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.

JON HUSTED, Secretary of State of Ohio

Defendant-Appellee

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

REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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ARGUMENT

A. Appellee's 2007 and 2009 Notices Failed to Include the Required Deadline for Responding.

Appellee cites two early versions of its Confirmation Notice that he contends complied with the NVRA by including "a specific date by which a registrant should return the confirmation notice." Dkt. No. 17, at 18. He does not say what that specific date was, and the notices he references simply include a blank line where counties could fill in a deadline. Nothing in the directives setting forth the Supplemental Process gave counties guidance on what date to insert. RE133-13, PAGEID#24273; RE39-7, PAGEID#400. The NVRA is not satisfied by including any random deadline; it requires that the notice advise voters that they must respond by the voter registration deadline.

Appellee incorrectly argues that an injunction is unnecessary because no voter has *yet* been purged using a notice that included the "immediate action" language. But Appellants' motion also asks this court to order Appellee not to purge any voter *after* the election who was purged using one of the later defective notices that used the improper "immediately" language.. Without an injunction, Appellee admittedly is set to conduct those purges immediately after the election in November. He should be enjoined from doing so until this court resolves this appeal.

B. Appellee's Regulations Provide that Voters Who Miss the Response Deadline Must Vote by Provisional Ballot.

Appellee states, without support, that a voter who fails to respond to a notice by the deadline, though "marked 'inactive' for administrative purposes[,] . . . remains fully eligible to vote." Dkt. No. 17, at 11. But the notice itself and Appellee's own regulations are to the contrary. *See* RE42-13, PAGEID#1702 (to avoid having to cast a provisional ballot, voter should take "immediate action" to respond to the notice); RE-74-2 (Ohio Election Official Manual, Chapter 6), PAGEID#23105-06 (voter must cast a provisional ballot if "the voter has moved to a different precinct without updating his or her address by the voter registration deadline (30 days prior to the election)").

C. The NVRA Requires States to Explain How to Avoid Removal and Remain Eligible to Vote.

Appellee's reliance on 1994 guidance from the Federal Election Commission to justify the notice's failure to accurately inform people of the consequences of failing to respond or how to avoid removal is entirely misplaced. That guidance expressly warns, "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 0NVRA of

1993 Requirements Issues Approaches and Examples Jan 1 1994.pdf. To underscore this point, the guidance then states, boldface, in all capital letters:

> **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.

As Appellants explained, the NVRA's requirement to inform voters that they "will" be removed requires the state to explain the circumstances in which a voter's registration "will" be cancelled and how the voter can avoid cancellation. Appellee does not dispute that the notice did not explain that by "may" the notice meant that other, unspecified activities would prevent removal (indeed, nothing in Ohio law or the list-maintenance directives issued by Appellee defines "voter activity"). Even if the FEC guidelines could allow the state to use wording that directly conflicted with the requirements of the NVRA, nothing in the FEC guidelines suggests that the state can rely on unstated and unexplained possibilities to avoid spelling out the consequences of not responding.

D. FEC's Guidelines Do Not Allow the State to Require Re-Registration.

Appellee contends that in suggesting that states create a single confirmation form that voters who move to a new jurisdiction can use to re-register, the FEC authorized the state to require even voters who had not moved to re-register. But

that does not allow the state to impose a re-registration requirement on those whose eligibility *has not changed*. As Appellants have explained, imposing such a requirement is the equivalent of purging a person without first following the NVRA's mandatory procedures. *See, e.g.*, S. Rep. No. 103-6, at 17-18, 34-35 (1993).

E. Neither the Appellant Nor the Public Interest Will be Harmed by the Requested Injunction.

Appellee contends that there is a "strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote." Br. at 19 (citing *Ne. Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006). But "[t]he public [also] has an interest in seeing that the State … complies with federal law, especially in the important area of voter registration. Ordering the state to comply with a valid federal statute is most assuredly in the public interest." *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1351 (N.D. Ga. 2016). Moreover, as Appellants have explained, Appellee's own expert conceded that the APRI Exception successfully "preclude[s] voting by those who are not entitled to vote," and thus even under the standard espoused by Appellee, neither Appellee nor the public interest will be harmed by the requested relief.

F. The Balance of the Equities Favors an Injunction.

In weighing the balance of hardships, it is crucial for the Court to understand that a wrongly removed voter who appears at the polls to vote in the November 6, 2018 election, and shows that he still lives at the same address, will be denied his fundamental right to vote in that election, but will be restored to the rolls for *future* elections. Although in restoring such a voter to the rolls, the state is necessarily conceding the voter's eligibility, it will nonetheless *discard the voter's provisional ballot*. The APRI Exception is necessary to prevent this perverse result.

Purcell in no way justifies the denial of relief to Appellants on the facts presented here. The very first time the APRI Exception was ordered, it was also in close proximity to a federal election (October 19, 2016), and the district court found that it would place no undue burden on the state:

> [C]ounty boards of elections are already required to provide any individual who appears to vote and whose name does not appear on the voter registration rolls with a provisional ballot. Therefore, the county boards of elections are already required to determine whether each person casting a provisional ballot is qualified to vote. *See* Ohio Rev. Code § 3505.182.

A. Philip Randolph Institute v. Husted, 2016 WL 6093371, *4 (S.D.O.H. October 19, 2016). The Court determined that "requiring election officials to tabulate [APRI Exception] ballots, [would impose] no undue burden on election officials []or . . . any increased risk for abuse of the voting process." *Id.* at *6.

Appellee has had two years of experience in applying the APRI Exception, and its own witnesses have confirmed it to have been manageable, ensuring that only ballots cast by qualified voters are counted. RE113-2 (Palmer Rpt.), PAGEID#23814-17. Indeed, the state most recently re-imposed the APRI Exception just one week before the special congressional election in August. RE126 (Joint Stipulation and Order Related to the Special Election on August 7, 2018). Under these circumstances, "because the only harm that the [Appellee] assert[s] is an administrative burden that [he] admit[s] to be manageable," it does not outweigh the "possibility that qualified voters may be turned away at the polls." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008).[1]

G. None of the Actions Appellee Has Taken Eliminate the Harm Caused by His NVRA Violations.

Appellant points to actions he has taken to mitigate the injury to those purged by the Supplemental Process by encouraging them to re-register. But the sum of these actions is demonstrably ineffective. Despite these, which include 1.6 million mailings to unregistered voters in 2016 suggesting they register, nearly

[1] *See also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) (relief is not unduly burdensome if it only requires the state to implement "systems have existed and do exist, and simply need to be resurrected"); *Action NC v. Strach*, 216 F. Supp. 3d 597, 648 (M.D.N.C. Oct. 27, 2016) (fact that counting of provisional ballots "would occur after the election is over, diminish[es] any risk that the injunctive relief would interfere with the administration of the election on Election Day"); *id.* at 647 ("Since the county boards of elections already verify every provisional ballot cast, any additional burden they face will be minimal compared to the hardship eligible voters may face if improperly denied the right to vote.").

8,000 people who had been purged using defective notices still did not re-register. Their votes were counted *only* because the APRI Exception was in place when they appeared to vote.

Appellee attempts to downplay the seriousness of this violation by suggesting that relief is unnecessary because of the time that has passed since the last purge took place, such that purged voters have had ample opportunity to re-register. Dkt. No. 17, at 8. Again, the record evidence, is to the contrary. Despite the mailings Appellee sent to unregistered Ohioans in 2016 after joining the Electronic Registration Information Center ("ERIC") encouraging them to register, *id.*, over 7,500 purged voters—*more than 900 of whom had not voted or reregistered in 12 years*—turned out to vote in the 2016 General Election. *See* RE133-4 (Damschroder Decl.), PAGEID#24117 ¶ 19; *id.*, PAGEID#24169. The APRI Exception is the only thing that protected the right of these voters to have their ballots counted. By the same token, voters purged in 2011 have continued to use the APRI Exception in subsequent elections—including the May 2018 Primary Election — nearly 14 years after they had last voted. *Id.*, PAGEID#24113.

As Appellee himself frequently notes, "[a] single vote makes all the difference." *E.g.*, RE139-5 (Secretary Husted: A Single Vote Makes All the Difference). 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.*

H. Appellants Have Consistently Sought Relief for the Deficient Notice.

Appellants' agreement to vacate the District Court's May 31, 2017 Order, RE118 (Order), in no way indicates an intention to abandon the APRI Exception with respect to their Notice Claim. The Order only required the APRI Exception until the Supreme Court issued a decision. This, having occurred by the time of the stipulation, meant the Order had expired by its terms. *Id.* Plaintiffs were not agreeing to forever end the APRI Exception. Further proceedings were required to put the APRI Exception—or another remedy—in place going forward. To this end, in consenting to lift the Order, Appellants' counsel notified counsel for Appellee that they needed to discuss next steps for the case. RE133-1 (Voigt-Naifeh Email Exchange). A call was accordingly set two business days after the Order was lifted, *id.*, at which time, counsel for Appellants notified counsel for Appellee that they intended to seek an extension of the APRI Exception. RE139-4, PAGEID#24724, ¶¶ 4-6. There is no question, therefore, that Appellee has been aware of the relief sought by Appellants on their Notice Claim since June 26, 2018. After this date, moreover, the parties jointly agreed to re-implement the APRI Exception in the August 7, 2018 Special Election for Ohio's 12th Congressional District, to provide relief for Ohio voters who had been purged using deficient notices RE126 (Joint Stipulation and Order).

I. Appellants' Notice of Appellee's NVRA Violations Was Timely.

Before initiating litigation under the NVRA, an aggrieved person generally must provide the chief election official with 90 days' notice of the violation 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). Further, an aggrieved person may sue immediately when providing pre-suit notice would be futile, such as when Defendant-Appellee 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 congressional election 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).

Appellant Ohio A. Philip Randolph Institute notified Appellee 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. RE133-8 (Dec. 2015 Notice). 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.*, PAGEID#24204. On February 23, 2016—fewer than 30 days before the 2016 primary and within 120 days of the June 2016 special election—Appellant Northeast Ohio Coalition for the Homeless sent Appellee a letter alleging the same NVRA violations, but with more specificity about the defects in Ohio's notice form. RE133-6 (Feb. 2016 Notice). These letters asserted that Ohio was engaged in ongoing violations of the NVRA by purging voters from the rolls based on a non-compliant notice, and by threatening to deprive voters of their right to vote in impending federal elections. Appellant Larry Harmon joined the case through an amended complaint filed on May 17, 2016, fewer than 30 days before the June 2016 special election.

Because Appellants' notice letters concerned NVRA violations occurring within 120 days of a federal election and were sent more than 20 days prior to filing suit, Appellants satisfied the NVRA's notice requirements. 52 U.S.C. § 20510(b).[2] Mr. Harmon entered the case after Appellee had already had the

[2] Even if Appellants 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 (N.D. Ga. 2012) (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").

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]

CONCLUSION

This Court should grant an injunction pending appeal ordering Appellee to implement the APRI Exception for the 2018 mid-term election and prohibiting him from purging any additional voters based on deficient notices.

[3] Moreover, even if Appellants had entirely failed to provide the required pre-litigation notice, by failing to raise this issue until final briefing on the merits, Appellee 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).

Dated: October 19, 2018

Respectfully submitted,

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2587 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: October 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply in Support of Emergency Injunction Pending Appeal was filed this 19th day of October, 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.

Dated: October 19, 2018

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General Information

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