Case No. 16-3746

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO A. PHILIP RANDOLPH INSTITUTE; NORTHEAST OHIO COALITION FOR THE HOMELESS; LARRY HARMON	:	**On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division**
Plaintiffs – Appellants	:	**District Court Case No. 2:16-cv-303**
v.	:	
JON HUSTED	:	
Defendant-Appellee	:	

MOTION TO EXPEDITE APPEAL

Appellants Ohio A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon ("Appellants") move this Court under Fed. R. App. P. 2 and Sixth Circuit Rule 27(f) for an order expediting the briefing schedule and oral argument in this appeal. Appellants maintain that Ohio's "Supplemental Process" for removing voters from the registration rolls violates Section 8 of the National Voter Registration Act of 1993 ("NVRA"). On June 29, 2016, the District Court denied Appellants' motion for summary judgment (R. 66, attached hereto as Exhibit A) and entered judgment in favor of Defendant Husted (R. 67,

attached hereto as Exhibit B), leaving in a place a procedure that Appellants maintain has unlawfully removed thousands of otherwise eligible Ohioans from the voter rolls simply because of their failure to vote in recent elections. Appellants seek an expedited appeal to ensure, should the Court rule in their favor, that clear, administrable rules and procedures for the restoration to Ohio's voter rolls of voters who have been wrongfully purged can be developed and put in place promptly to allow for the smooth administration of the impending federal election.

To allow the possibility of oral argument and a decision in this appeal by August 15, 2016, Appellants respectfully request that the Court set a briefing schedule as follows:

- Appellants' merits brief due on July 13;
- Appellee's merits brief due on July 20; and
- Appellants' reply brief due on July 22. [1]

[1] Counsel for Appellants attempted to meet and confer with counsel for Appellee to obtain consent for this motion and expedited briefing schedule but were unable to do so.

Dated: July 1, 2016

Respectfully submitted,

/s/ Naila Awan

Naila Awan, Trial Attorney (0088147)
Stuart C. Naifeh*
Cameron Bell*
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
Email: nawan@demos.org
Email: snaifeh@demos.org

Freda J. Levenson (0045916)
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Email: flevenson@acluohio.org

Daniel P. Tokaji*
Cooperating Attorney for ACLU of Ohio
The Ohio State University
Moritz College of Law**
55 W. 12th Ave
Columbus, OH 43210
Telephone: 310-266-0402
Email: dtokaji@gmail.com

Richard Saphire (0017813)
Cooperating Attorney for ACLU of Ohio
University of Dayton School of Law**
300 College Park
Dayton, Ohio 45469
Telephone: 937-229-2820
Email: rsaphire1@udayton.edu

Paul Moke (0014099)
Cooperating Attorney for ACLU of Ohio
Wilmington College**
1252 Pyle Center
Wilmington, Ohio 45177
Telephone: 937-725-7501
Email: paul.moke@gmail.com

Counsel for Plaintiffs-Appellants

---

* Admitted pro hac vice
** Institutional affiliation for the purpose of identification only

MEMORANDUM IN SUPPORT

No right is more fundamental than the right to vote. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). The outcome of this appeal will determine whether thousands of Ohio citizens are able to exercise that right this November. Appellants Ohio A. Philip Randolph Institute ("APRI"), Northeast Ohio Coalition for the Homeless ("NEOCH"), and Larry Harmon request that the briefing and oral argument in this appeal be expedited to allow the possibility of a decision by August 15, 2016. Expediting this appeal in in the best interest of all parties. Early voting in Ohio is set to begin on October 4, 2016. The closer the date of a decision in this matter comes to the start of early voting, the less time there will be for Appellee to implement the relief ordered should this court reverse the judgment below and hold the Supplemental Process unlawful. Expediting this appeal, on the other hand, will allow ample time for Appellee to accurately identify and restore to the rolls those infrequent voters who were purged pursuant to Ohio's Supplemental Process or to develop procedures for counting any provisional ballots cast by infrequent voters.

BACKGROUND

Appellants brought this action to enjoin the operation of one part of the program Ohio uses to maintain its voter registration rolls. The challenged process, known as the "Supplemental Process," targets voters who have failed to vote or

engage in certain other voting-related activity during the prior two-year period, and based solely on that lack of voter activity, initiates a process to cancel the voter's registration. In December 2015, Appellants notified Appellee that this process was not consistent with the requirements of the National Voter Registration Act of 1993 ("NVRA"), and in April 2016, after Appellee failed to take action to address Appellants concerns, Appellants filed suit.

According to Appellants' investigation and to documents produced by Appellee and a number of Ohio counties during discovery in this matter, thousands of Ohio citizens, including Appellant Larry Harmon, have been purged from Ohio's voter rolls as a result of the Supplemental Process despite remaining eligible to vote at the address at which they had been registered for many years. *See* Plaintiffs' Motion for Summary Judgment and Permanent Injunction or, in the Alternative, Preliminary Injunction, R. 39, attached hereto as Exhibit C, at 11-16, PAGEID # 1383-88. Voters purged for failing to vote often do not know they have been purged and need to re-register. R. 39, at 14, PAGEID # 1386. Appellants seek the restoration of these voters to the rolls so that they may exercise their fundamental right to vote this November.

ARGUMENT

The 2016 Presidential Election is fast approaching and it is in the interest of the parties and the general public that the legality of Ohio's Supplemental Process

be determined well in advance of the start of early voting. Should Appellants prevail, Appellee will require time to identify and restore to the voter rolls all of the infrequent voters whose registrations have been cancelled under the Supplemental Process. Should Appellee prevail, Appellants will require time to redirect their voter registration resources to re-registering and educating infrequent voters impacted by the Supplemental Process.

The Sixth Circuit frequently expedites appeals in election cases when there is an upcoming election. *See, e.g.*, *NAACP v. Husted*, Case No. 14-2877, Doc. 19-2 (6th Cir. Sept. 11, 2014); *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014); *North East Ohio Coalition for the Homeless v. Husted*, 696 F.3d 580, 583 (6th Cir. 2012); *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012). For the reasons stated below, an expedited appeal is appropriate in this case as well.

In this litigation, Appellants seek relief that, if granted, will require time to effectively implement before the election. Specifically, Appellants' requested relief includes an injunction requiring the Ohio Secretary of State to reinstate all unlawfully purged voters to the registration rolls or, alternatively, to count all provisional ballots cast by voters whose registrations have been cancelled through the Supplemental Process and who continue to reside at the same address. R. 39 at 2, PAGEID # 1376. Implementing this relief will require coordination and the

sharing of information among the Secretary of State and Ohio's 88 county boards of elections. Additionally, to ensure infrequent voters are able to cast provisional ballots and have them counted, Appellee will need to develop new provisional ballot rules and train poll workers and county election officials on them. The sooner these efforts can begin, the less likely it is that there will be any confusion during early voting or on Election Day. Conversely, should this Court rule in favor of Appellee, Appellants will be required to devote themselves to educating affected voters about the need to check their registration status and re-register if necessary. Thus, regardless of how this appeal is resolved, the parties will benefit from an expedited decision.

Appellee will in no way be prejudiced by an expedited appeal. Indeed, as discussed above, Appellee and other election officials would benefit from an expedited appeal because a swift resolution of the issue would allow for a prompt and effective implementation of the relief ordered. In addition, a prompt decision could avoid the need for Ohio's county boards of election to send out the hundreds of thousands of notices under the Supplemental Process this year, resulting in significant savings in staff time and postage costs.

Appellants and their members will be prejudiced if their appeal is not decided on an expedited schedule. Not only are Appellants and their members in danger of being unable to vote in the November Election, they must make a

decision about how to expend their limited resources. Specifically, if Appellants prevail, rather than spending their resources to re-register purged voters, they can devote their efforts to bringing new voters into the democratic process. On the other hand, a decision in favor of Appellee will required Appellants to re-direct their limited resources to notifying and re-register purged voters.

Moreover, it is in the public interest that this issue be decided on an expedited basis. The United States Supreme Court has acknowledged that there is "a strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (internal quotations omitted). Denial of this fundamental right makes "[o]ther rights, even the most basic, … illusory[.]" *Wesberry*, 376 U.S. at 17. All Ohioans share an interest in clear rules to determine who will be able to cast a ballot on Election Day and have it counted and who will need to re-register to avoid being turned away from the polls. To preserve infrequent Ohio voters' right to vote, it is essential this appeal be decided on as expedited a basis as possible.

CONCLUSION

Appellants APRI, NEOCH, and Larry Harmon respectfully request the Court to expedite this appeal to allow for a decision prior to August 15, 2016. Appellants request that the Court adopt the briefing schedule set forth above, or an alternative schedule that would allow for a timely decision.

Dated: July 1, 2016

Respectfully submitted,

/s/ Naila Awan

Naila Awan, Trial Attorney (0088147)
Stuart C. Naifeh*
Cameron Bell*
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
Email: nawan@demos.org
Email: snaifeh@demos.org

Freda J. Levenson (0045916)
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Email: flevenson@acluohio.org

Daniel P. Tokaji*
Cooperating Attorney for ACLU of Ohio
The Ohio State University
Moritz College of Law**
55 W. 12th Ave
Columbus, OH 43210
Telephone: 310-266-0402
Email: dtokaji@gmail.com

Richard Saphire (0017813)
Cooperating Attorney for ACLU of Ohio
University of Dayton School of Law**
300 College Park
Dayton, Ohio 45469
Telephone: 937-229-2820
Email: rsaphire1@udayton.edu

Paul Moke (0014099)
Cooperating Attorney for ACLU of Ohio
Wilmington College**
1252 Pyle Center
Wilmington, Ohio 45177
Telephone: 937-725-7501
Email: paul.moke@gmail.com

Counsel for Plaintiffs-Appellants

---

* Admitted *pro hac vice*
** Institutional affiliation for the purpose of identification only

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Expedite Appeal was filed this 1st day of July, 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: July 1, 2016

/s/ Naila Awan
Naila Awan, Trial Attorney (0088147)
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
E-mail: nawan@demos.org

Exhibit A

Order of the District Court for the Southern District of Ohio

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO A. PHILLIP RANDOLPH INSTITUTE, *et al.*,

Plaintiffs,

v.

Case No. 2:16-cv-303
JUDGE SMITH
Magistrate Judge Deavers

JON HUSTED, OHIO SECRETARY OF STATE

Defendant.

ORDER

This matter is before the Court on Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or, in the alternative, Preliminary Injunction (Doc. 39), and the parties' cross-merits briefing[1] (Docs. 38, 49, 52, 56, and 57); as well as the Amicus Curiae Briefs filed by the Public Interest Legal Foundation (Doc. 60) and Judicial Watch, Inc. (Doc. 61).[2] The parties agree that all the necessary facts and legal arguments have been presented to the Court and this action is ripe for adjudication. After careful review of the parties' arguments, the Court finds in

[1] The parties initially agreed during a scheduling conference before Magistrate Judge Deavers that there were no factual issues to be tried and that this case could be resolved on cross-merits briefing. (*See* Doc. 25, Tr. of Conf.). There was some confusion by the parties as to what to label the merits briefing and Plaintiffs therefore titled their initial brief as a Motion for Summary Judgment and Permanent Injunction, or, in the alternative a Motion for Preliminary Injunction. Despite the earlier discussions and request for an expedited resolution of the case, Plaintiffs now request that if their current motion is denied, that the case should be set for trial. (Doc. 57, Pls.' Reply, 29 ("However, if this Court disagrees and believes that there *are* genuine issues of material fact, Plaintiffs respectfully request an expeditious trial to resolve any genuine issues of material fact, and entry of a preliminary injunction in the interim period.")). The Court agrees with the parties' initial assessment of this case that the issues are purely legal and can be resolved on the briefs. Therefore, to expedite this matter as requested by both parties and because all issues have been fully briefed, the Court will rule on the permanent injunction and enter final judgment.

[2] Both Amicus Curiae briefs support Defendant's position in this case.

favor of Defendant and **DENIES** Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or, in the alternative, Preliminary Injunction.

I. BACKGROUND

Plaintiffs Ohio A. Philip Randolph Institute ("Randolph Institute") and the Northeast Ohio Coalition for the Homeless ("NEOCH") initiated this case seeking injunctive relief to prevent future removal of registered voters from the voter registration rolls pursuant to, *inter alia*, Ohio Secretary of State Directive 2015-15. Plaintiff Randolph Institute is a state chapter of the A. Philip Randolph Institute, a national organization for African-American trade unionists and community activists that was established in 1965 to forge an alliance between the civil rights and labor movements. Randolph Institute is a senior constituency group of the American Federal of the Labor and Congress of Industrial Organizations ("AFL-CIO"). Randolph Institute devotes most of its time and resources to voter education, registration, and outreach efforts. (Doc. 37, Am. Compl., ¶ 12). Plaintiff NEOCH is a nonprofit charitable organization who helps homeless and at-risk men, women, and children in the city of Cleveland by ensuring they have access to services, health screenings, legal assistance, and ensuring that every homeless person is provided the opportunity to vote and participate in the democratic process. (*Id*. at ¶ 15).

Plaintiff Larry Harmon is a 59 year-old U.S. Navy veteran who has resided at the same address in Portage County, Ohio for approximately 15 years. Mr. Harmon voted in the 2004 and 2008 Presidential elections, but did not vote, or engage in any voter activity, from 2009 through 2015. In November 2015, Mr. Harmon went to the polls on Election Day to vote, but was told that his name did not appear in the poll book. In fact, Mr. Harmon had been removed from the Portage County voter registration rolls pursuant to Ohio's current practices and procedures for maintaining accurate voter rolls. The propriety of these practices and procedures serve as the

focal point of this litigation. Mr. Harmon does not recall receiving a confirmation notice to confirm his voter registration.

Defendant Ohio Secretary of State, Jon Husted ("Secretary Husted") is Ohio's chief election officer and is charged with management of voter registration and election administration throughout the state. *See* Ohio Rev. Code § 3501.04. Ohio law requires the Secretary of State to adopt "[a] process for the removal of voters who have changed residence," which is required to use information from the U.S. Postal Service's National Change of Address program (the "Ohio NCOA Process"). Ohio Rev. Code §§ 3501.05(Q); 3503.21. In addition to the Ohio NCOA Process, Ohio also uses a supplemental process to combat voter roll inaccuracies brought about by the frequent occurrence of voters changing addresses without notifying the United States Postal Service (the "Ohio Supplemental Process"). Once a voter is identified under either process, a confirmation notice is sent to the voter. A voter's failure to respond to the confirmation notice can ultimately lead to their registration being cancelled. The difference between the two processes is how a voter is identified to receive a confirmation notice. Under the Ohio NCOA Process, the United States Postal Service's program indicates that a voter has a forwarding address on file. Under the Ohio Supplemental Process, a voter is notified following a two-year period of non-voting. Here, Plaintiffs challenge the Ohio Supplemental Process as a violation of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501 *et seq*. Section 8 of the NVRA establishes the requirements that states must follow to maintain their respective voter registration rolls. 52 U.S.C. § 20507.

A. History of Ohio's Voter Registration Roll Maintenance

Prior to the enactment of the NVRA, Ohio updated its voter registration roll pursuant to Article V, § 1 of the Ohio Constitution, which stated in part, "[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless

he again registers to vote." Ohio Const. art. V, § 1.1. In 1993, Congress passed the NVRA "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" while "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(1), (4). Among other requirements, the NVRA requires states to "make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant[.]" 52 U.S.C. § 20507(a)(4)(B).

Following the enactment of the NVRA, the 120th Ohio General Assembly passed Amended Substitute Senate Bill No. 300 (effective January 1, 1995) and eliminated the statutory language that required boards of election to cancel voters solely because of their inactivity. Since 1994, Ohio has used two different processes to make a reasonable effort to maintain the accuracy of its voter registration rolls. Ohio implemented its current procedures to comply with and mirror the procedures established by the NVRA. The December 9, 1994 Directive from Ohio's Secretary of State outlining Ohio's new voter registration maintenance procedures began with the following:

> This Directive prescribes programs and procedures to identify and cancel the voter registrations of ineligible persons in accordance with Am. Sub. S.B. 300, effective January 1, 1995 and the National Voter Registration Act of 1993 (NVRA). Am. Sub. S.B. 300 enacts new revised code sections 3503.19 and 3503.21, and amends current revised code sections 3501.01, 3501.05, 3501.11, 3503.18, and 3503.24 relating to the cancellation of ineligible voters.
>
> My goal in adopting these programs and procedures is to provide all boards of elections with workable, cost effective methods to remove ineligible persons from the voter registration rolls in accordance with the new requirements of state and federal law.

(Doc. 38-1, Ohio Secretary of State Directive 94-36).

B. Ohio's Voter Registration Roll Maintenance Procedures

Ohio currently utilizes two procedures to maintain the accuracy of its voter registration rolls: the Ohio NCOA Process and the Ohio Supplemental Process. *See* Ohio Rev. Code § 3503.21.

1. Ohio NCOA Process

The Ohio NCOA Process is conducted on an annual basis. Under the Ohio NCOA Process, the Secretary of State's Office compares "the records in the Statewide Voter Registration Database ("SWVRD") to the NCOA database." (Doc. 38-2, Damschroder Decl., ¶ 11). "The NCOA database contains names and addresses of individuals who have filed changes of address with the United States Postal Service ("USPS")." (*Id.*). During the Ohio NCOA Process, the Secretary "provides the boards with a file listing the possible voter matches to the NCOA file." (*Id.*). The boards of elections compare the county file to the NCOA file and then "send a confirmation notice (Form 10-S) to each elector identified." (*Id.* at ¶¶ 11, 17). The confirmation notice is a postage pre-paid forwardable form that a voter can return to indicate whether the voter still resides at the same location. (*Id.*).

In December 2013, an amendment by the General Assembly to Senate Bill 200 required the Ohio Secretary of State to conduct the Ohio NCOA Process on an annual, rather than a biennial, basis. At that time, the Secretary also moved the corresponding Ohio Supplemental Process to an annual basis. (*Id.* at ¶ 9).[3]

Pursuant to the Ohio NCOA Process, an individual's voter registration is cancelled when he or she: (1) appears on the list of individuals who have filed a change of address with the

[3] The Secretary of State maintains that Ohio is also obligated to perform both processes on an annual basis pursuant to a Settlement Agreement that ended prior litigation. *See Judicial Watch v. Husted*, Case No.: 12-cv-792 (Sargus, J.) (hereinafter, the *Judicial Watch* case). A copy of the Settlement Agreement was filed as Doc. 38-4, Exhibit D to Defendant's Initial Brief.

USPS and a different address appears for that individual in the SWVRD; (2) fails to respond to the confirmation notice sent by forwardable mail with a pre-paid return form; and (3) then fails to engage in any voter activity for a period of four consecutive years, including two federal general elections (one being a presidential general election) from the date that the confirmation card is mailed. (*Id*. at ¶ 21).

2. Ohio Supplemental Process

The Ohio Supplemental Process begins after the Ohio NCOA Process is completed and "seeks to identify electors whose lack of voter activity indicates they may have moved, even though their names did not appear on the NCOA generated list." (Doc. 38-7, Ex. G to Def.'s 1st. Br., Ohio Secretary of State Directive 2009-05; *see also* Doc. 38-2, Damschroder Decl., ¶ 14). As part of the Ohio Supplemental Process, "BOEs use data points (e.g., voting history) to compile the data for the supplemental process." (Doc. 38-2, Damschroder Decl., ¶ 14). In the Ohio Supplemental Process, each individual board of elections compiles its own list of individuals who, according to the board's records, have not engaged in any voter activity for two years.[4] (*Id*. at ¶ 15). The boards of elections send each such individual identified a confirmation notice by forwardable mail with a postage pre-paid return envelope. (*Id*.). An individual who receives a confirmation notice and needs to update his or her address may do so using the State's online change of address system. (*Id*. at ¶ 19). Secretary Husted implemented this online change of address system in 2012. (*Id*.). An individual receiving a confirmation notice may also return the postage pre-paid form free of cost through the mail. If the individual returns the

[4] Voter activity includes: "a voter completing the confirmation card and returning it; filing a change of address either through BMV or one of the other designated agencies; filing a voter registration card with the board of elections; . . . casting an absentee ballot; casting a provisional ballot; voting on election day." (Doc. 42-1, Damschroder Dep. 66:19-67:5). Boards also have discretion to consider whether signing a candidate, issue, or local option petition is viewed as voter activity. (*Id*. at 70:17-20; 130:9-14).

confirmation notice and provides a new address, the individual's registration record is updated by the appropriate board of elections with the new address. (*Id*. at ¶ 20). If the individual returns the confirmation notice confirming that his or her current address is still accurate, the board notes on the individual's registration record that the confirmation notice was returned to the board and the address was confirmed. (*Id*.).

If an individual fails to return the confirmation notice, fails to update his or her voter registration, and fails to engage in any other voter activity, the individual will be marked as "inactive" in the registration database. (*Id*.). This "inactive" individual has all the rights of an otherwise qualified elector, including the ability to cast a regular ballot at any election. (*Id*.). If, however, four years (including two federal general elections) passes without voter activity, at that time the individual's voter registration record is cancelled. (*Id*.).

Plaintiffs allege that thousands of Ohio voters, like Plaintiff Mr. Harmon, have been removed from the voter registration rolls pursuant to the Ohio Supplemental Process. Plaintiffs assert that "[i]n Cuyahoga, Greene, Hamilton, and Medina Counties, for example, nearly 70,000 voters were purged in 2015 pursuant to the [Ohio] Supplemental Process, with no indication that any of them had actually moved." (Doc. 37, Am. Compl., ¶ 46). Plaintiffs state that "the [Ohio] Supplemental Process disproportionately burdens Ohio's most vulnerable and marginalized citizens. In Cuyahoga County, for example, the purged voters disproportionately reside in communities of color and low-income communities." (*Id*. at ¶ 48).

On December 17, 2015, Plaintiff Randolph Institute, through its counsel, sent a certified letter and email to Defendant Husted, notifying him that the State of Ohio was not meeting its obligations under Section 8 of the NVRA. On February 23, 2016, Plaintiff NEOCH, through its counsel, notified Defendant Husted of the alleged violations and both letters provided notice of

their intent to sue for violations of Section 8 of the NVRA. Plaintiffs then initiated this case on April 6, 2016.

II. STANDARD OF REVIEW

Plaintiffs initially filed this case and immediately moved for a Temporary Restraining Order and Preliminary Injunction, and they are now seeking a permanent injunction. The "standard for granting a permanent injunction is essentially the same as the standard for a preliminary injunction." *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1147 (S.D. Ohio 2000) (Smith, J.). However, when a plaintiff seeks a permanent injunction, the plaintiff must show actual success on the merits, rather than a mere likelihood of success on the merits. *Id.*, (citing *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546, n. 12 (1987)). In the Sixth Circuit, it is well-settled that the following factors are to be considered in determining whether injunctive relief is necessary:

> (1) Whether the movant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the movant has shown irreparable injury; (3) whether the issuance of a preliminary [permanent] injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000) (citing *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*)). These four considerations are not required elements of a conjunctive test, but are rather factors to be balanced. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) (finding that no single factor is determinative).

The decision whether or not to issue injunctive relief falls within the sound discretion of the district court. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982). A permanent injunction shall only be ordered upon showing (1) "that [plaintiff] has suffered irreparable injury;" (2) "there is no adequate remedy at law;" (3) "'that, considering the

balance of hardships between the plaintiff and defendant, a remedy in equity is warranted;'" and (4) "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)). Moreover, Plaintiffs must establish their case by clear and convincing evidence. *Damon's Rests., Inc. v. Eileen K. Inc.*, 461 F. Supp.2d 607, 621 (S.D. Ohio Aug. 30, 2006) (King, M.J.). To meet this burden, the movant's evidence "must more than outweigh the [opposing] evidence," but must also "persuade the court that its claims are highly probable." *Id.*

III. DISCUSSION

Plaintiffs have alleged four violations of Section 8 of the NVRA of 1993: (1) that the Ohio Supplemental Process violates the NVRA by removing voters from the voter registration rolls based on their failure to vote; (2) Ohio's voter maintenance procedures are unreasonable; (3) Ohio's voter maintenance procedures are not conducted uniformly; and (4) the confirmation notice is legally deficient. Defendant, on the other hand, asserts that the Ohio Supplemental Process does not remove a voter solely for not voting and Ohio's processes for maintaining the voter registration rolls are specifically outlined and authorized by the plain language of the NVRA. This Court will consider the parties' arguments on each of the alleged violations in turn.

A. Success on the Merits

1. National Voter Registration Act

There is no dispute that federal law requires states to implement procedures to maintain voter registration rolls. Specifically, the two applicable statutes are the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA"). Plaintiffs allege that Defendant's use of the Ohio Supplemental Process "has violated and continues to violate Section 8 of the NVRA by removing voters based on a failure to vote and

without following the procedures required by the NVRA for removing voters who have changed residence. 52 U.S.C.A. § 20507." (Doc. 37, Am. Compl., ¶ 56).

Notably, both sides argue that the language of the NVRA is unambiguous. "If the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced." *United States v. Plavcak*, 411 F.3d 655, 661 (6th Cir. 2005). Despite both parties arguing in favor of a plain-meaning interpretation, they each reference the legislative history of the NVRA, citing selective quotes in support of their respective positions. (*See* Doc. 39, Pls.' Mot., 23; Doc. 52, Pls.' Opp. Br., 11–12; Doc. 49, Def.'s 2d Br., 8–9). It is well-settled that if a statute lacks ambiguity, then "there is no need to consult legislative history." *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002). Similarly, Plaintiffs' reliance on the Department of Justice's interpretations of the NVRA is misplaced because the Court need not consider those interpretations where the NVRA is clear on its face.

The NVRA, 52 U.S.C. § 20507, titled "Requirements with respect to administration of voter registration," specifically provides:

> **(b)** Confirmation of voter registration. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--
>
> > **(1)** shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (*42 U.S.C. 1973* et seq. [*52 USCS §§ 10301* et seq.]); and
> >
> > **(2)** shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--
> >
> > > **(A)** has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
> > >
> > > **(B)** has not has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs.

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2) (A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this Act.

(d) Removal of names from voting rolls.

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)

(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an 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.

> **(2)** A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a 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.
>
> **(3)** A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

52 U.S.C. § 20507(b)–(d).

Plaintiffs assert that the plain language of the NVRA, as set forth above, prohibits voter list-maintenance procedures that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reasons of the person's failure to vote . . ." 52 U.S.C. § 20507(b)(2). Plaintiffs seemingly ignore the rest of that clause, which is separated by a comma and provides exceptions that allow for the procedures specifically described in both subsections (c) and (d). Rather, Plaintiffs argue that subsections (c) and (d) are essentially just one exception that should be considered together as part of the address-change confirmation procedure. (Doc. 57, Pls.' Reply, 4–5). As such, Plaintiffs urge the Court to interpret the NVRA as a mandate that voter inactivity can only be considered after the

confirmation notice is sent and cannot be used as the trigger for initiating the address-confirmation process.

Plaintiffs accuse Defendant of "cherry-picking one of [the NVRA] exceptions and treating it as though it were the basic rule—contrary to the statute's actual words—[which] is not a "plain-meaning" interpretation." (*Id*. at 6 (citing *United States v*. *Medlock*, 792 F.3d 700, 709 (6th Cir. 2015) ("[I]t is a 'cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute.'" (quoting *Williams v*. *Taylor*, 529 U.S. 362, 364 (2000))))). In reality, it is Plaintiffs who focus on a single clause in Section 20507(b)(2) and not the entirety of the statute.

Further, Plaintiffs want the Court to read requirements and language into the NVRA that simply are not there. Plaintiffs argue that Ohio may only send a confirmation notice to a voter "to confirm a change of residence after the state has already obtained reliable second-hand information, independent of the voter's failure to vote, indicating that a voter has moved." (Doc. 39, Pls.' Mot., 26). Plaintiffs continue, "[a]llowing states to *initiate* the voter-removal process based on a failure to vote—as Ohio is now doing—would eviscerate subsection (b)'s plain language, allowing the exception to swallow the rule." (*Id*. at 27). However, this is not what the NVRA states. The plain language of the NVRA contradicts Plaintiffs' position. The phrases Plaintiffs rely on, such as "reliable second-hand information," "independent of the voter's failure to vote," "initiate," "trigger," etc., are nowhere to be found in the NVRA. These are phrases that Plaintiffs would like the Court to write into the NVRA.

Subsection (d), set forth in detail above, is the basis for the Ohio Supplemental Process. This section does not specifically state who should be sent a confirmation notice or when that confirmation notice should be sent. Therefore, Defendant argues, and the Court agrees, that that

decision is left to the states. *See Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993) ("Our duty [is] to refrain from reading a phrase into the statute when Congress has left it out."); *see also Bates v. U.S.*, 522 U.S. 23, 29 (1997) (courts "resist reading words or elements into a statute that do not appear on its face").

> In 2002, Congress addressed this section of the NVRA in HAVA, explaining:
>
> [C]onsistent with the National Voter Registration Act of 1993 . . . , registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed ***solely*** by reasons of a failure to vote.

52 U.S.C. § 21083(a)(4) (emphasis added). The Ohio Supplemental Process is consistent with both the NVRA and HAVA as voters are never removed from the voter registration rolls ***solely*** for failure to vote. Pursuant to the Ohio Supplemental Process, a confirmation notice is sent to voters who have been inactive for two years. If they do not respond to the confirmation notice, they are placed on an inactive list, but their ability to vote does not change at that time. If those on the inactive list then fail to vote in the next two general federal elections, one of which is a Presidential election, then those voters are removed from the voter registration rolls. Therefore, it is only after a person ***both*** (1) fails to respond to the confirmation process, ***and*** (2) subsequently fails to vote in the following two general federal elections that he or she is removed from the voter registration rolls. As Amicus Judicial Watch aptly describes the process, "registrants are *queried* on the basis of their failure to vote, but not *removed* on that basis." (Doc. 61, Judicial Watch Amicus Br., 7 (emphasis in original)). The NVRA does not mention—explicitly or implicitly—the events that need or need not happen before a state may initiate its confirmation process. For instance, as applicable here, the NVRA does not prohibit a state from sending a confirmation notice to voters who have not voted for a certain period of time. Using

the discretion left to the states, they have undertaken different ways of beginning the list maintenance process.[5] *See* 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.").

While there is a general lack of actual case law analyzing Section 8 of the NVRA, it bears mentioning that both parties have cited several cases in which the statute has been litigated and resolved without a final court order. Namely, Indiana entered into a consent decree with the DOJ in 2006 whereby the State would engage in a process that is more extensive than that employed in Ohio. *See U.S. v. Indiana*, 1:06-cv-1000-RLY-TAB (S.D. Ind. 2006). In addition, the City of Philadelphia reached a settlement agreement with the DOJ in 2007 whereby the City would consider voter inactivity as part of its voter roll maintenance process. *See U.S. v. City of Philadelphia and Philadelphia City Commission*, C.A. No. 06-4592 (E.D. Pa 2007). In addition, as noted above in footnote 3, this Court oversaw a settlement agreement reached by Defendant Husted and Judicial Watch in 2014. (*See* Doc. 38-4, *Judicial Watch v. Husted* Consent Decree.) That agreement is still in effect and sets forth Defendant Husted's obligations with respect to Ohio's voter registration maintenance processes. These agreements are not controlling in the instant matter, but they do lend credence to the fact that Ohio's voter roll maintenance processes comport with the NVRA's requirements.

Accordingly, the Court finds that the Ohio Supplemental Process does not violate the NVRA, and in fact, the unambiguous text of the NVRA specifically permits the Ohio Supplemental Process.

[5] Other states use inactivity to begin their list maintenance processes, including Missouri, Tennessee, Georgia, West Virginia, Montana, and Florida.

2. Reasonableness

Plaintiffs argue that the Ohio Supplemental Process violates the NVRA because it is "unreasonable" in violation of 52 U.S.C. § 20507(a)(4)(B). Plaintiffs argue that because the Ohio Supplemental Process does not reliably identify whether a voter has moved, it is not a reasonable method for purging the voter rolls and thus, it violates the NVRA. Plaintiffs ask the Court to adopt the definition of "reasonable" provided by the Department of Justice as "based upon objective and reliable information of potential ineligibility due to a change of residence that is independent of the registrant's voting history." (Doc. 39, Pls.' Mot., 30 (quoting *Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. May 4, 2016), ECF No. 19)). Defendant argues that the statute does not "create some nebulous reasonableness standard." (Doc. 49, Def.'s 2d Br., 10).

Plaintiffs argue that the NVRA requires that the Ohio Supplemental Process must be reasonable under 52 U.S.C. § 20507(a)(4)(B), but the language in the statute does not contain such a requirement. The statute specifically provides:

> **(a)** In general. In the administration of voter registration for election for Federal office, each State shall--
>
> * * *
>
> **(4)** conduct a general program that makes a ***reasonable*** effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--
>
> **(A)** the death of the registrant; or
>
> **(B)** a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

52 U.S.C. § 20507(a)(4)(B) (emphasis added). The language of the statute is clear that the "program" shall be "general" and the "effort" shall be "reasonable." Notably, the statute does not say that the "program" must be "reasonable." Further bolstering this conclusion is that the statute sets forth a specific set of requirements for programs used to remove voters who have moved. The statute requires that such a program be completed "in accordance with subsections

(b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). Again, it does not say that such a program needs to be reasonable nor is such a requirement contained within subsections (b), (c), or (d). The Court need not consider outside sources for the interpretation of the statute when the statute is clear on its face. *Detroit Receiving Hosp. & Univ. Health Ctr. v. Sebelius*, 575 F.3d 609, 613 (6th Cir. 2009) ("Our analysis begins and ends with the statute, because the provisions at issue are clear.") (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Accordingly, the Court finds that there is no reasonableness requirement for programs that are otherwise lawful under subsections (b), (c), and (d).

However, even if the Court were to accept that the NVRA requires Defendant Husted to use reasonable means to purge the voter rolls, Plaintiffs' only case source for what should be considered reasonable is *Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001). Plaintiffs argue "[i]f a state chooses to use another source of change-of-address information instead of or in addition to NCOA, that source must be similarly reliable." (Doc. 39, Pls.' Mot., 31). Plaintiffs rely on dicta from *Welker* for this conclusion, quoting that "the NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using *reliable* information from *government agencies* such as the Postal Service's change of address records." (*Id.*, emphasis added by Pls. (quoting *Welker*, 239 F.3d at 599)). Plaintiffs take the language in *Welker* one step further by asking this Court to determine that based on *dicta* from *Welker*, a state must use information that reliably indicates a voter has moved. The *Welker* Court made no such holding and the Court will not add language to the *Welker* decision. In actuality, the Ohio Supplemental Process uses information that is both reliable and comes from a government agency. A voter's non-participation in an election may not be an ideal indicator of whether a voter has moved, but Plaintiffs cannot dispute that the

information itself—that the voter did not participate in an election—is reliable and comes from a government agency. In the Court's view, the *dicta* in *Welker* requires nothing more. Accordingly, Plaintiffs' argument that the Ohio Supplemental Process is unreasonable is without merit.

3. Uniform Implementation

Next, Plaintiffs allege that the Ohio Supplemental Process violates the NVRA because it is applied in a non-uniform manner. Plaintiffs argue that counties conduct the process at different times, that counties can chose whether voter activity includes certain actions, and that the notices sent by each county are different. Defendant argues that Plaintiffs do not have standing to raise this argument because Plaintiffs failed to provide pre-litigation notice of the claim as required by the NVRA. Further, Defendant asserts that even if Plaintiffs have standing, the Ohio Supplemental Process is uniform and nondiscriminatory. To reach the merits of this claim, the Court will assume *arguendo* that Plaintiffs do have standing.

The "uniform and nondiscriminatory languages arises under 52 U.S.C. § 20507(b)(1) which requires that any program which protects the integrity of the voting process "shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Plaintiffs argue that a voter's county determines if and when a voter is removed from the rolls while Defendant argues that all of Ohio's 88 counties have the same 120-day window in which to purge their rolls and that each county has the discretion to determine which activities constitute "voter activity." Plaintiffs make no argument that the differences between counties are discriminatory, instead, Plaintiffs argue that the differences improperly lack uniformity.

Plaintiffs ask the Court to adopt the following standard: "To be uniform and non-discriminatory, a state's list-maintenance program must not treat similarly situated voters

differently based on irrelevant characteristics." (Doc. 39, Pls.' Mot., 22 (citing *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006)). But the county in which one resides is not an irrelevant characteristic in Ohio. Ohio's voting system delegates significant authority to the county boards of elections. Counties are responsible for generating ballots, delivering ballots, the selection and maintenance of voting equipment, determining whether certain petitions are needed, and for administering the actual election on Election Day. Ohio Rev. Code §§ 3501.06; 3501.11; 3506.02; 3506.03; 3513.051. Further, a person's physical location is of course determinative of which issues and candidates on which a person may vote. Ohio Rev. Code §§ 3503.06, 3503.07, 3503.17. In fact, county boards of elections in Ohio are specifically granted the responsibility of establishing, defining, rearranging, and combining election precincts. Ohio Rev. Code §§ 3501.11(A). There are numerous reasons why a county may operate a voter-maintenance program differently from a neighboring county including, but not limited to the county budget, the county population, and county access to data. In Ohio, the county in which one resides is anything but an irrelevant characteristic. Accordingly, under Plaintiffs' test, there is uniformity and non-discrimination because the Court cannot find that voters in different counties are similarly situated.

However, even if the Court were to find the process non-uniform, the Ohio Supplemental Process is otherwise lawful, meaning that those who did not get to vote because they were purged before the election were properly purged. Accordingly, the effective disparity is not that some voters were purged wrongfully, but rather, that some voters improperly remained on the rolls and should not have had the right to vote. Notably, HAVA requires that "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office **shall be removed** from the official list of eligible voters . . . ." 52 U.S.C.

§ 21083(a)(4). But even if Defendant is in violation of HAVA for not removing voters who should be purged, Plaintiffs' Amended Complaint does not ask this Court to address those who should not have been able to vote, but rather to restore those "unlawfully purged." (*See* Doc. 37, Am. Compl., ¶¶ 58, 62–63(ii)). As set forth, Plaintiffs' Amended Complaint does not seek any relief for an Ohio Supplemental Process which improperly allows some to vote. Finally, although it appears the timing of the Ohio Supplemental Process could be more narrowly tailored, the Court cannot find a 120-day period for voter-roll-maintenance non-uniform where the Ohio Supplemental Process uniformly removes voters who have no voter activity and fail to respond to a confirmation notice in accordance with the NVRA. Accordingly, Plaintiffs' claim fails on the merits.

4. Confirmation Notice

Plaintiffs argue that the version of Ohio's Confirmation Notice in place at the time this litigation began violates the requirements of Section 8(d) of the NVRA. Specifically, Plaintiffs argue that the Confirmation Notice does not notify voters of the date by which they must respond to avoid adverse consequences; it fails to inform voters of the consequences of not responding to the confirmation notice; it does not inform people who have moved out of the state how they can register in their new state; and it requires voters to provide the same information required to register to vote. Plaintiffs have sought injunctive relief "directing the Defendant to adopt a new Form 10-S that complies with the requirement of the NVRA. The NVRA specifically provides:

> **(2)** A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a 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.

52 U.S.C. § 20507(d)(2).

After Plaintiffs brought this issue to the attention of the Secretary of State, he has made changes to Form 10-S so that it is now in compliance with the requirements of the NVRA. (*See* Doc. 38-18, Ex. Q to Def.'s 1st Br., (the "Revised Notice")). The Revised Notice has been promulgated by Secretary Husted in the form of emails to each of Ohio's county boards of elections and it is posted on the Secretary of State's website. (*See* Doc. 56-2, Ex. B to Def.'s 3d Br., Website Screen Shots and Emails). Defendant represents that the Revised Notice will be used in the 2016 list maintenance procedure. Defendant asserts that as a government official, his change in the procedure is entitled to deference, relying on *Mosley v. Harrison*, 920 F.2d 409, 415 (6th Cir. 1990) (holding that, in the context of mootness, a change in procedure made by a public official is entitled to greater deference than a change by a private entity). Defendant therefore argues that Count II of Plaintiffs' Amended Complaint is now moot.

Plaintiffs dispute that their claim is now moot on the basis that the old Form 10-S was in existence at the time the Complaint was filed. For voluntary cessation to render a claim moot, "there [must be] no reasonable expectation that the wrong will be repeated." *Youngstown Publ'g Co. v. McKelvey*, 189 F. App'x 402, 405 (6th Cir. 2006). Plaintiffs argue that even if the Revised Notice is adopted and used in the 2016 process, there is nothing preventing the

Defendant from reverting back to the non-conforming Confirmation Notice in the future except court intervention. The Court does not agree. Defendant voluntarily made changes to Form 10-S upon receiving notice from Plaintiffs that it was not in compliance with the NVRA. Defendant has disseminated the Revised Notice and has stated as part of the record that the State plans to use this notice in the annual execution of the list maintenance procedures. There is no evidence to suggest that the Defendant does not plan to use this Revised Notice in 2016 or at any other point in the future.

Finally, Plaintiffs argue that problems persist with the Revised Notice despite Secretary Husted's revisions. Specifically, Plaintiffs argue that the Revised Notice violates the NVRA because it fails to provide information about how a recipient can re-register if he/she has moved outside the state. (Doc. 57, Pls.' Reply, 20). Section (d)(2)(B) of the NVRA provides: "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." 52 U.S.C. § 20507(d)(2)(B).

Plaintiffs have raised this argument for the first time in their Reply brief despite being aware—prior to filing their Response—of the Revised Notice and Defendant's position that the Revised Notice complies with the NVRA notice requirements. It is not proper for a party to raise a new argument in reply because the opposing party is not afforded with an opportunity to respond. As such, the Court is free to disregard this argument. *See Ross v. Choice Hotels Int'l, Inc*., 882 F. Supp. 2d 951, 958 (S.D. Ohio 2012) (Frost, J.) ("This Court has explained time and again that 'a reply brief is not the proper place to raise an issue for the first time.' Consequently, the Court need not and will not consider [the new argument]." (citations omitted)).

Even if the argument were timely raised, it still fails. The NVRA does not specifically require states to control and/or instruct voters in other states. Section 20507 begins with "Each State shall . . . ." The protections of the NVRA exist to protect voters in their respective states to *continue* to vote within that State—not register in another state. It defies logic that the NVRA would saddle the various secretaries of state (or their equivalents) with the onerous burden of coaching out-of-state residents through the registration process in their new states of residence. The Revised Notice gives *Ohio voters*—the only voters Ohio is obligated to provide notice to—several options to notify the Secretary of State of a change of address, including the opportunity to update the information online. Accordingly, the Revised Notice, Form 10-S, is therefore in compliance with the NVRA.

B. Irreparable Harm/Injury

Given that Plaintiffs have not substantially demonstrated a violation of the NVRA, the Court is unable to conclude that irreparable harm has been established for purposes of issuing a preliminary and/or permanent injunction.

C. Harm to Others

Again, since there has been no violation of the NVRA, there will be no harm to others in continuing to maintain the voter registration rolls in accordance with the NVRA.

D. Public Interest

The Court finds that the public interest is being served by Ohio's voter maintenance procedures and will continue to be served as long as Ohio continues to operate in compliance with the NVRA. The purposes of the NVRA include: "to protect the integrity of the electoral process;" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501. Therefore, Ohio's procedures of maintaining the voter registration rolls ensure the integrity of the election process.

Accordingly, after examining the preliminary and permanent injunction factors together, the Court concludes that injunctive relief is not warranted in this instance. This decision disposes of all of Plaintiff's claims and effectuates the desire of the parties—that is, it renders the Court's final decision on the merits of the case. The parties have agreed that a final, expedient decision is in the best interest of all involved in light of the looming November election. The Court believes this order provides exactly that.

IV. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or, in the alternative, Preliminary Injunction is **DENIED**. Having found that Plaintiffs' claims are not meritorious, there is no just reason for delay and therefore, final judgment shall be entered in favor of Defendant.

The Clerk of this Court shall remove Documents 9 and 39 from the Court's pending motions list and terminate this case.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Exhibit B

Judgment of the District Court for the Southern District of Ohio

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

OHIO A. PHILLIP RANDOLPH INST., et al.,
Plaintiff
v.
JON HUSTED, OH. SECRETARY OF STATE,
Defendant

Civil Action No. 2:16-CV-303

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

❒ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

❒ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

❒ other:

This action was *(check one)*:

❒ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

❒ tried by Judge _____ without a jury and the above decision was reached.

❒ decided by Judge George C. Smith on a motion for

☐ PURSUANT TO AN ORDER DATED JUNE 29, 2016 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION IS DENIED.

Date: JUNE 29, 2016

CLERK OF COURT

Signature of Clerk or Deputy Clerk

Print Save As... Reset

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

OHIO A. PHILLIP RANDOLPH INST., (
Plaintiff

vs

JON HUSTED, OH. SECRETARY OF
Defendant

Case Number: 2:16-CV-303

NOTICE OF DISPOSAL PER SOUTHERN DISTRICT OF OHIO LOCAL RULES 79.2(a)&(b)

The above captioned matter has been terminated on JUNE 29, 2016.

If applicable to this case, the disposal date will be six (6) months from the above termination date.

Rule 79.2(a) Withdrawal by Counsel:

All depositions, exhibits or other materials filed in an action or offered in evidence shall not be considered part of the pleadings in the action, and unless otherwise ordered by the Court, shall be withdrawn by counsel without further Order within six (6) months after final termination of the action.

Rule 79.2 (b) Disposal by the Clerk

All depositions, exhibits or other materials not withdrawn by counsel shall be disposed of by the Clerk as waste at the expiration of the withdrawal period.

RICHARD NAGEL, CLERK

By: _____
Deputy Clerk

Exhibit C

Plaintiffs' Motion for Summary Judgment and Permanent Injunction

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' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION,
or,
IN THE ALTERNATIVE, PRELIMINARY INJUNCTION

Plaintiffs Ohio A. Philip Randolph Institute ("APRI"), the Northeast Ohio Coalition for the Homeless ("NEOCH"), and Larry Harmon through their counsel, respectfully move this Court, pursuant to Federal Rules of Civil Procedure 56, to enter Summary Judgment on Claim 1 of their Complaint (Doc. 1), which alleges that Ohio's "Supplemental Process" violates Section 8 of the National Voter Registration Act of 1993 ("NVRA") and to enter Summary Judgment on Claim 2 of their Complaint, which alleges

that Ohio's "confirmation notice" does not comply with the plain requirements of Section 8(d)(2) of the NVRA. Absent injunctive relief, Plaintiffs will be subjected to permanent and irreparable harm as a result of Defendant's unlawful actions, and countless Ohio voters will be at risk of being disenfranchised in the November 2016 Presidential Election and future elections.

Intervention by this court is necessary to preserve for Ohio residents their fundamental right, as citizens of the United States and the State of Ohio, to participate meaningfully in the democratic process. In support of their Motion, Plaintiffs rely on the accompanying Memorandum of Law, the Declarations of Larry Harmon, Brian Davis, Andre Washington, Delores Freeman, KaRon Waites, Angaletta Pickett, Chad McCullough, Lisa Keil, Elizabeth Bonham, and Cameron Bell, the Exhibits that are attached thereto, and the other evidence in the record in this action.

WHEREFORE, Plaintiffs respectfully request this Court to enter summary judgment in favor of the Plaintiffs and to issue an order:

1. Declaring that Ohio's Supplemental Process violates Section 8 of the NVRA;
2. Permanently enjoining Defendant Secretary of State Husted and his successors, agents, officers, and employees from issuing roll-maintenance directives that require counties to implement the Supplemental Process or any other process that uses failure to vote as a trigger to initiate the confirmation and removal process under Section 8 of the NVRA;
3. Prohibiting Defendant Secretary of State Husted and his successors, agents, officers, and employees from sending or causing to be sent any confirmation notices to registered voters based on their voter inactivity;

4. Prohibiting Defendant Secretary of State Husted and his successors, agents, officers, and employees from removing or causing to be removed any voters from the registration rolls based on the Supplemental Process;
5. Requiring Defendant Secretary of State Husted and his successors, agents, officers, and employees to reinstate all unlawfully purged voters to the registration rolls or, in the alternative, to count all provisional ballots cast in any federal election by voters whose registrations have been cancelled by operation of the Supplemental Process and who continue to reside at the same address; and
6. Requiring Defendant Secretary of State Husted and his agents, officers, and employees to revise the confirmation notice (SOS Form 10-S) to comply with the requirements of Section 8(d)(2) of the NVRA.

In the alternative, should the Court find there are disputed issues of fact such that summary judgment is not appropriate, Plaintiffs respectfully request this Court to enter a preliminary injunction awarding the above requested relief pending an evidentiary hearing on the disputed facts, and to set this case for an expedited trial.

Plaintiffs request an oral argument because of the public importance of this case.

Dated: May 24, 2016

Respectfully submitted,

/s/ Naila Awan

Naila Awan, Trial Attorney (0088147)
Stuart C. Naifeh*
Cameron Bell*
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
Email: nawan@demos.org
Email: snaifeh@demos.org

Freda J. Levenson (0045916)
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Email: flevenson@acluohio.org

Daniel P. Tokaji*
Cooperating Attorney for ACLU of Ohio
The Ohio State University
Moritz College of Law**
55 W. 12th Ave
Columbus, OH 43210
Telephone: 310-266-0402
Email: dtokaji@gmail.com

Richard Saphire (0017813)
Cooperating Attorney for ACLU of Ohio
University of Dayton School of Law**
300 College Park
Dayton, Ohio 45469
Telephone: 937-229-2820
Email: rsaphire1@udayton.edu

Paul Moke (0014099)
Cooperating Attorney for ACLU of Ohio
Wilmington College**
1252 Pyle Center
Wilmington, Ohio 45177
Telephone: 937-725-7501
Email: paul.moke@gmail.com

Counsel for Plaintiffs

* Admitted *pro hac vice*
** Institutional affiliation for the purpose of identification only

MEMORANDUM OF LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION AND SUMMARY

No right is more fundamental than the right to vote. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). In furtherance of this most basic right, Section 8 of the National Voter Registration Act of 1993 ("NVRA") prohibits states from removing voters from the rolls based upon their failure to vote. The State of Ohio is currently violating the NVRA through its "Supplemental Process," under which countless registered voters have been—and, absent judicial relief, will be—placed in inactive status and ultimately removed from the rolls for not having voted. Plaintiffs Ohio A. Philip Randolph Institute ("APRI"), Northeast Ohio Coalition for the Homeless ("NEOCH"), and Larry Harmon seek summary judgment and a permanent injunction to stop the illegal Supplemental Process. Specifically, Plaintiffs request an order immediately halting the Ohio Secretary of State ("the Secretary") from initiating this year's Supplemental Process and restoring to the voter rolls the Ohio voters who have been unlawfully purged, so as to avoid denying tens of thousands of Ohio citizens their right to vote in the 2016 General Election.

Since approximately 1995, the Ohio Secretary of State has sent out periodic directives to Ohio's 88 county boards of elections, requiring them to conduct a list-maintenance process known as the "Supplemental Process." Under this process, registered voters who have not voted or engaged in other election-related activity in the previous two years are sent a "confirmation notice." Voters who do not respond to the confirmation notice are placed in "inactive" status and, if they do not vote for the

subsequent two federal election cycles, they are purged from Ohio's voter rolls. *See*, *e.g.*, Directive No. 2015-09, "2015 General Voter Records Maintenance Program" (May 19, 2015), *available at* http://www.sos.state.oh.us/sos/upload/elections/directives/2015/Dir2015-09.pdf (hereinafter "Directive 2015-09"). The Supplemental Process, because it relies on voters' failure to vote as the trigger for cancelling their voter registrations, is prohibited by the NVRA. 52 U.S.C.A. § 20507 (b)(2) (2016). *See infra* Part II.A. To make matters worse, the confirmation notice employed in this process violates the requirements plainly set forth in Section 8 of the NVRA. *Id.* § 20507 (d)(2). *See infra* Part II.B, III.B.

Ohio voters who have been removed from the rolls based on voting inactivity are often unaware that their registration has been cancelled. In November 2015 and March 2016, many purged voters came to the polls and attempted to cast ballots, only to be told that they were no longer registered, effectively denying them the right to vote in those elections. In November 2016, a presidential election in which turnout will be much higher than in the 2015 local election or the 2016 primary election, a much larger number of infrequent Ohio voters will be denied the opportunity to cast a vote that counts. *See infra* Part II.C, II.D.

Plaintiffs APRI and NEOCH are civic engagement groups that work to educate voters and bring them into the political process, and Plaintiff Harmon is an eligible Ohio voter who was deprived of his right to vote in 2015 because of the Defendant's use of the Supplemental Process. *See infra* Part II.E, III.D. Plaintiffs seek summary judgment and a permanent injunction prohibiting the Secretary from conducting the unlawful

Supplemental Process, and ordering him to restore already-removed voters to the rolls prior to the November General Election. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *infra* Part III.

Ohio's Supplemental Process violates the plain language of the NVRA. Under Section 8(b) of the NVRA, states may not maintain their voter rolls in a manner that results in voters being removed for their "failure to vote." 52 U.S.C.A. § 20507 (b). Although states are permitted to use failure to vote to confirm other reliable information that indicates a registrant has changed his or her address (such as change-of-address information from the Postal Service), states are prohibited from initiating a cancellation process based on failure to vote. There is no genuine dispute that the Supplemental Process, in targeting voters for removal solely based on their failure to vote, does exactly what the NVRA prohibits. *See infra* Part III.A.1. Using failure to vote as the basis for removing voters is not only expressly prohibited, it also violates the NVRA's other restrictions on roll-maintenance programs and fails to advance Ohio's stated goal of keeping its voter rolls properly maintained because, as the undisputed evidence in the record establishes, a failure to vote is a poor proxy for a change of address. *See infra* Part III.A.2. In addition, the Supplemental Process is not uniformly administered throughout the state, with the result that voters in some counties are purged while similarly situated voters in other counties remain registered and able to vote. *See infra* Part III.A.3.

Plaintiffs are entitled to a permanent injunction. The Supplemental Process has caused and will continue to cause irreparable injury to Plaintiffs, their members, and other infrequent Ohio voters, and Plaintiffs have no adequate remedy at law to

compensate them for these injuries. Absent a permanent injunction, many voters will be erroneously declared inactive in the summer of 2016 and ultimately unlawfully removed from the rolls, and tens of thousands of Ohio voters will be threatened with the irreparable harm of having their fundamental right to vote unlawfully denied. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (denial of the right to vote constitutes irreparable injury); *infra* Part III.C.1. There is no legal remedy that can compensate for a deprivation of the right to vote. *See infra* Part III.C.2.

A permanent injunction will not harm the Defendant, who has other means of keeping Ohio's voter rolls current and accurate, and will protect the "strong [public] interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). *See infra* Part III.C.3. Absent an injunction halting the Supplemental Process and ensuring that Ohio's infrequent voters are not disenfranchised, thousands of Ohio voters will be prevented from exercising their fundamental right to vote in the November 2016 Presidential Election. *See infra* Part III.C.4. This Court should grant summary judgment in Plaintiffs' favor and issue a permanent injunction. At the very least, Plaintiffs have demonstrated a strong likelihood of success on the merits, and this Court should enter a preliminary injunction and set the case for an expedited trial. *See infra* Part III.E.

II. STATEMENT OF FACTS

The NVRA was enacted to increase voter registration opportunities and electoral participation. 52 U.S.C.A. § 20501. One way the NVRA achieves this purpose is by

regulating state voter-roll maintenance programs, requiring states to maintain accurate voter registration rolls. Maintaining accurate rolls, according to the NVRA, requires not only removing voters who have become ineligible, but also ensuring that voters, once registered, remain on the rolls as long as they continue to be eligible. S. REP. NO. 103-6, at 19 (1993); *see also* H.R. REP. NO. 103-9 (1993), at 18, *reprinted in* 1993 U.S.C.C.A.N. 105, 122 The NVRA permits states to remove voters from the rolls only for particular reasons and in accordance with particular procedures, and it expressly prohibits states from removing voters merely for not voting. Unfortunately, Ohio's "Supplemental Process" does exactly what the NVRA prohibits: It removes voters from the rolls merely as a result of their failure to vote, regardless of their eligibility.

A. Ohio's Roll-Maintenance Processes

In accordance with directives issued annually (or, prior to 2014, biennially) by the Defendant to Ohio's 88 county boards of elections, Ohio operates a program that attempts to identify and remove individuals from its voter rolls who are no longer eligible to vote because of a change in residence. Plaintiffs' Statement of Undisputed Material Facts, May 24, 2016, ¶ 1 (hereinafter "SOF"). This program consists of two processes by which voters are identified and sent notices requiring them to confirm their voter registration information: the National Change of Address ("NCOA") Process and the Supplemental Process. SOF ¶¶ 2-3. The two processes are similar in one way: Voters identified through either the NCOA Process or the Supplemental Process are sent a confirmation notice requiring them to confirm or update their voter registration information. SOF ¶ 6.

If a voter does not respond to the notice and does not vote or engage in other voting-related activities in the subsequent four-year period, that voter's registration is cancelled. SOF ¶ 7-8; Ohio Rev. Code Ann. § 3503.21 (2016).

The difference between the two processes is the trigger for sending the confirmation notice. The NCOA Process is triggered when information obtained from the United States Postal Service's NCOA system indicates that a voter has a forwarding address on file with the Postal Service. SOF ¶¶ 2-4. Conducting voter-roll maintenance using information from the NCOA system is expressly authorized by the NVRA, *see* 52 U.S.C.A. § 20507 (c)(1), and is required by Ohio law. Ohio Rev. Code Ann. § 3501.05(Q) (2016). By contrast, the Supplemental Process is triggered merely by a voter's inactivity: It targets voters who do not vote or engage in other specific activities (such as filing a voter registration form) for a two-year period. SOF ¶ 4. The Supplemental Process, which is not authorized by the NVRA or required by Ohio law, has been created and is carried out solely pursuant to the Defendant's list-maintenance directives. SOF ¶ 5. This case challenges the Supplemental Process.

Neither the Defendant's list-maintenance directives nor Ohio law define the activities that will prevent the Supplemental Process from being initiated or that will preclude the cancellation of a voter's registration. The list-maintenance directives issued in 2011 and 2015, for example, each offer the vague pronouncement that "inactivity [is] determined by the absence of a voter initiated activity such as voting or the filing of a voter registration form," but do not provide a comprehensive list of the qualifying activities. SOF ¶ 11. Matthew Damschroder, the state Election Director in the Secretary

of State's office, testified that "voter activity" includes updating a voter registration or filing a new voter registration form. SOF ¶¶ 10, 13-14. Training materials provided to the county boards by the Defendant state that counties may, but are not required to, consider a voter's signing of a candidate petition to be "voter activity" for purposes of the Supplemental Process. SOF ¶ 15. In addition, some counties consider casting a provisional ballot to be "voter activity," even if the ballot is not counted, so long as they can identify the voter who cast the ballot. SOF ¶ 14.

Once a voter has been targeted to be sent a confirmation notice under the NCOA or Supplemental Process, the voter's status in the county and statewide voter-registration databases is changed to "inactive" (or "active-confirmation"). Voters in this status are not counted for crucial election-administration decisions such as the number of ballots to be printed, Ohio Rev. Code Ann. § 3505.11(A) (2016), and the number of voters assigned to a precinct or polling place. *Id.* §3501.18(A).

The Defendant's list-maintenance directives impose a deadline for county boards to send the confirmation notices under the NCOA and Supplemental Processes, which typically falls in late June. SOF ¶ 6. In addition, the directives require that the registrations of voters who have not responded to the notice or engaged in other voter activities must be cancelled no more than 120 days after the expiration of the four-year waiting period, but not within 90 days of a federal primary or general election. SOF ¶ 18. Not all counties comply with these deadlines, however. For example, in 2015, although the 2011 directive required all voter purges under the NCOA and Supplemental Processes to be completed by October 28, 2015 (120 days following the four-year anniversary of

the June 30 deadline by which the 2011 confirmation mailings were to have been sent), Franklin County, did not carry out its purge of voters until December. SOF ¶ 19. Similarly, Summit County did not complete its list-maintenance process until the end of November 2015—after the 2015 General Election. The effect of this discrepancy is that voters in Franklin County and Summit County who would have been purged had the counties conducted its roll-maintenance in the summer could vote in the 2015 election, while voters in other counties could not.

B. Ohio's Address Confirmation Notice

In most counties, but not all, the confirmation notice sent to voters identified through the NCOA Process and Supplemental Process is SOS Form 10-S, which is prescribed by the Defendant. *Id.* ¶ 39. The SOS Form 10-S has been revised periodically since its inception. *Id.* ¶¶ 40-42, 44. The current SOS Form 10-S, which was prescribed in March 2015, requires voters to provide their name, address, date of birth, a form of identification, and an attestation under penalty of perjury to the truth of the information provided on the form. *Id.* ¶ 42. With respect to the identification requirement, SOS Form 10-S states: "You must provide at least one form of identification." SOF ¶ 42. It requires the voter to provide a driver's license number, Social Security number, or, if the voter has neither, a copy of a document verifying the voter's identity and current address. *Id.*[1] The

[1] SOS Form 10-S also provides voters an alternative to respond. The form informs voters that they can update their address by visiting www.MyOhioVote.com/moved.htm. SOF ¶ 44. However, this site does not allow voters to confirm that their residence has remained unchanged. *Id.* ¶ 47. If a voter attempts to use the site without changing any of the information on file with the Secretary of State, the voter's submission is rejected, and the voter is instructed to "Please make a change or click Cancel to exit!" *Id.* ¶ 48. This may lead voters who visit the site to believe that they do not have to take action to respond to the notice if they have not changed address.

information required on SOS Form 10-S, commonly referred to in Ohio as the "five fields," mirrors what is required on Ohio's voter registration form. *Id.* ¶ 43. Because SOS Form 10-S must be filled out in its entirety, regardless of whether the voter has moved, *id.* ¶ 9, Ohio effectively requires that eligible and registered voters re-register after a mere two years of inactivity.

Further, SOS Form 10-S fails to describe the consequences of failing to respond. The form merely tells recipients that the failure to take "immediate action" may require them to cast a provisional ballot, even if they appear at the correct polling location at the next election. *Id.* ¶ 45. It also tells voters that their registrations *may* be cancelled after the second federal general election after the date of the notice. *Id*. This is not precisely true. If the voter does not respond to the notice and does not vote or engage in other voter activity in the subsequent four-year period, the voter's registration *is* cancelled. SOF ¶ 8.

Voters who are targeted by Ohio's Supplemental Process but who have not moved often overlook or do not receive the confirmation notice. *Id.* ¶¶ 123, 141. And, those who do receive the form are often confused as to why they are being asked to re-register when their eligibility to vote and their residence have remain unchanged.

C. **The Supplemental Process Targets Voters Who Have Not Moved.**

According to the Defendant, the Supplemental Process's targeting of voters who have been inactive for two years is intended to identify voters who may have become ineligible to vote due to a change in residence. *Id.* ¶¶ 1, 4. That is, the Defendant presumes that a voter who fails to vote for a two-year period is likely to have changed

residence. The Defendant has conducted no analysis, however, to determine the validity of this presumption. Specifically, the Defendant has admitted that:

- He does not know the number of voters who are sent confirmation notices under the NCOA Process or the Supplemental Process in Ohio each year or in any particular year (SOF ¶ 28);[2]

- He has not investigated and does not know the number of voters who respond to confirmation notices sent pursuant to the Supplemental Process and indicate that they have not moved (SOF ¶ 28(a));

- He has not investigated and does not know the number of voters sent a confirmation notice pursuant to the Supplemental Process who, prior to the expiration of the four-year inactivity period, appear to vote from the same address at which they are currently registered (SOF ¶ 28(b));

- He has not investigated and does not know the number of voters sent a confirmation notice pursuant to the Supplemental Process who, prior to the expiration of the four-year inactivity period, engage in a voter activity other than voting in which they confirm their residence at the same address at which they are currently registered (SOF ¶ 28(b));

- He has not investigated and does not know the number of voters whose registrations have been cancelled under the Supplemental Process and who subsequently complete a provisional ballot affirmation on which they provide the same address at which they were previously registered (SOF ¶ 28(c)); and

[2] The Defendant maintains that the Supplemental Process merely "supplements" the NCOA Process and is intended to capture those voters who move without filing a forwarding address with the Postal Service. In fact, the Supplemental Process appears to result in the removal of many more voters from the registration rolls than the NCOA Process. For example, in 2015:

- Cuyahoga County cancelled about 40,627 voter registrations pursuant to the Supplemental Process and about 10,596 registrations pursuant to the NCOA Process;
- Medina County cancelled about 767 voter registrations pursuant to the Supplemental Process and about 517 registrations pursuant to the NCOA Process;
- Greene County cancelled about 21,616 voter registrations pursuant to the Supplemental Process and about 3,600 registrations pursuant to the NCOA Process; and
- Hamilton County cancelled about 6,895 voter registrations pursuant to the Supplemental Process and about 2,118 registrations pursuant to the NCOA Process.

SOF ¶ 31.

- He has not investigated and does not know the number of voters whose registrations have been cancelled under the Supplemental Process and who subsequently re-register at the same address at which they were previously registered. (SOF ¶ 28(d)).

Had the Defendant investigated this information, he would have learned that presuming that a voter who is inactive for a two-year period has moved is incorrect in a vast number of cases in Ohio. A review of county voter files produced in discovery in this matter reveals that a two-year period of voting inactivity does not reliably indicate that an individual has moved. Voter files produced by some counties provide the history of list-maintenance activity on each voter's record. These files show that there are many Ohio voters who frequently miss two years of elections—many of them apparently because they have elected to participate only in presidential election years. These voters are regularly targeted by the Supplemental Process and are repeatedly sent confirmation notices at the same address, only to become active voters again when they vote in the next Presidential Election. SOF ¶ 30. According to the voter records, many if not most of these voters never respond to the confirmation notice, but, because they typically vote often enough, there may be no consequences to their failure to respond. However, such voters are at high risk of being purged under the Supplemental Process based on the clearly erroneous presumption that they have moved: If a voter who only votes every four years misses a single Presidential Election, whether as a matter of choice or necessity, that voter's registration will be cancelled. Indeed, the county voter records reveal a number of voters who have been purged after receiving confirmation notices at the same address several times. Such was the experience of Plaintiff Larry Harmon.

Mr. Harmon has resided at the same address for approximately 16 years. SOF ¶ 115. He regularly votes in Presidential Elections, but does not vote in midterm, state, or local elections unless there are particular issues or candidates on the ballot that interest him. SOF ¶ 116. Because of this, Mr. Harmon has been targeted for removal multiple times under the Supplemental Process. SOF ¶ 117. Mr. Harmon received a confirmation notice in 2007, voted in the 2008 Presidential Election, and then he did not vote in 2009 or 2010. SOF ¶ 117, 119. According to Mr. Harmon's voter record, Portage County, the county in which Mr. Harmon resides, sent Mr. Harmon a confirmation notice in June 2011. SOF ¶ 117. Mr. Harmon does not recall receiving the confirmation notice, he did not respond to it, and he did not vote in 2011. SOF ¶ 123. In 2012, the first Presidential Election since Mr. Harmon had last voted, Mr. Harmon was not happy with the candidates and was turned off by the political process, so he chose to express his views by staying home on Election Day and not voting. SOF ¶ 120. He did not vote in 2013 or 2014 and, according to Portage County's voter file, in September 2015, Mr. Harmon's voter registration record was cancelled, despite the fact that, throughout this time period, he did not change his residence or otherwise become ineligible to vote. SOF ¶ 115, 122.

The Supplemental Process not only misidentifies voters who may have moved for the purpose of sending confirmation notices; it ultimately causes voter registrations of eligible Ohio voters to be cancelled based on the faulty presumption that a period of inactivity—with no corroborating evidence of an address change—is a reliable proxy for a voter having moved. The voter history records produced in this case demonstrate that

the Supplemental Process frequently results in the cancellation of voters who, like Mr. Harmon, have not moved.

D. The Summer 2015 Voter Purge

In the summer of 2015, hundreds of thousands of Ohioans were removed from the registration rolls pursuant to the Supplemental Process. *Id.* ¶ 26 (describing removal of more than 65,000 voters from just two of Ohio's 88 counties).[3] The six-year period of inactivity that led to these removals began in 2009, *id.* ¶¶26-27, meaning that the last federal election in which these voters participated was the 2008 Presidential Election—a historic election that inspired massive get-out-the-vote efforts across the state and turned out a record number of electors. *Id.* ¶ 24. No election since 2008 has brought out the same number of electors in Ohio, suggesting that a high number of Ohioans who voted in 2008 have not voted since. These voters were sent confirmation notices pursuant to the Supplemental Process in or around June 2011. *Id.* ¶ 23. Voters who did not to respond to the confirmation notice and did not vote or engage in other qualifying voter activities between 2011 and 2015 were removed from the rolls during the summer of 2015.[4] SOF ¶26-27. The high turnout in 2008 combined with the relatively lower turnout in subsequent years may account for the extraordinarily high number of voters whose registrations were cancelled in 2015.

[3] *See also* SOF¶¶ 26-27 (Directive 2011-15, setting in motion the Supplemental Process that led to the 2015 purges.).
[4] As noted above, Franklin County did not conduct its voter purge until December 2015.

A number of infrequent voters turned out to vote in November 2015, possibly because of a controversial statewide ballot measure and several significant local races. *Id.* ¶ 33. Like many voters affected by the Supplemental Process, because their addresses had not changed, these voters were unaware that their registrations have been cancelled until they arrived at the polls. SOF ¶¶ 34-35. Some of these voters were permitted to vote provisional ballots that, in the end, were not counted. *See id.* ¶¶ 33-34(voter cast provisional ballot in November 2015 General Election after being told his name was not in the poll book). Others, including Plaintiff Harmon, were not even offered provisional ballots. SOF ¶ 35.

A review of the provisional ballots cast in several Ohio counties confirms that, despite November 2015 being an off-year election, hundreds of voters who had not moved and remained eligible to vote but whose registrations were cancelled as a result of the Supplemental Process were denied the opportunity to participate in the democratic process.

- In Mahoning County, at least 22 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (SOF ¶ 36);
- In Portage County, at least 14 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);
- In Licking County, at least 22 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Lake County, at least 24 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Lorain County, at least 52 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Warren County, at least 35 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*); and

- In Greene County, at least 19 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*)

A similar review of provisional ballots cast in the March 2016 Federal Primary Election shows that voters who were purged pursuant to the Supplemental Process in the summer of 2015 continued to be disenfranchised in that election.

- In Mahoning County, at least 33 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (SOF ¶ 37);

- In Cuyahoga County, at least 101 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Franklin County, at least 104 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Portage County, at least 8 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Licking County at least 20 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Lake County, at least 22 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);

- In Lorain County, at least 47 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);
- In Warren County, at least 22 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.*);
- In Lucas County, at least 18 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered (*id.)*; and
- In Montgomery County, at least 53 infrequent voters who had been purged under the Supplemental Process cast a provisional ballot and indicated that they still resided at the same address where they were previously registered. (*Id.*)

In aggregate, these numbers from a handful of counties in one local election and one primary election suggest that the Supplemental Process is disenfranchising and will continue to disenfranchise a significant number of eligible Ohio voters.[5] Furthermore, these numbers include only voters who cast provisional ballots; they do not include voters who were not offered the opportunity or were not able to cast a provisional ballot—whose identities are generally impossible to determine—and therefore likely understates the number of voters disenfranchised pursuant to the Supplemental Process.

Based on voters' experiences in the November 2015 and March 2016 elections, there is no doubt that many Ohioans who last voted in 2008 and who remain eligible to vote at the address where they registered will come to the polls to vote in the November 2016 General Election. Unless this Court grants relief, these voters will be denied their fundamental right to vote. When these voters arrive at the polls they—like the individuals

[5] Due to the expedited discovery schedule in this matter, Plaintiffs were unable to conduct an analysis of provisional ballots in every Ohio county. The counties for which this analysis was done were selected largely because they had provided information concerning their list-maintenance activities in a format that made such an analysis possible. In addition, in each county and election plaintiffs analyzed, they analyzed every provisional ballot cast in that election that was rejected because the voter was not registered or had been removed from the voter rolls.

who attempted to vote in Ohio's last two elections—will learn for the first time that they are no longer registered.

E. Plaintiffs and Their Members Were Harmed by the Supplemental Process.

Plaintiffs APRI and NEOCH (collectively "Organizational Plaintiffs") are nonpartisan membership organizations organized under the laws of the State of Ohio. A significant portion of each organization's activities is devoted to voter-registration drives, voter education, and other get-out-the-vote efforts.

APRI serves predominantly Black and low-income communities through a network of local chapters across the State of Ohio. SOF ¶¶ 52-56 (discussing activities of the Cleveland Chapter and past voter outreach conducted in predominately Black and low-income communities); *id.* ¶¶ 56, 67-68. APRI conducts voter registration drives annually at community events and conducts voter registration activities and outreach by going door-to-door in low registration and low-turnout rates precincts. *Id.* ¶¶ 63-72. APRI members, including Angaletta Pickett, have been targeted by the Supplemental Process. *See, e.g.*, *id.* ¶¶ 127-133. Furthermore, many voters in the communities APRI serves were purged in the summer of 2015 or are at risk of being purged in the future as a result of the Supplemental Process. *E.g., id.* ¶ 74. To try to mitigate the number of voters who will be disenfranchised this November, APRI is increasing its voter-registration efforts in advance of the 2016 Presidential Election, as well as providing additional resources to staff and volunteers who conduct voter registration. *Id.* ¶ 74-77. Through its prior work, APRI has learned that many voters erroneously believe they are registered. In response to

the large number of voters who were purged in 2015, APRI anticipates that many more voters will be unaware that they are not registered this year than in the past, and it is therefore diverting significant resources to providing iPads and other mobile technology to the volunteers working on its voter registration drives to allow them to confirm the registration status of voters they encounter. *Id.* ¶¶ 76, 88. The need to expend resources in this manner will reduce the number of voters APRI can register and will prevent it from devoting as much of its resources to its other activities, including its voter education and voter mobilization activities. *Id.* ¶¶ 87-88.

NEOCH is a membership organization serving homeless and housing-insecure individuals in the Greater Cleveland area. *Id.* ¶ 90. NEOCH conducts a wide array of voting-related activities, including registering homeless voters, coordinating voting trainings for social-service providers and assisting them with the creation of the voting plans they must submit to Cuyahoga County, and providing transportation to the polls. *Id.* ¶¶ 95-97, 104. To counteract the unjust effects of the Supplemental Process on homeless voters, NEOCH has had to allocate more of its resources to voter-registration activities—in lieu of other voter-education and advocacy efforts—in order to re-register voters whom they registered in prior years. *Id.* ¶ 106-08.

NEOCH has several categories of members. First, NEOCH has approximately 400 supporting members, including about 60 homeless individuals, who pledge their support to the organization's mission and provide financial support on a sliding scale. *Id.* ¶92. Second, it has approximately 30 members of its Homeless Congress. *Id.* ¶¶ 92-93. The Homeless Congress members attend monthly meetings and participate in setting

NEOCH's advocacy goals and priorities. *Id.* Third, NEOCH has members who are themselves organizations serving homeless or indigent individuals, including homeless shelters, organizations that operate permanent-supportive-housing buildings, and legal defense organizations. *Id.* ¶ 94.

NEOCH's homeless members, like many homeless individuals, are less likely than other voters to have an address where they can reliably receive mail and are more likely to face obstacles actually making it to the polls to cast a ballot. *Id.* ¶¶ 95-96, 111. For instance, voters who provide an intersection or landmark, rather than a building address, on their voter-registration application are unlikely to receive the confirmation notice. Other homeless voters may list a drop-in center as their mailing address, but the drop-in center might not hold the mail for them, and the post office has inconsistent policies for sending personal mail to a drop-in center. *Id.* Others may use the address of a commercial property where they sleep or an abandoned building, and may not be able to receive mail at these locations at all. *Id.*

NEOCH members have been, and are almost certain in the future to be, harmed by the Supplemental Process. *Id.* ¶¶ 109-110. Approximately 20 of NEOCH's current or former Homeless Congress members had their registrations cancelled by Cuyahoga County in 2015, pursuant to the Supplemental Process. *Id.* In addition, two of its current supporting members were sent confirmation notices in 2015 despite not having changed

their residences, and they must now complete a confirmation notice, re-register, or vote to avoid having their registrations cancelled.[6] *Id.*

Plaintiff Larry Harmon is a 59-year-old U.S. Navy veteran who was born and raised in Ohio and who has resided at the same address in Portage County for approximately 16 years. SOF ¶ 113. He has never been incarcerated, declared mentally incompetent, or otherwise disenfranchised for violating election laws. *Id.* As a direct result of Defendant's use of the Supplemental Process, Mr. Harmon's Ohio voter registration was cancelled in the summer of 2015, and Mr. Harmon was denied his fundamental right to vote. In November 2015, motivated by issues that appeared on the ballot, Mr. Harmon went to the polls on Election Day, only to be told that his name did not appear in the poll book. SOF ¶¶ 125-26 Mr. Harmon was not informed that he could cast a provisional ballot and therefore left the polls without voting at all. SOF ¶ 126. On that same day, Mr. Harmon contacted the Secretary of State's office in writing to notify them that his name had been removed from the voter registration rolls and he had been denied his right to vote, despite his having resided at the same address for over a decade. SOF ¶ 126. Unfortunately, neither the Defendant nor Portage County took action to correct the erroneous and unlawful cancellation of Mr. Harmon's voter registration.

[6] These members' identities constitute personal information under the protective order entered in this case on May 13, 2016, and they are therefore not identified by name in this Memorandum of Law. These members are identified in the Declaration of Brian Davis (May 20, 2016), ("Davis May 20 Decl."), filed separately and under seal.

III. ARGUMENT

Summary judgment is appropriate when the Court is satisfied "that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). In this case, Plaintiffs assert that Ohio's Supplemental Process violates the plain language of Section 8 of the National Voter Registration Act of 1993 ("NVRA"), and that Ohio's confirmation notice violates the detailed requirements of Section 8(d) of the NVRA. As explained below, there is no genuine dispute as to any material fact necessary to resolve Plaintiffs' claims, and Plaintiffs therefore respectfully request this Court to enter Summary Judgement in their favor pursuant to Fed. R. Civ. P. 56, and to issue an order permanently enjoining the Defendant from taking any further action under the Supplemental Process and commanding the Defendant to restore the voters who have been unlawfully purged under the Supplemental Process to Ohio's voter rolls.

A. The Supplemental Process Violates the Plain Language of the NVRA Because It Results in the Purging of Voters by Reason of Their Failure to Vote, and It Is Unreliable and Non-Uniform.

1. *Section 8 of the NVRA Allows States to Consider a Voter's Failure to Vote in Only One Circumstance, and Requires That Voter-Removal Programs Be Reasonable, Uniform, and Nondiscriminatory.*

Section 8 of the NVRA establishes the requirements that states must follow in the administration of voter registration. 52 U.S.C.A. § 20507. Section 8(a) sets forth the reasons for which a state may remove a registered voter from the voter rolls and prescribes the procedures states must follow when doing so. *Id.* § 20507 (a). Specifically, Section 8 provides that a voter may not be removed from the voter rolls unless the voter

so requests or the voter has become ineligible due to death, a judicial declaration of mental incompetence, a conviction for a disqualifying felony, or a change of address. *Id.*; *see also U.S. Student Assoc. Found. v. Land*, 546 F.3d 373, 376-77 (6th Cir. 2008) ("*Land II*").

Section 8 of the NVRA imposes explicit requirements on states in the establishment and operation of such list-maintenance programs. Section 8 requires such programs to make "reasonable" efforts to remove voters who lose eligibility because they have moved and provides that list-maintenance programs must be conducted "in accordance with subsections (b), (c), *and* (d)." 52 U.S.C.A. § 20507(a)(4)(B) (emphasis added). Those subsections work together to limit and regulate a state's program for removing voters by reason of a change of address. *See Land II*, 546 F.3d at 376.

Central to this case is subsection (b), which governs state voter-removal programs. First, subsection (b)(1) states that any such voter-removal program must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C.A. § 20507(b)(1). To be uniform and non-discriminatory, a state's list-maintenance program must not treat similarly situated voters differently based on irrelevant characteristics. *Cf. Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006) (program that treated voter registration workers differently based on whether they were compensated for their work was not "uniform" within the meaning of Section 8 (b)(1)). Second, subsection (b)(2) provides that a state voter-removal program:

> shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office *by reason of the person's failure to vote*, except that nothing in this paragraph may be

> construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters . . . .

52 U.S.C.A. § 20507 (b)(2) (emphasis added). There is only a single exception to this blanket prohibition on using failure to vote as a basis for removing voters from the rolls: Failure to vote may be considered as part of a process for confirming a change of address when evidence independent of the voter's failure to vote indicates the voter may have moved. *See id.* § 8(b)(2), (c)(2), (d).

Subsections (c) and (d), in turn, explain the process through which a voter may be removed from the rolls when second-hand information reasonably indicates that a voter may have moved. The NVRA expressly permits states to use one source of second-hand information as providing a reasonable, uniform, and non-discriminatory basis for believing a voter has moved: National Change of Address (NCOA) information obtained through the U.S. Postal Service. Under subsection (c), NCOA data may be used as the primary source of information to *identify* voters who may have changed their permanent residence, *id.* § 20507 (c)(1)(A) and the U.S. Department of Justice has described programs centered around the use of NCOA information as "safe-harbor" programs when proper procedures are followed. U.S. Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)," ¶ 33, *available at* https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last visited May 23, 2016).

Even when second-hand information—obtained through the NCOA system or from another reliable source—provides a reasonable basis for believing a voter has moved, the NVRA imposes a confirmation requirement in order to minimize errors. To

confirm the second-hand change-of address information, a state must "use[] the notice procedure described in subsection (d)(2) to *confirm* the change of address." 52 U.S.C.A. § 20507 (c)(1)(B)(ii) (emphasis added).[7] Subsection (d)(2) establishes the requirements for the notices that are to be sent to voters to confirm a suspected change of address. The notice must be postage prepaid and include a pre-addressed return card, must be sent by forwardable mail, and must allow the voter to provide her current address. *Id.* § 20507 (d)(2). The notice must also state that if the voter has not moved from the jurisdiction, then the voter must return the card no later than the registration deadline for the next election. *Id.* § 20507(d)(2)(A); *see also id.* § 20507 (a)(1)(B). The notice must also inform voters that if they do not return the card, they will be removed from the rolls after the second subsequent federal general election. *Id.* § 20507 (d)(2)(A)

A voter sent a notice under subsection (d)(2) may be removed from the registration rolls only when one of two conditions are met. First, a voter may be removed from the rolls if she fails to respond to a confirmation-of-address notice *and* does not vote or appear to vote in an election during the period beginning on the date of the notice and ending after the date of the second general election for Federal office that occurs after the notice is sent. *Id.* § 20507(d)(1)(B). Second, a voter may be removed from the rolls if she confirms in writing that she has moved outside of the jurisdiction in which she was previously registered. *Id.* § 20507 (d)(1)(A).

[7] Subsection (c)(2) also establishes time restrictions on when a state may conduct a voter-removal program. 52 U.S.C.A. § 20507(c)(2). Within 90 days of a primary or general federal election, a state must stop removing voters from its official list of voters pursuant to any systematic removal procedure. *Id.*; *see also Arcia v. Fla. Sec'y of State*, 746 F.3d 1273, 1284 (11th Cir. 2014).

Reading subsections (b)(2) and (d)(2) together, as the NVRA demands, the only circumstance in which a state may properly infer that a voter no longer meets the residency requirements to vote based on inactivity is when that inactivity occurs after (i) the state has obtained objective and reliable evidence, *independent of the voter's failure to vote*, that indicates the voter may have moved and (ii) the voter has been sent and failed to return the (d)(2) confirmation-of-address card. Under the unambiguous language of subsection (b), failure to vote may *only* be considered as part of the *confirmation procedure* laid out in these provisions. It may not be considered in any other circumstances, especially as the basis for initiating the cancellation process.

2. *Ohio's Supplemental Process Violates the Plain Language of the NVRA by Removing Voters for Their Failure to Vote.*

Ohio's Supplemental Process violates Section 8 in three ways. First, it makes the failure to vote the trigger for sending a confirmation notice, which begins the process for cancelling the voter's registration. This violates the plain and unambiguous text of subsection (b), which allows a failure to vote to be considered in one circumstance only: *after* the state has received information indicating that the voter has moved (such as through the NCOA system). By making the failure to vote a trigger for the confirmation notice, the Supplemental Process results in the removal of voters from the list of registered voters for their failure to vote, directly contrary to the plain language of subsection (b).

Second, the Supplemental Process's reliance on failure to vote as its primary source of evidence that a voter has moved violates Section 8's requirement that Ohio's

roll-maintenance processes be "reasonable." The record in this case conclusively demonstrates that a voter's failure to vote is an unreliable proxy for the voter having changed address, and a roll-maintenance program based on such an unreliable source of change-of-address information violates Section 8.

Third, the Supplemental Process violates Section 8's requirement that roll-maintenance programs be uniform and nondiscriminatory because it is administered differently in different Ohio counties, with the result that a voter in one county would be purged under the Supplemental Process while a similarly situated voter in another county would not.

a) *The Supplemental Process Unlawfully Removes Voters for Failing to Vote.*

The Supplemental Process directly violates the unambiguous text of the NVRA by "result[ing] in the removal of [registered voters] from the official list of voters registered to vote. . . by reason of [those voters'] failure to vote." 52 U.S.C.A. § 20507 (b)(2). The statutory language could not possibly be clearer. Section 8(b) creates a general rule that states may not consider failure to vote in removing voters from the rolls. There is only one exception: a voter's failure to vote may be used as a part of a follow-up process to *confirm* a change of residence *after* the state has already obtained reliable second-hand information, independent of the voter's failure to vote, indicating that a voter has moved. *See id*. § 20507(b)(2) ("except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) . . . ."); *see also id.* § 20507 (c)(1), (d).

It is a settled canon of statutory construction that exceptions—like the one contained in subsection (b)(2)—must be narrowly construed. *See, e.g.*, *Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 559 (6th Cir. 2006). Thus, under the unambiguous language of subsection (b), the State of Ohio has no authority to consider the failure to vote, except as specifically authorized in Section 8(b)'s proviso. Allowing states to *initiate* the voter-removal process based on a failure to vote—as Ohio is now doing—would eviscerate subsection (b)'s plain language, allowing the exception to swallow the rule.

The NVRA's legislative and implementation history confirm what the plain language of the statute unambiguously states. Both the House and Senate identified one of the NVRA's goals as ensuring that "once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. REP. NO. 103-6, at 19 (1993); *see also* H.R. REP. NO. 103-9 (1993), at 18, *reprinted in* 1993 U.S.C.C.A.N. 105, 122. The legislative history establishes that one way this goal was to be achieved was through abolishing the practice, common at the time of the NVRA's enactment, of periodically cancelling the registrations of inactive voters. The House Administration Committee stated that Section 8's language "specifically prohibit[s] any registered voter from being removed from the rolls for failure to vote." H.R. REP. NO. 103-9 (1993), at 5, *reprinted in* 1993 U.S.C.C.A.N. 105, 109. The Senate Committee on Rules and Administration further elaborated on the reason that the NVRA created a prohibition against targeting voters for removal based on their failure to vote:

> [M]any States … penalize … non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election. Such citizens may not have moved or died or committed a felony. Their only "crime" was not to have voted in a recent election.… "No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue."

S. REP. 103-6 (1993), at 17; *see also* The National Clearinghouse on Election Administration, Federal Election Commission, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* (January 1, 1994) ("FEC Guide to Implementing the NVRA"), at 5-5 (SEC001065) ("Although most jurisdictions currently remove the names of individuals from the voter registration list after their failure to vote within a specified time frame, the NVRA prohibits this practice.").

Further, the U.S. Department of Justice, the federal agency charged with enforcement of the NVRA, has repeatedly recognized that using a period of voter inactivity to trigger the Section 8(d)(2) notice-and-cancellation process violated the express language of Section 8 of the NVRA. On February 11, 1997, the Department of Justice sent letters to the attorneys general in the states of South Dakota and Alaska informing them that their voter removal procedures—both of which used a four-year period of inactivity to trigger the sending of a notice under Section 8(d)(2)—violated the NVRA. Both states agreed to stop using non-voting as the trigger for beginning the Section 8(d) notice-and-cancellation procedure. Earlier this month, the Department of Justice reiterated that view in a Statement of Interest filed in the case of *Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga.

May 4, 2016), ECF No. 19 ("DOJ Statement of Interest"). That case challenges Georgia's roll-maintenance procedure, which is virtually identical to Ohio's except that it uses three years of inactivity, instead of two, to trigger the mailing of a confirmation notice. *See* DOJ Statement of Interest at *2. In its Statement of Interest, the Department of Justice stated that Georgia's roll-maintenance practice violates Section 8 because it relies on voter inactivity to initiate the voter-removal process. *Id.* at *2. Thus, according to the Department of Justice, "[r]eliance on non-voting to trigger the Section 8(d) notice and cancellation process" violates Section 8 of the NVRA. *Id.* at *13.

Here, there is no dispute that Ohio's Supplemental Process relies on a voter's failure to vote as the trigger for sending a confirmation notice to the voter, and there is no dispute that Ohio cancels the registrations of voters who do not respond to the notice and do not vote in the subsequent four-year period.[8] Ohio's use of failure to vote as the reason to *initiate* a demand for confirmation of the voter's residence, rather than limiting its use to the sole permissible purpose of *confirming* an already independently identified change of residence, violates the plain meaning of the NVRA's statutory text, supported by the statute's legislative history and the consistent regulatory interpretation.

[8] The Defendant may contend that voter activities other than voting will also prevent cancellation under the Supplemental Process. *See*, *e.g.*, Declaration of Matthew M. Damschroder, May 13, 2016 ("A voter activity [for purposes of the Supplemental Process] includes casting a ballot, filing a voter registration form, and updating a voting address . . . ."). But a voter who has not moved has no need to update his or her voting address, and requiring a voter to file a voter registration form in order to avoid being purged is no different from removing the voter and then requiring her to re-register—the very thing the NVRA's prohibition on purges for failure to vote seeks to prevent.

b) *The Supplemental Process Removes Voters Based on Unreliable Information.*

Even if it were permissible to use failure to vote as the trigger for cancelling a voter's registration, the Supplemental Process would violate Section 8 of the NVRA for the independent reason that a voter's failure to vote does not *reliably* indicate the voter has moved. While the NVRA obliges states to establish a program to identify and remove voters who have become ineligible due to a change in residence, it requires that such programs be reasonable. 52 U.S.C.A. § 20507(a)(4)(B). At minimum, for such a program to be reasonable, it must "be based upon objective and reliable information of potential ineligibility due to a change of residence that is independent of the registrant's voting history." DOJ Statement of Interest, at 12. Only after such reliable second-hand information indicates that a voter has moved may the state use the confirmation procedure outlined in Section 8(d) to confirm that the voter has changed residence.

The NVRA and the U.S. Department of Justice view the U.S. Postal Service's NCOA program as providing the type of reliable information that is necessary to begin a removal procedure based on a change in address. *See* 52 U.S.C.A. § 20507 (c); Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)," ¶ 34, *available at* http://www.justice.gov/crt/ national-voter-registration-act-1993-nvra ("A State can only remove the name of a person from the voter registration list on grounds of change of residence upon . . . reliable second-hand information indicating a change of address outside of the jurisdiction from a source such as the NCOA program . . . .").

If a state chooses to use another source of change-of-address information instead of or in addition to NCOA, that source must be similarly reliable. *See Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001) ("[T]he NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using *reliable* information from *government agencies* such as the Postal Service's change of address records.") (emphasis added); *see also* S. REP. NO. 103-6, at 19 (1993) ("The Committee strongly encourages all States to implement the NCOA program. . . . Jurisdictions which choose not to use the program should implement another *reasonable program* which is designed to meet the requirements of the bill.") (emphasis added).

The NVRA's legislative history further supports this view. For instance, both the House and Senate reports on the NVRA indicate that the then-common practice of mailing nonforwardable sample ballots to all registered voters could provide a permissible source of change-of-address information: If a sample ballot were returned by the Postal Service as "undeliverable," *then* the jurisdiction's election official would have a sufficient basis for sending a confirmation notice to that voter. H.R. REP. NO. 103-9, at 15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 105, 119. The U.S. Department of Justice agrees:

> Other possible examples of a general list maintenance program could include States undertaking a uniform mailing of a voter registration card, sample ballot, or other election mailing to all voters in a jurisdiction, for which the State could use information obtained from returned non-deliverable mail *as the basis for* [either] correcting voter registration records (for apparent moves within a jurisdiction) or for sending a forwardable confirmation notice [under subsection (d)(2)].

Dep't. of Justice, "The National Voter Registration Act of 1993 (NVRA)," ¶ 33 (emphasis added), *available at* http://www.justice.gov/crt/ national-voter-registration-act-1993-nvra.

Ohio's Supplemental Process does not initiate the confirmation procedure based on reliable information indicating that a voter has moved, as required by the NVRA. Rather, with the Supplemental Process, the Defendant presumes that a voter's failure to vote for a mere two-year period—a period encompassing a single federal election cycle—indicates the voter has changed residence. A failure to vote, however, does not provide a reliable basis for believing a voter has moved and cannot serve as the trigger for the Section 8(d)(2) notice-and-cancellation process. As the Defendant has conceded, "there could be any number of reasons why a voter chooses not to vote in any particular election" other than the voter having moved. (Damschroder Depo. 81:19-82:5)

Indeed, the evidence in the record overwhelmingly demonstrates that, in the case of the Supplemental Process, a failure to vote is an unreliable proxy for a voter having changed residence. Specifically, the evidence establishes that throughout Ohio, numerous voters, including Plaintiff Larry Harmon, have had their registrations cancelled as a result of the Supplemental Process, despite not having moved. Many of these voters have been disenfranchised as a result, despite remaining eligible to vote. In Ohio's 2015 general election and again in the 2016 Federal Primary Election, approximately 700 individuals in approximately a dozen of Ohio's counties who were purged under the Supplemental Process despite continuing to reside at the same address attempted to vote. Worse, the Supplemental Process has resulted in some voters being purged multiple times or after

being repeatedly sent confirmation notices despite residing at the same address for many years.

That the Supplemental Process also considers other voter activities in addition to voting when identifying inactive voters does not render it reliable. First, most of the voter activities considered by the Supplemental Process, such as updating an address or filing a new voter registration form, are activities a voter who has not moved is unlikely to engage in. In addition, the Supplemental Process allows Ohio's county boards of election to ignore voter activities that would provide highly reliable evidence of a voter's current address—such as signing a petition. Voters who sign candidate petitions in Ohio must be registered in the county in which the candidate seeks to be on the ballot, and must provide their address when signing the petition. Yet under the Supplemental Process, counties are free to ignore this information and to cancel a voter's registration even if the voter has signed a petition using the same address at which she is registered.

Such an error-prone voter-roll-maintenance process does not satisfy the NVRA's requirement that such processes be reasonable. Accordingly, this Court should find that the Supplemental Process violates Section 8 and should enter judgment for the Plaintiffs.

c) *The Supplemental Process Is Not Administered in a Uniform and Nondiscriminatory Manner.*

Ohio's Supplemental Process further violates the NVRA because is not conducted in a "uniform" manner across Ohio's eighty-eight counties. First, counties do not conduct the Supplemental Process at the same time. In 2015, several counties—including Franklin and Summit—conducted their roll-maintenance cancellations after the November 2015

General Election, while most other counties cancelled their records prior to the Election. This means that, in some counties, voters who had been inactive for six years were able to vote in November 2015, while in others, voters who were inactive for the same period of time were removed from the rolls and found themselves disenfranchised when they turned out to the polls in 2015. Second, the types of "voter activity" that will prevent voters from being targeted by the Supplemental Process or from being removed from the rolls varies by county. In all counties, "voter activity" includes casting a regular ballot in a federal, state, or local election; casting a provisional ballot that is counted in a federal, state, or local election; updating a voter's residence with the county board of elections or the Bureau of Motor Vehicles; or submitting a complete voter registration application to a county board of elections. In some, but not all counties, "voter activity" also includes signing a candidate petition that is submitted to the county board of elections and casting a provisional ballot that is not counted but contains sufficient information to establish the voter's identity. Thus voters who engage in the exact same activity—signing a petition—but who reside in different counties will be treated differently by the Supplemental Process. Finally, at least one county, Wayne County, uses a confirmation notice that is somewhat less burdensome and confusing that the notice used in other counties. The Wayne County confirmation notice allows a voter receiving it to indicate that she remains resident at the same address simply by checking a box and signing the notice. In counties that use the standard SOS Form 10-S, voters must complete the entire form, including entering their address, even if they haven't moved. This lack of uniformity in the administration of the Supplemental Process results in similarly situated voters facing

different burdens on their right to vote based merely on where in Ohio they happen to live. Such a non-uniform and discriminatory process violates the NVRA, and Plaintiffs respectfully request this Court to enjoin it.

B. Ohio's Confirmation Notice Violates the Requirements of Section 8(d).

Although the NVRA prohibits states from requiring a voter to respond to any confirmation notice, regardless of its form, based on the voter's failure to vote, Ohio's confirmation notice is invalid even when used in the context of the NCOA Process. Section 8 of the NVRA imposes specific requirements on the confirmation notices that must be sent to voters before they can be removed for a change of residence. Among those requirements are that the notice inform voters of: (1) the date by which they must respond; (2) how they can re-register if they have moved from the jurisdiction; and (3) the consequences of failing to respond. 52 U.S.C.A. § 20507 (d)(2).

Ohio's confirmation notice, SOS Form 10-S, does not comply with these requirements. First, Ohio's confirmation notice does not notify voters of the date by which they must respond to avoid adverse consequences—specifically the date for mail registration, which in Ohio is 30 days before Election Day. Ohio. Rev. Code Ann. § 3503.06(A) (2016); *see also* 52 U.S.C.A. § 20507 (a)(1)(B). Instead, SOS Form 10-S provides the vague instruction that voters must take "immediate action." Furthermore, while the form does tell people who have moved within Ohio how they can re-register, it does not tell people who have moved out of the state how they can register in their new state. *See* 52 U.S.C.A. § 20507 (d)(2)(B). SOS Form 10-S also fails to accurately inform

voters of the consequences of not responding to the confirmation notice. Although Ohio law requires that voters who do not respond and do not vote in the subsequent four-year period must be removed from the rolls, the notice only states that such voters "may" be removed. *See id*. § 20507(d)(2)(A).

Finally, SOS Form 10-S requires voters to provide not only their name, address, and date of birth under penalty of perjury, but also proof of identity. Specifically, the form requires voters who have not moved to provide their driver's license number, Social Security number, or a document showing their name and current address. This is the same information that a voter must provide to register to vote in Ohio. The NVRA does not authorize states to require this information to confirm an existing registration. *See, e.g.*, *id*. § 20507(b); S. REP. NO. 103-6, at 18 (1993) (explaining that Section 8 was intended to prevent voters from being "caught in a purge system which will require them to needlessly re-register.").

C. Plaintiffs Are Entitled to a Permanent Injunction

A plaintiff seeking a permanent injunction must establish:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of the hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc., 547 U.S. at 391; *see also List v. Ohio Elections Com'n*, 45 F. Supp. 3d 765, 773 (S.D. Ohio 2014). In determining whether equitable relief should be granted, "[n]o single factor [is] determinative." *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*,

119 F.3d 393, 400 (6th Cir. 1997). Here, all four factors weigh heavily in favor of issuance of a permanent injunction.

First, Plaintiffs have suffered, and will continue to suffer, an irreparable injury as a result of Ohio's unlawful Supplemental Process. Ohio's Supplemental Process directly violates Section 8 of the NVRA and has resulted in the illegal removal of countless numbers of Ohio voters from the registration rolls and deprived them of their right to vote, including Plaintiff Larry Harmon and members of the Organizational Plaintiffs. Without relief from this Court, countless more such voters will have their registrations cancelled in the future. In addition, Ohio voters such as Plaintiff Harmon have their right to vote burdened each time they are compelled by the Supplemental Process to respond to a confirmation notice in order to avoid cancellation, should they choose not to vote or should they be unable to vote.

Second, Plaintiffs have no adequate remedy at law and injunctive relief is the only appropriate means to redress the harm Plaintiffs have suffered as a result of the Supplemental Process and to ensure they do not face continuing injury. No amount of money can compensate for the loss of the fundamental right to vote inflicted on Plaintiff Harmon and members of the Organizational Plaintiffs, or of the burden of having to be constantly vigilant about one's registration status.

Third, the balance of the equities tips steeply in Plaintiffs' favor because a permanent injunction will not harm Defendant, who can fully satisfy his NVRA roll-maintenance obligations using the NCOA system, 52 U.S.C.A. § 20507 (c), or other lawful list-maintenance processes.

Finally, injunctive relief will not disserve—but rather will protect—the public interest. A permanent injunction will protect the fundamental right to vote, maximize the number of eligible voters who are able to participate in federal elections, and help create a more robust and responsive democracy. Accordingly, this Court should grant Plaintiffs a Permanent Injunction.

1. *The Plaintiffs Have and Will Continue to Suffer an Irreparable Injury as a Direct Result of Ohio's Supplemental Process.*

The Sixth Circuit has held that "a restriction on the fundamental right to vote . . . constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Am. Civil Liberties Union of Ky. v. McCreary Cnty, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) ("If it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

As a result of Defendant's implementation of the Supplemental Process, hundreds of thousands of Ohio voters had their voter registration unlawfully cancelled in 2015 and countless more are threatened with having their registrations cancelled merely for choosing not to vote. Persons harmed by this process include NEOCH and APRI members, members of the communities where APRI and NEOCH conduct voter outreach and registration drives, and individuals like Plaintiff Harmon. The irreparable harm to Organizational Plaintiffs, their members, Plaintiff Harmon, and Ohio voters more generally suffice to warrant issuance of a permanent injunction.

2. *Plaintiffs Have No Adequate Remedy at Law and Injunctive Relief is Required to Remedy Their Injuries.*

Injunctive relief is appropriate where "there is no other adequate remedy at law." *U.S. v. Miami University*, 294 F.3d 797, 816 (6th Cir. 2002); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The Supreme Court has recognized that such relief is properly granted when there "is a real threat of future violation or a contemporary violation of a nature likely to continue or recur." *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952). Such is the case here, where an injunction ordering Ohio to both stop the Supplemental Process and to ensure that all voters already removed from the rolls pursuant to that Process are not disenfranchised provides the only appropriate form of relief.

Absent injunctive relief, Plaintiffs have been, and will continue to be, directly injured as a result of the Supplemental Process. First, Organizational Plaintiffs will continue to have to divert their limited resources to counteracting the harms inflicted on Ohio voters as a result of the Supplemental Process. Such a diversion of resources is necessary to reduce the number of Ohio voters who may be disenfranchised and ensure that individuals who have been unlawfully removed from the rolls are re-registered. Second, Organizational Plaintiffs' members will continue to be targeted by the Supplemental Process and potentially disenfranchised. And, third, the Supplemental Process will continue to disenfranchise Ohio voters like Plaintiff Harmon.

3. *The Balance of the Equities Demands that Plaintiffs Be Granted a Permanent Injunction.*

In this case, the balance of the equities favors issuance of a permanent injunction because the harm to Plaintiffs outweighs any potential harm to Defendant. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008)" ; *cf. Lorillard Tobacco Co. v. Amouri's Grand Foods, Inc*, 453 F.3d 377, 382 (6th Cir. 2006) (balancing potential harm to Plaintiffs if an injunction were not issued with potential harm to Defendants if an injunction were issued). A permanent injunction preventing Ohio from continuing the Supplemental Process will not harm the Defendant, who is obliged to comply with the list-maintenance requirements of the NVRA and has other lawful processes at his disposal for doing so. The Secretary is free to continue using NCOA information—under a process that complies with the NVRA—to keep Ohio's voter rolls current. The NVRA not only expressly approves of the use of NCOA information, it also contemplates it as sufficient on its own to satisfy a state's obligation to identify and remove voters who have changed residence. 52 U.S.C.A. § 20507 (c)(1). Further, the Secretary is permitted to adopt alternative programs to the Supplemental Process, so long as these programs comply with the NVRA. The Defendant's ability to use the NCOA Process and other alternative programs will ensure that orderly voter rolls are maintained and that any possible disruption caused by having to abandon the Supplemental Process will be de minimis.[9]

[9] Indeed, Ohio's counties will likely experience significant savings in postage costs as a result of enjoining the Supplemental Process.

In contrast, in the absence of a permanent injunction, Plaintiffs and their members will continue to suffer irreparable harm. Organizational Plaintiffs will be forced to continue expending their limited resources to counteract the Defendant's unlawful roll-maintenance procedures and Plaintiff Harmon and Organizational Plaintiffs' members will continue to have their fundamental right to vote burdened or wholly abridged as a result of the Defendant's Supplemental Process. These harms far outweigh any disruption to Defendant's list-maintenance processes an injunction would cause.

4. *A Permanent Injunction Would Advance the Public Interest.*

Injunctive relief preventing the Secretary of State from continuing the Supplemental Process and requiring Ohio to count the ballots cast by unlawfully purged voters will advance the public interest. The United States Supreme Court has acknowledged that there is "a strong interest in exercising the fundamental political right to vote." *Purcell*, 549 U.S. at 4 (internal quotations omitted). Denial of this fundamental right makes "[o]ther rights, even the most basic, … illusory[.]" *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Ohio's continued adherence to its unlawful roll-maintenance program threatens to bar eligible voters from participating in the 2016 General Election and all future elections. Because the Supplemental Process jeopardizes the legitimacy of our democracy and infringes on fundamental rights, a permanent injunction restoring unlawfully purged voters to the rolls and halting any additional action under the Supplemental Process would advance the public interest. *See Land II*, 546 F.3d at 388–89 (determining that an

injunction reinstating the registrations of voters whose registrations were rejected "eliminates a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process"); *see also Obama for Am.*, 697 F.3d at 437 ("The public interest … favors permitting as many qualified voters to vote as possible."). Moreover, there is no danger to the public interest from an injunction. There is no dispute that the voters whose voting rights Plaintiffs seek to protect—voters who reside in Ohio at the address at which they have previously registered and voted and have not become ineligible for any other reason—are eligible Ohio voters, and enabling them participate in the democratic process will not lead to voter fraud or vote dilution of any kind. Accordingly, there is no genuine dispute that the public interest favors issuance of an injunction in this case.

D. Plaintiffs Have Standing to Challenge the Supplemental Process.

The undisputed facts show that the Defendant's unlawful actions have injured the Plaintiffs by making the Organizational Plaintiffs' voter registration efforts less effective and more expensive, by causing the Organizational Plaintiffs to divert resources from other activities to addressing and counteracting Defendant's unlawful purges, by cancelling the voter registrations of Plaintiff Harmon and members of the Organizational Plaintiffs, and by requiring Plaintiff Harmon and the members of the Organizational Plaintiffs to respond to confirmation notices, to re-register, or to vote in order to remain registered, despite their having experienced no change in their voting eligibility. These facts show a sufficiently concrete injury to Plaintiff Harmon, to the Organizational

Plaintiffs themselves, and to their members to satisfy the requirements of Article III standing.

To have standing under Article III of the Constitution, a plaintiff must satisfy three requirements: (1) the plaintiff must have suffered an injury in fact, (2) fairly traceable to defendant's conduct, (3) that will likely be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also NEOCH v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006).[10] Plaintiffs' injuries "need not be monetary" but "may for instance be aesthetic, or informational." *Fair Elections Ohio v. Husted,* 770 F.3d 456, 460 (6th Cir. 2014). For instance, "if a voter can get to the polls more easily by winning the lawsuit…that ought to be enough for Article III." *Id.*

When the plaintiff is an organization, it may have standing on either or both of two independent bases, either of which is sufficient to confer standing: An organization may sue for its own injuries or for the injuries that its members have suffered or will suffer if those injuries are germane to the organization's purpose. *Sierra Club v. U.S. Envtl. Protection Agency,* 793 F.3d 656, 661 (6th Cir. 2015). Here, both Organizational Plaintiffs have standing to sue on behalf of their members. In addition, the Organizational Plaintiffs possess standing to bring this lawsuit on their *own* behalf because the

---

[10] The NVRA creates a private right of action for any "person who is aggrieved by a violation of th[e] Act." 52 U.S.C.A. § 20510(b)(1). The NVRA's use of the phrase "person who is aggrieved" reflects "a congressional intent to cast the standing net broadly," eliminating any prudential limitations on standing. *See Federal Election Com'n v. Akins*, 524 U.S. 11, 19 (1998); *accord Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 365 (5th Cir. 1999) (stating the NVRA's private right of action "eliminate[s any] prudential limitations on standing," and requires only that Plaintiffs "satisfy . . . the standing requirements under Article III . . . .").

Defendant's failure to comply with the NVRA causes injury to the Organizational Plaintiffs' own organizational interests.

In cases seeking injunctive and declaratory relief, only *one* plaintiff must have standing. *See*, *e.g.*, *American Civil Liberties Union v. Nat'l Sec. Agency,* 493 F.3d 644, 652–53 (6th Cir. 2007) (citing *Bowsher v. Synar,* 478 U.S. 714, 721 (1986)); *Crawford v. Marion Cnty Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007); *Texas Democratic Party v. Benkiser,* 459 F.3d 582, 585–86 (5th Cir. 2006); *Schulz v. Williams,* 44 F.3d 48, 53 (2d Cir. 1994). In this case, all three plaintiffs have standing to seek the declaratory and injunctive relief requested in this lawsuit.

1. *Plaintiff Larry Harmon Has Standing.*

The record establishes that Plaintiff Larry Harmon meets the three factors necessary to establish Article III standing. First, Plaintiff Harmon has been injured by the Defendant's prescription of the Supplemental Process. Mr. Harmon has lived at the same Portage County address for over a decade, but his voter registration was cancelled through the Supplemental Process due to his failure to vote between 2009 and June 2015. He attempted to vote in the 2015 General Election, only to be turned away from the polls because, as a result of the Supplemental Process, he was no longer on the registration roll. He was not offered a provisional ballot, but even if he had been, it would not have been counted. Second, the Supplemental Process led directly to Plaintiff Harmon's injury—in fact, the Supplemental Process caused Plaintiff Harmon to be disenfranchised. In 2012, Mr. Harmon chose not to vote, and he rarely votes in non-presidential elections. Mr.

Harmon had *not* moved, and thus the Defendant, through the Supplemental Process, singled him out for cancellation solely as a result of Mr. Harmon's decision not to vote. Third, a favorable decision on the merits will vindicate his voting rights and protect him, as an intermittent voter, from being forced to respond to confirmation notices and from being dropped from the registration rolls in the future. Accordingly, there is no genuine issue of disputed fact as to Mr. Harmon's standing, and this Court should grant Plaintiffs' Motion for Summary Judgment.

2. *Organizational Plaintiffs APRI and NEOCH Have Standing to Sue on Behalf of Their Members.*

An organization has standing to bring suit on behalf of its members, often called representational standing, when (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claims asserted nor the relief requested require the participation of individual members in the lawsuit. *Sandusky Cnty Democratic Party v. Blackwell*, 387 F. 3d 565, 573–74 (6th Cir. 2004) (hereinafter "*Sandusky County*") (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000), and *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333,343 (1977)). Member participation is not ordinarily required in cases involving injunctive and declaratory relief. *Sandusky County*, 387 F. 3d at 574 (6th Cir. 2004) (citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) and *Hunt*, 432 U.S. at 343).

The Sixth Circuit and other courts have recognized that representational standing is especially appropriate in voting cases, given the high volume of individuals who are vulnerable to injury, the difficulty of identifying the specific individuals who may be harmed, and the fundamental character of the right to vote. *See, e.g.*, *Sandusky County*, 387 F.3d at 574; *Arcia v. Florida Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014); *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1271 (D. Colo. 2010); *U.S. Student Ass'n Foundation v. Land*, 585 F. Supp. 2d 925, 934–35 (E.D. Mich. 2008) ("*Land I*"), *aff'd* 546 F.3d 373 (6th Cir. 2008).

Here, the Organizational Plaintiffs satisfy all three of the requirements for representational standing: First, NEOCH's and APRI's members would have standing to bring this suit in their own right. Second, the interests at stake in this suit are germane to NEOCH's and APRI's organizational purposes. Third, neither the claim asserted nor the relief requested requires the participation of individual members. *See Sandusky County*, 387 F.3d at 574.

a) *Organizational Plaintiffs' members have standing in their own right.*

To have Article III standing in their own right, NEOCH's and APRI's members must be able to show "(1) 'an injury in fact'; (2) 'a causal connection' between the alleged injury and the defendants' conduct—that 'the injury ... [is] fairly traceable to the challenged action ... and not the result of the independent action of some third party not before the court'; and (3) redressability—that the injury will 'likely ... be redressed by a favorable decision.'" *Sierra Club*, 793 F.3d at 661–62 (internal citation and quotations

omitted). NEOCH and APRI each have members who have been injured by the Defendant's use of the Supplemental Process.

More than 20 individuals whose registrations were cancelled by the Cuyahoga County Board of Elections in 2015 pursuant to the Supplemental Process were homeless or formerly homeless members of NEOCH's Homeless Congress and many had been registered by NEOCH. The cancellation of a voter's registration pursuant to an unlawful process is manifestly a concrete and particularized injury. *Buescher,* 750 F. Supp. 2d at 1271.

In addition, two of NEOCH's supporting members received confirmation notices in 2015 despite continuing to reside at the same address. Likewise, APRI member Angaletta Pickett, who frequently cannot get time off from work to vote, received a confirmation notice in 2015 at the address where she has lived since 2012, which is also the last year she voted. These NEOCH and APRI members now face the burden on their right to vote of having to either respond to the notice or complete a new voter registration (which, due to the confirmation notice's design, are effectively the same thing) in order to avoid having their registrations cancelled if they cannot or do not vote. This burden on the right to vote and the threat of disenfranchisement created by the Supplemental Process is a sufficiently concrete and particularized injury to establish standing. *See Buescher,* 750 F. Supp. 2d at 1271 (stating when members' fundamental rights are at stake, "any burden of the right to vote, even if it is no more than the cancellation of a voter's records in violation of the NVRA, constitutes an injury-in-fact."). Because there is a "real and immediate threat that [Orgnanizational Plaintiffs'] members will be

disfranchised," by the Supplemental Process, those members have suffered an injury sufficient to confer standing on themselves and, by extension, NEOCH and APRI under Article IIII. *Land I,* 585 F. Supp. 2d at 934–35.

Furthermore, there can be no serious question that this injury is caused by the Defendant's actions in implementing the Supplemental Process, nor that a favorable result in this case will redress the injury suffered by these members: The injunction Plaintiffs seek will ensure that the Homeless Congress members whose registrations were cancelled will be restored to the voter rolls and will be able to participate in the 2016 Presidential Election and future elections. Moreover, it will relieve Ms. Pickett and the NEOCH supporting members, along with the thousands of other voters targeted for cancellation by the Supplemental Process or who may be targeted in the future, of the burden of having to re-register and the imminent danger that they will be purged.

b) *The interests at stake in this lawsuit are germane to the Organizational Plaintiffs' purposes.*

The second requirement for organizational standing is also satisfied here. The interests at stake in this lawsuit are integral to NEOCH's and APRI's purposes. NEOCH is a non-profit charitable organization with the mission of organizing and empowering homeless and at-risk men, women, and children in the city of Cleveland, through public education, advocacy, and the creation of nurturing environments. Ensuring that NEOCH's members and the homeless individuals it serves are registered to vote and able to participate in the democratic process is a core component of NEOCH's mission. Likewise, APRI is a national organization for African-American trade unionists and

community activists that seeks to increase political participation in predominantly Black and low-income communities through voter registration, voter education, and voter mobilization. Defendant's removal of eligible voters from the rolls, pursuant to the Supplemental Process, cuts at the heart of both NEOCH's and APRI's purposes.

c) *Individual participation by the Organizational Plaintiffs' members is not necessary.*

Given that Plaintiffs seek only injunctive and declaratory relief, the individual participation of the Organizational Plaintiffs' members is not necessary for the resolution of this case. The Sixth Circuit has recognized that "[t]he individual participation of an organization's members is 'not normally necessary when an association seeks prospective or injunctive relief for its members.'" *Sandusky County*., 387 F.3d at 574 (quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546) (1996). The Supreme Court and this Circuit have recognized that this test is almost automatically met when, as here, a plaintiff-organization prays only for injunctive or declaratory relief. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975); *Neighborhood Action Coalition v. City of Canton, Ohio,* 882 F.2d 1012, 1017 (6th Cir. 1989).

Accordingly, APRI and NEOCH have representational standing to seek declaratory and injunctive relief on behalf of their members.

3. *The Organizational Plaintiffs Have Standing to Sue on Their Own Behalf*

The Supreme Court has "recognized that organizations are entitled to sue on their own behalf for injuries they have sustained." *Havens Realty Corp. v. Coleman*, 455 U.S.

363, 379 n.19 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Where the defendant's "practices have perceptibly impaired [the organizational plaintiff's] ability to provide [the services it was formed to provide] . . . there can be no question that the organization has suffered injury in fact." *Havens*, 455 U.S. at 379. To satisfy this standard, an organization must point to a "concrete and demonstrable injury to [its] activities." *Id.*; *see also Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013) ("The Supreme Court and this Circuit have found that a drain on an organization's resources ... constitutes a concrete and demonstrable injury for standing purposes") (citing *Havens*, 455 U.S. at 379, *and Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.,* 943 F.2d 644, 646 (6th Cir.1991)).

There are two ways an organization can demonstrate a concrete injury to its activities for standing purposes. First, it can show that the defendant's conduct has made it more burdensome for the organization to carry out its activities. *See Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 264–65 (1991) ("*CAAN*") (finding organization had standing where challenged statute made it more difficult for it to achieve its goal of reducing noise at National Airport in Washington). Second, it can show that it "devotes resources to counteract a defendant's allegedly unlawful practices." *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (citing *Havens*, 455 U.S. at 379). The undisputed facts establish both forms of injury.

a) *NEOCH has standing to sue on its own behalf*

NEOCH also has independent standing to bring this lawsuit on its own behalf. The Supplemental Process has harmed, and will continue to harm, NEOCH's ability to carry out its stated goal of working to "eliminate barriers to voting that are especially burdensome to NEOCH's members and clients." First, there can be no dispute that the registrations of voters whom NEOCH expended resources to register have been unlawfully cancelled pursuant to the Supplemental Process, rendering those resources wasted, and burdening NEOCH's efforts to carry out its organizational purposes. Cancelling registrations that NEOCH had invested time, effort, and monetary resources to obtain is an obvious, explicit, and direct harm to NEOCH as an organization. Second, the evidence in the record establishes beyond dispute that NEOCH has had to divert resources to registering and re-registering homeless voters to ensure they will be registered if they have been purged under the Supplemental Process, preventing the organization from using its resources for other purposes, such as voter education and legislative advocacy on behalf of Cleveland's homeless population. Enjoining the Supplemental Process will redress these harms by preventing further waste of NEOCH's resources and permitting NEOCH to allocate its scarce resources instead to other important activities, rather than being forced to continue to respond to the challenge of its clients and members being continually disenfranchised.

b) *Plaintiff APRI has standing to bring this lawsuit on its own behalf.*

For similar reasons, APRI also has standing to bring this lawsuit because the Supplemental Process has injured and will continue to injure its own organizational interests. The Supplemental Process has harmed, and will continue to harm, APRI's ability to carry out one of its very core goals: assisting individuals in exercising their right to vote. The evidence in the record establishes that the Supplemental Process has resulted in the cancellation of a significant number of voters in the areas and communities that APRI targets for its voter registration efforts. When APRI must re-register voters cancelled under the Supplemental Process during its voter registration drives, it limits the number of first-time voters it can register, reducing the effectiveness of its voter registration efforts. Additionally, APRI has diverted resources to its voter registration efforts to counter the unlawful removal of eligible voters under the Supplemental Process. For example, in 2016, APRI intends to divert resources from its other voter mobilization activities to the purchase of iPads and other mobile technology to allow its volunteers to confirm the registration status of the voters it encounters during voter registration drives. An order from this Court halting the Defendant's use of the Supplemental Process will prevent further weakening of APRI's ability to engage first-time voters and will preclude the need for future diversions of resources to mobile technology and away from volunteer stipends and other organizational activities.

Accordingly, there is no genuine dispute that NEOCH and APRI have suffered and will continue to suffer a concrete and particularized injury-in-fact that is fairly traceable to the Defendants' actions and is likely to be redressed by the relief requested in

this lawsuit. For all of these reasons, the Organizational Plaintiffs have standing to bring this lawsuit seeking injunctive relief on their own behalf.

E. If the Court Finds that Summary Judgment is Not Appropriate, the Court Should Issue a Preliminary Injunction Pending Trial.

Should the Court find that disputed issues of fact preclude the granting of Plaintiffs' Motion for Summary Judgment, Plaintiffs respectfully request this Court to issue a preliminary injunction pending an evidentiary hearing on the disputed facts. In seeking a preliminary injunction a plaintiff:

> must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Winter, 555 U.S. at 20; *Obama for Am.*, 697 F.3d at 428. As in the case of a permanent injunction, no single factor is determinative. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). This standard "is essentially the same as [the standard] for a permanent injunction with the exception that a plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987); *see also Am. Civil Liberties Union of Ky.*, 607 F.3d at 445 (6th Cir. 2010).

To establish a likelihood of success on the merits, "[i]t is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511

F.3d 535, 543 (6th Cir. 2007) (citations and internal quotation marks omitted). While "a plaintiff must show more than a mere possibility of success," *id.*, he "is not required to prove his case in full." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Here, as explained above, Plaintiffs' challenge to the Supplemental Process and Ohio's confirmation notice has, at the very least, raised serious and substantial issues as to their legality. Ohio's Supplemental Process results in the removal of eligible voters from the registration rolls for nothing more than their failure to vote. As explained in Part III.A above, the Supplemental Process is facially invalid under Section 8 of the NVRA, and it violates the NVRA's requirements that voter-roll maintenance programs be both reliable and uniform. In addition, the confirmation notice Ohio uses under both the NCOA and the Supplemental Processes is overly burdensome and fails to comply with the clear requirements of Section 8.

Furthermore, as described in Part III.C above, Plaintiffs have suffered and will continue to suffer irreversible and irreparable harm absent immediate intervention by this Court. Accordingly, a balancing of the equities demands that Plaintiffs be granted preliminary injunctive relief; and a preliminary injunction would protect the public's interest in all eligible voters being able to exercise their fundamental right to vote. Because all relevant factors decisively weigh in Plaintiffs' favor, this Court should grant a preliminary injunction that suspends the use of the Supplemental Process and ensures that ballots cast in the 2016 General Election by any Ohio voter who was removed from the rolls under this Process and who continues to reside at the address at which they were previously registered will be counted.

IV. CONCLUSION

Based on the evidence in the record, and the text of the NVRA, there can be no genuine dispute that the mere failure to vote for two years is not just an unreasonable and faulty indicator that someone has changed address, it is a forbidden one. Furthermore, the evidence conclusively establishes that Ohio's Supplemental Process is not conducted in a uniform and nondiscriminatory manner, as required by the NVRA. Accordingly, this Court should enter summary judgment for the Plaintiffs and issue a permanent injunction halting Ohio's use of the Supplemental Process and ensuring that Ohio voters will no longer be disenfranchised merely as a result of their failure to vote.

Dated: May 24, 2016

Respectfully submitted,

/s/ Naila Awan

Naila Awan, Trial Attorney (0088147)
Stuart C. Naifeh*
Cameron Bell*
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
Email: nawan@demos.org
Email: snaifeh@demos.org

Freda J. Levenson (0045916)
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Email: flevenson@acluohio.org

Daniel P. Tokaji*
Cooperating Attorney for ACLU of Ohio
The Ohio State University
Moritz College of Law**
55 W. 12th Ave
Columbus, OH 43210
Telephone: 310-266-0402
Email: dtokaji@gmail.com

Richard Saphire (0017813)
Cooperating Attorney for ACLU of Ohio
University of Dayton School of Law**
300 College Park
Dayton, Ohio 45469
Telephone: 937-229-2820
Email: rsaphire1@udayton.edu

Paul Moke (0014099)
Cooperating Attorney for ACLU of Ohio
Wilmington College**
1252 Pyle Center
Wilmington, Ohio 45177
Telephone: 937-725-7501
Email: paul.moke@gmail.com

Counsel for Plaintiffs

---

* Admitted *pro hac vice*
** Institutional affiliation for the purpose of identification only

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Summary Judgment and Permanent Injunction, or, in the Alternative, Preliminary Injunction was filed this May 24, 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.

/s/ Naila Awan
Naila Awan, Trial Attorney (0088147)
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
E-mail: nawan@demos.org