No. 18-3984

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

A. PHILLIP RANDOLPH INSTITUTE, *et al.*,
Plaintiffs – Appellants,

v.

JON HUSTED,
Defendant – Appellee.

On Appeal from the U.S District Court for the Southern District of Ohio,
Eastern Division, Case No. 2:16-cv-303

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF DEFENDANT-APPELLEE SECRETARY HUSTED AND AFFIRMANCE OF THE DISTRICT COURT'S ORDER

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Date: October 19, 2018

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. Phillip Randolph Institute v. Husted

Name of counsel: Paul J. Orfanedes

Pursuant to 6th Cir. R. 26.1, Judicial Watch, Inc.
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 19, 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/ Paul J. Orfanedes
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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.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES

FEDERAL RULES

STATE STATUES

INTERESTS AND AUTHORITY OF *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch" or "*amicus*") files this *amicus curiae* brief under authority of Federal Rule of Appellate Procedure 29(a) in support of Defendant-Appellee Jon Husted. Counsel for Judicial Watch contacted counsel for Plaintiffs-Appellants and Defendant-Appellee seeking their consent to the filing of the instant *amicus* brief, and all have given their consent.

Judicial Watch is a non-partisan, public interest organization headquartered in Washington, DC. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly files *amicus curiae* briefs and prosecutes lawsuits on matters it believes are of public importance.

Judicial Watch's main interest is preserving its settlement agreement with Ohio. In 2012, Judicial Watch filed a lawsuit against Secretary Husted, Defendant-Appellee in this case, under Section 8 of the National Voter Registration Act. RE 54, Page ID # 22667. Judicial Watch brought the 2012 lawsuit against Secretary Husted on behalf of its members registered to vote in Ohio who were injured due to Ohio's alleged failure to maintain accurate voter rolls. RE 54, Page ID # 22667.

[1] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

In January of 2014, the parties settled the lawsuit, agreeing to terms for Ohio to perform certain NVRA Section 8 list maintenance tasks, including sending annual Section 8(d)(2) notices to Ohio voters who failed to vote within a certain period of time. RE 54, Page ID # 22668. Judicial Watch has participated as *amicus curiae* at every stage in this litigation.

STATEMENT OF THE CASE

In 1994, Ohio issued a directive known as the "Supplemental Process," a procedure where the state would mail an NVRA Section 8(d)(2) address confirmation notice to the address on record for all active registered voters who failed to vote in a two-year time-period. RE38-1 (Directive 94-36), Page ID # 286-90. If the targeted voter did not respond to the address confirmation notice and then failed to vote or update the voter's registration during the next four consecutive years, to include two consecutive federal elections, that voter's registration would be cancelled and the voter removed from the rolls. Ohio Rev. Code § 3503.21(A)(7).

In April 2016, the Plaintiffs-Appellants, A. Philip Randolph Institute and Larry Harmon, challenged Ohio's "Supplemental Process" as a violation of two provisions of the NVRA. RE 37 (Amended Complaint). First, Plaintiffs-Appellants alleged the Supplemental Process violated the NVRA's "failure to vote" clause by sending voters an address confirmation notice by reason of their

failure to vote. 52 U.S.C. § 20507(b)(2). Second, Plaintiffs-Appellants' claimed the address confirmation notice was unlawful because it did not include statutory required language in subsection (d)(2) of the NVRA. 52 U.S.C. § 20507(d)(2). Specifically, subsection (d)(2) requires information on the address confirmation 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.

Id.

On June 29, 2016, the district court entered judgment for Defendant-Appellee on both claims, holding the Supplemental Process did not violate the NVRA's failure to vote clause and the challenge to the address confirmation notice form was moot. According to the district court, the challenge to the confirmation notice form was moot because Defendant-Appellee adopted a new form correcting three of the four issues alleged by Plaintiffs-Appellants and the remaining claim – information for out-of-state voters – was not required by Section 8(d)(2)'s statutory

language. Plaintiffs-Appellants timely appealed and this Court ordered expedited briefing. On September 23, 2016, this Court reversed the district court, holding the Supplemental Process violates the failure to vote clause and subsection (d)(2)'s statutory language requirement was not moot.

After this Court's ruling but before Defendant-Appellee filed a *cert.* petition to the U.S. Supreme Court, the district court ordered an interim remedy for the upcoming November 2016 general election, otherwise known as the "APRI Exception." The APRI Exception required Defendant-Appellee to count provisional ballots given to those former registered voters who were removed pursuant to the Supplemental Process between 2011 and 2015 and still resided at their address on record. RE89 (Order); RE90 (Directive implementing APRI Exception for November 2016 election).

On February 3, 2017, Defendant-Appellee filed its *cert.* petition at the U.S. Supreme Court, appealing this Court's determination that Ohio's Supplemental Process violates the failure to vote clause. Defendant-Appellee's *cert.* petition was granted on May 30, 2017. On June 11, 2018, the U.S. Supreme Court reversed, finding Ohio's Supplemental Process does not violate the failure to vote clause and "follows subsection (d) to the letter." *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842 (2018).

On July 9, 2018, Defendant-Appellee issued Directive 2018-20 (RE 132-4, Page ID # 24048), ordering Ohio local boards to issue revised address confirmation notices (Form 10-S-1) including information on the new form regarding the deadline to respond to the notice, the consequences of failing to respond, and Election Assistance Commission (EAC) information about how to register in another state.

On remand following the Supreme Court's order, Plaintiffs-Appellants sought relief from the district court on their claim regarding the adequacy of Defendant-Appellee's pre-2016 confirmation notice form. On September 14, 2018, Plaintiffs-Appellants moved the district court for a permanent injunction, seeking, among other things, reinstatement of all eligible voters who were removed pursuant to the Supplemental Process between 2009 and 2015 or, in the alternative:

> i. Continuing the APRI Exception indefinitely unless and until the Defendant (a) provides voters purged under the Supplemental Process with a notice that informs the voters they have been removed from the registration rolls because they have not voted in recent elections and explains how they can cast a ballot that will count and how to reregister to vote if the individual has moved, and then (b) continues to implement the APRI Exception through the second federal general election following the notice; and
>
> ii. Extending the Exception to allow purged but still eligible voters the opportunity to vote by mail and applying the Exception to voters removed in 2009

RE 132, Page ID # 24004. Plaintiffs-Appellants argued the pre-2016 address confirmation notice form was deficient because it did not (1) notify voters of the

deadline to respond; (2) inform voters of the consequences of failing to respond; (3) contain information on how to register out-of-state; and (4) it required voters to fill out "five fields" of information not statutorily mandated by the NVRA subsection (d)(2).

On October 10, 2018, the district court denied Plaintiffs-Appellants' request to extend the APRI Exception or seek reinstatement for all voters removed under the Supplemental Process since 2009. Instead, the district court found that Defendant-Appellee's pre-2016 notice violated the NVRA's requirement that the notice include information on how to register to vote out-of-state. The district court ordered Defendant-Appellee to "continue to use the current version of the confirmation notice, Form 10-S-1, or one that is substantially similar, that specifically includes information on how a voter moving out of state can continue to be eligible to vote." RE 140, Page ID # 24755. The district court further ordered Defendant-Appellee to complete the remedy "on or before November 1, 2018." *Id.* With respect to Plaintiffs-Appellants' other remaining claims, the district court found the pre-2016 notice did not violate subsection (d)(2)'s plain language. *Id.*, Page ID # 24747-24752.

Plaintiffs-Appellants timely appealed. On October 15, 2018, Plaintiffs-Appellants filed this instant motion for emergency relief before the November 6, 2018 elections. Plaintiffs-Appellants argue the district court erred in finding that

parts of the pre-2016 notice did not violate the NVRA and request emergency relief from this Court prior to the November 6, 2018 election. Specifically, Plaintiffs-Appellants ask this Court to (1) reinstitute the APRI Exception and (2) prohibit removal of all voters under the Supplemental Process if the address confirmation notice was sent prior to August 2016. Appellants' Emergency Motion for Injunction Pending Appeal (hereinafter "Aplts.' Mot."), Document 12 at 20.

ARGUMENT

The district court correctly determined that Defendant-Appellee's Directive 2018-20 issued July 9, 2018 (RE 132-4, Page ID # 24048), ordering Ohio local boards to issue revised confirmation notices (Form 10-S-1) with all the required statutory information, "remed[ies] the deficiency specifically cited by the Sixth Circuit." RE 140, Page ID # 24746. Plaintiffs-Appellants represented in their prior appeal before this Court that NVRA subsection (d)(2)'s "requirement could be satisfied … by simply modifying the confirmation notice to direct the recipient to the Federal Election Assistance Commission's website." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 714 (6th Cir. 2016); *see also id.*, at 717 (Siler, J., concurring in part, dissenting in part) ("*the relief which the plaintiffs have requested*" would be to issue a revised notice "directing voters to the Election Assistance Commission's website containing the federal form.") (emphasis added).

In July 2018, Defendant-Appellee complied with the mandate, issuing address confirmation notices with the statutory information, and on October 10, 2018, the district court ordered Defendant-Appellee to continue to do so. RE 140, Page ID # 24755.

Nevertheless, Plaintiffs-Appellants now ask this Court to go one step further: reinstitute the APRI Exception – less than three weeks before the November 6, 2018 election and while early in-person voting is already underway – and, during the pendency of this appeal, prohibit removal of any voter sent a pre-2016 notice under the Supplemental Process. Judicial Watch asserts that not only have Plaintiffs-Appellants failed to meet their burden to obtain this extraordinary relief, such relief is also arguably unlawful under the NVRA. This Court should decline Plaintiffs-Appellants' invitation.

A. Plaintiffs-Appellants Fail to Meet Their Burden to Obtain their Requested Relief.

Under Fed. R. App. P. 8(a), this Court considers the following four factors in evaluating a stay pending appeal:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Serv. Employees Int'l Union Local 1 v. Husted, 698 F.3d 341, 343 (6th Cir. 2012), citing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945

F.2d 150, 153 (6th Cir. 1991). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id.* (citation omitted). Importantly, however, the moving party "has the burden of showing it is entitled to a stay." *Id.*, citing *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

Plaintiffs-Appellants have failed to meet their burden to prevail on the merits of their appeal and obtain a permanent injunction for their requested relief. In order to obtain a permanent injunction, the party "must demonstrate that it has suffered irreparable injury, there is no adequate remedy at law, 'that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted,' and that it is in the public's interest to issue the injunction." *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006), quoting *eBay Inc., et al. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Plaintiffs-Appellants have not made the required showing for several reasons.

First, Plaintiffs-Appellants have not identified a single "eligible" voter who did not respond to the notice *because* he or she lacked certain information. Instead, Plaintiffs-Appellants simply assert that "many" voters were "unaware that they have been removed from the registration rolls" and that "[m]any of these voters remain perfectly eligible." Aplts.' Mot. at 20. These voters, according to Plaintiffs-Appellants, should be allowed to vote under the APRI Exception.

Plaintiffs-Appellants, however, miss the mark. It is not enough to show these voters were "unaware" they were removed from the registration rolls pursuant to the Supplemental Process. Rather, they must show the remedy is designed "to address just that violation." RE 140, Page ID # 24753. In other words, they must show the defective notice *caused* the voters to fail to respond to it. As the district court noted, Plaintiffs-Appellants "have not shown any individuals who received the confirmation notice, were confused by it, and therefore didn't send it in." *Id.* Thus, the remedy Plaintiffs-Appellants need is not "proportional to the harm suffered" and "limited to address just that violation," or, in other words, a corrected notice. *Id.*

Second, the public interest does not weigh in Plaintiffs-Appellants' favor. Not only do Plaintiffs-Appellants fail to meet their burden to identify the precise voters who ignored an address confirmation notice because it was defective, the relief they seek at this stage could wreak havoc on election administration. *See Ne. Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) ("[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of submission of absentee ballots."); *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("It is particularly harmful to such interests to have the

rules changed at the last minute.").[2] With less than three weeks before the November 6, 2018 election and with early in-person voting already underway in Ohio, administering the APRI Exception now could cause confusion among elected officials and could cause problems with the effective administration of the election.

Finally, considering the balance of hardships, if any, Plaintiffs-Appellants cannot identify an appropriate remedy in equity. In their prior appeal, Plaintiffs-Appellants argued Section 8(d)(2)(B)'s information requirement could be satisfied "by simply modifying the confirmation notice to direct the recipient to the Federal Election Assistance Commission's website, on which the recipient will find 'instructions and guidance for voter registration in all states.'" *A. Philip Randolph Institute*, 838 F.3d at 714, quoting Pls.' Br. at 44 n. 15. Then, after the Supreme Court found that "Ohio's Supplemental Process follows subsection (d) to the letter," *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842 (2018), Plaintiffs-Appellants attempted the present end-run around the Supreme Court's order.

[2] The closest Plaintiffs-Appellants come to showing the precise number of affected eligible voters is the 7,515 validly cast votes under the APRI Exception in the November 2016 election. *See* Aplts.' Mot. 12 at 8. On information and belief, however, all 7,515 individuals have been returned to active status and are not subject to the APRI Exception for this upcoming November 2018 election.

On remand, Plaintiffs-Appellants broadened their remedy, requesting, remarkably, either a reinstatement of all eligible voters removed under the Supplemental Process from 2009 to 2015, or an indefinite continuation of the APRI Exception under certain circumstances. RE 132, Page ID # 24004. This request, while wildly inconsistent with Plaintiffs-Appellants' prior request to this Court, is essentially a mandate to suspend and nullify Ohio's Supplemental Process, which the Supreme Court upheld this past summer.

Now, Plaintiffs-Appellants fashion a new remedy before this Court, on emergency briefing, dropping their reinstatement request altogether. Instead, Plaintiffs-Appellants are requesting a continuation of the APRI Exception and, during the pendency of this appeal, the suspension of any removal of voters sent a pre-2016 notice under the Supplemental Process. Simply put, Plaintiffs-Appellants have not met their burden in demonstrating the appropriate "remedy in equity" for a permanent injunction. Rather, Ohio's Directive 2018-20 with revised confirmation notice Form 10-S-1 is the remedy "proportional to the harm" suffered by the pre-2016 address confirmation notice.[3]

[3] On multiple occasions, Plaintiffs-Appellants represent that the district court held the confirmation notice did not violate the NVRA. *See* Aplts.' Mot. at 2, 19. This is incorrect. The district court found the pre-2016 notice violated the NVRA because it did not include information on how to register out of state, consistent with this Court's prior opinion. *See* RE 140, Page ID # 24753 (finding Plaintiffs-Appellants "prevailed on one issue related to their second cause of action – failure to inform voters who have moved out of state how to continue to be eligible to

B. The Indefinite Suspension of Section 8 in Ohio by Extending the "APRI Exception" is Contrary to the NVRA.

Plaintiffs-Appellants ask this Court to do the remarkable: Effectively suspend Defendant-Appellee's enforcement of a procedure the Supreme Court upheld. Aplts.' Mot. at 2-3. Needless to say, this remedy has no basis in the statute and is contrary to the language in the Supreme Court's ruling. The remedy would extend the "APRI Exception" for some voters through the 2020 elections at least, or, if Section 8(c)(2)'s 90-day "freeze" period is presumed to apply to such notices, through perhaps the 2022 elections. *See* 52 U.S.C. § 20507(c)(2)(A).

To be clear about what is at stake, the NVRA's Section 8 as written simply cannot be considered operative in Ohio while either of these remedies is in place. Section 8 provides that voters who receive an address confirmation notice and who do not respond to it or vote in the next two general federal elections shall be removed from the voter rolls. As long as such registrations are kept on the rolls *beyond* the next two general federal elections, however, Section 8 will be without effect. Similarly, once voters have received notices and have not responded to them and are placed in an inactive status, those same voters are then placed *back* in active status until they receive *another* notice. Again, Section 8's notice provision will have been effectively suspended. If Plaintiffs-Appellants' requested relief is

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vote."). The district court held the confirmation notice was consistent with Section 8(d)(2)'s requirement with respect to Plaintiffs-Appellants' other challenges.

granted, moreover, they will have succeeded in suspending the operation of Section 8 of the NVRA in Ohio from 2016 through perhaps 2022.

Yet even if Plaintiffs-Appellants' claims regarding shortcomings in Ohio's confirmation notices were entirely meritorious, their requested relief, which essentially suspends Section 8 in Ohio for several years, is contrary to the purpose manifest in the text of the statute. The NVRA does not expressly dictate the precise language that must be in a confirmation notice. Rather, it provides that a notice must be "to the following effect." 52 U.S.C. § 20507(d)(2). That phrase is a synonym for "basically," or "in sum and substance." Indeed, this flexibility is woven into the fabric of the statute, which generally gives states wide latitude to run their own list maintenance programs. *See, e.g.*, *Husted*, 138 S. Ct. at 1847 (no provision of the NVRA "demands that a State have some particular quantum of evidence of a change of residence before sending a registrant a return card. So long as the trigger for sending such notices is 'uniform, nondiscriminatory, and in compliance with the Voting Rights Act' … States can use whatever plan they think best.").

Once it is conveyed to a registrant that their registration may be cancelled if a Section 8(d)(2) confirmation card is not returned, the essential purpose of the confirmation card has been achieved. Other shortcomings are only technical and do not warrant the drastic remedies, like nullifying the effect of the card altogether

as if it had never been sent, as Plaintiffs-Appellants request. This is especially true of Section 8(d)(2)(B)'s requirement that a notice contain "information concerning how the registrant can continue to be eligible to vote." This information is at best tangential to the purpose of the card.

CONCLUSION

For the foregoing reason, *amicus* Judicial Watch respectfully requests this Court to deny Plaintiffs-Appellants' emergency motion.

Dated: October 19, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per Microsoft Word count, the brief contains 3,430 words excluding tables and certificates.

Dated: October 19, 2018 *s/ Paul J. Orfanedes*

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. I certify that the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

Dated: October 19, 2018 *s/ Paul J. Orfanedes*

General Information

Court	United States Court of Appeals for the Sixth Circuit; United States Court of Appeals for the Sixth Circuit
Federal Nature of Suit	Civil Rights - Voting[3441]
Docket Number	18-03984