No. 16-3746
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO A. PHILIP RANDOLPH INSTITUTE, *et al.*	:	
Appellants-Plaintiffs,	:	**On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division**
v.	:	
SECRETARY OF STATE, JON HUSTED	:	**District Court Case No. 2:16-cv-303**
Appellee-Defendant.	:	

RESPONSE OF APPELLEE- DEFENDANT SECRETARY OF STATE JON HUSTED TO APPELLANTS' MOTION TO EXPEDITE APPEAL

Appellants have not established good cause for a highly abbreviated and accelerated appellate briefing schedule. The district court has already rejected Appellants' election-year efforts to require Ohio to deviate radically from the procedures it has used to maintain its voter roll for over 21 years. In addition, Appellants' request that the State unilaterally re-register names removed from the voter lists would result in chaos in the few remaining months leading up to the presidential election.

Appellants challenge a portion of Ohio's voter list maintenance procedure known as the Ohio Supplemental Process. But Appellants cannot show any basis

for expediting a challenge to a procedure that has been in place for over 21 years. In particular, any claimed exigency fails because, regardless of the result of these proceedings, *no names will be removed from the voter list by the challenged Ohio Supplemental Process in 2016*. Accordingly, there is no impending time constraint. Rather, the only prejudice is to Ohio, and the mass confusion and chaos that would result from a last-minute change before a major election.

I. BACKGROUND

In December 1994 — *over 21 years ago* — Ohio implemented its current voter list maintenance procedures. Order, R.66, PageID#23006. Ohio adopted its procedures specifically to comply with the National Voter Registration Act of 1993 (the "NVRA"). *Id*. The NVRA places an affirmative obligation on States to make a reasonable effort to remove ineligible voters from their voter lists. *Id*.

A portion of Ohio's list maintenance process is known as "the Ohio Supplemental Process." *Id*., PageID#23008. The Ohio Supplemental Process closely tracks the plain language in the NVRA. *Id*., PageID#23015-16. The district court upheld the Ohio Supplemental Process as complying with the plain language of the NVRA. *Id*., PageID#23026.

II. ARGUMENT

1. Good Cause is Needed to Justify Expediting an Appeal

Appellants are required to "show good cause to expedite" in order to prevail on their motion. 6 Cir. R. 27(f); Fed. R. App. P. 2. Here, Appellants have "failed to demonstrate that delay will cause irreparable injury and that the decision under review is subject to substantial challenge." *See Northpoint Tech., Ltd. v. Fed. Commc'ns Comm'n.*, No. 02-1194, 2002 WL 31011256, at *1 (D.C. Cir. Aug. 29, 2002) (denying motion to expedite). As explained below, any injury would be to Ohio and its election administration efforts rather than to Appellants. And Appellants present no substantial challenge to the district court's finding that "the unambiguous text of the NVRA specifically permits the Ohio Supplemental Process." Order, R.66, PAGEID#23018.

Unlike many of the cases cited by Appellants, this is not a case in which a district court has changed election procedures ahead of a general or primary election. *Cf. Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 583 (6th Cir. 2012). Rather, this is an appeal of a decision in which the district court kept the same decades-long procedures in place, and accordingly no expedited schedule is necessary.

2. No Names will be Removed from the Voter List Pursuant to the Challenged Ohio Supplemental Process in 2016

No names will be removed from the Ohio voter list in 2016 based on the Ohio Supplemental Process. The next time that names will be removed through the process will be in the Summer of 2017. To be removed at that time, a voter's record would need to be devoid of activity since 2011, and the voter could not have responded to a pre-paid notice sent by Ohio in 2013. No notices were sent in 2012, however, as Ohio conducted the Ohio Supplemental Process only during every other odd-numbered year at that time. See Directive 94-36, R.38-1, PageID#289-90 (the Supplemental Process was originally initiated in only odd-numbered years). Beginning in 2014, pursuant to a settlement agreement with non-party Judicial Watch, Ohio began running its Supplemental Process annually instead of every other year. 2014 Settlement Agreement, R.38-4, PageID#370 (changing the Supplemental Process to annually). Because no notices were sent in 2012, no names will be removed by the process in 2016.

This alone eliminates any reason to expedite this case. A normal appellate briefing schedule would prejudice neither side because it would end briefing well before the next round of list maintenance in Summer 2017.

3. Unilaterally Reinstating Names Removed from the Voter Roll would Run Counter to Federal Law

Appellants apparently want more than a stop to the Ohio Supplemental Process. They want the State to unilaterally put names back on the voter list.

Unilaterally putting names back on the list would create unnecessary tension with federal law. The names were properly removed pursuant to the NVRA's *requirement* that States make a reasonable effort to remove ineligible voters. Order, R.66, PageID#23006. And, the Help America Vote Act of 2002 ("HAVA") specifically 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 . . .." *Id.*, PageID#23021-22, *citing* 52 U.S.C. § 21083(a)(4) (emphasis in Order). Putting names back on the list would eviscerate Ohio's efforts to comply with its list maintenance obligations under the NVRA and HAVA.

4. Ohio Would Sustain Prejudice with an Expedited Schedule

The "emergency" nature of this appeal is Appellants' doing. The last time that names were removed pursuant the Ohio Supplemental Process was in the Summer of 2015. Appellants waited until April 6, 2016 to file their Complaint. That is a delay of almost a year. Ohio should not be penalized because Appellants waited so long to challenge the last round of the Ohio Supplemental Process. Indeed, Appellants propose a schedule that would give Ohio only seven days to

write a brief to defend a process that has been in existence since the beginning of 1995.

Appellants are seeking a last-minute injunction. "As a general rule, last-minute injunctions changing election procedures are strongly disfavored." *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). This presumption is an election-specific application of the equitable factors governing injunctions—fairness to the parties and effect on the public interest. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). As for the public interest, last-minute changes harm the officials who administer the elections and cause voter confusion. *SEIU*, 698 F.3d at 346. As for fairness, a delay in seeking an injunction matters: "plaintiffs' failure to act earlier in pursuing these claims significantly undermines their assertions of irreparable harm in the absence of the injunction." *Id.*

Despite these admonishments against last-minute injunctions, the Court has repeated the message nearly every election cycle. *See Nader v. Blackwell*, 230 F.3d 833, 834-35 (6th Cir. 2000); *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004); *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006). In 2012, the Court even rejected vacatur of a published opinion mooted by the election to "provid[e] guidance on

injunctive relief as it concerns last-second changes to election procedures." *Serv. Emps. Int'l Union v. Husted*, 531 F. App'x 755, 756 (6th Cir. 2013).

The presumption against last-minute changes applies with full force here.

Delay. The Plaintiffs waited months after the 2015 clean-up before seeking an injunction. And they waited over 21 years from the time when the Ohio Supplemental Process was put into place.

Plaintiffs' Injury. The district court held that because Ohio complies with the NVRA, Appellants are unable to show any irreparable harm to themselves or their members. Order, R.66, PageID#23025.

Ohio's Injury. An injunction requiring Ohio to reinstate names removed from the voter list would create widespread confusion and chaos in a presidential election year. *See Purcell*, 549 U.S. at 4-5 (recognizing that court orders regarding elections "can themselves result in voter confusion" and that this risk increases as an "election draws closer"). Ohio's elections officials have been using the same list maintenance procedure for over 21 years. Even Appellants acknowledge that an injunction would "require time" to "implement," including "coordination" among the boards and the Secretary, "develop[ing] new provisional ballot rules," and "train[ing] poll workers and county election officials." Appellants' Motion, Doc. 9, Page 7. They admit there is a potential for "confusion." *Id*.

Appellants have not introduced any evidence that re-registering individuals (or similarly, allowing provisional ballots from only individuals removed by the Ohio Supplemental Process) is possible, or at least possible in such a short time span before a major election when boards will be busy with many other tasks. Ohio's Third Merits Brief, R.56, PageID#22749-50. Boards of elections have varying levels of information available to them and may not be able to separate names removed in the past (in 2015, 2013, *et cetera*) through the Ohio Supplemental Process or for other reasons. Such other reasons could include removal by the Ohio National Change of Address Process or by voters (or their kin) who personally notified their board of a death in the family or a relocation. This means some boards may not be able to identify whether an individual was removed pursuant to the Ohio Supplemental Process or because of another equally-lawful reason.

Public injury. Finally, the public interest includes Ohioans' interest in having their directives implemented. *See Summit*, 388 F.3d at 551. As noted by the district court, "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." Order, R.66, PageID#23025. In addition, if some boards are able to identify names removed by the Supplemental Process and other boards are not, there is a risk of non-uniformity, which is prohibited by the NVRA.

52 U.S.C. § 20507(b). Also, voter confidence will be shaken if the public cannot be certain which names are being added to the rolls and whether the names properly belong there. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process").

III. CONCLUSION

The Ohio Supplemental Process complies with the NVRA. It not only is consistent with the NVRA's plain language, but Congress also specifically expressed that the clean-up procedure used by Ohio would be permitted under the NVRA. Ohio's Third Merits Brief, Doc. 56, at 17-19, Page ID# 22741-22743 (citing legislative history). Appellants' claims are without merit and duplicate the allegations that the district court rejected. They offer no reason to expedite this matter. It should proceed under a normal appellate track in order to allow both sides adequate opportunity to state their positions.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Response of Appellee-Defendant Secretary of State Jon Husted to Appellants' Motion to Expedite Appeal* was filed electronically with the United States Court of Appeals for the Sixth Circuit, on July 5, 2016, and served upon all parties of record via this Court's electronic filing system.

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