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,	:	On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division
Plaintiffs-Appellants,	:	
v.	:	District Court Case No. 2:16-cv-00303
JON HUSTED, SECRETARY OF STATE OF OHIO,	:	
Defendant-Appellee.	:	

RESPONSE OF APPELLEE JON HUSTED, SECRETARY OF STATE OF OHIO, OPPOSING EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

It is eighteen days before Election Day, and more than ten days into early voting. As if on cue, a pair of advocacy groups and an Ohio resident have brought "yet another appeal . . . asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes," *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016).

But this request is worse than the usual last-minute election appeal. Immediately after losing their main challenge to Ohio's election procedures in the Supreme Court this summer, Plaintiffs ("APRI") conceded that they were no longer entitled to certain injunctive relief—the so-called "APRI Exception"—that the district court had granted after this Court ruled in APRI's favor in 2016. But then APRI had second thoughts, and turned to an alternative theory in an attempt to retrieve the relief that it had discarded.

APRI now asks this Court to reinstate the APRI Exception in an injunction pending appeal, despite the extraordinary showing required to obtain such relief in election cases, especially where, as here, a district court gave careful consideration to APRI's claims on the merits and denied its requests at the final-judgment stage and not merely at a preliminary-injunction stage. APRI has not come close to meeting the especially high standard that it faces, and this Court should therefore deny its motion for an injunction pending appeal.

BACKGROUND

Three important points are missing from APRI's account of the factual and procedural background of this case.

First, eleven days after the Supreme Court ruled against APRI's primary claim, APRI conceded that it was no longer entitled to the APRI Exception. *See* R.133-1, at PageID#24092. Until then, APRI had made two distinct claims and sought two distinct forms of relief. For its primary claim that Ohio's Supplemental Process as a whole violated the National Voter Registration Act ("NVRA"), APRI ultimately sought reinstatement of all the names that Ohio had removed from its voting lists pursuant to the Supplemental Process. *See* R.140, at PageID#24741. The APRI Exception was a form of interim relief tied to that primary claim. For its secondary claim that certain wording choices on Ohio's confirmation notices violated the NVRA, APRI sought a revised confirmation notice. *See id.* Only after losing its primary claim at the Supreme Court and conceding that it was no longer entitled to the APRI Exception, however, did APRI change course and seek the full primary relief for its secondary claim. *See* R.132, at PageID#24003-05.

Second, Ohio has used several versions of its confirmation notice over the past years, and not every version contained all of the wording choices that APRI contests. The record includes five versions of Ohio's confirmation notice—2007, 2009, 2011, 2013, and 2015—and Ohio does not remove any names from its

voting lists until four years after the registrant fails to respond to the confirmation notice. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct 1833, 1841 (2018). Because Ohio has not removed voter names pursuant to its Supplemental Process since 2015, reinstating the APRI Exception for the 2018 election could be justified only based on Ohio's confirmation notices from 2011 or earlier. (The allegedly deficient confirmation notices at issue here were created and sent by Secretaries of State from both major political parties. Then-Secretary of State Jennifer Brunner, a Democrat, sent the notices before 2011, and Appellee Secretary of State Jon Husted, a Republican, took office in January, 2011.)

Third, as the district court stated: "It is important to acknowledge that Ohio is a leader in making voting accessible to its residents." R.140, at PageID#24754; *accord Ohio Democratic Party*, 834 F.3d at 628 ("[I]t's easy to vote in Ohio. Very easy actually. . . . This is especially apparent when Ohio's voting practices are compared to those of other states."). Ohio not only offers "twenty-two days of early in-person voting and no-excuse absentee voting by mail" and "sends out absentee ballot applications to registered voters," it also aggressively promotes voter registration. *See* R.140, at PageID#24754. Secretary of State Jon Husted "sent registration notices to more than 1.6 million eligible but unregistered Ohioans" in 2016 and 319,000 more in 2018, "including individuals who may have had their voter registration cancelled pursuant to . . . the Supplemental Process."

Id. And to "re-set to active status all or nearly all still-eligible voters in the pipeline for removal based on inactivity," Ohio now automatically returns voters to active status when they use their voting addresses to renew their driver's licenses or state identification cards, and Ohio also sends a final removal notice thirty to forty-five days before removing any voter from its voting lists. *See id.* at PageID#24754-55, PageID#24747 n.6.

ARGUMENT

A. APRI seeks an *injunction* pending appeal, which requires a much higher showing than either a district-court injunction or a stay pending appeal, especially in a last-minute election case.

APRI cannot meet the especially high standard it faces. APRI rightly cites the well-established injunctive-relief factors. *See* APRI Br., at 11 (citing *SEIU Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (per curiam)). But it fails to note that the totality of these factors must meet a higher standard than an ordinary request for injunctive relief, for three reasons: (1) the procedural posture—on appeal, (2) the relief sought—an injunction, and (3) its content and timing—an election-eve change. Combined, these reasons require APRI to make an especially compelling case.

First, a party asking a court of appeals for any relief pending appeal, whether a stay or an injunction, needs a *stronger* showing that it is likely to succeed on the merits than it needed in the district court. That is, "[a]lthough the factors to be considered are the same" for both a district-court injunction and a stay

pending appeal, "the balancing process is not identical due to the different procedural posture in which each judicial determination arises." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Because cases in this procedural posture arise after a district court has already "carefully considered the merits" and ruled against a party, that party "will have a greater difficulty of demonstrating a likelihood of success on the merits." *Id.* A party seeking either a stay pending appeal or an injunction pending appeal therefore "must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal." *Id.* And here, the district court did not merely tentatively assess a likelihood of success in a preliminary context, but reached *final* judgment rejecting APRI's claims on full merits consideration.

Second, within the pending-appeal context, a party seeking an *injunction*, as APRI does here, must make a higher showing of likely success on the merits than does a party seeking a *stay*. That is so because stays and injunctions differ: Stays operate against the lower court's judgment and *preserve* the status quo, while injunctions *disrupt* the status quo and grant a judicial intervention withheld by the lower court. *See Respect Me. PAC v. McKee*, 562 U.S. 996 (2010) (table). Thus, the Supreme Court has long required a "significantly higher" showing of the likelihood of success on the merits to obtain an injunction pending appeal than to obtain a stay pending appeal. *Id.* (citation omitted). Rather than mere likelihood

of success, the Supreme Court requires parties seeking injunctions pending appeal to show that "their entitlement to relief" is "indisputably clear." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (citation omitted); *see also Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). Not only must the party's entitlement to relief be indisputably clear, but injunctive relief pending appeal "is to be used sparingly and only in the most critical and exigent circumstances" and is only appropriate where "necessary or appropriate in aid of [the court's] jurisdiction." *Wis. Right to Life v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citations omitted). This standard governs here (although this Court has not yet said so in this context) because this Court's authority to issue injunctions pending appeal derives from the same statute as the Supreme Court's, the All Writs Act. *See Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers); *E. Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962). And, of course, denying relief at this stage does not mean that the party seeking an injunction pending appeal may not or will not ultimately prevail. *Compare, e.g.*, *Hobby Lobby Stores*, 568 U.S. at 1403 (denying Hobby Lobby's request for an injunction pending appeal because its "entitlement to relief is not 'indisputably clear'"), *with, e.g.*, *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2759 (2014) (Hobby Lobby ultimately prevailed).

Third, last-minute injunctions changing election procedures, as APRI seeks, are strongly disfavored. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *SEIU Local 1*, 698 F.3d at 345-46 (collecting cases). Indeed, this Court has repeatedly invoked this "*Purcell* principle" to stay injunctions *granted* by district courts. *See, e.g.*, *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016); *Ne. Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006). Asking for an appeals court to *impose* an injunction denied by a district court is even more disfavored. Indeed, *Purcell* itself involved a circuit court imposing injunctive relief already denied by a district court, and the Supreme Court thought that worthy of its own intervention to vacate that interference and restore the status quo. 549 U.S. at 4-5 (the district court there "g[a]ve careful consideration to the plaintiffs' challenges" and the court of appeals should have given "deference to [its] discretion").

B. APRI is not likely to succeed on the merits of its claims, and a core claim is not even connected to the emergency relief it seeks for this election.

APRI is unlikely to succeed on any of its claims on the merits, and thus does not meet the heightened likelihood standard needed for the emergency relief it seeks. Indeed, the relief APRI seeks for *this election* does not even connect to a core argument—the instruction on how soon to return the notice. And APRI's remaining claims cannot sustain its burden because, among other things, Ohio

followed the Federal Election Commission's guidance in designing its past confirmation forms.

But first, Ohio has always defended the legality of its confirmation notices, and APRI is wrong to claim otherwise. *See* R.38, at PageID#278-79 ("Ohio's confirmation notice meets all the requirements of the NVRA, and the content of the card does not violate the NVRA."); *see also* R.49, at PageID#22343-44; R.56, at PageID#22751-54. Thus, any argument that Ohio started defending its confirmation notices only after winning the main issue in the Supreme Court, and thus waived confirmation-notice defenses, is mistaken. *See* APRI Br., at 2, 6.

1. Ohio's instructions to voters to "take immediate action" to return the confirmation notice did not violate the NVRA, and more important, this claim cannot justify relief for this election because *no voter* has been removed from Ohio's voting lists after receiving a notice including that language.

Ohio's confirmation notices have always properly told voters when to respond to the notice, thereby complying with the NVRA, and APRI is wrong in claiming that the "immediate action" language violates the NVRA. Equally important, this claim, even if true, does not support the emergency relief APRI seeks for *this election*, because of an indisputable mismatch: Anyone already removed from Ohio's rolls *did receive notices* meeting even APRI's demands, while those who received notices that APRI considers "deficient" have not been removed and need no relief for this election.

The NVRA requires that confirmation notices contain content "to the . . . effect" that, among other things, "the registrant should return the card not later than" "the lesser of 30 days, or the period provided by State law, before the date of the election." 52 U.S.C. § 20507(d)(2)(A), (a)(1)(B). "To that effect" is "used to indicate that the meaning of words is roughly correct even if the words themselves are not completely accurate." R.133-11, at PageID#24221 (Merriam-Webster). Similarly, "should" is an "expectation . . . equivalent to *ought to*." *Id.* at PageID#24223 (Webster's Second Edition).

Ohio's confirmation notices have been modified over the past several years, but they have always included content to that effect. Two versions of Ohio's past confirmation notices, in 2007 and 2009, included a specific date by which a registrant should return the confirmation notice. *See* R.133-13, at PageID#24273. Another version, in 2011, requested registrants to return the confirmation notice "by the 30th day before an Election." *See id.* at PageID#24276. So everyone notified in 2007, 2009, and 2011—and thus removed four years later, in 2011, 2013, and 2015—received notices meeting even APRI's demand for a specific deadline. In 2013 and 2015, the notices instructed registrants to "take immediate action." *See id.* at PageID#24279, PageID#24281.

APRI attacks Ohio's "take immediate action" language on its 2013 and 2015 confirmation notices as deficient for not including a specific deadline. APRI Br.,

at 14, 16-17. APRI does not challenge Ohio's earlier confirmation forms including specific deadlines, whether as a specific date or as thirty days before an election.

But APRI is wrong to attack the "take immediate action" language, as the NVRA does not purport to prescribe the exact language that States must use. To the contrary, the NVRA disclaims any such prescription, requiring only that States include content "*to the . . . effect*" that the registrant should return the card not later than thirty days before an election. *See* 52 U.S.C. § 20507(d)(2)(A) (emphasis added). *Accord* Fed. Election Comm'n, Guide to Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples, at 5-28 (1994) ("FEC Guide"), *available at* R.133-12.

Ohio's instruction to registrants to "take immediate action" meets that requirement; if anything, it uses *stronger* language than needed. "Immediate" means "occurring without delay; instant[.]" Black's Law Dictionary (10th ed. 2014). An instruction to "take immediate action" on a confirmation notice sent in June of an off-year (such as 2015) is more likely to prompt a timely response than an instruction indicating that a person has until thirty days before an election—that is, months until local elections, or a year-plus until a federal election—to respond. *See, e.g.*, R.133-7, at PageID#24192 ("All confirmation notices . . . must be mailed between June 15, 2015 and June 29, 2015."). Besides, a registrant faces no adverse consequences merely for failing to respond either immediately or by thirty days

before an election. The registrant is marked "inactive" for administrative purposes after that deadline passes, but is still listed in the precinct poll-book and remains fully eligible to vote. And if the registrant votes within the next four-year period, or engages in any other voter activity, the registrant is "reset" to active status.

Thus, APRI is unlikely to obtain reversal of the district court's conclusion that Ohio's past confirmation notices complied with the NVRA, and it cannot show that its view is indisputably clear.

But, equally important, APRI cannot justify relief in *this* election based on this claim, *even if it were correct beyond all doubt* and guaranteed to succeed on the merits, because of the disconnect between this claim and reinstatement of the APRI Exception. That is so because *no Ohio voter* has been removed from the rolls after receiving a confirmation notice including the "take immediate action" language. As APRI rightly notes, Ohio has not removed voters from its voting lists since "the summer of 2015." APRI Br., at 5. But because of the four-year delay between confirmation notices and removal, *see A Philip Randolph Inst.*, 138 S. Ct. at 1841, *all* voters removed in 2011, 2013, and 2015 would have received confirmation notices in 2007, 2009, and 2011, each of which included language that even APRI finds adequate. Voters removed in 2015 received the 2011 confirmation notice, which—even though the NVRA does not prescribe exact language—nevertheless tracked the NVRA's language almost word-for-word.

Compare R.133-13, at PageID#24276 ("Please detach, complete, sign and return the Confirmation Return Notice . . . by the 30th day before an Election . . . ."), *with* 52 U.S.C. § 20507(d)(2)(A), (a)(1)(B) ("the registrant should return the card not later than" "the lesser of 30 days, or the period provided by State law, before the date of the election"). Similarly, voters removed in 2013 and 2011 would have received the 2009 and 2007 confirmation notices, each of which contained a specific date by which a registrant should return the confirmation notice. *See* R.133-13, at PageID#24273. Thus, the removed voters—the only voters who would be eligible for the APRI Exception—did not even receive the allegedly deficient notices.

By contrast, those voters who did receive the confirmation notices that APRI attacks—the 2013 and 2015 ones with "take immediate action" language—all remain on Ohio's voting lists, and thus do not need an APRI Exception.

To be sure, if APRI somehow ultimately prevails on this asserted NVRA violation, it may be entitled to relief after reversal, to restore all those "in the pipeline" for possible removal to active status. Further, even if APRI could show a likelihood of success on this point, it could, at most, justify the alternative *post*-election relief pending appeal that it seeks, namely, barring any future removals while the case continues. But APRI cannot justify asking the Court to intervene in

this 2018 election—with a remedy that carries real costs, as explained below—on the basis of this disconnected claim.

2. Ohio's warning to voters that they "may" be removed from the voter lists if they did not respond did not violate the NVRA, and in fact followed federal guidance.

APRI is equally unlikely to succeed in invalidating Ohio's notices on the claim that Ohio's warning to voters that they "may" be removed somehow violates the NVRA. The NVRA requires that confirmation notices contain content "*to the . . . effect*" that "[i]f 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 four year period], 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." 52 U.S.C. § 20507(d)(2)(A) (emphases added).

Each of Ohio's confirmation notices in the record (2007, 2009, 2011, 2013, and 2015) contained language *to this effect*, in different ways—either stating that "your name *may* be removed from the voter registration list" or that "your voter registration in Ohio *may* be cancelled pursuant to federal and state law." *See* R.133-13, at PageID#24273, PageID#24277, PageID#24281 (emphases added).

APRI is wrong to argue that Ohio's use of "may" instead of "will" on its confirmation notices for those five years violated the NVRA, thereby making those confirmation notices invalid. APRI Br., at 14-15. Once again, the NVRA does not

purport to prescribe the exact language that States must use on their confirmation forms. The NVRA requires only that States include content "*to the . . . effect*" that "if the registrant does not vote in an election during that [four year] period the registrant's name will be removed from the list of eligible voters." *See* 52 U.S.C. § 20507(d)(2)(A) (emphasis added).

Ohio's use of "may" on its past confirmation forms was more accurate than "will" would have been, because Ohio gives registrants more opportunities besides voting during those four years to confirm that they have not moved. Any "voter activity" is sufficient to return a voter to active status; "the term 'voter activity' is broader than simply voting. It also includes such things as signing a petition . . . and updating a voting address with a variety of state entities.'" *A. Philip Randolph Inst.*, 138 S. Ct. at 1841 (alterations and some internal quotation marks omitted).

Ohio's use of "may" on its past confirmation forms was also consistent with guidance from the Federal Election Commission. The FEC Guide provided States with sample language to include in their confirmation forms. As relevant here, the FEC recommended the following language: "If this card is not returned and you do not vote by the *(month and year)* general election, then your name may be removed from the voter registration list." *See* FEC Guide, at 5-29. APRI's theory therefore boils down to the proposition that Ohio violated federal election law by following guidance from the Federal Election Commission. That cannot be right.

APRI has not shown the required likelihood of reversal of the district court's conclusion that this aspect of Ohio's past confirmation notices complied with the NVRA or that APRI's preferred interpretation of the NVRA is indisputably clear. This Court should therefore deny APRI's motion for an injunction pending appeal.

3. Ohio's request for five fields of information, such as address and birthdate, on its confirmation notice did not violate the NVRA.

Ohio's request for five fields of information about a registrant—name, address, date of birth, proof of identity (the registrant's driver's license number or the last four digits of the registrant's Social Security Number), and signature—on some of its past confirmation notices likewise did not violate the NVRA. (The 2007 and 2009 confirmation notices did not request the proof of identity. *See* R.133-13, at PageID#24274.) APRI argues otherwise, but it cannot point to any NVRA provision that restricts the information that States request on confirmation notices because no such NVRA provision exists.

Other than requiring States to give voters opportunity to "state [their] current address" on the confirmation notice, the NVRA is silent. 52 U.S.C. § 20507(d)(2). As the district court correctly stated: "There is nothing in the NVRA that requires the additional information, nor anything that bars requiring the additional information." R.140, at PageID#24751-52.

The FEC Guide in fact suggests that "States might want to consider adopting a single, all-purpose confirmation form" that requests the registrant's name, address, date of birth, proof of identity (optional), and signature—the same five fields that appear on some of Ohio's past confirmation notices. *See* FEC Guide, at 5-28, 5-31. Once again, APRI's bottom-line theory is that Ohio violated federal election law by following a suggestion from the Federal Election Commission.

Finally, as the district court noted, Ohio election officials (from both major political parties) testified that "confirmation notices are not rejected if the information requested is not completed in full." R.140, at PageID#24752. And APRI did not present any evidence to the contrary. Even if *requiring* registrants to completely fill out these forms somehow violates the NVRA, it does not violate the NVRA merely to *request* that registrants do so.

APRI has not shown the required likelihood of reversal of the district court's conclusion that this aspect of Ohio's past confirmation notices complied with the NVRA or that APRI's preferred interpretation of the NVRA is indisputably clear. This Court should therefore deny APRI's motion for an injunction pending appeal.

4. APRI's current merits claims were not decided in this Court's 2016 opinion, and they also face procedural hurdles that make an ultimate merits reversal even more unlikely.

APRI is wrong to imply that this Court already decided its current merits claims in 2016. The previous panel decided only two issues regarding the

confirmation card: *First*, it decided that APRI's challenges to Ohio's past confirmation notices were not moot, and *second*, it decided that Ohio's then-current confirmation form violated the NVRA because it did not adequately instruct persons who had moved out-of-state how to reregister to vote in their new state. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712-15 (6th Cir. 2016). Still, APRI now repeatedly cites two lines from the 2016 opinion, in particular the panel's reference to Ohio's confirmation notice as "blatantly non-compliant with the NVRA." APRI Br., at 1, 2, 7, 16, 19, 22. But the district court in 2016 did not decide anything about the facts or the law related to the current arguments about Ohio's past confirmation notices, other than deciding that those arguments were moot. And none of APRI's current merits claims were then before this Court. The panel's broad dicta—which appeared only in the Background and Mootness sections of the panel's opinion—do not bind this Court now on the merits.

APRI cannot have it both ways. Faced with the Supreme Court's statement that "Ohio's Supplemental Process follows subsection (d) to the letter," APRI quickly points out that this Court should not consider itself bound by that statement because "[n]either the facts of the Notice's content nor the legal question of the Notice's compliance with the NVRA were before the Court." APRI Br., at 9. But just as the Supreme Court's broad statement about Ohio's Supplemental Process following the NVRA to the letter does not require this Court to decide in Ohio's

favor in this appeal, so too the 2016 panel's broad statement about non-compliance with the NVRA does not require this Court to decide in APRI's favor. And without the benefit of that dictum, APRI has failed to meet its required burden of showing that it is entitled to an injunction pending appeal.

Further, Ohio raised several procedural arguments in the district court that further decrease any remote likelihood of success. For example, Ohio objected that APRI did not fulfill the NVRA's mandatory notice requirement and that APRI's new theories are waived and estopped. *See* R.133, at PageID#24074-79, PageID#24089-90 (listing these arguments and others). The district court recognized that at least some of these arguments raised serious questions, *see* R.140, at PageID#24738, PageID#24740, PageID#24742-73, but "address[ed] both parties' arguments on the merits" "out of an abundance of caution," *see id.* at PageID#24738. That "abundance of caution" view from the district court indicates that Ohio is likely to succeed on at least some of those procedural arguments, further lessening the likelihood that this Court will ultimately reverse the district court's judgment. Thus, for this reason too, the Court should deny APRI's motion for an injunction pending appeal.

C. All other equitable factors weigh against a last-minute injunction, especially when Election Day is only eighteen days away and absentee voting in Ohio is already underway, and APRI conceded it was no longer entitled to this relief before changing its mind.

The district court found that APRI had "failed to substantially demonstrate that [it] suffered an irreparable injury." R.140, at PageID#24752. Indeed, APRI has not presented any evidence that even one person did not vote or return a confirmation notice based on its format. *See id.* at PageID#24752-53.

In contrast with APRI's lack of injury, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). This is especially true in election cases, and even more so in last-minute election cases. *See Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). Finally, there is a "strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote." *Ne. Coal. for the Homeless*, 467 F.3d at 1012; *Summit Cty. Democratic Cent. & Exec. Comm.*, 388 F.3d at 551.

These principles hold true here. Plaintiffs' requests for relief would cause harm to Ohio. After APRI agreed to end the APRI Exception, Ohio communicated to all county boards of elections that the APRI Exception no longer applied. *See* Ohio Sec'y of State, Directive 2018-19 (July 9, 2018), *available at* https://www.sos.state.oh.us/globalassets/elections/directives/2018/dir2018-19.pdf.

When APRI changed its mind and sought to regain the APRI Exception, Ohio agreed to reinstate the APRI Exception for an August, 2018, special election (involving three counties and parts of four others) while the district court considered the merits of APRI's arguments. *See* Ohio Sec'y of State, Directive 2018-26 (July 31, 2018), *available at* https://www.sos.state.oh.us/globalassets/elections/directives/2018/dir2018-26.pdf. Then, after the district court ruled in Ohio's favor, Ohio again notified the boards that the APRI Exception will not be in effect for the November, 2018, election. Reversing course once again less than eighteen days before a major state-wide election would create even more confusion than APRI's litigation tactics have already caused. Especially given APRI's weak showing of a likelihood of success on the merits, the *Purcell* principle applies and this Court should decline to disrupt Ohio's election processes so close to Election Day. *See Purcell*, 549 U.S. at 4-5; *see also SEIU Local 1*, 698 F.3d at 345-46 (collecting cases).

Finally, the equitable weighing should account for Ohio's status as "a leader in making voting accessible to its residents." R.140, at PageID#24754; *accord Ohio Democratic Party*, 834 F.3d at 628. Ohio offers extensive early-voting and absentee-voting opportunities. *See* R.140, at PageID#24754. And Ohio aggressively promotes voter registration. Since 2016, Ohio Secretary of State Jon Husted has sent approximately two million registration notices to eligible but

unregistered Ohioans. *See id.* And in an attempt to "re-set to active status all or nearly all still-eligible voters in the pipeline for removal based on inactivity," Ohio has put in place processes to automatically returns voters to active status when they renew their driver's licenses or state identification cards and also sends a final removal notice before removing voters from its voting lists. *See id.* at PageID#24754-55, PageID#24747 n.6.

* * *

In summary, this Court should immediately deny APRI's emergency motion for an injunction pending appeal. Alternatively, this Court should immediately deny APRI's requested order requiring Ohio to reinstate the APRI Exception for the November, 2018 election. The Court may then consider, without unnecessary urgency, APRI's second requested form of relief requiring Ohio not to remove any voter pursuant to the Supplemental Process during this appeal. While that relief is also unjustified, it does not involve pre-election activity, so no emergency exists.

CONCLUSION

For the above reasons, this Court should deny APRI's emergency motion for an injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32 (b)(1), the brief contains 5,005 words.

2. The brief has been prepared in monospaced (nonproportionally spaced) typeface using a Times New Roman, 14 point font.

/s/ Steven T. Voigt
STEVEN T. VOIGT

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 19th day of October 2018. Electronic service was therefore made upon all counsel of record on the same day.

/s/ Steven T. Voigt
STEVEN T. VOIGT

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