remove voters who are ineligible because they are also registered to vote in other states, she does not even *reactively* correct her voter rolls once such information is brought to her attention.

And yet again, the district court did not credit this significant and uncontested evidence because, in its view, Section 8 of the NVRA does not require Snipes to review duplicate data in or out of the state. *Id*. at 38. "[T]he possibility of duplicate registration is not material to the Court's analysis," it held. *Id*. at 31.

3. Snipes acknowledged at trial that voters registered at a commercial address remain on the voter rolls.

Florida law requires that one be a legal resident both of Florida and of the county in order to register to vote in that county. FLA. STAT. § 97.041(1)(a)(3)-(4). Florida law also provides for a uniform voter registration application, which must elicit from the applicant the address of legal residence, among other things. FLA. STAT. § 97.052(2)(c). That statute also provides that "If a voter registration applicant

fails to provide any of the required information on the voter registration application form, the supervisor *shall notify* the applicant of the failure by mail within 5 business days after the supervisor has the information available in the voter registration system," and that the applicant is not eligible to vote in the next election if the required information is not provided before the close of registration for that election. *Id.* § 97.052(6). In addition, Florida law provides that "No person shall be permitted to vote in any election precinct or district other than the one in which he has his permanent place of residence and in which he is registered." *Id.* § 101.045(1).

Supervisor Snipes acknowledged as much during her trial testimony. Doc. 232 at 171:8-10. But when provided information in December 2013 that more than 1,200 voters in the county were registered at commercial UPS stores rather than residential addresses, Supervisor Snipes did not respond for months (FLA. STAT. § 98.075(7) requires that a notice be sent to such voters within 7 days), and then merely transferred the address on most (if not all) of the invalid registrations to the address of the Supervisor's office. Doc. 231 at 153-154.

Florida law does provide an exception to the "residence address" requirement for voters "temporarily residing outside the county;" such voters "shall be registered in the precinct in which the main office of the supervisor … is located when the person has no permanent address in the county and it is the person's'intention to remain a resident of Florida and of the county in which he or she is registered to

vote." FLA. STAT. § 101.045(1). But that exception applies to people "temporarily residing outside the county," and then only if they have an intention to remain a county resident. *Id.* It does not apply to the homeless living in the county, for example. *See, e.g.*, Registering the Homeless, Division of Elections DE 89-04 (June 1, 1989) (instructing that the homeless should be registered at a place where they receive mail and "is not to be registered routinely in the courthouse precinct").

Snipes admitted that she did not know if there were homeless people in that group, and that she didn't know a lot about the people in the group. Doc. 232 at 159:17-20. In other words, she did not know whether they qualified to be registered using the election office address. But, contrary to Florida law, she nevertheless moved 1,100 of them "to the Z73 precinct, which is located at" the election office. Doc. 232 at 159:17-20; Doc. 231 at 154:23. Far from ensuring that only "eligible" voters were on the voter rolls, Supervisor Snipes's actions, in this instance at least, all but guaranteed that ineligible voters remained on the rolls.

4. Supervisor Snipes has also admitted that she does not request information regarding whether voters registered in her county have become ineligible due to a federal felony conviction.

Florida law makes felons ineligible to vote, unless and until their civil rights are restored. FLA. STAT. § 97.041(2)(b). Plaintiff's expert acknowledged that Broward County receives information about felon status from the Florida Division of Elections, and further, that the generally consistent pattern of felon removals does

not, in his opinion, give rise to list-maintenance concerns, provided that the information being transmitted from the state includes those convicted of felonies in *federal* court, not just in state courts. Doc. 217-10 ¶¶ 62-64; *see also* Doc. 232 at 123:3-11 (Snipes's acknowledgment that her office receives information on felons from the State). But because Supervisor Snipes admittedly "does not request or directly receive any information or communications form the U.S. Attorney or federal courts regarding felony convictions," she should either confirm that the state Department of Elections obtains and forwards that information, or seek it herself, in order to be taking "reasonable steps" for list maintenance. Doc. 217-10 ¶ 63 (citing Def. Resp. to Production Request No. 4).[6]

In sum, there is a great deal of uncontested evidence demonstrating that Supervisor Snipes does not have a program in place to ensure that only eligible voters are being added to the voter rolls, or that ineligible voters are removed from the rolls, on several grounds of voter ineligibility other than death or relocation. Judgment should have been entered for the Plaintiff.

[6] The same is true with respect to those who have been "adjudicated mentally incapacitated with respect to voting," unless and until voting rights are restored. FLA. STAT. § 97.041(2)(a). The State collects that information and regularly forwards it to the counties. Doc. 244 at 50 (citing Doc. 232 at 190, 192). But because that ineligibility applies to those adjudicated as mentally incompetent in Florida "or any other state," FLA. STAT. § 97.041(2)(a), the process would only constitute a reasonable effort at list maintenance if the state was obtaining mental incapacity information from other states.

II. EVEN WITH RESPECT TO VOTERS WHO HAVE BECOME INELIGIBLE BY REASON OF DEATH OR RELOCATION, SUPERVISOR SNIPES'S LIST MAINTENANCE EFFORTS DO NOT MEET THE STANDARD OF REASONABLENESS MANDATED BY FEDERAL LAW.

Even if one accepts the district court's overly narrow interpretation of the NVRA's list maintenance requirements as limited only to voters who have become ineligible by reason of death or change of address, Supervisor Snipe's efforts with respect to those categories of ineligible voters do not rise to the level of "reasonable," as the NVRA requires. The district court's conclusion to the contrary is wrong as a matter of law.

A. The NVRA's mandate for a "reasonable" list maintenance effort incorporates a professional reasonableness standard.

The NVRA explicitly requires election officials to "conduct a general program that makes a *reasonable effort* to remove the names of ineligible voters from the official lists of eligible voters by reason of" death and change of address. 52 U.S.C. § 20507(a)(4) (emphasis added). ACRU contended below that, by use of the phrase "reasonable effort," the NVRA incorporates a professional reasonableness standard. The district court erroneously rejected that reading of the NVRA's requirement.[7]

[7] The district court also erroneously viewed ACRU's proffered interpretation of the NVRA standard as requiring a "jurisdiction-by-jurisdiction" standard of care. Doc. 244 at 53. Yet a professional reasonable standard of care does not amount to a jurisdiction-by-jurisdiction standard of care; it merely requires the same professional standard of care be applied to whatever circumstances prevail in each jurisdiction.

Courts routinely interpret and apply statutes imposing a "reasonable" care or effort mandate on government officials and others as providing for a professional standard of care. The district court was therefore not operating in a vacuum when determining what a "reasonable effort" means for purposes of an adequate list maintenance program. As the trial court's sister district court in the Northern District of Florida has recognized in another context, for example, "[t]he term 'reasonable' connotes an objective standard, a standard with which physicians, agencies regulating physicians, and courts are well acquainted." *Womancare of Orlando, Inc. v. Agwunobi*, 448 F. Supp. 2d 1293, 1308 (N.D. Fla. 2005). Although the question is one of first impression for purposes of the NVRA, there is also established analogous Eleventh Circuit precedent that is instructive.

When faced with statutes directing that government officials perform their duties "reasonably," this Court has read such a standard to be that of "prevailing professional norms." *Newland v. Hall*, 527 F.3d 1162, 1184 (11th Cir. 2008) (construing *Strickland v. Washington*, 266 U.S. 66, 688 (1984)). In *Newland*, this Court considered an application for writ of habeas corpus based on ineffective assistance of counsel under 28 U.S.C. § 2254(d). *Id.* To render habeas appropriate, federal law prescribes an inquiry into the reasonableness of counsel's actions. 28 U.S.C. § 2254(d)(1)-(2). Either the case must involve "unreasonable application[] of clearly established Federal law," or result in a decision based on "an unreasonable

determination." *Id.* In following the Supreme Court's decision in *Strickland*, this Court held that determining whether attorneys provided ineffective assistance under the statute are to be judged by the "prevailing professional norms," that is, the standard of care a reasonable professional would take at the time of the trial. *Newland*, 527 F.3d at 1201. This standard uses the judgment of peers rather than of lay persons. *Id.* at 1187 ("The … standard is an objective [one]…. [W]e consider what a reasonable attorney would have likely done under the circumstances ….''). In the same way, the reasonableness directive in Section 8 of the NVRA implicates the same concerns the Supreme Court and this Circuit resolved in *Strickland* and *Newland*: judging the sufficiency of administration procedures and the actions of government officials based on reasonableness necessitates an objective professional standard.

If Congress had intended to create a "fire-and-forget" single method that would fulfill all list maintenance obligations, then it would not have required a "reasonable effort." Congress had a decision to make. The goal was to ensure accurate and current lists. It could have employed a strict liability standard, whereby election officials could be found in violation of the NVRA if any inaccuracy or lapse in currency were found in a list. But it did not. Alternatively, Congress could have set out specific minimal activities, as Florida does in its list maintenance statute (as found in FLA. STAT. §§ 98.065, 98.075). But it did not do that either. Instead,

Congress expressly mandated a reasonableness standard. The district court's standard reads out Congress's express instructions.

In other contexts, Congress has used a "reasonable effort" standard as opposed to a specific activity or quantity standard. For example, in 1991 the standard for public liability due to exposure to nuclear radiation in the Price-Anderson Act was switched from a "reasonable effort" standard to a dose limit standard. *See Finestone v. Fla Power & Light Co.*, 272 F. App'x 761, 765 (11th Cir. 2008). Under the "reasonable effort" standard, the testimony of relevant experts in the field would have been required to show liability. *See id.* at 766.

Section 20507 of the NVRA, which adopts a reasonableness standard, thus creates a minimum objective standard for voter list maintenance. While the particular means and tools that each state may adopt to achieve the objective of accurate and current rolls may vary, the statute imposes an obligation that applies equally to all election officials in the state subject to the NVRA. *See United States v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008). A local election official in Colorado, for example, is subject to the same obligation to reasonably maintain clean voter rolls as Supervisor Snipes is in her county. And both can be challenged in federal court for failure to comply with the same standard to reasonably maintain the voter rolls.

In order to determine whether an election official has violated the duty of care regarding list maintenance, a court must weigh the state of the rolls against the efforts being made to maintain them. Whether the effort is reasonable depends upon the risk that ineligible voters are present in the voter rolls and the availability and costs of means to remedy the harm. Liability for failure to exercise care depends upon whether the burden of prevention and cure is less than the probability of harm from leaving the rolls as they are. *See Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1115 (11th Cir. 1992).

Here, a determination of the reasonableness of professional election administration duties should be determined through the use of expert witnesses in the professional field. *Ins. Co. of the West v. Island Dream Homes, Inc.*, 679 F.3d 1295, 1298 (11th Cir. 2012) ("Expert testimony is required to define the standard of care when the subject matter is beyond the understanding of the average juror"). That standard of care amounts to how reasonable professionals in the field would carry out their duties under similar circumstances. *Id.* In complex professional fields such as election administration, the opinions of experienced experts in the field are probative in determining liability. *Id.* The chief election officer of a state under the NVRA is ideally suited to serve as an expert in election administration. *See Cobb v. State Canvassing Bd.*, 2006 NMSC 34, ¶ 44, 140 N.M. 77, 140 P.3d 498, 511 (N.M. 2006) (holding "the Secretary of State is an expert in the area of voting or elections").

ACRU introduced the opinion of an expert in the field of election administration, who concluded that Supervisor Snipes's list-maintenance efforts were not reasonable when compared to the standard of professional care mandated by the NVRA. Neither Supervisor Snipes nor SEIU provided an expert in the relevant professional field offering an opinion to the contrary. *See* Doc. No. 244 at 44-52; *Island Dream Homes*, 679 F.3d 1295 at 1298 (finding that the relevant standard of care must be determined through the use of expert witnesses in the professional field). Instead, SEIU's expert was put forward as an expert on political science and elections at the state and local level, but without any professional election administration expertise. Doc. 182 at 33 n.16; Doc. 233 at 104, 172-74.

The district court, however, disregarded the professional opinion of Mr. Gessler, despite being presented with no countervailing professional opinion to adopt. The district court did not review and weigh evidence from competing experts. *See Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1272 (11th Cir. 2003) ("We are not dealing, therefore, with a case involving a battle of competing experts"). Instead, the district court substituted its own judgment regarding what the standard should be for list maintenance by election administration professionals. But, according to the only evidence of the applicable standard of care, Supervisor Snipes has not conducted a reasonable program of list maintenance as would a reasonable election administration official when faced with

the same condition of the voter rolls and with the same mandatory and available tools under state law. Doc. 217-10. The opinions of ACRU's expert therefore constitute unrefuted evidence regarding the prevailing professional norms under the NVRA regarding list maintenance practices and should have been accepted as such. For example, Mr. Gessler opined that a high registration rate is considered a red flag according to professional norms and that registration rates should be monitored. Doc. 229 at 135:16-138:10, 139:1-11; Doc. 217-10 ¶ 43. Accordingly, a reasonable election administrator should be monitoring registration rates regardless of whether the rate is in fact high.

B. Even if "reasonable efforts" under the NVRA can be defined by minimum requirements set out in state law, Snipe failed to comply with several list maintenance obligations imposed by Florida law.

Instead of adopting an objective professional standard for the "reasonable effort" mandate of the NVRA, the district court held that the "reasonable effort" requirement was satisfied if the list-maintenance program:

(1) complies with all mandatory list-maintenance tools established by the governing state to remove the names of ineligible voters by reason of death or change in residence;

(2) Uses NCOA information supplied by the USPS, or similarly reliable information garnered from other sources, such as mass mailings or targeted

mailings, to identify registrants whose addresses have changed to update its voter rolls; and

(3) Uses information from the state health department or other similarly reliable sources to identify voters who have recently died to update its voter rolls and remove deceased individuals from the rolls.

The district court then found that Supervisor Snipes met all three requirements, and therefore complied with the "reasonable effort" mandate of federal law.

The district court's conclusion here is faulty as a matter of law for three significant reasons. First, it relies on the odd notion that a state statute can alter the meaning of a mandate imposed by federal law. It cannot. *See* U.S. CONST. art. VI, cl. 2. Second, it continues to treat the list-maintenance mandate imposed by federal law as limited to removals of voters who have become ineligible by reason of death or change of address, thereby excluding from its reasonable list-maintenance analysis Snipes's admitted failure to comply with numerous list-maintenance procedures mandated by Florida law (which would, of course, be highly relevant if, as the district court held, state law determined the standard for reasonable list maintenance required by federal law). And third, it erroneously infers the word "only" into HAVA's mandate that election officials "coordinate the computerized

list with State agency records on death," 52 U.S.C. § 21083(a)(2)(A)(ii)(II), thereby creating a safe harbor as a matter of law where one does not exist.

1. **State law cannot reduce a mandate imposed by federal law.**

The Supremacy Clause of the Constitution makes clear that federal laws made in pursuance of the Constitution are the supreme law of the land. U.S. CONST. art. VI, cl. 2; *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1121-22 (11th Cir. 2004). Both the NVRA and HAVA were enacted pursuant to Congress's clear authority under the Elections Clause to regulate the "Times, Places and Manner of holding Elections" for federal officers. U.S. CONST. art. I, § 4, cl. 1. While the States are free to impose additional list-maintenance requirements on themselves, they cannot create safe harbors in state law that lessen the obligations imposed by a valid federal law. What constitutes "reasonable efforts" at list maintenance to ensure that only eligible voters are on the voter rolls and able to vote in federal elections is therefore a question of federal law, not state law. The district court's holding to the contrary—that the "reasonable effort" requirement in both the NVRA and HAVA was satisfied if, *inter alia*, the list-maintenance program "complies with all mandatory list-maintenance tools established by the governing state to remove the names of ineligible voters by reason of death or change in residence," Doc. 244 at 13—subordinates federal law to state law on a matter constitutionally delegated to Congress. That has it precisely backwards. *See Taylor v. General Motors Corp.*,

875 F.2d 816, 822 (11th Cir. 1989). Under the Elections Clause, States are free to enact election laws, but when Congress chooses to enact a statute regarding the time, place, or manner of elections, state laws become subordinate to the federal law. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013). The district court's holding to the contrary is therefore clearly wrong as a matter of law.

2. Supervisor Snipes failed to comply even with the mandates of Florida law, including the mandates related to death and change of address.

Even if state law (rather than a professional standard of care) could set the meaning of the "reasonable effort" required by federal law, Supervisor Snipes should still be found in violation of the NVRA because she was admittedly and irrefutably not in compliance with the minimum list maintenance procedures required under Florida law.

Florida law contains a statutory system of list maintenance, which serves to implement the list maintenance requirements of the NVRA and to attempt to achieve the goals of the NVRA. FLA. STAT. tit. IX, ch. 98. As recognized by the district court and as admitted by the Defendant, Supervisor Snipes fails to comply with many of the list maintenance mandates contained in Florida law, including:

- FLA. STAT. § 98.065(6), which requires each county supervisor of elections to "certify to the department" of state "no later than July 31 and January 31 of each year, … the list maintenance activities conducted during the first 6 months and the second 6 months of the year, respectively, including

the number of address confirmation requests sent, the number of voters designated as inactive, and the number of voters removed from the statewide voter registration system." Each year since 2009 Supervisor Snipes filed certifications indicating the requisite statistics on number of mailings, but which failed to indicate which (if any) list maintenance activities had been conducted. Moreover, the certification amendments were inaccurate and inconsistent with her records. Doc. 244 at 21; Doc. 217-6; Doc. 217-13; Doc. 233 at 82-83. As a result, the *amended* certifications on file with the state are inaccurate, as County director who prepared them conceded at trial. Doc. 233 at 73-82. Gessler testified that such reporting requirements are essential in order for a State to conduct a reasonable list maintenance program. Doc. 229 at 15-25.

- FLA. STAT. § 98.075(6), which specifies that, upon receipt of information about a voter's ineligibility from outside sources, a county election supervisor "*must* adhere to the procedures set forth in subsection (7)" regarding notices to be sent to voters. (emphasis added). Snipes received information regarding registrant's ineligibility, but the uncontroverted record shows she did not follow the procedure outlined in FLA. STAT. § 98.075(6)-(7). Doc. 230 at 170:8-171:21; Doc. 231 at 107:12-20; 108:17-109:7; 112:20-24; 151:1-4; 153:24-154:7. In fact, Snipes

maintains that she has no obligation to follow the notice requirement of § 98.075(7), instead claiming that "it's the Supervisor's latitude of options available" and that they "research [the information] first before [they] take any action." Doc. 232 at 154:2-5, 17-18.

- Although Florida Division of Elections regulations require removing inactive registrations in December of even numbered election years, Doc. 217-4 at 26, Snipes did not follow these directives after the 2010 and 2014 elections, Doc. 217-5 at 11, 24.

Thus, even if the list-maintenance obligations of the NVRA and the HAVA could be defined by compliance with requirements set out in state law rather than the professional reasonableness standard set out in federal law, Snipes's violations of these mandatory procedures in Florida's list maintenance program would violate her NVRA obligations.

The district court discounted all of these failures to comply with the list-maintenance mandates of state law as irrelevant, considering instead only the state law mandates related to the removal of voters who had become ineligible by reason of death or relocation. Doc. 244 at 27. But even with respect to death and relocation list maintenance, Supervisor Snipes failed to comply with the mandates of state law, and the district court's legal conclusions to the contrary are based on a misunderstanding of key terminology by Snipes and her witnesses.

The district court held that Snipes complies with two of the list maintenance requirements contained in Florida law: mailings based on change of address information supplied through the National Change of Address system maintained by the United States Postal Service as described at FLA. STAT. § 98.065(2)(a) and mass nonforwardable mailings under (2)(b). Doc. 244 at 46. And the district court concluded that doing these mailings is sufficient to establish compliance with the list maintenance obligations of the NVRA. *Id.* at 56-57. Even if that were the standard for compliance under the NVRA, the district court's finding that Snipes does mass nonforwardable mailings was incorrect as a matter of law, and its legal conclusion that merely utilizing the NCOA process is alone sufficient list-maintenance to comply with NRVA's "reasonable efforts" mandate, no matter how incomplete the data is or how inaccurate the voter lists remain after that process, creates a stronger NCOA safe harbor that the district court itself previously recognized.

a. *Biennial Mailings: Mass Mailings*

The district court wrongly held that Snipes's mass mailings for list maintenance purposes comply with FLA. STAT. § 98.065(2)(c). Under that statute, a supervisor of elections can use "change-of-address information identified from returned *nonforwardable* return-if-undeliverable mail sent to all registered voters in the county." *Id.* § 98.065(2)(b) (emphasis added). The evidence in the record conclusively shows that Snipes has never done such a mailing. The district court

completely ignores the requirements set out in the text of the subsection and ignores the plain facts in evidence.

None of the larger mailings shown in the invoices and export files from Commercial Printers were for *nonforwardable* mailings. Doc. 233 at 80:5-10; 81:15-82:4; Doc. 217-13. Instead, these were sent "via *forwardable* first-class mail." Doc. 244 at 47 (emphasis added). The 2013 and 2016 mailings were clearly marked "Forwarding Service Requested." Doc. 217-13. By default, a first-class piece of mail is forwardable unless it is marked "Return Service Requested." USPS DOMESTIC MAIL MANUAL 507.1.4.1; 507.1.5.1 ("No Endorsement - –n all cases: Same treatment as 'Forwarding Service Requested.'"); 507.2.3.3.

Moreover, the original certifications reported that Snipes has never utilized mass nonforwardable mailings. Doc. 217-5. When the BCSOE amended the original certifications during this litigation, she added checkboxes claiming to have done six mass nonforwardable mailings under 98.065(2)(b). Doc. 217-6. But the unrefuted record shows that these mailings never happened and that the amendments are inaccurate. Doc. 233 at 73:24-82:4. At trial, the IT Director testified that he amended the certifications to add the mass nonforwardable mailings *without* examining any invoices or records to confirm that the mailings had even been done. *Id.* at 32:19-33:4, 79:3-5; 85:1-3. Rather, he simply added the mass-mailing claims to the certifications because he was instructed to. *Id.* When presented with copies

of the actual mailings and the invoices for those large mailings at trial, he conceded that they did not qualify as mass-mailings under 98.065(2)(b) and that, therefore, the boxes should not have been checked after all in the amended certifications. Doc. 233 at 77-82.

b. *Biennial Mailings: Targeted Mailings*

The third type of mailing prescribed in FLA. STAT. § 98.065(2)(c) involves mailings of nonforwardable targeted address confirmation requests to registered voters who have not voted or requested an update to their records within the last two years. When a supervisor elects to use the targeted mailing procedure, they must send an address confirmation request to all registered voters who meet the above criteria. An address confirmation request is a state prescribed form. *Id.* § 98.0655(1). According to the statute, a targeted mailing is the only prescribed use for the address confirmation request form. The number of address confirmation requests sent out under targeted mailings is supposed to be recorded on the certifications of list maintenance.

The district court was correct in concluding that the BCSOE does not do adequate targeted mailings as defined under FLA. STAT. § 98.065(2)(b). Doc. 244 at 21. Snipes follows no formal procedure for conducting targeted mailings. The IT Director, who is responsible to putting together mailing files that are sent to Snipes vendor for printing, could provide no details regarding how he determines the scope

of the targeted mailings Snipes claims to perform. Doc. 233 at 12:16-21. No such procedure exists in the manual for the VR software program either, which bolsters the conclusion that Snipes lacks adequate written list maintenance procedures.

As correctly noted by the district court, the number of address confirmation requests sent out by the BCSOE as reported on the certifications of list maintenance are too small to possibly include every registrant who has not voted in the prior two-year period. According to the certifications and the mailing files sent to the printer, over an 8-year period, only 17,265 registrants did not vote for 2 years and also did not update their registrations. Doc. 217-6. Over each general election period that is roughly 4,000 registrations per two-year period.

That means all other registered voters, averaging 1.1-1.3 million, either voted every two-year period or, if they did not, contacted the office and updated their address. According to statistics published on Snipes's website, the 2010 general election had a turn out rate of 40.99% of 1,041,761 active registrations (not including inactive registrations), meaning that approximately 614,700 registrants did not vote in 2010. Doc. 217-12. The 2012 general election saw approximately 378,000 active registrants not vote. *Id.* The 2014 general election saw approximately 592,400 active registrants not voting. *Id.* Yet, despite hundreds of thousands of non-voters, only roughly 4,000 targeted mailings were sent out per two-year period. ACRU's expert opined that, in his experience as an election administration professional, this

is an impossibly small number. Doc. 217-10 ¶¶ 32-41. Furthermore, the record shows that only about 150,000 registrants updated their addresses during the relevant time periods. Doc. 233 at 145:5-6.

Yet Snipes amended her certifications of list maintenance to the state claiming that her office performed targeted mailings in 11 time periods since 2009. Doc. 217-5; Doc. 217-6. As shown by the evidence and the findings of the district court, these certifications of targeted mailings are not supported by Snipes's records and are, therefore, misrepresentations of the office's list maintenance activities in violation of FLA. STAT. § 98.065(6). In some instances, the certifications themselves are self-contradictory, in that Snipes claims to have done targeted mailings for a time-period, but the record shows no address confirmation requests were sent out at all. Doc. 233 at 74:17-18.

The district court was wrong to ignore these serious and evident violations of Florida's list maintenance program. Instead, the district court should have concluded that Snipes's failure to submit accurate certifications puts Snipes in violation of her duties under the NVRA.

c. *The NCOA processing*

Finally, although there was some conflicting evidence and failure to produce evidentiary problems regarding whether Supervisor Snipes utilized the NCOA

address correction process,[8] the principal problem with the NCOA issue is a legal one, namely, whether Snipes's utilization of *only* the NCOA process constitutes a safe harbor under 52 U.S.C. § 20507(c)(1), even in the face of extensive evidence showing that the NCOA process significantly undercaptures voters who have moved. Contrary to its earlier rulings denying Snipes's motion to dismiss and then her motion for summary judgment, the district court concluded "that compliance with this safe-harbor provision satisfies Section 8(a)(4)'s list maintenance requirement for address changes." Doc. 244 at 55. Those earlier rulings were correct. In denying the motion to dismiss, the district court noted its agreement with reasoning from the Sixth Circuit in *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016), *overruled on other grounds*, 138 S. Ct. 1833 (2018), namely, that "full compliance with subsection (c)(1) would *comply* with the NVRA's mandates and accompanying constraints," but dismissal was not appropriate because whether Snipes' had complied with all the constraints imposed by that subsection was a "fact-based argument." Then, even once the facts were developed, the district court denied

[8] In her responses to interrogatories and requests for admission, Snipes stated that her office did not use NCOA data for list maintenance, Doc. 217-7 at 8, but after she later intimated that they did, ACRU moved to compel production of all records and data received from the vendor in the supposed NCOA process. Doc. 111 at 4. That motion was granted, Doc. 126 at 6-7, yet Snipes produced no records or data of information received *from* their commercial vendor. Doc. 233 at 86:16-19, 88:6-9. The district court nevertheless found that Snipes' utilized the NCOA process for address correction list-maintenance. Doc. 244 at 46-47.

Snipes' motion for summary judgment, stating: "the Court does not take the view that, as a matter of law, full compliance with the safe-harbor provision necessarily absolves an election official of any liability under subsection (a)(4) of Section 8." Doc. 182 at 31-32. Again relying on the Sixth Circuit's *Husted* decision, the district court agreed that though the safe-harbor provision was "an example of a procedure that *complies* with the NVRA," it was not "an example of a procedure that *satisfies* all of an election official's duties under subsection (a)(4)." *Id.* at 31-32 (emphasis added). The district court then *held* "that although an election official's particular NCOA process for identifying and removing voters who have changed their residence is 'permissible under the NVRA' if it mirrors the safe-harbor provision outlined in subsection (c)(1) of Section 8, such a process does not necessarily demonstrate full satisfaction of all the duties owed by that election official under subsection (a)(4)." *Id.*

The Sixth Circuit's decision in *Husted* has subsequently been overruled by the Supreme Court, of course, but on other grounds. Indeed, when discussing the so-called safe harbor provision of Section 20507(c)(1), the Supreme Court treated it, much like the Sixth Circuit did, as but one permissible trigger that may be used to start a return card removal procedure. *Husted*, 138 S. Ct. at 1839. It also recognized that the NCOA process alone was an inadequate means for capturing voter change of address issues, "because according to the Postal Service '[a]s many as 40 percent

of people who move do not inform the Postal Service.'" *Id.* at 1840. The subsection therefore does not function as a ceiling for permissible change-of-address removal programs. And, by logical extension, Section 20507(c)(1) cannot possibly serve as a floor for satisfactory list maintenance under the affirmative list maintenance duties imposed by Section 8, which is exactly what the district court has done here.

This second point must be true for several reasons. As explained in *Husted*, the subsection addresses the confines of *permissible* list maintenance programs. Thus, it has nothing to do with the scope of what an election official *must* do to conduct reasonable list maintenance. Furthermore, as the district court itself recognized, Doc. 244 at 54, the NCOA example subsection could only conceivably deal with inaccuracies resulting from changes of address and would not take care of inaccuracies from a host of other causes, most obviously such as by reason of death. Yet the text and context of the rest of § 20507(a), especially in light of the main purposes of the statute and the HAVA, make clear that the statute contemplates more than just list maintenance regarding changes of address only.

C. Cross-checking state agency death records is not a safe harbor for a "reasonable effort" to remove voters who have died, particularly in areas such as Broward County with significant numbers of registered voters who die in other states.

Finally, with respect to deceased voters, the district court treated language in the HAVA statute requiring election officials to "coordinate the computerized [voter] list with State agency records on death," 52 U.S.C. § 21083(a)(2)(A)(ii)(II),

as though it were a safe harbor constituting reasonable list maintenance if *only* that were done. Doc. 244 at 9 ("Neither the NVRA nor HAVA requires other death records to be made available to election officials."). The district court's holding on that score is wrong as a matter of law, and the legal error is particularly germane in a county such as Broward County, which has a significant number of registered voters who die out of state. Those deaths are admittedly not identified by a process that coordinates only with "State agency records on death."[9]

Because of that, ACRU's expert opined that for Supervisor Snipes's list-maintenance activities with respect to deceased voters to be reasonable (and therefore in compliance with the NVRA mandate), Snipes should use the U.S. Social

[9] The district court claimed that "other states—including Florida—*may and do* consider death information from other sources such as Social Security Administration records or vital statistics records from other states." Doc. 244 at 9-10 (emphasis added). But the Florida statute it cited merely requires the Department of Elections to "identify those registered voters who are deceased by comparing information received from *either*: a. The Department of Health as provided in s. 98.093; *or* b. The United States Social Security Administration, including, but not limited to, any master death file or index compiled by the United States Social Security Administration." FLA. STAT. § 98.075 (emphasis added). That provision does not require Florida to use the SSDI, or in any way indicate that Florida *does* use it. Supervisor Snipes admitted at trial that she does not use it, and that she did not know whether or not the State did. Doc. 232 D4/88:15-20; 89:11-21; 99:5-8. But the record does reflect that Broward County does receive calls from relatives of voters who died in other states, triggering a notice and removal process because a significant number of such voters were still on the voter rolls, thereby indicating that the State records do not include out-of-state deaths. Doc. 232 168:17-22; Doc. 217-10 ¶¶ 82-83 (citing Snipes Deposition, 47:18-48:9; Plaintiff's Discovery Production ACRU00207).

Security Administration's Social Security Death Index (SSDI) and the State and Territorial Exchange of Vital Events (STEVE) program, both of which contain notices of deaths both in Florida and outside the state. Doc. 217-10 ¶¶ 81-84 (citing Snipes Deposition, 47:10-48:9 and 61:7-14; Plaintiff's Discovery Production ACRU00207; Def. Resp. to Interrogatory No. 5; Hall Deposition 49:19-50:5).

As noted above, the district court did not consider Snipes's failure to use out-of-state death indexes because of its erroneous holding that "Neither the NVRA nor HAVA requires other death records [than the state's own death records] to be made available to election officials." Doc. 244 at 9. But Supervisor Snipes's admission that she does not use those readily available tools conclusively demonstrates that she has failed to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—(A) the death of the registrant," as the NVRA requires. 52 U.S.C. § 20507(a)(4)(A).

CONCLUSION

Broward County has failed to carry out its obligations under the National Voter Registration Act and the Help America Vote Act to make reasonable efforts to maintain clean voter rolls. This Court should therefore reverse the judgment of the Southern District of Florida.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant American Civil Rights certifies:

This brief complies with the type-volume limitation of Fed. R. App. 29(d) and Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 12,997 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

Executed this 13th day of August 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I further certify that all participants brief in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Executed this 13th day of August 2018.

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