

16-3811

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT



AMERICAN CIVIL RIGHTS UNION,
Plaintiff-Appellant,

—v.—

PHILADELPHIA CITY COMMISSIONERS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CASE NO. 16-CV-1507
DISTRICT JUDGE C. DARNELL JONES, II

**BRIEF OF PROJECT VOTE AND DEMOS AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE**

IRA M. FEINBERG
DARYL L. KLEIMAN
HOGAN LOVELLS US LLP
875 Third Avenue
New York, New York 10022
(212) 918-3000

SARAH C. MARBERG
HOGAN LOVELLS US LLP
555 Thirteenth Street N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for Amici Curiae Project Vote and Demos

RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

Project Vote Inc. is a non-profit corporation, incorporated in the State of Louisiana. It has no parent corporation, and no publicly-held corporation owns 10 percent or more of Project Vote Inc.'s stock.

The full corporate name of Demos is "Demos: A Network for Ideas and Action, Ltd." Demos is a non-profit corporation, incorporated in the State of New York. It has no parent corporation, and no publicly held corporation owns 10 percent or more of Demos' stock.

TABLE OF CONTENTS

| | Page |
|---|-------------|
| RULE 26.1 CORPORATE DISCLOSURE STATEMENTS | i |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF INTEREST OF <i>AMICI CURIAE</i> | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 5 |
| I. THE NATIONAL VOTER REGISTRATION ACT DOES NOT REQUIRE PHILADELPHIA TO REMOVE INCARCERATED VOTERS WHO HAVE BEEN CONVICTED OF A FELONY | 5 |
| A. The NVRA Was Enacted to Increase Voter Registration and Impose Safeguards to Prevent Unfair Removal from Voter Rolls | 5 |
| B. The NVRA Does Not Mandate Any Action Regarding Individuals with a Felony Conviction, and Defers to State Law on This Issue | 7 |
| C. Pennsylvania Law Does Not Require or Permit the Removal of Voters Incarcerated for a Felony from the Voter Rolls | 11 |
| i. Pennsylvania Law Does Not Disenfranchise Previously- Registered Individuals Upon Conviction of a Felony | 11 |
| ii. Pennsylvania Law Does Not Authorize the Removal of Individuals Incarcerated for a Felony from the Voter Rolls | 13 |
| D. The Help America Vote Act Did Not Alter the NVRA’s Voter Roll Maintenance Requirements | 15 |
| II. VOTER ROLL PURGES, LIKE THE RELIEF ACRU SEEKS HERE, THREATEN THE RIGHTS OF ELIGIBLE VOTERS | 17 |
| CONCLUSION | 24 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| CASES | |
| <i>A. Philip Randolph Inst. v. Husted</i> , 838 F.3d 699 (6th Cir. 2016) | 16 |
| <i>Mixon v. Commonwealth</i> , 759 A.2d 442 (Pa. Commw. Ct. 2000), <i>aff'd</i> , 783 A.2d 763 (Pa. 2001)..... | 11, 12, 13, 14 |
| <i>Owens v. Barnes</i> , 711 F.2d 25 (3d Cir. 1983) | 12 |
| <i>Ray v. Commonwealth</i> , 276 A.2d 509 (Pa. 1971)..... | 12 |
| <i>United States v. Missouri</i> , No. 05-4391-CV-C-NKL, 2006 WL 1446356 (W.D. Mo. May 23, 2006), <i>rev'd</i> , 535 F.3d 844 (8th Cir. 2008)..... | 10 |
| <i>Welker v. Clarke</i> , 239 F.3d 596 (3d Cir. 2001) | 6 |
| STATUTES | |
| 25 Pa. Stat. & Cons. Stat. Ann. § 1203(a) (West 2016) | 13 |
| 25 Pa. Stat. & Cons. Stat. Ann. § 1203(h) (West 2016)..... | 13 |
| 25 Pa. Stat. & Cons. Stat. Ann. § 1901(a) (West 2016) | 13 |
| 25 Pa. Stat. & Cons. Stat. Ann. § 2602(w) (West 2012) | 11 |
| 52 U.S.C. § 20501(a)(3)..... | 5 |
| 52 U.S.C. § 20501(b)(1) | 5 |
| 52 U.S.C. § 20501(b)(4) | 5 |
| 52 U.S.C. § 20507 | 5 |
| 52 U.S.C. § 20507(a)(3)..... | 8, 9 |

52 U.S.C. § 20507(a)(4).....7
52 U.S.C. § 20507(b)18
52 U.S.C. § 20507(c)8, 18
52 U.S.C. § 20507(c)(2)(A)18
52 U.S.C. § 20507(d)8, 18
52 U.S.C. § 20507(g)9
52 U.S.C. § 21083(a)15
52 U.S.C. § 21083(a)(2)(A)(i)15
52 U.S.C. § 21083(a)(2)(A)(ii)(I)17
52 U.S.C. § 21145(a)16
Help America Vote Act of 2002, Pub. L. No. 107-252 (Oct. 29, 2002)15

RULES:

Fed. R. App. P. 29(a)(2).....2
Fed. R. App. P. 29(a)(4)(E).....1

LEGISLATIVE MATERIALS:

147 Cong. Rec. H9304 (2001)16
H.R. Rep. No. 103-9 (1993).....6, 8
H.R. Rep. No. 107-329 (2001).....16
S. Rep. No. 103-6 (1993)6, 10, 18, 19

OTHER AUTHORITIES:

ACLU, Right to Vote & Demos, *Purged! How a patchwork of flawed and inconsistent voting systems could deprive millions of Americans of the right to vote* (Oct. 2004), <https://static.prisonpolicy.org/scans/purged.pdf>19, 20, 21, 22, 23

Alan Riquelmy, *Political confusion: Removal letter confuses law-abiding voters*, Columbus Ledger-Enquirer (Apr. 3, 2008), <http://archive.fairvote.org/index.php?page=9&articlemode=showspecific&showarticle=2985>.....21

Benjamin Hardy, *Data mix-up from Ark. Secretary of State purges unknown number of eligible voters*, Arkansas Times (July 25, 2016), <http://www.arktimes.com/ArkansasBlog/archives/2016/07/25/data-mix-up-from-ark-secretary-of-state-purges-unknown-number-of-eligible-voters>.....22

Chelsea Boozer, *Error flags voters on Arkansas list; thousands in jeopardy of having their registration canceled*, Arkansas Democrat-Gazette (July 25, 2016), <http://www.arkansasonline.com/news/2016/jul/25/error-flags-voters-on-state-list-201607/#/>22

Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L.J. 111 (2008)20

Myrna Perez, Brennan Center for Justice, *Voter Purges* (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf>.....19, 20, 21, 22, 23

Office of the Att’y Gen., *Voting by Untried Prisoners and Misdemeanants*, *Official Op. No. 47*, 67 Pa. D. & C. 2d 449 (Pa. A.G. 1974)12

Pa. Dep’t of State, *The Administration of Voter Registration in Pennsylvania: 2015 Report to the General Assembly* (June 30, 2016), <http://www.dos.pa.gov/Documents/Final%20Report%202015%206-30-16.pdf>13

Pa. Dep’t of State, *Voting Rights of Convicted Felons, Convicted Misdemeanants and Pretrial Detainees* (2016), http://www.cor.pa.gov/How%20Do%20I/Documents/Convicted_felon_brochure%20-%20Voting%202016.pdf12, 14

United States Comm’n on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election: Executive Summary*, <http://www.usccr.gov/pubs/vote2000/report/exesum.htm> (last visited Feb. 9, 2017)20

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae Project Vote Inc. is a national non-partisan, non-profit 501(c)(3) organization based in Washington, D.C., whose mission is to ensure that the American electorate accurately represents the diversity of America's citizenry. Through its research, advocacy, technical assistance and direct legal services, Project Vote works to ensure that every eligible citizen is able to register, to vote, and to cast a ballot that counts. In recent years, Project Vote has focused principally on issues relating to voter registration, and has developed significant expertise on these issues. Among Project Vote's core objectives is to ensure that voter list maintenance procedures do not wrongfully remove eligible voters. Project Vote has a substantial interest in this case because of the significant adverse impact that Appellant's requested relief would have on eligible Pennsylvania voters.

Amicus curiae Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Demos was founded in 2000, and has offices in New York, Boston and Washington, D.C.¹ The goals of removing barriers to political participation and ensuring full representation of America's diverse citizenry are central to

¹ Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici* certify that (1) this brief was not authored in whole or in part by counsel for any party; (2) that no party and no party's counsel contributed money to fund preparing or submitting this brief; and (3) that no person, other than *amici curiae*, their members or their counsel, contributed money to fund preparing or submitting this brief.

Demos' mission. Demos therefore engages in litigation, research, and advocacy campaigns to support electoral reforms that protect the integrity of government and ensure that the voices of all citizens can be heard. Demos has a substantial interest in this case because it believes that voting rights protections remain indispensable to the goal of full and equal access for all citizens to political participation.²

INTRODUCTION AND SUMMARY OF ARGUMENT

The effort of the American Civil Rights Union (“ACRU”) to force the City of Philadelphia to strike people incarcerated for a felony from its voter-registration rolls is utterly without merit. Neither the National Voter Registration Act (“NVRA”) nor the Help America Vote Act (“HAVA”) require the Philadelphia City Commissioners (the “Commissioners”) to remove individuals incarcerated for a felony or to conduct list maintenance procedures directed toward removing them from the voter rolls. In arguing that federal law requires the Commissioners to do these things, the ACRU misconstrues the provisions of the NVRA and HAVA, and distorts these statutes beyond recognition. These statutes do not require any list maintenance procedures with respect to criminal convictions; they require list maintenance, subject to strict safeguards, only with respect to voters who have died or moved. Rather than require procedures with respect to voters convicted of a felony, the statutes explicitly defer to state law on this issue. And, contrary to the ACRU's claims, Pennsylvania law does not require that individuals convicted of a

² All parties have consented to the filing of this brief. Accordingly, it may be filed without leave of court, pursuant to Fed. R. App. P. 29(a)(2).

felony be removed from the voter rolls. Rather, Pennsylvania law provides that people with felony convictions who were registered before their conviction are temporarily disabled from voting during their term of incarceration – but are immediately eligible to vote as soon as they are released from incarceration, without the need to re-register.

The ACRU's arguments are inconsistent with the letter and purposes of the federal laws. The NVRA was enacted to *increase* voter registration and to slow down the removal of registered voters from the rolls, to ensure that eligible voters are not erroneously removed. To that end, the NVRA imposes strict limits on the reasons for which states may remove voters from the rolls, and strict safeguards on the procedures that states may use to do so. And the NVRA explicitly defers to state law on the crucial question of how the states should address the impact of criminal convictions on voting eligibility and registration status, which vary widely from one state to the next. The ACRU would turn the statute on its head by *requiring* the Commissioners to invoke procedures that the NVRA explicitly makes discretionary, and by twisting the statute's *limits* on voter registration removal procedures into *mandates* that would force the Commissioners to remove individuals who are properly registered under state law. Whereas the NVRA puts the brakes on registrant removal and roll maintenance procedures, the ACRU would have this Court push the accelerator to the floor. That is not what the law requires or permits.

Nothing in the Help America Vote Act changed the NVRA's basic ground rules. On the contrary, HAVA explicitly defers to the NVRA's requirements on the crucial issues relating to the permissible grounds for removing registrants and the procedures for maintaining voter rolls. Though the ACRU repeatedly claims that HAVA expanded the NVRA's requirements, this is not true. As HAVA's language and legislative history show, nothing in HAVA changed the limits imposed by the NVRA on who can be removed from the rolls or the procedures that states can use.

The ACRU pretends that it is seeking a modest and easily accomplished adjustment in the Commissioners' maintenance of the Philadelphia voting rolls, but the consequences of its claims are far broader, and there are powerful policy reasons why they should be rejected. Multiple studies have shown that procedures to purge individuals with felony convictions from the voting rolls have been wildly inaccurate and resulted in the disenfranchisement of large numbers of eligible voters, including a disproportionate number of people of color. In past efforts, countless eligible voters were removed, often without notice, because their names were similar to those of individuals with felony convictions, because election officials relied on inaccurate records, or because election officials blindly removed people with criminal convictions even though their civil rights had been restored. This is precisely the sort of injustice that the NVRA seeks to avoid; indeed, it

requires states to ensure that eligible registrants are *not* removed from the voter rolls.

ARGUMENT

I. THE NATIONAL VOTER REGISTRATION ACT DOES NOT REQUIRE PHILADELPHIA TO REMOVE INCARCERATED VOTERS WHO HAVE BEEN CONVICTED OF A FELONY.

A. The NVRA Was Enacted to Increase Voter Registration and Impose Safeguards to Prevent Unfair Removal from Voter Rolls.

Congress enacted the National Voter Registration Act in 1993, with bipartisan support, to increase opportunities for voter registration and provide greater avenues for electoral participation. Congress explicitly found that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation . . . and disproportionately harm voter participation by various groups, including racial minorities.” 52 U.S.C. § 20501(a)(3). The NVRA was thus intended to “establish procedures that will increase the number of eligible citizens who register to vote,” *id.* § 20501(b)(1), as well as to “ensure that accurate and current voter registration rolls are maintained,” *id.* § 20501(b)(4).

The ACRU relies principally on Section 8 of the NVRA, codified at 52 U.S.C. § 20507, which sets out the obligations imposed by the Act on state election officials with respect to voter registration. But contrary to the ACRU’s contentions, Section 8 was designed as a *shield* to protect voters from *losing* their registration and ability to vote, not a mechanism to strike voters from the rolls.

Thus, the Senate Report on the bill, by the Senate Committee on Rules and Administration, explained that this provision was intended “to ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction.” S. Rep. No. 103-6, at 17 (1993). The framers of the NVRA were concerned that some states had been overzealous in their efforts to purge voter rolls, not – as the ACRU suggests – that states were lackadaisical. Congress explained that efforts to purge voter rolls were often “highly inefficient and costly,” unfairly “require[d] eligible citizens to re-register,” and would have an unfair impact, in particular, on low-income individuals and people of color. *Id.* at 18. The Senate Report explained that voter roll purge processes “must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register.” *Id.* See also H.R. Rep. No. 103-9, at 15 (1993) (expressing concern about removal of voters solely because they failed to respond to correspondence from election officials).

Indeed, this Court has already recognized that these were the central purposes of the NVRA. In *Welker v. Clarke*, 239 F.3d 596, 598-99 (3d Cir. 2001), this Court explained that “[o]ne of the NVRA’s central purposes was to dramatically expand opportunities for voter registration and to ensure that, once registered, voters could not be removed from the registration rolls” improperly.

The ACRU's reading of the NVRA is fundamentally at odds with both the plain language and legislative history of the statute.

B. The NVRA Does Not Mandate Any Action Regarding Individuals with a Felony Conviction, and Defers to State Law on This Issue.

The ACRU's central contention on this appeal is that Sections 8(a)(3) and 8(a)(4) of the NVRA *require* the Commissioners to remove from the voter rolls people who are incarcerated for a felony conviction. *See, e.g.*, ACRU Br. 7. But the plain language of the statute demonstrates that this contention is meritless. The statute does not impose any requirement for the Commissioners to remove people incarcerated for a felony from the voter rolls or to conduct a program that makes an effort to remove them from the voter rolls because of their incarceration.

Section 8(a)(4) is the only provision of the NVRA that imposes a mandatory affirmative obligation on state election officials. Section 8(a)(4) provides that each state "shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible 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). On its face, Section 8(a)(4) lists only two types of ineligible voters that the required "general program" should seek to remove: voters who have moved or died. And even as to these registrants, the NVRA imposes strict safeguards to ensure that any such program is carried out in a way that will not inadvertently remove eligible voters, including requiring reliable evidence that the registrant has moved or died, giving notice to the registrant, and waiting until they have failed to vote for at least

two federal elections before removing them from the rolls. *See id.* §§ 20507(c), 20507(d).

Section 8(a)(4) says nothing about a mandatory program to remove people with criminal convictions. This is no accident. The legislative history makes clear that the mandatory “general program” is limited to removing voters who have become ineligible “by reason of death or by a change of residence.” H.R. Rep. No. 103-9, at 14. And as discussed below, the statute, in Section 8(a)(3), explicitly defers to state law on the issue of removal for criminal conviction. The ACRU’s reading of the statute tramples on the federalism values that lie at the heart of the NVRA’s deference to state law with respect to the effect of a criminal conviction on an individual’s eligibility to vote.

The ACRU erroneously relies on Section 8(a)(3). While Section 8(a)(3) addresses the possibility of removal from the voting rolls for “criminal conviction” or “mental incapacity” if these are grounds for ineligibility under state law, it does not *require* removal of voters in these categories. 52 U.S.C. § 20507(a)(3). Instead, consistent with the NVRA’s purposes, it is a *prohibition* on state action to remove voters from the rolls.

Under Section 8(a)(3), “the name of a registrant may *not* be removed from the official list of eligible voters,” *id.* (emphasis added), “except (A) at the request of the registrant; (B) as provided by State law, by reason of criminal conviction or mental incapacity; or (C) as provided under paragraph (4)” [*i.e.*, Section 8(a)(4), as

part of a valid “general program” addressing removal for death or change of residence]. *Id.*

This provision restricts states from removing registrants from the rolls, except in the specified limited circumstances. With respect to criminal convictions in particular, Section 8(a)(3) *permits* – but does not require – states to remove people with criminal convictions to the extent this is “provided by State law.” *See id.* Under no reasonable reading does Section 8(a)(3) require the Commissioners to remove individuals incarcerated for a felony from the voter rolls, as the ACRU contends.

The ACRU attempts to bolster its argument by pointing out that Section 8(g), 52 U.S.C. § 20507(g), imposes an obligation on United States Attorneys to notify state election officials when a resident of the state is convicted of a federal felony, and requires state election officials to provide that notice to local election officials. The ACRU argues that “the only plausible reason for requiring this information to be sent to local election officials is so that they can make note of the registrants who are ineligible by reason of criminal status.” ACRU Br. 16. This argument is baseless. This provision does not require local election officials to do anything with the information, and does not override state law as to the effect of a felony conviction on registration status or voting eligibility. In states where felony conviction leads to disenfranchisement and cancellation of voter registration, this information would obviously be useful to

state and local election officials, and could be used as the basis for removal of the affected individuals from the voter rolls as long as the procedures employed are otherwise compliant with the NVRA. But nothing in Section 8(g) *requires* state or local officials to act upon the information made available to them, and election officials are free not to utilize this information if state law does not require them to.³

Similarly, relying on *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2006 WL 1446356 (W.D. Mo. May 23, 2006), *rev'd*, 535 F.3d 844 (8th Cir. 2008), the ACRU argues that Section 8(a)(4)'s required "reasonable effort" to remove voters from the rolls "appl[ies] to the other subsections of Section 20507." ACRU Br. 14. But nothing in *Missouri* suggests that state officials have a mandatory obligation under federal law to remove individuals incarcerated for a felony from the rolls. *Missouri* did not involve any issue relating to criminal convictions. When the *Missouri* court said that the "reasonable effort" language applied to other subsections of the statute, it was not referring to the other permissible bases for removal under Section 8(a)(3); it was addressing Sections 8(b), 8(c) and 8(d), which do not relate to removals for criminal conviction. 2006 WL 1446356 at *8. The district court adopted Missouri's argument that state and local officials only

³ The legislative history confirms this interpretation of the notification provision. As the Senate Report explains, the purpose of this provision is that it will "*permit* States to make a determination *if* such criminal conviction is reason for the removal of the person's name from the list of eligible voters." S. Rep. No. 103-6, at 18 n.4 (emphases added).

had to show a “reasonable effort” to satisfy their list maintenance responsibilities under Sections 8(b), 8(c) and 8(d). But the opinion simply did not address Section 8(a)(3). The *Missouri* opinion is thus irrelevant here, because it does not address any issue relating to removal under state law based on felony conviction.

C. Pennsylvania Law Does Not Require or Permit the Removal of Voters Incarcerated for a Felony from the Voter Rolls.

Section 8(a) of the NVRA thus defers to state law on the crucial question of how to address registrants with criminal convictions for purposes of voter-list maintenance. And Pennsylvania law could not be more clear: There is no basis in state law for removing registrants with criminal convictions, including those incarcerated for a felony, from the voting rolls.

i. Pennsylvania Law Does Not Disenfranchise Previously-Registered Individuals Upon Conviction of a Felony.

Pennsylvania law does not disenfranchise individuals who are registered to vote upon their conviction for a felony. Article VII, Section 1 of the Pennsylvania Constitution guarantees that “every citizen who meets the age and residency requirements is entitled to vote in all elections, subject, however, to ‘such laws . . . regulating the registration of electors as the General Assembly may enact.’” *Mixon v. Commonwealth*, 759 A.2d 442, 450 (Pa. Commw. Ct. 2000), *aff’d*, 783 A.2d 763 (Pa. 2001). Only one provision of state law addresses the voting rights of incarcerated individuals convicted of a felony who were previously registered to vote, 25 Pa. Stat. & Cons. Stat. Ann. § 2602(w) (West 2012), and it

provides only that voters incarcerated for a felony are not eligible to vote via absentee ballot. *See Ray v. Commonwealth*, 276 A.2d 509, 510 (Pa. 1971). This is the full extent to which persons registered to vote and subsequently convicted of a felony are unable to vote in Pennsylvania.⁴

Similarly, Pennsylvania law does not require that voters incarcerated for a felony must be stricken from the voter rolls; it merely suspends their right to vote during their period of incarceration. In *Mixon*, the Commonwealth Court held unconstitutional a provision of Pennsylvania law that precluded individuals released from incarceration for a felony from registering to vote for five years after their release. 759 A.2d at 451-52. The court held that there was no rational basis for this provision, because voters incarcerated after a felony conviction “who were legally registered prior to incarceration *may* vote upon their release.” *Id.* at 451 (emphasis in original). This reasoning is plainly based on the understanding that it is entirely proper for a previously registered voter to maintain their voter

⁴ People convicted of a felony who are not confined in a penal institution retain their right to vote in Pennsylvania. *See Owens v. Barnes*, 711 F.2d 25, 26 (3d Cir. 1983) (“unincarcerated convicted felons, such as those who have been sentenced to probation or released on parole, may vote”); *Mixon*, 759 A.2d at 451 (felons recently released from incarceration may vote). *See also* Pa. Dep’t of State, *Voting Rights of Convicted Felons, Convicted Misdemeanants and Pretrial Detainees* 2 (2016), http://www.cor.pa.gov/How%20Do%20I/Documents/Convicted_felon_brochure%20-%20Voting%202016.pdf (felons whose period of confinement has ended, or who are on parole or supervised release, are eligible voters); Office of the Att’y Gen., *Voting by Untried Prisoners and Misdemeanants, Official Op. No. 47*, 67 Pa. D. & C. 2d 449, 453 (Pa. A.G. 1974) (“convicted misdemeanants and pretrial detainees shall . . . be entitled to register and vote during the period of confinement in a penal institution”).

registration during the time of their incarceration. Indeed, the *Mixon* court expressly held that Pennsylvania law “do[es] not completely disenfranchise the convicted felon . . . , it merely suspends the franchise for a defined period.” *Id.* at 448 n.11.

ii. Pennsylvania Law Does Not Authorize the Removal of Individuals Incarcerated for a Felony from the Voter Rolls.

Thus, the ACRU’s claim that the Commissioners were required to remove individuals incarcerated for a felony from the voter rolls is wrong. In fact, Pennsylvania law prohibits any such action.

In Pennsylvania, each county’s registration commission has jurisdiction over the voter rolls, and only the commission may remove ineligible voters. 25 Pa. Stat. & Cons. Stat. Ann. §§ 1203(a), 1203(h) (West 2016). Pennsylvania law directs that commissioners “shall not . . . cancel[]” a registered voter’s registration except in four enumerated circumstances: (1) voter request; (2) voter death; (3) voter change of residence outside the county; or (4) removal is necessary to comply with the NVRA. *See* 25 Pa. Stat. & Cons. Stat. Ann. § 1901(a) (West 2016); *see also* Pa. Dep’t of State, *The Administration of Voter Registration in Pennsylvania: 2015 Report to the General Assembly* 3-7 (June 30, 2016), <http://www.dos.pa.gov/Documents/Final%20Report%202015%206-30-16.pdf>.

Plainly, confinement in a penal institution for a felony conviction is *not* one of the permissible grounds for commissioners to remove a voter from the rolls.

Moreover, removal of individuals incarcerated for a felony from the voter rolls would be inconsistent with Pennsylvania law that permits individuals released from prison to vote immediately upon their release. *See Mixon*, 759 A.2d at 451. Indeed, the Pennsylvania Department of State has explicitly stated that incarcerated persons who “will be released by the date of the next election[] . . . upon completion of their term of incarceration for conviction of a misdemeanor or a felony” are eligible to vote, and may register in advance from prison. *See Pa. Dep’t of State, Voting Rights of Convicted Felons, Convicted Misdemeanants and Pretrial Detainees* 2-3. This state law authority flatly contradicts the ACRU’s argument that Pennsylvania law requires the Commissioners to strike individuals incarcerated for a felony from the voter rolls.

The ACRU also argues that the Commissioners are at least required to “make note” of the names of voters incarcerated for a felony, to ensure that they are unable to vote. ACRU Br. 15-16. But the ACRU does not point to anything in the NVRA or state law that would require the Commissioners to make such a notation, and no such authority exists.⁵

⁵ The ACRU *concedes* that “[i]f there is no state law disenfranchising persons based on criminal convictions, then no list maintenance would be required” under either the NVRA or HAVA, ACRU Br. 13-14, and that would preclude any alleged obligation to make notations on its records.

D. The Help America Vote Act Did Not Alter the NVRA's Voter Roll Maintenance Requirements.

The Help America Vote Act was enacted in 2002 to address some of the problems of election administration that became obvious during the 2000 presidential election. The statute recites that it was intended to “provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections . . . [and] to establish minimum election administration standards for States and units of local government.” Help America Vote Act of 2002, Pub. L. No. 107-252 (Oct. 29, 2002). HAVA includes provisions that relate to voter registration and voter roll maintenance, particularly Section 303(a), codified at 52 U.S.C. § 21083(a), which directed the states to establish computerized, state-wide registration systems, in addition to the local registration systems that typically existed at that time. But HAVA was not intended to alter the requirements or restrictions of the NVRA with regard to voter registration or voter roll maintenance.

On the contrary, HAVA explicitly states that for purposes of the new state-wide registration system required by the Act, it was adopting the standards of the NVRA applicable to the pre-existing registration systems, without modifying or altering them. Section 303(a)(2)(A) – which requires state or local officials to perform list maintenance on the statewide voter registration list – provides that a state may remove an individual from the rolls only “in accordance with the provisions of the National Voter Registration Act.” 52 U.S.C. § 21083(a)(2)(A)(i).

Moreover, Section 906 reiterates that the statute was not intended in any way to supersede or alter the application of the NVRA. Section 906 provides: “Except as specifically provided in section 21083(b) of this title [relating to registration by mail] . . . , nothing in this chapter may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of” any of the listed statutes, including the NVRA. 52 U.S.C. § 21145(a).

The legislative history confirms that HAVA was not intended to alter the list maintenance requirements of the NVRA in any way. In crafting HAVA, its co-sponsors, Rep. Steny Hoyer (D-MD) and Rep. Bob Ney (R-OH), sought the advice of the Department of Justice regarding the effect of HAVA on the NVRA. The Justice Department stressed that “[a]lthough several provisions in the bill affect the list maintenance provisions in section 8 of the NVRA, it is evident that the bill is not designed to modify the NVRA and, in fact, it does not alter or undermine the NVRA’s requirements.” 147 Cong. Rec. H9304 (2001). *See also A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 706 (6th Cir. 2016) (holding that HAVA “leaves NVRA intact, and does not undermine it in any way”) (quoting H.R. Rep. 107-329, at 37 (2001)). In particular, the Justice Department clarified that “the bill’s list maintenance provisions can and should be read consistently with the NVRA’s existing list maintenance procedures.” 147 Cong. Rec. H9304. The Justice Department’s language here is clear and uncompromising – when it comes

to list maintenance procedures, HAVA does not add to the NVRA's limited mandatory requirements.

There is no support for the ACRU's assertion that HAVA was designed to "augment," "enhance," or "broaden" the NVRA's list maintenance requirements. *See, e.g.*, ACRU Br. 11, 12. These terms appear nowhere in HAVA, and the text of the statute, its legislative history, and case law all expressly reject the ACRU's contention. HAVA makes only one reference to felony status, in Section 303(a)(2)(A)(ii)(I), which states that for purposes of removing names of ineligible voters from the rolls, "the State shall coordinate the computerized list with State agency records on felony status." 52 U.S.C. § 21083(a)(2)(A)(ii)(I). But this provision does not *require* the Commissioners to remove those incarcerated for a felony from the voter rolls, and does not alter the NVRA's explicit deference to state law concerning removals on the basis of criminal conviction.

II. VOTER ROLL PURGES, LIKE THE RELIEF ACRU SEEKS HERE, THREATEN THE RIGHTS OF ELIGIBLE VOTERS.

In addition to clear Pennsylvania law protecting the right of registered voters to remain on the rolls during a period of incarceration and the NVRA's explicit deference to this state law, there are also strong policy reasons to reject the procedures the ACRU seeks. The ACRU pretends that purging voters currently incarcerated for a felony from Philadelphia's voter rolls would be a flawlessly accurate and easily accomplished endeavor, but the reality is otherwise. Study after study has shown that the procedures that states have used to purge individuals

convicted of a felony from the rolls produce wildly inaccurate results and disenfranchise large numbers of eligible voters. These past efforts have mistakenly removed eligible voters because their names were similar to the names of individuals who had been convicted of a felony, or because election officials failed to consider when someone's civil and voting rights had explicitly been restored. Often, these wrongly disenfranchised voters do not learn of their removal from the rolls until they show up at the polls on Election Day, when it is too late to correct the state's errors.

This type of wrongful removal is exactly what the NVRA seeks to prevent. The statute contains numerous protections to ensure that eligible registrants are *not* removed from the voter rolls, including the exacting process required before individuals can be removed from the rolls because they have changed residence, *see* Sections 8(b), (c) and (d), 52 U.S.C. §§ 20507(b), (c), (d), and the prohibition against conducting systematic list maintenance programs within 90 days of a federal election, *see* Section 8(c)(2)(A). 52 U.S.C. § 20507(c)(2)(A). In enacting the NVRA, legislators warned against the dangers of purging voters from the rolls. “Unfortunately, there is a long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens.” S. Rep. No. 103-6, at 18. As the Senate Report explained, voter purges “must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them

to needlessly re-register.” *Id.*⁶ The Senate Report also insisted that any voter purges “must be structured to prevent abuse which has a disparate impact on minority communities.” *Id.*

The enormous problems created by voter purges are well documented. First, states often use flawed matching criteria to wrongly conclude that a registrant is the same person as an individual with a felony conviction. *See* ACLU, Right to Vote & Demos, *Purged! How a patchwork of flawed and inconsistent voting systems could deprive millions of Americans of the right to vote* 8-9 (Oct. 2004), <https://static.prisonpolicy.org/scans/purged.pdf> (hereinafter “Purged!”); Myrna Perez, Brennan Center for Justice, *Voter Purges* 3 (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf> (hereinafter “Voter Purges”). As a result of such poor matching criteria, election officials may wind up removing an eligible registrant from the rolls because they mistakenly believe they have “matched” a registrant with someone with a felony record, when they are actually looking at the records of two distinct individuals with similar identifying information. *Voter Purges* at 3. In a survey of fifteen states with laws limiting voting on the basis of criminal conviction, researchers from Demos, Right to Vote and the ACLU found that none of the states

⁶ This concern is especially relevant here. Under Pennsylvania law, citizens convicted of a felony lose the ability to vote absentee while under confinement but are eligible to vote immediately upon their release from incarceration. Purging them from the voter rolls would require these individuals to needlessly re-register when they are released, and deprive them of their right to vote in elections shortly after their release.

had codified any specific or minimum set of criteria to ensure that an individual with a felony conviction is actually the same individual being purged from the voter rolls. Purged! at 8. Using limited information to match individuals in a purge leaves substantial room for error.⁷

In 2001, the United States Commission on Civil Rights conducted an investigation of Florida's removal program before the 2000 federal election, which was conducted by a private vendor ostensibly to remove registrants with a felony record and other ineligible voters. In its report, the Civil Rights Commission concluded that "[t]he ubiquitous errors and dearth of effective controls in the state's list maintenance system resulted in the exclusion of voters lawfully entitled and properly registered to vote," and led to disproportionately erroneous removals of African-American voters as compared with white or Hispanic voters. See United States Comm'n on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election: Executive Summary*, <http://www.usccr.gov/pubs/vote2000/report/exesum.htm> (last visited Feb. 9, 2017).

In advance of the 2000 election, Florida's attempt to purge voters convicted of a felony resulted in the wrongful removal of nearly 12,000 registrants, according to conservative estimates. See *Voter Purges* at 3, 23. This occurred, in part,

⁷ Indeed, a recent study demonstrated that even if two listed names have the exact same name and birthdate, there is a high statistical probability that they are two distinct individuals rather than a successful match. See Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L.J. 111 (2008).

through the use of bad matching criteria. *Id.* at 23. “Florida registrants were purged from the rolls if, in part, 80 percent of the letters of their last names were the same as those of persons with criminal convictions.” *Id.*

Election officials in Georgia encountered a similar problem in 2008. The Elections Director for Muscogee County, Georgia, sent 700 letters to local residents informing them that they were ineligible to vote because they had supposedly been convicted of a felony. *Id.* at 22. More than one-third of voters called to report that there had been a mistake. *Id.*; *see also* Alan Riquelmy, *Political confusion: Removal letter confuses law-abiding voters*, Columbus Ledger-Enquirer (Apr. 3, 2008), <http://archive.fairvote.org/index.php?page=9&articlemode=showspecific&showarticle=2985>. According to media reports, the official responsible attributed the errors to bad matching criteria, explaining that she had received limited information to match individuals with felony convictions with registered voters. *Id.*; *see also* Voter Purges at 22 (explaining that the attempted purge included voters whose names, but not necessarily other information, matched the names of those with felony convictions).

In addition to insufficient matching criteria, poor source data regarding people with felony convictions contributes to erroneous purges. *See* Purged! at 5. Source lists of people with a felony record are often “riddled with errors,” because they are overbroad, lack specificity, or simply contain errors. *See* Voter Purges at

20. Faulty conviction information also leads to wrongful removal of eligible voters. *Id.* at 21. State election officials may receive information on individuals convicted of a felony from multiple state agencies or from other states, but this often reduces the quality and accuracy of the available information. In surveying the fifteen states, Demos, Right to Vote and the ACLU found that there were no uniform standards for sharing felony conviction information between states. *See Purged!* at 5. Even more troubling, their survey found no statutes concerning state-to-state notification of *overturned* felony convictions. *Id.*

Historically, source lists have been not just imprecise, but wrong. In Florida's 2000 purge of people presumed to have felony convictions, the state source lists contained multiple types of errors. In one example, Reverend Willie Dixon was wrongly purged even though he had been pardoned of a crime he committed in his youth and had had his voting rights restored. *Voter Purges* at 21.⁸ Florida's purge also removed voters like Wallace McDonald, who had only committed a misdemeanor, even though under Florida law, misdemeanors do not

⁸ Similarly, a bureaucratic error during 2016 voter roll maintenance in Arkansas improperly removed thousands of voters from the rolls, including ex-felons who were then eligible to vote. Chelsea Boozer, *Error flags voters on Arkansas list; thousands in jeopardy of having their registration canceled*, *Arkansas Democrat-Gazette* (July 25, 2016), <http://www.arkansasonline.com/news/2016/jul/25/error-flags-voters-on-state-list-201607/#/>; *see also* Benjamin Hardy, *Data mix-up from Ark. Secretary of State purges unknown number of eligible voters*, *Arkansas Times* (July 25, 2016), <http://www.arktimes.com/ArkansasBlog/archives/2016/07/25/data-mix-up-from-ark-secretary-of-state-purges-unknown-number-of-eligible-voters>.

affect voting rights. *Id.* The Florida purge also included more than 300 individuals who, implausibly, had conviction dates in the future. *Id.*

Compounding these problems, eligible voters often do not learn that they have been erroneously purged from the voter rolls until Election Day. *See id.*; *see generally* Purged! at 9-11. When this happens, these voters are wrongfully disenfranchised, because it is then too late to restore their registrations for that election. But even if voters are notified before the state purges the rolls, eligible voters mistakenly purged may have to either contest that decision or re-register, which imposes an unfair burden on the registrant. This makes eligible voters vulnerable, and frustrates one of the key purposes of the NVRA, to make it less likely that state officials will erroneously remove eligible voters from the rolls.

The NVRA was intended to prevent state officials from depriving eligible citizens of their fundamental right to vote through mechanisms that are imprecise, unfair and in practice discriminatory. The NVRA's purposes and goals, as well as its text, are flatly inconsistent with the ACRU's claim that the Commissioners are required to purge individuals incarcerated for a felony from Philadelphia's voter rolls.

CONCLUSION

For the foregoing reasons, the District Court's decision dismissing the ACRU's Amended Complaint should be affirmed.

Dated: February 10, 2017

Respectfully submitted,
By: /s/ Ira M. Feinberg
Ira M. Feinberg
Daryl L. Kleiman
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
ira.feinberg@hoganlovells.com
daryl.kleiman@hoganlovells.com
Tel: (212) 918-3000
Fax: (212) 918-3100

Sarah C. Marberg
D.C. Bar No. 1021550
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
sarah.marberg@hoganlovells.com
Tel: (202) 637-5600
Fax: (202) 637-5910

*Counsel for Amici Curiae Project Vote Inc.
and Demos*

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 5,806 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

3. This brief complies with 3d Cir. Local App. R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies.

/s/ Ira M. Feinberg
Ira M. Feinberg

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to 3d Cr. Local App. R. 28.3(d) and 46.1(e), I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Ira M. Feinberg
Ira M. Feinberg

CERTIFICATE OF VIRUS DETECTION

Pursuant to 3d Cir. Local App. R. 31.1(c), I hereby certify that I have run Trend Micro Titanium Internet Security on this file. No virus was detected.

/s/ Ira M. Feinberg
Ira M. Feinberg

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February 2017, the foregoing Brief of Project Vote Inc. and Demos as *Amici Curiae* was filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

/s/ Ira M. Feinberg
Ira M. Feinberg