Case No. 18-3984

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants

v.

FRANK LAROSE, Secretary of State of Ohio

Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of Ohio
Eastern Division

BRIEF OF APPELLANTS

Stuart C. Naifeh
Naila Awan
Brenda Wright
Dēmos
80 Broad St, 4th Fl.
New York, NY 10004
212-485-6055
snaifeh@demos.org

Chiraag Bains
Dēmos
740 6th Street NW, 2nd Floor
Washington, DC 20001
202-864-2746
cbains@demos.org

Freda J. Levenson
Elizabeth Bonham
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
216-472-2220
flevenson@acluohio.org

Richard Saphire
Cooperating Attorney, ACLU of Ohio
109 North Main St., #1205
Dayton, OH 45402
937-229-2820
rsaphire1@udayton.edu

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-3984 Case Name: A. Philip Randolph Institute v. Husted

Name of counsel: Stuart Naifeh

Pursuant to 6th Cir. R. 26.1, Ohio A. Philip Randolph Institute
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 15, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Stuart Naifeh
80 Broad Street, Fourth floor
New York, NY 10004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-3984 Case Name: A. Philip Randolph Institute v. Husted

Name of counsel: Stuart Naifeh

Pursuant to 6th Cir. R. 26.1, Northeast Ohio Coalition for the Homeless
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 15, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Stuart Naifeh
80 Broad Street, Fourth floor
New York, NY 10004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-3984 Case Name: A. Philip Randolph Institute v. Husted

Name of counsel: Stuart Naifeh, Demos

Pursuant to 6th Cir. R. 26.1, Larry Harmon
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 30, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Stuart Naifeh
80 Broad Street, Fourth floor
New York, NY 10004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REQUEST FOR ORAL ARGUMENT

Given the significant importance of the issues at stake in this case, Appellants Ohio A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon respectfully request oral argument, which they believe would aid the Court in deciding the issues before it.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the action below under 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 as to the District Court's final judgment.

ISSUES PRESENTED

1. Did the District Court err in concluding that the confirmation notice form used in Ohio until 2016 to begin the process of removing voters under the Supplemental Process complied with the requirements of Section 8(d)(2) of the National Voter Registration Act of 1993 ("NVRA") and that the removal of registered voters from Ohio's registration rolls on the basis of that notice was lawful under the NVRA?

2. Did the District Court abuse its discretion in denying Appellants' request for a permanent injunction?

INTRODUCTION

This case is about whether Ohio must comply with the federal voting rights protections enshrined in the National Voter Registration Act of 1993 ("NVRA"). The NVRA requires that before a state may remove a voter from the registration rolls on the ground that the person has changed residence, it must give that voter notice and an opportunity to confirm or correct the state's information. To ensure voters understand that their right to vote is at stake and have the information they need to be able to continue exercising it, the statute meticulously details the form and contents of the notice that must be sent to begin the removal process. From 1994 until last year, the notices used in Ohio when removing voters under the state's Supplemental Process did not satisfy the NVRA's requirements. Prescribed by Appellee, the Ohio Secretary of State ("Appellee" or the "Secretary"), Ohio's notice failed to inform voters of the deadline for responding or the consequences of failing to do so—specifically, that they would be removed from the voter rolls if they did not respond and did not vote in the subsequent four-year period—and the notice did not include information for voters who had moved away about how to re-register. In addition, voters who had not moved and merely needed to confirm that fact were required by the notice to effectively re-register to preserve their ability to vote. Using this flawed notice, Ohio has purged innumerable voters from the rolls under the Supplemental Process, with as many as 275,000 having been cancelled just this month.

The District Court erroneously found that these removals did not violate the NVRA. Its decision cannot be reconciled with the text and purpose of the statute. Congress mandated that the notice contain certain specific information to prevent voters who remain eligible from falling off the rolls, and it sought to preclude states from requiring voters to periodically re-register. Neither state officials nor courts may substitute their own judgment of what constitutes adequate notice for that expressly adopted by Congress.

To protect the fundamental right to vote of the hundreds of thousands of Ohioans who have been or will be removed from the voter rolls based on notices that are plainly out of compliance with federal law, this Court should vacate the District Court's judgment and remand the case with instructions to enter judgment in favor of Appellants Ohio A. Philip Randolph Institute ("APRI"), Northeast Ohio Coalition for the Homeless ("NEOCH"), and Larry Harmon on the legality of Ohio's notice and, further, to issue an injunction ordering reinstatement of the unlawfully purged voters to the rolls, prohibiting further removals on the basis of NVRA non-compliant notices, and requiring that any notice used to begin the Supplemental Process in the future adhere to the requirements of the NVRA.

STATEMENT OF THE CASE

A. Ohio's Confirmation Notice

In 1994, Ohio established a roll-maintenance procedure known as the Supplemental Process to identify people who "may have moved" and become

ineligible to vote in their current voting district. *See, e.g.*, Directive 94-36, RE38-1, PAGEID#286-90. Pursuant to the Supplemental Process, any registered voter who does not vote at least once every two years is targeted for removal from the voter registration rolls. *See, e.g.*, Directive 2015-09, RE42-2, PAGEID#1588. These voters are sent a confirmation notice—known when this litigation began as "SOS Form 10-S"[1] (hereinafter "Notice")—prescribed by the Secretary. *E.g.*, 2015 Notice, RE42-13, PAGEID#1702; Ohio Rev. Code § 3503.21(B)(2). The Notice includes a response card that a voter may use to confirm or update her residence address. If a voter does not return the card and then does not vote or engage in certain other activity in the subsequent four-year period, the voter's name is removed from the registration rolls. *See* Directive 2015-09, RE42-2, PAGEID#1587-91.

Ohio's Notice has been "revised on a relatively frequent basis," *A. Philip Randolph Institute v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016) ("*APRI I*"),[2] but until the summer of 2016, the content of every Notice used to begin the Supplemental Process was deficient in three specific ways.

First, none of the pre-2016 Notices accurately informed registrants of the deadline by which they needed to respond to avoid adverse consequences. In Ohio,

[1] Ohio's confirmation notice is now called SOS Form 10-S-1. Defendant's Third Merits Brief, RE56, PAGEID#22753; *see also* 2016 Notice, RE56-2, PAGEID#22821.

[2] *See, e.g.*, 2015 Form, RE42-13, PAGEID#1702; 2013 Form, RE42-14, PAGEID#1704; 2011 Form, RE42-15, PAGEID#1706-07; 2007 Form, RE42-16, PAGEID#1709-10.

the relevant deadline is 30 days before Election Day, the state's voter registration deadline. Ohio Rev. Code § 3503.06(A); 52 U.S.C. § 20507(a)(2)(B), (d)(2)(A). Prior to 2011, the Notice's instructions stated, "Please detach, complete, and return the postcard at the bottom no later than _____." 2007 Notice, RE42-16, PAGEID#1709. Presumably, county boards of elections, responsible under Ohio law for sending the Notices, would fill in the blank with a specific date. But although Appellee routinely issued directives providing counties with detailed instructions on how to conduct the Supplemental Process, including the deadline for Notices to be mailed and the deadline for registrants to be removed, these directives gave counties no guidance about what date to place in the blank. *E.g.*, Directive 2011-15, RE42-5.

In 2011, the Notice was amended. Voters who *had* moved were told that if they returned the card by the voter registration deadline, their registrations would be updated. Voters who *had not* moved, however, were instructed to return the card but were given no deadline at all for doing so. 2011 Notice, RE42-15, PAGEID#1705. From 2013 through 2015, the Notice included only the vague and misleading instruction that voters must take "immediate action." *E.g.*, 2015 Notice, RE42-13, PAGEID#1702.

Second, the pre-2016 Notices never adequately informed voters of the consequences of failing to respond. The Notices instead stated that the voter "may" be removed if they did not respond or vote in the subsequent four-year period,

suggesting—inaccurately—that there were circumstances in which a voter who failed to take action *would not* be removed.

The 2011 Notice compounded the inadequacy of this warning by placing it where voters were unlikely to see it. The portion of the 2011 Notice designated "instructions" asked voters to return the confirmation card but failed to alert them to the possibility that not doing so could result in their removal. 2011 Notice, RE42-15, PAGEID#1706. Because of this omission in the instructions, only a registrant who read to the bottom of the return card itself would see the wording "NOTE: If this card is not returned and you do not vote [by the second subsequent general election] then your name *may* be removed from the voter registration list." *Id.*, PAGEID#1707 (emphasis added).

The 2013 and 2015 Notices were likewise flawed. They informed voters targeted for removal under the Supplemental Process that the Notice had been sent because the voter had not "cast a ballot, signed a petition, etc." *E.g.*, 2015 Notice, RE42-13, PAGEID#1702. It then instructed voters who had not moved or had moved within Ohio (and who therefore remained eligible to vote) that their registration "may be cancelled" if they "do not [complete, sign and return the confirmation card] and do not vote." *Id.*

Further aggravating the uncertainty created by the Notice's language, from 2013 to 2015, the Notices referred voters to a website as an alternative to returning the card: www.MyOhioVote.com/moved.htm. *E.g.*, 2015 Notice, RE42-13,

PAGEID#1702. But while a voter whose address *had* changed could use the site to update their registration and avoid removal under the Supplemental Process, the site did not allow voters to confirm that their address had *not* changed. A voter attempting to use the site without providing a new address was instructed to "Please make a change or click Cancel to exit!"—incorrectly suggesting no action was required to maintain an active registration unless the voter had actually changed residence. Bonham Decl., RE39-4, PAGEID#1447.[3]

Third, the Notice did not provide information on how a voter registered in Ohio could remain eligible to vote if the person had moved to another state.

More recent Notices were also flawed in a fourth way: They required recipients to fill out the same "five fields" of information—name, address, date of birth, proof of identity, and signature under penalty of perjury—that are required on Ohio's voter registration form. 2015 Notice, RE42-13, PAGEID#1702; 2013 Notice, RE42-14, PAGEID#1704; 2011 Notice, RE42-15, PAGEID#1706-07. Thus, registered Ohio voters who had not changed residence or who had moved within the same county were required to perform the functional equivalent of re-registering in order to remain on the voter rolls.

[3] In the middle of briefing on the merits in the District Court in 2016, Appellee modified the website to allow registrants to confirm an existing address. Def. Third Merits Brief, RE56, PAGEID#22753 n.9.

In the summer of 2016, on the final day of summary judgment briefing in this case, Appellee issued a new Notice, re-designated SOS Form 10-S-1 (the "2016 Notice"), that corrected three of the four issues outlined above. 2016 Notice, RE56-2, PAGEID#22821. Specifically, the 2016 Notice included the correct deadline for responding, informed registrants that they "will be removed" if they fail to take appropriate action and allowed registrants who had not moved to confirm their address simply by signing the form. *Id.* However, "the new form still lack[ed] information on how persons who have moved to another state can register to vote in their new state." *APRI I*, 838 F.3d at 704. This still-deficient form was sent to Ohio voters in the summer of 2016. Directive 2016-20, RE132-3, PAGEID#24042. Only in the summer of 2018 did Appellee finally issue a Notice that corrected the remaining issue. Directive 2018-20, RE132-4, PAGEID#24049; *see also* 2018 Notice, RE132-5, PAGEID#24055.

B. Past and Ongoing Purges of Voters Who Received the Invalid Pre-2016 Confirmation Notice

Ohio has purged countless voters from the rolls who were sent defective confirmation notices, and it is continuing to do so. Before this litigation began, the most recent of these purges had occurred in the summer of 2015, when the state purged hundreds of thousands who had been sent deficient Notices in 2011. Sealed Bell Decl., RE45, PAGEID#1822-25, ¶¶ 13, 15, 17-19. During this litigation, additional removals were enjoined pursuant to orders of the District Court and

directives issued by Appellee. *E.g.*, Order, RE118, PAGEID#23915, ¶ 5; *see also* Directive 2018-22, RE132-6, PAGEID#24057 n.4. But in November 2018, the Secretary issued a directive resuming removals of voters who had received defective notices in 2013 and 2014. Directive 2018-39 (Nov. 20, 2018), *available at* https://www.sos.state.oh.us/globalassets/elections/directives/ 2018/dir2018-39.pdf; *see also* Directive 2013-10, RE42-4, PAGEID#1063-64, 1607; Directive 2014-14, RE42-3, PAGEID#1595-96, 1599. Pursuant to this directive, these registrants were removed from the voter rolls in January 2019.[4] Registrants who were sent defective notices in 2015 and 2016 are scheduled to be purged from the voter rolls in the summers of 2019 and 2020, respectively. Directive 2015-09, RE42-2, PAGEID#1588, 1591; Directive 2016-20, RE132-3, PAGEID#24042-46.

C. Prior Proceedings

On April 6, 2016, Appellants filed suit in the U.S. District Court for the Southern District of Ohio against the Ohio Secretary of State. Complaint, RE1, PAGEID#1-17. On May 17, 2016, they filed an Amended Complaint, asserting two causes of action. Amended Complaint, RE37, PAGEID#222-41. First, Appellants alleged that Ohio's practice of initiating voter purges by targeting people who had failed to vote in recent elections violated the NVRA. *Id.*,

[4] The Secretary's directive instructed counties that, no later than December 12, 2018, they must send registrants set to be removed in January 2019, a final, forwardable mailing, advising them that their registration would be cancelled unless they confirmed or updated their information within 30 days. Directive 2018-39 (citing SOS Notice 255-A-3).

PAGEID#236-37. Second, Appellants alleged that the confirmation notice Ohio sent to registrants targeted by this practice failed to meet the requirements of Section 8 of the NVRA. *Id.*, PAGEID#237-38. Only the second cause of action is at issue in this appeal.

In the 2016 District Court proceedings, Appellee vigorously defended the use of non-voting to trigger removal pursuant to the Supplemental Process but did *not* argue for the validity of the Notice. Instead, on the final day of merits briefing before the District Court, Appellee issued the 2016 Notice that corrected three of the four issues outlined above and argued that this change rendered the second cause of action moot. Def. Third Merits Brief, RE56, PAGEID#22751-54; *see also APRI I*, 838 F.3d at 713; *see also id.* at 703-04 (noting that "the new form still lack[ed] information on how persons who have moved to another state can register to vote in their new state"). The District Court agreed and, on June 29, 2016, entered judgment for Appellee. Order, RE66, PAGEID#23003-26. Appellants appealed. Notice of Appeal, RE68, PAGEID#23029-30.

On September 23, 2016, this Court reversed the District Court's judgment. Regarding count two, this Court held that the 2016 Notice did not render moot Appellants' remaining challenges to the pre-2016 Notices because Appellee's voluntary correction of the notice would not prevent future revisions that violated the NVRA and had not corrected the harm Appellants alleged had been inflicted on voters purged based on the old Notices. *APRI I*, 838 F.3d at 713. This Court also

held that the 2016 Notice violated the NVRA because it did not provide information on how an individual registered to vote in Ohio could remain eligible to vote if the person moved to another state. *Id.* at 714-15. With respect to count one, this Court reversed the District Court's judgment regarding the use of nonvoting as a trigger to begin the Supplemental Process for removal. *APRI I*, 838 F.3d at 707.

On remand, in an order entered on October 19, 2016, the District Court directed the state to count provisional ballots cast in the November 2016 Presidential Election by voters purged under the Supplemental Process, in accordance with a procedure that has become known as the "APRI Exception," described in greater detail below. Order, RE89, PAGEID#23529-50. Appellee issued a directive implementing this procedure that same day. Notice of Compliance, RE90, PAGEID#23551-53.

After the November 2016 election, the parties resumed litigation concerning remedial issues. Appellee also filed a petition for writ of certiorari solely on the first cause of action: the question of the legality of the non-voting trigger for the Supplemental Process. Appellee once again chose not to defend the Notice and did not seek Supreme Court review of this Court's rulings in connection with the second cause of action. On May 30, 2017, the Supreme Court granted Appellee's petition. After the grant of certiorari, the parties stipulated to stay further District Court proceedings, suspend the operation of the Supplemental Process, and

continue implementing the APRI Exception in all elections pending the Supreme Court's decision in the case. Order, RE118, PAGEID#23915-16.

The Supreme Court issued its closely divided decision on June 11, 2018. The Court upheld Ohio's Supplemental Process with respect to its use of nonvoting as a trigger to begin the confirmation process provided by Sections 8(c) and (d) of the NVRA. *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842-46 (2018) ("*Husted*"). While so holding, the Supreme Court majority noted that the NVRA "prescribes requirements that a State must meet in order to remove a name on change-of-residence grounds," and expressed the view that "[t]he most important of these requirements is a prior notice obligation." *Id.* at 1838. The Court cautioned that the notice must contain "statutorily prescribed content," and declared that, "[i]f the State does not send such a card or otherwise get written notice that the person has moved, it may not remove the registrant on change-of-residence grounds." *Id.* at 1838-39. And although the Court stated that "Ohio's Supplemental Process follows subsection (d) to the letter," the Court was describing the structure of Ohio's process, not the content of the Notice. *Id.* at 1842. Neither the facts concerning the Notice's content nor the legal question of the Notice's compliance with the NVRA were before the Supreme Court.

Upon remand to the District Court, the parties agreed to lift the stay and dissolve the order halting the Supplemental Process and mandating the APRI Exception, because the order by its terms was effective only until the Supreme

Court issued its decision. Order, RE122, PAGEID#23984-85. Appellants then initiated negotiations concerning the appropriate remedy for the second cause of action. On July 31, 2018, Appellee agreed to entry of an order requiring the use of the APRI Exception for the Special Election for Ohio's 12th Congressional District. Joint Stipulation and Order, RE126, PAGEID#23992-93.

Following the Special Election and after an unsuccessful mediation effort, the parties returned to the District Court and proceeded toward a final decision on the merits on an expedited schedule. Appellants filed their motion for summary judgment on September 14, 2018. Mot. for Summary Judgment and Permanent Injunction, RE132, PAGEID#24003-28. Appellee did not file a motion, but in opposition to Appellants' motion, he requested that the District Court dismiss the second cause of action and enter judgment in his favor. Defendant's Merits Brief, RE133, PAGEID#24090. Briefing was completed on October 5, 2018. Plaintiffs' Reply, RE139, PAGEID#24621-33. On October 10, 2018, the District Court entered partial summary judgment for Appellee, ruling that the pre-2016 Notice complied with Section 8(d) of the NVRA, with the exception of the one issue as to which this Court had already found an NVRA violation. Opinion and Order, RE140, PAGEID#24730-56. The District Court reasoned that Section 8(d) provides states with significant leeway in determining the content of the Notice, and specifically that (1) Ohio did not need to advise voters of a specific deadline for responding to the Notice; (2) Ohio satisfied Section 8(d)'s requirement of

warning voters that they "will" be removed from the rolls if they fail to respond by instead warning them that they "may" be removed for not responding; and (3) Section 8(d) does not prevent Ohio from requiring voters who have not moved to provide all information that would be necessary to make a new registration. *Id.*, PAGEID#24746-49, 24751-52. Accordingly, the District Court denied any relief for qualified Ohio voters who had been purged from the registration rolls after receiving the pre-2016 Notices. Appellants filed a Notice of Appeal from the judgment and a motion for an injunction pending appeal in the District Court, which the District Court denied. Motion for Injunction Pending Appeal, RE143, PAGEID#24761-70; Order, RE144, PAGEID#24771-73.

With the November 2018 election approaching, on October 15, 2018, Appellants filed an emergency motion for an injunction pending appeal in this Court. This Court granted the motion in part and denied it in part. *A. Philip Randolph Institute v. Husted*, 907 F.3d 913 (6th Cir. 2018) ("*APRI II*"). This Court ruled that Appellants had a likelihood of success on merits of their claim that the Notice violated the NVRA by not informing registrants that their registration "will" be cancelled. 52 U.S.C. § 20507(d). As the Court explained:

> A statement that the individual "may be removed" is not a statement that the individual "will be removed" and a confirmation notice with such language appears at least in tension with, and likely in violation of, the NVRA. The district court's analysis with respect to this claim misunderstands the statutory scheme, and Plaintiffs have at least a reasonable (if not a substantial) likelihood of success on the merits with respect to this issue.

APRI II, 907 F.3d at 920.

When considering the emergency injunction motion, this Court did "not conclusively decide the merits of" Appellants' claim that pre-2016 Notices also violated the NVRA by requiring registrants to provide the same information required for an initial voter registration application.[5] *Id.* at 919. While stating that it is "[a]rguably . . . not the functional equivalent of being purged from the rolls if a confirmation notice informs a registrant that he or she may remain on the rolls either by effectively re-registering *or* by voting in an election in the next four years," this Court invited Appellants "to raise additional arguments in their appeal of the district court's Opinion and Order." *Id.* at 919.

In determining what relief was appropriate, this Court found that Appellants had met the other requirements for an injunction pending appeal, including that Appellants would likely suffer irreparable harm in the absence of relief, that Appellees would not suffer irreparable harm if relief were granted, and that the public interest would be served by injunctive relief. *Id.* at 921-22. Based on this determination, this Court ordered Appellee to continue the APRI Exception for the November 2018 General Election, while this appeal was pending. *Id.* at 922-23. Appellants' request for injunctive relief to prevent Ohio from removing voters who

[5] This Court did not reach the merits of Appellants' claim that the Notice's failure to accurately inform voters of the return deadline violated the NVRA, stating that a decision on the issue was not necessary for a ruling on the emergency injunction motion. *APRI II*, 907 F.3d at 919 n.6.

received defective notices from the rolls post-election was, however, denied. This Court reasoned that this relief was not necessary because the courts could remedy any improper removals through post-election relief. *Id.* at 923.

D. Voters' Usage of APRI Exception

The APRI Exception required county boards of elections ("Boards") to count the provisional ballots cast by voters who had been purged under the Supplemental Process between 2011 and 2015 if the voters:

> (1) cast the ballot in person at their county's early voting location or at the correct polling location on Election Day;
>
> (2) still resided in the same county where they were previously registered; and
>
> (3) had not become ineligible by reason of felony conviction, mental incapacity, or death subsequent to the date on which their name was removed from the rolls.

Opinion and Order, RE89, PAGEID#23546-48. The APRI Exception also required Boards to mail information to purged voters who requested vote-by-mail ballots explaining that they must vote in person. *Id.*, PAGEID#23549. Additional orders, which became part of the APRI Exception, established exceptions to the in-person voting requirement for people who could not get to the polls by reason of disability or illness, or because they were uniformed or overseas citizens. Order, RE92, PAGEID#23566; Order, RE93, PAGEID#23567-68.

The APRI Exception—used in every federal, state, and local election held in Ohio between November 2016 and November 2018—has been instrumental in

preventing the disenfranchisement of eligible voters who were sent pre-2016 Notices and were subsequently purged from Ohio's voter rolls. Thus far the Exception has protected the right to vote of at least 8,570 eligible Ohio voters. Damschroder Decl., RE133-4, PAGEID#24119-70 (Attachment A).[6] In November 2016, it was thanks to the APRI Exception that 7,515 eligible voters had their votes counted. *Id*., PAGEID#24169. Notwithstanding the passage of time and the outreach the Secretary has conducted to unregistered voters, *e.g*., Damschroder Decl, RE133-4, PAGEID#24113-14, ¶¶ 7.xii-xiv, an additional 772 individuals—some of whom had not voted in 14 years—had their votes counted in last November's election solely because this Court reinstated the APRI Exception. November 2018 Provisional Supplemental Report.

As the Secretary frequently notes: "A Single Vote Makes All the Difference." Secretary Husted: A Single Vote Makes All the Difference, RE139-5, PAGEID#24725-26. In fact, according to Appellee's June 2018 report in the last five years, 199 Ohio races or issues have been decided by one vote or were tied, and in 2018 alone, 59 Ohio races were decided by one vote or were tied. *Id.*

[6] Data regarding the number of voters whose provisional ballots were cast under the APRI Exception in November 2018 is available on the Appellee's website. Ohio Secretary of State, Provisional Supplemental Report for the November 6, 2018 General Election, *available at* https://www.sos.state.oh.us/globalassets/elections/2018/gen/2018-11-06_provisionalsupplemental.xlsx (last visited Jan. 31, 2019) (hereinafter "November 2018 Provisional Supplemental Report").

SUMMARY OF ARGUMENT

The District Court erred as a matter of law in concluding that the Notices used in the Supplemental Process prior to 2016 complied with the NVRA. The NVRA lays out in detail certain contents that must be in the notice sent to a registered voter to begin the process of removing the voter from the registration rolls on the ground of a change in residence. 52 U.S.C. § 20507(d). Specifically, the notice must allow the voter who has not moved or has moved within the same registrar's jurisdiction to confirm her registration simply by "stat[ing] his or her current address." *Id.* § 20507(d)(2). The notice must also inform voters that they will be removed from the rolls unless they respond to the notice or vote in any election in the subsequent two federal election cycles; if there are other actions a voter can take to keep from being removed, the notice must spell out what those actions are. *Id.* The notice must notify voters of the deadline for responding, which under the NVRA is the state's voter registration deadline for the next federal election occurring after the date of the notice. *Id.* And the notice must inform voters who have moved out of the registrar's jurisdiction, including those who have moved out of state, how they can continue to be eligible to vote. *Id.* Unless the state sends a notice satisfying these requirements, it may not remove the voter from the rolls on change of address grounds.

Until 2016, Ohio's Notice met none of these requirements. The pre-2016 Notice failed to adequately inform voters that failure to respond "will" lead to

removal unless the voter took other specific actions. Instead, the Notice simply told voters they "may" be removed without accurately and completely explaining what actions would or would not lead to removal. The Notice also failed to inform voters of the deadline for responding; different versions gave them either no information or inaccurate information about when a response was required. In addition to eventually leading to removal, failure to respond by the deadline could result in voters being required to cast a provisional ballot. Finally, the Notice required voters who had not moved and simply needed to confirm their existing address to fill out the equivalent of a new voter registration form to ensure that their registrations remained active. These faults in the Notices violated the NVRA. As a result, all voters removed under the Supplemental Process on the basis of these Notices were removed unlawfully. Likewise, any future removals based on Notices sent through 2015 will also be unlawful.

Additionally, the District Court's denial Appellants' request for a permanent injunction, based as it was on the District Court's erroneous view of the NVRA's requirements, was an abuse of discretion. *See Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir. 1997). When viewed in light of the correct legal standard, Appellants' entitlement to a permanent injunction is plain. Without an injunction, thousands of Ohio voters will be irreparably harmed by being denied their fundamental right to vote, as evidenced by the number of voters who continue to have their votes counted under the APRI Exception, and Appellants APRI and

NEOCH will be harmed by continuing to have to expend resources registering voters who were improperly purged on the basis of the unlawful Notices. Because the loss of the right to vote cannot be compensated with money damages and because the NVRA expressly authorizes injunctive relief, Appellants have no adequate remedy at law. The loss of the right to vote far outweighs any possible harm to Appellee from reinstating improperly purged voters. And the public interest favors an injunction that would protect the fundamental right to vote and ensure that as many eligible Ohioans as possible can exercise it. Appellants are therefore entitled to a permanent injunction.

To fully remedy the harm caused by Appellee's unlawful removal of voters, an injunction is required that would (i) reinstate voters purged under the Supplemental Process based on pre-2016 Notices, (ii) prohibit further purges based on those Notices, and (iii) enjoin the future use of any Notice that does not comply with the NVRA's requirements.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Cass v. City of Dayton*, 770 F.3d 368, 373 (6th Cir. 2014). A lower court's decision to deny a permanent injunction is subject to differing standards of review: "Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed de novo, and the scope of injunctive relief is reviewed for an abuse of

discretion." *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1046 (6th Cir. 2018) (internal citations and quotation marks omitted).

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT OHIO'S PRE-2016 NOTICES COMPLIED WITH SECTION 8 OF THE NVRA.

Section 8 of the NVRA permits states to remove voters from the registration rolls on the ground that the voter has changed residence only in accordance with specific requirements and safeguards. 52 U.S.C. § 20507(a)(4)(B), (b)-(f). "The most important of these requirements is a prior notice obligation" set forth in Section 8(d). *Husted*, 138 S. Ct. at 1838 (citing 52 U.S.C. § 20507(d)). Under Section 8(d)'s prior notice requirement, states "may not remove a registrant's name on change-of-residence grounds unless either (A) the registrant confirms in writing that he or she has moved or (B) the registrant fails to return a [notice] containing statutorily prescribed content" and then fails to vote during the next two federal election cycles. *Id.* at 1838-39 (citing 52 U.S.C. § 20507(d)(1)).

The purpose of the notice requirement is to alert voters that their voter registration is in jeopardy and provide them an opportunity to confirm or update their address. To serve this purpose, the notice "must explain what a registrant who has not moved needs to do in order to stay on the rolls" and, "for the benefit of those who have moved," the notice must explain "how the registrant can continue to be eligible to vote." *Id*. at 1839 (internal quotations omitted).

The required content of the notices is set out with specificity in Section 8(d)(2):

> (2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:
>
> (A) 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 not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal 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, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.
>
> (B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

52 U.S.C. § 20507(d)(2). In addition, Section 8(f) of the NVRA provides that when a registrar receives notification of an address change,

> In the case of a change of address, for voting purposes, of a registrant to another 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 subsection (d).

Id. § 20507(f).

Thus, to satisfy Section 8(d)(2), a notice sent to begin the removal process must meet several specific requirements. The notice must include a return card that

allows voters to notify the voter registrar of their current address. If a voter uses the card to report a new address within the same registrar's jurisdiction, then Section 8(f) of the NVRA provides that "the registrar shall correct the voting registration list accordingly" and may not remove the voter's name from the rolls. *Id*. § 20507(f); *see also id.* § 20507(c)(1) (if Postal Service records indicate a voter has moved within a jurisdiction, the registrar must update the voter rolls and notify the voter of the change). And of course, Section 8(f) must also be understood to preclude removal of a voter who uses the Section 8(d) return card to confirm she continues to reside at the *same* address. The return card requirement, together with Section 8(f)'s prohibition on purging voters who move within a jurisdiction, reflects Congress's intent to preclude states from requiring voters who remain eligible within a jurisdiction to repeatedly re-register. *See, e.g.*, S. Rep. No. 103-6 (1993), at *34 (Section 8(f)'s restriction on removing voters who move within a jurisdiction also prohibits states from requiring such voters to re-register); *see also id.* *18 (list maintenance program must not "require [voters] to needlessly re-register"); *id.* at *2 (NVRA seeks "to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction"). Consistent with the language of 8(d) and the Congressional purpose, reflected in Section 8(f), of preventing states from imposing periodic re-registration requirements, the notice cannot condition the continued eligibility of voters who have not moved or who have moved within the

same jurisdiction on providing any information other than their current address. 52 U.S.C. § 20507(d)(2), (f).[7]

In addition, a confirmation notice under Section 8(d)(2) must inform registrants of three critical pieces of information. First, the notice must inform voters that, if they have not moved outside of their election jurisdiction, they should return the card before the registration deadline for the next election to avoid having to provide confirmation of address at the polls. *Id.* § 20507(d)(2)(A). Second, the notice must notify voters of the consequences of failing to respond—*i.e.*, that they "*will* be removed" from the voter rolls if they do not return the card or vote during the next two federal election cycles, *id.* (emphasis added)—and it "must explain what a registrant who has not moved needs to do in order to stay on the rolls." *Husted*, 138 S. Ct. at 1839. Third, the notice must explain how voters can ensure they are eligible to vote if they have moved to another jurisdiction within the state or to another state. 52 U.S.C. § 20507(d)(2)(B).

Section 8(d)(2)'s use of the phrase "to the following effect" indicates that Congress set forth the information that must be included while allowing states to use state-specific technical wording where necessary and not inconsistent with the

[7] In addition, interpreting Section 8(d)(2) to allow states to require information from a voter who moves locally other than the voter's address would produce the absurd result that when the registrar learns of a voter's local address change through the Postal Service, it must update the voter rolls and may not require additional information or re-registration, 52 U.S.C. § 20507(c)(1), but when the registrar learns of the address change directly from a voter in response to a Section 8(d)(2) notice, the registrar may demand additional information for the voter to stay on the rolls.

statute. For example, in Ohio, the relevant "registrar's jurisdiction" is the county, but that is not the case in all states. *E.g.*, La. Stat. § 18:51 (voter registration administered at the parish level). Section 8(d)'s "to the following effect" language thus permits Ohio to use the term "county" in its confirmation notice rather than the legalistic phrase "registrar's jurisdiction." *See*, *e.g.*, H.R. Rep. No. 103-9 (1993), at *17 ("The term 'registrar's jurisdiction,' as used … with regard to the 'affirmation' or 'confirmation' requirements, is a term of art for the purpose of this Act and is not intended to dictate to the States their actual administrative structure for the purpose of registering voters."). Likewise, Congress recognized that some information required to be in the notice, such as the voter registration deadline, varies from state to state. *See* 52 U.S.C. § 20507(d)(2). The phrase does not, as Appellee has argued, authorize states to provide inaccurate information or to omit or alter content that the statute prescribes in detailed terms.

If the state does not send a confirmation notice in the required form and containing the required content or otherwise get written notice from the voter confirming a change of residence, "it may not remove the registrant on change-of-residence grounds." *Husted*, 138 S. Ct. at 1839; *see* 52 U.S.C. § 20507(d)(1). As explained below, until Appellee issued the 2016 Notice in response to this litigation, Ohio's Notices failed to satisfy any of the aforementioned requirements, rendering removals predicated on these Notices unlawful.

A. Ohio's Pre-2016 Notices Did Not Contain the Prescribed Content.

Ohio's pre-2016 Notices failed to conform to the NVRA's requirements in several ways. Each of these defects on its own rendered the Notices invalid under the NVRA and made the removal of any voter predicated on them unlawful. Taken together and in combination with other misleading information contained in the Notices, these defects rendered the Notices wholly inadequate to inform voters of the consequences of failing to respond, how a voter who had not moved could avoid removal, and whether and when a response was required.

1. *The Pre-2016 Notices Did Not Adequately Inform Voters of the Consequences of Failing to Respond.*

Prior to 2016, Ohio's Notice failed to intelligibly notify voters of the consequences of failing to respond. It did not, as the NVRA requires, explain the circumstances in which the voter's registration "will" be cancelled or what actions a registrant could take other than voting to keep from being removed. Instead, every Notice used since at least 2007 told voters that they "may" be removed from the rolls. None of these Notices adequately explained the circumstances that would lead to removal or the actions available to voters to avoid removal.

A statement that the voter "may be removed" is not a statement that the individual "will be removed." At minimum, this language fails to put voters on notice of the urgency of taking action, and it could be understood to mean that no action is required at all. By failing to notify voters that they "will be removed"

unless they take specific actions, Ohio's pre-2016 Notices violated the NVRA, and removals based on those notices where therefore unlawful. 52 U.S.C. § 20507(d)(2).

In addition to violating the letter of the NVRA, the Notices are misleading and fail to serve the purpose of the NVRA's notice requirement, which is first and foremost to give voters a meaningful opportunity to remain registered if they continue to be eligible. By using the word "may," the Notices suggest uncertainty about the consequences of failing to respond to the Notice or take other action: Inaction, the Notices imply, "may" lead to removal from the rolls, but then again, it may not. Under the directives implementing the Supplemental Process, however, county boards of elections are *required* to remove all voters who do not respond to the notice or engage in vaguely defined "voter activity" in the subsequent four-year period. *See*, *e.g.*, Directive 2011-15, RE42-5, PAGEID#1615 ("board of elections … *shall* cancel [such an] elector's registration") (emphasis added).

Likewise, the Notices' language denies voters who remain eligible meaningful information concerning how to stay on the rolls. The Notices did not inform voters of all the actions they could take to ensure that failing to respond would *not* result in removal. For example, in notifying voters of the reason they received the Notice, the 2013 and 2015 Notice suggests that activities other than voting are relevant to preventing removal from the rolls, but they fail to spell out what those activities might be, instead relegating them to a single abbreviation:

"etc." And the one specific example it gives, signing a petition, is not even accurate: Boards are not required to treat signing a petition as voter activity, and Appellee's election director testified he was not aware whether any counties in fact did so. Damschroder Depo., RE42-1, PAGEID#1549, 70:7-23. Further, the 2011 Notice put the inadequate warning it contained at the bottom of the return card where many voters would likely miss it. Thus, a voter reading the Notice would have no clear idea what to do to avoid removal or whether any action was required at all.

The District Court stated that "the NVRA does not require" confirmation notices to include language informing registrants that they "will be removed" if they fail to respond and fail to vote. Opinion and Order, RE140, PAGEID#24748. But the language of the statute could not be clearer on this point: the confirmation card must provide "notice [that i]f the card is not returned …, and if the registrant does not vote in an election during [the next two federal election cycles] the registrant's name *will be removed*." 52 U.S.C. § 20507(d)(2)(A) (emphasis added).

The District Court also based its decision on Appellants' failure to allege that voters who were purged on the basis of Appellee's defective Notice would have responded if they had, hypothetically, received a compliant notice. Opinion and Order, RE140, PAGEID#24749. But the NVRA places the onus on states to comply with its requirements, prohibiting them from removing voters unless they send a notice that contains the prescribed content. *Husted*, 138 S. Ct. at 1839.

Speculation that a given voter might have failed to respond even to a legally sufficient notice does not excuse the state from its obligation to send one.

In the District Court and in opposition to Appellants' motion for an injunction pending appeal, Appellee argued that the Notice's use of the word "may" is accurate in the context of Ohio's list-maintenance program because under the Supplemental Process, a voter may forestall removal by engaging in activities other than voting or returning the confirmation card. Def. Merits Brief, RE133, PAGEID#24081; Doc. 17, at 19. Appellee, however, does not dispute that the Notice *omits* information about what these activities might be. Instead, Appellee contends that the statute's use of the phrase "to the following effect" permits this alteration of the statutorily prescribed content, even if it renders the Notice "not completely accurate." Def. Merits Brief, RE133, PAGEID#24080. As the Supreme Court explained, the purposes of the NVRA's notice requirement is to "explain what a registrant … needs to do in order to stay on the rolls." *Husted*, 138 S. Ct. at 1839. If the voter may avoid removal through activities other than responding to a notice or voting, compliance with this requirement demands that the state list those activities clearly and spell out the circumstances that "will" lead to removal. By omitting this information and using language suggesting that a response may not be required, the Notice "did not adequately inform voters of the consequences of failing to respond to the notice." *APRI I*, 838 F.3d at 703. This failure violated the NVRA.

Appellee has also argued that 1994 guidance from the Federal Election Commission ("FEC") authorizes the Notice's use of the word "may." While the FEC's example language uses the word "may", nothing in the guidelines suggests that states can fail to inform people of the ways state law provides for them to avoid removal. Moreover, that guidance expressly warns that "It is very important to note … that the Federal Election Commission does not have legal authority either to interpret the Act or to determine whether this or that procedure meets the requirements of the Act." Fed. Election Comm'n, Guide to Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples, at P-1 (1994) ("FEC Guide"), *available at* https://www.eac.gov/assets/1/1/Implementing the NVRA of 1993 Requirements Issues Approaches and Examples Jan 1 1994.pdf.[8] To underscore this point, the guidance then states, in all capital letters and boldface:

> **ANY SUGGESTIONS CONTAINED IN THIS DOCUMENT . . . ARE OFFERED WITHOUT FORCE OF LAW, REGULATION, OR ADVISORY OPINION. NO DECISION REGARDING THE IMPLEMENTATION OF ANY FORMS, PROCEDURES, OR CONFORMING STATE LEGISLATION SHOULD BE MADE ON THE BASIS OF THIS DOCUMENT ALONE.**

Id. Appellees' failure to mention this critical disclaimer, which this Court took note of in its pre-election ruling, *APRI II*, 907 F.3d at 921, is telling. As explained above, by requiring voters to be informed that they "will" be removed, the NVRA

[8] Appellee included excerpts from the FEC Guide in opposing Appellants' motion for summary judgment, but omitted the pages containing this caveat. FEC Guide, RE133-12, PAGEID#24224.

obligates states to explain the circumstances in which a voter's registration "will" be cancelled and how the voter can avoid cancellation.

2. *The Pre-2016 Notices Did Not Notify Voters of the Deadline to Respond.*

Section 8(d) specifically requires confirmation notices to alert voters of the deadline for responding. 52 U.S.C. § 20507(d)(2)(A). It specifies that the relevant deadline is "the time provided for mail registration under subsection (a)(1)(B)"—in other words, the state's voter registration deadline for the next election. *See id.* § 20507(a)(1)(B). Prior to 2016, Ohio's Notices violated this requirement. Rather than informing voters of the deadline to respond, the 2013 and 2015 Notice instructed them to respond "immediately." While there is nothing unlawful about *encouraging* a prompt response, "immediately" is not a deadline. Failing to include information specifically required by the statute renders the Notice invalid and renders any removals based on that Notice unlawful.

The 2011 Notice also was flawed; it warned voters that affirmation or confirmation of their address may be required if the card is not returned, but it provided no deadline at all for voters who had not changed residence. RE42-15, PAGEID#1706.

Prior to 2011, the Notice simply included a blank line where counties were intended to fill in a deadline for a response. *E.g.*, 2007 Notice, RE42-16, PAGEID#1709. Nothing in the directives issued by Appellee regarding the Supplemental Process gave counties any guidance as to what date to insert into the

confirmation notice. *E.g.*, Directive 2009-05, RE38-7, PAGEID#400. In opposition to Appellants' motion for an injunction pending appeal, Appellee contended that it is sufficient that these notices "included a specific date." Doc. 17, at 14. But Appellee cites no evidence of what date, exactly, these Notices included. *Id.* The NVRA does not allow a notice to include any old deadline; it requires that the notice advise voters that they must respond by the state's voter registration deadline.

The District Court held that, because it requires confirmation notices to inform registrants that they "*should* return the card" by the voter registration deadline, the NVRA "gives states flexibility" to omit the deadline altogether. Opinion and Order, RE140, PAGEID#24746-47 (quoting 52 U.S.C. § 20507(d)(2)) (emphasis added by the District Court). But the statute says *the voter* "should return the card" by the deadline to avoid having to provide confirmation of address at the polls; it does not say *the state* "should" (but need not) notify voters of the deadline, and it does not authorize the state to impose a different, earlier deadline.

The District Court also concluded that because a registered Ohio voter who returns the Notice even after the voter registration deadline will be restored to active status, it was unnecessary for the Notice to include any deadline. *Id.*; *see also* Def. Merits Brief, RE133, PAGEID#24083. But even if some counties make an exception to the state-imposed deadline for responding, this does not excuse Appellee from notifying voters of the actual deadline. *Cf. Carter v. McDonald*, 794

F.3d 1342 (Fed. Cir. 2015) (practice of accepting documentation in support of veterans' benefits claim after statutory deadline did not excuse failure to provide notice of the actual deadline). Regardless of how dispensable any party or court may consider the deadline, Congress decided that it must be articulated. 52 U.S.C. § 20507(d)(2)(A); *see also Husted*, 138 S. Ct. at 1846 (courts may not second guess "the congressional judgment embodied in subsection (d)'s removal process").

The requirement to notify voters of the deadline for responding is not a mere formalistic demand. It has real consequences. For example, if a voter has moved within the same county but does not respond to a Notice by the voter registration deadline, the voter will be denied a regular ballot and must instead vote by provisional ballot. *See* Ohio Election Official Manual, Chapter 6, RE74-2, PAGEID#23105-06. Voting by provisional ballot takes more time and often requires standing in an additional line. *Id.*, PAGEID#23108-12. Moreover, evidence in this case shows that some voters, including Appellant Larry Harmon, are not offered a provisional ballot even if they are entitled to one, with the result that a voter who misses the deadline could be deprived of the right to vote entirely. Harmon Decl., RE39-6, PAGEID#1462, ¶ 11. In addition, the failure to give a clear deadline makes it more likely that the voter will not respond to the Notice at all.

B. Ohio's Pre-2016 Notices Violated the NVRA By Effectively Requiring Re-Registration Rather than Confirmation of Current Address.

Since at least 2011, the Notices used to begin removal under the Supplemental Process required voters to provide the same five fields of information that are required of a first-time registrant, even if the voter had not moved. *E.g.*, 2015 Notice, RE42-13, PAGEID#1702 (instructing voters that, to "confirm [their] status as a registered Ohio voter," they must provide the same information required for a new voter registration form to be deemed complete). The Notice thus effectively imposed a re-registration requirement based on merely two years of inactivity. By requiring more of such voters than confirmation of their current address, the Notice violated the NVRA. 52 U.S.C. § 20507(d)(2), (f).

The District Court noted that "Section 8(d)(2) of the NVRA requires the voter to 'state his or her current address' on the confirmation notice," but held that nothing in the NVRA "bars requiring the additional information" demanded by Ohio's Notice. Order, RE140, PAGEID#24751-52. But the NVRA requires states to update a voter's registration when they receive information that the voter has moved within the same jurisdiction (or, under any reasonable interpretation, when they receive information that the voter has not moved at all) and prohibits states from removing voters in such circumstances. 52 U.S.C. § 20507(f). By instructing such voters that they must provide additional information to remain registered, the Notice violated this requirement.

In its decision granting Appellants' motion for an injunction pending appeal, this Court observed that voters could avoid the need to complete the Notice's return card by simply voting. But Section 8(d)'s notice procedure requires that states give voters two options for confirming an existing registration. Voters may "either [1] return the card or [2] vote during the period covering the next two general federal elections." *Husted*, 138 S. Ct. at 1839. And as explained above, the first of these options must allow a voter who has not moved or has only moved locally to remain registered simply by "stating his or her current address." 52 U.S.C. § 20507(d)(2). The state cannot avoid this requirement simply by providing the second option.

By requiring registrants who have not voted for two years essentially to re-register, even when they continued to reside at the same address where they were already registered to vote, Ohio's pre-2016 Notice violated the NVRA. This Court should reverse the judgment of the District Court and remand with instructions to enter judgment for Appellants and to issue a permanent injunction.

C. Ohio's Pre-2016 Notice Failed to Serve the NVRA's Purpose of Providing Ohio Voters a Meaningful Opportunity to Preserve Their Registrations.

Each of the Notice's defects described above independently constitutes a violation of the NVRA and demonstrates how Ohio's failure to abide by the NVRA's safeguards would have led to widespread disenfranchisement absent the APRI Exception. Taken together and with the other flaws in the Notice's language

and instructions, the Notice was wholly inadequate to serve the NVRA's statutory purpose of providing voters who remained eligible to vote in Ohio with notice that their registrations were in jeopardy and with a meaningful opportunity to remain on the rolls without the need to re-register.

For example, notices used from 2013 to 2015 informed voters that they must respond "[i]f the address at which you received this notice is the same address printed on the delivery envelope, and is where you reside." *See, e.g.*, 2015 Notice, RE42-13, PAGEID#1702. This cryptic language was apparently intended to notify voters who had not moved that they nevertheless needed to respond. These hapless voters would have had to understand what was required of them and to have kept the "delivery envelope" in which the Notice had arrived. These multiple deficiencies—the unintelligible instruction, the lack of a deadline, the failure to advise of the consequences of not responding, and the requirement to effectively re-register—rendered the Notice all but meaningless for notifying voters that their registrations were in jeopardy, which is the very purpose of the NVRA's notice requirement. 52 U.S.C. § 20507(d).

Similarly, voters who had not moved and attempted to use the website referenced in the Notice to confirm their address were instructed that the site was only for people who have changed address. A reasonable person would conclude that because her address had not changed, she need not take any action. Not surprisingly, fewer than 20% of the voters to whom Ohio sent Notices in the 2012

election cycle actually responded. U.S. Election Assistance Commission Report, 2011-12, RE38-9, PAGEID#475.

Because the Notices sent to voters through 2016 lacked the information required by the NVRA and imposed requirements prohibited by the NVRA, Appellee could not lawfully remove those voters from the registration rolls. 52 U.S.C. § 20507(d). Thus, (1) every voter removed for failing to respond to a Notice sent through 2014 was removed unlawfully, and (2) all removals scheduled to occur through the summer of 2019 based on notices sent in 2015 would also be unlawful.

The District Court erred in concluding that the pre-2016 Notice did not violate the NVRA and in denying injunctive relief. Accordingly, this Court should vacate the judgment of the District Court and remand the case with instructions to enter judgment in favor of Appellants on their Second Cause of Action and to enter a permanent injunction ordering the relief outlined in Part III.B below.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING A PERMANENT INJUNCTION.

In denying Appellant's request for a permanent injunction based on its incorrect interpretation and application of the NVRA, the District Court abused its discretion. *See Schenck*, 114 F.3d at 593 (application of incorrect rule of law constitutes abuse of discretion). When a district court abuses its discretion in denying an injunction, particularly where injunctive relief is authorized by statute,

this Court has not hesitated to remand with instructions to enter a permanent injunction rather than for further proceedings. *See*, *e.g.*, *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 437 (6th Cir. 2000) (reversing summary judgment for defendant and remanding with instructions to enter injunction in dormant commerce clause case); *Boatman v. Hammons*, 164 F.3d 286, 292 (6th Cir. 1998) (reversing summary judgment in part and remanding with instructions to issue detailed injunction); *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1074 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978) (reversing denial of permanent injunction "where the national policy objectives of a statute have been frustrated," and remanding with instructions to enter injunction sought by plaintiffs). Here, the factual record is fully developed and the NVRA authorizes injunctive relief. As explained below, the circumstances of this case plainly call for an injunction. Accordingly, there is no need for further proceedings and this Court should vacate the judgment of the District Court and remand with instructions to enter an injunction to (i) reinstate to the rolls voters who were removed based on the pre-2016 Notices, (ii) prevent further removals of voters who have not received an NVRA compliant notice and then given the requisite two-election cycles to correct or confirm their registrations or vote, and (iii) require that any Notice used in the future comply with the NVRA's provisions.

A. Appellants Are Entitled to a Permanent Injunction.

A party seeking a permanent injunction must establish:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the [Appellants] and [Appellee], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); *see also Gas Nat. Inc. v. Osborne*, 624 F. App'x 944, 948 (6th Cir. 2015). In denying Appellant's request for a permanent injunction, the District Court relied on its conclusion that the only way in which the Notice violated the NVRA was in omitting information about how voters who had moved out of Ohio could remain eligible to vote. The District Court accordingly limited its analysis of the permanent injunction factors to this narrow issue. When these factors are analyzed in light of the correct legal standard and applied to the full range of NVRA violations Appellant has engaged in, all four factors weigh heavily in Appellants' favor, and Appellants are therefore entitled to an injunction.

1. *Appellants Have Suffered, and Will Continue to Suffer, Irreparable Injury as a Direct Result of Ohio's Failure to Meet the NVRA's Notice Requirements.*

This Court has repeatedly held that "[a] restriction on the fundamental right to vote . . . constitutes irreparable injury." *See, e.g.*, *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). In 2015 alone, hundreds of thousands of registered Ohio voters had their registrations cancelled without ever receiving proper notice.

Many of these voters—who remain perfectly eligible to vote at the same address or in the same county where they had previously been registered—learned that their names had been removed from the registration rolls only when they showed up at the polls to vote. *E.g.*, Damschroder Decl., RE133-4, PAGEID#24119-70 (Attachment A); Harmon Decl., RE39-6, PAGEID#1461-62, ¶¶ 7-9.

Those who showed up to vote in elections prior to November 2016 were denied their right to vote. *E.g.*, Harmon Decl., RE39-6, PAGEID#1461-62, ¶¶ 10-11. And, the APRI Exception is the only thing that prevented an absolute denial of the right to vote for at least 8,570 voters who sought to cast a ballot in elections from November 2016 through November 2018.[9] Further, given that just this month Ohio removed as many as 275,000 additional voters who never received a notice comporting with the requirements of Section 8(d) from the registration rolls, the need for relief is all the more apparent.

Those harmed by Appellee's violation of the NVRA include Organizational Appellants Ohio A. Philip Randolph Institute and Northeast Ohio Coalition for the Homeless, who conduct voter outreach and registration drives and engage in considerable efforts to re-register individuals who were unlawfully purged, as well as Organizational Appellants' members, people in the communities where

[9] Had this Court not issued an emergency injunction pending appeal last October, 772 qualified Ohio voters would have had their ballots rejected in the November 2018 election. November 2018 Provisional Supplemental Report.

Organizational Appellants conduct voter outreach and registration drives, and individuals like Appellant Harmon. *See, e.g.*, Sealed Davis Decl., RE46, PAGEID#22302-04, ¶¶ 20-32, 30; Washington Decl., RE39-1, PAGEID#1434, ¶¶ 24-29; Freeman Decl., RE39-3, PAGEID#1442-44, ¶¶ 14-26. The irreparable harm these organizations and individuals face warrants issuance of a permanent injunction. *See, e.g.*, *N.C. NAACP v. N.C. Bd. of Elecs.*, 2016 WL 6581284, *9 (M.D.N.C. Nov. 4, 2016) ("An organization has been harmed in its own right if the defendant's actions have 'perceptibly impaired' the organization's programs, making it more difficult to carry out its mission." (quoting *Havens Realty v. Coleman*, 455 U.S. 363, 379 (1982))).

In denying Appellants' requested injunction, the District Court relied on Appellee's contention that the record contains no evidence that voters failed to return the confirmation card because of the Notice's NVRA violations. Order, RE140, PAGEID#24752-53. The NVRA, however, requires that specific content be included in the confirmation notice, and it prohibits states from removing voters unless they have first sent a compliant notice. 52 U.S.C. § 20507(d). Appellee cannot escape liability for violating this clear statutory mandate by inventing a reliance element not contained in the NVRA. Moreover, the record is replete with evidence that thousands of Ohio voters who received the inadequate Notices were unaware they had been purged until they arrived at the polls and were forced to

cast provisional ballots. *See, e.g.*, Damschroder Decl., RE133-4, PAGEID#24119-66 (Attachment A).

2. *Appellants Have No Adequate Remedy at Law, and Injunctive Relief Is Necessary to Remedy Their Injuries and Prevent Future Injury.*

Injunctive relief is appropriate as "there is no other adequate remedy at law." *United States v. Miami University*, 294 F.3d 797, 816, 819 (6th Cir. 2002). Courts have routinely held that a "denial of the right to vote . . . cannot be compensated by money damages." *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016). Moreover, the NVRA expressly authorizes injunctive relief as a means of remedying violations of its terms. 52 U.S.C. § 20510(b).

In the current case, an injunction is necessary to: (1) prevent the disenfranchisement of individuals who have been unlawfully removed from the registration rolls; (2) protect voters currently slated to be purged on the basis of not responding to a defective Notice; and (3) guarantee that any new Notice issued by Appellee contains the information required under the NVRA. Injunctive relief is also needed to protect the Organizational Appellants, who will continue to expend resources to re-register unlawfully purged individuals.[10]

3. *The Balance of Hardships Weighs in Favor of a Permanent Injunction.*

The balance of hardships favors the issuance of a permanent injunction because the harm Appellants and Ohio voters face in the absence of an injunction

[10] The specific relief Appellants request is set forth in Part B, *infra.*

far outweighs any potential harm to Appellee. *See*, *e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008). Voters who were—or will be—purged without receiving the required notice that their registrations were at risk will likely be deprived of their fundamental right to vote unless they re-register either through their own efforts or through the efforts of Organizational Appellants. Provisional Ballot Report (Nov. 2016), RE132-7, PAGEID#24058-59. In contrast, as discussed in greater detail below, the relief Appellants seek will impose no significant hardship on Appellee, who now has a well-tested procedure for identifying unlawfully removed voters who remain eligible to vote in their respective counties.

4. *The Public Interest Is Served By a Permanent Injunction.*

The public interest weighs decidedly in favor of a permanent injunction that will remedy and prevent the unlawful disenfranchisement of eligible voters.[11] Courts have repeatedly recognized that the public has "a strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This "interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Hunter v. Hamilton Cty. Bd. of Elecs.*, 635 F.3d 216, 244 (6th Cir. 2011); *Obama for Am.*, 697 F.3d at 436-36 (same). Further, the public interest favors "seeing that [a state]

[11] As this Court recognized in its order regarding the November 2018 elections, "[t]here is a great public interest in not denying voters the opportunity to vote, in violation of the procedures of the NVRA, and a great public interest in not removing names from state voter rolls in violation of federal law." *APRI II*, 907 F.3d at 922.

complies with federal law, especially in the important area of voter registration." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1369 (N.D. Ga. 2004), *aff'd*, 408 F.3d 1349 (11th Cir. 2005).

Absent an injunction, qualified Ohio voters will be denied their right to vote and, through at least 2019, will continue to be removed from the state's voter rolls and disenfranchised despite never having received proper notice, in violation of federal law. These harms are not hypothetical, but grounded in the experience of Ohio voters, including 7,515 voters who would have been disenfranchised had the APRI Exception not been in place for the November 2016 election, *see* Provisional Ballot Report (Nov. 2016), RE132-7, PAGEID#24058-59, the voters that Appellants identified who were disenfranchised in November 2015 and March 2016, Sealed Bell Decl., RE45, PAGEID#1832-39, ¶ 40, and countless others who have shared the same fate as Appellant Harmon. The public interest demands that, to correct Appellee's violation of federal law and protect the fundamental right to vote of countless Ohio voters, a permanent injunction must issue.

B. Relief Is Needed to Prevent the Disenfranchisement of Qualified Ohio Voters Who Were Not Sent Proper Notice and to Ensure the NVRA's Notice Requirements Are Met.

Appellants seek relief for voters sent deficient notices who (1) have already been unlawfully purged from the registration rolls, and (2) are in the queue to be removed. Further, Appellants seek an injunction that would require any future notice to contain the information required under Section 8(d).

1. *An Injunction Is Necessary to Protect Voters Who Have Already Been Purged from Ohio's Voter Rolls Without Being Provided Proper Notice.*

Every voter removed from Ohio's voter rolls under the Supplemental Process to date was removed without being provided with the prior notice required by the NVRA. Injunctive relief is necessary to protect their rights. Appellants therefore seek an injunction requiring that individuals who were unlawfully purged but remain eligible Ohio voters be reinstated to the rolls prior to Ohio's November 5, 2019 General Election.

Voters who never received an NVRA compliant notice continue to be removed from Ohio's rolls. Appellee violated the NVRA when he caused these and other voters to be removed from Ohio's voter rolls without first providing them NVRA-compliant notice that their registrations were in jeopardy and what steps they must take to continue to be eligible to vote. The only way to provide complete relief to these Ohioans is to restore them to the voter rolls, which will allow them to exercise their right to vote just as other eligible, registered voters do—without the need to jump through additional hoops.[12] This relief will not impose undue

[12] Once these voters have been restored to the rolls, the Secretary could, if he wishes, begin the process of removing them lawfully by sending those who have not voted for two years a new, NVRA-compliant notice. Voters who do not respond to these notices or for whom the notices are returned as undeliverable could be made "inactive" just as they are under existing procedures, which would obviate the need to consider them for election administration purposes. *See*, *e.g.*, Ohio Rev. Code § 3501.18 (authorizing counties to exclude inactive voters from consideration in drawing precinct boundaries).

burdens on the Secretary or the counties if implemented on the timeline Appellants suggest.

Restoring these wrongfully purged voters to the voter rolls will also ensure that political parties, community groups, and candidates can reach them with outreach and education efforts, which typically target only those who are on the rolls. More importantly, state and county election officials mail information about voting location changes, early voting locations and hours, vote by mail, and other important information *only* to voters who are on the rolls.

Reinstatement is completely feasible. There is no longer any doubt that the Secretary and the counties have the necessary records to implement reinstatement. The implementation of the APRI Exception during the last two years confirms that the Secretary and the counties are able to identify persons whose removal from the rolls pursuant to the Supplemental Process was predicated on the unlawful Notices, and to conduct appropriate verifications to determine whether the unlawfully purged voters remain eligible. *See* Directive 2016-39, RE90-1, PAGEID#23554-57. The next logical step—reinstatement—does not require the Appellee or the counties to employ any new or untested process. It simply asks them to apply their now well-established process—which has been used to identify the thousands of eligible voters who have cast provisional ballots in recent elections—to the

remaining unlawfully purged voters.[13] There is ample time prior to the next statewide election in November 2019 for Appellee and the counties to carry out this reinstatement effort safely and with no disruption of the election.

Appellee has repeatedly argued that reinstatement or any other relief for voters purged using the deficient Notices is unjustified because he has implemented new safeguards and conducted outreach efforts to give the wrongfully purged voters the opportunity to re-register and because the amount of time that has passed since these individuals last voted means they are no longer eligible Ohio voters. The implication of these claims appears to be that Appellee believes there are no more unlawfully purged but eligible voters for whom a remedy is necessary. But notwithstanding Appellee's claims, in every Ohio election during the past two years, voters who were purged based on the pre-2016 Notices have returned to the polls—in some cases after as long as 14 years of not voting—and cast provisional ballots that were counted solely by virtue of the APRI Exception. *See* Damschroder Decl., RE133-4, PAGEID#24119-70 (Attachment A);

[13] In April 2017 Appellants' Expert Dr. Daniel A. Smith testified that purged, yet eligible, voters could be feasibly and reliably identified. As Dr. Smith explained, many Ohio counties can identify the wrongfully purged persons, and if there are individual counties that do not maintain the required information, the Secretary can supply the needed information, just as he has for purposes of implementing the APRI Exception. Expert Report of Dr. Daniel A. Smith ("Smith Rpt."), RE112-1, PAGEID#23668; Directive 2016-39, RE90-1. The counties and the Secretary also have adequate means to determine if the unlawfully purged voters have become ineligible for other reasons. *See, e.g.*, Smith Rpt., RE112-1, PAGEID#23657-68; Directive 2016-39, RE90-1, PAGEID#23554-57.

November 2018 Provisional Supplemental Report. Moreover, in November 2018, Appellee issued a directive requiring the purge of as many is 275,000 additional voters this month based on the faulty Notices sent in 2013 and 2014—despite being on notice that this Court could rule those purges unlawful. Those individuals have voted much more recently than voters who used the APRI Exception in recent elections, and relief is needed to ensure those of them who remain eligible are not denied their right to vote.

Because reinstatement is necessary to provide a complete remedy and will not impose an undue burden on elections officials, this Court should remand the case to the District Court with instructions to order reinstatement as part of a permanent injunction.

2. *An Injunction Is Necessary to Prevent Harm to Ohio Voters Who Were Sent Defective Confirmation Notices and Are in the Queue to Be Purged.*

Ohio is poised to continue purging voters sent non-compliant Notices through the summer of 2019. The removal of these voters would be unlawful.[14]

[14] Removals scheduled for 2020 would also be unlawful. The 2016 Notice, on which the 2020 removals will be predicated, failed to notify voters who had moved out of state how they could continue to be eligible to vote. Consistent with this Court's September 2016 opinion, the District Court entered judgment in Appellants' favor on this issue but the only relief it ordered was a change to Appellee's website. Opinion and Order, RE140, PAGEID#24755. In ordering this limited relief, the District Court relied in part on Appellee's assertion that voters removed under the Supplemental Process in the future will receive an additional notice 30-45 days before removal which contains the required information for voters who have moved out of state. However, the directive requiring this additional notice applies only to voters who received a confirmation notice in 2013 or 2014. Directive 2018-39. The District Court's assumption that these notices would be sent to those who received the 2016 Notice was therefore clearly erroneous. *See APRI I*, 838 F.3d at 713 (observing that policies and procedures established by

Although the Secretary recently instructed counties to provide voters set to be purged in January 2019 with a "last chance" notice 30-45 days prior to their removal, Directive 2018-39, these notices do not remedy Appellee's NVRA violation because, even if they contained all of the content mandated by Section 8(d), voters are not afforded the required four-year period in which to come forward and reactivate their registrations by voting.[15] In order to prevent these unlawful removals from taking place, as well as the potential for disenfranchisement and voter confusion that would follow, Appellants seek an injunction requiring that Appellee change the registration status to "active" for all Ohio voters who were sent a Notice under the Supplemental Process prior to 2016 and who are currently in "active-confirmation" or "inactive" status. This change in status will have the effect of resetting the clock for their potential removal.[16] If Appellee believes these individuals may have moved, he may then order counties

---

directive can be easily changed). The limited nature of the District Court's injunctive relief on this issue was thus an abuse of discretion. On remand, this Court should instruct the District Court to issue an injunction requiring that Appellee continue to send the 30-45 day notices to voters who will be removed through 2020.

[15] Moreover, Appellee has issued no directive requiring that "last chance" notices be sent to voters scheduled for removal in the summer of 2019.

[16] The Secretary recently issued Directive 2018-21, which requires counties to restore to "active" status all voters who are in the queue for removal if they have an active Ohio's driver's license showing an address that matches the voter registration. *See* Damschroder Decl., RE133-4, PAGEID#24115, ¶ 7.xxiii. However, not all voters threatened with unlawful removal have a driver's license—a fact Congress explicitly recognized in the NVRA by requiring that voter registration be provided at public assistance agencies as well as motor vehicle agencies. *See, e.g.*, S. Rep. No. 103-6, at *15-16 ("[M]otor-voter registration programs may not adequately reach low income citizens and minorities. . . . [V]oter registration programs available through . . . public assistance offices . . . are more likely to reach these eligible citizens[.]"). Directive 2018-21, therefore, will not fully remedy the harm caused by the use of non-compliant Notices.

to send them each a new notice that complies with the NVRA's requirements and to remove them if they do not respond to this new notice or vote in the subsequent four-year period. This is the only way to ensure that these Ohioans are removed in accordance with Section 8(d)'s notice and waiting procedure, which requires the waiting period to be measured from the time a valid notice is sent.

3. *An Injunction Is Needed to Ensure that Future Ohio Confirmation Notices Include the Information Required Under the NVRA.*

As this Court has recognized, Ohio's confirmation notice has regularly changed and "there [is] a distinct possibility that a future Secretary will be less inclined to maintain the confirmation notice in its current form." *APRI I*, 838 F.3d at 713. For this reason, it is essential that a permanent injunction require Ohio's notice to maintain language that is substantially similar to the 2018 Notice. *See* 2018 Notice, RE132-5, PAGEID#24055. Specifically, whenever Appellee revises the confirmation notice in the future, he must ensure that voters who have not moved can use it to maintain an existing registration simply by confirming their current address and that it contains the information required under Section 8(d)(2), including notice (1) that if the voter has not moved outside of their election jurisdiction then they should return the card before the registration deadline for the next election, (2) that if the voter does not return the notice, vote, or engage in other activities that must be specified in the notice, the voter "will be removed" from the voter rolls after the second subsequent federal general election, and (3)

how the voter "can continue to be eligible to vote" if the voter has moved from one Ohio county to another or out of Ohio.

CONCLUSION

The District Court erred as a matter of law in concluding that Ohio's pre-2016 Notices complied with the NVRA, and it abused its discretion in declining to order the injunctive relief Appellants requested. Accordingly, Appellants respectfully request that this Court vacate the District Court's judgment and remand the case with instructions to enter judgment in favor of Appellants on their second cause of action and to issue an injunction (1) requiring reinstatement of voters who were purged under the Supplemental Process based on pre-2016 Notices; (2) requiring restoration to "active" status of all voters who are currently in "inactive" status because they failed to respond to a pre-2016 Notice sent pursuant to the Supplemental Process; and (3) prohibiting the state from using any Notice in the future that does not conform to the requirements of Section 8(d) of the NVRA.

Dated: January 31, 2019

Respectfully submitted,

/s/ Stuart C. Naifeh

Stuart C. Naifeh
Naila Awan
Brenda Wright
Dēmos
80 Broad Street, 4th Floor
New York, NY 10004
212-485-6055
snaifeh@demos.org

Chiraag Bains*
Dēmos
740 6th Street NW, 2nd Floor
Washington, DC 20001
202-864-2746
cbains@demos.org

Freda J. Levenson
Elizabeth Bonham
ACLU of Ohio
4506 Chester Avenue
Cleveland, OH 44103
216-472-2220
flevenson@acluohio.org

Richard Saphire
Cooperating Attorney, ACLU of Ohio
109 North Main St., #1205
Dayton, OH 45402
937-229-2820
rsaphire1@udayton.edu

Paul Moke
Cooperating Attorney, ACLU of Ohio
Wilmington College**
1252 Pyle Center
Wilmington, OH 45177
937-725-7501
paul.moke@gmail.com

Counsel for Plaintiffs-Appellants

---

* Not admitted in the District of Columbia; practice limited pursuant to D.C. App. R. 49(c)(3).

** Institutional affiliation for the purpose of identification only

STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word 2016.

Dated: January 31, 2019

/s/ Stuart Naifeh

Stuart Naifeh
Dēmos
80 Broad Street, 4th Fl.
New York, NY 10001
Telephone: 212-485-6055
E-mail: snaifeh@demos.org

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellants was filed this 31st day of January, 2019 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: January 31, 2019

/s/ Stuart Naifeh
Stuart Naifeh
Dēmos
80 Broad Street, 4th Fl.
New York, NY 10004
Telephone: 212-485-6055
E-mail: snaifeh@demos.org

DESIGNATION OF DISTRICT COURT RECORD

Plaintiff-Appellants hereby designate the following items from the District Court record:

A. Philip Randolph Institute et al. v. LaRose

District Court Case No. 2:16-cv-00303-GCS-EPD

Docket Entry No.	Page ID No.	Document Descriptions
1	1-17	Complaint
37	222-241	Plaintiffs' First Amended Complaint
38-1	286-292	Directive No. 94-36. Cancellation of Voter Registrations in Accordance with AM. SUB. S.B. 300 and the NVRA
38-7	400-408	Directive 2009-05. 2009 General Voter Records Maintenance Program (National Change of Address and Supplemental Processes); Grounds for Registration Cancellations
38-9	410-494	U.S. Election Assistance Commission Report. The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office (2011-12).
39-1	1430-1436	Declaration of Andre Washington in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction
39-3	1440-1444	Declaration of Delores Freeman in Support of Plaintiff's Motion for Summary Judgement
39-4	1445-1454	Declaration of Elizabeth Bonham in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction
39-6	1460-1462	Declaration of Larry Harmon

Docket Entry No.	Page ID No.	Document Descriptions
42-1	1530-1585	Deposition of Matthew Damschroder
42-2	1586-1593	Directive 2015-09. 2015 General Voter Records Maintenance Program
42-3	1594-1601	Directive 2014-14. 2014 General Voter Records Maintenance Program
42-4	1602-1609	Directive 2013-10. 2013 General Voter Records Maintenance Program (National Change of Address and Supplemental Processes); Grounds for Registration Cancellations
42-5	1610-1618	Directive 2011-15. 2011 General Voter Records Maintenance Program (National Change of Address and Supplemental Processes); Grounds for Registration Cancellations
42-13	1701-1702	SOS Form 10-S. Important Information About Your Ohio Voter Registration. Confirmation Notice
42-14	1703-1704	SOS Form 10-S (2013)
42-15	1705-1707	SOS Form 10-S (2011)
42-16	1708-1710	SOS Form 10-S (2007)
45	1817-1846	Sealed Declaration of Cameron Bell in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction
45-10	4400-5400	Green County Voter History File (Part 1)
46	22297-22306	Declaration of Brian Davis in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction
56	22717-22756	Defendant Secretary of State Jon Husted's Third Merit Brief
56-2	22821-22824	SOS Form 10-S-1. Confirmation Notice
66	23003-23026	Order Denying Plaintiffs' Motion for Summary Judgment and Permanent

Docket Entry No.	Page ID No.	Document Descriptions
		Injunctions
68	23029-23031	Notice of Appeal
74-2	23105-23127	Directive 2015-28. Provisional Voting
78-2	23151-23161	Ohio Democratic Party's Amicus Curiae Brief Regarding Remedy on Remand in Response to Motions Filed by the Parties
89	23529-23550	Order Granting in Part and Denying in Part Defendant's Motion to Implement Remedy and Plaintiffs' Motion for Temporary Restraining Order
90	23551-23553	Notice of Issuance of Directive Pursuant to Court Order
90-1	23554-23557	Directive 2016-39. Provisional Ballots Cast by Voters Cancelled Since 2011 Under Ohio's Supplemental Process
92	23566	Order Granting Parties' Joint Motion for Further Relief
93	23567-23568	Order that the Ohio Secretary of State shall Issue a Directive regarding the Absentee Ballot Requests of Military and Overseas Voters
112-1	23654-23687	Expert Report of Daniel A. Smith
118	23915-23916	Order Granting Motion to Stay
122	23984-23985	Order Granting Defendant's Motion to Lift the Stay and to Vacate the Orders related to the Interim Remedies
126	23992-23994	Joint Stipulation and Order Related to the Special Election on August 7, 2018
132	24003-24028	Plaintiffs' Motion for Entry of Judgment or Summary Judgment and for a Permanent Injunction
132-3	24042-24047	Directive 20126-20. 2016 General Voter Records Maintenance Program –

Docket Entry No.	Page ID No.	Document Descriptions
		Supplemental Process
132-4	24048-24054	Directive 2018-20. 2018 General Voter Records Maintenance Program – Supplemental Process
132-5	24055	2018 Confirmation Notice
132-6	24056-24057	Directive 2018-22. Notice of Cancellation Procedures
132-7	24058-24059	Provisional Ballot Report: November 8, 2016 General Election
133	24069-24091	Defendant's Merits Brief
133-4	24109-24178	Declaration of Matthew M. Damschroder
133-12	24224-24271	Implementing the National Voter Registration Act of 1993. Requirements, Issues, Approaches, and Examples
139	24621-24633	Plaintiff's Reply in Support of Motion for Entry of Judgment or Summary Judgment and for Permanent Injunction
139-5	24725-24729	Secretary Husted: A Single Vote Makes All the Difference
140	24730-24756	Order Granting in Part and Denying in Part Plaintiffs' Motion for Final Judgment and Granting in Part and Denying in Part Defendant's Motion for Final Judgment
143	24761-24770	Plaintiffs' Motion for Injunction Pending Appeal
144	24771-24773	Order Denying Plaintiffs' Motion for Injunction Pending Appeal