**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**
**FORT LAUDERDALE DIVISION**

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| AMERICAN CIVIL RIGHTS UNION, in its individual and corporate capacities,<br><br>*Plaintiff*,<br><br>v.<br><br>BRENDA SNIPES, in her official capacity as the SUPERVISOR OF ELECTIONS of BROWARD COUNTY, FLORIDA<br><br>*Defendant*,<br><br>v.<br><br>1199SEIU UNITED HEALTHCARE WORKERS EAST,<br><br>*Intervenor-Defendant* | ) | Civil Action No. 16-cv-61474 |

**PLAINTIFF AMERICAN CIVIL RIGHTS UNION'S PROPOSED**
**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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Plaintiff American Civil Rights Union ("ACRU") respectfully submits its Proposed Findings of Fact and Conclusions of Law.

## I. Introduction

### A. Summary of ACRU's Claims

1. By failing to conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters, and thereby keep those lists accurate and current, Defendant Snipes is in violation of Section 8 of NVRA.

2. First, ACRU has presented evidence showing it is more likely than not that the number of registrations on the list of eligible voters exceeds, or is impossibly close to, the number of eligible citizen residents in Broward County.

3. Second, ACRU has presented expert testimony showing that, under the facts and circumstances in Broward County, Defendant Snipes has not undertaken a reasonable list maintenance program so that the list of eligible voters are accurate and current, consistent with how a reasonable election administration professional would carry out their duties under similar circumstances.

4. Third, ACRU has presented testimony of lay witnesses who have observed inaccuracies, including registrants who were deceased, no longer residents, and registered by the Defendant at improper commercial addresses on the official publicly available list of eligible voters in Broward County. The evidence made it more likely than not that the Defendant has not reasonably maintained accurate and current voter rolls. Defendant was, with few exceptions, nonresponsive to submissions by lay witnesses and did not follow the required list maintenance procedures under Florida law regarding information provided by these witnesses.

5. Fourth, the evidence in the record demonstrates that Defendant and her office staff admitted inaccuracies on the rolls, including ineligible aliens who registered and voted. Defendant also admitted to irregularities in office procedures, including systemic failures to accurately certify list maintence activities to the Florida Secretary of State.

6. Finally, the evidence in the record demonstrates that Defendant Snipes does not effectively or correctly use the list maintenance tools required under Florida law, further, does not use the additional list maintenance tools available under Florida law, and does not have clear and effective policies and procedures in place for list maintenance.

7. Taken as a whole, the evidence in the record proves it is more likely than not that Defendant Snipes has violated her obligation under Section 8 of the NVRA to conduct a reasonable program of list maintenance to ensure that the list of eligible voters in Broward County is kept accurate and current.

8. ACRU seeks an order from this Court (1) declaring that Defendant Snipes has failed to conduct a reasonable general program of voter list maintenance and (2) ordering Defendant to implement reasonable and effective registration list maintenance programs to cure failures to comply with the NVRA and ensure that only eligible registrants are on Defendant's voter registration rolls and that those registrations are accurate and current.

**B. Jurisdiction and Standing**

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. The claims advanced by the ACRU in this action are premised on violations of the National Voter Registration Act, 52 U.S.C. § 20507. This private right of action is properly before this Court under 52 U.S.C. § 20510(b), as the action seeks injunctive and declaratory relief under the NVRA. ECF No. [184] at 8. The Court has personal jurisdiction

over this action because Defendant Brenda Snipes, in her official capacity as the Supervisor of Elections of Broward County, Florida, is located in the district.

**C. The Parties**

10. Plaintiff American Civil Rights Union, Inc., ("ACRU") is a non-profit corporation, incorporated in the District of Columbia, which promotes election integrity, compliance with federal election laws, government transparency, and constitutional government. Plaintiff ACRU brings this action in its individual and corporate capacities and also on behalf of its members and supporters who are registered to vote in the State of Florida. (Tr. D3/6:4-16.) The ACRU has dedicated significant time and resources to ensure that voter rolls in Broward County are free from ineligible registrants, such as noncitizens, citizens who are no longer residents, and citizens who are registered in more than one location. (Tr. D3/7:10-9:8.)

11. As an integral part of its public interest mission, Plaintiff ACRU disseminates information about compliance by state and local officials with federal election statutes, including election integrity statutes. (Tr. D3/7:15-19.) A central activity of ACRU is to promote election integrity and compliance with federal and state statutes which ensure the integrity of elections. (Tr. D3/6:13-16.)

12. Defendant, Brenda Snipes, the Supervisor of Elections of Broward County, Florida ("the Supervisor" or "Defendant"), holds an office created by Florida Statutes § 98.015. (Ex. P-28 at 1-2.) Defendant Snipes has served as Supervisor of Elections for Broward County since November 1, 2003. ECF No. [184] at 9.

13. Defendant Intervenor 1199SEIU United Healthcare Workers East ("1199SEIU") is a labor union. The Court granted 1199SEIU leave to intervene as to Count I of the First Amended Complaint filed by ACRU. ECF No. [184] at 9.

**D. Statutory Grounds**

14. The stated purposes of the National Voter Registration Act ("NVRA") are (1) "to establish procedures that will increase the number of *eligible citizens* who register to vote," (2) to "enhance[] the participation of *eligible citizens* as voters," (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) (emphasis added). Section 8 of the NVRA, along with the parallel provisions of the Help America Vote Act ("HAVA"), Pub. L. 107-252, 116 Stat. 1666, 52 U.S.C. § 20901 *et seq.*, carries out NVRA's list maintenance purpose by imposing maintenance obligations on Defendant. Chief among these is an obligation to conduct a general program that makes a reasonable effort to remove the names of ineligible persons from the official lists of eligible voters, such as those who have moved out of the jurisdiction or who have died. 52 U.S.C. § 20507(a); *see* 52 U.S.C. § 21083(a)(2) and (4); (Tr. D1-22:9-11). The central issue in this case, as both sides agree, is whether Supervisor Snipes has violated this obligation. ECF No. [184] at 25-26.

15. These purposes are not in tension, very much contrary to what the Defendant-Intervenor would contend. Instead, the purposes support and reinforce each other. Protecting the integrity of the electoral process, for example, serves to enhance the participation of eligible citizens as voters. Similarly, procedures to ensure that accurate and current rolls are maintained serve to increase the number of eligible citizens who are registered to vote.

16. The list maintenance obligation in Section 8 is not limited only to the registrations of those who have died or moved, but includes those who become ineligible to vote or who were never eligible in the first place.

17. In order to ensure that election officials are fulfilling their list maintenance duties, the NVRA further provides a public inspection provisions. 52 U.S.C. § 20507(i). These provisions are available to any member of the public, which clearly conveys Congress's intention that the public should be monitoring the state of the voter rolls and the adequacy of election officials' list maintenance programs. 52 U.S.C. § 20507(i). Accordingly, election officials must provide full public access to all records related to their list maintenance activities, including their voter rolls. 52 U.S.C. § 20507(i). This mandatory public inspection right is designed to preserve the right to vote and ensure that election officials are complying with the NVRA. *Project Vote v. Long*, 682 F.3d. 331, 335 (4th Cir. 2012). If someone has discovered sufficient facts to support a claim that an election official has failed to adequately maintain the rolls, that person may bring a claim in federal court to seek enforcement. 52 U.S.C. § 20510(1).

18. The list maintenance provisions of the NVRA were added by Congress as a compromise measure between Republicans and Democrats in order to pass the legislation. Absent the inclusion of these provisions, the legislation would not have become law. National voter registration legislation passed no further than the House of Representatives without the "general program" and "reasonable effort" standard found in present law. *Compare* National Voter Registration Act of 1989, H.R. 2190, 101st Cong. § 106 (1989) (requiring "systematic review") with National Voter Registration Act of 1993, H.R. 2, 103rd Cong. § 8 (1993) (requiring "a general program that makes a reasonable effort" to conduct list maintenance). Accordingly, both the provisions that encourage and expand opportunities for voter registration and the provisions ensuring that those registrations are accurate and current must be given their full expression.

19. In the state's implementation of the NVRA, multiple Florida statutes vest power in Supervisor Snipes to maintain voter rolls and place responsibility on Defendant Snipes to ensure that only eligible voters are on the rolls. Florida Statutes § 98.015(3) provides that the Supervisor "shall update voter registration information" and Section 98.045(1) provides for the administration of voter registration by the Supervisor. Sections 98.065 and 98.075 describe the procedures and tools available to the Supervisor for performing list maintenance for removal of registrants who are ineligible.[1] Some of these tools are mandatory and some are optional. But whether the Defendant is operating a reasonable list maintenance programs depends on the facts and circumstances surrounding the accuracy and currency of the voter rolls. Whether it is

[1] Florida law grants Supervisors of Elections considerable latitude and authority to conduct list maintenance. The tools provided by statute for Supervisors of Election to conduct reasonable list maintenance include:

a. Request and use information from out-of-state voter registration officials in order to identify duplicates. Fla. Stat. 98.045(2)(b).
b. Use National Change of Address ("NCOA") database information to identify registered voters who may have moved. Fla. Stat. 98.064(2)(a).c. Use nonforwardable mailings sent to all registered voters in the county, both active and inactive, to identify registrants who may have moved. Fla. Stat. 98.065(2)(b).
d. Send mailings to registrants who have not voted or contacted the office in 2 years. Fla. Stat. 98.065(2)(c).
e. Obtain and use information from returned jury notices for list maintenance purposes. Fla. Stat. 98.065(4)(a).
f. Obtain and use information from the Department of Highway Safety and Motor Vehicles for list maintenance purposes. Fla. Stat. 98.065(4)(a).
g. Obtain and use information from "other sources" for list maintenance purposes. Fla. Stat. 98.065(4)(b).
h. Obtain and use information regarding death, felony status, non-citizen status, or change of address from "sources other than those identified." Fla. Stat. 98.075.
i. Remove ineligible registrants based on information from other sources, not explicitly stated in the statute.

reasonable to do the bare minimum, or, whether the use of additional tools is warranted depends on the situation.

## II. Findings of Fact

### A. Pretrial Stipulations

20. The parties submitted a joint pretrial stipulation on July 15, 2017. ECF No. [184].

### B. ACRU Provided Adequate Statutory Notice to Defendant

21. On January 26, 2016, Susan Carleson, the President of the ACRU, writing on behalf of ACRU and its members and supporters who are registered to vote in the State of Florida, sent a statutory notice letter to Defendant notifying her that she was in violation of federal voter registration laws. ECF No. [184] at 9. The letter is in the record at ECF No. [12-1]. (Tr. D1/9:1-9.) A copy was sent to the Florida Secretary of State. ECF No. [12-1].

22. The notice letter informed Defendant that "your county is in apparent violation of Section 8 of the National Voter Registration Act (NVRA) based on our research." ECF No. [12-1] at 1. The letter explained that, "Based on our comparison of publicly available information published by the U.S. Census Bureau and the federal Election Assistance Commission, your county is failing to comply with Section 8 of the NVRA." ECF No. [12-1] at 1. The letter, among other things, stated: "In short, your county has an implausible number of registered voters compared to the number of eligible living citizens." ECF No. [184] at 9.

23. ACRU undertook an analysis of the registration rate in Broward County. (Tr. D3/13:4-5.) According to publicly available data disseminated by the United States Census Bureau and the United States Election Assistance Commission, over the past several election cycles the voter rolls maintained by Defendant have contained either more total registrants than eligible voting-age citizens or, at best, an implausibly high number of registrants. (Tr. D1/56:16-

59:22; P-22 at 7.) According to this data, at the time of the 2014 general election, approximately 101% of the citizens of voting age were registered to vote and could cast a ballot in Broward County. (Tr. D1/59:22; P-22 at 7.)

24. A review of contemporaneous data for 2010, 2012, and 2014 reveals that this inflated registration rate has persisted over several election cycles. (Tr. D1/57:12-59:22; P-22 at 7.) According to United States Census Bureau and Election Assistance Commission data, at the time of the 2010 general election, for example, approximately 108.5-110.6% of the citizens of voting age were registered to vote and could cast a ballot in Broward County. (Tr. D1/57:12-59:22; P-22 at 7.)

25. ACRU has spent considerable time and financial resources in an effort to improve voter rolls in Broward County. (Tr. D3/7:10-8:5.) Among its efforts has been a newspaper awareness campaign to encourage Defendant to take remedial steps and to raise awareness among the public. This newspaper campaign was conducted in January 2016. (Tr. D3/7:15-19.)

**C. The Inflated Registration Rate in Broward County**

26. The registration rate can be found by comparing the total voter registration figures as reported by the Broward County Supervisor of Elections with contemporary population data provided by the United States Census Bureau. (Tr. D1/57:15-20; Ex. P-22.)

27. Dr. Steven A. Camarota provided expert testimony as to the population and registration data for Broward County for the last several election cycles, specifically 2010, 2012, and 2014. (Tr. D1/49:14-59:22.) Dr. Camarota retrieved and compared official population and registration figures from the Census Bureau and the United States Election Assistance Commission. (Tr. D1/53:6-12; D1/56:5-9; D1/50:6-51:4.) Dr. Camarota served as lead researcher with the Census Bureau examining the quality of data in the American Community Survey. (Tr.

D1/46:10.) He is an expert on population studies and statistics. (Tr. D1/45:8-46:25; Ex. P-22 at 1-2.) Mr. Camarota's report was admitted into evidence. (Tr. D1/85:21-86:5.)

28. Using American Community Survey data, Dr. Camarota was able to use estimates of the voting-age citizen population for Broward County. (Tr. D1/56:21-24.) His analysis reported the number of voting-age citizens in Broward County using American Community Survey data for 2010, 2012, and 2014. (Ex. P-22.)

29. Dr. Camarota's analysis concluded:

(1) In 2010, Broward County had a total registration of 1,214,714, and an active registration of 1,042, 290. The estimated 18+ citizen population was 1,119,528 (1-year) and 1,098,140 (5-year), resulting in a citizen population total registration rate of 108.5%-110.6%. (Tr. D1/56:25-57:3; P-22 at 5.)[2] Broward County had a total 18+ population of 1,361,787. (Tr. D1/53:16; D1/54:4.) These result in an 89.2% total registration rate compared to the total adult population. (Tr. D1/55:18.)

(2) In 2012, an active registration of 1,140,454 (total registration was not reported to the Election Assistance Commission that year). (D1/54:7-12; D1/55:8.) The estimated 18+ citizen population in 2012 was 1,187,350 (1-year) and 1,134,383 (5-year), resulting in a citizen population active registration rate of 96.1%-100.5%. (Tr. D1/57:5-8; Ex. P-22 at 5.)[3] Broward County had a total 18+

[2] Using the 2008-2012 5-year ACS figure still gives a ratio of total registration to adult citizen population of 107.1%.
[3] Using the 2010-2014 5-year ACS figure still gives a ratio of total registration to adult citizen population of 97.1%.

population of 1,421,895. (Tr. D1/53:23.) This results in an 80.2% active registration rate compared to the total adult population. (Tr. D1/56:13.)

(3) In 2014, Broward County had a total registration of 1,198,616, and an active registration of 1,071,305. (D1/54:15; D1/55:10.) The estimated 18+ citizen population in 2014 was 1,239,345 (1-year) and 1,187,020 (5-year), resulting in a citizen population total registration rate of 96.7%-101.0%. (Tr. D1/57:10-11; Ex. P-22 at 5.) Broward County had a total 18+ population of 1,467,042. (Tr. D1/53:19.) These result in an 81.7% total registration rate compared to the total adult population. (Tr. D1/56:2.)

30. The Census Bureau estimates the size of the population by age in each county annually. (Tr. D1/46:6-25.) These population estimates can be compared to the number of people registered to vote in a county. (Tr. D1/56:21-24; D1/65:24-25.) Doing so results in a registration rate showing the share of the adult citizen population that is registered to vote. (Tr. D1/57:15-20.) The American Community Survey done by the Census Bureau collects and provides estimates for citizenship population. (Ex. P-22 at 3.) Dr. Camarota used these figures, population estimates from the American Community Survey, together with the actual reported registration figures from the United States Election Assistance Commission's Election Administration Voting Survey. (Tr. D1/57:15-59:22.)[4]

31. Population estimates from the American Community Survey are used by the government every day in various fields. (Tr. D1/84:5-18.) Localities are required to report their registration figures to the Election Assistance Commission. (Tr. D1/67:9-16.) No evidence in the

[4] The Court finds that it is of no consequence to its analysis whether the rate in Broward County is inflated compared to Florida or the country as a whole based on CPS survey numbers.

record suggests that counties do not report accurate and up-to-date information to the Election Assistance Commission. The results of the Election Assistance Commission survey, including county data, can be readily downloaded from the Election Assistance Commission's website, which is how Dr. Camarota obtained the data he used. (Tr. D1/51:1-4; D1/66:5-8.) Dr. Camarota compared registration totals in Broward County to contemporaneous population estimates for the years 2010, 2012, and 2014. (Tr. D1/57:15-59:22; Ex. P-22 at 6-7.) Population estimates are publicly available from the Census Bureau's American Factfinder website. (Tr. 53:2-7.) Dr. Camarota obtained population figures from that source. (Tr. 53:2-7.) Total population estimates are released by the Census Bureau each year and can be sorted by age group. (Ex. P-22 at 3-4.) The American Community Survey breaks down the estimates even further and provides information on citizenship. (Ex. P-22 at 3-4.) American Community Survey estimates provide one-year data and five-year aggregates. (Ex. P-22 at 3-4.)

**D. Expert Opinion of Scott Gessler**

33. ACRU has presented an expert in election administration in the person of Mr. Scott E. Gessler, who served as Secretary of State of Colorado from 2011 through 2015. 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 ("the Secretary of State is an expert in the area of voting or elections"). Mr. Gessler's reports, both his original and the report he updated following the Court's order compelling discovery, were admitted into evidence. (Tr. D1/232:23-233:8; Ex. P-15, P-23.)

34. ACRU's expert, former Colorado Secretary of State Scott Gessler, has opined that Defendant Snipes's list maintenance efforts were not reasonable under industry standards applicable to election administration in light of the state of the rolls, the procedures used by the

office, and the statutory and investigative tools available to Defendant Snipes. Mr. Gessler concluded that Defendant Snipes therefore lacks a general program of list maintenance. (Tr. D1/145:6-10; Ex. P-23 ¶17; Ex. P-15 ¶ 13.)

### 1. Defendant Does Not Perform Even Minimum List Maintenance Mailings

35. Florida law establishes that, at an absolute minimum, supervisors of elections must perform one of a list of three list maintenance mailings in every non-election year. Fla. Stat. 98.065(2)(a)-(c). Having reviewed the documents and testimony from discovery, Mr. Gessler opined that Defendant Snipes is not adequately performing any of these three programs. (Tr. D1/182:2-191:13.) The three programs are National Change of Address mailings, nonforwardable mass-mailings, and targeted mailings to registrants who have not voted or contacted the office. Fla. Stat. 98.065(2)(a)-(c). Ultimately, these three programs seek change-of-address information for registrants from different sources. Through one program "change-of-address information supplied by the United States Postal Service through its licensees is used to identify registered voters whose addresses might have changed." Fla. Stat. 98.065(2)(a). By another, "change-of-address information is identified from returned nonforwardable return-if-undeliverable mail sent to all registered voters in the county." Fla. Stat. 98.065(2)(b). And finally, "Change-of-address information is identified from returned nonforwardable return-if-undeliverable address confirmation requests mailed to all registered voters who have not voted in the last 2 years and who did not make a written request that their registration records be updated during that time." Fla. Stat. 98.065(2)(c). Mr. Gessler observed that both Defendant and her staff were unfamiliar with these provisions. (Ex. P-15 ¶ 14; Tr. D1/159:22-160:24; D1/184:3-25.)

36. First, Broward County does not conduct reasonable list maintenance to identify registered voters whose have moved, whether inside or by leaving the county, by using "change-of-address information supplied by the United States Postal Service through its licensees." Fla. Stat. 98.065(2)(a). Mr. Gessler based his opinion on several facts in evidence. First, Ms. Mary Hall, the Director of Voter Services, testified that the office receives National Change of Address database information only through the stickers placed on mail that has been returned to the office as undeliverable by the Postal Service. (Tr. D1/184:3-25.) But this is not the same as NCOA data received from the USPS NCOA database through its licensees. Secondly, in response to requests for production for all records related to requests for and receipt and use of NCOA database information, Defendant produced nothing. (Ex. P-23 ¶ 23.) Finally, in her sworn interrogatory responses, Defendant Snipes stated that she does not obtain or use data from commercial vendors regarding change of address for registrants on the list of eligible voters. (Ex. P-23 ¶ 24, P-20 at 7.)

37. Based on the evidence, Mr. Gessler concluded that Defendant Snipes does not do any nonforwardable mass-mailings to all registered voters. First, Defendant's certifications of list maintenance, as originally submitted, never once certify that any mass-mailings, as defined in the statute, have been done. (Ex. P-18.) Second, the large mailings that the Supervisor has done are clearly marked as forwardable. (Ex. P-26.) And finally, the large mailings done by the Supervisor have only gone to all active registrants, rather than to all registered voters. (Tr. D1/222:22-223:13.)

38. When observing whether Supervisor Snipes is in fact conducting adequate targeted mailings under Fla. Stat. 98.065(2)(c) as claimed in her certifications, Mr. Gessler opined that the numbers on the certifications show an impossibly small number of "address

confirmation requests." (Tr. D1/213:2-8; Ex. P-23 ¶ 32-41.) Based on the number of address confirmation requests sent, it is impossible that Defendant Snipes sent such requests to "all registered voters who have not voted in the last 2 years and who did not make a written request that their registration records be updated during that time." *Id.* The number fluctuates in each six-month time period from 456 to a maximum of 7,025. (Ex. P-18.) In the 2014 general election, for example, 592,463 of Broward County's 1,067,083 voters did not vote and in the 2012 general election, 378,111 registrants did not vote. (Ex. P-25 at 3.) Yet from 2013-present, Defendant Snipes has only sent out 14,704 address confirmation requests. (Ex. P-18.) In Mr. Gessler's professional opinion, and with no records showing otherwise, it is entirely unlikely that all of the hundreds of thousands of non-voters made contact with the Supervisor's office during that time. (Ex. P-23 ¶ 37.) Defendants' only argument that the Supervisor is in fact doing targeted mailings is from Intervenor's expert Dr. Smith, who claimed that roughly 150,000 registrants contacted the office to update their information. Even if Dr. Smith is correct, 592,463 is overwhelmingly greater than the combined total 150,000 and the 14,704 address confirmation notices the Supervisor sent out from 2013 to the present.

**2. Defendant Lacks Written Procedures and Policies Consistent with a General Program of List Maintenance**

39. In Mr. Gessler's opinion, a reasonable list maintenance program must feature consistent and written policies and procedures. (Tr. D1/110:1-112:25.) These are necessary to ensure the equal and consistent treatment of all voters, to ensure that the same steps are followed regardless of personnel, to minimize human error and oversights, to ensure consistency despite office turnover, and to allow election officials and the public to review policies and procedures to make improvements and adjustments. (Tr. D1/109:24-112:23; Ex. P-23 ¶ 14.) The fact that

Defendant Snipes has no written policies and procedures whatsoever, other than a third-party software manual, is indicative of the complete absence of a general program of list maintenance.[5] (Ex. P-23 ¶ 16-17.) Without them, it is impossible to have adequate recordkeeping, processing, analysis, and auditing of the list maintenance program. (Ex. P-23 ¶ 14.) Without written procedures and policies, it is impossible to implement training, documentation, and reporting. *Id.* The fact that Supervisor Snipes has been consistently filing inaccurate certifications of list maintenance for 5-6 years due to "oversights" is proof of this failure. (Tr. D1/193:9-195:2; Ex. P-15 ¶ 13.) As another example, written procedures would have provided guidance for how to respond to information received regarding registrations at invalid commercial addresses, as compared with haphazard instantaneous conversion to the Supervisor's address. (Tr. D3/153:22-154:24.) In addition, in Mr. Gessler's opinion it is imperative that such written policies and procedures be readily available and open to review by the public, so that there is openness and transparency in list maintenance. (Tr. D1/111:22-112:11.) Defendants' claim that the VR Systems manual, for example, is proprietary and not available for public inspection. (Tr. D5/6:8-12.) Even those policies and procedures that were not proprietary could not even be located or produced pursuant to discovery obligations, much less made readily available to the public.

40. Mr. Gessler gave further explanations for his opinion that Defendant Snipes has an unreasonable general list maintenance program, in part, because her office lacks written manuals, policies, or procedures. (Tr. D1/145:6-155:25.) Mr. Gessler contrasted her lack of written materials with what he opines is the standard among election administration

[5] Plaintiff ACRU submits that the portions of the late-produced Voter Services Procedures Manual that are not derived from the VR Systems help desk should be excluded under Federal Rule of Procedure 37(c).

professionals. (Tr. D1-155:6-25.) Mr. Gessler emphasized the importance of having list maintenance processes that are mapped out in written charts and schedules. (Tr. D1/108:9-109:23.) He observed that Dr. Snipes does not have such maps and flowcharts. (Tr. D1/154:13-17.) Clear and regularly consulted written procedures are needed in order to ensure that steps are not missed in list maintenance procedures and so that there is a continuity of procedures when there is turn over in personnel. (Tr. D1/110:18-111:21.)

41. Mr. Gessler's conclusions were reinforced by the astonishing late-production of a "Voter Services Procedures Manual" by Defendant on the second day of trial, the day after Mr. Gessler gave his opinion concerning the lack of written procedures. (Tr. D2/71:13-20.) Defendant testified that part of the reason why none of the staff knew about the Voter Services Manual, why it was late-produced, and why it was initially produced in an incomplete state is because the person who was in charge of maintaining the manual had recently left the office, so that Ms. Flemming, who currently maintains the manual, has only been doing it for the last year or so. (Tr. D2/6:7-12.) As a result, it featured multiple apparently dated and obsolete sections, (Tr. D3/69:7-70:16,) the staff are not aware of its location, (Tr. D1/145:20-155:25,) and there is not consistency in version control between the various copies throughout the office, (Tr. D3/66:18-67:18).[6] Defendant's excuse for the chaotic state of the Voter Service Procedures Manual is the turnover in the relevant staff. (Tr. D2/6:7-12.) According to Mr. Gessler, this would not be happening if there were consistent and well-established written policies and procedures. (Tr. D1/111:5-16; D4/124:12-19.)

[6] The record is wildly inconsistent regarding how many copies of the Voter Services Procedures Manual are maintained. Counsel told the Court that there are two copies. (Tr. D3/43:10-14; D3/67:9-15; D3/78:13-15.) Ms. Flemming stated that there are 30. (Tr. D4/192:13-23.)

### 3. No Evidence of Consistent List Maintenance Activity and Removals

42. Mr. Gessler reviewed the biannual certifications of list maintenance that are submitted by the Supervisor to the Florida Secretary of State. (Ex. P-18.) These certifications list the numbers of removal and list maintenance notices sent. Mr. Gessler opined that, because of the wildly fluctuating numbers of registrants moved into inactive status and then also in the numbers of registrants moved from inactive to ineligible, the Supervisor lacks a general program of list maintenance. (Tr. D1/163:12-18; D1/164:16-166:4.) According to Mr. Gessler, there is no semblance of consistency or a pattern in the removal numbers that is indicative of a consistent and general program of list maintenance. *Id.* Haphazard, inconsistent numbers are inconsistent with a program of list maintenance that is reasonable and applied consistently. (Tr. D1/163:16-18.) For example, in the second half of 2011 the Supervisor removed 141,939 inactive registrations. (Ex. P-15 at 8.) But then during the two year period from the second half of 2013 through the second half of 2015 did not remove one single inactive registration. (Ex. P-15 at 8.) In Mr. Gessler's opinion, it is very important and standard practice for list maintenance to be consistent and regular due to the nature of a moving populace and the importance of ensuring that people can exercise their right to vote efficiently. (Tr. D1/140:24-25.)

### 4. Defendant Does Not Make Use of Effective and Readily Available List Maintenance Tools

43. In Mr. Gessler's opinion, due to uncontested inaccuracies and irregularities in the Broward County voter rolls, it is unreasonable for Supervisor Snipes not to avail herself of the readily available list maintenance tools under Florida law. (Ex. P-23 ¶ 86-76.) With regard to noncitizen registrants, for example, she could utilize the Florida DAVID system. (Ex. P-23 ¶ 66-73.) Indeed, using the DAVID system would give Supervisor Snipes at no cost most of the

abilities that she wishes she had access to when she laments not having access to the ERIC system. (Tr. D1/177:6-13; D1/202:5-17.) The Supervisor cannot hide behind that fact that only the state can acquire use of ERIC, because in large measure she already has access to the same functionality and data through the DAVID system. (Tr. D/254:13-24.)

**5. The Registration Rate in Broward County Is a Red Flag**

44. Also, Mr. Gessler reviewed the registration rate information for Broward County and opined that, in his experience with similar facts and circumstances, an inflated registration rate serves as a main indicator that a jurisdiction is not taking reasonable steps to maintain its voter registration lists. (Tr. D1/135:16-138:10.) In his opinion, the rate in Broward County was "alarmingly high" and serves as a warning sign that an examination of the rolls and practices should be initiated so that remedial measures can be taken. (Ex. P-23 ¶ 43.)

45. Mr. Gessler testified that monitoring registrations rates should be part of a reasonable list maintenance program. (Tr. D1/139:1-11.) He also testified that there is no magic rate number at which a jurisdiction is inherently in or out of compliance with list maintenance obligations. (Tr. D1/11-24.) Instead, the registration rate must be viewed in light of the facts and circumstances of the jurisdiction in question. There can be unique industries or demographic factors that may account for an unusually high registration rate.[7] Mr. Gessler saw no evidence of unique population factors that would explain an unusually inflated registration rate in Broward

[7] Registration rates in certain Colorado counties in the past have been an example of this, such as skiing communities and small university towns. (Tr. D1/136:8-25; D2/18:1-2; D2/19:12-16; D2/20:3-19.) In those cases, another likely circumstance contributing to a high registration rate was the fact that the Colorado legislature had converted inactive registrants back into active registrants and reset the wait time for removal of inactive registrants in a particular year, so that inactive registrations remained on the rolls for a longer period than usual. (Tr. D2/24:9-20.)

County, nor did Defendants present any such evidence. Alternatively, there may be circumstances that may cause a relatively lower registration rate to still be a red flag.

46. In addition, Mr. Gessler examined the number of registrants over age 100 on the voter roll in Broward County and compared it with Census Bureau data regarding the estimated number of centenarians in Broward County. (Ex. P-23 ¶¶ 76-80.) He concluded that the registration list showed over 8 times the expected number of centenarians in the county based on census estimates, indicating that inadequate list maintenance was being done regarding deceased registrants. (Ex. P-23 ¶ 78.) In Mr. Gessler's opinion, this was the result of only obtaining and processing death information passively, so that nothing is done to ensure that missed deaths or those who have been deceased and on the rolls for years are identified, such as by using the cumulative Social Security Death Index. (Ex. P-23 ¶¶ 80-82.) He recommends the use of the Social Security Death Index as standard practice for periodically ensuring that long deceased voters do not remain on the rolls. (Ex. P-23 ¶¶ 83-85.)

**6. Defendants Offered No Election Administration Professional Expert**

47. Neither Defendant nor Defendant-Intervenor provided an expert in the relevant professional field offering an opinion regarding how a reasonable election administration professional would carry out their duties under similar circumstances to those in Broward County. *Ins. Co. of the West v. Island Dream Homes, Inc.*, 679 F.3d 1295, 1298 (11th Cir. 2012) (finding that the relevant standard of care must be determined through the use of expert witnesses in the professional field). Nevertheless, Defendant Snipes maintains that she and her staff are election administration professionals. (Tr. D1/22:20-22; D1/23:1.) Defendant Snipes herself presented no expert witnesses at all at trial.

**E. Expert Opinion of Dr. Daniel Smith**

48. Defendant-Intervenor presented Dr. Daniel Smith as an expert. Dr. Smith was not put forward as an election administration expert offering an opinion regarding the proper standard of care that an election administrator should exercise regarding list maintenance under the NVRA. *See* ECF No. [182] at 33 n.16. Instead, Dr. Smith was put forward by the Defendant-Intervenor as an expert on political science and elections at the state and local level. (Tr. D5/104:11-13.)

49. Dr. Smith provided essentially provided three opinions. First, that Plaintiff ACRU's registration rate calculation is flawed. (Tr. D5/111:9-13; D5/119:10-21.) Second, that attempts to find inaccurate voter registrations based upon elementary, widely used, and statutorily permitted matching between databases is problematic. (Tr. D5/160:13-161:11.) And third, that, in Dr. Smith's opinion, there is reasonable "churn" of the voter rolls in Broward County based on the number of registrations updated or removed between January 2015 and January 2017. (Tr. D5/143:6-18.) Dr. Smith's opinion was confined to an analysis "churn" data viewed from a distance, not an examination of the Supervisor's actual list maintenance practices.

50. Dr. Smith disputed the calculation of registration rate in Broward County. (Tr. D5-170:5-6.) Ultimately, it is significant that Dr. Smith did not offer his own calculation to the court, particularly considering that he repeatedly opined about flaws in Plaintiff's ratios. (Tr. D5/107:7-12; D5/111:20-22; D5/116:8-13.) His omission is strange in light of the fact that he does not, however, dispute that it is *possible* to calculate an eligible citizen registration rate for a given jurisdiction. (Tr. D5-170:10-11.) Stranger still, Dr. Smith does not explain how one should go about correctly calculating the eligible citizen registration rate for a jurisdiction. (Tr. D5:170:4-6.) Dr. Smith did not offer any ratio to rebut Plaintiff.

51. Dr. Smith points out what are, in his opinion, problems with both the numerator and denominator in Dr. Camarota's analysis of the registration rate. For the numerator, Dr. Camarota had used the number of registered voters as reported by the Election Assistance Commission in its biennial reports. Dr. Smith opined that this number is problematic because (1) this number is taken at a "high-water" mark shortly before an election, (Tr. D5-106:20-25,) (2) it is taken from the Election Assistance Commission rather than from the county itself, (Tr. D5-108:9-25,) and (3) there is a temporal mismatch between this number taken in October of the year in question while the population number from the American Community Survey is weighted to July of that year (Tr. D5-120:7-14).

52. For the denominator, Dr. Smith opined that, while the American Community Survey is valid data as far as providing an estimate of the eligible citizen population, that population figure should be compared to the corresponding registration figure for the control month in a given year. (Tr. D5-120:7-14.)

53. This Court attaches little weight to Dr. Smith's findings in this regard. For example, the "high water mark" before an election represents something plainly significant—namely the list of those eligible to cast a ballot who have not been subject to list maintence procedures instituted by the Defendant. That number, therefore, most likely represents the actual voting populace. While indeed the list of eligible registrants may peak on the eve of an election, that is precisely the point the Plaintiff has made: that the list of those who may case a ballot regularly exceeds the actual number of people who could be eligible to do so.

54. Moreover, Defendant's objection that the data is derived from the Election Assistance Commission also falls flat. These data are self-reported by the Defendant to the Election Assistance Commission and ultimately represents a formalized response to a systematic

nationwide survey conducted by a government agency. The argument that the data reported by the Defendant to a federal government agency cannot be trusted raises more questions about the Defendant's practices than it answers. Indeed, neither Defendant nor Defendant-Intervenor offer alternative numbers, and this Court accepts a federal election administration agency's own re-publication of the Defendant's own data as authoritative of the number of registrants eligible to cast a ballot in an election.

55. Furthermore, while there may be a temporal mismatch of a few months, neither Defendant nor Defendant-Intervenor ultimately provide this court with any evidence that a temporal mismatch of a few months would measurably alter the conclusions of Plaintiff's experts. Indeed, despite insisting that it is possible to calculate a registration rate, (Tr. D5/170:10-11,) Dr. Smith does not offer his own calculation of the registration rate, but simply states that Dr. Camarota's must be incorrect, (Tr. D5/169:19-23.) Pointing out the temporal mismatch is inadequate to rebut the compelling statistical data from the two separate federal agencies showing more registrations than eligible citizens living in Broward County at various times. Furthermore, it would have been impossible for Dr. Camarota to create a ratio using registration data from the state because it is not possible to request a monthly disc from an earlier time period. (Tr. D2/112:17-19.)

56. Dr. Smith remarked that demographics that include temporary residences cause aberrations in calculating a registration rate. Military and students, for example, are registered where they are from but are often counted in the population where they are deployed or studying. (Tr. D5/166:25-167:8.) The Court finds this argument unpersuasive. Dr. Smith provided no evidence regarding the military or student populations in or from Broward County that would have resulted in an inflated effect on the numerator or denominator. He gave the Court no basis

with which to conclude that the high registration rate in Broward is the result of, or is affected by, such segments of the population.

57. Dr. Smith's ultimate conclusion regarding the registration rate has little to do with questioning the reliability of the sources used by Dr. Camarota or the preferred methodology for calculating a registration rate of eligible citizens in a jurisdiction. Rather, Dr. Smith simply disagrees with the legal significance or import of a "high" registration rate. (Tr. D5/172:2; 169:12-15.) In his opinion, it is categorically irrelevant whether the rate is 90% or 150% as far as the question of adequate list maintenance is concerned. (Tr. D5/172:13-15.) Dr. Smith used an analogy wherein how full a bottle of water tells him nothing about the purity of the water. Dr. Smith's analogy rejects other court's common sense conclusion that if there are more registrants than population, it is a strong indication that the list is not accurate or current.

58. The Court finds unpersuasive Dr. Smith's extreme skepticism regarding whether the registration rate in a jurisdiction is symptomatic of inadequate list maintenance. The Court agrees with every other federal District Court to have considered the matter and finds, contrary to Dr. Smith, that a high voter registration rate creates an inference that an election official has failed to meet the reasonableness requirement of Section 8.

59. Supporting this conclusion is the opinion of Mr. Gessler that criticism of the registration rate metric is an outlier among actual election administration officials who engage in the actual practice of list maintenance. (Tr. D1/139:12-17.) According to Mr. Gessler, given actual registration trends and list maintenance patterns, a high registration rate is a red flag and is something that should be monitored as part of a reasonable list maintenance program. (Tr. D1/139:1-6.)

60. In developing his opinions, Dr. Smith did not review Florida list maintenance law. (Tr. D5/172:20.) He did not review any of the discovery in this case, such as depositions or documents or discovery responses. (Tr. D5/173:2, 19.) He did not review the certifications of list maintenance that are in the record. (Tr. D5/173:12.) Yet he claimed to understand and be able to explain various removal processes in Florida, including details that none of Defendant's staff were familiar with, such as whether the Social Security Death Index is used by the State as a source. (Tr. D5/150:10-17.) For example, he was unfamiliar with the requirement that supervisors remove inactive registrants who have passed their two-cycle wait by the end of December following a general election. (Tr. D5/112:17-20.) By his own admission, he did not "open the hood and look into the practices of . . . [the] Supervisor of Elections office" in this case, as Mr. Gessler had. (Tr. D5/138:24-25.) His opinion as to whether or not adequate list maintenance is occurring in Broward County was based on "a 30,000-foot view;" (Tr. D5/139:7,) again in contrast with Mr. Gessler, who reviewed almost all of the discovery in this case and even spent hours during the trial reviewing the Voter Services Procedures Manual, (Tr. D3/50:3-10.) All Dr. Smith did was look at two snapshots in time in the voter registration file and observe how many registration updates and removals had been made. (Tr. D5/140:20-141:13.) Conveniently, his snapshots were from January 2015 and January 2017, the latter date being right after the Defendant had done a rare amount of removal of inactives in December 2016. (Ex. P-19 at 2; Ex. P-15 at 8.) According to the certifications of list maintenance, Defendant Snipes has never removed inactives in amounts anywhere near 88,823 in the second half of an election year before. *Id.* That means that nearly half of the 192,000 removals that took place from January 2015-January 2017 took place in December 2016. The Court is therefore compelled to conclude that these removals were done after the commencement of this litigation.

61. As a result, the Court gives very little weight to Dr. Smith's opinion that "there's churning going on" and that there is "some type of list maintenance going on." (Tr. D5/143:6-20.) He is not an election administration professional with any expertise of the appropriate standard of care required under Section 8 of the NVRA and, even if he had such expertise, he did not actually examine the Supervisor's list maintenance practices. Accordingly, Dr. Smith is not competent to offer an opinion as to the reasonability of the Supervisor's list maintenance program with regard to the standard expected of an election administration professional.

**F. Observations by Citizens of the Broward County Voter Roll**

62. The Court heard testimony from several residents of Florida and of Broward County who have acquired and reviewed the official lists of registered voters of Broward County. These lists are made public through the Department of Elections of Florida and are official public records. The witnesses testified about the registrations they observed on the lists and in some cases submitted the records they observed into evidence. These observations show empirical defects in the list, deceased registrants, duplicate registrations, underage registrations, and registrations at illegal commercial addresses. Results matter, and at minimum these defects together establish that Defendant's list maintenance efforts are less than reasonable.

**1. Mr. William Skinner Observed Out-of-State Duplicate Registrations**

63. In 2016, Mr. William Skinner and Mr. Kirk Wolak conducted a review of the registration rolls in Broward County. (Tr. D2163:15-22.) They obtained and used contemporaneous official lists of registered voters from the Florida Division of Election and from the New York State Board of Elections. (Tr. D2/161:25.) They cataloged observations of multiple duplicate registrations between the lists. (Tr. D2/167:12-16; D2/169:7-10; Ex. P-9.) They utilized a matching criteria based on exact first name, middle initial or middle name, last

name, and date of birth. (Tr. D2/164:4-9.) Their matching cataloged 7,635 matching registrations in both New York State and in Broward County for the same time period. (Ex. P-9.) Florida law expressly allows Defendant Snipes to request and use information from out-of-state voter registration officials in order to identify duplicates. Fla. Stat. 98.045(2)(b).

64. On August 11, 2016, Mr. Skinner sent a letter summarizing these findings, together with a Microsoft Excel spreadsheet with all of the relevant data, to Supervisor Snipes via email. (Tr. D2/168:6-10; Exs. P-12, P-13.)

65. After receiving no response from Supervisor Snipes, Mr. Skinner followed up via email on September 21, 2016. (Tr. D2/170:2-9.) He received no response. (Tr. D2/170:8-10.) At trial, none of the Supervisor's staff could recall the complaint received from Mr. Skinner or relate any of the actions taken under Fla. Stat. 98.075(6) and (7) in response to his submissions. Furthermore, despite repeated requests in discovery, including an order compelling production of the documents, Defendant Snipes has not produced any of her records related to Mr. Skinner's communications and submissions.

66. After hearing no response whatsoever from the Defendant, Mr. Skinner contacted Defendant Snipes's office yet again on February 22, 2017, regarding his August 2016 submissions. (Tr. D2/170:10-11.) Finally he received a response in the form of a phone call from Ms. Dolly Gibson with the Supervisor's office on February 27, 2017. (Tr. D2/170:11-15.) Ms. Gibson asked Mr. Skinner to resend the information he had submitted prior. (Tr. D2/170:11-20.) Mr. Skinner has received no further information regarding his submissions or any actions taken regarding these duplicate registrations as of the time of trial. (Tr. D2/171:9-11.)

**2. Mr. Richard DeNapoli Observed Deceased Active Registrants**

67. In 2012, Mr. Richard DeNapoli obtained information from the Social Security Death Index through GeneaologyBank.com regarding the total number of deaths that had occurred in Broward County the previous year, 2011. (Tr. D2/249:19-24.) According to that data, 9,960 persons had died in Broward County in 2011. (Tr. D2/247:6-8; D2/249:24.) He then conducted a search of 2,100 of these deceased persons from May 13-19, 2012, using the Broward County Supervisor of Elections website. (Tr. D2/247:8-14; D2/246:22-247:5.) On the website, searches can be run for current active registration information. (Tr. D2/247:4-5.) The searches cross-referenced the registrant's name, birth date, as well as city or zip code. (Tr. D2/249:11-16.) Mr. DeNapoli's search revealed that 481 of the 2,100 deceased individuals searched were still listed as active registrants. (Tr. D2/247:10-14.) This is a rate of 23% of those who died in 2011 being active registrants at least six months after they had died or potentially up to one year and five months. The resources Mr. DeNapoli used had not cost.

68. In May 2012, Mr. DeNapoli forwarded his research and the findings regarding the 481 deceased active registrants to Supervisor Snipes. (Tr. D2/247:15-24.) The 481 deceased registrants were removed in June 2012 after Mr. DeNapoli alerted the Defendant of the deceased registrants who had not been removed from the prior year. Defendant Snipes ultimately removed all of those deceased registrants identified by Mr. DeNapoli. (Tr. D2/247:18-248:3; D2/250:12-15.)

**3. Mr. Kirk Wolak Observed Implausible Birthdates**

69. Mr. Kirk Wolak presented testimony regarding his observations of registrations on the Broward County voter roll featuring birthdates with implausible birth years. Mr. Kirk Wolak obtained and examined official Voter Extract File information from the Florida Division of Elections in 2016. (Tr. D2/111:11-112:8; D2/114:14-19.) He compiled the data from the

official disks since that time using a MySQL database. (Tr. D2/112:20-113:15.) Sorting the Broward County voter list from the December 2016 disk, he was able to reduce a Microsoft Excel file featuring all registrations having birth dates resulting in a registrant of 101 years of age and over. (Tr. D2/121:6-13; Ex. P-5.) The list contains 3,045 entries. (Tr. D2/121:3; Ex. P-5.) The three oldest registrants have birthdates in 1886, 1889, and 1896, resulting in ages of 130, 127, and 120 years old and are listed as *active* registrants. (Tr. D2/122:23-123:8; Ex. P-5.)

70. As Mr. Wolak explained, anyone can request the Florida registration files from the Department of Elections, free of charge. (Tr. D2/112:1-8.) Also, no advanced computer skills are required in order to open the files and read them. (Tr. D2/154:20-24.) The files can be opened, read, and sorted with common programs, such as NotePad and Microsoft Excel. (Tr. D2/113:20; D2/114:7-9.) Indeed, it stands to reason that this is why they are made publicly available: so that the public may examine them. This privilege is not reserved to academics and persons with advanced degrees.

#### 4. Mr. Richard Gabbay Observed Registrations of Deceased and Moved in His Community

71. In 2014, Mr. Richard Gabbay, a registered voter in Broward County, being concerned with the state of the voter rolls in his county after observing irregularities at polling places, started to investigate the accuracy and currency of registrations in his community. (Tr. D3/99:8-100:9.) Mr. Gabbay lives in a retirement community in Coconut Creek, Florida. He is registered to vote in Precinct F004. (Tr. D3/98:16-25.) Mr. Gabbay obtained a Voter Extract Data CD from the Florida Department of Elections. (Tr. D3/99:14-25.)

72. Mr. Gabbay took the list and reduced it to the registrations that had addresses in his precinct. (Tr. D3/99:22-100:9.) He then proceeded to conduct research into whether the

registrations were accurate and current. His community has a published social registry of residents and also each building has regularly updated building directories posted that lists current residents, much like names on a mailbox. (Tr. D3/104:14-19.) By checking the addresses on the voter roll against the residence lists he was able to discover over 600 registrations that were not accurate, either because the person listed did not live at the registered address, or because the person had died. (Tr. D3/104:20-105:19.) In some instances, Mr. Gabbay had personal knowledge that a registrant listed on the roll had died because he knew the deceased resident personally. (Tr. D3/103:11-104:10.)

73. Mr. Gabbay compiled the information he had gathered and prepared an Excel spreadsheet listing the registrations from the Voter Extract File that his research revealed were inaccurate. (Ex. P-3.) He sent the spreadsheet in an email to Supervisor Snipes on October 6, 2015. (Ex. D-184 at 5-6.) In his email, Mr. Gabbay expressly stated that he was submitting the information under Florida Statute 98.075(6) & (7). (Ex. D-184 at 6.) The Supervisor responded by email on October 8, 2015, acknowledging receipt. (Ex. D-184 at 5.)

74. Mr. Gabbay's list included names of 629 registrations that appeared to be inaccurate according to his observations. (Tr. D3/100:5-9.) Seven of the registrations were for deceased persons. (Ex. P-3.) Mr. Gabbay listed how long the person had been deceased in the information he submitted to the Defendant Snipes. (Ex. P-3.) One registrant had been deceased for nine years and was still listed as an active registrant. (Ex. P-3.) One active registrant, in fact, was a deceased golfing partner of Mr. Gabbay's, Ms. Shirley Zamore. (Tr. D3/103:11-17.) Four registrations were duplicates, that is, the same name and address were registered twice. (Ex. P-3.)

570 registrations were outdated or inaccurate because the registrant either did not live in the community at all, or, had moved to a different address within the community. (Ex. P-3.)[8]

75. This court finds that the Defendant's response to various citizen complaints also is relevant to determining the reasonableness of list maintenance. When citizens discover defects in the voter rolls, how an election official processes that information provided by helpful third parties is an important part of list maintenance. This is especially true in Florida, where state statutory list maintenance procedures explicitly detail actions to be taken and obligations of election officials regarding those actions. Fla. Stat. 98.075(6) & (7). The Court finds that the Defendant failed to comply with those state procedures based on testimony provided to the court, and those failures are relevant to the question of whether the Defendant conducted reasonable list maintenance. Florida Statute 98.075(6) & (7) provide that, if a supervisor of elections receives information from any source that a registration is inaccurate, "the supervisor of the county in which the voter is registered *shall*: 1. Notify the registered voter of his or her potential ineligibility by mail *within 7 days* after receipt of notice or information." Fla. Stat. 98.065(7) (emphasis added). On November 18, 2015, Mr. Gabbay followed up with Supervisor Snipes by sending an email requesting information and records related to what actions had been taken on the information he submitted on October 8, 2015. (Tr. D3/106:7-9.) His request was made as a public records request under Florida law.

[8] Mr. Gabbay's original submission to Defendant Snipes did contain a registration for a single registrant that he erroneously thought was dead. (Tr. D3/103:3-7.) He discovered this error himself, however, and resubmitted the information with the correction. *Id.* The fact that Defendant Snipes did not discover this error is further evidence that she did not follow the appropriate procedures in response to Mr. Gabbay's submissions.

76. Supervisor Snipes responded on December 1, 2015. In her response she simply stated that she had sent a vote by mail application to all active registrants in the county in October 2015. (Tr. D3/135:13-22.) Mr. Gabbay followed up again on December 9, 2015, asking why notices had not been sent out to the registrants he had identified. (Ex. D-184 at 11.) Some of the registrants he had identified were inactive. Accordingly, as of December 2015, Supervisor Snipes had not sent out notices to the registrants identified by Mr. Gabbay as required by Fla. Stat. 98.075(6) & (7). Mr. Gabbay received no records in response to his public records request either.

77. After further requests for information, Supervisor Snipes sent an email to Mr. Gabbay on March 21, 2016. (Ex. D-184 at 2.) This email included a chart summary of the actions her office had apparently taken regarding Mr. Gabbay's October submission. The chart purported that 196 registrations had been acted upon and removed. (Tr. D3/139:11-14.) The chart showed that 407 of the registrants that Mr. Gabbay had alerted the Defendant about were made inactive and would be removed after waiting through a number of federal cycles of inactivity, even though some of them were deceased. (Tr. D3/140:2-5.) The chart did not, however, identify which registrations any of these were. (Ex. D-184 at 4.) Mr. Gabbay also did not receive any records in response to his public records requests. (Ex. D-184 at 2-4.) Mr. Gabbay sent emails on April 8 & 12, 2016, and May 3, 2016, requesting which specific registrants were placed on inactive status pursuant to his request and what actions had been taken by the Supervisor's office regarding them. (Ex. D-184 at 14-17.)

78. The lack of responsiveness is not excused by the Supervisor's insistence that the majority of these registrants were slated for removal already as a result of being inactive. Some

were inactive when they may have still been living at the address listed.[9] (Ex. P-3.) In the end, Dr. Snipes did not send letters pursuant to Fla. Stat. § 98.075(7) and did not permit inspection of list maintenance records related to Mr. Gabbay's submissions pursuant to Section 8 of the NVRA.

79. Receiving no response and no records, on August 1, 2016, Mr. Gabbay resubmitted his original October 2015 submission, with a couple of amendments, this time including a request under Section 8 of the NVRA, 52 U.S.C. § 20507(i), for public inspection of all records related to the information he initially submitted in October 2015. (Ex. D-184 at 24.) He also requested records of any list maintenance activity related to those submissions. (Ex. D-184 at 25-49.) Six months later, in February 2017, Mr. Gabbay received a response from Supervisor Snipes in the form of a spreadsheet showing that the registrations he had originally submitted in October 2015 had finally been removed as inaccurate. (Tr. D3/109:6-7.) To date, however, Mr. Gabbay has received none of the documents he requested in August 2016 under the public inspection provision of the NVRA, such as the copies of the notices that were sent out under Fla. Stat. 98.075(7). (Tr. D3/107:15-20.) He has received no actual list maintenance records and no invitation to inspect these records. (Tr. D3/107:1-20.)

80. Accordingly, the Court finds that Defendant Snipes's actions in response to Mr. Gabbay's complaints did not comport with the requirements of Fla. Stat. 98.075(7).

[9] This illustrates the problem with Defendant not including inactive registrants in mass-mailings as prescribed by Fla. Stat. 98.065(2)(b), for example. As Mr. Gessler stated, it is important to reach out to inactive registrants to ensure that voters are not placed on inactive status by mistake and to afford them an opportunity to update their registrations so that they can efficiently exercise their right to vote. (Tr. D1/173:16-174:12 Ex. P-15 ¶¶ 3-6.)

### 5. Mr. Logan Churchwell Observed Duplicate Registrations and Found Death Certificates of Active Registrants

81. Utilizing publicly available data as contemplated by the NVRA, Mr. Logan Churchwell was able identify multiple registrants who were deceased and even obtained death certifications for those registrants. (Tr. D2/207:14-208:3.) He also observed and cataloged duplicate, underage, and implausibly old registrations on the Broward County voter rolls. Mr. Churchwell's research was done at little to no cost.

82. In March 2017, Mr. Logan Churchwell examined the Broward County registration list from May 2016 as obtained from a Voter Extract Disk obtained from the Florida Division of Elections. (Tr. D2/201:2-16.) Mr. Churchwell sorted the data using basic Microsoft Excel functions in order to find certain categories of registrations. (Tr. D2/201:22-23.)

83. Mr. Churchwell sorted the list and catalogued his observations of registrations with the same first name, middle initial or name, last name, and date of birth. (Tr. D2/202:13-23.) His catalog contained 2,082 registrations with matching first name, middle name, last name, and exact date of birth. (Tr. D2/202:11-16; Ex. P-1.)

84. Mr. Churchwell also observed several other inconsistencies or inaccuracies in the registration list. Twenty one registrations had no first name listed. (Ex. P-1.) Another registration showed a date of birth resulting in the person being 12 years old and having been registered since they were 8. (Tr. D2/205:1-5; Ex. P-1.) A further 862 registrations showed birth dates putting the registrants at over 105 years of age. (Tr. D2/204:7-19; Ex. P-1.)

85. Mr. Logan Churchwell also examined a list of the registrations from the Broward County voter rolls with a date of birth putting the registrant at over 100 years of age. (Tr. D2/206:11-24; Ex. P-5.) This list of registrants in excess of 100 years old was created by Mr.

Kirk Wolak and appeared as an exhibit at trial. (Ex. P-5.) Mr. Churchwell selected several hundred registrations and conducted searches to confirm whether the person listed was deceased in the Social Security Death Index. (Tr. D2/206:20-207:2.) Mr. Churchwell observed that 104 registrants on Defendant Snipes' roll were listed on the Social Security Death Index. (Tr. D2/207:3-5.)

86. Mr. Churchwell even obtained death certificates for several of these active registrants. (Tr. D2/208:1-3.) From memory, Mr. Churchwell recounted at trial that the four death certificates for currently active registrants that he obtained were for Irene T. Bartlett, who died in 2000; Marie Evans, who died in 1996; Albert Chazen, who died in 1995; and Gerald Livingston Bullard, Sr., who died in 1994. (Tr. D2/207:6-11.)

87. While Defendant and Defendant-Intervenor make much of Mr. Churchwell's list of "possible" duplicates having "possible" matches, they overstate the purposes for why Mr. Churchwell included this category. (Tr. D2:236:5-238:2.) Mr. Churchwell testified that the category was created not to suggest these potential matches had significant merit, but rather something in the records showed a potential match to a degree greater than zero. (Tr. D2/231:4-8.) The category was established to create a set of potential duplicates so as to not relegate the potential matches into a category that would entail no further scrutiny.

**6. Value of Citizen Observations**

88. Defendants argue that the testimony of citizen witnesses regarding their observations of the registration list are invalid because the witnesses are not experts, do not have statistical training, and do not have access to the kind of information that Dr. Smith and Dr. Snipes have. (Tr. D2, D3 passim.) The Court finds these arguments unpersuasive. Instead, the Court shares Mr. Gessler's opinion that observations made by citizens regarding the accuracy

and currency of the voter rolls are valuable. (Tr. D1/125-130.) Indeed, the public inspection provisions of Section 8 clearly contemplate that ordinary citizens should be readily able to review the registration list precisely in order to verify their accuracy and currency and provide for effective and transparent list maintenance.

89. As was made clear in the testimony, ACRU's lay witnesses are not testifying that they have personal knowledge regarding whether particular individual persons should have their registrations removed or updated. Rather, they are providing their personal observations of the official registration list and apparent defects found there. The Court accepts their testimony and exhibits as such. (Tr. D2/124:1-3; Tr. D2/132:3-21; Tr. D2/174:10-14; Tr. D3/109.) Federal Rule of Evidence 803(8), (9). The sworn statements of Plaintiff's lay witnesses at trial purporting to describe the content of their spreadsheet based upon information from public records have evidentiary value. Defendant presented no evidence to contradict these sworn statements despite the fact that, if Defendant were correct, public records accessible to Defendant exist to rebut Plaintiff's witnesses testimony. Instead, Defendant offered no argument beyond the obvious fact that the witnesses cannot disprove a negative. Given Plaintiff's evidence and Defendant's lack of any contrary evidence, it is more likely than not that the testimony of Plaintiff's witnesses is true.

**G. Defendant's Admissions of List Maintenance Failures**

90. Testimony from Defendant and her staff indicate several admissions of inaccuracies in the rolls, failures to conduct adequate list maintenance, and failures to follow Florida statutes. Supervisor Snipes does not effectively utilize the list maintenance tools

available to her under Florida law.[10] In fact, she does not even claim to take advantage of any of these tools, at least not until after this litigation was initiated. She asserts that she only does the absolute minimum mandated by Florida's list maintenance statutes. The facts reveal, moreover, that she does not even do the minimum.

**1. Jury Recusal Forms**

91. Under Florida law, supervisors of election are expressly authorized to make use of jury recusal forms obtained from state and federal courts for list maintenance purposes. Fla. Stat. 98.065(4)(a)-(b). Despite concluding that it would be helpful to utilize this data, she does not. (Tr. D1/202:20-203:3.) These forms potentially contain information regarding current residency, citizenship, or felony status.

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[10] The tools provided by statute for Supervisors of Election to conduct reasonable list maintenance include:

a. Request and use information from out-of-state voter registration officials in order to identify duplicates. Fla. Stat. 98.045(2)(b).
b. Use National Change of Address ("NCOA") database information to identify registered voters who may have moved. Fla. Stat. 98.064(2)(a).c. Use nonforwardable mailings sent to all registered voters in the county, both active and inactive, to identify registrants who may have moved. Fla. Stat. 98.065(2)(b).
d. Send mailings to registrants who have not voted or contacted the office in 2 years. Fla. Stat. 98.065(2)(c).
e. Obtain and use information from returned jury notices for list maintenance purposes. Fla. Stat. 98.065(4)(a).
f. Obtain and use information from the Department of Highway Safety and Motor Vehicles for list maintenance purposes. Fla. Stat. 98.065(4)(a).
g. Obtain and use information from "other sources" for list maintenance purposes. Fla. Stat. 98.065(4)(b).
h. Obtain and use information regarding death, felony status, non-citizen status, or change of address from "sources other than those identified." Fla. Stat. 98.075.
i. Remove ineligible registrants based on information from other sources, not explicitly stated in the statute.

92. Currently the Supervisor does not obtain jury excusal forms or information from courts, including the local circuit court. (Tr. D1/202:20-25.) The Supervisor has at least one staff member who is familiar with the forms and understands what information is available. (Tr. D1/204:3-7.)

93. Defendant undertakes absolutely no effort whatsoever to use data available from the Broward County Circuit Court Clerk obtained from jury excusal forms. This data identifies numerous Broward County residents who self-identify, under oath, that they are non-citizens or non-residents of Broward County. (Tr. D1/203:1-17.) The data would likely also identify potentially obsolete mailing addresses of registrants. (*Id.*) Though potential jurors are drawn from the Florida Department of Transportation database, which includes both citizens and noncitizens, a reasonable list maintenance program would cross-check the excusal forms or other data regarding jurors who have moved, died, or declared non-United States citizenship to ensure that those persons are not on the registration list. (Tr. D1/203:1-3.)

**2. Use of the Statewide Computerized Voter List**

94. In accordance with the requirements of the Help America Vote Act, Florida has implemented a statewide computerized voter list. Fla. Stat. § 98.035. These computerized lists are maintained by the Florida Division of Elections. Fla. Stat. § 98.035. Voter registration and list maintenance are conducted by the various supervisors in each county, who access and update the statewide system through computer software. Fla. Stat. § 98.045.

95. There is no evidence in the record regarding whether the Supervisor's office is competent in utilizing the FVRS. At trial it was demonstrated that the office of the Defendant is unaware of what information or data is obtained through the FVRS system from the state. Mr. Nunez was put forward as the person with the most knowledge of how the list maintenance

systems work with the FVRS system. (Tr. D1/26:22-27:14.) Yet Mr. Nunez—despite being one of the office "list maintenance gurus," (Tr. D2/105:19-23,) referred to as such by Defendant-Intervenor's counsel—has no knowledge of the various databases used by the state to provide information regarding deceased voters through the FVRS system. (Tr. D5/90:6-93:5.) Mr. Nunez also did not know what databases were used by the state to identify felons, mentally incompetent, or noncitizens. *Id.*

**3. Out-of-State Registration Information**

96. Supervisor Snipes does not engage in any active efforts to attempt to discover in-state or out-of-state duplicate registrations. (Tr. D4/35:1-4.)

97. Florida law expressly authorizes supervisors of election to obtain and use voter registration data from other states for list maintenance purposes, such as to identify potential duplicate out-of-state registrations. Fla. Stat. 98.045(2)(b). Defendant Snipes does not take advantage of this tool. (Tr. D4/35:1-4.) She has received information, however, showing that there are potentially thousands of out-of-state duplicate registrations on her rolls, yet she took no action, even investigatory action, in response to this information utilizing tools available to her under Florida law. (Tr. D2/170:10-172:8.)

**4. Department of Highway Safety and Motor Vehicles DAVID System**

98. Defendant Snipes does not obtain and use information from the Department of Highway Safety and Motor Vehicles for list maintenance purposes from the free DHSMV system. (Tr. D5/92:5-6.) Snipes does not use this free system, despite the fact that she testified that she very much would like access to a paid system that would provide the same information. (Tr. D4/101:13-15.) The DAVID system would provide the Supervisor with information such as address and name changes of registrants on Broward County rolls. (Tr. D1/202:5-17.) Florida

law requires individuals to update their driver's license address or name information within 30 days of any change. Failure to do so could result in a non-moving violation. Furthermore, Florida is a REAL-ID compliant state as of 2012. That means that new and updated licenses must include citizenship or alien status verification information. All of this information is accessible to Defendant Snipes without charge. Other Florida counties, such as Orange County, use the DAVID system for list maintenance purposes. (Tr. D4/100:8-25.)

99. At trial, Defendant Snipes announced that she is planning to initiate the process for obtaining access to the DAVID system. (Tr. D4/99:19-20.) As of the time of trial she had not yet submitted an application to gain access to DAVID. (Tr. D4/99:19-20; D4/106:13-16.)

**5. Failure to Process Information Obtained from Other Sources**

100. In the instances recounted by Mr. Gabbay, Mr. Churchwell, Mr. Prentice, and Mr. Skinner, Defendant's office received information from the third party regarding potential ineligibility of a registration on the voter roll. In each instance, however, the record shows that Defendant did not follow the procedure outlined in Fla. Stat. 98.075(6) and (7). (Tr. D2/170:8-171:21; D3/108:17-109:7; D3/107:12-20; D3/112:20-24; D3/151:1-4; D3/153:24-154:7.) She did not send notices to the registrants within 7 days as prescribed by statute. Indeed, at trial the Defendant maintained that she had no obligation to follow the statute, believing it to be discretionary, subject to her researching it first. (Tr. D4/154:2-5.)

**6. Failure to Use Readily Available Sources**

101. Defendant Snipes acknowledges that her office does not monitor registration rates. (Tr. D4/35:6-11.) Mr. Gessler testified that, in his experience, monitoring registration states is a commonly accepted practice of reasonable list maintenance. (Tr. D1/104:24.) Also, despite acknowledging their helpfulness and utility, Defendant does not access or use other

readily available sources of registration information. She stated that information from obituaries would be helpful, but doesn't use them. (Tr. D4/88:21-89:10.)

**H. The Supervisor's Discovery Violations**

102. Throughout the course of this litigation, Defendant has thwarted the rules of discovery in responding to Plaintiff's discovery requests. Her responses have been incomplete and evasive, she has been consistently unavailable to conduct discovery, she has failed to produce documents, and has used knowledge of undisclosed documents at trial to impeach Plaintiff's expert. On the second day of trial, Defendant produced documents that were requested in October 2016. Plaintiff has been prejudiced by these discovery violations.

103. On October 31, 2016, ACRU served discovery requests on Supervisor Snipes requesting admissions and responses to interrogatories regarding list maintenance activities, as well as a request for production of documents. ECF No. [118] at 3. The Supervisor responded on December 12, 2017, but simply produced in discovery the same certifications that she had sent in February 2016, nothing more. ECF No. [118] at 4. In violation of Fed. R. Civ. P. 34(b)(2)(B) and Local Rule 26.1(e)(3)(C), Defendant Snipes did not offer or provide inspection of documents requested in discovery within 14 days or within a reasonable time either. ECF No. [71] at 2. Not until mid-January 2016, in compliance with a discovery order from the Court, ECF No. [77], did Supervisor Snipes allow an arguable inspection of her voter registration database. ECF No. [118] at 4. The Defendant's December 12, 2016 response was, however, silent regarding all of the originally requested records that had nothing to do with Defendant's VR System. ECF No. [118-2].

104. ACRU conducted an in-person inspection of the Broward County Supervisor of Elections' registration database on January 13, 2017. (Tr. D5/60:9.) This was the earliest

possible date that Supervisor Snipes stated that she could fulfill the discovery inspection obligation responsive to requests made on October 31, 2016. ECF No. [74] at 2. During the inspection, ACRU was not provided or permitted to inspect certain categories of requested documents because they are not contained in the registration database. ECF No. [118] at 4. Other documents requested required additional assembly before the Supervisor would make them available to ACRU. ECF No. [118] at 3. Accordingly, counsel for ACRU received a CD from the Defendant on January 26, 2017. On the CD were the following documents:

(i) A .pdf file of the current active voter roll for Broward County, and

(ii) A .pdf file containing a table list of mailings sent out by the Supervisor through her vendor, Commercial Printing, since 2015. ECF No. [118] at 4. The CD still did not contain all of the documents requested in ACRU's discovery requests, much less a full inspection of all list maintenance records as contemplated by NVRA.

105. On February 1, 2017, ACRU received a written, supplemental response to its October 31, 2016 Requests for Production of Documents. The supplement did not contain any documents. Although ACRU requested documents dated as far back as 2009, the Supervisor stated that she refused to provide documents created earlier than two years prior to the date of the initiation of the litigation, regardless of whether Defendant possesses these list maintenance records. Defendant Snipes claimed that any records older than two years were not subject to disclosure under the NVRA. ECF No. [118] at 5. Yet the statute specifically contemplates that the obligation to preserve records includes those "at least" two years old. 52 U.S.C. § 20507(i)(1). If list maintenance records exist that are older than two years old, they must be disclosed pursuant to Section 20507(i)(1). The subsequent requests were made pursuant to

discovery procedures in the Federal Rules of Civil Procedure, rules which contain no such time limitation.

106. On February 9, 2017, the day before expert reports were due to be exchanged, ACRU received from the Defendant by U.S. Mail two additional CDs. ECF No. [117] at 7-8. These disks contained the following additional discovery production:

(i) .csv data files for redistricting mailings done in Jan. 2014.

(ii) .pdf of a chart listing notices send to Commercial Printers.

(a) .csv files data files for these mailings as sent to Commercial Printers

(iii) .csv data file sent to Commercial Printers of a supposed "NCOA" mailing sent in 2015.

(iv) .pdf of all registrants removed in 2014-2016.

(v) .pdfs of invoices from Commercial Printers

(a) Jan. 2014 redistricting mailers 1,091,337 sent (ordered in Sept. 2013) by forwardable mail.

(b) May 2015 "NCOA" active list 1,099,517 sent. No information regarding any change-of-address information received by the office or of any mailing.

(c) Sept. 2015 vote by mail cards sent to all actives.

(d) May 2016 forwardable mailing sent to all actives.

(vi) .csv data file sent to Commercial Printers of May 2015 mailing.

(vii) .csv data file sent to Commercial Printers of May 2016 mailing.

These disks did not contain all of the records requested in ACRU's initial letter of January 2016 or all documents responsive to ACRU's discovery requests. ECF No. [117] at 8. They also

demonstrate that considerable numbers of records were not available for inspection at the January 13, 2017 discovery inspection.

107. On March 7, 2017, ACRU's counsel contacted opposing counsel again about the outstanding known documents that were responsive to ACRU's discovery requests, outlining the still-unproduced documents. On March 8, 2017, Defendant Snipes provided revised versions of the original certifications sent, revealing that the originals provided in February and December 2016 were allegedly inaccurate and incomplete in very significant respects. ECF No. [118] at 5.

108. Discovery in this case closed on March 10, 2017. On March 10, 2017, ACRU filed a motion to compel production of certain known outstanding responsive documents and asked the Court to re-open discovery regarding the previously produced documents that the Defendant had altered after initial production. ECF No. [122]. The Court partially granted the motion to compel by Order on March 27, 2017, ordering the production of certain categories of records by March 28, 2018. ECF No. [126]. Defendant Snipes did not produce any responsive documents in compliance with the Court's order compelling production and did not respond at all to the March 27, 2017 Order. On April 4, 2017, Plaintiff's counsel contacted Defendant's counsel by letter to inquire into the status of the compelled production. ECF No. [158-5] at 3. On April 6, 2017, Defendant Snipes finally provided documents in accordance with the March 27, 2017 compel order. ECF No. [158] ¶ A-1. Documents produced included the following:

(i) A list of all inactive registrants.

(ii) A copy of the election calendar published by the Florida Division of Elections.

(iii) Invoices from VR Systems from 2013-present.

(iv) Emails received from Mr. Richard Gabbay.

(v) Additional invoices from Commercial Printers from 2013-present.

109. During trial, it became apparent that several responsive documents and records have not been produced in accordance with Plaintiff ACRU's requests and with the Court's March 27, 2017 Order.

110. On the second day of trial, July 26, 2017, Defendant revealed the existence of a "Voter Services Procedures Manual" that had previously never been produced in discovery. (Tr. D2/68:11-16.) After examination, Defendant argued that part of the manual was propriety matter belonging to VR Systems, the vendor who produces the database software used by supervisors of elections in Florida, and therefore did not belong to Defendant. (Tr. D5/5:15-25.) In this respect, Plaintiff ACRU had already been made aware through discovery that a third-party software manual existed, apart from any written procedures, policies, or manuals belonging to Defendant. (Tr. D2/11:9-12; D1/145:20-24.) Plaintiff did not seek third-party discovery of this manual because it was proprietary and, therefore, by definition could not be a written procedure, policy, or manual maintained by Defendant. (Tr. D1/147:23-149:3.) Repeatedly in discovery Defendant and her agents stated that there were no written procedures, policies, or manuals *other than* the proprietary software manuals belonging to the third-party vendor. *Id.* Even at trial, the Director of Voter Services continued to state that there are not procedures other than what is printed from the VR help desk. (Tr. D4/17:25-18:6.) Plaintiff's expert relied upon these repeated representations in opining that is was unreasonable and evidence of a lack of a general program of list maintenance that *Defendant* did not have any written procedures, policies, or manuals regarding the conduct of list maintenance. (Tr. D2/11:9-12.) Indeed, Defendant's counsel argued that the Voter Services Manual "says nothing about list maintenance." (Tr. D2/6:17-21.) Defendant's excuse for not producing the non-VR Systems portions of the manual was that no

one in the Supervisor's office thought that the Voter Services Procedures Manual was responsive to the initial discovery requests because no one understood it as a list maintenance manual. (Tr. D2/6:17-21; D2/7:18-19; D2/9:9-13.) The Court finds that this excuse is not credible. Deposition questions, interrogatory responses, and Plaintiff's expert report delve deeply into the issue of the existence of any written list maintenance policies, procedures, or manuals.

111. Portions of the "Voter Services Procedures Manual," however, were identified by some of Defendant's staff as non-proprietary and created and maintained by Defendant, and not by a third-party vendor. (Tr. D4/168:10-14; Tr. D5/46:6-57:13. These procedures, policies, and manuals were squarely responsive to Plaintiff's discovery requests. ECF No. [111-1]. In responses to discovery requests and in depositions, however, Defendant repeatedly stated that no such written policies, procedures, and manuals exist, apart from the vendor's software manual. (Tr. D1/145:11-150:14.)

112. In addition, Defendant's staff could not agree upon which portions of the Voter Services Manual were proprietary third-party documents and which were Defendant's own policies. The Director of Voter Services, Mary Hall, upon examining the manual, asserted that the entire manual consisted of third-party materials and were not policies or procedures created by the Defendant. (Tr. D4/82:7.) Ms. Sharon Flemming, the staff person responsible for maintaining the manual, however, testified that several sections were created by the office and were not proprietary. (Tr. D4/168:10-1.) Then, Mr. Jorge Nunez, the IT Director who is responsible for assembling and sending actual mailing files, reviewed the manual and testified that some sections were created in-house, but not the same documents that were identified by Ms. Flemming. (Tr. D5/46:6-57:13.)

113. Defendant's counsel claims that she did not become aware of the existence of any manuals other than the proprietary VR Systems help system, until she was preparing Ms. Sharon Flemming as a witness on July 21, 2017, the Friday before trial began. (Tr. D2/66:19-15.) Defendant's counsel did not tell any other parties about the manual and "did not want to be in possession of it" at that time. (Tr. D2/67:2-4.) She claims that she did this so that she could represent to the Court that she had not seen the manual when she informed the Court about the manual after trial began. *Id.* As a result, the Court ordered that a deposition of Ms. Sharon Flemming take place on the morning of July 25, 2017, because it was represented that she knew the most about the manual that had suddenly appeared. (Tr. D2-9:21; Tr. D2-74:1-5.)[11]

114. Ms. Flemming was disclosed through Defendant's interrogatory responses in a list of four "voter services" clerks, without any indication of any kind of supervisory role over the other clerks in the list or of being in charge of overall day-to-day operations. (Ex. P-20 at 2.) Her title was given as "Voter Services and Deceased Persons." (Ex. P-20 at 2.) Ms. Hall was listed as "Director of Voter Services." (Ex. P-20 at 2.) At trial, however, Ms. Flemming was described as "the coordinator over the whole Voter Services Department." (Tr. D4/18:22-24.) She was not described in this manner during discovery, contrary to Defendant's counsel's representations. (Tr. D2/101:7-11.) In addition, Defendant's chronic unavailability from October 2016 through early January 2017 resulted in Plaintiff only being able to take depositions of Defendant's staff

[11] Defendant's counsel represented that she permitted a full and thorough deposition of Ms. Flemming in order to provide Plaintiff with an opportunity to review and discover the scope and use of the late-produced "Voter Services Procedures Manual." She stated at trial that, "I didn't care what they asked. I don't think I made one objection – well, maybe one." (Tr. D3/45:20-21.) In fact, she objected 11 times to questioning about the manual (Flemming Deposition 22:17; 24:14; 25:12; 26:15-18; 34:22; 36:13-17; 48:5; 49:17-18; 60:2-3; 93:15; 96:14-15) and at least twice she testified for the witness and gave speaking objections (Flemming Deposition 21:1-25; 37:4-5).

over a limited three-day period shortly before expert reports were due to be exchanged, followed by no availability through March. ECF No. [85] at 2.[12] Thus, it is clear that Plaintiff did not avoid taking Ms. Flemming's deposition earlier. For this reason, the Court gave Plaintiff the opportunity to depose her as they doubtless would have had Ms. Flemming been fully and accurately disclosed at the appropriate time in this litigation.

115. Defendant's Counsel did not reveal the existence of a manual to the Court or to any other party until the second day of trial. It is clear, however, from statements made on the first day of trial that she believed the manual was relevant and alluded to it, attempting to incorporate the undisclosed manual into her trial strategy without disclosing them. (Tr. D1/238:15-18.) Indeed, Defendant's counsel used her undisclosed knowledge of the existence of the manual to attempt to impeach Mr. Gessler on the first day of trial. (Tr. D1/238:4-18.) Without disclosing the manual to the Plaintiff or to the Court, Defendant's counsel suggested that Mr. Gessler had not been provided everything he needed to review in order to give his opinion and asked if he would change his opinion regarding the adequacy of Defendant's written policies and procedures if he had reviewed certain materials. (Tr. D1/238:4-18.) But at the time that she asked this, the only written policies or procedures that had been disclosed in discovery were the existence of the VR Systems software manual. Mr. Gessler's opinion was formed with this software manual already in mind and was unaffected by its late-production because it is not Defendant's manual, but is a third-party proprietary manual.

[12] Defendant was unavailable to conduct any discovery until after the November 2016 election and then not until after the 2016 holidays. ECF No. [67] at 2; ECF No. [74] at 2. Defendant's earliest availability to conduct an inspection of requested discovery documents was January 13, 2017, less than a month from the expert report deadline. ECF No. [74] at 2.

116. Nevertheless, it remains that there are written procedures in existence that are not proprietary third party materials that should have been produced in December 2016. These portions of the "Voter Services Procedures Manual" were, therefore, produced late when they were produced on the second day of trial. Accordingly, under Federal Rule of Civil Procedure 37(c), the Court must exclude these materials and find that Defendant Snipes has no written list maintenance policies, manuals, or procedures. Furthermore, the haphazardly kept and maintained non-VR Systems portions of the manual did not alter, but rather reinforced, Mr. Gessler's opinion that Defendant's written policies and procedures are woefully inadequate, if not nonexistent.

117. After reviewing the Voter Services Procedures Manual, Mr. Gessler expressed several reasons why it did not change his opinion that Defendant Snipes has inadequate written policies and procedures. (Tr. D5/50:7-14.) The testimony revealed a complete lack of version control, for example. (Tr. D5/66:19-67:18.) The manual in the record contains up-to-date as well as obsolete versions of the very same sections. (Tr. D5/67:22-24.) One section contained a hand-written note that stated "Old Procedure" on it, without an indication as to why an obsolete procedure would still be in the manual. (Tr. D5/68:12-69:23.) Several of the sections had only been printed off very close to the date the manual was produced. (Tr. D5/71:1-4.) These facts reinforced Mr. Gessler's opinion that the procedures were inadequate because they were clearly not maintained, used, or readily available.

118. Defendant asserts that her office properly performs certain mailings in accordance with Florida statutes. One of these is a National Change of Address database mailing under Fla. Stat. 98.075(c)(2). The procedure for this mailing involves sending a datafile of the registration list to a commercial vendor who then runs the list through the NCOA database provided by the

USPS to search for updated addresses. (Tr. D5/82:5-10.) The vendor then sends back an updated datafile, which the IT Director converts into a format that can be used by the office to update addresses. (Tr. D5/82:19-23.) Despite explicit requests for these datafiles in discovery and despite that production of these updated NCOA datafiles received by Defendant from her vendors was explicitly compelled by this Court, none were ever produced by Defendant. (Tr. D5/82:24-83:1.) Yet the IT Director testified that he indeed receives these datafiles via email, keeps a record of them in their original format, and also keeps records of the converted versions he creates. (Tr. D5/86:20-87:9.) Indeed, despite the explicit order of this Court to compel production of the datafiles, no one ever asked the IT Director for these files for discovery. (Tr. D5/82:24-83:1.)

119. Accordingly, there is no documentary evidence of the key component of the proper conduct of an NCOA mailing under Fla. Stat. 98.065(2)(a) in the record. Fla. Stat. 98.065(2)(a) ("Change-of-address information *supplied* by the United States Postal Service through its licensees . . . ."); Fla. Stat. 98.065(4)(a) ("If the supervisor *receives* change-of-address information . . . ."). There is no documentary evidence in the record showing that the Defendant *receives* change-of-address information provided by the USPS through its NCOA database, despite the fact that the Court compelled production of these very documents. ECF No. [126] at 6-7. The Court therefore must find that the documents do not exist and that Defendant does not receive and use NCOA database information from a USPS licensee. Rule of Evidence 803(7).

120. The Supervisor claims to have spent "countless" hours searching for responsive discovery documents. (Tr. D5/63:8-10.) Nevertheless, none of the staff can recall when these searches for countless hours with the entire staff took place, even roughly. (Tr. D5/72:13-19.)

Furthermore, the record shows that, far from "thousands" of invoices being produced, (Tr. D1/240:22-24,) the actual total of invoices is contained in 56 exhibits introduced by Defendant, totaling 305 pages, (Ex. D-5, D-10-18, D-20-66). Each page does not contain a separate invoice. And of these exhibits, at least 8 sets are duplicates of each other, totaling at least 54 pages, bringing the actual total pages down to approximately 250. (Exs. D-64/D-51, D-29/D-30, D-55/D-58, D-54/D-59, D-53/D-60, D-51/D-62, D-56/D-63, D-52/D-61.) In fact, the very same invoice appears three times in three separate exhibits. (Exs. D-17, D-57, D-62.) Also, these invoices, .txt files, and Excel files simply correlate to the summary index of mailings provided by the Defendant, which corresponds to the numbers of mailings in the certifications of list maintenance. (Ex. P-24.) Far from showing "thousands" of invoices produced, Defendant's exhibits reveal an attempt to exaggerate the scope of the mailings in fact conducted by the Supervisor.

121. Defendant's counsel insists that ACRU is required to pay for the production of documents in this case. (Tr. D5/132:22-136:5.) This has no foundation in rule, law, or equity. The documents were not produced pursuant to NVRA. Rather, they were produced because this Court ordered their production and they were responsive to discovery requests and to fulfill inspection obligations. Parties bear their own discovery costs, absent an express protective order directing payment of costs. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) ("Once again, a rough analogy might usefully be drawn to practice under the discovery rules. Under those rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery."). This

default arrangement is codified in the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(c)(1)(B) ("Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.")

## I. Defendant's Records and List Maintenance Practices Demonstrate Unreasonable List Maintenance.

122. Defendant's own records illustrate that her list maintenance practices lack any semblance of a general and consistent program of list maintenance. Defendant Snipes has not implemented any formal written practices or procedures related to her list maintenance programs. Ms. Mary Hall works directly under Dr. Snipes as the Director of Voter Services. (Tr. D4/15:14-15.) The list maintenance activities of the office fall under the Voter Services department. (Tr. D4/15:21-25.) Nevertheless, Ms. Hall is unfamiliar with the certifications of list maintenance filed by the office that summarize the list maintenance activities performed every half year. (Tr. D1/157:1-25.) Hall has also exhibited unfamiliarity with the basic procedures involved in the different list maintenance mailings provided for under Florida law. (Tr. D1/159:22-160:24.)

### 1. Absence of Consistent Policies and Procedures

123. Defendant does not maintain or follow any list maintenance schedules. No such schedules for list maintenance are in the record and none were produced in discovery by the Defendant after Plaintiff's requests for the same. The Florida Division of Elections does publish an election calendar every election cycle. (Ex. P-16.) This calendar features only a few deadlines related to list maintenance activities. (Ex. P-16.) The majority of them deal with registration and other logistics related to running an election. (Ex. P-16.) Accordingly, the Court adopts Mr. Gessler's conclusion that the calendar is not a list maintenance schedule. (Tr. D1/169:2-25.)

124. According to the Election Calendar published by the Florida Division of Elections, inactive registrants are to be removed in December of even numbered election years following the respective November election. (Ex. P-16 at 26.) Defendant Snipes did not do this after the November 2010 and 2014 elections, as no inactives were removed in those time periods. (Ex. P-18 at 11, 24.) Inactive registrants were removed in 2011, approximately a year later than they should have been according to the Division of Elections published calendar. (Ex. P-18 at 22.) Thus, the Court finds that the Defendant is not even following the minimum schedule outlined by the elections calendar published by the State.

125. Defendant does not have any written manuals, procedures, or policies regarding list maintenance programs or activities. The only manuals that the office has are proprietary software manuals used for running the VR System software that interfaces with the FVRS. (Tr. D1-146:25-147:4.) VR Systems is a third party vendor that contracts with Defendant Snipes for database software for utilizing the statewide voter registration system. All office staff testified to the absence of any written policies and procedures *other than* the software manuals that are provided by the database software vendor. (Tr. D2-69:3-5.) The software manuals do not provide list maintenance schedules or procedures, they instead describe how to operate the software itself. (Tr. D1/147:23-148:4.) The Voter Services Procedures Manual does not address procedures for many list maintenance scenarios, such as responding to third-party complaints or receiving information from other sources.

126. In addition, the VR Systems manual is proprietary and belongs to a third party. (Tr. D1-28:8-10.) Therefore, by definition, it is not a written manual, procedure, or policy of the Defendant. In discovery, ACRU requested all written manuals, procedures, and policies related to the conduct of list maintenance. (ECF No. [111-1] at 8.) In response, Defendant indicated that

there are no written manuals, procedures, or policies *other than* the proprietary VR Systems software manual. (ECF No. [111-2] at 8.) All directors and employees asked about written manuals, policies, and procedures in deposition testified in the same way: that there are no written materials other than the VR Systems software manual. (Tr. D2/145:20-24, D1/148:2-22, D1/153:7-15.) Plaintiff did not seek to compel third-party production of the VR Systems software manual because its existence did not change the fact that Defendant herself had no written manuals, policies, or procedures. Instead, Defendant's office relies upon word-of-mouth procedures and unwritten practices. (Tr. D1/153:17-24.) Mr. Gessler opined that having no written materials *other than* a third-party software manual would be unacceptable and out of line with the reasonable standard of care established by election administration professionals under the NVRA. (Tr. D1/145:6-153:25.)

127. ACRU's expert, Mr. Gessler, based his opinion, in part, on these facts. (Tr. D1/153:23-24, 154:13-17.) In his opinion, the fact that the Defendant has and uses a third-party software manual, did not change the fact that Defendant Snipes does not have a reasonable list maintenance program because of the complete lack of written manuals, procedures, and policies. (Tr. D1-147:23-148:4.)

128. Mr. Gessler observed that Ms. Sonia Cahuasqui, a voter registration clerk at the Supervisor of Elections office, does not use written training materials to train people working for her. (Tr. D1/153:4-25.) Instead, newly-trained employees write down the instructions given them to them verbally by Ms. Cahuasqui and they "follow their own process" based on their personal notes. (Tr. D1/153:4-25.)

129. As an example of the complete lack of procedures for list maintenance, Defendant Snipes unilaterally changed the registrations of over 1,200 registrants in 2014. (Tr. D3/154:19-

24.) Mr. Gregg Prentice had obtained the Broward County voter roll through the Florida Division of Elections and had searched the list of registered voters for registrations using commercial addresses, such as UPS stores, as residential addresses. (Tr. D3/150:5-17.) Registering to vote at a commercial address is a violation of Florida law, which requires a residential address. Fla. Stat. § 98.045(1)(h). It is Defendant's responsibility to create and maintain a list of valid residential addresses in her jurisdiction. Fla. Stat. §§ 98.015(12), 98.045(4)(a). Mr. Prentice sent information about over 1,200 registrants who registered at commercial addresses to Defendant Snipes in 2014. (Tr. D3/150:14-25.) Under Florida law, only the supervisor is permitted to make changes to the voter rolls in that county and a supervisor may not update or change a registrant's information unilaterally. Fla. Stat. § 98.075(7). Nevertheless, Defendant Snipes unilaterally and collectively changed the commercial address registrations to her own office address in response to Mr. Prentice's information, rather than follow the procedures of Fla. Stat. 98.075(7). (Tr. D3/153:6-154:24.) In order for list maintenance processes under NVRA to be effective, it is imperative that registrations are accurately and effectively entered initially. A registrant, regardless of whether they are UOCAVA voters or boaters, must be registered either at a valid residential address or at the Supervisor's office.

130. For most larger mailings, the Supervisor's uses a printing vendor called Commercial Printers, Inc. (Tr. D4/86:8-10.) In the past, there have been issues and errors with printing jobs for list maintenance and election mailings. Despite this, the Supervisor's office does not check the vendor's work before it goes out. (Tr. D4/87:4-6.) On one such occasion, the Supervisor distributed a large mailing of inaccurate voter identification cards. (Tr. D4/86:4-14.) News reports claimed that the Supervisor had sent an incorrect file to the printer, while according to the Supervisor, the vendor had a power outage that affected the print run. (Tr. D4/85:18-

86:25.) Because the Supervisor never reviews the work done by Commercial Printers, the error was not caught. In another example, the printer sent absentee ballots out with referendum options missing. (Tr. D4/92:5-23.) Despite these errors, Defendant Snipes continues to use the same printer and has no mechanisms in place to review items before they go out or to catch errors.

131. Under Florida law, Defendant Snipes is required to maintain a list of valid residential addresses in her county. Fla. Stat. 98.015(12). Defendant Snipes, however, does not maintain such a list and does not provide it to the state. (Tr. D4/158:11-159:21.) This, in part, explains how persons have been able to register at commercial addresses in Broward County in significant numbers.

**2. Certifications of List Maintenance Activities**

132. Florida law requires each supervisor of elections to prepare and submit Certifications of List Maintenance activities. Fla. Stat. § 98.065(6). These certifications consist of two pages. The certifications are filed with the Florida Division of Elections no later than July 31 and January 31 for the first six month and second six month period of each year. Fla. Stat. § 98.065(6). In the record are the certifications that Defendant Snipes filed from 2009 through 2016. (Ex. P-18.)

133. From the language of the statute, the purpose of these certifications is to allow the Division of Elections to review the list maintenance activity conducted by each supervisor and determine whether that activity was adequate under the statute. Fla. Stat. § 98.065(6).

134. Mr. Jorge Nunez, the IT Director, has been delegated the responsibility of preparing the certifications of list maintenance that are to be submitted to the Florida Division of Elections. (Tr. D5/32:1-15.) Despite the fact that Mr. Nunez does not engage in conducting list maintenance programs or deal with the invoices or records that support the different programs,

(Tr. D5/85:1-20,) no one from Voter Services reviews the certifications of list maintenance before they are filed with the state, (Tr. D5/32:1-15). Certifications from the years 2009 through 2016 are in the record. (Ex. P-18.)

135. After the certifications filed with Florida Secretary of State were provided to the Plaintiff, and after Defendant Snipes was asked questions about the certifications in her deposition, Defendant Snipes suddenly created and filed amended certifications with the Secretary of State. (Ex. P-19; Tr. D4/94:20-25.) Her amendments pertained to list maintenance records going back as far as 2011, claiming that the originals had been filed with incorrect information since 2011. Thus, by her own admission, the Defendant filed supposedly inaccurate certifications for a period of over five years. There is no evidence in the record extending before 2011, so the extent of the filing of inaccurate certifications is unknown. There is no evidence in the record that reviewing certifications for accuracy years later is a general practice in Broward County of in any Florida county. And but for this litigation, they presumably would not have been corrected.

136. The certifications provide the numbers of different mailings sent out to registrants, as well as the numbers of registrations acted upon, such as by placement into inactive status or removal from the rolls. (Ex. P-18.) From the original certifications to the amended versions there were no changes to the numbers reported. (Ex. P-18, P-19.) In addition to the numbers reported, however, the certifications also feature three checkboxes, which correspond to the three types of list maintenance mailings outlined in Fla. Stat. § 98.065(2), at least one of which a supervisor is required to make use of at a minimum. The three checkboxes are labelled (1) “Change-of-address information from U.S. Postal Service/NCOA” corresponding to Fla. Stat. § 98.065(2)(a); (2) “Mass (nonforwardable) mailing to all registered voters in county”

corresponding to Fla. Stat. § 98.065(2)(b); and (3) "Targeted address confirmation request (nonforwardable) mailing to registered voters who have not voted or requested an update to their records within the last 2 years" corresponding to Fla. Stat. § 98.065(2)(c).

137. In the original certifications, (Ex. P-18,) Supervisor Snipes had checked the boxes for the types of mailings she had done as follows:

| Time Period | NCOA | Mass-Mailing | Targeted |
|---|---|---|---|
| 2016 H1 | | | x |
| 2015 H2 | x | | |
| 2015 H1 | | | x |
| 2014 H2 | | | x |
| 2014 H1 | | | x |
| 2013 H2 | | | |
| 2013 H1 | | | x |
| 2012 H2 | | | |
| 2012 H1 | | | x |
| 2011 H2 | x | | x |
| 2011 H1 | | | |

After being asked about the certifications in her deposition, (Ex. P-19; Tr. D4/94:20-25,) however, Defendant Snipes instructed her IT Director to amend the certification checkboxes to the following (Ex. P-19):

| Time Period | NCOA | Mass-Mailing | Targeted |
|---|---|---|---|
| 2016 H2 | | | x |
| 2016 H1 | | | x |
| 2015 H2 | x | x | x |
| 2015 H1 | | | x |

| | | | |
|---|---|---|---|
| 2014 H2 | | x | x |
| 2014 H1 | | x | x |
| 2013 H2 | x | x | x |
| 2013 H1 | | | x |
| 2012 H2 | | x | x |
| 2012 H1 | | | x |
| 2011 H2 | x | x | x |
| 2011 H1 | | | |

Defendant also produced the certification for the second half of 2016, though on the last day of discovery. ECF No. [126] at 10.

138. The evidence in the record, however, demonstrates that the certifications were, in fact, apparently accurate as originally filed. (Tr. D5/73:24-82:4.) One of the three list maintenance program activities listed on the certifications of address list maintenance activities is a "mass (nonforwardable) mailing to all registered voters in county." This activity is described by Florida law at Section 98.065(2) as one of the activities that must be incorporated into each supervisor's biennial list maintenance program. Subsection 98.065(2)(b) provides for "returned nonforwardable return-if-undeliverable mail sent to all registered voters in the county." The certifications, as originally filed, reported that the Defendant has never utilized this type of mailing and has never done a mass nonforwardable mailing. (Ex. P-18.)

139. The Defendant amended the certifications to claim that she has done six mass mailings under Fla. Stat. 98.065(2)(b) from 2011 to present. (Ex. P-19.) The evidence in the record, however, shows that the amended certification is not accurate and that in fact the office has never done a mass mailing as defined by Fla. Stat. 98.065(2)(b). (Tr. D5/73:24-82:4.) The evidence shows that the Defendant has only done certain mailings to all *active* registrants, and

not mailings to all registered voters. (Tr. D1/187:5-12.) The Defendant never sends any mailings to inactive registrants. (Tr. D1/196:4-6.) Furthermore, the five invoices from the Defendant's mailing vendor, Commercial Printers, reveal total mailings correlating to the total active registration figure, not the total registration number. (Ex. P-26.) In addition, the invoice for the all-actives mailing done in January 2014 shows that the order was placed in 2013 and was printed then, but the mailing only went out in 2014. (Ex. P-26.) Nevertheless, the amended certifications inaccurately check the mass-mailing box for both the second half of 2013 and the first half of 2014, which is inaccurate. (Tr. D5/78:18-79:12; Ex. P-26.) The evidence shows that no mailing was done in 2013 whatsoever. 2013 was simply when a mailing was ordered. Furthermore, all of the large mailings in the record were not nonforwardable. (Tr. D5/80:5-10; D5/81:15-82:4; Ex. P-26.) The examples of the mailing sent out for the January 2014 and May 2016 supposed mass-mailings are clearly marked "Forwarding Service Requested." (Ex. P-26.)

140. Furthermore, the IT Director testified that he amended the certifications to add the checks to the boxes for mass-mailings without examining any invoices or records to confirm that mass-mailings had in fact been done. (Tr. D5/32:19-33:4; D5/85:1-3; D5/79:3-5.) He testified that he simply added the checkboxes because he was instructed to by Ms. Hall. *Id.* Ms. Hall is completely unfamiliar with the list maintenance certifications and is not involved in their creation. (Tr. D4/29:13-30:6.) It appears that none of the personnel who actually engage in the list maintenance activities in the office are involved in the creation or review of the certifications of list maintenance.

141. There are other inaccuracies on the amended certifications as well. For example, on the certification for the second half of 2016, the checkbox for "targeted mailings" is checked, but the certification shows that no address confirmation requests were sent by the Defendant. (Tr.

D5/74:74:3-18; Ex. P-19.) According to the statute delineating the process for sending targeted mailings, registrants who are identified as having not voted or updated their information for two years are to receive an address confirmation request. Fla. Stat. 98.065(2)(c). This form is proscribed by the Division of Elections according to the statute as well. Fla. Stat. 98.0655(1). Defendant Snipes is not knowledgeable of the Sections 98.065 and 98.075 of the Florida statutes and is not aware of any correlation between the checkboxes on the certifications, the three types of mailings described in the statute, and the various forms prescribed in the statute. (Ex. P-15 ¶¶ 14-16.)

142. According to the certifications, both amended and original, Defendant Snipes removed no inactive registrants from the roll during 2009, 2010, and the first half of 2011. (Exs. P-18, P-19.) Defendant Snipes removed 141,939 inactive registrants from the roll in the second half of 2011. (Exs. P-18, P-19.) Defendant Snipes removed 33 inactive registrants from the roll in the first half of 2012. (Exs. P-18, P-19.) Defendant Snipes removed 17,091 inactive registrants from the roll in the second half of 2012. (Exs. P-18, P-19.) Defendant Snipes removed 52 inactive registrants from the roll in the first half of 2013. (Exs. P-18, P-19.) Defendant Snipes removed no inactive registrants from the roll during the two-year period from the second half of 2013 through the first half of 2015. (Exs. P-18, P-19.) Defendant Snipes removed 9,131 inactive registrants from the roll in the second half of 2015. (Exs. P-18, P-19.) Defendant Snipes removed no inactive registrants from the roll in the first half of 2016. (Exs. P-18, P-19.) Defendant Snipes removed 88,823 inactive registrants from the roll in the second half of 2016. (Exs. P-18, P-19.)

143. Mr. Gessler observed that there is no correlation between the frequency and volume of registrants being placed into inactive status and then being removed. (Tr. D1/163:12-

18.) Defendant Snipes placed the following numbers of registrants into inactive status during these time periods:

| 2010H2 | 2011H1 | 2011H2 | 2012H1 | 2012H2 | 2013H1 | 2013H2 | 2014H1 | 2014H2 | 2015H1 | 2015H2 | 2016H1 | 2016H2 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 546 | 9,568 | 2 | 6,596 | 1 | 44,300 | 31,885 | 59,905 | 3 | 3 | 19,235 | 4,711 | 79 |

Mr. Gessler noted that, when consistent list maintenance is occurring, there should be a correlation or pattern between those two metrics. (Ex. P-15 ¶¶ 7-12.)

### 3. Defendant's Records Show She Is Not Using National Change of Address Database Information

144. Florida law provides that Defendant may use change of address information from the United States Postal Services in conducting list maintenance. Under Fla. Stat. 98.065(2)(a): "Change-of-address information supplied by the United States Postal Service through its licensees is used to identify registered voters whose addresses might have changed[.]" After utilizing change of address procedures, if the Supervisor receives change-of-address information, "the supervisor must change the registration records to reflect the new address and must send the voter an address change notice[.]" Fla. Stat. 98.065(4)(a).

145. The evidence in the record shows that Defendant Snipes does not perform NCOA database mailings in a manner that comports with the procedures in the NVRA or Florida law. According to Mary Hall, the Director of Voter Services, the Supervisor obtains change-of-address information from "yellow stickies" that are put on returned mail by USPS and that they do not receive NCOA database information from any other source. (Tr. D1/183:20-184:11.) This is not "change-of-address information supplied by the United States Postal Service through its licensees," as is clear from the statute and from the opinion of Mr. Gessler. Fla. Stat. 98.065(2)(a); (Ex. P-23). In response to interrogatories, the Supervisor did not state that she

obtains and uses NCOA database information and did not describe any such procedures, despite being expressly asked to describe the procedures, if any, by which NCOA data is used by her office. (Ex. P-26 at 7.)

146. Defendants' primary argument in support of their contention that Defendant Snipes satisfies her list maintenance obligations under Section 8 is that the Supervisor conducts mailings using updated address information received from the NCOA database through a licensed vendor. (Tr. D1/21:20-21; D1/32:21-24.) In support of that argument, Defendants put forward records showing datafiles being sent to a licensed USPS vendor and testimony of the IT Director, Mr. Nunez, describing the process he follows for conducting the NCOA mailings. (Tr. D5:

147. The evidence in the record, however, shows that Defendant Snipes does not conduct mailings using NCOA database information obtained from licensees in accordance with the requirements of the NVRA and Florida law. Most significantly, there is no documentary evidence in the record whatsoever that Defendant Snipes in fact receives NCOA database information with updated addresses from a vendor. All records of data received by the Defendant from a USPS licensee regarding NCOA database address changes were explicitly requested by the Plaintiffs in discovery. No records of anything received from Commercial Printers were produced. When Defendant's staff intimated during depositions that NCOA mailings were done, Plaintiff filed a motion to compel production of all records received from the vendor in the NCOA process. ECF No. [111] at 4. The Court granted the motion and compelled production of these documents. ECF No. [126] at 6-7. Yet again no records of information *received from* Commercial Printers were produced and none are in the trial record. (Tr. D5/86:16-19; 88:6-9) Defendant has thus produced no documentary evidence to support its assertion that the

Defendant receives NCOA database information from a licensed vendor. Pursuant to the Federal Rules of Evidence, the Court concludes that such records do not exist and therefore, that the Defendant does not receive NCOA change of address database information from a licensee.

148. Federal Rule of Evidence 803(7) provides,

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . .
>
> > (7) Absence of a record of a regularly conducted activity. Evidence that a matter is not included in a record described in paragraph (6) if:
> >
> > > (A) the evidence is admitted to prove that the matter did not occur or exist;
> > >
> > > (B) a record was regularly kept for a matter of that kind; and
> > >
> > > (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Under this Rule, the "absence of a record of a matter that would normally be included in records of regularly conducted activity is admissible as an exception to the rule against hearsay to prove the nonoccurrence or nonexistence of the matter." *United States v. Navolio*, 2008 U.S. Dist. LEXIS 49962, n.6 (M.D. Fla. June 11, 2008). The Committee Notes to this Rule further explain that "[f]ailure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence." Notes of Advisory Committee on Rules to Fed. R. Evid. 803(7).

149. According to Mr. Nunez, files received from Commercial Printers are regularly kept in the course of ordinary business:

> BY MS. BELL:
>
> Q. Do you save the document that you receive back and you do the massaging—do you save it separately?

A. Yes. All those files are saved.

(Tr. D5/87:6-9; *see also* Tr. D5/86:12-87:1). Those files were never produced. Mr. Nunez also claims that he receives an updated datafile back from Commercial Printers by email. (Tr. D5/82:14-18.) Yet no such files or records were ever produced by the Defendant, even after this Court compelled their production. (Tr. D5/82:24-83:1.) The "failure of [Defendant's] record[s] to mention a matter which would ordinarily be mentioned is satisfactory evidence of [their] nonexistence." Notes of Advisory Committee on Rules to Fed. R. Evid. 803(7); *see also Exxon Corp. v. United States*, 45 Fed. Cl. 581, 690-91 (1999) ("If records are routinely kept (or entries are routinely made), they are likely to be *complete and comprehensive*, so nonmention (or nonexistence of a record or entry) is a good indication that act, event, or condition did not occur or exist.").

150. Similarly, Federal Rule of Evidence 803(10), "sets forth a hearsay exception for evidence introduced 'to prove the absence of a record … or the nonoccurrence or nonexistence of a matter of which a record … was regularly made and preserved *by a public office or agency*….'" *United States v. Stout*, 667 F.2d 1347, 1351 (11th Cir. 1982) (emphasis added). This Rule, however, permits the admission of "testimony . . . that a diligent search failed to disclose a public record" if admitted to show that the "record . . . does not exist." Fed. R. Evid. 803(10). In October 2016, Defendant was instructed to search for "[r]ecords related to United States Postal Service National Change of Address database requests from 2009-present." ECF No. [126] at 3. The files Mr. Nunez swore he receives from Commercial Printers related to NCOA mailings were not produced. In March 2017, this Court compelled Defendant to search for and produce

these files dating back to 2013. ECF No. [126] at 6-7. Yet Defendant still did not produce these files.

151. There are two conclusions this Court may draw from the fact that no records of NCOA information being received are in the record or were produced. First, this Court may draw the conclusion that Defendant—being once instructed, and once being compelled—diligently searched for these records and could not find and produce them. Rule of Evidence 803(10) provides that the search, having produced nothing, is evidence that these files do not exist. *Stout*, 667 at 1351; *see also United States v. Robinson*, 544 F.2d 110, 114 (2d Cir. 1976) ("The absence of a record of an event which would ordinarily be recorded gives rise to a legitimate negative inference that the event did not occur.").

152. The second conclusion this Court may draw is that, despite this Court's order compelling their production, Defendant did not even search for the files and did not produce them. The testimony of Mr. Nunez supports this conclusion. When asked by Plaintiff's counsel if anyone asked him to produce NCOA files he received from Commercial Printers, he responded in the negative:

> Q. Did anyone ask you to produce those files, the file you received back and the Excel, in discovery?
>
> A. I do not remember receiving that request, no.

(Tr. D5/82:24-25 – 83:1). None of these files were produced and none are in the record.

153. If Mr. Nunez is correct, and no search was conducted despite this Court's order compelling such a search, Defendant's actions warrant sanctions under Federal Rule of Civil Procedure 37(b), which concerns violations of a discovery order. Pursuant to Rule 37(b)(2)(A)(ii), this Court should accordingly "prohibit[] the [Defendant] from supporting or

opposing designated claims or defenses" that rely on this evidence or, at minimum, prohibit the Defendant "from introducing [the] matters in evidence."

154. Either scenario is antithetical to the adversarial process envisioned by the American judicial system and warrants sanctions under Rule 37(b)(2)(A)(i) and (ii): "directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims," or "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." Fed. R. Civ. P. 37(b)(2)(A)(i)-(ii). Plaintiff submits that either or both sanctions are appropriate, especially in light of Defendant's repeated discovery violations throughout this action.

155. Under both of these scenarios, the result remains the same—Defendant has failed to submit necessary evidence to support its claim that she receives NCOA database information from a licensed vendor. As a result, the Court must find that the Defendant does not conduct an NCOA mailing program under Fla. Stat. 97.065(2)(a) because she does not receive change-of-address information from an licensed USPS vendor.

#### 4. Defendant's Records Show She Is Not Doing Nonforwardable Mailings to All Registered Voters

156. Under Florida law, Defendant may use "change-of-address information . . . identified from returned nonforwardable return-if-undeliverable mail sent to all registered voters" in conducing list maintenance. Fla. Stat. 98.065(2)(b). If the Supervisor receives such information, "the supervisor must change the registration records to reflect the new address and must send the voter an address change notice[.]" Fla. Stat. 98.065(4)(a).

157. The evidence in the record shows that Defendant Snipes has not done any mailings in conformity with Fla. Stat. 98.065(2)(b). Her own certifications indicate no mass-mailings were done. (Ex. P-18.) Her own records show the mailings were not nonforwardable mail. (Tr. D5/77:8; D5/79:18.) And her records show that the mailings were not sent to all registered voters. (Ex. P-26.)

158. In the original certifications of list maintenance going back to 2009, not once is the box for mass-mailings to all registered voters checked. (Ex. P-18.) The records produced by Defendant Snipes support these original certifications, as no records have been produced showing mass mailings to all registered voters.

159. Defendant Snipes' amended certifications purport to show that a mass mailing under 98.075(2)(b) was done six times since 2011. (Ex. P-19.) The invoices produced, however, only show mailings to all active registrants, not to all registered voters. (Ex. P-26.)

160. In addition, for the mailings that the Supervisor claims were mass mailings under Fla. Stat. 98.065(2)(b), the mailings were done using forwardable mail. (Tr. D5/77:6-81:17; Ex. P-26.) The copies provided of the January 2014 mailing (which was ordered in September 2013) are clearly marked as "Forwarding Service Requested." (Ex. P-26.) Also, the May 2016 mailing is clearly marked as "Forwarding Service Requested." (Ex. P-26.)

### 5. Defendant's Records Show She Is Not Doing Mailings Targeted at Registrants Who Have Not Voted in Two Years

161. The third type of mailing prescribed in Florida Statute 98.065(2)(c) correlates to the checkbox on the certifications of list maintenance labelled: "Targeted address confirmation request (nonforwardable) mailing to registered voters who have not voted or requested an update to their records within the last 2 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. The address confirmation request is a particular form prescribed by the Florida Division of Elections according to the statute. Fla. Stat. § 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 then recorded on the certifications of list maintenance.

162. There is no evidence in the record describing the process by which list of registrants to receive targeted mailings are created, despite requests for this information in depositions and interrogatories. From the record, to the extent it exists, the process to do targeting mailings appears to be an informal one whereby Mr. Jorge Nunez compiles a list and sends a .txt file to Commercial Printers to send a notice. (Tr. D5/12:16-21.) But he provided no details regarding how he determines the universe of who has neither voted nor contacted the office over the previous 2-year period.

163. According to the process prescribed by Florida law, a targeted mailing is one that is sent to "all registered voters who have not voted in the last 2 years and who did not make a written request that their registration records be updated during that time." Fla. Stat. 98.065(2)(c). According to the amended certifications of list maintenance, the Defendant claims to have made use of the targeted mailings tool in every half-year list maintenance period from the second half of 2011 through the present, that is, in 11 time periods. (Ex. P-18, P-19.) In the original certifications that were filed with the Florida Division of Elections, however, targeted mailings were reported in only seven time periods. (Ex. P-18.) For the second half of 2016, the box for targeted mailings is checked, yet the numbers show that no address confirmation requests were in fact sent out. (Ex. P-19.)

164. Under the procedure described by Florida law, a targeted mailing results in a specific mailing being sent to all registrants who have not voted in two years and have not otherwise updated their registration in that time period. Fla. Stat. 98.065(2)(c). According to the certifications submitted by the Defendant to the Florida Division of Elections, the following numbers of address confirmation requests were sent out (Ex. P-18, P-19):

| 2011H1 | 2011H2 | 2012H1 | 2012H2 | 2013H1 | 2013H2 | 2014H1 | 2014H2 | 2015H1 | 2015H2 | 2016H1 |
|---|---|---|---|---|---|---|---|---|---|---|
| 946 | 456 | 587 | 572 | 930 | 5,043 | 1,146 | 171 | 227 | 7,025 | 162 |

These numbers are the same in the original and amended certifications. No address confirmation requests were sent out in 2009, 2010, or in the second half of 2016. (Ex. P-19.) These numbers correlate, with a few exceptions, to the number of notices sent to Commercial Printers as evidenced by the .txt files produced in discovery. (Ex. P-24, D-67 through D-176.) Therefore, according to Defendant's own certifications, a total of 17,265 registrants out of a total of between 1.1-1.3 million registrants in Broward County over an 8 year period did not vote for 2 years and also did not update their registrations. (Ex. P-19.) Over each general election period that is an average of roughly 4,000 registrants per two-year period.

165. It necessarily follows that all remaining registrants either voted every two year period or, if they did not, updated their registration. According to statistics published on the Broward County Supervisor of Elections 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. (Ex. P-25.) The 2012 general election had a 66.85% turn out rate of 1,140,456 active registrations, resulting in approximately 378,000 active registrants not voting in 2012. (Ex. P-25.) The 2014 general election had a 44.48% turnout

rate of 1,067,083 active registrations, meaning that approximately 592,400 active registrants did not vote in 2014. (Ex. P-25.)

166. The Court concurs with Mr. Gessler's observation that the numbers on the certifications show an impossibly small number of "address confirmation requests" being sent out. (Ex. P-23 ¶¶ 32-41.) Based on the number of address confirmation requests sent, it is impossible that Defendant Snipes sent such requests to "all registered voters who have not voted in the last 2 years and who did not make a written request that their registration records be updated during that time." The number fluctuates in each six-month time period from 456 to a maximum of 7,025. In the 2014 general election, for example, roughly 592,400 of Broward County's 1,067,083 voters did not vote and in the 2012 general election, roughly 378,000 registrants did not vote. Yet from 2013-present, Defendant Snipes has only sent out 14,704 address confirmation requests. (Ex. P-18, P-19.) The testimony of Defendant-Intervenor's expert, Dr. Smith, then shows that only around 150,000 registrants updated their information with the Supervisor during 2015, yet in 2014 nearly 600,000 registrants did not vote in the general election. (Tr. D5/145:5-6.) Nothing in the record demonstrates the process or procedure by which the universe of registrants why have both not voted in two years and not updated their registrations is created. There does not appear to be such a procedure. Therefore, the Court finds that it is wholly improbable that all but a few thousand of the approximately 400,000-600,000 registrants who do not vote in each general election in Broward County update their voter registrations.

167. Finally, in some instances, Defendant Snipes's assertions that she does targeted mailings are controverted simply from the certifications themselves. The certification for the second half of 2016 has the "targeted mailing" checkbox checked, and yet no address

confirmation requests were sent. Her staff then conceded that the checkbox should not have been checked for that period and that the certification is inaccurate. (Tr. D5/74:17-18.)

**6. Removal of Ineligible Registrants**

**a. Noncitizens Have Registered and Voted in Broward County**

168. Defendant Snipes admitted at trial that non-citizens are registered to vote and voted in Broward County. (Tr. D4/91:25-92:1.) Yet, at the same time, she acknowledges that noncitizens cannot vote and that they should not be registered to vote. (Tr. D4/90:1-92:1.) Her concerns are well placed considering the large number of non-citizens in Broward County. (Exs. P-22, P-23.) According to Census data, in 2015 Broward County had 259,115 noncitizens among its population, which represents over 14% of the population. (Ex. P-23.) Furthermore, the Supervisor has specific knowledge that non-citizens have been on her rolls and have voted. (Tr. D4/90:1-92:1.) She has sporadically received contact from the Department of Homeland Security in order to identify registered voters who are seeking to become United States citizens or whose registration status was under investigation by the DHS. (Tr. D4/90:1-92:1.)

169. Defendant, however, does nothing to attempt to discover noncitizen registrants. (Tr. D4/35:14-36:3.) Defendant does not obtain or use any information from any source regarding the citizenship status of the registrants on the Broward County rolls. One reliable source of potential noncitizenship information is provided and available to Defendant Snipes under Florida law without cost. Supervisors of election in Florida are authorized to obtain and use signed returned jury notices from state courts. Fla. Stat. § 98.065(4). In response to a jury summons, a person can return a signed jury notice indicating a basis for excusal. One such basis is that the person is not a citizen of the United States. Under Florida law, a registrant must be removed from the voter roll "at the written request of the voter." Fla. Stat. § 98.035(2)(a).

Furthermore, under Florida law, when a registrant in Florida registers to vote in another state, that registration is considered a written request from the voter to be removed from the rolls in Florida. Similarly, a signed jury notice is a writing from a voter, under oath, stating that they are not a citizen or a resident of Broward County, for example.

170. Defendant Snipes was unaware of the availability of the returned jury notices and that she can use them for list maintenance purposes. (Tr. D4/95:7-11.) She only became aware after this litigation. Defendant Snipes has considered obtaining and using jury data in the past, but has never proceeded to do so. (Tr. D4/95:7-97:25.)[13]

171. At trial, however, Defendant Snipes announced that she has decided to start obtaining and using jury form information from the county clerk's office. (Tr. D4/61:1-10.)

172. Finally, Defendant Snipes has removed a total of 19 noncitizens from the voter rolls from 2009 to present. (Ex. P-18, P-19.) Defendant Snipes does not check voter registrations for citizenship and does not verify it. (Tr. D4/151:11-13.)

**b. Removal of Deceased Registrants**

173. Defendant Snipes does not actively obtain or use any information from any source regarding deceased registrants. Rather, the office passively receives information from the state through the FVRS system, the statewide computerized voter registration system, and removes the registration. (Tr. D4/168:15-22.) Yet the Defendant's staff was wholly unaware of a number of facts related to the data in the FVRS system. For example, Mr. George Nunez was unable to

[13] The court did not hear testimony from the Florida Secretary of State regarding the particular process of obtaining and processing jury recusal information. Nevertheless, it is apparent that the employees utilized any information provided by the state in a haphazard fashion, at best. In addition, the statute would not provide for the Supervisor to obtain the information directly from the courts if that were redundant with the information coming from the Department of Elections.

answer the Court's questions regarding the sources of the information they receive. It is unknown whether she receives information regarding persons who die out-of-state through the state computerized system. (Tr. D4/89:12-93:6.)

174. The Defendant is aware that the information received from the Florida Division of Elections through the FVRS does not identify out-of-state deaths. (Tr. D4/88:19.) This shortcoming in the data relied on by the Defendant has led to failures in removing dead registrants who have died out of state. The Defendant and Defendant's employees regularly receive calls from relatives of registrants who died of out-of-state. (Tr. D4/88:3-20.) Mr. Richard DeNapoli was able to identify hundreds of deceased persons lingering on the rolls a year after they had died. (Tr. D2/246:16-247:21.) Nevertheless, the Supervisor has never audited the rolls for implausible birthdates, indicating that deceased persons were missed and remained on the rolls and she does not obtain or use any sources of death information for list maintenance purposes. The Supervisor does not utilize any cumulative Social Security Death Index, (Tr. D4/99:5-12,) and instead only relies on the periodic reports of death through the FVRS system.[14]

**III. Conclusions of Law**

175. The Broward County Supervisor of Elections, Brenda Snipes, has violated Section 8 of the NVRA by failing to conduct reasonable voter list maintenance for elections for federal office and by failing to produce records and data related to those efforts.

[14] Though Mr. Gessler opined that the Supervisor's program for removal of deceased voters appeared to be adequate, (Tr. D2/35,) it is apparent that he had not reviewed the observations of Mr. DeNapoli, Mr. Churchwell, and Mr. Gabbay.

### A. Section 8 of the National Voter Registration Act Creates a Minimal Professional Standard for Voter List Maintenance.

176. Under Section 8 of the NVRA, election officials are required 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; or (B) a change in residence of the registrant." 52 U.S.C. § 20507(a)(4). Other subsections provide for removal of other categories of ineligible registrants, such as felons and those who request removal, while establishing that eligible registrants are not to be removed except in the circumstances established in the statute. 52 U.S.C. § 20507(a)(3). These list maintenance provisions serve to achieve the explicit legislative purpose of ensuring that "accurate and current voter registration rolls are maintained" and to "protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3) and (4).

177. Section 20507 of the NVRA accordingly creates a minimal standard for voter list maintenance. It imposes a standard of reasonableness on election officials in ensuring the accuracy and currency of the voter rolls under their jurisdiction. While the particular means and tools that each state may adopt to achieve the end of accurate and current rolls may vary, the statute creates an obligation and standard to reasonably maintain clean rolls that applies equally to all election officials in the states subject to the NVRA. *See United States v. Missouri*, 535 F.2d at 851. 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 Broward County. Both can be challenged in federal court for failure to comply with the same standard to reasonably maintain voter rolls.

178. The NVRA clearly states that the end of the statute is to effect accurate and current voter lists across the country. 52 U.S.C. § 20501(b)(4). Accordingly, the facts and circumstances regarding the state of the roll in a given jurisdiction and the effectiveness of the list maintenance activities being employed are probative of whether an election official has complied with his or her list maintenance obligations under the NVRA. List maintenance is, therefore, not a matter of checking a box. Otherwise, the means given in the statute would be entirely inadequate to attain its end.

179. Consequently, it cannot be a correct reading of Section 8 that it provides a so-called "safe-harbor" that can absolve election officials of all list maintenance obligations, without regard for the actual accuracy and currency of the rolls or for how the list maintenance programs have been implemented. The NVRA does not define specific activities that constitute a "reasonable" effort to conduct a general list maintenance program. It likely could not do so because what is reasonable list maintenance will vary according to the facts and circumstances, based on the condition of the voter rolls. *See U.S. v. Missouri*, 2007 U.S. Dist. LEXIS 27640, *19 (W.D. Mo. April 13, 2007) *aff'd in part, rev'd in part on other grounds*, *U.S. v. Missouri*, 535 F.2d at 851. Nor does the NVRA create a ceiling that blocks effective reasonable list maintenance.

180. In order to determine whether an election official has violated her duty of care regarding her obligation to adequately maintain the rolls, a court must weigh the state of the rolls against the efforts being made to maintain them. The NVRA states that an election official must keep the rolls accurate and current and must make a reasonable effort to conduct a general program of list maintenance to achieve that end. Whether the effort is reasonable depends upon the risk and harm present in the state of the rolls and the availability and cost of means to remedy

that harm. Liability for failure to exercise care depends upon whether the burden on the official in engaging in preventative measures is less than the probability of harm from the official's current conduct multiplied by the gravity of the injury that might result from maintaining the status quo. *See Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1115 (11th Cir. 1992).

181. As applies here, accuracy and currency of the voter rolls dictate the degree of list maintenance activity that should be reasonably undertaken. If a given jurisdiction, for example, has a relatively static population, with an ordinary registration rate, low transience, and there is no evidence of problems or inaccuracies on the rolls, then fewer list maintenance activities may be adequate to reasonably maintain accurate and current rolls. But if there is an implausible registration rate, together with evidence of inaccurate and non-current rolls, then it is unreasonable for an election official to do the bare minimum mandated by law, while ignoring other tools provided by law. Instead, the official should reasonably avail herself of the tools available by law to adequately maintain the rolls. Here, the evidence in the record reveals that Defendant Snipes is not even employing the minimum tools prescribed by Florida law.

182. In cases such as this one, where professionals employ specialized knowledge, a determination of the reasonableness of their conduct should be informed by an industry standard. That standard of care in carrying out professional activities is deduced from how a reasonable professional in that field would carry out their duties under similar circumstances. *Ins. Co. of the West v. Island Dream Homes, Inc.*, 679 F.3d 1295, 1298 (11th Cir. 2012). The relevant standard of care should be determined through the use of expert witnesses in the professional field. *Id.* ("Expert testimony is required to define the standard of care when the subject matter is beyond the understanding of the average juror.").

183. Election administration, specifically voter list maintenance, is one such professional field. Because the field of election administration relies on specialized and complex knowledge and methods, the opinions of experienced experts in the field are probative in determining liability. *Island Dream Homes*, 679 F.3d at 1298. This technical complexity is especially pronounced in the area of voter registration list maintenance, which requires responsible officials to take advantage of different technologies and methods in order to keep accurate and current lists of eligible voters.

184. Similar to the standards of care applied in other areas of the law that use a reasonableness standard for liability for failure to take reasonable care. This involves assessing what is considered reasonable or prudent by members of the same group in a similar situation. *Island Dream Homes*, 679 F.3d at 1298. Because NVRA applies nationally, it creates a national standard of care and a national field of professionals.

185. Thus, the Court views the opinion of Mr. Scott Gessler as informative of the standard of care that should be exercised by election administration officials in similar circumstances. Mr. Gessler was the chief election official of the state of Colorado and was subject to the same obligations as Defendant Snipes is subject to under the NVRA. Defendants have brought no countering expert to demonstrate another opinion on the standard that should be exercised by a reasonable election administration official in carrying out their list maintenance obligations. Defendants have not proffered any standard at all.

186. The language and purpose of the NVRA militate against an amorphous definition of reasonableness devoid of any set standard of care. The Court, therefore, must reject Defendants' interpretation of the list maintenance requirements of Section 8 of the NVRA. Defendants are incorrect that the NVRA imposes no "results based" standard for its list

maintenance obligations. It is emphatically results based: the rolls must be kept accurate and current.

187. According to the Defendants, the only question for the Court is whether Defendant Snipes is doing *one* particular mailing pertaining to registrants who have moved, regardless of how well that program is being done, what effect it is having on the state of the voter rolls, or how other categories of registrants are maintained. But simply implementing an NCOA program cannot render Defendant Snipes's list maintenance program compliant with Section 8.

188. Accordingly, the Court must reject the notion that the NVRA creates a "safe harbor" whereby all of an election official's list maintenance obligations can be satisfied by doing one of the two described mailings. There are two very significant reasons why a so-called "safe harbor" argument must be rejected. First, as a list maintenance tool, an NCOA mailing, by definition, only treats those registrants who have moved. But NVRA certainly imposes list maintenance obligations relating to registrants who have died, 52 U.S.C. § 20507(a)(4), or who are ineligible for other reasons, 52 U.S.C. § 20507(a)(3), to say nothing of the mandate in the Help America Vote Act to remove all ineligible registrants, 52 U.S.C. § 21083(a)(4)(A). But Defendants argue that an election official can become compliant with all her list maintenance obligations under Section 8 simply by doing an NCOA mailing. Defendants seek immunity from a Section 8 claim *if* they do any form of an NCOA mailing. That would mean that an election official could be doing *nothing* regarding the removal of deceased voters and yet somehow her list maintenance program could be compliant with Section 8. Defendants thus argue that the example of list maintenance given in the NVRA is a ceiling, rather than just what it states: an example of a permissible list maintenance procedure. The Court rejects this argument.

189. Second, the ramifications of such an interpretation will strip protections for voters who are wrongfully removed from the rolls. If Defendants were correct, then a person who had been *improperly* removed in a list maintenance program could get no relief under Section 8 of NVRA if the election official simply conducted an NCOA mailing that nevertheless resulted in the voter's wrongful removal. If an election official's program is complaint with Section 8, then she cannot face liability for improper removals any more than for failing to make proper removals. This cannot be the case. *See Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1341 (11th Cir. 2014).

190. Defendants provide no legal authority for their assertion that the primary purpose of the NVRA is to increase voter registration, while the other purposes are inferior. (Tr. D5/234:20-23.) No such hierarchy exists. Rather, the purposes of the statute are not in conflict and there is no reason that they cannot each be given full weight. Indeed, Defendants' interpretation of the statute puts it at cross-purposes with itself; sacrificing one purpose for another. Defendant-Intervenor's expert thinks that having incorrect and ineligible registrations is acceptable, without regard for accuracy and correctness. Congress cannot have intended such a result, and this Court finds such an unreasonable view toward the utility of list maintenance reveals a bias against efforts to vigorously clean dirty rolls.

191. The Broward County Supervisor of Elections has a federal obligation to maintain accurate and current voter rolls which contain the names of only eligible voters residing in Broward County. The obligation is independent from any obligations placed on her by Florida law. Federal law requires that "[t]he appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis . . . ." 52 U.S.C. § 21083(a)(2)(A). Moreover, Section 8 of NVRA requires Supervisor Snipes 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; or (B) a change in the residence of the registrant . . . .” 52 U.S.C. § 20507(a)(4)(A)-(B). Local election officials, such as Supervisor Snipes, are specifically obliged to carry out these list maintenance duties and remove ineligible voters from the rolls pursuant to 52 U.S.C. § 20507(d)(3).

192. Section 8 of the NVRA also requires that Defendant shall “complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.” 52 U.S.C. § 20507(c)(2)(A). Section 8 of the NVRA mandates that any such list maintenance programs or activities “shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (52 U.S.C. § 10301 *et seq.*).” 52 U.S.C. § 20507(b)(1).

### B. Supervisor Snipes Has Failed to Make Reasonable Efforts to Conduct a General Program of List Maintenance to Ensure Accurate and Current Voter Lists.

193. Defendant Snipes’s list maintenance efforts have not been reasonable under any standard of care. She has violated NVRA Section 8’s requirement to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters.” 52 U.S.C. § 20507(a)(4).

#### 1. Registration Rate Is Indicative that Lists Are Not Accurate or Current.

194. ACRU has presented evidence showing an impossible, or at least improbable, registration rate in Broward County. *Report of Steven Camarota*, ECF No [144] at 26-36. According to his testimony, Broward County has more persons registered to vote than it has citizens of voting age. Population data comes from the American Community Survey conducted

by the U.S. Census Bureau, which carries with it a presumption of validity. *Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir. 2000). Contemporaneous registration numbers are taken from the data reported by the Election Assistance Commission. These numbers are reported to the EAC directly from the counties through the states. Defendants have offered no argument as to why they would have provided inaccurate data to the EAC.

195. Other courts have found that inflated registration rates create are indicative that an election official has neglected her duty to reasonably maintain an accurate and current registration lists. *See Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 793 (W.D. Tex. 2015) (finding a "strong inference"); *see also Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, No. 5:16-CV-683-BR, 2017 U.S. Dist. LEXIS 23565, at *17 (E.D.N.C. Feb. 21, 2017). Not only that, but other courts have recognized the validity and utility of population registration rates in other election law contexts. *Johnson*, 204 F.3d at 1342 n.13. This Court must do the same and accepts the registration rate in evidence as indicative of a roll that is not accurate or current.

**2. Inactive Registrants**

196. Supervisor Snipes has failed to make a reasonable effort to conduct a general program of list maintenance because she performs no list maintenance whatsoever regarding inactive registrants. Including inactive registrants is an essential component of a reasonable general program of list maintenance. There are several reasons why the failure to include inactive registrants in a list maintenance program constitutes unreasonable list maintenance. Something more than nothing could and should be done.

197. First, failure to include inactives is inconsistent with the plain text of both Section 8 of the NVRA and of Florida's list maintenance provisions. No distinction is made between

active and inactive registrants anywhere in the language of Section 8. Both active and inactive registrants are registered voters. An inactive voter is just as entitled to vote as an active voter under Florida law. Defendants have pointed to no authority indicating that the words "all registered voters" excludes inactive registrants.

198. Second, failure to include inactives in a list maintenance program violates the purpose of list maintenance under Section 8 of the NVRA. One of the express purposes of Section 8 is to mandate list maintenance in order to ensure that the rolls are kept accurate and current. A registrant becomes inactive when they fail to respond to a final notice, which is in turn triggered by information indicating they have moved or because they received a mailing because they have not voted in two years. It is more likely, therefore, that the information on file for an inactive registrant is even less accurate. For this reason it is in some respects more important to conduct list maintenance regarding inactive registrants than active ones.

199. Defendants assert that inactive registrants cannot be subject to any list maintenance processes during the two-general election cycle wait period following their placement into inactive status. This is not accurate. They may be sent notices by forwardable mail to request a response to update their address or status. Or they could be subject to an NCOA database check to obtain their new address.

200. Furthermore, list maintenance regarding inactive registrants is imperative in order to fulfill a related purpose under the NVRA: ensuring that those who are eligible to vote are registered. Ignoring inactive registrants could very well result in the cancellation of the registrations of voters whose information is inaccurate, so that they were not getting mailings when they were active. It is entirely possible that an inactive registrant might very well update their registration if they received some king of mailing. In addition, it is not uncommon for

inactive registrants to decide to participate in an election, even after years of inactivity. Therefore, in order to ensure that eligible voters in Broward County are properly registered, which is among the purposes of the NVRA, it is imperative that inactives be included in list maintenance programs.

201. Defendant-Intervenor represented at trial that Florida administrative rules "expressly state that inactive voters don't have to be included in further mailings, further confirmation mailings. . . . that inactive voters are not required to be sent further confirmation mailings." (Tr. D2/28:10-11; D2/28:14-15.) Examining Florida Administrative Code 1S-2.401, especially subsection (3), the express language referred to by Defendant-Intervenor does not appear.

202. Fla. Admin. Code 1S-2.401(3)(c)3.c provides:

> If an Address Confirmation Final Notice is returned as undeliverable or the active voter does not respond to the notice within 30 days, the Supervisor shall change the voter's registration status to inactive. No further notice to the voter is required except as provided in paragraph (e).

This language does not "expressly state" that inactives should not be included in any further list maintenance, as Defendants would suggest. First, the sentence appears to simply state that no further notice to the voter is required in order to change their status to inactive. Nothing in the sentence suggests that inactive registrants are to receive no further "mailings," as Defendant-Intervenor stated. Second, a "notice" under Florida Statutes and Rules has particular meaning under Florida law. Several different types of mailings are contemplated under Florida law. Some are notices. Some are not. There are Address Change Notices, Fla. Stat. § 98.0655(2), Address Confirmation Final Notices, Fla. Stat. § 98.0655(3). And then there are Address Confirmation Requests, Fla. Stat. § 98.0655(1), as well as "returned nonforwardable return-if-undeliverable

mail," Fla. Stat. § 98.065(2)(b) and notices of potential ineligibility, Fla. Stat. § 98.075(7). These are clearly distinct types of mailings and not all of them are "notices." Thus, it is clear that the rule is clarifying that no further notice must be sent to the registrant to inform them that they have been placed into inactive status. Third, Mr. Gessler opined that it was mailings under Fla. Stat. § 98.065(2)(b) that, by its terms, needs to go to all registered voters, which would include inactives. By the terms of the statute and rules these mailings are not "notices" and so would not be referenced by the language in Fla. Admin. Code 1S-2.401(3)(c)3.c. Finally, the language in that rule is clearly permissive rather than prohibitive. It simply says that inactives need not be sent an additional notice after being made inactive. It does not proscribe additional mailings, or even notices. Accordingly, the Court continues to agree with Mr. Gessler's opinion that reaching out to inactive registrants is an important component of reasonable list maintenance and that the Supervisor is not conducting mass-mailings as defined by Fla. Stat. § 98.065(2)(b) because the mailings she has sent have only gone to all active registrants.

**3. Easily Avoidable Inaccuracies and Problems on the Rolls**

203. ACRU has presented evidence showing examples of inaccuracies and a lack of currency on the rolls. The Court finds that the testimony of Mr. Skinner, Mr. DeNapoli, Mr. Gabbay, Mr. Wolak, and Mr. Churchwell, as well as the opinions of Dr. Camarota and Mr. Gessler, are evidence that the Broward County voter rolls have has issues with accuracy and currency.

204. Defendant Snipes has failed to follow the prescribed procedures required under Florida Statutes 98.075(6) and (7) regarding the information she received from these witnesses regarding potential inaccurate registrations. Florida law states that "If the . . . supervisor receives information from sources other than those identified in subsections (2)-(5) that a registered voter

is ineligible . . . the supervisor *must* adhere to the procedures set forth in subsection (7) . . . .” Fla. Stat. 98.075(6) (emphasis added). Subsection (7) provides: “If the supervisor receives notice or information pursuant to subsections (4)-(6), the supervisor of the county in which the voter is registered *shall*: 1. Notify the registered voter of his or her potential ineligibility by mail *within 7 days after receipt* of notice or information.” Fla. Stat. 98.075(7) (emphasis added). The record is abundantly clear that Defendant Snipes has repeatedly failed to follow this procedure when presented with information regarding potentially ineligible registrants.

205. The testimony of Mr. Gabbay, Mr. Churchwell, and Mr. DeNapoli shows that deceased registrants, sometimes long deceased, remain on the voter rolls in Broward County. Mr. Churchwell even obtained the death certificates of active registrants who died in the 1990s. If a registrant is not removed through the regular update process from the statewide system, there is no way for them to be identified later, resulting in long-deceased registrants remaining on the rolls. Despite being made aware of these situations, Defendant Snipes does not use any of the tools available to her that could remedy it and ensure that deceased registrants are promptly and consistently removed from the rolls. For example, she could use the cumulative Social Security Death Index to periodically check for deceased registrants. Mr. Gessler testified that this is standard industry practice because the Index provides a cumulative check that would account for registrants who died further in the past and in other states. Also, Defendant Snipes could periodically check for registrants with implausible birthdates and send them a notice, or even make a phone call or two. These simple maintenance procedures would doubtless rectify the problem of deceased voters remaining on the Broward County rolls. Instead, she does nothing proactive, except await the latest news from the VR System.

206. The testimony of Mr. Skinner, Mr. Churchwell, and Mr. Wolak reveal irregularities and inaccuracies on the Broward County roll in the form of duplicate entries, missing names, and duplicates with other states. These inaccuracies result from Supervisor Snipes's failure to utilize the tools available to her under Florida law. She should obtain and use information from the Department of Highway Safety and Motor Vehicles to check for update addresses and avoid duplicates internal to Florida. She should then use information, which can be obtained for free, from other states in order to protect from multiple registrations across states. She might even use the phone to call election officials in the states where the Broward citizens are registered. Given that there are known problems with duplicate registrations, obtaining and using these free resources would be imminently reasonable in order to conduct a general program to ensure accurate and current rolls. Finally, it is very significant that other Florida counties make use of the tools available under Florida law in their list maintenance programs, such as jury notice returns and the DAVID system. But the Defendant does not.

207. The Court holds that it is not enough to say that perceived discrepancies in the rolls are most likely typographical errors. For example, Defendant suggested that implausible birthdates are likely typographical errors. But an inherent component of list maintenance is to ensure that the registrations of voters list them at correct and valid residential addresses. If registrations are inaccurate, they ought to be corrected.

208. Defendant-Intervenor suggests that ACRU is attempting to remove otherwise eligible voters from the rolls in Broward County. To the contrary, nowhere does ACRU request or seek the removal of a single named voter. Furthermore, Defendant-Intervenor could not identify a single person that would be subject to unjust removal should ACRU's obtain the relief it seeks. This is because ACRU seeks nothing more or less than compliance with Section 8 by

Defendant Snipes. List maintenance is not a zero sum game if done properly. The implementation of a robust and careful list maintenance program can only serve to increase confidence in voting and even to increase voter registration as a result.

**4. Failure to Engage in the Minimum List Maintenance Activities**

209. The Court finds that Defendant Snipes has failed to conduct the minimum list maintenance activities prescribed by Florida law. Defendants argue that the Supervisor is conducting a reasonable list maintenance program under the NVRA based on a showing that she is conducting certain list maintenance activities. They assert that the Supervisor is (1) conducting an NCOA mailing procedure; (2) receiving information regarding deceased registrants from the state and processing those removals; (3) conducting additional maintenance procedures in the form of targeted mailings, mass mailings, removals based on information from third parties, and removal of duplicates discovered within the state. The evidence in the record, however, does not support these factual assertions and, therefore, the Court must conclude that Supervisor Snipes is not conducting an appropriate program of list maintenance in Broward County. The Court's conclusion in this case is made easier because the Supervisor does not appear to be conducting even the minimum list maintenance activities prescribed by Florida law. Her failure to conduct even one of these mailings effectively under Florida law, standing alone, supports a finding of liability in this case. Even if she were to effectively conduct one of these mailings, however, the professional liability standard set by the NVRA would not necessarily be satisfied.

**a. The Supervisor Does Not Do NCOA Mailings**

210. The Court has found that the Supervisor does not receive change-of-address information through a licensed United States Postal Service vendor from the NCOA database. Accordingly, the Court concludes that the Defendant does not do NCOA mailings as prescribed

in Florida law, which contributes to the Court's conclusion that Defendant is not reasonably conducting a general program of list maintenance.

211. Even if the Court were to find that the Supervisor receives NCOA data, the language of both the NVRA and Florida law contemplates that NCOA database information and mailings should be "used to identify registrants whose addresses may have changed." 52 U.S.C. § 20507(b)(1)(A). But the invoices presented by Defendant Snipes show only ostensible submissions of the list of active registrants. Nowhere in the NVRA is there a distinction between active and inactive registrants. Inactive registrants may vote just as well as active ones. The failure to include inactive voters constitutes a failure to properly conduct NVRA mailings. The IT Director, Mr. Nunez, confirmed that, when the list is sent to the United States Postal Service licensee to check for NCOA database changes, he only sends the full active list. As the election administration professional, Mr. Gessler, testified, it is important to include the entire list in case there are inactive registrants who do indeed live in Broward County, and have not moved out of state, but may have inaccurate registrations and who would update their registrations and become active if the Supervisor reached out to them.

212. Finally, the Supervisor exercises no oversight over the printer to whom she outsources her large mailings. (Tr. D4/87:4-6.) During the 2016 election cycle, there was a large mailing that featured incorrect and mismatches names and addresses, such that registrants were receiving incorrect voter identifications cards. The Supervisor claims that this was caused by a power outage at the printer. But according to her testimony her office does not check the work of the printer before it goes out. Her office sends a .csv file with registrants to be sent a mailing and then never go over the printer's work. (Tr. D4/87:1-6.( If she was exercising basic oversight in

the programs she outsources, these sorts of errors could be caught. Thus, even accepting that she receives NCOA data, the record shows that she is not utilizing it properly and reasonably.

**b. The Supervisor Does Not Do Mass-Mailings**

213. The Court has found that Defendant Snipes has not done any mailings in conformity with Fla. Stat. 98.065(2)(b). Accordingly, the Court concludes that the Defendant does not do mass-mailings as prescribed in Florida law, which contributes to the Court's conclusion that Defendant is not reasonably conducting a general program of list maintenance.

214. Defendant Snipes' "amended" certifications purport to show that a mass mailing under 98.075(2)(b) was done six times since 2011. But the evidence in the record clearly does not support checking the mass-mailing boxes, as Defendant's staff conceded at trial. The invoices produced only show mailings to all active registrants, not to all registered voters. Defendant Snipes also stated unequivocally that her office never sends any mailings to inactive registrants. Furthermore, in the amended certifications Snipes checks the mass-mailing box for both late 2013 and early 2014, even though the September 2013 invoice is for the same mailing that in fact was sent out in January 2014, so that there was no mailing in 2013.

215. And finally, the mailings themselves demonstrably show that none of them were sent by nonforwardable mail. The mailings are clearly marked as "forwarding service requested" or lack any marking indicating "return service requested." (Ex. P-26.) Therefore, none of these mailings, which are the only mailings in the record ostensibly involving large enough numbers to be to all registered voters, are mass-mailings under Section 98.065(2)(b).

216. The facts surrounding the issue of whether Supervisor Snipes does mass-mailing as defined under Florida law clearly demonstrates the lack of a consistent, reasonable general program of list maintenance in the office. Supervisor Snipes and her staff appear to believe that

they are conducting mass-mailings according to the amended certifications. Yet none of the staff are familiar with the requirements of the statute and, in fact, the office does not do the prescribed mass-mailings. To compound matters, Supervisor Snipes proceeded to amend list maintenance certifications going back six years, claiming to have done these list maintenance activities. Yet, as the record shows, the certifications are now, in fact, inaccurate. Supervisor Snipes has, therefore, been failing to file correct list maintenance certifications, which are an integral component of the list maintenance system set up by the state under NVRA.

**c. The Supervisor Does Not Do Adequate Targeted Mailings**

217. The Court has found that Defendant Snipes has not done any targeted mailings in conformity with Fla. Stat. 98.065(2)(c). Accordingly, the Court concludes that the Defendant does not do targeted mailings as prescribed in Florida law, which contributes to the Court's conclusion that Defendant is not reasonably conducting a general program of list maintenance. The numbers of address confirmation requests sent are impossibly small compared to the number of registrants who do not vote in Broward County elections. The original certifications produced by Defendant Snipes claim that targeted mailings under 98.065(2)(c) were done during seven time periods from 2011-2016. These certifications were apparently inaccurate, however, and were amended as a result of this litigation to show targeted mailings in all time-periods from 2011-2016.

**5. Unreasonable List Maintenance Activities and Procedures**

218. The Broward County Supervisor of Elections has consistently failed to exercise reasonable and prudent care in carrying out her list maintenance obligations and activities.

219. Florida statutes clearly place various list maintenance obligations and duties upon the elected office of supervisor of elections. These obligations may be delegated to various

deputies within the supervisor's office, Fla. Stat. § 98.015(8), but it is ultimately the supervisor who is responsible for carrying out list maintenance activities, Fla. Stat. § 98.015(10). There is no provision in Florida law governing whether or not the various supervisors may use outside vendors for the purpose of conducting voter list maintenance mailings or whether each office is required to take care of all mailings in house. What is clear, however, is that each supervisor may not delegate the authority and responsibility for conducting adequate list maintenance. Fla. Stat. § 98.015(10). Accordingly, it is unreasonable and a violation of her list maintenance duties for the Broward County Supervisor of Elections to outsource mailings to an outside printing vendor *without* any oversight or review of the work that the vendor is doing. In this case, there are several instances in the record of inaccurate and faulty mailings being issued from the Supervisor's office. The Supervisor attempts to explain these away as "glitches" in the regular course of business with her printing vendors. The Supervisor, however, exercises no oversight whatsoever over the printing vendors and does not check their work before it is mailed. Such errors would certainly be minimized or eliminated if there had been some minimal amount of oversight with the outsourcing of these activities.

220. The lack of written procedures and policies in the office has resulted in many errors and omissions. As Mr. Gessler testified, the lack of written list maintenance procedures and schedules demonstrates, by definition, the absence of a consistent general list maintenance *program*. The errors are many and have become systemic. The certifications of list maintenance are not prepared according to any sent process and have featured inaccuracies and errors for years. And then when they were "corrected," the certifications only became demonstrably more inaccurate. The list maintenance program for a large county such as Broward must include written and established procedures and policies and cannot rely upon word-of-mouth training and

knowledge. This is necessary in order to maintain a consistent program and training, especially to account for staff roll-over.

221. The late-produced "Voter Services Procedures Manual" does not change the Court's conclusion. To the extent that the content of the Voter Services Manual is merely a print-out of the help desk pages from the VR System software, it does not affect the Court's conclusion that *the Supervisor* does not have written manuals, procedures, and policies. By definition, the proprietary help desk is a third-party software manual, and not written procedures of the Supervisor. Whatever sections of the Voter Services Manual are actually created by the Supervisor, even if they were not excluded under Rule 37(c), they are clearly not used or updated by the Supervisor's office. This is shown by the complete lack of familiarity with the manual and the fact that it was not even discovered until after the beginning of trial, was missing sections even after it was produced after trial began, and each witness who was asked about it gave conflicting and inconsistent responses regarding its composition, source, and usage.

222. Taken together, the various errors, omissions, and lack of consistent practices in the Defendant's office supports the Court's conclusion that Defendant Snipes is not making a reasonable effort to conduct a general program of list maintenance.

Dated: October 20, 2017

Respectfully submitted,

/s/ William E. Davis

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**CERTIFICATE OF SERVICE**

I certify that on October 20, 2017, I caused the foregoing to be filed with the United States District Court for the Southern District of Florida via the Court's CM/ECF system, which will serve all registered users.

/s/ William E. Davis