

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

<b>OHIO A. PHILIP RANDOLPH INSTITUTE, <i>et al.</i></b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>Case No. 2:16-cv-00303</b>
	:	
<b>v.</b>	:	<b>JUDGE GEORGE C. SMITH</b>
	:	
<b>SECRETARY OF STATE, JON HUSTED</b>	:	<b>Magistrate Judge Deavers</b>
	:	
<b>Defendant.</b>	:	

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**MOTION TO IMPLEMENT REMEDY**

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The Secretary of State submits this motion pursuant to the decision of the Sixth Circuit Court of Appeals, *A. Philip Randolph Institute et al. v. Husted*, \_\_ F.3d \_\_, 2016 WL 5328160 (6th Cir. Sept. 23, 2016), and requests that the Court issue an Order requiring the implementation of the Directive attached hereto. This Directive sets forth a process that reflects the remedy Plaintiffs sought in their Complaint and allows individuals removed from the registration roll through the Supplemental Process in 2015 to vote, assuming certain qualifications are met.

Compelling reasons and legal authority support a prospective-only remedy that would consist of replacing the Supplemental Process with a different process going forward. The Secretary believes, however, that in the interest of resolving this litigation and following the Sixth Circuit's decision, in addition to changing the supplemental process going forward, a reasonable process can be put in place to allow individuals removed through the Supplemental Process in 2015 to cast a provisional ballot in elections through January 13, 2019. This reasonable process ensures that individuals, such as Plaintiff Larry Harmon, who were cancelled in 2015 after receiving a confirmation card in 2011 due to a lack of voter activity since 2008,

would be permitted to cast a provisional ballot, which would count should the qualifications laid out in the Directive be met. Plaintiffs also requested an identical process in their filings. See Doc. 39, Pls.’ Motion, 3 (“[r]equir[e] Defendant Secretary of State Husted . . . to count all provisional ballots cast in any federal election by voters whose registrations have been cancelled by operation of the Supplemental Process and who continue to reside at the same address”) & Appellants’ Brief, 54 (“requir[e] the Secretary of State . . . to count all provisional ballots cast by eligible voters whose registrations have been cancelled by operation of the Supplemental Process and who continue to reside at the same address”).

The attached Directive sets forth this process and includes cross-referencing identities against lists of deceased voters and incarcerated felons, as well as other safeguards. This process is a reasonable compromise that would implement the holding of the Sixth Circuit and also protect the integrity of Ohio’s voting system.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General

*s/ Steven T. Voigt*

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Secretary of State Jon Husted*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 2016, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

*/s/ Steven T. Voigt*

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## Jon Husted Ohio Secretary of State

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### **DIRECTIVE 2016-XX**

October XX, 2016

To: All County Boards of Elections  
Directors, Deputy Directors, and Board Members

Re: Provisional Ballots Cast by Voters Cancelled in 2015 Under Ohio's Supplemental Process—*Ohio A. Philip Randolph Institute, et al. v. Husted*

### **BACKGROUND**

On September 23, 2016, the United States Court of Appeals for the Sixth Circuit issued a decision in *Ohio A. Philip Randolph Institute, et al. v. Husted*, holding among other things, that Ohio's longstanding Supplemental Process used by four secretaries of state from both major political parties violates Section 8(b)(2) of the NVRA. The Court reversed and remanded the case for further proceedings consistent with its opinion.<sup>1</sup>

For purposes of the November 8, 2016 General Election and all other elections through January 13, 2019,<sup>2</sup> a provisional ballot cast during the in-person absentee voting period or on Election day by a voter who is not registered to vote in the State of Ohio may be counted if all of the following apply (the "APRI Exception"):

1. The individual's voter registration was cancelled in 2015 (confirmation card mailed in 2011) pursuant to the Supplemental Process;
2. The voter's provisional ballot affirmation reflects the same address at which the voter was last registered to vote in the State of Ohio at the time of cancellation;
3. The board of elections does not have information that the voter was deceased, incarcerated on a felony conviction, or adjudicated as incompetent under Ohio law by a county probate court after the individual's registration record was cancelled; and,
4. The voter's provisional ballot affirmation form and the ballot otherwise comply with all applicable laws and directives.

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<sup>1</sup> *Ohio A. Philip Randolph Institute, et al. v. Husted*, Case No. 16-3746 (6th Cir. 2016).

<sup>2</sup> A substantively identical directive will be issued after the November 8, 2016 General Election for the process described herein to remain in place for all other elections through January 13, 2019.

## **INSTRUCTIONS**

Boards must apply the *APRI* Exception to the provisional ballot eligibility determination of any provisional voter who is not registered to vote in the State of Ohio at least 30 days before the election. If the board determines, as evidenced by the voter having a “cancelled” status in the Statewide Voter Registration Database (SWVRD), that the voter previously was registered to vote in the State of Ohio, it must count the provisional ballot using the following steps in conjunction with the mandatory process for determining eligibility of provisional ballots in Chapter 6, Provisional Voting, of the Ohio Election Official Manual:

- a. Identify the most recent address of registration in the Statewide Voter File for the voter (because merged records can result in multiple records for a single voter, it is necessary to identify the most recent address of registration on file prior to cancellation). Proceed to “step b” below.
- b. If the most recent address of registration in the Statewide Voter File for the voter is different than the address provided by the voter on the provisional affirmation, the board must reject the provisional ballot. If the most recent address of registration in the Statewide Voter File for the voter is the same as the address provided by the voter on the provisional affirmation, proceed to “step c” below.
- c. Identify the “reason” code in the SWVRD. If the reason code is “Cancelled – Deceased,” “Cancelled – Incompetent,” or “Cancelled – Incarcerated” the board must reject the provisional ballot. (A “merged” record is not a “cancelled” record.) If the reason code is something other than death, adjudication of incompetency by a probate judge, or incarceration on a felony conviction, proceed to “step d” below.
- d. Identify the date of cancellation in the SWVRD. If the date of cancellation is prior to 2015, the board must reject the provisional ballot. If the date of cancellation in the SWVRD is after January 1, 2015, proceed to “step e” below.
- e. Determine if the voter was cancelled under the “Supplemental Process” of the state’s general voter records maintenance program.

**If the board’s records do not differentiate between a cancellation under the “NCOA Process” and a cancellation under the “Supplemental Process,” the board must contact the Secretary of State’s elections counsel assigned to its county.** The Secretary of State’s elections counsel will compare the information from the voter’s provisional ballot affirmation to the NCOA list from 2011.

The provisional ballot of a voter whose registration was cancelled under the “NCOA Process” cannot be counted under the *APRI* Exception. If the voter’s registration was cancelled under the “NCOA Process,” the board must reject the provisional ballot.

The provisional ballot of a voter whose registration was cancelled under the “Supplemental Process” must be counted under the *APRI* Exception if the provisional

ballot affirmation and the provisional ballot otherwise comply with all applicable laws, as directed in the mandatory process for determining eligibility of provisional ballots in Chapter 6, Provisional Voting, of the Ohio Election Official Manual.

### **ADDITIONAL INSTRUCTIONS**

- The board must provide ballots and envelopes in the quantity of at least 15 percent more than the number of provisional ballots cast in that precinct at the 2008 or 2012 Presidential General Election, whichever is higher.<sup>3</sup> Additionally, each board must provide to each precinct and/or polling location a stock of provisional ballot affirmation envelopes (containing Secretary of State Form 12-B) that is greater than the number of provisional ballots being provided for this election. Be mindful of the proper allocation of ballot and envelope quantities across precinct splits. Additionally, any multi-precinct polling location must have a sufficient supply of Secretary of State Form 12-D.<sup>4</sup>
- Boards of elections will be required to provide the total count of provisional ballots counted using the *APRI* Exception separate from all other counted provisional ballots when the board submits its supplemental report at the conclusion of the official canvass following Election Day.

If you have any questions regarding this Directive, contact the Secretary of State's elections counsel assigned to your county at (614) 466-2585.

Sincerely,

Jon Husted

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<sup>3</sup> This is a minimum requirement for preparedness, not a prediction for the number of provisional ballots expected to be cast this election or as a result of the *APRI* Exception.

<sup>4</sup> For all information relative to ballot quantities for the November 8, 2016 presidential general election, see [Directive 2016-35](#).