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

OHIO A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, and LARRY HARMON, Plaintiffs, v. **JON HUSTED,** *in his official capacity as Ohio Secretary of State*, Defendant.	Case No. 2:16-cv-303 JUDGE GEORGE C. SMITH Magistrate Judge Elizabeth Preston Deavers

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDMENT OR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION

INTRODUCTION

From the beginning of this litigation, Plaintiffs have asserted a challenge to the confirmation notices Defendant previously used to initiate the Supplemental Process. From the outset, Plaintiffs have sought as a remedy the reinstatement to active status of purged or inactive voters. And at least since their first motion for summary judgment, Plaintiffs sought the counting of provisional ballots as an alternative remedy. But in an effort to avoid the consequences of his strategic choices in conducting this litigation, Defendant now seeks to blame Plaintiffs for his own failure to comprehend that these remedies were necessary to address the harm caused by his use of deficient confirmation notice forms. This effort must be rejected.

In his initial briefing on the merits, Defendant chose not to contest Plaintiffs' challenge to the confirmation notice but instead to issue a new notice that addressed most of the flaws Plaintiffs identified—and then to argue that the challenge was moot. Doc. 38. When the Court of Appeals rejected his mootness argument and held that Ohio's confirmation notice "blatantly" violated the National Voter Registration Act of 1993 ("NVRA"), Defendant chose not to challenge this decision in his petition for writ of certiorari to the United States Supreme Court. *See* Ex. A. These were Defendant's strategic choices.

Voters who received deficient confirmation notices are entitled to relief, including reinstatement or, alternatively, a continuation of the APRI Exception. Defendant's argument that this Court should decline to order relief for a clear violation of federal law defies the bedrock principle that every violation of law requires a remedy. His failure to appreciate the significance of the notice claim and his regret over his own litigation strategy are not grounds for denying relief. This Court should enter judgment for Plaintiffs and issue the requested injunction.

ARGUMENT

A. Plaintiffs' Notice of Defendant's NVRA Violations Was Timely.

Prior to initiating litigation under the NVRA, an aggrieved person generally must provide the chief election official with 90 days' notice of the violation and an opportunity to cure before filing suit. 52 U.S.C. § 20510(b). Where the violation occurs "within 120 days . . . of an election

for Federal office," however, only 20 days' notice must be provided, and within 30 days of such an election, no notice is required. *Id.*; *see Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1042 (9th Cir. 2015). And an aggrieved person may sue immediately when providing pre-suit notice would be futile, as where the defendant has already refused to comply with the law. *Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997).

In 2016, Ohio's federal primary election occurred on March 15, 2016, and a special election to fill the seat of former House Speaker John Boehner took place on June 7, 2016. Both of those elections were "elections for Federal office" within the meaning of the NVRA. *See* 52 U.S.C. §§ 20502(1), (2), 30101(1), (3) (elections for federal office include "a general, special, [or] primary … election" for, *inter alia*, President, Senator, or Representative).

Plaintiff Ohio A. Philip Randolph Institute notified Defendant, the state's chief election official, that the Supplemental Process violated the NVRA on December 17, 2015, within 120 days of the 2016 primary election and more than 90 days before filing suit. Doc. 133-8. The letter stated that Supplemental Process violated the NVRA in part because the notice Ohio used to initiate the removal of voters (known as SOS Form 10-S) effectively required the voter to re-register. *Id.* at 2. On February 23, 2016—fewer than 30 days before the 2016 primary and within 120 days of the June 2016 special election—Plaintiff Northeast Ohio Coalition for the Homeless sent Defendant a letter alleging the same NVRA violations as the December letter, but with more specificity about the defects in Ohio's notice form. Doc. 133-6. These letters asserted that Ohio was engaged in ongoing violations of the NVRA by purging voters from the rolls based on this non-compliant notice, and by threatening to deprive voters of their right to vote in impending federal elections.[1] Plaintiff Larry Harmon joined the case through an amended complaint filed on May 17, 2016, fewer than 30 days before the June 2016 special election.

[1] In addition to depriving voters who had been purged using the flawed notice of the right to vote in elections occurring within 120 days of the notice letter, some voters were purged in the 120-day period. For example, Summit County conducted a purge of its voter rolls under the Supplemental Process on November 24, 2016, and Franklin County conducted a purge of its voter rolls under the Supplemental Process in December 2015. Doc. 45, ¶ 40(m) ("Sealed Bell Decl."); Ex. B (Franklin County summary of voters purged in 2015).

Because Plaintiffs' notice letters concerned NVRA violations occurring within 120 days of a federal election and were sent more than 20 days prior to filing suit, Plaintiffs satisfied the NVRA's notice requirements. 52 U.S.C. § 20510(b).[2] Mr. Harmon entered the case after Defendant had already had the opportunity to come into compliance; providing his own notice at that point would have been an exercise in futility. *Miller*, 129 F.3d at 838.[3]

B. The Challenge to Ohio's Confirmation Form Has Consistently Been a Part of this Case.

In both their original Complaint filed in April 2016, and in their Amended Complaint filed in May 2016, Plaintiffs asserted two clear challenges to the Supplemental Process. Doc. 1; Doc. 37. The first cause of action ("Failure-to-Vote Claim") challenged the Supplemental Process for relying on failure to vote as the basis for removal. Doc. 37. The second cause of action ("Notice Claim") challenged Form 10-S, used to initiate the Process, for failing to conform to the NVRA's notice requirements. *Id.* In their prayer for relief, Plaintiffs sought reinstatement of all voters purged under the Supplemental Process. *Id.* Neither the Complaint nor the Amended Complaint limited that relief to the Failure-to-Vote Claim. Plaintiffs' subsequent litigation was unwavering and consistent with their articulated intention to seek this relief on the Notice Claim. In their first motion for summary judgment, filed in May 2016, Plaintiffs argued that the confirmation form violated the NVRA for the same reasons asserted in the instant motion and sought, *inter alia*, an order requiring reinstatement of voters purged under the Supplemental Process, all of whom had been purged using the unlawful notice. Doc. 39, at 3. Additionally, in their Sixth Circuit appeal, filed in July 2016, Plaintiffs argued that merely issuing a new form was insufficient to provide relief on the Notice Claim because doing so would not remedy the harm to those who had already received the defective notice, and, again,

[2] Even if Plaintiffs had been required to provide 90 days' notice, the December 2015 letter was sufficient to satisfy the NVRA. *See*, *e.g.*, *Georgia State Conference of N.A.A.C.P. v. Kemp*, 841 F. Supp. 2d 1320, 1334 (NVRA notice requirement satisfied if written notice outlines the "general proposition [that the state is] not complying with the mandates of the NVRA … to provid[e] voter registration services at public assistance offices").

[3] Moreover, even if Plaintiffs had entirely failed to provide the required pre-litigation notice, by failing to raise this issue until final briefing on the merits, Defendant has waived any defense based on the notice requirement, which does not implicate this Court's subject matter jurisdiction. *See Cegavske*, 800 F.3d at 1042 (NVRA notice requirement concerns "statutory standing" not Article III standing); *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462, 468 (2d Cir. 2014) (defenses based on statutory standing are waived if not raised).

Plaintiffs again sought reinstatement of those individuals. *See* Ex. C, at 18. The Sixth Circuit agreed, rejecting Defendant's mootness argument and holding that "the Secretary's newly issued form does nothing to correct the fact that Ohio has, for years, been removing voters from the rolls because they failed to respond to forms that are blatantly non-compliant with the NVRA." *A. Philip Randolph Institute v. Husted*, 838 F.3d 699, 714 (6th Cir. 2016) ("*APRI*"). The only relief that would correct the improper removals based on "blatantly non-compliant" notices would be the relief sought here. Thus, there is nothing new about the legal theories Plaintiffs are asserting *or* the relief they seek.

Defendant resorts to inaccurate and contorted record citations to argue that Plaintiffs lulled him into believing that the Notice Claim was entirely unconnected to the relief articulated in the complaint until after the U.S. Supreme Court overturned their first claim. The record is clear, however, that Plaintiffs always sought relief on the Notice Claim for purged voters.

First, Defendant contends, illogically, that, because one form of relief Plaintiffs seek—an amendment to the Form 10-S—applies only to the Notice Claim, all other forms of relief must relate only to the Failure-to-Vote Claim.[4] *E.g.*, Opp. at 7 (citing Doc. 39, at 2-3). Not only is this argument flawed in its logic; Plaintiffs never made any such distinction in their complaint or summary judgment motion. While some forms of relief logically apply only to one claim or the other, others apply equally to both claims, including the request for reinstatement of wrongfully purged voters. Nor does framing the Notice Claim as a challenge to the "form" of the notice indicate that Plaintiffs only sought an amendment to the form itself and not retrospective relief for those already harmed. Defendant's attempt to impose a heightened pleading standard requiring Plaintiffs to articulate which form of relief is sought for which cause of action, is unsupported by the Federal Rules and must be rejected. *See* Fed. R. Civ. P. 8 (requiring "a short and plain statement … showing that the pleader is entitled to relief; and … a demand for the

[4] Defendant's assertion that the February 23 notice letter "*only* asked Ohio to 'amend' the notice," Opp. at 7 (emphasis added), is patently false. The letter asked the Secretary to "count any ballots cast by individuals whose voter registration records have been cancelled pursuant to the Supplemental Process, amend Form 10-S to comply with the NVRA's requirements, and direct local election officials to cease and desist from cancelling any voter registration based on the Supplemental Process." Doc. 133-6, at 1.

relief sought"); *Bartz v. Carter*, 709 F. Supp. 827, 829 (N.D. Ill. 1989) ("stating generally the relief sought at the end of the Amended Complaint, rather than stating what relief is sought for each separate count," is sufficient to provide notice of the relief sought as required by Rule 8).

Next, Defendant argues that because Form 10-S was used for the NCOA process as well as the Supplemental Processes, Plaintiffs "logically" would have challenged both processes had they wanted relief for all voters harmed by the use of the flawed notice. But Plaintiffs were under no obligation to pursue all of the claims they may have had against the Defendant. *See, e.g.*, Fed. R. Civ. P. 18 (joinder of claims is permissive). This lawsuit has always focused on voters targeted under the Supplemental Process, and the Notice Claim has been a part of Plaintiffs' challenge to the Supplemental Process from the beginning.

Plaintiffs' stipulation in June 2018 to vacate this Court's May 31, 2017, order, Doc. 118, likewise says nothing about the relief they were seeking on the Notice Claim. That order only required the APRI Exception until the Supreme Court issued a decision, which had already occurred by the time of the stipulation. *Id.* Thus, Plaintiffs were not agreeing to do away with the APRI Exception; they were recognizing that further proceedings were required to put the APRI Exception or another remedy in place going forward. And two days after the stipulation was filed, Plaintiffs notified Defendant that they intended to seek reinstatement or a more robust APRI Exception as a remedy for the Notice Claim. Ex. D, ¶¶ 4-6. Defendant can hardly claim prejudice because, for two days, he did not realize what relief Plaintiffs sought on that Claim.

Because Plaintiffs did not delay in asserting the Notice Claim or in putting Defendant on notice of the relief they seek, the doctrines of waiver, laches, and estoppel are inapplicable. [5] Even if these defenses applied, Defendant has failed to meet his burden to prove prejudice. *E.g.*,

[5] The cases Defendant cites do not support him in any event. In *Yoder v. University of Louisville*, the court reversed summary judgment on a claim that had never been pled. 417 Fed. Appx. 529, 530 (6th Cir. 2011). Here, there is no question that Plaintiffs asserted a claim that Ohio's Form 10-S violates Section 8(d) of the NVRA.

And *Versatile Helicopters, Inc. v. City of Columbus* in fact supports Plaintiffs. 548 Fed. Appx. 337 (6th Cir. 2013). There, the court of appeals held that the district court erred by not allowing the plaintiff to amend the prayer for relief to increase the amount of damages sought on one claim after another claim was dismissed. *Id.* at 343-44. Critical to the court's reasoning was that the defendant had been on notice of the total damages sought, and the plaintiff had proved its entitlement to the full amount on the remaining claim. *Id.* Here, Defendant has known from the start exactly what relief Plaintiffs were seeking, and his assumptions about which cause of action would support that relief are irrelevant when Plaintiffs have shown they are entitled to the relief based on the Notice Claim.

E.E.O.C. v. Watkins Motor Lines, Inc., 463 F.3d 436, 439 (6th Cir. 2006) (burden is on party asserting laches to show prejudice). After the Sixth Circuit's decision, the parties engaged in months of discovery concerning remedial issues, including expert evidence on reinstatement and continuation of the APRI Exception. That discovery was completed before the Supreme Court granted certiorari and the case was stayed. And since the time Plaintiffs notified him in June 2018 of the remedies they are seeking, Defendant has twice agreed to briefing schedules on the Notice Claim without ever raising the need for additional discovery. Defendant has had ample opportunity to seek the discovery he needed to defend against the Notice Claim.

At bottom, Defendant's contention that he was somehow duped into not defending the Notice Claim is nothing more than an attempt to avoid the consequences of his own strategic decisions and should be rejected. Plaintiffs have not hidden the ball. On the contrary, they have consistently sought reinstatement or other relief for purged voters and those in the queue to be purged, and they have never represented that this relief was limited to the Failure-to-Vote Claim.

C. Defendant's Confirmation Notices Violated the NVRA.

For the first time in this litigation, Defendant argues, incorrectly, that the confirmation notices used prior to 2016 complied with the NVRA.[6] Opp. at 9-13. Defendant's contention that the Sixth Circuit did not reach the question of the forms' compliance, because its description of the forms' defects occurred in the "background" section of its opinion, is wrong. The Sixth Circuit held that Plaintiffs' Notice Claim was not moot because correcting the notice prospectively did not remedy the harm to voters who had already been purged using a notice which, for the reasons the court had explained in the background, was "blatantly non-compliant with the NVRA." *APRI*, 838 F.3d at 714. This statement is from the court's merits discussion. Thus, while the issue before the court was whether the claim was moot, in holding that it was not, the court necessarily found that the notices did not comply with the NVRA's requirements. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by

[6] If there is a case for waiver here, it is against Defendant for failing, until now, to defend the pre-2016 notices.

which we are bound."). And even if that finding were not strictly necessary to the court's mootness decision, it is highly persuasive, and this Court should follow it. *See PDV Midwest Refining, L.L.C. v. Armada Oil & Gas Co.*, 305 F.3d 498 (6th Cir. 2002) (following court of appeals dicta that was closely related to issue actually decided).

Defendant's defense of his pre-2016 notices also fails on the merits. Defendant's argument that Section 8(d)'s use of the phrase "to the following effect" means that notices need not be "completely accurate" must be rejected out of hand. Opp. at 10. It would entirely defeat the purpose of a notice requirement if the notice could provide inaccurate information about when, how, or where to respond. In the Section 8 context, the more natural reading of the phrase "to the following effect" is that the statute is describing the information that must be included without prescribing the precise wording because some information, such as the voter registration deadline, varies from state to state. The phrase does not grant the Secretary a license to mislead.

The affidavits submitted by several county election officials stating that Defendant never instructed them to reject incomplete confirmation cards are all but meaningless. *See* Docs. 133-17–133-22. The card itself instructed voters that they must fill it out completely even if they had not moved. *See, e.g.*, Doc. 133-13. If that instruction was not accurate, as the affidavits suggest, that fact only highlights the flaws in the confirmation notice. Moreover, none of the local election officials stated that they ever in fact received or acted on incomplete confirmation cards.

Defendant also contends that the instruction to return the card "immediately" is sufficiently precise to inform voters of the deadline for responding. According to Defendant's less-than-illuminating dictionary definition, this instruction requires voters to respond "instantly." Regardless of its clarity, however, this instruction violates the plain text of the NVRA, which states that the card must be returned by the registration deadline for the next federal election and requires notification of this specific deadline. 52 U.S.C. § 20507(d)(2)(A).

For the reasons explained in Plaintiffs' motion, the confirmation notices used prior to 2016 were inaccurate and did not adequately advise voters of the consequences of failing to respond, in violation of the NVRA. Doc. 132, Memorandum at 2-3, 6-8.

D. The Public Interest and the Harm Faced by Plaintiffs in the Absence of an Injunction Far Outweigh Hardships Defendant May Face in Implementing the Requested Relief.

The Supreme Court held that if the state fails to provide notice containing the content required by the NVRA, removal of a voter is impermissible under the NVRA. *Husted v. APRI*, 138 S. Ct. 1833, 1838-39 (2018). Ohio has not met this notice obligation. Voters who were—or are in the queue to be—purged for not responding to misleading and legally deficient notices face irreparable harm, including disenfranchisement, in the absence of relief.

Defendant attempts to downplay the seriousness of this violation and need for relief. First, Defendant asserts that the relief Plaintiffs request is unnecessary because of the time that has passed since the last purge took place. He argues that these voters have had multiple opportunities to reregister and claims that it is highly likely that voters unlawfully purged in 2015 are reregistered by now. Opp. at 2-3. The record evidence is to the contrary. Despite the over 1.6 million mailings Defendant sent to unregistered Ohioans in 2016 after joining the Electronic Registration Information Center ("ERIC") encouraging them to register, over 7,500 purged voters—more than 900 of whom had not voted or reregistered in 12 years—turned out in the 2016 General Election. *See* Doc. 133-4, ¶ 19; Doc. 133-17, at 88. The APRI Exception ordered by this Court is the only thing that protected the right of these voters to have their ballots counted. Voters purged in 2011 have continued to use the APRI Exception in subsequent elections—including the May 2018 Primary Election, which occurred nearly 14 years after they had last voted. Doc. 133-4 at 15. As Defendant himself frequently notes, "[a] single vote makes all the difference." *E.g.*, Ex. E. Indeed, 199 elections in Ohio have been decided by one vote or tied in the past five years—59 of those elections took place in 2018 alone. *See id.* It is thus disingenuous for Defendant to argue that the small number of votes cast by eligible but unlawfully purged Ohioans are not important enough for this Court to protect.

Next, Defendant asserts that certain voluntary actions he has undertaken to mitigate—but not remedy—the harm caused by the defective notices "make *any remedy* unwarranted." Opp. at 14 (emphasis added). These actions—including (1) a recently issued directive requiring the use

of driver's license address data to restore inactive voters to active status, (2) information on Defendant's website allowing voters to see their registration status, and (3) sending a "final warning notice" to inactive voters 30 to 45 days before they are purged—in no way cure Defendant's NVRA violations. First, none of these actions provide relief for voters who have already been illegally purged. Second, not all Ohioans who are in the queue to be purged have a driver's license.[7] And third, the 30-45 day warnings do not contain the information required by the NVRA and would not validate the purge of voters in the queue based on a defective notice.

Last, this is not the first time during this litigation that Defendant has tried to adjust or amend the challenged election procedures and then argue that Plaintiffs requests for relief are no longer actionable. The Sixth Circuit has already held that changes in election procedures adopted at the whim of the Secretary may easily be revised or reversed and cannot moot Plaintiffs' claim. *APRI*, 838 F.3d at 713–14. Relief is, therefore, warranted here.

E. The Relief Plaintiffs Request is Reasonable and Easily Implemented.

With respect to the November 2018 General Election, Plaintiffs have requested continuation of the APRI Exception. Doc. 132 at 2. This procedure has been used in every election held in Ohio for the past two years, and, contrary to the claims of Defendant and his amici, will cause no disruption of the upcoming election. *See, e.g.*, Opp. at 20 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006)).[8]

For future elections, Plaintiffs request reinstatement of unlawfully purged voters who remain eligible or, in the alternative, an extension and enhancement of the APRI Exception. As Plaintiffs' expert witness, Dr. Smith, explained reinstatement is feasible; this court should ignore the contrary opinion of Defendant's expert, Mr. Palmer, for the reasons stated in Plaintiffs'

[7] It is for this reason that the NVRA requires voter registration at public assistance agencies as well as motor vehicle departments. *See, e.g.*, 52 U.S.C. §§ 20504, 20506; 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[.]")

[8] Defendant's claim, with no supporting evidence, that the records necessary to implement the APRI Exception may have been destroyed should be ignored, particularly in light of the fact that it was just implemented in August.

Daubert motion. *See* Doc. 113.[9] Even if the Court is not inclined to order reinstatement, the feasibility of the APRI Exception, with the enhancements Plaintiffs request, is beyond dispute.

Defendant has been using the APRI Exception successfully for two years; even Mr. Palmer opined that it works well. Plaintiffs' two requested enhancements do not alter that conclusion. With respect to vote-by-mail, this Court declined to require Defendant to mail provisional ballots when it ordered a preliminary injunction in 2016. Opp. at 17. But this fact is not pertinent here. First, the Court's concern with mandating new election procedures in the context of a preliminary injunction does not apply when considering permanent relief. Second, Plaintiffs have offered an alternative vote-by-mail extension that would not require mailing provisional ballots: The eligibility determination required under the APRI Exception for provisional ballots could be applied to the mail-ballot request—which is already processed before any ballot is sent. Ohio's mail ballot request form requires the same information from the voter as a provisional ballot, allowing officials to determine eligibility under the APRI Exception and, if the voter is eligible, to mail a regular rather than a provisional ballot.

As regards extending the APRI Exception to voters purged in 2009, Defendant does not disagree that he has the necessary NCOA data. His objection to that extension is that "other agency lists … are also needed for the APRI Exception." Opp. at 18. But neither Defendant nor his county declarants—the individuals with knowledge about what documents are and are not available—assert that these "other agency lists" are not available.

Either reinstatement or the enhanced APRI Exception is a feasible and appropriate remedy for the Defendant's NVRA violation. This Court should grant Plaintiffs' motion.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Entry of Judgment or Summary Judgment and for a Permanent Injunction should be granted.

[9] Defendant's hyperbolic assertion that reinstatement would add 1.2 million voters to the rolls should be ignored. Plaintiffs only seek to restore those Ohio voters who remain eligible and who have not already taken it upon themselves to reregister. Defendant insists the number of eligible voters who remain unregistered is vanishingly small. This should make the job of reinstatement achievable with minimal effort or disruption.

Dated: October 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT OR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION was filed this October 5, 2018 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

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General Information

Court	United States District Court for the Southern District of Ohio; United States District Court for the Southern District of Ohio
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	2:16-cv-00303
Status	CLOSED

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