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

ANDREA BELLITTO and AMERICAN CIVIL RIGHTS UNION, *in its individual and corporate capacities* Plaintiffs, v. **BRENDA SNIPES,** *in her official capacity as the SUPERVISOR OF ELECTIONS of BROWARD COUNTY, FLORIDA* Defendant.	**CASE NO.:** 0:16-CV-61474-BB

1199SEIU UNITED HEALTHCARE WORKERS EAST'S MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24, 1199SEIU United Healthcare Workers East ("1199SEIU") respectfully submits this motion, by and through undersigned counsel, to intervene in the above-captioned case as of right or, in the alternative, with the Court's permission.

As set forth in the accompanying memorandum in support of its motion to intervene, and its Brief in Support of Motion to Dismiss Count I (hereby lodged with the Court as Exhibit 1 hereto), 1199SEIU seeks to dismiss Count I of the Complaint and opposes any requested court-ordered purging of voting rolls in Broward County. For the reasons stated in those papers, no such court-ordered "list maintenance" is appropriate under—much less required by—the National Voter Registration Act ("NVRA"), a federal statute designed to make it *easier* for voters to obtain and maintain their registration to vote.

1199SEIU requests that the Court accept as properly filed its [Proposed] 1199SEIU United Healthcare Workers East Brief in Support of Motion to Dismiss Count I. In the event that the Court grants 1199SEIU's Motion to Intervene and hears argument on the Supervisor's Motion to Dismiss, 1199SEIU requests that 1199SEIU's argument be heard simultaneously.

Should the Court properly dismiss Count I of the Complaint for failure to state a claim for relief under the NVRA, 1199SEIU would no longer seek to participate in the case, unless Plaintiffs were to file an amended complaint again seeking to compel the Supervisor to purge voter registrations or if Plaintiffs appealed the dismissal of Count I.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the movant has conferred with counsel for Defendant and Defendant does not oppose this motion. Counsel for the movant has conferred with counsel for Plaintiffs and Plaintiffs do oppose the motion.

Dated: September 19, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2016 the foregoing was filed via the Court's CM/ECF filing system which will send a notification of filing to all counsels of record listed in the attached service list.

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IN THE UNITED STATES DISTRICT COURT
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ANDREA BELLITTO and AMERICAN CIVIL RIGHTS UNION, *in its individual and corporate capacities* Plaintiffs, v. **BRENDA SNIPES,** *in her official capacity as the SUPERVISOR OF ELECTIONS of BROWARD COUNTY, FLORIDA* Defendant.	**CASE NO.:** 0:16-CV-61474-BB

MEMORANDUM IN SUPPORT OF MOTION TO INTEVENE AND FOR LEAVE TO FILE BRIEF IN SUPPORT OF MOTION TO DISMISS

Proposed intervenor 1199SEIU United Healthcare Workers East ("1199SEIU") seeks to protect the interests of itself and its members and ensure that no voter, including its members, in Broward County has his or her registration improperly or illegally canceled as a result of the Plaintiffs' request for court-ordered voter "list maintenance." No such court-ordered action is appropriate under—much less required by—the National Voter Registration Act ("NVRA"), a federal statute designed to make it easier for voters to become and remain registered to vote. 1199SEIU thus respectfully moves to intervene in this matter and file the attached [Proposed] 1199SEIU United Healthcare Workers East Brief in Support of Motion to Dismiss Count I (Exhibit A hereto), hereby lodged with the Court.

I. 1199SEIU Has a Vital Interest in Protecting Voting Rights and Voter Registration.

1199SEIU is a labor union that is dedicated to empowering workers to have a voice on the job, in their local communities, and in the political process. Declaration of Dale Ewart ("Ewart Decl.") ¶ 1, attached hereto as Exhibit B. 1199SEIU represents approximately 25,000 healthcare

EXHIBIT 1

workers and has an additional 7,400 retired members in the state of Florida. Ewart Decl. ¶ 2. 1199SEIU is committed to ensuring that every Florida citizen, including its members and their families, has the right to vote and the opportunity to exercise that right. Ewart Decl. ¶ 2. 1199SEIU has devoted significant time and resources to making sure its eligible members and their families, co-workers, and community members are registered to vote and remain registered. Ewart Decl. ¶ 2. Thousands of new Florida voters have entered the political process over the past decade a result of 1199SEIU's efforts and support. Ewart Decl. ¶ 2. 1199SEIU plans to continue its efforts to help make sure eligible voters can register and vote in future elections, and these efforts will require the expenditure of staff time and financial resources. Ewart Decl. ¶ 2.

In the past, some of 1199SEIU's members and their families were included on lists of eligible voters to be purged by Florida election officials. Ewart Decl. ¶ 3. For example, during the 2012 election period, 1199SEIU's members were improperly included on lists of voters to be purged in violation of the NVRA.[1] Ewart Decl. ¶ 3. Efforts to purge alleged ineligible voters from the rolls will frustrate 1199SEIU's mission and undermine its efforts to support registration of eligible voters and other voter education activities. Ewart Decl. ¶ 4. Specifically, implementing the untried and potentially unreliable procedures requested by Plaintiffs here would require 1199SEIU to divert resources from its planned voter education activities in order to identify and assist its members and other eligible voters who may have been improperly removed from the voter rolls. Ewart Decl. ¶ 4. 1199SEIU therefore has a strong interest in opposing the aggressive—and potentially unlawful—list-maintenance strategies that Plaintiffs would have the Court order

[1] 1199SEIU was a prevailing party in the litigation that culminated in the Eleventh Circuit's 2014 ruling that the NVRA's prohibition on systematic list maintenance in the 90 days before a federal election forbids the Florida Secretary of State from using data-matching programs to remove alleged noncitizens in that 90-day timeframe. *See Arcia v. Florida Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014); *see also* 52 U.S.C. § 20507(c)(2).

as relief on Count I of the Complaint. Indeed, 1199SEIU has at least as much interest as the Plaintiffs with respect to the relief requested in Count I of the Complaint.

II. The Court Should Grant the Motion to Intervene.

The Court should grant 1199SEIU's Motion to Intervene. As discussed below, 1199SEIU is entitled to intervention as of right because its motion is timely, it has a strong interest in ensuring its members and their communities remain registered to vote and cast a ballot, the methods of list maintenance by Plaintiffs will impede this interest, and the Defendant—an elected public servant with limited resources and a broad constituency—cannot adequately protect this interest. Alternatively, 1199SEIU should be granted permissive intervention because it seeks to preclude this Court from ordering the relief Plaintiffs seek because such relief would potentially violate the NVRA and undermine 1199SEIU's mission. Thus, SEIU's interests in preventing Plaintiffs from prevailing present common questions of law and fact as those presented in the main action. Moreover, intervention will not unduly delay or prejudice the rights of the existing parties.

a. The Court Should Grant the Motion to Intervene as of Right.

Under Federal Rule of Civil Procedure 24, 1199SEIU is entitled to intervene in this action as of right because any resolution of this matter will necessarily impact its interests in ensuring that Broward County's list maintenance activities comply with the NVRA. Rule 24(a) provides in relevant part:

> [o]n timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In the Eleventh Circuit, a party seeking to intervene as of right under Rule 24(a)(2) must show that:

> (1) his application to intervene is timely; (2) he has an interest relating to the property of transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989). If the party establishes that it meets these requirements, "the district court has no discretion to deny the motion." *United States v. Georgia*, 19 F.3d 1388, 1393 (11th Cir. 1994).

1199SEIU easily satisfies the Rule's requirements for intervention as of right under *Chiles v. Thornburgh* because (1) 1199SEIU's motion to intervene is timely in that the case is still in the pleading stage and no discovery has taken place; (2) 1199SEIU has a strong interest in its members' ability to remain registered to vote and cast a ballot; (3) any order concerning the Defendant's list-maintenance activities will necessarily impact both that interest and the ability of 1199SEIU to carry out its mission and absent intervention, 1199SEIU's ability to protect those interests will be impaired; and (4) as a public official subject to numerous competing obligations, the Defendant has interests that do not necessarily align with those of 1199SEIU and therefore she cannot adequately represent its interests.

i. The Motion to Intervene Is Timely.

In assessing the timeliness of a motion to intervene, courts in this circuit consider four factors:

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

United States v. Jefferson Cty., 720 F.2d 1511, 1516 (11th Cir. 1983). The timing requirement "must have accommodating flexibility toward both the court and the litigants" in order to serve the interest of justice. *Chiles*, 865 F.2d at 1213 (quoting *McDonald v. E.J. Lavino Co*., 430 F.2d 1065, 1074 (5th Cir. 1970)). These factors compel a finding that 1199SEIU's motion to intervene is timely.

This case was initially filed by the American Civil Rights Union ("ACRU") and Andrea Bellitto (collectively, "Plaintiffs") on June 27, 2016. After Defendant filed a Motion to Dismiss on July 20, 2016, Plaintiffs filed a First Amended Complaint on August 4, 2016, which was followed by the Defendant's Second Motion to Dismiss on August 18, 2016, approximately one month prior to the filing of this Motion. 1199SEIU moved to intervene as soon as it became clear from Defendant's Second Motion to Dismiss that 1199SEIU's interests would not be adequately represented. 1199SEIU could not reasonably have known what Defendant's defense would be prior to the filing of the Motion to Dismiss. A one-month interval to file a motion to intervene is reasonable and, indeed, is a significantly shorter interval than the filing periods of numerous motions to intervene that have been found timely in this Circuit. *See, e.g.*, *Chiles*, 865 F.2d 1213 (finding timeliness when the motion to intervene was filed "only" seven months after the original complaint was filed, three months after a motion to dismiss was filed, and before discovery had commenced); *Smith Petroleum Service, Inc. v. Monsanto Chemical Co*., 420 F.2d 1103, 1115-16 (5th Cir. 1970) ("[C]ourts have allowed intervention months or even years after the original filing of the suit where the substantial litigation of the issues had not been commenced when the motion to intervene was filed.") (internal quotations omitted).

Second, the existing parties will suffer no prejudice due to the timing of 1199SEIU's motion. In assessing this second factor, "[t]he relevant issue is not how much prejudice would

result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977). Because 1199SEIU has acted promptly in moving to intervene and the case has not yet progressed beyond the initial pleading stage, the existing parties will not be prejudiced. *See NAACP v. New York*, 413 U.S. 345, 365-66 (1973) (stating "the point to which the suit has progressed is one factor" in determining timeliness). Moreover, no other parties have moved to intervene and Defendant's Second Motion to Dismiss has yet to be heard. Indeed, the current case schedule contemplates that new parties may be added by October 31, 2016. Order Setting Trial and Pretrial Schedule, Requiring Mediation and Referring Certain Matters to Magistrate Judge at 2 (Dkt. 20). Intervention will cause no delay in the case and will impose no extra burden on Plaintiffs or Defendant.

Third, as discussed in Section II.a.ii, *infra*, the prejudice to Intervenor would be significant should its motion be denied.

Finally, there are no unusual circumstances militating against intervention. If anything, the fact that the Plaintiffs' requested relief potentially puts at risk the fundamental right to vote favors intervention by 1199SEIU. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

For all the reasons stated above, SEIU's motion is timely.

ii. 1199SEIU Has an Interest in this Case that Will Be Impaired if Broward County's Voting Rolls Are Improperly or Illegally Purged.

For the reasons set forth in the attached Brief in Support of Motion to Dismiss, the interests of SEIU and its members are threatened by the court-ordered "voter list maintenance" that Plaintiffs seek to compel in Count I. The threat is particularly grave because the requested relief could itself violate the NVRA. Any court-ordered action that would result in eligible voters'

registrations being put at risk by unnecessary, improper, or unlawful purges of the voting rolls would directly harm the interests of 1199SEIU and its longstanding efforts to promote and maintain lawful voter registration. As the Eleventh Circuit recognized when it upheld a finding that 1199SEIU had both organizational and associational standing to challenge Florida's list-maintenance procedures, *see Arcia v. Florida Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014), 1199SEIU members throughout Broward County may be put at risk of having their voter registration unlawfully canceled. This potential harm is particularly great in light of the upcoming 2016 General Election.[2] *See id.* at 1339 (holding unlawful Florida's attempt to use various lists to systematically remove ineligible voters within 90 days of a federal election).

iii. The Supervisor May Not Adequately Protect 1199SEIU's Interests.

In determining whether existing parties "adequately represent" the interests of 1199SEIU, "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also* Stone v. *First Union Corp*., 371 F.3d 1305, 1311 (11th Cir. 2004). The Eleventh Circuit has provided guidance on this issue. *See Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir 1989). In *Chiles*, a legislator challenged aspects of a federal facility housing undocumented immigrants. Several parties sought to intervene, including individuals detained at the facility and the county where the facility was located. The Eleventh Circuit reversed the district court's denial of the detainees' motion. The Eleventh Circuit held that even though the interests of two intervenors were similar, their emphases

[2] Plaintiffs' Complaint requests that preliminary relief be granted before the 2016 General Election. Pls.' First Amended Complaint ("Am. Compl."), Prayer for Relief ¶ 5. Implementation of the type of systematic removal activity urged by Plaintiffs before the General Election would violate Section 8(c)(2)(A), which prohibits systematic removal programs conducted within 90 days before a federal election, including those ostensibly designed to remove alleged noncitizens. *Arcia*, 772 F.3d at 1346.

and approaches to the litigation may differ. *Id.* at 1214-15 (*citing Trbovich v. United Mine Workers of America*, 404 U.S. 528, 539 (1972)). The court noted that Dade County may decide not to emphasize the plight of the aliens held at a detention facility, but instead focus on fiscal concerns, and thus would not adequately protect the detainees' interests. *Chiles*, 865 F.2d at 1214.

Plainly, Plaintiffs and 1199SEIU have different views about the interpretation and application of the NVRA. To the extent Plaintiffs have standing to pursue Count I, 1199SEIU has a similar interest in ensuring that the NVRA is properly applied consistent with its intended purpose: to protect (rather than impair) the rights of voters to register to vote and to remain registered so long as they remain eligible.

Defendant's interests and interpretation of the NVRA also may not be aligned with those of 1199SEIU. While 1199SEIU and the Supervisor agree that Count I should be dismissed, their reasons for seeking dismissal are different. For example, the Defendant's Second Motion to Dismiss focuses solely on issues of standing and her responsibility to implement the NVRA. 1199SEIU's Proposed Motion to Dismiss argues that Count I should be dismissed based on Plaintiffs' failure to state a claim under the substantive law, an argument that goes to the core of 1199SEIU's interests and one the Defendant did not address.

In addition, the Supervisor is a public servant with limited resources and broad responsibilities. She has distinct governmental interests—including managing an office, stewarding limited public resources, and running elections—that may affect her approach in defense of this litigation. The interests of 1199SEIU, on the other hand, are focused entirely on the proper interpretation and application of the NVRA and the protection and preservation of the right to vote. This litigation threatens to infringe upon those interests.

Moreover, as an elected official under Fla. Stat. Ann. § 98.015, Defendant Snipes is accountable to all citizens of Broward County, including Plaintiff Bellitto. The Eleventh Circuit has found an elected official's representation of an intervenor's interests to be inadequate—and intervention therefore justified—when the defendant is an elected official representing the interests of all county citizens. *Clark v. Putnam Cty.*, 168 F.3d 458 (11th Cir. 1999); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (holding would-be intervenor's interests not adequately represented by government in part because "the government must represent the broad public interest"); *S. Florida Equitable Fund LLC v. City of Miami, Fla.*, No. 10-21032-CIV, 2010 WL 2925958, at *5 (S.D. Fla. July 26, 2010).

Similarly, "like all elected officials," the Supervisor has an interest in "remain[ing] politically popular and [an] effective leader[]." *Clark*, 168 F.3d at 462 (quoting *Meek v. Metropolitan Dade Cty., Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993)). It may therefore be in the Defendant's political interest to settle this case on terms unfavorable to 1199SEIU's interests or to accede to Plaintiffs' demand for list-maintenance procedures that are not fully compliant with the NVRA and not protective of 1199SEIU's interests.

Finally, the legal interests of 1199SEIU and its members are likely to be impacted by the mediation ordered by this Court, and of negotiations by the parties. *See* Order Setting Trial and Pre-Trial Schedule, Requiring Mediation, and Referring Certain Matters to Magistrate Judge, at 1-2 (Dkt. 20) (requiring mediation to be scheduled by Sept. 21, 2016 and held by Jan. 13, 2017). For example, Plaintiffs believe that this case would be resolved with "a settlement by means of a remedial plan implemented through a consent decree." Joint Scheduling Report and Discovery Plan at 1 (Dkt. 19). Should the Court deny the Motions to Dismiss and fail to allow 1199SEIU to participate in mediation or settlement discussions regarding a potential consent decree, the

outcome of the mediation or discussions could effectively determine the policies and practices that would concretely impact 1199SEIU and its members—without its involvement and input. If a resulting consent decree infringed the rights of 1199SEIU members under the NVRA, those members—or 1199SEIU acting on their behalf—would then be forced to consider a later collateral challenge to the consent decree or to otherwise seek relief against the Defendant.

Moreover, the NVRA specifically provides private aggrieved parties a right of action. 52 U.S.C. § 20510(b). However, if 1199SEIU cannot intervene in this action, the private right of action authorizing a collateral suit may not offer 1199SEIU meaningful relief. If Plaintiffs obtain relief or a court-approved settlement agreement that harms 1199SEIU's interest, the *stare decisis* effect of this Court's action may thwart 1199SEIU in challenging the resolution of the instant case. This practical disadvantage constitutes the prejudice contemplated by Rule 24(a) and supports intervention as of right. *See, e.g. Chiles*, 865 F.2d at 1214. The interests of justice and judicial efficiency mandate that 1199SEIU be made a party in the current proceeding and any negotiated resolution, so these issues may be considered and litigated simultaneously.

As 1199SEIU has satisfied all the requirements for intervention as of right, its motion should be granted.

b. The Court Should Grant Permissive Intervention Because 1199SEIU's Defenses and the Claims and Defenses of the Plaintiffs and Defendant Have Common Questions of Law and Fact.

In the event that the Court finds the requirements for intervention as of right have not been satisfied, the Court should nevertheless allow permissive intervention. Permissive intervention under Rule 24(b) may be granted if a would-be intervenor establishes that the application to intervene was timely and that "the intervenor's claim or defense and the main action have a question of law or fact in common." *Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) (*citing Chiles*, 865 F.2d at 1213).

As discussed above, 1199SEIU's Motion to Intervene is timely and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Additionally, 1199SEIU's defense and the main action both concern the identical legal question—whether the Defendant's list-maintenance activities satisfy the requirements of the NVRA and HAVA. In the attached Brief in Support of Motion to Dismiss, 1199SEIU asks the Court to deny Plaintiffs' the relief requested for Count I because such relief is not required by the NVRA and, indeed, may violate the statute. 1199SEIU's request for dismissal of Count I thus presents the same issues of law and fact that are presented in the main action.

II. CONCLUSION

The Court should grant 1199SEIU's motion to intervene as of right or, in the alternative, for permissive intervention.

Dated: September 19, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2016 the foregoing was filed via the Court's CM/ECF filing system which will send a notification of filing to all counsels of record listed in the attached service list.

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

ANDREA BELLITTO and AMERICAN CIVIL RIGHTS UNION, *in its individual and corporate capacities* Plaintiffs**,** v. **BRENDA SNIPES,** *in her official capacity as the SUPERVISOR OF ELECTIONS of BROWARD COUNTY, FLORIDA* Defendant.	**CASE NO.:** 0:16-CV-61474-BB

[PROPOSED] 1199 SEIU UNITED HEALTHCARE WORKERS EAST'S BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT I

Intervenor 1199SEIU United Healthcare Workers East ("1199SEIU") respectfully submits this Brief in Support of its Motion to Dismiss Count I for the following reasons:

I. INTRODUCTION

Congress passed the National Voter Registration Act of 1993 ("NVRA") to increase opportunities for voter registration and provide greater avenues for electoral participation. 52 U.S.C. § 20501. The NVRA achieves this purpose by regulating state voter-roll maintenance programs and specifically requiring states to maintain accurate voter registration rolls. Maintaining accurate rolls, according to the NVRA, requires not only removing voters who have become ineligible, but also ensuring that voters, once registered, remain on the rolls as long as they continue to be eligible. S. REP. NO. 103-6, at 19 (1993); *see also* H.R. REP. NO. 103-9 (1993), at 18, *reprinted in* 1993 U.S.C.C.A.N. 105, 122. To that end, the NVRA permits states to remove voters from the rolls only for particular reasons and in accordance with particular procedures, which are explained in Section 8. Indeed, the NVRA provides an explicit safe harbor procedure by which states and jurisdictions can comply with Section 8's affirmative list-maintenance

EXHIBIT A

requirements by using information provided by the Unites States Postal Service's National Change of Address Program ("NCOA"). *See* 52 U.S.C. § 20507(c)(1). Defendant is implementing this prescribed procedure. Pls.' First Amended Complaint ("Am. Compl."), Exh. B. Plaintiffs in this case, however, overlook the NVRA's safe harbor. The Plaintiffs instead want the Defendant to exercise her lawful discretion in particular ways, and maintain the rolls by using processes and data that the NVRA does not endorse. In sum, they claim that she is violating the NVRA because she is using her lawful discretion in a manner with which they disagree. Their contention is both false and inadequate to state a claim under the NVRA. Therefore, Count I of Plaintiffs' First Amended Complaint should be dismissed on the grounds set forth in this Brief.[1]

II. STATEMENT OF FACTS

On January 26, 2016, the American Civil Rights Union ("ACRU") sent a letter to Dr. Brenda Snipes, Supervisor of Elections for Broward County, Florida, notifying her that "[Broward C]ounty is in apparent violation of Section 8 of the National Voter Registration Act." Am. Compl., Exh. A. The violation, the ACRU explained, was that the County "has an implausible number of registered voters compared to the number of eligible living citizens," based on "publicly available data from the U.S. Census Bureau." Am. Compl., Exh. A. The letter concluded with a request for information and documents about the County's list-maintenance activities.

On February 3, 2016, Dr. Snipes responded to the ACRU's letter and provided nearly twenty pages of certification statements—documents that each county must submit to the Florida Chief of Voter Registration Services every six months. Am. Compl., Exh. B. These certificates, covering the period from January 1, 2011, to December 31, 2015, indicated that Broward County

[1] 1199SEIU joins Defendant's Motion to Dismiss Count I of the Complaint solely on the grounds stated in this Brief rather than those set forth by Defendant. 1199SEIU takes no position on Defendant's Motion to Dismiss Count II of the Complaint.

used a variety of data sources to maintain its voter registration rolls. Specifically, the certificates demonstrated that Broward County used (1) change-of-address information from the United States Postal Service's NCOA Program *and* (2) targeted, nonforwardable address-confirmation requests returned as undelivered after being sent to registered voters who had not voted or requested an update to their records within the last two years.[2] Am. Compl., Exh. B. Nonetheless, despite the undisputed documentation showing that Broward County was complying with its obligations under the NVRA, the ACRU filed its Complaint against Dr. Snipes, claiming that the County was violating the law.

ACRU filed a First Amended Complaint on August 4, 2016. The Amended Complaint alleges that Broward County's voter roll has "contained either more total registrants than eligible voting-age citizens or, at best, an implausibly high number of registrants," according to "publicly available data disseminated by the United States Census Bureau and the federal Election Assistance Commission." Am. Compl., ¶ 11. Plaintiffs allege that according to the same data, at the time of the 2014 general election, the number of registered voters in Broward County was approximately 103% of Broward County's population of voting age citizens, and at the time of the 2010 general election, the number of registered voters was approximately 106% of the voting-age citizen population. Am. Compl., ¶¶ 11-12. Plaintiffs also allege that Defendant has not undertaken particular list-maintenance activities that Plaintiff would prefer Dr. Snipes pursue, such as using information about persons who allegedly had moved or died provided by private parties, or using jury lists to conduct purges. *See* Am. Compl. ¶¶ 13, 19. Dr. Snipes filed a Motion to Dismiss on August 18, 2016.

[2] Florida's nonforwardable address-confirmation request is distinct from the confirmation procedure outlined in subsection 8(d)(2) of the NVRA. 52 U.S.C. § 20507(d)(2).

On September 19, 2016, Intervenor 1199SEIU United Healthcare Workers East ("1199SEIU") filed a Motion to Intervene as a defendant to protect its members and eligible voters from any unjustified and unlawful purges, and now files its Motion to Dismiss Count I. *See* Mot. of 1199SEIU to Intervene.

III. STANDARD OF REVIEW

"When reviewing a motion to dismiss, a court as a general rule, must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff." *Alhassid v. Bank of America N.A.*, 60 F. Supp. 3d 1302, 1310 (S. D. Fla. 2014). As the United States Supreme Court has stated, Plaintiffs' complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Complaint's well-pleaded facts, however, must demonstrate that a legal violation is not merely possible but plausible. *See American Dental Ass'n. v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009)). Indeed, "[c]ourts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would have the court infer." *American Dental Ass'n*, 605 F.3d at 1290 (internal quotations omitted). Finally, in evaluating a motion to dismiss, a court may consider documents attached to the complaint. *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997) ("the analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto").

IV. VOTER ROLL MAINTENANCE UNDER THE NVRA

Although the NVRA requires election officials to ensure that a reasonable effort is made to remove ineligible voters from the registration rolls, *see* 52 U.S.C. § 20507(a), the statute provides that election officials cannot remove the names of registrants except in a few enumerated circumstances:

- If the registrant requests to be removed;
- If the registrant is convicted of a crime or adjudicated mentally incompetent, and state law prevents such individuals from voting;
- If the registrant has died; or
- If the registrant's residence has changed, *and*
    - The registrant confirms in writing that she has changed residence to a place outside the registrar's jurisdiction (i.e., the county), or
    - The registrant fails to respond to written notice from the registrar *and* fails to vote in any election in the subsequent period that includes two general Federal elections.

With these strictures in place, the NVRA requires election officials to "conduct a general program" for roll maintenance to remove voters who have moved or died. 52 U.S.C. § 20507(a)(4). The NVRA gives officials discretion to use a variety of databases or procedures to identify voters who are believed to be ineligible. It provides clear guidelines that set the floor: any roll-maintenance program must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act . . . ." 52 U.S.C. § 20507(b)(1). Additionally, the NVRA expressly provides that list-maintenance programs cannot result in the removal of any registrant due to the person's failure to vote.[3] *Id.* § 20507(b)(2). Beyond that, however, election officials have discretion to use certain data sources while choosing not to use others.

The NVRA also identifies what the Department of Justice has called a "safe harbor program," which, by the statute's own terms, will fully satisfy the law's requirement that election officials conduct a "general program" to remove voters who have become ineligible because they have moved. Specifically, subsection 8(c) allows states to use NCOA data, provided by the United States Postal Service, to identify registrants who may have changed residence. 52 U.S.C.

[3] This limitation does not prohibit the use of failure to vote as part of the statutory waiting period after a compliant change-of-address notice, as described in 52 U.S.C. § 20507(d)(2), is sent based on appropriate grounds. 52 U.S.C. § 20507(b)(2).

§ 20507(c)[4]; *see also* U.S. Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)" ¶ 33, *available at* https://www.justice.gov/crt/national-voter-registration-act-1993-nvra. Once an election official has reason to believe a voter has moved based on data from the NCOA program, the official must follow the precise procedure described in subsection 8(d). Under that process, the election official sends a postage pre-paid notice, by forwardable mail, to the voter. Unless the voter responds to the notice confirming that she has moved, the election official *cannot* remove the voter from the registration rolls until two general federal elections have passed in which the voter has neither responded nor voted. This protective procedure necessarily requires that a voter who has not affirmatively notified the Supervisor of Elections that she has moved will remain on the registration rolls until the mandatory waiting period has passed.

If the election official uses NCOA data as a basis for identifying voters who may have moved, the requirements of Section 8(a)(4) are satisfied: By the express terms of Section 8(c), this process is sufficient to comply with the NVRA's mandate to identify and remove voters who have moved outside the jurisdiction; the state need take no other action to remove voters who may have moved.[5] *See* 52 U.S.C. § 20507(c)(1); *see also Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1020 (D. Neb. 2000) ("[T]he general program for maintaining voter registration lists must include

[4] Section 8(c)'s "safe harbor provision" provides that, "A State may meet the requirements of subsection (a)(4) by establishing a program under which . . . change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose address may have changed" and, for registrants who may have moved to a different jurisdiction, the registrar may use the confirmation mailing procedures in subsection (d)(2) to confirm the change. 52 U.S.C. § 20507(c)(1).

[5] While not required, states may use additional or alternative processes to identify voters who may have moved, and many states do. U.S. Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)" ¶34, *available at* https://www.justice.gov/crt/national-voter-registration-act-1993-nvra. For example, as discussed above, in addition to NCOA information, Broward County uses mail returned as undeliverable to identify voters who no longer reside at their registered address. Regardless of whether NCOA or other reliable information is used, a state must still comply with Section 8(d)'s notice-and-waiting period procedure to confirm any change in residence.

a process for removing the names of persons who have moved. A state begins this process by mailing a notice to all persons believed to have moved. Either [NCOA] information from the post office, or the results of a mass mailing to all registered voters, can serve to identify persons believed to have moved.").

This procedure serves to protect eligible citizens from losing their right to vote and seeks to ensure that as long as voters remain eligible, they are able to remain registered and vote.

V. PLAINTIFFS' COUNT I FAILS TO STATE A CLAIM UNDER THE NVRA.

The Plaintiffs' unsubstantiated assertion that there are too many voters on the Broward County rolls and Plaintiffs' contention that the Defendant's failure to, *in her discretion*, use additional—but not required—data to regulate the registration lists are insufficient to state a claim for relief under the NVRA.

As described above, the NVRA explicitly provides that the use of NCOA information satisfies the roll-maintenance requirement. 52 U.S.C. § 20507(c). Documentation from the Plaintiffs' own Complaint demonstrates that Broward County uses NCOA information to maintain the voter registration rolls. *See* Am. Compl., Exh. B (demonstrating that Broward County used NCOA information to conduct roll maintenance as recently as 2015). This fact alone defeats Plaintiffs' claim that a legal violation has occurred. *See* 52 U.S.C. § 20507(c)(1). Moreover, the County engages in an additional mechanism—not required, but permitted by the NVRA—in which it seeks to identify voters who *may* have moved by sending a nonforwardable confirmation

request.[6] Am. Compl., Exh. B (demonstrating that Broward County conducted an additional roll-maintenance process in 2015).

Despite these activities, Plaintiffs erroneously contend that Dr. Snipes' legally permissible choice not to use certain data that they would prefer she use amounts to a "fail[ure] to make reasonable efforts to conduct voter list maintenance programs, in violation of Section 8 of the NVRA." Am. Compl. ¶ 28. As proof, Plaintiffs allege that Dr. Snipes "undertakes absolutely no effort whatsoever to use data available from the Broward County Circuit Court Clerk obtained from jury excusal forms," which, Plaintiffs claim, would identify "numerous Broward County residents who self-identify, under oath, that they are non-citizens or non-residents of Broward County." Am. Compl. ¶ 19. But the NVRA's mandate does not require Dr. Snipes to consult such data. In fact, the "general program" described in Section 8(a)(4), 52 U.S.C. § 20507(a)(4), is intended to identify and remove registrants who have died or who have become ineligible due to change of residence. Jury excusal forms are not mentioned in the NVRA, are not required by the statute, and simply do not serve such purpose.

Similarly, Plaintiffs' claim that Defendant has failed to act on reliable information provided to her about registered voters who may have died or moved, Am. Comp ¶ 13, does not allege an NVRA violation. There is no requirement to use any particular set of information to conduct voter roll maintenance. In addition, use of such information may actually *violate* the NVRA if removals are undertaken without adherence to the requirements of Sections 8(b), (c) and (d). For example, Defendant could not simply remove any registered voters without sending the required statutory notice and waiting the prescribed two election cycles as the Plaintiffs suggest, nor could Defendant

[6] As noted above, this mechanism is separate and distinct from the confirmation notice required by subsection 8(d)(2) of the NVRA. 52 U.S.C. § 20507(d)(2).

undertake a removal program that was not uniform and nondiscriminatory. *See* 52 U.S.C. § 20507(b)(1), (d).

Plaintiffs also claim that data from the U.S. Census Bureau and U.S. Election Assistance Commission indicate Broward County's voter roll has "contained either more total registrants than eligible voting-age citizens or, at best, an implausibly high number of registrants." Am. Compl., ¶ 11. Plaintiffs allege that according to the same data, at the time of the 2014 general election, approximately 103% of the citizens of voting age were registered to vote, and at the time of the 2010 general election, approximately 106% of voting-age citizens were registered. Am. Compl., ¶¶ 11-12. But this oversimplified conclusion completely disregards the procedural safeguards inherent in the two-election-cycle waiting period that Congress imposed.

The NVRA is designed to restrict and slow the removal of voters from the rolls, specifically to ensure that eligible voters are not improperly disenfranchised. Under the NVRA, when a registrant moves out of Broward County, unless that registrant either (1) explicitly requests, in writing, to be removed from the rolls, 52 U.S.C. § 20507(a)(3)(A), or (2) responds to the written notice sent by the Supervisor confirming that they no longer reside in Broward County, § 20507(d)(1)(A), the registrant cannot be removed from the official list of eligible voters for two federal general elections after the date of the notice, § 20507(d)(1), a period of anywhere from just over two to four years after the notice is sent.

Thus, it is entirely plausible, if not likely, that the number of registrants could *exceed* the eligible voting age population in a jurisdiction with high voter participation and a relatively transient population. Such a situation could just as easily be the result of compliance with the NVRA as a supposed violation. As one court explained, "The NVRA makes it inevitable that voter registration lists will be inflated because of its requirement that States wait to remove a

voter's name who has not responded to an 8(d)(2) notice until that voter fails to vote in two successive federal elections." *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *4 n.7 (W.D. Mo. Apr. 13, 2007), *aff'd in part, rev'd in part and remanded*, 535 F.3d 844 (8th Cir. 2008). This is exactly the kind of "obvious alternative explanation[], which suggest[s] lawful conduct rather than the unlawful conduct the plaintiff would have the court infer." *American Dental Ass'n*, 605 F.3d at 1290 (internal quotations omitted). Stopping short of the line between possibility and probability, Plaintiffs' Amended Complaint simply does not comprise a "plain statement" possessing enough heft to "sho[w] that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557.

VI. COUNT I FAILS TO STATE A CLAIM UNDER HAVA

Plaintiffs also claim a violation of the Help America Vote Act ("HAVA"), Am. Compl. ¶¶ 8, 28-29, pointing to its requirement that local officials perform computerized list maintenance on a regular basis. 52 U.S.C. § 21083(a)(2)(A). However, removal of registrants is governed by the NVRA, as HAVA expressly recognizes. 52 U.S.C. § 21083(a)(2)(A)(1) ("If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act."). As explained above, the Plaintiffs cannot plausibly claim that the Defendant's actions constitute a violation of the NVRA. And because HAVA defers to the NVRA, there is thus no violation of HAVA.

VII. CONCLUSION

For the reasons stated above, the Court should dismiss Count I for failure to state a claim

Dated: September 19, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2016 the foregoing was filed via the Court's CM/ECF filing system which will send a notification of filing to all counsels of record listed in the attached service list.

/s/ Kathleen Phillips
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 0:16-cv-61474

ANDREA BELLITTO and
AMERICAN CIVIL RIGHTS UNION,
in its individual and corporate capacities,

Plaintiffs,

BRENDA SNIPES, in her official capacity
as the SUPERVISOR OF
ELECTIONS of BROWARD COUNTY,
FLORIDA,

Defendant.

DECLARATION OF DALE EWART

I, Dale Ewart, declare as follows:

1. I am the Assistant Regional Director of the Florida Region for 1199SEIU United Healthcare Workers East (1199SEIU), a labor union that is dedicated to empowering workers to have a voice on the job, in their local communities, and in the political process. I have personal knowledge of the facts set forth below, and, if called as a witness, could and would testify competently to those facts.
2. 1199SEIU represents about 25,000 healthcare workers, and an additional 7,400 retired members, in the state of Florida. A significant number of those members and their families reside in Broward County. 1199SEIU is committed to ensuring that every Floridian citizen, including its members and their families, can register to vote and has the opportunity to exercise their right to vote. 1199SEIU has devoted significant time, energy, and resources to making sure its members and their families, co-workers, and

EXHIBIT B

community members have the information they need in order to register to vote and to keep their registrations current. As a result of 1199SEIU's efforts and support, thousands of new voters have entered the political process in Florida during the past decade. As over half of 1199SEIU's membership is minority, our voter education efforts include focusing on the importance of registering to vote and educating eligible voters from underrepresented minority groups on how, when and where to register. 1199SEIU plans to continue its efforts to help make sure that eligible voters can register for and vote in future elections. These efforts require the expenditure of staff time and financial resources.

3. Some of 1199SEIU's members and members of their families were included on prior lists of eligible voters to be purged by Florida election officials. These members included eligible voters like Melande Antoine and Karla Vanessa Arcia, who along with 1199SEIU itself, were named plaintiffs in an action brought under the National Voter Registration Act challenging voter purge policies and procedures to be implemented by Florida election officials. Arcia, et. al. v. Detzner, 772 F.3d 1335 (11th Cir. 2014).

4. Efforts to purge alleged non-citizens or other alleged ineligible voters from the voter rolls will frustrate 1199SEIU's mission and undermined its efforts to support the registration of eligible voters and to conduct other voter education activities. This is particularly true where election officials may be pressured to adopt untried and unreliable criteria and procedures, such as those advocated by the Plaintiffs in this action, for purging otherwise eligible voters from the voting rolls in order to resolve costly and disruptive litigation. Adopting such untried and potentially unreliable procedures as a result of this lawsuit will require 1199SEIU to divert resources from its

planned voter education activities and support for voter registration efforts in order to identify and assist its members and other eligible voters who have been improperly purged from the voter lists.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed in Miami, Florida on September 9, 2016.

Dale Ewart