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

ANDREA BELLITTO and AMERICAN CIVIL RIGHTS UNION, in its individual and corporate capacities, *Plaintiffs*, v. BRENDA SNIPES, in her official capacity as the SUPERVISOR OF ELECTIONS of BROWARD COUNTY, FLORIDA, *Defendant*.	)	Civil Action No. 16-cv-61474

PLAINTIFFS' RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs American Civil Liberties Union ("ACRU") and Andrea Bellitto, by and through counsel, file this response in opposition to Defendant Broward County Supervisor of Elections Brenda Snipes' Second Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim. (Doc. 16.)

Summary of the Argument

Defendant's Motion is based on the erroneous premise that "the State of Florida and/or the Secretary [of the State of Florida] are the *only* parties that may be subject to a civil enforcement action" for violations of NVRA. (Def.'s Mot. to Dismiss 6 (emphasis added).) Defendant's Motion downplays the responsibilities placed on her by Florida law and the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501, *et seq.*, including as enhanced by the Help America Vote Act at 52 U.S.C. § 21083(a), *et seq.* ("HAVA"). Plaintiffs have delineated these responsibilities in their Complaint. (Doc. 12, First Am. Compl. ¶¶ 8-10.)

Courts that have considered the question of whether local officials who are responsible for voter list maintenance under Section 20507(a) (formerly known as "Section 8") can be held liable for violations of those responsibilities have universally agreed with the Plaintiffs' position.

Most importantly, arguing that the Secretary of State has some obligations under Section 8 and may be subject to a private right of action for violations thereof is not that same thing as establishing that local election registrars have no obligations or liability under NVRA. Both state-level and local-level officials within a state have obligations under NVRA. But this action involves only the responsibilities of the local election official, as she is the one who is responsible under state and federal law for the actual maintenance of the voter rolls in Broward county, which is synchronized with Florida's state-wide list. (First Am. Compl. ¶¶ 6-7 (citing Fla. Stat. §§ 98.015, 98.045, and 98.075).) This suit involves violations of the Supervisor's duties and obligations, which are not shared with the Secretary of State or with any other election official in Florida.

Plaintiffs' complaint also seeks records solely within the custody of the Supervisor of Elections. These list maintenance documents concern the Supervisor's activities, not the Secretary of State's. The Secretary does not possess some of the requested records or have access to them. Therefore, the Secretary cannot be a necessary party for the list maintenance document claims in this case, let alone the only proper party. Only the Defendant can provide the complete relief sought by Plaintiffs.

In addition to naming the proper party in its Complaint, the Plaintiffs provided sufficient notice to the Supervisor and, therefore, have standing to bring these claims. (Doc. 12-1, First Am. Compl. Exh. A.) The Supervisor does not contest that the notice letter was mailed and received more than 90 days before the initiation of this litigation. 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 "the violation if not corrected within 90 days after receipt" of the notice, an action may be brought "in an appropriate district court for declaratory or injunctive relief with respect to the violation." A federal district court for the Western District of Texas recently found a nearly identical notice letter sent to a local election official, with a copy send to the Texas Secretary of State, provided sufficient notice under NVRA. *ACRU v. Martinez-Rivera*, Civil Action No. DR-14-CV-0026-AM/CW, 2015 U.S. Dist. LEXIS 177883 (W.D. Tex. Mar. 30, 2015). The Plaintiffs' notice here was likewise sufficient.

The Supervisor's argument that Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of standing because the ACRU did not send a statutory notice letter to the State of Texas or the Secretary of State also lacks merit. (Def.'s Mot. to Dismiss 10.) ACRU did send a copy of the notice letter it sent to the Supervisor to the Secretary of State. (Am. Compl. Exh. A.) The fact that this was done was noted at the bottom of the letter received by the Supervisor. Both letters were mailed 152 days before this action commenced, more than satisfying the statutory standing requirements. 52 U.S.C. § 20501(b).

For these reasons and those that follow, the Supervisor's Motion should be denied.

Standard of Review

The standard for evaluating a motion to dismiss under Rule 12(b)(6) is well established. First, this Court must "accept as true all well-pleaded factual allegations in the complaint." *Davidson v. Capital One Bank*, 797 F.3d 1309, 1312 (11th Cir. 2015) (citations omitted). Furthermore, these facts must be construed "in the light most favorable to the plaintiff." *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). A Rule 12(b)(6) motion should be granted "only if

it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

While a complaint need not contain detailed factual allegations, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction must not "implicate the merits of the underlying claim." *Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003). "If it is apparent from the face of the complaint that the plaintiff has pled facts that confer subject matter jurisdiction under a statute, then a court must deny a defendant's 12(b)(1) motion." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir 2013). If a jurisdictional challenge constitutes an attack on the merits of the case, however, the court should find the jurisdiction exists and deal with those merits. *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256, 1261 (11th Cir. 1997).

Procedural History of the Case

Plaintiff ACRU is a "non-profit corporation . . . which promotes integrity, compliance with federal election laws, government transparency, and constitutional government." (First Am. Compl. ¶ 4.) Plaintiff Andrea Bellitto is a member of ACRU and a resident of Broward County. (First Am. Compl. ¶ 5.) On June 27, ACRU brought this action under NVRA, 52 U.S.C. § 20501 *et seq.*, to enforce obligations of election officials to maintain current and accurate voter

registration rolls.[1] The registration rolls in Broward County, both past and present, have contained more registrants that there are citizens eligible to vote in the county. (First Am. Compl. ¶¶ 11-12.) Plaintiffs named as Defendant Broward County Supervisor of Elections Brenda Snipes because she is the official responsible for conducting list maintenance of the voter rolls in Broward County. (First Am. Compl. ¶¶ 6-11.) Plaintiffs amended their complaint on August 4.

The Supervisor filed a motion to dismiss on August 18. (Doc. 16.)

Argument

Fundamentally, Defendant's motion is based on the contention that the NVRA, as enhanced by HAVA, does not "provide Plaintiffs with a private right of action against Defendant Snipes." (Def.'s Mot. to Dismiss 2.) Therefore, Defendant contends, the complaint against her should be dismissed because it "fails to invoke the Court's subject-matter jurisdiction under [the NVRA] and also fails to state a claim from which relief may be granted." (Def.'s Mot. to Dismiss 9.) Further, Defendant contends that Plaintiffs lack standing because they "failed to comply with the pre-suit notice requirements of section 20510(b)." (Def.'s Mot. to Dismiss 10.) The Supervisor supports her Motion with cases brought under the NVRA against state election officials and other state-level agencies for violations of their unique responsibilities under the NVRA. These cases are readily distinguishable from the case at hand.

Defendant's Motion should be denied because the Supervisor of Elections is a proper party and the Secretary of State is not required to be joined as a party. Actions under NVRA may proceed against local election officials, as will be shown. Here, the allegations in the Complaint concern activities and obligations of the Supervisor. In Florida, the Supervisors of Elections are

[1] The list maintenance obligations and public record rights at issue in this case under 52 U.S.C. § 20507, as enhanced by 52 U.S.C. § 21083(a), are commonly referred to as "Section 8" obligations under the NVRA as they were originally contained in Section 8 of Pub. L. 103-31, May 20, 1993, 107 Stat. 77.

responsible for carrying out list maintenance functions and preserving records related to voter registration and list maintenance. Enjoining Defendant will provide Plaintiffs with the complete relief they seek. Furthermore, the Plaintiffs have more than satisfied the pre-litigation notice requirement as a notice letter was sent to both the Supervisor and the Secretary of State well in advance of filing this suit.

I. Supervisor of Elections Snipes Is the Proper Defendant.

According to Defendant Snipes' interpretation of the NVRA, "private actions for alleged NVRA violations must be brought against the State and/or its chief election official." (Def.'s Mot. to Dismiss 6.) Therefore, this case must be dismissed because it is simply against the "wrong party." (Def.'s Mot. to Dismiss 5, 6, 10.) The cases cited by the Supervisor are distinguishable, however, because they involve actions against state-level officials under different sections of NVRA or involving Section 8 activities by the state-level official. At the same time, Defendant makes no mention of the several federal courts that have found local election officials to be the proper defendants in challenges for violations of Section 8 of the NVRA, while rejecting the very arguments brought by Defendant here.

Ultimately, establishing that the NVRA might contemplate liability for the Secretary of State in some situations does not mean that local election registrars cannot also be subject to a private right of action under the NVRA. Whether the chief state election official or a local election official are the proper defendant for a given violation of list maintenance obligations is a mixed question of law and fact depending on the violations alleged in the complaint brought. In this case, the Supervisor is the proper party and enjoining her will address the Plaintiffs' injuries.

A. Local Registrars Have Federal List Maintenance Obligations.

Defendant Snipes repeatedly downplays her obligations under state and federal law regarding voter roll list maintenance. (Def.'s Mot. to Dismiss 11.) She goes so far as to say the NVRA imposes no obligations on her. (Def.'s Mot. to Dismiss 6.) Congress, however, provided election officials with flexibility to implement a generalized program to keep voter rolls clean. The NVRA requires covered officials to make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters, and allows any aggrieved person to file suit to enforce that requirement. 52 U.S.C. §§ 20507(a)(4), 20507(a)(3), 21083(a)(4), 20510(b). NVRA places the responsibility for this maintenance on the official actually conducting it. 52 U.S.C. § 20507(d)(3) ("[The] *voting registrar* shall correct an official list of eligible voters . . . ." (emphasis added)). In addition, HAVA specifically 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) (emphasis added); *see also* (First Am. Compl. ¶ 8.). A violation of this duty, by whomever it falls upon, gives rise to a cause of action against the "appropriate" election official, state-level or local-level, depending on who has been given that responsibility by state law.

It is entirely possible, for example, for a state to do away with local voter registration administration altogether (or even with voter registration altogether), and administer all registration and list maintenance in the state through a state-level entity. *See United States v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008).[2] As evidenced by the repeated reference to local election officials throughout the NVRA and the HAVA, however, those federal statutes do not

[2] To give one example, in Kentucky list maintenance is primarily conducted at the state level by the State Board of Elections. *See* Ky. Rev. Stat. Ann §§ 116.112-113. Local-level officials are permitted to engage in list maintenance activities, but they must request permission to do so first and are not required to do so by law. *See* Ky. Rev. Stat. Ann. § 116-112(4).

require states to administer their voter rolls entirely at the state level and do not place the duty to do so exclusively on state-level officials. They impose duties and obligations on the appropriate official, state or local, depending on the division of responsibility established by the state. *E.g.* 52 U.S.C. §§ 20501(a)(2) ("[I]t is the duty of the Federal, State, *and local governments* to promote the exercise of [the right to vote] . . . ." (emphasis added)), 20501(b)(2), 20507(g)(5), 21083(a)(1)(A), 21083(a)(2)(A), 21083(a)(3). NVRA and HAVA allow the states to set up their own programs for voter registration and roll maintenance, so long as they adhere to the requirements in the NVRA. In the case of Florida, the state program for voter registration under Section 7 of the NVRA, for example, is conducted by the Department of Highway Safety and Motor Vehicles, under the coordination of the Secretary of State. *See* Fla. Stat. § 97.057. But the Secretary of State does not implement the actual program of facilitating voter registration at DHSMV sites, for example; that is done by the DHSMV. *Id.* Therefore, if a violation of Section 7 was to occur involving failures to register at DHSMV sites, *both* the Secretary of State and the Director of the Department would be proper defendants in a suit under Section 20510(b). *Harkless v. Brunner*, 545 F.3d 445, 456-58 (6th Cir. 2008) (holding that the Director of Job and Family Services was a proper party in an action under NVRA Section 20510(b) for violations of Section 7). In the instant case, however, the claims pertain to list maintenance activities of the Broward County Supervisor of Elections, as well as claims seeking access to election records solely in her custody.

Plaintiffs' Complaint pertains to Defendant Snipes' failures to properly maintain the Broward County voter rolls. First, the Supervisor is designated by Florida law to maintain the voter rolls in Broward County and also has a federal obligation to keep them accurate and current, containing only the names of eligible voters residing in the county. (First Am. Compl. ¶¶

6-8.) Second, the Supervisor must conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists. (First Am. Compl. ¶ 8.) Third, the voter rolls maintained by the Supervisor for Broward County contain more registrants than eligible citizens residing in the county according to data reported by the U.S. Census Bureau and the Election Assistance Commission. (First Am. Compl. ¶¶ 11-12.) Fourth, an implausible (or impossible) voter registration rate indicates that the Supervisor has failed to make reasonable efforts to conduct voter list maintenance programs. (First Am. Compl. ¶ 14.) And finally, ACRU and its members, including Ms. Bellitto, are aggrieved because of the potential resulting voter fraud and vote dilution. (First Am. Compl. ¶¶ 15-17.)

Defendant dismisses the obligations of HAVA as not relevant here because HAVA does not confer a private right of action. (Def.'s Mot. to Dismiss at 7.) Plaintiffs do not dispute that HAVA does not confer a private right of action. But Section 20183(a) of HAVA expressly refers to and expands the voter list maintenance obligations of Section 20507(a). *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.").

Defendant is incorrect that HAVA has no effect on the NVRA and that violations of HAVA are not incorporated into the NVRA's list maintenance requirements. (Def.'s Mot. to Dismiss at 7-8.) Certain sections of HAVA—52 U.S.C. §§ 21083(a)(2) and (4)—expressly refer to and augment the general maintenance provision requirements of the NVRA at 52 U.S.C. § 20507(a), while Section 21083(a)(2)(A)(i) does the same for 52 U.S.C. § 20507(a)(4) of the NVRA. It is clear from the language and section numbers in 52 U.S.C. § 21083(a) that it is intended to enhance the list maintenance requirements of 52 U.S.C. § 20507(a). Section

21083(a)(4), for example, mirrors the numbering and language of Section 20507(a)(4). Section 20507(a)(4) 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. Section 21083(a)(4) 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 subsection numbers are identical and the language is almost identical. According to established rules of statutory interpretation, these should be interpreted to have related meanings and complimentary purposes. *See Brown & Williamson*, 529 U.S. at 132-33. 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).

Therefore, list maintenance done in accordance with 52 U.S.C. § 20507(a) includes the requirements in Section 20507(a) of the 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 or competes with the one in Section 20507. Instead, they enhance those requirements and become part of the general maintenance provision of the NVRA. Finally, these HAVA requirements expressly do not supplant or limit the list maintenance requirements in the NVRA. Therefore, Section 21145, by its express text, is inapplicable here.

B. All Authority Interpreting Section 8 Supports Plaintiffs.

1. The Cases Cited by Defendant Are Irrelevant or Distinguishable.

The courts that have looked most carefully at the question of whether an action may proceed under Section 8 of the NVRA against a local election official have supported Plaintiffs' position. The Supervisor has provided no authority addressing this question directly. Among the cases offered by the Supervisor is *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014).

But notably absent from that case is any discussion of who was the appropriate election official responsible for the list maintenance at issue. This is likely because the program being challenged was initiated and implemented directly by the Secretary of State. *Id.* at 1339. In that instance, the Secretary was unquestionably the appropriate party. Here, however, the duties and activities of the Supervisor are at issue, not those of the Secretary of State.

Another case cited by the Supervisor is *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008). *Harkless*, however, was not brought under Section 8 but, rather, Section 7 of the NVRA. Further, the fact that *Harkless* was brought against the Ohio Secretary of State pursuant to the allegations before that court does not mean that all actions under NVRA *must* likewise be brought against the State and/or chief election official. In *Harkless*, the question before the court was whether the secretary of state was a proper party at all, and not whether he was the only proper party.

It is significant that *Harkless* was brought under Section 7 of the NVRA because, pursuant to that section, state-level agencies are designated as voter registration offices. *Harkless*, 545 F.3d at 449-50. It is a provision squarely and exclusively aimed at state-level officials, not at local officials. Section 7 is a voter registration obligation aimed at facilitating the registration of unregistered individuals who seek services from state government. Section 8, the law at issue in this case, is a list maintenance obligation aimed at removing ineligible registrants on rolls maintained, in the case of Florida, by local officials. In *Harkless* the court noted that, in assigning the duties of voter registration under Section 7, Ohio law placed the responsibility squarely with the Secretary of State. *Id.* at 453.

But here that is not the case. List maintenance obligations in Florida are placed predominantly, and in many instances exclusively, on the Supervisors of Elections. *E.g.* Fla. Stat.

§ 97.021(43) ("voter registration official" is defined as the supervisors of elections); 97.052(6) (supervisors are responsible for following up on inadequate voter registration forms); 97.0525(4)-(6) (online applications, regardless of where received, are forwarded and processed by supervisors); 97.071 (voter information cards are provided by the supervisors); 97.1031 (changes of address are received and processed by the supervisors); 98.015 (describing the office and duties of the supervisors, including custody of registration-related documents); 98.035(2) (the statewide system enables the supervisors to "provide, access, and update voter registration information"); 98.045(1) (supervisors responsible for determining eligibility of applicants); 98.045(2) (supervisors responsible for removal of registrants); 98.045(3) (supervisors responsible for maintaining and providing public access to "records concerning implementation of registration list maintenance programs and activities"); 98.045(4) (street address information is provided by the supervisors to the department); 98.065 ("The supervisor must conduct a general registration list maintenance program . . . ."); 98.075(1)-(6) (supervisors remove deceased, criminal, and other ineligible registrants upon receiving information from the secretary of state); 98.075(7) (describing procedures that must be followed by supervisors for removal of registrants upon receiving notice or information of ineligibility); 98.081(1) (original registration applications are in the custody of the supervisors); 98.093(3) (supervisors have an independent duty to perform list maintenance regarding ineligible voters). Therefore, in keeping with both *Arcia* and *Harkless*, the Supervisor is the proper defendant because her duties and activities are at issue here, not those of the Secretary of State.

Also, importantly, the *Harkless* court considered whether the Ohio Secretary of State is a proper party, and not whether the state official should be the *only* party. *Id.* at 451-55. In fact, the court also found that the Director of the Department of Job and Family Services for the State of

Ohio was also a proper party. *Id*. at 458. Thus, *Harkless* does not support the Supervisor's position that the secretary is the only proper party in an NVRA action.

The Fifth Circuit case *Scott v. Schedler* is also distinguishable along the same lines. 771 F.3d 831 (5th Cir. 2014). Above all, the *Scott* case did not hold that the secretary of state is always a necessary party to an NVRA suit, much less the only proper party, as the Supervisor here contends. *ACRU v. Martinez-Rivera*, 2015 U.S. Dist. LEXIS 177883 at *24 (W.D. Tex. Mar. 30, 2015). First, in *Scott*, the court was presented with Louisiana's implementation of Section 7 and not Section 8. Again, under the relevant sections of NVRA and state law, Section 7 functions and duties are placed on state-level agencies. *Scott* involved a challenge pursuant to Section 7(a)(6) of the NVRA, which "requires [] voter registration agencies to provide all applicants with declination forms." *Id*. at 840. Under Section 7, state agencies are designated as voter registration offices. It is a provision squarely and exclusively aimed at state governments, not at local governments. In *Scott*, the Louisiana Secretary of State sought to have the claim dismissed against it, arguing in part that "neither the NVRA nor Louisiana law provide[d] his office with the authority to enforce the NVRA" and, therefore, the plaintiffs' claims were not redressable. *Id*. at 838. The Fifth Circuit disagreed with the Louisiana Secretary of State's interpretation of Section 7, finding that he did have the power to enforce compliance with the NVRA with respect to state agencies. *Id*. at 838-39. The Plaintiffs here have brought an action for violations of Section 8, not a case under Section 7, of the NVRA. The two provisions are entirely distinct in topic, function, and object. Section 7 is a voter registration obligation aimed at facilitating the registration of unregistered individuals who seek services from state government. Section 8, the law at issue in this case, is a list maintenance obligation aimed at removing ineligible registrants on rolls maintained by local officials in Florida.

Second, *Scott* did not address whether a plaintiff *must* name the Louisiana Secretary of State as a necessary party but, rather, whether enjoining the Secretary of State would redress the plaintiffs' concerns. In fact, below, the plaintiffs in *Scott* sought to enjoin two state agencies as well as the Secretary of State. *Scott v. Schedler*, 2013 U.S. Dist. LEXIS 9302, at *3-4 (E.D. La. January 22, 2013).[3] Specifically, as to the Secretary of State, "the injunction [sought] to require the [Secretary of State] to properly coordinate and direct voter registration agencies to develop uniform rules, regulations, forms, and instructions." *Id*. at *15. Here, replacing the Broward County Supervisor of Elections with the Florida Secretary of State would not redress Plaintiffs' injuries. As explained above, Plaintiffs claim that the Supervisor has failed to conduct reasonable list maintenance and failed to provide inspection of records and data in the Supervisor's exclusive possession, all claims that are redressable by injunctive relief against the Supervisor.

2. All Courts to Have Considered the Question Support the Position that the Appropriate Local Election Official Is Subject to an Action Under NVRA.

A significant case not addressed by the Supervisor is *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008). The central finding of that case is that liability under Section 8 can lie against *either* state or local election officials depending on the unique facts and circumstances of list maintenance programs as well as state law dividing authority for list maintenance. To Plaintiffs' knowledge, *Missouri* is the only court of appeals case involving a careful examination of the statutory construction of Section 8 of the NVRA regarding the question of state versus local official liability for list maintenance violations. Plaintiffs respectfully present it as significant persuasive authority.

[3] The agencies did not appeal the injunction against them. *Scott*, 771 F.3d at 833.

In that case, the State of Missouri sought to *deflect* liability under the NVRA to the local entities, claiming that only the local election official was responsible, that the state official is not an appropriate party, and that the state had met its obligations under the NVRA. *Id.* at 849. Unlike the challenges under Section 7 discussed above, which invariably involve state agencies conducting voter registration activities, in the *Missouri* case there was a claim under Section 8 alleging that voter rolls in some parts of Missouri exceeded 100% of eligible citizens, a claim like the one now before this Court. *Id*. at 847.

The court in the *Missouri* case analyzed the NVRA and noted that some "provisions envision delegation, and do not require the states to do more than delegate." *Id*. at 849. The Eighth Circuit explained that while the NVRA requires the state to conduct a general program of list maintenance, the state *may* delegate the *actual administration of voter rolls and maintenance to local election officials*. *Id*. ("By its plain language, this requirement envisions the states will actively oversee a general program wherein many of the duties not specifically assigned to the states may be delegated."). The Eighth Circuit acknowledged that determination of liability requires a factual inquiry into the activities and responsibilities of the local officials. *Id*. at 851 (on remand, the lower court must "consider any lack of LEA [local election agency] compliance and determine whether any such noncompliance renders Missouri's effort to 'conduct a general program' unreasonable in removing the names of eligible voters.") The court suggested several remedies "if the district court determines a lack of LEA [local election agency] compliance renders Missouri's efforts to conduct a general program unreasonable." *Id*. In other words, liability under Section 8 could lie against *either* local registrars or the state, depending on the factual circumstances and state statutory delegation of maintenance duties. This dual liability structure of Section 8 is exactly why the United States District Court for the Western District of

Missouri expected the United States to sue local election officials who fail to maintain the rolls, not the state. "Likewise, because the United States has the most interest in elections for federal office, it is reasonable for the State to expect the Department of Justice to pursue LEAs [local election agencies] who are not complying with the NVRA." *United States v. Missouri*, 2007 U.S. Dist. LEXIS 27640, *23-24 (W.D. Mo. April 13, 2007). Here, the Plaintiffs are pursuing just such an action, under the same enforcement section. 52. U.S.C. § 20510.

In fact, the Eighth Circuit rejected the United States "policy plea" to find that Section 8 of the NVRA should only be enforced against state officials, the very same position taken by the Supervisor here. Instead of arguing that Section 8 mandates cases only against the state, a position that if accepted would have defeated Missouri's defense *per se*, the United States asked the court "to hold Missouri responsible for enforcement because it will be much more difficult for the federal government to enforce the NVRA against individual LEAs [local election agencies]." *Missouri*, 535 F.3d at 851 n.3. According to the Eighth Circuit,

> This plea fails to recognize (1) the federal government has taken enforcement actions directly against the LEAs [local election agencies] in the past; (2) after one or two LEAs [local election agencies] are held liable others are more likely to fall in line without lengthy litigation; and (3) it is not the place of the courts to "rework" a statute to simplify enforcement when Congress could have written the legislation differently. This is a policy decision for Congress. We decline to shift this cost and burden to the states without clear direction from Congress.

Id.

The Eighth Circuit noted the "plain language of the NVRA provides a right of enforcement to only two categories of plaintiffs—the United States and '[a] person who is aggrieved by a violation of [the NVRA].' … The State of Missouri would not necessarily be a 'person . . . aggrieved by' a violation of the NVRA." *Id.* at 851 (citations omitted). Failure of local election officials to comply with Section 8 is confined to merely being "relevant to

determining whether or not Missouri" (or North Carolina) is complying with Section 8. *Id.* Put another way, if Florida or the Florida Secretary of State were the only defendant in this case, violations of NVRA by the Broward County Supervisor of Elections would be a drop in a very large bucket as to whether Florida itself was failing to comply with Section 8 overall across the state. The NVRA gives states no power to order the compliance of local officials.

Previously, the district court in the *Missouri* case had rejected the argument that Section 8 of the NVRA gives the state the power to order local election registrars to comply with the NVRA. The "[c]ourt, however, does not believe that Congress intended the NVRA to alter the longstanding division of authority between county and statewide officials. It would be radical for this Court to find such an intent absent clear direction, which is not present here." *United States v. Missouri* 2006 U.S. Dist. LEXIS 32499, *20 (W. D. Mo. May 23, 2006). Section 8 of the NVRA does not give Florida state officials the authority to enforce the requirements of the NVRA against local election officials. This power was specifically rejected as part of the NVRA in *United States v. Missouri*, 535 F.3d at 851, *supra*. Furthermore, the fact that the Secretary of State may have authority under Florida law to enforce Florida voter registration laws, Fla. Stat. § 97.012(14), does not take away the Plaintiffs' independent private right of action granted by NVRA to seek redress for violations of NVRA.

Six months after the Eight Circuit's decision in *Missouri*, the Western District of Missouri rejected an argument similar to the one presented by the Supervisor here. *ACORN v. Scott*, No. 08-CV-4084-NKL, 2008 U.S. Dist. LEXIS 101778 (W.D. Mo. Dec. 17, 2008). There, the plaintiffs sought declaratory and injunctive relief against several agency heads and local officials pursuant to Section 7 of the NVRA, without naming the Secretary of State. *Id*. at *3-4. The local officials filed a "Motion to Compel Joinder of the Secretary of State as an Additional

Party Defendant." *Id.* at *2-3. The court denied the motion, finding that "Plaintiffs have made no claims against the Secretary; their Complaint does not allege that she has failed to fulfill her responsibilities under the NVRA or Missouri's statutes, and it requests no relief from her." *Id*. at *7. Regarding the impact of *Missouri*, the court in *ACORN* noted that:

> The Eighth Circuit's opinion in that case recognized that "Missouri could not be [held] responsible for enforcement of the NVRA against local election authorities," even though local election authorities' noncompliance was relevant to a determination of whether the State had fulfilled its own obligations under the NVRA to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters[.]" *Id*. at 847-848, 851. This Court and the Eighth Circuit *recognized in that case that direct actions by local prosecutors and the U.S. Government against local election authorities for violations of the NVRA were available*. *Id*. at 851, 851 n.3. Here, ACORN and O'Neal are suing the local election authorities, not the Secretary of State, for their alleged violations of Section 7 of the NVRA.

ACORN, 2008 U.S. Dist. LEXIS 101778 at *5-6 n.1 (emphasis added) (alternations in original).

Here, the Supervisor is the custodian of the information sought. The Supervisor is the entity responsible for conducting reasonable list maintenance activities in Broward County and keeping records of the same. Therefore, the Supervisor is the proper party and its Motion should be denied.

Several other federal district court have found local election officials to be the appropriate and proper party for an action for violations of Section 8. The Western District of Texas squarely addressed the issue before this Court in *Martinez-Rivera*. In *Martinez-Rivera*, a private organization filed a lawsuit against the Zavala County voting registrar pursuant to the *same* Section 8 statutory provisions now before this Court. Defendant there, as here, alleged that the plaintiff failed to sue the proper party, namely the Texas Secretary of State. *See Martinez-Rivera*, 2015 U.S. Dist. LEXIS 177883 at *21. The district court in *Martinez-Rivera* assessed the responsibilities of the voter registrar for maintaining the voter rolls and found that "[b]y fulfilling

these duties, the county tax assessor-collectors enable the Texas Secretary of State to maintain accurate and current voter registration rolls, as mandated by the NVRA. *See* 52 U.S.C.§ 20507." *Id*. at *23. The Western District of Texas also enforced a consent decree against a local election official in another case. *ACRU v. Sheriff/Tax Assessor-Collector McDonald*, No. 2:14-cv-00012 (W.D. Tex. Mar. 17, 2015). The Southern District of Mississippi has done the same in more than one case. *E.g. ACRU v. Clarke County, Miss., Election Commission*, No. 2:15-cv-101 (S.D. Miss. Nov. 25, 2015).

All of these decisions are logically sound and consistent with the purposes and obligations of Section 8. No contrary authority exists regarding Section 8 obligations of appropriate local election officials. In the *Missouri* line of cases and in *Martinez-Rivera* the courts were presented with the same question at issue here: defendants sought to escape liability because the plaintiff arguably sued the wrong governmental entity, and in both cases, the court sided with the plaintiff's choice while recognizing that Section 8 permits either to be sued depending upon the circumstances in each case. These decisions are not binding authority on this Court, but they are the only authorities which have examined the question at issue. Therefore, the Supervisor's arguments to the contrary should be rejected.

II. Plaintiffs Have Satisfied the Notice Requirement Under NVRA.

For the same reasons that the Supervisor is the proper defendant for this action for violations of Section 8, notice upon her was properly accomplished under NVRA. Notice was effected by certified mail on February 1, 2016. (First Am. Compl. Exh. C.) A copy was sent to the Florida Secretary of State in order to provide notice of the violations to the chief election official. (First Am. Compl. ¶ 18.) The litigation was not initiated until June 27, well outside of the required notice period. 52 U.S.C. § 20510(b)(2). And the notice provided detailed

information regarding the alleged violations for failure to adequately maintain accurate and current rolls, along with a request for inspection of records. (First Am. Compl. ¶¶ 18-20, Exh. A.) The Supervisor's response simply denies that there is any violation and offers a few list maintenance reports. (First Am. Compl. Exh. B.) A representative of the Plaintiffs conferred by telephone with the Supervisor on April 24, in which the representative requested a meeting with the Supervisor in order to inspect list maintenance records. The Supervisor declined. (First Am. Compl. ¶ 24.)

The Supervisor argues that Plaintiff Bellitto failed to provide adequate notice. (Def.'s Mot. to Dismiss 10.) ACRU is a membership organization and sent the notice on behalf of itself and its members. Plaintiff Bellitto is a member of ACRU. Therefore, notice was adequate regarding Ms. Bellitto as well. And there is no indication that the individual plaintiff in the *Scott* case was a member of the organizational plaintiff. *Scott v. Schedler*, 2013 U.S. Dist. LEXIS 9302 (E.D. La. Jan. 22, 2013); *Scott*, 771 F.3d 831 (5th Cir. 2014).

Conclusion

For the reasons stated above, the Supervisor's Motion should be DENIED.

Dated: September 6, 2016

Respectfully submitted,

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** Pro Hac Vice application to be filed*
† Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify than on September 6, 2016, 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
William E. Davis