

**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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**DEFENDANT SECRETARY OF STATE JON HUSTED'S INITIAL MERITS BRIEF**

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Respectfully submitted,

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## **I. INTRODUCTION**

In 1994, Ohio changed its voter list maintenance procedures specifically to comport with the National Voter Registration Act of 1993 (the “NVRA”), which was signed into law on May 20, 1993 and took effect on January 1, 1995. For the past 22 years, through the tenures of four different Secretaries of States and both Democrats and Republicans, Ohio has used the two-part system that it adopted in 1994.

The first part of the maintenance program (the “Ohio NCOA Process”) matches addresses in the county voter files with data from the National Change of Address Database (the “NCOA database”). Because many individuals who move do not register their move with the Postal Service, the NVRA requires more than a procedure based on the NCOA database to maintain accurate voter rolls. Indeed, a 2006 study by the U.S. Postal found a striking “40 percent” of undeliverable mail is caused by “customers who do not notify the Postal Service of address changes.”

The second part of Ohio’s voter list maintenance process (the “Ohio Supplemental Process”) is a procedure based on a section of the NVRA providing for removal of voter names from the registration list after mailing notice to the voter and a passage of time with no voter activity. During the Ohio Supplemental Process, which is similar to the supplemental process used by a number of other States, each county board of election compiles a list of registrants having no voter activity for two years. The boards send each individual a confirmation notice by forwardable mail with a postage pre-paid return response. If the individual does not reply to the notice or engage in any voter activity for a period of four years, including two federal general elections (one being a presidential general election), from the date of the notice, then the individual’s name is removed from the registration list. This process makes a reasonable effort

to identify individuals who have moved without notifying the Post Office. It also clears names from the voter roll of individuals who have passed away.

The Ohio Supplemental Process closely mirrors a procedure set forth in the NVRA (the “NVRA Supplemental Procedure”). Likewise, the Ohio NCOA Process closely mirrors a different portion of the NVRA (the “NVRA NCOA Procedure”).

In this case, Plaintiffs’ primary argument is simple: Plaintiffs contend that voter inactivity cannot be part of a State’s list maintenance procedure.

Notably, the NVRA says otherwise. The NVRA specifies that registrants cannot be removed from the official list of voters by reason of the failure to vote “*except*” that this general rule does not affect or preclude the NVRA Supplemental Procedure, which Ohio mirrors in the Ohio Supplemental Process. Furthermore, neither the NVRA Supplemental Procedure nor the Ohio Supplemental Process removes individuals solely for failing to vote. Both include mailing a confirmation notice to the voter.

Ohio’s list maintenance processes are not simply a choice. They are required. In 2002, Congress passed and the President signed a law called the Help America Vote Act of 2002 (“HAVA”). This law reinforced that States are *required* to follow the NVRA list maintenance procedures:

“registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters”.

*The plain language of the NVRA and HAVA should end Plaintiffs’ case.* But if there is any doubt about congressional intent, the congressional record likewise supports Ohio. In 1991, as Congress was debating a predecessor bill to the NVRA that had the same registration clean-up provisions as the NVRA, *the Congressional Budget Office specified that only States that drop*

*voters from the list without sending a notice could not continue this practice, that voter inactivity coupled with a notice was a proper procedure, and that States would still be free to use “non-voting as an indication that a voter has changed addresses.”*

The NVRA and HAVA were a compromise between two mandates: simplifying the voter registration process while simultaneously ensuring that voter lists include only eligible, current voters. The Senate Report that accompanied the NVRA stated that “The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud.” Under these laws, States are required to make a “reasonable effort” to clean up voter registration lists. No system can ever be infallible, but for the past 22 years, Ohio has done its job and followed its obligations under the NVRA and HAVA.

## **II. FACTUAL BACKGROUND**

### **A. Ohio’s Two-Stage Voter Registration Roll Maintenance Process was Implemented 22 Years Ago Specifically to Comply with the National Voter Registration Act of 1993**

Before 1994, Ohio updated its voter registration roll pursuant to Article V § 1 of the Ohio Constitution, which states in part, “[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.” Ohio Const. art. V, § 1.<sup>1</sup> Following the enactment of the NVRA, the 120<sup>th</sup> Ohio General Assembly passed Amended Substitute Senate Bill No. 300 (effective January 1, 1995) and eliminated the statutory language that required boards of election to cancel voters solely because of their inactivity.<sup>2</sup>

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<sup>1</sup> This constitutional amendment proposed by initiative petition was adopted at the November 8, 1977 general election with over 62% of Ohioans supporting the amendment. See <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last viewed May 23, 2016).

<sup>2</sup> Specifically, Am. Sub. S.B. 300 repealed R.C. 3503.21, which read:

Since 1994 — for over 22 years — Ohio has used a two-stage procedure to make a reasonable effort to maintain the accuracy of its voter registration roll. Ohio implemented its current procedures to comply with and mirror procedures established by the NVRA, 52 U.S.C. § 20501, *et seq.* The December 9, 1994 Directive outlining Ohio’s new procedures began with the following:

This Directive prescribes programs and procedures to identify and cancel the voter registrations of ineligible persons in accordance with Am. Sub. S.B. 300, effective January 1, 1995 and the National Voter Registration Act of 1993 (NVRA). Am. Sub. S.B. 300 enacts new revised code sections 3503.19 and 3503.21, and amends current revised code sections 3501.01, 3501.05, 3501.11, 3503.18, and 3503.24 relating to the cancellation of ineligible voters.

My goal in adopting these programs and procedures is to provide all boards of elections with workable, cost effective methods to remove ineligible persons from the voter registration rolls in accordance with the new requirements of state and federal law.

Ohio Secretary of State Directive 94-36 (attached hereto as Exhibit A).

Ohio’s voter maintenance procedures have been in place during the terms of four separate Secretaries of State, which included both Republican and Democrat officials. *See* Declaration of Matthew Damschroder, ¶ 9 (attached hereto as Exhibit B) (noting that Supplemental Process occurred under former Secretary of State Blackwell, a Republican, and former Secretary of State

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At the beginning of each calendar year, the board of elections shall cancel the registration of each registered elector who has not voted at least once in the four next preceding calendar years or has not registered a change of name or change of address or otherwise updated his registration during that period. Thirty days prior to the cancellation, the board shall send to each such person at his last known address a printed notice that his eligibility to vote will be cancelled by reason of his failure to vote or to update his registration in four calendar years and that he must update his registration in order to be eligible to vote. The notice shall be in the form prescribed by the secretary of state.

No person whose registration has been cancelled under this section or any other section of the Revised Code and who has not reregistered or had his registration reinstated under this chapter shall be considered a “registered elector” for purposes of this or any other chapter of the Revised Code.

Brunner, a Democrat). The procedures have remained substantively unchanged since 1994. Declaration of Patricia Wolfe, ¶ 5 (attached hereto as Exhibit C).

As explained in the introduction, the two primary procedures that Ohio uses to help maintain the accuracy of its voter registration roll are sometimes referred to as the “NCOA Process” and the “Supplemental Process,” and in this brief for clarity they are termed the “Ohio NCOA Process” and the “Ohio Supplemental Process.” The two maintenance procedures in the NVRA that the Ohio NCOA Process and the Ohio Supplemental Process mirror are called herein the “NVRA NCOA Process” and the “NVRA Supplemental Process.”

#### **B. The Ohio NCOA Process**

The Ohio NCOA Process is conducted on an annual basis.<sup>3</sup> Damschroder Declaration, ¶ 9. Under the Ohio NCOA Process, The Secretary’s Office compares “the records in the Statewide Voter Registration Database (“SWVRD”) to the NCOA database.” Damschroder Declaration, ¶ 11. “The NCOA database contains names and addresses of person who have filed changes of address with the United States Postal Service (USPS).” *Id.* During the Ohio NCOA Process, the Secretary “provides the boards with a file listing the possible voter matches to the NCOA file.” *Id.* The boards of election compare the county file to the NCOA file and then “send a confirmation notice (Form 10-S) to each elector identified.” *Id.* at ¶¶ 11, 17. The confirmation notice is a postage pre-paid forwardable form that a voter can return to indicate whether the voter still resides at the same location. *Id.*

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<sup>3</sup> In December 2013, an amendment by the General Assembly to Senate Bill 200 required the Secretary to conduct the Ohio NCOA Process on an annual, rather than a biennial, basis. At that time, the Secretary also moved the corresponding Ohio Supplemental Process to an annual basis. Damschroder Declaration, ¶ 9. Ohio is also obligated to perform both processes on an annual basis pursuant to a settlement agreement that ended prior litigation. A copy of the settlement agreement is attached hereto as Exhibit D.

Pursuant to the Ohio NCOA Process, an individual's voter registration is cancelled when he or she appears on the list of individuals who have filed a change of address with the USPS and a different address appears for that individual in the SWVRD, fails to respond to the confirmation notice sent by forwardable mail with a pre-paid return form, and then fails to engage in any voter activity for a period of four consecutive years, including two federal general elections (one being a presidential general election) from the date that the confirmation card is mailed. Damschroder Declaration, ¶ 21.

**C. Limitations of Relying on the NCOA Database**

The Ohio NCOA Process is unable to identify many individuals who relocate. According to the U.S. Census Bureau, 11.6% of the U.S. population relocated in 2014, with similar numbers in recent years (11.5 % in 2013, 11.7% in 2012, 12.0% in 2011). United States Census Bureau, *Annual Geographic Mobility Rate, By Type of Movement: 1948-2015* (2015) (attached hereto as Exhibit E). Not all individuals who move notify the Postal Service and, therefore, the NCOA database does not reflect those changes. Damschroder Declaration, ¶ 13. While difficult to quantify the precise number of individuals who move without filing a change of address, the numbers are substantial. In 2006, the U.S. Postal Service conducted a study that found a striking “40 percent” of undeliverable mail is caused by “customers who do not notify the Postal Service of address changes.” Office of the Inspector General, United States Postal Service, *Strategies for Reducing Undeliverable Mail as Addressed*, 1 (2015) (emphasis added) (attached hereto as Exhibit F). Because the Ohio NCOA Process does not reach many people who relocate, Ohio uses an additional process as part of its reasonable effort to identify individuals who have moved.

**D. The Ohio Supplemental Process**

The Ohio Supplemental Process begins after the Ohio NCOA Process is completed and “seeks to identify electors whose lack of voter activity indicates they may have moved, even though their names did not appear on the NCOA generated list.” Ohio Secretary of State Directive 2009-05 (attached hereto as Exhibit G); *see also* Damschroder Declaration, ¶ 14. As part of the Ohio Supplemental Process, “BOEs use data points (e.g., voting history) to compile the data for the supplemental process.” Damschroder Declaration, ¶ 14. In the Ohio Supplemental Process, each individual board of elections compiles its own list of individuals who, according to the board’s records, have not engaged in any voter activity for two years.<sup>4</sup> *Id.* at ¶ 15. The boards send each such individual identified a confirmation notice by forwardable mail with a postage pre-paid return envelope. *Id.*

An individual who receives a confirmation notice and needs to update his or her address may do so using the State’s online change of address system. Damschroder Declaration, ¶ 19. Secretary Husted implemented this online change of address system in 2012. *Id.*

An individual receiving a confirmation notice may also return the postage pre-paid form free of cost through the mail. If the individual returns the confirmation notice and provides a new address, the individual’s registration record is updated by the appropriate board with the new address. *Id.* at ¶ 20. If the individual returns the confirmation notice confirming that his or her current address is still accurate, the board notes on the individual’s registration record that the confirmation notice was returned to the board and the address was confirmed. *Id.* In the

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<sup>4</sup> Voter activity includes: “a voter completing the confirmation card and returning it; filing a change of address either through BMV or one of the other designated agencies; filing a voter registration card with the board of elections; . . . casting an absentee ballot; casting a provisional ballot; voting on election day.” Damschroder Dep. 66:19-67:5. Boards also have discretion to consider whether signing a candidate, issue, or local option petition is viewed as voter activity. *Id.* at 70:17-20; 130:9-14.

event the individual fails to return the confirmation notice, fails to update his or her voter registration, and fails to engage in any other voter activity, the individual will be marked as “inactive” in the registration database. *Id.* This “inactive” individual has all the rights of an otherwise qualified elector, including the ability to cast a regular ballot at any election. *Id.* If, however, four years (including two federal general elections) passes without voter activity, at that time the individual’s voter registration record is cancelled. *Id.*

The chart attached hereto as Exhibit H illustrates the inactivity needed for a voter to be removed from the roll. The chart takes the example of an individual cancelled from the voter roll in the summer of 2017. That person would have received a confirmation card in 2013 after the primary election. In addition to not returning that postage pre-paid card, to be removed from the list, the individual would have had to miss numerous elections, including:

- The November 2011 general election when Ohio voters repealed a bill that affected collective bargaining for public employees and adopted a constitutional amendment proposed by initiative petition regarding “healthcare freedom”.
- The 2012 presidential election. Also in that election was a competitive United States Senate election in Ohio.
- The 2013 general election, where there were 1,677 local issues decided, including 194 school issues.
- The 2014 general election when Governor Kasich was re-elected.
- The 2015 general election, which included a resolution seeking to legalize marijuana use.
- The 2016 presidential election.
- Numerous primaries, as well as additional municipal and local elections.

Ohio roll maintenance is working. While Ohio is maintaining the integrity of its voting roll with list maintenance procedures, the number of registered voters in Ohio is also increasing. By way of example, Ohio was one of five States with the largest registration increases between

2008 and the 2012 general election. U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2011-2012*, 1 (2013) (attached hereto as Exhibit I). Plainly, Ohio is fulfilling both goals of the NVRA — enhancing opportunities to register and making a reasonable effort to have an accurate voter roll.

**E. Some States Use Voter Inactivity to Begin their Supplemental Maintenance Process**

The NVRA states that “each State shall . . . 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 . . . a change in residence of the registrant . . . .” 52 U.S.C. § 20507(a)(4)(A). The NVRA Supplemental Process provides for removal of names from the voter roll if an individual does not respond to a confirmation notice and thereafter does not vote or appear to vote for a duration that consists of the next two general elections for federal office. *Id.* § 20507(d)(1)(B)(ii). The NVRA Supplemental Process is premised on finding additional individuals beyond those identified in the NCOA database who have changed their residence. *See id.* § 20507(d). The NVRA leaves to the States the discretion to decide what data points should be used to indicate whether a registrant may have moved. Ohio uses two years of voter inactivity as this data point. *See, e.g.* Ex A.

A number of other States also use lack of voter activity as the indication to begin the supplemental process. By way of example, South Dakota operates a maintenance program that sends confirmation cards to those who have not voted, updated their registration, or replied to a confirmation mailing at least once during the preceding four years. SDCL § 12-4-19. If a person to whom such a card is sent fails to respond or the card returns to the sender as undeliverable, then the county auditor “shall move the voter to an inactive registration file.” SDCL § 12-4-

19.2. If the person “does not vote by the second general election following the confirmation mailing, the registration shall be cancelled.” SDCL § 12-4-19.4.

Alaska sends confirmation notices to three different groups of individuals: (1) those “whose mail from the division has been returned to the division in the two years immediately preceding the examination of the register;” (2) those “who ha[ve] not contacted the division in the two years immediately preceding the examination or the register;” and (3) those “who ha[ve] not voted or appeared to vote in the two general elections immediately preceding the examination of the register.” AS § 15.07.130(a).

Georgia sends confirmation cards to those individuals “whose names appear on the list of electors with whom there has been no contact during the preceding three calendar years as who were not identified as changing addresses”. Ga. Code Ann. § 21-2-234(a)(2). If an individual fails to return their card within 30 days, they move to the inactive list. Ga. Code Ann. § 21-2-234(g). Once on the list, if the individual fails to make contact within two election cycles, that individual loses their registration status. Ga. Code Ann. § 21-2-235 (b).

Montana offers the chief election officer a choice as to what process they may follow. MCA 13-2-220(1). One such option involves “mail[ing] a targeted mailing to electors who failed to vote in the preceding federal general election . . . .” MCA 13-2-220(1)(c). If the notice returns as undeliverable or there is no response, the election office sends a second notice and failure to respond to this second notice within 30 days leads to placement on the inactive list. MCA 13-2-220(3). If an individual on the inactive list fails to vote in two consecutive federal election cycles, cancellation of voter registration follows. MCA 13-2-402(7).

Tennessee uses a system like Ohio’s in so far as it uses lack of voter activity as an indicator of a change of address. Tennessee requires the mailing of confirmation cards “if

indications exist that the voter may no longer reside at the address at which the voter is registered, *such as the voter's failure to voter, or otherwise update the voter's registration over a period of two (2) consecutive regular November elections.*" T.C.A. § 2-2-106(c) (emphasis added). If a voter takes no action after the mailing of a confirmation notice over two "regular November election[s]", then the election administrator shall cancel that individual's registration. T.C.A. § 2-2-106(e).

Finally, West Virginia mails confirmation notices "to those persons not identified as potentially ineligible through the chance of address comparison procedure but who have not updated their voter registration records and have not voted in any election during the preceding four years." W.Va. Code § 3-2-25(j). Failure to respond to a confirmation notice yields placement on inactive status. W. Va. Code § 3-2-27(c). Cancellation of registration follows if the inactive voter fails to vote, otherwise update their voter registration, or respond to the confirmation notice within two general election cycles after the date of notice. W. Va. Code § 3-2-27(e).<sup>5</sup>

#### **F. The Continuing Importance of List Maintenance**

Despite the efforts of States to update their registration lists, inaccurate voter rolls remain a significant problem in the United States.

According to research conducted by the Center for the States of the Pew Charitable Trusts ("Pew"), published in February 2012, approximately 24 million active voter registrations throughout the United States are either no longer valid or are significantly inaccurate. The Pew Center on the States, *Inaccurate, Costly, and Inefficient: Evidence That America's Voter*

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<sup>5</sup> Alaska, South Dakota, Georgia, Montana, Tennessee, and West Virginia are provided as examples. Ohio has not conducted an exhaustive search of the supplemental procedures used by all other States.

*Registration System Needs an Upgrade*, p. 1 (February 2012) (attached hereto as Exhibit J). Pew also found that more than 1.8 million deceased individuals are listed as active voters on registration lists nationwide and that approximately 2.76 million people have active registrations in more than one State. *Id.*

Notably, in addition to being in place for over 22 years, the Ohio Supplemental Process was not identified as an area “need[ing] reform” in a report published seven years ago. In 2009, the Brennan Center for Justice published a lengthy report about election procedures in Ohio. The report, among other things, “prioritiz[ed] issues based on the need for reform, as stated by election officials, advocates and academics we interviewed.” Brennan Center, *Final Report 2008-2009 Ohio Election Summit and Conference*, p. i (Attached hereto as Exhibit K). The report did not designate the Ohio Supplemental Process as an area for reform. Importantly, the report was “endorsed” by one of the lawyers for Plaintiffs (Daniel Tokaji), and a Senior Policy Analyst at Demos (Demos is also counsel to Plaintiffs) was one of “academics, advocates and individuals in the media that participated in [the Brennan Center’s] interviews . . .” *Id.* at p. iii.

#### **G. Ohio Sends Election Mail to Homeless Voters**

While the issue is not relevant to the Court’s determination of whether Ohio complies with the NVRA, Plaintiffs raised allegations in their Amended Complaint about the homeless registering and receiving election mail. *See* Am. Compl. ¶17.

Under Ohio law, a person’s “voting residence” is “[t]hat place . . . in which the person’s habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.” R.C.3503.02(A). R.C.3503.02(I) provides that “[i]f a person does not have a fixed place of habitation, but has a shelter or other location at which the person has been a consistent or regular inhabitant and to which the person has the intention of returning, that shelter or other location shall be deemed the person’s residence for the purpose of registering to vote.”

Election officials have confirmed Ohio’s effective efforts to reach the homeless. Matt Damschroder, Chief of Staff to the Secretary and former Director of the Franklin County Board of Elections, stated:

Based on my thirteen years of election experience, homeless individuals can and do receive the mail. I have not encountered a situation where a homeless individual was unable to receive the mail. The most common method for homeless individuals to receive the mail is to have their mail sent to a local homeless shelter.

Damschroder Declaration, ¶ 24. Karla Herron, Director of the Delaware County Board of Elections and former President of the Ohio Association of Election Officials, likewise stated:

Based on my thirteen years of election experience, homeless individuals can and do receive mail. I have not encountered a situation where a homeless individual was unable to receive mail. The most common method for homeless individuals to receive mail is to have their mail sent to a local homeless shelter.

Herron Declaration, ¶ 6 (attached hereto as Exhibit L).

Notably, Brian Davis, Executive Director of NEOCH, testified in a prior trial that most instances of homelessness in Cuyahoga County are for “short periods of time.” *NEOCH v. Husted*, Case No. 2:06—CV—00896 (S.D. Ohio) (Marbley, J.), Trial Transcript 4, pp. 185-186 (attached hereto as Exhibit M). He stated that the average duration of homelessness for an individual in Cuyahoga County is 20 or 22 days and 52 to 54 days for a family. *Id.* at 185. He summarized, “most people are . . . only staying homeless for a brief period of time.” *Id.*

In sum, while Plaintiffs’ allegations of a purported difficulty reaching the homeless by mail are not relevant to compliance with the NVRA, Plaintiffs’ allegations, even if considered, are not well-founded.

### **III. LEGAL ARGUMENT**

#### **A. Plaintiffs Bear the Burden of Proof**

In order to obtain any of their requested relief, Plaintiffs bear the burden of proving every element of their claim by a preponderance of the evidence. *See U.S. v. Missouri*, No. 05-43941-CV-C-NKL, 2007 WL 1115204, \*12 (W.D. Mo. April 13, 2007) (plaintiff's NVRA claim failed because plaintiff failed to prove a violation "by a preponderance of the evidence"), *affirmed in part and reversed in part*, 553 F.3d 844 (8<sup>th</sup> Cir. 2008); *see also United States v. Brown*, 988 F.2d 658, 663 (6<sup>th</sup> Cir. 1993) ("[T]he burden in civil actions has traditionally been placed on the plaintiff by a preponderance of the evidence."). As such, Plaintiffs must show by a preponderance of the evidence that the Ohio Supplemental Process is not a reasonable effort by the Secretary to carry out his required duty to conduct a general voter list maintenance program.

#### **B. Federal Law Requires States to Implement Procedures that Maintain the Integrity of the Voter Roll**

Ensuring that elections are legitimate, without fraud, and have verifiable results is an essential component of our electoral process, and maintaining the integrity of the voter registration roll furthers these goals and enhances the public's confidence in the election process. *See Crawford, v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy . . . Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.").

Two federal statutes obligate the States to enact procedures that maintain the integrity of the voter rolls. The first is the NVRA. The second is HAVA, 52 U.S.C. §20901, *et seq.*

The NVRA was enacted in 1993 to (1) “establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” and (2) “protect the integrity of the electoral process” and “ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20507(b)(1),(3),(4). As the district court of Colorado stated:

These purposes counterpose two general, sometimes conflicting, mandates: To expand and simplify voter registration processes so that more individuals register and participate in federal elections, while simultaneously ensuring that voter lists include only eligible, current voters.

*Common Cause of Colorado v. Buescher*, 750 F.Supp.2d 1259, 1274 (D. Col. 2010).

Congress designed Section 8 of the NVRA, 52 U.S.C. § 20507, to increase the integrity of elections by requiring States to perform maintenance of their voter registration roll to ensure the roll is accurate. The Senate Report that accompanied the NVRA explained that “accurate” and “up-to-date” voter registration list would be the “hallmark” of the law. More fully, it stated:

An important goal of this bill, to open the registration process, must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis. *The maintenance of accurate and up-to-date voter registration lists is the hallmark of a national system seeking to prevent voter fraud.*

S. Rep. No. 103-6 at 17-18 (1993) (Conf. Rep.) (emphasis added) (a copy of all of the congressional record pages cited in this brief is attached as Exhibit N).

HAVA also requires States to conduct voter list maintenance. Congress passed HAVA in 2002 in part because States were not complying with the list maintenance obligations of the NVRA, and as a result, the voter lists of States were in disarray. As Senator Dodd, one of the primary authors of HAVA (148 Cong. Rec. S10488 (daily ed. October 16, 2002) (statement of Sen. Bond)), explained during a speech supporting HAVA, “The authors of this bill found that voter rolls across the country are inaccurate or in very poor order, the condition in many jurisdictions, particularly the large jurisdictions, are in a state of crisis. Voter lists are swollen

with the names of people who are no longer eligible to vote in that jurisdiction, are deceased or are disqualified from voting for another reason. It has been found that 650,000 in this country are registered in more than one State.” 148 Cong. Rec. S10490 (daily ed. October 16, 2002) (statement of Sen. Dodd).

Others commented similarly about HAVA. Representative Terry remarked that “bad voter lists” exist “making the system vulnerable to fraud.” 147 Cong. Rec. H9290 (daily ed. Dec. 12, 2001) (statement of Rep. Terry). Senator Bond stated, “I believe these meaningful reforms will go a long way to helping states clean up voter rolls, and thus clean-up elections.” 148 Cong. Rec. S10489 (daily ed. October 16, 2002) (statement of Sen. Bond).

**C. The Requirement to Make a Reasonable Effort to Remove the Names of Ineligible Voters**

The NVRA requires each State to “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 . . . death . . . or a change in residence . . . .” 52 U.S.C. § 20507(a)(4)(B) (emphasis added). The NVRA leaves to the States the discretion to decide the method by which the States update their registration lists. *See generally* The Office of Election Administration, Federal Election Commission, *Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995–1996* (1998) (“The list maintenance provisions of the NVRA grant the States considerable latitude”) (Attached hereto as Exhibit O).

HAVA states that, at “*minimum*”, “The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly.” 52 U.S.C. § 21083(a)(4) (emphasis added). Included in the minimum system of maintenance must

be “[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters.” *Id.* § 21083(a)(4)(A).

**D. The NVRA Provides for Two Types of List Maintenance Procedures**

While giving flexibility to the States, the NVRA prescribes particular procedures that States should use to meet their list maintenance requirements. Ohio’s voter maintenance procedures, the Ohio NCOA Process and the Ohio Supplemental Process, closely mirror both of the procedures set forth in the NVRA.

With the first NVRA list maintenance procedure, the NVRA NCOA Procedure, which Ohio mirrors using the Ohio NCOA Process, States contract with the Postal Service to obtain “change-of-address information.” 52 U.S.C. § 20507(c)(1)(A). If the voter “has moved to a different residence address not in the same registrar’s jurisdiction, the registrar uses the [by mail] notice procedure . . . to confirm the change of address.” *Id.* § 20507(c)(1)(B)(ii). One problem with the NVRA NCOA Procedure (and likewise the Ohio NCOA Process) is that the procedure “is not useful in identifying those who have died [and] those who have moved without filing a change of address . . . .” The National Clearinghouse on Election Administration, Federal Election Commission, *Implementing the National Voter registration Act of 1993: Requirements, Issues, Approaches, and Examples* 5-21 (January 1, 1994) (attached hereto as Exhibit P). For this reason, there is a second, supplemental list maintenance procedure.

The second NVRA list maintenance procedure, the NVRA Supplemental Process, which Ohio mirrors in the Ohio Supplemental Process, consists of sending “a notice” to registrants and then removing registrants from the voter list who do not return the notice or otherwise do not vote in the subsequent two general federal elections. 52 U.S.C. § 20507(d)(2)(A). The NVRA contemplates that the “ground[s]” for sending the notice should be the possible “death of the registrant” or “a change in the residence of the registrant.” *Id.* §20507(a)(4)(A)(B). A State is

given discretion to determine the “reasonable” procedure it wants to use to decide whether there may be such an instance of death or relocation that warrants sending a notice and beginning the State’s supplemental process. *Id.* §20507(a)(4).

The notice used pursuant to the NVRA Supplemental Process should be “a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address . . . .” *Id.* § 20507(d)(2)(A). Once the notice is sent, there are two possibilities. First, the card may be returned: “If the registrant did not change his or her residence, or changed residence but remained in the registrar’s jurisdiction, the registrant should return the card . . . .” *Id.* Second, if the registrant does not return the card, “the registrant’s name will be removed from the list of eligible voters” if the registrant does not vote during the time period “beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice . . . .” *Id.*

**E. HAVA Confirmed there is an Obligation to Follow the NVRA Procedures**

HAVA, passed in 2002, confirmed that the NVRA procedures are mandatory. Section 303(4)(A) of HAVA stated, in part:

(4) MINIMUM STANDARD FOR ACCURACY OF STATE VOTER REGISTRATION RECORDS.—The State election system *shall* include provisions to ensure that voter registration records in the State are accurate and are updated regularly, *including the following*: H. R. 3295—45 (A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), *registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.*

52 U.S.C. § 21083(a)(4) (emphasis added).

HAVA, however, did not disrupt the discretion left to the States to decide what data each State would use to start its supplemental process. “The specific choices on the methods of

complying with the requirements of this title [HAVA] shall be left to the discretion of the State” (*Id.* § 21085) but the requirements of Section 304(A) are the “minimum.” *Id.* § 21084. Indeed, “nothing . . . shall be construed to prevent a State from establishing . . . administration requirements that are more strict than the requirements established under this title” so long as such requirements comply with other federal laws. *Id.*; see generally *Colon-Marrero v. Velez*, 813 F.3d 1, 17 (1st Cir. 2016) (“section 303(a)’s primary focus is the obligation of states to adopt measures to ensure accurate registration records”).

**F. Count I of the Amended Complaint does not State a Violation of the NVRA**

**1. The Plain Language of the NVRA Controls in Ohio’s Favor**

The starting point in any case involving statutory construction is the language of the statute itself. *Watt v. Alaska*, 451 U.S. 259, 265 (1981); *Deutsche Bank Nat. Trust Co. v. Tucker*, 621 F.3d 460, 462 (6th Cir. 2010). “If the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced.” *United States v. Plavcak*, 411 F.3d 655, 661 (6th Cir. 2005) (quotation omitted).

The entirety of Plaintiffs’ argument rests on a solitary section of the NVRA (52 U.S.C. § 20507(b)) that was amended in 2002 by Section 903 of the HAVA, 52 U.S.C. § 21083(b). Plaintiffs argue that 52 U.S.C. § 20507(b) purportedly provides a “near categorical prohibition against removing voters for failure to vote”. See Am. Compl. ¶3. When the section of the NVRA is read with the 2002 amendment included, it is plain that Plaintiffs have no claim.

In 1993, when originally passed, the relevant portion of this section of the NVRA stated:

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall not 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) (as enacted).

In 2002, however, HAVA amended 52 U.S.C. § 20507(b) to add the italicized words below:

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall not 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, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) of this section to remove an individual from the official list of eligible voters if the individual— (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*

52 U.S.C. §20507(b)(2). This italicized portion describes the NVRA Supplemental Procedure.

The plain language of the NVRA is clear. The 2002 amendment to the NVRA expressly allows States to remove from their registration lists those voters who (1) fail to respond to the statutory notice, i.e., Ohio's confirmation notice, and (2) fail to vote in two additional federal elections. In other words, HAVA modified the precise language on which Plaintiffs' argument relies. Plaintiffs' claim hinges on the phrase "shall not result in the removal . . . by reason of the person's failure to vote," but in 2002, Congress deleted the comma after "failure to vote" and added these words: "*except that nothing in this paragraph may be construed to prohibit*" the NVRA Supplemental Procedure.

"It is a well-worn principle of statutory construction that a statute is to be construed to give effect to every part thereof whenever reasonably possible." *U.S. v. Graham Mortg. Corp.*, 740 F.2d 414, 419 (6<sup>th</sup> Cir. 1984). Plaintiffs' reading of Sec. 8(b) of the NVRA would render the 2002 amendment to the NVRA meaningless.

The question in this case, therefore, is not whether a “failure to vote” can be part of a State’s supplemental process. The NVRA is clear that it can be. Indeed, the italicized portion of 52 U.S.C. § 20507(b) above includes in the NVRA Supplemental Process a consideration whether there was voter inactivity. Instead, the salient question is whether the Ohio Supplemental Process, which in essence boils down to removing voter names only when there is a six-year period of inactivity *and* when the voter did not respond to a confirmation notice, is a “reasonable effort” to remove ineligible voters. The answer to that question is yes. *See generally U.S. v. Missouri*, 535 F.3d at 851; *Montana Democratic Party v. Eaton*, 581 F.Supp.2d 1077, 1081 (D. Montana 2008) (stating that list maintenance under the NVRA clears “stale information” and can be based on the “passage of time”).

In a 2006 challenge to a State’s voter maintenance procedure, the NVRA’s “reasonableness” standard was likewise the dispositive query. In 2006, the United States sued Missouri and alleged that Missouri was not doing enough to clean up its voter roll. Missouri, under Missouri Revised Statute § 115.181, conducts a “canvass” of voters every two years. The canvass is either “made house-to-house” or conducted “through the United States Postal Service.” *Id.* If, based on the door to door or Postal Service canvass, it is determined that “the registrant no longer resides at his or her registration address,” then Missouri begins its supplemental process (*i.e.* Missouri sends a confirmation notice and waits for two consecutive general elections before removing the registrant from the roll). *U.S. v. Missouri*, No. 05-43941-CV-C-NKL, 2006 WL 1446356, \*1 (W.D. Mo. May 23, 2006).<sup>6</sup>

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<sup>6</sup> This citation reflects the District Court’s decision related to a motion for summary judgment filed by defendants. The 2007 citation for the same case, 2007 WL 1115204, provides the District Court’s findings of fact and conclusions of law based on the entire written record. The District Court entered judgment in favor of the defendants, the State of Missouri and the Missouri Secretary of State.

The *Missouri* district court held that Missouri was obligated to make a “reasonable effort” to remove the names of ineligible voters. *Id.* at \*8. It defined “reasonable effort” as follows:

A reasonable effort is one based on reason and not improper purposes. The dictionary defines the term “reasonable” as “agreeable to reason”; “not extreme or excessive”; “possessing sound judgment.” Webster’s 7th New Collegiate Dictionary. The antonym for effort is “do-nothingness, ease, inaction, lackadaisicalness, laziness.” Roget’s New Millennium Thesaurus First Edition (Vol.3.1).

*U.S. v. Missouri*, 2007 WL 1115204, \*7 (Apr. 13, 2007). The district court also specified that Missouri’s program need not be infallible:

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. It would be impossible for any state to achieve that result because human bureaucracies are fallible, modern society is mobile, and as previously discussed, elections are usually administered by multiple jurisdictions.

Given the language of the NVRA and the logical expectations of Congress, the Court finds that Missouri need only make a reasonable effort to maintain an accurate voter registration list that complies with the NVRA.

*U.S. v. Missouri*, 2006 WL 1446356, \*9.

On appeal, the Eighth Circuit adopted the district court’s “reasonable effort” standard. *U.S. v. Missouri*, 535 at 851. (The appellate court reversed in part the district court’s decision and remanded for the district court to consider whether any lack of compliance with the state program by local election authorities rendered the state program “unreasonable.” *Id.*). The Eighth Circuit also stressed the importance of federalism and stated that courts “should refrain from micromanaging the state and its agencies.” *Id.*

Other courts have also stressed that the NVRA requires a system of file maintenance that “makes a reasonable effort” to remove registrants who are ineligible to vote. *See Colon-Marrero*, 813 F.3d at 13; *see also League of Women Voters v. Blackwell*, 340 F.Supp.2d 823,

829 (N.D. Ohio 2004) (“the burden imposed” by identification requirements “is reasonable, and thus acceptable under the Constitution and HAVA”); *Common Cause of Colorado*, 750 F.Supp.2d at 1277 (list maintenance procedures are required because voter registration lists may contain individuals who are not actually eligible).

## **2. Congressional Intent Supports the Plain Reading of the NVRA**

To rule in Ohio’s Favor, the Court need not go past the plain language of the NVRA. Regardless, the Congressional Record likewise supports the legality of the Ohio Supplemental Process. “Reference to the congressional debates may be made to establish a common agreement upon the general purpose of an Act.” *U.S. v. City and County of San Francisco*, 310 U.S. 16, 22 n. 10 (1940). *Prior to Congress passing the NVRA, the Congressional Budget Office specified that a list maintenance procedure such as the Ohio Supplemental Process would not violate the NVRA.*

Prior to passage of the NVRA, in 1991 Congress debated a nearly identical law that ultimately was passed by Congress but then vetoed by the President. The bill was termed the National Voter Registration Act of 1992 (“S. 250”) and because of its similarity to the NVRA, the congressional debates related to S. 250 are likewise informative. S. 250 included voter list maintenance provisions that are nearly identical to the pre-2002 amended NVRA:

(b) CONFIRMATION OF VOTER REGISTRATION- Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform and nondiscriminatory; and

(2) shall not 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.

\* \* \*

(d) REMOVAL OF NAMES FROM VOTING ROLLS- (1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and (ii) has not appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

S. 250, 102 Cong. (1991).

In 1991, the Congressional Budget Office prepared and submitted a report to Congress about S. 250 that discussed whether States would need to make changes under S. 250. 138 Cong. Rec. S11686-89 (daily ed. May 19, 1992).<sup>7</sup> The Congressional Budget Office found that while 20 percent of States canvassed “all voters on the[ir voter] list,” 80 percent of States targeted “only those who did not vote in the most recent election,” “using not voting as an indication that an individual might have moved.” *Id.* at 11689. “Of these” 80 percent, “about five states simply drop the non-voters from the list without notice.” *Id.* The rest “send a notice to assess whether the person has moved.” *Id.*

Importantly, in its report, the Congressional Budget Office specified that *only the “five states” that drop voters without sending a notice “could not continue this practice under S. 250.”* *Id.* The other States (including those that used non-voting and a notice to maintain rolls) could continue their current method for list maintenance. *Id.* *The report stressed that States would still be free to use “non-voting as an indication that a voter has changed addresses.”* *Id.*

Statements of Senators and Representatives similarly confirm that the focus of the NVRA and HAVA is compliance with the requirement of sending the confirmation notice followed by inactivity over two general elections and that beyond this, the “reasonable effort” standard

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<sup>7</sup> This report was entered twice into the Congressional Record. It also appears at 137 Cong. Rec. S11116 (daily ed. July 29, 1991).

applies. For example, Senator Dodd, explaining the list maintenance procedures of HAVA before Congress, stated:

Those provisions provide that any name that is removed from the list must . . . [not] have responded to a notice mailed by the appropriate election official and then have not voted in the subsequent two Federal general elections . . . The conference report also added a new minimum standard for ensuring the accuracy of the centralized computerized registration list . . . Consistent with section 303(a)(2), this provision parallels language in the NVRA that requires States to make a reasonable effort to remove registrants who are ineligible to vote, consistent with the provisions of NVRA, specifically the requirement that such voters fail to respond to a notice and then fail to vote in the subsequent two general Federal elections.

148 Cong. Rec. S10509 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd). During the debates over the NVRA, Representative Kleczka, a member of the House Elections Sub-Committee, stated:

Mr. Chairman, I rise today in strong support of H.R. 2, the National Voter Registration Act.

\* \* \*

Contrary to some of the rhetoric espoused by opponents of this measure, it will not create inaccurate voter lists, but rather it requires States and local jurisdictions to maintain accurate lists.

It mandates that the purge processes must be uniform and nondiscriminatory, and stipulates that a registrant who fails to return an address confirmation notice may be removed from the rolls if that person does not vote within a period of two Federal elections.

139 Cong. Rec. H510 (daily ed. Feb 4, 1993) (statement of Rep. Kleckza). Senator Bond stated:

[HAVA] will not affect the obligation on the States to conduct list maintenance according to the provisions of the National Voter Registration Act. . . *This legislation does not limit the circumstances under which States can remove names from voter lists.* . . The requirement for a state-wide registration system will enhance the integrity of our election process, making it easier for citizens to vote and have their ballots counted, while clearing ineligible and false registrations from the voter rolls.

148 Cong. Rec. S10492 (daily ed. October 16, 2002) (statement of Sen. Bond) (emphasis added).

**G. Count II of the Amended Complaint does not State a Violation of the NVRA**

Count II of Plaintiffs' Amended Complaint fails because the Secretary has made changes to the 10-S confirmation notice (attached hereto as Exhibit Q) that moot the majority of Count II and, in addition, the confirmation notice satisfies the requirements of Section 8 of the NVRA.

**1. Most of Count II is moot**

The new form of the confirmation notice moots the majority of Plaintiffs' allegations related to Count II. First, the new notice describes the process an individual must follow to re-register at his or her new address in an easy-to-follow manner (mooting Am. Compl. ¶ 35). Second, the instructions on the form provide sufficient clarity to direct individuals about the proper process to confirm their registration (mooting *id.* ¶ 34). Third, the notice describes the consequences of a failure to respond (mooting *id.* ¶ 36). Finally, the notice provides guidance to voters in terms of providing a deadline to correct their registration to avoid having to cast a provisional ballot in the next election (mooting *id.* ¶ 37).

An issue fails as moot if the relief sought would make no difference to the legal interest of the parties. *Mepheron v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6<sup>th</sup> Cir. 1997) (*en banc*). Changing a practice moots a claim so long as the defendant shows "that there is no reasonable expectation that the wrong will be repeated." *Youngstown Publishing Co. v. McKelvey*, 189 Fed. App'x 402, 405 (6<sup>th</sup> Cir. 2006). When a government official changes their practice the Sixth Circuit has received the change in conduct "with more solicitude . . . than similar actions by private parties." *Mosley v. Harrison*, 920 F.2d 409, 415 (6<sup>th</sup> Cir. 1990) (quotation omitted).

The confirmation notice imparts specific instructions to allow a voter to register at a new residence. This moots Plaintiffs' argument that the prior form failed to instruct voters how to do so. Am. Compl. ¶ 34. If an individual needs to correct his or her registration, the form directs

the individual to the appropriate area to make those corrections with an arrow and text box that contains bold text in a 16-point font. Additionally, as an alternative method, the notice directs those who wish to complete the change online to the website where they can complete the change.

In the new notice, large, arrowed text boxes provide the card recipients directions as to what areas of the card to complete depending on residence status. One such box instructs individuals where they should sign if their address information is correct and the other box directs individuals to the box to fill out if their information requires updating. For those so inclined, the notice contains information allow the recipient to complete this process online. This moots Plaintiffs' argument that the instructions on this front "are confusing." *Id.* at ¶ 35.

The new notice also states in bold all-caps font that removal will follow failure to take action by returning the card or voting in any election during the following two election cycles. Plaintiffs contend that the use of the word 'may' on the prior notice "is vague and misleading." *Id.* at ¶ 36. The all-caps declaration "YOUR NAME WILL BE REMOVED FROM THE REGISTRATION LIST" belies that notion and moots Plaintiffs' argument.

Finally, the new confirmation notice includes the date at which registration for the upcoming election closes. This moots Plaintiffs' argument that there was no "clear deadline" on the prior notice. *Id.* at ¶ 37.

The attached declaration of Matthew Walsh, legislative counsel to the Secretary, confirms that the Secretary intends to issue a directive implementing the new notice card around June 10, 2016. Declaration of Matthew Walsh, ¶ 4 (attached hereto as Exhibit R). For this reason, nearly all of Count II is moot.

## 2. The Confirmation Notice Complies with the NVRA

Ohio's confirmation notice meets all the requirements of the NVRA, and the content of the card does not violate the NVRA. Therefore, this Court should dismiss those parts of Count II not covered under the mootness doctrine.

The requirement to enter identifying information if an individual changes addresses does not violate the NVRA; rather the NVRA requires this. Ohio's confirmation notice directs those who have changed addresses to enter identifying information that includes: (1) name, (2) address, (3) date of birth, (4) one form of identification, and (5) signature. Plaintiffs contend that the use of these fields, the five-fields requirement, violates the NVRA. Am. Compl. at ¶32. The NVRA, however, requires that confirmation notices contain "information concerning how the registrant can continue to be eligible to vote" if the individual changes residences to a place outside the registrar's jurisdiction. 52 U.S.C. § 20507(d)(2)(B). The five-fields requirement serves as this information. The NVRA does not prescribe the language a state must include. *See* 52 U.S.C. § 20507(d)(2) (articulating notice requirements). As such, the States have latitude in crafting their notice provision. Within this latitude, the form prescribed by the Secretary must also follow Ohio law. R.C. 3505.14(A) requires, in relevant part, that a "change of residence" form prescribed by the Secretary of State "shall include spaces for all of the following: (1) the voter's name; (2) the voter's address; . . . (4) the voter's date of birth; (5) the [voter's identification numbers or documentation];' (6) the voter's signature." Ohio's five-fields requirement falls within the latitude Congress granted to the States and comports with Ohio law.

In addition to conforming with the NVRA and state law requirements, the five-fields requirement advances policy benefits. The five-fields requirement appears on voter registration forms, absentee voting forms, and provisional voting forms. Declaration of Damschroder, ¶ 18. The consistent use of these fields across voting materials benefits voters and the election

administrators. *Id.* For voters, the five fields allow the notice to serve as a mechanism to update their voter registration when they move. *Id.* For administrators, the consistent use of five fields confirms the validity of a given form, while also streamlining the address update process for an individual who changes addresses. *Id.*

The five-fields requirement satisfies the NVRA, as it provides information concerning how registrants may update their registration and retain their eligibility to vote. Additionally, the use of five fields simplifies the registration update process for voters and election administrators. Because Ohio's 10-S notice does not violate the NVRA, Count II of Plaintiffs' Amended Complaint fails. Even for those claims not mooted by the Secretary's revised notice, there is no NVRA violation, because the confirmation card satisfies its intended purpose of "information concerning how the registrant can continue to be eligible to vote". 52 U.S.C. § 20507(d)(2).

## **H. Federalism, Anti-Commandeering, Constitutional Avoidance, Laches, and Impossibility also Control in Ohio's Favor**

### **1. Federalism**

While federalism is important every time federal law meets state policy, *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (acknowledging the "unique nature of state decisions that 'go to the heart of representative government'"), with respect to deciding the qualifications of electors, federalism is especially crucial. *See Marston v. Lewis*, 410 U.S. 679, 681 (1973) (the "Constitution is not so rigid" as to preclude a State's registration cut-off 50 days before an election). The United States Constitution, Article I Section 2, and the Seventeenth Amendment both reserve to the States the authority for determining elector qualifications:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

U.S. Const., Art. 1 § 2.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. Const., Amend. XVII.

This reservation of authority is separate from the “Time, Places and Manner” clause in Article I Section 4, which refers to “holding Elections.” In those areas, the Constitution says that Congress can regulate. U.S. Const., Art. I § 4. As to establishing the electorate, however, this belongs to the state governments. At least two separate Essays of the *Federalist* confirm this understanding of the Constitution — that Sections 2 and 4 of Article I of the Constitution are independent. Alexander Hamilton, in *The Federalist* No. 60, said of Article I, Section 4, that the national government’s “authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or may be chosen . . . are defined and fixed in the Constitution; and are unalterable by the [national] legislature.” In *The Federalist* No. 52, James Madison wrote that “the right of suffrage” is “fixed by the State Constitutions” and “is conformable to the standard already established, or which may be established by the State itself.” He wrote further that “To have left it open for the occasional regulation of Congress, would have been improper . . . .” Thus, both Hamilton and Madison believed that the Constitution reserved to the States the decision about who could vote.

Prior court decisions also confirm the importance of federalism when applying the NVRA and HAVA and that States have wide discretion to adopt their own voter list maintenance procedures. Perhaps the best example is Judge Posner’s decision for the Seventh Circuit in *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995). There, Illinois challenged the NVRA, arguing that it unlawfully forced Illinois to implement a federal regime and imposed heavy unreimbursed

costs on the State. *Id.* at 793. The district court ruled against Illinois, and while Judge Posner did not take issue with much of the lower court decision, he sharply criticized the district court's order requiring Illinois to designate "a chief state election official to be responsible for coordinating" compliance with the NVRA. *Id.* at 797. In the context of striking this portion of the district court's order, Judge Posner had many cautionary words about the NVRA. He warned that "[t]he 'motor voter' law [the NVRA] is an intrusion upon the operations of state government" and because of this, when applying the NVRA, courts must "exhibit an adequate sensitivity to the principle of federalism." *Id.* at 798.

As another example, in *Common Cause of Colorado*, plaintiffs challenged Colorado's voter registration statute requiring cancellation of new registrants if within 20 days of mailing the voter's registration notice is returned as "undeliverable." 750 F.Supp.2d at 1262. The court:

decline[d] to adopt the narrow reading of NVRA § 8(d) urged by Plaintiffs. Plaintiffs' reading interferes with Colorado's ability to confirm a registration applicant's initial residential eligibility and prevents it from moving voters who refuse or fail to confirm their initial eligibility out of 'active' status in SCORE for two federal election cycles. This interference is neither mandated by § 8 nor consistent with the NVRA's overall purposes.

*Id.* at 1263-64.

The principle of federalism weighs strongly in Ohio's favor. Federalism contradicts Plaintiffs' theory of federal micro-management that prohibits States from implementing reasonable clean-up procedures. Of course, Plaintiffs' theory is also untenable given that Ohio is following the procedures set forth in the NVRA and HAVA themselves.

## 2. Anti-Comandeeing and Constitutional Avoidance

While HAVA sets forth “minimum” standards to maintain voter registration rolls, HAVA also states that “[t]he specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.” 52 U.S.C. § 21085. Were this different, if flexibility were to be taken from the States, this would raise an anti-commandeering problem.

Under the principle of anti-commandeering, the federal government is unable to commandeer States to enact a federal regulatory regime. *Printz v. United States*, 521 U.S. 898, 935 (1997). In *Printz*, the Supreme Court invalidated a federal law that obligated state and local officials to conduct background checks on gun purchases and held that “[t]he Federal Government may neither issue directives requiring States to address particular problems, nor command the States’ officers, of those of their political subdivision, to administer or enforce a federal regulatory program.” *Id.* Likewise, in *New York v. United States*, 505 U.S. 144, 147 (1992), the Supreme Court held that while Congress can encourage States to dispose of radioactive waste within their borders, it cannot *compel* them to do so. *Printz* and *New York* make clear that the federal government is not able to mandate a one-size-fits-all set of rules for voter list maintenance.

Finally, under the canon of constitutional avoidance, courts interpret a statute with an ambiguous scope in a manner that will avoid a constitutional question. *Davet v. Cleveland*, 456 F.3d 549, 554-55 (6th Cir. 2006); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). This canon applies to election law statutes. See *Shelby County, Alabama v. Holder*, 133 S.Ct. 2612, 2631 (2013); *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), superseded by U.S. Const. Amend XXVI. Here, if there is any ambiguity in the NVRA and HAVA, that ambiguity should be interpreted in favor of Ohio and in favor of flexible election administration.

### 3. Laches and Impossibility

The Ohio Supplemental Process has been in place for 22 years, since 1994. Wolfe Declaration, ¶ 5. Plaintiffs never questioned or challenged the Ohio Supplemental Process before this lawsuit. Laches bars their claims. *See Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, 1476 (10<sup>th</sup> Cir. 1990) (holding that plaintiff's 17-year delay in bringing a constitutional challenge to a zoning ordinance barred the claim); *see also Fouts v. Harris*, 88 F.Supp.2d 1351, 1353-55 (S.D.Fla. 1999) (holding that a 5-year delay in challenging a congressional redistricting plan prevented plaintiffs from challenging the plan based on laches). If 17-year and 5-year delays qualify for laches, certainly a 22-year delay does. Moreover, implementing significant changes to long-standing clean-up procedures in an election year would cause confusion. *See Purcell*, 549 U.S. at 4-5 (2006) (recognizing court orders regarding elections “can themselves result in voter confusion” and that this risk increases as an “election draws closer”); *see also Hindel v. Husted*, No. 2:15-cv-3061, 2016 WL 2735935, \*8 (S.D. Ohio May 11, 2016) (Smith, J.) (noting that plaintiffs failed to offer reason for delaying until 2015 a challenge to receive an election-related accommodation that plaintiffs knew of in 2012).

In addition, some of the relief sought by Plaintiffs — automatically “re-registering” any voters removed from the rolls who purportedly have not relocated — would (1) violate the Ohio Constitution (Ohio Const. Art. V, § 1) (stating that voters must be registered 30 days before an election to be qualified to vote); and (2) be impracticable or impossible because not all counties would have the data necessary to comply (Damschroder Dep. 94:16-95:20). For these reasons as well, Plaintiffs’ claims fail.

**IV. CONCLUSION**

Ohio's 22-year-old voter list maintenance procedures comply with federal law. The Secretary of State of Ohio requests judgment in his favor.

Respectfully submitted,

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*s/ Steven T. Voigt*

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 24, 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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