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)

REPLY 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.

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INTRODUCTION

One thing that jumps out from Appellees' opposition brief ("Opp.") is that the principal legal issue presented in this appeal is crystal clear. Appellees contend (and the district court held) that the voter list maintenance mandated by federal law is limited *only* to the removal of voters who have become ineligible by reason of death or relocation. Appellant ACRU contends that the required voter list maintenance must make a reasonable effort to remove ineligible voters no matter the cause, including voters who were never eligible to vote in the first place.

A second legal issue is also squarely presented. Appellees contend (and the district court held) that the requirement in federal law that a "reasonable effort" be made to maintain accurate voter lists is really no mandate at all, but merely something to be undertaken at the discretion of state law. ACRU contends, on the other hand, that the language in this statute mandating a "reasonable effort" actually invokes a professional duty of care.

Finally, despite Appellees' best efforts to obscure the evidentiary record below, the fact remains that the uncontested evidence demonstrated both that Broward County election officials do not proactively do list maintenance on grounds other than for death and relocation, and even on those grounds, the list maintenance efforts are woefully inadequate.

ARGUMENT

I. Appellees' Contention that the NVRA Requires List Maintenance *Only* For Death and Relocation Is Based on a Flawed Premise, Ignores Other List-Maintenance Language in the NVRA, Undercuts the NVRA's Purpose, and Is Contrary to the Supreme Court's Decision in *Husted*.

Appellees' misconstruction of the National Voter Registration Act, 52 U.S.C. § 20501 *et seq*. ("NVRA"), is based on an erroneous interpretation of subsections 8(a)(3)-(4) of the NVRA. Appellees explicitly state in their brief that "The name of a registrant *may not be removed* from the voter rolls except (A) at the request of the registrant; (B) as provided by state law, by reason of criminal conviction or mental incapacity; (C) by reason of death of the registrant or (D) by reason of a change in residence of the registrant." Opp. 4-5 (citing 52 U.S.C. § 20507(a)(3)-(4) (emphasis added)). Under Appellees' reading, election officials "may not" remove from the voter rolls those who were ineligible for a host of reasons other than the specified ones, including non-citizens, non-residents, and underage, unless the ineligible voter actually requests removal. That cannot possibly be true. Such a reading would thwart the NVRA's express statutory purpose of "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(4). It has already been recognized by this Court as an interpretation that "would raise constitutional concerns." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014). And it is not one that Appellee Snipes herself follows in practice, since she has admittedly removed from the voter rolls a few individuals who were ineligible for other than the stated

reasons. *See, e.g.*, Opp. 22 ("Between January 2014 and December 2016, Supervisor Snipes removed four non-citizens from the rolls" (citing App. II at 56; Supp. at 90)).

Nevertheless, from this patently erroneous premise, Appellees build the argument that the *only* list maintenance obligations imposed upon local election officials by federal law deal with the removal of voters who have become ineligible by reason of death or relocation. *See, e.g.*, Opp. 1 ("the NVRA requires that a state conduct a general program that makes a reasonable effort to locate and remove *only* those voters who have become ineligible due to death or a change in residence" (emphasis added)); *id.* 5-6 ("each state is required to remove voters who are ineligible by reason of *two criteria only*: death or change in residence" (emphasis in original)).[1] Appellees' contention is wrong, for several reasons.

[1] Appellees cite legislative history to bolster their claim that the only *required* list maintenance is the removal of voters who are ineligible "by reason of death or a change in residence." Opp. 6 n.3 (quoting S.Rep. 103-6 at 18 (1993)). The passage cited by Appellees does not use the word "only," but instead says that the provision is "in addition" to other requirements contained in the statute. S.Rep. 103-6 at 18. Moreover, the same report speaks of concerns about noncitizens and underage citizens registering to vote, *id.* at 11, and specifically notes "that the bill *requires* States to conduct a program to maintain the integrity of the rolls." *Id.* at 18 (emphasis added). This is because "accurate and current voter registration lists are essential to the integrity of the election process and for the protection of the individual." *Id.* Voter rolls that are chock full of voters who are ineligible to vote for reasons other than death or relocation can hardly be said to be "accurate and current," and the committee report notes that the bill "requires" programs to maintain voter roll integrity.

Most fundamentally, Appellees' argument, which relies on a single subsection of the NVRA, discounts the several other provisions of the NVRA that mandate broader list-maintenance efforts. Election officials "*shall* … [e]nsure that any *eligible* applicant is registered to vote." 52 U.S.C. § 20507(a)(1) (emphasis added). Election officials "*shall* complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of *ineligible voters from the official lists of eligible voters.*" *Id.* § 20507(c)(2)(A) (emphasis added). The use of the word "shall" in both subsections makes the provisions mandatory. *United States v. Missouri*, 535 F.3d 844, 849 (8th Cir. 2008). The negative implication of the first provision is that election officials *shall* also ensure that *ineligible* individuals are not registered to vote, an obligation that is explicit in the second provision. And both of those additional obligations are necessary "to ensure that accurate and current voter registration rolls are maintained," the express statutory purpose that is not limited to inaccuracies in the voter rolls resulting from death or relocation of voters. 52 U.S.C. § 20501(b)(4).

Appellees' reliance on the Supreme Court's recent decision in *Husted v. A. Philip Randolph Inst.*, 138 S.Ct. 1833 (2018), for the proposition that list maintenance is required *only* for death and relocations, is misleading. The Supreme Court never even stated, much less held, that the Subsection 8(a)(4) mandate dealing with

removals for death and relocation was the "only" list-maintenance obligation imposed by the NVRA, as Appellees claim, Opp. 29. Rather, the Court simply noted, in a case dealing with change-of-address list maintenance practices, that "the NVRA requires States to 'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence." *Husted*, 138 S.Ct. at 1838.

Husted is highly relevant for other reasons, however, and strongly supports ACRU's position. In that case, the Supreme Court repeatedly relied on the Help America Vote Act, 52 U.S.C. § 20901 *et seq.* ("HAVA"), to interpret and clarify the obligations imposed on states by the NVRA, just as ACRU contends here.

Appellees' argument to the contrary is two-fold: First, they contend that ACRU cannot rely on HAVA's clarifications of the NVRA because HAVA itself "does not include a private right of enforcement." Opp. 30 (quoting *ACRU v. Philadelphia City Comm'rs*, 872 F.3d 175, 184-85 (3rd Cir. 2017)). But *Husted* was also a case brought by private plaintiffs, and the Supreme Court decided that case on the merits with explicit reliance on HAVA's explication of the NVRA, *Husted*, 138 S.Ct. at 1841-43, thereby necessarily rejecting Appellees' assertion that a private plaintiff such as ACRU cannot rely on the added, clarifying language of HAVA in pursuing an NVRA challenge.

Second, Appellees advance an interpretation of HAVA that makes its list-maintenance provisions entirely redundant to the circumscribed reading they have given to the NVRA. HAVA's requirement that removal of voters from the voter rolls must be done "in accordance with the provisions of the [NVRA]," 52 U.S.C. § 21083(a)(2)(A)(i), means, according to Appellees, that states are required to conduct list maintenance only to remove voters who have become ineligible by reason of death or relocation. Appellees implausibly assert that HAVA's explicit text to the contrary, such as the requirement that states have in place 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)(A) (emphasis added), "does not add any mandatory criteria for the removal of names of ineligible voters beyond those specified in the NVRA." Opp. 30. Appellees cite no authority for that proposition.

It takes quite a contortion of the statute to interpret the mandate "to remove registrants who are *ineligible to vote*" as limited to death and relocation. Non-citizens are also "ineligible to vote," as are those younger than 18, felons and persons adjudged to be mentally incapacitated (in many states), and voters who register or remain actively registered in other jurisdictions. HAVA clearly mandates that states make a reasonable effort to remove all such ineligible voters. 52 U.S.C. § 21083(a)(4)(A); *see also id.* § 21083(a)(1)(A) ("each State … *shall* implement … a

… computerized statewide voter registration list … that contains the name and registration information of every *legally registered voter* in the State" (emphasis added)); *id.* § 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" (emphasis added)); *id.* § 21083(a)(2)(B) ("The list maintenance performed under subparagraph (A) *shall* be conducted in a manner that ensures that-- … (ii) only *voters who are not registered or who are not eligible to vote are removed from the computerized list*; …." (emphasis added)). To interpret all of this mandatory language as doing nothing, merely because another subsection of HAVA requires that removals be done "in accordance with the provisions of the [NVRA]," simply puts more weight on that phrase than it can reasonably bear. That subsection references NVRA's sections dealing with *procedures* for removal, after all, and ACRU does not contest that the removal of ineligible voters must be done in accord with NVRA's procedures.

Moreover, because HAVA also mandates that the State's centralized, computerized voter list "*shall* serve as the official voter registration list for the conduct of all elections for Federal office in the State," *id.* § 21083(a)(1)(A)(viii) (emphasis added), it is simply implausible to interpret the mandate to remove "ineligible" voters as limited to death and relocation, leaving it entirely to the state's discretion whether to retain other ineligible voters on their voter rolls—voters who, if retained

on the rolls, could then vote illegally in and potentially alter the outcomes of federal elections. And, as ACRU noted in its opening brief, the Supreme Court has held that the mandates in HAVA "explain the meaning" of the NVRA, "mak[ing] explicit what was implicit" in the NVRA. ACRU Br. 12 (quoting *Husted,* 138 S.Ct. at 1840, 1842).

Appellees also chide ACRU for pressing statutory arguments that were rejected by the Third Circuit in *ACRU v. Philadelphia City Comm'rs*, 872 F.3d 175 (3d Cir. 2017). That argument is misplaced, for several reasons. First, the *Philadelphia* case dealt with whether the list maintenance obligations extended to the removal of incarcerated felons who were ineligible to vote under state law when state law did not expressly require their removal. *Philadelphia*, 872 F.3d at 182. That provision of the NVRA, 52 U.S.C. § 20507(a)(3)(B), is not at issue here.

Second, ACRU's contention in *Philadelphia* that the "reasonable effort" language in subsection (a)(4) extends beyond subsection (a)(4) was adopted by the District Court in Missouri, which specifically held "that Congress intended the 'reasonable effort' standard of § 1973gg-6(a)(4) to apply to subsections (b), (c) and (d)." *United States v. State of Missouri*, No. 05-4391-CV-C-NKL, 2006 WL 1446356, at *8 (W.D. Mo. May 23, 2006), *rev'd on other grounds*, 535 F.3d 844 (8th Cir. 2008). Subsection (c) of the NVRA—specifically, subsection (c)(2)(A)—is where is located the obligation that "A State *shall* complete … 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).

Third, ACRU's contention that subsection (c)(2)(A) requires states to have a program to remove the names of "ineligible voters" is exactly how the Justice Department has read that subsection. *See United States v. Missouri*, 535 F.3d at 847-48 (noting that the United States alleged that Missouri violated the NVRA by failing to "complete, at least 90 days before the date of a primary or general election for federal office, a program to ensure that the names of ineligible voters have been removed from the official list"); *see also id.* at 849 (noting that Section 8 of the NVRA imposes numerous obligations on the states in addition to the obligations imposed in subsection (a)(4)); Complaint ¶¶ 13-15, *United States v. Missouri*, No. 05-4391, 2005 WL 3683710 (W.D. Mo. 2005) (noting NVRA's numerous list maintenance requirements and alleging that "Defendants have failed to ensure that election officials in Missouri actually regularly perform a uniform general program of voter registration list maintenance to remove ineligible voters").

Fourth, and most significantly, ACRU's contention in the *Philadelphia* case that the obligations imposed by the NVRA must be read in light of the clarifying language contained in HAVA, which was rejected by the Third Circuit, was adopted by the Supreme Court in *Husted*. The Supreme Court trumps the Third Circuit.

In sum, the NVRA, particularly as elucidated by HAVA, requires election officials to perform list maintenance to remove ineligible voters from the voter rolls, not just voters who are ineligible by reason of death or relocation. The district court's holding to the contrary is wrong as a matter of law, and its truncated consideration of evidence that was only relevant in light of that erroneous legal conclusion requires reversal.[2]

II. The "Reasonable Effort" Language of the NVRA Imposes a Professional Standard of Care, Which Is Not Met by the NVRA's "Safe Harbor" or by Compliance with State Law.

The second legal issue squarely presented by this appeal is whether the NVRA's requirement that states make a "reasonable effort" to remove ineligible voters from their voter rolls imposes on the states a professional standard of care, as determined by experts in the field, or whether use of the so-called "safe-harbor" NCOA system qualifies as the mandatory "reasonable" effort even in the face of uncontested expert testimony to the contrary. Again, Appellees' arguments here are contrary to the explicit language of the statute.

[2] Appellees' related argument that the district court did not subordinate federal law to state law, Opp. 41, turns on their truncated view of the list maintenance obligation imposed by federal law. Without that, the district court's holding that compliance with state law, together with the limited NCOA process, is sufficient for purposes of meeting the federal mandate does in fact subordinate the federal obligation to the requirements set by state law.

The NVRA requires election officials to make a "reasonable effort" at list maintenance in order to further the express statutory purposes "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(b)(3)-(4). Those purposes cannot adequately be served if Appellees' several contentions are correct.

a. Subsection (c)(1) merely "allows" use of the NCOA process.

Appellees' first contention is that the so-called "safe harbor" of subsection (c)(1) "fully satisfies" what they believe is the only list maintenance obligation contained in the NVRA. Opp. 6 (citing 52 U.S.C. § 20505(c)(1)). The text is "plain," they contend. *Id.* at 34. In addition, they contend that the Supreme Court in *Husted* "observed that use of the Postal Service NCOA option *is sufficient* to show compliance with Section 8's 'reasonable effort' requirement for address changes." *Id.* (emphasis added) (citing *Husted*, 138 S.Ct. at 1840, 1847). Appellees are wrong on both counts.

The text, which provides that a "State may meet the requirement of subsection (a)(4) by establishing a program" that utilizes the NCOA program from the U.S. Postal Service, is far from "plain." Taken in isolation, it could possibly mean that utilization of the NCOA program is all that is necessary to meet the "reasonable effort" list maintenance effort of subsection (a)(4), as Appellees contend. Alterna-

tively, it could merely mean, as ACRU contends, that in pursuit of their list maintenance efforts, election officials' use of the NCOA program is *permissible*. As between those two interpretations, ACRU's is the only one consistent with the overall statutory scheme. It alone comprehensively furthers the statutory purpose of "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(4). And it alone clarifies that use of the NCOA program would not violate any of the statutory restrictions on how list maintenance efforts are to be conducted that appear both immediately before and immediately after the subsection (c)(1) text.[3] In contrast, Appellees' interpretation produces the absurd result that use of the NCOA address-correction program would satisfy not only the relocation component of subsection (a)(4) but also the death component, even though the NCOA program does not purport to identify deceased voters.[4] In order for Appellees' "fully satisfies" interpretation to be correct, the statutory language would have to be altered either by adding the words "change-of-address" before the word "requirement," or

[3] Subsection (b)(1), for example, requires that voter roll integrity programs "shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act." Subsection (c)(2) requires such programs to be completed at least 90 days prior to elections. And subsection (d) imposes additional requirements for the removal of voters who have relocated. 52 U.S.C. §§ 20507(b)(1), (c)(2), (d).

[4] Appellees' contention that this point is "irrelevant," Opp. 35 n.9, misses the point. If subsection (c)(1) means what they claim, the text would provide a compliance "safe harbor" for death as well as relocation, even though the NCOA process clearly does not deal with deceased voters at all.

by specifying that the "safe harbor" applied only to subsection (a)(4)(B) instead of the entire "subsection (a)(4)." The actual text does neither.

Appellees' contention that the Supreme Court recognized its interpretation in *Husted* fares no better. The Supreme Court never held, or even "observed," as Appellees contend, "that use of the Postal Service NCOA option *is sufficient* to show compliance with Section 8's 'reasonable effort' requirement for address changes." Opp. 34 (emphasis added). Quite the opposite. The Supreme Court stated that the use of the NCOA program "*may* meet" the list maintenance requirement for relocations, *Husted*, 139 S.Ct. at 1847 (emphasis in original), and that it "is undisputedly lawful," *id.* at 1840, which is a far cry from stating that it "is sufficient." Indeed, the Court then immediately noted that, "according to the Postal Service '[a]s many as 40 percent of people who move do not inform the Postal Service." *Id.* Whether the NCOA process would, standing alone, constitute a "reasonable effort" at list maintenance was not at issue.[5] But it is hard to imagine that a process that misses nearly half of voters who have become ineligible because of relocation would qualify as a "reasonable effort" even for the relocation component of subsection (a)(4) once the issue is actually presented to the Court.

[5] Neither was it at issue in *Judicial Watch, Inc. v. Lamone*, No. CV ELH-17-2006, 2018 WL 2564720, at *9 (D. Md. June 4, 2018).

In sum, the far better reading is that subsection (c)(1) merely *allows* the use of the NCOA change-of-address system as a tool for performing list-maintenance with respect to changes of address and satisfies the removal restrictions put in place by the NVRA. That subsection does not address at all the other requirement of subsection (a)(4), namely, voters who have died, so it cannot possibly "fully satisfy" even Appellees' truncated view of the NVRA's list maintenance obligation. And even with respect to changes of address, subsection (c)(1) is not sufficient, only permissive—a point Appellees themselves acknowledge elsewhere in their brief. *See* Opp. 6 ("Subsection 8(c) *allows* states to use [NCOA] data" (emphasis added)).

b. ACRU's claim that the NVRA's list-maintenance obligation must be assessed against a professional standard of care is rooted in the statute's explicit text, not "made up out of whole cloth."

Appellees next contend that ACRU's argument for a professional standard of care is "made up out of whole cloth." Not true. As noted in ACRU's opening brief, the professional standard of care obligation is rooted in the plain text, namely, the requirement that election officials make a "reasonable effort" to remove ineligible voters from the rolls. ACRU Br. 31.

ACRU provided several examples where "reasonable effort" language in mandates imposed on professionals has invoked a professional standard of care. Appellees discount two of those examples as "completely inapposite" because they did

not involve "the interpretation of a federal statute." Opp. 39. But those cases happened to involve the interpretation of the phrase, "reasonable effort," by courts in this circuit. That they applied the use of the phrase in a *state* statute imposing obligations on medical professionals (*Womancare of Orlando, Inc. v. Agwunobi*, 448 F. Supp. 2d 1293 (N.D. Fla. 2005)) or in the *Strickland* standard for ineffective assistance claims against legal professionals (*Newland v. Hall*, 527 F.3d 1162 (11th Cir. 2008)) is beside the point. Moreover, Appellees overlook entirely the third example cited by ACRU, which *did* involve such language in a *federal* regulation. *See* ACRU Br. 34 (citing *Finestone v. Fla Power & Light Co.*, 272 F. App'x 761, 765 (11th Cir. 2008)).

There are many other examples as well where "reasonable effort" or "reasonable care" language has been deemed to require a professional standard of care. The Tariff Act of 1930, for example, requires that textile importers exercise "*reasonable care* to ensure that the textile or apparel products [they import] are accompanied by documentation, packaging, and labelling that are accurate as to its origin." 19 U.S.C. § 1592a(a)(4)(A) (emphasis added). The Customs Service published a "Reasonable Care Checklist" that specifically notes the importance of using actual experts rather than an unlicensed individual who merely "chooses to call himself or herself a Customs expert." U.S. Customs Service, Appendix 22-A. Reasonable Care Checklist, 2 L of Intl Trade Appendix 22-A. The Customs Service also noted that "the agency's

use of the term 'expert' is in conformity with the Customs Modernization Act's legislative history as reflected in the language of the House of Representatives and Senate Reports (H.Rep. 103-361, at 120; S.Rep. 103-189, at 73) discussion of the reasonable care standard." *Id.* "A party's selection of an expert," it added, "and the expert's qualifications are part and parcel of the review of all of the facts and circumstances in the agency's determination whether the party has exercised reasonable care." *Id.*

Similarly, Section 1308 of Title 19 provides to any person accused of illegally importing dog or cat fur an affirmative defense

> if that person establishes by a preponderance of the evidence that the person exercised *reasonable care*—
> (A) in determining the nature of the products alleged to have resulted in such violation; and
> (B) in ensuring that the products were accompanied by documentation, packaging, and labeling that were accurate as to the nature of the products.

19 U.S.C. § 1308(c)(6) (emphasis added). The statute directed the Customs Service to establish a process for certifying laboratories that could reliably determine the type of fur contained in imported products, noting that the use of such a certified laboratory, while not required, may "prove dispositive in determining whether that person exercised reasonable care for purposes" of availing himself of the affirmative defense. *Id.* § 1308(c)(4); *see also* 66 FR 42163-01.

The Health Care Quality Improvement Act provides review bodies with immunity from damages when, inter alia, the body made a "reasonable effort to obtain the facts of the matter" and developed a "reasonable belief that the action was warranted." 42 U.S.C. § 11112(a). The Fourth Circuit applied an "objective test" that relied upon professional "reports and investigations" to determine whether the body made a "reasonable effort." *Gabaldoni v. Wash. Cty. Hosp. Ass'n*, 250 F.3d 255, 261 (4th Cir. 2001). And this Court has held that "reasonable effort" language in the Railway Labor Act, 45 U.S.C. § 152, "imposes a legal duty enforceable by courts." *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300, 1304 (11th Cir. 2001). That Act required the regulated parties to engage in "virtually endless" effort to satisfy their statutory obligation. *Id*. at 1305. This Court noted that the Air Line Pilots Association had made some effort to fulfill its statutory obligations, but nonetheless held that its actions fell sort of making "'every reasonable effort' as required by statute." *Id*. at 1310.

These statutory provisions impose on business or other professionals of one sort or another a duty to undertake "reasonable efforts" or use "reasonable care" as

measured against an "objective" standard that would be utilized by other professionals in the field. The district court's decision not to credit the uncontested expert opinion of ACRU's experts is therefore erroneous as a matter of law.[6]

c. Once the testimony of ACRU's experts was admitted after the district court rejected Appellees' *Daubert* challenge, the district court could not substitute its own, non-expert views on technical matters for the uncontested conclusions of ACRU's expert.

Appellees take issue with ACRU's claim that the district court improperly substituted its own conclusion for the conclusion offered by ACRU's uncontested expert, contending instead that "the court assesses the credibility of the expert's opinions and how much weight to afford them, and its assessment cannot be overturned absent clear error." Opp. 37. But the case on which it relies for that proposition, *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1305 (10th Cir. 2015), had competing expert testimony. *Id.*; *see also Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1273 (11th Cir. 2008) ("The district court was not required to

[6] Neither would a professional standard of care requirement, as articulated by experts in the field, be "unworkable," as Appellees claim. ACRU is aware of no case rejecting a professional standard of care as "unworkable," and Appellees cite none. Instead, courts routinely rely on and even mandate expert testimony to establish professional standards of care in the even more complicated medical malpractice context. *See, e.g.*, *West v. Dacey*, No. 03-7171, 2004 WL 1533913, at *1 (D.C. Cir. July 7, 2004) ("violation of the applicable standard of care and causation … must usually be proved by expert testimony"); *Cagle v. United States*, No. 17-14400, 2018 WL 2771067, at *3 (11th Cir. June 8, 2018) ("In medical malpractice cases, the standard of care is determined by a consideration of expert testimony"); *Nelson v. United States*, 478 F. App'x 647, 648 (11th Cir. 2012) ("expert testimony is required to prove the acceptable standard of professional care").

credit" defendant's expert testimony that was contested by plaintiffs' "own expert who reached the opposite conclusion"). Here, Appellees offered no election administration expert in opposition to ACRU's election administration expert who could opine as to the adequacy of list maintenance practices. App. II at 32 (deeming irrelevant the absence of an election administration expert from Appellees); Dkt. 182 at 33 n.16 ("Notably, Snipes and United make no effort to identify exactly what the statutory standard for reasonableness is and what its parameters are."); Dkt. 233 at 104:11-13, 173:16-19 (Appellees' expert did not review any of Snipes's list maintenance records or practices).

Appellees attempt to minimize the significance of their lack of competing expert testimony by asserting that a "court must assess the credibility and probity of an expert's opinion even if no competing expert testimony is offered by the opposing party, and may determine that the expert's opinion is unreliable even if it has been 'presented with no countervailing professional opinion to adopt.'" Opp. 37 n.10 (quoting *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1333 (11th Cir. 2010)). But the *Kilpatrick* case upon which Appellees rely involved the *exclusion* of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), not the weight to be given to uncontested expert testimony that had been admitted into evidence. *Kilpatrick*, 613 F.3d at 1334. Appellees here moved to exclude the testimony of Plaintiff's experts, but their *Daubert* motion

was denied. Dkt. 182 at 24-29 (denying Appellees' motion to exclude Gessler's testimony, finding his testimony "reliable," that he will "opine on industry practices, and that the testimony "is 'beyond the understanding of the average lay person' and will lend assistance to the factfinding in this case"). The district court's subsequent ruling on the merits, which took issue with the "ultimate opinion" of ACRU's election administration expert—the *legal* conclusion that Snipes is ultimately not in compliance with the NVRA—as well as his specific opinions that Supervisor Snipes did not make a "reasonable effort" at list maintenance on a number of grounds, therefore improperly substituted the district court's non-expert opinion for the uncontested expert opinion offered by ACRU's expert. The district court could disregard Gessler's ultimate legal conclusion regarding compliance, but it could not disregard his expert opinions on whether Snipes's activities and procedures are up to industry standards.

To be sure, in a few instances the district court made factual determinations contrary to some assumed facts on which Mr. Gessler based some of his opinions. For example, the district court ultimately disregarded ACRU's evidence that Broward County has an unacceptably high registration rate and also found that Snipes had done certain mailings under Florida law. Although ACRU believes that some of those factual determinations were themselves clearly erroneous, *see infra* Part III, that is not the issue here. Rather, ACRU challenges the several instances in

which the district court rejected the expert's opinion, not on the basis of contrary factual determinations or legal rulings but merely because it disagreed with it.[7] For example, Mr. Gessler examined the certifications of list maintenance from Broward County. In his expert opinion, the frequency and amounts of removals were sporadic and fluctuated wildly. Mr. Gessler concluded, based on his expertise, that such fluctuations demonstrated inadequate list maintenance activity. App. II at 160. The district court did not make a factual determination that such fluctuations did not exist. Rather, it acknowledged that they did, but nevertheless rejected the expert's conclusion because *in its opinion* the numbers were regular enough. App. II at 29-30. This is akin to a district court accepting the expert testimony of a doctor regarding what is an acceptable fluctuation in heart rate, and then rejecting that expert opinion and substituting its own concept of what a heart rate should be.

Another example involved whether Supervisor Snipes had adequate written policies or procedures for list maintenance, which Mr. Gessler expertly opined would exist if a reasonable effort at list maintenance was being undertaken. Factually, there was a third-party software manual that explains how to add or remove voters from the computerized voter rolls or to make various corrections that a proper

[7] *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985), relied on by Appellees, Opp. 38, is therefore inapposite.

list maintenance program would require. Mr. Gessler reviewed the procedures contained in the VR software manual and acknowledged its existence in his original opinion. But he concluded that it was unreasonable for an election official to have no written policies or procedures for *conducting* list maintenance activities, other than a third-party software manual which merely described how to make corrections that might be required following proper list maintenance. Dkt. 231 at 51 ("However, overall, this manual doesn't cover what we've discussed as list maintenance activities, with a few limited exceptions"). Mr. Gessler testified that there was a host of situations and procedures involving list maintenance obligations that a software manual would not cover. The district court ignored this expert opinion and substituted its own opinion that the manuals Supervisor Snipes has are enough. App. II at 28-29.[8] The district court was not free to reject the expert opinion that the manuals Supervisor Snipes has are not consistent with industry practices, as Gessler's unopposed testimony established. Again, the district court may have ultimately rejected whether the law imposes a professional standard for liability, but it should not have rejected the professional opinions that the standard was not met once they had been admitted as reliable.

[8] The district court's "finding" that the "VR System" includes an online "help desk" providing topic-specific, written list-maintenance policies and procedures (the "VR Manual")," App. II at 51-52, is clearly erroneous. The manual describes *how* to make additions to or update the voter rolls; it does not articulate policies for when list maintenance is required, or how to conduct it. Dkt. 231 at 51, 52, 63-64.

Other examples include the industry significance of monitoring registration rate and checking for noncitizen registrations. In Mr. Gessler's opinion, it is unreasonable for an election official to neglect to monitor the registration rate in their jurisdiction. Dkt. 229 at 139. It was also his opinion that standard industry practice requires officials to at least check for noncitizen registrations, especially in a jurisdiction with high concentrations of noncitizens. App. II at 170. By flat admission, Supervisor Snipes does neither of these things. Dkt. 232 at 103, 213; App. II at 16. While the district court could reject the legal significance of these things, it could not maintain that the absence of the practices complies with industry standards.

In matters such as these where technical expertise is required, the district court's ruling is contrary to the law of this circuit. *See, e.g.*, *Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) ("the trier of fact [is not] at liberty to disregard arbitrarily the unequivocal, uncontradicted and unimpeached testimony of an expert witness, … where, as here, the testimony bears on technical questions … beyond the competence of lay determination"); *E.C. ex rel. Crocker v. Child Dev. Sch., Inc.*, No. 3:10-CV-759-WKW, 2011 WL 4501560, at *11 (M.D. Ala. Sept. 29, 2011) (citing *Webster*).

III. The District Court's Findings That Supervisor Snipes Complied with State Law Are Either Clearly Erroneous or Based on Erroneous Interpretations of Law.

Finally, Appellees contend that ACRU "fail[ed] to argue that the district court's factual findings were clearly erroneous and has therefore waived any argument for reversal on this basis," Opp. 43 n.12, and that there is substantial evidence in support of the findings, in any event, *id.* at 42-53. Appellees are wrong on both counts.[9]

First, ACRU devoted several pages of its opening brief to demonstrating how the district court's "factual" findings were both contrary to uncontested evidence and based on erroneous interpretations of the law. *See, e.g.*, ACRU Br. 21-30, 41-44. That is more than enough to have pressed the issue on appeal, even if ACRU did not recite the magic words of "clearly erroneous."

As for the substantial evidence claim, Appellees merely repeat the district court's conclusions without discussing the evidence that supposedly supports them, or explaining how the limited evidence, if any, relied on by the district court was substantial enough to overcome ACRU's strong evidence, including unrefuted expert testimony, to the contrary. The district court acknowledged, for example, that Supervisor Snipes "did not remove any inactive voters" for a full two-year period

[9] Appellees do not address at all ACRU's contention that the district court erroneously treated use of the state death index as a "safe harbor" for list maintenance of deceased voters.

between the second half of 2013 and the second half of 2015. That evidence is therefore undisputed, but instead of drawing the only logical conclusion that Supervisor Snipes failed to conduct adequate list maintenance during that two-year period—which requires actually removing ineligible voters from the rolls—the district court found that the Supervisor's certifications of activity demonstrated that she mailed notices to voters every year and therefore that, "when the certifications are viewed in their entirety, there is sufficient evidence demonstrating that [Supervisor Snipes] has an ongoing list-maintenance program in place." The "unexplained gap in the removal of inactive voters"—that's the phrase the district court itself used—confirms ACRU's unrefuted expert testimony that Supervisor Snipes does not consistently make reasonable efforts at list maintenance. The district court's "finding" to the contrary is not only not supported by substantial evidence, but it should leave this Court "with the definite and firm conviction that a mistake has been committed." *Sidman v. Travelers Cas. & Sur.*, 841 F.3d 1197, 1201 (11th Cir. 2016).

The same is true of the district court's finding that Supervisor Snipes sent mass mailings via "nonforwardable" mail in order to comply with Florida Statute § 98.065(2)(b). As noted in ACRU's opening brief, Supervisor Snipes' own certifications—as originally prepared—demonstrated that no "nonforwardable" mailings were made. App. II at Tab 217-13. Even after the certifications were altered during the course of this litigation to assert that "nonforwardable" mailings were conducted,

the mail pieces themselves conclusively demonstrated otherwise, ACRU Br. 55, which again should leave this Court "with the definite and firm conviction that a mistake has been committed." *Sidman*, 841 F.3d at 1201.

More fundamentally, though, the district court simply did not consider uncontested evidence of improper list maintenance when the ground of ineligibility was other than death or relocation. Most stark is the uncontested evidence that Supervisor Snipes simply re-registered more than 1,000 voters who had been registered at commercial addresses to the address of the election office itself, without verifying, as Florida law requires, that they still had Broward County as their lawful domicile but were temporarily residing outside of the county. FLA. STAT. § 101.045(1). The district court made no finding contrary to that uncontested evidence, but rather held that it was "not relevant" because it did not involve death or relocation ineligibility. App. II at 41.

The district court also found that the information received from the state regarding deaths is drawn from the national Social Security Death Index. But there is *no evidence in the record* to support that finding, and no one in Snipes's office had any knowledge that national SSDI information was part of the process. The district court cited to one remark by Appellees' *expert*, who claimed no knowledge or expertise regarding the process for removals of deceased from the rolls, as support for this factual finding. Dkt. 233 at 150. He stated that he had not reviewed Florida law

or procedures and was only generally familiar with them. *Id.* at 172:16-23. Yet the district court relied upon this single reference by a non-fact witness to conclude that Snipes already uses SSDI information.

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 district court.

Respectfully submitted,

s/ John C. Eastman

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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 reply brief utilizing proportionally-spaced font, because the length of this brief is 6,478 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 9th day of October 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 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 9th day of October 2018.

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