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

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

THE SECRETARY'S REPLY IN SUPPORT OF THE SECRETARY'S PROPOSED DIRECTIVE (DOC. 72).[1]

The Secretary's proposed remedy set forth in Doc. 72 is reasonable and feasible. Plaintiffs oppose the Secretary's proposal and instead demand large-scale changes to Ohio's election procedure just weeks before the presidential, general election.

To obtain a temporary restraining order in any context is a high burden. But to obtain a temporary restraining order that would overhaul Ohio election procedure only 21 days before a presidential general election, Plaintiffs would have needed to make a compelling presentation to the Court with: Strong legal arguments that Plaintiffs' widespread, burdensome remedy should be implemented; Compelling evidence that Plaintiffs' proposal can be implemented; And, weighty evidence that Plaintiffs' remedy is reliable and would retain the integrity of the election process.

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[1] Plaintiffs filed a motion seeking to withdraw their Reply and asking the Court to reconsider the Order permitting the Secretary to file a Reply. At the time of this filing, the Court has not ruled on Plaintiffs' motion. Subject to the Court's decision on Plaintiffs' motion, the Secretary submits this Reply.

Plaintiffs have done none of this. Plaintiffs have not demonstrated that the Court should not implement the Secretary's proposed Directive. So far in their briefing, Plaintiffs have not provided any legal authority stating that a massive overhaul of election procedure so close to an election is proper. They have provided no case law saying that they are entitled to anything other than ending the Supplemental Process. They have not distinguished the U.S. Supreme Court and Sixth Circuit law stating that the federal courts should not become enmeshed in the minutiae of state administrative procedures. Plaintiffs have not (and cannot) rebut the Secretary's position that Plaintiffs' remedy is barred by the Eleventh Amendment as retrospective relief.

With no legal authority, Plaintiffs stand on weak ground.

But their position is even weaker considering that Plaintiffs failed to provide the Court with any meaningful evidence supporting their own proposal. Plaintiffs did not offer evidence from any election official that the election overhaul that Plaintiffs seek can be implemented—let alone implemented reliably—prior to the November presidential general election. In contrast, even with the expedited briefing schedule, Defendant put forward *five* declarations from election administrators stating that Plaintiffs' plan is unworkable. Arguments from lawyers, including out-of-state New York lawyers and academic professors, are not a substitute for actual evidence from election administrators.

I. THE SECRETARY'S PROPOSED DIRECTIVE IS REASONABLE

Without support, Plaintiffs argue that there are "no practical barriers to the relief sought by Plaintiffs." Plaintiffs' Opposition p. 6 (Doc. 79). To the contrary, in the Secretary's Opposition to the Plaintiffs' Motion for a Temporary Restraining Order, the Secretary detailed the barriers to implementation of each of the elements in Plaintiffs' proposal. *See* Doc. 80 at pp. 11-20. The Secretary explained that boards of election and election officials will be extremely busy in the remaining days before the upcoming election. Declarant Masich explained that

"Board staff workload is already at full capacity. Board staff has been working eleven hour days before the start of absentee voting to process and assemble absentee ballots for mailing." Masich Dec. at ¶8. Likewise, Declarants Damschroder, Billing, Shubat, and McDonald all attested that the boards will be extremely in the remaining time before the election, given all of their already-existing obligations. Damschroder Dec. at ¶7; Shubat Dec. at ¶3; Billing Dec. at ¶3; McDonald Dec. at ¶3. There is simply a common-sense limit to how much work already-burdened election officials can accomplish in a short period of time before the presidential election.

The Secretary also explained that document retention schedules and the potential unavailability of lists necessary to conduct cross-checks create reliability and feasibility problems for any remedy related to Supplemental Processes before 2015. As Declarant Damschroder attested, "The older the NCOA list, the less likely the county has the deceased voter lists and other necessary lists." Damschroder Dec. at ¶24. Plaintiffs provided no evidence that the counties actually have the lists (the deceased, incarcerated felons, etc.) needed to conduct the verifications for Supplemental Processes before 2015. In addition, some counties, such as Cuyahoga County, do not have lists showing who was removed through Supplemental Process prior to 2013. McDonald Dec. at ¶10. There is also a two-year document retention schedule for many of the records that creates reliability problems for any remedy involving Supplemental Processes before 2015. Damschroder Dec. at ¶24.

For some of Plaintiffs' proposals, such as mailing provisional ballots, the necessary envelopes, instructions, and forms do not exist. Damschroder Dec. at ¶32. Moreover, with regard to all of Plaintiffs' proposal, Plaintiffs have provided no evidence that there is sufficient time to instruct and train election officials across 88 counties to perform the new procedures that Plaintiffs propose. Such training would be essential. *Id.*

Also without support, Plaintiffs claim that the Secretary's proposed Directive will "exclude many eligible voters." Opposition at p. 3. The only evidence that Plaintiffs introduce is the Declaration of Stephen Tayala. Importantly, under the Secretary's Directive, Mr. Tayala *will be able to cast a provisional ballot that will count.* Mr. Tayala states that he last voted in 2008, so that would mean that if he was removed from the registration list, it would have been in 2015. He also resides at the same address that he did in 2008.

Notably, Plaintiffs also avoid discussing Ohio's participation in the Electronic Registration Information Center ("ERIC") and Ohio's efforts to reach about 1.6 million Ohioans who were not registered to vote. Ohio's laudable effort to find individuals who are not registered and encourage registration is relevant. *See Colon-Marrero v. Conty-Perez*, 703 F.3d 134 (1st Cir. 2012).

In sum, the proof put forward by Plaintiffs (very little) cannot meet the high burden that Plaintiffs face to implement a complete election process overhaul with less than three weeks left before the presidential election.

Tellingly, Plaintiffs' briefing is devoid of law. The one case opinion that Plaintiffs cite to justify their widespread relief (*Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010)) is inapposite. *Ostergren* is a First Amendment case where the Fourth Circuit held that a private advocate has a First Amendment right to publish land records with unredacted social security numbers. *Id*. at 286-87. The district court limited its remedy to publication of only public officials. *Id*. at 289. The Fourth Circuit held that because its decision did not distinguish between social security numbers of public officials and private individuals, the lower court's remedy should not have been so limited. *Id*.

Ostergren is apples and oranges to this case. It says nothing about retrospective relief or overhauling an election system less than three weeks before a major election. The Sixth Circuit's decision said that the Supplemental Process is invalid under the NVRA. Accordingly, the only legally-compelled remedy is ending that process. *Lewis v. Casey*, 518 U.S. 343, 362 (1996); *Ohio Democratic Party v. Husted*, No. 16-3561, slip op. at 2 (6th Cir. Aug, 23, 2016). *Ostergren* does not say otherwise.

Accordingly, Plaintiffs have also failed to provide legal support for their temporary restraining order or in opposition to the Secretary's proposed remedy.

II. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant the Secretary's Motion to Implement Remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 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.

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