Case No. 16-3746

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO A. PHILIP RANDOLPH INSTITUTE; NORTHEAST OHIO COALITION FOR THE HOMELESS; and LARRY HARMON

Plaintiffs-Appellants

v.

JON HUSTED, Secretary of State of Ohio

Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of Ohio
Eastern Division

BRIEF OF APPELLANTS OHIO A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, AND LARRY HARMON

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3746 Case Name: A. Philip Randolph Institute v. Husted

Name of counsel: Stuart Naifeh, Demos

Pursuant to 6th Cir. R. 26.1, Ohio A. Philip Randolph Institute
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on July 1, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Naila Awan
220 Fifth Ave., 2nd Flr.
New York, NY 10001

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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REQUEST FOR ORAL ARGUMENT

Given the significant importance of the issues at stake in this case, Appellants Ohio A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon respectfully request oral argument, which they believe would aid the Court in deciding the issues before it.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the action below under 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 as to the District Court's final judgment and pursuant to 28 U.S.C. § 1292(b) as to the District Court's denial of Plaintiffs-Appellants' motion for a preliminary injunction.

ISSUES PRESENTED

1. Did the District Court err in concluding that the National Voter Registration Act of 1993 ("NVRA") permits Appellee Secretary of State Jon Husted (the "Secretary") to use a voter's failure to vote to initiate a process of cancelling the voter's registration by sending the voter a confirmation notice and requiring the voter to either respond to the notice or vote during a period that includes two federal general elections, where using failure to vote results in the erroneous cancellation of eligible voters?

2. Did the District Court err in dismissing Appellants APRI's, NEOCH's, and Mr. Harmon's Second Cause of Action, which asserts that Ohio's address-confirmation notice form does not comply with the NVRA, as moot where Secretary Husted voluntarily issued a new form of confirmation notice during the pendency of this litigation and the new notice did not address all of the alleged violations?

INTRODUCTION

No right is more fundamental than the right to vote. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). In furtherance of this most basic right, Section 8 of the National Voter Registration Act of 1993 ("NVRA") prohibits states from removing voters from the rolls based upon their failure to vote. 52 U.S.C. § 20507. In passing the NVRA, Congress recognized that "it is the duty of the Federal, State, and local governments to promote the exercise" of the "fundamental right" to vote. *Id.* § 20501(a). The NVRA seeks to prevent "unfair registration laws and procedures [from] hav[ing] a direct and damaging effect on voter participation" by depriving eligible voters of the right to vote merely because they do not vote in every election. *Id.* To achieve these purposes, the NVRA prohibits states from administering their voter-registration rolls in a manner that results in the removal of voters because of their failure to vote. 52 U.S.C. § 20507(b).

The State of Ohio is currently violating the NVRA through its "Supplemental Process," under which many thousands of Ohio voters have been removed from Ohio's voter-registration rolls because they have failed to vote with what Ohio deems sufficient frequency. Under the Supplemental Process, Ohio asks registered voters who have not voted for two years to confirm their registrations; if they do not and they fail to vote for four more years, they are purged from Ohio's voter rolls. This amounts to purging voters because of their failure to vote in violation of the NVRA. Appellants Ohio A. Philip Randolph Institute ("APRI"), Northeast Ohio Coalition for the Homeless ("NEOCH"), and Larry Harmon seek to protect the federal voting rights of the infrequent Ohio voters whose

registrations have been cancelled or are threatened with cancellation—often without the voters' knowledge and despite their continuing eligibility.

Section 8 of the NVRA requires states to keep their voter rolls current by removing voters who are ineligible because of a change in residence, but it forbids roll-maintenance programs that "result in the removal of the name of any person from the official list of voters . . . *by reason of the person's failure to vote*." 52 U.S.C. § 20507(b). This broad prohibition contains a single, limited exception. When a state has obtained reliable evidence that a voter may have changed residence—such as where the voter files a forwarding address with the postal service—it must confirm the suspected change. *Id.* § 20507(c), (d). As part of the confirmation process, the state may consider a voter's failure to vote—but only *after* it has obtained evidence of an address change that is independent of the failure to vote. *Id.*

In this Appeal, Appellants seek reversal of the District Court's judgment in favor of Ohio Secretary of State Jon Husted ("the Secretary"). The District Court disregarded the plain meaning of the NVRA and ignored the evidence of the Supplemental Process's disenfranchisement of many thousands of eligible Ohio voters, and held that, notwithstanding the explicit ban on purging infrequent voters, Ohio may continue to remove eligible voters under the Supplemental Process based upon their failure to vote. In so doing, the District Court misconstrued Section 8's a narrow exception—which is limited to the address-confirmation process—as a grant to states of virtually unfettered discretion in maintaining their voter registration rolls—including the discretion to purge voters who fail to vote—despite the restrictions expressly imposed by the NVRA. Contrary to the District

Court's order, the NVRA prohibits programs that, like the Supplemental Process, rely on failure to vote as a basis for removing a voter from the rolls.

The District Court's interpretation of the NVRA must be rejected. The judgment below must be vacated and this case remanded to the District Court with instructions to enter judgment for Appellants and to issue a permanent injunction immediately halting the Secretary from initiating this year's Supplemental Process, and ordering him to restore to the rolls all of the eligible Ohio voters who have been unlawfully purged, or, alternatively, to count the provisional ballots those voters cast, so as to avoid denying thousands of Ohio citizens their right to vote.

STATEMENT OF FACTS AND OF THE CASE

A. Ohio's Roll-Maintenance Processes

Ohio maintains its official list of registered voters in accordance with several provisions of state law and directives issued by the Secretary. These statutes provide for the removal of voters who have died as well as those who have become ineligible due to criminal conviction, judicial declaration of incompetence for voting purposes, or change in residence. Voters who have died, been convicted of a disqualifying felony, or adjudged mentally incompetent are identified through information obtained from a variety of state and federal agencies.[1] In addition, Ohio obtains information from the Bureau of Motor Vehicles ("BMV") to update the voter registration records of electors who have changed their name or residence. Ohio Rev. Code § 3503.15.

[1] *See*, *e.g.*, Ohio Rev. Code § 3503.18(A)-(C) (removal of electors who have died, as identified from information provided by the Ohio Department of Health; removal of persons who have been adjudicated incompetent, as identified from information provided by probate judges; removal of electors convicted of a disqualifying felony, as identified from information provided by state courts and United States Attorneys).

Finally, and most relevant to this litigation, Ohio employs two processes that attempt to identify and remove individuals from its voter rolls who are no longer eligible to vote because of a change in residence. Directive 2015-09, RE42-2, PageID#1587-1588. These two processes, known respectively as the National Change of Address ("NCOA") Process and the Supplemental Process, are carried out pursuant to directives issued annually (or, prior to 2014, biennially) by the Secretary of State to Ohio's 88 county boards of election. Directive 2015-09, RE42-2, PageID#1587-1588; Joint Proposed Stipulation of Facts ("Fact Stip.") ¶¶ 1,7, RE41, PageID#1505, 1506-1507.

These two processes are similar in one way: When a voter is identified through either the NCOA Process or the Supplemental Process, the county, acting pursuant to the Secretary's directive, mails the voter a confirmation notice, which the voter must complete and return to remain eligible to vote. Directive 2015-09, RE42-2, PageID#1588. If the voter fails to complete and return the confirmation notice and does not vote or engage in other voting-related activity in the subsequent four-year period, the voter's registration is cancelled. Ohio Rev. Code § 3503.21; Directive 2015-09, RE42-2, PageID#1591-1592; Fact Stip. ¶ 14, RE41, PageID#1508.

The difference between the two processes is the information used to trigger the confirmation-and-removal procedure. Under the NCOA Process, the procedure is initiated based on direct evidence that a voter has moved: when a voter has a forwarding address on file with the United States Postal Service. *See* Directive 2015-09, RE42-2, PageID#1587-1588; Pls.' Mot. Summ. J., RE39, PageID#1377-1379; Fact Stip. ¶¶ 1, 7, 10, RE41, PageID#1505, 1506-1507. In contrast, the

Supplemental Process is triggered simply by a voter's inactivity: It targets voters who do not vote or engage in other voting-related activities (such as filing a voter registration form—an unnecessary action for voters who are already registered) for a two-year period. *E.g.*, Directive 2015-09, RE42-2, PageID#1588; Fact Stip. ¶ 10, RE41, PageID#1507. The Supplemental Process requires such voters to confirm or update their voter registration information in order to remain on the registration rolls. Directive 2015-09, RE42-2, PageID#1588. If the voter does not respond to the confirmation notice and fails to vote for an additional four-year period, the voter will be purged. In other words, under the Supplemental Process, a voter is purged after six years of voting inactivity—even if she has not moved and remains eligible to vote.

Neither the list-maintenance directives nor Ohio law define the voting-related activities that will prevent a voter from being targeted or cancelled by the Supplemental Process. The list-maintenance directives issued in 2011 and 2015, for example, each offer the vague pronouncement that "inactivity [is] determined by the absence of a voter initiated activity such as voting or the filing of a voter registration form," but do not provide a comprehensive list of the qualifying activities. Directive 2011-15, RE42-5, PageID#1611; Directive 2015-09, RE42-2, PageID#1588. According to the Secretary of State, "voter activity" includes updating a voter's registration record or submitting a new voter registration form. Deposition of Matthew Damschroder ("Damschroder Depo.") at 68:8-69:2, RE42-1, PageID#1548-1549. In addition, county boards of election may, *but are not required to*, consider a voter's signing of certain petitions to be "voter activity." Frequently Asked Questions Related to NCOA/Supplemental Process, RE42-20,

PageID#1808. Most counties do not consider petitions, notwithstanding that petitions contain first-hand evidence from the voter of the voter's current address. Damschroder Depo. at 70:17-23, RE42-1, PageID#1549.

Other than voting, most or all of the qualifying activities are not activities that a voter who had not changed residence would ever be expected to take. For example, a voter who has not moved would have no need to submit a new voter registration form or to update her address with the BMV or county board of elections. Declaration of Matthew Damschroder ("Damschroder Decl.") ¶ 16, RE38-2, PageID#295. So, not surprisingly, many voters who receive a confirmation notice due to inactivity but have not moved are confused about why they have received the notice or whether they need to take action in response. *See, e.g.*, Declaration of Andre Washington ("Washington Decl.") ¶¶ 26, 28, RE39-1, PageID#1434-1435; Damschroder Depo. at 85:13-23, RE42-1, PageID#1553.

B. The Supplemental Process Disenfranchises Substantial Numbers of Eligible Voters Who Have Not Moved.

According to the Secretary, Ohio's Supplemental Process is intended to identify voters who may have become ineligible to vote due to a change in residence. Directive 2015-09, RE42-2, PageID#1587-88; Fact Stip., RE41, PageID#1507, ¶ 10. That is, the Secretary presumes that a voter who fails to vote for a two-year period likely has moved. Directive 2015-09, RE42-2, PageID#1588. The Secretary has conducted no analysis, however, to determine the validity of this presumption. Damschroder Depo. at 83:6-84:10, RE42-1, PageID#1552. He agrees that it is possible that individuals who have not moved from the address where they were registered have been purged by the Supplemental Process, Damschroder Depo. at 92:15-93:14, RE42-1, PageID#1554-1555, and readily admits that while

"there could be any number of reasons why a voter chooses not to vote in any particular election," he has no "sense of what proportion of voters engage in no voter activity" but haven't moved. Damschroder Depo. at 82:3-5, 82:12-24, 83:1-10, RE42-1, PageID#1552. But no one in the Secretary's office or county boards of elections has ever bothered to collect or review information that would provide insight into these issues. Damschroder Depo. at 84:5-10, RE42-1, PageID#1552. The Secretary admits that he has never investigated whether or how many inactive voters targeted by the Supplemental Process subsequently vote from their current registered address or respond to the confirmation notice to confirm that they have not moved. Damschroder Depo. at 83:1-84:10, RE42-1, PageID#1552. Likewise, he has not investigated whether or how many voters, after being purged, re-register at the same address or cast a provisional ballot on which they provide the same address at which they were previously registered. Damschroder Depo. at 83:1-84:10, 108:3-108:20, 117:6-120:14, RE42-1, PageID#1552, 1558-1559, 1561-1562. In fact, the Secretary does not even know how many confirmation notices are sent or how many voter registrations are cancelled each year under either the NCOA Process or the Supplemental Process. Damschroder Depo., RE42-1, PageID#1552, 1554.

Had the Secretary investigated this information, he would have learned that a two-year—or even six-year—period of voting inactivity is a poor proxy for whether individual has moved.[2] Although the Secretary maintains that the

[2] Moreover, the Secretary is failing to use information at his disposal that would more accurately target voters who move without leaving a forwarding address without impacting so many eligible but infrequent voters. For example, the Secretary could use mail returned as undeliverable to identify voters who have changed address. The Secretary of State's office already sends absentee ballot applications to all registered voters in Ohio every two years. *See* Damschroder Decl.

Supplemental Process merely "supplements" the NCOA Process to ensure those voters who move without filing a forwarding address do not slip through the cracks, the Supplemental Process is in fact the primary way voters are stricken from the voter rolls in Ohio, resulting in about three times as many cancellations as the NCOA Process. *See* Sealed Declaration of Cameron Bell ("Bell Decl."), RE45, PageID#1822-1825, ¶¶ 13, 17-19; Damschroder Depo. at 74:23-75:9, RE42-1, PageID#1550. Voter history data from several Ohio counties confirms that many of these voters are eligible and have not changed their address, undermining the presumption underlying the Supplemental Process. According to this data, many Ohioans vote almost exclusively in presidential-election years, meaning that they routinely miss two years of elections. These voters are regularly targeted by the Supplemental Process and are repeatedly sent confirmation notices at the same address. According to county election records, many if not most of these voters never respond to the notice but avoid cancellation only because they vote in the next Presidential Election. Pls.' Stmt of Undisputed Material Facts ("SOF") ¶ 30, RE40, PageID#1479-1480. But, in Ohio, when voters who typically vote only every four years miss a single Presidential Election, whether as a matter of choice, accident, or necessity, their registrations are cancelled. Indeed, such occurrences are a frequent consequence of the Supplemental Process—county voter-registration records reveal many voters who have been purged after receiving confirmation

¶¶ 25-26, RE38-2, PageID#296-297. In addition, Ohio recently joined the Electronic Registration Information Center ("ERIC"), an interstate data-sharing system that aggregates data from voter registration lists, motor vehicle departments, and other sources to, *inter alia*, identify individuals who have likely died or moved outside their jurisdiction of registration. Either of these methods would provide information that is more reliable than voter inactivity at indicating that an individual has moved, but the Secretary uses neither for voter list-maintenance. Declaration of Matthew E. Walsh ¶ 4, RE49-9, PageID#22520.

notices multiple times despite never having changed their residence. Bell Decl. ¶ 51, RE45, PageID#1843.

Such was the experience of Appellant Larry Harmon—who was purged via the Supplemental Process despite never having moved from his address in Portage County during the past approximately 16 years. Declaration of Larry Harmon ("Harmon Decl.") ¶ 3, RE9-4, PageID#89. Mr. Harmon regularly votes in Presidential Elections, but typically does not vote in midterm, state, or local elections unless there are particular issues or candidates on the ballot that interest him. Harmon Decl. ¶ 5, RE9-4, PageID#89. Because of this, Mr. Harmon has been targeted multiple times for removal under the Supplemental Process. Bell Decl. ¶ 53, RE45, PageID#1843. According to Portage County registration records, Mr. Harmon was sent a confirmation notice in 2007 after missing the 2005 local election and the 2006 midterm election, but then voted in the 2008 Presidential Election, which reactivated his registration. Bell Decl. ¶¶ 52-53, RE45, PageID#1843. He then did not vote in 2009 or 2010, and as a result, Portage County sent Mr. Harmon another confirmation notice in June 2011 pursuant to the Secretary's 2011 list-maintenance directive. Bell Decl. ¶ 54, RE45, PageID#1843; Harmon Decl. ¶ 10, RE9-4, PageID#90. Mr. Harmon does not recall receiving the 2011 confirmation notice and did not respond to it. Harmon Decl. ¶ 10, RE9-4, PageID#90. Mr. Harmon again did not vote in the off-year election of 2011. Bell Decl. ¶ 54, RE45, PageID#1843-1844. In the 2012 Presidential Election, the first since he had last voted, Mr. Harmon was disillusioned by the candidates on the ballot and chose to express his dissatisfaction by not voting. Harmon Decl. ¶ 6, RE9-4, PageID#89. He then did not vote in 2013 or 2014 or in the special or

primary elections in 2015. Harmon Decl. ¶ 3, RE9-4, PageID#89. Consequently, Portage County cancelled Mr. Harmon's voter registration record in September 2015 pursuant to the Supplemental Process, despite the fact that, throughout this time period, he never changed his residence and did not otherwise become ineligible to vote. Bell Decl. ¶ 54, RE45, PageID#1843-1844; Harmon Decl. ¶ 3, RE9-4, PageID#89. Mr. Harmon's fundamental right to vote was entirely negated. The integrity of Ohio's election was weakened, not strengthened, by excluding Mr. Harmon, and thousands of eligible voters like him, from casting a ballot that would count.

C. The Summer 2015 Voter Purge

Ohio's most recent purge under the Supplemental Process occurred, in most counties, in the summer of 2015, pursuant to the Secretary's 2011 list-maintenance directive.[3] *See* Directive 2011-15, RE42-5, PageID#1611; Bell Decl. ¶¶ 15, 17, 19, RE45, PageID#1823-1825. This purge resulted in hundreds of thousands of Ohioans being removed from the registration rolls due to their failure to vote for a six-year period. Bell Decl. ¶¶ 13, 15, 17, 19, RE45, PageID#1822, 1823-1825.[4] Under the 2011 directive, these voters were sent confirmation notices in or around June 2011, based on a period of inactivity that began in 2009. Directive 2011-15, RE42-5, PageID#1611; Bell Decl. ¶¶ 13, RE45, PageID#1822. In other words, the last federal election in which the voters purged last summer participated was the 2008 Presidential Election—a historic election that inspired massive get-out-the-vote efforts in Ohio across the political spectrum and turned out a record number

[3] Summit and Franklin Counties did not conduct their voter purges until later in 2015. *See* Bell Decl. ¶ 40, RE45, PageID#1837.

[4] In Cuyahoga and Greene Counties alone, over 62,000 voters were purged pursuant to the Supplemental Process in 2015. Bell Decl. ¶¶ 13, 17, RE45, PageID#1822-1824.

of electors. Fact Stip. ¶ 23, RE41, PageID#1510; SOF ¶ 24, RE40, PageID#1478. No election since 2008 has brought out the same number of electors in Ohio, suggesting that a high number of Ohioans who voted in 2008 have not voted since.

Because a failure to vote is such an inaccurate proxy for a change of address, a substantial number of the individuals purged in 2015 had not changed residence and were still eligible to vote. While the precise number of inactive but eligible voters who were erroneously purged in 2015 is difficult to determine without full access to Ohio's voter-registration records,[5] the record in this case shows that a significant number of eligible voters were not only unlawfully purged but also denied their right to vote as a result of the Supplemental Process.

During the expedited discovery period in this case, Appellants obtained provisional ballot envelopes and voter-registration records for voters whose registrations were cancelled in 2015 under the Supplemental Process from several Ohio counties. Bell Decl., RE45, PageID#1819, 1828-1830. A review of these documents shows that a number of the infrequent voters who were erroneously purged under the Supplemental Process last year subsequently turned out to vote but were unable to cast a ballot that was counted. By comparing the address provided by the voter on the provisional ballot envelope to the address at which the voter had been registered prior to the 2015 purge, it was possible to identify the cancelled voters who continued to reside at the same address. Bell Decl., RE45, PageID#1830-1832; 1839-1842. This analysis of information from the 2015 local election in seven counties and from the 2016 federal primary election in ten counties identified more than 600 Ohio voters who attempted to vote but, as a

[5] During the expedited discovery period in this case, Appellants obtained voter-registration data and provisional ballots from a small sample of Ohio counties.

result of the Supplemental Process, were deprived of the opportunity to participate in the democratic process.[6] None of these voters was ineligible.[7] They had been purged because of their failure to vote.

These specific individuals represent only a small subset of the eligible voters whose registrations have been erroneously cancelled pursuant to the Supplemental Process. That is, of the hundreds of thousands of voters purged under the Supplemental Process in 2015, a subset had not changed residence and should not have been removed, and of those erroneously purged infrequent voters, a further subset turned out to vote in the two elections that occurred between the purge and the close of the expedited discovery period in this case—the 2015 statewide election and the 2016 Primary Election. Yet a further subset of those who turned out to vote were offered—and were able to take the time to cast—a provisional ballot. *Compare* Declaration of Chad McCullough ¶ 12, RE39-7, PageID#1465 (offered a provisional ballot), *with* Harmon Decl. ¶ 11, RE9-4, PageID#90 (not offered a provisional ballot). Within the constrained discovery process in this case, Appellants were able identify the voters in this last category in a small number of counties. In other words, the total number of voters who were unlawfully purged

[6] In the 2015 statewide General Election, approximately 188 infrequent voters from Mahoning, Portage, Licking, Lake, Lorain, Warren, and Greene Counties who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the address where they were previously registered. Bell Decl. ¶ 40, RE45, PageID#1833-1839. In the 2016 Primary Election, approximately 428 infrequent voters from Mahoning, Cuyahoga, Franklin, Portage, Licking, Lake, Lorain, Warren, Lucas, and Montgomery Counties who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the address where they were last registered. *Id*. ¶ 40, RE45, PageID#1833-1839.

[7] In Ohio, a completed provisional ballot affidavit acts as a voter registration application if the voter is eligible to vote, even if the ballot itself is not counted. Each of the voters identified in this analysis was re-registered as a result of casting a provisional ballot. Thus, although Ohio denied them their opportunity to vote, it acknowledged their eligibility.

certainly vastly outnumbers the 600 or so wrongfully purged voters from a handful of counties who attempted to vote in two low-turnout elections. Moreover, based on the number of provisional ballots typically cast in non-federal and primary elections in Ohio as compared to presidential elections and the fact that the counties analyzed represent only a fraction of the state's total population, the number of unlawfully purged voters who were forced to cast provisional ballots in these two recent elections is likely to be dwarfed by the number who will turn out in the November Presidential Election, only to find they are no longer registered. These voters will lose their fundamental right to vote in this critical election—a loss that cannot be remedied except through action by this Court.

D. The Parties

Appellant APRI is the Ohio state chapter of the A. Philip Randolph Institute, a national organization for Black trade unionists and community activists established in 1965 to forge an alliance between the civil rights and labor movements. APRI serves predominantly Black and low-income communities through a network of ten local chapters across the State of Ohio. *See, e.g.*, Washington Decl. ¶¶ 12, 13, 15, RE39-1, PageID#1432-1433; Declaration of KaRon Waites, Jr. ("Waites Decl.") ¶ 10, RE39-5, PageID#1457-1458. APRI conducts voter registration drives annually at community events and conducts voter registration activities and outreach by going door-to-door in low registration and low-turnout precincts. *See, e.g.*, Washington Decl. ¶¶ 16, 21-24, RE39-1, PageID#1432-1434; Declaration of Delores Freeman ("Freeman Decl.") ¶¶ 10, 13, 18-19, RE39-3, PageID#1442-144421-23; Waites Decl. ¶¶ 9, 10, 12, RE39-5, PageID#1457-1458.

Appellant NEOCH is a membership organization serving homeless and housing-insecure individuals in the Greater Cleveland area. Declaration of Brian Davis ("Davis Decl.") ¶ 5-8, RE46, PageID#22298-22299. NEOCH conducts a wide array of voting-related activities, including registering homeless voters, coordinating voter-registration trainings for social-service providers, and providing transportation to the polls for homeless voters. Davis Decl. ¶¶ 12-14, RE46, PageID#22300.

Appellant Larry Harmon is a 59-year-old U.S. Navy veteran who was born and raised in Ohio and who has resided at the same address in Portage County for approximately 16 years. Harmon Decl. ¶¶ 2-3, RE9-4, PageID#89. He is an eligible Ohio voter who has never been incarcerated, declared mentally incompetent, or otherwise disenfranchised for violating election laws. *Id*.

Appellee Jon Husted is the Ohio Secretary of State. Secretary Husted is the chief election officer in Ohio and is responsible for overseeing voter registration and election administration in the State. Ohio Rev. Code § 3501.04 (2015). In his official capacity, Secretary Husted coordinates the State's NVRA responsibilities, including overseeing and adopting rules governing the maintenance of voter registration lists. *Id.* § 3501.05(Q). As chief election officer, Secretary Husted is responsible for ensuring statewide compliance with Section 8 of the NVRA, including by Ohio's local boards of elections. *See* 52 U.S.C. § 20509; *see also* Ohio Rev. Code § 3501.05 (2015).

E. Procedural History

On November 3, 2015, the date of Ohio's 2015 statewide General Election, Larry Harmon notified the Secretary's office that he had attempted to vote but had

been told his name was not on the voter roll, despite the fact that he had lived at the same address for many years. See Damschroder Depo. 102:14-103:7, RE42-1, PageID#1557; Pls.' First Amend. Complaint, RE37, PageID#234. On December 17, 2015, APRI sent a letter by certified mail and email to Secretary Husted, notifying him that Ohio's Supplemental Process violated Section 8 of the NVRA. RE49-4, PageID#22477-22480. On February 23, 2016, NEOCH sent a similar letter by first-class mail and email to Secretary Husted. RE49-5, PageID#22481-22483.

On January 21, 2016, APRI met with Secretary Husted in an attempt to resolve the concerns raised in the December 17 letter, and APRI and NEOCH subsequently engaged in further discussions with the Secretary in an effort to avoid litigation. These discussions proved unfruitful, however, and on April 6, 2016, after Secretary Husted had failed to remedy the NVRA violations identified in their notice letters, APRI and NEOCH filed suit. *See* Complaint, RE1, PageID#1.

The Complaint alleged two causes of action: (1) that Ohio's Supplemental Process unlawfully removes registered voters from the rolls in violation of Section 8 of the NVRA, and (2) that the confirmation notice sent to voters under both the NCOA and Supplemental Processes violates the NVRA. Complaint, RE1, PageID#13-15. The day after filing the Complaint, APRI and NEOCH moved for a temporary restraining order to prevent the Secretary from issuing any directives or removing any voters from the rolls based on the Supplemental Process and a preliminary injunction to compel him to reinstate voters previously removed pursuant to the Supplemental Process to the registration rolls or, in the alternative, count provisional ballots cast by any such voters whose address remains

unchanged. Pls.' Mot. Temp. Rest. Order, RE9, PageID#36. On April 11, 2016, the parties filed and the District Court signed a stipulation in which APRI and NEOCH agreed to withdraw their request for a temporary restraining order in exchange for the Secretary's agreement not to initiate the Supplemental Process prior to July 1, 2016. [Proposed] Joint Stip. & Order, RE16, PageID#132; Joint Stip. & Order ("Joint Stip."), RE18, PageID#148. The motion for a preliminary injunction remained on the calendar. Joint Stip., RE18, PageID#148.

On April 14, 2016, the parties engaged in a court ordered mediation before Magistrate Judge Deavers. *See* RE20, PageID#152. At the close of the mediation, the Court held a brief status conference at which, in the interest of resolving the case expeditiously, the parties agreed to engage in extremely limited discovery and to consolidate all of the dispositive issues in the case through simultaneous briefing. This agreement was memorialized in an order filed on April 15, 2016. RE22, PageID#156. The discovery and briefing schedule was subsequently modified by stipulation of the parties. RE36, PageID#221. Neither the parties' agreement nor the Court's orders specified in what form the dispositive issues in the case would be presented to the Court. RE22, PageID#156; RE36, PageID#221.

On April 28, 2016, the Secretary filed his Answer. RE27, PageID#184. On May 17, 2016, Appellants filed an Amended Complaint naming Larry Harmon as an additional plaintiff, and on June 10, 2016, the Secretary filed an Answer to the Amended Complaint. Pls.' First Amend. Complaint, RE37, PageID#222; Def. Ans. Pl. First Amend. Complaint, RE48, PageID#22308.

On May 24, 2016, in accordance with the stipulated briefing schedule, Appellants filed a motion seeking summary judgment and a permanent injunction.

Pls.' Mot. Summ. J., RE39, PageID#1366. In the alternative, Appellants sought a preliminary injunction and an expedited trial. *Id.* The Secretary filed what he styled an "Initial Merits Brief" in which he requested that judgment be entered in his favor. Def.'s Initial Merits Br., RE38, PageID#242. The parties filed opposition briefs on June 10, 2016, and reply briefs on June 17, 2016. Def.'s Second Merits Br. RE49, PageID#22320; Pls.' Opp., RE52, PageID#22627; Def.'s Third Merits Br., RE56, PageID#22717; Pls.' Rep., RE57, PageID#22825. In their briefs, the parties agreed that there were no disputed issues of fact but disagreed on the appropriate procedure for resolving the case. *See* Secretary's Position Statement Regarding the Procedural Posture of This Litigation, RE62, PageID #22952 ("[T]he plain language of the NVRA is the only source needed to resolve this matter and the issue before the Court is purely a legal issue."); Pls.' Mot. Summ. J., RE39, PageID#1393 (asserting that there were no genuine issues of material fact to contradict plaintiffs' entitlement to relief, and the case could be decided in plaintiffs' favor as a matter of law). Appellants asserted that, to secure an expeditious resolution on the dispositive questions of law in the case, summary judgment in their favor was appropriate. Pls.' Opp., RE52, PageID#22637-22638; Pls.' Rep. Supp. Mot. Summ. J., RE57, PageID#22857-22859. The Secretary argued that the case should be resolved "on the merits" and a final judgment entered, but did not specify what procedural mechanism the District Court should apply. Def.'s Second Merits Br., RE49, PageID#22349-22352; Def.'s Third Merits Br., RE56, PageID#22754.

On June 29, the District Court denied Appellants' motion for summary judgment and their alternative request for a preliminary injunction, and ordered

judgment for the Secretary—notwithstanding the Secretary's failure to move for summary judgment in his favor. Order, RE66, PageID#23003. A Clerk's Judgment in favor of the Secretary was entered the same day. RE67, PageID#23027. Appellants filed their notice of appeal on June 30, 2016. RE68, PageID#23029.

SUMMARY OF ARGUMENT

The NVRA sets out a comprehensive scheme regulating the administration of voter registration by the states. Section 8 limits the circumstances in which a voter may be removed from the voter rolls based on a change of address, and it prohibits states from removing voters for failure to vote. Section 8(b) has one narrow exception by which a state may use a voter's failure to vote as part of an address-confirmation process after receiving independent evidence that the voter may have moved.

The District Court erred in concluding that the NVRA allows Ohio to use failure to vote as the initial evidence a voter has moved in its Supplemental Process, rather than limiting it to the confirmation process. The plain language of the NVRA prohibits using failure to vote to begin the removal process. The District Court ignored this general prohibition, instead transforming the rule's narrow exception into a broad general rule and turning Section 8(d), a limitation on removal, into an independent and unlimited means to target voters for removal. The legislative history of the NVRA confirms Appellants' position.

Second, the District Court erred in concluding that Section 8 does not include a reasonableness requirement. The statute's plain language, when read in the context, requires that a state's list-maintenance effort must identify with reasonable accuracy those voters who have changed residence. Because it uses

failure to vote as an indicator of an address change and routinely targets for removal voters who have not moved and remain eligible, Ohio's Supplemental Process is unreliable and patently unreasonable.

Finally, the District Court erred in dismissing as moot Appellants' claim that Ohio's confirmation notice violates the NVRA. The voluntary changes made to the form by the Secretary during the course of this litigation do not moot Appellants' claim because voluntary cessation only moots a claim when the violation cannot reasonably be expected to reoccur, and because the revised form failed to address all of Appellants' claims.

ARGUMENT

I. STANDARD OF REVIEW

Although the procedural basis for the District Court's entry of judgment in this case is unclear, in its order, the Court resolved purely legal questions. *See* Order, RE66, PageID#23003. Whether the District Court is construed as having granted summary judgment in favor of the Secretary or as having entered judgment after a trial on the briefs, however, this Court reviews questions of law *de novo*. *Burzynski v. Cohen*, 264 F.3d 611, 616 (6th Cir. 2001) (court of appeals reviews *de novo* a district court's conclusions of law following a bench trial); *Cass v. City of Dayton*, 770 F.3d 368, 373 (6th Cir. 2014) ("We review a district court's grant of summary judgment *de novo.*").

The order of the District Court on which the final judgment in this case was predicated entirely on the statutory construction of the NVRA. *See* Order, RE66, PageID#23012. Questions of statutory interpretation are issues of law and are thus reviewed *de novo*. *Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 459

F.3d 676, 680 (6th Cir. 2006). Similarly, in denying Appellants' request for preliminary injunctive relief, the District Court assessed the likelihood of Appellants' success on the merits on the basis of its construction of the NVRA without making any factual determinations. Order, RE66, PageID#23011-23025.

Thus, the applicable standard of review in this appeal is *de novo*.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT OHIO'S SUPPLEMENTAL PROCESS DOES NOT VIOLATE THE NVRA.

The NVRA was enacted to increase voter registration opportunities and electoral participation and to "protect the integrity of the electoral process." 52 U.S.C. § 20501. Section 8 of the NVRA seeks to achieve this purpose by regulating state voter-roll maintenance programs, requiring states to maintain accurate voter registration rolls. *Id.* §§ 20501(b), 20507. Maintaining accurate rolls, according to the NVRA, requires "ensur[ing] that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction," S. REP. NO. 103-6, at 19 (1993); *see also* H.R. REP. NO. 103-9, at 18 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 105, 122; Pls.' Mot. Summ. J., RE39, PageID#1377, as well as removing voters who have become ineligible. The NVRA permits states to remove voters from the rolls only when they become ineligible and only in accordance with particular procedures, and it expressly prohibits states from removing voters merely for not voting.

Ohio's Supplemental Process violates Section 8 of the NVRA in at least two ways. First, it makes the failure to vote the trigger for sending a confirmation notice, which begins the process for cancelling the voter's registration. Section 8(b) allows a failure to vote to be considered in one circumstance only: *after* the state has received information indicating that the voter has moved (such as through

the NCOA system). By making the failure to vote a trigger for the confirmation notice, the Supplemental Process results in the removal of voters from the list of registered voters because of their failure to vote, in direct contravention of Section 8(b)'s plain language. Second, the Supplemental Process's reliance on failure to vote as the evidence that a voter has moved violates Section 8's requirement that Ohio's roll-maintenance processes be "reasonable." The record in this case conclusively demonstrates that a voter's failure to vote is an unreliable proxy for the voter having changed address, and a roll-maintenance program based on such an unreliable source of change-of-address information violates Section 8.

A. Section 8 of the NVRA Forbids Cancelling Registrations by Reason of a Voter's Failure to Vote and Requires State Programs for Maintaining Voter Rolls to Be Reasonable.

Section 8 of the NVRA establishes specific requirements that states must follow in the administration of their official lists of registered voters. *Id.* § 20507. Section 8(a) sets forth the reasons for which a state may remove a registered voter from the voter rolls and prescribes the procedures states must follow when doing so. *Id.* § 20507(a). Specifically, Section 8 provides that a voter may not be removed from the voter rolls unless the voter so requests or the voter has become ineligible due to death, a judicial declaration of mental incompetence, a conviction for a disqualifying felony, or a change of address. *Id.*; *see also U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 376-77 (6th Cir. 2008) ("*Land II*").

Section 8 further requires states to establish a program for maintaining accurate and up-to-date voter-registration rolls. Such a program must make a "reasonable effort to remove the names" of voters who have become ineligible due to a change in residence, 52 U.S.C. § 20507(a)(4), and, consistent with the

statutory purpose, must ensure that voters, once registered, remain on the rolls as long as they continue to be eligible. H.R. REP. NO. 103-9 (1993), at 18. While Section 8 vests states with a good deal of discretion in determining what form those efforts will take, that discretion is not without limits. Section 8 provides that such list-maintenance programs must be conducted "in accordance with subsections (b), (c), *and* (d)." *Id.* § 20507(a)(4)(B) (emphasis added). Those subsections work together to limit and regulate a state's program for removing voters by reason of a change of address. *See Land II*, 546 F.3d at 376 ("Removal by reason of change of residence . . . may be conducted only in accordance with specific requirements set forth in subsections (b), (c), and (d) of section 8 of the NVRA.").

Central to this case is subsection (b), which imposes specific requirements on state voter-removal programs. First, subsection (b)(1) states that any such voter-removal program must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1). Second, subsection (b)(2) provides that a state voter-removal program:

> shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office *by reason of the person's failure to vote*, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters . . . .

Id. § 20507(b)(2) (emphasis added). This provision establishes as the basic rule an broad prohibition on using failure to vote as a basis for removing voters from the rolls. It not only prohibits removing voters as a direct consequence of their failure to vote; it prohibits any program that *results in* a voter's removal because the voter failed to vote. There is but a single exception: A voter's failure to vote may be

considered as part of the process set forth in subsections (c) and (d) for confirming a change of address when the state has obtained independent evidence indicating the voter may have moved. *See id.* § 20507(b)(2), (c)(1), (d).

Subsections (c) and (d), in turn, explain the process through which a voter may be removed from the rolls when second-hand information reasonably indicates that a voter may have moved. Section 8(c) expressly permits states to use one source of second-hand information as providing a reasonable, uniform, and nondiscriminatory basis for believing a voter has moved: NCOA information obtained through the U.S. Postal Service. Under subsection (c)(1), a state may fully satisfy its obligation to remove voters who have lost eligibility due to a change of residence by using the NCOA system as the primary source of information to identify voters who appear to have moved. *Id.* § 20507(c)(1)(A).[8] Although the NCOA system is not the exclusive source of change-of-address information permitted by the NVRA, alternative sources must be similarly reliable.

Under subsection (d), even when second-hand information—obtained through the NCOA system or from another reliable source—provides a reasonable basis for believing a voter has moved, the change of address must still be confirmed through a prescribed procedure before the voter can be removed. Specifically, a voter may not be removed from the registration rolls on the basis of a suspected change of address unless one of two conditions is met. First, the voter's registration may be cancelled if the voter confirms in writing that she has moved outside of the jurisdiction in which she was previously registered. *Id.* § 20507(d)(1)(A). Second, the voter may be removed if, after being sent a

[8] The U.S. Department of Justice has described programs centered around the use of NCOA information as "safe-harbor" programs. U.S. Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)" (hereinafter "NVRA FAQ") ¶ 33, RE42-7, PageID#1678.

confirmation-of-address notice, the voter fails to respond to the notice and then fails to vote or appear to vote in any election during the next two federal election cycles. *Id.* § 20507(d)(1)(B). Under the terms of Section 8(b), this confirmation process is the only context in which failure to vote may be considered as part of a state's list-maintenance program.

B. The District Court Erred in Concluding that the NVRA Gives States Discretion to Use Failure to Vote to Initiate the Cancellation Process.

1. *The Plain Meaning of Section 8 Prohibits Using Failure to Vote to Trigger the Cancellation Process.*

In giving a statute its plain meaning, courts "look[] at the language and design of the statute as a whole. In doing so, [the court] must give effect to each word and make every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (alterations, citations, and internal quotation marks omitted). When given its plain meaning, Section 8(b) of the NVRA must be construed to prohibit states from considering a voter's failure to vote in conducting their list-maintenance programs, with one proviso: The rule does not prevent states from using the procedure the set forth in subsections (c) and (d) to confirm an address change when there is a reasonable basis for believing the voter has moved, notwithstanding that consideration of a voter's failure to vote is part of that procedure. Because this exception is limited to the address-confirmation process, it follows that the change-of-address evidence that triggered the confirmation must be independent of the voter's failure to vote.

The District Court's interpretation of Section 8 ignores the first part of Section 8(b)(2) and gives effect only to the exception, which it reads too broadly. In fact, the District Court's reading of subsection (b)(2) would not forbid *any* list-maintenance activity: It reads the prohibition right out of the statute, interpreting the exception to give states virtually limitless discretion to determine "who should be sent a confirmation notice or when that confirmation notice should be sent." Order, RE66, PageID#23016.[9]

Section 8(b)(2)'s exception allows states to use "the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters." 52 U.S.C. § 20407(b)(2). In the District Court's reading, this language permits states to use one of two alternative procedures for identifying voters who may have moved: the NCOA procedure set forth in subsection (c) *or* the separate procedure provided by subsection (d). The District Court then construes subsection (d) as operating in a vacuum, unconstrained by any other provision of Section 8, including Section 8(b)'s general rule prohibiting the consideration of failure to vote. In the Court's reading of subsection (d), a voter can be sent a confirmation notice for any reason—or indeed no reason at all[10]—and if the voter fails to respond to the notice or vote during the next two federal election cycles, the voter may be removed from the rolls regardless of whether or not there is reason to believe that her eligibility has changed. Order, RE66, PageID#23015-23016.

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[9] *See also* Order, RE66, PageID#23016 ("The NVRA does not mention—explicitly or implicitly—the events that need or need not happen before a state may initiate its confirmation process.").

[10] Taken to its logical conclusion, the District Court's construction of the statute would not require that there be any reason for sending the notice; it permits states to purge a voter simply by sending a notice and waiting for the requisite amount of time to pass. *See id.*

The District Court erred when it concluded that subsection (d) establishes an independent means for a state to satisfy its obligation to remove voters who have become ineligible due to a change in residence. Order, RE66, PageID#23015-23016. Contrary to the Court's holding, subsections (c) and (d) work together—and must be read together—to establish the requirements states must adhere to when constructing a program to remove voters who have left the jurisdiction. First, subsection (c) does not set forth a complete procedure for removing voters from the rolls based on a change of address, but only part of a procedure. It sets forth one source of information states may use to identify voters who have moved, but then incorporates subsection (d) as the mechanism for confirming that information. That is, the language of subsection (c) confirms that the two subsections make up a single list-maintenance procedure.

Likewise, the language of subsection (d) shows that it does not operate independently of Section 8's other provisions. By its own terms, subsection (d) constitutes a restriction on the voter-removal procedures states may adopt to comply with Section 8(a)(4). Specifically, subsection (d)(1) provides that "a state *shall not remove* [a registrant] on the ground that the registrant has changed residence *unless*" the procedures set forth in the subsection are followed. 52 U.S.C. § 20507(d) (emphasis added). In other words, subsection (d) requires that even where a state has a reasonable basis for believing a voter has changed residence, such as through the NCOA system as provided in subsection (c)(1), it must still confirm the change before the voter can be removed from the rolls.

Had Congress intended subsections (c) and (d) to provide two similar but independent mechanisms for removing voters who have changed residence, it

would have worded them similarly. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (citation omitted)). Instead, subsection (c) is worded as an affirmative *authorization* of a specific list-maintenance process, while subsection (d) is worded as a *restriction* on a state's list-maintenance procedures. *Compare* 52 U.S.C. § 20507(c)(1) ("A State *may* meet the requirement of subsection (a)(4)" by using NCOA information and following the Section 8(d) confirmation process. (emphasis added)), *with id.* § 20507(d)(1) ("A State *shall not* remove" a voter from the rolls unless it follows the confirmation procedures laid out in the subsection.).

Reading subsections (b), (c), and (d) together, as the plain language of Section 8 demands, the only circumstance in which a state may properly infer that a voter no longer meets the residency requirements to vote based on inactivity is when that inactivity occurs after (i) the state has obtained objective and reliable evidence, *independent of the voter's failure to vote*, that indicates the voter may have moved, and (ii) the voter has been sent and failed to return the confirmation-of-address card. Failure to vote may not be considered as the basis for initiating the confirmation-and-cancellation process.

In rejecting this construction of the statute, the District Court failed to look at the language and design of Section 8 as a whole, and erroneously held that the requirement that change-of-address evidence be independent of a voter's failure to vote is "nowhere to be found in the NVRA." Order, RE66, PageID#23015. When Section 8 is read holistically, it is clear that failure to vote is *not* among the permissible sources of change-of-address information that may be used to trigger

the notice-and-waiting-period procedure. The only place Section 8 expressly authorizes states to consider failure to vote in their list-maintenance programs is as *part* of the address-confirmation process. Because that process is the *only* exception to a general rule against considering failure to vote, an interpretation of the statute that allows failure to vote to be used for any other purpose is inconsistent with the statute's overall structure. Thus, while states have discretion in designing their list-maintenance program, that discretion is not unlimited, contrary to District Court's holding: states do not have the discretion to use failure to vote as the basis for initiating the address-confirmation procedure.

The District Court's failure to give effect to Section 8(b)'s prohibition against cancelling a voter's registration as a result of the voter's failure to vote renders meaningless one of the NVRA's core provisions for preventing eligible voters from being erroneously removed from the voter-registration rolls, "flout[ing] the rule that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).[11] By contrast, the construction of Section 8(b) proffered by Appellants—that failure to vote may not be considered in list-maintenance programs except in the context of the notice-and-waiting-period procedure for confirming a change of address—gives effect to both Section 8(b)'s general rule and its exception.

[11] The District Court's interpretation of subsection (d) also renders superfluous the NCOA process laid out in subsection (c)(1): There would be no need for Congress to have set out a process that includes obtaining information from the NCOA system and confirming it using subsection (d)'s notice-and-waiting period procedure if states could satisfy their list-maintenance obligations using subsection (d) procedure on its own, without first obtaining evidence of a change of address.

2. *The Exception to Section 8's Prohibition on Consideration of Failure to Vote Must Be Construed Narrowly.*

The District Court's markedly overbroad reading of the Section 8(b)(2) proviso violated another canon of statutory construction holding that exceptions to remedial statutes must be narrowly construed. *See Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 559 (6th Cir. 2006) (noting that "remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly"); *Detroit Edison Co. v. Sec. & Exch. Comm'n*, 119 F.2d 730, 739 (6th Cir. 1941) ("Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms, since they are intended to restrain or except that which would otherwise be within the scope of the general language."). Construing Section 8(b)'s exception narrowly, Section 8 permits consideration of failure to vote only after independent information indicates a voter may have changed residence and the voter has failed to respond to a notice requesting confirmation of the change.[12] Because the Supplemental Process uses failure to vote outside of this narrow context, it violates Section 8(b).

3. *The NVRA's Legislative History Confirms that Failure to Vote Is an Impermissible Basis for Removing Voters from the Rolls.*

If there were any ambiguity as to the meaning of Section 8(b)'s prohibition against the consideration of failure to vote in list-maintenance programs, the legislative history of the NVRA confirms that Section 8(b) was intended to prohibit the use of a voter's failure to vote as the basis for initiating a purge. *See Roth v. Guzman*, 650 F.3d 603, 614 (6th Cir. 2011) ("When a plain reading leads to

[12] Likewise, were there any ambiguity as to whether the reference to subsections (c) and (d) in the proviso to Section 8(b)(2) should be read as a single exception or two separate exceptions, the rule that exceptions should be construed narrowly would require construing the proviso as creating a single, narrow exception for a multi-step confirmation process.

ambiguous or unreasonable results, a court may look to legislative history to interpret a statute."). Committee reports from both the House and Senate make clear that one purpose of this provision was to ensure that "once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. REP. NO. 103-6, at 19 (1993); *see also* H.R. REP. NO. 103-9, at 18 (1993). The committee reports elaborate this animating principle by elucidating both the reasons for and the meaning of Section 8's provisions.

The legislative history confirms that Section 8(b)'s prohibition against the use of failure to vote in list-maintenance programs must be given a broad reach. At the time of the NVRA's enactment, a number of states, including Ohio, periodically cancelled the registrations of voters who had not voted for a period of time. The House and Senate Reports make clear that the NVRA was intended to eliminate these practices:

> [M]any States … penalize … non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election. Such citizens may not have moved or died or committed a felony. Their only "crime" was not to have voted in a recent election.… "No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue."

S. REP. NO. 103-6, at 17 (1993), at 17; *see also* H.R. REP. NO. 103-9, at 5 (1993) (Section 8's language "specifically prohibit[s] any registered voter from being removed from the rolls for failure to vote."). In targeting these practices, Congress was particularly concerned that programs predicated on failure to vote disparately impacted marginalized voters, and it sought to "prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register." S. REP. NO. 103-6, at 18 (1993); *id*. ("Such processes must be structured

to prevent abuse which has a disparate impact on minority communities."). Consequently, as the House Report explains, the prohibition enacted in Section 8(b) is not limited to roll-maintenance programs that purge infrequent voters without notice, but also encompassed programs, like Ohio's Supplemental Process, that "may result in the elimination of names of voters from the rolls *solely due to their failure to respond to a mailing*." H.R. REP. NO. 103-9, at 15 (1993) (emphasis added).

In light of this legislative history, this Court should reject the District Court's conclusion that the Supplemental Process complies with Section 8(b) because it purges voters not "solely" for failing to vote but also for failing to respond to a notice. Order, RE66, PageID#23016. Even where notification of the voter is part of the process, a confirmation procedure triggered by inactivity is one that "result[s] in the removal of the name of [a voter] . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). A state may not demand that a voter respond to a confirmation notice because she failed to vote, and then claim that the voter is being purged for failing to respond to the notice rather than for failing to vote. Because it all but guarantees that voters who do not vote frequently will be required to "needlessly re-register" by completing a confirmation notice that is, for all intents and purposes, a voter registration application, and because it routinely results in voters like Larry Harmon being purged "due to their failure to respond to a mailing" despite not having changed residence, the Supplemental Process violates the NVRA.

The NVRA's legislative history also sheds light on the need for reliable change-of-address information to undergird states' efforts to carry out their list

maintenance obligations. The House Report indicates that the then-common practice of mailing nonforwardable sample ballots to all registered voters could provide a permissible source of change-of-address information: If a sample ballot were returned by the Postal Service as "undeliverable," that returned mail would provide a reliable basis to believe that the voter had moved and, supported by that preliminary information, to then send a confirmation notice. H.R. REP. NO. 103-9, at 15 (1993). Thus, the District Court erred in holding that a state's effort to identify and remove voters who have changed residence need not be reasonable or based on reliable information. Order, RE66, PageID#23015; *see infra* Part II.D.

4. *The Help America Vote Act Did Not Alter or Restrict the Prohibition on Removing Voters for Failure to Vote.*

The District Court's reliance on the Help America Vote Act ("HAVA") is misplaced. Section 903 of HAVA amended the NVRA, adding the proviso to Section 8(b)'s prohibition against purging non-voters on which the District Court so heavily relied. That proviso states that "nothing in [Section 8(b)(2)] *may be construed* to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters . . . ." 52 U.S.C. § 20507(b)(2) (emphasis added). As the Department of Justice has pointed out, this proviso is, "by its own terms, . . . merely a rule of construction" that did not alter the pre-existing requirements of the NVRA. Department of Justice Statement of Interest, *Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. 2016) ("DOJ Statement of Interest"), RE42-6, PageID#1637. Indeed, according to the title of Section 903, the amendment constituted a "*clarification* of [the] ability of election officials to remove registrants from [the] official list of voters on grounds of change of

residence." Help America Vote Act, Pub. L. 107-252 (2002). Thus, the HAVA proviso does not change the NVRA's ban on purging voters for failure to vote and does not allow Ohio to target infrequent voters for removal on the basis of their failure to vote.

The legislative history of HAVA confirms that it was not intended to change the system of voter-registration regulations established by the NVRA. HAVA "leaves [the] NVRA intact, and does not undermine it in any way," and "[t]he procedures established by [the] NVRA that guard against removal of eligible registrants remain in effect under [HAVA]." H.R. REP. NO. 107-730, at 81 (2002) (Conf. Rep.); *see also* 147 Cong. Rec. H9304 (daily ed. Dec. 12, 2001) (letter from Assistant Attorney General Daniel J. Bryant) (confirming that "[a]lthough several provisions in the bill affect the list maintenance provisions in section 8 of the NVRA, it is evident that the bill is not designed to modify the NVRA and, in fact, it does not alter or undermine the NVRA's requirements").

Giving the HAVA proviso the required narrow construction, it must be read merely to clarify that the otherwise categorical prohibition against purging non-voters does not prevent states from using the notice-and-waiting-period procedure to confirm a change of address, even though one element of that procedure is that the voter fails to vote during the waiting period. *See Detroit Edison*, 119 F.2d at 739. Thus, contrary to the District Court's interpretation, the HAVA amendment does not transform Section 8(d) into an independent basis for purging voters based on their failure to vote.

C. The Supplemental Process Violates Section 8's Prohibition on the Removal of Voters for Failure to Vote.

Ohio's Supplemental Process directly violates Section 8 of the NVRA, which prohibits list-maintenance programs that "result in the removal of the name of any person from the official list of [registered] voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). As explained above, the NVRA allows consideration of a voter's failure to vote in one circumstance only: *after* the state has received information indicating that the voter has moved (such as through the NCOA system). *See id*. ("except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) . . . ."); *see also id.* § 20507(c)(1), (d). By using a voter's failure to vote to *initiate* the process of removing a voter who may have changed address rather than constraining it to the procedure laid out in subsection (d) for *confirming* the address change, the Supplemental Process falls outside of Section 8(b)'s limited exception to its general rule that states may not purge voters for not voting.

In targeting and removing infrequent voters from Ohio's voter rolls, the Supplemental Process not only violates the express requirements of the NVRA; it subverts the Section 8's carefully constructed balance of ensuring eligible voters are not burdened by aggressive purge practices while permitting states to take reasonable steps to keep their voter rolls up to date. As evidenced by both the NVRA's plain meaning and the statute's legislative history, Congress struck this balance in favor of keeping voters on the rolls, even when they vote only infrequently. By removing eligible Ohio voters from the rolls as a result of their failure to vote rather than on the basis of objective and reliable evidence of their ineligibility, the Supplemental Process contravenes the clear requirements of

federal law. The District Court erred in holding that the NVRA permits the Supplemental Process, and its judgment must be vacated and the case remanded with instructions to enter judgment for Appellants.

D. The Supplemental Process Violates the NVRA's Requirement that Roll-Maintenance Programs Be Reasonable.

1. *States' Roll-Maintenance Programs Must Be Reasonable.*

Section 8 of the NVRA specifies that states must "conduct a general program that makes a *reasonable* effort to remove the names of ineligible voters" if they have died or moved. 52 U.S.C § 20507(a)(4) (emphasis added). Given its plain meaning and construed in light of "the design of the statute as a whole[,] its object and policy," *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)), Section 8 requires that a state's effort to update its voter-registration rolls must identify with reasonable accuracy those voters who have lost eligibility due to a change in residence and, conversely, it must make a reasonable effort to avoid removing voters who remain eligible. *See, e.g.*, 52 U.S.C. § 20507; S. REP. NO. 103-6, at 19 (1993); H.R. REP. NO. 103-9, at 18 (1993). In *United States v. Missouri*, the court held that the term "reasonable" as used in Section 8 of the NVRA carries its dictionary definition of "'agreeable to reason'; 'not extreme or excessive'; 'possessing sound judgment.'" *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *7 (W.D. Mo. Apr. 13, 2007), *aff'd in relevant part*, 535 F.3d 844 (8th Cir. 2008) (quoting Webster's 7th New Collegiate Dictionary). As the Department of Justice has explained, at minimum, for a state's list-maintenance program to meet this standard, it must "be based upon objective and reliable information of potential ineligibility due to a change of residence that is

independent of the registrant's voting history." Dep't of Justice Statement of Interest, RE42-6, PageID#1631. Only after such reliable information indicates that a voter has moved may the state use the confirmation procedure outlined in Section 8(d) to confirm that the voter has changed residence. The Supplemental Process fails to satisfy this requirement. In targeting voters for removal based on a lack of voter activity, it results in the removal of voters not based on any objective or reliable evidence of potential ineligibility, but because the voter infrequently participates in the democratic process.

The NVRA sets a standard for reasonableness by expressly authorizing list-maintenance programs based on information supplied by the U.S. Postal Service's NCOA system. *See* 52 U.S.C.A. § 20507(c). If a state chooses to use another source of change-of-address information instead of or in addition to NCOA, that source must be similarly reliable. *See Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001) ("[T]he NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using *reliable* information from *government agencies* such as the Postal Service's change of address records.") (emphasis added); *see also* S. REP. NO. 103-6, at 19 (1993) ("The Committee strongly encourages all States to implement the NCOA program. . . . Jurisdictions which choose not to use the program should implement another *reasonable program* which is designed to meet the requirements of the bill.") (emphasis added).

As noted above, the NVRA's legislative history further supports this view. For instance, both the House and Senate Reports on the NVRA suggest using election-related mail returned by the Postal Service as "undeliverable" to provide

the requisite reliable basis for sending a confirmation notice to that voter. H.R. REP. NO. 103-9, at 15 (1993). The U.S. Department of Justice agrees:

> Other possible examples of a general list maintenance program could include States undertaking a uniform mailing of a voter registration card, sample ballot, or other election mailing to all voters in a jurisdiction, for which the State could use information obtained from returned non-deliverable mail *as the basis for* [either] correcting voter registration records (for apparent moves within a jurisdiction) or for sending a forwardable confirmation notice [under subsection (d)(2)].

NVRA FAQ ¶ 33, RE42-7, PageID#1678.

The District Court incorrectly held that the NVRA contains "no reasonableness requirement" at all. Order, RE66, PageID#23019. In reaching this conclusion, the District Court, after engaging in a tortuous parsing of the statutory language, posits the surprising notion that only a state's list-maintenance "efforts" must be reasonable under the NVRA, but its list-maintenance "program" need not be. Order, RE66, PageID#23018. The District Court fails to explain the distinction between a "program that makes a reasonable effort" and a "reasonable program." In any case, the regardless of whether the Secretary was required to make a "reasonable effort" to identify and remove voters who have changed residence or to operate a reasonable program for that purpose, the evidence shows that he has done neither.

2. *The Supplemental Process Does Not Reasonably Identify Ineligible Voters.*

The Secretary's stated purpose in using the Supplemental Process is to identify and remove voters who have become ineligible by reason of a change of residence. *See* Election Official Manual, RE42-17, PageID#1782; Damschroder Decl. ¶ 14, RE38-2, PageID#295. But Ohio's Supplemental Process does not initiate the confirmation procedure based on reliable information indicating that a

voter has moved, as required by the NVRA. Rather, with the Supplemental Process, the Secretary presumes that a voter's failure to vote for a mere two-year period—a period encompassing a single federal election cycle—indicates the voter has changed residence. *See, e.g.*, Directive 2015-09, RE42-2, PageID#1588. Failure to vote does not, however, provide a reliable basis for believing a voter has moved and cannot serve as the trigger for the Section 8(d)(2) notice-and-cancellation process. Moreover, using the same information--failure to vote—both as the trigger for the confirmation procedure and in the confirmation procedure itself undermines the purpose and effectiveness of the confirmation requirement. Accordingly, the Supplemental Process is patently unreasonable.

The evidence in the record overwhelmingly demonstrates that, as used in the Supplemental Process, a failure to vote is an unreliable proxy for a voter having changed residence. Specifically, the evidence establishes that throughout Ohio, numerous eligible voters, including Appellant Larry Harmon, have had their registrations cancelled as a result of the Supplemental Process, despite not having moved. Bell Decl. ¶ 54, RE45, PageID#1843-1844; Harmon Decl. ¶ 3, RE9-4, PageID#89. Many of these voters have been disenfranchised as a result, despite remaining eligible to vote, including the over 600 individuals identified in a limited sample of counties who attempted to vote in either the 2015 local general election or the 2016 federal primary election but were forced to cast provisional ballots that were not counted. *See* Bell Decl., RE45, PageID#1832-1842. As explained above, these voters represent only a small subset of all Ohio voters who have not moved but who have been purged in recent years under a process whose sole purported purpose is to weed out voters who have changed residence.

The District Court ignores these harmful effects of the Supplemental Process and misconstrues *Welker*, the only case to address the requirement that states use reliable information to identify voters who have changed address. Order, RE66, PageID#23019-23020; *see Welker*, 239 F.3d at 599 (voters may be removed for a change of address only based on "*reliable* information from *government agencies*") The District Court erroneously finds that the Supplemental Process satisfies *Welker* because the voter history information on which it relies to identify inactive voters comes from government records—county voter registration systems—and reliably indicates that the voter has not voted. Order, RE66, PageID#23019-23020. The NVRA is not satisfied merely by using *any* reliable government information about a voter to target the voter for removal, however; it requires government information reliably indicating that a voter *has moved*. *See* 52 U.S.C. § 20507(a)(4) (States must make a "reasonable effort" to remove voters who are ineligible "by reason of . . . a change [of] residence.").[13]

That the Supplemental Process also considers other voter activities in addition to voting when identifying inactive voters does not render it reliable. First, most of the voter activities considered by the Supplemental Process, such as updating an address or filing a new voter registration form, are activities a voter who has not moved is unlikely to engage in. In addition, the Supplemental Process allows Ohio's county boards of election to ignore voter activities that would provide highly reliable evidence of a voter's current address—such as signing a

[13] In the District Court's reading, for example, tax records could be used to purge voters because they provide reliable governmental information concerning a voter's income, or state hospital records could be used because they provide reliable information about a voter's health history. "Such an absurdity cannot be imputed to the legislature." *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 172 (1896).

petition. For example, voters who sign candidate petitions in Ohio must be registered in the county in which the candidate seeks to be on the ballot, and must provide their address when signing the petition. *See* Ohio Rev. Code. Ann. § 3513.261; Damschroder Depo. at 131:14-132:4, RE42-1, PageID#1564.Yet under the Supplemental Process, counties are free to ignore this information and to cancel a voter's registration even if the voter has signed a petition using the same address at which she is registered.

Such an error-prone process for maintaining Ohio's voter rolls does not satisfy the NVRA's requirement that roll-maintenance programs be reasonable. Accordingly, the judgment of the District Court must be vacated, and the case remanded to the District Court with instructions to enter judgment for Appellants.

III. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' SECOND CAUSE OF ACTION AS MOOT.

Section 8(d)(2) of the NVRA establishes the requirements for the notices that are to be sent to voters to confirm a suspected change of address. The notice must be postage prepaid and include a pre-addressed return card, must be sent by forwardable mail, and must allow the voter to provide her current address. 52 U.S.C. § 20507(d)(2). The notice must also state that if the voter has not moved from the jurisdiction, then the voter must return the card no later than the registration deadline for the next election. *Id.* § 20507(d)(2)(A); *see also id.* § 20507(a)(1)(B). The notice must also inform voters who have moved outside the jurisdiction how they can remain eligible to vote. *Id.* § 20507(d)(2)(B). Finally, the notice must inform voters that if they do not return the card, they will be removed from the rolls after the second subsequent federal general election. *Id.* § 20507(d)(2)(A).

In most Ohio counties (but not all) the confirmation notice sent to voters identified through the NCOA Process and Supplemental Process is SOS Form 10-S (now known as the 10-S-1), which is prescribed by the Secretary. 2015 Confirmation Notice ("2015 Conf. Not."), RE42-13, PageID#1702; Wayne County Confirmation Notice, RE42-18, PageID#1798. In the Second Cause of Action in their Amended Complaint, Appellants alleged that the SOS Form 10-S failed to satisfy the requirements of subsection (d)(2). Amend. Compl., RE37, PageID#14-15, ¶¶ 60-63. The SOS Form 10-S that was in use when this litigation began, which was prescribed in March 2015, required voters to provide their name, address, date of birth, and an attestation under penalty of perjury to the truth of the information provided on the form. 2015 Conf. Not., RE42-13, PageID#1702. In addition, the 2015 form required the voter to provide a driver's license number, Social Security number, or, if the voter had neither, a copy of a document verifying the voter's identity and current address. *Id.*[14] The information required on the 2015 SOS Form 10-S, commonly referred to in Ohio as the "five fields," mirrors what is required on Ohio's voter registration form. Damschroder Depo., RE42-1, PageID#1541. Voters responding to the 2015 SOS Form 10-S were required to complete all of the "five fields," regardless of whether or not they had changed address.

[14] SOS Form 10-S also provides voters an alternative to respond. The form informs voters that they can update their address by visiting www.MyOhioVote.com/moved.htm. 2015 Conf. Not., RE42-13, PageID#1702. However, as of the time this litigation began, the site did not allow voters to confirm that their residence has remained unchanged. Declaration of Elizabeth Bonham ("Bonham Decl.") ¶ 8, RE39-4, PageID#1446-1447. If a voter attempted to use the site without changing any of the information on file with the Secretary of State, the voter's submission was rejected, and the voter was instructed to "Please make a change or click Cancel to exit!" *Id.* This may have led many voters visiting the site to believe that they did not have to take action to respond to the notice if they had not changed address. According to the new SOS Form 10-S-1, the site can now be used to confirm as well as update an address. 2016 Conf. Not., RE38-19, PageID#1365.

The 2015 SOS Form 10-S did not notify voters of the consequences of failing to respond. The form merely told recipients that the failure to take "immediate action" may require them to cast a provisional ballot, even if they appeared at the correct polling location at the next election. 2015 Conf. Not., RE42-13, PageID#1702. It also told voters that, if they did not respond and did not vote, their registrations "may" be cancelled after the second federal general election following the date of the notice. *Id*. In fact, under Ohio law and the Secretary's list-maintenance directives, the registrations of these voters *will* be cancelled after the second federal election. Directive 2015-09, RE42-2, PageID#1591-92. Finally, the form failed to notify voters who had moved outside of the state how to remain eligible to vote in their new locality.

The SOS Form 10-S, issued with each roll-maintenance directive, has been repeatedly revised since its inception—sometimes with only minor changes from one year to the next and other times with substantial revisions to the prior form. *See* 2015 Conf. Not., RE42-13, PageID#1702; 2013 Conf. Not., RE42-14, PageID#1704; 2011 Conf. Not., RE42-15, PageID#1706-1707; 2007 Conf. Not., RE42-16, PageID#1709-1710. After Appellants filed the Amended Complaint and on the day final briefs were due to the District Court, the Secretary issued a directive revising SOS Form 10-S and redesignating it "SOS Form 10-S-1." The 2016 form now includes the date by which the voter must respond and clarifies that failure to respond will result in removal from the voter rolls. The revised form also permits a voter who has not changed residence to verify her registration by signing and returning the form, without the need to complete all of the "five fields." Def.'s Third Merits Br., RE56, PageID#22753.

In issuing this new notice and addressing a number of the defects Appellants had identified, the Secretary has effectively conceded that the former notice did not comply with federal law. However, the new notice does not address all of the violations alleged in the Second Cause of Action. Specifically, it does not inform voters who have moved outside of Ohio how they can remain eligible to vote. *See* 2016 Conf. Not., RE38-19, PageID#1365.[15] The District Court concluded that the Secretary's revisions to the confirmation notice rendered Appellants' Second Cause of Action moot. This conclusion is without support in the law, and the District Court's entry of judgment in favor of the Secretary on Appellants' Second Cause of Action must be vacated.

The Supreme Court has held that where a Defendant contends that a voluntary cessation of wrongful conduct moots a claim, the Defendant bears the burden of showing that the allegedly wrongful conduct cannot reasonably be expected to recur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) ("[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."); *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008) ("[V]oluntary conduct moots a case only in the rare instance where subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (internal quotation marks omitted)). The

[15] As Appellants pointed out in the court below, this requirement can be easily met by directing voters to the Election Assistance Commission's website containing the federal form, which provides instructions and guidance for voter registration in all states. *See* U.S. Election Assistance Commission, National Mail Voter Registration Form, RE49-8, PageID#22495-22519.

Secretary made no such showing below, and indeed, the District Court made no finding on this issue.[16]

Here, the Secretary has never suggested that he will not return to the former SOS Form 10-S or otherwise reverse some of his recent revisions to the confirmation notice form. On the contrary, the record shows that the Secretary has regularly changed the form nearly every year that a roll-maintenance directive has issued—leaving little doubt that he will change the notice in some fashion in the future. Merely changing the notice in the course of the litigation is insufficient to establish that the Secretary will not once again issue a form that violates the NVRA. This is especially true given that the office of Secretary of State in Ohio is an elected office, and thus is subject to extreme shifts in practices based on who occupies the position at a given time. Accordingly, Defendant-Appellee has not met his burden of showing that the harm "could not reasonably be expected to recur." *Brunner*, 548 F.3d at 473.

Moreover, even if the Secretary had established that he had permanently corrected the issues the new notice in fact addresses, the Second Cause of Action would still not be moot. A claim will only become moot when "interim relief or events have *completely* and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added); *see also Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (finding that voluntary cessation of illegal conduct will only render a controversy moot where

[16] Indeed, in the posture of the case when the District Court made its decision, it would have been improper for the Court to make such a finding. Although the Secretary's failure to introduce any evidence as to the likelihood of a future recurrence means there was no genuine issue of material fact on this issue and that the Second Cause was not moot as a matter of law, even if there were an issue of fact, it was improper for the Court to resolve that issue without a trial.

"there are no remaining effects of the alleged violation"). Here, the new SOS Form 10-S-1 does not completely "eradicate . . . the effects of the alleged [NVRA] violation" because it does not address Appellants' allegation that the notice violates the NVRA by failing to provide information to voters who move outside of Ohio on how they can remain registered to vote. The Second Cause of Action thus cannot be moot.

Finally, the District Court erred in its conclusion that the NVRA does not require information about how a person who has moved can re-register in a new state. Section 8(d)(2) provides that "[a confirmation notice must contain] a notice to the following effect: . . . (B) If the registrant has changed residence to a place *outside the registrar's jurisdiction* in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2) (emphasis added). In concluding that it "defies logic" that the NVRA requires a confirmation notice to provide information to voters who have moved out of state, the court reads a geographic limitation into the NVRA that simply is not there. Order, RE66, PageID#23025. The phrase "outside the registrar's jurisdiction" is not limited to another jurisdiction within the state.[17]

The Second Cause of Action is not moot. The judgment of the District Court must be vacated and judgment entered for Appellants.

[17] Moreover, contrary to statement the District Court's Order that this argument was raised on the first time in Appellants reply, Order, RE66 PageID#23024, Appellants timely raised the issue in their motion for summary judgment. *See* Pls.' Mot. for Summ. J., RE39, PageID#1407 ("[The form] does not tell people who have moved out of the state how they can register in their new state.").

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment of the District Court and remand with instructions to enter judgment for Appellants on both their First and Second Causes of Action and to issue a permanent injunction (1) prohibiting the Secretary of State from issuing any list-maintenance directive that requires counties to implement the Supplemental Process or any other process that uses failure to vote to initiate the confirmation and removal process under Section 8 of the NVRA, sending or causing to be sent any confirmation notices to registered voters based on their voter inactivity, removing or causing to be removed any voter from the registration rolls based on the Supplemental Process or on the voter's failure to vote; (2) requiring the Secretary of State to use a confirmation notice that complies with the requirements of Section 8(d)(2) of the NVRA; and (3) requiring the Secretary of State to reinstate all unlawfully purged voters to the registration rolls or, in the alternative, to count all provisional ballots cast by eligible voters whose registrations have been cancelled by operation of the Supplemental Process and who continue to reside at the same address.

Dated: July 13, 2016

Respectfully submitted,

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also 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 this brief has been prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellants was filed this 13th day of July, 2016 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

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DESIGNATION OF DISTRICT COURT RECORD

Plaintiff-Appellees/Cross-Appellants hereby designate the following items from the District Court record:

Philip Randolph Institute et al v. Husted
District Court Case No. 2:16-cv-00303-GCS-EPD

Docket Entry No.	Date	Page ID No.	Document Descriptions
1	04/06/16	1-17	Complaint against Jon Husted
9	04/07/16	36-66	Motion for Temporary Restraining Order and Preliminary Injunction by Plaintiffs
9-4	04/07/16	88-90	Declaration of Larry Harmon
16	04/11/16	132-135	Stipulation and Order Filed Jointly by Defendant Jon Husted
18	04/11/16	148-150	Joint Stipulation and Order. Signed by Judge George C. Smith
20	04/12/16	152-153	Order Scheduling Settlement Conference Before Magistrate Judge Elizabeth Preston Deavers
22	04/15/16	156	Order Memorializing 4/14/16 Settlement Conference
27	04/28/16	184-193	Answer to Complaint of Defendant Jon Husted
36	05/13/16	221	Order Granting Motion to Modify Briefing Schedule
37	05/17/16	222-241	Plaintiffs' First Amended Complaint

Docket Entry No.	Date	Page ID No.	Document Descriptions
38	05/24/16	242-285	Defendant's Initial Merits Brief
38-2	05/24/16	293-361	Declaration of Matthew Damschroder
38-19	05/24/16	1363-1365	Declaration of Matthew Walsh (dated May 20, 2016) and Proposed 2016 Confirmation Notice
39	05/24/16	1366-1429	Plaintiffs' Motion for Summary Judgment and Permanent Injunction
39-1	05/24/16	1430-1436	Declaration of Andre Washington
39-2	05/24/16	1437-1439	Declaration of Angaletta Pickett
39-3	05/24/16	1440-1444	Declaration of Delores Freeman
39-4	05/24/16	1445-1454	Declaration of Elizabeth Bonham
39-5	05/24/16	1455-1459	Declaration of KaRon Waites, Jr.
39-7	05/24/16	1463-1465	Declaration of Chad McCullough
40	05/24/16	1473-1504	Plaintiffs' Statement of Undisputed Material Facts
41	05/24/16	1505-1524	Joint Proposed Stipulation of Facts and Stipulations of Authenticity, Admissibility, and Preserved Objections
42	05/24/16	1525-1529	Declaration of Cameron Bell in Support of Plaintiffs Motion for Summary Judgment and Preliminary Injunction
42-1	05/24/16	1530-1585	Deposition of Matthew Damschroder
42-2	05/24/16	1586-1593	Directive 2015-09
42-5	05/24/16	1610-1618	Directive 2011-15

Docket Entry No.	Date	Page ID No.	Document Descriptions
42-6	05/24/16	1619-1668	Department of Justice Statement of Interest, *Common Cause and the Georgia State Conference of the NAACP v. Kemp*
42-7	05/24/16	1669-1683	FAQ: The National Voter Registration Act of 1993
42-13	05/24/16	1701-1702	2015 Confirmation Notice
42-14	05/24/16	1703-1704	2013 Confirmation Notice
42-15	05/24/16	1705-1707	2011 Confirmation Notice
42-16	05/24/16	1708-1710	2007 Confirmation Notice
42-17	05/24/16	1711-1796	Election Official Manual, Chapter 3 (Voter Registration)
42-18	05/24/16	1797-1804	Wayne County Confirmation Notice
42-20	05/24/16	1807-1810	Frequently Asked Questions Related to NCOA/Supplemental Process (from 2011 webinar)
45	05/26/16	1817-1846	Declaration of Cameron Bell in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction (Filed under seal)
45-1	05/26/16	1847-1853	Public Records Request Sent to Cuyahoga County Board of Elections
45-2	05/26/16	1854-1858	Public Records Request Sent to Greene County Board of Elections
45-3	05/26/16	1859-1864	Subpoena Duces Tecum Served on Diane J. Noonan, Butler County Board of Elections Director
45-4	05/26/16	1865-1867	Exhibit A (Amended) to

Docket Entry No.	Date	Page ID No.	Document Descriptions
			Subpoena Duces Tecum
45-5	05/26/16	1868-2094	2015 Cuyahoga County Cancellation List
45-6	05/26/16	2095-2907	2015 Cuyahoga County Cancellation List (Supplemental Process)
45-7	05/26/16	2908-3802	Lake County Voter History File
45-8	05/26/16	3803-4103	Franklin County 2015 Cancellation List (Part 1)
45-9	05/26/16	4104-4399	Franklin County 2015 Cancellation List (Part 2)
45-10	05/26/16	4400-5400	Greene County Voter History File (Part 1)
45-11	05/26/16	5401-6401	Greene County Voter History File (Part 2)
45-12	05/26/16	6402-6935	Greene County Voter History File (Part 3)
45-13	05/26/16	6936-6989	2015 Greene County Cancellation List (NCOA Process)
45-14	05/26/16	6990-7321	2015 Greene County Cancellation List (Supplemental Process)
45-15	05/26/16	7322-7378	2015 Hamilton County Cancellation List (NCOA Process)
45-16	05/26/16	7379-7544	2015 Hamilton County Cancellation List (Supplemental Process)
45-17	05/26/16	7545-7561	2015 Medina County Cancellation List (NCOA Process)
45-18	05/26/16	7562-7586	2015 Medina County Cancellation List (Supplemental

Docket Entry No.	Date	Page ID No.	Document Descriptions
			Process)
45-19	05/26/16	7587-7592	Email Exchange with Warren County Board of Elections
45-20	05/26/16	7593-7625	"Exhibit Q" – Attached to Bell Declaration Filed Under Seal
45-21	05/26/16	7626-7645	Greene County Provisional Ballot Affirmation Statements (2015)
45-22	05/26/16	7646-7693	Lake County Provisional Ballot Affirmation Statements (2015)
45-23	05/26/16	7694-7736	Licking County Provisional Ballot Affirmation Statements (2016)
45-24	05/26/16	7737-7837	Lorain County Provisional Ballot Affirmation Statements (2015)
45-25	05/26/16	7838-7893	Mahoning County Provisional Ballot Affirmation Statements (2015)
45-26	05/26/16	7894-7947	Montgomery County Provisional Ballot Affirmation Statements (2016)
45-27	05/26/16	7948-7970	Portage County Provisional Ballot Affirmation Statements (2015)
45-28	05/26/16	7971-8045	Summit County Provisional Ballot Affirmation Statements (2016)
45-29	05/26/16	8046-8115	Warren County Provisional Ballot Affirmation Statements (2015)
45-30	05/26/16	8116-8118	Public Records Request Sent to Lucas County Board of Elections
45-31	05/26/16	8119-8137	Lucas County Provisional Ballot

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			Affirmation Statements (2016)
45-32	05/26/16	8138-8303	Cuyahoga County Provisional Ballot Affirmation Statements (2015)
45-33	05/26/16	8304-8417	Franklin County Provisional Ballot Affirmation Statements (2016)
45-34	05/26/16	8418-8460	Ohio APRI's Responses to Defendant's Interrogatories
45-35	05/26/16	8461-8499	NEOCH's Responses to Defendant's Interrogatories
45-36	05/26/16	8500-9394	Licking County Voter History File
45-37	05/26/16	9395-10357	Lorain County Voter History File
45-38	05/26/16	10358-11358	Mahoning County Voter History File (Part 1)
45-39	05/26/16	11359-12630	Mahoning County Voter History File (Part 2)
45-40	05/26/16	12631-13631	Montgomery County Voter History File (Part 1)
45-41	05/26/16	13632-14632	Montgomery County Voter History File (Part 2)
45-42	05/26/16	14633-15633	Montgomery County Voter History File (Part 3)
45-43	05/26/16	15634-16634	Montgomery County Voter History File (Part 4)
45-44	05/26/16	16635-17485	Montgomery County Voter History File (Part 5)
45-45	05/26/16	17486-17902	Portage County Voter History File
45-46	05/26/16	17903-20453	Summit County Voter History File
45-47	05/26/16	20454-20936	Warren County Voter History

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			File
45-48	05/26/16	20937-21737	Lucas County Voters Sent Supplemental Notices in 2011
45-49	05/26/16	21738-22294	Lucas County Cancellation List (2015)
45-50	05/26/16	22295-22296	Provisional Ballot Affirmation of Chad McCullough
46	5/26/16	22297-22306	Declaration of Brian Davis in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction (Filed under seal)
48	06/10/16	22308-22319	Defendant's Answer to Plaintiffs' Amended Complaint
49	06/10/16	22320-22353	Defendant's Second Merits Brief
49-4	6/10/16	22477-22480	Notice Letter from Plaintiff APRI
49-5	06/10/16	22481-22483	Notice Letter from Plaintiff NEOCH
49-8	06/10/16	22495-22519	U.S. Election Assistance Commission, National Mail Voter Registration Form
49-9	06/10/16	22520	Declaration of Matthew E. Walsh (dated June 10, 2016)
52	06/10/16	22627-22665	Plaintiffs' Opposition to Defendant's Merits Brief
56	06/17/16	22717-22756	Defendant's Third Merits Brief
57	06/17/16	22825-22861	Plaintiffs' Reply in Support of Motion for Summary Judgment and Permanent Injunction
62	06/24/16	22952-22958	Secretary's Position Statement Regarding the Procedural Posture of Litigation

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66	06/29/16	23003-23026	Order denying Plaintiffs' Motion for Summary Judgment
67	06/29/16	23027-23028	Clerk's Judgment in favor of Jon Husted against A. Philip Randolph Institute
68	06/30/16	23029-23031	Plaintiffs' Notice of Appeal