

**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 TEMPORARY RESTRAINING ORDER**

The whole of the Secretary's Opposition to Plaintiffs Motion for Temporary Restraining Order is a tacit acknowledgement that the relief requested by Plaintiffs is fully possible to implement for the November election—with the single exception of buying TV and radio ads. The Secretary chooses his words very carefully in responding to the Plaintiffs' proposal: While he characterizes the main elements of the remedy (the counting of provisional ballots cast by voters purged before 2015, by voters who have moved within the county, or by voters who vote by mail) as “unworkable” or “burdensome,” only one detail, the purchase of media, is claimed to be “impossible.”

Memo. in Opp. to Pls.’ Request for a Temporary Restraining Order, Doc. 80, PAGEID# 23189, 23207. This wording appears intentional; the Secretary knows full well that the implementation of all of the proposed voting procedures *is* in fact something he can do with little more difficulty than the relief he himself as he has proposed.

A. The Eleventh Amendment Does Not Bar Plaintiffs’ Requested Relief

The remedy Plaintiffs seek in their motion is *prospective* in nature. The Secretary’s violations of the National Voter Registration Act of 1993 (“NVRA”) are causing ongoing harm to Plaintiffs and to voters in Ohio by preventing them from voting in elections that have yet to occur, including this November’s Presidential Election. Plaintiffs are not asking the Court to undo the results of prior elections, notwithstanding that many would-be voters in those elections were disenfranchised by the Secretary’s unlawful conduct. The remedy Plaintiffs seek—treating illegally purged voters as though they had never been purged if they appear to vote in person or apply to vote by mail, and providing them the ability to vote just as any other duly registered voter in the State of Ohio—in no way violates the Eleventh Amendment bar on retrospective relief.

B. Ohio Law Must Give Way to Federal Law to Remedy Ohio’s NVRA Violations.

The Secretary’s assertion that the relief Plaintiffs seek is “not provided for in Ohio law” or “contrary to Ohio law” is wholly irrelevant. *See, e.g.*, Memo. in Opp. to Pls.’ Request for a Temporary Restraining Order, Doc. 80, PAGEID# 23199-23201. The Secretary has violated federal law, and under the Supremacy Clause of the Constitution, this Court has the power to order a remedy for those violations regardless of whether

state law provides such a remedy. Indeed, if state law provided a remedy for the voters the Secretary unlawfully purged, there would be no need for Plaintiffs' motion.

Moreover, as the Secretary concedes, Ohio does have a process for mailing provisional ballots to absentee voters. That process currently applies only to voters who have moved or changed name but cannot appear at the polls due to illness or disability, but there is no practical reason that it cannot be extended to voters purged under the Supplemental Process. Assistant Secretary of State Matthew Damschroder states that "boards would not have on hand carrier envelopes intended to deliver the provisional envelope, a ballot, and a courtesy reply envelope large enough for the voter to enclose his or her provisional envelope," but he does not say that boards cannot obtain them. Damschroder Decl., Doc. 80-1, ¶ 32. Likewise, Mr. Damschroder asserts that "boards would need to immediately print additional provisional ballots and prepare instructions to include with the provisional ballot mailing," but he does not say these steps cannot be taken in sufficient time to provide provisional ballots to absentee voters purged under the Supplemental Process. *Id.*

C. From the Inception of this Case, Plaintiffs Have Sought a Remedy for All Voters Harmed by the Supplemental Process.

Further, the Secretary asserts that "Plaintiffs ... for the first time request extending the relief sought to individuals who have moved within a county or who elect to vote by mail." Mem. in Opp. to Pls.' Request for a Temporary Restraining Order, Doc. 80, PAGEID# 23192. This is simply untrue. Plaintiffs have repeatedly stated that their preferred relief is reinstatement to the registration rolls of the unlawfully purged voters

who remain eligible to vote in Ohio. *E.g.*, Pls.’ Mot. For Sum. Judgment and Permanent Injunction, Doc. 39, PAGEID# 1368. Were such relief granted, the voters impacted by the Supplemental Process would be able to vote-by-mail and update their addresses by voting a provisional ballot at their polling location.

D. Plaintiffs Requested Relief Will Not Confuse Voters.

The Secretary protests that the remedy proposed by Plaintiffs should not be ordered because it would be “confusing to voters.” *See, e.g.*, Memo. in Opp. to Pls.’ Request for a Temporary Restraining Order, Doc. 80, PAGEID# 23201. None of the relief, however, would require a voter to understand or do anything other than to vote the ballot provided to them. On the other hand, what *would* be confusing to a voter who comes out to vote or who mails in an absentee ballot application, would be the denial of his expectation to participate in this important election. Further, purged voters are already checking their registration information online, and a failure to implement paragraphs 4 and 5 of Plaintiffs’ requested relief, *see* Doc. 74-1 at PAGEID#23101, would undermine the effectiveness of even Defendant’s proposed remedy, as Ohio voters may be deterred from turning out to the polls. *E.g.*, Declaration of Stephen Tayala, October 17, 2016, Doc. 79-1, PAGEID# 23178, at ¶¶ 16-17.¹

¹ Moreover, the experience of Mr. Tayala demonstrates that the actions taken by the Secretary under ERIC, a significant focus of the Secretary’s brief, have been insufficient to ensure that voters affected by the Supplemental Process are re-registered in time for the November 2016 Election.

E. Plaintiffs Have Disclosed No Settlement Communications.

The Secretary devotes his opposition to characterizing Plaintiffs' requested relief as "unprecedented" and "unworkable," while knowing his contention is disingenuous. In fact, it is fully possible for the Secretary to implement the precise relief Plaintiffs requested. That *fact* is proper for this Court to consider, regardless of how Plaintiffs came to be aware of it.

Contrary to the Secretary's allegation, Plaintiffs have not introduced communications they learned in the course of settlement discussions. Rather, Plaintiffs learned facts establishing that it is possible for the Secretary to effectuate Plaintiffs' requested relief.

This Court's consideration of those facts is proper, because they demonstrate the feasibility of the remedy Plaintiffs request, and they refute the Secretary's characterization of that proposal as "unworkable." No facts could be more probative of the issue before this Court—the appropriateness of the remedy—than those revealing it is possible for the Secretary to perform the appropriately-tailored relief Plaintiffs seek.

This Court should grant Plaintiffs Motion for a Temporary Restraining Order and issue a Preliminary Injunction continuing the Temporary Restraining Order, applying it to any other election that occurs prior to a final judgment being entered in this case, and prohibiting the Secretary from cancelling any voter's registration or sending any voter a confirmation notice pursuant to the Supplemental Process.

Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER was filed this October 17, 2016 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 17, 2016

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