IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, and LARRY HARMON, Plaintiffs, v. **JON HUSTED,** *in his official capacity as Ohio Secretary of State*, Defendant.	Case No. 2:16-cv-303 JUDGE GEORGE C. SMITH Magistrate Judge Elizabeth Preston Deavers

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MERITS BRIEF

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I. INTRODUCTION

Plaintiffs seek to protect the federal voting rights of tens of thousands of infrequent voters whose registrations have been cancelled or are threatened with cancellation—often without their knowledge and despite their continuing eligibility. Without intervention by this Court, Defendant will continue to exclude many eligible Ohioans from voting and having their votes counted simply because they have not voted frequently enough. The National Voter Registration Act of 1993 (NVRA) is very clear in prohibiting states from removing voters simply for their failure to vote. As the U.S. Department of Justice has unequivocally stated, Defendant's current practice of doing just that is contrary to the NVRA's plain language, threatening the integrity of Ohio's electoral process this November and beyond.

Defendant's brief elides the text of the NVRA, not to mention the many eligible voters who have already been denied the opportunity to vote by his illegal roll-maintenance practice, known as the Supplemental Process. Defendant seeks to justify the mass disenfranchisement caused by the Supplemental Process as the price Ohioans must pay to combat voter fraud. This policy argument runs contrary to the NVRA's text. Moreover, it is unsupported by the evidence. Although Defendant argues that the Supplemental Process is necessary because 40% of returned mail is due to people moving with no forwarding address, the Supplemental Process is not based on returned mail; it is based on infrequent voting. [1] As Plaintiffs demonstrated in their Motion for Summary

[1] Although Ohio does not use returned mail on a systematic basis, it could do so. Many other states use returned mail to initiate a confirmation process, and both the U.S. Department of Justice and the NVRA's legislative history support it as an alternative or supplement to the National Change of Address system ("NCOA"). *See, e.g.*, Dep't. of

Judgment, purging infrequent voters is unlawful under the NVRA and is disenfranchising eligible voters in numbers sufficient to have a significant impact in the 2016 Presidential Election. Contrary to Defendant's assertion, the Supplemental Process is not working.[2] Instead, the toll it takes is threatening the integrity of the democratic process in Ohio.

II. STATEMENT OF FACTS

Defendant has conceded the central factual issue in this case: that the Supplemental Process targets infrequent voters for their failure to vote over a two-year period—including only a single federal election—to initiate the process of removing them from the rolls, and results in their removal after a mere six years of inactivity. Defendant's Initial Merits Brief ("Def. Br."), Doc. 38, at 7, 8. The Supplemental Process is premised on the notion that a voter's two-year period of inactivity "indicates they may have moved." Def. Br. at 7. Because voters frequently fail to vote for reasons unrelated to having changed residence, however, the Supplemental Process targets many voters who have not actually moved. *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction ("Pls.' Br."), Doc. 39, at 15-17, 32. Indeed, the real life experiences of Ohio voters, including Plaintiff Larry Harmon, show that neither a two-year nor a six-year period of inactivity reliably indicates that a voter

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Justice, "The National Voter Registration Act of 1993 (NVRA)," ¶ 33; H.R. REP. NO. 103-9, at 15 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 119.

[2] Defendant misrepresents the findings of a report by the U.S. Election Assistance Commission ("EAC"), stating that voter registration is on the rise in Ohio. Defendant's Initial Merits Brief ("Def. Br."), Doc. 38, at 8-9. In fact, the EAC report states that the number of *active* voters in Ohio increased from 2008 to 2012. The EAC report and Defendant's own data show that Ohio's overall reported registration rate has steadily declined in recent years and now stands at over 750,000 fewer registered voters than at its peak in 2008, despite a steadily rising eligible population. *See* EAC Report at 24; Ohio Secretary of State, "Voter Turnout in General Elections," *available at* https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/HistoricalElectionComparisons/Voter Turnout in General Elections.aspx.

has moved. *See, e.g.*, Pls.' Br. at 11-12, 14-16. Rather, across the state, infrequent voters are sent notices time and again, even when they have resided at the same address for many years. *Id.* at 11. Many of these voters do not vote for six years or more, whether due to illness, work, intentional abstention, or another reason—again, all the while living at the same address—and are purged from the rolls as a result. *Id*. at 11-16. Because voters removed under the Supplemental Process often learn that their names have been removed from the rolls only when they show up to the polls to vote, when it is too late to re-register, the Supplemental Process has resulted in widespread disenfranchisement across the state. *See, e.g.*, *id.* at 12, 14-16.

By contrast, Defendant has provided no evidence showing that two years or six years of voter inactivity accurately correlates with a voter having changed address. In fact, Defendant has conceded that he has never reviewed readily available data that would show whether voters purged under the Supplemental Process had or had not moved. Pl Br. at 10. Indeed, in a recent public statement about this case, the Defendant made clear how little concern he has for the impact of the Supplemental Process on infrequent voters, stating "If this is really important thing [sic] to you in your life, voting, you probably would have done so within a six-year period."[3] Even if this unfounded statement were true, the NVRA makes clear that a voter cannot be removed simply for missing an election.

[3] Andy Sullivan & Grant Smith, *Use It or Lose It: Occasional Ohio Voters May be Shut Out in November*, REUTERS, May 31, 2016, *available at* http://www.reuters.com/article/us-usa-votingrights-ohio-insight-idUSKCN0YO19D.

In the absence of direct evidence to support his contention that the Supplemental Process reliably purges only ineligible voters, Defendant appeals to unfounded concerns about voter fraud and resorts to a slanted description of the importance of recent elections to suggest that it is implausible that an eligible voter would have missed them. Def. Br. at 14, 8. This suggestion fails in the face of the substantial direct evidence submitted by Plaintiffs showing that Ohio voters routinely miss six—or more—years of elections. Pl Br. at 15.

Defendant attempts to bolster his claimed need for the Supplemental Process by citing Census Bureau data indicating that approximately 11.5% of Americans move each year. Def. Brief, at 15. Once again, Defendant provides no evidence that the Supplemental Process accurately targets the voters who have moved, and this Census data merely provides further evidence that it does not. Ohio sends notices under the Supplemental Process to a far greater number of voters each year than this Census data suggests have moved. For example, in 2015, Cuyahoga County sent approximately confirmation notices to over 20% of its registered voters pursuant to the Supplemental Process and Meigs County sent nearly 23% of its registered voters such notices. Sealed Declaration of Cameron Bell, May 24, 2016 ("Sealed Bell Decl."), Doc. 45, ¶¶ 11, 14. These numbers do not include the notices sent pursuant to Ohio's "NCOA Process," which relies on change-of-address data from the U.S. Postal Service, or the voters whose registrations are updated when they change their driver's license addresses or who affirmatively reregister when they move.

In addition, there are numerous sources of change-of-address information that are more reliable than a voter's failure to vote that the Defendant does *not* use. For example, Defendant does not have a program that makes systematic use of undeliverable mail to maintain Ohio's voter rolls, despite sending routine mailings to all registered voters. *See* Nat'l Ass'n of Secretaries of State, NASS Report: Maintenance of State Voter Registration Lists 8, 62 (2009) ("NASS Report"), Exhibit A to Defendant's Second Merits Brief, Doc 49-1. Likewise, Defendant does not make use of interstate data used by other states, such as interstate driver's license or voter registration data. *See id.*

In sum, the Supplemental Process unlawfully targets infrequent voters for removal from Ohio's voter rolls, and its reliance on failure to vote is unreliable and improperly and unnecessarily prevents eligible Ohio voters from participating in the democratic process.

III. ARGUMENT

Plaintiffs have submitted evidence in support of their Motion for Summary Judgment that demonstrates their entitlement to summary judgment in their favor. Defendant has not moved for summary judgment, apparently conceding that the undisputed evidence does not support summary judgment in his favor.[4] In fact, Defendant's admission of the critical fact in this case—that he is removing voters from

[4] The parties in this case agreed to consolidate all dispositive issues into a single set of briefs, but there was no agreement among the parties or order from the Court concerning the appropriate motions or procedure for presenting those issues to the Court. In the absence of a pretrial conference or pretrial order under Federal Rule of Civil Procedure 16, or an order setting the case for trial, Plaintiffs believe summary judgment to be the appropriate procedure. Defendant filed what he entitled his "Initial Merits Brief." Defendant has not moved for judgment on the pleadings or summary judgment. Accordingly, Plaintiffs treat Defendant's brief as a pre-trial brief. Plaintiffs do not thereby waive any objection to the propriety of Defendant's filing such a brief or to the sufficiency of the brief as a motion for judgment on the pleadings, summary judgment, or other relief under Rules 7, 12, or 56 of the Federal Rules of Civil Procedure.

the rolls based upon their failure to vote—confirms that summary judgment should be granted in Plaintiffs' favor.

A. The Plain Language of the NVRA Prohibits Ohio's Supplemental Process.

Section 8 of the NVRA requires states to "conduct a general program that makes a reasonable effort to remove the names of" voters who have become ineligible "by reason of a change in residence," 52 U.S.C. § 20507(a)(4)(B), and it prohibits such voter removal programs from using failure to vote as the basis for removing voters. *Id.* § 20507(b)(2). Ohio's Supplemental Process violates both of these requirements because it targets voters for failing to vote, and it does not reasonably or reliably remove voters who have changed residence.

1. *The NVRA Prohibits Cancellation of Voters for Failure to Vote.*

The plain language of Section 8(b) prohibits states from using any list-maintenance program that "result[s] 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 . . . ." *Id.* There is only one limited exception to this blanket prohibition against considering failure to vote in list-maintenance programs: Failure to vote may be considered *only* as one part of a process to *confirm* other reliable information indicating a voter has moved. *Id.* §§ 20507(b)(2), (d). Ohio's Supplemental Process does not fall within this exception. The Supplemental Process uses failure to vote to *trigger* the confirmation process, rather than limiting its use to the confirmation process itself. While the Defendant may be correct that the NVRA allows states some flexibility in determining what type of information to

use to trigger Section 8(d)'s confirmation process, the language of Section 8(b)(2) makes abundantly clear that this flexibility does *not* include using failure to vote as the trigger.[5]

2. *Section 8(d) Does Not Provide Independent Authority to Remove Infrequent Voters.*

As Plaintiffs explained in their Motion for Summary Judgment, Section 8(d) of the NVRA sets forth a procedure for confirming a change of address when reliable second-hand information suggests a voter may have moved. *See* Pls.' Br. at 30. The Defendant misconstrues this confirmation procedure as an independent basis for removing voters, mislabeling it the "NVRA Supplemental Process." *See*, *e.g.*, Def. Br. at 11, 26. The text and structure of the NVRA make clear that the Defendant is wrong: There is no "NVRA Supplemental Process." First, nowhere in the NVRA is Section 8(d) described as an independent basis for removing voters. In every provision of the statute in which subsection (d) is referenced, it is consistently described as working in conjunction with the NCOA system or another reliable source of change-of-address information. *See*, *e.g.*, 52 U.S.C. §§ 20507(b)(2), (c)(1)(B). Second, the language of Section 8(d) itself demonstrates that it constitutes a restriction on voter removal programs and is not an independent authorization to remove voters.

Elementary principles of statutory construction require that a court construing Section 8 must "give the Act 'the most harmonious, comprehensive meaning possible' in

[5] Defendant suggests that the Supplemental Process does not violate Section 8(b) because it removes voters when they fail to vote and fail to respond to a confirmation notice. Def. Br. at 21. This argument puts the cart before the horse by presuming that it was proper to send the voter the confirmation notice in the first place. Under Section 8(b), the Defendant cannot require a voter to take action to remain registered simply because the voter failed to vote. The Defendant cannot unlawfully place a hoop before a voter because the voter failed to vote and then assert that the voter is being purged not for failing to vote but for failing to jump through the hoop.

light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631–32 (1973) (quoting *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947)); *see also Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) ("We must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013))). Reading Section 8(d) in isolation as a justification for removing inactive voters, as Defendant attempts to do, fails to give effect to the context, structure, and purpose of Section 8 as a whole.

When Section 8(d) is read together with Section 8's other provisions, the only plausible construction is that it sets forth a procedure for confirming independent evidence of a voter having moved. First, Section 8(a) establishes a general requirement that states make an effort to remove voters who have moved, and requires that such removals be conducted "in accordance with subsections (b), (c), *and* (d)." 52 U.S.C. § 20507(a)(4)(B) (emphasis added). The use of the word "and" here rather than "or" indicates that 8(d) is not an isolated removal provision but part of a procedure encompassed by all three of these subsections. Likewise, the exception to Section 8(b)'s prohibition on removing a voter for failing to vote allows states to use "the procedures described in subsections (c) *and* (d)" to remove voters who have moved. *Id.* § 20507(b)(2) (emphasis added). Finally, subsection (d) is specifically referenced in subsection (c)(1), which describes the notice-and-waiting-period procedure as a procedure "to *confirm* the change of address" identified using the NCOA database. *Id.* § 20507(c)(1)(B)(ii) (emphasis added).

Consistent with this understanding of Section 8(d) as part of a multi-step list-maintenance process, the language of Section 8(d) itself demonstrates that it is a restriction on voter removal programs set out elsewhere in Section 8, and not an independent grant of authority to remove voters from the rolls. Specifically, Section 8(d) begins with language of limitation, not authorization: It provides that "a state *shall not remove* [a registrant from the rolls] on the ground that the registrant has changed residence *unless*" the procedures set forth in the subsection are followed. *Id.* § 20507(d) (emphasis added). If subsection (d) had been intended as an independent authorization to remove voters in accordance with the notice-and-waiting-period procedures, it would have been worded in the affirmative, as in subsection (c). *See* 52 U.S.C. § 20507(c)(1) ("A State *may* meet the requirement of subsection (a)(4)" by using the NCOA program and the Section 8(d) confirmation process. (emphasis added)).

The language and context of Section 8 make clear that Section 8(d) establishes a confirmation procedure, not an independent "NVRA Supplemental Process." Defendant's reliance on Section 8(d) to justify the Supplemental Process is misplaced and does not support judgment in his favor.

3. *HAVA Does Not Permit Cancellation for Failure to Vote.*

The Help America Vote Act ("HAVA") does not change the NVRA's ban on purging voters for failure to vote and does not allow Ohio to target infrequent voters absent reliable evidence they have changed residence. Section 903 of HAVA amended the NVRA, adding the proviso to Section 8(b)'s prohibition against purging non-voters on which Defendant so heavily relies. 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. *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”), Exhibit F to Declaration of Cameron Bell in Support of Plaintiffs’ Motion for Summary Judgment (Doc. 42-6). 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, notwithstanding that one element of that procedure is that the voter fails to vote during the waiting period. *See 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.”). The HAVA amendment does not transform Section 8(d) into an independent basis for purging voters based on their failure to vote.

This common-sense reading of the HAVA amendment is supported by both the plain text of HAVA and the statute’s legislative history. 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) (emphasis added). Likewise, the Conference Report on HAVA stated that HAVA "leaves [the] NVRA intact, and does not undermine it in any way," and explained that "[t]he procedures established by [the] NVRA that guard against removal of eligible registrants remain in effect under this Act." 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").

HAVA did not change the NVRA's prohibition on purging infrequent voters. The Supplemental Process violated the NVRA before HAVA and continues to violate it now.

4. *The Legislative History of the NVRA Confirms that States Are Prohibited from Purging Non-Voters.*

As explained in Plaintiffs' Motion for Summary Judgment, the NVRA's legislative history provides abundant support for the view that Section 8(b) prohibits the very program Ohio has established by its Supplemental Process. Defendant's reliance on the statements of individual legislators and a Congressional Budget Office report on a *different bill*, considered by a different Congress, Def. Br. at 23, fails to overcome the strong and persuasive authority found in the congressional reports on the NVRA. *See Gustafson v. Alloyd Co., Inc*., 513 U.S. 561, 580 (1995) ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."); *United States v. Int'l Union United Auto., Aircraft and Agr. Implement*

Workers of America (UAW-CIO), 352 U.S. 567, 585 (1957) (noting that comments made during Senate debates are "not entitled to the same weight as [the] carefully considered committee reports"). House, Senate, and Conference Committee Reports establish that, in passing the NVRA, Congress intended to prohibit states from using failure to vote as a trigger for removing voters from the rolls. H.R. REP. NO. 103-9, at 15 (1993) ("The Committee is concerned that such programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing."); *id.* at 18 ("[Section 8] of the bill attempts to incorporate an underlying purpose of the Act; that once registered, a voter should remain on the list of voters so long as the individual remains *eligible* to vote in that jurisdiction.") (emphasis added); S. REP. NO. 103-6, at 17 (1993) ("One of the purposes of this bill is to ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction."); *see also* H.R. REP. NO. 103-66, at 20 (1993) (Conf. Rep.) ("The States shall conduct a general program that makes a reasonable effort to remove the names of *ineligible* voters by reason of . . . change of residence of the voter.") (emphasis added). These reports, rather than the irrelevant authority cited by the Defendant, are clear and instructive.

B. <u>The Supplemental Process Is Overbroad, Unreliable, and Unnecessary to Satisfy Ohio's Obligation to Remove Voters Who Have Become Ineligible.</u>

In addition to violating the plain language of the NVRA prohibiting removal for failure to vote, the Defendant's practice also violates Section 8's requirement that list-maintenance programs be reasonable, uniform, and nondiscriminatory. 52 U.S.C.

§§ 20507(a), (b)(1). The NVRA allows states to keep their voter-registration rolls up-to-date using sources of change-of-address information in addition to or instead of the NCOA system, but it requires those sources to be reliable. *See, e.g.*, 52 U.S.C. § 20507(a)(4); . Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)," ¶ 34. A failure to vote is far from a reliable indicator that a voter has moved. In addition, as Defendant's own argument and evidence make clear, Ohio already uses several alternative sources of change-of-address information and has others at its disposal. Def. Br. at 16. Given the existence of these alternatives and the Supplemental Process's overbreadth and inaccuracy, the Supplemental Process is not a reasonable list-maintenance program, and it therefore violates the NVRA.

As an initial matter, the Defendant is simply incorrect when he asserts that "the NVRA requires more than a procedure based on the NCOA database." Def. Br. at 1. Subsection 8(c) of the NVRA expressly and unambiguously states that using the NCOA system will satisfy a state's obligation to identify and remove voters who move. 52 U.S.C. § 20507(c)(1) (noting that "[a] State *may* meet" its obligations to identify such voters by establishing a program that uses NCOA information). Nevertheless, while not required, using sources of reliable second-hand change-of-address information in addition to (or in lieu of) the NCOA database to identify and remove voters who change residence is permitted, and Ohio already does so. *Id.* §§ 20507(a)(4), (c)(1); *see also*, *e.g.*, DOJ Statement of Interest at 12; *Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001) ("[S]tates [must] maintain accurate registration rolls by using reliable information from government agencies . . . ."). In addition to NCOA data, Ohio already uses data from the Bureau of

Motor Vehicles and Social Security Administration keep its voter rolls accurate and to identify voters who have moved without notifying the Postal Service. Election Official Manual, Doc. 42, Exhibit Q, at 3-53. Further, as explained below, Ohio has many alternative sources of information available.[6]

1. *Failure to Vote Is an Unreliable Indicator that a Voter Has Moved.*

Section 8 of the NVRA requires states to conduct a reasonable, uniform, and nondiscriminatory program to identify and remove voters who have become ineligible to vote due to a change in residence outside the jurisdiction. 52 U.S.C. §§ 20507(a), (b)(1). The Supplemental Process does not satisfy this requirement because failure to vote does not provide a reasonable basis for believing a voter has lost eligibility due to a change of address. As Defendant has conceded, voters fail to vote for many reasons other than having moved. Pls.' Br. at 32. Consequently, using failure to vote as a proxy for changing address, as the Supplemental Process does, is considerably overinclusive. Not surprisingly, the number of voters purged pursuant to the Supplemental Process, which by its own terms is intended to "supplement" Ohio's NCOA Process, overwhelms by

[6] Defendant also incorrectly argues that the NVRA's confirmation-notice process is intended to identify voters who have died, citing this as a further justification for using failure to vote as the trigger for the Supplemental Process. *See* Def. Br. at 2. The NVRA is clear that the confirmation procedure set forth in Section 8(d) is part of the requirement that states remove voters who have become ineligible due to a change in residence, not death. 52 U.S.C. § 20507(a)(4)(B) (states must "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d)."); *id.* § 20507(d) ("A State shall not remove [voters from the rolls] on the ground that *the registrant has changed residence* unless" the confirmation procedure is followed.). Moreover, the Supplemental Process by its own terms is intended to identify voters who have moved, *see*, *e.g.*, Election Official Manual, Doc. 42, Exhibit Q, at 3-71, and Defendant has consistently stated that this is its purpose. *E.g.*, Damschroder Decl. ¶ 14; Damschroder Depo., at 62:23-63:4. Only in Defendant's brief in this matter does the Secretary offer the *ex post* rationalization that the Supplemental Process is a means of identifying voters who have died. And, like change-of-address information, Defendant already uses numerous more targeted sources of death information to maintain its rolls, including Ohio Department of Health and the State and Territorial Exchange of Vital Events system. Election Official Manual, Doc. 42, Exhibit Q, at 3-64. The need to remove voters who have died does not justify Ohio's Supplemental Process or render it lawful.

many multiples the number of voters purged under the NCOA Process. For example, in 2015, Cuyahoga County elections officials sent approximately six times as many confirmation notices and cancelled four times as many voter registrations under the Supplemental Process as under the NCOA Process. Sealed Bell Decl. ¶¶ 11-13. As Plaintiffs have shown, many of the voters purged through the Supplemental Process have not moved and remain eligible to vote. *Id.* ¶¶ 50-51. The Supplemental Process has thus erroneously identified thousands of eligible Ohio voters as having moved, purged them from the rolls, and caused many to be disenfranchised. Given this massive overbreadth, the Supplemental Process does not constitute a "reasonable" effort to maintain up-to-date voter rolls.

Despite acknowledging the unreliability of failure to vote as a basis for identifying voters who have moved, the Defendant insists that Supplemental Process is reasonable. Defendant's contention that the Supplemental Process is reasonable rests only on his bare assertion, not on any evidence regarding the number or percentage of people the process identifies who have actually moved. Indeed, as set forth in Plaintiffs' Motion for Summary Judgment, the Defendant admits that he does not know how many of the voters targeted by this process have and have not moved. Pls.' Br. at 10-11. Defendant argues that it does not matter how many eligible voters are harmed by the Supplemental Process, citing *United States v. Missouri* for the proposition that "Congress could not have expected that a State program would ensure that no voter's name is ever removed from the voter registration list in violation of the NVRA." *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2006 WL 1446356, at *9 (W.D. Mo. May 23, 2006), *rev'd and*

remanded, 535 F.3d 844 (8th Cir. 2008). However, merely because a state's list-maintenance program need not be infallible does not mean that the degree of its fallibility is irrelevant to its reasonableness. The NVRA requires states to balance the protection of eligible voters against the need to remove those who are ineligible. *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1274 (D. Col. 2010). A state cannot satisfy this obligation by simply ignoring the number of eligible voters its list-maintenance program erroneously removes. Here, the record indisputably establishes that the Supplemental Process has resulted in the removal of numerous eligible but infrequent Ohio voters from the voter rolls, and the Defendant has cited no evidence to the contrary. The Supplemental Process's reliance on failure to vote to trigger the Section 8(d) address-change confirmation process is not reasonable and does not comply with the NRVA.

2. *Ohio Has Reliable Alternatives to the Supplemental Process to Identify Voters Who Have Changed Residence.*

Defendant points to several pieces of ambiguous data in an attempt justify the Supplemental Process. None support his argument that the process complies with the NVRA, but they do underscore the many lawful—and more precise—alternatives to the Supplemental Process the Defendant has available to maintain the accuracy of Ohio's voter rolls.

For example, Defendant argues that because, according to the U.S. Postal Service, 40% of all undeliverable mail is the result of people moving without leaving a forwarding address, the NCOA Process is insufficient on its own to ensure the accuracy of the rolls. Def. Br. at 6. Rather than supporting the propriety of the Supplemental Process, this fact

provides further evidence of its unreasonableness by highlighting one alternative source of information that the Defendant *could* use to identify voters who have moved: returned mail. Returned mail would be both lawful and more reliable than failure to vote as an indication that a voter had moved, and, if the Defendant's evidence is to be believed, would capture a significant number of voters who move without registering with the NCOA system. Both the Department of Justice and the NVRA's legislative history have stated that mail returned as undeliverable may provide a reasonable basis for believing a voter may have moved, and therefore trigger the removal process. Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)," ¶ 33; H.R. REP. NO. 103-9, at 15 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 119. Moreover, according to the Defendant, the Secretary of State's office already sends absentee ballot applications to all registered voters in Ohio—active and inactive—every two years. *See* Declaration of Matt Damschroder, May 13, 2016 ("Damschroder Decl."), Doc. 38-2, ¶¶ 25-26. Returned mail from these absentee ballot applications would provide a more reliable—and lawful—means of identifying voters who may have moved than failure to vote.

In addition, Defendant's contention—inaccurate as described below—that six other states use failure to vote as part of their list-maintenance process underscores that the vast majority of states covered by the NVRA, keep their voter rolls up-to-date without purging large numbers of eligible infrequent voters. Many states use returned mail to trigger the address-confirmation process. *See infra* Section III.B.3. In addition, states obtain information from their own motor vehicles departments to update their rolls (a process already in place in Ohio); use information provided to their state motor vehicles

department from other states under an interstate compact known as the Driver License Compact; and share information concerning voters who newly register so that other states may remove them. NASS Report at 8.

Additionally, a number of states, including Ohio, are members of the Electronic Registration Information Center ("ERIC"), which enhances these multistate data-sharing systems by aggregating data from voter registration lists, motor vehicle departments, and other sources to identify individuals who have likely moved outside their jurisdiction of registration as well as eligible but unregistered voters residing in member states. *See, e.g.*, Testimony of Judd Choate, U.S. Senate Rule Committee, Apr. 9, 2014, *available at* http://www.rules.senate.gov/public/?a=Files.Serve&File_id=3A46DDD8-5F71-4D67-B30A-6CD5E86D89B8 (discussing Colorado's list maintenance practices); Virginia State Board of Elections, Annual Report on Voter Registration List Maintenance Activities, 5-6, Jan. 6, 2014, *available at* https://elections.virginia.gov/Files/maintenance-reports/2013SBEListMaintenancereport.pdf. States can use ERIC to conduct voter-roll maintenance as well as outreach to unregistered voters.

These alternative sources of change-of-address information are available to Ohio and, unlike the Supplemental Process, do not result in the removal of voters by reason of their failure to vote. Thus, Ohio's assertion that the Supplemental Process is required to ensure accurate roles is not only legally irrelevant given the NVRA's clear ban on purging infrequent voters; it is also factually unsupported. The Supplemental Process is in no sense a "reasonable" effort to remove voters who have become ineligible due to a change of residence.

3. *Other States' Violations of the NVRA Do Not Justify Ohio's Supplemental Process.*

Defendant incorrectly asserts that six other states also use failure to vote to initiate purges of voters, wrongly implying that because the practice has gone unchallenged in these other states, Ohio's Supplemental Process must be lawful. Not only is the Defendant wrong about many of these states' practices, but the fact that other states may also be violating the NVRA provides no defense to Ohio's own violations.

As an initial matter, Ohio's assertion is based on false premises. Both South Dakota and Alaska adopted roll-maintenance practices similar to Ohio's Supplemental Process after the passage of the NVRA. On February 11, 1997 the U.S. Department of Justice sent both states letters notifying them that their processes "violated Section 8's ban on purging for non-voting." DOJ Statement of Interest, at 15. Both "states subsequently agreed to stop using non-voting as the trigger for beginning the Section 8(d) notice and cancellation procedures, and instead adopted an undeliverable non-forwardable initial notice trigger[.]" *Id.*; *see also* S.D. Codified Laws § 12-4-19 (South Dakota law requires that "a nonforwardable return-if-undeliverable address verification request" be sent to any voter who has failed to vote, not updated their registration information, and not replied to a confirmation mailing at least once in the preceding four years. Only if this nonforwardable mailing is retuned as undeliverable is notice under subsection (d)(2) sent.); Alaska Stat. Ann. § 15.07.130(a)-(b) (West) (noting that it is only if an individual has had no contact with the board of elections for a four-year period

and a non-forwardable mailing requesting address confirmation is returned as undeliverable that a voter will be sent a (d)(2) confirmation notice).

In Montana, election officials are instructed to use at least one of six roll-maintenance options every odd-numbered year, only one of which uses failure to vote as a trigger for sending a notice. Mont. Code Ann. § 13-2-220 (1). However, even when this process is used, voters who do not respond to the notice are sent a second confirmation notice prior to being removed. *Id.* § 13-2-220(3). Moreover, Montana allows voters to register at the time they appear to vote, mitigating much of the harm caused by erroneous purges of infrequent voters. Hence, while Montana's practice is of questionable legality, it is materially different from Ohio's.

Further, Georgia's process—which does closely mirror Ohio's but relies on a longer window of inactivity to trigger the sending of a confirmation notice—is currently being challenged in federal court. *See Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. 2016). In that case, the U.S. Department of Justice—the agency tasked with upholding and enforcing the NVRA—has filed a Statement of Interest in the case stating that using failure to vote as a trigger for sending a confirmation notice violates subsection (b)'s explicit prohibition on using non-voting as a basis for removing voters from the registration rolls. *See* DOJ Statement of Interest, at 13-14.

Thus, Ohio is one of only a handful states identified by the Defendant that currently have a practice of initiating removal based upon a voter's failure to vote. Of course, the practice would not be lawful even if other states were doing the same thing,

but the exceptionality of Ohio's practice confirms that it is neither necessary nor reliable to serve the State's asserted goals.

C. Settled Law Holds that Section 8 of the NVRA is Constitutional.

The NVRA has been consistently upheld against constitutional challenges as a valid exercise of Congress's power under the Elections Clause of Article I of the U.S. Constitution. Remarkably, Defendant does not even cite the Supreme Court case that provides the most relevant and recent authority on this subject. Just three years ago, the Supreme Court upheld the NVRA as a permissible exercise of Congress's Elections Clause power in *Arizona v. Inter Tribal Council of Arizona Inc.* 133 S. Ct. 2247, 2256-57 (2013) ("*ITCA*"). The Court confirmed what lower courts had previously held: that the Elections Clause "empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections." *ITCA*, 133 S. Ct. at 2253. The "substantive scope" of the Elections Clause "is broad" and the words "Times, Places and Manner . . . are comprehensive[,] embrac[ing Congress's] authority to provide a complete code for congressional elections, including . . . regulations relating to registration." *Id.* at 2253 (internal quotations omitted).

Defendant's attempt to raise constitutional questions about the NVRA rests upon his ignoring this controlling precedent. As the Court stated, principles of state sovereignty that apply in other contexts are inapposite when Congress acts within its Elections Clause power, as it did with the NVRA. *Id.* at 2256-57. The Defendant's resort to the Seventh Circuit case of *Association of Community Organizations for Reform Now v. Edgar* is inapposite. *See* Def. Br. at 30-31 (citing *Association of Community Organizations for*

Reform Now v. Edgar, 56 F.3d 791(7th Cir. 1995)). While the *Edgar* court did state that the NVRA was an "intrusion upon the operations of state government," it fully upheld that intrusion as a valid exercise of congressional power under the Elections Clause. *Edgar*, 56 F.3d at 795. Its criticism of the district court's order was that it went beyond the requirements of the NVRA. *Id.* at 797-98. *Gregory v. Ashcroft* is likewise inapplicable to this case. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). *Gregory* involved a challenge to the Age Discrimination in Employment Act, a statute passed pursuant to the Commerce Clause, which the Court held did not provide Congress the authority to infringe on the authority of states to determine the qualifications of their elected officials. *Id.* As the Supreme Court held in *ITCA*, the Elections Clause provides Congress with the near-plenary authority to displace state laws regarding voter registration, and the Defendant's challenge to the NVRA's regulation of voter list-maintenance must be rejected. *See ITCA*, 133 S. Ct. 2247, 2256; *see also Edgar*, 56 F.3d at 795 (distinguishing *Gregory* and holding that the NVRA did not interfere with any traditional area of state sovereignty).

Defendant's reliance on the states' authority to set voter qualifications is also misplaced, and in no way implicates the NVRA's list-maintenance provisions. Section 8's roll-maintenance procedures do not affect who is permitted to register and vote in Ohio. *Edgar*, 56 F.3d at 794-95 (NVRA does not infringe upon state's authority to set voter qualifications). Section 8 merely ensures that individuals who meet Ohio's voter qualifications and have properly registered are not removed from the voter registration rolls unless they lose their eligibility. *See U.S. Student Ass'n Found. v. Land*, 546 F.3d

373, 381-82 (6th Cir. 2008) (Section 8 prohibits states from removing eligible voters from the rolls). And there is no dispute that the infrequent voters whose rights Plaintiffs seek to vindicate are qualified. Ohio has previously placed these voters on the rolls, and the only reason it removed them was its erroneous assumption that their failure to vote meant that they had moved.

Additionally, the NVRA's list-maintenance provisions, like its other elements, do not run afoul of the anti-commandeering principle. Defendant relies on *New York v. United States*, 505 U.S. 144 (1992), a case that applied the anti-commandeering principle when assessing whether Congress had exceed the scope of its authority under the Commerce Clause, and ignores controlling authority, which long ago rejected a commandeering challenge to the NVRA. Def. Br. at 32. In *Association of Community Organizations for Reform Now v. Miller*, the Sixth Circuit expressly rejected a commandeering argument against the constitutionality of the NVRA as a whole, holding that, "unlike the Commerce Clause at issue in *New York*, [the Elections Clause] *specifically grants Congress the authority to force states to alter their regulations regarding federal elections*." 129 F.3d 833, 836 (6th Cir. 1997) (emphasis added) (citing *New York v. United States*, 505 U.S. 144 (1992)); *accord Branch v. Smith*, 538 U.S. 254, 279-80 (2003) (plurality opinion of Scalia, J.) (noting that *New York*'s anti-commandeering principle is not applied in the same manner in Elections Clause cases); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (holding that the Elections Clause expressly authorized Congress to commandeer states system of voter registration). Defendant offers no basis for

distinguishing this controlling authority and no reason why these cases should be revisited. Accordingly, Section 8's prohibition on purging infrequent voters does not violate anti-commandeering principles.

Because Section 8 of the NVRA is a valid exercise of Congress's authority under the Elections Clause, the doctrine of constitutional avoidance is plainly inapplicable. *See* Def. Br. at 32. That doctrine requires ambiguous statutory provisions to be construed so as to avoid serious constitutional questions. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.") (internal quotation marks and citations omitted). Here, however, there is simply no constitutional question to avoid. Accordingly, even if Section 8's prohibition on purging infrequent voters were ambiguous, that ambiguity must be resolved in favor of the clear congressional intent and in a manner that protects eligible Ohio voters. Accordingly, Plaintiffs are entitled to Summary Judgment in their favor.

D. Laches Does Not Bar Plaintiffs' Claims, Which Seek Prospective Relief for Ongoing Violations of the NVRA.

Plaintiffs' claims are a timely challenge to an ongoing policy and practice of the Defendant that has harmed Ohio voters in violation of the NVRA and, absent court intervention, will continue to do so. Defendant has wholly failed to establish that these

claims are barred by the equitable doctrine of laches, an issue on which he bears the burden of proof. "To invoke the equitable doctrine of laches, a party must show: '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it.'" *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003) (citing *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 321 (6th Cir. 2001)); *see also E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 439 (6th Cir. 2006) ("As laches is an affirmative defense, the burden of establishing both of these elements is on the party raising the defense . . . ."). Defendant has failed to satisfy his burden on either of these elements.

First, Defendant's bare assertion that the Supplemental Process has been in place for 22 years does not meet his burden to establish that Plaintiffs have not been diligent in asserting their claims. Most importantly, because Plaintiffs seek prospective relief in this matter, laches is simply inapplicable. *See, e.g.*, *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981) ("Laches may not be used as a shield for future, independent violations of the law."). Moreover, with respect to Plaintiff Larry Harmon, the evidence is clear that he was harmed by the Supplemental Process last year, when his registration was cancelled and he was prevented from voting, not 22 years ago when the process was established. *See, e.g.*, Pls.' Br. at 10, 20. Likewise, APRI and NEOCH are harmed anew each time their members or the voters they register are targeted by the Supplemental Process. *See, e.g.*, *id.* at 17-20. These harms were most recently inflicted as a result of Ohio's 2015 purge of infrequent voters, which occurred between July and December of 2015, shortly before Plaintiffs notified the Defendant of his NVRA violations. Laches

does not give the Defendant a free pass to continue violating the Plaintiffs' rights merely because he has been violating the rights of other Ohioans for 22 years. *Environmental Defense Fund*, 651 F.2d at 1005 n.32; *see also Danjaq LLC v. Sony Corp*., 263 F.3d 942, 959-60 (9th Cir. 2001) (noting that "almost by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm"); *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001) ("A prospective injunction is entered only on the basis of current, ongoing conduct that threatens future harm. Inherently, such conduct cannot be so remote in time as to justify the application of the doctrine of laches.").

Second, laches does not simply concern itself with the passage of time, but rather focuses on the question of whether a delay renders it inequitable to permit the claims to be enforced, and Defendant has failed to show how the purported 22-year delay has resulted in prejudice to him. *Catalanotte*, 342 F.3d at 550. Citing *Purcell v. Gonzalez*, Defendant vaguely asserts that "implementing significant changes to long-standing clean-up procedures in an election year would cause confusion," Def. Br. at 33, but *Purcell* was not a laches case. 549 U.S. 1, 3 (2006). Moreover, Defendant fails to point to any evidence that confusion would result simply from ending the practice of sending notices to and cancelling the registrations of infrequent voters, particularly when he is at liberty to use NCOA or other reliable address-change information to keep Ohio's voter rolls up to date.[7] Indeed, the evidence submitted by Plaintiffs suggests that it is the Supplemental

[7] Belying Defendant's concern about changing the Supplemental Process in an election year, Defendant himself sought a stipulation delaying the start of the Supplemental Process this year until July 1, *see* Joint Stipulation and Order, Doc. 18, while in prior years, the process had to be completed by the end of June. *See, e.g.*, Directive No.

Process itself that is the cause of electoral confusion because voters, unaware they have been purged, arrive at the polls to find their names are not on the voter rolls. Additionally, even if confusion could occur by enjoining the Supplemental Process "in an election year," that would not be a basis for barring Plaintiffs' claims *after* the conclusion of the election.

What Defendants' argument boils down to is that Plaintiffs cannot obtain relief against a practice that violates federal law, where that practice (or something like it) has been in place for many years. There is no foundation in American law for such a principle. To the contrary, the Supreme Court has often invalidated practices that have been in place for much longer than Ohio's—the racial segregation of public schools, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), and the malapportionment of state legislatures, *Reynolds v. Sims*, 377 U.S. 533 (1964), being just two of the most prominent examples. Contrary to Defendant's implicit argument, there is no newly discovered rule of law immunizing voting rules that have been in place for a long time. *See, e.g.*, *Common Cause Indiana v. Individual Members of the Ind. Elec. Com'n*, 800 F.3d 913 (7th Cir. 2015) (striking down a judicial elections process that had been in effect for 40 years). Defendant has failed to meet his burden on either element of laches, and his laches defense must be rejected.

2015-09, "2015 General Voter Records Maintenance Program" (May 19, 2015), *available at* http://www.sos.state.oh.us/sos/upload/elections/directives/2015/Dir2015-09.pdf; Directive No. 2011-15, "2011 General Voter Records Maintenance Program (National Change of Address and Supplemental Processes); Grounds for Registration Cancellations" (April 18, 2011), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-15.pdf.

E. The *Purcell* Principle Does Not Bar Plaintiffs' Requested Relief.

The doctrine established by the Supreme Court in *Purcell* favors preserving the status quo in election matters when there is insufficient time to implement the relief sought without disruption to the election. *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006), 549 U.S. at 4-5. Here, any voter confusion or prejudice that might result from the relief Plaintiffs seek rises nowhere near the level found in election cases where the *Purcell* principle has been applied. *See*, *e.g.*, *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (refusing to enjoin an entire election because of the "enormous resources already invested" in reliance on the election occurring on an established date); *McClafferty v. Portage Cnty. Bd. of Elections*, 661 F. Supp. 2d 826, 841 (N.D. Ohio 2009) (applying *Purcell* where voting machines had already been programmed, absentee ballots had already been printed, and early voting had already begun).

First, a permanent injunction prospectively terminating the Supplemental Process would not adversely impact any voters this Election Day, and would significantly reduce the financial and administrative burden imposed on county boards of election by the Supplemental Process. All it would do is stop the Defendant from sending the notice that will, years from now, trigger removal from the rolls—relief that the Defendant has already agreed to on an interim basis. Joint Stipulation and Order, Doc. 18. Additionally, neither reinstatement of all voters whose registrations were unlawfully cancelled nor the counting of provisional ballots cast by such voters would change how the election is conducted on Election Day. Reinstatement of the unlawfully purged voters could take

place well before Election Day and before Ohio's deadline for voter registration, which would allow all eligible voters to appear at the polls and vote just as if they had never been purged. The alternative remedy of counting provisional ballots would only impact the rules by which county boards of election count provisional ballots, a process which occurs over a period of up to 21 days *after* the election.[8] Ohio Directive No. 2015-28, "Provisional Voting" (Dec. 2015) at 6-10, 6-11 to 6-16.

F. The Doctrine of Impossibility Does Not Bar Plaintiffs' Claims or the Relief Sought.

Plaintiffs do not ask the impossible here. There is nothing impossible about stopping the Supplemental Process, and allowing people to vote who have been wrongfully removed. Even were the impossibility doctrine applicable here, the Defendant has not met his burden of establishing that any particular form of relief Plaintiffs seek would be impossible. *See Stand Energy Corp. v. Cinergy Servs., Inc.*, 760 N.E.2d 453, 457 (Ohio Ct. App. 2001) (stating that the party seeking to avoid performance bears the burden of proving the events that would excuse nonperformance); *see also E. Capitol View Cmty. Dev. Corp., Inc. v. Robinson*, 941 A.2d 1036, 1040 (D.C. 2008) ("The party asserting the defense of impossibility bears the burden of proving a real impossibility and not a mere inconvenience or unexpected difficulty." (internal quotation marks omitted)).

Defendant contends that Plaintiffs' entire complaint fails because, according to him, it would be impossible to provide one part of the relief Plaintiffs seek—to reinstate the voters whose registrations were cancelled pursuant to the Supplemental Process

[8] Even if the *Purcell* doctrine applied, it would not wholly bar Plaintiffs' claims; at most it would require that any relief by stayed until after the 2016 election. *Purcell*, 549 U.S. at 5.

because those individuals cannot be identified by all county boards of election. Def. Br. at 33. It bears emphasis that this argument applies only to a portion of the relief Plaintiffs request. The Defendant does not argue that it would be impossible to cease using the Supplemental Process on a prospective basis, to count provisional ballots cast by improperly purged voters, or to amend the confirmation notice to comply with the NVRA. Moreover, even if Defendant were correct, this would be a problem of Defendant's own making—caused by the failure to identify those who have been removed through this illegal process. In fact, however, the evidence cited by the Defendant at most establishes that *the Secretary himself* cannot identify those individuals in Ohio's Statewide Voter Registration Database. Damschroder Depo., at 94:7-19. Plaintiffs have introduced county databases that do show the reason for the removal of each voter, including whether the voter was removed due to the Supplemental Process or the NCOA Process. Defendant has failed to establish that it is impossible for him to comply with the injunction Plaintiffs seek.[9]

G. Defendant's Voluntary Change to the Confirmation Notice Does Not Moot Plaintiffs' Second Cause of Action.

Plaintiffs' Second Cause of Action challenges the form of the confirmation notice that most Ohio counties use for both the NCOA Process and the Supplemental Process (officially known as SOS Form 10-S). Defendant incorrectly contends that his plan to issue a new confirmation notice form that addresses most, but not all, of the issues

[9] Defendant also suggests that it would be impossible to comply with the relief Plaintiffs seek without violating the Ohio constitution. The law is clear what the result is in such a circumstance: "state law [is] . . . preempted . . . when it is impossible to comply with both state and federal law[.]" *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248 (1984).

Plaintiffs raised, renders the Second Cause of Action moot. Def. Br. at 27. 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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*, 528 U.S. 167, 190 (2000); *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). Defendant has failed to make such a showing.

Here, Defendant has merely provided the court a *proposed* revised SOS Form 10-S—one that has not even been formally adopted—along with a declaration stating that the Defendant intends to issue the new form this year. *See* Declaration of Matthew E. Walsh, May 20, 2016 ("Walsh Decl."), Doc. 38-19. The Defendant has frequently changed the form of the confirmation notice in prior years, however, and his intention to issue a new form this year, even were it fully compliant, provides no assurance that he will not reissue a non-compliant form in future years. *See* Declaration of Cameron Bell, May 24, 2016, Doc. 42, Exhibits M–P. Moreover, Ohio has vigorously defended the legality of the current confirmation notice. Def. Br. at 28-29. Thus, the mere issuance of a new notice, even had it already occurred, would not establish that the violation was not reasonably likely to recur absent an order from this Court. *See Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (declining to find that Defendant's voluntary cessation mooted the claim because "the district vigorously

defends the constitutionality of its . . . program, and nowhere suggests that if this litigation is resolved in its favor it will not resume [the challenged conduct]"). Defendant's claim that Plaintiffs' Second Cause of Action is moot must, therefore, be rejected.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's request for judgment in his favor or summary judgment.

Dated: June 10, 2016

Respectfully submitted,

/s/ Naila Awan

Naila Awan, Trial Attorney (0088147)
Stuart C. Naifeh*
Cameron Bell*
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
Email: nawan@demos.org
Email: snaifeh@demos.org

Freda J. Levenson (0045916)
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Email: flevenson@acluohio.org

Daniel P. Tokaji*
Cooperating Attorney for ACLU of Ohio
The Ohio State University
Moritz College of Law**
55 W. 12th Ave
Columbus, OH 43210
Telephone: 310-266-0402
Email: dtokaji@gmail.com

Richard Saphire (0017813)
Cooperating Attorney for ACLU of Ohio
University of Dayton School of Law**
300 College Park
Dayton, Ohio 45469
Telephone: 937-229-2820
Email: rsaphire1@udayton.edu

Paul Moke (0014099)
Cooperating Attorney for ACLU of Ohio
Wilmington College**
1252 Pyle Center
Wilmington, Ohio 45177
Telephone: 937-725-7501
Email: paul.moke@gmail.com

Counsel for Plaintiffs

* Admitted *pro hac vice*
** Institutional affiliation for identification only

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Opposition to Defendant's Merits Brief was filed this 10th day of June, 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.

Dated: June 10, 2016

/s/ Naila Awan
Naila Awan, Trial Attorney (0088147)
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
E-mail: nawan@demos.org