No. 22-13708

**UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

GREATER BIRMINGHAM MINISTRIES,
*Plaintiff-Appellee*,

v.

SECRETARY OF STATE FOR THE STATE OF ALABAMA,
*Defendant-Appellant*.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:22-cv-00205-MHT-SMD

# SECRETARY OF STATE'S OPENING BRIEF



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January 11, 2023

## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5, the undersigned counsel certifies that the following listed persons and entities may have an interest in the outcome of this case:

1. Alabama Attorney General's Office;
2. Alabama Secretary of State's Office;
3. Bowie, Blair;
4. Campaign Legal Center;
5. Davis, James W.;
6. Doyle, Hon. Stephen M.;
7. Gaber, Mark P.;
8. Greater Birmingham Ministries;
9. Huling, Alice;
10. Kallon, Hon. Abdul K.;
11. LaCour Jr., Edmund G.;
12. Lang, Danielle;
13. Lapinig, Christopher;
14. McGuire & Associates LLC;
15. McGuire, Joseph Mitchell;

16. Marshall, Hon. Steve;

17. Merrill, Hon. John H.;

18. Messick, Misty S. Fairbanks;

19. Richardson, Valencia;

20. Seiss, Benjamin M.; and,

21. Thompson, Hon. Myron H.

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

Respectfully submitted this 11th day of January 2023.



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## STATEMENT REGARDING ORAL ARGUMENT

This case presents multiple questions of statutory interpretation that are matters of first impression for this Court. The questions regard a provision of National Voter Registration Act, 52 U.S.C. § 20507(i), which has been the subject of an increasing number of lawsuits in the last decade. The answers to these questions have the potential to impose substantial costs on State election officials and result in broader dissemination of voter records. Oral argument will assist the Court in deciding these important questions of federal law.

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## STATEMENT OF JURISDICTION

Pursuant to § 20507(i) of the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501 *et seq*., Greater Birmingham Ministries requested from the Secretary of State electronic lists of categories of people based on data extracted from specified records within the State's voter registration system, PowerProfile. Docs. 1 & 35.[1] The district court exercised jurisdiction pursuant to 52 U.S.C. § 20510(b) and 28 U.S.C. § 1331. Doc. 90 at 2.

On October 4, 2022, the district court ruled for GBM and entered judgment enjoining the Secretary to "forthwith" produce "three categories of records[.]" Doc. 91. The judgment said that it was final but provided the parties time "to reach an agreement as to the reasonable fee for the records ... based on the actual costs that [the Secretary] incurs in their production to [GBM]." Doc. 91 at 3. Absent agreement, the court would order briefing and determine the fee. Doc 90 at 26.



With the fee issue not yet resolved, the issue arose whether the district court's order was final because "[a] final judgment is 'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Riley v. Kennedy*, 553 U.S. 406, 419 (2008) (footnote omitted) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). While this Court has recognized that ministerial

[1] "Doc." refers to entries on the district court's docket. "App." refers to entries on this Court's docket.

calculations do not prevent a judgment from being final, *Turner v. Orr*, 759 F.2d 817, 820 (11th Cir. 1985), the issue here was not so clear cut, as reflected in the district court's recognition of the potential need for additional briefing, doc. 90 at 26.[2] That the court labeled the judgment final is not controlling. *Riley*, 553 U.S. at 419.

After complying with the court's judgment and without waiving his legal arguments, the Secretary offered information relevant to setting the fee and asserted that "$429.17 in staff costs fit within the Court's narrow definition of 'reasonable costs[,]'" while his vendor's fees did not because the vendor had elected not to charge him. Doc. 95 at 5-9; *see also* docs. 95-1 & 95-11. Simultaneously, the Secretary moved for an expedited ruling. Doc. 95. The district court denied the motion, doc. 98, and the Secretary timely noticed his appeal on October 31, 2022, doc. 100; *see also* Fed. R. App. P. 4(a)(1)(A).



This Court had jurisdiction over the appeal of the October injunction pursuant to 28 U.S.C. § 1292(a)(1). *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1127 (11th Cir. 2018); *Birmingham Fire Fighters Ass'n 117 v. City of Birmingham*, 603 F.3d 1248, 1254 (11th Cir. 2010).

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[2] *Cf. Catlin*, 324 U.S. at 233 ("[O]rdinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership *and just compensation*, as well as the right to take the property." (emphasis added)).

Thereafter, GBM agreed to pay the $429.17. Doc. 109. The parties notified the court, *id.*, and the Secretary requested a final judgment, *id.* at 2. When GBM paid the fee, the Secretary filed a notice and moved for entry of final judgment. Doc. 112.

On December 5, 2022, the district court entered final judgment. Doc. 113. At that point, the October judgment merged into the final judgment, depriving this Court of jurisdiction over the original appeal. *Birmingham Fire Fighters Ass'n 117*, 603 F.3d at 1254-55; *Burton v. Georgia*, 953 F.2d 1266, 1272 n.9 (11th Cir. 1992) ("Once a final judgment is rendered, the appeal is properly taken from the final judgment, not the preliminary injunction.").



Two days later, on December 7, 2022, the Secretary timely appealed. Doc. 114; *see also* Fed. R. App. P. 4(a)(1)(A). This Court treated the second notice of appeal as an amended notice and docketed it in the original appeal. App. 19. This Court has jurisdiction over the appeal of a final judgment pursuant to 28 U.S.C. § 1291. Jurisdiction exists here either because the December judgment was final, or the October judgment was.

Finally, while the Secretary complied with the district court's judgment, the appeal is not moot because this Court can provide relief to the Secretary. As to the fees issue, the Secretary's fee for the list responsive to the Purged Voters Request would have been more than the $429.17 GBM paid for all three lists. *Compare* doc. 95 at 5, *with* doc. 109 at 1. This Court can provide relief by ordering GBM to pay

the Secretary's fee (minus a credit for $429.17). Thus, the Secretary—who accepted the payment "without waiver of his right to additional payment should he prevail on appeal," doc. 109 at 2; *see also* doc. 95 at 10 n.4—still has "a legally cognizable interest in the outcome" of this appeal. *Crown Media, LLC v. Gwinnett County*, 380 F.3d 1317, 1324 (11th Cir. 2004); *cf. id.* at 1325 (claims for damages may prevent a case from becoming moot).

Additionally, this Court can "effectuate a partial remedy by ordering" GBM "to destroy or return any and all copies of the" lists "still in its possession." *Ala. Disabilities Advoc. Program v. J.S. Tarwater Dev. Cir.,* 97 F.3d 492, 496 (11th Cir. 1996) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992)). This is sufficient to avoid mootness. *Id.*



Alternatively, the "capable of repetition, yet evading review" exception to mootness applies, particularly given that the district court demanded immediate compliance due to the then-impending election, doc. 91 at 1 ("forthwith"); *see also* doc. 90 at 25 ("immediately"). *See Ala. Disabilities Advoc. Program*, 97 F.3d at 496 n.1; *see also Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Hall v. Sec'y of State,* 902 F.3d 1294, 1297-1305 (11th Cir. 2018).

This Court has jurisdiction to reach the merits of this appeal.

## STATEMENT OF THE ISSUES

The NVRA includes detailed instructions for a "program" States must conduct to ensure that voters who are no longer eligible to remain on voting rolls due to death or change of residence are removed from the rolls. For "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," the State must "maintain the records at least 2 years," "make [them] available for public inspection," and "where available," provide for "photocopying at a reasonable cost." GBM alleges that the NVRA also requires the Secretary of State to provide electronic disclosure of voting records and that his offer outside the context of the NVRA to provide records for a fee of one cent per name does not satisfy the NVRA's "reasonable cost" requirement. GBM further demands felon records over the Secretary's objection. The questions presented in this appeal are:



Does the NVRA require States to make available electronic copies of records? If not, GBM's entire case fails.

If so, does the Secretary of State's fee of one cent per name constitute a "reasonable cost"?

Additionally, do the felon records fit within the "programs and activities" referenced in § 20507(i)(1)?

Alternatively, does the requirement to "maintain" records require a State to create new felon records from data in a State's possession?

## STATEMENT OF THE CASE

### A. Statutory Background.

Congress enacted the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501 *et seq*., to encourage voter registration while "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained," 52 U.S.C. § 20501(b). Congress's "twin objectives—easing barriers to registration and voting, while at the same time protecting electoral integrity and the maintenance of accurate voter rolls—naturally create some tension." *Bellitto v. Snipes*, 935 F.3d 1192, 1198 (11th Cir. 2019). "The NVRA, with its carefully balanced objectives, is paradigmatic of legislation aimed at maximizing competing social values." *Id.* at 1201.



To encourage voter registration, the NVRA requires States to incorporate an opportunity to register to vote into the driver license process, 52 U.S.C. § 20504, to accept a federal voter registration application by mail, *id.* § 20505, to make voter registration available through designated agencies, *id.* § 20506, and to timely register

eligible applicants, *id.* § 20507. A federal agency develops the mail-in form in consultation with the States. *Id.* § 20508(a)(2).[3]

To ensure more accurate and current voter rolls, § 20507 "requires the states regularly to conduct maintenance on its voter registration lists, removing certain ineligible voters," *Bellitto*, 935 F. 3d at 1196. Specifically, States must "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 a registrant ...." 52 U.S.C. § 20507(a)(4). Subsections (b), (c), and (d) specify certain restrictions on such State programs and identify certain steps a State may take to implement its program.



For a State seeking to remove names of registrants from the official voter list due to change in residence, subsection (d)(2) sets forth requirements for the notice States must first provide registrants who have not confirmed in writing that they have changed their residence. The State must send "by forwardable mail" "a postage prepaid and pre-addressed return card ... on which the registrant may state his or her current address," with notice that if the card is not returned and the registrant does not vote in the next two "general election[s] for Federal office that occur[] after the

[3] Initially, the agency was the Federal Election Commission, doc. 79-1 at 157; now it is the Election Assistance Commission, 52 U.S.C. § 20508.

date of the notice," the "registrant's name will be removed from the list of eligible voters." *Id.* § 20507(d)(2)(A).

Section 20507 also recognizes that change of address and death are not the only reasons for removing a voter from the voting rolls. Subsection 20507(a)(3) recognizes that the States may remove voters at their request and "as provided by State law, by reason of criminal conviction or mental incapacity[.]"[4] Subsection (g) supports the States' efforts in removing felons by requiring the United States Attorneys to give written notice of federal convictions to State election officials. While the NVRA requires that any "program" to "systematically remove the names of ineligible voters from the official lists of eligible voters" be completed at least 90 days before a federal primary or general election, 52 U.S.C. § 20507(c)(2)(A), States may still remove voters from the rolls within that window based on the voter's request, a disqualifying criminal conviction, mental incapacity, or death, *id.* § 20507(c)(2)(B(i).



Subsection 20507(i) imposes three requirements on States related to "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." *Id.* § 20507(i)(1). First, "[e]ach State shall maintain" such records "for at least two

[4] In Alabama, felonies involving moral turpitude are disenfranchising while other felonies are not. Ala. Const. art. VIII, § 177; *see also* Ala. Code § 17-3-30.1.

years." *Id.* Second, each State "shall make" such records "available for public inspection." *Id.* And, third, each State shall, "where available," make such records "available for … photocopying at a reasonable cost." *Id.* The provision specifies that these "records … shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made." *Id.* § 20507(i)(2). And it specifically excludes "records" that "relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered." *Id.* § 20507(i)(1). This exclusion is consistent with other portions of the NVRA, which require that these records not be disclosed. *Id.* § 20504(b) & (c)(2)(D)(ii)-(iii); *id.* § 20506(a)(7); *id.* § 20507(a)(6); *id.* § 20508(b)(4)(ii)-(iii).



After Congress enacted the NVRA, the Federal Election Commission issued a guide for the States. Doc. 79-1. It includes some legislative history, which as to § 20507(i) mostly restates the statute. *Id.* at 171, 200. The guide itself reflects that § 20507(i) concerns list maintenance, which "in the elections field is just updating and removing voters from the voter rolls that you have[,]" doc. 110 at 142[5]; *see also*

[5] Clay Helms, the Secretary's Deputy Chief of Staff and Director of Elections, doc. 69 at 1, testified as the Secretary's Fed. R. Civ. P. 30(b)(6) representative, doc. 78-1, and at trial, doc. 110 at 58-145. Citations to the trial transcript and post-trial proceedings are to the court reporter's page numbers. Citations to earlier transcripts are to the CM/ECF page numbers.

doc. 79-3 ("The process of updating voter registration rolls and removing ineligible voters is referred to as list maintenance."). The FEC discussed § 20507(i)'s requirements under a subheading titled "***The Accountability of List Maintenance Activities***[.]" Doc. 79-1 at 88-89. The guide also explained that one purpose of § 20507(i) was to "enable interested private and public agencies to ensure that 'list cleaning' activities are nondiscriminatory and otherwise in accordance with the NVRA." Doc. 79-1 at 140. Another FEC guide has similar language. Doc. 79-2 at 16 ("Second, they make it possible to demonstrate that the methods by which a list is kept accurate and current ('list cleaning' activities) are nondiscriminatory and are otherwise in accordance with NVRA.").



The guide offers two more insights. First, immediately after setting out § 20507(i)'s requirements, the guide provides: "*As a matter of prudence, though not as a requirement of the Act*, States might also want to retain for the same time period all *records of removals* from the voter registration list—the date and the reason." Doc. 79-1 at 89, 140 (emphasis added). Second, and separately, the guide advises that "all States might want to consider maintaining the confidentiality of all original voter registration documents while providing public access to computerized lists of *registered voters* minus the confidential information." Doc. 79-1 at 144 (emphasis altered). This discussion is not specific to § 20507(i). *Id.* Thus, according to the FEC,

the States should make available lists of eligible voters, but need not maintain records of persons who have been removed from the lists of eligible voters.

### B. Alabama's Implementation of the NVRA and the Secretary of State's Practice.

#### 1. Alabama's general list maintenance program.

As the NVRA requires, Alabama has a general list maintenance program. It "is a four-year process" initiated in January with a non-forwardable mailer, doc. 78-1 at 20; doc. 110 at 109, sent "to all registered voters at their last known address." Doc. 79-16 at 276. *See also* doc. 79-22; doc. 110 at 110, 112. If the mailer is successfully delivered to the voter, then "[n]o further action" is needed. Doc. 79-16 at 276; doc. 110 at 109-10. If the mailer is returned, then a forwardable mailer is sent to the voter. Doc. 79-16 at 276; *see also* doc. 110 at 109, 110; doc. 79-25. If the second mailer is returned as undeliverable or if the voter does not update his address within 90 days of the second mailer being sent, then his status is changed to "inactive." Def. Ex. 16 at 277.



An inactive voter remains on the rolls *and eligible to vote* until (1) he is made active when he updates or votes *or* (2) he is purged when the purge process ends. Doc. 78-1 at 20; doc. 110 at 109, 113-14. Near the end of the purge process, the names and precincts of persons scheduled to be purged are published in the newspaper. Doc. 110 at 113-14. Purged voters are not deleted; their status within the

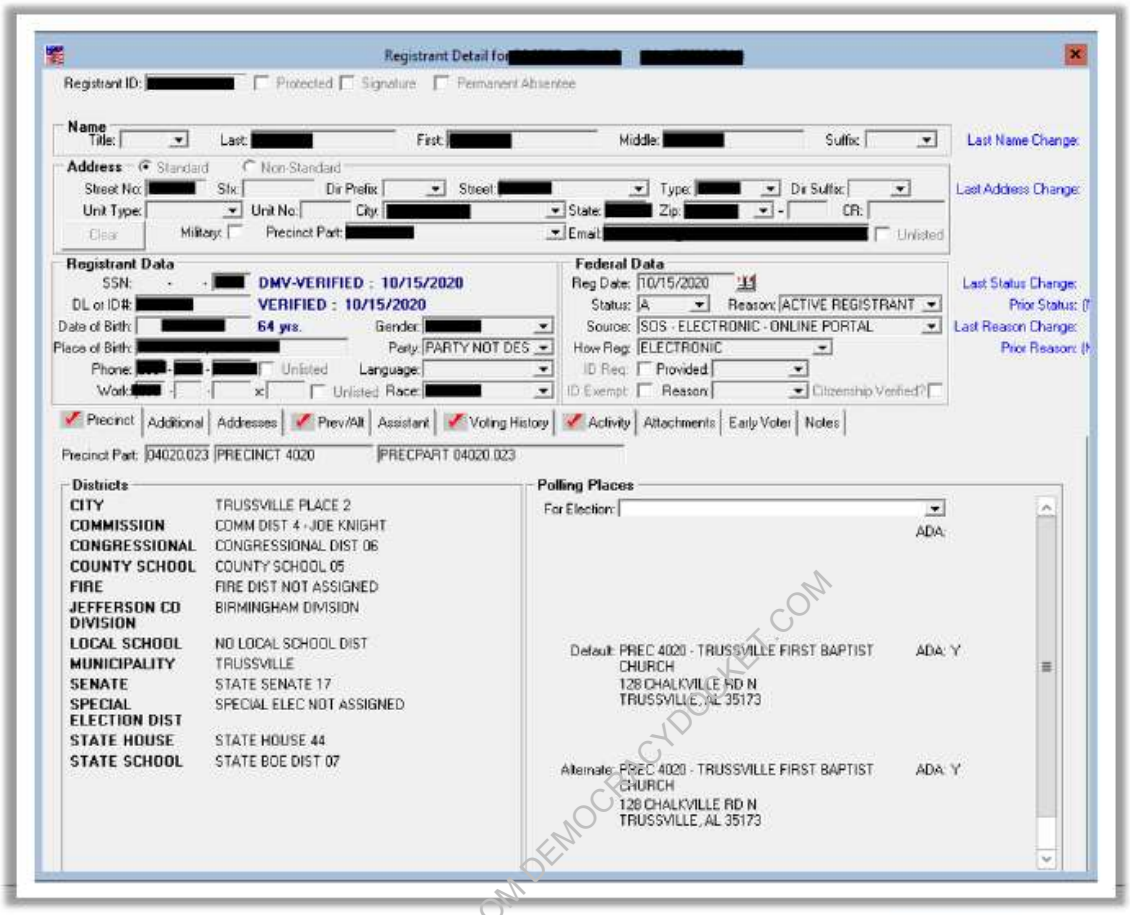
State's voter registration system, PowerProfile, is changed. Doc. 110 at 114; *see also* doc. 69 at 12. "[O]nce that purge ends, a new purge begins." Doc. 78-1 at 20.

**2. The State's voter registration system, PowerProfile.**

The Secretary of State has access to the State's voter registration information through a statewide, computerized system called PowerProfile. *See* doc. 69 at 12. About fifteen years ago, a federal court acting through a special master built this system to bring the State into compliance with the Help America Vote Act of 2002. *Id.* PowerProfile contains voters in active and inactive status, as well as "persons who were purged, removed, denied registration, or who are deceased." Doc. 69 at 3. It also contains information about why an individual is in a particular status. *Id.* And, of course, it includes name, address, phone number, date of birth, race, gender, districting information, voter history, and other information. *See* doc. 69 at 8-9; *see also* doc. 79-20 at 3; doc. 72-76.



Below is a screenshot showing how an individual record for an active voter appears in PowerProfile:






DEFENDANT'S EXHIBIT 47

Doc. 79-47; *see also* doc. 69 at 12.

**3. The Secretary's practice selling active and inactive voter lists.**

Before the NVRA, Alabama made voter lists available to limited persons and entities for limited purposes. Ala. Act No. 1989-649, doc. 79-6 at 4; *see also* Ala. Code § 17-4-35(10). With the passage of the NVRA, Alabama enacted an implementing law. Doc. 69 at 2; *see also* doc. 79-5 at 13-19. The law broadened the list of people who could request voter lists and requires the Secretary to "ensure that

all applicants obtain requested voter lists in a timely manner." Ala. Code § 17-4-38(a); doc. 69 at 2.

"The Secretary routinely sells the list of active and inactive voters, or portions of it." Doc. 69 at 8; doc. 110 at 115. "Requestors can purchase lists of active and inactive voters through the Secretary's online portal where they can essentially build their own list by specifying parameters for the voters they are seeking …." Doc. 69 at 9. The Secretary "invest[ed] a tremendous amount of time in originally developing [the] online portal ... and continues to update information in the system after each election and when changes are made, e.g., changes to district assignments." Doc. 79-14 at 9. A list of online transactions dating back to 2016 is more than 30 pages long. Doc. 72-64; *see also* doc. 69 at 8.



"Requestors can also purchase lists of active and inactive voters by contacting the [Secretary's] office." Doc. 69 at 9; *see also* doc. 79-20. Staff process these requests, doc. 69 at 9, following a process that is detailed in the record, doc. 79-14 at 9-11. "How long [the] process takes can vary depending on the parameters of the request. On average, the entire transaction (not counting wait time) takes approximately ten to thirty minutes. Some transactions can take as long as an hour." *Id.* at 11. Requestors may select from many fields to include. Doc. 69 at 8-9. Requests are frequently made this way. Docs. 72-65 through 72-71 (lists of transactions); *see also* doc. 69 at 8.

The Secretary can provide lists of active and inactive voters without assistance from his PowerProfile vendor, Election Systems & Software (ES&S). Doc. 110 at 69. Joint Exhibit 21 is a one-line sample of such a list. Doc. 110 at 69, 118; doc. 72-76.

There is "a uniform charge for the production of voter lists." Ala. Code § 17-4-38(b). The Secretary determines the charge for electronic lists and "conspicuously post[s]" the fee schedule in his office. *Id*. It is the Secretary's long-standing practice to sell electronic voter lists for one cent per name. Doc. 110 at 80, 115; doc. 79-20 at 2; doc. 79-21; doc. 78-1 at 59. By statute, printed copies are $1 per page. Ala. Code § 17-4-38(b); *see also* Ala. Code § 36-14-3. "Convenience fees are added when paying by credit card or debit card, and the Secretary's online portal also has a $1 minimum fee." Doc. 79-14 at 8.



**4. The Secretary on a few occasions makes lists of disenfranchised felons available.**

When, in February 2018, Southern Poverty Law Center asked to buy a list persons removed from the voter registration list, Clay Helms, *see* n.5, *supra*, responded that "[w]e only provide lists of voters currently registered," not those who were previously registered. Doc. 79-42 at 1[6]; doc. 110 at 125-26. To his knowledge, the Secretary "ha[d] never created/provided a list of persons no longer registered to

[6] Stray characters were inserted in some documents, like this email, during the discovery process below.

vote." Doc. 79-42 at 1; *see also* doc. 110 at 125-26. Later that year, in an effort to accommodate requests, not because of the NVRA, the Secretary deviated from the long-standing policy by agreeing to also sell lists of purged voters (i.e., those removed through the general NVRA purge program) and disenfranchised felons. Doc. 78-1 at 109-10; doc. 110 at 103. With respect to disenfranchised felons, the deviation was temporary.

First, though SPLC asked for removed or denied felons and was told that the Secretary would sell them, it appears SPLC did not complete the purchase. Doc. 110 at 102, 127; doc. 72-22 at 2-3; doc. 72-69 at 12 (Seth Levi entry). Second, the Secretary sold purged voters and voters removed due to a disenfranchising felony conviction to the Limestone County NAACP in August 2018. Doc. 72-69 at 10; Doc. 110 at 102-03; 126. Third, a file prepared for a request for "Clarke County Purged Voters" in February 2019 included voters removed due to a disenfranchising felony conviction, though it does not appear that the purchase was completed. Doc. 72-68 at 1; doc. 110 at 126-27. These instances are few, especially by comparison to the number of list sales. Docs. 72-64 through 72-71. The Secretary subsequently returned to the long-standing policy as to disenfranchised felons but has agreed to continue making lists of purged voters available. Doc. 110 at 103, 125-29.



Separately, the Secretary provided felon records in federal court litigation. A court order required the Secretary to "disclose to counsel for Plaintiffs a list of all

voter applicants previously purged or denied based on convictions for the past two years, *see* 52 U.S.C. § 20507(i), or" show cause why he should not. Doc. 79-35 at 4. The Secretary complied with the order. Records were thereafter produced during the litigation in discovery—not pursuant to § 20507(i). The litigation did not include a § 20507(i) claim. *Thompson v. Merrill*, Case No. 2:16-cv-783, docs. 1 & 93 (M.D. Ala.), on appeal as Case No. 21-10034 (11th Cir.).

**C. GBM's Purged Voters Request and Felony Records Request.**

Alabama's last completed NVRA purge began in 2017 and ended in January 2021. Doc. 110 at 112. Thereafter, GBM requested from the Secretary an electronic list of persons who had been purged from the voter list for Jefferson County. The Secretary provided an Excel spreadsheet, and GBM paid for the records. Doc. 72-56 at 2; doc. 110 at 22; doc. 72-66 at 1 (fifth entry); *see also* doc. 69 at 8.



In May 2021, GBM reached out again, this time invoking § 20507(i). GBM sought "a list of all registered voters purged from the voter rolls following the 2020 General Election in January 2021." Doc. 69 at 3, 5; doc. 110 at 114. This is GBM's "Purged Voters Request." Doc. 69 at 3, 5. Though GBM had previously paid for similar records, GBM wanted the list "in electronic format and at no cost to GBM." *Id.* at 3; doc. 72-56. GBM said its letter should serve as notice of an intent to sue if its request was not fulfilled. Doc. 72-56 at 3; *see also* 52 U.S.C. § 20510(b). The

Secretary offered to sell the electronic list for one cent per name and said that GBM could inspect the list to determine whether to purchase it. Doc. 72-57.

In June 2021, GBM "reiterat[ed] its position that the Purged Voters Request should be fulfilled at no cost to GBM and [said] that the Jefferson County records should be excluded.… This letter also made a request for additional persons not currently registered, which was subsequently narrowed to the Felony Records Request." Doc. 69 at 4; doc. 72-58. "The Secretary continued to offer the Purged Voters Request at one cent per name[,] and [he] offered public inspection at his office. As to the new request, the Secretary took the position that the requested information was beyond the scope of the NVRA." Doc. 69 at 4; doc. 72-59. The Secretary's offer of public inspection was pursuant to § 20507(i) and carried no suggestion that inspection was offered only to determine whether to purchase the list. Doc. 72-59.



In September 2021, GBM wrote to the Secretary "reiterating its position that the Purged Voters Request should be fulfilled at no cost to GBM and narrowing its additional request to the Felony Records Request." Doc. 69 at 4; doc. 72-60. That request "is for a list of (1) all voter registration applicants who were *denied voter registration* due to a disenfranchising felony conviction and (2) all voters who were *removed from the voter rolls* due to a disenfranchising felony conviction. GBM request[ed] these records for the past four years, to the extent they are available, 'but

for no less than two years (since June 15, 2019)[.]'" Doc. 69 at 6-7 (emphasis added). GBM said that the letter should serve as notice of intent to sue. Doc. 72-60 at 3. The Secretary stood by his position and again offered public inspection. Doc. 72-61; *see also* doc. 69 at 5.

A couple of months passed. Counsel, on behalf of GBM, sent the Secretary a 90-day notice of intent to sue in December 2021, doc. 69 at 5; doc. 72-62, and then a 20-day notice in January 2022, doc. 69 at 5; doc. 72-63. The operative letter demanded electronic lists, not public inspection, doc. 72-63, which is consistent with the earlier letters. Docs. 72-56, 72-58, 72-60, 72-62 & 72-63. *See also* doc. 78-2 at 47-50; doc. 110 at 38-39, 46-51. GBM never accepted the Secretary's offers for public inspection. Doc. 110 at 133.



**D. Pre-Trial Proceedings.**

GBM filed suit in February 2022 in the Northern District of Alabama. Doc. 1. The Secretary moved to transfer venue, doc. 9, and to dismiss, doc. 12. The district court granted the motion to transfer venue. Doc. 20.

In late May 2022, the district court in the Middle District of Alabama held a hearing on the Secretary's motion to dismiss. Doc. 33. The court determined that there was a fact issue about what public inspection would look like, doc. 37 at 24, 26, which lead to the Secretary adopting a formal policy, doc. 79-20; *see also* doc. 69 at 9-11. Usually, requestors contact the Secretary to purchase a copy of the voter

list and give no indication that they are interested in public inspection. Doc. 78-1 at 15-16. Accordingly, the Secretary does not routinely offer it. *Id.*

Also at that hearing, GBM raised for the first time the possibility of seeking a preliminary injunction with the goal of registering voters for the 2022 General Election. Doc. 37 at 25. The court suggested expedited discovery and proceeding to final judgment. *Id.* Thereafter, the court summarily denied the Secretary's motion to dismiss, ordered GBM to amend its complaint, and required the parties to quickly consult on a proposed schedule for expedited discovery. Doc. 34.

On June 2, 2022, GBM filed an amended complaint, doc. 35, and thereafter the parties submitted competing proposals for moving the case forward, doc. 36. GBM sought a trial or preliminary injunction hearing in mid-July. *Id.* at 2. The Secretary contended the case should be resolved on dispositive motions and proposed an expedited schedule that allowed time for discovery and securing an expert witness. *Id.* at 2, 5, 6-7, 11-12. The Secretary proposed a September 30 dispositive motion deadline and a December 5 trial but alternatively asked that trial be no sooner than late July. *Id.* at 5, 12-13. The parties agreed to a limit of three depositions. *Id.* at 19. The court set trial for July 28, 2022 and provided for three weeks of discovery, including a single three-hour deposition for each side. Doc. 40 at 2, 6; docs. 42 & 43.

Meanwhile, the Secretary moved to dismiss one count in the amended complaint. Doc. 39. The court summarily denied the motion. Doc. 49. The Secretary timely filed his answer the day before discovery closed. Doc. 52.

**E. Pre-Trial: Purged Voters Request.**

"At the time that the Secretary of State's office offered to make the records responsive to the Purged Voters Request available to GBM for public inspection, no list had been created." Doc. 69 at 5-6. An employee apparently thought that he had the information needed to generate the list if GBM agreed to pay for it or came to inspect it. Doc. 78-1 at 21-24, 25, 133-34. In July 2022, the Secretary learned that the list had not been created and quickly worked with ES&S to create one. Doc. 69 at 5-6; doc. 110 at 129-31; doc. 78-1 at 133-37. ES&S approached the project in two different ways and, heading into trial, GBM wanted one of the newly created lists "updated to include the field of current registration status." Doc. 69 at 6; doc. 110 at 130.



As discovery was closing, the Secretary received a request from Voter Reference Foundation for a list of "cancelled/deleted/purged/archived voters," and before trial he responded by selling them only one of the lists that had been created for GBM (minus one field). Doc. 79-46 at 2; doc. 110 at 127-29. GBM could likewise afford to pay the Secretary's fee for the Purged Voters Request. Doc. 78-3 at 38, 39; doc. 79-13.

**F. Pre-Trial: Felony Records Request.**

"In May 2022, the Secretary consulted with ES&S about its ability to pull the data responsive to the Felony Records Request." Doc. 69 at 7. ES&S unilaterally pulled two lists, and the Secretary took possession of them. Doc. 110 at 134. The parties stipulated as to the fields contained in those lists. Doc. 69 at 7-8. Neither list is for the time frame that GBM requested. *Compare* doc. 69 at 6-7, *with id.* at 7-8; doc. 110 at 133-34. And neither list contains all the fields that GBM requested. *Compare* docs. 72-58 at 2 (listing fields including phone number, date of birth, race, and gender), *with* doc. 69 at 7-8; doc. 110 at 133-38.

Thus, going into trial, the Secretary did not have electronic lists responsive to GBM's Felony Records Request. If necessary, he expected to be able to create customized responsive lists repeating the method used in earlier litigation, *see supra* at 12-13, and editing from there but had not done so. Doc. 110 at 138-40.



**G. Trial and Decision.**

The case was tried over two days in late July 2022. Doc. 40 at 2; docs. 85, 110 & 111. In early October, the court entered an opinion and judgment finding in GBM's favor on all counts. Docs. 90 & 91. With respect to the Purged Voters Request, the court said that "[t]ime is now of the essence, through no fault of GBM[,]" doc. 90 at 18, which "is relevant to the court's analysis[,]" *id.* While not holding that § 20507(i) always requires electronic disclosure, "it h[e]ld[] that the

provision requires digital access in the specific circumstances of this case, where the records are already kept in digital form, where providing them in any other form would unduly interfere with the NVRA's express purposes, and where the window of time before the registration deadline for the next election is so slim." *Id.* at 21. With respect to the Felony Records Request, the court rejected the Secretary's statutory interpretation arguments and said that he could disclose the entire voter registration database to avoid his concerns about extracting customized lists of records on demand. *Id.* at 9-17. The court also found "that [the Secretary] must provide the records GBM has requested for a reasonable cost[,]" *id.* at 23, "based on the actual costs the Secretary incurs in their production to GBM[,]" *id.* at 26. *See also* doc. 91 at 3. Given the then-impending voter registration deadline for the General Election, the Court enjoined the Secretary to provide three categories of records to GBM "forthwith[.]" Doc. 91 at 1; *see also* doc. 90 at 25 ("immediately").



**H. Complying with the District Court's Injunction.**

The Secretary quickly worked with ES&S to create compliant lists. Doc. 95-1 at 1-3; *see also* doc. 110 at 99. The method used in earlier litigation was not employed for the Felony Records Request because that method relied on current status while the judgment focused on status during a particular time frame. Doc. 91 at 2-3; doc. 95-1 at 3; doc. 110 at 137. Thereafter, GBM requested that race, gender, and date of birth fields be added to the felony records; these fields were not included

in the judgment but are routinely offered for sale with lists of active and inactive voters. Doc. 95-6 at 1; doc. 91 at 2; doc. 95-1 at 4. The Secretary worked with ES&S to pull lists with those additional fields, and discrepancies in the number of records returned prompted further work. Doc. 95-1 at 4-6; *see also* doc. 95-7 at 1; doc. 95-9 at 1-2.

The final lists contained 135,074 purged individuals, 16,368 disenfranchised felons who had been *removed* from the voter list, and 7,695 disenfranchised felons who had been *denied* registration. Doc. 95-1 at 3, 6. At one cent per name, the Purged Voters Request would cost $1,350.74 while the Felony Records Request would cost $240.63. Combined, the Secretary's fee would be $1,591.37.

To create these lists, ES&S spent about 15.5 hours of time, which would be $2,325 at its contractual rate of $150 per hour, though ES&S declined to bill the Secretary. Doc. 95-1 at 6-8. The Secretary's staff's estimated time was valued at $429.17. Doc. 95-1 at 8-9; doc. 95-11.



## I. Post-Trial Proceedings.

The court's judgment had left open the issue of what fee GBM was to pay for the records. Doc. 91 at 3. After complying, the Secretary filed a notice and moved for an expedited ruling to facilitate an appeal, docs. 95, 95-1, & 95-11. Without retreating from his legal positions, the Secretary asserted that "$429.17 in staff costs fit within the Court's narrow definition of 'reasonable costs'" while ES&S's fees did

not because it had elected not to charge him. Doc. 95 at 5-9; *see also* docs. 95-1 & 95-11. Following a telephone hearing, docs. 97 & 106, the district court denied the Secretary's motion to expedite, doc. 98. The Secretary appealed. Doc. 100.

Thereafter, GBM agreed to pay the $429.17, and the parties filed a joint notice, within which the Secretary requested a final judgment. Doc. 109. After GBM paid the $429.17, the Secretary notified the court and moved for entry of a final judgment. Docs. 112 & 112-1. On December 5, 2022, the court entered final judgment. Doc. 113. Two days later, the Secretary appealed. Doc. 114. This Court treated the second notice of appeal as an amended notice and docketed it in the original appeal. App. 19.



**J. Standard of Review.**

This Court reviews questions of statutory interpretation *de novo. United States v. Garcon*, 54 F.4th 1274, 1277 (11th Cir. Dec. 6, 2022) (en banc).

## SUMMARY OF THE ARGUMENT

Section 20507(i) of the National Voter Registration Act of 1993 provides: "Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters ...." 52 U.S.C. § 20507(i)(1). 52 U.S.C. § 20507(i)(1).

By its plain text, § 20507(i) requires the Secretary only to "maintain" certain records and make them available for (1) "public inspection" and (2) "where available, photocopying at a reasonable cost." 52 U.S.C. § 20507(i). Nothing in the statute requires the Secretary to create or provide electronic records to anyone. Yet that is all GBM seeks in either count of its complaint. Because GBM seeks electronic records that the NVRA does not require States to provide to anyone, GBM's claims necessarily fail.

Outside the context of the NVRA, the Secretary does make electronic voter lists available for one cent per name. But because the NVRA does not require the Secretary to provide electronic records, the statute does not speak to the fees that the Secretary may impose when he makes electronic lists available. And even if this Court amended the NVRA to apply to the production of electronic records, the Secretary's one-cent-per-name fee is reasonable.



GBM's Felony Records Request fails for an additional reason—it is outside the scope of § 20507(i). The records that § 20507(i) requires States to "maintain" are only those limited to NVRA-mandated list maintenance related to purges of voters who have died or moved away. And even if the statute could be read more broadly to also cover removal of felons from the voter roll, the statute's focus on list maintenance means it does not extend also to voter registration. The NVRA thus does not require disclosure of *denials* of registration.

Finally, § 20507(i) only requires that the States "shall make available" those records which it requires the States to "maintain." It does not require creating customized records on demand.

Accordingly, GBM should be required to pay the Secretary's one-cent-per-name fee for the electronic list responsive to the Purged Voters Request. GBM should be required to return or destroy the electronic lists it received in response to the Felony Records Request, or, if the Court holds that the Secretary was required to provide these lists, pay the Secretary's one-cent-per-name fee for them.

## ARGUMENT

### I. The NVRA does not require the Secretary to produce electronic records.

By its plain text, § 20507(i) requires the Secretary only to make certain records available for (1) "public inspection" and (2) "where available, photocopying at a reasonable cost." The district court agreed "that the text of the public-inspection provision does not specifically provide for digital access. That much is true…." Doc. 90 at 21. And that much should have been enough to end this case. Instead, the district court looked to the "NVRA's express purposes." *Id*. And there, the court found that the NVRA *sometimes* "requires digital access" including "in the specific circumstances of this case." *Id.* Then, despite acknowledging that "[t]he NVRA does not provide that the States may charge for public inspection[,]" *id.* at 23-24, the court—recognizing the consequences of ordering that records be provided for free,

*id.* at 25—allowed the Secretary to charge a fee. The court announced, without analysis, that the fee must be "based on the actual costs the Secretary incurs in" producing the electronic lists to GBM, *id.* at 26.

The decision represents "nothing other than the elevation of judge-supposed legislative intent over clear statutory text." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107-08 (2007) (Scalia, J., dissenting). This Court has repeatedly and emphatically made clear that "purpose ... cannot be used to contradict the text or to supplement it." *Bellitto*, 935 F.3d at 1201 (quoting ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 57 (2012)). And it must do so again here. Because the NVRA does not require the Secretary to produce electronic copies of voter lists—not even sometimes—the district court's order should be reversed.



### A. Section 20507(i) requires only public inspection and, where available, photocopying at a reasonable cost.

In drafting § 20507, Congress was clear about the NVRA's required methods of public disclosure: (1) "public inspection" and (2) "where available, photocopying at a reasonable cost." This inquiry should begin and end with this unambiguous text. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 177 (2004) ("The inquiry begins with the statutory text, and ends there as the text is unambiguous."); *Iberiabank v. Beneva 41-I, LCC*, 701 F.3d 918, 924 (11th Cir. 2012) ("We look first to the text of the statute. If the text of the statute is unambiguous, we need look no further."

(internal citation omitted)). GBM doesn't want public inspection or photocopying, so it should not have a claim under § 20507. GBM has instead invoked the statute for another end—seeking to force the Secretary to produce electronic lists and restrict his fee to actual reproduction costs. *See* doc. 71 at 38; *see also* doc. 35 at 14. Thus, the question is whether Congress hid a duty for a State to electronically disclose records alongside the State's duty to "make available" those records "for public inspection and, where available, photocopying at a reasonable cost." 52 U.S.C. § 20507(i)(1). It did not.[7]

There is no plausible way to read production of electronic lists into "public inspection" or "photocopying." Nonetheless, at one point, GBM argued that "in a world where the records are electronic, photocopying means electronic copying of records." Doc. 37 at 8. But a "photocopy" is "[a] copy of documentary material made by any of various processes (usually involving the chemical or electric action of light on a specially prepared surface) in a copying machine ...." *Photocopy*, OXFORD ENGLISH DICTIONARY (2d ed. 1989); *see also Photocopy*, MERRIAM-WEBSTER'S



[7] GBM complained about the Secretary's offer of public inspection and new policy (adopted after the ligation began) about how public inspection is carried out, but never sought public inspection. Accordingly, GBM has neither (1) an "actual" and "concrete" injury sufficient to support standing to challenge the adequacy of the Secretary's offer of public inspection, *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (en banc); nor (2) the ability to file a suit under the NVRA challenging the Secretary's public inspection practices because GBM was not "aggrieved," *see* 52 U.S.C. § 20510(b). Also, GBM has not cross-appealed to raise this issue.

COLLEGIATE DICTIONARY (10th ed. 1993) ("a photographic reproduction of graphic matter").

Indeed, "[w]ithin the meaning of a statute authorizing the recovery of costs for photocopying, the term 'photocopying' d[oes] not embrace digital electronic reproduction contained on electronic media." 20 C.J.S. *Costs* § 109 (2022); *see also Zurich Am. Ins. Co. v. Wis. Physicians Srvs. Ins. Corp.*, 743 N.W.2d 710, 7210 (Wis. Ct. App. 2007) (holding that "'photocopying' must be narrowly construed to include only hard copy photocopies, rather than electronic imaging" because "[a]lthough both serve essentially the same ultimate purpose, they are not physically the same"). Because it is not the courts' role to modernize § 20507(i), *cf. Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 456 (1984),[8] and there is a difference between the plain meanings of "photocopying" and "electronic disclosure," Congress's use of the former does not encompass the latter.



"Public inspection" also does not include electronic disclosure, though the district court held otherwise. Doc. 90 at 21-23. "Inspect" means "[t]o look carefully into" or "to view closely and critically[.]" *Inspect*, OXFORD ENGLISH DICTIONARY

[8] *See also Arcadian Fertilizer, L.P. v. MPW Indus. Srvs.*, 249 F.3d 1293, 1296-98 (11th Cir. 2001) (holding that "copies of papers" in 28 U.S.C. § 1920 meant "reproductions involving paper in its various forms" and declining to modernize the statute to comport with technological advancements because "[u]ntil Congress sees fit to amend the language of § 1920 to include the innovative technologies currently used in the production of demonstrative exhibits, computer animations and videotape exhibits are not taxable because there is no statutory authority").

(2d ed. 1989); *see also Inspect*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) ("to view closely in critical appraisal; look over"). As § 20507(i) itself demonstrates by listing "public inspection" and "photocopying" as separate things States "shall make available[,]" it is clear that "public inspection" does not mean providing any sort of copy—paper or electronic; it refers to viewing a record where it is located. Likewise, the Federal Rules of Civil Procedure distinguish between "inspecting" and "copying," with Rule 34(a)(1) providing that a party may serve a request "to inspect, copy, test, or sample[.]" If inspecting included copying, that language would be redundant.

In contemporaneous federal statutes, Congress often paired "public inspection" with language about where the federal records would be kept, further supporting the Secretary's interpretation.[9] The district court got things backwards when it reasoned that "one might infer from the fact that these statutes specify that public inspection shall occur in an office or other discrete location that, if Congress had intended to so limit the scope of the NVRA's public-inspection provision, it would have said so." Doc. 90 at 22-23 (footnote omitted). To the contrary, the



[9] *E.g.*, 16 U.S.C. § 460hhh-2(d) (1993) ("The map shall be on file and available for public inspection in the offices of the Chief of the Forest Services, Department of Agriculture."); 42 U.S.C. § 10710(c) (1984) ("Copies of all reports … shall be maintained in the principal office of the Institute[,]" and "[s]uch reports shall be available for public inspection during regulator business hours[.]"); 20 U.S.C. § 76i(b)(2) (Pub. L. No. 105-95, 1997) ("The plan shall be on file and available for public inspection in the office of the Secretary of the Center.")

language specifying where public inspection must occur confirms what "public inspection" means: the inspector goes to the records. In any event, there are also federal statutes where Congress used "public inspection" without specifying a location, *e.g.*, 46 U.S.C. § 31302, and where it is otherwise clear that the inspector must visit, *e.g.*, 42 U.S.C. § 8851(a) (model biomass facilities); 42 U.S.C. § 10710 ("available for public inspection during regular business hours"); 42 U.S.C. § 3217 (similar). Moreover, in our federalist system, it is reasonable for Congress to have deferred to the States to determine where to make records available while exercising greater authority over federal entities. *See* 42 U.S.C. § 300w-5(a)(4) ("[T]he State involved will make copies of the report … available for public inspection, and will upon request provide a copy … for a charge not exceeding the cost of providing the copy."). Congress exercised similar deference in other parts of the NVRA when referencing the relevant State election official. *E.g.*, 52 U.S.C. § 20503(a)(3)(A); *id.* § 20508(a).



Reading "public inspection" to include any form of copying lists would produce a nonsensical result. The statute would effectively say: "Each State shall maintain for at least 2 years and shall make available for public inspection, *which includes photocopying,* and, where available, photocopying at a reasonable cost …." That makes no sense and is not the statute that Congress wrote. In fact, where Congress wanted to make general copying available in addition to public inspection,

it did so (and in contemporaneous statutes). *See, e.g.*, 46 U.S.C. § 31302(2) (1988); 47 U.S.C. § 396(k), (l); (Pub. L. No. 102-356, 1992); 2 U.S.C. § 1605(a)(4) (1995). Neither the district court nor GBM offer a valid reason why public inspection would include electronic disclosure but not logically include photocopying as well.

If Congress wanted electronic disclosure, it could have said so, as it did by amending the Freedom of Information Act. When Congress passed FOIA in 1966, federal agencies were required to make their opinions and orders "available for public inspection and copying[,]" Pub. Law No. 89-487, § 3(b), 80 Stat. 250 (1966), and their records "promptly available to any person" if the requestor satisfied certain conditions, *id.* § 3(c), 80 Stat. 251. But by 1996, "Congress recognized that FOIA faced a new challenge as the federal government began storing and analyzing massive amounts of information on electronic networks and in electronic databases." *Ctr. for Investigative Reporting v. U.S. Dep't of Just.*, 14 F.4th 916, 937 (9th Cir. 2021) (cleaned up). Congress thus enacted the Electronic Freedom of Information Act Amendments of 1996 "to provide for public access to information in an electronic format[.]" Pub. Law. No. 104-231, 110 Stat. 3048 (1996). "[R]ecognizing the malleability of digital data," *Ctr. for Investigative Reporting*, 14 F.4th at 938, Congress updated subsection (a)(3)—§ 3(c) in the 1966 Act—to read: "an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." *Id.*; *see also* 5 U.S.C.

§ 552(a)(3)(B). Then, in 2016, Congress passed the FOIA Improvement Act of 2016, which struck subsection (a)(2)'s—§ 3(b) in the 1966 Act—"public inspection and copying" requirement and replaced it with "public inspection in an electronic format[.]" Pub. Law. No. 114-185, § 2, 130 Stat. 538 (2016). Congress knows how to update public records laws to keep up with modern technology.

Congress could have amended the NVRA at any time to provide for electronic disclosure, but it didn't—even when it had the perfect opportunity. The Help America Vote Act of 2002 required the States to adopt computerized statewide voter registration lists, 52 U.S.C. § 21083(d). Though HAVA amended portions of the NVRA, *see* Pub. Law. No. 107-52, title IX, § 903, 116 Stat. 1728 (2002), Congress did not touch § 20507(i). It was not the district court's role to interfere with Congress's prerogative. *See Sony Corp.*, 464 U.S. at 456 ("It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written."). The district court exceeded its authority by "try[ing] [its] hand at updating the statute" itself. *Shelby County v. Holder*, 570 U.S. 529, 554 (2013).



Recall that the district court *agreed* that § 20507(i) is silent as to electronic disclosure, yet the court held "that the provision requires digital access in the specific circumstances of this case," because "the records are already kept in digital form,"

"providing them in any other form would unduly interfere with the NVRA's express purposes," and "the window of time before the registration deadline for the next election is so slim." Doc. 90 at 21. The court simply would not allow the "plain-meaning rule" to "be applied to produce a result which is actually inconsistent with the policies underlying the statute." *Id*. (citations omitted). But the NVRA means the same thing in the spring as it does in the fall, and it means the same thing whether GBM or an identity thief invokes it.[10] This Court focuses on that unchanging text. *United States v. Garcon*, 54 F.4th 1274, 1277 (11th Cir. 2022) (en banc) ("We begin, as we must, with the text of the statute."). And this Court has recognized that a textual grounding is all the more important with the NVRA, which "is particularly ill-suited to focus on purpose rather than text because the statute's purposes are multiple and in some tension with each other." *Bellitto v. Snipes*, 935 F.3d 1192, 1201 (11th Cir. 2019). The meaning of "public inspection" does not morph case by case based on factors such as "the window of time before the registration deadline for the next election," doc. 90 at 21. Courts "must presume that Congress said what it meant and meant what it said," *United States v. Steele*, 147 F.3d 1316, 1318 (11th



[10] "[T]here is no restriction in the NVRA as to who may request records under that law and no limit on the requestors' use or further dissemination of the information once disclosed." *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 735 (S.D. Miss. 2014); *Libertarian Party of Ala. v. Merrill*, No. 20-13356, 2021 WL 5407456, at *7-8 (11th Cir. 2021) (unpublished) (acknowledging that the State's important interest in ensuring that free copies of the voter list "will go to groups who will use it for legitimate political purposes").

Cir. 1998) (citation omitted), and Congress did not say or mean that "public inspection" sometimes means digital access based on a judge-made factors.

GBM's atextual theory fares no better. GBM argued below that the NVRA requires "meaningful" disclosure that "can vary somewhat depending on the type of records at issue[,]" Doc. 71 at 26, but one searches the NVRA and associated caselaw in vain for support. GBM is inserting text into the statute that doesn't exist. *See Garcon*, 54 F.4th at 1280 ("[W]e must take the provision as Congress wrote it, and neither add words to nor subtract them from it." (cleaned up)). Congress did not say that "meaningful disclosure" is required, leaving it to the courts to decide what that means. Instead, Congress decided that public inspection and, where available, photocopying at a reasonable cost provide meaningful disclosure. Section 20507(i)'s unambiguous silence about electronic disclosure controls.



### B. Because § 20507(i) does not govern electronic disclosure, it does not govern the Secretary's fee for electronic lists, but that fee is nonetheless reasonable.

Because § 20507(i) is silent as to electronic disclosure, the NVRA has nothing to say about what fees that the Secretary may charge for producing electronic lists. Thus, there can be no conflict with federal law, and GBM's preemption argument, *see, e.g.*, doc. 35 at 12, is misplaced. *See True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 732 (S.D. Miss. 2014) ("If the NVRA does not mandate universal disclosure, then the two laws do not conflict, there is no preemption, and the Mississippi law

requiring redaction of birthdates controls." (footnote omitted)). If this Court holds that the NVRA requires the Secretary to produce electronic lists, the Secretary's fee for all requesters of electronic lists is reasonable.

Using a per-record fee structure falls within the deference Congress gave to the States to set a "reasonable fee." It is reasonable for a purchaser to pay more money for each additional record when he gets more value with each additional record. GBM's argument[11] (which the district court may have accepted, though it offered no legal analysis, *see* doc. 90 at 23-27) is that the Secretary's rate is *per se* unreasonable because he "is only permitted to charge reasonable costs related to reproduction[,]" doc. 71 at 29, but Congress did not limit the fee to reproduction costs or say that the fee had to be done one way. It said "a reasonable cost[,]" 52



[11] At one point, GBM argued that because § 20507(i) "only permits [the Secretary] to charge for 'photocopying at a reasonable cost[,]'" the Secretary cannot charge for the costs of electronic disclosure. Doc. 71 at 29. In support, GBM relied on a Georgia district court's assertion that "[t]he absence of a cost provision *in the public inspection provision* of the NVRA—and its inclusion in other record disclosure laws—suggests Congress intended States to shoulder the burden about which Defendant now complains." *Project Vote v. Kemp*, 208 F. Supp. 3d 1320, 1351 (N.D. Ga. 2016) (emphasis added) (cited by doc. 71 at 29). But it's plain that *Kemp* was talking about Georgia's costs in making its records available for public inspection—not the costs that Georgia may charge for providing any kind of copy. And the court's reference would be nonsensical if it referred to every method of public disclosure (and not just public inspection) considering that § 20507(i) contains and explicit cost provision for photocopying. That is, the *Kemp* court could not have meant that the State may never charge any fee for public disclosure by producing a copy when the statute explicitly says that, where photocopying is available, it shall be at a reasonable cost.

U.S.C. § 20507(i). That language indicates deference: the opposite of a bright-line rule. *Cf. Bellitto*, 935 F.3d at 1205 (explaining that States need not "exhaust all available methods for identifying deceased voters" because § 20507(a)(4) "requires a general program of list maintenance that makes a '*reasonable* effort' to remove voters who become ineligible" (emphasis added)).

The Secretary's fee structure is one of the many reasonable structures that fall within that deference. Realtors may charge fees based, not on the hours they spent on the sale, but on a percentage of a house's sale price. Theaters may charge the same ticket price for movies irrespective of the costs of producing it. And here, it is not unreasonable for the Secretary of State to use a per-record fee schedule. Quite the opposite; doing so is a sensible, convenient measure that eliminates the need to precisely document costs to recover them by charging a one-to-one fee and allows the requestor some control over how high the fee will be.[12]



[12] Interestingly, had the Secretary been allowed to charge one cent per name for the 159,137 total records that GBM requested, for a total of the $1,591.37, that would have been less than ES&S's investment in creating the records. Doc. 95-1 at 7-8. It is true that the parties have referred to Purged Voters Request and the Felony Records Request separately throughout the litigation, but the Secretary's information about the costs of complying with the district court's injunction were not broken down by request. Doc. 95-1 at 7-9; doc. 95-11. And that makes sense. GBM requested the records together, *see* doc. 72-63; *see also* 52 U.S.C. § 20510, and litigated the requests together, docs. 1 & 35, and the district court entered an injunction covering all the requests. The Secretary does acknowledge that the production costs for the Felony Records Request exceed his one-cent-per-name fee, doc. 95-1 at 3, 6, 7-9; doc. 95-11, while his fee for the Purged Voters Request likely exceeds its cost of production.

Setting the rate at a penny a name is also reasonable. One cent is the lowest indivisible unit of money, and it is less than the dollar-per-page rate that the Alabama Legislature set in 1990 for printed materials, *see* Ala. Act No. 1990-184; *see also* Ala. Code § 36-14-3, because 100 records generally would not fit on a page, *cf.* doc. 110 at 118; doc. 72-76. The record also reflects that many persons and entities routinely pay this rate for copies of the active and inactive lists of voters. Docs. 72-64 through 72-71.[13] And this voter registration data, chock-full of demographic information, is obviously valuable. These many markers of reasonable of the Secretary's long-standing (unadjusted for inflation) fee show that the fee is reasonable under the NVRA.

* * *

This Court should reject the district court's rewrite of § 20507(i) to require electronic disclosure. There's no need to inject language into an unambiguous state. GBM might prefer that this Court continuously rewrite the NVRA as technology progresses, but the Supreme Court has made clear that that role is left to Congress. *See Sony Corp.*, 464 U.S. at 456. The plain text is clear that public inspection and where available, photocopying at a reasonable cost, where available, are all that is

[13] GBM's suggestion that people pay the fee because they have no other choice, *see* doc. 81 at 5 (citation omitted), is speculation. Moreover, the Secretary does not control the market on this information. For example, the Alabama Democratic Party resells the list. *Request Voter File*, AL. DEMOCRATS, https://aldemocrats.org/request-voter-file (last visited Dec. 21, 2022).

required. "[A] matter not covered is to be treated as not covered." SCALIA & GARNER, *supra* at 93. And a statute that does not cover electronic disclosure cannot govern the fees that the Secretary may charge for it. The district court should be reversed.

## II. Section 20507(i) does not require the Secretary to disclose customized lists of records responsive to GBM's Felony Records Request.

The records responsive to GBM's Felony Records Request are beyond the scope of § 20507(i). Even if they were within the scope, the Secretary is not required to create customized lists upon demand.

### A. The records responsive to GBM's Felony Records Request are not "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of eligible voters."



"The Felony Records Request is for a list of (1) all voter registration applicants who were denied voter registration due to a disenfranchising felony conviction" at the application stage "and (2) all voters who were" registered to vote and then "removed from the voter rolls due to a disenfranchising felony conviction." Doc. 69 at 6-7. Denials are a function of voter registration while removals are part of list maintenance. GBM recognizes the difference between voter registration and list maintenance but assumes that § 20507(i) encompasses both. *See, e.g.*, doc. 71 at 24. The better reading is that it encompasses only list maintenance, and specifically the NVRA's general program of list maintenance for change of address and death. But even if felon removal programs and activities are within § 20507(i)'s scope, the

provision still does not require production of lists of persons who have been removed, and that includes removed felons.

### 1. Section 20507(i) concerns list maintenance, not voter registration and, thus, not denials.

Section 20507(i) does not say that the States must make available all records concerning the *administration of voter registration*, *see* 52 U.S.C. § 20507 (title). Within an act focused on encouraging voter registration while not improperly bloating the voter rolls, Congress addressed "all records concerning the implementation of *programs* and *activities* conducted for the purpose of ensuring the *accuracy* and *currency* of official lists of eligible voters ...." 52 U.S.C. § 20507(i) (emphasis added). This language, situated in the broader context of the NVRA, refers to list maintenance activities, not all actions touching on voting. *Cf. Wachovia Bank, N.A. v. U.S.*, 455 F.3d 1261, 1267 (11th Cir. 2006) ("The first step of statutory construction is to determine whether the language of the statute, when considered in context, is plain.").



"List maintenance in the elections field is just updating and removing voters from the voter rolls that you have." Doc. 110 at 142. The federal Election Assistance Commission agrees: "The process of updating voter registration rolls and removing ineligible voters is referred to as list maintenance." Doc. 79-3 at 12.[14] Thus, a 2020

[14] The Help America Vote Act of 2002 created the EAC, 52 U.S.C. § 20921, and transferred the FEC's NVRA obligations to the EAC, 52 U.S.C. § 20508.

EAC report contains language recognizing list maintenance as a distinct concept that concerns the *accuracy* and *currency* of the voter list.[15]

The core list maintenance program or activity is the general program that § 20507 requires: "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—(A) the death of the registrant; or (B) a change in the residence of the registrant ...." 52 U.S.C. § 20507(a)(4); *see also Bellitto*, 935 F.3d at 1210 ("The [NVRA] requires the states … to employ a general program of list maintenance that makes a reasonable effort to remove voters who become ineligible because of death or change of address.").

Congress situated § 20507(i) within § 20507. If Congress wanted subsection (i) to be broader, Congress certainly could have made it a stand-alone section within the NVRA. *See Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1192 (11th Cir. 2019) ("The whole-text canon refers to the principle that a 'judicial interpreter [should] consider the entire text, in view of its structure and of the physical and



[15] Doc. 79-3 at 66 ("Policies on Voter Registration and List Maintenance"); *id.* at 74 ("List Maintenance[.] The NVRA establishes a process for states to keep their voter registration lists accurate. Under this law, a registrant can be removed from a state's list …."); *id.* at 129 ("The NVRA also requires states to maintain their voter registration rolls by removing registrants who are no longer eligible to vote…. This process is referred to as 'list maintenance.'"); *id.* at 143 ("Registration List Maintenance[.] The NVRA requires states to maintain an 'accurate and current voter registration roll' to 'protect the integrity of the electoral process.' To facilitate this maintenance, the NVRA requires" change of address and removal programs.).

logical relation of its many parts,' when interpreting any particular part of the text." (quoting SCALIA & GARNER, *supra* at 167)).

The FEC's contemporaneous guidance to the States reflects that § 20507(i) concerns list maintenance. The FEC guide described the States' responsibilities pursuant to § 20507(i) under the subheading "***The Accountability of List Maintenance Activities***[.]" Doc. 79-1 at 88-89. And it explained that one purpose of § 20507(i) was to "enable interested private and public agencies to ensure that '*list cleaning*' activities are nondiscriminatory and otherwise in accordance with the NVRA." Doc. 79-1 at 140 (emphasis added). A different FEC guide had similar language. Doc. 79-2 at 16.

The U.S. Department of Justice recognizes on its website that the programs and activities discussed in § 20507, which is Section 8 of the NVRA, concern list maintenance. According to a Q&A page:

> Section 8 permits States to remove the name of a person from the voter registration rolls upon the request of the registrant, and, if State law so provides, for mental incapacity or for criminal conviction. The Act also requires States to conduct a *general voter registration list maintenance program* that makes a reasonable effort to *remove* ineligible persons from the voter rolls by reason of the person's death, or a change in the residence of the registrant outside of the jurisdiction, in accordance with procedures set forth in the NVRA. The list maintenance program must be uniform, nondiscriminatory and in compliance with the Voting Rights Act.

Doc. 79-4 at 7-8 (May 2022); *see also id.* at 9-10 (emphasis added).

Thus, USDOJ is referring to § 20507's general program concerning change of address and death as list maintenance and saying it must be "uniform, nondiscriminatory and in compliance with the Voting Rights Act." *Id.* The last phrase is confirmatory. Subsection (b) of § 20507 provides: "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" and, broadly speaking, shall not remove a voter solely for failing to vote. 52 U.S.C. § 20507(b) (emphasis added). There is no reason why similar language in subsection (i) would refer to anything different. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law[.]" (internal citations omitted)).



Circling back, the FEC guide contains legislative history that recognized that the *programs* and *activities* of § 20507 which make voter lists *accurate and current* concern list maintenance. In at least one instance, that history draws the same line to subsection (b) that USDOJ does. Doc. 79-1 at 164 ("any list cleaning procedure must

be uniform and nondiscriminatory and in compliance with the Voting Rights Act of 1965"). In other instances, there is concern about improper *removals* in a discussion of "keep[ing] accurate and current voter rolls" and "keep[ing] voting lists clean[.]" *Id.* at 169; *see also id.* at 191-93, 198-99.

Congress's use of *program* nearby in subsection (c) three additional times provides additional support. Congress first uses the word in the subsection's heading, "Voter *removal* programs." 52 U.S.C. § 20507(c) (emphasis added). In subsection (c)(1), Congress explains one way that States can construct the required general program concerning change of address and death. Then, in subsection (c)(2)(A), Congress requires that "[a] state shall complete, not later than ninety 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 name of ineligible voters from the official lists of eligible voters." Thus, Congress uses *program* in subsection (c)(2)(A) to reference the "systematic[] remov[al] [of] the names of ineligible voters." *Id.* (c)(2)(A). This language refers to list maintenance.



To reach a contrary result, the district court relied on two cases from the Fourth Circuit Court of Appeals. Doc. 90 at 9-11. The earlier case arose out of Virginia where an informal Attorney General opinion had reasoned that "[i]t is all the documents that are generated during the regular periodic review of the registration records program that constitute the records" that § 20507(i) covers. Doc.

79-34 at 6. That included "the official registered voter list" and records related to the purge but not voter registration applications. *Id.* at 5-6. The Court rejected Virginia's argument and concluded that § 20507(i) covers records of denials. *Project Vote/Voting for Am. v. Long*, 682 F.3d 331 (4th Cir. 2012).[16]

The *Long* Court reasoned "the process of reviewing voter registration applications is a 'program' or 'activity'" that "is plainly 'conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" and the "registration applications ... are clearly records concerning the implementation of' this 'program or activity'" and Congress said "all." 682 F.3d at 335-36. It also reasoned that "[i]t is unclear what other purpose" "evaluating voter registration applications" would have if not making the lists more accurate and current. *Id.* at 335. That analysis is superficially appealing, but it breaks the concepts into pieces and interprets them in a void. That is not how statutory interpretation is done in this Circuit. *Wachovia Bank*, 455 F.3d at 1267 ("Courts should avoid slicing a single word from a sentence, mounting it on a definitional slide, and putting it under a microscope in an attempt to discern the meaning of an entire statutory provision."). Moreover, the end result proves too much. Everything that the State does with the voter registration system is intended to make the list more accurate and current; errors are not intentionally inserted.



[16] Admittedly, the United States filed an *amicus* brief supporting the *Long* plaintiff.

To understand what Congress meant when it took the time to refer to "programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters," the Court should look to context. *Wachovia Bank*, 455 F.3d at 1266; *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). If Congress had meant to refer to all records concerning the *administration of voter registration*, it would have said that "[i]nstead of [using the] intricate phraseology" it chose. *United Sav. Ass'n of Texas*, 484 U.S. at 373.

Though Congress did not, the *Long* Court effectively concluded that § 20501(i) encompassed the administration of voter registration. Then, in *Public Interest Legal Foundation v. North Carolina State Board of Elections*, the Fourth Circuit simply followed the path the *Long* panel set for it. 996 F.3d 257, 266 (4th Cir. 2021).



That Congress said "all records" does not undermine the Secretary's analysis. There is a world of difference between referring to "all blue cars" as opposed to "all blue cars with blind-spot monitoring and advanced cruise control." Here, Congress selected nuanced language referring to list maintenance. Congress's limitation on § 20507(i)'s scope must govern this Court's analysis of what falls within it.

Section 20507(i)'s exclusionary language also doesn't undermine the Secretary's analysis. As previously noted, § 20507(i)(1) ends by exempting from

disclosure records that "relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered." Those records concern voter registration documents, not list maintenance. However, this language merely repeats language elsewhere in the NVRA—52 U.S.C. § 20507(a)(6); *see also id.* at § 20504(b) & (c)(2)(D)(ii)-(iii); *id.* at § 20506(a)(7); *id.* at § 20508(b)(4)(ii)-(iii)—where Congress said that these particular records were not to be disclosed. Given the breadth of § 20507(i)'s "all records concerning" language and that Congress could not anticipate every record that the States and their subdivisions and Washington D.C. would choose to create over the decades, it was entirely logical for Congress to repeat its non-disclosure direction within § 20507(i) to avoid any potential conflict or confusion.



**2. Going further, § 20507(i) is best read to concern general list maintenance focused on change of address and death, not disenfranchising felony convictions.**

The NVRA's context further shows that § 20507(i) refers only to general list maintenance programs and activities concerning change of address and death, and thus, not other list maintenance programs or activities such as those concerning felon disenfranchisement. Subsection (i)(2) informs (i)(1)'s scope. As the only time that Congress explicitly tells the States what records (i)(1) contains, Congress directly calls back to the mailers sent out as part of the general program on change of address

and death. 52 U.S.C. § 20507(i)(2). Congress did not mention disenfranchising felony convictions.

Moreover, Section 20507 provides great detail regarding the general program that is required, 52 U.S.C. § 20507(a)(4), (b), (c), (d), (e), (f) & (j), and speaks very differently of felon disenfranchisement. As to the latter, Congress deferred to the States entirely by saying that State law prevailed, *id.* at § 20507(a)(3)(B), allowing removal of felons from voting lists even within 90 days of an election, *id.* at § 20507(c)(2)(B)(i), and requiring the United States Attorneys to notify the States about convictions, *id.* at § 20507(g); *see also* doc. 79-1 at 171. As the *Bellitto* Court recognized, "Congress intended to treat the categories of ineligibility differently." *Bellitto*, 935 F.3d at 1200. "On the one hand, Congress made removal based on the request of the registrant, criminal conviction or mental incapacity permissive, while on the other, it required an affirmative program of list maintenance to remove voters who become ineligible because of death or change of address. The statute is structured to treat these ineligibility categories differently." *Id.* Congress thus specifically excluded even systematic efforts to remove felons from a general list maintenance provision, which is consistent with the *Bellitto* Court's recognition that not all ineligibility is treated the same.[17]



[17] *Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014), is not controlling. *Arcia* is "confine[d]" to the 90-day bar, *id.* at 1347, and does not purport

Looking back to the USDOJ website, the Department also seems to draw a distinction between the general list maintenance program and optional removals when it refers only to the former as list maintenance:

> Section 8 permits States to remove the name of a person from the voter registration rolls upon the request of the registrant, and, if State law so provides, for mental incapacity or for criminal conviction. The Act *also* requires States to conduct a *general voter registration list maintenance program* that makes a reasonable effort to remove ineligible persons from the voter rolls by reason of the person's death, or a change in the residence of the registrant outside of the jurisdiction….

Doc. 79-4 at 7-8 (May 2022); *see also id.* at 9-10 (emphasis added).

Accordingly, the NVRA supports treating felon removals differently from the general list maintenance programs and activities concerning change of address and death, which are the focus of § 20507. This distinction is appropriate given that the States decide whether felons may vote. U.S. Const. amend. XIV; *Richardson v. Ramirez,* 418 U.S. 24, 54 (1974).[18]



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to interpret § 20507(i). Further, as set out in the text, felon removal is exempted from the 90-day bar and so *Arcia* itself would have reached a different result if it had addressed felon removals. At most, *Arcia* creates difficulty in resolving a future case concerning § 20507(i) and non-citizens. *Arcia* raised substantial constitutional questions that ought to be avoided, and, indeed, recognized it was creating some constitutional tension but, based on the arguments made in that case, kicked the can down the road. 772 F.3d at 1347. *Arcia* is no solid foundation for erring further, and it does not control the result here.

[18] *See also* U.S. Const. art. I § 2; *id.* art. II, § 1; *id.* amend. XVII; *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 16 (2013).

### 3. Even if § 20507(i) concerns all list maintenance, lists of persons removed from the rolls need not be disclosed and that includes felons who are removed.

Even if the Court rejects (or declines to reach) the argument that § 20507(i) does not reach felon removals generally, the FEC's contemporary understanding of § 20507(i) evidences that the specific felon removal records GBM demands are outside its scope.

While Congress enacted the NVRA in 1993, the relevant case law is relatively recent, which suggests that organizations have only recently been invoking § 20507(i) to demand access to a broad range of records. Much of the early FEC guidance restated § 20507(i)'s terms without explanation or development. *E.g.*, doc. 79-1 at 88-89, 140. At least some of the legislative history is the same. *E.g.*, *id.* at 171, 200. Still, the FEC guide *twice* said that: "As a matter of prudence, though not as a requirement of the Act, States might also want to retain for the same time period all records of removals from the voter registration list—the date and the reason." *Id.* at 89, 140. And, given the plain text of the statute, because the removal records need not be maintained, they also need not be made available *even if* a State chooses to maintain them. 52 U.S.C. § 20507(i) ("Each State shall maintain … and shall make available ….").

The FEC guide does not explain why it takes this position. It may have been thought obvious. It may have been because the NVRA was enacted at a time before

a computerized voter registration system was required—a point that feeds into the discussion below about the difference between maintaining records and creating them, *see infra* Part II.B. It may have been because § 20507(i) addresses records of "implementation."

Section 20507(i)(1) requires disclosure of "all records concerning the implementation of programs and activities ...." "Implement" means "[t]o complete, perform, carry into effect" or "[t]o carry out, execute." *Implement*, OXFORD ENGLISH DICTIONARY (2d ed. 1989), *see also Implement*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) ("carry out, accomplish" (capitalization altered)). A district court in Georgia recognized that "implementation" might be read to only require disclosure of records "that relate to the procedures a State has put into effect to ensure the accuracy and currency of the official lists" before adopting a broader reading. *Kemp*, 208 F. Supp. 3d at 1338-41. For instance, a policy or manual about the State's procedures for removals would be a document that the Secretary would maintain that the public could easily publicly inspect or take with them *via* a photocopy. By contrast, a list of persons removed from the voter list and the reason for their removals is a very different document. And it is one that Alabama has generally not made available.



Notably, Virginia's position in *Long* was that § 20507(i) was limited to "programs and activities related to the purging of voters from the list of registered

voters," *Long*, 682 F.3d at 335, and the informal opinion from the Commonwealth's Attorney General was to that same effect while also recognizing that it included "the official registered voter list." Doc. 79-34 at 6. Similarly, Pennsylvania argued that only purge documents are within the scope of § 20507(i). *Public Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 559, 560 (M.D. Pa. 2019).

Given that the FEC guide was clear that § 20507(i) does not require the States to maintain "all records of removals from the voter registration list—the date and the reason[,]" Doc. 79-1 at 89, 140, the Court should be hesitant to conclude otherwise.



### B. Section 20507(i)(1) requires that the Secretary "maintain" records, not create them.

The Secretary did not possess the customized lists of records that GBM demanded in its Felony Records Request until he worked with ES&S to create them in response to the district court's judgment. He should not have been required to do that, and he should not be required to do it in the future. Section 20507(i)(1) does not require creating new records, only "maintain[ing]" existing records.

Section 20507(i)(1) provides: "*Each State shall maintain* for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning ...." 52 U.S.C. § 20507(i)(1) (emphasis added). That language clearly speaks to maintaining pre-existing records, not creating records. *See Maintain*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]o

keep up, preserve, cause to continue in being" and "to keep vigorous, effective, or unimpaired; to guard from loss or derogation"); *Maintain*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) ("to keep in an existing state").

The following paragraph in § 20507(i), subsection (i)(2), makes this point even clearer by providing additional context. It provides:

> The records maintained pursuant to paragraph [i](1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

52 U.S.C. § 20507(i)(2). Congress thus knew how to instruct the States to create and maintain a particular document. And that specific document tracks the progress of the then-ongoing general removal program concerning change of address and death that the NVRA requires. It has nothing to do with felony convictions. Thus, Congress has not instructed that the information responsive to GBM's Felony Records Request must be created.



GBM apparently believes that the lack of an extant list meeting its demands is irrelevant because the Secretary maintains the records from which such a list could be created, *see* doc. 81 at 9-10, but there is a world of difference between the two. As set out above, PowerProfile has individual records like the one reproduced at page 9. These registrant profiles would necessarily be the building blocks for any list responsive to GBM's Felony Records Request. Such profiles exist for persons

that have been denied registration or removed from the voting rolls. Doc. 69 at 3. But they are not collected in the way that GBM wants any more than a list of persons with the first name "John" who were born in 1963 are collected in a list. GBM is not asking for an individual registrant profile, and it is not asking for any list that the Secretary routinely produces. GBM is demanding that the Secretary extract data from PowerProfile to create customized lists of the particular individuals in which it is interested ("status"), for a particular time frame, and containing specified fields of information for each (name, address, date of birth, race, gender, *etc.*). Doc. 72-58 at 2.

As the post-judgment proceedings demonstrated, creating those lists (and the list responsive to the Purged Voters Request) required about 15 hours of ES&S's time, for which the Secretary is usually billed $150 per hour, doc. 95-1 at 18, and about ten hours of staff time, doc. 95-1 at 8-9; doc. 95-11. It is entirely possible that the next demand will be one that the Secretary cannot meet even with ES&S's assistance.

The Secretary is not required to make available any records that the Secretary does not already have. With the sole exception of the record demanded in subsection (i)(2), the Secretary need only maintain and make available records that the Secretary has. The information responsive to GBM's Felony Records Request is not such a record.

## CONCLUSION

The district court's decision should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as it contains 12,899 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.



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## CERTIFICATE OF SERVICE

I hereby certify that, on January 11, 2023, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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# STATUTORY ADDENDUM