IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3811

AMERICAN CIVIL RIGHTS UNION,

Appellant,

V.

PHILADELPHIA CITY COMMISSIONERS

Appellee.

BRIEF FOR APPELLEE PHILADELPHIA CITY COMMISSIONERS

Appeal from the September 9, 2016 Order of the
United States District Court for the Eastern District of Pennsylvania,
the Honorable C. Darnell Jones, II, at No. 16-cv-01507.

CITY OF PHILA. LAW DEPARTMENT
SOZI PEDRO TULANTE
CITY SOLICITOR

By: Kelly Diffily, Esq.
Deputy City Solicitor
City of Philadelphia Law Department
Appeals Unit
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
(215) 683-5010
kelly.diffily@phila.gov
Attorney for the Appellee Philadelphia City Commissioners

Dated: February 3, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF JURISDICTION 1

COUNTERSTATEMENT OF THE ISSUES PRESENTED ON APPEAL 2

COUNTERSTATEMENT OF THE STANDARD OF REVIEW 3

COUNTERSTATEMENT OF RELATED CASES AND PROCEEDINGS 4

COUNTERSTATEMENT OF THE CASE AND OF THE FACTS 5

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. The District Court Properly Dismissed ACRU's Claim for Alleged Violation of Section 8 of the NVRA for Failure to State a Claim 12

A. The NVRA merely *permits* rather than *requires* the removal of felons from the voter rolls. 13

B. The NVRA defers to state law regarding removal of persons from the voter rolls based on criminal status, and Pennsylvania law does not allow election officials to purge incarcerated felons from the registration rolls. 18

C. ACRU failed to state a violation of Section 303(a) of HAVA as a matter of law 22

1. HAVA is irrelevant because its requirement that election officials make a reasonable effort to remove registrants who are ineligible to vote is not enforceable via a private right of action. 23

2. On the merits, ACRU fails to state a claim for a violation of Section 303(a) of HAVA. 29

D. The NVRA does not preempt Pennsylvania law. 31

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....................13

Association of Community Organizations for Reform Now (ACORN) v. Ridge,
1995 WL 136913 (E.D. Pa. Mar. 30, 1995)....................18

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007)....................13

Blessing v. Freestone,
520 U.S. 329 (U.S. 1997)....................26

Borelli v. City of Reading,
532 F.2d 950 (3d Cir.1976)....................1

Colon-Marrero v. Conty-Perez,
703 F.3d 134 (1st Cir. 2012)....................32

In re Federal-Mogul Global Inc.,
684 F.3d 355 (3d Cir. 2012)....................25

Gonzaga University v. Doe,
536 U.S. 273 (U.S. 2002)....................27, 28

Harris v. City of Phila.,
35 F.3d 840 (3d Cir. 1994)....................26

International Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC v. Westinghouse Elec. Corp.,
631 F.2d 1094 (3d Cir. 1980)....................25

Lamie v. United States Tr.,
540 U.S. 526 (U.S. 2004)....................17

Martin v. Haggerty,
548 A.2d 371 (Pa. Cmwlth. 1988)....................21

Mixon v. Pennsylvania,
759 A.2d 442 (Pa. Cmwlth. 2000), *aff'd*, 566 Pa. 616 (2001), ...9, 11, 20, 21, 22, 31

New Jersey Primary Care Ass'n Inc. v. New Jersey Dept. of Human Services,
722 F.3d 527 (3d Cir. 2013) 29

Oliver v. City of Pittsburgh,
11 A.3d 960 (Pa. 2011) 24

Ortiz v. City of Phila. Office of City Com'rs Voter Registration Div.,
28 F.3d 306 (3d Cir. 1994) 14, 17

Owens v. Barnes,
711 F.2d 25 (3d Cir. 1983) 20

Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan,
388 F.3d 393 (3d Cir. 2004) 1, 9

Phillips v. County of Allegheny,
515 F.3d 224 (3d Cir. 2008) 3

Ray v. Com.,
276 A.2d 509 (Pa. 1971) 21

Robinson v. Napolitano,
554 F.3d 358 (3d Cir. 2009) 16, 20

Rosenberg v. XM Ventures,
274 F.3d 137 (3d Cir. 2001) 16

Sabree ex rel. Sabree v. Richman,
367 F.3d 180 (3d Cir. 2004) 28

Superior Precast, Inc. v. Safeco Ins. Co. of America,
71 F. Supp. 2d 438 (E.D. Pa. 1999) 24

United States v. Diallo,
575 F.3d 252 (3d Cir. 2009) 16

United States v. Pelullo,
399 F.3d 197 (3d Cir. 2005) 26

Welker v. Clarke,
239 F.3d 596 (3d Cir. 2001) 19

STATUTES

Federal Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 ....11, 25, 26, 27, 29

Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. §§ 20901–21145
.... 2, 5, 7-8, 11, 13, 22-27, 29-31

Section 303(a) (52 U.S.C. § 21083(a)).. 2, 7, 9, 11, 12, 22, 23, 25, 26, 27, 28, 29, 30, 31

52 U.S.C. § 21111 24

52 U.S.C. § 21112 24

National Voter Registration Act ("NVRA"), 52 U.S.C. §§ 20501–20511.......*passim*

Section 8 (52 U.S.C. § 20507).................. 2, 5, 6, 7, 10, 12, 15, 18, 22, 29, 31

Section 8(a) (52 U.S.C. § 20507(a))....................10, 15, 16, 31, 32

Sec. 8(a)(3) (52 U.S.C. § 20507(a)(3))..... 8, 10-11, 13, 15-18, 27, 30-32

Sec. 8(a)(4) (52 U.S.C. § 20507(a)(4))............... 6, 10, 15-16, 22, 27, 30

52 U.S.C. § 20501 ....14, 17

52 U.S.C. § 20502 32

52 U.S.C. § 20510 25

State Statutes

Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333

art. I, § 102, *as amended*, 25 P.S. § 2602(w)......................................9, 11, 20

art. XII, § 1206.2, *as amended*, 25 P.S. § 3046.2..24

art. XIII, § 1301, *as amended*, 25 P.S. § 3146.1..20

Pennsylvania Voter Registration Act, 25 Pa C.S. § 1901(a) 9, 11, 19, 21, 22, 31

25 Pa. C.S. § 1203...5

RULES

Fed. R. Civ. P. 12(b)(6)..3, 13

Fed. R. Civ. P. 12(b)(7)...32

Fed. R. Civ. P. 19...32

HOME RULE CHARTER AND ORDINANCES

Phila. Home Rule Charter § 2-112...5

Phila. Home Rule Charter § 11-103...5

Phila. Home Rule Charter § A-100...5

OTHER AUTHORITIES

H. Rep. No. 103–9, 103d Cong., 1st. Sess. 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 105 14

Pa. Dept. of State, *Complaint Procedures under Section 402(a) of the Help America Vote Act of 2002 and Section 1206.2 of the Pennsylvania Election Code*, 33 Pa.B. 6119, *available at* www.pabulletin .com/secure/data/vol33/33-50/2364.html 24

Pa. Department of State, *Voting Rights of Convicted Felons, Convicted Misdemeanants and Pretrial Detainees*, *available at* http://www.cor.pa.gov/How%20Do%20I/Documents/Convicted_felon_brochure%20-%20Voting%202016.pdf 21

Voting by Untried Prisoners and Misdemeanants, 67 Pa. D. & C.2d 449, 1974 WL 377850, Official Pa. Att'y Gen. Opinion No. 47 (Sept. 11, 1974)..20

COUNTERSTATEMENT OF JURISDICTION

This case was properly filed in the United States District Court pursuant to that court's federal question jurisdiction, 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.[1]

[1] With respect to this two count complaint, the District Court dismissed Count I with prejudice, but dismissed Count II without prejudice with leave to file a Second Amended Complaint within fourteen (14) days, or by September 23, 2016. A3. While a claim dismissed without prejudice is generally neither final nor appealable, such an order becomes final and appealable if the plaintiff cannot amend or declares his intention to stand on his complaint. *See Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir.1976). Here, Plaintiff failed to file an amended complaint by the September 23rd deadline, and instead filed this appeal on October 6, 2016. *See Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 398 (3d Cir. 2004) (finding order dismissing complaint without prejudice final and appealable where plaintiff declined to amend — declaring its intention to forego the alternative claim offered by the court and to stand on its complaint — and instead filed an appeal). At that time, the District Court's September 9, 2016 order became final and appealable.

COUNTERSTATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the District Court properly dismiss Plaintiff's claim that the City violated Section 8 of the National Voter Registration Act ("NVRA") by failing to remove incarcerated felons from Philadelphia's voter registration rolls, where the NVRA merely permits rather than requires states to remove felons from the voter registration rolls?

2. Did the District Court properly dismiss Plaintiff's claim that the City violated Section 8 of the NVRA by failing to remove incarcerated felons from Philadelphia's voter registration rolls, where the NVRA entirely defers to state law regarding the purging of voters based on criminal status, and Pennsylvania law does not permit election officials to remove incarcerated felons from the registration rolls?

3. Should this Court refuse to consider any purported claim premised on an alleged violation of the Help America Vote Act ("HAVA") (or HAVA *through* the NVRA), as there is no private right of action under HAVA?

4. Does Plaintiff's claim for a violation of Section 303(a) of HAVA fail on the merits, as HAVA does not create any new or different obligations than those set forth in the NVRA?

COUNTERSTATEMENT OF THE STANDARD OF REVIEW

This Court's standard of review of a district court's grant of a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is *de novo*. *See Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). In conducting its review, the Court must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Id.* at 233.

COUNTERSTATEMENT OF RELATED CASES AND PROCEEDINGS

Appellee is not aware of any related cases.

COUNTERSTATEMENT OF THE CASE AND OF THE FACTS

This appeal is from the September 9, 2016 Order of the District Court dismissing the American Civil Rights Union's ("ACRU") Amended Complaint, which sought to hold the Philadelphia City Commissioners ("City") liable for failing to remove incarcerated felons from Philadelphia's voter registration rolls, in alleged violation of the National Voter Registration Act ("NVRA"), 52 U.S.C. §§ 20501–20511, and the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. §§ 20901–21145.

ACRU is a non-profit corporation, incorporated in the District of Columbia, with its principal place of business in Alexandria, Virginia. A26 (Amd. Compl. at ¶ 4). ACRU promotes compliance with federal election laws, government transparency and constitutional government. *Id.* A central activity of ACRU is to promote election integrity and compliance with federal and state statutes which ensure the integrity of elections. A30 (Amd. Compl. at ¶ 18).

In Philadelphia, the City Commissioners are responsible for the registration of voters, and oversee and administer the County Board of Elections. *See* Phila. Home Rule Charter §§ 2-112, 11-103, A-100; 25 Pa. C.S. § 1203; *see also* A29-30 (Amd. Compl. at ¶ 5).

Original Complaint

ACRU filed suit against the City on April 4, 2016. ACRU's single count complaint asserted a violation of the NVRA, 52 U.S.C. §20507(i), and sought an injunction requiring the City to permit ACRU to publicly inspect and examine all of the City's voter registration and election records. A45 (Doc. No. 1, Orig.

Compl. ¶¶ 1, 12-16).

The City filed a motion to dismiss on April 7, 2016. A45 (Doc. No. 5).

Preliminary Injunction Motion and Rule to Show Cause re: Sanctions

On June 30, 2016, Susan Carleson, President of ACRU, met with the Philadelphia City Commissioners. During that meeting, the Commissioners stated that they do not remove the names of incarcerated felons from, or make any notation to identify felons on, the voter rolls in Philadelphia. A29-30 (Amd. Compl. at ¶¶ 14, 17).

On July 20, 2016, while the motion to dismiss the original complaint was still pending, Plaintiff filed a Motion for a Preliminary Injunction seeking to force the City to remove incarcerated felon voters from the Philadelphia County's voter registration rolls pursuant to Section 8 of the NVRA, 52 U.S.C. § 20507. A45 (Doc. No. 14) ("PI"). ACRU represented that it was likely to succeed on the merits of this claim because "[t]he NVRA requires Defendants to make a 'reasonable effort to remove the names of ineligible registrants from the official lists of eligible voters,'" including "voters [rendered] ineligible by virtue of felony conviction." (PI at 6, *citing* 52 U.S.C. § 20507(a)(4)).

The *next day*, the District Court *sua sponte* issued a Rule to Show Cause why ACRU's preliminary injunction motion should not be stricken and why sanctions should not issue, noting that the plain language of Section 8(a)(4) of the NVRA, 52 U.S.C. § 20507(a)(4), does *not* require reasonable efforts to remove incarcerated felons as "incorrect[ly]" represented by ACRU. A45 (Doc. No. 15).

In response, ACRU admitted that its citation to Section 8(a)(4) of the

NVRA, 52 U.S.C. § 20507(a)(4), was an "incomplete" citation of the law. A45 (Doc. No. 19, Resp. to Order to Show Cause). Then, *for the first time*, ACRU cited an entirely different statute: HAVA — one that does not even provide a private right of action. *Id.* ACRU argued that HAVA's list maintenance provisions, 52 U.S.C. § 21083(a), "enhance" Section 8 of the NVRA and require the City to purge incarcerated felons from its voter registration lists. *Id.*

While the trial court was satisfied that Plaintiff did not make a knowing false statement of law and thus did not issue sanctions "at [that] time," it cautioned ACRU of the necessity of providing accurate and complete statements of law and stated that further failure to comply with applicable rules would result in sanctions. A46 (Doc. No. 21).

Amended Complaint

On July 21, 2016, ACRU filed an Amended Complaint. A25-43 Amd. Compl.). The first count, unchanged since the original complaint, continued to allege that ACRU was being denied access to requested records and data. A31-32 (Amd. Compl. at ¶¶ 22-27).

A new Count II essentially repeated the allegations in the preliminary injunction motion: that the City Commissioners were purportedly violating Section 8 of the NVRA, 52 U.S.C. § 20507, and Section 303(a) of HAVA, 52 U.S.C. § 21083(a), by failing to remove incarcerated felons from Philadelphia's voter registration rolls. A32 (*Id.* at ¶¶ 28-32). ACRU alleged that this purported violation "has impaired and will impair ACRU from carrying out [its] mission," "places ACRU's members' votes at risk of dilution by the casting of a ballot by an

ineligible registrant," and undermines the integrity of Pennsylvania's voter registration rolls and, accordingly, its elections. A30-31 (*Id.* at ¶¶ 18-21). ACRU sought declaratory and injunctive relief, as well as attorney's fees and costs. A33 (*Id.* at p. 9).

The City filed a Motion to Dismiss the Amended Complaint on August 18, 2016. A46 (Doc. No. 22). ACRU responded on August 29. A46 (Doc. No. 27). In its response, ACRU conceded that "the Commissioners have provided full inspection," and that Count I should be dismissed. A46 (Doc. No. 27, at 1, 6). The City filed a Reply on September 6, 2016. A46 (Doc. Nos. 28-29).

September 9, 2016 Order Dismissing the Action

On September 9, 2016, the District Court granted the City's motion, dismissing the Amended Complaint. A46 (Doc. Nos. 30-31); A3-A4 (9/9/16 Order); A5-A24 (9/9/16 Opinion). The court dismissed Count I with prejudice based on ACRU's concession. A3. As to Count II, the District Court determined that it failed to state a claim upon which relief may be granted. This is because the court found that neither the NVRA, nor the HAVA, requires the City to remove incarcerated felons from Pennsylvania's voter rolls. A11-21.

First, the District Court rejected ACRU's theory that the requirements of HAVA are privately enforceable. A12. However, even assuming *arguendo* that ACRU could somehow maintain its HAVA claims, the Court squarely determined that ACRU failed to state a claim under *either* the NVRA or HAVA. A12.

The District Court determined (1) that the NVRA merely permits rather than requires the removal of felons from the voter rolls; A15-A16 (*citing* 52 U.S.C. §

20507(a)(3)(B) and 52 U.S.C. 21083(a)(2)(A)(ii)); (2) that *if* state election officials remove persons from the voter rolls based on criminal conviction, the NVRA provides that they may only do as "*as provided by state law*"; *id.*; and (3) that, under Pennsylvania law, incarcerated felons cannot be removed from the voter rolls. A18-20 (*citing Mixon v. Pennsylvania*, 759 A.2d 442 (Pa. Cmwlth. 2000), *aff'd*, 566 Pa. 616 (2001), 25 Pa C.S. § 1901(a); Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, art. I, § 102, *as amended*, 25 P.S. § 2602(w)). The District Court dismissed Count II without prejudice and with leave to file a Second Amended Complaint within fourteen (14) days.

However, ACRU did not amend. Instead, ACRU filed a notice of appeal on October 6, 2016. A1. Thus, the District Court's September 9, 2016 order became final and appealable. *See Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 398 (3d Cir. 2004) (finding order dismissing complaint without prejudice final and appealable where plaintiff declined to amend — declaring its intention to forego the alternative claim offered by the court and to stand on its complaint — and instead filed an appeal).

ACRU filed its Brief with this Court on December 5, 2016.

SUMMARY OF ARGUMENT

The District Court properly dismissed ACRU's claim that the City violated Section 8 of the NVRA by failing to remove incarcerated felons from Philadelphia's voter registration rolls, as the claim failed as a matter of law.

The District Court properly determined that the NVRA, in Section 8(a)(4), only *requires* election officials to remove persons for two criteria: those who have died or moved. 52 U.S.C. §§ 20507(a), 20507(a)(4). The plain language of the preceding section, Section 8(a)(3), is to generally *prohibit* the removal of voters from the voter registration rolls, *except* it allows removal for four specific reasons, including "as provided by State law, by reason of criminal conviction." That is, Section 8(a)(3) *permits* rather than *requires* state officials to remove felons from their voter rolls *if* state law provides that conviction status is disqualifying.

Further, where the primary purpose of the NVRA is to *increase*, not *reduce*, the number of the eligible citizens who are registered, it is entirely reasonable that Congress would determine that incarcerated persons must be left on the voter rolls unless state law requires them to be purged, and incarcerated felons, who regain the right to vote once they are released, would not be on the very short list of those that must be removed. Because cancelling registration based on criminal conviction is merely permissive, there can be no violation of the NVRA.

Moreover, even assuming *arguendo* that the NVRA creates mandatory list maintenance obligations based on conviction status, the District Court correctly held that the NVRA mandates that removal of names "by reason of criminal conviction" is only to happen "as provided by state law." 52 U.S.C. § 20507(a)(3).

The Court properly determined that, under Pennsylvania law, although incarcerated felons are not qualified absentee electors, and thus, temporarily may not vote while incarcerated, they are permitted to be *registered* to vote. Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, art. I, § 102, *as amended*, 25 P.S. §§ 2602(w); 25 Pa. C.S. §1901(a); *Mixon v. Commonwealth*, 759 A.2d 442, 448 n.11, 451-52 (Pa. Cmwlth. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001). Thus, for this additional reason, no NVRA violation could have taken place.

Finally, this Court should not consider any purported claim based on violation of HAVA (or HAVA *through* the NVRA). Simply, HAVA is entirely irrelevant here because there is no private right of action under HAVA.

For starters, ACRU provides absolutely no support for its assertion that one can imply a private right of action into a statute by "enhancement," and to do so would be contrary to the statute's plain language. HAVA unambiguously *omits* a private right of action, while providing other enforcement mechanisms. Further, as the District Court found, the specific section of HAVA cited by ACRU, Section 303(a), 52 U.S.C. § 21083(a), is not enforceable through 42 U.S.C. § 1983. The provision lacks any "rights-creating language," does not identify any discrete class of beneficiaries, and focuses solely on regulating state election officials.

Anyway, on the merits, ACRU fails to state a claim for a violation of Section 303(a) of HAVA. HAVA does not create any obligations not already set forth in the NVRA. HAVA's list maintenance requirements are expressly to be performed "in accordance with" the NVRA. Because the requirements are the same as those in the NVRA, there can be no HAVA violation.

ARGUMENT

I. The District Court Properly Dismissed ACRU's Claim for Alleged Violation of Section 8 of the NVRA for Failure to State a Claim.

ACRU only challenges the District Court's dismissal of its claim in Count II that the City violated Section 8[2] of the National Voter Registration Act of 1993 (the "NVRA"), 52 U.S.C. § 20507, and/or Section 303 of the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. § 21083, by failing to remove incarcerated felons from Philadelphia's voter registration rolls. However, ACRU is wrong.[3]

Incredulously, ACRU is before this Court urging that the lower court erred in dismissing its incarcerated felon purge claim. This is the same claim that, when first presented to the District Court, the court found so patently frivolous that it immediately — and *sua sponte* — almost issued sanctions against ACRU for "incorrect[ly]" representing the law. A45 (Doc. No. 15). Nothing has changed since then, as, under no circumstances, does ACRU state a violation of federal law.

Section 8 of the NVRA merely permits rather than requires the removal of felons from the voter rolls. Further, the NVRA defers entirely to state law regarding removal of persons from the voter rolls based on criminal status, and Pennsylvania law does not allow election officials to purge incarcerated felons

---

[2] Purported violations of 52 U.S.C. § 20507 of the NVRA are referred to as "Section 8" violations because they were contained in Section 8 of the public law originally enacting the statute, Pub. L. No. 103–31, § 8, May 20, 1993, 107 Stat. 77 (1993).

[3] The District Court's dismissal of Count I, and its holdings that Count II failed to plead a generalized list maintenance claim and that the City failed to communicate with law enforcement regarding felons are not before the Court.

from the registration rolls. Accordingly, for both those reasons, no NVRA violation could have taken place. Finally, this Court should not consider any purported claim based on violation of HAVA (or HAVA *through* the NVRA). Simply, HAVA is entirely irrelevant here because there is no private right of action under HAVA. Anyway, on the merits, nothing in HAVA gets ACRU anywhere. HAVA does not create any new requirements; it merely looks to and follows the NVRA, which has not been violated.

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept all well-pleaded allegations as true and view them in the light most favorable to the plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), require a plaintiff to set forth "sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 570.

A court must engage in a two-step analysis to ensure compliance with the *Iqbal* pleading standard: (1) a court must ignore legal conclusions and (2) consider only those allegations entitled to a presumption of truth to determine whether "they plausibly give rise to an entitlement to relief." *Id.* at 678-79.

A. The NVRA merely *permits* rather than *requires* the removal of felons from the voter rolls.

As a threshold matter, notwithstanding ACRU's assertion on appeal that "list maintenance regarding ineligible felons is <u>mandatory</u> in states such as Pennsylvania," the District Court properly determined that Section 8(a)(3) of the

NVRA, 52 U.S.C. § 20507(a)(3), merely *permits* rather than *requires* the removal of felons from the voter rolls *if* state law provides that conviction status is disqualifying. Appellant's Br. at 6-9. Because federal law does not mandate any action by state officials with respect to incarcerated felons, there can be no violation of the Act.

Congress enacted the NVRA in 1993 (popularly known as the "Motor Voter Law"). In introducing the NVRA, Congress stated its finding 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.

Accordingly, with the stated objective of promoting the exercise of the fundamental right to vote, Congress enacted a law designed to remedy the nationwide problem of low electoral turnouts and to remove barriers to electoral participation found in some states' registration laws. *See Ortiz v. City of Philadelphia Office of City Com'rs Voter Registration Div.*, 28 F.3d 306, 319 (3d Cir. 1994) (Scirica, J., concurring); *id.* at 339 (Lewis, J., dissenting). Through the NVRA, Congress hoped to "*expand*[] the rolls of the eligible citizens who are registered" and thus "give the greatest number of people the opportunity to participate" in federal elections. *Id.* at 339, *citing* H. Rep. No. 103–9, 103d Cong., 1st. Sess. 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 105, 107 (emphasis added); *see also* 52 U.S.C. § 20501 (stated purpose of NVRA includes "establish[ing] procedures that will *increase* the number of eligible citizens who register to vote") (emphasis added).

Consistent with this goal of increasing registration and *en*franchising voters, Section 8(a)(3) of the NVRA provides that "the name of a registrant *may not be removed* from the official list of eligible voters *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) [limited to. . . "by reason of--(A) the death of the registrant; or (B) a change in the residence of the registrant, in accordance with" [detailed notice provisions set forth in Section 8]]

52 U.S.C. § 20507(a)(3) (emphasis added).

That is, the plain language of Section 8(a)(3) is to generally *prohibit* the removal of voters from the voter registration rolls, and does not create any affirmative obligations. It creates very limited exceptions that *allow* state election officials to remove persons from the rolls in the specific circumstances it set forth, including for "reason of criminal conviction" "as provided by state law." As the District Court noted, however, this language by its plain terms is permissive and does not require such removal. A15.

That Section 8(a)(3) of the NVRA does not require removal of a voter for criminal conviction is made even clearer simply by looking at the following subsection, Section 8(a)(4). Section 8(a)(4) is the only subsection that imposes a mandatory obligation on election officials. It provides that, of the four reasons listed in Section 8(a)(3) that *permit* removal, "each State *shall*" "make[] a reasonable effort to remove the names of" registered voters who fall *only in the last two categories – i.e.*, persons who have died or moved. 52 U.S.C. §§

20507(a), 20507(a)(4) (emphasis added).[4] Congress' use of mandatory language in Section 8(a)(4) for election officials to conduct list maintenance to remove only two specific categories of voters — which **plainly does not include removal for criminal conviction status** — compels a finding that it intended to exclude incarcerated felons from that list. *See Robinson v. Napolitano*, 554 F.3d 358, 365 (3d Cir. 2009) (the maxim *expressio unius est exclusio alterius* establishes the inference that, where certain things are designated in a statute, all omissions should be understood as exclusions).

The view that Congress did *not* intend to require that state election officials remove "incarcerated felons" from voter registration rolls is only made stronger when viewed along with Congress' use of *permissive* language in the statutory section that actually does discuss criminal convictions (Section 8(a)(3) instructs that "a registrant may not be removed from the official list of eligible voters except . . . [for four reasons, including] as provided by State law, by reason of criminal conviction"). *See United States v. Diallo*, 575 F.3d 252, 256 (3d Cir. 2009) (*quoting Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001)) ("The role of the courts in interpreting a statute is to give effect to Congress's intent . . . Because it is presumed that Congress expresses its intent through the ordinary

[4] The text of Section 8(a)(4) reads "each State shall":

> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--
>
> (A) the death of the registrant; or
>
> (B) a change in the residence of the registrant.

52 U.S.C. §§ 20507(a), 20507(a)(4).

meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute."); *see also Lamie v. United States Tr.*, 540 U.S. 526, 534 (U.S. 2004) ("when the statute's language is plain, the sole function of the courts…is to enforce it according to its terms").

In its brief, ACRU nonetheless argues that the District Court erred, and that if removal of ineligible felons from the voter rolls is construed as permissive, then Section 8(a)(3) of the NVRA's discussion of removal for criminal conviction is rendered entirely "redundant," and that the federal law's list maintenance provisions are rendered "superfluous." Appellant's Brief at 9. This is non-sensical.

Where the primary purpose of the NVRA is to *increase*, not *reduce*, the number of the eligible citizens who are registered, it is entirely reasonable that Congress would severely circumscribe the categories of voters that it determined *shall* be removed from the voter rolls – and that it opted not to include convicted felons on that short list. Further, Section 8(a)(3)'s discussion of removal for criminal conviction is not in any way redundant or superfluous. It explains that, consistent with the NVRA's goal of "promot[ing] registration and voter participating," such persons — often already members of poor and minority groups that have historically been disproportionately disenfranchised — *must be left on the voter rolls*; they cannot be purged unless "provided by State law." *Ortiz*, 28 F.3d at 319 (Scirica, J., concurring) (the NVRA "ma[d]e it more difficult for the states to cull out ineligible voters and remove them from the rolls"); 52 U.S.C. §§ 20501, 20507(a)(3).

Where Section 8 of the NVRA does not mandate that state election officials, including the City Commissioners here, remove incarcerated felons from voter registration rolls, there can be no violation of the NVRA based on their failure to do so. The District Court properly so held, and this Court's inquiry can (and should) end here.

B. The NVRA defers to state law regarding removal of persons from the voter rolls based on criminal status, and Pennsylvania law does not allow election officials to purge incarcerated felons from the registration rolls.

Even assuming *arguendo* that the NVRA creates mandatory list maintenance obligations based on criminal conviction, the District Court correctly held that the NVRA looks to state law regarding whether a person must be disqualified from voting based on conviction status. The Court properly determined that, under Pennsylvania law, the Commonwealth is *not* permitted to remove incarcerated felons from the registration rolls. Thus, for this additional reason, no NVRA violation could have taken place.

As discussed above, the plain language of Section 8 of the NVRA is clear: removal of names "by reason of criminal conviction" is only to happen "as provided by state law." 52 U.S.C. § 20507(a)(3); *see also, e.g.*, *Association of Community Organizations for Reform Now (ACORN) v. Ridge*, 1995 WL 136913, at *8 (E.D. Pa. Mar. 30, 1995) ("defendants . . . argue that NVRA law governs the qualifications of voters, a right specifically given to the States. But NVRA does not establish who is entitled to vote . . ."). Under Pennsylvania law, although incarcerated felons temporarily may not vote while incarcerated, they are permitted

to be *registered* to vote. As a result, ACRU's claim against the City fails.

Appellant urges that it states a cause of action under the NVRA because, in Pennsylvania, incarcerated felons are ineligible to vote, and thus, must be removed from the rolls, or at least be "notated." Appellant's Br. at 16-20. However, this is inaccurate.

First, Chapter 19 of the Pennsylvania Voter Registration Act ("PVRA"), 25 Pa. C.S. §1901(a), prohibits cancellation of an elector's registration on the basis of a criminal conviction. *Id.* Under Section 1901(a), election officials may only cancel a voter's registration:

> (1) At the request of the elector.
>
> (2) Upon the death of the elector under section 1505 (relating to death of registrant).
>
> (3) Upon confirmation that the elector has moved to a residence outside the county.
>
> (4) Under a voter removal program as provided for under subsection (b), and in compliance with the National Voter Registration Act of 1993

25 Pa. C.S. §1901(a). As this Court noted in *Welker v. Clarke*, 239 F.3d 596 (3d Cir. 2001), this provision of the PVRA, which "strictly limits the manner and circumstances under which a voter's registration may be canceled," is "virtually identical to [the procedures] of the NVRA for the removal of voters from [the] registration rolls." *Id.* at 599.

Just like the NVRA, discussed supra, the PVRA strictly limits the bases for removing a voter from the registration rolls in Pennsylvania. Cancellation of an elector's registration by reason of that elector's felony incarceration is simply not

on that list. This compels a finding that the General Assembly intended to disallow cancellation of incarcerated felons' voter registration. *See Robinson*, 554 F.3d at 365 (*expressio unius est exclusio alterius* maxim).

Further, Pennsylvania law permits incarcerated felons to be registered to vote, even if they temporarily may not vote while in a penal institution.

It is undisputed that no Pennsylvania statute disenfranchises persons upon conviction for a felony. Felons who are not confined in a penal institution may continue to exercise their right to vote. *See Owens v. Barnes*, 711 F.2d 25, 26 (3d Cir. 1983) ("while Pennsylvania could choose to disenfranchise all convicted felons, it has not done so; unincarcerated convicted felons, such as those who have been sentenced to probation or released on parole, may vote").

Instead, Pennsylvania law provides that incarcerated felons are not "qualified absentee electors," and therefore may not vote by absentee ballot during the term of their incarceration. *See* Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, art. I, § 102, *as amended*, 25 P.S. §§ 2602(w) ("the words 'qualified absentee elector' shall in nowise be construed to include persons confined in a penal institution"), *id.* at art. XIII, § 1301, *as amended*, 25 P.S. § 3146.1 (same); *see also Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Cmwlth. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001).[5] In *Mixon*, the Commonwealth Court most

---

[5] Even though the Pennsylvania Election Code says *any* person "confined in a penal institution" is not a "qualified absentee elector" who may vote by absentee ballot, the Attorney General and Department of State have opined that, in fact, this restriction only applies to incarcerated *felons*; and that incarcerated misdemeanants and pretrial detainees may vote while incarcerated. *Voting by Untried Prisoners*
(footnote continued on the next page)

recently reaffirmed the legislature's right to restrict incarcerated felons' eligibility to vote *via absentee ballot*. *Id.* at 450 (*citing Ray v. Com.*, 276 A.2d 509, 510 (Pa. 1971), and *Martin v. Haggerty*, 548 A.2d 371, 375 (Pa. Cmwlth. 1988)).

However, the *Mixon* Court — affirmed *per curiam* by the Supreme Court — also determined that Pennsylvania law does "not completely disenfranchise the convicted felon . . .; it merely suspends the franchise for a defined period," and that incarcerated felons "*may* vote upon their release." *Mixon*, 759 A.2d at 448 n.11, 451 (emphasis in original). Because this right to register and vote immediately upon release remains intact, the *Mixon* court declared unconstitutional that the portion of the PVRA that barred previously-unregistered felons from registering to vote for five years after their release from a penal institution, while permitting felons registered prior to their incarceration to vote immediately upon release. *Id.* at 451-52. In so holding, the *Mixon* Court plainly recognized the right of a person validly-registered before entering a penal institution to remain registered during his or her temporary imprisonment, such that he may vote upon release. *Id.*

ACRU may not like Pennsylvania's statutory structure — which upholds, as deserving of utmost importance — the right to register and vote in this state. However, the Pennsylvania legislature has made the determination that while incarcerated felons temporarily cannot cast a ballot while incarcerated, they *are*

---

and Misdemeanants, 67 Pa. D. & C.2d 449, 453, 1974 WL 377850, at *3, Official Pa. Att'y Gen. Opinion No. 47 (Sept. 11, 1974); *see also* Pa. Department of State, *Voting Rights of Convicted Felons, Convicted Misdemeanants and Pretrial Detainees*, *available at* www.cor.pa.gov/How%20Do%20I/Documents/Convicted_felon_brochure%20-%20Voting%202016.pdf.

permitted to be *registered* to vote. 25 Pa. C.S. §1901(a); *Mixon*, 759 A.2d at 448 n.11, 451-52.

Plaintiff's allegation that there is a violation of the NVRA (which entirely defers to state law) is wrong and the District Court properly dismissed Count II for failure to state a claim for this reason.

C. ACRU failed to state a violation of Section 303(a) of HAVA as a matter of law.

Notwithstanding that, as discussed *supra*, Section 8 of the NVRA plainly prohibits removal of incarcerated felons from the registration rolls in Pennsylvania — so clearly that the District Court almost issued sanctions against ACRU for "incorrect[ly]" representing the NVRA's dictates — ACRU still comes to this Court asserting the lower court erred in dismissing Count II. ACRU's theory is that it is not the NVRA alone, but rather, the NVRA, "as enhanced by the parallel obligations found in the Help America Vote Act of 2002 ("HAVA")," which spells out the City's obligations. Appellant's Br. at 3. This argument lacks merit.

ACRU argues that, pursuant to Section 303 of HAVA, 52 U.S.C. §§ 21083(a)(2) and (4) — a statute that does not even provide a private right of action — election officials must perform regular list maintenance and make "a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters" and that these purportedly broader list maintenance provisions "augment" the narrower list maintenance provision of the NVRA, Section 8(a)(4). 52 U.S.C. § 20507(a)(4). Appellant's Br. at 10-11, 15. It asserts that the City thus violated its federal mandate by keeping incarcerated felons on the registration rolls.

ACRU's baseless claim fails for several independent reasons.

1. HAVA is irrelevant because its requirement that election officials make a reasonable effort to remove registrants who are ineligible to vote is not enforceable via a private right of action.

First, this Court should not consider any purported claim based on violation of HAVA (or HAVA *through* the NVRA). The provisions of HAVA are irrelevant here because, as the District Court correctly held, there is no private right of action under HAVA. A12.

ACRU essentially provides no explanation as to how or why HAVA is privately enforceable, except to summarily assert it has a right to enforce the terms of HAVA *through* the NVRA. It repeatedly states that Section 303(a) of HAVA, 52 U.S.C. § 21083(a), "enhances" and "becomes part of" the list maintenance provisions of the NVRA. *See, e.g.*, Appellant's Br. at 13; *id.* at 3, 12, 19. ACRU therefore contends Section 303(a) of HAVA is "subject to the private right of action provision of NVRA." Appellant's Br. at 15. This Court must reject ACRU's flawed logic.

For starters, undersigned frankly does not know what ACRU means when it says HAVA "enhances" the NVRA, nor does ACRU offer any credible explanation — grounded in an actual principle of law — elucidating its apparent theory that one can imply a private right of action into a statute via "enhancement." And undersigned has been unable to find any caselaw discussing or supporting a

theory of statutory "enhancement."[6]

By its plain terms, HAVA is not privately enforceable. As the District Court pointed out, HAVA *omits* language creating a private right of action. Instead, it includes a subchapter entitled "Enforcement" (Subchapter IV), which provides two *other* mechanisms for remedying grievances: (1) a civil action brought by the Attorney General, 52 U.S.C. § 21111, and (2) in states (such as Pennsylvania) receiving funds under HAVA, "[e]stablishment of State-based administrative complaint procedures," *Id.* at § 21112(a).[7] In contrast, the NVRA explicitly

---

[6] To the extent by "enhancement," ACRU means the *in pari materia* canon of statutory interpretation, that doctrine has no application here. The *in pari materia* doctrine is only invoked when a statute is ambiguous, and is not to be invoked where the language of a statute is clear. *See, e.g.*, *Superior Precast, Inc. v. Safeco Ins. Co. of America*, 71 F. Supp. 2d 438, 454 (E.D. Pa. 1999); *Oliver v. City of Pittsburgh*, 11 A.3d 960, 965 (Pa. 2011) ("there is no need to resort to rules of statutory construction—including an *in pari materia* reading of the enactments" where the terms of the statute to be construed were unambiguous). As discussed *infra*, HAVA is unambiguous: it plainly *excludes* a private right of action, while providing other enforcement mechanisms. 52 U.S.C. §§ 21111-21112.

[7] Under the required administrative scheme, "any person who believes that there is a violation" of HAVA's voting and registration requirements may file a complaint with the state. 52 U.S.C. § 21112(a)(2)(B). If the state determines that a violation occurred, it must "provide the appropriate remedy." *Id.* at § 21112(a)(2)(F). If the state finds no violation, it must "dismiss the complaint and publish the results of the procedures." *Id.* at § 21112(a)(2)(G).

Pennsylvania receives funding under HAVA and has enacted an administrative procedure for the review of HAVA complaints. *See* Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, art. XII, § 1206.2, *as amended*, 25 P.S. § 3046.2; *see also* Pa. Dept. of State, *Complaint Procedures under Section 402(a) of the Help America Vote Act of 2002 and Section 1206.2 of the Pennsylvania Election Code*, 33 Pa.B. 6119, *available at www.pabulletin .com/secure/data/vol33/33-50/2364.html*.

provides for a private right of action. 52 U.S.C. § 20510.

It is reasonable to infer that Congress' failure to include a private right of action provision in HAVA was deliberate rather than inadvertent, and this Court should not ignore Congress' intent. A13 (District Court Op. at 9, "it is assumed that Congress [in HAVA] intentionally excluded . . . a private right of action. This Court will not ignore Congress'[] intentions."); *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 372 (3d Cir. 2012) ("[W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent."); *International Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1101 (3d Cir. 1980) ("where a statute with respect to one subject contains a specific provision, the omission of such provision from a similar statute is significant to show a different intention existed.").

In short, this Court must reject ACRU's invitation to create out of whole cloth a private right of action in HAVA under the guise of a non-existent theory of "enhancement," where the plain language of HAVA unambiguously *excludes* a private right of action, while providing other enforcement mechanisms.

Additionally, as the District Court found, the specific section of HAVA cited by ACRU — Section 303(a), 52 U.S.C. § 21083(a), is not enforceable through Section 1983. A12 (District Court Op. at 8, "There is a circuit split as to . . . whether plaintiffs are . . . able to use 42 U.S.C. § 1983 to seek enforcement of HAVA . . . the language of the statute and persuasive case law are clear: there is no

private right of action under HAVA.").[8]

Section 303 — which provides that each state has a responsibility to maintain its statewide voter registration list — entirely lacks any "rights-creating language" and does not identify any discrete class of beneficiaries entitled to a statutory benefit; instead the sole focus of the statute is to regulate state election officials.

While a plaintiff can potentially seek redress for violation of a federal statute through 42 U.S.C. § 1983, the "plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (U.S. 1997) (emphasis in original). To determine whether a particular statutory provision gives rise to a federal right, the Court must look to whether: (1) Congress intended that the provision in question benefit the plaintiff; (2) the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute unambiguously imposes a binding obligation on the States. *Id.* at 340–41.

Congressional authorization of a private right of action must be clear, as "anything short of an unambiguously conferred right [is insufficient] to support a

[8] The City notes that ACRU does not even challenge the District Court's holding that it has no right to enforce HAVA under Section 1983. Accordingly, any challenge thereto is waived. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal."). ACRU also did not argue it had a cognizable private right of action pursuant to Section 1983 in the trial court. *See Harris v. City of Phila.*, 35 F.3d 840, 845 (3d Cir. 1994) (arguments not raised below cannot be raised for the first time on appeal as a basis for upsetting the judgment).

cause of action brought under § 1983." *Gonzaga University v. Doe*, 536 U.S. 273, 283 (U.S. 2002).

Here, the specific section of HAVA cited by ACRU — Section 303(a), 52 U.S.C. § 21083(a) — provides that each state shall implement and maintain a computerized statewide voter registration list. 52 U.S.C. § 21083(a). Specifically, it provides that states shall perform list maintenance, which includes removing registrants who are ineligible to vote from the official list of eligible voters in accordance with the provisions of the NVRA. In relevant part, it states:

> (2) Computerized list maintenance
>
> (A) In general
>
> The appropriate **State or local election official shall perform list maintenance** with respect to the computerized list on a regular basis as follows:
>
> (i) If an individual is to be removed from the computerized list, such individual **shall be removed in accordance with the provisions of the National Voter Registration Act** of 1993…
>
> (ii) For purposes of removing names of ineligible voters from the official list of eligible voters--
>
> (I) under section 8(a)(3)(B) of [the NVRA, which allows state election officials to remove persons from the registration rolls for "reason of criminal conviction" "as provided by State law"], the State shall coordinate the computerized list with State agency records on felony status; and
>
> (II) by reason of the death of the registrant under section 8(a)(4)(A) of [the NVRA, which requires states to make reasonable efforts to remove deceased persons], the State shall coordinate the computerized list with State agency records on death.
>
> . . .

> (4) Minimum standard for accuracy of State voter registration records
>
> The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
>> (A) **A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters**. Under such system, consistent with the National Voter Registration Act of 1993 . . .

52 U.S.C. § 21083(a) (emphasis added).

Nothing in the language of Section 303(a) of HAVA indicates that Congress intended to confer a private right of action to individual voters, much less a non-profit advocacy group such as ACRU that generically seeks to "promote election integrity," for alleged violations of the state's voter registration list maintenance responsibilities. A30 (Amd. Compl. at ¶ 18). Importantly, the provision contains no "unambiguous articulation and conferral of rights by Congress" — it entirely lacks the sort of "rights-creating" language imparting an "individual entitlement" critical to demonstrating such legislative intent. *See Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 187-88 (3d Cir. 2004) (Congress must use "rights-creating language" that must clearly impart an "individual entitlement," and have an "unmistakable focus on the benefitted class").

Section 303(a) also does not identify any discrete class of beneficiaries, and focuses exclusively on *election officials* as regulated government entities rather than any individuals or class of beneficiaries. *See Gonzaga University*, 536 U.S. at 287–90 (language of FERPA, which directs that "[n]o funds shall be made available" to any educational agency or institution which has a prohibited policy or practice, speaks to the Secretary of Education – "two steps removed from the

interests of individual students and parents and clearly does not confer the sort of 'individual entitlement' that is enforceable under § 1983"); *see also New Jersey Primary Care Ass'n Inc. v. New Jersey Dept. of Human Services*, 722 F.3d 527, 538 (3d Cir. 2013) (federally-qualified health centers lack a private right of action to enforce the Medicaid requirement of federal approval of amendments to state plan).

Since there is no private right of action for a purported violation of HAVA, its provisions are irrelevant here. As a matter of law, any cause of action premised on allegedly violating the list maintenance provisions of Section 303(a) of HAVA, or the NVRA, as "enhanced" by HAVA, fails as a matter of law.[9]

2. On the merits, ACRU fails to state a claim for a violation of Section 303(a) of HAVA.

As discussed above, because there is no private right to enforce a violation of the list maintenance provisions of Section 303(a) of HAVA, the only thing before it is ACRU's NVRA Section 8 claim. Its inquiry can and should begin and end there. That is, this Court should not consider the merits of any purported HAVA claim.

However, even when one reviews the merits, nothing in HAVA changes the

---

[9] While the District Court squarely held that the requirements of HAVA were not privately enforceable, for purposes of its Opinion, it was willing to assume *arguendo* that ACRU could maintain a private HAVA cause of action. A12. However, it then determined that ACRU failed to state a claim on the merits. A12. This Court can (and should) simply end its inquiry after holding that no private right of action in HAVA exists.

law on the issue presented. While ACRU suggests that Section 303(a) of HAVA "broadens" states' list maintenance responsibilities to remove *all* ineligible voters beyond what the NVRA narrowly requires, this is incorrect. Appellant's Br. at 12. HAVA merely looks to and follows the NVRA. And, as discussed at length *supra*, the NVRA defers entirely to state law regarding whether incarcerated felons may continue to be registered to vote. A18-A20.

That is, rather than transforming the NVRA to create new obligations, by its plain language, HAVA's voter registration removal requirements are to be performed "in accordance with" the NVRA. *See* 52 U.S.C. § 21083(a)(2)(A)(i) ("If an individual is to be removed from the computerized list, such individual shall be removed *in accordance with the provisions of the National Voter Registration Act of 1993* . . .") (emphasis added); *see also id.* at § 21145 (HAVA is to have "[n]o effect" on the NVRA, in that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit [the NVRA]").

As discussed at length in Section I.A, the NVRA only *requires* removal for two categories: death or change of address, and *permits* a person to be disqualified from voting based on conviction status in accordance with state law. 52 U.S.C. §§ 20507(a)(3), 20507(a)(4). HAVA adds nothing new to these requirements.

But even if HAVA did require removal for any ineligibility, including removal of felons if required by state law, ACRU still fails to state a HAVA claim. This is because, for all the reasons discussed in Section I.B., Pennsylvania law does not allow election officials to purge incarcerated felons from the registration

rolls. *See* 25 Pa. C.S. §1901(a); *Mixon*, 759 A.2d at 448 n.11, 451-52.

Accordingly, the District Court correctly determined that even assuming *arguendo* that ACRU could maintain a private cause of action under HAVA, which it cannot, ACRU failed to state a claim on the merits for violation of Section 303(a) HAVA (or Section 8 of the NVRA as "enhanced" by HAVA). Count II was properly dismissed.

D. The NVRA does not preempt Pennsylvania law.

Finally, ACRU's argument that the NVRA preempts Pennsylvania law, to the extent that state law does not require election officials to purge incarcerated felons, is easily put to rest. Appellant's Br. at 20.

The NVRA *expressly defers to* state law regarding the cancellation of registration records based on criminal conviction status. 52 U.S.C. § 20507(a)(3). ACRU actually squarely concedes this in its brief, noting: "that [the] 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.) . . . If there is no state law disenfranchising persons based on criminal convictions, then no list maintenance would be required under [the NVRA] 52 U.S.C. 20507(a) *et seq.* and the supplemental provisions of HAVA." Appellant's Br. at 13-14.[10]

---

[10] For the same reason, ACRU's argument that *Mixon* is not determinative regarding whether Pennsylvania election officials must remove incarcerated felons from the registration lists because it predates the enactment of HAVA is wholly without merit. Appellant's Br. at 19.

(footnote continued on the next page)

Because federal law expressly looks to state law to define the states' list maintenance responsibilities, there can be no conflict between the NVRA and state law.[11]

[11] This Court may affirm the dismissal for the independent and alternative reason that the City is an improper defendant to this action. The NVRA Section 8(a)'s list maintenance provisions — which ACRU assert have been violated — apply only to the "State," which is a defined term. 52 U.S.C. § 20507(a). A "State" "means a State of the United States and the District of Columbia" and does *not* include a municipality or local election officials. 52 U.S.C. § 20502; *Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 137–38 (1st Cir. 2012) (the express inclusion of one non-state jurisdiction is telling evidence that other such jurisdictions were intentionally excluded). Further, because the NVRA defers to state law, allowing for removal of names by reason of criminal conviction only "as provided by state law," *as a practical matter*, ACRU is taking issue with state law. 52 U.S.C. § 20507(a)(3). Therefore, the Commonwealth, and not the City, is the proper Defendant for this additional reason. At minimum, because state law is drawn into question, ACRU's claim could not proceed in the absence of the Commonwealth; the State is therefore an indispensable party. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19.

CONCLUSION

For the foregoing reasons, Appellee the Philadelphia City Commissioners respectfully request that this Court affirm the District Court's September 9, 2016 Order dismissing Plaintiff's Amended Complaint.

CITY OF PHILA. LAW DEPARTMENT
SOZI PEDRO TULANTE, CITY SOLICITOR

/s/ Kelly Diffily
By: Kelly Diffily, Esq.
Deputy City Solicitor, Appeals
City of Philadelphia Law Department
Appeals Unit
1515 Arch Street, 17th Floor
Philadelphia, PA 19102-1595
(215) 683-5010
kelly.diffily@phila.gov
Attorney for the Appellee Philadelphia City Commissioners

Dated: February 3, 2017

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to the Third Circuit Local Appellate Rule 46.1(e), I hereby certify that I am a member of the bar of this Court.

/s/ Kelly Diffily

Kelly Diffily, Esq.
City of Philadelphia Law Department

Dated: February 3, 2017

CERTIFICATION OF COMPLIANCE WITH RULE 32(a) AND REQUIREMENTS FOR ELECTRONIC FILING

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, Type Style Requirements,
and Electronic Filing Requirements.

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains **8,113** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

4. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using McAfee VirusScan Enterprise 8.8, and that no virus was detected.

/s/ Kelly Diffily
Kelly Diffily
City of Philadelphia Law Department

Dated: February 3, 2017

CERTIFICATE OF SERVICE

I, Kelly Diffily, hereby certify that I caused to be served today the foregoing **Brief for Appellee** upon the persons and in the manner indicated below:

Electronically, via CM/ECF:

Joseph A. Vanderhulst, Esq.
Public Interest Legal Foundation
32 East Washington Street
Suite 1675
Indianapolis, IN 46204

Linda A. Kerns, Esq.
Law Offices of Linda A. Kerns LLC
1420 Locust Street
Suite 200
Philadelphia, PA 19102

/s Kelly Diffily
Kelly Diffily
City of Philadelphia Law Department

Dated: February 3, 2017