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

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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INTRODUCTION

The district court ruled that the State of Missouri cannot be held responsible for its local election authorities' violations of Section 8 of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg-6. That holding is erroneous as a matter of law. It is inconsistent with the language, structure, and legislative history of the NVRA, with Missouri's own election code, and with the well-established principle that county and municipal officials are state agents. That legal error infected every aspect of the district court's determination that Missouri

complied with Section 8. For that reason, this Court should reverse the district court's judgment in its entirety.

As the United States explained in its opening brief, local election authorities are *state* election officials for purposes of the NVRA where, as here, the State has assigned voter-registration responsibilities for federal elections to those local authorities. See US Br. 29-30.[1] Those local officials are agents of the State when carrying out the voter-registration responsibilities assigned to them under state law, and thus their violations of Section 8 are violations committed by the State.

Nothing in the State's brief undermines this interpretation of the NVRA. Indeed, as explained below, Missouri's brief simply ignores key portions of the NVRA's language, its legislative history, and the State's own election code — all of which confirm that the United States' reading of the NVRA is the correct one.

The evidence in this case establishes that the State's agents (and, hence, the State itself) violated the list-maintenance requirements of Section 8 of the NVRA. See US Br. 12-19. For example, Missouri's election officials allowed voter-

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[1] This brief uses the following abbreviations: "US Br. __" for the page number of the United States' opening brief; "US Add. __" for the page number of the addendum to the United States' opening brief; "US App. __" for the page number of the United States' appendix; "US Supp. App. __" for the page number of the United States' supplemental appendix; "Mo. Br. __" for the page number of appellees' answering brief; and "Mo. App. __" for the page number of appellees' appendix.

registration lists in several jurisdictions to fall woefully out of date, swelling to the point where they far exceeded the jurisdictions' voting-age population. Indeed, in one Missouri county, the number of people registered to vote in November 2004 was more than 150% of the number of individuals of voting age living in that jurisdiction. US Br. 14-16. Although Missouri may well have made some efforts to comply with the NVRA through training and other efforts, see Mo. Br. 7-15, Missouri's officials themselves have made admissions that prove that the State's efforts fell far short of bringing the State into compliance. As Missouri's Secretary of State conceded, "[c]learly, a problem exists. It defies common sense that we would have more registered voters than people of voting age in any Missouri County." US Br. 15. The State further admitted in July 2006 that 68 of its local election jurisdictions — more than 58% of those in Missouri — "show[ed] no list-maintenance activities." US Br. 16-17. In addition, local election authorities in a number of Missouri counties admitted removing individuals from the voter-registration lists without complying with the procedural safeguards mandated by Section 8 of the NVRA. US Br. 12-14. The State is liable for these widespread and systemic failures to comply with the NVRA's list-maintenance requirements.

ARGUMENT

1. The NVRA's Language, Structure, And Legislative History Make Clear That A State That Assigns Voter-Registration Duties For Federal Elections To Its Local Election Authorities Will Be Liable If Those Local Officials Violate Section 8 Of The NVRA

The State of Missouri is liable for its local election authorities' violations of Section 8 of the NVRA because those local officials are state agents. This conclusion is compelled by the NVRA's language, structure, and legislative history.

a. Each Provision Of The NVRA At Issue In This Case Explicitly Identifies The "State" As The Entity Responsible For Complying With List-Maintenance Requirements

At the outset, it is important to clarify which provisions of the NVRA are at issue in this case.[2] The United States alleges that the State violated five different subsections of the NVRA: Sections 8(a)(4), 8(b)(1), 8(b)(2), 8(c)(2), and 8(d)(1),

[2] Missouri's brief creates considerable confusion on this point. The State initially asserts that "the only issue in the case" is "whether Missouri conducted a general program that made a reasonable effort to remove ineligible voters from the voter registration list," as required by Section 8(a)(4) of the NVRA, 42 U.S.C. 1973gg-6(a)(4). Mo. Br. 13. Later in its brief, the State suggests that subsections 8(a)(3) and 8(a)(4) are the only portions of the NVRA relevant to this appeal. See Mo. Br. 16, 22-24, 27 (discussing 42 U.S.C. 1973gg-6(a)(3) & (4)).

42 U.S.C. 1973gg-6(a)(4), (b)(1) & (2), (c)(2) & (d)(1). See US Supp. App. 8-9 (emphasizing to the district court that the United States was relying on all five of these provisions); US App. 14-20 (Complaint ¶¶ 7-9, 13-16, 22); US Add. 1-4, 12-13 (district court's citation of the relevant statutory provisions and its summary of the United States' allegations).

Each of these five subsections uses the word "State" — not local election authority, local jurisdiction, or local official — to identify the entity responsible for NVRA compliance:

Section 8(a)(4)

In the administration of voter registration for elections for Federal office, each ***State*** shall —

* * * * *

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of —

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section.

42 U.S.C. 1973gg-6(a)(4) (emphasis added).

(chart continued on the next page)

Sections 8(b)(1) & 8(b)(2)

> Any ***State*** program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office —
>
> (1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 *et seq.*); and
>
> (2) 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 that nothing in this paragraph may be construed to prohibit a ***State*** from using the procedures described in subsections (c) and (d) of this section to remove an individual from the official list of eligible voters if [certain conditions are met].

42 U.S.C. 1973gg-6(b)(1) & (2) (emphasis added).

Section 8(c)(2)

> A ***State*** shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

42 U.S.C. 1973gg-6(c)(2)(A) (emphasis added).

Section 8(d)(1)

> 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 [certain procedures are followed].

42 U.S.C. 1973gg-6(d)(1) (emphasis added).

This language makes unmistakably clear that Congress intended to hold *states* responsible for violations of the list-maintenance requirements imposed by these five subsections of the NVRA.

Despite this clear statutory language, Missouri contends that it cannot be held liable for improper removal of registrants from the voter rolls. In support of this argument, Missouri relies on Section 8(a)(3) of the NVRA (see Mo. Br. 23-24), which requires each state to

> provide that the name of a registrant may not be removed from the official list of eligible voters except –
>
> > (A) at the request of the registrant;
> > (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
> > (C) as provided under [Section 8(a)(4)].

42 U.S.C. 1973gg-6(a)(3). Invoking this provision, the State asserts that "the congressionally imposed duty on States with regard to proper removal of registrant names was only to *provide* that they not be removed except as permitted." Mo. Br. 24. The State suggests (Mo. Br. 23-24) that it fulfilled this obligation by enacting legislation that imposes the same restrictions as the NVRA on the removal of registrants' names.

As with the State's other arguments, this one cannot be reconciled with the language of the statute. Sections 8(b)(2) and 8(d)(1) of the NVRA expressly prohibit the "State" from removing registrants' names from the voter-registration lists unless certain conditions are met. 42 U.S.C. 1973gg-6(b)(2) & (d)(1). These provisions impose mandates on the State *in addition to* those set forth in Section

8(a)(3). The State's theory would effectively nullify Sections 8(b)(2) and 8(d)(1), thereby violating "the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 340-341 (1994).

The State also argues (Mo. Br. 16, 24) that it cannot be held liable for NVRA violations committed by its local election authorities because the statutory provisions at issue in this case do not use the word "ensure" in describing the State's obligations. According to the State, the absence of the word "ensure" means that the State has no duty to ensure NVRA compliance by its local election authorities. The State's logic is fundamentally flawed. The relevant portions of the NVRA provide that the "State" either "shall" meet certain requirements or "shall not" engage in certain conduct. 42 U.S.C. 1973gg-6(a)(4), (b)(1), (b)(2), (c)(2)(A) & (d)(1). Because these provisions impose duties directly on the "State," the State is necessarily obligated to ensure its *own* compliance with these statutory mandates. And because a state can act only through its agents, it cannot satisfy its duties under Section 8 of the NVRA unless it ensures that *its own agents* comply with these statutory requirements. As explained below, Missouri's local election authorities are agents of the State for purposes of the NVRA because the State has assigned voter-registration responsibilities to those local officials. As long as

Missouri continues to use those local authorities as its agents, the State will be obliged to ensure that they comply with the duties that Section 8 of the NVRA imposes on the State itself.[3]

b. Local Election Authorities Are "State" Officials Under The NVRA When Carrying Out Voter-Registration Duties Assigned To Them By The State

As the United States explained in its opening brief, local election authorities are *state* election officials for purposes of the NVRA where, as here, the State has assigned list-maintenance responsibilities for federal elections to those local authorities. Local election authorities are agents of the State when carrying out the voter-registration responsibilities assigned to them under state law, and their failures to comply with Section 8 of the NVRA are thus attributable to the State.[4]

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[3] Missouri also emphasizes that states are not authorized to bring enforcement actions under Section 11 of the NVRA, 42 U.S.C. 1973gg-9. See Mo. Br. 16, 30 & n.7. That fact is irrelevant. The United States is not arguing that the State can sue other parties under the NVRA. Instead, the State must ensure its own compliance with the NVRA, an obligation that necessarily includes a duty to ensure that its own agents comply with the statute.

[4] The State erroneously contends (Mo. Br. 37-40) that the United States implicitly conceded that county clerks are not state officials because it obtained declarations from them without first notifying the State's counsel. No such concession can be inferred from the United States' actions. Starting in its answer and continuing consistently throughout this litigation, the State has taken the position that county clerks are not state agents and that it does not control them. See US App. 39-40 ¶¶ 4-5; U.S. Supp. App. 4-5. More to the point, even though the State knew that these declarations were being sought and obtained, it not only

(continued...)

The State's contention to the contrary – that local election authorities are not state agents – contains a fundamental, internal contradiction. Both the State and the district court agree that local election authorities are subject to the list-maintenance requirements of Section 8 of the NVRA and can be held liable for violating those statutory mandates. See Mo. Br. 23, 42 & n.12, 49; US Add. 16-17, 44. But neither the State nor the district court has explained how local election authorities can be liable for violating the list-maintenance requirements if those local officials are not *state* agents. As previously explained, the portions of Section 8 at issue in this case — including the restrictions on removing registrants' names from the voter rolls, see 42 U.S.C. 1973gg-6(b)(2) & (d)(1) — impose requirements only on the "State." If the local election authorities' actions are not those of the "State," then their conduct is not covered by the portions of Section 8 that are at issue in this case. Conversely, if a local authority's conduct violates these provisions of Section 8, that conduct necessarily must be an action of the

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[4](...continued)
declined to assert any right as counsel for the clerks, it flatly told at least one of the clerks that it would not represent her. Mo. App. 347 ¶ 5; US Supp. App. 11-13 ¶¶ 10, 12, 14. In light of the State's conspicuous and consistent litigating position, the fact that the United States did not ask the State, in the summer of 2006, whether it would represent the clerks has no relevance. Of course, the United States received permission from the clerks' attorneys before obtaining their declarations. US Supp. App. 11-13 ¶¶ 9-13, 15.

State. This inconsistency cannot be reconciled in any way that preserves the State's theory.

In any event, the State's position is contrary both to the NVRA's legislative history as well as its plain language. For example, as explained in the United States' opening brief, the Senate and House Committee Reports emphasize that local authorities are "*State* election officials" for purposes of the NVRA if they have responsibility under State law for voter registration in their jurisdictions. US Br. 29-30 (emphasis added) (citing S. Rep. No. 6, 103d Cong., 1st Sess. 24, 28 (1993), and H.R. Rep. No. 9, 103d Cong., 1st Sess. 8, 12 (1993)). Missouri's brief simply ignores this legislative history — indeed, the State's brief fails to even mention the NVRA's legislative history.

Instead of addressing this legislative history, the State relies on Eleventh Amendment case law to argue that local election authorities cannot be state agents. See Mo. Br. 37. Contrary to the State's assertion, the Eleventh Amendment jurisprudence has no relevance here. Outside of the Eleventh Amendment context, the general rule is that "[t]he actions of local government *are* the actions of the State." *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968); see US Br. 40-42. The Supreme Court has emphasized that "the distinction in [its] Eleventh Amendment jurisprudence between States and municipalities * * * is peculiar to

the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity." *Printz* v. *United States*, 521 U.S. 898, 931 n.15 (1997) (refusing to apply the Eleventh Amendment distinction between states and municipalities to "the question of whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment"); see also *Edelman* v. *Jordan*, 415 U.S. 651, 668 n.12 (1974) (explaining that "county action is generally state action for purposes of the Fourteenth Amendment," even though a county defendant is not necessarily a state actor under the Eleventh Amendment). The State's interpretation of the NVRA conflicts with this general principle of federal law. See US Br. 40-42.

The State also relies on Missouri law in arguing that local election authorities are not state agents. This reliance on state law is misplaced for two reasons.

First, Missouri law cannot absolve the State of liability under Section 8 of the NVRA. What matters here is that Missouri's local election authorities qualify as state agents *for purposes of the NVRA*. Consequently, the State would be liable for those local authorities' NVRA violations even if those officials were not considered state agents under Missouri law. To the extent that a conflict exists

between Missouri law and the NVRA, state law must yield to the requirements of federal law. See US Br. 31-34, 44.

At any rate, Missouri law contradicts, rather than supports, the State's position in this litigation. For example, the Missouri election code reflects the understanding that local election authorities are *state* election officials when carrying out voter-registration duties regulated by the NVRA. As the United States explained in its opening brief, the Missouri code equates a "State election official," a term used repeatedly in the NVRA, with a local election authority. See US Br. 37-39. The State's brief simply ignores this fact.

Instead, the State relies on state court decisions interpreting the term "state office" in Article 5, Section 3 of the Missouri Constitution. See Mo. Br. 35-37. Contrary to the State's assertion, this case law is consistent with the conclusion that Missouri's local election authorities are state agents. Missouri's Constitution gives the state supreme court "exclusive appellate jurisdiction in all cases involving * * * the title to any state office." Mo. Const. Art. 5, § 3. In this limited context, Missouri courts interpret "state office" narrowly to mean a position held by a *statewide* officer — one whose duties and functions are co-extensive with the boundaries of Missouri. *State* v. *Olvera*, 969 S.W.2d 715, 716 (Mo. 1998). The

State has an obvious interest in interpreting "state office" narrowly in this context to keep the Missouri Supreme Court's caseload manageable.

This case law does not call into question the general rule, which is well-established under Missouri law, that counties and municipalities are arms of the State. See US Br. 42. Missouri courts have repeatedly recognized that county and municipal officials can qualify as state agents even if they are not "state office[rs]" under Article 5, Section 3 of the Missouri Constitution. For example, even though a city election commissioner is not a "state officer" for purposes of the state supreme court's exclusive jurisdiction, he nonetheless qualifies as "an officer of the state" because he "exercises an important function of the state government" and is "an agent or servant of the sovereign people of the state." *State* v. *Washburn*, 67 S.W. 592, 594 (Mo. 1902).

Similarly, Missouri courts have held that a county prosecutor is an agent of the State even though he or she, like a county clerk, is elected by the voters of a particular county (see Mo. Rev. Stat. 51.020, 56.010), rather than the State as a whole. See *Williams* v. *Armontrout*, 877 F.2d 1376, 1384 n.2 (8th Cir. 1989) (quoting *Williams* v. *State*, 730 S.W.2d 284, 288 (Mo. App. 1987), for the proposition that a "county prosecutor is an agent of the state" whose actions bind the State of Missouri), cert. denied, 493 U.S. 1082 (1990); *State* v. *Crockett*, 419

S.W.2d 22, 29 (Mo. 1967) (in performing his or her official duties, a local prosecutor "is acting for the State"); accord *State* v. *Brandom*, 973 S.W.2d 187, 190 (Mo. App. 1998). This is so, even though a county prosecutor does not meet the narrow definition of "state officer" for purposes of the Missouri Supreme Court's exclusive jurisdiction. *State* v. *Allen*, 250 S.W.2d 348, 350 (Mo. 1952).

2. The State's Interpretation Of 42 U.S.C. 1973gg-6(b), (c), & (d) Directly Conflicts With The NVRA's Language

As an alternative argument, the State contends (Mo. Br. 31-33) that the NVRA requires only that election officials make a "reasonable effort" to comply with the mandates of Sections 8(b), 8(c), and 8(d) of the statute, 42 U.S.C. 1973gg-6(b), (c), & (d). Under the State's theory, the "reasonable effort" language of Section 8(a)(4), 42 U.S.C. 1973gg-6(a)(4), implicitly modifies the requirements of Sections 8(b), 8(c), and 8(d).

The State's interpretation cannot be squared with the NVRA's plain language.[5] See chart, pp. 5-6, *supra*. As previously explained, Sections 8(b), 8(c), and 8(d) mandate that a State either "shall" meet certain requirements or "shall not" take certain action. See 42 U.S.C. 1973gg-6(b)(1) (A "State program or activity * * * *shall* be uniform, nondiscriminatory, and in compliance with the

[5] Contrary to the State's assertion (Mo. Br. 31), the United States challenged this interpretation in its opening brief. See US Br. 43.

Voting Rights Act.") (emphasis added); 42 U.S.C. 1973gg-6(b)(2) (A "State program or activity * * * *shall not* result in the removal of the name of any person" from the voter-registration list "by reason of the person's failure to vote.") (emphasis added); 42 U.S.C. 1973gg-6(c)(2)(A) ("A State *shall* complete, not later than 90 days prior" to a federal election, a program to remove ineligible voters from the voter rolls.) (emphasis added); 42 U.S.C. 1973gg-6(d)(1) ("A State *shall not* remove the name of a registrant" from the voter rolls without following certain procedures.) (emphasis added). None of these mandates speaks of "reasonable efforts."

Contrary to the State's contention (Mo. Br. 31-32), Section 8(a)(4)'s cross-reference to Sections 8(b), (c), and (d) does not support the State's interpretation of the statute. Indeed, the cross-reference means the opposite of what the State asserts. It clearly establishes that the list-maintenance program required by Section 8(a)(4) cannot be construed to alter or set aside the separate and distinct mandates of Sections 8(b), (c), and (d).

The State argues, however, that requiring anything more than a "reasonable effort" to comply with Sections 8(b), (c), and (d) would impose an unrealistic burden on the states. Mo. Br. 31-32. In particular, the State contends that, because election officials are imperfect and make honest mistakes, it would be

unreasonable to hold a state responsible whenever a voter's name is improperly removed from the voter rolls without following the procedural safeguards set forth in Sections 8(b)(2) and 8(d)(1). This argument is meritless.

Although some honest mistakes are likely in any voter-registration system, holding the State responsible for each unlawful removal of a registrant's name is hardly unreasonable. The State's argument ignores the limited nature of the relief available against states under the NVRA. If a court finds a state liable for violating the NVRA, the available remedies are declaratory and injunctive relief — not monetary damages. See 42 U.S.C. 1973gg-9. Thus, the typical court-ordered remedy for an isolated, good-faith mistake in removing a registrant from the voter rolls likely would be an injunction directing the State to restore the individual's name to the voter-registration list. This is hardly an unreasonable burden on the State, particularly when weighed against the potential loss of voting rights that an individual may suffer if his or her name is not restored to the voter rolls.

At any rate, an isolated mistake in removing a registrant's name from the list need not result in litigation at all, because a private litigant typically is not allowed to sue under the NVRA unless he or she gives notice to the State's chief election official and then waits 90 days to give the State an opportunity to correct the

violation. See 42 U.S.C. 1973gg-9; US Br. 28.[6] Thus, when an improper removal of a voter's name is brought to the State's attention, the State typically can avoid a private lawsuit by reinstating the individual to the voter-registration list within the 90-day period. Although the notice requirement does not apply to suits filed by the United States, the federal government's usual practice, which it followed in this case (see US App. 19 ¶¶ 20-21), is to notify a state of alleged violations well in advance of filing suit. This advance notice, combined with the limited nature of the relief available in litigation under the NVRA, ensures that the United States' interpretation will not impose unreasonable burdens on states.

3. The "Plain Statement" Rule Does Not Apply In Construing The NVRA

The State invokes the "plain statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), in defending the district court's flawed interpretation of the NVRA. See Mo. Br. 19-21, 47. This reliance on *Gregory* is misplaced.

To begin with, even if the plain statement rule were somehow relevant to the regulation of federal elections (which it is not), that rule would not support the district court's interpretation of the NVRA. The plain statement rule is merely a

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[6] The NVRA provides exceptions to this 90-day requirement where the alleged violation occurs relatively close to an election. See 42 U.S.C. 1973gg-9(b)(2) & (3).

canon of statutory construction "to be applied where statutory intent is ambiguous." *Gregory*, 501 U.S. at 470. It is not a license to disregard clearly expressed congressional intent. *Salinas* v. *United States*, 522 U.S. 52, 60 (1997). For the reasons set forth above, Congress's intent is clear: States that assign voter-registration duties for federal elections to local election officials are responsible for those officials' violations of Section 8 of the NVRA.

More to the point, *Gregory*'s plain statement rule does not apply here because the NVRA regulates voter registration only for *federal* elections,[7] and the regulation of such elections is not an inherent power reserved to the states. *Gregory* involved the authority of states "to determine the qualifications of their most important government officials" — "a power reserved to the States under the Tenth Amendment." 501 U.S. at 463. It was in that context that the Supreme Court applied the "plain statement rule" (*id.* at 461), a canon of statutory construction under which courts interpret federal statutes to preserve rather than

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[7] The NVRA's language makes clear that it governs only federal — not state — elections. See, *e.g.*, 42 U.S.C. 1973gg(b), 1973gg-2, 1973gg-6. "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." *Association of Cmty. Orgs. for Reform Now (ACORN)* v. *Miller*, 129 F.3d 833, 837 (6th Cir. 1997). "Nothing in the Act prohibits a state from adopting separate registration requirements for the election of state officials." *Ibid.*; accord *Welker* v. *Clarke*, 239 F.3d 596, 599 (3d Cir. 2001).

destroy states' "substantial sovereign powers," absent an "unmistakably clear" expression of congressional intent to alter the "usual constitutional balance between the States and the Federal Government." *Id.* at 460-461.

The NVRA, which was enacted pursuant to the Elections Clause (Mo. Br. 19), does not implicate the states' "substantial sovereign powers." *Gregory*, 501 U.S. at 460. Unlike the states' authority to select their own top officials, see *id.* at 463, the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 802-805 (1995). This is so because federal offices "aris[e] from the Constitution itself." *Cook* v. *Gralike*, 531 U.S. 510, 522 (2001) (quoting *U.S. Term Limits*, 514 U.S. at 805). Thus, "any state authority to regulate election to those offices could not precede their very creation by the Constitution," and "such power 'had to be delegated to, rather than reserved by, the States.'" *Ibid.* (quoting *U.S. Term Limits*, 514 U.S. at 804). Although the Elections Clause delegates certain powers to the states to regulate federal elections, it also explicitly authorizes Congress to supersede or alter a state's federal election regulations "at any time." U.S. Const. Art. I, § 4. Because this case does not implicate any powers reserved to the states by the Tenth Amendment, *Gregory* has no relevance here. See *Association of Cmty. Orgs. for Reform Now (ACORN)* v. *Edgar*, 56 F.3d

791, 796 (7th Cir. 1995) (relying on Elections Clause in concluding that *Gregory*'s plain statement rule did not support state's constitutional challenge to the NVRA).

Nor does *Roberts* v. *Wamser*, 883 F.2d 617 (8th Cir. 1989) (see Mo. Br. 20), support the State's position. In *Roberts*, this Court applied the plain statement rule in construing the Voting Rights Act in the context of state elections. 883 F.2d at 621-623. In invoking the rule, the Court explained that "[a] concern for federalism cautions against the excessive entanglement of federal courts in state election contests." *Id.* at 622-623 & n.16. No such risk exists in construing the NVRA, which, as explained, regulates only *federal* elections.

In short, the federalism concerns at issue in *Gregory* and *Roberts* are simply not present in the arena of federal elections. The plain statement rule is thus inapposite here.

4. The United States' Interpretation Of The NVRA Does Not Violate The Anti-Commandeering Rule Of *New York* v. *United States*

The State asserts (Mo. Br. 43, 46-47) that the United States is trying to force Missouri to bring criminal prosecutions or seek extraordinary writs against its local election authorities — a requirement that the State contends would violate the anti-commandeering rule of *New York* v. *United States*, 505 U.S. 144 (1992). This contention is wrong for two reasons: The State has distorted the United States'

position, and, in any event, *New York*'s anti-commandeering rule does not apply in interpreting the NVRA.

The United States is *not* arguing that Missouri is required to bring criminal prosecutions or seek extraordinary writs against local officials. The United States discussed these options in its opening brief simply to refute the district court's contention that statewide officials in Missouri had no means under existing state law to require local election authorities to comply with their list-maintenance obligations. See US Br. 44-48. If the State prefers not to exercise these state-law powers against recalcitrant local officials, it can choose other options for achieving NVRA compliance in Missouri, such as assigning list-maintenance duties for federal elections to its Secretary of State or other statewide officials. What the State may not do is avoid responsibility for complying with the NVRA by delegating list-maintenance duties to its local election authorities.[8]

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[8] The State incorrectly asserts (Mo. Br. 28) that it has not delegated NVRA responsibilities to its local election authorities. In fact, Missouri's election code provides that "[t]he secretary of state and *local election authorities* shall perform system maintenance on a regular basis, which shall include * * * [r]emoving names in accordance with the provisions and procedures of *the National Voter Registration Act of 1993*." Mo. Rev. Stat. 115.158.2 (emphasis added). Several other provisions of the election code assign list-maintenance responsibilities, including removal of ineligible registrants from the voter rolls, to local election authorities. See, *e.g.*, Mo. Rev. Stat. 115.145(4), 115.179, 115.185, 115.187, 115.189, 115.193.

At any rate, the Supreme Court's decision in *New York* has no relevance here. In that case, the Court invalidated a portion of a federal statute that required states either to regulate radioactive waste under federal guidelines or take title to and dispose of the waste themselves. 505 U.S. at 174-175. The Court held that the statute, which was enacted pursuant to the Commerce Clause, violated the general principle that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161; see also *id.* at 175-176, 178. The Court explained that "[t]he allocation of power contained in the Commerce Clause * * * authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 166.

New York's anti-commandeering rule does not apply in the context of Elections Clause legislation such as the NVRA. See *Branch* v. *Smith*, 538 U.S. 254, 279-280 (2003) (plurality opinion of Scalia, J.) (relying on Elections Clause to distinguish *New York*); see also *id.* at 301-302 (O'Connor, J., concurring in part and dissenting in part) ("the plurality states that the anticommandeering jurisprudence is inapplicable to [the Elections Clause]"). Unlike the Commerce Clause, which was at issue in *New York*, the Elections Clause explicitly authorizes Congress to force states to regulate federal elections on behalf of the federal

government. U.S. Const. Art. I, § 4; *Association of Cmty. Orgs. for Reform Now (ACORN)* v. *Miller*, 129 F.3d 833, 836-837 (6th Cir. 1997); *ACORN* v. *Edgar*, 56 F.3d at 793-795.

5. The United States Is Challenging, In Its Entirety, The District Court's Finding Of No Liability, Including Its Ruling That Missouri Conducted A List-Maintenance Program In Compliance With 42 U.S.C. 1973gg-6(a)(4)

The State incorrectly asserts (Mo. Br. 16-18, 24) that the United States is not challenging the district court's determination that Missouri "conduct[ed] a general program that makes a reasonable effort to remove the names of ineligible voters" from the voter rolls. 42 U.S.C. 1973gg-6(a)(4). The United States is, in fact, contesting that ruling on appeal, as it made clear in its opening brief:

> [B]ecause 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.

US Br. 43-44.

In holding that the State could not be responsible for NVRA violations committed by its local election authorities, the district court made a legal error that fatally infected *all* aspects of the court's judgment, including its ruling that the

State complied with 42 U.S.C. 1973gg-6(a)(4). This Court should thus reverse the district court's judgment in its entirety.

6. The District Court Abused Its Discretion In Excluding As Hearsay The Survey Responses That Missouri Used In Preparing Its Report To The Federal Government

If this Court determines, as argued above, that local election authorities are state agents for purposes of the NVRA, then their survey responses are non-hearsay party admissions that are admissible regardless whether they qualify as adoptive admissions, public records, or business records. See US Br. 50-51. Accordingly, if the Court agrees with the United States on this point, the Court need not address the issues discussed in the remainder of this section.

The arguments presented in the State's brief focus largely on whether the evidence at issue is trustworthy. Mo. Br. 51-52, 54-56. But the issue of trustworthiness is relevant only to determining whether the evidence satisfies the public- and business-record exceptions. Fed. R. Evid. 803(8) & 803(6). It has no bearing on the question whether the evidence constitutes an adoptive admission. Fed. R. Evid. 801(d)(2)(B).

As explained in the United States' opening brief, the local election authorities' survey responses are admissible under Rule 801(d)(2)(B). US Br. 51-52. The State, in effect, adopted the survey responses as its own when the

Secretary of State's office used them to compile a report that the State submitted to the federal government. Although the State asserts that it "affirmatively disclaimed any adoption of the information in the [local election authorities'] survey responses" (Mo. Br. 55), the evidence shows otherwise. The State's report to the federal government contains no disclaimer regarding the accuracy of the information reported. See US App. 598-606.

With regard to the public- and business-record exceptions, the State's primary argument is that the evidence it submitted is not trustworthy. As the party opposing admission, the State bears the burden of establishing the untrustworthiness of the challenged evidence. *AmTrust, Inc.* v. *Larson*, 388 F.3d 594, 600 (8th Cir. 2004). Here, the fact that a small number of local election authorities gave statements contradicting the information contained in their survey responses (Mo. Br. 51 n.15) does not undercut the trustworthiness of those survey responses or render them inadmissible. Such statements affect the weight given to evidence, not its admissibility. See *AmTrust*, 388 F.3d at 599-600 (witness testimony contradicting information contained in documentary evidence did not "establish[] the unreliability of" documentary evidence, as it affected weight rather than admissibility). Accordingly, the survey responses should have been admitted for their truth.

CONCLUSION

For the reasons set forth in this reply brief and in the United States' opening brief, this Court should reverse the judgment of the district court.

Respectfully submitted,

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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 6,210 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that the text of 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.

s/ Gregory B. Friel

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October 18, 2007

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2007, two copies of the foregoing REPLY 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 October 18, 2007, the original and nine hard copies of the REPLY 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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