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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION

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I. INTRODUCTION

Ohio's Supplemental Process cancels the registrations of infrequent voters in violation of the plain language of Section 8 of the National Voter Registration Act ("NVRA"). The NVRA explicitly forbids states from removing voters from the rolls based upon their failure to vote. Disregarding the actual language of the statute, Defendant contends he is permitted to initiate purges for any reason, no matter how many eligible voters are erroneously removed as a result. Defendant's contorted interpretation of the NVRA is contrary to its unambiguous text and must be rejected. In addition to improperly triggering the removal process based solely on the failure to vote, the Supplemental Process violates Section 8 for two other, independent reasons: It is unreasonable, and it is being implemented in a nonuniform manner.

An expeditious resolution of this case is essential, as Defendant acknowledges. If not immediately enjoined, the Supplemental Process will have a significant impact on many eligible Ohio voters. It will prevent thousands of them from participating in the November Election, while confusing other voters who are illegally sent a notice this year, calling into serious question the integrity of Ohio's elections. In November 2015 and March 2016, infrequent voters across the state turned out to vote only to learn that their names no longer appeared on Ohio's registration rolls. Absent relief from this Court, countless Ohio voters will be denied their right to vote this November and beyond.

Plaintiffs are entitled to summary judgment under Federal Rule of Civil Procedure 56. Plaintiffs' first basis for challenging the Supplemental Process—that the removal of

voters may not be triggered by their failure to vote—is wholly legal. Plaintiffs' other two arguments against the Supplemental Process—unreasonableness and nonuniformity—are partly factual, but Defendant has raised no genuinely disputed issue of material fact as to either. Nor is there any disputed factual issue as to Plaintiffs' challenge to the form of notice the Defendant has been using, which he does not even try to defend on the merits, effectively conceding its illegality.

Accordingly, this Court should grant Plaintiffs' Motion for Summary Judgment and issue a permanent injunction ordering the Defendant to (1) immediately halt the Supplemental Process, (2) reinstate all voters whose registrations were unlawfully and erroneously cancelled due to the Supplemental Process, or count the provisional ballots of such voters if their eligibility remains unchanged, and (3) issue a new confirmation notice form that complies with the requirements of the NVRA. In the alternative, if this Court believes that summary judgment is improper and cannot promptly hold a trial to resolve any genuine disputes of material fact, Plaintiffs request that a preliminary injunction be granted, preserving the status quo by stopping this year's notice—which may be sent out as soon as July 1, 2016 absent further court order—and protecting the votes of people who have already been removed, with ample time to provide notice to counties and to allow orderly appellate review.

II. ARGUMENT

Summary judgment is appropriate where the evidence in the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. To successfully oppose a summary

judgment motion, the non-moving party must present affirmative evidence to demonstrate that a factual dispute remains. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995). The non-moving party has "an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

The Defendant has failed to demonstrate that any material facts are genuinely in dispute with respect to either of Plaintiffs' two causes of action. On their first cause of action, Plaintiffs are entitled to judgment as a matter of law for three independent reasons: First, the Supplemental Process incontrovertibly targets voters for failing to vote. Second, the Supplemental Process is unreasonable, resulting in the erroneous removal of countless eligible voters. Third, the Supplemental Process is not uniformly administered across the state, resulting in arbitrary disparities in the ability of infrequent voters to participate in the democratic process.

On the second cause of action, there is no dispute that Ohio's current confirmation notice, SOS Form 10-S, violates the NVRA. Defendant does not even attempt to defend the form that he has been using as complying with the NVRA, effectively conceding its illegality. Instead, he proposes a new—but as yet unissued—form, disregarding settled law that voluntary cessation of putatively illegal activity cannot result in mootness. Accordingly, this Court should grant Plaintiffs' Motion for Summary Judgment, and issue a permanent injunction directing Defendant to: cease using the Supplemental Process; restore all of the unlawfully purged voters to the voter rolls; and adopt a new, NVRA-compliant confirmation notice.

A. The Supplemental Process Violates the NVRA Because It Results in the Removal of Voters by Reason of Their Failure to Vote, Because It Is Not a Reasonable Procedure for Removing Ineligible Voters, and Because It Is Not Uniform Across the State.

1. The Supplemental Process Violates the NVRA Because It Uses Failure to Vote as the Trigger for Removing Voters.

No "plain language" reading of Section 8 of the NVRA supports Defendant's position that the Supplemental Process complies with the NVRA. First, Defendant reads Section 8(b) as if its prohibition on the removal of voters for failure to vote were not in the statute. Defendant Husted's Second Merits Brief ("Def. 2d Br."), Doc. 49, at 4-5, PAGEID # 22329-30. Defendant also ignores the word "reasonable" in the requirements for voter-roll-maintenance programs, arguing that *any* process that removes voters, no matter how overbroad or inaccurate, complies with the NVRA. *Id.* at 9-10, PAGEID # 22334-35. The language of the NVRA is simply not susceptible to the Defendant's contorted interpretation, especially in light of established canons of statutory interpretation, the NVRA's legislative history, and its remedial purpose, all of which confirm that it must be construed literally—not loosely, as Defendant would have it.

a. The Plain Language of Section 8 Prohibits Ohio from Removing Voters for Their Failure to Vote. .

The plain language of Section 8 of the NVRA prohibits voter list-maintenance procedures that "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." 52 U.S.C. § 20507 (b)(2). There is one and only one exception to this rule: under a proviso to the above-quoted general prohibition, the failure to vote may be

considered as part of the address-change confirmation procedure "described in subsections (c) and (d)." *Id.* § 20507 (b)(2). These subsections, in turn, describe the process for initiating a removal process based on change-of-address information and the subsequent failure to respond to a confirmation notice. After voters are properly sent a confirmation notice and fail to respond, they may be removed if they fail to vote in two subsequent federal election cycles. *Id.* § 20507d)(1)(B). Thus, under subsections (c) and (d), the failure to vote can only be used *after* the confirmation notice is sent. *See, e.g.*, *id.* §§ 20507 (b)(2), (c), (d). Neither subsection (c) or (d), nor any other provision of the NVRA, authorizes states to *initiate* the removal process based upon the failure to vote.

To the extent there is any ambiguity in these subsections—and there is not—their authorization to use failure to vote in the confirmation process must be construed narrowly. As Defendant recognizes, that authorization appears in an exception to subsection (b)'s general prohibition on using failure to vote as part of list maintenance, and under accepted rules of statutory construction, exceptions to remedial statutes must be narrowly construed. *Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 559 (6th Cir. 2006). Construing the exception narrowly, subsection (b) permits failure to vote only after a confirmation notice has properly been sent and prohibits states from using a failure to vote as the trigger for initiating an address-confirmation process, as Ohio is undisputedly doing here.

Defendant's proffered construction of this exception, so broad that it entirely swallows the basic rule, flatly contradicts subsection (b)'s express requirement that list-maintenance programs "shall not result in the removal of the name of any person … by

reason of the person's failure to vote." 52 U.S.C. § 20507 (b)(2). Defendant, ignoring the overarching provision and focusing only on the language in its exception, argues that "Sub-Section (b) states that a person's failure to vote can be a part of voter maintenance." Def. 2d Br. at 4, PAGEID # 22329. But cherry-picking one of its exceptions and treating it as though it were the basic rule—contrary to the statute's actual words—is not a "plain language" interpretation. *See United States v. Medlock*, 792 F.3d 700, 709 (6th Cir.) ("[I]t is a 'cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute.' (*quoting Williams v. Taylor,* 529 U.S. 362, 364 (2000))). Defendant's selective construction of Section 8 must be rejected, given that subsection (b) expressly and unambiguously restricts the use of failure to vote as a basis for removing voters, prohibiting voters from being targeted for confirmation notices for not voting.

While the NVRA does not allow states to purge people for failing to vote, it does afford states some flexibility in the implementation of list-maintenance programs. For example, to identify voters who may have moved, the NVRA permits, but does not require, states to use information from the U.S. Postal Service's National Change of Address ("NCOA") system to identify voters who may have changed address. 52 U.S.C. § 20507 (c). This flexibility, however, is expressly limited by the statute's text, particularly subsection (b). While Defendants' suggest that the Help America Vote Act of 2002 changed the law (Def. 2d Br. at 7, PAGEID # 22332), the reality is that HAVA clarified the impermissibility of initiating removal based upon the failure to vote. HAVA allows states some discretion in determining *how* to comply, 52 U.S.C. § 21085, but

Section 903 of HAVA makes it clear that states continue to be bound by the NVRA's list-maintenance requirements, and that HAVA's amendment to Section 8 was intended only to clarify, not modify, those requirements. Pub. L. No. 107-252, § 903, 116 Stat. 1666, 1728 (2002); *see also* Plaintiffs' Opposition to Defendant's Merits Brief ("Pls.' Opp."), Doc. 52, at 10-12, PAGEID # 22642-43. Thus, in addition to NCOA, states may use returned-as-undeliverable mail or address-change information from another state or national database as a basis for sending out a confirmation notice. What the NVRA explicitly does *not* allow is using the failure to vote as a trigger for initiating removal. The NVRA's prohibition against using failure to vote to trigger a voter-removal process is clear and was not altered by HAVA.

b. Legislative History Confirms that Failure to Vote Is a Prohibited Basis for Removing Voters from the Voter Rolls.

If there were any doubt or ambiguity as to the meaning of Section 8(b)'s prohibition on list-maintenance programs that target infrequent voters, the legislative history of *the NVRA* (and not the irrelevant floor debates from a prior Congress over a failed predecessor bill) establishes that failure to vote is an impermissible basis on which to target voters for removal, as Plaintiffs explained in their Motion for Summary Judgment. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Pls.' Br."), Doc. 39, at 27-28, PAGEID # 1399-1400. Moreover, the documents Plaintiffs cite—the Conference Report, Senate Report, and House Report—have been recognized as the most authoritative forms of legislative history. *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."); *see also 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"). Those legislative materials make clear that, once registered, voters cannot be removed from the rolls so long as they remain eligible, and states may not force voters to continually respond to a notice or re-register simply for failing to vote with sufficient frequency. *See, e.g.*, S. REP. NO. 103-06, at 18-19 (1993).

c. The Supplemental Process Is Contrary to the Department of Justice's Consistent Interpretation of the NVRA.

Contrary to Defendant's assertion, the Department of Justice ("DOJ") has consistently taken the position that failure to vote cannot be the trigger for initiating the address confirmation and removal process. Beginning soon after passage of the NVRA, when the DOJ threatened suit against Alaska and South Dakota for adopting list-maintenance practices virtually identical to Ohio's, and continuing through the recent filing of its Statement of Interest in *Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. 2016),[1] the DOJ has challenged state practices that use failure to vote outside of the confirmation process itself. *See* Decl. of Cameron Bell in Support of Plaintiffs' Motion for Summary Judgment ("Bell Decl."), Doc. 42, Exh. F, PAGEID # 1620-44. In addition, for many years, the DOJ has published

[1] Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of the Department of Justice's statement of interest. *Lyons v. Stovall*, 188 F.3d 327, 333 n.3 (6th Cir. 1999) ("[I]t is well-settled that '[f]ederal courts may take judicial notice of proceedings in other courts of record'" (quoting *Granader v. Pub. Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969))).

guidance on the requirements of the NVRA which explains that states must use reliable change-of-address information, and not failure to vote, when carrying out their list maintenance obligations. Bell Decl., Exh. G, PAGEID # 1679-79, ¶ 34.

Defendant cites language from two settlement agreements signed by the DOJ in recent years to argue that the agency's position has wavered. Defendant is wrong. The terms of both agreements are consistent with the position the DOJ has repeatedly taken since the NVRA's passage: Voter inactivity is not an appropriate trigger to begin a Section 8(d) removal process. For example, the Indiana settlement cited by Defendant states that a confirmation notice may only be sent after a non-forwardable mailing "is returned as undeliverable with no forwarding address or a forwarding address outside the registrar's jurisdiction." Def. 2d Br. at 13, PAGEID # 22338. Under those settlements, voter inactivity on its own may not trigger a confirmation notice.[2]

Furthermore, even if these settlements agreements were inconsistent with DOJ's current and prior positions, they are not statements of the Department's official position; they, like all settlement agreements and unlike official agency guidance or enforcement actions, are compromises intended to resolve litigation. *See*, *e.g.*, Doc. 49-2, PAGEID # 2247 (stating the parties have settled the matter "in the spirit of cooperation and comity and to avoid the expense and time of litigating the matter").

[2] Defendant mischaracterizes the requirements of the Philadelphia agreement by focusing on a single isolated provision without regard to the surrounding context. When Defendant's cherry-picked language is placed in context, the Philadelphia agreement, like that in Indiana, requires that a Section 8(d) notice be sent if election officials receive independent notification of an address change, e.g., through the NCOA or by non-forwardable mailings that are returned as undeliverable. *See* Doc. 49-2, PAGEID # 22453, ¶ 16.

The DOJ's consistent view that Section 8(b) prohibits using failure to vote as a basis for initiating the voter removal process under Section 8(d) constitutes persuasive authority as to the meaning of these statutory provisions. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 276 (1991) ("In this case, moreover, the [plaintiff] EEOC's interpretation is reinforced by the long-standing interpretation of the Department of Justice, the agency with secondary enforcement responsibility under Title VII."); *accord Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1351-52 (2015) (The opinions of agencies charged with enforcing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). Finally, if there is any question regarding the DOJ's position, the Statement of Interest filed in *Common Cause and the Georgia State Conference of the NAACP v. Kemp* makes its position on the illegality of purging voters for failure to vote abundantly clear.

d. Ohio Is an Outlier in Relying on Failure to Vote to Purge Its Voter Rolls.

Even if a large number of states were violating the NVRA, that would not immunize Ohio's Supplemental Process from challenge. In fact, however, Ohio is one of just a handful of states that unlawfully continue to use failure to vote as the trigger for initiating the NVRA's confirmation-of-address procedure—and even among those, Ohio is an outlier. Defendant mischaracterizes the list-maintenance procedures in other states, which differ in crucial respects from the Supplemental Process.

Specifically, Defendant highlights Alabama, Indiana, Florida, and Arizona, incorrectly claiming that each of these states uses failure to vote as the basis for initiating a voter-removal procedure. Def. 2d Br. at 5-7, PAGEID # 22330-32. Contrary to Defendant's assertion, however, these states do not use failure to vote as the trigger for sending a change-of-address confirmation notice; they use returned mail in a procedure that has been authorized by the DOJ and is used in numerous other states. Specifically, all four of these states use a two-step mailing process, in which voters are first sent a non-forwardable mailing, and only if that mailing is returned as undeliverable does the state initiate the notice-and-waiting period process set forth in Section 8(d) by sending a forwardable confirmation-of-address notice.[3]

Other states' procedures differ from Ohio's in similarly significant respects. Montana and Missouri also use two-step processes that rely on triggers other than returned mail. Missouri conducts an initial canvass of all registration records to indentify voters who may have moved, Mo. Rev. Stat. § 115.181.1, and then acting on the results of the canvass, voters who are believed to have moved are sent a forwardable notice under subsection (d)(2). *Id.* §115.193.2. Montana's process uses failure to vote as a trigger for sending a first notice, but this notice does not result in cancellation; only if the

[3] Most of these states rely on returned mail that was sent to all voters. *See* Ala. Code § 17-4-30 (2015) (roll-maintenance process begins by sending a nonforwardable mailing to *all registered voters*, and sending a forwardable notice to any voter whose initial notice is returned as undeliverable); Def. 2d Br., Exh. C, PAGEID # 22471-72 (requiring Indiana to follow same practices); Ariz. Rev. Stat. §16-166 (2015) (forwardable "confirmation notice" sent after the county recorder receives nonforwardable mail returned as "undeliverable"). Some give localities the option to send an initial mailing to voters who have not voted for a period of time, but that mailing does not result in the voter's removal from the voter rolls, even if the voter fails to respond or vote. *See* Fla. Stat. § 98.065 (2015). It is only if that initial mailing cannot be delivered that the state begins a confirmation process that can result in the voter's removal. *Id.* § 98.0655(3).

voter fails to respond to the first notice does Montana send a confirmation notice under subsection (d)(2). Mont. Code Ann. § 13-2-220(1), (3).

Thus, the roll-maintenance procedures Ohio points to only underscore that it is an outlier in using failure to vote to trigger the Supplemental Process. Even among the other states that arguably do something comparable, Ohio is an outlier, initiating the removal process after only two years of inactivity.[4] In any event, the practice of a few other states cannot and does not justify Ohio's violation of the plain language in Section 8(b) of the NVRA.

2. Ohio's Supplemental Process Is Not "Reasonable" and Therefore Violates the NVRA.

In addition to contravening Section 8(b)'s explicit prohibition on removing voters for failing to vote, the Supplemental Process violates Section 8(a) because it is not "reasonable." 52 U.S.C. § 20507(a)(4). The NVRA mandates that states maintain accurate, up-to-date voter rolls. Under the NVRA, maintaining accurate rolls requires not only removing voters who have become ineligible, but also ensuring that voters, once registered, remain on the rolls as long as they continue to be eligible. *See* S. REP. NO. 103-6, at 19 (1993); H.R. REP. NO. 103-9, at 18 (1993). Accordingly, Section 8(a)(4) of the NVRA requires states to make a "*reasonable effort* to remove the names of *ineligible* voters from the official lists of eligible voters by reason of . . . a change in the residence

[4] West Virginia, Pennsylvania, and Georgia (whose list-maintenance practice is also under challenge for relying on failure to vote) all use longer periods of inactivity to trigger their list-maintenance processes. *See, e.g.*, Va. Code Ann. § 3-2-25(j) (citing four years of inactivity); 25 Pa. C.S.A. § 1901(b)(3) (citing five years of inactivity); *see also* Ga. Code Ann. § 21-2-234 (citing three years of inactivity).

of the registrant." 52 U.S.C. § 20507(a)(4) (emphasis added); *see also* Bell Decl., Exh. G, PAGEID # 1679-79, ¶ 34.

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). A review of provisional ballots cast in a small subset of Ohio counties found hundreds of infrequent voters who had been purged under the Supplemental Process despite not having changed address and who were deprived of their opportunity to vote as a result. *See* Pls.' Br. at 16, PAGEID # 1388. Because it results in the removal of a substantial number of eligible voters from the rolls, the Supplemental Process is "extreme and excessive." Because infrequent voting is an unreliable proxy for a voter having moved and because the state has more accurate methods of identifying voters who move (*see id.* at 40, PAGEID # 1412), the Supplemental Process does not ensure "sound judgment" in identifying and removing only ineligible voters.

Once again, the Defendant's purportedly "plain language" reading of the NVRA reads the key word out of the statute: subsection(a)(4)'s requirement that list-maintenance efforts be "reasonable." According to Defendant, *any* effort to remove voters from the rolls satisfies the NVRA, no matter how inaccurate and overinclusive of eligible voters it may be, so long as it is "intended" to identify voters who may have moved. Def. 2d Br. at 9-10, PAGEID # 22334-35. Indeed, the Defendant makes no attempt to show that the

Supplemental Process reasonably or reliably targets voters who have moved—nor can he, because he has never conducted a single study to determine whom the Supplemental Process affects or to test to what degree it may be accurate, or even wildly inaccurate. Pls.' Br. at 10, PAGEID # 1382.

Unable to controvert Plaintiffs' evidence that the Supplemental Process is unreliable, the Defendant instead argues that the number of eligible voters who are erroneously cancelled by the Supplemental Process despite not having changed address—no matter how large that number may be—is irrelevant to an assessment of the Process's reasonableness.[5] As *United States v. Missouri* makes clear, however, the term "reasonable" as used in Section 8(a)(4) both requires a baseline of effort on the part of the state (which can be met through the use of the NCOA database) and sets a limit on how far the state can go. 2007 WL 1115204, at *7 (defining "reasonable" as "not extreme or excessive"). Defendant must have a reasonable, reliable basis for believing a voter has changed residence before initiating the address confirmation process, and, as the uncontroverted evidence establishes, a voter's failure to vote does not satisfy that requirement. Accordingly, Plaintiffs are entitled to summary judgment on this basis as well.

[5] Defendant's objection on the ground of relevance to the admissibility of Plaintiffs' evidence that the Supplemental Process erroneously results in the removal of eligible voters must be overruled. Defendant's objection wrongly presumes the correctness of his legal theory that his list-maintenance activities need not be based on reasonable or reliable sources of change-of-address information. Moreover, this evidence is relevant to show that the Supplemental Process is resulting in the very harms the drafters of the NVRA sought to avoid, and is thus relevant to this Court's interpretation of the statute.

3. Ohio's Supplemental Process Violates Section 8(b) Because It Is Not Uniform.

The Supplemental Process is not uniformly applied across Ohio counties, in violation of the NVRA. As explained in Plaintiffs' Motion for Summary Judgment, the Supplemental Process is unlawful because its definition of voter activity, the notice used, and the time at which it is conducted are not uniform throughout the state, in violation of Section 8(b)'s requirement that list-maintenance procedures be "uniform." Pls.' Br. at 33-35, PAGEID # 1405-07. In this case, Plaintiffs have documented inter-county disparities in the implementation of the Supplemental Process that Defendant made no effort to rebut, and these disparities have meant that whether a voter can cast a ballot that counts varies arbitrarily across the state.

a. Plaintiffs Provided Adequate Notice of Ohio's NVRA Violations.

As an initial matter, the letters Plaintiffs sent to the Secretary of State notifying him that the Supplemental Process violates Section 8 of the NVRA were sufficient to satisfy the NVRA's notice requirement. In most circumstances, the NVRA requires an individual who is aggrieved by a state's violations of the statute provide the state's chief election official with notice of the violation. 52 U.S.C. § 20510(b). The NVRA's notice requirement does not require detailed factual allegations or legal arguments; it simply requires notice to the state's chief election official that the state is violating the NVRA. *See, e.g.*, *Georgia State Conference of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1334 (N.D. Ga. 2012) (determining that a notice was sufficient because it informed the defendant "of the plaintiffs' position that Georgia was failing to comply with the NVRA

in the broadest sense"); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 852 (D. Md. 2001) (finding conclusory allegation that a public assistance office "failed to provide voter registration services to its clients" sufficient to comply with NVRA's notice requirements); *Delgado v. Galvin*, 2014 WL 1004108, at *3-4, *8-9 (D. Mass. Mar. 14, 2014) (generally informing the state that public assistance offices were not providing required voter registration services was sufficient and notice letter was not required to identify every state agency violating the NVRA). Here, Plaintiffs' letters notified the Defendant that the Supplemental Process violates Section 8(b) of the NVRA, and just as the *Delgado* plaintiffs were not required to identify every agency that was violating the statute, Plaintiffs here were not required to identify every legal argument they may have or every aspect of Section 8(b) that the Supplemental Process violates.[6]

b. Ohio's Supplemental Process Is Non-Uniform.

As the Plaintiffs have demonstrated, the Supplemental Process is conducted at different times, based on different criteria, and with different forms in different Ohio

[6] Defendant states in a footnote that notice letter sent by Plaintiff Northeast Ohio Coalition for the Homeless was untimely because it was sent less than 90 days prior to filing the Complaint in this suit. Courts have repeatedly held that, after one Plaintiff has informed Defendant(s) of a particular NVRA violations, others need not provide any notice at all. *See*, *e.g.*, *Ass'n of Cmty. Orgs for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) (refusing to dismiss Plaintiffs who had not submitted a notice letter to the state's chief election official when notice of the same violation had already been provided by a different organization and recognizing that the dismissal would in no way further the purpose of the NVRA's notice provision); *Ferrand v. Schedler*, 2011 WL 3268700, *6 (E.D. La. July 21, 2011) (holding that the fact that individual Plaintiffs did not provide "duplicate" notice of the same violation on which the state NAACP had already sent a notice letter did not prejudice Defendant, as the purpose of the notice requirement—"affording [States] the ability to attempt compliance before facing litigation"—had been met). Moreover, because Defendant failed to assert a lack of notice in its Answer in this case, it has waived that defense. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1042 (9th Cir. 2015) (stating that the NVRA's notice requirement pertains to "statutory standing," not Article III standing); *MHANY Mgmt. Inc. v. Inc. Vill. of Garden City*, 985 F. Supp. 2d 390, 411 (E.D.N.Y. 2013) (statutory standing defense under 42 U.S.C. § 1982 waived where not raised in answer or 12(b)(6) motion).

counties. These variations in county administration of the Supplemental Process result in the process having a significant differential impact on voters—including whether or not the voter can cast a ballot that counts—based solely on the voter's county of residence. For example, in 2015, both Summit and Franklin Counties conducted their roll-maintenance after the November 2015 General Election, while in every other Ohio county Plaintiffs have surveyed, roll maintenance was conducted before that election, with most purges occurring around the end of July. Pls.' Br. at 33-34, PAGEID # 1405-06. The effect of this difference is significant: Infrequent voters who lived in counties that conducted roll maintenance prior to the election, such as Plaintiff Larry Harmon, were unable to vote in 2015, while voters who had been inactive for the same period of time but resided in a county that conducted roll-maintenance after the election were able to cast a regular ballot. *Id.* at 34, PAGEID# 1406. Had Mr. Harmon resided in Franklin County instead of Portage County, he would have been able to vote in the 2015 General Election. This is precisely the kind of unequal result the NVRA's uniformity requirement was intended to avoid.

Defendant does not dispute that the Supplemental Process is being implemented differently in different counties. Instead, he contends that the state is in compliance with Section 8's "uniformity" requirement because he gives "the same discretion" to all counties. Def. 2d Br. at 17, PAGEID # 22342. But permitting all counties to invent their own definition of voter activity and to decide when to conduct their list-maintenance does not make the process uniform. By permitting such non-uniformity, the Defendant has merely ensured that voters who engage in the exact same activity—signing a petition or

failing to vote—but who reside in different counties will be treated differently by the Supplemental Process. Uniform non-uniformity is an oxymoron. That every county is allowed to be different does not mean that they are the same. It means the opposite. The Supplemental Process violates Section 8(b)'s requirement that list-maintenance procedures be uniform. Accordingly, this Court should grant Plaintiffs' Motion for Summary Judgment as to their First Cause of Action on this ground as well.

B. Ohio's Confirmation Notice Does Not Comply with the NVRA.

As alleged in Plaintiffs' Second Cause of Action, Ohio's confirmation notice ("SOS Form 10-S"), which is used when voters are identified under the Supplemental Process or through the use of NCOA information,[7] violates the requirements of Section 8(d)(2) of the NVRA. Defendant's proposed new form—which has not even been issued—does not moot the Plaintiffs' claim.

Section 8(d)(2) of the NVRA lists the required contents of the "confirmation notice." The notice must include: (1) the date by which a recipient must respond; (2) how a recipient can re-register if she has moved from the jurisdiction; and (3) the consequences of failing to respond. 52 U.S.C. § 20507(d)(2). As Plaintiffs explained in their Motion for Summary Judgment, the confirmation notice that Ohio has been using—and that is currently being used by most Ohio counties—does not comply with these requirements. Pls.' Mot. at 35-36, PAGEID # 1407-08. Defendant makes no attempt to defend the form he has been using, effectively conceding that it violates the NVRA.

[7] As Plaintiffs have explained, the mailing of any confirmation notice that will result in removal based on a voter's failure to vote violates the NVRA. Thus, even if the Defendant corrected all of the deficiencies in the SOS Form 10-S, it would not render the Supplemental Process lawful.

Instead, Defendant contends that Plaintiffs' Second Cause of Action is moot because he plans to issue a new SOS Form 10-S that addresses most—but not all—of the violations Plaintiffs identified in the Complaint. Defendant is wrong for three reasons.

First, notwithstanding his statement that the new form would be issued on June 10, 2016, (*see* Declaration of Matthew Walsh, May 20, 2016, Doc No. 38-19), as of the date of this filing, Plaintiffs' understanding is that the form has not yet been issued. Because the SOS Form 10-S in existence at the time the Complaint was filed remains the only form in effect, Defendant's mootness argument must be rejected out of hand.

Second, even if the new form had issued, Defendant's voluntary cessation of the challenged conduct does not moot Plaintiffs' Second Cause of Action. For voluntary cessation to render a claim moot, "there [must be] no reasonable expectation that the wrong will be repeated." *Youngstown Publ'g Co. v. McKelvey*, 189 Fed. App'x 402, 405 (6th Cir. 2006). The circumstances in which courts find mootness based on voluntary cessation are not present here, as *Mosley v. Hairston*, the case the Defendant cites to support his mootness argument, makes clear. *See Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990). In *Mosley*, the Sixth Circuit found the plaintiff's cause of action to be moot because it pre-dated a change in federal law that expressly required the defendants to provide the relief the plaintiff sought in the case. *Id.* The Sixth Circuit found that there was "no reasonable basis for assuming that the state and federal defendants in this case [would] fail to comply with [federal law]." *Id*. Here, in contrast, the Defendant adopted and has continued to use the challenged 10-S form—or one substantially similar to it—for many years *after* passage of the federal law it violates, and there has been no

suggestion he will not revert to the current form in the future in the absence of court intervention. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 719 (2007) (rejecting the Defendant's mootness argument 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 program]").

Third, even if voluntary cessation could moot a claim, there are still problems with the proposed new SOS Form 10-S, which does not address all of the violations Plaintiffs identified in the existing form. *See* Def. 2d Br. at 18, PAGEID # 22343. At minimum, the new form violates the NVRA because it fails to provide information about how a recipient can re-register if she has moved outside the state. As Section 8(d) states, "if the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, [the confirmation notice must provide] information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B). The provision is not limited to moves within a state; it applies to any move outside the registrar's jurisdiction. Once again, Defendant Husted disregards Section 8's plain language, and instead asserts that the federal voter registration form issued by the Election Assistance Commission contains 18 pages of state-specific instructions. This is a non sequitur. All the State must do to comply with this requirement is to direct voters to the EAC's website containing the federal form, which provides instructions and guidance for voter registration in all states.[8]

[8] *See* U.S. Election Assistance Commission, National Mail Voter Registration Form, http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited June 17, 2016).

The Second Cause of Action is not moot, despite Defendant's assertion that the new, unissued SOS Form 10-S addresses "all but two of Plaintiffs' objections." *See* Def. 2d Br. at 18, PAGEID # 22343. By failing to defend the legality of the form currently in use, Defendant has effectively conceded that Plaintiffs are entitled to judgment on this claim.

C. The Supreme Court Has Held the "Clear Statement" Rule Inapplicable When Congress Legislates Under the Elections Clause, as It Did When Enacting the NVRA.

Plaintiffs addressed most of Defendant's constitutional arguments and affirmative defenses to their claims in their opposition brief and do not repeat those arguments here. *See* Pls.' Opp. at 21-27, 29-30, PAGEID # 22653-59, 22661-62. In his opposition brief, Defendant raises the additional argument that the NVRA does not contain a clear statement of Congress's intent to "interfer[e] with state sovereignty." Def. 2d Br. at 23, PAGEID # 22348. The "clear statement" principle and the cases on which Defendant relies in support of his claim have no bearing on this case. The "clear statement" rule requires federal statutes to make sufficiently clear Congress's intent to abrogate state sovereign immunity under the Eleventh Amendment to the Constitution. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). This doctrine is inapplicable to the NVRA because it was enacted under Congress's broad Elections Clause power, as the U.S. Supreme Court stated with unmistakable clarity in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013) (explaining that Article I, Section 4 is different than other clauses of the Constitution, making the "presumption against pre-emption" and attendant clear statement rule inapplicable in this context); *see also Ass'n*

of Cmty. Organizations for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995)(also recognizing Congress's power to "step in and either make its own regulations or alter those adopted by the state").

D. A Permanent Injunction Is Warranted.

Plaintiffs are entitled to permanent injunctive relief in this case, because (1) they have suffered an irreparable injury and will continue to suffer such injuries moving forward absent injunctive relief; "(2) the remedies available at law, such as monetary damages, are inadequate to compensate for that injury;" (3) the balance of hardships weighs in favor of issuing a permanent injunction; and (4) "the public interest would not be disserved[—but rather advanced—]by a permanent injunction."[9] *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 773 (S.D. Ohio 2014).

1. Plaintiffs Have Suffered and Will Continue to Suffer Irreparable Harm as a Result of the Supplemental Process.[10]

As a result of the Supplemental Process, Plaintiffs have suffered and will continue to suffer irreparable harm. A restriction on the fundamental right to vote constitutes irreparable injury. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). As discussed in Plaintiffs' Motion for Summary Judgment and a Permanent Injunction,

[9] Should the Court find that disputed issues of fact preclude the granting of Plaintiffs' Motion for Summary Judgment, Plaintiffs have requested a preliminary injunction. Pls.' Br. at 53, PAGEID #1425. The requirements for a permanent injunction are "essentially the same" as those that must be meant for a preliminary injunction to order. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1987); *see also Am. Civil Liberties Union of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003).

[10] Defendant has not argued that Plaintiffs have an adequate remedy at law. And indeed, in this case, Plaintiffs have asserted violations of the NVRA, a statute which provides only for injunctive relief. Thus, the first requirement for a permanent injunction is satisfied.

Organizational Plaintiffs Ohio A. Philip Randolph Institute ("APRI") and the Northeast Ohio Coalition for the Homeless ("NEOCH") have had members targeted by and removed from the rolls as a result of Ohio's Supplemental Process. Pls.' Br. at 17, 19-20, PAGEID # 1389, 1391-92. Individual Plaintiff Larry Harmon, who was deprived of his opportunity to vote in 2015 as a result of the Supplemental Process, has also suffered irreparable injury and is in danger of further irreparable harm should he fail to vote in the future. *Id.* at 20, PAGEID # 1392. Further, both APRI and NEOCH have had to divert resources to re-register individuals who have been unlawfully removed under the Supplemental Process—significant numbers of whom reside in (or are members of) the communities that these organizations serve. *Id.* at 17-18, PAGEID # 1389-90 (noting that NEOCH has also been forced to re-register voters purged under the Supplemental Process whom it had registered in previous years).

Defendant asserts that Plaintiffs cannot establish that they have suffered irreparable harm because Ohio's Supplemental Process offers voters opportunities to avoid having their registration cancelled. Defendant argues that a voter can avoid cancellation by responding to the confirmation notice or voting in the four years after the notice is sent. Def. 2d Br. at 20, PAGEID # 22345. This argument fails because (1) unlawfully requiring an infrequent voter to respond to a notice or vote is itself a harm, Pls.' Br. at 37, PAGEID # 1409; and (2) these options for avoiding cancellation are ineffective given the evidence that voters frequently fail to receive or do not see the notices and that those who do are often confused about whether they need to take action. *See* Pls.' Br. at 9, PAGEID # 1381. Moreover, these two "options" for preventing

removal, already in place, have not prevented voters across the state from being erroneously removed from the rolls and being denied their right to vote. *See id.* at 14-16, PAGEID # 1386-88.

Defendant further argues that voters targeted by the Supplemental Process can avoid removal by "filling [out] a voter registration form, updating his or her voting address online through the online change of address system established by Secretary Husted, or updating his or her voting address with a variety of entities such as the Ohio Bureau of Motor Vehicles, any of the public libraries throughout the State, or the Ohio Department of Jobs and Family Services." Def. 2d Br. at 20, PAGEID # 22345. Once again, forcing voters to take steps to avoid being unlawfully purged is itself an irreparable harm. Moreover, because a voter who has not changed address does not need to update his or her address with any of these entities, that voter never will take any of these steps, so these "escape valves" are wholly ineffective in preventing unlawful cancellation as a result of the Supplemental Process.

Additionally, Defendant argues that Plaintiffs have not suffered irreparable harm because Ohio has very recently taken steps that may ameliorate that harm, including joining the Electronic Registration Information Center ("ERIC") and enacting online voter registration. However, steps taken by a defendant that ameliorate, but do not remove, the irreparable harm threatened by the challenged conduct are insufficient to overcome a showing of irreparable harm. *See Pub. Serv. Co. of N.H. v. Patch*, 202 F.3d 29, 31-32 (1st Cir. 2000) (change to one aspect of challenged policy that reduced the threatened harm is insufficient to defeat showing of irreparable harm). First, for either

ERIC or online voter registration to benefit unlawfully purged voters, those voters must somehow learn they have been purged and need to re-register. Second, requiring a voter who should not have been purged to repeatedly re-register is itself an irreparable injury. Third, neither ERIC nor online voter registration will prevent voters from continuing to be unlawfully purged in the future. Finally, it is doubtful that either ERIC or online registration will offer any benefit to voters who wish to participate in the November 2016 General Election. Online registration will not be available until 2017, and Defendant has provided no information about the timing of the voter outreach purportedly required by ERIC. *See Oregon State Pub. Interest Research Group v. P. Coast Seafoods Co.*, 374 F. Supp. 2d 902, 906 (D. Or. 2005) (finding irreparable harm where there was no evidence that asserted remedial action would come into effect until six months after the issuance of the injunction and would not wholly remedy the irreparable harm).

2. An Injunction Will Result in Minimal Harm to Defendant, and Will Serve the Public Interest.

The harm to the Plaintiffs outweighs any possible harm to the Defendant, and granting injunctive relief serves the public interest. The harm to the Defendant in granting a permanent injunction is minimal. As the Plaintiffs have noted, the Defendant has numerous alternatives to the Supplemental Process to keep accurate, up-to-date voter rolls. By using databases, such as the NCOA database, to identify people who may have moved, or the Statewide Territorial Exchange of Vital Events (STEVE) to identify people who may have died, the Secretary is able to easily identify which voters may no longer be

eligible to vote in Ohio.[11] Further, the Defendant may use returned mail or ERIC to provide a more accurate and cost-effective way of conducting roll-maintenance. Pls.' Opp. at 17, PAGEID # 22649. Ending the Supplemental Process would not create substantial administrative difficulties, as the Defendant suggests.

Furthermore, the requested relief—reinstating the voters whose registrations were improperly cancelled—would not lead to the widespread chaos Defendant describes. Plaintiffs are not asking Defendant to "arbitrarily" put voters back on the rolls. Instead, Plaintiffs request that the Defendant identify and reinstate only those voters who were purged pursuant to the Supplemental Process and have not become ineligible for some other reason. In the alternative, Plaintiffs have requested that the provisional ballots cast by voters purged under the Supplemental Process be counted if the voter provides an address on the provisional ballot that matches the last known address for that voter in Ohio's voter registration system and the voter is not otherwise ineligible. This narrowly targeted remedy would guarantee that only ballots cast by eligible Ohio voters—voters whose provisional ballots will serve to register them even under current Ohio law—will be counted.

Finally, the public interest will be served by a permanent injunction. The Defendant's contention that allowing eligible but unlawfully purged voters to vote will threaten "public confidence in the integrity of the electoral process" must be rejected.

[11] The Secretary of State already uses both the NCOA and the STEVE databases.

E. Plaintiffs Are Entitled to Summary Judgment or, if This Court Believes There Are Genuine Disputes of Material Fact, to a Preliminary Injunction.

Plaintiffs are entitled to summary judgment under Federal Rule of Civil Procedure 56, because the undisputed facts show that Defendant is violating the NVRA. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). Indeed, the purpose of summary judgment procedure exactly fits the circumstances of this case. *Pen-Ken Gas & Oil Corp. v. Warfield Nat. Gas Co.*, 137 F.2d 871, 877 (6th Cir. 1943) (the "purpose [of summary judgment] is to eliminate the formal trial of cases where only questions of law are involved"). While failing to offer any procedural basis for a judgment in his favor, Defendant has failed to introduce any evidence to counter the evidence Plaintiffs presented in support of their Motion for Summary Judgment.

Accordingly, summary judgment in Plaintiffs' favor is warranted. In fact, it is the only proper procedure for presenting the legal issues at stake in this litigation to the Court on the basis of "depositions, documents, . . . affidavits or declarations, stipulations . . ., admissions, [and] interrogatory answers," and without a trial. Fed. R. Civ. P. 56(c). Defendant argues that Plaintiffs' Motion for Summary Judgment was somehow inconsistent with an agreement among the parties to resolve the case through simultaneously filed briefs addressing all dispositive issues in the case. Defendant is wrong. In agreeing to this briefing schedule, neither Plaintiffs nor Defendant waived trial, much less the applicability of the Federal Rules of Civil Procedure, which prescribe the appropriate mechanisms through which judgment may be granted. While asserting they

are entitled to judgment, Defendant points to no rule other than Rule 56 on which judgment could be issued without a trial.[12]

It is essential that this case be resolved expeditiously, a point on which Defendant agrees. The only proper procedural mechanism for expeditiously resolving this case without trial is summary judgment. Yet Defendant has failed to move for summary judgment. That failure precludes judgment from being entered in Defendant's favor. Even were the Court to treat Defendant's brief as a motion for summary judgment, granting such a motion would be improper because Defendant has made no attempt to demonstrate that there are no genuine issues of material fact with respect to his view of the case, and Plaintiffs have preserved their procedural objections to such motion.

In addition, Defendant has failed to show that there is any disputed issue of material fact with respect to Plaintiff's entitlement to judgment. Rather than presenting any affirmative evidence to demonstrate that a dispute exists as to the facts Plaintiffs raise, as Rule 56 requires, Defendant conclusorily denies Plaintiffs facts. *See* Defendant's Response to Plaintiffs' Statement of Purportedly Undisputed Material Facts, Doc. 51. Conclusory denials are insufficient to create a genuine issue of material fact to defeat summary judgment. *See, e.g.*, *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009) ("Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment."); *Doren v. Battle Creek*

[12] During a scheduling conference held before Magistrate Judge Deavers at the close of a court-ordered mediation, the parties agreed that in the interest of expeditious resolution of the case, they would present all dispositive issues in the case in a single set of briefs to be filed simultaneously, but there was no agreement on the procedural mechanism for presenting to the Court. Nor did the orders issued by Magistrate Judge Deavers specify the procedure by which those briefs were to be presented to the Court, reserving the decision on whether a trial would be necessary to the District Court.

Health Sys., 187 F.3d 595, 598-99 (6th Cir. 1999) (finding statements that are merely conclusory cannot create a genuine issue of material fact sufficient to defeat summary judgment).

Finally, Plaintiffs stress that a prompt resolution of this case is vital, to prevent the confirmation notices from going out to infrequent voters this summer, and to protect those who have already been purged with ample time for orderly appellate review before the November General Election. Specifically, Plaintiffs' request that an order resolving Plaintiffs' claims be entered no later than July 1, 2016. For the reasons set forth above, Plaintiffs are entitled to summary judgment because Defendant has failed to demonstrate a genuine issue of material fact on either of their claims. However, if this Court disagrees and believes that there *are* genuine issues of material fact, Plaintiffs respectfully request an expeditious trial to resolve any genuine issues of material fact, and entry of a preliminary injunction in the interim period.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment on all causes of action or, in the alternative, a preliminary injunction.

Dated: June 17, 2016

Respectfully submitted,

/s/ Naila Awan

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Plaintiffs' Reply in Support of Motion for Summary Judgment and Permanent Injunction or, in the Alternative, for a Preliminary Injunction** was filed this 17th 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 17, 2016

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