No. 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 (Hon. C. Darnell Jones, II)

APPELLANT'S OPENING BRIEF AND APPENDIX VOL. I, pp. A1-24

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Corporate Disclosure Statement

The American Civil Rights Union is a non-profit 501(c)(3) organization. It is not a publicly held corporation and no corporation or other publicly held entity owns more than 10% of its stock.

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Statement of Jurisdiction

Appellant invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court granted Appellee's motion to dismiss on September 9, 2016. (A3-4.) The Appellant filed a notice of appeal with the district court on October 6, 2016. (A1-2.) This Court has jurisdiction under 28 U.S.C. § 1292.

Issues Presented for Review

1. Whether Federal Law Requires the Removal of Registrants Who Are Ineligible to Vote by Reason of a Criminal Conviction from the Lists of Eligible Voters. (A13-17, 29-31.)
2. Whether Incarcerated Felons Are Ineligible to Vote Under Pennsylvania Law. (A18-20, 29.)

Statement of Related Cases and Proceedings

Appellant American Civil Rights Union is aware of no related cases or proceedings that present substantially similar issues as those involved in this appeal. This case has not previously been before this Court or any other court of appeals.

Statement of the Case

On January 26, 2016, the American Civil Rights Union ("ACRU") sent a notice letter to the Philadelphia City Commissioners ("City") by certified mail stating that, "[b]ased on [ACRU's] comparison of publicly available information

published by the U.S. Census Bureau and the Federal Election Assistance Commission, [the City] is failing to comply with Section 8 of the National Voter Registration Act." (A26-27, 36-38.) ACRU sent a copy of the notice letter to the Pennsylvania Secretary of State. (A38.)

On April 4, 2016, receiving no response from the Commissioners for more than three times the statutory waiting period,[1] ACRU filed the underlying action. (A28.) ACRU named the Philadelphia City Commissioners as Defendant because collectively, pursuant to Pennsylvania law, that office is "the public entity empowered to register voters, oversee elections records, and supervise list maintenance activities." (A26.) On April 28, 2016, the City filed a Motion to Dismiss ACRU's original Complaint pursuant to Fed. R. Civ. Proc. 12(b)(1), 12(b)(6), and 12(b)(7). (A45.) ACRU filed a response in opposition to the City's Motion to Dismiss on May 12, 2016. (A45.)

During the ensuing months, the parties resolved Count I of the original Complaint through production of documents and through inspection meetings held on June 30 and August 24, 2016. (A6.)

[1] Pursuant to 52 U.S.C. § 20510(b), "A person who is aggrieved by a violation of [the NVRA] may provide written notice of the violation," and if, as relevant here, "the violation is not corrected . . . within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation." (A29, 37.)

Count II, however, persists in that it seeks declaratory and injunctive relief for failure to remove or flag registrants on the lists of eligible voters who are incarcerated felons. (A7-8.) The City filed a renewed Motion to Dismiss regarding the Amended Complaint based on the argument that no federal law requires it to conduct list maintenance regarding registrants who are ineligible to vote under state law by reason of criminal conviction. (A8.) The district court granted the motion to dismiss on September 9, 2016. (A3-4.)

Summary of the Argument

Appellant seeks a declaration that federal law, specifically Section 8 of the National Voter Registration Act of 1993 ("NVRA") requires states to conduct reasonable list maintenance procedures to remove or otherwise process from their lists of eligible voters the registrations of persons who become ineligible to vote under state law by reason of a criminal conviction.

The stated purposes of the 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, as enhanced by the parallel obligations found in the Help America Vote Act of 2002 ("HAVA"), carries out the statute's list maintenance purpose by

imposing obligations on election officials. These include obligations to make reasonable efforts to remove the names of ineligible persons from the official lists of eligible voters. 52 U.S.C. § 20507(a) *et seq.*; 52 U.S.C. § 21083(a)(2) and (4); *see United States v. Missouri*, 2006 WL 1446356, at *8 (W.D. Mo. May 23, 2006) ("[B]oth its text and common sense suggests that Congress intended the 'reasonable effort' standard to apply to subsections (b), (c) and (d) . . . .").

Incarcerated felons are not eligible to vote under Pennsylvania law. A person who is incarcerated for a felony in Pennsylvania cannot vote in any way and cannot register to vote while incarcerated. Accordingly, incarcerated felons must be subject to the appropriate list maintenance procedures under the NVRA and HAVA to ensure that they do not appear on the lists of eligible voters in Pennsylvania elections. This maintenance is mandated by federal law and is not contingent on any state list maintenance provisions for its effectiveness. List maintenance under the general list maintenance provision in 52 U.S.C. § 20507(a) *et seq.* is not merely permissible, it is mandatory. Yet the City does not contest that it makes no effort whatsoever to remove these registrations or even flag the registration with the status as an incarcerated felon.

The ACRU stated a claim for relief under the NVRA that should not have been dismissed under Federal Rule of Civil Procedure 12(b)(6) because it has alleged sufficient facts to support the claim that the official lists of eligible voters

in Philadelphia are not kept accurate and current and are in violation of 52 U.S.C. § 20507(a)(3)(B), as well as other subsections, because the City engages in no list maintenance whatsoever with regard to registrants who are ineligible to vote under Pennsylvania law as a result of being incarcerated for a felony.

Standard of Review

This Court uses a *de novo* standard of review when reviewing a district court's granting of a motion to dismiss. *Witasick v. Minn. Mut. Life Ins. Co.*, 803 F.3d 184, 191-92 (3d Cir. 2015). The Court applies the same standard as the District Court and therefore accepts all factual allegations in the complaint as true and construes the complaint in the light most favorable to the plaintiff. *See Santomenno v. John Hancock Life Ins. Co.*, 677 F.3d 178, 182 (3d Cir. 2012). The Court considers only facts alleged in the complaint, attached exhibits, and matters of public record. *See Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007). The district court should only be affirmed if the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face. *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Argument

In this action, the ACRU has properly pleaded a cause of action against the City under 52 U.S.C. § 20510(b) for violations of Section 8 of the National Voter

Registration Act ("NVRA").[2] Count II of ACRU's Amended Complaint properly alleges that the City is not complying with the list maintenance provisions of Section 8 with regard to registrants who are ineligible under Pennsylvania law because they are incarcerated felons. (A29-32.) Appellee was properly served notice of these violations by letter in January 2016, as required by 52 U.S.C. § 20510(b)(1). (A26-28, 36-38.)

Dismissal under Federal Rule of Civil Procedure 12(b)(6) was improper with regard to Count II of the Amended Complaint because Section 8 of the NVRA, requires the appropriate election official not to produce lists of eligible voters including names of registrants who become ineligible to vote "as provided by State law." 52 U.S.C. § 20507(a)(3)(B).

I. Federal Law Requires Reasonable List Maintenance Regarding the Registrations of Persons Who Are Ineligible to Vote by Reason of Criminal Status Under State Law.

The district court's conclusion that NVRA and HAVA require election officials to only remove or otherwise process registrants who become ineligible by reason of a criminal conviction if there is a corresponding state statute that requires such removal is erroneous. According to the district court, federal law permits but

[2] List maintenance obligations and public record rights at issue in this case under 52 U.S.C. § 20507 are commonly referred to as "Section 8" obligations under the NVRA as they were contained in Section 8 of Pub. L. 103-31, May 20, 1993, 107 Stat. 77.

does not require election officials to perform list maintenance on the registrations of voters who become ineligible by reason of a criminal conviction. (A15-17.) Under the district court's reading, removal of such ineligible registrants is only required under federal law if state law provides an explicit procedure for removal based on criminal conviction. (A15-17.)

But this reading is incorrect. Voter list maintenance of registrants "by reason of criminal conviction" is not required only if the *list maintenance* is "provided by State law." 52 U.S.C. § 20507(a)(3)(B). Rather, those subsections, when read consistently with the whole of the NVRA and HAVA that pertain to felon registration, require reasonable list maintenance when *ineligibility to vote* by reason of criminal conviction is provided by state law. List maintenance is required in order to ensure that those who are ineligible to vote "as provided by State law, by reason of criminal conviction," are not on the lists of eligible voters. 52 U.S.C. § 20507(a)(3)(b). Other courts have examined the extent of reasonable list maintenance obligations and those decisions should be given weight. The district court's reading here allows election officials to produce lists of eligible voters for use during elections that contain the names of individuals who are, pursuant to Pennsylvania law, not eligible to vote. This omission certainly creates a plausible cause of action under the NVRA for failure to conduct reasonable list maintenance and the district court should be reversed.

The fundamental issue presented in this appeal is whether federal law requires election officials to remove or otherwise process registrant records when they become ineligible under state law by reason of a criminal conviction, or, whether federal law exempts states from conducting reasonable list maintenance on registrants who are ineligible to vote in federal elections because of a criminal conviction but are nevertheless kept on the list of eligible voters. ACRU submits that the former interpretation is consistent with the plain language of the statutes, especially when Section 8 and the parallel sections of HAVA are read as a whole. The latter interpretation allows ineligible individuals to participate in elections and certainly gives rise of a cause of action for failing to conduct reasonable list maintenance.

Under Pennsylvania law, incarcerated felons are ineligible to vote. *See, e.g.*, 25 Penn. Stat. § 2602(w). At a minimum, therefore, the City should undertake some minimal list maintenance steps to ensure that these ineligible registrants do not obtain or cast ballots. The City does not even inquire into the identity of the ineligible felon registrants or obtain any information about felony convictions and incarceration whatsoever. (A30.)

A reading of the entire list maintenance regimen of NVRA and HAVA demonstrates that list maintenance regarding ineligible felons is mandatory in states such as Pennsylvania that have determined that incarceration for a felony is

disqualifying. This list maintenance is not required merely when state law has explicit procedures for such maintenance. The City does not dispute the fact in the properly pled complaint that it conducts no list maintenance whatsoever regarding ineligible incarcerated felon registrants. (A8.)

If list maintenance were permissive, but not required, the maintenance provisions of NVRA and HAVA related to felons would be superfluous. An interpretation of NVRA's list maintenance obligations that would exempt a state from obligations to maintain accurate lists of registrants and allow ineligible felons to remain on the rolls simply because the state has not adopted particularized procedures for correcting the rolls would render the federal law redundant. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'" (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (additional citations and quotations omitted) (brackets in original)).

A permissive interpretation of the language of 52 U.S.C. § 20507(a)(3)(B) mistakes the application of the descriptive clause "as provided by State law" within the statute. In a correct reading of this section, that clause is nonrestrictive and describes the clause "by reason of criminal conviction or mental incapacity." Therefore, the subsection refers to state laws that provide for ineligibility by reason

of criminal conviction or mental incapacity. In other words, if state law provides that someone becomes ineligible by reason of criminal conviction or mental incapacity, then reasonable list maintenance must be done on the list of eligible voters to reflect that ineligibility.

This correct interpretation is congruous with the parallel provisions of HAVA, which require list maintenance of the centralized state-wide computer lists to remove all ineligible registrants. Those sections explicitly refer to the general list maintenance provisions of NVRA. Read together, NVRA and HAVA enacted an obligation that election officials make reasonable efforts to remove ineligible voters from the list of eligible voters. Therefore, 52 U.S.C. § 20507(a)(3)(B) is correctly interpreted as containing a requirement, rather than merely permitting states to remove ineligible criminals if they so choose.

Accordingly, when read as a whole, NVRA and HAVA contain an obligation to make a reasonable effort to remove ineligible voters, including those who are ineligible as a result of state law regarding criminal conviction or mental incapacity. The district court's analysis was incorrect in that it looked at particular subsections one by one rather than as a whole, and this read out of the law the obligation of election officials to reasonably maintain accurate lists of eligible voters. This was incorrect because, when interpreting a statute, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of

the whole law, and to its object and policy." *Prestol Espinal v. AG of the United States*, 653 F.3d 213, 217 (3d Cir. 2011) (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850)); *see also* 52 U.S.C. § 2051(b)(4) (stated purpose of the NVRA includes "ensur[ing] that accurate and current voter registration rolls are maintained").

Obligations under the NVRA remain operative even if state law does not specifically provide specific list maintenance procedures to process registrants deemed ineligible by a separate provision of state law. The obligation under the NVRA to reasonably maintain the rolls and ensure that the lists of eligible voters do not include the names of ineligible individuals is a federal obligation. If the state deems incarcerated felons ineligible to vote, as Pennsylvania has, then the lists of eligible voters should not include their registrations.

Certain provisions of HAVA augment NVRA and require registrants on the rolls to be detected, noted, and acted upon for those rolls to be accurate and current, as required by the NVRA. 52 U.S.C. § 21083(a)(2)(A)(ii)(I). HAVA requires that each state have a statewide registration list, 52 U.S.C. § 21083(a)(1)(A), that is maintained by "the appropriate State or local election official," 52 U.S.C. § 21083(a)(2)(A), in such a way that "makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters," 52 U.S.C. § 21083(a)(4). Election officials must make a

reasonable effort to ensure that those who are not eligible cannot cast a ballot. When an election official makes no effort to detect or note the possibility of ineligible registrants due to incarcerated felony status, these federal list maintenance obligations are implicated by any fair reading of the statutes. These sections of HAVA—52 U.S.C. §§ 21083(a)(2) and (4)—expressly refer to and augment the general maintenance provisions of NVRA at 52 U.S.C. § 20507(a) *et seq.*, while Section 21083(a)(2)(A)(i) does the same for 52 U.S.C. § 20507(a)(4) of NVRA.

The plain language in 52 U.S.C. § 21083(a) enhances the list maintenance requirements of Section 20507(a) of NVRA. Section 20507(a)(4) of NVRA, for example, requires "a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" for two specific reasons: death and change in residency. Then Section 21083(a)(4)(A) of HAVA broadens the requirement and creates a blanket mandate to make "a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." The language in the sections is almost identical. According to established rules of statutory interpretation, these should be interpreted to have related meanings and complimentary purposes. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically

to the topic at hand."). And the broader requirements in HAVA are to be performed "in accordance with the provisions of the National Voter Registration Act." 52 U.S.C. § 21083(a)(2)(A)(i). Finally, these HAVA requirements expressly do not supplant or limit the list maintenance requirements in NVRA. 52 U.S.C. § 21145.

Therefore, list maintenance done in accordance with 52 U.S.C. § 20507(a) includes the requirements in Section 20507(a) of NVRA, as enhanced by the requirements in Section 21083(a) of HAVA. By its express terms, Section 21083(a) does not create a new list maintenance scheme that supplants the one in Section 20507. Instead, Section 21083(a) enhances those requirements and becomes part of the general maintenance provisions in NVRA. The district court below in fact recognized and found that certain provisions of HAVA "supplement[] the NVRA." (A16.)

The conclusion that NVRA requires list maintenance regarding criminals who are ineligible to vote by reason of state law in no way means that list maintenance is required for criminals in states where state law does not disenfranchise criminals. (A16.) The operative provision clearly states that list maintenance is required for criminals *when* state law provides that a person becomes ineligible to vote by reason of criminal conviction. If there is no state law disenfranchising persons based on criminal convictions, then no list maintenance

would be required under 52 U.S.C. 20507(a) *et seq.* and the supplemental provisions of HAVA.

Furthermore, one U.S. District Court has expressly interpreted the "reasonable effort" language found in 52 U.S.C. § 20507(a)(4) to apply to the other subsections of Section 20507. *United States v. Missouri*, 2006 WL 1446356, at *8 (W.D. Mo. May 23, 2006). This finding was not controverted by the Eighth Circuit Court of Appeals. *See United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008). The district court found that "common sense" and the "text" of Section 20507(a)(4) "suggests that Congress intended the 'reasonable effort' standard . . . to apply to subsections (b), (c) and (d)," which includes the subsection treating removal of those who are ineligible because of criminal convictions. *Missouri*, 2006 WL 1446356 at *8. The court went on to remark that "[a]ll these subsections also have a common subject matter, the removal of names of ineligible voters from the voter registration lists. This text strongly indicates that the subsections are to be read as a whole." *United States v. Missouri*, 2006 WL 1446356 at *8. Therefore, NVRA itself contains a requirement that election officials make a reasonable effort to remove registrants who are ineligible by operation of state law as a result of criminal conviction.

Federal law certainly is not silent as it relates to the obligation to reasonably maintain the registration rolls free from ineligible felons. Pennsylvania utilizes a

statewide voter registration system as required by Section 21083(a). Under Pennsylvania law, and in accordance with Section 21083(a), local election officials maintain the statewide roll and update its voter registration information. 52 U.S.C. §§ 21083(a)(1)(A)(vi); 21083(a)(2)(A) ("The appropriate State or local election official shall perform list maintenance . . . ."); 21083(a)(4). Accordingly, election officials are to remove ineligible voters from the official list of eligible voters based on felony status pursuant to two provisions. First, under 52 U.S.C. § 21083(a)(2)(A)(ii): "For purposes of removing names of ineligible voters from the official list of eligible voters—(I) under section 8(a)(3)(B) of such Act . . . the State shall coordinate the computerized list with State agency records on felony status . . . ." Second, under 52 U.S.C. § 21083(a)(2) and (4), election officials are to make "a reasonable effort to remove registrants who are ineligible." This language seems to purposefully mirror that of Section 20507(a)(4) and thereby expands that section's coverage to require removal of all ineligible voters, not only those who are ineligible by death or change in residency. Both methods are conducted under NVRA as augmented by HAVA and are therefore subject to the private right of action provision of NVRA. 52 U.S.C. § 20510(b).

Finally, the conclusion that federal law requires no action at all with regard to the registrations of ineligible felons is inconsistent with the other provisions of NVRA and HAVA that expressly deal with the criminal status of registrants. For

example, U.S. attorneys are required to send written notice of felony convictions to the chief State election official for the obvious purpose of list maintenance. 52 U.S.C. § 20507(g)(1). The chief State election official is required to pass along this information to the appropriate local voter registration officials. 52 U.S.C. § 20507(g)(5). ACRU submits 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. The City entirely ignores these provisions of federal law by doing nothing with regard to list maintenance involving incarcerated felons. (A30.)

II. Incarcerated Felons Are Ineligible Voters Under Pennsylvania Law.

In Pennsylvania, incarcerated felons are ineligible to vote. (A29.) The Pennsylvania Supreme Court has held that incarcerated felons are disenfranchised. *See Mixon v. Commonwealth*, 759 A.2d 442, 450 (Pa. 2000) ("no violation of constitutional rights occurs in the disenfranchisement of incarcerated felons"). Therefore, they are ineligible voters for purposes of list maintenance under NVRA and HAVA. The district court was incorrect when it concluded that incarcerated felons are not "ineligible voters" for list maintenance purposes under NVRA even though they may not vote or even register to vote under Pennsylvania law.

It is irrelevant that the mechanism Pennsylvania law uses to temporarily disenfranchise incarcerated felons is by establishing that incarcerated felons "are

not qualified absentee electors." 25 Pa. Stat. § 2602(w). Quite simply, incarcerated felons in Pennsylvania may not vote, whether by absentee ballot or in any other way. *See Mixon*, 759 A.2d at 450. It is quite likely that the reason Pennsylvania law focuses on absentee ballot eligibility is because it would be redundant to say that incarcerated felons may not vote at a poll when they are physically incapable of appearing at a poll in the first place. Refusing to permit incarcerated felons to vote absentee serves to render them ineligible to vote because there is no other way for them to vote. Accordingly, the district court was incorrect when it found that incarcerated felons in Pennsylvania are not ineligible voters even though they are not permitted to vote in any way under Pennsylvania law. (A17-20.)

The Pennsylvania Supreme Court in *Mixon* made a finding that is very significant here. One of the groups of plaintiffs in that case was incarcerated felons who were not registered to vote. The *Mixon* court held that that groups' claims failed as a matter of law and, therefore, they were not permitted to register to vote while in prison. *Mixon*, 759 A.2d at 444, 451. Therefore, incarcerated felons may not register to vote. *Mixon*, 759 A.2d at 444.

This is relevant for several reasons. First, it undermines the defense that incarcerated felons must not be removed from the voter rolls under NVRA because they can vote upon release. *Mixon* expressly held that incarcerated felons who were not registered before they were incarcerated may not register while incarcerated.

Mixon, 759 A.2d at 444, 451. Yet these persons may vote immediately upon release, just as well as incarcerated felons who happened to be registered before incarceration. When an election official makes no effort to amend the rolls even in the circumstances dictated by *Mixon*, a plaintiff states a cause of action for violations of NVRA. For example, a mere annotation of a registrant's record that they are ineligible to vote prior to a specified release date may constitute reasonable list maintenance under NVRA. On the other hand, the failure to do anything whatsoever to the registrant's record gives rise to a cause of action under the NVRA, even under *Mixon*. The district court erred in holding otherwise.

In the same way, there are several classes of potential registrants who are "temporarily" ineligible to vote, such as minors who are under the required age or non-citizens who have not yet finalized naturalization. They may vote immediately upon coming of age or becoming citizens. Certainly if election officials found these classes of people on the list of registrants eligible to vote, and failed to take steps to any actions whatsoever to cancel or amend the registrations, a cause of action would certainly lie under the NVRA. And this would be true even in the absence of an explicit state list maintenance provision requiring election officials to conduct such list maintenance. A more appropriate system would perhaps be to permit early registration for persons who will be of age, become a citizen, or be released from prison at the time of an upcoming election. But those registration

would need to be at least flagged as preemptive and notated that the person is not yet eligible until a certain date. The district court found that there is no requirement whatsoever that the registrations of ineligible incarcerated felons be annotated in any way, such as by being placed in inactive status or with a release date to revive the active status. Concluding that NVRA provides no cause of action to enforce reasonable list maintenance in that circumstance was erroneous.

Second, the question of whether registered incarcerated felons must be removed from the rolls was not at issue in *Mixon* and was not expressly discussed by the court. Even if the case were not silent on the issue, given that *Mixon* predates the HAVA, with its enhancements to the NVRA list maintenance provisions, *Mixon* would not be determinative on the issue of whether federal law requires Pennsylvania election officials to conduct list maintenance to remove or annotate registrants who are incarcerated felons from the lists of those eligible to cast a ballot. The City would have *Mixon* devour any federal obligation to maintain accurate registration rolls because election officials have not implemented procedures to manage incarcerated felons who are released just before an election but after the last date to register to vote. That is an extreme position that should not undermine the federal interest in conducting elections where only those who are eligible participate.

Finally, the registrations of incarcerated felons in Pennsylvania must be processed in some way regardless of whether Pennsylvania law requires such list maintenance, and even if Pennsylvania law explicitly banned list maintenance regarding incarcerated felons. This is because in the area of list maintenance of lists of eligible voters used in federal elections, federal law preempts state law. With respect to the application of NVRA, the Supreme Court has held that, where there is a conflict between state election laws and NVRA, the latter pre-empts state law. *See, e.g.*, *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1195 (10th Cir. 2014) ("[W]hen Congress acts pursuant to the Elections Clause, courts should not assume reluctance to preempt state law.") (citing *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013)).

In *Arizona v. Inter Tribal Council*, Arizona had passed a law requiring election officials to reject federal registration forms that were not accompanied by documentary proof of citizenship. 133 S. Ct. at 2252. The NVRA, however, requires states to "accept and use" the federal form. *Id.* at 2253. This created a direct conflict between the requirements of the NVRA and Arizona's law. In that situation, the Supreme Court held that the NVRA pre-empts the state law adding additional requirements onto the federal form. *Inter Tribal*, 133 S. Ct. at 2257, 2260. Accordingly, the Arizona law was enjoined. Therefore, here election

officials may not produce lists of eligible voters for use in federal elections that contain ineligible voters.

Conclusion

For the forgoing reasons, the lower court's decision should be reversed.

Dated: December 5, 2016

Respectfully submitted,

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Local Appellate Rule 28.3(d) Certification

Both Linda A. Kerns and Joseph A. Vanderhulst are members of the bar of this court.

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Certificate of Service

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief and Appendix Vol. I with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on December 5, 2016. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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I hereby certify that the text of the electronically filed brief is identical to the text of the original copies that will be dispatched on December 6, 2016, by courier to the Clerk of Court of the United States Court of Appeals for the Third Circuit.

December 5, 2016

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