No. 07-2322

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

STATE OF MISSOURI, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS APPELLANT

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SUMMARY OF THE CASE
AND REQUEST FOR ORAL ARGUMENT

This appeal arises from a suit to enforce the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq*. The United States' complaint alleged that the State of Missouri and its Secretary of State, in her official capacity (collectively "the State"), failed to comply with the NVRA's requirements regarding the maintenance of voter-registration lists for federal elections.

The district court granted judgment to defendants, concluding that – in view of the decentralized nature of Missouri government – the United States could not hold the State liable for NVRA violations resulting from the failures of Missouri's local election officials. Instead, the district court concluded, the United States must enforce the NVRA by filing suit against each offending locality. This ruling fundamentally misconstrues the NVRA.

This appeal presents an issue of first impression at the circuit court level that is of great importance to effective enforcement of the NVRA. If the district court's ruling stands, NVRA enforcement would turn on the idiosyncracies of state law, and, in many cases, the United States would be limited to enforcing the statute on a locality-by-locality basis – a result that would overwhelm the Department of Justice's resources. Because of this case's importance and complexity, the United States respectfully requests 30 minutes for oral argument.

TABLE OF CONTENTS

PAGE

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

STATEMENT OF JURISDICTION. 1

STATEMENT OF THE ISSUES. 2

STATEMENT OF THE CASE.................... 2

STATEMENT OF FACTS. 9

1. *Missouri's Voter Registration System*. 9

2. *Local Election Authorities' Maintenance Of The Voter-Registration Lists*.................... 12

a. *Improper Removal Of Individuals' Names From The Voter Rolls*. 12

b. *The State's Identification Of List-Maintenance Problems Among Its Local Election Authorities*. 14

(i) *Several Counties Had More Registered Voters Than Persons Of Voting Age*. 14

(ii) *According To The State, At Least 68 Of Missouri's 116 Local Election Jurisdictions Showed No List-Maintenance Activity*. 16

SUMMARY OF ARGUMENT. 19

ARGUMENT. 23

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE STATE OF MISSOURI CANNOT BE HELD LIABLE FOR NVRA VIOLATIONS COMMITTED BY ITS LOCAL ELECTION AUTHORITIES. 23

TABLE OF CONTENTS (continued): PAGE

A. *Standard Of Review.* 23

B. *Constitutional And Statutory Background.* 24

C. *The State Of Missouri Is Liable For The NVRA Violations Committed By Its Local Subdivisions.* 25

1. *The Statute's Language, Structure, And Legislative History Confirm That States Cannot Avoid Liability Under The NVRA By Delegating Their Statutory Responsibilities To Their Local Subdivisions.* 26

2. *The State Cannot Rely On The Structure Of Its Government To Insulate It From Liability Under The NVRA.* 31

3. *In Its Own Election Code, Missouri Implicitly Recognizes That Local Election Authorities Are State Officials For Purposes Of The NVRA* 37

4. *Treating Local Election Authorities As State Agents Is Consistent With The Well-Established Principle That Counties And Cities Are Not Sovereign Entities, But Instead, Merely Subdivisions Of The State Created To Carry Out State Functions.* 40

5. *The District Court Erred In Concluding That State Officials Had No Means Under Existing State Law To Ensure NVRA Compliance In Local Election Jurisdictions* 44

TABLE OF CONTENTS (continued): PAGE

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN CONCLUDING THAT SURVEY RESPONSES BY MISSOURI'S LOCAL ELECTION AUTHORITIES WERE INADMISSIBLE HEARSAY 48

A. Standard Of Review. 48

B. Background. 48

C. The Survey Responses Were Admissible Under Federal Rules Of Evidence 801 And 803. 50

CONCLUSION 55

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

CASES: **PAGE**

Association of Cmty. Org. for Reform Now (ACORN) v. *Miller*,
129 F.3d 833 (6th Cir. 1997). .... *passim*

Association of Cmty. Org. for Reform Now v. *Edgar*,
56 F.3d 791 (7th Cir. 1995). 32

Avery v. *Midland County*, 390 U.S. 474 (1968). 40

Baumli v. *Howard County*, 660 S.W.2d 702 (Mo. 1983). 42

City of Trenton v. *New Jersey*, 262 U.S. 182 (1923). 32, 41

Cooper Tire & Rubber Co. v. *St. Paul Fire & Marine Ins. Co.*,
48 F.3d 365 (8th Cir. 1995). 23

Darst-Webbe Tenant Ass'n Bd. v. *St. Louis Housing Auth.*,
339 F.3d 702 (8th Cir. 2003). 23

Ex Parte Siebold, 100 U.S. 371 (1879)... 31

Foster v. *Love*, 522 U.S. 67 (1997).. 2, 24, 31

Grundberg v. *Upjohn Co.*, 137 F.R.D. 365 (D. Utah 1991). 52

Harkless v. *Blackwell*, 467 F. Supp. 2d 754 (N.D. Ohio 2006)......................... 35

Henrietta D. v. *Bloomberg*, 331 F.3d 261 (2d Cir. 2003)................................ 35

Hunter v. *City of Pittsburgh*, 207 U.S. 161 (1907). 32

Kehm v. *Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983). 53

M.K.B. v. *Eggleston*, 445 F. Supp. 2d 400 (S.D.N.Y. 2006). 2, 51

CASES (continued): PAGE

Mawby v. *United States*, 999 F.2d 1252 (8th Cir. 1993). 48

Missouri ex rel. Kemper v. *St. Louis, Kansas City, & N. Ry. Co.*,
9 Mo. App. 532, 1881 WL 175 (1881) 42

Pilgrim v. *Trustees of Tufts Coll.*, 118 F.3d 864 (1st Cir. 1997),
abrogated in part on other grounds by
Crowley v. *L.L. Bean, Inc.*, 303 F.3d 387 (1st Cir. 2002). 52

Reynolds v. *Sims*, 377 U.S. 533 (1964).. 32, 41

Robertson v. *Jackson*, 972 F.2d 529 (4th Cir. 1992). 35

Sea-Land Serv., Inc. v. *Lozen Int'l, LLC*, 285 F.3d 808 (9th Cir. 2002)............ 2, 51

Shelton v. *Consumer Prod. Safety Comm'n*, 277 F.3d 998 (8th Cir.),
cert. denied, 537 U.S. 1000 (2002).. 53, 54

Smiley v. *Holm*, 285 U.S. 355 (1932). 24

Stanley v. *Darlington County Sch. Dist.*, 84 F.3d 707 (4th Cir. 1996)............ 36, 41

State ex rel. Nixon v. *Russell*, 45 S.W.3d 487 (Mo. App. 2001). 46

State v. *Alford*, 467 S.W.2d 55 (Mo. 1971) (en banc) 46

State v. *Crockett*, 419 S.W.2d 22 (Mo. 1967)... 47

State v. *Kirby*, 136 S.W.2d 319 (Mo. 1940). 39-40

State v. *McClellan*, 532 S.W.2d 870 (Mo. App. 1976)... 45

State v. *Riley*, 590 S.W.2d 903 (Mo. 1979). 46

State v. *Wade*, 231 S.W.2d 179 (Mo. 1950). 45

CASES (continued): **PAGE**

State v. *Wilbur*, 450 S.W.2d 458 (Mo. App. 1970). 42

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995). 31

United Bldg. & Constr. Trades Council v. *Mayor & Council of Camden*,
465 U.S. 208 (1984). 41

United States v. *Bach*, 400 F.3d 622 (8th Cir.),
cert. denied, 126 S. Ct. 243 (2005). 24

United States v. *Cicero*, 22 F.3d 1156 (D.C. Cir.),
cert. denied, 513 U.S. 905 (1994). 54

United States v. *Dudley*, 941 F.2d 260 (4th Cir. 1991). 53

United States v. *Enterline*, 894 F.2d 287 (8th Cir. 1990). 52

United States v. *New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003). 2, 34, 35

Voting Rights Coal. v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995)................................ 32

Waller v. *Florida*, 397 U.S. 387 (1970)... 41

White Indus., Inc. v. *Cessna Aircraft Co.*, 611 F. Supp. 1049 (W.D. Mo. 1985)... 52

Woods v. *United States*, 724 F.2d 1444 (9th Cir. 1984). 35-36

XO Missouri, Inc. v. *City of Maryland Heights*, 362 F.3d 1023 (8th Cir. 2004).... 42

CONSTITUTIONS:

U.S. Const. Art. I, § 4, Cl. 1... 19, 24

Mo. Const. Art. 6, § 1. 42

FEDERAL STATUTES: **PAGE**

National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*. 1
42 U.S.C. 1973gg(a)(2). 27
42 U.S.C. 1973gg(b)... 2
42 U.S.C. 1973gg(b)(2). 27
42 U.S.C. 1973gg-1(4). 2, 26
42 U.S.C. 1973gg-2. 25
42 U.S.C. 1973gg-2(b). 36
42 U.S.C. 1973gg-3(c)(2)(B)(ii). 29
42 U.S.C. 1973gg-3(c)(2)(E). 29
42 U.S.C. 1973gg-3(e)(1). 29, 38
42 U.S.C. 1973gg-3(e)(2). 29
42 U.S.C. 1973gg-5. 34
42 U.S.C. 1973gg-5(a)(3)(B)(i). 27
42 U.S.C. 1973gg-5(a)(4)(A)(iii). 29, 38
42 U.S.C. 1973gg-5(d)(1). 29, 38
42 U.S.C. 1973gg-5(d)(2). 29
42 U.S.C. 1973gg-6. 2
42 U.S.C. 1973gg-6(a). 2, 26
42 U.S.C. 1973gg-6(a)(1)(D). 29
42 U.S.C. 1973gg-6(a)(2). 29, 39
42 U.S.C. 1973gg-6(a)(4). 3, 43
42 U.S.C. 1973gg-6(b). 2, 26
42 U.S.C. 1973gg-6(b)(1). 3
42 U.S.C. 1973gg-6(b)(2). 3, 13, 43
42 U.S.C. 1973gg-6(c)(2)(A). 2, 3, 27
42 U.S.C. 1973gg-6(d). 2, 27, 43
42 U.S.C. 1973gg-6(d)(1). 4, 14
42 U.S.C. 1973gg-6(d)(1)(B). 13
42 U.S.C. 1973gg-6(d)(2). 4
42 U.S.C. 1973gg-6(g)(5). 27
42 U.S.C. 1973gg-6(j). 30
42 U.S.C. 1973gg-7(a)(3). 48
42 U.S.C. 1973gg-7(b)(1). 29
42 U.S.C. 1973gg-8. .... 4, 26
42 U.S.C. 1973gg-9(b). 28
42 U.S.C. 1973gg-9(b)(1). 28, 29

FEDERAL STATUTES (continued): **PAGE**

42 U.S.C. 1973gg-9(b)(2).. 28
42 U.S.C. 1973gg-9(b)(3).. 28

Pub. L. No. 103-31, 107 Stat. 77 (1993)
§ 9, 107 Stat. 87... 49
§ 13(1), 107 Stat. 89. 33

Pub. L. 107-252, § 802(b), 116 Stat. 1726 (2002).. 49

28 U.S.C. 1291 1

28 U.S.C. 1331 1

28 U.S.C. 1345.. 1

STATE STATUTES:

Mo. Rev. Stat. 51.010. 40

Mo. Rev. Stat. 51.020. 40

Mo. Rev. Stat. 51.050. 40

Mo. Rev. Stat. 51.090. 40

Mo. Rev. Stat. 51.120-51.165. 40

Mo. Rev. Stat. 51.280-51.282. 40

Mo. Rev. Stat. 51.390. 40

Mo. Rev. Stat. 51.410. 40

Mo. Rev. Stat. 106.220. 46

Mo. Rev. Stat. 106.250. 46

STATE STATUTES (continued): **PAGE**

Mo. Rev. Stat. 115.012-115.199. 9

Mo. Rev. Stat. 115.015. .... 9, 37

Mo. Rev. Stat. 115.017. .... 9, 37

Mo. Rev. Stat. 115.027.1. 39

Mo. Rev. Stat. 115.029-115.035. 39

Mo. Rev. Stat. 115.037. 39

Mo. Rev. Stat. 115.043-115.049. 39

Mo. Rev. Stat. 115.136.1. .... 4, 10

Mo. Rev. Stat. 115.136.2. 49

Mo. Rev. Stat. 115.136.6. 10

Mo. Rev. Stat. 115.141. 9

Mo. Rev. Stat. 115.145. 9

Mo. Rev. Stat. 115.145(4). 49, 53, 54

Mo. Rev. Stat. 115.149. 9

Mo. Rev. Stat. 115.151. 9

Mo. Rev. Stat. 115.151.3. 38

Mo. Rev. Stat. 115.155. 9

Mo. Rev. Stat. 115.155.4. 39

STATE STATUTES (continued): **PAGE**

Mo. Rev. Stat. 115.158. 47

Mo. Rev. Stat. 115.158.1. 10

Mo. Rev. Stat. 115.158.1(6). 10

Mo. Rev. Stat. 115.158.2. .... 10, 11

Mo. Rev. Stat. 115.158.4. .... 11, 47

Mo. Rev. Stat. 115.158.4(1). 11, 13

Mo. Rev. Stat. 115.158.8. 11

Mo. Rev. Stat. 115.160.6. 38

Mo. Rev. Stat. 115.162.2(2). 38

Mo. Rev. Stat. 115.162.2(3). 38

Mo. Rev. Stat. 115.163.3. 11

Mo. Rev. Stat. 115.179. 11

Mo. Rev. Stat. 115.193.1. .... 12, 14

Mo. Rev. Stat. 115.193.5. 12

Mo. Rev. Stat. 115.195. 12

Mo. Rev. Stat. 115.199. 12

Mo. Rev. Stat. 115.637(12). 46

Mo. Rev. Stat. 115.641. 46

RULES: **PAGE**

Fed. R. App. P. 4(a)(1)(B). 1

Fed. R. App. P. 32(a)(7)(B). 56

Fed. R. Evid. 801. .... 2, 51

Fed. R. Evid. 801(d)(2)(A). 51

Fed. R. Evid. 801(d)(2)(B). 51

Fed. R. Evid. 801(d)(2)(D). 51

Fed. R. Evid. 801 advisory committee's note. 51

Fed. R. Evid. 803. 2

Fed. R. Evid. 803(6). 54

Fed. R. Evid. 803(8)(A). 53

Fed. R. Evid. 803(8)(B). 53

REGULATION:

11 C.F.R. 8.7(a) 49

LEGISLATIVE HISTORY:

139 Cong. Rec. 2454 (1993). 30

139 Cong. Rec. 5098 (1993). 33

139 Cong. Rec. 9221 (1993). 30

H.R. Rep. No. 9, 103d Cong., 1st Sess.(1993) 4, 29, 30

S. Rep. No. 6, 103d Cong., 1st Sess. (1993). 4, 24, 29, 30

MISCELLANEOUS: **PAGE**

56 Am. Jur. 2d *Municipal Corporations* § 2 (2007). 41

20 C.J.S. *Counties* § 1 (2007). 42

5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* (2d ed. 2007). 52

U.S. Election Assistance Comm'n, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2005-2006* (EAC Report) at 15 & n.6 (2007), available at http://www.eac.gov/docs/EAC_NVRArpt2006.pdf. 36

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STATEMENT OF JURISDICTION

The United States brought this action to enforce the requirements of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq*. The district court had jurisdiction under 28 U.S.C. 1331 and 1345. The court entered final judgment on April 13, 2007. Add. 47; Doc. 104.[1] The United States filed a timely notice of appeal on June 4, 2007. Doc. 107; App. 836; see Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. 1291.

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[1] This brief uses the following abbreviations: "Add. ___" for the page number of the addendum to this brief; "App. ___" for the page number of the United States' appendix; and "Doc. __" for the entry number on the district court docket sheet.

STATEMENT OF THE ISSUES

1. Whether states can be held accountable for their local subdivisions' violations of Section 8 of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg-6.

42 U.S.C. 1973gg-6(a), (b), (c)(2)(A), and (d)

42 U.S.C. 1973gg-1(4)

Foster v. *Love*, 522 U.S. 67 (1997)

United States v. *New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003)

2. Whether the district court abused its discretion in determining that survey responses by Missouri's local subdivisions were inadmissible hearsay.

Fed. R. Evid. 801

Fed. R. Evid. 803

M.K.B. v. *Eggleston*, 445 F. Supp. 2d 400 (S.D.N.Y. 2006)

Sea-Land Serv., Inc. v. *Lozen Int'l, LLC*, 285 F.3d 808 (9th Cir. 2002)

STATEMENT OF THE CASE

1. The NVRA was enacted to "increase the number of eligible citizens who register to vote in elections for Federal office," "protect the integrity of the electoral process," and "ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. 1973gg(b). Section 8 of the NVRA, 42 U.S.C. 1973gg-6, imposes a number of duties and restrictions on states regarding the maintenance of

voter-registration lists. These list-maintenance provisions are the focus of this litigation.

Section 8 requires, among other things, that "[i]n the administration of voter registration for elections for Federal office, each State shall * * * 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" death or change in residence. 42 U.S.C. 1973gg-6(a)(4). The statute mandates that a state's list-maintenance program be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." 42 U.S.C. 1973gg-6(b)(1). In addition, the NVRA requires that any state program aimed at systematically removing ineligible voters from the rolls must be completed at least 90 days prior to a federal election. 42 U.S.C. 1973gg-6(c)(2)(A).

The NVRA also prescribes procedures that states must follow before removing individuals from voter-registration rolls. The NVRA provides that a "State program or activity * * * shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote," except according to specified procedures. 42 U.S.C. 1973gg-6(b)(2). Some of these procedures are set forth in Section 8(d) of the NVRA, which mandates that "[a] State shall not remove" an individual's name from the list of registered voters because of a change in

residence unless that person either (1) confirms in writing that he or she has moved outside the registrar's jurisdiction or (2) fails to respond to a confirmation notice sent by the state and, after that notice is sent, fails to vote (or show up at the polls to vote) in either of the next two federal general elections. 42 U.S.C. 1973gg-6(d)(1). The required confirmation notice is commonly known as an "8(d)(2) notice" because that section of the NVRA prescribes the necessary contents and method of delivery for such a notice. See 42 U.S.C. 1973gg-6(d)(2). These safeguards reflect Congress's intent that "once registered, a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction." H.R. Rep. No. 9, 103d Cong., 1st Sess. 18 (1993); S. Rep. No. 6, 103d Cong., 1st Sess. 34 (1993).

In addition, the NVRA requires each state to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA]." 42 U.S.C. 1973gg-8. Missouri has designated its Secretary of State as the responsible state official for NVRA purposes. Mo. Rev. Stat. 115.136.1.

2. On November 22, 2005, the United States filed a one-count complaint alleging that the State of Missouri and its Secretary of State (collectively "the State") had violated the list-maintenance requirements of Section 8 of the NVRA. App. 13-22. The complaint alleged, among other things, that the State had

delegated the conduct of voter registration in federal elections to its local election jurisdictions, and that many of those local authorities had failed to comply with the NVRA's list-maintenance requirements in carrying out their delegated duties. App. 16-18 ¶¶ 12-16. For example, the United States alleged that "a number of local election jurisdictions in Missouri * * * do not conduct a meaningful general program of voter registration list maintenance in elections for federal office" with respect to voters who relocate or die. App. 16 ¶ 13. These failures, according to the complaint, "resulted in ineligible voters remaining on the voter registration lists in elections for federal office." *Ibid.* In addition, the complaint alleged that some local election authorities had engaged in practices that "resulted in the removal of voters from voter registration lists in elections for federal office prematurely in a manner not consistent with federal law." *Ibid.*

3. Prior to the close of discovery, the State filed its first motion for summary judgment. Doc. 8; see App. 54 ¶ 40. The State did not dispute that some of its local election authorities had committed the alleged NVRA violations. See Doc. 9 at 6-7. Instead, the State argued that it had fulfilled its obligations by making a reasonable effort to obtain compliance, that it could not be held responsible for the failures of local election authorities, and that this litigation represented an improper attempt by the federal government to require the State to enforce the NVRA against local election authorities. See Doc. 9 at 4, 6-7, 14-16.

The district court[2] granted in part, and denied in part, the State's motion. Add. 1-20. At the outset, the court noted that the United States had produced evidence that "some local election authorities were not conducting routine canvasses of registered voters, that some local election authority officials did not have training about the NVRA or an awareness of its obligations, and that voters in some local election authorities were dropped from the active registration list without the protections mandated by the NVRA." Add. 12. In addition, the court recognized that a local election authority in Missouri "is a creature of state statute and does not have separate sovereignty" from the State. Add. 17. Nonetheless, the court granted the State's motion for summary judgment "[t]o the extent the Government's claims are based on the Government's contention that Missouri has violated the NVRA because it failed to adequately enforce the NVRA against local election authorities." Add. 17. Construing the United States' action as an attempt to force the State to bring NVRA lawsuits against its local election authorities, the district court concluded that the State lacked standing to sue under the NVRA. Add. 13-14.

The court denied the State's motion in all other respects, concluding that further discovery was necessary to determine whether the State had met its own obligations under the NVRA. Add. 19-20. The court also curtailed the discovery

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[2] The Honorable Nanette K. Laughrey, District Judge.

period, from the five months that were then remaining to 60 days. See Add. 20; App. 62-B ¶ C.3; App. 62-I ¶ C.3.[3]

4. Following discovery, the parties filed cross-motions for summary judgment (Docs. 59 & 60), which the court denied. Add. 22 n.2. At the court's request, both parties stipulated that the court could make findings of fact and conclusions of law based on the written submissions without holding an evidentiary hearing. App. 830-832; Add. 22-23 & n.2.

The court entered final judgment in favor of defendants on April 13, 2007. Add. 47; Doc. 104. The court concluded that the State satisfied the NVRA's reasonable-effort requirement by "passing a law mandating its LEAs [local election authorities] to comply with the NVRA, providing resources and training for the LEAs, and giving local prosecuting attorneys the authority to prosecute LEAs for noncompliance." Add. 38. In reaching this conclusion, the district court relied in part on the State's assertion that the Secretary of State's office had obtained a "personal commitment" from each of the State's local election authorities to comply with the NVRA. Add. 30-31 n.8. Yet the court also

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[3] This abbreviated discovery period was consistent with the court's view that the list-maintenance activities of Missouri's local election authorities need not be the focus of discovery, since their failure to comply with the NVRA would not in itself establish a violation by the named defendants. If this Court agrees that the State can be held liable for its local election authorities' failure to comply with the NVRA, further discovery will be necessary to develop a complete picture of those local jurisdictions' list-maintenance activities.

expressed doubt whether some of these local authorities were sincere when they promised compliance with federal law. Add. 39.

The district court did not dispute that several local election authorities in Missouri had violated the NVRA. To the contrary, the court acknowledged that "there are list maintenance problems by some LEAs," Add. 41, and that "[t]he United States has identified LEAs who have failed to comply with the NVRA." Add. 40. The court pointed specifically to seven localities – Knox, Reynolds, Crawford, Miller, Worth, Gentry, and Ralls counties – and concluded that "there is no evidence in the record that the count[y] clerks" in those jurisdictions "are now in compliance with the NVRA." Add. 39.

Nonetheless, the court held as a matter of law that any violation of the NVRA by a local official cannot be imputed to the State. Add. 34 n.9, 43-45. This conclusion was based in part on the court's understanding that, "[u]nder Missouri law, no statewide official can sue the LEAs to make them comply with the NVRA, so it would make no sense to conclude that the LEAs' conduct should be imputed to [the State]." Add. 45. The court reasoned that the responsibility "lies with the Department of Justice and local prosecuting attorneys, not the Defendants," to take action against local jurisdictions that violate the NVRA. Add. 40. Thus, the court concluded that, "[t]o the extent the United States seeks a

declaration that the State of Missouri has violated the NVRA because the LEAs have violated the NVRA, the United States has sued the wrong parties." Add. 44.

STATEMENT OF FACTS

1. Missouri's Voter Registration System

Missouri has delegated much of the responsibility for voter registration to its local election authorities. State law provides that "[e]ach election authority shall supervise the registration of voters within its jurisdiction," Mo. Rev. Stat. 115.141, and assigns local election authorities the responsibility for receiving, screening, and processing voter-registration applications. See, *e.g.*, Mo. Rev. Stat. 115.145, 115.149, 115.151, 115.155.

The State has 116 local election authorities, one for each of Missouri's 114 counties and one for each of its two largest cities (St. Louis and Kansas City). App. 36 ¶ 8. In 110 of these jurisdictions, the election authority is the county clerk; in the other six jurisdictions, a board of election commissioners serves as the election authority. App. 36-37 ¶ 8; Mo. Rev. Stat. 115.015, 115.017.

After enactment of the NVRA, Missouri amended its election code to implement the new requirements of the federal statute. See generally Mo. Rev. Stat. 115.012-115.199; App. 23-34. Missouri designated its Secretary of State as "the chief state election official responsible for coordination of state responsibilities" under the NVRA, and authorized the Secretary to promulgate

rules "to ensure state compliance with" the NVRA. Mo. Rev. Stat. 115.136.1, 115.136.6. Despite this rulemaking authority, the Secretary has not promulgated regulations regarding compliance with the NVRA's list-maintenance requirements. App. 15-16 ¶ 11; App. 36 ¶ 7.

The state election code also requires the Secretary of State to "implement a centralized, interactive computerized statewide voter registration list," known as the "Missouri Voter Registration System." Mo. Rev. Stat. 115.158.1. This system "shall * * * [s]erve as the official voter registration list for the conduct of all elections in Missouri." Mo. Rev. Stat. 115.158.1(6). State law further provides that the system "shall be maintained and administered by the secretary of state and contain the name and registration information of every legally registered voter in Missouri." Mo. Rev. Stat. 115.158.1. Missouri instituted this statewide system in January 2006. App. 586 ¶ 17. Prior to 2006, each of the State's 116 local election authorities maintained a separate voter-registration list for its jurisdiction. App. 585 ¶ 6; Add. 23.

State law assigns responsibility to both the Secretary of State and the local election authorities to perform list maintenance on Missouri's centralized, statewide voter-registration list. Mo. Rev. Stat. 115.158.2. These list-maintenance requirements include "[r]emoving names in accordance with the provisions and procedures of the National Voter Registration Act of 1993," and

"[r]emoving only voters who are not registered or who are not eligible to vote." Mo. Rev. Stat. 115.158.2.

Although local election authorities share some of the maintenance obligations for the statewide voter list, the statute assigns responsibility to "[t]he secretary of state [to] develop procedures to ensure that voter registration records within the system are accurate and updated regularly." Mo. Rev. Stat. 115.158.4. Such procedures must include "[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote," as well as "[s]afeguards to ensure that eligible voters are not removed in error." Mo. Rev. Stat. 115.158.4. This provision further mandates that, "[c]onsistent with the National Voter Registration Act of 1993, registrants who have not responded to a notice and who have not voted in two consecutive general elections for federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." Mo. Rev. Stat. 115.158.4(1). The statute also grants the Secretary authority to promulgate regulations to implement these provisions. Mo. Rev. Stat. 115.158.8.

State law imposes additional responsibilities on the local election authorities. Each local authority must canvass the registration records in its jurisdiction every two years and complete the canvass no later than 90 days prior to a federal election. Mo. Rev. Stat. 115.179; Mo. Rev. Stat. 115.163.3. State law

further provides that, upon completion of the canvass, the election authority may not remove an individual's name from the voter-registration list on the ground that he or she has changed residence unless (1) the voter confirms in writing that he or she has moved outside the election authority's jurisdiction, or (2) the individual fails to respond to a confirmation notice and does not vote during the next two general election cycles. Mo. Rev. Stat. 115.193.1. State law authorizes an election authority to designate a voter as "inactive" if he or she fails to respond to a confirmation notice within 30 days. Mo. Rev. Stat. 115.193.5.

Missouri law also requires that local election authorities remove individuals from the voter rolls if they have died or been declared incapacitated. Mo. Rev. Stat. 115.199. The local authorities also must "determine the voting qualifications of those reported convicted or pardoned." *Ibid.* At least monthly, designated officials must report to election authorities the names of individuals over age 18 who have died, been convicted of a felony, or been adjudged incapacitated. Mo. Rev. Stat. 115.195.

2. Local Election Authorities' Maintenance Of The Voter-Registration Lists

a. Improper Removal Of Individuals' Names From The Voter Rolls

A number of local election authorities in Missouri admitted removing individuals from the voter-registration lists without following the procedures

mandated by the NVRA and state law. For example, Ralls County Clerk Ernest Duckworth submitted a declaration explaining that

> [i]f my office learned that a voter had not cast a ballot in any election in five years but had not moved from the county, we would delete that voter's registration and notify the voter by mail that he must re-register in order to vote in any future election.

App. 563 ¶ 5. The Secretary of State's office later notified Duckworth that such removal of registrants violates both state and federal law, and directed him to restore the individuals immediately to the voter-registration list. App. 820-821; App. 818-819 ¶ 3. See 42 U.S.C. 1973gg-6(b)(2) (prohibiting removal of individual from voter rolls "by reason of the person's failure to vote" without complying with the safeguards of 42 U.S.C. 1973gg-6(d)(1)(B)); Mo. Rev. Stat. 115.158.4(1) ("no registrant may be removed solely by reason of a failure to vote"). The record does not indicate whether those individuals were ever restored to the voter rolls.

Other county clerks similarly reported purging voters using procedures that are unlawful under both the NVRA and Missouri law. Caldwell County Clerk Shari Lee informed the United States that, in 2002 and again in 2004, she sent a letter to each registrant in the county who had not voted in the previous four years, and that, if the mailing was returned as undeliverable, she immediately removed the individual from the rolls. App. 53 ¶ 37. Atchison County Clerk Susette Taylor similarly reported that if a canvass mailing to a registrant was returned with a

notation from the Postal Service that the person had moved out of state, she immediately removed the individual from the voter-registration list. App. 53-54 ¶ 38. She also "immediately purged the registrations of voters whose [canvass] mailing was returned and who had not voted in the past two elections." App. 54 ¶ 38.[4] These voter purges violated both 42 U.S.C. 1973gg-6(d)(1) and Mo. Rev. Stat. 115.193.1.

b. The State's Identification Of List-Maintenance Problems Among Its Local Election Authorities

The State has acknowledged widespread list-maintenance problems among Missouri's local election authorities.

(i) Several Counties Had More Registered Voters Than Persons Of Voting Age

On November 22, 2005 – the day that the United States filed this lawsuit – Missouri's Secretary of State issued a statement admitting, in relevant part, that

> [i]n last year's election, 29 Missouri counties and election jurisdictions had more persons registered to vote than people of voting age living in the jurisdiction. In one Missouri county, over 150% of the voting age population was registered to vote in the 2004 federal election.

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[4] Lee and Taylor made these admissions in telephone conversations with Joel Ard, one of the United States' trial attorneys in this case. App. 53-54 ¶¶ 37-38. The United States introduced their statements through a declaration from Ard. Because county clerks are agents of the State when they are performing list-maintenance activities, see pp. 25-44, *infra*, Lee's and Taylor's statements qualify as admissions of a party-opponent under Federal Rule of Evidence 801(d)(2). See pp. 50-51, *infra*.

> Clearly, a problem exists. It defies common sense that we would have more registered voters than people of voting age in any Missouri county.

App. 497; Doc. 59 at 30-31 ¶ 86; App. 816 ¶ 86. The State acknowledged that it was aware of this problem prior to the 2004 general election. App. 489.

The State has made similar admissions throughout this litigation. In its answer to the United States' complaint, the State "admit[ted] that there are counties in Missouri where the number of people registered to vote exceed the estimates of the voting age population for the county." App. 37 ¶ 10. In May 2006, the State again identified 29 local election jurisdictions in Missouri as having more registered voters than persons of voting age. App. 607-636; App. 493, 495-496, 502-503, 817 ¶ 89.[5] And the State later acknowledged that, as of mid-June 2006, 14 Missouri counties still had more registered voters than residents of voting age. See App. 803, 805, 807 (column 24); App. 511-512, 817 ¶ 89.

One of those local jurisdictions was Reynolds County. In November 2004, the number of registered voters in Reynolds County was 151.2% of that jurisdiction's voting-age population (App. 802 (column 6)) and 118.5% of its

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[5] The State later asserted that its original statistics were inaccurate and that, as of November 2004, the number of registered voters exceeded the voting-age population in 22 counties, rather than the 29 originally reported. App. 802 (column 6); App. 589-590 ¶ 52; App. 834-835.

estimated *total* population (including all children under 18). Compare App. 802 (column 2) with App. 85 (column 2); see also Add. 11.

(ii) According To The State, At Least 68 Of Missouri's 116 Local Election Jurisdictions Showed No List-Maintenance Activity

In March 2005, the Secretary of State's office distributed to Missouri's 116 local election authorities a "Voter Registration Survey" from the federal Election Assistance Commission (EAC). App. 69, 87-478. That survey asked about list-maintenance activity that occurred between November 2002 and November 2004. See App. 595-597. After completing the surveys, the local election authorities submitted them to the Secretary of State's office, which used the survey responses to compile a report that the State submitted to the EAC about its list-maintenance activities. App. 598-606; Doc. 60 at 19 ¶ 74; App. 811-812 ¶¶ 11-12; App. 69, 74-75.

In July 2006, based on the responses to the EAC survey and other available data, the Secretary of State's office sent letters to 82 of Missouri's 116 local election jurisdictions notifying them that they either (1) had "more registered voters than voting age population" or (2) "show[ed] no list maintenance activities." App. 637-800; see App. 813 ¶ 54; App. 814 ¶ 64; App. 815 ¶¶ 75-76; App. 508-509, 521-522. The State later clarified that 14 of the 82 jurisdictions received the letters because they had more registered voters than voting-age population. App. 512, 515, 817 ¶ 89. This means that 68 of the local election

jurisdictions – more than 58% of those in Missouri – were identified by the State in July 2006 as showing no list-maintenance activity.

In determining whether local election authorities showed list-maintenance activity, the State relied in part on whether they reported on the EAC survey that they had sent out 8(d)(2) notices. App. 514, 524-525; App. 496. According to the State, one of the "important components" of a proper list-maintenance program is the sending of 8(d)(2) confirmation notices to registrants whose canvass mailings are returned as undeliverable. Doc. 60 at 31-32 ¶ 112; App. 593-594 ¶¶ 60-61.

The EAC survey responses showed that 23 counties, with a combined total of 267,657 registered voters, reported sending out *zero* 8(d)(2) notices between November 2002 and November 2004. App. 77-82 (column 6); App. 103, 121, 124, 156, 175, 196, 202, 215, 224, 230, 236, 242, 331, 334, 348, 357, 360, 366, 387, 396, 438, 456, 474; App. 802, 804, 806, 808 (columns 1 & 2).[6] By contrast, Missouri as a whole sent out 454,287 such notices during the same two-year period, approximately one notice for every nine registered voters in the State. If these 23 counties had sent out notices at the same rate as the State as a whole, they

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[6] The county clerks in two of these 23 counties later claimed that, contrary to their survey responses, they had sent out some 8(d)(2) notices. See App. 531 ¶ 5; App. 558 ¶ 3.

would have mailed a combined total of nearly 29,000 notices during this period – not zero as they reported.[7]

The number of counties that failed to send out 8(d)(2) notices may, in fact, be significantly higher than 23. In response to the EAC survey question about the number of 8(d)(2) notices, 15 other counties either failed to respond, wrote "n/a" as the answer, or otherwise indicated that they did not have the information. App. 77-82 (column 6); App. 94, 118, 212, 261, 313, 322, 337, 339-340, 351, 381, 402, 429, 441, 444, 447.

Despite the district court's conclusion that the Secretary of State had provided adequate training to local election authorities (see Add. 38), a number of county clerks expressed ignorance and confusion about their list-maintenance obligations. Several clerks submitted declarations confirming that they sent no 8(d)(2) notices to registered voters between November 2002 and November 2004. App. 536 ¶¶ 3-4; App. 542 ¶ 3; App. 548 ¶¶ 3 & 5; App. 554 ¶¶ 5-6; App. 564 ¶ 6;

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[7] The 23 counties were Barton, Butler, Caldwell, Clark, Crawford, Dent, Dunklin, Gentry, Harrison, Hickory, Howard, Iron, Monroe, Montgomery, Oregon, Pemiscot, Perry, Phelps, Ralls, Randolph, Shannon, Texas, and Worth. App. 77-82 (column 6). These counties had a combined total of 267,657 registered voters in November 2004. See App. 802, 804, 806, 808 (columns 1 & 2). Missouri, which had 4,194,146 registered voters in November 2004 (App. 808), sent out 454,287 notices from November 2002 to November 2004. App. 82 (column 6). Thus, Missouri sent out one 8(d)(2) notice for every 9.23 registered voters (4,194,146 ÷ 454,287). If these 23 counties had sent out the 8(d)(2) notices at the same rate, they would have mailed 28,999 such notices (267,657 ÷ 9.23).

App. 574 ¶¶ 3-4; App. 579 ¶ 5. For example, Crawford County Clerk Connie Smith explained that "[a]lthough a canvass mailing in the form of a voter ID card was sent to each registered voter in Crawford County, [her] office was unaware that voters whose canvass mailings were returned should subsequently be sent a Section 8(d)(2) confirmation notice." App. 536 ¶ 4. Other county clerks explained that they, too, were unaware of the need to send out such notices when registered voters' mail was returned as undeliverable. App. 554 ¶ 6; App. 574 ¶ 4.

This failure to send out 8(d)(2) notices is a long-standing problem in Missouri. The Secretary of State acknowledged that "prior to 2000, some local election authorities, including the City of St. Louis, did not send the proper notice as required by section 8(d) of the National Voter Registration Act of 1993 (NVRA) to voters who may have changed their residence." App. 61-62.

SUMMARY OF ARGUMENT

The Constitution – through the Elections Clause – delegates to state legislatures the authority to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," but grants Congress the power to "make or alter such Regulations." U.S. Const. Art. I, § 4, Cl. 1. Congress enacted the NVRA pursuant to its authority under the Elections Clause. In so doing, Congress placed a number of duties on the states with regard to voter registration

for federal elections, including the obligation to maintain accurate lists of eligible voters.

Missouri failed to fulfill this obligation. It allowed voter lists in some jurisdictions to fall woefully out of date, swelling to the point where they far exceeded the jurisdiction's voting-age population. In others, the State permitted individuals to be improperly removed from voter lists without the protections provided by the NVRA. This litigation arose as the result of these failures.

The district court concluded that the decentralized nature of Missouri's government absolved the State of responsibility for the failures of local election authorities. The United States, the district court reasoned, should have determined on a jurisdiction-by-jurisdiction basis which of the State's 116 localities were violating the NVRA, and then filed suit directly against the offending localities. The court ruled that the United States could not hold the State responsible for its local election jurisdictions' failure to comply with the statute. This ruling represents a fundamental error in statutory construction and a basic misunderstanding of the NVRA.

The district court's ruling is directly at odds with the text of the NVRA. The relevant provision of the statute places the burden of compliance on state – not local – governments. Notably, other provisions of the NVRA besides Section 8 specifically refer to local governments, demonstrating that Congress knew how

to distinguish between the two. This reading of the statute is confirmed by the legislative history, which shows that Congress intended that if states delegated their NVRA responsibilities to their local subdivisions, those local authorities would be considered state officials for purposes of the NVRA.

The structure of Missouri government cannot insulate the State from liability under the NVRA. As a threshold matter, the State has numerous tools at its disposal for ensuring compliance in its local election jurisdictions. It simply has elected not to employ them.

Missouri law similarly contemplates that the actions of its local election authorities are those of the State. Indeed, the language of Missouri's own election code illustrates that the State views its local election authorities as the equivalent of "State election official[s]" under the NVRA. This approach is consistent with the principle – well-settled both as a matter of federal and Missouri law – that cities and counties are not sovereign entities, but are instead political subdivisions and, hence, agents of the State.

But even assuming *arguendo* that Missouri cannot effectively ensure NVRA compliance by local officials under its current statutory scheme, this would not be a meritorious defense. The NVRA, like any law enacted by Congress pursuant to its authority under the Elections Clause, supersedes state law regulating federal elections where the two conflict. Accordingly, to the extent Missouri's existing

election code does not provide State officials sufficient means for ensuring NVRA compliance by local officials, it is incumbent upon Missouri to make the necessary changes in its laws. The State cannot delegate away its responsibilities – or liability – under the NVRA.

Finally, the district court abused its discretion in holding that certain evidence submitted by the United States was hearsay and thus could not be considered for the truth of the information contained therein. The documents in question were survey responses completed by local election authorities summarizing their list-maintenance activities, as well as related documents derived from those responses. The survey responses were sent to Missouri's Secretary of State, who used them to compile a report that Missouri submitted to the federal government as required by law.

This evidence is not hearsay. It constitutes an admission by a party-opponent because the local election authorities who created the documents in question are agents of the State. The challenged documents also are adoptive admissions, as the Secretary of State adopted the statements when she compiled and forwarded them to the federal government. For these reasons, the survey responses fall outside the definition of hearsay. Even if this were not the case, the documents also constitute both public records and business records, and thus fall

within exceptions to the rule against hearsay. The district court's exclusion of this evidence therefore was an abuse of discretion.

Accordingly, this Court should reverse the judgment of the district court and remand the matter with instructions that the survey responses and related documents be admitted into evidence.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT THE STATE OF MISSOURI CANNOT BE HELD LIABLE FOR NVRA VIOLATIONS COMMITTED BY ITS LOCAL ELECTION AUTHORITIES

A. Standard Of Review

This case was submitted to the district court based on the written record, making it the functional equivalent of a bench trial. In appeals from bench trials in civil cases, findings of fact are reviewed for clear error, conclusions of law are reviewed *de novo*, and "[m]ixed questions of law and fact that require the consideration of legal concepts and the exercise of judgment about the values underlying legal principles are also reviewed de novo." *Darst-Webbe Tenant Ass'n Bd.* v. *St. Louis Housing Auth.*, 339 F.3d 702, 710-711 (8th Cir. 2003) (quoting *Cooper Tire & Rubber Co.* v. *St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995)).

The issue presented here is one of statutory interpretation – namely, whether Congress intended states to be liable under Section 8 of the NVRA when their local subdivisions fail to comply with the statute's list-maintenance requirements. Questions of statutory construction are legal issues reviewed *de novo*. *United States* v. *Bach*, 400 F.3d 622, 627 (8th Cir.), cert. denied, 126 S. Ct. 243 (2005).

B. Constitutional And Statutory Background

Congress enacted the NVRA pursuant to its authority under the Elections Clause. See S. Rep. No. 6, 103d Cong., 1st Sess. 3-4 (1993). Although the Elections Clause does not specifically mention voter registration, it is well settled that the Clause gives Congress authority to regulate registration procedures that affect federal elections. See *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932); *Association of Cmty. Org. for Reform Now (ACORN)* v. *Miller*, 129 F.3d 833, 836 n.2 (6th Cir. 1997).

The Elections Clause grants state legislatures authority to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," but specifies that Congress may "make or alter such Regulations." U.S. Const. Art. I, § 4, Cl. 1. "The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster* v. *Love*, 522 U.S. 67, 69 (1997) (citations omitted).

By its terms, the NVRA governs only federal elections. 42 U.S.C. 1973gg-2. "Although the registration obligations imposed by the Act will likely affect registration procedures associated with state and local elections, this result will arise as a matter of convenience and not because the Act requires it." *ACORN*, 129 F.3d at 837. The NVRA does not "prohibit[] a state from adopting separate registration requirements for the election of state officials." *Ibid.*

C. The State Of Missouri Is Liable For The NVRA Violations Committed By Its Local Subdivisions

The district court granted judgment to the State based largely on its conclusion that the United States sued the wrong parties. The court took as its starting point the proposition that, because of the decentralized nature of Missouri government – in which elections are run primarily by locally elected officials – the State is not liable for NVRA violations resulting from the actions (or inaction) of local authorities. Under the district court's reading of the law, the United States should have determined on a jurisdiction-by-jurisdiction basis which of Missouri's 116 localities were not in compliance with the NVRA and then filed suit directly against the offending localities. Viewing the United States' claims through this lens, the district court construed the suit as an attempt to force the State to bring NVRA enforcement actions against its counties. The court then rejected the suit based on the State's lack of standing under the NVRA.

This was error. The question was not whether the State had standing under the NVRA to bring an enforcement action against local election authorities. Rather, the question was whether the State, which delegated many of its federally imposed duties under the NVRA to its political subdivisions, is liable when those subdivisions fail to carry out those duties in compliance with the NVRA. This Court should hold that, where such delegation occurs, a state will be liable for its local subdivisions' NVRA violations.

1. The Statute's Language, Structure, And Legislative History Confirm That States Cannot Avoid Liability Under The NVRA By Delegating Their Statutory Responsibilities To Their Local Subdivisions

The text of the NVRA places the burden of compliance on state – not local – governments. The statute defines the term "State" as "a State of the United States and the District of Columbia," 42 U.S.C. 1973gg-1(4), making no mention of local governments. It mandates that each State "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA]." 42 U.S.C. 1973gg-8. And Section 8 of the NVRA – the provision on which the United States' claims are based – repeatedly uses the term "State" in describing the entity responsible for NVRA compliance. See 42 U.S.C. 1973gg-6(a) ("In the administration of voter registration for elections for Federal office, each State shall [fulfill certain obligations]."); 42 U.S.C. 1973gg-6(b) (placing certain requirements on "[a]ny

State program or activity"); 42 U.S.C. 1973gg-6(c)(2)(A) ("A State shall complete" list-maintenance efforts 90 days prior to an election.); 42 U.S.C. 1973gg-6(d) ("A State shall not remove the name" of an individual from the voting rolls based on change of residence unless certain conditions are met.).

Consistent with this understanding, when Congress intended for portions of the NVRA to refer to both state and local governments, it said so explicitly. See 42 U.S.C. 1973gg(a)(2) (noting that "it is the duty of the Federal, State, and local governments to promote the exercise" of the right to vote); 42 U.S.C. 1973gg(b)(2) (one purpose of the NVRA is "to make it possible for Federal, State, and local governments to implement [the statute] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office"); 42 U.S.C. 1973gg-5(a)(3)(B)(i) (specifying that voter registration agencies may include "State or local government offices"); 42 U.S.C. 1973gg-6(g)(5) (requiring the "chief State election official" to notify "the voter registration officials of the local jurisdiction in which an offender resides" of information received from the federal government about an offender's felony conviction in federal court).

Thus, in drafting the NVRA, Congress plainly knew how to distinguish between state and local governments. Congress's failure to make such a distinction in Section 8 demonstrates it intended to place those responsibilities squarely on the shoulders of the states. Although a state may delegate many of its

NVRA duties to local authorities, the plain language of the statute shows that the state retains ultimate responsibility for ensuring NVRA compliance.

The portion of the NVRA that creates a private right of action bolsters the conclusion that states are ultimately responsible for violations committed by their political subdivisions. With one exception, an aggrieved individual may file suit under the NVRA only if he or she first "provide[s] written notice of the violation to the chief election official of the State involved."[8] 42 U.S.C. 1973gg-9(b)(1). Even then, the aggrieved individual may file suit only if the violation is not corrected within 90 (or, in some cases, 20) days after the state's chief election official receives the written notice. 42 U.S.C. 1973gg-9(b)(2). "The language and legislative history of 42 U.S.C. § 1973gg-9(b) indicate that Congress structured the notice requirement in such a way that notice would provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *ACORN*, 129 F.3d at 838.

Notably absent from this provision is any requirement that private litigants provide notice to local election officials before filing suit. If Congress had not intended a state to be accountable for the NVRA violations of its local subdivisions, Congress likely would have required pre-suit notice to local election officials so that they would have an opportunity to correct alleged violations

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[8] An aggrieved person need not provide pre-suit notice if the alleged violation occurs no more than 30 days before a federal election. 42 U.S.C. 1973gg-9(b)(3).

before facing litigation. By requiring written notice only to the "chief election official of the State," 42 U.S.C. 1973gg-9(b)(1), Congress signaled that states are ultimately responsible for NVRA violations committed by their local election officials, and for fixing those violations.

The legislative history confirms this reading of the statute. The committee reports and floor debate show that Congress considered local election authorities to be *state* officials for purposes of the NVRA if they handle voting registration duties delegated to them by state law. Because they are state officials, their conduct is attributable to the State under the NVRA. The legislative history confirms that the terms "appropriate State election official" and "State election officials" (which appear repeatedly throughout the NVRA, including Section 8) include local election officials. See 42 U.S.C. 1973gg-3(c)(2)(B)(ii) & (E), 1973gg-3(e)(1) & (2), 1973gg-5(a)(4)(A)(iii), 1973gg-5(d)(1) & (2), 1973gg-6(a)(1)(D) & (2), 1973gg-7(b)(1). Both the Senate and House Committee reports on the NVRA emphasized that

> [t]he terms "State election officials" and "appropriate State election official" refer to whatever election official under State law has the appropriate responsibility for the administration of voter registrations and elections. In some cases, *this may be a local election official*.

S. Rep. No. 6, *supra*, at 24 (emphasis added); accord H.R. Rep. No. 9, 103d Cong., 1st Sess. 8 (1993). The committee reports further noted that the term "appropriate State election official" "is intended to mean that official who is authorized under

State law to register voters in the jurisdiction where the registrant resides." S. Rep. No. 6, *supra*, at 28; H.R. Rep. No. 9, *supra*, at 12.

Congressman Swift, the floor manager of the bill in the House of Representatives (see 139 Cong. Rec. 9221 (1993)), reiterated this point during a colloquy on the House floor:

> Mrs. THURMAN. Mr. Chairman, I have a few questions regarding the intent of the bill. As you know, in some States, such as Florida, the elections official with authority to act under this bill would be the local elections official. Do I understand correctly that throughout the bill, the term "State election official" or "appropriate State election official" refers to the official with authority under State law, even if it is a local elections officer?
>
> Mr. SWIFT. Mr. Chairman, if the gentlewoman will yield, as stated in the report, that is the intention of the term.

139 Cong. Rec. 2454 (1993).

As this legislative history illustrates, Congress was well aware that states might delegate some of their NVRA responsibilities to local officials. See 42 U.S.C. 1973gg-6(j) (recognizing that, in some states, "voter registration is maintained by a county, parish, or other unit of government"). But the legislative history also underscores that such local officials are considered agents of the state when carrying out these delegated responsibilities.

2. The State Cannot Rely On The Structure Of Its Government To Insulate It From Liability Under The NVRA

The district court concluded that, under existing state law, statewide officials in Missouri have no authority to control the actions of the local election authorities. Add. 45. Even if the court's interpretation of state law were correct – which it is not, see pp. 44-48, *infra* – that would not absolve the State from liability under the NVRA. To the extent Missouri's current law impedes the ability of the State to fulfill its obligations under the NVRA, that state law must yield to the requirements of federal law.

"[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster*, 522 U.S. at 69 (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 832-833 (1995)). "The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ibid.* (quoting *Ex Parte Siebold*, 100 U.S. 371, 384 (1879)); accord *ACORN*, 129 F.3d at 836 (holding, in an NVRA case, that the Elections Clause "specifically grants Congress the authority to force states to alter their regulations regarding federal elections").

Contrary to the district court's suggestion (see Add. 14), Congress may force states to alter their regulations regarding federal elections without

compensating them for costs incurred in complying with Elections Clause legislation. See, *e.g.*, *Voting Rights Coal.* v. *Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) ("Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its terms intended to be borne by the states without compensation."); *Association of Cmty. Org. for Reform Now* v. *Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) ("Congress can * * * regulate federal elections *and* force the state to bear the expense of the regulation."); accord *ACORN*, 129 F.3d at 837.

Just as Congress has the power under the Elections Clause to place this burden on the states, states have plenary authority to alter the rights and responsibilities of their own localities. Counties and cities "are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon [them] * * * and the territory over which they shall be exercised rests in the absolute discretion of the state.'" *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964) (quoting *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907)); accord *City of Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923) (state may withhold, grant, or withdraw powers from a municipality "as it sees fit"). States must use that authority to the extent necessary to ensure compliance with NVRA obligations placed upon them by Congress.

The district court asserted, however, that "there is nothing in the NVRA to suggest that Congress intended to make the states restructure their governments to comply with the NVRA." Add. 45. The court was mistaken. In enacting the NVRA, Congress recognized that some states might have to change their laws or even amend their state constitutions to comply with their obligations under the federal statute. Congress's intent in this regard is evident in the provision of the NVRA establishing the statute's effective date. Congress set January 1, 1995, as the default date for the NVRA to take effect, but delayed the effective date until at least January 1, 1996, in those states whose constitutions "would preclude compliance with this Act unless the State maintained separate Federal and State official lists of eligible voters." Pub. L. No. 103-31, § 13(1), 107 Stat. 89 (1993). This delay was designed to allow a state "to adopt and place into effect any amendments to the constitution of the State that are necessary to permit such compliance with this Act without requiring a special election." *Ibid.* See also 139 Cong. Rec. 5098 (1993) (statement of Sen. Jeffords) (explaining that Vermont would have to amend its constitution to comply with NVRA). Congress thus plainly envisioned that the NVRA might necessitate significant changes in state

laws.[9] And, indeed in 1994 Missouri amended its election laws precisely to implement the NVRA. See pp. 9-10, *supra*.

The State of Missouri therefore cannot avoid its responsibilities under the NVRA on the ground that its existing laws delegate some voter-registration tasks to local election authorities. To the extent those laws impede the State's ability to comply with the NVRA, they must either be changed or disregarded insofar as they pertain to federal elections.

Several courts have correctly held that states may not avoid liability under federal law by delegating their responsibilities to their local subdivisions. Particularly relevant in this regard is *United States* v. *New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003), which involved a state's liability under Section 7 of the NVRA, 42 U.S.C. 1973gg-5. In *New York*, the issue was whether two state agencies that administered services "through district offices run by local municipal governments" were responsible for ensuring that their local district offices complied with the NVRA. 255 F. Supp. 2d at 74-75. The court in *New York* accepted "that the NVRA does not explicitly require that state agencies ensure NVRA compliance by county or city-run district offices." *Id.* at 79. But it concluded this was irrelevant, as "[i]t would be plainly unreasonable to permit a

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[9] Accordingly, the district court's ruling – that "[a]bsent a clear directive from Congress, the default rule should apply and the [State] should be able to continue its tradition of decentralized elections," Add. 45 – is incorrect.

mandatorily designated State agency to shed its NVRA responsibilities because it has chosen to delegate the rendering of its services to local municipal agencies." *Ibid.* In reaching this conclusion, the court noted that "the burdens that would be imposed upon the Attorney General and those persons seeking enforcement of the NVRA through the private right of action conferred by Congress * * * would be palpable if they had to resort to litigation against multiple local agencies in lieu of holding [state voter registration agencies] fully accountable for compliance with the NVRA." *Id.* at 81. But cf. *Harkless* v. *Blackwell*, 467 F. Supp. 2d 754, 762-767 (N.D. Ohio 2006) (relying in part on the district court's summary-judgment ruling in the present case to hold that Ohio's secretary of state was not liable for violations of Section 7 of the NVRA), appeal pending, No. 07-3829 (6th Cir.).

Other courts have reached similar conclusions under other federal statutes. See *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003) (state cannot avoid its obligations under the Rehabilitation Act by delegating authority to localities to deliver federally funded social services; instead, the state "is liable to ensure that localities comply with the Rehabilitation Act" in delivering those services); *Robertson* v. *Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) ("Although the state is permitted to delegate administrative responsibility for the issuance of food stamps, 'ultimate responsibility' for compliance with federal requirements nevertheless remains at the state level."); *Woods* v. *United States*, 724 F.2d 1444,

1447-1448 (9th Cir. 1984) (same); see also *Stanley* v. *Darlington County Sch. Dist.*, 84 F.3d 707, 713 (4th Cir. 1996) ("Because the Fourteenth Amendment imposes direct responsibility on a state to ensure equal protection of the laws 'to any person within its jurisdiction,' a state's delegation to a political subdivision of the power necessary to remedy the constitutional violation does not absolve the state of its responsibility to ensure that the violation is remedied.").

In addition to ignoring Congress's intent, allowing states to avoid liability under the NVRA by delegating their responsibilities to local officials would significantly impair enforcement of the statute. The 44 states that are presently subject to the NVRA[10] contain a total of 2,851 counties[11] and have more than 5,500 local election jurisdictions responsible for voter registration.[12] Forcing the United States to proceed locality-by-locality in enforcing the NVRA's list-maintenance requirements would severely strain the federal government's resources and inevitably leave many NVRA violations unremedied.

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[10] Six states – Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming – are currently exempt from the NVRA. U.S. Election Assistance Comm'n, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2005-2006* (EAC Report) at 15 & n.6 (2007), available at http://www.eac.gov/docs/EAC_NVRArpt2006.pdf; see 42 U.S.C. 1973gg-2(b) (exempting states from NVRA if they satisfy certain conditions).

[11] See http://www.census.gov/popest/counties/files/CO-EST2006-ALLDATA.csv (U.S. Census Bureau's list of counties in the United States, including parishes in Louisiana and boroughs in Alaska).

[12] See EAC Report, *supra* footnote 10, at 54 (column labeled "Units").

Finally, this Court should reject the district court's rationale because it creates perverse incentives for states to try to circumvent their NVRA obligations. Under the district court's logic, states can avoid most of their NVRA duties simply by delegating them to local election authorities and then structuring their governments so that statewide officials lack authority to compel those local authorities to comply with federal law. This Court should reject an interpretation of the NVRA that would allow states to so easily shirk the duties that Congress imposed upon them.

3. In Its Own Election Code, Missouri Implicitly Recognizes That Local Election Authorities Are State Officials For Purposes Of The NVRA

The wording of Missouri's own election code implicitly recognizes that local election authorities are state officials for purposes of the NVRA. In 1994, Missouri amended its election code to implement the NVRA's requirements, see App. 23-34, and, in doing so, added several provisions that closely track the language of the NVRA. A number of these state statutory provisions equate the term "State election official," which appears repeatedly in the NVRA (see p. 29, *supra*), with "election authority," which Missouri law defines as either a county clerk or a local board of election commissioners. See Mo. Rev. Stat. 115.015, 115.017. Here are some examples:

NVRA	Missouri Election Code
"At each voter registration agency, the following services shall be made available: * * * Acceptance of completed voter registration application forms for transmittal to the *appropriate State election official*." 42 U.S.C. 1973gg-5(a)(4)(A)(iii) (emphasis added).	"At each voter registration agency, the following services shall be made available: * * * Acceptance of completed voter registration application forms for transmittal to the *election authority located in the same county or any city not within a county*." Mo. Rev. Stat. 115.162.2(2) (emphasis added).
"[A] completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate *State election official*." 42 U.S.C. 1973gg-3(e)(1) (emphasis added).	"A completed voter registration application accepted in the driver's licensing process shall be transmitted to the *election authority* [located within the appropriate county or city]." Mo. Rev. Stat. 115.160.6 (emphasis added).
"[A] completed registration application accepted at a voter registration agency shall be transmitted to the appropriate *State election official*." 42 U.S.C. 1973gg-5(d)(1) (emphasis added).	"Voter registration agencies * * * shall transmit voter registration application forms to the appropriate *election authority*." Mo. Rev. Stat. 115.151.3 (emphasis added); accord Mo. Rev. Stat. 115.162.2(3).

NVRA	Missouri Election Code
"In the administration of voter registration for elections for Federal office, each State shall * * * require the appropriate *State election official* to send notice to each applicant of the disposition of the application." 42 U.S.C. 1973gg-6(a)(2) (emphasis added).	"If, upon receipt * * * of a voter registration application * * *, the *election authority* determines that the applicant is not entitled to register, such *authority* shall * * * so notify the applicant by mail and state the reason such authority has determined the applicant is not qualified." Mo. Rev. Stat. 115.155.4 (emphasis added).

These provisions illustrate that Missouri itself considers a local "election authority" to be a "State election official," at least for purposes of the NVRA.

Other provisions of Missouri law confirm that local election authorities are agents of the State. In six of Missouri's jurisdictions (including Kansas City, the City of St. Louis, and St. Louis County), the election authority is the board of election commissioners. App. 36-37 ¶ 8. Missouri's governor appoints election commissioners with the advice and consent of the state senate, Mo. Rev. Stat. 115.027.1, and the governor has authority to remove those commissioners for misconduct. Mo. Rev. Stat. 115.037. In addition, state law prescribes the duties, powers, minimum qualifications, salaries, and terms of office of election commissioners. Mo. Rev. Stat. 115.029-115.035, 115.043-115.049. These statutory provisions provide additional confirmation that county and city election commissioners act on behalf of the State. See *State* v. *Kirby*, 136 S.W.2d 319, 320

(Mo. 1940) (en banc) (concluding, in a case involving the Kansas City Board of Election Commissioners, that "[t]he maintenance of an election board is a state function").

State law also confirms that county clerks, who serve as the election authorities in most Missouri jurisdictions, are state agents. The office of county clerk was created by state statute. Mo. Rev. Stat. 51.010. Although county clerks are elected by the voters of their respective counties, Mo. Rev. Stat. 51.020, state law prescribes the clerks' duties, powers, minimum qualifications, salary, and terms of office. Mo. Rev. Stat. 51.020, 51.050, 51.120-51.165, 51.280-51.282, 51.390, 51.410. State law further mandates that a county clerk "be commissioned by the governor," Mo. Rev. Stat. 51.020, and gives the governor authority to appoint replacements for county clerks who vacate their offices before the end of their terms. Mo. Rev. Stat. 51.090. These statutory provisions provide additional evidence that county clerks perform state functions.

4. Treating Local Election Authorities As State Agents Is Consistent With The Well-Established Principle That Counties And Cities Are Not Sovereign Entities, But Instead, Merely Subdivisions Of The State Created To Carry Out State Functions

"The actions of local government *are* the actions of the State." *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968). Thus, a county or city's handling of voter registration for federal elections is attributable to the State, and NVRA

violations resulting from failures by county or city officials are properly understood as failures by the State.[13]

It is well-established as a general matter that cities and counties are merely subdivisions of state government created for the state's administrative convenience. "Political subdivisions of States – counties, cities or whatever – never were and never have been considered as sovereign entities." *Reynolds*, 377 U.S. at 575. "Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Ibid.*; accord *United Bldg. & Constr. Trades Council* v. *Mayor & Council of Camden*, 465 U.S. 208, 215 (1984); *Waller* v. *Florida*, 397 U.S. 387, 392 (1970). In other words, a city or county "is merely a department of the state." *City of Trenton*, 262 U.S. at 187; see also 56 Am. Jur. 2d

[13] It is for this reason that the United States may, in its discretion, pursue NVRA claims against either the State or one of its localities. In granting partial summary judgment to the State, the district court made much of the fact that the United States previously brought an NVRA claim against the City of St. Louis. Add. 17. But that suit against St. Louis is consistent with the United States' position in this appeal. As noted above, Section 8 of the NVRA imposes duties only on state – not local – governments. Any cause of action against a local government for violation of the NVRA simply reflects the legal status of the locality as a subdivision of the State. In short, the government may elect to sue local governments directly under the NVRA because the local governments are subdivisions of the State, and their violations accordingly are the State's violations. Cf. *Stanley* v. *Darlington County Sch. Dist.*, 84 F.3d 707, 710-711, 717 (4th Cir. 1996) (in seeking remedies for unconstitutional school segregation, plaintiffs had the option of suing the state, the local school district, or both, because the school district was a political subdivision and, hence, an agency of the state).

Municipal Corporations § 2 (2007) ("A county has no inherent or general power, but merely acts as an arm of state government, or as an agent of the state, having been created for administrative convenience.") (footnotes omitted); 20 C.J.S. *Counties* § 1 (2007) ("counties are constituent parts of the state government").

Missouri law is in accord. The Missouri Constitution recognizes existing counties "as legal subdivisions of the state," Mo. Const. Art. 6, § 1, and "[i]t is fundamental" under Missouri law that "a county is but a subdivision of the state, created as a matter of administrative convenience." *Baumli* v. *Howard County*, 660 S.W.2d 702, 705 (Mo. 1983). Consequently, in Missouri, "[a] county is but an agency or arm of the state government." *State* v. *Wilbur*, 450 S.W.2d 458, 459 (Mo. App. 1970) (quoting 20 C.J.S. *Counties* § 1). And this Court, in interpreting Missouri law, has held that a city, "as a political subdivision of the state, cannot exceed the authority granted by the state and must accept the state's election to limit that authority." *XO Missouri, Inc.* v. *City of Maryland Heights*, 362 F.3d 1023, 1027 (8th Cir. 2004) (citing *Missouri ex rel. Kemper* v. *St. Louis, Kansas City, & N. Ry. Co.*, 9 Mo. App. 532, 1881 WL 175, at *3 (1881)). Thus, under both federal and Missouri law, county and city officials are agents of the State when they perform the voter-registration functions delegated to them by state law.

As a result, under the NVRA, a state is liable whenever a local registrar improperly strikes an individual's name from the voter-registration list without

following the safeguards and procedures mandated by the NVRA. The statute provides that a "*State* program or activity * * * shall not result in the removal of the name of *any* person from the official list of voters registered to vote in [a federal election] by reason of the person's failure to vote," except if certain procedures are followed. 42 U.S.C. 1973gg-6(b)(2) (emphasis added). The NVRA further provides that "*[a] State shall not remove* the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless" specified conditions are met. 42 U.S.C. 1973gg-6(d) (emphasis added). Because the State is responsible for its local election authorities' improper removal of names from the voting rolls, the State cannot avoid liability for such removal – as the district court seemed to believe – simply by "mak[ing] a reasonable effort to maintain an accurate voter registration list." Add. 19. Rather, if a voter's name is improperly removed from the voting rolls, the State is legally responsible under the NVRA and must ensure that the individual is restored to the voter-registration list.

Moreover, because the State is responsible for NVRA violations committed by its local election officials, whether the State "conduct[s] a general program that makes a reasonable effort to remove the names of ineligible voters" from the voting rolls on account of death or change in residence, 42 U.S.C. 1973gg-6(a)(4), depends not solely on the actions of the Secretary of State's office, but also on the

efforts of, and the results achieved by, the local election authorities to whom the State has delegated list-maintenance responsibilities. Contrary to the district court's suggestion (Add. 42), the United States is not arguing that a state's efforts are unreasonable simply because they are imperfect or simply because they fail to remove all ineligible individuals from the voting rolls. The evidence in this case reveals far more than mere imperfection; it shows substantial, widespread, and systemic problems with list maintenance in local jurisdictions across the State.

5. *The District Court Erred In Concluding That State Officials Had No Means Under Existing State Law To Ensure NVRA Compliance In Local Election Jurisdictions*

The district court concluded that Missouri law restricted the ability of statewide officials to ensure compliance with the NVRA in Missouri's local election jurisdictions. See Add. 44-45. As explained above, any such state-law restrictions that might exist would not absolve the State from liability under the NVRA. See pp. 31-37, *supra*. The district court thus erred in allowing the State to invoke state law as a defense to the United States' claims under the NVRA.

But the district court's holding is doubly flawed because it is based on a misinterpretation of Missouri law. Contrary to the district court's ruling, state officials in Missouri have a number of options under existing state law to ensure that list-maintenance activities throughout Missouri are carried out in compliance with the NVRA.

First, the district court erroneously concluded that "[u]nder Missouri law, no statewide official can sue the [local election authorities] to make them comply with the NVRA." Add. 45. In fact, the State's attorney general has authority under a number of theories to seek judicial remedies against non-compliant local election authorities.

For example, the state attorney general may seek writs of mandamus to compel local officials to fulfill their duties under state law. See *State* v. *Wade*, 231 S.W.2d 179, 181-183 (Mo. 1950) (en banc) (holding that state attorney general had statutory and common-law authority to seek a writ of mandamus on behalf of the State to compel county officials to comply with their state-law duty to prepare and publish a financial statement). A writ of mandamus is an appropriate remedy under Missouri law to compel local election authorities to fulfill their list-maintenance obligations under the state election code. See *State* v. *McClellan*, 532 S.W.2d 870, 871-872 (Mo. App. 1976) (upholding, in a case involving a private petitioner, a writ of mandamus commanding the St. Louis Board of Election Commissioners to conduct a door-to-door canvass required by state statute).

In addition, under certain circumstances, the state attorney general (1) may obtain a writ of prohibition to prevent a local official from violating state election laws, or (2) may seek a court order removing from office a local official who

willfully neglects to perform his or her public duties. See *State* v. *Alford*, 467 S.W.2d 55, 56-57 (Mo. 1971) (en banc) (issuing writ of prohibition at attorney general's request to prevent a county clerk from placing an ineligible candidate's name on the ballot); Mo. Rev. Stat. 106.220 (providing that county or city officials shall forfeit their offices if they are "guilty of any willful or fraudulent violation or neglect of any official duty"); Mo. Rev. Stat. 106.250 (authorizing attorney general, under certain circumstances, to file a complaint seeking removal of local officials from office); *State* v. *Riley*, 590 S.W.2d 903, 904, 906-907 (Mo. 1979) (en banc) (ordering removal of county sheriff from office under Section 106.220 in response to attorney general's petition); *State ex rel. Nixon* v. *Russell*, 45 S.W.3d 487, 493, 501 (Mo. App. 2001) (upholding removal of county sheriff from office under Section 106.220 in action brought by attorney general).

The State may also bring criminal prosecutions against local election officials who fail to perform the list maintenance required by state law. A failure to comply with the State's election code, including those provisions implementing the NVRA, is a criminal offense under Missouri law. See Mo. Rev. Stat. 115.641 ("Any duty or requirement imposed by sections 115.001 to 115.641 [the election provisions of the Missouri code] * * *, which is not fulfilled and for which no other or different punishment is prescribed, shall constitute a class four election offense."); Mo. Rev. Stat. 115.637(12) (criminalizing an election authority's

willful neglect, refusal or omission to perform "any duty required of him by law with respect to holding and conducting an election").

The State, of course, has authority to enforce its own criminal laws. See *State* v. *Crockett*, 419 S.W.2d 22, 29 (Mo. 1967) ("In a criminal prosecution the accused is charged by the State of Missouri, and the State is not merely a nominal plaintiff.").

Finally, the district court ignored the Secretary of State's authority to conduct list-maintenance activities relating to a local jurisdiction if the local election officials fail to do so. If, for example, a county clerk refused to engage in list maintenance, the Secretary of State's office could use its authority under Mo. Rev. Stat. 115.158 to do its own canvass mailing to individuals registered to vote in that county, could directly send out the required 8(d)(2) notices to individuals whose mailings were returned as undeliverable, and could remove from the statewide voter-registration list the individuals from that county who have died or have disqualifying felony convictions. Such actions are encompassed within the Secretary's responsibility under state law to "develop procedures to ensure that voter registration records within the [statewide computerized] system are accurate and updated regularly" – procedures which must include "[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." Mo. Rev. Stat. 115.158.4. Neither the district court nor the

State has pointed to any provision of Missouri law, and we have found none, that would preclude the Secretary of State from directly performing these list maintenance activities if a local election authority refused to do so.

As far as the record shows, the State never attempted to use any of these available state-law options to bring its local election jurisdictions into compliance with the NVRA. Having failed to take advantage of the tools available to it under existing state law, the State cannot credibly claim that it is powerless to stop NVRA violations by its local election officials.

II

THE DISTRICT COURT ABUSED ITS DISCRETION IN CONCLUDING THAT SURVEY RESPONSES BY MISSOURI'S LOCAL ELECTION AUTHORITIES WERE INADMISSIBLE HEARSAY

A. Standard Of Review

This Court reviews a district court's evidentiary rulings for abuse of discretion. *Mawby* v. *United States*, 999 F.2d 1252, 1254 (8th Cir. 1993).

B. Background

The NVRA requires the federal Election Assistance Commission (EAC) to submit a report to Congress on a biennial basis detailing the statute's "impact * * * on the administration of elections for Federal office" and making recommendations regarding potential improvements. 42 U.S.C. 1973gg-7(a)(3). To assist the Commission in preparing this report, each state must provide the

EAC with information regarding the state's NVRA compliance on a biennial basis. 11 C.F.R. 8.7(a).[14] Under Missouri law, the Secretary of State is responsible for transmitting this information to the federal government. Mo. Rev. Stat. 115.136.2. Missouri's Secretary of State, in turn, compiles this information from survey responses completed by local election authorities. App. 527; Doc. 60 at 19 ¶ 74; App. 811-812 ¶¶ 11-12; App. 481-486; see also Mo. Rev. Stat. 115.145(4) (requiring election authorities to "[r]etain all voter registration records and registration list maintenance records for a minimum of two years," and "compile data from the records as may be necessary for compliance with the [NVRA]").

In presenting its case to the district court, the United States relied in part on survey responses that local election authorities submitted to Missouri's Secretary of State in 2005 (Exhibit A-5; see App. 87-478), and on documents created by the Secretary of State's office that incorporated information contained in the survey responses (Exhibits A-3 and 1-W; see App. 77-82, 598-606).

The district court held that the local election authorities' responses to the 2005 survey were inadmissible hearsay. Add. 29 n.6.[15] The court ruled that the

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[14] This regulation was promulgated by the Federal Election Commission, which originally had responsibility under the NVRA to prepare the biennial reports to Congress. See Pub. L. No. 103-31, § 9, 107 Stat. 87 (1993). Congress later transferred this responsibility to the EAC. See Pub. L. No. 107-252, § 802(b), 116 Stat. 1726 (2002).

[15] The scope of the district court's ruling on this issue is not clear, as the court

(continued...)

survey responses therefore could not be considered for the truth of the information reported in those responses. *Ibid.* Instead, the district court held that the survey responses were admissible only "to show that this information was reported by the LEAs [local election authorities] and to show that, as of March 2005, the Secretary of State was on notice that some LEAs either did not know how to fill out the survey or had made entries that indicate the LEA may not have complied with the list maintenance requirements of the NVRA." *Ibid.*

C. The Survey Responses Were Admissible Under Federal Rules Of Evidence 801 And 803

The district court abused its discretion in ruling that the local election authorities' survey responses could not be introduced to prove the truth of the information reported in these documents. There are at least four separate and independent bases for admitting the documents into evidence.

First, the survey responses and exhibits derived therefrom are not hearsay. The federal rules exclude from the definition of hearsay both party admissions and admissions by a party's agent "made during the existence of the relationship" that

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[15](...continued)
states only that "[t]he data contained in the 2005 survey is hearsay." Add. 29 n.6. This statement obviously encompasses the 2005 survey results contained in Exhibit A-5, but may also include Exhibits A-3 and 1-W as well, as they were derived in part from evidence contained in Exhibit A-5. Accordingly, to the extent this Court determines that the district court abused its discretion in excluding Exhibit A-5, it also should make clear that Exhibits A-3 and 1-W likewise are admissible.

address matters "within the scope of the agency." Fed. R. Evid. 801(d)(2)(A) & (D). As explained in Section I of this brief, localities are political subdivisions of the State, and local election authorities therefore are state officials for purposes of determining NVRA compliance. Thus, their statements constitute party admissions. See *M.K.B.* v. *Eggleston*, 445 F. Supp. 2d 400, 436 & n.18 (S.D.N.Y. 2006) (statements by city employees are admissible against state under Rule 801(d)(2)(D)).

Second, the federal rules also exclude from the definition of hearsay statements adopted by a party-opponent. Fed. R. Evid. 801(d)(2)(B) ("A statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement of which the party has manifested an adoption or belief in its truth"). According to the advisory committee notes, "[a]doption or acquiescence may be manifested in any appropriate manner." Fed. R. Evid. 801 advisory committee's note.

Here, the Secretary of State incorporated information from the local election authorities' survey responses into the State's official report to the federal government. App. 598-606; App. 481-486, 527; Doc. 60 at 19 ¶ 74; App. 811-812 ¶¶ 11-12. Thus, the State plainly adopted the information contained in the survey responses. See *Sea-Land Serv., Inc.* v. *Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (copying and forwarding of content of e-mail message constituted

adoption of original e-mail's content, thereby exempting the content from the definition of hearsay pursuant to Rule 801(d)(2)(B)); *Pilgrim* v. *Trustees of Tufts Coll.*, 118 F.3d 864, 870 (1st Cir. 1997) (official's "acceptance of the contents" of a report and "implementation of its recommendations, without disclaimer, served as an adoption" under Rule 801(d)(2)(B)), abrogated in part on other grounds by *Crowley* v. *L.L. Bean, Inc.*, 303 F.3d 387, 405 (1st Cir. 2002); *Grundberg* v. *Upjohn Co.*, 137 F.R.D. 365, 369-370 (D. Utah 1991) (drug manufacturer's use of clinical reports to seek FDA approval for drug constituted adoption of research contained in reports); *White Indus., Inc.* v. *Cessna Aircraft Co.*, 611 F. Supp. 1049, 1062-1063 (W.D. Mo. 1985) ("There is no doubt that where a party's use of a document supplied by another in fact represents the party's intended assertion of the truth of the information therein, an adoptive admission can be found."); 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* 801.31[3][b] (2d ed. 2007) ("A party may adopt a written statement if the party uses the statement or takes action in compliance [with] the statement.").

Third, even if the survey responses were hearsay, they fall within the public-record exception. "The hearsay exception for public records is based on both the necessity for admitting such records and their inherent trustworthiness." *United States* v. *Enterline*, 894 F.2d 287, 289 (8th Cir. 1990). Both the public-record and business-record exceptions to hearsay "assume[] admissibility in the first instance

and provide[] that the party opposing admission has the burden of proving inadmissibility." *Shelton* v. *Consumer Prod. Safety Comm'n*, 277 F.3d 998, 1010 (8th Cir.), cert. denied, 537 U.S. 1000 (2002). Thus, once the party offering the evidence demonstrates that the requirements of these exceptions are satisfied, "the burden shifts to the party opposing admission to prove inadmissibility by establishing sufficient indicia of untrustworthiness." *Ibid.* See also *Kehm* v. *Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983).

Here, the relevant information contained in the surveys relates to maintenance of the voter rolls, and therefore falls within the first portion of the exception. See Fed. R. Evid. 803(8)(A) (providing exception for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth * * * the activities of the office or agency"). Even if not covered by this portion of the exception, however, the survey responses also are admissible under the following subsection as "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," Fed. R. Evid. 803(8)(B). See Mo. Rev. Stat. 115.145(4) (requiring election authorities to "[r]etain all voter registration records and registration list maintenance records for a minimum of two years," and "compile data from the records as may be necessary for compliance with the [NVRA]"); see also *United States* v. *Dudley*, 941 F.2d 260, 263 (4th Cir. 1991) (forms "used in a number of other contexts by the various

branches pursuant to the record-keeping and oversight responsibilities assigned to the Federal Reserve Bank" were "prepared pursuant to a legal duty," and therefore admissible under Rule 803(8)).

Finally, the survey responses also fall within the business-record exception of Federal Rule of Evidence 803(6). That rule defines "business" broadly to include "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Fed. R. Evid. 803(6). Records created by government employees fall within this definition. See *Shelton*, 277 F.3d at 1010 (laboratory tests performed by government commission held admissible as business records); *United States* v. *Cicero*, 22 F.3d 1156, 1163-1164 (D.C. Cir.) (records held by pretrial services agency fell within business-record exception), cert. denied, 513 U.S. 905 (1994). Deposition testimony indicates that the survey responses represented regular business activity as required by the rule. See App. 480-481; App. 70-71; see also Mo. Rev. Stat. 115.145(4).

Accordingly, the district court abused its discretion in ruling that the survey responses were inadmissible hearsay. This Court therefore should direct the district court to fully admit the challenged exhibits into evidence on remand.

CONCLUSION

The Court should reverse the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief, which was prepared using WordPerfect 12, contains 12,947 words of proportionally spaced text, excluding the "Summary of the Case and Request for Oral Argument," the table of contents, the table of authorities, the certificates of counsel, and the addendum. The type face is Times New Roman, 14-point font.

I also certify that the electronic version of this brief is an exact copy of what has been submitted to the Court in written form. I further certify that this electronic copy has been scanned with the most recent version of Trend Micro Office Scan (version 7.3) and is virus-free.

____

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July 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT, along with a disk containing an electronic copy of the same brief, were served by Federal Express, overnight delivery, on

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I further certify that on July 26, 2007, the original and nine hard copies of the BRIEF FOR THE UNITED STATES AS APPELLANT, along with a disk containing an electronic copy of the same brief, were sent by Federal Express, overnight delivery, to the United States Court of Appeals for the Eighth Circuit.

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Attorney