

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

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

Plaintiffs,

v.

SECRETARY OF STATE, JON HUSTED,

Defendant.

Case No. 2:16-cv-303
JUDGE GEORGE C. SMITH
Magistrate Judge Deavers

STATEMENT OF INTEREST OF THE UNITED STATES

The United States of America (“United States”) respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending lawsuit. This case presents an important question of statutory interpretation of the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. § 20501 *et seq.*, pertaining to the standard for removing voters from registration rolls. Congress gave the Attorney General broad authority to enforce the NVRA on behalf of the United States. *See* 52 U.S.C. § 20510. Pursuant to this authority, the United States filed a brief as *amicus curiae* in the appeal of this matter in the United States Court of Appeals for the Sixth Circuit. Accordingly, the United States has a strong interest in ensuring that the NVRA is fully and uniformly enforced.

The United States files this Statement of Interest to explain why Defendant’s proposed remedial plan does not fully remedy the NVRA violation found by the Sixth Circuit, is inconsistent with remedial principles in cases involving unlawful voter purges, and is

inconsistent with the NVRA.

I. BACKGROUND

On September 23, 2016, the United States Court of Appeals for the Sixth Circuit held that Ohio's Supplemental Process for removing voters from its registration rolls violates Section 8(b) of the NVRA because it removes voters for failure to vote. *A. Philip Randolph Inst. v. Husted*, No. 16-3746, 2016 WL 5328160, at *9 (6th Cir. Sept. 23, 2016). The Sixth Circuit remanded the case for this Court to determine an appropriate remedy for Ohio's NVRA violations.

The parties have submitted their proposals, both of which are premised on permitting voters who were illegally purged to cast valid provisional ballots. The parties differ on which provisional ballots should be counted. The State proposes to count the provisional ballots of voters who were illegally purged in 2015 (as opposed to all identifiable voters harmed by the State's illegal purge program), and whose address on their provisional ballot envelope matches their address on their last registration record. Def.'s Mot. to Implement Remedy, ECF No. 72 at 1; Ex. 1 to *id.*, at 1; *see also* Def.'s Mem. in Opp'n to Pls.' Req. for a TRO, ECF No. 80 at 6-9. Conversely, Plaintiffs propose that Defendant count the provisional ballots of all voters purged pursuant to the Supplemental Process since 2011 (the apparent limit of Defendant's record-keeping), whose current address, as indicated by their provisional ballot, falls within the same county in Ohio as their most recent voter registration. Mem. in Support of Pls.' Emergency Mot. for a TRO and Order to Show Cause Why a Prelim. Inj. Should Not Issue, ECF No. 74 at 2-3.

II. ARGUMENT

A. Defendant's Proposal Does Not Fully Remedy the Violation and Would Likely Deprive Thousands of Illegally-Purged Ohio Voters of Any Relief Whatsoever.

Defendant argues that the proper remedy here consists only of overhauling its purge

process to make it NVRA-compliant during future list-maintenance procedures. Def.'s Mot. to Implement Remedy, ECF No. 72 at 1. Such a remedy, however, ignores how parties and courts—including the Sixth Circuit—have resolved similar cases by restoring the franchise to those from whom it was improperly deprived. Perhaps recognizing this shortcoming, Defendant proffers a partial remedy that would restore the vote to some, but not all, identifiable voters harmed by Ohio's illegal voter purges. But that partial remedy does not fully correct the violation of federal law. Indeed, it would perpetuate the harms already inflicted on affected Ohio voters, and deprive many of these voters the right to relief afforded by the NVRA.

1. This Court Should Require Ohio to Restore the Franchise to All Identifiable Citizens Harmed by Ohio's Illegal Purges, Not a Mere Subset of Them.

When federal laws have been violated, federal courts “may use any available remedy to make good the wrong done.” *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). And the Sixth Circuit has made clear that the appropriate remedy for voters who have been improperly purged from voting rolls is to restore their names to those rolls.

In *United States Student Association Foundation v. Land*, for example, the district court found that a Michigan statute that led to purging of certain voters from the voting rolls violated the NVRA. 585 F. Supp. 2d 925, 951 (E.D. Mich. 2008) (“*Land I*”), *aff'd* 546 F.3d 373 (6th Cir. 2008) (“*Land II*”). The district court not only enjoined the state statute's future enforcement, but also adopted, and the Sixth Circuit approved, a complete remedy that “ensure[d] that each individual who ha[d] properly registered to vote but was removed due to an error that [was] out of his or her control [would] be able to cast a ballot on election day.” *Land II*, 546 F.3d at 388.

That remedial principle should govern here. This Court should certainly enjoin Ohio's future enforcement of its Supplemental Process. But it should also “make good” the harm done

by ensuring that voters already illegally purged will, to the fullest extent possible, be restored to the voting rolls and entitled to cast a valid ballot on election day.

Other NVRA cases mirror this approach. In challenges to improper purging procedures under Section 8 of the NVRA, the United States has obtained complete relief restoring illegally-purged voters to the rolls. *See* Amended Joint Stipulation, *United States v. Cibola Cty.*, No. 93-1134 (D. N.M. Mar. 19, 2007), ECF No. 89 ¶ 12 (Ex. 1) (restoring improperly-purged voters to the rolls); Consent Order, *United States v. Pulaski Cty.*, Civil Action No. 4:04-cv-389 (E.D. Ark. Apr. 19, 2004), ECF No. 9 ¶ 7 (Ex. 2) (restoring improperly-purged voters to the rolls); *see also* Stipulation of Facts and Consent Order, *United States v. City of St. Louis*, No. 4:02-cv-1235 (E.D. Mo. Aug. 14, 2002), ECF No. 4 ¶ XV (Ex. 3) (ensuring that improper list maintenance and polling place procedures did not prevent voters previously targeted for removal from casting a ballot).¹

Indeed, restoring the names of illegally-purged voters to the voting rolls has been an appropriate and consistent remedy in purging cases long before the NVRA was enacted. *See, e.g., United States v. McElveen*, 180 F. Supp. 10, 13 (E.D. La. 1960), *aff'd in part sub nom. United States v. Thomas*, 362 U.S. 58 (1960) (issuing injunction restoring voters to rolls after their removal was found to violate the Civil Rights Act).

2. Failure to Provide Complete Relief Would Undermine the NVRA and Perpetuate Proven NVRA Violations.

Defendant's proposal does not fully remedy the harm done to all identifiable

¹ The United States has also obtained full relief in matters to enforce Section 5 of the NVRA (which requires voter registration opportunities at motor vehicle authorities). *See* Memorandum of Understanding, The United States and the State of Connecticut at 9 (Aug. 5, 2016) (Ex. 4) (requiring state to provide NVRA-mandated voter registration opportunities to citizens who had previously been denied them); Memorandum of Understanding, The United States and the State of Alabama at 12 (Nov. 13, 2015) (Ex. 5) (same).

improperly-purged voters. The proposed remedy also undermines the NVRA and perpetuates Ohio's NVRA violations.

Congress granted private parties the right to challenge NVRA violations, and, if necessary, bring an action for “declaratory or injunctive relief with respect to the violation.” 52 U.S.C. § 20510(b)(2). But under Defendant’s theory, relief “with respect to the violation” applies only to *future* voters, not to those voters who were actually harmed by the violation and filed suit as a result. That is illogical. See *Guzman v. U.S. Dep’t of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012) (“Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” (internal quotation marks omitted)).

Moreover, Defendant’s proposed remedy would result in a continuing NVRA violation unfairly affecting thousands of Ohio voters. Ohio’s Supplemental Process violates Section 8(b)(2) of the NVRA by improperly purging voters due to failure to vote. *A. Philip Randolph Inst.*, 2016 WL 5328160, at *9. Correcting this violation requires making whole all affected voters who can reasonably be identified. Thus, if Plaintiffs’ claims that Defendant can identify voters illegally purged in 2011 and 2013 are correct, and those voters are not permitted to cast a ballot that counts, they will continue to suffer harm as a direct result of Ohio’s NVRA violation.² This Court should not ratify and perpetuate that violation by denying voters illegally purged prior

² The United States recognizes that there may not be sufficient time to restore voters to the rolls before the November 8, 2016 election, particularly in light of the start of absentee voting by mail and in-person. That may be a fact question for the Court to determine. And in that circumstance, allowing a wrongfully purged voter to cast a provisional ballot that will be counted may be sufficient as a temporary matter. But identifiable voters who were unlawfully removed from the rolls must be fully restored to the voter registration list once time permits. To the extent that Ohio does not plan to restore such individuals to the statewide list of legally registered voters, and instead plans to require them to cast provisional ballots, this would also constitute a continuing violation of federal law.

to 2015 the right to vote in upcoming elections, if such wrongly purged voters can be identified.

B. The NVRA Bars Defendant’s Proposal to Reject Provisional Ballots Cast by Voters Who Have Changed Addresses within a County.

Defendant’s proposal is not merely incomplete and inadequate, but also inconsistent with the NVRA’s protections for voters who have moved within the same registrar’s jurisdiction. Under Defendant’s plan, provisional ballots cast by voters who had been purged in 2015 and restored to the rolls will nonetheless be rejected based on any change of address between their last date of registration and the date of the election. However, Section 8 of the NVRA does not allow Ohio to purge voters based on intra-county moves.

Section 8 generally protects voters from removal from the rolls if they have not become ineligible to vote. Of specific relevance here, Section 8 protects voters who move within the same registrar’s jurisdiction, because such voters remain eligible to vote.³ Section 8(d) prohibits purging voters based on a changed address without either (a) the confirmation process improperly triggered in the instant case, or (b) “confirm[ation] in writing that the registrant has changed residence to a place *outside the registrar’s jurisdiction* in which the registrant is registered.” 52 U.S.C. § 20507(d)(1) (emphasis added). The notice sent to voters under Section 8(d) similarly makes clear that voters who move within the registrar’s jurisdiction, just like voters who have not moved at all, will not be removed from the voter registration list. *See* 52 U.S.C. § 20507(d)(2)(A) (“If the registrant did not change his or her residence, or changed residence but remained in the registrar’s jurisdiction, . . .”). Section 8(f) likewise instructs that when a voter changes address within the same registrar’s jurisdiction, “the registrar shall correct the voting registration list accordingly, and the registrant’s name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in

³ In Ohio, the “registrar’s jurisdiction” is the county. 52 U.S.C. § 20507(j)(2).

subsection (d) of this section.” 52 U.S.C. § 20507(f). Furthermore, under Section 8(c), when USPS change-of-address information indicates that a voter has moved within the same registrar’s jurisdiction, officials meet NVRA requirements if they “change[] the registration records to show the new address” rather than initiating the removal process of Section 8(d). 52 U.S.C. § 20507(c)(1)(B)(i).

Each of these provisions confirms that a voter moving *within* the registrar’s jurisdiction remains eligible to vote absent some other basis for removal, and that a registrar should update such a voter’s address rather than removing him or her from the rolls.⁴

Yet, Defendant would count provisional ballots of improperly-purged voters only if “[t]he 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.” Def.’s Mot. to Implement Remedy, Ex. 1 at 1, ECF No. 72 (emphasis added); *see also* Def.’s Mem. in Opp’n to Pls.’ Req. for a TRO, ECF No. 80 at 17-19. His proposal makes no exception to allow ballots to count for voters who move within the same county. It is thus inconsistent with Section 8 of the NVRA.

Defendant may contend that he has never *officially* restored these purged voters to the registration rolls, and thus rejecting their provisional ballots falls outside of Section 8’s aegis. But these voters never should have been purged in the first place (and, as was true of failure to vote, information indicating a move within the same county would not have provided a valid basis for removal under the NVRA). All eligible voters affected by Ohio’s illegal purge should be able to cast votes that count, and Defendant should not be permitted to compound his error by

⁴ Section 8(e) provides yet another safeguard, prescribing a particular procedure for many voters who move within a registrar’s jurisdiction to cast a valid ballot even if their registration has not been updated to reflect their new address. *See* 52 U.S.C. § 20507(e) (permitting voters to cast valid ballots following within-precinct moves and within-county moves in the same congressional district).

disenfranchising these voters again in a manner inconsistent with yet another NVRA provision. Accordingly, any order fully correcting Ohio's violation of the NVRA should allow illegally-purged voters who have moved within a county to cast a ballot that counts, just as Defendant proposes for those who have not moved at all.

III. CONCLUSION

For the foregoing reasons, Defendant's proposal does not fully remedy the NVRA violation, is inconsistent with the remedial principles in cases involving unlawful purges, and is itself inconsistent with the NVRA.

Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served this day on all counsel of record through the ECF Filing System.

Date: October 17, 2016

/s/ Matthew J. Horwitz
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